

No. 46571-0-II

COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION TWO

PORT OF KINGSTON,

Respondent,

v.

ROB BREWSTER and BETH BREWSTER,
KINGSTON ADVENTURES, LLC,

Appellants.

FILED
COURT OF APPEALS
DIVISION II
2015 FEB - 9 PM 1:12
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

APPELLANTS'
OPENING BRIEF (AMENDED)

Dennis J. McGlothin, WSBA No. 28177
Robert J. Cadranel, WSBA No. 41773
Attorneys for Appellants

WESTERN WASHINGTON LAW GROUP, PLLC
7500 212th Street SW Suite 207
Edmonds, WA 98026
(425) 728-7296

ORIGINAL

51-9-2 MD

TABLE OF CONTENTS

I. Introduction..... 1

II. Assignments of Error.....3

III. Issues Related to Assignments of Error4

IV. Facts7

V. Argument.....21

 A. The Court erred when it denied Appellants’ Motion to Vacate.....21

 1. The Court's order denying the motion to vacate contained errors of fact and law.....21

 2. The 2011 BUA continued to govern the tenancy after its fixed term expired22

 3. The Court erred when it diminished Appellants' First Amendment Retaliation defense because the Port was purportedly acting in its proprietary capacity23

 4. The Court erred when it concluded there were no procedural irregularities and not vacating the final orders in this matter....24

 5. The Court erred when it concluded there was no prima facie evidence of a meritorious defense34

 6. The Court erred when it failed to rule in Appellants' favor on whether Appellants' presented a prima facia meritorious defense to the Port's unlawful detainer claim40

 B. The Court abused its discretion when it denied Appellants’ Motion to Abate..45

 C. The Court erred in concluding the Port was entitled to attorney fees....47

 1. The Trial Court made no finding as to reasonable hours or hourly rate.48

 2. The Trial Court failed to require the Port to segregate its fees related to regaining possession of the shelves from its fees related to collecting amounts due under the SWFAs.....49

 3. The Trial Court failed to reduce the Port's attorney fee request by duplicate time and time never billed the client.....49

 4. The Trial Court improperly awarded the Port attorney fees for its non-lawyer time without first showing the non-lawyer's experience and supervision.....50

 6. The Trial Court erred when it awarded the Port its costs.....50

TABLE OF AUTHORITIES

Washington Cases

<i>Absher Constr. Co. v. Kent School Dist.</i> , 79 Wn. App. 841, 845, 917 P.2d 1086 (1995)	50
<i>Allison v. Hous. Auth.</i> , 118 Wn.2d 79, 85-86, 95, 821 P.2d 34 (1991).....	43
<i>Am. Mobile Homes of Wash., Inc. v. Seattle-First Nat'l Bank</i> , 115 Wn.2d 307, 321, 796 P.2d 1276 (1990)	45
<i>Berryman v. Metcalf</i> , 177 Wn. App. 644, 660, 312 P.3d 745 (2013)	49
<i>Bowers v. Transamerica Title Ins. Co.</i> , 100 Wn.2d 581, 597, 675 P.2d 193(1983)	49
<i>Bunch v. Nationwide Mutual Insurance Co.</i> , 321 P.3d 266, 180 Wn. App. 37 (2014)	45-46
<i>Christensen v. Ellsworth</i> , 162 Wash. 2d 365, 374, 173 P.3d 228, 232-33 (2007)	25
<i>City of Yakima v. Int'l Ass'n of Fire Fighters, AFL-CIO, Local 469</i> , 117 Wn.2d 655, 675, 818 P.2d 1076 (1991)	45
<i>Cnty. Investments, Ltd. v. Safeway Stores, Inc.</i> , 36 Wn. App. 34, 38, 671 P.2d 289, 291 (1983)	40
<i>Dep't of Revenue v. Boeing Co.</i> , 85 Wn.2d 663, 667, 538 P.2d 505 (1975)	32
<i>First Union Mgmt., Inc. v. Slack</i> , 36 Wn. App. 849, 858, f.n. 8, 679 P.2d 936, 942 (1984).....	47
<i>Gaglidari v. Denny's Restaurants, Inc.</i> , 117 Wn.2d 426, 450, 815 P.2d 1362 (1991)	49
<i>Hegwine v. Longview Fibre Co.</i> , 162 Wn.2d 340, 354, 172 P.3d 688, 696 (2007)	39, 41
<i>IBF, LLC v. Heuft</i> , 141 Wash. App. 624, 634, 174 P.3d 95, 100 (2007).....	25
<i>In re Detention of Morgan</i> , 180 Wash. 2d 312, 319, 380 P.3d 774 (2014).....	26
<i>In re Marriage of Short</i> , 125 Wn.2d 865, 870, 890 P.2d 12 (1995)	33
<i>Josephinium Associates v. Kahli</i> , 111 Wn. App. 617, 630, 45 P.3d 627(2002)	29-29, 41
<i>Keyes v. Bollinger</i> , 27 Wn. App. 755, 761, 621 P.2d 168, 171 (1980)	47
<i>Landry v. Luscher</i> , 95 Wn. App. 779, 783-84, 976 P.2d 1274, 1277-78 (1999).....	46-47

<i>Lenci v. Owner</i> , 30 Wn. App. 800, 803, 638 P.2d 598, (1981)	48
<i>Little v. King</i> , 160 Wn.2d 696, 703-04, 161 P.3d 345 (2007).....	35, 48
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 434-35, 957 P.2d 632 (1998).....	48
<i>March-McLennan Bldg., Inc. v. Clapp</i> , 96 Wn. App. 636, 643-48, 980 P.2d 311 (1999).....	22
<i>Mosbrucker v. Greenfield Implement, Inc.</i> , 774 P.2d 1267, 54 Wn. App. 647, 652 (1989)	27
<i>Muscek v. Equitable Sav & Loan Ass'n</i> , 29 Wash. 2d 546, 552-53, 717 P.2d 856 (1946)	27
<i>Owens v. Layton</i> , 133 Wn. 346, 233 P. 645 (1925)	48
<i>Pannell v. Food Servs. of Am.</i> , 61 Wn. App. 418, 447, 810 P.2d 952, 815 P.2d 812 (1991), review denied, 118 n.2d 1008, 824 P.2d 490 (1992).....	65
<i>Pfaff v. State Farm Mut. Auto. Ins. Co.</i> , 103 Wn. App. 829, 835-36, 14 P.3d 837 (2000).....	36
<i>Pier 67, Inc., v. King Cy.</i> , 71 Wn.2d 92, 94, 426 P.2d 610 (1967)	35
<i>Port of Longview v. International Raw Materials, Ltd.</i> 96 Wn. App. 431, 979 P.2d 917 (1999)	24, 29, 37
<i>Rosander v. Nightrunners Transp., Ltd.</i> , 147 Wn. App. 392, 404, 196 P.3d 711 (2008)	35-36
<i>San Juan County v. No New Gas Tax</i> , 160 Wn.2d 141, 164, 157 P.3d 831 (2007)	30
<i>Sherwin v. Arveson</i> , 96 Wn.2d 77, 633 P.2d 1335 (1981)), rev. denied, 148 Wn.2d 1020 (2003)	45
<i>Smith v. Dalton</i> , 58 Wash. App. 876, 881, 795 P.2d 706, 709 (1990).....	34
<i>State v. Kinneman</i> , 155 Wn.2d 272, 289, 119 P.3d 350 (2005)	34
<i>State v. Williams</i> , 132 Wn.2d 248, 254, 937 P.2d 1052 (1997)	47
<i>State ex rel. Evergreen Freedom Foundation v. Washington Education Ass'n</i> 111 Wn. App. 586, 606-607, 49 P.3d 894 (2002).....	45-46
<i>Sunkidd Venture, Inc. v. Snyder-Entel</i> , 87 Wn. App. 211, 216, 941 P.2d 16, 19 (1997)	33

<i>Travis v. Washington Horse Breeders Ass'n, Inc.</i> , 111 Wn.2d 396, 410–11, 759 P.2d 418 (1988)	49
<i>Tuschoff v. Westover</i> , 60 Wn.2d 722, 724, 375 P.2d 254 (1962)	26
<i>White v. State</i> , 131 Wn.2d 1, 10, 929 P.2d 396 (1997)	37, 39

Other Cases

<i>Allied Structural Steel Co. v. Spannaus</i> , 438 U.S. 234, 244, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978)	44
<i>Anderson Marketing, Inc. v. Design House, Inc.</i> , No. 3-92-Civ-548 at 8 (D.Minn. Mar. 17, 1995)	45
<i>Energy Reserves Group, Inc. v. Kansas Power & Light Co.</i> , 459 U.S. 400, 411, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983)	44
<i>FCC v. League of Women Voters</i> , 468 U.S. 364, 380, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984)	43
<i>Godwin v. Hunt Wesson, Inc.</i> , 150 F.3d 1217, 1221 (9th Cir. 1998), as amended (Aug. 11, 1998)	41
<i>Hughes v. Heinze</i> , 268 F.2d 864, 869 (9th Cir. 1959)	26
<i>Lehman v. City of Shaker Heights</i> , 418 U.S. 298, 303, 94 S. Ct. 2714, 41 L.Ed.2d 770 (1974)	24
<i>McDonald's Corp. v. Nelson</i> , 822 F. Supp. 597, 609 (D.Iowa 1993), <i>aff'd sub nom, Holiday Inns Franchising, Inc. v. Branstad</i> , 29 F.3d 383 (8th Cir. 1994)	45
<i>Monell v. Dep't of Soc. Servs.</i> , 436 U.S. 658, 690 (1978)	42-43
<i>Willowbrook v. Olech</i> , 528 U.S. 562, 564, 120 S.Ct. 1073, 1074–75 (2000)	42
<i>United States v. Virginia</i> , 518 U.S. 515, 533, 116 S.Ct. 2264, 2275 (1996)	42
<i>United States Trust Co. v. New Jersey</i> , 431 U.S. 1, 22, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977)	44

Constitutional Provisions

U.S. Const., art. I	43
U.S. Const., amend. I	2, 5, 23, 24, 29, 36-37, 39, 46
U.S. Const., amend XIV	2, 29, 42
Wash. Const., art. I	26

Washington Statutes

RCW 4.84.110.....6, 50
RCW 26.16.190.....33
Ch. 59.12 RCW 1, 4, 24, 25
RCW 59.12.030.....26
RCW 59.12.130.....5, 25
Ch. 59.18 RCW 1

Federal Statutes

42 USC § 198342, 44

Rules

CR 727
CR 1230
CR 6035
CR 8125

I. Introduction

This case will show the trial court's confusion between the process in a commercial unlawful detainer proceeding pursuant to ch. 59.12 RCW and a residential unlawful detainer proceeding pursuant to ch. 59.18 RCW.

