

No. 40868-6-II

WASHINGTON STATE COURT OF APPEALS,  
DIVISION II

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ANGELO PROPERTY CO.,

*Plaintiff-Respondent,*

vs.

ABDUL HAFIZ ABDULMAGED, d/b/a "THE NILE,"

*Defendant-Appellant,*

11 APR 25 AM 11:01  
COURT OF APPEALS  
DIVISION II  
BY STATE OF WASHINGTON  
DEPUTY

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**ON APPEAL FROM CLARK COUNTY SUPERIOR COURT  
(Hon. John F. Nichols)**

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**APPELLANT'S REPLY BRIEF**

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Michael B. King, WSBA No. 14405  
Justin P. Wade, WSBA No. 41168  
CARNEY BADLEY SPELLMAN, P.S..  
Counsel for Appellant Abdul Hafiz  
Abdulmaged

Carney Badley Spellman, P.S.  
701 Fifth Avenue, Suite 3600  
Seattle, Washington 98104-7010  
(206) 622-8020 (tel.)  
(206) 467-8215 (fax)

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## I. SUMMARY OF REPLY

Review of Angelo Property's brief makes it quite clear that Angelo Property really would prefer not to address the issue of jurisdiction *at all*. Thus, when Angelo Property purports to recite the trial court's rulings in "chronological order" (Brief of Respondent -- "BR" -- at 2), it skips over the trial court's August 2008 decision to continue to exercise its unlawful detainer jurisdiction -- even though possession had ceased to be at issue by then, and a dispute over possession is a precondition to the continuing exercise of jurisdiction under the unlawful detainer statute. Similarly, although Angelo Property takes three pages of its brief to address the standard of review, Angelo Property fails to address the standard for determining whether the trial court erred in continuing to exercise its unlawful detainer jurisdiction -- even though that issue is at the heart of this appeal. And when Angelo Property purports to restate the issues raised in Maged's opening brief, Angelo Property leaves out jurisdiction altogether, as if Maged had not raised the issue!

When Angelo Property finally gets around to acknowledging the jurisdictional issue, Angelo Property accuses Maged of inviting the trial court to continue to exercise unlawful detainer jurisdiction. Angelo Property ignores that Maged sought in August 2008 to have the action converted to the trial court's ordinary civil jurisdiction. In reality, *Angelo Property* was the party that led the trial court down the path of error on this crucial point, by arguing the trial court should continue to hear this matter under its unlawful detainer jurisdiction, instead of -- as Maged

urged -- converting the case to one subject to the court's ordinary civil jurisdiction.

To be sure, Angelo Property does assert that the right to possession remained a live issue until the trial court's summary judgment ruling in May 2009. But Angelo Property never explains how this could be so, given that on August 15, 2008, Maged had surrendered possession and waived any claim to ongoing possessory rights, and Angelo Property had regained possession with the court-ordered authority to re-let the premises. Moreover, Angelo Property ignores the case law on the legal effect of Maged's decision to elect the remedy of damages, instead of trying to hang on to Suite 50. That case law establishes that, as a matter of law, possession ceased to be an issue as of August 15, 2008 -- *nine months* before the trial court presumed to grant Angelo Property's motion for a summary judgment in unlawful detainer dismissing Maged's constructive eviction claim with prejudice.

Angelo Property also asserts that whether the trial court had continuing authority to act in unlawful detainer does not matter because the trial court supposedly had general as well as unlawful detainer jurisdiction. This remarkably blasé attitude towards the question of jurisdiction has no support in the case law, which makes clear that, upon resolution of the issue of possession, a trial court in an unlawful detainer action loses the authority to do anything other than either (1) dismiss the case or (2) convert it to an ordinary civil action. The trial court here did neither, instead presuming to proceed under a "hybridized" unlawful

detainer action for which it had no authority, and this lack of authority rendered invalid all decisions subsequently taken pursuant to that supposed authority.

Maged was prejudiced by the trial court's decision to proceed under a jurisdictional basis for which it had no authority. The case law cited in Maged's opening brief demonstrates that he had a potentially meritorious constructive eviction counterclaim. Refusing to convert the action to an ordinary civil suit for damages prevented Maged from fully prosecuting that counterclaim and limited his ability to conduct discovery related to that counterclaim. And even as Maged's ability to pursue his counterclaim was limited by the trial court's failure to convert the matter to an ordinary civil action, Angelo Property was allowed to continue to run the damages meter long after its damages should have been fixed and limited by the resolution of the issue of possession in August 2008.

