

70956-9

70956-9

NO. 70956-9-I

COURT OF APPEALS
OF THE
STATE OF WASHINGTON
DIVISION I

LANG PHAM, appellant,

vs.

SHAWN CORBETT, SHAKIA MORGAN, and all other occupants
respondents.

APPELLANT'S OPENING BRIEF

W
FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAR 25 AM 9:22

Jeana K. Poloni, WSBA No. 43172
Evan L. Loeffler, WSBA No. 24105

Law Office of Evan L. Loeffler PLLC
2033 Sixth Avenue, Suite 1040
Seattle, WA 98121
(206) 443-8678
(206) 443-4545 facsimile

Table of Contents

A. ASSIGNMENTS OF ERROR 1

 Assignments of Error 1

 Issues Pertaining to Assignments of Error..... 1

B. STATEMENT OF THE CASE 2

C. ARGUMENT 7

 1. The court’s findings of a breach of the implied warranty of habitability are not supported by substantial evidence. 7

 2. The trial court erred by elevating the habitability standard based upon the identity of the occupants. 12

 3. The trial court erred in finding that a tenant who fails to pay rent may credit his last month’s rent payment to the month he is served with a notice to pay rent or vacate..... 13

 4. The trial court erred in finding the terms of the rental agreement do not continue after expiration of the initial lease term. 15

 5. The trial court erred in determining relocation assistance is due under RCW 59.18.085 when a landlord is served with a notice of violation and has an opportunity to cure the defect. 16

 6. The trial court erred in allowing a counterclaim for relocation assistance in an unlawful detainer action..... 18

 7. The trial court erred in considering what a reasonable landlord would know when no testimony was offered to support this conclusion. 22

 8. The trial court erred in calculating damages, awarding attorney’s fees and granting judgment against the landlord based upon a breach of the implied warranty of habitability..... 23

 9. Pham is entitled to attorney’s fees on appeal. 25

Pham requests an award of his attorney’s fees and costs on appeal. RAP 18.1. The court may award attorney’s fees to the prevailing party in a residential unlawful detainer. RCW 59.18.410. The lease agreement also provided for an award of attorney’s fees to Pham in the event of litigation. Exhibit 1. This court should award fees on appeal. 25

D. CONCLUSION..... 25

TABLE OF AUTHORITIES

Table of Cases

Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 73 P.3d 369 (2003)7
Fisher Props. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 798 P.2d 799 (1990)7
Munden v. Hazelrigg, 105 Wn.2d 39, 711 P.2d 295 (1985). ..18, 19, 20, 21
Granat v. Keasler, 99 Wn.2d 564, 663 P.2d 830 (1983).19
Foisy v. Wyman, 83 Wn.2d 22, 515 P.2d 160 (1973).....
.....8, 12, 20, 21, 23, 24
Young v. Riley, 59 Wn.2d 50, 365 P.2d 769 (1961). 19
Landis & Landis Constr. LLC v. Nicola Nation, 171 Wn. App. 157, 286 P.3d 979 (2012)8, 9, 11, 12
Negash v. Sawyer, 131 Wn. App. 822, 129 P.3d 824 (2006)19
Josephinium Assoc. v. Kahli, 111 Wn. App. 617, 45 P.3d 627 (2002)
..... 19, 20
Rock Homeowner’s Ass’n v. Misich, 106 Wn. App. 231, 23 P.3d 520 (2001).7
Lian v. Stalick, 106 Wn. App. 811, 25 P.3d 467 (2001) 12, 13
Housing Authority of City of Seattle v. Silva, 94 Wn. App. 731, 972 P.2d 952 (1999)18
Marsh-McLennan Bldg. Inc., v. Clapp, 96 Wn. App. 636, 980 P.2d 311 (1999)..... 15
Sprincin King Street Partners v. Sound Condition Club, Inc., 84 Wn. App. 56, 925 P.2d 217 (1996).20
First Union Management, Inc., v. Slak, 36 Wn. App. 849, 679 P.2d 936 (1984).20

Statutes

1. RCW 36.18.012(5)19
2. RCW 59.12.170.....8
3. RCW 59.18.070.....11, 24
4. RCW 59.18.080.....21, 24
5. RCW 59.18.085.....1, 2, 16, 17, 18, 21, 23

