



**TABLE OF CONTENTS**

Table of Authorities ..... 1

Introduction ..... 2

Reply to Respondent’s Statement of the Case ..... 4

Argument:

- 1. Reply to Respondents:  
The trial court did not make an order of default: It granted  
an order directing entry of a writ of restitution ..... 8
- 2. Reply to Respondents:  
Appellant cannot prove a ‘constructive lease’ that would  
prevent a respondents from evicting him by termination  
of tenancy ..... 11
- 3. Reply to Respondents:  
The trial court did not err by refusing to consider  
appellant’s counterclaims ..... 14
- 4. Reply to Respondents:  
The trial court did not err by refusing to order a hearing  
before ordering the entry of a writ of restitution ..... 16
- 5. Reply to Respondents:  
The action is an unlawful detainer and is not subject to  
the general jurisdiction of the court ..... 19
- 6. Reply to Respondents:  
Respondents are entitled to their costs and reasonable  
attorney fees incurred on appeal ..... 20

Reply to Respondents: Conclusion ..... 23

**TABLE OF AUTHORITIES**

**Case Law**

Fuller Market v. Gillingham & Jones, 14 Wn. App. 128, 539 P.2d 868 .... 13

First Union Management, Inc. v. Stack, 36 Wn. App. 849. 679 P.2d 936 .. 15

Foisy v. Wyman, 83 Wn.2d 22, 515 P.2d 160 .....	15
Income Properties Inv. Corp v. Trefethen, 155 Wash. 493, 506 P. 782 ...	15
Leda v. Whisnand, 150 Wn. App. 69 (2009) .....	18, 19
Honan v. Ristorante Italia, 66 Wn. App. 262, 832 P.2d 89 .... 22 .....	19
Leingang v. Pierce County Med. 131 Wn.2d 133, 143, 930 P.2d 288 .....	20, 21
Boeing Co. v. Sierracin Corp. 108 Wn.2d 38, 66, 738 P.2d 665 .....	23
Nordstrom Inc. v. Tampourlos, 107 Wn.2d 735, 743, 733 P.2d 208 .....	23
<b>Statutes</b>	
RCW 59.18.290(2) .....	22

## INTRODUCTION

The argument portion of this brief will reply to Respondent Doyle’s brief in the same order, section by section, as Respondent’s Brief.

### WHAT THIS REPLY IS FUNDEMENTALLY ABOUT:

This reply is about Respondent Doyle’s unfortunate propensity to redefine Appellant Goughnour’s assertions into something else which he can then argue against. In this the primary redefining subjects by Respondent Doyle are:

- That the trial court did not enter a default order;
 

There is nothing more clear than that the trial court’s order finds that Appellant Goughnour has not appeared and is therefore in default (CR 93-94). It is shown in the Opening Brief and in this Reply Brief that he appeared in a very substantial manner in writing and in person.
- That counterclaims are not a defense in an unlawful detainer;
 

Appellant Goughnour has not offered counterclaims as a defense. He also filed a stand-alone answer (CP 57-92).
- That Appellant Goughnour represented to the trial court that his answer to Respondent Doyle’s verbal opening argument was confined to his written answer;
 

This is a misrepresentation of the record of proceedings by redefining context and subject matter (RP 2-5).

- That Appellant Goughnour was heard at the show cause hearing;  
The record of proceedings demonstrates that the trial court immediately cut him off when he tried to speak regarding his answer, and was given no further opportunity to be heard (RP 2, Lines 11-14).
- That Appellant Goughnour had no right to a hearing since he had no defense to the show cause order, indicating that:
  - The parties second agreement provided for termination by either party;  
The second agreement in fact prohibits unilateral termination. A modification was penciled in at signing that requires collective termination only (CP 4, Paragraph 4). This was the parties intent as there were special circumstances regarding the overpaid rent balance in effect at that time (CP 68, Paragraphs 3-5).
- Respondent Doyle's obligation regarding a substantial overpayment balance of approximately \$6,290 (CP 85, Exhibit N) cannot be supported by "implied covenant;"  
Respondent Doyle used quotes to imply that Appellant Goughnour asserted "implied covenant." He did not. The overpaid rent balance is entirely objective, explicit, and was acknowledged by Respondent Doyle (CP 68, Paragraphs 3- 5).
- Respondent Doyle's obligation regarding a substantial overpayment balance was released by the parties second agreement;  
The second agreement contains a release provision that applies only to utility expenses previously incurred. It that does not include the overpaid rent balance (CP 4, Paragraph 3).

These misrepresentations are discussed in detail in their respective sections of this reply brief.

**FUNDAMENTALS OF THE HEARING ITSELF:**

This appeal is fundamentally about a show cause hearing in which the tenant (Appellant Goughnour) appeared in writing and in person while:

1. prepared with substantial argument backed by documentation in opposition to Respondent Doyle's motion to show cause,
2. not being allowed to be heard,
3. being defaulted,
  - a. without prior presentation of the order,
  - b. with signature of the court after he departed at the hearing's conclusion.