The trial court's disregard of the well established limits on its unlawful detainer jurisdiction ultimately prevented Maged from pursuing relief in damages for Angelo Property's failure to fulfill its obligations as landlord to protect Maged's right of quiet enjoyment, and saddled him with a massive unlawful detainer damages judgment that Angelo Property should never have been awarded. This Court should rectify this manifest injustice by reversing the trial court's damages award to Angelo Property, reinstating Maged's counterclaim for constructive eviction, and remanding with directions that Maged may fully pursue that counterclaim under the trial court's general civil damages jurisdiction.

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## II. REPLY IN SUPPORT OF ASSIGNMENTS OF ERROR AND STATEMENT OF ISSUES

Angelo Property's re-casting of the issues Maged presents for review is remarkable for the issue it omits -- whether the trial court had the authority to continue acting in this case under its unlawful detainer jurisdiction once the right to possession ceased to be at issue. Angelo Property states that Maged presented four issues in its opening brief. *See* BR at 3. Maged expected that Angelo Property, like any respondent, would reframe the issues in a light most favorable to Angelo Property. Maged did not expect, however, that Angelo Property would *entirely omit* the jurisdictional issue at the center of this appeal from Angelo Property's list of the issues supposedly raised in the opening brief.

As much as Angelo Property would like to avoid discussing how the trial court lost jurisdiction and the resulting prejudice to Maged, it may not unilaterally remove that issue from the case by falsely representing that lack of jurisdiction was not among the issues presented to this Court. Maged presented a single issue statement pertaining to all assignments of error, and the "Limited Scope of A Trial Court's Jurisdiction" is the title of that issue statement. *See* Opening Brief ("OB") at 4. All four sub-issues relate to that issue and the prejudice caused by the trial court's failure to recognize that it had lost the jurisdictional basis for maintaining the action in unlawful detainer. *See id.* Those are the issues pertaining to the assignments of error, and they were argued throughout Maged's opening brief, as illustrated by the following statement found at page 43 of that brief:

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Because the trial court lost jurisdiction over the unlawful detainer proceedings no later than August 15, 2008, it was powerless to pass on the merits of the case after that point. Maged accordingly requests that this Court reverse *all* of the trial court's rulings after August 15, 2008, and remand these proceedings to the trial court to allow Maged to fully prosecute his claims under the trial court's ordinary civil jurisdiction.

Angelo Property's suggestion that Maged has waived his assignments of error by failing to argue them is patently meritless, and yet another manifestation of Angelo Property's attempt to recast this appeal and thereby avoid having to come to grips with the *real* issue: the trial court's lack of jurisdiction to proceed as it did after August 2008, which ended up depriving Maged of his day in court on his constructive eviction counterclaim.

### III. RESTATEMENT OF THE STANDARD OF REVIEW

Although Angelo Property provided a lengthy discussion of what it claims is a "relatively simple" standard of review, it entirely omitted discussing the standard by which to review the pivotal issue in this case. The standard of review for that issue *is* simple: Whether a trial court has subject matter jurisdiction presents a question of law reviewed *de novo* by this Court. *Young v. Clark*, 149 Wn.2d 130, 132, 65 P.3d 1192 (2003).

### IV. ARGUMENT IN REPLY

#### A. A Party Suing for Unlawful Detainer Invokes a Jurisdiction Limited to Summary Determination of the Right to Possession.

By suing under the unlawful detainer statute, Angelo Property invoked "a special, *limited* jurisdiction of the superior court." *See Spricin King Street Partners v. Sound Conditioning Club, Inc.*, 84 Wn. App. 56, 66, 925 P.2d 217 (1995) (emphasis added); RCW 59.12.050. A court

presiding over an unlawful detainer action does not sit as a court of general jurisdiction to decide issues unrelated to possession of the subject property. *Port of Longview v. Int'l Raw Materials, Ltd.*, 96 Wn. App. 431, 438, 979 P.2d 917 (1999). The scope of an unlawful detainer action is narrow, “limited to the question of possession and related issues.” *Munden v. Hazelrig*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985).

**B. The Trial Court Erred by Retaining Its Unlawful Detainer Jurisdiction After the Right to Possess Suite 50 Was Resolved in Favor of Angelo Property on August 15, 2008.**

**1. Maged Did Not Invite the Trial Court’s Jurisdictional Error -- *Angelo Property* Did.**

When Maged moved to amend his answer to add counterclaims, he set forth the basis for the trial court to convert the action into an ordinary civil suit for damages. He argued his counterclaims were permissible *because* the trial court was no longer entitled to continue hearing the suit under its unlawful detainer jurisdiction, since the right to possession was no longer at issue. CP 35-37. In doing so, Maged did not invite the trial court to “hybrid[ize]” its jurisdiction over unlawful detainer matters. *See* RP V (September 18, 2009) 29. Nor did Maged suggest that the trial court use the wrong test to determine what counterclaims would be allowed in an unlawful detainer action (*i.e.*, erroneously allowing counterclaims that referred to the lease itself instead of permitting only those counterclaims necessary to determine the right of possession). *See* CP 259. The record is crystal clear that Maged told the trial court that the issue of possession

had been resolved and that the time therefore had come to convert the case to an ordinary civil damages action.

