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NO. 65003-3

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

Housing Authority of the City of Seattle,

Plaintiff/Appellant,

v.

Khadija Bin,

Defendant/Respondent.

BRIEF OF RESPONDENT KHADIJA BIN

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I. Introduction

This appeal arises from an inappropriate eviction lawsuit Seattle Housing Authority (SHA) filed against a tenant, Khadija Bin. The superior court dismissed the suit on summary judgment after finding SHA had violated Ms. Bin's due process rights and failed in its attempt to terminate her lease. Following the dismissal, the superior court awarded Ms. Bin a portion of the costs and attorney fees she incurred defending herself in the action. SHA does not challenge the dismissal, but appeals the order granting costs and fees.

However, the order for costs and fees was proper under Ms. Bin's lease agreement and consistent with applicable law. SHA pursued this action despite repeated warnings that the case was unfounded, leaving Ms. Bin no choice but to litigate. The fees Ms. Bin recovered pertain to legal work reasonably and necessarily performed in her defense, at a reasonable hourly rate, and thus were well within the superior court's discretion. In fact, the amount awarded was serendipitously modest, because Ms. Bin elected not to pursue fees for work her attorneys performed before January 1, 2010 (when the repeal of a federal restriction precluding legal services programs from collecting attorney fees took effect). For these reasons, Ms. Bin asks this Court to affirm the superior court, and to grant her the additional costs and fees of this appeal pursuant to RAP 18.1.

II. Statement of the Case

Defendant/Respondent Khadija Bin is a 37-year-old U.S. Citizen of Somali origin. She, her husband, and their five young children reside in an apartment at Yesler Terrace—a public housing¹ development owned and operated by Plaintiff/Appellant Seattle Housing Authority (SHA). CP at 149-53. SHA filed this eviction lawsuit against Ms. Bin’s household in 2009, based on its misunderstanding of events that took place between two and four years earlier. See CP at 1-5.

The first of these events took place in July 2005, when, Ms. Bin’s husband, Ali Abdullahi Aden, moved out of the home due to marital difficulties. CP at 76-77, 120, 303-04, 314, 320. Since public housing rents fluctuate based on household income,² Ms. Bin was obligated to inform SHA of this change in household membership, and did so as soon as Mr. Aden moved out. See 24 CFR 966.4(c); CP at 76, CP at 303-04. SHA then adjusted the amount of Ms. Bin’s monthly rent to reflect just the

¹ “Public housing” is a public housing is a federal low-income housing program that provides funding for cities and towns to develop and operate affordable housing facilities for low-income families in their communities. See 42 USC 1437 et seq. (U.S. Housing Act). Public housing is administered at the national level by the U.S. Department of Housing & Urban Development (HUD), which appropriates federal funds to local “public housing agencies,”(or “PHAs”) government agencies that, in turn, develop and manage the properties. See 24 CFR 5.100. Seattle Housing Authority (SHA) is the public housing agency that administers the public housing program in Seattle. See RCW 35.82 (in Washington, PHAs are called “housing authorities”).

² See 24 CFR 960.253 (public housing tenant rents generally cannot exceed 30% of total household income).

\$500 monthly child support payments Mr. Aden began making, rather than his full monthly income. CP at 61-62, 76-77. This change resulted in a net decrease in Ms. Bin's monthly rent. CP at 62.

Mr. Aden remained outside the household from July 2005 through the end of February 2007. CP at 120, 320-21. But he and Ms. Bin later reconciled, and Mr. Aden returned to their Yesler Terrace apartment on or about February 28, 2007. CP at 82, 306, 321. It was undisputed that Ms. Bin reported his return to SHA at that time. CP at 82. Despite living outside the marital residence between July 2005 and February 2007, Mr. Aden never changed the address on his driver's license, and listed the marital address on his federal income tax returns for 2005 and 2006. See CP at 78-79, 343.

About two years after he returned to the residence, an SHA employee came across these tax and driver's license records, and formed a suspicion that Ms. Bin had misrepresented the duration of her husband's absence from the home. See CP at 309-13. Ms. Bin and Mr. Aden denied this allegation, but could not convince SHA staff that Mr. Aden did not return to the subsidized apartment sooner than reported; as explained by one of the SHA employees:

“[Mr. Aden] explained that they were having a marital problem, and that she kicked him out of the house, and that he was living on a friend's couch ... He was homeless and

sleeping between relatives outside of the home. And I said, ‘Well, you know, it’s possible that could be true, but it doesn’t explain, you know, the forms you filled out. It doesn’t explain the tax returns. Everything still points that you [were] still in the home.’”

CP at 313.

Based on this allegation, SHA issued Ms. Bin a lease termination notice on or about July 8, 2009. CP at 6-9. In essence, the notice accused Ms. Bin of having purposefully delayed her report of Mr. Aden’s return so as to prevent her monthly rent payment from going back up. CP at 6. The notice alleged that Ms. Bin had under-paid her rent by at least \$5,867, and demanded she both pay this claim and surrender her apartment. CP at 9. SHA provided no Somali-language translation of the notice even though, as SHA has at all relevant times been aware, Ms. Bin and Mr. Aden both speak Somali as their primary language and have limited English proficiency. CP at 65, 75, 567.

After obtaining a partial translation of the lease termination notice from a friend, Ms. Bin requested SHA provide her a “grievance hearing” to refute SHA’s accusations and contest both the monetary claim and the lease termination decision. CP at 75; RP at 8. A grievance hearing is an administrative tribunal designed for public housing tenants to challenge certain adverse actions or decisions by housing authorities, such as a proposed tenancy termination or unfavorable rent calculation. See 24

CFR 966.50. SHA scheduled the grievance hearing for August 10, 2009. CP at 122, 225, 229. In the mean time, Ms. Bin contacted the Northwest Justice Project for assistance, and ultimately obtained legal representation there. RP at 24; CP at 225.238-58.

Ms. Bin was pregnant at the time and the August 10 hearing date coincided with her expected delivery date. Thus, Ms. Bin's attorney wrote SHA on August 7, 2009, asking for the hearing to be postponed because of the pregnancy. CP at 222-29. In the same letter, Ms. Bin's attorney asked to review SHA's documents on August 18.³ CP at 225. SHA rescheduled the hearing for September 2, but did not produce its documents until August 26. CP at 69, 239, 246.