**THE PRACTICAL MATTER:**

The tenant (Appellant Goughnour) immediately complied with the trial court's Writ of Restitution, established himself in other premises, and the subject premises are now occupied by a third party. Appellant Goughnour has not asked for restoration of possession of the premises. In that respect this matter is history which cannot be reasonably undone. The landlord (Respondent Doyle) therefore has no practical reason to expend resources opposing this appeal other than to subsequently hold that counterclaims by the tenant (Appellant Goughnour) which were made separately from his answer to the show cause motion are mandatory and barred by default. Respondent Doyle can be expected to argue at that time that the trial court's order is a default order as it so plainly states.

**REPLY TO RESPONDENT'S: STATEMENT OF THE CASE**

**RENT OVERPAYMENT BALANCE:**

There was no dispute about the fact that rent was substantially overpaid and Respondent Doyle in fact admitted this fact and subsequently accepted rent

remittance via debit to that overpayment balance (CP 63, Paragraphs 4-5; CP 68, Paragraphs 3-4). Respondent Doyle's Brief is the first occasion asserting a dispute of the rent overpayment balance.

The agreement of April 15, 2010 referenced by Respondent Doyle's brief as "CP 4, Exhibit A" does supersede the terms from that time forward, but only the terms. It does not release Mr. Doyle from the rent overpayment balance which was without dispute at that time (CP 68-69, Affidavit, Paragraphs 4-5). The agreement's releases are specified in Paragraph 4. The rent overpayment balance is not released (CP 4, Ex. A).

TERMINATION CLAUSE:

Respondent Doyle states as though it were a fact that the agreement provides termination by either party with 30 days notice, although this time he did not quote the provision he asserts. Respondent Doyle's first occasion of making this assertion was his oral argument at the show cause hearing (RP 2, Lines 16-17). The agreement was originally drafted to give the tenant (Appellant Goughnour) the exclusive termination right as there was a substantial rent balance in his favor. At signing it was penciled in to give tenant and landlord a collective right to terminate. The penciled in portion reads "and landlord," not "or landlord" (CP 4, Exhibit A, Paragraph 4). This is a substantive distinction and was so intended which Appellant Goughnour could have pointed out to the trial court had he been allowed to speak in reply to Respondent Doyle's opening verbal argument to the contrary. Appellant Goughnour did point out this distinction to the court in his Request to Reconsider (CP 98, Lines 14-22). That Appellant Goughnour was not allowed to speak in any substantive manner was brought to the trial court's attention in his Request to Reconsider (CP 98, Lines 5-8). The trial court ruled in

his answer to Appellant Goughnour's Request to Reconsider that, "Thus I ruled on that which had been submitted to the court at that time." (CP 102)

NO MODIFICATION OF AGREEMENT:

In the August 12, 2010 letter, Appellant Goughnour notified Respondent Doyle of the remittance date as a courtesy (CP 83). There is no due date in the agreement (CP 4, Exhibit A). This was not a modification. In fact it was Appellant Goughnour's option each month to remit via debit of the overpaid rent balance. Paying with new funds was temporary and intended to assist Respondent Doyle in restoring his financial footing (CP 68, Paragraphs 3-5).

NOTICE OF TERMINATION:

Respondent Doyle omits that subsequent to Mr. Doyle's Notice of Termination of Tenancy of Sept. 15, 2010, Appellant Goughnour asserted to Respondent Doyle that such termination was prohibited (CP 70, Paragraph 14; CP 88-89, Exhibit P). This assertion related to both the substance regarding the rent overpayment balance (aka positive rent balance) as well as procedural flaws.

TRIAL COURT'S DISPLEASURE BASED UPON MISTAKEN BELIEF:

The trial court did express dissatisfaction in the mistaken belief that Appellant Goughnour's paperwork had not been filed until 4:59PM on the Friday before; Oct. 29, 2010 (RP 4, Lines 12-19). The deadline as specified by Respondent Doyle himself was 5:00 p.m. on October 29, 2010 (CP 7). As can be seen by the Clerk's stamps, on that Friday, Oct. 29, 2010; Mr. Goughnour filed his answer and counterclaims to the complaint at 3:37 PM (CP 20) and his answer to the show cause at 3:38 PM (CP 57). Mr. Goughnour than immediately went up to the Court Administrator's office and delivered courtesy bench copies which she in turn delivered to the trial judge's office after a brief conversation with Mr. Goughnour. (CP 98, Line 24 – CP 99, Line 12)

APPELLANT GOUGHNOUR LACKED OPPORTUNITY TO BE HEARD:

Respondent Doyle materially edits and misinterprets the statements of Appellant Goughnour and the trial court itself when he states:

“Following remarks from Respondent’s counsel to the effect that Appellant had failed to state any defense to the eviction, the trial court asked whether Appellant had an answer to the allegations. Appellant stated to the trial court that his answer was contained in a sworn statement. RP, pg. 3.”