This confusion resulted in the failure to follow the correct statutory procedure and final orders being entered without affording Appellants their substantive due process right to a jury trial and their procedural due process right to notice and a meaningful opportunity to be heard.

The trial court then exacerbated these due process problems when it refused to vacate the improperly entered final orders in this case. First, the trial court improperly concluded there were no procedural irregularities. Second, the trial court improperly concluded Appellants had not established a *prima facie* defense, which is not even a requirement if there are procedural irregularities.

Here, the pleadings disclosed substantial fact issues that needed to be tried. Moreover, Appellant Beth Brewster's declaration provides ample evidence supporting several fact issues that needed to be tried by a jury. First, that the shelves rented by Respondent (the "Port") were not real property. Second, the applicable tenancy was a holdover tenancy by and between the Port and Kingston Adventures, LLC ("KA"). Third, that Appellant Rob Brewster was not individually liable as to his separate

estate because he never signed any agreement in his individual capacity. Fourth, that the Port's decision to terminate KA's holdover tenancy was substantially motivated by gender discrimination and violated the Equal Protection clause of the Fourteenth Amendment of the U.S. Constitution and Washington's Law Against Discrimination ("WLAD"); Fifth, that the Port's decision to terminate KA's holdover tenancy was in retaliation for KA and Beth Brewster exercising their First Amendment rights to freedom of speech and to petition the government. Finally, that the Port's actions violated the Tenth Amendment to the U.S. Constitution by impairing KA's contract rights with the Port. Despite the ample, and often undisputed evidence, the trial court concluded Appellants had not established a prima facie defense and refused to vacate the final orders.

The trial court also improperly concluded that the Port was entitled to attorney fees pursuant to four Small Watercraft Facilities Agreements ("SWFA") signed solely by Beth Brewster in an uncertain capacity and four SWFAs that were not signed by anyone. The Port's pre-printed SWFAs provided the Port would be entitled to attorney fees only if it brought a collection action. This unlawful detainer action was an action to possess property, not a collection action. Despite this, the trial court concluded the Port was entitled to attorney fees.

Finally, the trial court abused its discretion when it awarded the Port all the attorney fees that it requested. The trial court did not require the Port to segregate its fees between the action for possession and any incidental relief for unpaid rent that KA actually tendered and offered to the Port in court without prejudicing the Port's rights, but the Port refused to accept. It also awarded all the Port's requested fees for non-lawyer time despite the Port not showing the non-lawyer's experience or supervision. It also awarded the port's attorney fees for duplicate billings and efforts that were never billed to the Port.

II. Assignments of Error

A. The trial court erred when it failed to abate this unlawful detainer action in favor of a prior pending federal action involving the same issues.

B. The trial court erred and denied Appellants procedural and substantive due process when it entered final orders at a show cause hearing.

C. The trial court erred when it entered judgment against Rob Brewster, individually and as to his separate estate.

D. The trial court erred when it failed to vacate the findings of fact and conclusion of law because there were procedural irregularities.

E. The trial court erred when it failed to vacate the findings of fact and conclusions of law because there were meritorious defenses to the Port's unlawful detainer proceedings.

F. The trial court erred when it determined the Port was entitled to attorney fees from Appellant.

G. The trial court erred when it determined the Port was entitled to \$13,300 in attorney fees from Appellants.

III. Issues Related to Assignments of Error

A. Whether the federal court had exclusive authority to determine KA's affirmative defenses. (Assignment of Error A.).

B. Whether the trial court denied Appellant procedural due process and committed procedural irregularities when it entered final order at a show cause hearing in a ch 59.12 RCW commercial unlawful detainer action. (Assignments of Error B and D).

C. Whether pre-trial writs of restitution in ch. 59.12 RCW commercial unlawful detainer proceedings determine who is entitled to possess the premises until trial. (Assignments of Error B and D).

D. Whether Appellants timely answered and demurred to the Port's complaint prior to the date for an answer set forth in the Port's summons. (Assignments of Error B and D).

E. Whether Appellants timely appeared in court on the date set forth in the Port's summons. (Assignments of Error B and D).

F. Whether Appellants' pleadings presented fact issues that were required to be tried by a jury pursuant to RCW 59.12.130. (Assignments of Error B and D).

G. Whether Appellants showed a prima facie retaliation for exercising First Amendment rights defense to the Port's commercial unlawful detainer complaint. (Assignments of Error B, D, and E).

H. Whether Appellants showed a prima facie unlawful gender discrimination defense to the Port's commercial unlawful detainer complaint. (Assignments of Error B, D and E).

I. Whether the clause in the Port's standard printed form allowing it to collect attorney fees in only a *collection* action entitled the Port to attorney fees in this unlawful detainer action, which was primarily an action for possession. (Assignment of Error F).

J. Whether the trial court erred when it failed to calculate an attorney fee award pursuant to the lodestar method, failed to find the attorney's time was reasonable or the hourly rate was reasonable, and failed to reduce the Port's fee request for duplicate time and time that was not billed to the Port. (Assignment of Error G).

K. Whether the Port should have been required to segregate its attorney fee request between time related to seeking possession of the premises and the incidental time related to collecting unpaid rent. (Assignment of Error G).

L. Whether a landlord who unilaterally terminates a month-to-month lease is collecting damages, as opposed to rent due under the month-to-month lease. (Assignments of Error F and G).

M. Whether the Port's attorney fee request should have been reduced by amounts for non-lawyer time because the Port did not demonstrate the non-lawyer's experience or supervision. (Assignment of Error G).

N. Whether the Port should have been denied its costs under RCW 4.84.110 because Appellants tendered rent prior to the Port commencing its unlawful detainer action, and Appellants brought the rent money into court and offered to pay the Port the rent without prejudice to the Port's rights, but the Port refused the tender and offer. (Assignment of Error G).

O. Whether the trial court erred in entering a final judgment against the Brewsters and KA. (Assignments of Error B, F and G).

P. Whether the trial court erred in entering a final judgment against Rob Brewster in his individual capacity and as to his separate estate when he never signed any agreement with the Port in his individual capacity. (Assignments of Error B, F and G).

IV. Facts

On April 23, 2010, for storing the family's 14' kayak, Beth Brewster signed an agreement to rent a single shelf at the small watercraft facility at the Port of Kingston ("the Port") for the personal use of herself and her husband, Rob Brewster.¹

In November 2010, Beth Brewster approached the Port regarding the possibility of her Company, Kingston Adventures, opening a commercial kayak and stand-up paddleboard (SUP) rental business at the Port with Kingston Adventures storing its kayaks and SUPs on the Port's shelves.²

In December 2010 the Port approved Kingston Adventures' request to allow Kingston Adventures to use the Port's facilities, including up to 8 shelves on its storage racks.³ To maximize the number of shelves available to her business, in the spring of 2011 and with the mutual agreement with the Port, Beth Brewster surrendered her shelf (used by her and her husband) back to the Port so the Port could then allow Kingston Adventures to use the shelf, along with 7 other available shelves, for its commercial kayak and SUP rental business.⁴

During January 2011, the Port drafted a Business Use Agreement ("BUA") governing KA's commercial use of the 8 shelves pledged by the

¹ CP 148 at ¶5.

² *Id.* at ¶6 and Exhibit A (the Port's minutes).

³ CP 148 at ¶7 and Exhibit B (the Port's minutes)

⁴ CP 149 at ¶8.

Port in December 2010. Emails exchanged during the negotiating process unequivocally stated that Kingston Adventures was merely renting “a ‘shelf’ in a shed.”⁵

On January 26, 2011, the Port and KA signed the Port’s Business BUA that the Port’s attorneys drafted.⁶ Its key terms are summarized:

1. Recital A: KA wants to store kayaks, paddleboard and similar small watercraft at THE PORT for use in its watercraft rental business.
2. Recital B: THE PORT wants to make space available to KA in its small watercraft facility.
3. Agreement A: *KA shall rent* available spaces from THE PORT in its small watercraft facility and *THE PORT will rent available spaces to KA* upon the following terms and conditions.
4. Terms and Conditions included the following:
 - a. The Agreement is for a one-year term.
 - b. The Agreement set the monthly rent.
 - c. The Agreement stated: Regardless of the amount of spaces rented, Business shall be entitled only to the following: Two (2) parking spaces, Two (2) gate keys....and, Two (2) keys for the bathroom....⁷

The BUA is the sole agreement KA and the Port ever entered into regarding KA’s commercial use of the shelves for its kayak and SUP business. No other subsequent BUA was signed by KA or the Port. The Port minutes, in which the Port gave KA its consent to use the shelves for

⁵ *Id.* at ¶9 and Exhibit C (emails between the Port and Kingston Adventures). See, especially, the Port’s attorney, John Mitchell’s, January 20, 2011 email.

⁶ *Id.* at ¶11 and Exhibit D (Signed copy of the Business Use Agreement).