Because of the late production of documents, Ms. Bin's attorney advised SHA that she did not have enough time left to prepare for a September 2 hearing. CP at 239, 252-53. She asked SHA to reschedule the hearing a second time and proposed several dates in mid-September when she would be available. CP at 252-53. She also advised SHA of the dates she would not be available. CP at 250, 252-53. SHA employee Linda Todd, at the direction of SHA attorney Linda Brosell, rescheduled the hearing for September 8—one of the dates for which Ms. Bin's

³ See 24 CFR 966.4(m) ("The PHA shall provide the tenant a reasonable opportunity to examine, at the tenant's request, before a PHA grievance hearing or court trial concerning a termination of tenancy or eviction, any documents ... directly relevant to the termination of tenancy or eviction."); see also 24 CFR 966.56(b) (same).

attorney had reported a conflict. CP at 248.

Ms. Bin promptly objected to the September 8 hearing date, but SHA refused to change the hearing to a time her lawyer could attend. CP at 255-58. Ms. Bin asked SHA to forward her objection to the hearing officer, but Brosell, on behalf of SHA, denied this request as well, writing:

“In regard to your request to have this matter referred to the hearing officer, SHA is denying your request. Hearings are scheduled by the Housing Authority, not the hearing officer, in accordance with SHA policy. The hearing officer does not determine when the hearings are scheduled.”

CP at 255.

With her attorney unable to attend, Ms. Bin appeared at the grievance hearing on her own on September 8, 2009, and asked the hearing officer, Lawrence Weldon, to reschedule the hearing for a time her attorney could be present. CP at 297-300. Weldon called a recess, went to Linda Todd's office, and discussed the matter with her. CP at 420-24. Weldon did not ask or permit Ms. Bin to accompany him to Todd's office. CP at 423-24. Todd told Weldon that SHA's legal department "had made a determination that the case should not be continued." CP at 422-23, 466-67. Weldon then returned to the hearing room and said that he lacked authority to reschedule Ms. Bin's grievance hearing. CP at 264, 298-300. Weldon denied the continuance and proceeded to conduct the hearing with

Ms. Bin's counsel absent. CP at 264, 300-349.

Ms. Bin attempted to defend at the grievance hearing without representation. CP at 264-70, 300-349. Ms. Bin offered evidence corroborating the true dates of Mr. Aden's departure from and return to the subsidized residence, including child support records, evidence that the Department of Social and Health Services had inspected her home, a signed statement from the person who housed Mr. Aden through most of his absence, a supporting letter from a marital counseling program, and her own testimony as well as Mr. Aden's. See CP at 120, 264-270, 300-349. Ms. Bin also stated that, because of her language barrier and SHA's failure to provide Somali language access services, she did not understand all of the evidence and allegations against her. CP at 321. However, on September 24, 2009, Weldon issued a written decision upholding the termination of her tenancy. CP at 127-33.

On October 8, 2009, Ms. Bin's attorney sent SHA a letter detailing a series of material errors in Ms. Bin's grievance hearing and in Weldon's written decision. CP at 260-63. The letter urged SHA to disavow the defective proceeding and grant Ms. Bin a new grievance hearing. CP at 260-63. But SHA attorney James Fearn denied this request in a letter dated October 21, 2009. CP at 272-73. SHA then filed this unlawful detainer action in King County Superior Court on October 27, 2009,

seeking to remove Ms. Bin and her family from their home. CP at 1-5.

On December 14, 2009, Ms. Bin brought a motion for summary judgment, asserting that her tenancy had not been terminated—and thus that she was entitled to possession of the rental premises—because SHA had not provided her an adequate grievance hearing. CP at 11-34; RP at 3-5. The Superior Court heard and granted her motion on January 15, 2010, finding Ms. Bin's grievance hearing had indeed been deficient and thus her tenancy had not been terminated. CP at 149-53; RP at 24-28.

In the mean time, on December 16, 2009, President Obama signed into law the Consolidated Appropriations Act of 2010. See Pub. L. 117-111 of 2009. This Act, which took effect January 1, 2010, eliminated a restriction that, since 1996, had prohibited federally-funded legal services programs (such as Northwest Justice Project) from seeking or collecting attorney fees. See 75 Fed. Reg. 6816 (Feb. 11, 2010); see also 45 CFR 1642.3 (1997). Thus, on January 25, 2010, Ms. Bin filed a motion seeking \$2,026.33 in costs and \$9,200.00 in attorney fees (for 36.8 hours) services rendered after January 1, 2010. CP at 154-57. Ms. Bin did not request fees for legal work performed prior to January 1, 2010. CP at 182.

On February 9, 2010, the superior court issued an order awarding Ms. Bin \$1,199.77 in costs and \$7,375 in attorney fees. CP at 217-18. This award represented fees for 29.5 hours at the requested \$250 per hour

rate. CP at 217-78. The order specified that the court “deducted attorney fees that appeared to be duplicative, seemed excessive on a particular issue, or did not have enough details that the court could discern the subject, as well as some costs not allowed.” CP at 218. SHA appeals only this award of costs and fees. CP at 219.

III. Argument

The trial court’s award of costs and attorney fees to Ms. Bin should be sustained. The award is authorized by Ms. Bin’s rental agreement, and the amount is reasonable and well within the trial court’s discretion. The award also advances the public interest by serving as an incentive for SHA to correct its deficient grievance hearing practices.

The Court should also award Ms. Bin her costs and attorney fees incurred in defending this appeal, pursuant to RAP 18.1. SHA’s position is unsupported by the facts or law and contrary to basic interests of justice, and Ms. Bin had no choice but to litigate because SHA disregarded factual evidence favorable to her, ignored her repeated warnings of procedural flaws, and steadfastly refused to negotiate. SHA did not even respond to a letter Ms. Bin sent on February 26, 2010—after she had prevailed at both the administrative and judicial levels—offering to waive half the costs and fees in return for SHA’s promise to rectify its deficient grievance hearings.

A. The superior court properly awarded Ms. Bin costs and attorney fees because, as the prevailing party, she was entitled to costs and attorney fees under her lease.

The trial court awarded Khadija Bin her court costs and attorney fees pursuant to ¶7(11) of her dwelling lease, which provides that “[t]he prevailing party in any action under this Lease shall be entitled to reasonable costs and attorneys’ fees or attorney’s fees as provided by law.” CP at 170. This award was appropriate because Ms. Bin was the prevailing party and the amount granted was reasonable in light of the legal services performed and results achieved.