6. RCW 59.18.090.....	24
7. RCW 59.18.180.....	18
8. RCW 59.18.200.....	14
9. RCW 59.18.310.....	14

Court Rules

1. CR 13.....	19
2. CR 81.....	18, 19

A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in entering findings of fact 2.3.4 and 2.3.5, and conclusions of law 3.4.1 through 3.4.4 finding a breach of the implied warranty of habitability.
2. The trial court erred in entering finding of fact 3.4.2 by elevating the habitability standard based upon the identity of the occupant.
3. The trial court erred in finding that a tenant who fails to pay rent may credit his last month's rent deposit to the month he is served a three day notice to pay rent or vacate.
4. The trial court erred in entering conclusion of law 3.3 by finding the terms of the rental agreement do not continue after the expiration of the initial lease.
5. The trial court erred in entering conclusions of law 3.5.1 through 3.5.3 by finding relocation assistance is due under RCW 59.18.085 when the landlord has been served with a notice of violation.
6. The trial court erred in entering conclusions of law 3.2.1 through 3.2.3 by allowing a counterclaim for relocation assistance in an unlawful detainer action.
7. The trial court erred in entering conclusion of law 3.5.3 by considering what a reasonable landlord would know when no testimony was offered to support this conclusion.
8. The trial court erred in entering conclusions of law 3.4.4, 3.5.4, 3.9, and 3.10 by miscalculating damages, awarding attorney's fees and granting judgment against the landlord based upon a breach of the implied warranty of habitability.
9. Landlord is entitled to fees on appeal.

Issues Pertaining to Assignments of Error

1. Did the trial court err in finding a breach of the implied warranty of habitability?
2. Was it error to elevate the habitability standard based upon the identity of the occupant?
3. Was it error to find that a tenant who fails to pay rent may credit his last month's rent deposit to the month he is served a three day notice to pay rent or vacate?
4. Did the trial court err in finding that the terms of the rental agreement do not continue after the expiration of the initial lease?
5. Was it error for the trial court to find relocation assistance is due under RCW 59.18.085 when the landlord has been served with a notice of violation?
6. Did the trial court err by allowing a counterclaim for relocation assistance in an unlawful detainer action?
7. Was it error for the trial court to consider what a reasonable landlord would know when no testimony was offered to support this conclusion?
8. Did the trial court err calculating damages, awarding attorney fees and granting judgment against the landlord based upon a breach of the implied warranty of habitability?
9. Is Pham entitled to attorney's fees on appeal?

B. STATEMENT OF THE CASE

This action is a residential unlawful detainer based upon the tenants' failure to pay rent. The landlord, Lang Pham, bought the property in March 2012. VRP 28. At the time of purchase, Pham repainted all the units, replaced carpets, buffed the hardwood floors, and restored the units to a very good condition. VRP 28.

Pham, entered into a one-year lease agreement with Shawn Corbett and Shakia Morgan (hereinafter “the tenants”) on April 25, 2012, for the property located at 9312 51st Avenue South, Apt. 5, Seattle, Washington. VRP 26, Exhibit 1. The tenants completed an initial condition report checklist upon move-in. Exhibit 2. The walkthrough checklist shows the property in good condition and indicated only minor, aesthetic defects. *Id.* The lease called for rent in the amount of \$850.00 due on the first day of each month. VRP 26-27, Exhibit 1. The lease was for a term of one year from May 1, 2012, to April 30, 2013. Exhibit 1. A \$25.00 per day late fee accrued for each day after the first day of the month that rent remains unpaid. VRP 27, Exhibit 1.

Corbett and Morgan failed to pay rent in May 2013. VRP 39. Pham served the tenants with a three-day notice to pay rent or vacate on May 6, 2013, by posting and mailing. VRP 39, Exhibit 3. The tenants ignored the notice and did not pay any amount of rent. *Id.* Pham served a second three-day notice to pay rent or vacate on May 16, 2013, by personal delivery. VRP 40, Exhibit 4. The tenants did not pay rent after service of the second notice to pay rent or vacate and did not pay any rent through the remainder of their tenancy. VRP 42.

Pham brought this unlawful detainer action by serving the tenants with a summons and complaint for unlawful detainer on May 20, 2013.

The tenants asserted counterclaims in the unlawful detainer action for relocation assistance and damages based upon breach of the implied warranty of habitability. CP 15-19. They did not pay the counterclaim filing fee. *Id.* After a show cause hearing, the court set the matter for trial on June 13, 2013. CP 22-23.

At trial, the tenants raised defenses based upon the implied warranty of habitability. CP 15-19. They claimed there were structural issues with the property, rats throughout the premises, and sewer leaks which created unsafe living conditions. VRP 140-195. The tenants admitted that they had not paid rent since April 2013. VRP 196.