⁷ *Id.* at Exhibit D (Signed Copy of the BUA).

its commercial activities, indicate that the agreement was to be re-visited at the end of one year.⁸

The Port did not revisit the terms of the BUA after one year. Instead, after one year and subsequent years, the Port and KA and the Brewsters acted in conformity with the agreement including KA paying rent and the Port receiving rent.⁹ Starting April 2011 all rent was paid by KA, not the Brewsters.¹⁰ KA was given only two parking spaces, two gate keys and two keys to the bathroom despite having rented 8 shelves.¹¹

Despite signing the BUA in January 2011, KA did not begin renting the Port's shelf spaces until April 1, 2011.¹² Up until then Beth Brewster rented only the one personal shelf and paid for the shelf with her personal checking account. She surrendered this shelf in March 2011 so it could be rented by the Port to KA.¹³ Commencing May 1, 2011, until the present, all rent payments for the Port's shelf spaces were paid by KA for shelves it was renting. No payments were made by Rob or Beth Brewster or their marital community.¹⁴

⁸ CP 148 at ¶7 and Exhibit B (Port Minutes).

⁹ CP 153 at ¶ 18.

¹⁰ CP 427, ¶7(a); and CP 150 at ¶13.

¹¹ CP 428, ¶9.

¹² CP 150 at ¶13.

¹³ CP 150, ¶14.

¹⁴ CP 150 at ¶13.

During the signed BUA's term, and in May 2011, Beth Brewster signed three small watercraft facility agreements (SWFA) for three individual shelf spaces. She contends these were signed on KA's behalf.¹⁵ By their own terms, they governed the shelves used by KA for its commercial operations as set forth in the BUA.¹⁶ From 2011 – 2014, the Kayak storage rack numbers changed continuously, but the Port did not require that the parties enter into a new BUA each time this occurred.¹⁷

Besides the BUA, these were the only other agreements ever signed by any Appellant. All three of these agreements were signed by Beth Brewster in her capacity as a member and owner of Kingston Adventures. They were not signed by Rob Brewster.¹⁸ The sole agreement signed by Rob Brewster was when he signed the 2011 BUA, which by its own terms was a contract between the Port and KA and not him individually.¹⁹

The SWFAs contained a prevailing party attorney fees and cost provision, but only if there was a collection action.²⁰

During the winter of 2013, the Kingston community wanted to stage a winter festival to attract tourists to Kingston during the off-season.

¹⁵ CP 1-18. *See* signed Small Watercraft Facility Agreements signed by Beth Brewster, on behalf of Kingston Adventures during the term of the BUA, attached to the Port's Complaint. CP 150, ¶ 15.

¹⁶ *Id.*

¹⁷ CP 427 – 28 at ¶¶ 7, 8, 9, 10 and 11.

¹⁸ CP 427 at ¶7.

¹⁹ *Id.* at ¶11 and Exhibit D (Signed copy of the Business Use Agreement). See the text of the Agreement.

²⁰ CP 11, ¶3.

Kingston is predominantly a summer tourist destination. Beth Brewster undertook getting approval for the use of the summer tent, owned by the Port. After a long process, the Port denied the request to use the tent. The participating businesses, including KA, were upset by the Port's decision. This started the tension between the Port managers and the commercial community.

Between December 2013 and February 2014, KA, through Beth Brewster, its female day-to-day operator, increasingly began to publicly and critically question the way the Port was being run and operated, its decisions, actions and omissions.²¹ Her verbal criticisms included, but were not limited to: inquiring whether the security cameras were operative, questioning why the community was not allowed to use the Port's tent for the winter event, and eventually the Port's disparate treatment of KA from male-run businesses and others similarly situated (discussed below).²²

After KA began to question the Port's decisions, actions, and omissions regarding security cameras, the winter tent and other Port decisions, the Port began treating KA differently from other similarly situated persons:

²¹ CP 156 at ¶¶29 and 30.

²² *Id.* at ¶30.

- In April, 2014, the Port moved the small floating dock without notice to KA, without KA's knowledge or consent, and without obtaining a required permit from Kitsap County.²³
- In April 2014, the Port conditioned KA's continued commercial use of its shelf spaces in a public facility upon KA entering into a new, written BUA. The Port's proposed new BUA contained a non-disparagement clause that conditioned KA's continued use of the Port's public shelf spaces upon KA and its members (Beth and Rob Brewster) not saying anything negative about the Port in public or on social media.²⁴ It also contained a one-sided and overly harsh provision that would have limited only the Port's liability to KA, but not KA's liability to the Port. The Port stated these provisions were non-negotiable.
- The Port insisted on fair market value for the Port's proposed new BUA with KA, but did not require the same for other businesses similarly situated to KA that used the Port's public accommodations and facilities for commercial purposes, such as Sean Osborn; Aviator Coffee and Teas, Inc.; and the Kingston Cove Yacht Club.²⁵
- Starting in or around April 2014, the Port began saying and publishing defamatory statements about KA and KA's business and operations, including implying KA was operating its business in an unsafe manner, did not have liability insurance, KA was violating its agreement with the Port, and that KA's business would be closed as of June 30, 2014. It did not do the same for male-run commercial users of the Port's public accommodations and facilities and other persons similarly situated to KA.²⁶
- Since February 2014, the Port's employees and officials harassed KA, but not other commercial businesses or their operators. For instance, Port Commissioner Walt Elliott kept KA's business under daily surveillance, has tried to get the City of Poulsbo sailing program staff to say they feel uncomfortable working with KA's

²³ *Id.* at ¶30(a).

²⁴ *Id.* at ¶30(b).

²⁵ CP 159 at ¶30 (c)(iv).

²⁶ CP 160 at ¶30(c)(ix).

staff (something the sailing program staff would not do), approaching KA's staff saying he was from the "Ferry Commission" and asking questions about KA's operations.²⁷

- On May 22, 2014 the Port delivered to KA a notice attempting to terminate KA's month-to-month holdover tenancy under the 2011 BUA that allowed KA to commercially use the Port's shelves. This despite KA having timely paid its rent from March 2012 through and including May 2014. The Port never attempted to terminate any month-to-month tenancy by a male-run commercial business or other commercial business similarly situated to KA.²⁸

The Port's treatment of KA and its female manager and day-to-day operator (Beth Brewster) is consistent with its rich history of discrimination against women:

- It has terminated the employment of 4 women over the past three years and replaced them all with men. It currently has only 1 full-time woman and 1 part-time woman on its staff.²⁹
- The Port restricted a business with a female owner renting commercial space from the Port from competing with local businesses in the products she sold, which caused her business to fail. Then it rented this same space to a male-run business without the restrictions placed on the previous female owner.^{30, 31}
- The Port denied a female business owner the opportunity to rent space at the Port.³²
- The Port's rules and regulations require all those who commercially use the Port's public accommodations and facilities to carry general liability insurance of at least \$1,000,000 listing the Port as an additional insured in an amount not less than \$1 million.

²⁷ CP 161 at ¶30(c)(x).

²⁸ CP 160 at ¶30(c)(viii).

²⁹ CP 155 at ¶27.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

The Port enforced this provision against KA, but not male-run businesses or other similarly situated to KA.³³

- The Port did nothing in response to a citizen complaint to remedy a male commercial user of the Port facilities who objectified women by having several young women scantily clad in short shorts and bikini tops washing that user's car repeatedly for hours on the Port property. Washing cars on the Port property is restricted by the Port's rules and regulations and other laws, ordinances, rules, and regulations; and the male-run commercial user had not complied with these laws, ordinances, rules or regulations when he had the young females repeatedly wash his car.³⁴
- The Port did nothing when a citizen complained to the Port about a male commercial user of the Port facilities inappropriately sexually harassing at least three of his young, female employees. The Port did nothing when a citizen complained that this same male commercial user engaged in employment fraud by not paying taxes withheld from his female employees' pay. This male commercial user's lease with the Port prohibits this conduct, yet the Port did nothing to enforce these provisions or investigate the citizen's complaint.³⁵
- The Port's rules and regulations require all who commercially use the Port's public accommodations and facilities to provide proof of compliance with applicable business regulations and laws. The Port enforced this provision against KA, but did not enforce it against male-run businesses, and others similarly situated to KA. Specifically when a male-run business had its proprietor, an unlicensed contractor, completely build a structure on the Port property, the permits were inadequate for the structure built. Also, the Port allowed the male-run business to use a donut fryer before the male-run business obtained a Fire Marshall's permit.³⁶
- The Port's rules and regulations: require all contractors and divers to carry insurance approved by the Port; require all contractors to observe the Port's Best Management Practices, as set forth in the

³³ CP 160 at ¶30(c)(ix). *See* the Port's Rules and Regulations attached as **Exhibit R**.

³⁴ CP 158 at ¶30(c)(ii).

³⁵ CP 158 at ¶30(c)(iii).

³⁶ CP 159 at ¶30(c)(vi).

Port's rules and regulations; and prohibits any commercial activity on the Port's public accommodations and facilities except by a pre-qualified contractor. The Port did not enforce this rule or regulation against male-run businesses and others similarly situated to KA.³⁷

Procedural History of the Case

On June 26, 2014, KA filed a federal civil lawsuit against the Port of Kingston and, both individually and as Port Commissioners: Pete DeBoer, Bruce MacIntyre and Walter Elliott ("Federal Action").³⁸ On July 2, 2014, the Port filed a commercial unlawful detainer complaint in Kitsap County Superior Court against KA and the Brewsters (collectively "the Appellants") and concurrently filed a Motion for an Order to Show Cause.³⁹ On the same day the trial court, *ex parte*, entered the order to show cause directing the Appellants to show cause "why a Writ of Restitution should not be issued restoring the [Port] the possession of the property described in the Complaint."⁴⁰

On July 11, 2014, in response to the Port's unlawful detainer action, KA and the Brewsters filed both a Motion to Abate and a Motion to Dismiss.⁴¹ Their motion to abate showed that most of their affirmative defenses to the Port's unlawful detainer action were already affirmatively

³⁷ CP 160 at ¶30(c)(vii).

³⁸ CP 23 and CP 29-44 (Motion to Abate and Exhibit A).

³⁹ CP 1-18 and CP 19-20.