1. Ms. Bin was the prevailing party.

Whether Ms. Bin was the “prevailing party” for purposes of the attorney fees award is a mixed question of law and fact that is reviewed under an error of law standard. *Kyle v. Williams*, 139 Wn. App. 348, 356; 161 P.3d 1036 (2007). When attorney fees are authorized under a contract or lease, “‘prevailing party’ means the party in whose favor final judgment is rendered.” RCW 4.84.330; see *Wright v. Miller*, 93 Wn. App. 189, 198; 963 P.2d 934 (1998) (RCW 4.84.330 controls attorney fees clauses in residential lease agreements). In this case, final judgment was entered in favor of Khadija Bin, when the superior court granted her motion for summary judgment on January 15, 2010. CP at 149-53, RP at 24-28. This made her the prevailing party under RCW 4.84.330. Thus, the trial court

correctly awarded Ms. Bin her costs and attorney fees under the lease. See CP at 170, 217-18; see also *Ernst Home Center, Inc. v. Sato*, 80 Wn. App. 473, 491; 910 P.2d 486 (1996) (attorney fee provisions in real estate leases are generally enforceable).

Contractual attorney fees are properly awarded to a defending party at the time of dismissal. See *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 288-89; 787 P.2d 946 (1990) (“Since the case may never be renewed, it is essential to apply the attorney fee provision of the lease at the time of dismissal to effectuate the intent of the parties.”). The superior court was therefore also correct to award Ms. Bin her costs and fees upon dismissal, notwithstanding SHA’s representation that it intended to renew its lease termination proceedings in the future. See *Walji* at 288-89; see CP at 192.

SHA argues that Ms. Bin is not a prevailing party for purposes of RCW 59.18.290. But the attorney fee award in this case was based on Ms. Bin’s lease, not RCW 59.18.290. CP at 217-18. SHA has presented no argument for why Ms. Bin is not a prevailing party for purposes of her lease (or RCW 4.84.330).

2. *Housing Authority of Everett v. Kirby* does not preclude Ms. Bin from recovering attorney fees to which she is entitled under her lease.

SHA heavily relies on *Housing Authority of Everett v. Kirby*, which (like this case) was also an attorney fees dispute that arose out of a

public housing unlawful detainer suit. See *Housing Authority of Everett v. Kirby*, 154 Wn. App. 842; 226 P.3d 222 (2010). But despite that superficial point of similarity, this case has little in common with *Kirby*.

a. Summary of *Housing Authority Everett v. Kirby*

The *Kirby* case began with the Everett Housing Authority's (EHA) service of a defective summons upon the tenant. See *Kirby* at 846. While the defect was of a rather technical variety,⁴ service of a proper summons is a "jurisdictional condition precedent" to maintaining an unlawful detainer action. See *Housing Authority of Everett v. Terry*, 114 Wn.2d 558, 564-65; 789 P.2d 745 (1990). Serving a defective summons deprives the court of subject matter jurisdiction, requiring the case to be dismissed without prejudice. See *Kirby* at 850. Thus, as soon as the defect in the summons was brought to her attention, EHA's lawyer offered to dismiss the case without prejudice. See *Kirby* at 847-48.

The tenant's lawyer, however, insisted upon a dismissal with prejudice, and also sought payment for attorney fees for work performed on an answer, a motion to dismiss, and a request for sanctions that accused EHA of bringing a "frivolous suit under RCW 4.84.185." See *Kirby* at

⁴ The defect with the *Kirby* summons was that it did not contain language advising the tenant of his right to respond by mail or fax, which became mandatory in a residential eviction summons under 2005 amendments to RCW 59.18.365. See *Truly v. Hueft*, 138 Wn. App. 913, 916; 158 P.3d 1276 (2007); see also *Kirby* at 846-47.

847. EHA's lawyer did not agree to these demands, necessitating a judicial hearing. See *Kirby* at 848. At that hearing, the trial court found that it indeed lacked subject matter jurisdiction because of the defective summons, and dismissed the case—but without prejudice. See *Kirby* at 848. The tenant then filed two motions for attorney fees, both of which the court denied, and the tenant appealed. See *Kirby* at 848-49.

The *Kirby* tenant's lease agreement did not contain an attorney fees provision. See *Kirby* at 857. However, the tenant offered several theories and authorities in support of his attorney fees request, including RCW 4.84.185, 250, 270, and 330, two subsections of RCW 59.18.290, a novel theory based on judicial estoppel, and CR 11. See *Kirby* at 848-49. On appeal, the *Kirby* court analyzed each of these arguments and rejected all but one, finding only that the tenant was entitled a nominal attorney fee (\$200) as a taxable cost under RCW 4.84.080. See *Kirby* at 858.

b. *Kirby* is easily distinguished from the present case.

The most significant difference between this case and *Kirby* is of course that Ms. Bin's rental lease has a mandatory fee-shifting provision. CP at 170. The lease in *Kirby* had no attorney fees provision at all. See *Kirby* at 857 ("The lease at issue here does not contain any attorney fee provision, stating only that 'after the initial term ends, terminations will be in accordance with the [RLTA] as contained in RCW 59.18 and related

statutes.”). Again, the attorney fees provision of Ms. Bin’s lease was the basis upon which the superior court awarded attorney fees in this case. CP at 217. Whether the superior court could have awarded Ms. Bin fees on some alternative ground, such as RCW 59.18.290, is immaterial.

That said, this action also differs from *Kirby* in that Ms. Bin proved her lease had not been terminated, and thus could have recovered her costs and fees under RCW 59.18.290(2) had it been necessary to invoke the statute. See *Terry*, 114 Wn.2d at 570-71 (to recover attorney fees under RCW 59.18.290(2), a tenant “must prove either that the lease was not terminated or that they held over under a valid court order.”).