The trial court’s inquiry to Appellant Goughnour explicitly stated that the court was asking about “documents.” (RP Page 3, Lines 9-10) Although the transcript cannot indicate tone or volume; the record nonetheless demonstrates that Appellant Goughnour’s response was interrupted by the trial court before he was able to make any substantive remark in reply (RP Page 3, Lines 11-13). In its interruption of Appellant Goughnour, the trial court reiterates that the inquiry relates solely to “documents.” (RP Page 3, Lines 13-14). The trial court again confirms that he is inquiring only about “the document.” (RP Page 3, Lines 16-17)

The trial court’s inquiry appears clearly directed to the sworn statement requirement indicated in Respondent Doyle’s Payment or Sworn Statement Requirement. It reads, “File a sworn statement that you do not owe the rent claimed due.” (CP 10, Line 24) This was all in the context of Respondent Doyle’s opening verbal argument in which he made very derogatory remarks about Appellant Goughnour’s rent payment history in general with no substantiation of any kind (RP Page 2, Line 20 – Page 3, Line 6). It was in that context that Appellant Goughnour stated that the required sworn statement was provided (RP Page 3, Lines 23-24). Appellant Goughnour rightfully expected to be allowed to respond to Respondent Doyle’s opening verbal argument. But not just in defense of his inaccurately portrayed reputation. He expected to be allowed to reply to the substantive and material issue of the termination clause in the parties agreement

inaccurately represented by Respondent Doyle (RP Page 2, Lines 16-17).

Appellant Goughnour was not allowed either opportunity (RP Pages 3-4)

After returning from it's recess, the trial court expressed substantial displeasure with Appellant Goughnour in the mistaken belief that he had filed his "paperwork" shortly after 5:00PM the Friday before this hearing of Monday morning (RP Page 4, Lines 12-19). Appellant Goughnour was able to clarify only in his Request to Reconsider (CP, Page 98, Line 24 – Page 99, Line 12). The trial court's post-recess remarks continued the loud and angry tone. This caused Appellant Goughnour to become concerned that in the trial court's anger apparently from the mistaken acceptance of Respondent Doyle's derogatory characterization, the judge was about to rule while overlooking the fact that Appellant Goughnour had not had an opportunity to speak on the substance of the matter. Therefore Appellant Goughnour very discretely raised an index finger in such a way that only the judge could see in an effort to remind the trial court that he had not yet been allowed to speak. The trial court immediately responded with, "Don't interrupt me." (RP Page 5, Line 5) Although the transcript cannot convey tone and additional volume, Appellant Goughnour felt that the trial court's temperament at that time made it imprudent to make any further effort to be heard. The only opportunity Appellant Goughnour had to convey this was in his Request to Reconsider (CP 98, Lines 5-8 and 100, Lines 17-19).

**REPLY TO RESPONDENT'S:**

- 1. THE TRIAL COURT DID NOT MAKE AN ORDER OF DEFAULT; IT GRANTED AN ORDER DIRECTING ENTRY OF A WRIT OF RESTITUTION.**

**TRIAL COURT DID ENTER AN ORDER OF DEFAULT:**

The trial court's order states in it's recital, in pertinent part:

“Plaintiff’s are represented by Gregory B. Durr, their attorney. Defendant does not appear by adequate written response or in person.” (CP 93, Lines 17-18)

Although the appearance of Respondent Doyle’s attorney is noted, there is no reference to the appearance of Appellant Goughnour either as pro se or represented. Further it states as a fact that Defendant (Appellant Goughnour) does not appear by either:

a. “adequate written response.”

Appellant Goughnour’s written response is in meticulous detail and includes 15 relevant exhibits (CP 57 – 92).

b. “in person.”

The record is clear that Appellant Goughnour did appeared in person (RP 2-5).

The trial court’s order further states in it’s finding, in pertinent part:

“The Court, having examined the records and file herein and being fully informed, finds as follows:

1. Defendant failed to adequately appear and is in default.” (CP 93, Lines 18-21)

Nowhere in the order is there a reference “that Appellant had not presented a defense to the eviction action, and was thus in default” as asserted in Respondent Doyle’s brief. The word “defense” or any derivative of it does not appear in the order. The order clearly states that Appellant Goughnour has been defaulted for failure to appear which in turn, is clearly in error. Id.

#### THE NATURE OF SHOW CAUSE HEARINGS:

Appellant Goughnour does not misunderstand the nature of the case. Respectfully, Respondent Doyle appears to not understand the nature of the appeal. Appellant Goughnour clearly appeared at the show cause hearing to show cause why a writ of restitution should not be entered. If Respondent Doyle’s purpose is

to obfuscate the use of the word “default,” even his own Motion/Affidavit for Order to Show Cause uses the word only with respect to, “why a default judgment for damages, attorney fees and costs should not be entered” (CP 13, Lines 18-20). The word “default” is not used in a preceding line with respect to, “why a Writ of Restitution should not be issued” (CP 13, Line 17). The trial court declined to order a judgment for damages, attorney fees, costs, rent, or any other type of monetary judgment (CR 93-94).