⁴⁰ CP 21-22

⁴¹ CP 23-81 (Motion to Abate).

raised in the Federal Action. Their motion to dismiss showed that the shelves at issue were on racks that were not affixed to any real estate or fixture and were, thus, personal property; that Rob Brewster was not a proper party in his individual capacity and as to his separate estate; and that the Port was seeking to evict Appellants from property the Port did not own or control.

On July 16, 2014, the Port, without leave of court, filed an Amended Complaint for Unlawful Detainer correcting the problem with the property description.⁴² Also on July 16, 2014, the Port filed a response to Appellants' motion to dismiss.⁴³ In both its motion to abate and motion to dismiss the Port affirmatively asserted it was proceeding solely on the SWFAs that were signed by only Beth Brewster and affirmatively asserting she signed this in her personal capacity and not in her representative capacity as KA's owner and operator. In its response to the Port's motion to dismiss, the Port attached a declaration from its business manager, Scott Coulter, that attached 8 SWFAs – one for each shelf – but only 4 were signed by Beth Brewster. None were signed by Rob Brewster. It also attached the BUA and asserted that it had expired and that only the SWFAs were operative. Nowhere did the Port contest that the shelves were not attached to any real property or fixture.

⁴² CP 82-103 (Motion to Dismiss).

⁴³ CP 108-132

On July 17, 2014 (the day set forth in the summons for an answer to be filed)⁴⁴ Appellants, in an abundance of caution, filed Beth Brewster's and Rob Brewster's Declarations Opposing the Port's Order to Show Cause.⁴⁵ These declarations contravened the Port's assertions in its response to Appellants' motions to abate and dismiss and affirmatively alleged that the Brewsters' community relinquished the shelf it rented in 2010 for their personal kayak and that the Port re-leased the shelf to KA for its commercial operations. It also alleged the additional 3 signed SWFAs, signed during the BUA's stated term (May 25, 2011), were signed by Beth Brewster in her representative capacity as KA's owner and operator and that KA made all the rent payments for all the shelves since April 2011. Finally, Appellants timely requested a jury trial on the same date.⁴⁶

On July 18, 2014, the show cause hearing and the Appellants' motion to dismiss and motion to abate convened. At the show cause hearing, Appellants specifically offered to pay the rent alleged and that would become due directly to the Port without prejudice to the Port's unlawful detainer action or the court registry.⁴⁷ Only Appellant's motion to abate was heard and argued because the Port requested additional time to

⁴⁴ CP 2-3

⁴⁵ CP 147-289 (Declaration of Beth Brewster in Opposition to Motion for Order to Show Cause) and CP 142-144 Declaration of Rob Brewster in Opposition to Motion for Order to Show Cause)

⁴⁶ CP 145-46

⁴⁷ VRP July 18, 2014 pps 7-8.

respond to present further evidence rebutting the Brewsters' declarations.⁴⁸ Despite hearing oral argument on only one of the three matters, on July 23, 2014, the Court issued an Order denying Appellants' motion to abate as well as their motion to dismiss. It also denied the show cause order and ordered the matter be set for jury trial.⁴⁹ Appellants filed a motion asking the court to reconsider its denying Appellants' motion to abate.⁵⁰ The trial court denied Appellants' motion on August 12, 2014.⁵¹

Inexplicably, two days later on July 25, 2014, the Court amended its order, sua sponte, and re-set the show cause hearing for the Motions Calendar on August 1, 2014.⁵² Neither Appellants nor their attorney saw the Court's order prior to the August 1, 2014 hearing.⁵³ The Port filed no further paperwork rebutting anything in the Brewsters' declarations despite that being the reason the show cause hearing was continued.

The show cause hearing took place August 1, 2014. Neither Appellants nor their attorney were present.⁵⁴ The trial court took no testimony, and the Port rested on its prior pleadings and paperwork and Appellants' non-attendance. Contrary to the scope of the show cause

⁴⁸ VRP July 18, 2014 pps 2-3.

⁴⁹ CP 301-302.

⁵⁰ CP 305-45.

⁵¹ CP 381-83.

⁵² CP 303-304.

⁵³ CP 363-64.

⁵⁴ CP 363-64.

order, the trial court did more than issue a writ of restitution; it also entered extensive findings of fact and conclusions of law and a final judgment.⁵⁵

Appellants immediately moved to vacate the court's findings, order and judgment on August 4, 2014.⁵⁶ On August 22, 2014 Appellant's motion to vacate was heard and the trial court ruled there were no procedural irregularities and that Appellant's counsel had shown excusable neglect.⁵⁷ It continued the hearing, however, to allow additional briefing on whether there was a meritorious defense. On September 2, 2014, the Court denied Appellants' Motion to Vacate concluding that Appellants had failed to show a meritorious defense.⁵⁸

After the trial court denied Appellants' motion to vacate, the Port moved for an attorney fee and cost award.⁵⁹ In its motion it relied entirely upon a unilateral attorney fee provisions in the SWFAs that stated in Paragraph 3, "In any action or proceeding for the collection of any sums which may be payable hereunder, Lessee agrees to pay to the Port a reasonable sum for the Port's expenses and attorney's fees."⁶⁰ Appellants responded alleging the Port was not entitled to attorney fees pursuant to

⁵⁵ CP 346-355.

⁵⁶ CP 360-63.

⁵⁷ CP 458-59.

⁵⁸ CP 463-66.

⁵⁹ CP 474-80.

⁶⁰ CP 494.

this clause because this was primarily an action for possession and not to collect amounts due under the SWFAs, that the time devoted to possession as opposed to collection (largely undisputed) needed to be segregated, that any attorney fee award had to be made against the party signing the SWFA (either Beth Brewster individually or KA) but not both; that the attorney fee award should be apportioned because four of the purported SWFAs were unsigned; no attorney fee award may be made against Rob Brewster's separate estate because he did not sign any SWFA; that the Port's attorney fee request was too large because it included duplicate time, time spent on appellate matters, and work performed by non-lawyers.⁶¹ On October 10, 2014 the trial court determined the Port was entitled to its attorney fees.⁶²

After determining entitlement the trial court determined the amount of attorney fees the Port was requesting. The Port amended its attorney fee request and ultimately claimed \$12,300 in attorney fees and \$781.21 in costs.⁶³ Appellants challenged the amount the Port claimed by arguing the Port had duplicative time entries and unnecessary work, was charging appellants for work not charged to the Port, was charging for non-lawyer time without first establishing the non-lawyer's experience or supervision,

⁶¹ CP 481-506.

⁶² CP 518.

⁶³ CP 529-547.

and a failure to segregate the work performed to gain possession of the shelves from work to collect sums due under the SWFAs.⁶⁴ The trial court ignored all Appellants' arguments and entered an order and supplemental judgment awarding all the attorney fees and costs the Port requested.⁶⁵

The trial court made no finding as to reasonable hours or reasonable rates.

Appellants timely appealed the trial court's final judgment and findings of fact and conclusions of law, order on show cause and motion to abate;⁶⁶ order denying reconsideration on the motion to abate;⁶⁷ denying Appellant's motion to vacate;⁶⁸ the order determining entitlement to attorney fees;⁶⁹ and the order and judgment awarding attorney fees. All these appeals were consolidated in this appeal.

V. Argument

A. The Court erred when it denied Appellants' Motion to Vacate.

1. The Court's Order Denying the Motion to Vacate contained errors of fact and law.

In its written order on Appellants' Motion to Vacate, the Court erred:

1. The conclusion of law in Paragraph 1 in the Findings and the Conclusions that there were no procedural irregularities were erroneous.⁷⁰

⁶⁴ CP 548-77.

⁶⁵ CP 590-93.

⁶⁶ CP 365-80.

⁶⁷ CP 443-49.

⁶⁸ CP 467-73.

⁶⁹ CP 587-89.

⁷⁰ CP 459 and 461, ¶1.

2. The conclusion in Paragraph 3 is erroneous because the Port was not acting in its proprietary capacity.
3. The conclusion in Findings Paragraph 4 is erroneous because a holdover tenancy had occurred after the expiration of the initial 2011 BUA, as a matter of law.⁷¹
4. The trial court's finding in its Conclusions ¶2(a) was not supported by substantial evidence because Appellants did dispute whether there was a current commercial use agreement respecting KA's commercial operations.⁷²
5. The trial court's findings in its Conclusions that the written lease agreements required the "written permission of the Port" is not supported by substantial evidence because the lease agreements (a/k/a SWFAs) stated commercial use needed the "*prior* written permission of the Port."
6. The trial court's conclusion of law in its Conclusions paragraph 2(e) were erroneous because Appellants were not in breach of the lease (and BUA) agreements at the time that the Notice to Vacate was issued.⁷³

2. The 2011 BUA continued to govern the tenancy after its fixed term expired.

In Washington State, the terms of a lease agreement for a fixed term continue to apply when the tenant continues to occupy the premises after the lease agreement expires.⁷⁴ Here, the 2011 BUA signed by the Port and

⁷¹ CP 459-60.

⁷² CP 154, ¶25 (The initial BUA terms governed a month-to-month tenancy after its term expired); CP 290-91; CP 426-442.

⁷³ CP 462 (Conclusion of Law No. 2e).

⁷⁴ *March-McLennan Bldg., Inc. v. Clapp*, 96 Wn. App. 636, 643-48, 980 P.2d 311 (1999) (citing the general rule that the terms of a fixed lease apply to the terms of a holdover tenancy and referencing and adopting the principles found in the laws of other states).

KA⁷⁵ did not automatically expire when its stated one-year term ended; rather the BUA continued to govern KA's holdover month-to-month tenancy after the fixed term stated in the BUA.⁷⁶ To be sure, it is uncontested that KA, and not the Brewsters, paid the rent for the shelves up until the Port refused KA's tender in June 2014.⁷⁷ Therefore, the trial court erred when it concluded that Appellants were in breach of the lease agreements at the time that the Port issued its Notice to Terminate Tenancy on May 22, 2014.⁷⁸ Moreover, the Port brought a without cause unlawful detainer action based upon the lease agreements being terminated rather than a for cause unlawful detainer action based upon a breach of an agreement.⁷⁹

3. The trial court erred when it diminished Appellants' First Amendment Retaliation defense because the Port was purportedly acting in its proprietary capacity.