In *Kirby*, the tenant’s attorney fees claim under RCW 59.18.290(2) had failed because the court never decided which party had the right to possession of the disputed premises. See *Kirby* at 854. Rather, the action was dismissed for lack of subject matter jurisdiction. See *Kirby* at 850. That order of dismissal may have incidentally benefited the defendant, who could continue occupying the premises despite an admitted failure to pay rent—but did not establish that her tenancy was still in effect. See *Kirby* at 854; see also *Terry* at 571. The tenant’s ongoing possession of the premises may have indeed been unlawful—but without subject matter jurisdiction, the court could not even decide that question, let alone order her removal. See *Kirby* at 850 (“Lack of [subject matter] jurisdiction

‘renders the superior court powerless to pass on the merits of the case.’ In this circumstance, dismissal without prejudice is the limit of what a court may do.”), quoting *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556; 958 P.2d 962 (1998).

In this case, by contrast, Ms. Bin proved that SHA had not terminated her tenancy. It is settled law in Washington that a “housing authority must ... comply with HUD regulations and its own grievance procedure. Until it does so, [a public housing resident] is entitled to continue her tenancy.” *Housing Authority of King County v. Saylor*, 19 Wn. App. 871, 875; 578 P.2d 76 (1978). Such grievance procedures must, at minimum, afford the basic procedural safeguards that the U.S. Supreme Court interpreted the Fourteenth Amendment (Due Process Clause) to require any time “welfare [that] provides the means to obtain essential food, clothing, housing, and medical care” is threatened. *Goldberg v. Kelly*, 397 U.S. 254, 264; 90 S.Ct. 1011 (1970); see *Saylor* at 873 (“the procedural safeguards of *Goldberg* must be afforded public housing tenants before the determination to evict them.”), citing *Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir. 1970), and *Caulder v. Durham Housing Authority*, 433 F.2d 998 (4th Cir. 1970). Federal public housing regulations similarly provide that a “tenancy shall not terminate ... until the time for the tenant to request a grievance hearing has expired,

and (if a hearing was timely requested by the tenant) the grievance process has been completed.” 24 CFR 966.4(l)(3)(iv).

The superior court found that SHA—contrary to constitutional due process requirements as set forth in *Goldberg v. Kelly*—failed to conduct an adequate grievance procedure in Ms. Bin’s case. CP at 149-53; RP at 24-28. This meant Ms. Bin was “entitled to continue her tenancy,” and thus entitled to possession of the premises and—in the proceedings below—to judgment as a matter of law. *Saylor* at 875; see 24 CFR 966.4(l)(3)(iv); see CR 56(b); see also RP at 28 (“I think that the *Saylor* case is clear that if I do find that there has been a lack of due process ... then she's entitled to have her hearing again and you kind of have to start over from where that is.”).

c. The superior court did adjudicate the right to possession in the proceedings below.

SHA contends that Ms. Bin is like the tenant in *Kirby* in having prevailed below on essentially procedural grounds and claims the superior court never decided the case “on the merits.” See SHA’s Brief at 8-9. But the function of an unlawful detainer suit is to determine which party has the right to possession of the disputed rental premises. See *Christiansen v. Ellsworth*, 162 Wn.2d 365, 370; 173 P.3d 228 (2007) (“unlawful detainer action is a statutorily created proceeding that provides an expedited

method of resolving the right to possession of property.”). The superior court did decide the case “on the merits” because it determined that Ms. Bin was entitled to possession. CP at 149-153.

SHA complains that the superior court’s ruling left some of SHA’s allegations unadjudicated. See SHA’s Brief at 10. But as the *Kirby* court itself pointed out, “[a]n unbroken line of cases establishes that ‘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.’” *Kirby* at 850, quoting *Granat v. Keasler*, 99 Wn.2d 564, 571; 663 P.2d 830 (1983) (italics in original). Once the superior court determined that Ms. Bin’s grievance hearing had been defective, it was clear under *Saylor* that her tenancy had not been terminated. See *Saylor* at 875; see RP at 28. Since her tenancy remained in effect, Ms. Bin had the right to possession of the premises. See RCW 59.12.030(1) (“tenant of real property for a term less than life is guilty of unlawful detainer [when] he or she holds over or continues in possession ... of the property or any part thereof after the expiration of the term for which it is let to him or her.”).

Having determined that Ms. Bin was entitled to possession of the premises, the superior court had sufficient information to resolve the case. See *Christiansen* at 370. To make further findings or rulings on issues

such as SHA's underlying allegations would not have been appropriate. See *Kirby* at 850; see CR 56(c) (summary judgment "*shall be rendered forthwith* if the [record] show[s] 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.") (italics added).

B. The amount of costs and fees awarded to Ms. Bin was reasonable and within the trial court's discretion.

Whether the amount of attorney fees awarded to Ms. Bin was reasonable is reviewed for manifest abuse of discretion. See *North Coast Elec. Co. v. Selig*, 136 Wn. App. 636, 643; 151 P.3d 211 (2007) ("A trial judge is given broad discretion in determining the reasonableness of an award, and in order to reverse that award, it must be shown that the trial court manifestly abused its discretion."). The trial court exercised proper discretion in awarding Ms. Bin \$1,199.77 (of the \$2,026.33 requested) in costs, or \$7,375 (of the \$9,200 requested) in attorney fees. CP at 217.

1. The hourly rate for Ms. Bin's attorneys was reasonable.

"When calculating attorney fees, the court first begins with the lodestar figure, which is the total number of hours reasonably expended multiplied by the reasonable hourly rate of compensation." *Morgan v. Kingen*, 141 Wn. App. 143, 162; 169 P.3d 487 (2007). The RLTA lodestar defines "[r]easonable attorney's fees" as:

“an amount to be determined including the following factors: The time and labor required, the novelty and difficulty of the questions involved, the skill requisite to perform the legal service properly, the fee customarily charged in the locality for similar legal services, the amount involved and the results obtained, and the experience, reputation and ability of the lawyer or lawyers performing the services.”

RCW 59.18.030(14).

All of these factors supported the costs and fees award the superior court granted Ms. Bin. CP at 175-86. The \$250 hourly Ms. Bin’s counsel requested was well within the range charged by attorneys of comparable experience in Seattle. CP at 181. Her lawyers had particular experience in relevant fields including as federally-subsidized housing programs (and SHA’s especially), summary unlawful detainer proceedings, language access issues, and administrative due process. See CP at 180-82. The result achieved, dismissal, was the best possible outcome. CP at 149-53. Moreover the amount involved, representing only the work performed since January 1, 2010, in a case where representation began in August 2009, was—for reasons only fortuitously beneficial to SHA—much lower than it might otherwise have been. CP at 222-26.