Pham testified he never saw rodents or any evidence of a rodent infestation in the unit. VRP 31- 32. As part of Pham's pest prevention program and due to the tenants' allegations of a rodent infestation, Pham hired a pest inspector to treat the premises in August 2012. VRP 38. At trial, two neutral witnesses, City of Seattle Housing and Building Maintenance Inspector, Tom Bradrick, and a Paratex pest control technician, Eric Bittenbender, both testified there was no evidence of a pest infestation. VRP 103, 127. On August 16, 2012, Bittenbender inspected the interior and exterior of the premises. VRP 101; Exhibit 5. Bittenbender recalled inspecting the premises several times. VRP 103. Upon re-inspection of the premises the professional found no evidence of

rats in the unit. *Id.* He noted that the crawl space was cluttered with the tenants' personal property and placed traps in the area as requested. VRP 103-104. At no time did Bittenbender see evidence of rodents or pests. VRP 103.

Inspector Bradrick testified to the existence of some defects in the premises but nothing that created an emergency situation or an immediate habitability issue. VRP 116. Bradrick testified that if there had been an egregious defective condition implicating substantial habitability issues he would have issued an emergency order with a short compliance window and vacate the tenants from the unit. VRP 126. He has the authority to close and condemn the unit. VRP 126. Instead, Inspector Bradrick issued a notice of violation identifying deficiencies in the premises and provided Pham an opportunity to cure the defects. Exhibit 17. Bradrick testified that there were no rats or rat droppings during his inspection. VRP 127-128. Bradrick provided Pham an extension on his compliance deadline as he and his architect were actively pursuing permitting. VRP 123.

Defendant Morgan testified she saw rats after the inspector came to the premises in August, but never told her landlord the problem reoccurred. VRP 160-162. Morgan could not identify when she saw rats or even how many times she saw them. *Id.*

The only requests for repair conclusively established by the tenants were ones to which Pham responded. The tenants complained that they did not have enough hot water. VRP 30. Pham immediately turned up the temperature on the hot water heater. VRP 30, 49. Tenants complained of a smell, and upon inspection Pham found that a drain was missing a P-trap. VRP 55, Exhibit 24. Pham purchased a P-trap, but when he came to install it, the tenants volunteered to install it themselves. *Id.* The tenants did not complain of a smell in the unit after Pham provided a P-trap for the sink. VRP 55. Mr. Corbett testified that he unsuccessfully attempted to install the P-trap. VRP 175. Corbett did not identify any time after his attempted installation that he notified Pham of the continued smell or of the need for a new P-trap.

The tenants claimed other defects existed on the property, but they admit they did not inform Pham of the defects in writing. Corbett stated he noticed a leak in the crawl space after he moved into the unit, but did not provide written notice to the landlord. VRP 185. Mr. Corbett said he always notified the landlord of problems via phone, but could not identify a date or approximate time of doing so. *See* VRP 192.

After the one-day trial, the trial court found in favor of the tenants and issued a judgment against landlord. CP 81-88; 98-109. Pham brings this appeal seeking reversal of the trial court's determination.

C. ARGUMENT

On appeal from a bench trial, the appellate court's review is limited to determining whether substantial evidence supports the findings of fact and whether the findings support the conclusions of law. *Standing Rock Homeowner's Ass'n v. Misich*, 106 Wn. App. 231, 242-43, 23 P.3d 520 (2001). Substantial evidence is the "quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). There is a presumption in favor of the judgment and the party alleging error has the burden of showing a finding of fact is not supported by substantial evidence. *Fisher Props. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990).

1. The court's findings of a breach of the implied warranty of habitability are not supported by substantial evidence.

In a residential unlawful detainer, a tenant may raise a defense based upon the landlord's breach of the implied warranty of habitability. There is insufficient evidence to support a finding of the breach of the implied warranty of habitability in this case.

In *Foisy v. Wyman*, 83 Wn.2d 22, 515 P.2d 160 (1973), the Washington State Supreme Court recognized an affirmative defense to unlawful detainer actions for violations of the implied warranty of habitability. Notably, the court required payment of rent if the premises were even partially habitable.