The Court erred when it *sua sponte* raised the issue that the Port was acting in its proprietary capacity and the Appellants are not entitled to as much First Amendment protection. Without conceding the Port was acting in its proprietary capacity when it was operating public facilities,

⁷⁵ CP 119 – 23 (Copy of the Business Use Agreement attached to the Port's Response to Appellants' Motion to Dismiss).

⁷⁶ CP 153 (Beth Brewster's declaration in support of Opposition to Show Cause Hearing) at ¶18 -21.

⁷⁷ CP 150, ¶13.

⁷⁸ CP 46, ¶2(e); and CP 6, ¶5.2.

⁷⁹ CP 4–7.

Appellants suggest the Port's capacity is not relevant as shown in *Port of Longview v. International Raw Materials, Ltd.*⁸⁰ There, this Court extended First Amendment free speech protection to commercial tenants who are being evicted by a port district because they were complaining about the Port District's decisions regarding the property upon which the tenant was operating.⁸¹

The cases cited by the trial court are inapposite. They are cases involving ordinances or regulations prohibiting free speech activities in a non-public forum. Even in those cases, the government, unlike a private landlord, cannot act unreasonably or in an "arbitrary, capricious, or invidious" manner.⁸²

4. The Court erred when it concluded there were no procedural irregularities and not vacating the final orders in this matter

a. There were irregularities in the show cause proceedings.

There were procedural irregularities in this case. First, commercial unlawful detainer actions pursuant to ch. 59.12 RCW, unlike residential unlawful detainer actions pursuant to ch 59.18 RCW, do not require show

⁸⁰ 96 Wash. App. 431, 979 P.2d 917 (2005)

⁸¹ *Longview*, 96 Wash. App. at 442 - 444.

⁸² *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303, 94 S. Ct. 2714, 41 L.Ed.2d 770 (1974)

cause hearings.⁸³ Appellants were, therefore, justifiably surprised to have a show cause hearing.⁸⁴

Second, if the court chooses to conduct a show cause hearing, it should determine only who possesses the premises until the trial and not the ultimate issue who has the right to possess the premises.⁸⁵ The ultimate issue needs to be tried by a jury.⁸⁶ Here, Appellants timely demanded a jury trial.⁸⁷

Third the show cause order did not provide notice to Appellants that the trial court would decide the ultimate possession issue. It stated Appellants were to show cause “why a Writ of Restitution should not be issued restoring the Plaintiff the possession of the property...”⁸⁸ The show cause order did state the trial court could grant “such other relief as may be prayed for in the complaint,” but that provision cannot override the statutorily required procedures in ch. 59.12 RCW because unlawful detainer proceedings are special proceedings.⁸⁹

⁸³ *IBF, LLC v. Heuft*, 141 Wash. App. 624, 634, 174 P.3d 95, 100 (2007).

⁸⁴ *IBF*, 141 Wash. App. at 634-35. (“it is understandable that a party may be surprised by the use of a show cause hearing in a commercial landlord-tenant dispute”)

⁸⁵ *Id.* at 634. A show cause hearing is not the final determination of the rights of the parties in an unlawful detainer action.” (*citation omitted*). Instead, show cause hearings are summary proceedings to determine the issue of possession pending a lawsuit. (*citation omitted*).

⁸⁶ RCW 59.12.130

⁸⁷ CP 145-46.

⁸⁸ CP 22

⁸⁹ CR 81(a); and *Christensen v. Ellsworth*, 162 Wash. 2d 365, 374, 173 P.3d 228, 232-33 (2007).

As a result, Plaintiffs were deprived substantive and procedural due process when the trial court issued final orders disposing of the case when the pleadings showed fact issues that needed to be resolved. Both the Federal and Washington State Constitution gave Appellants the substantive due process right to have the fact issues raised in the pleadings decided by a jury.⁹⁰ They were deprived this right at a show cause hearing that was supposed to determine only who was entitled to possession of the premises pending trial.

Not only were Appellants deprived of their substantive due process right to a jury trial, they were also denied procedural due process when the trial court entered final orders at a show cause hearing that was supposed to decide only the issue of who would possess the shelves pending trial. Procedural due process requires notice and an opportunity to be heard.⁹¹ In this case, the Appellants did not receive notice that they would lose their entire case, especially where the pleadings in the case showed there were material fact issues that need to be resolved.

At the very least, there was a procedural irregularity sufficient to vacate the final orders under CR 60(b)(1). Irregularity has been defined as “the want of adherence to some prescribed rule or mode of proceeding;

⁹⁰ Article I, §21 Wash. Const.; RCW 59.12.030; and *Tuschoff v. Westover*, 60 Wn.2d 722, 724, 375 P.2d 254 (1962); and *Hughes v. Heinze*, 268 F.2d 864, 869 (9th Cir. 1959)

⁹¹ *In re Detention of Morgan*, 180 Wash. 2d 312, 319, 380 P.3d 774 (2014).

and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit or doing it in an unseasonable time or improper manner.”⁹² It includes the premature entry of a judgment.⁹³ If there is an irregularity in the proceedings there is no requirement the moving party show a meritorious defense.⁹⁴ Here, the trial court held a residential unlawful detainer case, decided the entire case in a summary fashion depriving Appellants of their jury trial, and prematurely entered final orders. As such, the final orders should be vacated.

Because there were both substantive and procedural due process violations as well as irregularities in the proceedings, the trial court’s final orders were erroneous and it abused its discretion in denying Appellant’s motion to vacate the final papers based on Appellants not asserting a meritorious defense.

b. Appellants’ affirmative defenses revealed triable issues.

As noted above, in an unlawful detainer action, the allegations in the pleadings determine whether a trial is required.⁹⁵ The “pleadings” in this case are the Port’s complaint and the Appellants’ answer.⁹⁶ In its

⁹² *Mosbrucker v. Greenfield Implement, Inc.*, 54 Wash. App. 647, 652, 774 P.2d 1267, 1270 (1989).

⁹³ *Muscek v. Equitable Sav & Loan Ass’n*, 29 Wash. 2d 546, 552-53, 717 P.2d 856 (1946).

⁹⁴ *Mosbrucker*, 54 Wash. App. at 652.

⁹⁵ The pleadings are: the Port’s amended complaint and Appellants’ Answer and Affirmative Defenses.

⁹⁶ CR 7(a).

Complaint, the Port's allegations were limited to alleging that it provided Appellants with Notice of Termination of Tenancy and that the notice period had run.⁹⁷

In its Answer, Appellants disputed the Port's allegations and asserted affirmative defenses alleging: failure to state a claim; violation of unlawful discrimination under the Washington and U.S. constitutions; retaliation in response to exercise of free speech; due process violations; equal protection violations; violation of the Contract clause; the BUA is the governing contract; and that Rob Brewster was not separately liable.⁹⁸

c. The pleadings revealed facts issues for a jury trial.

Plaintiffs alleged gender discrimination as a substantial motivating factor in the Port's decision to evict Appellants.⁹⁹ In one highly factually analogous case, *Josephinium Associates v. Kahli*, the Court stated:

The right to be free from discriminatory eviction is a substantive legal right, and ordinary civil remedies are unavailing in the face of a summary eviction proceeding. A landlord cannot simply decide to evict all tenants of color. If unlawful discrimination is the reason for an eviction, the defense certainly affects the tenant's right of possession.¹⁰⁰

⁹⁷ CP 1-18.

⁹⁸ CP 138-141.

⁹⁹ CP 140, ¶¶3 and 6.

¹⁰⁰ *Josephinium Associates v. Kahli*, 111 Wn. App. 617, 630, 45 P.3d 627(2002).

Washington Courts have found that Discrimination is a proper defense to an unlawful detainer action when it arises out of the tenancy.¹⁰¹ Here, Appellants alleged gender discrimination that implicates both the U.S. Constitution's Fourteenth Amendment and the Washington Law Against Discrimination (WLAD). The Port's Complaint makes no mention of any discriminatory acts. This allegation, therefore, placed in dispute whether the Port acted improperly when it issued a Notice of Termination.

Appellants further alleged the Port retaliated against the Port because KA and Beth Brewster exercised their free speech rights under the First Amendment to the U.S. Constitution.¹⁰² A defense of retaliation is properly asserted in defense of an unlawful detainer action. *See Port of Longview v. International Raw Materials, Ltd.* case.¹⁰³ Appellants' pleadings, therefore, denied the Port's allegations in doubt and raised material fact issues that were statutorily required to be tried by a jury.

Appellants further alleged that the Port has impermissibly interfered with its contract rights in violation of the Contracts Clause of the U.S. Constitution.¹⁰⁴ Consistent with *Port of Longview* and *Josephinium Associates*, when a constitutional violation arises out of the tenancy, it is properly asserted as a defense to an unlawful detainer action.

¹⁰¹ *Id.* at 626.

¹⁰² CP 140, ¶4.

¹⁰³ 96 Wn. App. 431, 979 P.2d 917 (1999).

¹⁰⁴ CP 140, ¶8.

Appellants allege that the Port's complaint fails to state a claim upon which relief can be granted under CR 12(b)(6). A 12(b)(6) analysis is limited to the face of the pleadings.¹⁰⁵ As noted above, at minimum, there should have been a factual determination regarding whether the shelves that were being rented were "real property."

Appellants also alleged that the BUA, not the SWFAs attached to the Port's complaint, governed Appellants' tenancy.¹⁰⁶ The Port's Complaint contended the opposite.¹⁰⁷ By raising a dispute regarding which contract(s) governed the tenancy, a jury trial was required to resolve this issue of material fact.