SHA actually does not appear to contest the hourly rate—only the number of hours for which fees were awarded. In particular, SHA argues Ms. Bin should not have been awarded attorney fees for time devoted her

“language access argument,” i.e., Ms. Bin’s contention that SHA’s failure to translate vital documents into Somali precluded the termination of her tenancy. CP at 218; see SHA’s Brief at 11-20. This contention challenges between 1.5 and 19.3 hours of the (29.5 hours) attorney time for which Ms. Bin was awarded fees.⁵ CP at 180-86.

2. The trial court did not abuse its discretion by awarding attorney fees for work on the language access argument.

The trial court did not reach or adjudicate the language access argument. CP at 153. But as the U.S. Supreme Court has recognized, “[l]itigants in good faith may raise alternative legal grounds for a desired outcome, and the court’s rejection or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.” *Hensley v. Eckerhart*, 461 U.S. 424, 435; 103 S.Ct. 1933 (1983). The language access argument was a meritorious defense and part of a common core of facts and related legal theories that ultimately led to the dismissal of this action. For this reason, and because time spent on the language access argument was unavoidable, the trial court did not abuse its discretion in awarding Ms. Bin her costs and attorney fees for time related to the issue.

⁵ The time records show 1.5 hours of attorney time devoted specifically to research on the language access issue. CP at 183-85. However, Ms. Bin discussed the language access argument at length in a reply brief (in support of her motion for summary judgment), and orally at the summary judgment hearing. CP at 555-566; RP at 5-9. The time records indicate 17.8 attorney hours were spent drafting the reply brief (11.0 hours), preparing for the motion hearing (5.9 hours), and at the hearing itself (.9 hours). CP at 183-85.

a. The language access argument was an integral component of Ms. Bin's due process defense.

Ordinarily, a party should not be awarded attorney fees for time spent on "unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time." See *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 538; 151 P.3d 976 (2007). But where a party achieves "substantial relief" based on a set of claims involving "a common core of facts and related legal theories," it is not proper to reduce the party's attorney fees "simply because the [superior] court did not adopt each contention raised." *Steele v. Lundgren*, 96 Wn. App. 773, 783; 982 P.2d 619 (1999), quoting *Martinez v. City of Tacoma*, 81 Wn. App. 228, 242-43; 914 P.2d 86 (1996); see also *Hensley*, 461 U.S. at 435. In this case, the trial court found Ms. Bin was "entitled to attorney fees on issues such as required translation. Issues were properly raised and not decided against the defendant, just not reached because of the Court's ruling." CP at 218. This finding was well within the trial court's discretion.

As mentioned above, Ms. Bin's defense was based on *Housing Authority of King County v. Saylor*, which held that a housing authority's failure to comply with administrative notice and grievance hearing procedures precludes the termination of a public housing tenancy. See *Saylor*, 19 Wn. App. at 875. Ms. Bin's motion for summary judgment

identified numerous deficiencies in the process by which SHA attempted to terminate her tenancy, including:

- SHA's failure to schedule the grievance hearing for a date and time when Ms. Bin's lawyer could be present;
- The hearing officer's refusal, based on an illegitimate SHA policy, to consider Ms. Bin's request for a continuance;
- Improper ex parte communications between SHA legal staff and the hearing officer assigned to Ms. Bin's case;
- SHA's failure to translate vital documents into Somali, including an eviction notice, a summary of grievance procedures, and the written grievance hearing decision; and
- Defects in the written decision, including a lack of substantial evidence to support the conclusion and legally-incorrect analysis.

See CP at 11-34; RP at 3-14. The language access argument thus was thus one part in Ms. Bin's overarching legal theory: that all of these procedural deficiencies—whether independently or in some combination—rendered Ms. Bin's grievance hearing less-than-meaningful, contrary to SHA policies, HUD regulations, and constitutional due process requirements, and thus precluded the superior court from finding that her tenancy had been terminated. CP at 11-34; RP at 3-14.

The superior court agreed Ms. Bin's grievance proceeding did not afford due process, and entered judgment in her favor pursuant to *Saylor*. CP at 149-53; RP at 24-28. In her oral ruling, the trial judge cited the SHA hearing officer's erroneous failure to consider Ms. Bin's continuance

request and improper ex parte communications as the specific due process violations, and *Goldberg v. Kelly* as the key legal authority, upon which she relied. RP at 24-28. But the trial judge also indicated that her ruling was influenced by the *degree* to which Ms. Bin's due process rights had been violated. See RP at 28 ("I'm not talking a technical lack of due process; I'm talking here a substantive lack of due process."). That SHA had also failed to translate Ms. Bin's vital documents despite her limited English proficiency helped show how important it was for Ms. Bin to have her attorney present—and thus for her continuance request to be considered—whether or not the lack of translation supplied independent grounds for declaring the grievance hearing defective. See RP at 9.

The close association of Ms. Bin's language access argument with her other due process contentions justifies the superior court's attorney fees award. See *Mayer v. City of Seattle*, 102 Wn. App. 66, 80; 10 P.3d 408 (2000) ("[t]he trial court need not segregate the time if it determines that the various claims in the litigation are 'so related that no reasonable segregation of successful and unsuccessful claims can be made.'"), quoting *Hume v. American Disposal Co.*, 124 Wn.2d 656, 673; 880 P.2d 988 (1994). "[I]t is the trial judge who has watched the case unfold and who is in the best position to determine which hours should be included in the lodestar calculation." *Chuong* at 540. Being in the best position to

appreciate the connection between Ms. Bin’s needs for Somali translation, legal representation, and consideration of her continuance request—vis-à-vis the governing due process standards—the superior court was within its discretion not to segregate these closely-related issues for attorney fee purposes. See *Mayer* at 80.

b. The time Ms. Bin’s attorneys devoted to the language access argument could not practically have been avoided.