The finder of fact must make two findings where the defendant claims the landlord has breached the implied warranty of habitability: (1) Whether the evidence indicates that the premises were totally or partially uninhabitable during the period of habitation and, if so, (2) what portion, if any or all, of the defendant's obligation to pay rent is relieved by the landlord's total or partial breach of his implied warranty of habitability. If the finder of fact determines that the entire rental obligation is extinguished by the landlord's total breach, then the action for unlawful detainer based on nonpayment of rent must fail. If, on the other hand, the court determines that the premises are partially habitable, and the tenant failed to tender to the plaintiff a sufficient amount to pay rent due for the partially habitable premises, then judgment shall be entered in accordance with RCW 59.12.170.

Id. at 23.

In the recent Division One Court of Appeals Case, *Landis & Landis Constr. LLC Nicola Nation*, 171 Wn. App. 157, 164, 286 P.3d 979 (2012), the court determined that, “a rodent infestation *evident at move-in* represents an actionable breach of the implied warranty of habitability, justifying rescission of the rental agreement and immediate vacation of the premises.” *Landis & Landis Constr. LLC v. Nicola*

Nation, 171 Wn. App. 157, 164, 286 P.3d 979 (2012) (Emphasis added). In *Landis*, the court held that the decision of the tenants to move out immediately without giving the landlord an opportunity to address the problem was appropriate where there was a material breach of the implied warranty of habitability apparent at move-in. *Id.* In its analysis the court explained the importance of the defect to be apparent at move-in:

A treatise cited by *Nation* addresses in general terms what amounts to a breach of the implied warranty. *Nation* relies on the author's statement, "it would seem that the landlord should not be deemed to be in breach of his duty unless he fails to make the necessary repairs within a reasonable time after receiving notice. (Citations omitted). But *Nation* omits the remainder of the sentence, which reads "at least where the defective condition(s) only arise, or become patent, after the tenancy begins" Here the evidence of rodent infestation was patent at move-in.

Id. at 164.

In the instant case, the premises were not found to be totally uninhabitable. The trial court determined that a smell in the sink, after over a year of tenancy, posed habitability problems. CP 88. The trial court also found that there was a sewer leak and a possible rat infestation which posed habitability problems. CP 88.

Nowhere does the trial court explain how a bad smell relates to habitability or poses a substantial risk of future danger. The trial court

bases its finding of uninhabitability on a minor sewer leak in the crawl space. CP 88. In its findings, the trial court states that the landlord was first notified of the leak by the City of Seattle in a letter dated May 22, 2013. CP 88. The date of service of the three-day notice to pay rent or vacate was May 16, 2013, several days prior. Exhibit 4. The trial court also found the tenants informed the landlord of the problem. CP 88. Nowhere in the record does it state when or how the tenants informed the landlord that the sewer leak was an issue at any time during their tenancy.

The court also determined there was a rat infestation that posed a substantial risk of future danger. CP 88. The only testimony concerning the existence of rats came from the tenants. *See* VRP 145. Two neutral professionals, the city inspector and the pest control technician, testified there was no evidence of a rodent infestation. VRP 103, 127. The quantum of evidence supported by the record would persuade a rational fair-minded person that there was *not* a rodent infestation. The court erred in finding otherwise.

The tenants first complained of an infestation via text message on August 15, 2012. Exhibit 24. The landlord sent the pest inspector out to investigate and treat the problem the next day on August 16, 2012. VRP 103-104. The pest inspector did not find any evidence of a rat

infestation, but treated the premises as a precautionary measure. *Id.* The tenants did not notify the landlord that the problem continued. Eight months later, the tenants wrote to the landlord regarding a new pest problem on April 21, 2013, via text message. Exhibit 24. The landlord immediately brought rat poison and investigated the problem. *Id.* Tenants did not complain of rats after that incident.

There is no evidence that the premises were uninhabitable throughout the duration of the tenancy other than the unsubstantiated statement of the tenants. The tenants had a duty to notify the landlord of a problem if it occurred and provide him with an opportunity to cure the defect. RCW 59.18.070; *Landis*, 171 Wn. App. at 164. *Landis* does not stand for the premise that if there is a habitability issue during the tenancy the tenant may remain silent and withhold rent. *Landis* explains that a defect must be patent at move-in or notice and the opportunity to cure are required before there is a breach of the implied warranty of habitability. *Landis*, 171 Wn. App. at 164. There is no finding of when the tenants put the landlord on notice of defects in the premises. Similarly, the trial court did not make any finding of patent defects in the premises. As such, there is no support for the finding of a breach of the implied warranty of habitability. The court's conclusions are not

supported by sufficient findings, and the findings the court did make are not supported by substantial evidence.

