

Appeal No. 48383-1-II
Superior Court No. 15-2-05879-2

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

SOUTH SOUND CHARITIES, INC., et al,

Appellants,

v.

UNION STREET HOLDINGS, LLC,

Respondent.

APPELLANT'S REPLY BRIEF

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COMES NOW the Appellants, SOUTH SOUND CHARITIES, (“Charities) by and through its attorney Martin Burns of Burns Law, PLLC, and submits its Reply Brief to the Court of Appeals as follows:

I. REPLY STATEMENT OF FACTS

In argument, Union Street argues the “...the trustee sold the Property to Union Street as the highest bidder on January 16, 2015.” Response p.13. This point is not conceded. The record shows that it was not Union Street that purchased at the trustee sale, but rather HomeStreet Bank. This is evidenced in the following ways: (1) Kathleen J. Johanson filed a Declarations in this case testifying that HomeStreet was the successful bidder, CP 41; (2) The attorney for Bank saying that HomeStreet was the successful bidder, CP 228; (3) The trustee’s deed recited that the property was sold to the “grantee” of the deed of trust which was HomeStreet. CP 18-19; and (4) The trustee sent out a letter to occupants saying HomeStreet purchased at the trustee sale. CP 226. Moreover, as discussed below, given the problems in the dates on the assignment, the notion that Union Street was the holder of the deed of trust at the time of the Trustee’s Sale is highly questionable as the assignment is notarized days after the trustee sale. CP 306-306.

The Respondent has argued that the trial court “allowed Charities a short reprieve” to remove property and finish leagues and asserted “the

trial court terminated Charities right of possession as of March 7.” Respondent’s brief page 5. This is misleading at best. The commissioner court that “extended the occupancy” did not terminate anything – the order directed that the matter be set for trial. CP 123-124. The fact that the trial court later ordered “Defendant is required to vacate no later than March 7, 2015” obviously occurred but there was no trial and there were no findings that the “trial court acknowledged Union Street’s ownership.” Respondent Brief page 5.

In the fact section of the Respondent’s Brief, in discussing the lease from South Sound Sports Management (“Management”) to South Sound Sports Charities (“Charities”), Respondent glosses over the fact that the lease was done in conjunction with a meeting on May 29, 2013 where Fortune Bank (prior to merger with HomeStreet) gave permission to such arrangement and thereafter continued to receive the mortgage payments based upon the proceeds of such lease. CP 102 - 103. Despite knowing of the arrangement and receiving the proceeds of lease payments, there was no notice given to Charities related to the trustee sale.

In the Response Brief at p. 8, the brief provides that Charities requested the “court exercise its equitable powers to allow it to remain in possession.” That is a false characterization of the record. Such pleadings cited (CP 75-121) set forth the basis for the estoppel defense that had been

set forth in the answer (CP 125-129) – a defense that Charities never got to present at trial – despite the Commissioner Court binding the matter over for trial.

The Response argues as fact at page 10, “Pursuant to the trial court’s March 6 and February 18 orders, Union Street entered the Property on March 8, 2015....” Nothing in either the March 6 or February 18 orders authorized Union Street to enter the property. Normally in an eviction, the court issues an order for a writ to have the sheriff restore a party to possession, which the clerk issues and the sheriff executes. The response glosses over the record that none of this happened and the entry on the property was actually prior to March 8, 2016 (CP 238) and was effectuated by having the Tacoma Police Department threaten an employee of Charities with trespassing. CP 238-239.

Again, the Response at page 10-11 discusses the March 26, 2015 order that occurred on the day of trial (without a trial) where Judge Stolz ordered that the “Plaintiff is entitled to possession” but glosses over that there was no trial.

II. ARGUMENT

INTRODUCTION:

The Response’s repeated tries to deflect relevant, specific precedent with sweeping legal generalities to unduly complicate the

matter. This was a case brought in unlawful detainer where the court's jurisdiction is limited primarily to the issue of possession. Puget Sound Inv. Grp., Inc. v. Bridges, 92 Wash. App. 523, 526, 963 P.2d 944, 945 (1998). In this case there is a claim that there was a lease that had been agreed to by Fortune Bank, that HomeStreet received the benefit of the mortgage payments with knowledge of the Charities lease that was generating the payments, that Charities was not provided the formal notice of the foreclosure and that even after the eviction was filed, HomeStreet received two months' rent payments¹ thus acknowledging the lease and waiving the termination (if any). The issues in this case go far beyond a normal unlawful detainer. Add to that, to even invoke the unlawful detainer statute under RCW 59.12.032 there has to be a proper trustee sale under RCW 59.24.040 and 61.24.060 and the sale has to be conducted property as set forth in requirements for conducting a trustee sale are extensively spelled out in RCW 61.24.030 and RCW 61.24.040. Albice v. Premier Mortgage Servs. of Washington, Inc., 174 Wash. 2d 560, 567, 276 P.3d 1277, 1281 (2012). There are factual issues as to if there was a

