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A. APPELLANT'S ASSIGNMENTS OF ERROR

1. Appellant contends the trial court committed error by entry of an order of default, although no such order was ever entered, and Appellant had admitted the only facts required for issuance of a writ of restitution.
2. Appellant contends the trial court erred by ordering entry of a writ of restitution after refusing to examine the parties or to set an evidentiary hearing, although the trial court had asked Appellant if he had a reply to statements made by Plaintiff's counsel, and Appellant replied that his answer was contained in sworn statements, which the Court reviewed.
3. Appellant appears to contend the trial court erred in adopting Findings of Fact and denial of his Request for Reconsideration, but does not specifically set forth his objections.
4. Appellant contends the trial court erred by "classification" of the action as an unlawful detainer, but does not specifically state what else the action could be called.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it granted an order directing entry of a writ of restitution, after having reviewed Appellant's detailed written statements that admitted all pertinent facts in the action for possession of the rented property.
2. Whether further examination was required by the trial court after it had reviewed Appellant's sworn statements, which he contended contained his answer, and which admitted the pertinent facts of the action for possession.
3. Whether the trial court erred by adopting an order that

stated Appellant was in default after he admitted all pertinent facts.

4. Whether the action was improperly classified as an unlawful detainer.
5. Whether Respondents are entitled to their attorney fees at trial and on appeal.

C. STATEMENT OF THE CASE

On May 12, 2009, the Appellant and Respondents Doyle entered into an agreement for the rental of Respondents' property located at 1202 W. Young Street, Elma, Washington. CP 36, Exhibit A. Following a dispute about the amount of rent and Appellant's claim that he had overpaid, the parties entered into a second rental agreement for the same property on April 15, 2010. CP 4, Exhibit A. That agreement contains the following clause: "This Agreement supersedes all previous agreements, written or oral, including the agreement of May 12, 2009." It also contains a provision that makes it terminable by either party with 30 days notice. *Id.*

The April 15, 2010, agreement did not contain a specific date for payment of rent after the first month. On August 12, 2010, Appellant wrote to Respondents and advised them that he would pay the rent on the 15<sup>th</sup> of the month. CP 5, Exhibit A, pg. 2. According to Appellant, Respondents accepted this modification of the agreement by telephone the following day. CP 69, par. 6.

On September 15, 2010, Respondents terminated the tenancy by Notice of Termination of Tenancy, effective October 15, 2010, at

midnight. CP 6, Exhibit B. Appellant admits having received the notice by personal service on September 15<sup>th</sup>. CP 34, par. 11.

Appellant did not vacate the property on or before October 15, 2010, the termination date set forth in the notice. On October 18, 2010, this action was commenced by filing a summons and complaint for eviction and a motion/affidavit for order to show cause. CP 1-14. The order to show cause was executed the same day. CP 15-16. An affidavit of service was filed on October 22, 2010. CP 17-18. Appellant admits service of process on October 19, 2010. CP 34, par. 16.

At the show cause hearing on November 1, 2010, the trial court advised the parties that Appellant's paperwork had not made it into the court file, because it had not been filed until 4:58 p.m., on the Friday before the Monday morning show cause hearing. RP, pg. 4. 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. Appellant then handed up to the trial court bench copies of the documents he had filed, an Answer and Counterclaims, CP 20-56, and an Answer to Show Cause by

Sworn Affidavit, CP 57-92; RP 3-4. The trial court then continued the matter in order to review the documents submitted by Appellant. RP 4. When the case was recalled, the trial court ruled that Appellant had not stated a defense to the action and that Respondents were entitled to a writ of restitution. RP 4-5. This appeal ensued.

D. ARGUMENT

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

Appellant asserts to this Court that the trial court erred by entering an order of default. The trial court did not enter an order of default or a default judgment. It entered an Order on Show Cause, which merely noted that Appellant had not presented a defense to the eviction action, and was thus in default. CP 93-94.