2. The trial court erred by elevating the habitability standard based upon the identity of the occupants.

The trial court determined a landlord is required to take *all reasonable measures* to prevent an infestation based on the fact an infant resides in the unit. CP 88. The Residential Landlord-Tenant Act (“RLTA”) does not make any such distinction and it was error for the trial court to invent this new requirement.

A landlord is required to provide a safe and habitable dwelling for his tenants. *See Foisy v. Wyman, supra*. There is nothing that requires a landlord to act with more than reasonable diligence to eliminate dangers that pose an actual or potential safety hazard to its occupants. *Lian v. Stalick*, 106 Wn. App. 811, 818, 25 P.3d 467, 472 (2001). There is no breach if the landlord’s efforts are reasonable but unsuccessful. *Id.* Neither the implied warranty of habitability nor the RLTA requires a landlord to take *all reasonable measures* to cure a defect in the premises.

The trial court relied on *Landis*, 171 Wn. App. at 166, to state that “there is no doubt that a rodent infestation can create an actual or potential safety hazard.” CP 88. However, if a landlord takes reasonable measures to provide a reasonable program for pet control, and is not notified of a re-

occurrence of the problem, there is no breach of the implied warranty of habitability. *See Lian v. Stalick*, 106. Wn. App. at 818.

Here, Pham immediately hired a pest control technician to inspect and treat the premises for rodents and pests. VRP 100. Morgan testified that after the pest control technician treated her unit she continued to see rats in the unit. VRP 161. She did not, however, state when, if at all, she notified Pham of the problem re-occurring. VRP 162. Pham took reasonable measures in response to the complaint regarding rodents. He reasonably believed the problem was resolved when he was not notified that the problem continued after the initial treatment. Eight months later, when the tenants complained again about rats, Pham took reasonable steps by providing rat poison to the tenants. In light of the trial court's reliance on a non-existent rule that there is a higher duty to tenants with children, it was error to determine Pham acted unreasonably.

3. The trial court erred in finding that a tenant who fails to pay rent may credit his last month's rent payment to the month he is served with a notice to pay rent or vacate.

The trial court determined when the tenants were served with a three-day notice to pay rent or vacate in May 2013, this became their last month of occupancy and they could apply pre-paid, last month's rent to become current with rent. CP 86. The court found that the tenants elected

to relocate and notified the landlord in their answer to the unlawful detainer. CP 86. This is error and a misapplication of the law.

In order to terminate tenancy and apply last month's rent two things must occur: (1) the tenants must give or receive twenty days' notice of their intent to vacate; and (2) the tenants must actually vacate the premises. *See* RCW 59.18.200(a)(1). Neither of those actions occurred here.

Even if tenants provided notice of their intent to "relocate," after service of the three-day notice to pay rent or vacate on May 16, 2013, they would not have provided sufficient notice pursuant to RCW 59.18.200. As such, they would remain liable for June rent. *See* RCW 59.18.200(a)(1), .310. More to the point, the tenants did not vacate the property and therefore owed rent for June.¹ The trial court produces a new rule that would require any tenant to be two months in arrears before he could be evicted if he paid a last month's rent deposit. Nowhere does the law support this conclusion. The trial court should have found the failure to pay rent after service of a three-day notice to pay rent or vacate made the tenants guilty of unlawful detainer. RCW 59.12.030(3).

¹ The tenants were still occupying the premises when the notice of appeal was filed. The tenants subsequently vacated the premises in November 2013.

4. The trial court erred in finding the terms of the rental agreement do not continue after expiration of the initial lease term.

The trial court erred in determining that the terms of the rental agreement cease to apply after the expiration of the initial lease term. CP 84. The lease stated that the term was for one year commencing on May 1, 2012, and ending on April 30, 2013. Exhibit 1. The lease provided if tenant holds over without the prior written consent of the landlord, he is liable for rent and other damages sustained due to the holdover. *Id.* The trial court found that because there was no oral agreement for the terms of the lease to continue, late fees could not be assessed against the tenants. CP 84.

There is no basis in law to conclude that the lease terms of a fixed-term tenancy cease to apply once the tenant holds over and becomes a month-to-month tenant. It is well-established law that proof of holding over after the expiration of a fixed term in a lease gives rise to the presumption that the holdover tenant continues to be bound by the covenants which were binding upon him during the fixed term. *Marsh-McLennan Bldg. Inc., v. Clapp*, 96 Wn. App. 636, 644, 980 P.2d 311 (1999). In *Clapp* the court held the terms of a fixed lease apply to the terms of a holdover tenancy. *Id.* at 644.