INHERENT RULING:

Respondent Doyle asserts that, “Inherent in the trial court’s ruling and order is the recognition that Appellant had not presented a defense to the eviction.” The trial court’s ruling was that Appellant Goughnour had not even appeared in adequate writing or in person (CP 93, Lines 17-21), even though Appellant Goughnour appeared in meticulous writing (CP 57-92) and in person (RP, Pages 2-5). Clearly a party who in fact failed to appear would have inherently also failed to present a defense. However Respondent Doyle’s extrapolation of that logic to assert that an order stating in error that Appellant Goughnour failed to appear is an inherent order that he only failed to present a defense, is fallacious on the face of it.

DEFENSE TO THE EVICTION:

Appellant Goughnour’s defense to the eviction is a separate issue from the issue of whether the trial court’s order was a default order. However Respondent Doyle attempts to tie the defense to eviction with the assertion that the trial court’s order is not a default order, but an order that Appellant Goughnour had not presented a defense. It appears that Respondent Doyle rather than argue that what is clearly a default order is not in error, chooses to argue that it is something else. Appellant Goughnour’s assertions that the parties agreement explicitly prohibits unilateral termination and that the parties had a constructive lease via eight (8)

months worth of advance paid rent balance is argued in the appropriate sections of this brief and does not need to be redundantly stated here.

**REPLY TO RESPONDENT'S:**

**2. APPELLANT CANNOT PROVE A "CONSTRUCTIVE LEASE" THAT WOULD PREVENT RESPONDENTS FROM EVICTING HIM BY TERMINATION OF TENANCY.**

OBLIGATIONS OF RECONDENTS:

That Respondent Doyle is responsible for the paid rent balance was firmly established between the parties (CP 68, Paragraph 3 – CP 69, end of Paragraph 5). Appellant Goughnour had paid rent by means of debit to the paid rent balance as early as April 2010 with nary a word of dispute from Respondent Doyle. This was six (6) months prior to commencement of Respondent Doyle's efforts to terminate tenancy (CP 68, Paragraph 4 and CP 81, Exhibit I). In addition to the merits on their own, Respondent Doyle should be estopped from reversal of acceptance of the paid rent balance and remittance by debit from that balance.

THE PARTIES SECOND AGREEMENT:

Respondent Doyle argues:

“First, if there were obligations that were known at the time of the parties' second rental agreement, they could have no effect on the parties subsequent relationship. As noted above, the second rental agreement ‘supersedes all previous agreements, written or oral, including the agreement of May 12, 2009’ (the source of the rent dispute). CP 4”

The agreement's provision of “supersedes all previous agreements ...” clearly relates strictly to the terms of the new agreement. That to supersede the terms of a prior agreement releases a party from obligations not stated is without merit and asserted by Respondent Doyle without reference to legal authority.

Respondent Doyle argues:

“Second, the second rental agreement clearly states that Appellant is obligated to actually pay rent during the life of the agreement. Had the

parties desired to allow Appellant to off-set prior obligations, that could have easily been included in the agreement.”

The second rental agreement’s reference to rent changes the amount from the previous \$1,000 per month to \$800 per month (CP 4, Paragraph 1). Respondent Doyle’s assertion of what could have been included is irrelevant. There is no provision prohibiting Appellant Goughnour from remitting rent via debit as had been established or with new funds at his option (CP 68, Paragraph 5). The intent of the parties was to give Respondent Doyle a “little breathing room” at the discretion of Appellant Goughnour upon his belief in Respondent Doyle’s remarks that he was functionally insolvent. *Id.* In fact Appellant Goughnour did remit rent via debit to the overpaid rent balance that very same month that the second agreement was executed. Respondent Doyle made no objection or assertion that such remittance was improper (CP 68, Paragraph 4).

Respondent Doyle argues:

“Finally, both parties had the right to terminate the agreement upon thirty days’ written notice. Had it been contemplated that the lease would continue until the off-sets were recouped, the termination provision would not have been included in the agreement. It would be directly contrary to the ‘constructive agreement.’ ”

Respondent Doyle is in factual error with that statement. The termination provision was originally drafted to give the tenant (Appellant Goughnour) the sole right to terminate (CP 4, Paragraph 4). The purpose was to protect Appellant Goughnour from the very course of action undertaken by Respondent Doyle six (6) months later, terminating tenancy while an overpaid rent balance remained. At signing the addition of “and landlord” was penciled in to make the termination a collective right. *Id.* That is why the penciled in provision is “and landlord” and not “or landlord.” This is why Appellant Goughnour agreed to the penciled in revision, it did not effect his protection from the landlord (Respondent Doyle) terminating

tenancy while an overpaid rent balance remained. Respondent Doyle did undertake action to terminate tenancy six (6) months later while an overpaid rent balance remained of approximately \$6,290 (CP 85, Exhibit N). Unfortunately the trial court accepted the representation made by Respondent Doyle's counsel in his opening verbal argument that the termination provision provided for unilateral action (RP 2, Lines 16-17). Had Appellant Goughnour been allowed to substantively speak, he would have pointed out to the trial court that the penciled in phrase is "and landlord" as intended to be collective and deliberately distinguished from "or landlord."