¹ Interesting issues arises. Union Street, in the course of the litigation accepted two payments of \$22,000 (CP 196) – the exact amount of the monthly rent (CP 106) and has never returned such amounts. If the amounts were rent, which they obviously were as the commissioner conditioned the continued occupancy in February and March upon such payment (CP 123-124), why didn't Charities at least get to stay through the end of March. If they were not rent – then what were they, why was Charities so charged and why were such funds not returned?

proper sale given that there was a credit bid to a party who did not hold the note and deed of trust.

There is a threshold issue regarding if this should even be an unlawful detainer matter and, even then, did the court err in handling such an unlawful detainer?

a. Standard of Review.

The Response Brief sets forth that this is both factual and legal review. It discusses, correctly, that issues of law are reviewed de novo. It then goes on to discuss how “a trial court’s findings of fact are reviewed for substantial evidence”. But isn’t that sort of the point? There are no findings of facts. There was no trial. The document nominally entitled “Order and Judgment, Findings of Facts and Conclusions of Law” crosses off all findings and conclusions and makes a bare order that Union Street was entitled to possession. CP 438-440. There never was an opportunity to try the affirmative defenses. It has been long the law of Washington that “the decision must be in writing in which the findings of fact and conclusions of law are separately stated...” State v. Olympia Veneer Co., 131 Wash. 209, 210, 229 P. 529, 529 (1924). CR 52(a)(1). There was no summary judgment. The actual just “vacate” order came in response to a motion by Charities to continue operations. CP 189-199, 130. The entire proceeding below was so completely botched, there are no findings to

review. There are no conclusions of law. There was, in essence, a one line order that Respondent seems to argue suffices for findings, conclusions and a judgment. The normal rule in such a situation is: “Where a trial court fails to provide sufficient findings of fact and conclusions of law to develop an adequate record for appellate review of the fee award, we will vacate the judgment and remand for a new hearing to gather adequate information and for entry of findings of fact and conclusions of law....” (Citation omitted) Bay v. Jensen, 147 Wash. App. 641, 659, 196 P.3d 753, 762 (2008).

So, in general, Appellant agrees with Respondent on the standard of review but points out that there are no findings of facts and conclusions of law because the trial court erred in denying a trial. The court should note that while unlawful detainers do allow an expedited manner in getting to a judgment by getting preference over all other civil cases under RCW 59.12.130, the commissioner clearly found factual issues in binding the matter over for trial (CP 123-124) otherwise judgment would have been rendered on the show cause docket. At that point in time, the statute is not unclear: “Whenever an issue of fact is presented by the pleadings it must be tried by a jury, unless such a jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in the court in which the action is pending; and in all cases actions under this chapter

shall take precedence of all other civil actions.” RCW 59.12.130. Factual issues exist in this case regarding, without limitation, the conduct of the sale, the acknowledgement of the lease, the character of the \$22,000 payments, and the facts underlying the estoppel argument.

The lack of factual findings and the lack of legal conclusions makes the drafting of such brief difficult as there was such a truncated proceeding. That in and of itself should be persuasive to the court that the trial court acted improperly and the matter needs to be reversed and/or remanded for a trial to actually get to findings and conclusions.

b. Charities had a right of possession.

The Respondent’s Brief is indicative of its entire approach to this case: Use sweeping generalities of law and try to apply them to the present, unusual case. Yes, in general, trustee sales extinguish junior interests. But it has to be a properly conducted sale. There are plenty of cases where trustee sales have been set aside and the junior interest not extinguished. Albice, Klem v. Washington Mut. Bank, 176 Wash. 2d 771, 295 P.3d 1179 (2013), for example. In this case, we have a bank official testifying under oath that the sale occurred to two different entities, the later story which conflicts with the complaint section 2.7. CP 3, 41 and 257. In this case, we have a claimed assignment that was not executed until after the sale. As more fully set forth in the opening brief, there are

good faith legal arguments that the case should proceed to trial based upon conduct up to the sale. The Respondent's Brief at page 14 claims that there is a lack of citation related to the proposition that Union Street is not a purchaser at the trustee sale and that such language should not be expanded to assignees. We cite the plain language of RCW 61.24.040 which on numerous occasions refers to the "purchase at the trustee's sale" and allows such purchaser to utilize RCW 59.12. But there clearly is no mention in such statute related to subsequent assignees. We cited to Schultz v. Werelius, 60 Wash. App. 450, 803 P.2d 1334 (1991) where this court refused to expand a similar statute related to real estate contract forfeitures to subsequent assignees.² The Response brief simply ignores this very on point precedent from Division 2 and argues we provide no authority. Statutory language and a decision of this court should constitute authority.