It was *Angelo Property* who then led the trial court astray by arguing the court should maintain the action in unlawful detainer. *See* CP 53-59. Angelo Property took that position because it did not want the trial court to grant Maged leave to assert his counterclaims, and therefore contended that Maged's counterclaims were *not* related to the right of possession and could not be added in an unlawful detainer action. CP 53-54, 57-58. Angelo Property argued that an unlawful detainer action remained proper even after Maged had relinquished possession because Maged was somehow presumptively suggesting that the right to possession remained at issue. CP 56. And although the trial court ultimately determined that Maged would be allowed to pursue a counterclaim for constructive eviction, the court left that counterclaim constrained by the court's -- erroneous -- assertion of its authority to continue to proceed under its unlawful detainer jurisdiction: a decision invited by *Angelo Property*, not Maged.

**2. Maged's Amended Answer and Counterclaim Could Not Possibly Have Kept the Right to Possession at Issue, Because All Maged Did By That Amended Answer and Counterclaim was Confirm His Election to Pursue His Remedy in Damages.**

As "proof" that Maged had merely abandoned physical possession while still claiming the legal right to possess, Angelo Property now relies

on Maged's amended answer and counterclaim.<sup>1</sup> But that pleading only provides further support for Maged's theory of the case: (1) he *had* enjoyed the right to possess Suite 50 at one point; (2) that right was wrongfully taken from him; and (3) he did not want Suite 50 back; but he was entitled to damages to compensate for the wrongful loss of that right. As Maged established in his opening brief, he unequivocally disclaimed any ongoing right to possess the premises. OB at 33-35.

Maged's motion to file an amended answer and add counterclaims shows that Maged was treating Angelo Property's actions as having terminated the lease, and that he was pursuing counterclaims for damages resulting from the loss of his former right to possess the premises. *See* CP 35 ("Defendant [Maged] wishes to add multiple causes of action based on the termination of this lease...") Maged's amended answer and counterclaim alleges that the lease had conferred upon him the right to possess Suite 50. CP 366-67. That is the right he claimed was wrongfully taken from him when Angelo Property constructively evicted him by interfering with his quiet enjoyment of that right. CP 366-67.<sup>2</sup> The

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<sup>1</sup> Without citing to the record, Angelo Property claims that "Maged was still asserting he had a property interest in the premises." BR at 20. Maged made no such claim (he was asserting that he suffered damages from having *lost* his property interest in the premises). Angelo Property's "factual statement," however, is impossible to specifically reply to because Angelo Property fails to cite where it supposedly came from in the record. This statement should be disregarded. *See* RAP 10.3(a)(5). To the extent Angelo Property's unsupported statement is meant to refer to Maged's amended answer, that argument is addressed in the main text accompanying this footnote.

<sup>2</sup> Angelo Property misapprehends the legal significance of its act of terminating the lease. As Maged explained in his opening brief, the source of his damages was Angelo Property's failure to fulfill its obligation as landlord to curb the wrongful activities of its tenant, "After Dark," which was encouraging its customers to prevent Maged from being able to operate  
(Footnote continues on next page.)

allegation in his amended answer that he once had a property right in the premises did not show that the right to possession was disputed -- Maged was not seeking to regain his right of possession. CP 367. Suing for damages flowing from the wrongful loss of a right is not the same as asserting an ongoing right of possession and asking for the remedy of reinstatement.