NOT AN IMPLIED COVENANT, BUT A SPECIFIC OBLIGATION:

Respondent Doyle asserts that that a "constructive lease" is not supported by implied covenant, citing Fuller Market v. Gillingham & Jones, 14 Wn. App. 128, 539 P.2d 868 (Div. II, 1975). Appellant Goughnour has asserted that an actual lease exists as a result of overpaid rent balance which was accepted by Respondent Doyle prior to his actions to terminate tenancy (CP 68, Paragraph 4). Further it constitutes a constructive lease as well, not by implied covenant but by an explicit and specific obligation just as that created by an inn keeper who retains advance funds paid.

Market v. Gillingham & Jones is completely distinguished from this case as it related to an assertion of an implied covenant resulting from a lessors' obligation to build and maintain a retail outlet. In this case, the overpaid rent balance results from an obligation and debt of the landlord (Respondent Doyle) in place prior to the second rental agreement and not released. There is nothing implied about that obligation and debt as it relates to the actual or constructive lease. It is quite explicit and germinates from the first rental agreement as intended by the parties should the landlord (Respondent Doyle) fail to use Appellant Goughnour's rental

payments for maintaining the mortgage payments. It was intended as a self-enforcing mechanism (CP 72, Paragraph 7). Respondent Doyle did fail to make any of the subject mortgage payments as he admitted only after a two (2) month long effort to conceal that fact and assert falsely that he had made the mortgage payments (CP 67, Paragraph 2 – CP 68, Paragraph 3).

**REPLY TO RESPONDENT'S:**

**3. THE TRIAL COURT DID NOT ERR BY REFUSING TO CONSIDER APPELLANT'S COUNTERCLAIMS**

Nowhere in his original pleadings or in this appeal has Appellant Goughnour asserted that counterclaims are his defense to the motion to show cause or that the trial court erred by not considering his counterclaims. Respondent Doyle's assertion to the contrary is a substantial misunderstanding on his part which was first demonstrated in his opening verbal argument (RP, Page 2, Lines 12-15). The trial court's error was in accepting that misrepresentation (RP 5, Lines 2-4) and not allowing Appellant Goughnour to substantively speak and refute Respondent Doyle's oral misrepresentations (RP, Pages 2-5).

Appellant Goughnour's answer and counterclaims to the complaint (CP 20-56) were in addition to his stand-alone answer to the motion to show cause (CP 57-92). Respondent Doyle chooses to ignore the actual answer to the show cause motion and imagines it to be the counterclaims included with the answer to the complaint. Then he proceeds to argue that the imagined answer is not a defense.

The answer and counterclaims to the complaint were filed to protect those claims from subsequently being ruled as mandatory and therefore barred had they not been filed initially. Far from lacking "specific facts" and being "far-flung," the counterclaims are meticulously detailed in Appellant Goughnour's Answer and Counterclaims to Plaintiff's Complaint (CP 20 – 35) accompanied by eighteen (18) exhibits (CR 36-56). This leads to the Respondent Doyles' plausible purpose in

presenting the court with an order that explicitly states that Appellant Goughnour had not appeared and was therefore in default. Since Appellant Goughnour is not asking for restoration of possession of the premises and has moved on in that respect, the maintenance of that purpose to subsequently assert that the counter claims are barred; can be the only practical reason for Respondent Doyle to expend resources opposing this appeal.

Appellant Goughnour's assertion of a lease and/or constructive lease in his answer to the show cause do emanate from the same set of facts as his answer and counterclaims in his answer to the complaint. Even if Appellant Goughnour presented his counterclaims as a defense to the show cause, the trial court had jurisdiction to hear them as demonstrated by Respondent's own argument when his misstatement of fact is considered. That misstatement being, "no allegation of breach is alleged by the landlord."

In citing three cases:

1. First Union Management, Inc. v. Stack, 36 Wn. App. 849, 679 P.2d 936 (Div. II, 1984)
2. Foisy v. Wyman, 83 Wn.2d 22, 515 P.2d 160 (1973)
3. Income Properties Inv. Corp. v. Trefethen, 155 Wash. 493, 506 P. 782 (1930)

Respondent Doyle relates:

"if facts exist which excuse a tenant's breach, the tenant ought to be permitted to show them before ouster. 36 Wn. App. At 854."

"All of these cases have in common the element of alleged breach on the part of the tenant. In the case at bar, no allegation of breach is alleged by the landlord – the case is based only upon the failure of the tenant to vacate following notice of termination. Therefore, no counter claim could be allowed because the trial court lacked subject matter jurisdiction to entertain it. Id."