Even viewing SHA’s failure to translate Ms. Bin’s vital documents as a separate issue distinct from the other due process violations that SHA committed, the language access argument was still a meritorious defense upon which she could have prevailed. CP at 218. There was no dispute that SHA had not translated the vital documents⁶ related to the termination of Ms. Bin’s tenancy into Somali, and the record clearly established that Ms. Bin was of limited English proficiency (even though SHA did raise some dispute concerning the extent of her limitation). CP at 60-66. The translation of vital documents for tenants with limited English proficiency is mandatory under SHA’s Interpretation and Translation Policy (ITP). CP at 137. Thus, the only serious question facing the superior court was whether SHA’s failure to comply with the ITP precluded its attempt to

⁶ The documents Ms. Bin contended were “vital documents” and thus subject to mandatory translation were her lease termination notice, summary of grievance rights, and grievance hearing decision, CP at 6-10, 127-33, 136-37 (vital documents defined as “written materials that, if not understood, will result in the loss of housing.”).

terminate Ms. Bin's tenancy (whether automatically or combined with a showing that the non-translation caused actual prejudice).

In other words, the superior court—had it reached the issue—could well have found that SHA's violation of the ITP precluded termination of Ms. Bin's lease. See *Saylor* at 875 (public housing tenancy cannot be terminated except in accordance with PHA's own rules). Or, the superior court could have found that SHA's violation of the ITP, combined with the actual prejudice Ms. Bin experienced because of the non-translation (e.g., by impairing her ability to understand and rebut SHA's allegations at the grievance hearing), precluded termination of her tenancy. CP at 321; see *Saylor* at 875; see also *Kustura v. Dept. of Labor & Industries*, 142 Wn. App. 655, 681; 175 P.3d 1117 (2008) (agency's failure to provide statutorily-required translation may constitute reversible error if actual prejudice results), superseded by *Kustura v. Dept. of Labor & Industries*, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 2432085 (2010). SHA offered no persuasive rebuttal of the language access argument,⁷ and the superior court's ruling that the issue was "properly raised" seems to acknowledge a realistic possibility that Ms. Bin could have prevailed on it. CP at 218.

A zealous advocate would not fail to raise such a strong argument.

⁷ SHA, for its part, has argued that it has no enforceable legal duty to comply with the ITP. See CP at 44-49; see SHA's Brief at 11-20. The defense considers it unlikely that, if Ms. Bin's language access defense had failed, it would have been for this reason.

While the language access defense might have failed, Ms. Bin's chances of prevailing on that argument were sufficiently high that her attorneys could not responsibly have neglected the issue, no matter how confident they may have been in her other defenses. Indeed, failing to raise a potentially winning defense can sometimes even constitute professional negligence or ineffective assistance of counsel. See *Matter of Maxfield*, 133 Wn.2d 332, 344; 945 P.2d 196 (1997) (failure to raise meritorious argument can be ineffective assistance of counsel if prejudice results). Since the time and labor devoted to raising and presenting the language access argument was reasonably necessary in Ms. Bin's defense, the superior court was correct to award costs and fees for time devoted to that issue. See RCW 59.18.030(14).

c. Ms. Bin had no choice but to litigate.

SHA had perfect knowledge of the improprieties in Ms. Bin's original grievance hearing before it brought this action on October 27, 2009. CP at 1-5, 272-73. SHA had a copy of the grievance decision itself, dated September 24, 2009. CP at 127. SHA had received a letter from Ms. Bin's counsel, dated October 8, 2009, detailing many deficiencies in the hearing and surrounding procedures, and asking for a new grievance hearing. CP at 260-63. SHA had an audio recording of the hearing, which was later transcribed. CP at 295-350, 430-32. And on October 21, 2009,

SHA attorney Linda Brosell attended and participated in a deposition of Lawrence Weldon (CP at 352-477), who testified in detail about his handling of Ms. Bin's hearing. CP at 418-429.

In his deposition, Weldon described his ex parte conversation with SHA staff about Ms. Bin's case and admitted that he relied on information received in that ex parte conversation to deny her continuance request. CP at 421-24. SHA could not reasonably have failed to appreciate that these facts would preclude a court from finding that Ms. Bin's tenancy had been terminated.⁸ See *Saylor* at 875; see 24 CFR 966.4(l)(3-4). But SHA did not grant Ms. Bin a new grievance hearing or take any other corrective measures before filing this action. CP at 272-73.

In fact, Weldon's deposition testimony contained many statements that called into question his general temperament, demeanor, and ability to remain impartial at all—particularly in a case involving a limited English proficient tenant who raised language access as an issue in her defense. For instance, Weldon testified that fair housing arguments (including those based on national origin discrimination, such as language access claims) are not relevant to public housing grievance hearings. CP at 36-37, 78, 107-108. Weldon denied having any knowledge or training relevant to

⁸ The superior court specifically found this ex parte communication was “inappropriate and should not have occurred, and that violated [Ms. Bin's] right to an impartial decision maker.” RP at 26.

language access issues, including relevant HUD policies. CP at 428-30.

A provision of Weldon's contract appeared potentially to make him responsible for securing necessary translations of written grievance decisions—but when asked whether he had arranged for Ms. Bin's grievance decision to be translated into Somali, Weldon replied:

“That question is so ridiculous. I can't even begin to tell you how stupid that question is. No, I did not arrange it. It's not the hearing officer's job to arrange to have interpreters, whatever, translated into somebody's language.”

CP at 428.

SHA's own grievance policy provides that no person “who appears to lack impartiality” may serve as a public housing hearing officer. CP at 139. Even if SHA might justifiably have felt that Weldon's inappropriate ex parte conversation with Linda Todd or his improper handling of Ms. Bin's continuance request did not render the grievance hearing deficient, SHA could not reasonably have overlooked the appearance of bias that arose from Weldon's contemptuous deposition remarks. In light of this information, SHA's choice to file an unlawful detainer suit, rather than concede the illegitimacy of Ms. Bin's grievance hearing and disavow Weldon's ruling, approaches something like deliberate indifference.

Even after filing the unlawful detainer suit, SHA could still have avoided liability for Ms. Bin's attorney fees by dismissing the case prior to

January 1, 2010. C.f., *Council House v. Hawk*, 136 Wn. App. 153, 159-60; 147 P.3d 1305 (2006). Ms. Bin served SHA on December 14, 2009, with her Motion for Summary Judgment, setting forth in detail her arguments for why the tenancy had not been terminated and dismissal was warranted. CP at 37-38. Had SHA acknowledged the flaws in its case and taken a voluntary dismissal at that time, SHA would have avoided liability for attorney fees because the federal restriction precluding Northwest Justice Project from seeking or recovering attorney fees was still in effect. See 45 CFR 1642.3 (1997). Still, SHA did not back down. SHA filed a response to Ms. Bin's summary judgment motion on January 5, 2010, opposed her efforts to conduct discovery, and contested her summary judgment motion at oral argument on January 15, 2010. CP at 39, 503-507, 538-547; RP at 14-20.