Maged's election to pursue a claim for damages, rather than contest Angelo Property's ongoing right to possess the premises, is expressly allowed by decisions such as *Craft v. Pitts*, 161 Wn.2d 16, 24, 27, 162 P.2d 382 (2007), and *Aldrich v. Olson*, 12 Wn. App. 665, 672, 531 P.2d 825 (1975). Yet even though those cases provide the controlling authority on this point, Angelo Property treats them as if they did not exist and provides no authority for its claim that an election of remedies is irrelevant. *Craft* holds that an injured party in Maged's position "always has a choice between specific performance and money damages." 161 Wn.2d at 24, 27. And under *Aldrich*, a party may pursue a claim for damages resulting from having lost the right to possession without resorting to an action to recover possession. 12 Wn. App. at 672. That is

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his business by racist harassment of Maged's customers. Confronted with his demand that it fulfill its obligations as landlord, Angelo Property instead evicted *both* Maged and "After Dark." While Maged does contend that this eviction was wrongful, because it was done in bad faith and in an effort to avoid having to answer in damages for the failure to stop "After Dark's" harassment of Maged's business, it is that failure that is the legal cornerstone of Maged's constructive eviction claim, not the act of eviction pursuant to the unlawful detainer statute.

precisely what Maged did here, and nothing in his Amended Answer and Counterclaim suggests otherwise.

**3. Angelo Property Fails to Explain the Basis for Maintaining an Unlawful Detainer Action -- “Hybrid” or Otherwise -- Once Angelo Property Had Regained the Right to Possess Suite 50 on August 15, 2008.**

The legal right to possess Suite 50 was definitively resolved in favor of Angelo Property by August 15, 2008. *See* OB at 33-40. By then, Maged had surrendered possession of the property and made a binding election of remedies. The trial court enforced that election in its August 15, 2008 order: “Defendant does not wish to re-take possession of the premises, even if successful in defending this lawsuit.” CP 101. Moreover, through that same order, the trial court restored to Angelo Property the legal right to possess the premises by authorizing its re-letting of those premises. CP 102. Angelo Property does not rebut the legal effect of these facts, which conclusively establish that Angelo Property enjoyed the undisputed right to possess Suite 50 of the Cascade Village Shopping Center no later than August 15, 2008. After that date, there was nothing left for Angelo Property to accomplish under the trial court’s unlawful detainer jurisdiction.

The purpose of the unlawful detainer thus was fulfilled: there was a summary proceeding to determine the right of possession between a landlord and a tenant. *Munden*, 105 Wn.2d at 45-46. Once the right to possess and re-let Suite 50 was restored to Angelo Property by August 15, 2008, the trial court was divested of unlawful detainer jurisdiction.

*Kessler v. Nielson*, 3 Wn. App. 120, 126-27, 472 P.2d 616 (1970). Having lost jurisdiction, the trial court had just two options: dismiss the action without prejudice, *see Housing Auth. v. Kirby*, 154 Wn. App. 842, 850, 226 P.3d 222 (2010), *rev. denied*, 169 Wn.2d 1022 (2010), or convert the action into an ordinary civil suit for damages such that Maged could freely conduct discovery in support of that counterclaim. *See Munden*, 105 Wn.2d at 45-46. Remarkably, beyond simply asserting that possession was still an issue needing to be addressed in May 2009 -- when it quite clearly was not because, as shown, it had been conclusively resolved as of August 15, 2008 -- Angelo Property has no response to these well-established principles of Washington unlawful detainer law. Yet these principles mean that the trial court had no authority to do what it did here: rather than dismissing the action or converting it to an ordinary civil action, instead presuming to continue the case as an unlawful detainer action.

**C. Where the Trial Court Continued to Rule in this Action Under Its Unlawful Detainer Jurisdiction After Having Lost the Basis for Exercising Any Authority Over that Subject Matter, None of the Trial Court's Subsequent Orders Could Have Any Effect Because of that Loss of Jurisdiction.**

Because the trial court lost jurisdiction over the unlawful detainer proceedings by August 15, 2008, none of its orders after that date have any effect. *See Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998) ("Lack of jurisdiction over the subject matter renders the superior court powerless to pass on the merits of the controversy brought before it"). Maged made precisely this

argument in his opening brief. *See* OB at 40-41. Individualized discussion of the orders in question was not necessary, because they were all flawed in the same way. What matters is that the trial court was powerless to issue any of the following orders (including any findings of fact contained in those orders):

- The June 4, 2009 Order Granting Plaintiff's Motion to Strike. CP 185-86.
- The June 4, 2009 Order Regarding Plaintiff's Motion for Summary Judgment. CP 187-90.
- The October 16, 2009 Order Striking the Post-Hearing Declaration of Benjamin L. Wolff on an Issue of Fact Raised by Plaintiff. RP VI (October 16, 2009) at 2.
- The January 8, 2010 Order Denying Defendant's Motion for Judgment of Unlawful Detainer Pursuant to CR 54(b). CP 283-84.
- The January 8, 2010 Order Denying Defendant's Motion for Revision Per CR 54(b) and Scheduling Order. CP 285-86.
- The May 14, 2010 Final Order and Judgment. CP 350-52.