The factual assertion by Respondent Doyle that "no allegation of breach is alleged by the landlord," is in error. Respondent Doyle did not dispute either the existence

of the overpaid rent balance or the remittance of rent by debiting that account as far back as six (6) months prior to this action being filed. However once he filed this action, he made did make claims in his filings, asking for judgment for rent for two (2) of those months in which debits to the overpaid rent balance were applied. He also made claims for speculative damage. These can be found in:

- Motion/Affidavit for Order to Show Cause (CP 14, Lines 14-16)
- Complaint for Eviction (CP 2, Line 4 – CP 3, Line 9)
- Eviction Summons (CP 7, Lines 23-24)
- Payment or Sworn Statement Requirement (CP 10, Line 22 – CP 11, Line 14)

Therefore as detailed in Respondent Doyle's own argument, counter claims could be allowed as a defense in the show cause hearing. Therefore Respondent Doyle's argument on the counter claims issue is without merit either way:

1. Appellant Goughnours' answer to the motion for show cause and his answer/counterclaims to the complaint shared similar facts. However he did not present counterclaims as a defense at the show cause hearing.
2. If Appellant Goughnour had presented counterclaims as a defense at the show cause hearing, they could be allowed as Respondent Doyle made allegations of rent breach.

**REPLY TO RESPONDENT'S:**

**4. THE TRIAL COURT DID NOT ERR BY REFUSING TO ORDER A HEARING BEFORE ORDERING THE ENTRY OF A WRIT OF RESTITUTION.**

**DENIAL OF OPPORTUNITY TO SUBSTANTIVELY SPEAK:**

Respondent Doyle concedes that Appellant Goughnour was denied an evidentiary hearing. Appellant Goughnour was not just denied an evidentiary hearing, he was denied the opportunity to speak at all other than being confined to a

yes or no answer to the trial courts' inquiry as to whether he had filed "documents."  
(RP 2-5)

Respondent Doyle argues first that had Appellant Goughnour been allowed to state, "That story is false, he's making it up," it would not be evidence warranting an evidentiary hearing. Again Respondent Doyle is attempting to redefine to something that he can argue. Appellant Goughnour obviously used that example to illustrate that the trial court would not allow him to make any substantive remark whatsoever; not even to refute an erroneous, derogatory story. Respondent Doyle argues secondly that Appellant Goughnour has not advised what evidence he would have presented. Appellant Goughnour would clearly have started with clarifying the misrepresentations in Respondent Doyle's verbal opening argument. Beginning with the structure of his answer to the show cause motion as standing alone as it was filed, quite separate to the answer and counterclaims to the complaint (RP 2, Lines 12-15). Response was also called for regarding Respondent Doyle misrepresentation of the wording of the termination clause in the parties agreement (RP 2, Lines 16-18).

Appellant Goughnour was denied the opportunity to answer Respondent Doyle's misrepresentation and establish that in addition to the agreement not allowing unilateral termination, that an actual and/or constructive lease existed. This would be unequivocally clear with examination of the parties in a forum in which Mr. Doyle himself could not absent himself as he did in the show cause hearing. That Appellant Goughnour be afforded the opportunity to be heard is even the more important to equity under the short response period of an unlawful detainer action.

DENIAL OF FURTHER HEARING:

Respondent Doyle argues that *Leda v. Whisnand*, 150 Wn. App. 69, 207 P.3d 468 (Div. I, 2009) is distinguished from this case resulting in:

“Therefore the trial court was correct in ordering entry of the writ of restitution without further hearing;”

and by implication, without allowing Appellant Goughnour to substantively speak at the show cause hearing itself. Respondent Doyle argues the distinction with, “Appellant did not bring forth a viable defense to the action at the show cause hearing.” He supports the argument with two (2) statements that are not factually correct:

1. “In fact, in response to the trial court’s query regarding his position, Appellant stated that his response was to be found in a sworn statement contained in his written materials.”

This is factually incorrect. The actual facts and circumstances are detailed quite meticulously in reply to Respondent Doyle’s first assertion of this, in STATEMENT OF THE CASE – APPELLANT GOUGHNOUR LACKED OPPORTUNITY TO BE HEARD. It does not need to be redundantly repeated here.

2. “Those materials raised no defense to the termination of tenancy and eviction.”

This is also factually incorrect. The agreement between the parties does not allow unilateral termination. It allows only collective termination (CP 4, Paragraph 4). This was the intent of the parties (CP 68, Paragraph 5). Further the parties had an actual lease and/or constructive lease which is demonstrated in detail in reply to Respondent Doyle’s earlier assertion of this, in APPELLANT CANNOT PROVE A ‘CONSTRUCTIVE LEASE’ THAT WOULD PREVENT REpondENTS FROM EVICTING HIM BY

TERMINATION OF TENANCY. It does not need to be redundantly repeated here.

Therefore this case is not distinguished from Leda and the trial court erred in ordering entry of the writ of restitution without further hearing, or even allowing Appellant Goughnour to substantively speak at the show cause hearing.

**DENIAL OF DUE PROCESS:**

Respondent Doyle attempts to dispose of due process denied to Appellant Goughnour by citing Carlstrom v. Hanline, supra. He argues that like Carlson, in this case Appellant Goughnour cannot argue lack of due process for the trial court's failure to consider his counterclaims. Again Respondent Doyle doesn't understand that Appellant Goughnour has made no assertion of counterclaims in his defense of the show cause motion.