After pushing Ms. Bin's back against the wall, SHA can hardly complain that she fought back with everything she had—language access arguments included. Ms. Bin had no choice but to defend tenancy in court, and thus to incur the costs and attorney time necessary to win her case. See CP at 272-73. Respondent can only hope the modest attorney fee award in this case will cause SHA to approach future eviction lawsuits a bit more carefully. See, accord, 75 Fed. Reg. 6816, 6817 (Feb. 11, 2010) (“the ability to make a claim for attorneys’ fees is often a strategic tool in

the lawyer's arsenal to obtain a favorable settlement from the opposing side").

3. A comparison of relevant case law shows the attorney fee award was appropriate.

*Saylor*s, the prior decision that most closely resembles the present action, gives no indication as to whether the tenant sought or recovered attorney fees in that proceeding. See *Saylor*s, 19 Wn. App. at 871-75. But three other subsidized housing cases—*Kirby*, *Terry*, and *Council House v. Hawk*—discuss attorney fees issues in considerable depth. See *Kirby*, 154 Wn. App. at 852; see *Terry*, 114 Wn.2d at 570-71; see *Council House v. Hawk*, 136 Wn. App. 153; 147 P.3d 1305 (2006). A comparison of these three decisions reinforces the conclusion that the attorney fee award in this case was appropriate.

a. *Council House v. Hawk*

Council House, though it did not involve a public housing tenancy, has the most closely analogous facts. See *Council House*, 136 Wn. App. at 156-57. In *Council House*, an adult family home brought an unlawful detainer action seeking to remove a tenant who had allegedly “violated her lease by disturbing her neighbors and acting rudely.” *Council House* at 156. The tenant's defenses included a free expression argument that entailed a series of pretrial motions, briefs, and delays. *Id.* at 156-57. Her

attorneys devoted about 200 hours to her defense through several months of litigation, before the plaintiff finally moved for, and was granted, a voluntary dismissal without prejudice. *Id.* at 157. The tenant then requested attorney fees under RCW 59.18.290, but the trial court ruled it had “no statutory basis for attorney fees.” *Id.* at 159.

On appeal, this Court held RCW 59.18.290 did authorize the trial court to award attorney fees, because the defendant is the prevailing party (for attorney fees purposes) when the plaintiff takes a voluntary dismissal. See *Council House* at 159-60. By filing and prosecuting the action, the landlord had made it necessary for the tenant’s attorneys to invest time and effort in raising and preparing her defense, and as the prevailing party she could recover reasonable fees for that work even if no court ever reached or sustained any of her arguments. *Id.* at 157.

Like the tenant in *Council House*, Ms. Bin was the prevailing party entitled to attorney fees under an applicable contract (or statute). CP at 170. And like the attorneys in *Council House* who spent 200 hours working on a free speech defense the court never ultimately adjudicated, Ms. Bin’s attorneys devoted (considerably less) time to a language access defense the superior court did not reach. See *Council House* at 157; CP at 153. But, like in *Council House*, the superior court had discretion to include that time in Ms. Bin’s attorney fees award, provided the time was

reasonably expended on her defense. See *Council House* at 162. Having found the language access defense was properly raised, the superior court was within its discretion to award fees for time devoted to that argument. CP at 218.

b. *Everett Housing Authority v. Kirby* revisited

In *Kirby*, the tenant's attorneys sought attorney fees of almost \$5,000 for a case they probably could have resolved with one telephone call. See *Kirby*, 154 Wn. App. at 848. Despite a facial defect in the summons that obviously⁹ required the suit to be dismissed for lack of subject matter jurisdiction, the *Kirby* tenant's attorneys ran up over 20 hours preparing interrogatories, a motion to dismiss, and pleadings related to a dubious claim of frivolity. See *Kirby* at 847. Then, when EHA's attorney offered to dismiss the suit after the defective summons was brought to her attention, the tenant's attorneys inappropriately insisted the dismissal be entered with prejudice, thus prolonging the proceedings and increasing their fees. See *Kirby* at 847-48.

In stark contrast with *Kirby*, Ms. Bin brought her defenses to SHA's attention early and often, and offered to accept the relief to which

⁹ It is noteworthy that one of the attorneys who represented the tenant in *Kirby* also represented Carmen Hueft, the tenant in the case establishing that a residential unlawful detainer summons which fails to advise the tenant of her right to respond by mail or fax is a fatal jurisdictional defect. See *Kirby* at 845; see *Truly v. Hueft*, 138 Wn. App. 913, 914-15; 158 P.3d 1276 (2007).

she was legally entitled (i.e., a new grievance hearing). See CP at 11-34, 260-63. Unlike EHA, which offered to dismiss its flawed suit, SHA fought to the bitter end. See *Kirby* at 847-48. Unlike the *Kirby* tenant's attorneys, who attempted to inflate their fees through unnecessary work, all of the time for which Ms. Bin's attorneys sought and were awarded fees was incurred with the outcome in doubt and no viable settlement terms on the table. See *Kirby* at 847. Moreover, Ms. Bin's attorneys did not even seek fees for necessary legal services that were performed prior to January 1, 2010, even though they could have. CP at 182; see 75 Fed. Reg. 6816, 6817 (Feb. 11, 2010) (federally-funded legal services programs may "claim and collect and retain attorneys' fees with respect to any work they have performed for which fees are available to them, without regard to when the legal work for which fees are claimed or awarded was performed."). The only reason Ms. Bin's attorneys gave for not requesting these additional fees was simply to "minimize concerns about the reasonableness of [the] fee request." CP at 182.