Appellants also raised the issue of whether Beth Brewster was cloaked in the immunity of a corporate agent when she signed the four of the 8 SWFAs (4 were unsigned).¹⁰⁸ Appellants' answer, therefore, placed this material fact in dispute and resolution by jury trial was required.

There was also an issue as to whether the shelves were real or personal property. On July 2, 2014, the Port filed its original unlawful detainer

¹⁰⁵ Under CR 12(b)(6), dismissal is appropriate only when it appears beyond a doubt that the claimant can prove no set of facts, consistent with the complaint, which would justify recovery. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007).

¹⁰⁶ CP 140-41, ¶¶ 10-11.

¹⁰⁷ CP 1-18. In fact, the Port attached all of the alleged agreements to the complaint except the BUA.

¹⁰⁸ CP 140, ¶10.

complaint.¹⁰⁹ It subsequently filed an amended complaint on July 16, 2014.¹¹⁰ In neither of these filings did it allege that the property in question, “storage racks,” is “real property.” In fact, Appellants submitted the only evidence describing the true nature of the shelves. Beth Brewster’s Declaration in Opposition of Motion to Show Cause stated:

POK’s shelves it rented, and the racks upon which they are located, are not permanently affixed to the dock or other structure and, in fact, POK was willing to move the racks for KA.¹¹¹

In its Response to Appellants’ Motion to Dismiss, the Port did not deny Beth Brewster’s description of how the racks were not affixed to any real property; rather it offered only the following cursory response: “the Kingston Marina...is undeniably real property.”¹¹²

A review of Washington case law indicates that just because a thing is located on real property, it is not necessarily automatically classified as real property. Here, the issue is whether the movable “storage racks” are fixtures, and therefore, real property. If not fixtures, the movable storage racks are personal property. Under the common law, whether an item is a fixture or personal property turns on a three-part test: Under the test,

¹⁰⁹ CP 1-18.

¹¹⁰ CP 104-07.

¹¹¹ CP 154, ¶22.

¹¹² CP 111 (“The issue in this case is whether or not the Appellants have the rights to continue to store their kayaks and paddleboards, at the Kingston Marina, which is undeniably real property.”).

personal property becomes a fixture if (1) it is actually annexed to the realty, (2) it is adapted to the use of the realty, and (3) the annexing party intended a permanent attachment.¹¹³ Each requirement must be met before an item may be classified as a fixture.¹¹⁴ Here, there was a genuine fact issue whether the movable storage racks were a fixture because they were not affixed to or annexed to the Port's real property. There is no evidence, circumstantial or otherwise, whether this element of the test was met. Therefore, the Court should have determined that the movable storage racks were personal property and the property was not the jurisdiction of an unlawful detainer action.

There was also a disputed issue as to whether Rob Brewster, individually and as to his separate estate, could be liable. In its Unlawful Detainer Complaint, the Port sued Rob and Beth Brewster both individually and as a marital community alleging they both entered into written agreements attached to the complaint.¹¹⁵ The 8 SWFAs attached to the Port's complaint, however, are either unsigned or signed only by Beth Brewster.¹¹⁶ In their Motion to Dismiss and Reply, Appellants argued extensively that there was no factual basis on which to sue Rob Brewster

¹¹³ *Dep't of Revenue v. Boeing Co.*, 85 Wn.2d 663, 667, 538 P.2d 505 (1975)

¹¹⁴ *Id.* at 668.

¹¹⁵ CP 1 (Caption), and 6 (§ IV).

¹¹⁶ CP 11-18.

separately because he never individually signed any agreement with the Port.¹¹⁷ The trial court summarily denied the motion without argument.

In Washington, all property acquired during marriage is presumptively community property.¹¹⁸ Furthermore, when one spouse's act causes community liability, "there shall be no recovery against the separate property of the other spouse...except in cases where there would be joint responsibility if the marriage...did not exist."¹¹⁹

At most, Beth Brewster signed the SWFAs in her own name and bound the marital community. There is nothing in the manner in which she signed that said she bound her husband's separate property. She signed the agreement in her own name. The presumption, in the law, is that the community is bound, not the separate estates.

The Port argues that Rob Brewster somehow ratified the signing of the agreements. Ratification, however, was not asserted by the Port in its pleadings (complaint). Moreover, the sole evidence presented on this

¹¹⁷ CP 83-85 (Statement of Facts); 86-87 (Argument RE separate property); CP 291-292 (Argument RE separate property).

¹¹⁸ *In re Marriage of Short*, 125 Wn.2d 865, 870, 890 P.2d 12 (1995).

¹¹⁹ RCW 26.16.190. *See also, Sunkidd Venture, Inc. v. Snyder-Entel*, 87 Wn. App. 211, 216, 941 P.2d 16, 19 (1997) ("Usually, when a spouse's act creates a community liability, it is enforceable only against the community property and the acting spouse's separate property.")

issue is that all payments were made by KA for renting the shelves.¹²⁰ As such, it was a fact question for the jury to decide.¹²¹

d. It is still unclear who the contracting parties are.

In its complaint, the Port alleged that all three Appellants entered into contracts with the Port.¹²² However, it subsequently has argued that only the Brewsters entered agreements with the Port.¹²³ Appellants argued that Beth Brewster solely signed the three May 2011 SWFAs in her corporate capacity as KA's managing member.¹²⁴ Because this was also a genuine fact issue, a jury trial was necessary.

e. There were irregularities in the proceedings.

The Court abused its discretion when it failed to vacate its Order on Show Cause, Findings of Fact and Conclusions of Law. The Court's analysis was based on an incorrect application of the law. Application of an incorrect legal analysis or other error of law can constitute abuse of discretion.¹²⁵ This happened here. Therefore, this Court should reverse the Court's error and vacate.

5. The Court erred when it concluded there was no prima facie evidence of a meritorious defense.

¹²⁰ CP 150, ¶13.

¹²¹ *Smith v. Dalton*, 58 Wash. App. 876, 881, 795 P.2d 706, 709 (1990).

¹²² CP 1-18; CP 104-07.

¹²³ CP 414-15. The Port argues that the leases were all signed by Beth and Rob Brewster and they, therefore, are solely liable.

¹²⁴ CP 150, ¶15; CP 119-124 (The original BUA speaks for itself and indicates that Rob and Beth Brewster signed it on behalf of Kingston Adventures.).

¹²⁵ *State v. Kinneman*, 155 Wn.2d 272, 289, 119 P.3d 350 (2005).

In addition to the trial court's error in concluding there were no irregularities in the proceedings, the Court also erred when it failed to find Appellants' established a meritorious defense. While it is conceded that a party moving to vacate under CR 60(b)(1) for excusable neglect must show there is substantial evidence supporting a prima facie defense.¹²⁶

a. The Court properly found excusable neglect

The Court concluded, after considering evidence and argument from Appellants' counsel, that excusable neglect was established regarding Appellants' counsel's claim that he did not receive timely notice of the reset show cause hearing.¹²⁷ The Port has not filed a cross-appeal. Nobody has challenged that finding of fact; it is thus a verity on appeal.¹²⁸

b. There was substantial evidence supporting multiple prima facie defenses.

To determine whether the moving party has shown a prima facie defense the trial court must review the evidence, drawing all reasonable inferences in the light most favorable to the moving party.¹²⁹ The moving party has presented a prima facie defense "if it produces evidence that, if later believed by the trier of fact, would constitute a defense to the claims

¹²⁶ *Little v. King*, 160 Wn.2d 696, 703-04, 161 P.3d 345 (2007).

¹²⁷ CP 459 (Finding of Fact No. 2).

¹²⁸ *Pier 67, Inc., v. King Cy.*, 71 Wn.2d 92, 94, 426 P.2d 610 (1967) (An unchallenged finding is a verity on appeal.)

¹²⁹ *Rosander v. Nightrunners Transp., Ltd.*, 147 Wn. App. 392, 404, 196 P.3d 711 (2008).

presented."¹³⁰ In making its determination, the trial court does not weigh the evidence.¹³¹

The Court's analysis of Appellants' evidence is limited to an analysis of the Appellants' evidence supporting its affirmative defenses. Here, Appellants' presented substantial evidence supporting its claims of discrimination and retaliation in violation of the US Constitution. Appellants direct this Court to two declarations submitted by Beth Brewster in opposition to the motion to show case and in support of the motion to vacate.¹³² In these declarations, Ms. Brewster provides extensive factual evidence of disparate treatment, retaliation and gender discrimination. See, especially the list of discriminatory acts done by the Port and its agents against Ms. Brewster.¹³³

1. Appellants produced sufficient evidence of a prima facie First Amendment retaliation defense.

The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

¹³⁰ *Id.* at 404.

¹³¹ *Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wn. App. 829, 835-36, 14 P.3d 837 (2000).

¹³² CP 147-289 and 426 – 442.

¹³³ CP 155, ¶28, subparts a –b; CP 156-161, ¶30 a – c, subparts (i) - (x).

peaceably to assemble, *and to petition the Government for a redress of grievances.*”¹³⁴

According to *Port of Longview v. International Raw Materials, Ltd.*¹³⁵, free speech rights are worthy of protection where government is the landlord of a commercial tenant who is a private citizen.¹³⁶ Courts use a burden-shifting analysis to analyze an unlawful affirmative defense based on First Amendment retaliatory conduct. To establish a *prima facie* case of retaliatory eviction in an unlawful detainer action against a government landlord based upon the exercise of First Amendment rights, the proponent alleging a constitutional violation must first demonstrate a *prima facie* case that (1) the disputed speech addressed a matter of public concern, and (2) the speech was a substantial or motivating factor in the government landlord's adverse decision to seek eviction.¹³⁷

Appellants produced substantial evidence of a *prima facie* defense based on protected speech. First, the speech dealt with a public concern. Appellants alleged that, beginning in December 2013, Beth Brewster began publically criticizing the Port for the way it was managing the property on which she was renting storage racks: inquiring whether the security cameras were operative, not allowing the community to use the

¹³⁴ U.S. Const. amend. I.