A holdover tenancy is the situation here. The tenants' lease expired on April 30, 2013. CP 78-80; Exhibit 1. Since they held over past the original term, they were required to pay \$850.00 for rent in May and June 2013. Failure to pay by the due date results in a \$25.00 per day late fee. The court erred by concluding that the original terms of the lease did not apply after expiration of the initial term.

5. The trial court erred in determining relocation assistance is due under RCW 59.18.085 when a landlord is served with a notice of violation and has an opportunity to cure the defect.

The trial court erred in finding relocation assistance was due under RCW 59.18.085. The trial court concluded that the tenants "elected to be relocated" after service of the City of Seattle's Notice of Violation, dated May 17, 2013.² CP 86-87. This misstates the requirements of RCW 59.18.085 and the evidence in this case.

RCW 59.18.085(3)(a) provides if a governmental agency notifies a landlord that "a dwelling will be condemned or will be unlawful to occupy" and the landlord "knew or should have known" of the conditions that violate the applicable code, he must pay relocation assistance. RCW 59.18.085(3)(b) explains the amount of the award of relocation assistance.

² Notably, the May 17, 2013, Notice of Violation is dated *after* service of both three-day notices to pay rent or vacate. Exhibit 3, 4, 17. The trial court fails to explain how not paying rent and electing to relocate, satisfies the requirements in RCW 59.18.085 and alleviates the need to comply with the notice. Also, RCW 59.18.250 states that if a tenant makes a complaint when behind on the payment of rent, it is presumptively made in bad faith.

RCW 59.18.085(3)(c) explains the timing of when relocation assistance is due. Here, the City did not notify the landlord that the dwelling is unlawful to occupy. The evidence established that the Notice of Violation provided the landlord with a deadline, which was extended by the City, to *either* pay relocation assistance *or* permit the unit. Exhibit 17. There was no finding that the building was condemned or unlawful. As such, if the landlord chose to permit the unit, the unit would not be unlawful to occupy. At the time of trial, the landlord was in the final stages of the permitting process and had obtained an extension of the compliance deadline from the city. VRP 123. Therefore, the property was not unlawful and the landlord may continue to have tenants in the unit.

The tenants do not have the option to elect to receive relocation assistance. The statute provides when this occurs. The units must be condemned or deemed unlawful to occupy before the landlord becomes obligated to pay relocation assistance. RCW 59.18.085(3). The trial court's finding that the premise was "unlawful to occupy" is not supported by substantial evidence or a plain reading of the statute.

Moreover, RCW 59.18.085(3)(c) clearly explains *when* relocation assistance must be paid: within seven days of the notice of condemnation, eviction or displacement order to the landlord. No such order exists here. VRP 126. Even if the tenant is entitled to relocation assistance, it was not

due at the time of either the commencement of the action or the date of trial. *See* RCW 59.18.085(3)(c). The court's ruling allows any tenant who occupies a unit with a defect to withhold rent, receive a three-day notice to pay rent or vacate, *then* make a claim to the city (which is presumed to be bad faith, *see* RCW 59.18.250), and receive relocation assistance prior to vacating the premises. This is not consistent with the plain language of the statute. The trial court erred in finding relocation assistance was due as it was not supported by law or substantial evidence presented at trial.

6. The trial court erred in allowing a counterclaim for relocation assistance in an unlawful detainer action.

Only claims and defenses that relate to the right of possession are properly asserted in an unlawful detainer action, whereas counterclaims are typically prohibited. *Munden v. Hazelrigg*, 105, Wn.2d 39, 45, 711 P.2d 295 (1985). The trial court properly made this finding. CP 84. The trial court erred in extending this finding to allow a counterclaim for relocation assistance under RCW 59.18.085 in an unlawful detainer action. *Id.*

An unlawful detainer is a special, summary proceeding with unique rules and limited pleadings. RCW 59.12.180; *Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985); *Housing Authority of City of Seattle v. Silva*, 94 Wn. App. 731, 734, 972 P.2d 952 (1999); CR

81. The issue is limited to possession and incidental claims that arise out of the unlawful detainer alleged, such as payment of rent set out in the notice or accruing during the action. *Munden*, 105 Wn.2d at 44; see RCW 59.18.380, .410. To preserve the special nature of the action, defenses and counterclaims that do not excuse the breach are not permitted. *Munden*, 105 Wn.2d at 45; *Josephinium Assoc. v. Kahli*, 111 Wn. App. 617, 624-25, 45 P.3d 627 (2002).