Appellant misunderstands the posture of the case. At the show cause hearing, the trial court was determining the right to possession of the rental property. “Show cause hearings are summary proceedings to determine the issue of possession pending a lawsuit.” *Carlstrom v. Hanline*, Wn. App. 780, 788, 990 P.2d 986 (Div. I, 2000). Inherent in the trial court’s ruling and order is the recognition that Appellant had not

presented a defense to the eviction.

RCW 59.12.030, states in pertinent part as follows:

A tenant of real property for a term less than life is guilty of unlawful detainer either: ...

(2) When he or she, having leased property for an indefinite time with monthly or other periodic rent reserved, continues in possession thereof, in person or by subtenant, after the end of any such month or period, when the landlord, more than twenty days prior to the end of such month or period, has served notice (in the manner in RCW 59.12.040 provided) requiring him or her to quit the premises at the expiration of such month or period.

As Professor Stoebuck has written, with the above termination provision, “the default is not curable; the notice is ‘absolute’; the tenant has no choice but to vacate within the notice period.” *Washington Practice, Real Estate: Property Law*, Vol. 17, pg. 418. Accord: *Labor Hall Ass’n, Inc. v. Danielson*, 24 Wn.2d 75, 163 P.2d 167 (1945).

Respondents alleged in their complaint that the parties had entered into a rental agreement with monthly rent, that Appellant had not vacated the premises following a Notice of Termination of Tenancy, that more than twenty days had passed, that the notice was served as required by law, and that it required Appellant to quit at the expiration of the period. CP 1-3, 13-14.

Appellant admitted the rental agreement. CP 46. However, he

claimed that the parties had not entered into a month-to-month agreement despite the clear intent of the agreement; according to Appellant, the parties had entered into an “actual or constructive lease”, of some uncertain length because of alleged obligations of Respondents arising from the parties’ previous landlord-tenant relationship. CP 21; Appellant’s Brief, 23. The ”constructive lease” allegation will be discussed below.

It is obvious that Appellant did not vacate the property. He appeared at the show cause hearing to dispute the eviction.

More than twenty days had passed following delivery of the Notice of Termination of Tenancy. In his Answer to Show Cause, Appellant admitted personal service of the notice on September 15<sup>th</sup>, which required him to vacate by midnight on October 15<sup>th</sup>. CP 34, par.11.

The notice required Appellant to vacate on a periodic rent payment date as agreed to by the parties. CP 5; CP 33, par. 6.

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

Appellant alleges that the parties had a “constructive lease” arising from obligations of Respondents that arose during the period of the

parties' first lease. The theory seems to be that because of the alleged overpayments of rent during the first tenancy, the term of the second tenancy would be extended by enough months for Appellant to recoup the overpayments through set-offs against his rent. There are a number of problems with that theory, apart from the fact that it is presented utterly without citation of authority.

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.

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.

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.”

No case could be found supporting the concept of a “constructive lease.” This Court has addressed the theory of implied covenants in leases, however. In *Fuller Market v. Gillingham & Jones*, 14 Wn. App. 128, 539 P.2d 868 (Div. II, 1975), a tenant had argued that the parties’ lease contained an implied covenant for the landlord to operate a shopping center during the term of the lease. The Court noted that implied covenants are not favored in the law and quoted a California case with approval as follows:

Summarized, therefore, the rule deducible from the foregoing authorities controlling the exercise of judicial authority to insert implied covenants may be stated as follows: (1) the implication must arise from the language used or it must be indispensable to effectuate the intention of the parties; (2) it must appear from the language used that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it; (3) implied covenants can only be justified on the grounds of legal necessity; (4) a promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it; (5) there can be no implied covenant where the subject is completely covered by the contract.

14 Wn. App. 128, at 133-34. (Quoting from *Cousins Inv. Co. v. Hastings Clothing Co.*, 45 Cal. App. 2d 141, 113 P.2d 878 (1941). Appellant, in the case at bar, would not be able to meet a single requirement for an implied covenant that would restrict his landlord from evicting him.

Therefore, all requirements of the statute were met and Appellant did not raise an issue of fact regarding the right to possession.