The Respondent at page 15 then attempts to deflect attention from the fact that the assignment was signed on January 21, 2016 by citing to Bain and saying "the security follows the note, not the other way around."

² "Had the Legislature intended to extend standing to assignees of assignments recorded after the notice of intent to forfeit, the forfeiture act would have so stated." Schultz v. Werelius, 60 Wash. App. 450, 453, 803 P.2d 1334, 1336 (1991). How is this any different than the present situation? Had the Legislature intend to extend standing to use RCW 59.12 to assignees after a trustee sale, the deed of trust act would have so stated.

Ok. We can agree on that. However, what should also be abundantly clear is that the assignment of the note occurred on January 21, 2015 – 6 days after the January 15, 2015 sale. Besides, by the very terms of the “Omnibus Assignment of Deed of Trust and Other Loan Documents” (underline added) (CP 306-313), the documents were assigned together. One did not follow the other. Respondent does not dispute that such an assignment – given that it relates to a deed of trust which is an interest in real property – must be acknowledged in the form of a deed under RCW 61.04.010. It is long established law that deed are valid upon execution and delivery. Anderson v. Ruberg, 20 Wash.2d 103, 107, 145 P.2d 890, 893 (1944). So there is a very cogent legal argument that the assignment was after the trustee’s sale and, per the plain language of the RCW 61.24.060 and pursuant to this court’s determination in Schultz v. Werelius, that there is no right for an assignee to exercise statutory remedies the legislature did not explicitly extend to assignees. There is conduct prior to the sale which would, if we had a trial, shows that there was not a proper trustee sale and as such the interest of Charities was not extinguished. This is all tied to the authority cited in the Opening Brief that these statutes are to be construed against the Respondent and in Charities’ favor.

However, there is also conduct after the sale that would serve to revive, acknowledge and waive the purported termination in the acceptance of rent. This is discussed below.

c. The trial court did not properly award possession to Respondent.

In more citations to general legal principals as to unlawful detainers, Respondent claims starting on Page 18 of the Response Brief that: “The unlawful detainer action properly awarded possession to Union Street as the holder of the trustee’s deed.” The first obvious problem with such proposition is that actions don’t award anything...judges do. In this appeal, it is contended the judge erred. The second problem is “exactly where did the court award possession?” The March 6, 2015 order told Charities to vacate – it never awarded possession to Union Street. CP 198-199. Even in March 26, 2015 order on what was to be the trial date, the court without any findings or conclusions simply stated that the “Plaintiff is entitled to possession.” CP 455. Let’s apply such procedure in other areas of law. Say, on the day of trial on a personal injury suit, the judge makes no findings or conclusions, holds no trial and simply says “The plaintiff is awarded \$100,000.00” would that be acceptable? What about in a criminal trial and everyone is ready for trial and the judge comes out as says “The defendant is guilty and is sentenced to 5 years”? The whole notion of – on the day of trial and without a trial - determining

the ultimate issue is astounding and yet we are arguing it as if just ignoring basic civil procedure and statutory requirements somehow could make sense. While Appellant concedes that the unlawful detainers are expedited procedures – RCW 59.12.130 requires a trial which are supposed to take place pursuant to CR 38. Thompson v. Butler, 4 Wash. App. 452, 453–54, 482 P.2d 791, 792–93 (1971).

In the Response Brief, Respondent again tries to gloss over the actual procedural history by claiming on page 19 that “Charities asserts for the first time on appeal that it suspects the Trustee allowed a non-beneficiary to credit bid and that the sale did not comply with RCW 61.24.04.” But that is not true as the issue of the improper credit bid was raised in the motion to dismiss. CP 213-214. South Sound again tries to deflect claiming that Charities was merely arguing “Union Street was the beneficiary – as that term is defined in statute – simply because the Assignment was not notarized and recorded until after the Trustee’s Sale.” Response Brief p. 19-20. But that is not the argument. The argument is that the evidence shows that assignment was not even executed until 6 days after the sale. This is reflected in the notary jurat of January 21, 2015, the complaint Section 2.7, the prior conflicting declarations of the bank official, the letter from the trustee, and the email of Respondent’s then counsel. The complaint does not even allege the assignment was in

existence at the time of the sale as the complaint clearly says HomeStreet was the successful bidder at the sale and differentiates between “the Bank” and “Union Street Holdings, LLC”. CP 3. The Trustee sent out a letter saying HomeStreet – not Union Street – was the purchaser at the trustee sale (CP 226). The facts and inferences heavily support the proposition that the note and deed of trust were not assigned until January 21, 2015 – after the sale – thus making it improper for a then non-beneficiary to credit bid.

d. The trial court ignored the statutory writ process.