**REPLY TO RESPONDENT'S:**

**5. THE ACTION IS AN UNLAWFUL DETAINER AND IS NOT SUBJECT TO THE GENERAL JURISDICTION OF THE COURT.**

Respondent Doyle argues that this case is distinguished from Honan v. Ristorante Italia, 66 Wn. App. 262, 832 P.2d 89 (Div. II, 1992) in that,

“the only relief requested apart from possession of the property was unpaid rent, and the trial court refused to invoke its general jurisdiction.”

At the time of filing this action Respondent Doyle possessed knowledge that:

- the overpaid rent balance of approximately \$6,290 remained (CP 85, Exhibit N)
- rents had been previously and intermittently remitted via debit to the overpaid rent balance beginning six (6) months prior to the origination of this action, without dispute by Respondent Doyle (CP 68, Paragraph 4 and CP 70, Paragraph 10)
- Appellant Goughnour was staying collection of the funds on a month to month basis. He could demand the total amount at his pleasure and the claim would

remain until satisfied, independent of tenancy or possession of the premises (CP 68, Paragraph 5)

- He had an obligation, never disputed, to return the overpaid rent balance to Appellant Goughnour before the lease could be terminated (CP 69, Paragraph 5a)

Therefore Respondent Doyle had clear and ample knowledge that a claim for the funds existed at all times, regardless of possession of the premises. Respondent Doyle's proper remedy for disputing this matter is an ejectment action. Respondent Doyle concealed this from the trial court. However the trial court erred by not recognizing the claim which is independent of possession of the premises in Appellant Goughnour's answer to the show cause motion and/or not allowing Appellant Goughnour to substantively speak at the show cause hearing so as to bring it to the trial court's attention.

**REPLY TO RESPONDENT'S:**

**6. RESPONDENTS ARE ENTITLED TO THEIR COSTS AND REASONABLE ATTORNEY FEES INCURRED ON APPEAL.**

**DISTINGUISHED FROM LEINGANG V. PIERCE COUNTY MED. BUREAU, INC.:**

Respondent Doyle argues for costs and attorney fees citing Leingang v. Pierce County Med. Bureau, Inc. 131 Wn.2d 133, 143, 930 P.2d 288 (1997). Leingang is quite distinguished from the present case in that in Leingang, the issue regarding attorney fees was that an insurer compelled it's insured to litigate to enforce coverage. Leingang is further distinguished in that attorney fees were awarded at the trial court level. To quote directly from the appellant court:

[5] Mr. Leingang also requests attorney fees on appeal. **Since we conclude that the trial court correctly awarded attorney fees** for the declaratory judgment portion of the action, Mr. Leingang is also entitled to attorney fees on appeal to this court for the portion of the action which pertains to the issue of the attorney fees under Olympic Steamship. McGreevy, 128 Wn.2d at 40; Olympic Steamship, 117 Wn.2d at 53; RAP 18.1 (Bold emphasis is added)

In the present case attorney fees were not awarded by the trial court (CP 93-94). Therefore an award of attorney fees in this appeal would not be supported by Leingang.

NATURE OF THIS APPEAL NOT APPLICABLE TO ATTORNEY FEES:

In this appeal, Appellant Goughnour has not asked for restoration of possession of the premises. He has asked only:

1. that the default Order to Show Cause be reversed and vacated. It was(is) Respondent Doyle who:
  - a. presented an order to the court that clearly indicated that Appellant Goughnour had not appeared when clearly he had (RP, Pages 2-5), and was therefore in default (CP 93).
  - b. failed to present the order to Appellant Goughnour for preview and presented it to the trial court only after Appellant Goughnour left the courtroom at the conclusion of the hearing.
  - c. will with near certainty when the underlying case moves forward on Appellant Goughnour's claims, argue that those are mandatory counterclaims barred by the initial failure to appear as the order so clearly states (CP 92).

Without restoration of possession of the premises at issue, this is the only practical reason for Respondent Doyle to expend effort and resources opposing this appeal.

2. That the Writ of Restitution be reversed and vacated.

Although restoration of possession of the premises is not asked for in this appeal, restoration of Mr. Goughnour's life long reputation as a perfect tenant is asked for. This reputation is backed by a long list of landlord references (CP 99, Lines 19 – 25), which are largely negated by this one Writ of Restitution.

These two (2) requests of the appellant court are what mandate Appellant Goughnour's fundamental arguments that:

1. The default Order to Show Cause is in error,
2. Appellant Goughnour was denied a hearing or even an opportunity to be heard at all in spite of unsupported declarations made in Respondent Doyle's opening verbal argument,
3. Appellant Goughnour had substantial material evidence and argument to present to the trial court.