As discussed above, the most critical differences between this case and *Kirby* are (i) the existence of a contractual provision upon which to award fees, and (ii) that the superior court had subject matter jurisdiction and found that Ms. Bin had the right to possession. CP at 149-53. But SHA urges the Court to read *Kirby* as standing for a broad rule precluding

public housing tenants from recovering attorney fees in dismissed eviction cases (at least when the dismissal is for “procedural” reasons). See SHA’s Brief at 7-10. The Court should decline this invitation as not only being inconsistent with law, but—insofar as Ms. Bin and her lawyers morally deserve their fees—contrary to the interests of justice.

c. Everett Housing Authority v. Terry

The *Terry* case involved a public housing tenant, also at Everett Housing Authority, who had harassed and intimidated a neighbor through “verbal threats, physical intimidation and destruction of property.” *Terry*, 114 Wn.2d at 561. The tenant had violated multiple civil protection orders the neighbor had obtained, and even attempted to run the neighbor over with his car. See *Terry* at 560-61. EHA brought proceedings to evict the tenant because of these incidents. See *Id.* at 560. The tenant raised two defenses: (i) that EHA’s lease termination notice was defective, and (ii) that the tenant’s violent actions were caused by a disability, which EHA owed a duty to accommodate (by transferring him to EHA’s Section 8 Voucher Program¹⁰) rather than evicting him. See *Id.* at 561-62.

After rejecting the argument regarding the defective lease termination notice, the superior court conducted a trial on the disability

¹⁰ Now called “Housing Choice Voucher,” the Section 8 Voucher Program is a rental-subsidy program whereby tenants obtain rental housing from private landlords and receive federally-funded subsidies to assist in the payment of rent. See 24 CFR 982.1.

accommodation issue, which the tenant also lost. See *Id.* at 562. The trial court thus entered judgment for EHA and the tenant appealed. See *Id.* at 562. On review, the Supreme Court found EHA's lease termination notice had indeed been defective, and thus that the subject matter jurisdiction was lacking. See *Id.* at 564. The judgment was therefore reversed and the case remanded for dismissal. See *Id.* at 571.

Having prevailed in the appeal, the tenant moved for attorney fees under both RCW 59.18.290(2) and RCW 49.60.030(2), a provision of the Law Against Discrimination. See *Terry* at 570. Both arguments failed. See *Id.* at 571. As previously discussed, an order for dismissal based on lack of subject matter jurisdiction does not entitle a tenant to recover fees under RCW 59.18.290(2), because such an order does not reflect a finding that the tenancy was not terminated. See *Terry* at 571. And even though the superior court had lacked jurisdiction, the claim for attorney fees under RCW 49.60.030(2) also failed because the issue had been resolved against the tenant in the trial. See *Terry* at 571 (“One party should not be able to seek an affirmative result at trial and, when disappointed, burden the other party with all the expenses.”). Significantly, the *Terry* court observed that the tenant had had “the benefit of a formal, if adverse, trial decision” on the disability accommodation issue. *Terry* at 571.

Nothing in *Terry* suggests the superior court abused its discretion

by granting Ms. Bin attorney fees related to the language access argument. See *Terry* at 571. Unlike the disability accommodation defense in *Terry*, which went to trial and was adjudicated against the tenant—albeit in a proceeding later found to have been without jurisdiction—the language access defense in Ms. Bin’s case was never tried or adjudicated at all. See CP at 153, 218. She did not gain “the benefit of a formal, if adverse, trial decision.” *Terry* at 571. Rather, as the superior court was careful to specify, in Ms. Bin’s case the language access issue “was properly raised and not decided against the defendant, just not reached[.]” CP at 218.

C. Ms. Bin should recover attorney fees for this appeal.

Ms. Bin further requests an award of attorney fees for the time devoted to this appeal. See RAP 18.1. Her rental agreement provides adequate authority for this award. CP at 170; see *Barber v. Peringer*, 75 Wn. App. 248, 255; 877 P.2d 223 (1994) (contract that provides for attorney fee award at trial also supports attorney fee award on appeal).

The superior court’s ruling was just and legally sound, and ample basis would exist to award Ms. Bin the costs and fees of this appeal even if not for its salutary impact on the public interest. But as is clear from the record, the grievance hearing SHA provided Ms. Bin was marred by serious due process violations, many of which were attributed to official SHA policies or recurring practices. RP at 24-28; CP at 255. Lawrence

Weldon, who reports having presided over more than 500 cases with SHA, demonstrated an alarming lack of professionalism at his deposition, and his testimony (as well as his performance in Ms. Bin's case) calls his fitness for hearing and adjudicating these important, high-stakes disputes into serious question. CP at 352-477.

This litigation has put SHA on clear notice of these problems, and given SHA ample opportunity to make the appropriate corrections in its grievance hearing policies, practices, and personnel. Appropriate changes may include revising rules to ensure that hearing officers can continue or reschedule hearings when necessary, providing language access services for tenants with language barriers, and retraining or replacing unqualified hearing officers. Such reforms stand to benefit everyone residing in the more than 5,200 public housing units that SHA manages.¹¹ SHA's only tangible incentive to correct its grievance hearing practices—the superior court's attorney fee award—would be lessened if Ms. Bin must now defend that award in this Court without further compensation.

For these reasons, an award of attorney fees on appeal is warranted by Ms. Bin's rental agreement and is further appropriate in light of the public interest. See CP at 170. Ms. Bin requests such fees pursuant to RAP 18.1.

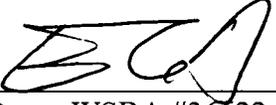
¹¹ <http://www.seattlehousing.org/about/overview/>, last visited June 24, 2010,

IV. Conclusion

For the foregoing reasons, this Court should affirm the Superior Court's February 9, 2010, Order Granting Defendant's Costs and Attorney Fees and should further award Defendant her costs and fees for this appeal pursuant to RAP 18.1.

RESPECTFULLY SUBMITTED this 30 day of June, 2009.

NORTHWEST JUSTICE PROJECT

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COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

HOUSING AUTHORITY OF
THE CITY OF SEATTLE,

Plaintiff/Appellant,

vs.

KHADIJA BIN,

Defendant/Respondent.

No. 65003-3

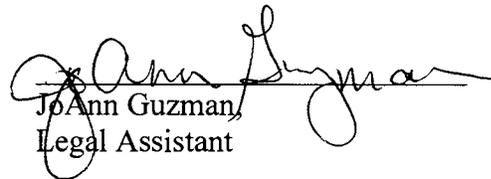
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STATE OF WASHINGTON
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I certify that on the 30th day of June, 2010, I caused a true and correct copy of the Brief of Respondent Khadija Bin to be served on the following, via ABC Legal Services, Inc.:

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