A counterclaim is any claim which may be maintained independently of the plaintiff's action, whether for more, less, or different relief than that sought by the plaintiff.³ CR 13; see *Negash v. Sawyer*, 131 Wn. App. 822, 827, 129 P.3d 824 (2006). By contrast, a permissible defense is one which is "based on facts which excuse a tenant's breach." *Josephinium Assoc.*, 111 Wn. App. at 625 (quoting *Munden*, 105 Wn.2d at 45).

Case law has consistently held that counterclaims may not be asserted in an unlawful detainer action. *Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985); *Granat v. Keasler*, 99 Wn.2d 564, 570, 663 P.2d 830 (1983); *Young v. Riley*, 59 Wn.2d 50, 365 P.2d 769 (1961);

³ Any party filing a counterclaim, cross-claim, or third-party claim in an unlawful detainer action shall pay a \$197.00 filing fee. RCW 36.18.012(5). The defendant has not paid the required filing fee or obtained a fee waiver in this case. The trial court fails to explain why tenants should be entitled to a monetary award of any kind when they failed to pay the required filing fee or obtain a fee waiver.

Sprincin King Street Partners v. Sound Condition Club, Inc., 84 Wn. App. 56, 925 P.2d 217, 222 (1996). The stated reason for this rule is that the Legislature, in creating and promulgating the RLTA, intended to establish a summary procedure limited to the sole of issue of the landlord's right to possession. *Granat*, 99 Wn.2d at 570; *First Union Management, Inc. v. Slak*, 36 Wn. App. 849, 853, 679 P.2d 936 (1984). The Washington Supreme Court's holding in *Munden v. Hazelrigg*, adopted an adjunct to that general rule prohibiting claims unrelated to the issue of possession in unlawful detainer proceedings. 105 Wn.2d at 47.

There are two cases specifically addressing the limits of a permissible defense or counterclaim. In *Josephinium*, the court held that failure to grant a reasonable accommodation that, if granted, would have allowed the defendant to cure the breach was a permissible defense. *Josephinium*, 111 Wn. App. at 626. In *Foisy*, the court determined that the landlord's breach of the implied warranty of habitability would excuse a breach for non-payment of rent if and only if the tenant tendered rent for at least the value of the space after determining the diminished rental value. 83 Wn.2d 22, 34, 515 P.2d 160 (1973).

Under the *Josephinium* standard, the court asks if the landlord's violation had not occurred, whether the tenant's violation have been prevented. Here, the counterclaim does not excuse the tenants' breach of

failing to pay rent. *See Munden*, 105 Wn.2d 29. The violation of failing to pay rent would not have been cured by landlord's payment of relocation assistance. Even if the landlord paid relocation assistance after the City of Seattle issued the Notice of Violation on or about May 17, 2013, the tenants still would not have tendered rent by May 1, 2013. The tenants' claim for relocation assistance is a counterclaim for more and different relief than sought by Plaintiff and is more appropriately reserved for separate adjudication.

Under the *Foisy* standard, the Court looks to the diminution in rental value, if any, due to habitability issues. However, the *Foisy* standard does not extend to permit a claim for relocation assistance and other damages under 59.18.085. It is limited to the diminution in rental value. As a remedy afforded under the RLTA, a "tenant shall be current in the payment of rent including all utilities which the tenant has agreed in the rental agreement to pay before exercising any of the remedies accorded him or her" in the RLTA. RCW 59.18.080. Having failed to follow these requirements, the tenants cannot avail themselves of any remedy under the RLTA, including one for relocation assistance.

The trial court allowed tenants' counterclaim for relocation assistance. CP 84. The trial court fails to explain how relocation assistance relates to possession of the property. The tenants failed to

provide notice of intent to vacate or relocate. Rather, they remained in possession of the premises without paying rent and were subsequently served with a statutory three-day notice to pay rent or vacate. VRP 39-40; Exhibits 3-4. Even if tenants establish claim for relocation assistance under RCW 59.18.085, there is no basis in law justifying an award for relocation assistance in an unlawful detainer action.

This is especially true where the tenants were not current in payment of rent, a prerequisite for exercising their statutory remedies under the RLTA. Rent was late in May 2013. The City provided a compliance deadline in its Notice of Violation of June 30, 2013. Exhibit 17. This does not excuse the tenant from paying rent for two months. There is no causal connection between the tenant's decision to relocate and their decision to withhold rent. The court's conclusion of law permitting a counterclaim for relocation assistance is not supported by the substantial evidence.

7. The trial court erred in considering what a reasonable landlord would know when no testimony was offered to support this conclusion.