Respondent Doyle reliance upon RCW 59.18.290(2) is misplaced. It reads in pertinent part:

“Any landlord so deprived of possession of premises in violation of this section may **recover possession of the property and damages sustained** by him or her, and the prevailing party may recover his or her costs of suit or arbitration and reasonable attorney's fees.” (Bold emphasis is added)

Appellant Goughnour does not ask for restoration of possession of the property (Appellant's Opening Brief, Page 23) and the trial court's order did not include damages (CP 93-94). Therefore Respondent Doyle is not entitled to attorney fees as provided in RCW 59.18.290(2) regardless of which party prevails.

**SEGREGATION OF ATTORNEY FEES:**

From *Boeing Co. v. Sierracin Corp.* 108 Wn.2d 38, 66, 738 P.2d 665 (1987)  
(citing *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 743, 733 P.2d 208 (1987))

“attorney fees should be awarded only for those services related to the  
causes of action which allow for fees.”

Appealing a default order or denial of a hearing does not fall within the category  
which allows for fees. Further a denial of hearing assertion inherently requires a  
showing of the appellant’s arguments had he been granted a hearing, or been  
allowed to substantively speak at all.

**REPLY TO RESPONDENT’S CONCLUSION:**

The trial court’s order is clearly an order of default (CP 93-94). In it’s  
recital it states in pertinent parts,

“Plaintiffs are represented by Gregory B. Durr, their attorney. Defendant  
does not appear by adequate written response or in person”  
and

“1. Defendant failed to adequately appear and is in default.”

It could not be more clear that the defendant (Appellant Goughnour) is defaulted  
for failure to appear, although he timely filed an answer to the show cause order  
(CP 57-92) and appeared personally at the show cause hearing (RP, Pages 2-5).

Appellant Goughnour has not argued that the actual lease and/or  
constructive lease was based upon an “implied covenant” as asserted by  
Respondent Doyle who used quotes around the phrase to imply that he is quoting  
from Appellant’s Opening Brief. The lease is explicitly established as detailed  
above in the relevant section.

Respondent Doyle misrepresents the termination clause of the parties  
agreement with:

“... the clear termination provision ...”

and

“... with a termination clause exercisable by either party.”

The termination clause which was originally drafted as a right exclusive to the tenant (Appellant Goughnour) was penciled in at signing to be a collective right by the addition of the phrase, “and landlord,” which was quite deliberately intended to be distinguished from “or landlord.” (CP 98, Lines 14-22)

Appellant Goughnour answered the show cause order with a stand-alone answer, quite apart from his answer and counterclaims to the complaint. Quite apart from that fact, Respondent Doyle did allege breach by the tenant (Appellant Goughnour) and related counterclaims would be allowed in any case. These facts are detailed above in the relevant section.

Respondent Doyle filed the unlawful detainer action improperly with the knowledge that there was an undisputed claim acknowledged by his actions of approximately \$6,290 remaining against him. Respondent Doyle had knowledge that the claim was related to the unlawful detainer but enforceable independent of possession of the premises.

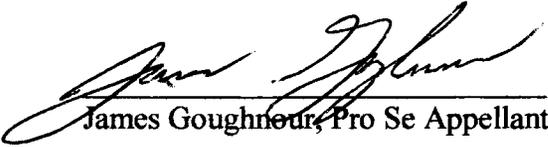
Respondent Doyle misrepresents that Appellant Goughnour, “declared to the court that his position was contained in those sworn statements.”

Appellant Goughnour’s brief makes it clear that had he been given a hearing he could have shown that the parties agreement explicitly required collective termination. The brief also showed that the parties had an actual lease and/or constructive lease that was explicit in nature. It was not from “implied consent” as Respondent Doyle attempts to misrepresent as Appellant Goughnour’s argument.

To reiterate, Appellant (Goughnour) asks the court for the following relief:

1. That the default Order on Show Cause be reversed and vacated.
2. That the inherently derogatory Writ of Restitution be reversed and vacated.

Respectfully submitted,

  
James Goughnour, Pro Se Appellant

DATED this 1 st day of August, 2011

**Declaration of Service:**

I, James Goughnour certify and declare that I served by first-class mail, postage pre-paid, from Elma, Washington; a complete copy of this document on August 1, 2011 to Plaintiff's/Respondent's counsel of record at:

Gregory B. Durr  
305 West First St.  
Aberdeen, WA 98520

  
James Goughnour

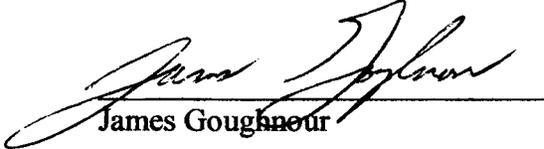
DATED: August 1, 2011

FILED  
COURT OF APPEALS  
DIVISION II  
11 AUG -2 PM 1:45  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

**Declaration of Mailing:**

I, James Goughnour certify and declare that I mailed by first-class mail, postage pre-paid, from Elma, Washington; one (1) original and one (1) complete copy of this document on August 1, 2011 to:

Attn: Cheryl, Case Manager  
Clerk of the Court's Office  
Wash. State Court of Appeals, Div. II  
950 Broadway, Suite 300  
Tacoma, WA 98402

  
James Goughnour

DATED: August 1, 2011