*None* of these orders should ever have been issued, because the trial court had lost the authority to issue them in unlawful detainer upon the resolution of the issue of possession on August 15, 2008.<sup>3</sup> Nor is this a

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<sup>3</sup> The trial court's decision to grant Angelo Property's motion to strike the declaration of Ben Wolff (CP 243-246) warrants special mention as an example of Angelo Property's ability to lead the trial court astray, because the circumstances giving rise to the ruling were especially egregious. In open court, Angelo Property asserted that the parties had a full opportunity to conduct discovery on Maged's counterclaim before Angelo Property had moved for a summary judgment dismissal of that counterclaim. RP V (September 18, 2009) 29. But  
(Footnote continues on next page.)

mere technicality. While Maged was being kept in jurisdictional purgatory, Angelo Property was allowed to continue to rack up damages and ultimately received a massively inflated judgment for those damages.

**D. This Court Should Remand the Action to Allow Maged the Full and Fair Opportunity to Prove the Constructive Eviction Claim He Could Not Have Litigated Under the Trial Court's Unlawful Detainer Jurisdiction.**

Maged requests that this Court remand the action back to the trial court for further proceedings under its ordinary civil jurisdiction, which will allow Maged to develop the basis for his claim for damages and prevent Angelo Property from continuing to obstruct discovery on the ground that this is an unlawful detainer action. *See* CP 246. Angelo Property admits that a constructive eviction, to be actionable, can be accomplished either by the landlord *or one under the landlord's control*. BR at 29. And that is exactly what Maged contends happened here: another tenant over whom the landlord had the right to exercise control was allowed to harass Maged's customers to the point of rendering Maged unable to continue to operate his business. Moreover, in his opening brief Maged cited cases where courts have held that the actions of a neighboring tenant of the same landlord will support a constructive eviction claim. *See* OB at 42-43 (citing cases).

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that was not true -- Angelo Property had *resisted* discovery on the counterclaim, and on the basis that the action was an unlawful detainer action. *See* CP 246 (Angelo Property's response to discovery requests). When Maged tried to correct Angelo Property's misstatement, Angelo Property moved to strike instead of arguing for the accuracy of what it told the court. There was no literally no reasonable basis for striking that declaration, which should have been admitted as a matter of course.

Maged is not claiming he should have prevailed on this claim in the appealed proceedings that occurred under the trial court's unlawful detainer jurisdiction -- he could not have litigated that claim there, because the claim lacked the requisite nexus to the issue of possession. Maged is only asking for the opportunity to prove that Angelo Property destroyed his business by failing to control the outrageous conduct of another of its tenants. Angelo Property has managed to avoid answering for that wrongdoing by a manipulation of our state's unlawful detainer statute, ultimately resulting in Angelo Property receiving a judgment for damages and attorney's fees totaling well over \$100,000. Fortunately, this Court has the ability to undo this manifest injustice, by vacating that judgment, reinstating Maged's counterclaim, and remanding for further proceedings in an ordinary civil damages action.

#### V. CONCLUSION

This Court should vacate the judgment in favor of Angelo Property, reverse the dismissal with prejudice of Maged's counterclaim for constructive eviction, and remand for further proceedings under the trial court's ordinary civil jurisdiction. This Court should also award Maged prevailing party attorney fees and costs for this appeal.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of April, 2011.

CARNEY BADLEY SPELLMAN, P.S.

By: Michael B. King  
Michael B. King, WSBA No. 14405  
Justin P. Wade, WSBA No. 41168  
Counsel for Appellant Abdul Hafiz Abdulmaged

NO. 40868-6-II

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

ANGELO PROPERTY  
COMPANY, a Washington  
Limited Partnership,

Respondent,

vs.

MAGED HAFIZ, an individual  
d/b/a THE NILE,,

Appellant.

CERTIFICATE OF SERVICE

11 APR 25 AM 11:01  
STATE OF WASHINGTON  
DIVISION II  
DEPUTY  
Court of Appeals  
Division II

The undersigned, under penalty of perjury, hereby declares as follows:

1. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.

2. On April 25, 2011, I served by US Mail, one copy of the following document:

*Appellant's Reply Brief*

On:

William A. Davis  
Davis Rothwell Earle Xochihua  
111 SW Fifth Avenue, Suite 2700  
Portland, OR 97204-3650

Benjamin L. Wolff  
315 West Mill Plain Blvd., Suite 212  
Vancouver, WA 98660-3999

DATED this 25<sup>th</sup> day of April, 2011.

CARNEY BADLEY SPELLMAN, P.S.

By   
PATTI SAIDEN