The trial court erred in finding a landlord should have known that the unit subject to dispute was not properly permitted for five units as a basis for awarding relocation assistance. CP 87. The trial court stated that the structural issues would have been readily apparent to an experienced

landlord. *Id.* The trial court found that landlord knew or should have known that the property was not permitted for 5 units as the property's permitted use is readily accessible through the county assessor. *Id.*

There was no testimony presented at trial or finding of fact in the trial court's order establishing what a reasonable or experienced landlord should have known. Moreover, even if the landlord should have known that the unit was not properly permitted, the court does not explain why this automatically triggers the protections of RCW 59.18.085. The City notified the landlord of a problem by issuing the Notice of Violation, and provided an opportunity to cure the defect. Exhibit 17. The landlord hired an architect and actively took steps to come into compliance with the City's requirements. VRP 123. No relocation assistance is required under RCW 59.18.085 when the landlord has an opportunity to cure the defect and the premises has not been condemned or deemed unlawful to occupy.

8. The trial court erred in calculating damages, awarding attorney's fees and granting judgment against the landlord based upon a breach of the implied warranty of habitability.

Even if the tenants proved a partial diminution in value for alleged defects to the premises, they are required to tender the diminished value within the time period for compliance with the three-day notice to pay rent or vacate. *Foisy*, 83 Wn. 2d at 23. Defendants failed to tender any amount. VRP 42. During oral argument counsel for

the tenants argued that the premises were 25 percent uninhabitable. VRP 217. The court agreed with this assessment in its findings. CP 88. This calculation was not supported by the evidence.

There is no evidence to show where this percentage came from or that it is a reasonable approximation of the diminution in rental value. Even if the property was 25 percent uninhabitable, nowhere in the law is a tenant allowed to sit silently for months on end and suddenly withhold rent for an entire month. If the remaining 75 percent of the property was habitable, the tenants should have tendered rent for that portion of the property that was habitable. *See Foisy*, 83 Wn.2d 22. Instead, the tenants paid nothing.

The implied warranty of habitability does not alleviate the need to provide written notice to a landlord regarding defects in the property. If a tenant properly notifies a landlord of defects in the premises, and remains current in payment of rent, he may avail himself of more remedies set forth in the RLTA. *See* 59.18.080-.090. The trial court's ruling is tantamount to allowing a tenant to live at the rented premises for a year without saying anything about habitability and then withhold rent claiming diminution in value and uninhabitability dating back to the beginning of the tenancy. This is not consistent with common law and RCW 59.18.070 requiring notice and an opportunity to cure, or RCW 59.18.080 requiring tenants to remain current with rent. The trial erred

by entering conclusions of law that are not supported by evidence or the law itself.

9. Pham is entitled to attorney's fees on appeal.

Pham requests an award of his attorney's fees and costs on appeal. RAP 18.1. The court may award attorney's fees to the prevailing party in a residential unlawful detainer. RCW 59.18.410. The lease agreement also provided for an award of attorney's fees to Pham in the event of litigation. Exhibit 1. This court should award fees on appeal.

D. CONCLUSION

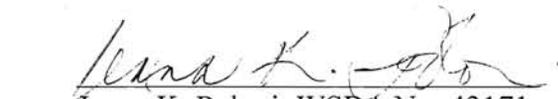
For the foregoing reasons, Appellant respectfully requests the Court find the trial court erred in entering findings of fact 2.3.4 and 2.3.5, and conclusions of law 3.4.1 through 3.4.4 finding a breach of the implied warranty of habitability. Appellant requests the Court find it was an error of law to elevate the standard of habitability based upon the identity of the occupant. Appellant further requests the Court find error based upon the trial court's findings that a tenant who fails to pay rent may credit his last month's rent deposit to the month he is served a three day notice to pay rent or vacate, and that the terms of the rental agreement do not continue after the expiration of the initial lease. The Court should find that the trial court erred in permitting a counterclaim for relocation assistance in an unlawful detainer and finding that said relocation assistance was due at the

time of trial. The trial court erred in calculating damages and awarding attorney fees. This Court should therefore, reverse the trial court, award attorney's fees to landlord on appeal, and remand for entry of findings of fact and conclusions of law consistent with this Court's ruling.

March 24, 2014

Respectfully submitted,

LAW OFFICE OF EVAN L. LOEFFLER PLLC



Jeana K. Poloni, WSBA No. 43171
Evan L. Loeffler, WSBA No. 24105
Attorneys for Appellant