¹³⁵ 979 P.2d 917, 96 Wn. App. 431 (1999)

¹³⁶ See *Port of Longview*.

¹³⁷ See *White v. State*, 131 Wash.2d 1, 10, 929 P.2d 396 (1997)

Port's tent for a winter event, and the Port's disparate treatment of KA from male-run businesses and others similarly situated.¹³⁸

Second, Appellants produced substantial evidence showing that a retaliatory motive was a substantially motivating factor in the port's decision to terminate KA's tenancy without cause. Beth Brewster began making public statements about her concerns about how the Port was running the Port.¹³⁹ In apparent response to her public criticisms, in April 2014, the Port presented KA with a proposed new BUA that contained a non-disparagement clause that prohibited Appellants from saying anything negative about the Port.¹⁴⁰ After KA refused to sign the BUA, the Port issued a notice terminating KA's tenancy without cause.¹⁴¹ From the sequence of events, there is substantial evidence that Appellants' exercise of their free speech rights was a substantial motivating factor in the Port's decision to terminate KA's tenancy and force KA out of the Port.¹⁴²

These are the only two factors necessary to constitute a prima facie defense. Like discrimination cases, a prima facie retaliation case or defense is the evidence necessary to create a rebuttable presumption and

¹³⁸ CP 156, ¶ 29.

¹³⁹ CP 150-156, ¶¶ 26-31.

¹⁴⁰ CP 156 – 157, ¶30 and subpart (a); and CP 250-264 (Exhibit Q).

¹⁴¹ CP 10 (Notice of Termination).

¹⁴² As noted above, Kingston Adventures was governed by the initial BUA as a hold-over tenant which made refusal to sign the new BUA an improper basis on which to evict Kingston Adventures.

shift the burden of proof to the other party. There is a 3-step burden-shifting protocol.¹⁴³ First, the person asserting the claim or defense “bears the burden of making a prima facie showing...”¹⁴⁴ Once the person asserting the claim makes this showing, “then a legally mandatory, rebuttable presumption...temporarily takes hold, and the evidentiary burden shifts to the defendant to produce admissible evidence of a “legitimate, nondiscriminatory explanation” for its actions.¹⁴⁵ There is no reason to treat a First Amendment case any differently. There is no reason to treat an affirmative defense claimed by a defendant differently from an action brought by a plaintiff. The prima facie case or defense, therefore, is made if it shifts the burden to the other party.

Once Appellants demonstrated the prima facie retaliation defense, the burden then shifted to the Port to prove it would have sought eviction regardless of the protected conduct, i.e., *that it had another legal basis for pursuing the unlawful detainer action.*¹⁴⁶ The trial court should never have reached the second step, however, because Appellants had shown evidence of the prima facie defense. Despite this, the trial court erred when it went to this second step and decided the entire case adversely to Appellants.

¹⁴³ *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 354, 172 P.3d 688, 696 (2007)

¹⁴⁴ *Hegwine*, 162 Wash. 2d at 354.

¹⁴⁵ *Id.*

¹⁴⁶ See *White*, 131 Wash.2d at 11, 929 P.2d 396.

Not only did the trial court err when it went to the second step after Appellants established a prima facie defense, it also improperly concluded that Appellants had breached the SWFAs and could not assert the retaliation defense. Even if the SWFAs were the operative agreements (a point hotly contested by Appellants), the Port still had no legal basis for pursuing the unlawful detainer action. The SWFAs specifically state that the Port was required to give Appellants notice of any violation and allow Appellants 30 days to cure the violation before bringing an unlawful detainer action.¹⁴⁷ If the landlord brings an unlawful detainer action before the curative period stated in the lease, then there is a jurisdictional defect, and the superior court never has subject matter jurisdiction to consider the unlawful detainer issue.¹⁴⁸ That means even if Appellants were in technical noncompliance with a lease provision, the noncompliance did not give rise to a “*legal basis* for pursuing the unlawful detainer action.” As such, the Port never even met its burden of proof on the second step of the 3-step burden shifting test.

Finally, even if the Port had met its burden at the second step, Appellants still had the right to rebut the Port’s proffered explanation for

¹⁴⁷ CP 12 at ¶ 3; CP 13 at ¶ 3; CP 14 at ¶ 3; CP 16 at ¶ 3.

¹⁴⁸ *Cnty. Investments, Ltd. v. Safeway Stores, Inc.*, 36 Wn. App. 34, 38, 671 P.2d 289, 291 (1983).

its unlawful detainer action.¹⁴⁹ If Appellants rebutted the Port's proffered explanation by direct evidence of retaliatory motive, even if insubstantial, it created a genuine fact issue for trial.¹⁵⁰ Here, Appellants produced direct evidence of the Port's retaliatory motive. It produced the BUA red-lined by Port Commissioner Bruce McIntyre that inserted a non-disparagement clause conditioning KA's continued use of the storage spaces on Appellants not saying anything negative about the Port.¹⁵¹ This is direct and dramatic evidence of the Port's motive to chill Appellants' free speech. Because Appellants produced direct evidence of the Port's motive to quiet Appellants' free speech rights, a triable issue - which is far greater than evidence of a prima facie defense - was presented and the trial court erred in concluding that Appellants failed to show a meritorious defense when denying their motion to vacate.

2. KA produced sufficient evidence to establish a prima facie gender discrimination defense.

Discrimination is a proper defense to an unlawful detainer action when it arises out of the tenancy.¹⁵² To assert the claim, the proponent must prove that the eviction resulted from the discrimination.¹⁵³ Here,

¹⁴⁹ *Hegwine v. Longview Fibre Co.*, 162 Wash. 2d 340, 354, 172 P.3d 688, 696 (2007)

¹⁵⁰ *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998), as amended (Aug. 11, 1998).

¹⁵¹ CP 262.

¹⁵² *Josephinum Associates v. Kahli*, 45 P.3d 627, 111 Wn. App. 617, 626 (2002).

¹⁵³ *Id.* at 630.

Appellants allege that the Port engaged in unconstitutional gender discrimination in violation of both the Equal Protection Clause of the United States Constitution and the Washington Law Against Discrimination (“WLAD”).

The equal protection clause of the Fourteenth Amendment protects individuals against intentional, arbitrary discrimination by government officials.¹⁵⁴ Gender is a quasi-suspect class that triggers intermediate scrutiny in the equal protection context; the justification for a gender-based classification thus must be exceedingly persuasive.¹⁵⁵

In support of its gender-discrimination claims, Appellants provided extensive evidence of: (1) The Port’s history of preferring men over women¹⁵⁶; (2) numerous examples of instances where the Port has enforced its rules and regulations against KA and Beth Brewster and not against similarly situated male commercial tenants.¹⁵⁷ Appellants also alleged the Port adopted a policy to enforce its rules and regulations in a disparate manner against women, a quasi-protected class under the United States Constitution.¹⁵⁸ Proof of discrimination under the WLAD requires

¹⁵⁴ *Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 1074–75 (2000).

¹⁵⁵ *United States v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 2275 (1996).

¹⁵⁶ CP 155, ¶27.

¹⁵⁷ CP 155- 161 (numerous examples of disparate treatment).

¹⁵⁸ Under 42 USC § 1983, customary actions of a municipality and its agents is actionable. The *Monell* Court determined that a Section 1983 claim could not be maintained against a municipality purely on the basis of respondeat superior, but that such a claim could be maintained if "the execution of a government's policy or custom,

proof, like the federal standard, that the gender discrimination was a substantial factor in the decision adverse to the aggrieved party.¹⁵⁹

The extensive evidence produced by Appellants is sufficient to show a *prima facie* meritorious defense because it operates to shift the burden of producing evidence to the Port. Once Appellants produced their prima facie evidence showing a custom or policy implicating the Equal Protection Clause, the burden shifted to the Port to show, under intermediate scrutiny, that the challenged policy or custom is “narrowly tailored to further a substantial governmental interest.”¹⁶⁰ The Port did not contradict Appellants’ gender discrimination assertions or meet its burden of proof. As such, Appellants established a meritorious prima facie gender discrimination defense.

3. KA produced evidence of a prima facie impairment of contract defense.

Article 1, Section 10, Clause 1 of the United States Constitution states: “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.” Courts analyze a Contract clause claim under a three-part test. First, “[t]he threshold inquiry is ‘whether the state law has, in fact,

whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury.” *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978).

¹⁵⁹ *Allison v. Hous. Auth.*, 118 Wn.2d 79, 85-86, 95, 821 P.2d 34 (1991) (acknowledging the WLAD’s requirement of liberal construction but adopting an intermediate “substantial factor” standard of proof).

¹⁶⁰ *FCC v. League of Women Voters*, 468 U.S. 364, 380, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984).

operated as a substantial impairment of a contractual relationship."¹⁶¹

Second, the Court considers whether there is "a significant and legitimate public purpose behind the regulation" causing the substantial impairment.¹⁶² Finally, the Court must consider whether "the adjustment of 'the rights and responsibilities of the parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption."¹⁶³

In this instance, the Contract Clause violation is asserted against the municipality under 42 USC § 1983. Here, conditioning the Port's contract with KA, and the continuing month-to-month holdover tenancy, on the Appellants not saying anything negative about the Port impaired KA's contract rights. As noted above, the Port has failed to assert any legitimate basis for making such conditions. In fact, there is no valid basis under law for government to chill free speech through a contract.

If a state's law is found to substantially impair a contract, without a significant and legitimate public purpose, it is unconstitutional, without

¹⁶¹ *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978)).

¹⁶² *Energy Reserve Group, Inc.* at 411.

¹⁶³ *Id.* at 412 quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977)).

consideration of the third prong.¹⁶⁴ Appellants, therefore, produced prima facie evidence of this affirmative defense as well. The Port never contradicted by fact or argument Appellants' contract impairment defense. The trial court never addressed the issue.