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

Appellant asserted numerous counterclaims in his Answer and Counterclaims. CP 25-28. The claims include fraud, conspiracy to defraud, breach of the first rental agreement, breach of the second agreement, breach of fiduciary duty, breach of his right to peaceful enjoyment, obtaining money under false pretenses, breach of rights under the Landlord-Tenant Act, breach of the Consumer Protection Act, and discrimination. Although he alleges no specific facts that would provide a basis for these far-flung claims, Appellant alleges the trial court erred by refusing to consider them in the context of a show cause possession hearing.

In general, counterclaims are not permissible in an unlawful detainer proceeding. In *First Union Management, Inc. v. Slack*, 36 Wn. App. 849, 679 P.2d 936 (Div. III, 1984), the lessee counterclaimed in an unlawful detainer action for damages resulting from the landlord's failure to respond to a request for permission to assign the lease. The Court held that the trial court lacked jurisdiction to hear the counterclaim and

reversed the trial court's decision. The Court notes exceptions to the general rule when the counterclaim is based on facts which excuse the tenant's breach, e.g., the landlord's breach of the implied warranty of habitability, *Foisy v. Wyman*, 83 Wn.2d 22, 515 P.2d 160 (1973); where the landlord has deprived the lessee of the beneficial use of the property, *Income Properties Inv. Corp. v. Trefethen*, 155 Wash. 493, 506 P. 782 (1930); 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 counterclaim could be allowed because the trial court lacked subject matter jurisdiction to entertain it. *Id.*

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

Appellant claims he was denied due process because he was not allowed an evidentiary hearing before entry of the order on show cause. He complains that he was not allowed an opportunity to tell the trial court,

“That story is false, he’s making it up.” Such a statement would not be evidence warranting an evidentiary hearing. In fact, other than that, Appellant has not advised what, if any, evidence he would have presented to the trial court at an evidentiary hearing that was not included in the seventy-one pages of sworn statements and exhibits he presented at the show cause hearing.

Appellant cites *Leda v. Whisnand*, 150 Wn. App. 69, 207 P.3d 468 (Div. I, 2009) in support of his argument about his right to a hearing before issuance of a writ of restitution. In that unlawful detainer, the tenant’s attorney informed the trial court at the show cause hearing that the 20-day notice to terminate tenancy was improper because it did not end the tenancy at the middle of the month, the tenant’s periodic rent payment date. The trial court sustained an objection to a statement from tenant’s counsel to the effect that this fact presented a viable defense to the action. The Court held that the trial court erred by failure to allow the tenant to prove the defense by presentation of some kind of evidence. The Court described the procedure the trial court should use at a show cause hearing as follows:

- (1) the trial court must ascertain whether either the defendant’s written or oral presentations potentially establish a viable legal or

equitable defense to the entry of a writ of restitution and (2) the trial court must then consider sufficient admissible evidence (including testimonial evidence) from parties and witnesses to determine the merits of any viable asserted defenses.

150 Wn. App. at 83.

*Leda* is distinguishable from the case at bar. In sharp contrast with the tenant in that action, Appellant did not bring forth a viable defense to the action at the show cause hearing. 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. Those materials raised no defense to the termination of tenancy and eviction. Therefore, the trial court was correct in ordering entry of the writ of restitution without further hearing.

*Carlstrom v. Hanline, supra*, which is distinguished by *Leda*, disposes of Appellant's due process complaint. The tenant in *Carlstrom* had claimed that he was denied due process by the summary show cause proceedings because he was not allowed a jury trial on his counterclaims. As in the case at bar, the tenancy was terminated by twenty-day notice.

The Court said:

Procedural due process in Washington requires a meaningful opportunity to be heard. ... The scope of due process involves a balancing of "the private interest to be protected, the risk of

erroneous deprivation of that interest by governmental procedure, and the government's interest in maintaining such a procedure." ... Summary proceedings do not violate the constitutional guarantee of due process. ...