B. The Court abused its discretion when it denied Appellants' Motion to Abate.

Under the priority of action doctrine, "the court which first gains jurisdiction of a cause retains the exclusive authority to deal with the action until the controversy is resolved."¹⁶⁵ This rule applies where two actions share "identity"¹⁶⁶ of certain elements. Generally, courts look to whether the actions share identity of (1) subject matter, (2) parties, and (3) relief.¹⁶⁷ Though the general rule has three elements, the elements are not applied inflexibly.¹⁶⁸ Rather, courts have looked beyond these elements and to the policy behind the doctrine.¹⁶⁹ This Division has previously found, in *State ex rel. Evergreen Freedom Foundation v. Washington*

¹⁶⁴ See *Anderson Marketing, Inc. v. Design House, Inc.*, No. 3-92-Civ-548 at 8 (D.Minn. Mar. 17, 1995); *McDonald's Corp. v. Nelson*, 822 F. Supp. 597, 609 (D.Iowa 1993), *aff'd sub nom, Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3d 383 (8th Cir. 1994).

¹⁶⁵ *Bunch v. Nationwide Mutual Ins. Co.*, 180 Wn. App. 37, 39, 321 P.3d 266 (2014) citing *City of Yakima v. Int'l Ass'n of Fire Fighters. AFL-CIO, Local 469*, 117 Wn.2d 655, 675, 818 P.2d 1076 (1991).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* citing *Sherwin v. Arveson*, 96 Wn.2d 77, 80, 633 P.2d 1335 (1981)), review denied, 148 Wn.2d 1020 (2003)

¹⁶⁸ *Am. Mobile Homes of Wash., Inc. v. Seattle-First Nat'l Bank*, 115 Wn.2d 307, 321, 796 P.2d 1276 (1990).

¹⁶⁹ *Id.*

Education Ass'n,¹⁷⁰ that the underlying purpose of the three elements is to determine whether the "identity" of the actions is "such that a decision in one tribunal would bar proceedings in the other tribunal because of res judicata."¹⁷¹

First, there is no dispute that KA filed its federal lawsuit before the Port filed its Unlawful Detainer action.¹⁷² Second, the subject matter of the lawsuits is predominantly the same. In the federal lawsuit, KA asserts numerous federal violations including gender discrimination, retaliation for exercising First Amendment rights; unconstitutional impairment of contracts; Washington Law Against Discrimination (RCW 49.40 ff); and the Privileges and Immunities provision in the Washington Constitution.¹⁷³ These same claims are asserted as affirmative defenses in Appellants' Answer to the Port's Unlawful Detainer Complaint.¹⁷⁴

Here, KA is a party to both actions, so there is identity of parties. The Port cannot destroy this identity by adding KA's owners individually. Moreover, there is identity if a determination on the merits in the second action would preclude litigation of the same issues in the first action.¹⁷⁵

¹⁷⁰ 111 Wn. App. 586, 606-607, 49 P.3d 894 (2002).

¹⁷¹ *Bunch at 41-42.*

¹⁷² CP 42-43 (federal lawsuit dated June 26, 2014); CP 1 (state complaint stamped July 2, 2014).

¹⁷³ CP 29-42 (Copy of federal complaint attached to Motion to Abate).

¹⁷⁴ CP 138-141.

¹⁷⁵ *Landry v. Luscher*, 95 Wn. App. 779, 783-84, 976 P.2d 1274, 1277-78 (1999)

There is also issue identity between the two actions because issue and claim preclusion would apply if KA's discrimination, retaliation, and contract impairment defenses were determined on the merits in this action which would bar KA from raising the defenses in the federal action.¹⁷⁶

C. The Court erred in concluding the Port was entitled to attorney fees.

The attorney fees provision in the signed SWFAs and the other unsigned agreements limits attorney fees to collection actions only. Any ambiguities in the attorney fee clause in the Port's moorage agreement should be construed against the Port because it drafted the agreement.¹⁷⁷ It is similar to the narrow language in *Keyes v. Bollinger*¹⁷⁸ where the attorney fee clause was held to be limited to actions to pay a broker's commission and not to actions arising out of the contract.¹⁷⁹ There is no language in the SWFAs that allow any attorney fees award for repossessing the leased premises.¹⁸⁰ And this was an action primarily to recover possession of the premises because Appellants attempted to pay

¹⁷⁶ See 4 part test in *Landry* 95 Wn. App. at 307; *State v. Williams*, 132 Wn.2d 248, 254, 937 P.2d 1052 (1997).

¹⁷⁷ *Keyes v. Bollinger*, 27 Wn. App. 755, 761, 621 P.2d 168, 171 (1980).

¹⁷⁸ *Id.* at 761,

¹⁷⁹ *Id.*

¹⁸⁰ See *First Union Mgmt., Inc. v. Slack*, 36 Wn. App. 849, 858, n.8, 679 P.2d 936, 942 (1984) (the lease provided: "In the event suit is brought for recovery of the Leased Premises ..., Tenant shall pay to Landlord all expenses incurred in the prosecution of such suit, including reasonable attorney's fees to the extent permitted by law.").

rent, but the Port refused to accept the rent.¹⁸¹ Appellants also went into court and offered to pay the Port the rent without prejudice to the Port's rights to proceed with its unlawful detainer proceeding, but the Port refused both the tender and offer.

Finally, even if the Port alleges rent due, ultimately it is pursuing damages unrelated to the Lease. Damages awarded in an unlawful detainer action are unrelated to the voided lease. "The amount of damages occasioned by an unlawful detainer and holding over is based upon the fair value of the use of the premises rather than the amount of rent agreed upon by the parties **under a lease no longer in effect.**"¹⁸²

Finally, if this Court were to vacate or reverse the findings of fact and conclusions of law and judgment, then the Port would no longer be a prevailing party and would not be entitled to attorney fees.

1. The Trial Court made no finding as to reasonable hours or hourly rate.

Courts cannot simply accept a counsel's fee affidavits; rather the court must make adequate findings of fact for appellate review.¹⁸³ They must

¹⁸¹ CP 153, ¶20; and CP 206-208 (Exhibit L).

¹⁸² *Lenci v. Owner*, 30 Wn. App. 800, 803, 638 P.2d 598, (1981) *citing Owens v. Layton*, 133 Wn. 346, 233 P. 645 (1925).

¹⁸³ *Mahler v. Szucs*, 135 Wn.2d 398, 434-35, 957 P.2d 632 (1998) (citations omitted).

make findings that the hours are reasonable and the hourly rates are reasonable.¹⁸⁴ This the trial court did not do.

2. The Trial Court failed to require the Port to segregate its fees related to regaining possession of the shelves from its fees related to collecting amounts due under the SWFAs.

If an attorney fees recovery is authorized for only some claims, the fee award must properly reflect a segregation of the time spent on issues for which attorney fees are authorized from time spent on other issues.¹⁸⁵ Here, the trial court erred when it failed to require the Port to segregate its attorney fees between its efforts to re-take possession of the premises, for which there was no entitlement to attorney fees, and the incidental efforts to collect June rent under the SWFAs.

3. The Trial Court failed to reduce the Port's attorney fee request by duplicate time and time never billed to the client.

The Washington Supreme Court has said, “the total hours an attorney has recorded for work in a case is to be discounted for hours spent on “unsuccessful claims, duplicated effort, or otherwise unproductive time.”¹⁸⁶ It follows from this rule that duplicate line items in a fee request must also be discounted. The trial court failed to do so. Additionally, time never billed to the client should not have been included in the award.

¹⁸⁴ *Berryman v. Metcalf*, 177 Wn. App. 644, 660, 312 P.3d 745 (2013) (citations omitted).

¹⁸⁵ *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 450, 815 P.2d 1362 (1991); *Travis v. Washington Horse Breeders Ass'n, Inc.*, 111 Wn.2d 396, 410–11, 759 P.2d 418 (1988).

¹⁸⁶ *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193(1983).

4. The Trial Court improperly awarded the Port attorney fees for its non-lawyer time without first showing the non-lawyer's experience and supervision.

When requesting an attorney fee award for non-lawyer time, the requesting party must establish that the services were supervised by an attorney and the non-lawyer's qualifications.¹⁸⁷ The Port failed to provide evidence on these required elements, and the trial court erred in awarding fees for non-lawyer time.

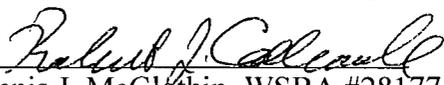
5. The Trial Court erred when it awarded the Port its costs.

RCW 4.84.110 provides that costs are not to be awarded when a party seeks to collect monies that were tendered prior to the action being commenced and that party goes into court and offers the money. That is what happened here. The trial court erred in awarding the Port its costs.

DATED this 6th day of February, 2015.

Respectfully submitted,

Western Washington Law Group, PLLC


Dennis J. McGlothlin, WSBA #28177
Robert J. Cadranell, WSBA #41773
Attorneys for Appellant
7500 212th St SW, Suite 207
Edmonds, WA 98026
Phone 425.728.7296
Fax 425.955.5300

¹⁸⁷ *Absher Constr. Co. v. Kent School Dist.*, 79 Wn. App. 841, 845, 917 P.2d 1086 (1995).

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the below written date, I caused delivery of a true copy of Appellants' AMENDED Opening Brief on the following individuals:

Office of the Clerk State of Washington Court of Appeals, Div. II 950 Broadway Suite 300 Tacoma, WA 98402-4427	<input type="checkbox"/> Federal Express <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Email
Carrie E. Eastman Sanchez, Mitchell, Eastman & Cure, PSC Attorneys at Law The Spinnaker Building 4110 Kitsap Way, Suite 200 Bremerton, WA 98312-2401 Fax 360-479-3983	<input type="checkbox"/> Federal Express <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Email <input type="checkbox"/> Fax
Howard M. Goodfriend Smith Goodfriend, P.S. 1619 8 th Avenue North Seattle, WA 98109	<input type="checkbox"/> Federal Express <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Email <input type="checkbox"/> Fax

DATED this 10th day of February, 2015 at Edmonds, Washington.


Lindsey Matter, Paralegal