98 Wn. App. at 789-90. Citations omitted.

Interestingly, although the tenant in *Carlstrom* claimed that the show cause hearing was unfair because it was too short, he could state "no specific examples of arguments he failed to raise because of the time constraints." *Id.* Just like Appellant in the case at bar.

The trial court made it clear to Appellant that his ruling did not foreclose Appellant's rights to bring an action against Respondents for damages as alleged in his counterclaims. It was merely dealing with the issue of the right to possession of the property, in regard to which Appellant had presented no viable defense.

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

Appellant claims that the case at bar is not an unlawful detainer action because it involves "claims in addition to a claim with respect to possession of the premises." Appellant's Brief At 23. Appellant relies on *Honan v. Ristorante Italia*, 66 Wn. App. 262, 832 P.2d 89 (Div. II, 1992); his reliance on that case is misplaced. In *Honan*, the plaintiffs sued for the

amount due on a personal property sales contract and damages, as well as for possession and unpaid rent. They used a 20-day summons, invoking the general jurisdiction of the trial court in contrast to that of an unlawful detainer summons. In addition, the trial court treated the complaint as one for multiple kinds of relief. 66 Wn. App. at 269.

The distinction is clear. In the case at bar, Respondents commenced the case with an unlawful detainer summons and complaint, the only relief requested apart from possession of the property was unpaid rent, and the trial court refused to invoke its general jurisdiction.

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

A party is entitled to costs and attorney fees on appeal if a contract, statute or ground of equity permits recovery of attorney fees at trial and the party is the prevailing party. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 143, 930 P.2d 288 (1997), RAP 18.1. RCW 59.18.290(2) provides for attorney fees to a landlord who must evict a holdover tenant, like Appellant. Consequently, Respondents are entitled to their costs and attorney fees in defending this appeal. RAP 18.1.

**E. CONCLUSION**

Appellant misconstrued the trial court's order. It was neither an order of default nor a judgment. It was merely an order on show cause which granted Respondent's possession of their real property following termination of the rental agreement by notice under RCW 59.18.020(2).

Appellant's effort to show a long-term "constructive lease" as a way of defeating the clear termination provision contained in the parties' written agreement, was made without benefit of authority of any kind. Nor could an uncertain term by "implied covenant" be found because that would be a direct contradiction of the express written term contained in the rental agreement, which was a month-to-month tenancy with a termination clause exercisable by either party.

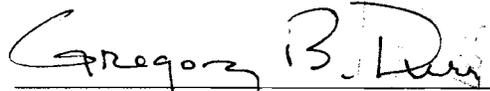
The trial court did not err by refusing to consider Appellant's numerous counterclaims, none of which met the exceptions to the rule of *First Union Management, Inc. v. Slack, supra.*, that no counterclaims can be considered under the trial court's limited jurisdiction for unlawful detainers. Appellant cannot overcome that rule by attempting to show that the case was not an unlawful detainer at all; the case he cited in support of that proposition, *Honan v. Ristorante Italia, supra*, is completely distinguishable on its facts from the case at bar.

The trial court did not err by refusing to grant Appellant an evidentiary hearing. He submitted voluminous sworn statements of his position, declared to the court that his position was contained in those sworn statements, and the sworn statements did not reveal any defense to the action for possession. Nowhere in Appellant's brief is there any reference to a defense to the action that he would have been able to prove at an evidentiary hearing.

The Court should order that Respondents Doyle are entitled to their reasonable attorney's fees and costs for the necessity of defending this dubious appeal.

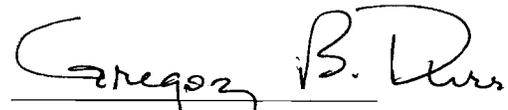
Dated: 6/29/11

Respectfully submitted,

  
By: Gregory B. Durr, WSBA #16981  
Attorney for Respondents Doyle

#### CERTIFICATE OF SERVICE

I certify that I served a true copy of the foregoing Respondent's Brief upon Appellant, at his last known address, by causing it to be placed in the United States Mail, first class, postage pre-paid, this 29<sup>th</sup> day of June, 2011.

  
Gregory B. Durr