Union Street argues the unlawful detainer action properly awarded possession to it and the simple order to “vacate” was sufficient. However, as discussed below, the court ignored repeatedly the safeguards built into an unlawful detainer action. What is stunning in the Response Brief is that there is no discussion of the proper writ process, the bonding process, the protection against forfeiture portions of the statute, the appellate bonding process...and why such protections should not apply in this case. The Response Brief at page 21 claims superficially that the unlawful detainer action was properly conducted – and then never discusses the statute except to make a nonsensical argument that “nothing in the unlawful detainer statute requires a trial court to order a writ of restitution” and cites to RCW 59.12.090. But the plain language of that statute is to provide for

not only post-judgment writs – but prejudgment writs which require substantial bonds. Ironically, it is just that type of a bond that should have been required in this case with a pretrial eviction “vacate no later than midnight on March 7, 2015” type order given trial was set for March 25. Moreover, the plain language of the statute is that the discretion is left to the Plaintiff to request the writ who “at the time of filing...or at any time afterwards, **may** apply to the judge...for a writ of restitution...and the judge **shall** order a writ of restitution to issue.” (bold added) RCW 59.12.090. Respondent’s argument seems to imply that there is an alternate, proper process than following the statutory writ procedure. To support this, Respondent cites to a fragment of RCW 59.12.170 to say the writ process is not the exclusive method. But that is not what the full statute says. It does say, as Respondent cites, that “judgment shall be entered for the restitution of the premise.” However, Respondent leaves off the first part of the sentence: “If upon the trial the verdict of the jury or, if the case be tried without a jury, the finding of the court be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises.” So, putting aside the little statutory and constitutional implication of the denial of a trial, the fragment cited by respondent would leave one guessing as to how the judgment “for the restitution of the premises” would be effectuated. There is no need to

guess. The entire Chapter RCW 59.12 is replete that such judgments are enforced by the execution of writs by the sheriff. In that very section, RCW 59.12.170 discusses how to deal with “writs of restitution executed prior to judgment.” Perhaps better questions would be directed to the Respondent that - if there is another method of executing a judgment to restore possession – what is it? Is there a single Washington case that has approved the eviction of a defendant without a writ? Union Street claims Charities has not provided authority that a writ is required. Nonsense. In prior briefing the exclusive procedure has been set forth. CP 215-216.

It is clear in Washington that a landlord may not oust a holdover tenant by physical force against the tenant's person. In statements that are broader than required for disposition of the cases before it, the Supreme Court of Washington has repeatedly said that, because unlawful detainer is the exclusive remedy, a landlord is not privileged to enter the premises in any way to oust a holdover tenant, not even by peaceable means.

(footnotes omitted) 17 Wash. Prac., Real Estate § 6.80 (2d ed.). Case law is not particularly unclear on this point:

While the respondent may have been in default in the payment of rent and in other provisions of the lease, this did not warrant the appellants in unlawfully entering upon the premises and with force ejecting him therefrom and taking possession of his furniture. As was said in *Spencer v. Commercial Co.*, 30 Wash: 520, 71 P. 53, the common-law rule which allowed the lessor to regain possession by force no longer obtains. This rule, which made the landlord a law unto himself, has been supplanted by a statutory remedy, speedy, adequate, and orderly; and this remedy is exclusive.

Nelson v. Swanson, 177 Wash. 187, 191, 31 P.2d 521, 522 (1934). The unlawful detainer statute is the sole means to evict someone. The sole method of executing a judgment to restore possession that is set forth in the statute is the writ of restitution. RCW 59.12.090. There is no language in RCW 59.12 preserving any other statutory or common law process to evict someone.

Moreover, does this court really want to open the door to alternate methods of effectuating evictions? On page 22 of the Response Brief, there is an “all’s well that ends well” sort of argument which concedes “it may not be the conventional method” but it “makes no substantive difference.” Such an argument stands in stark contrast with the well-established law of strict construction of unlawful detainer laws in favor of the defendant. To veer off into allowing parties to execute a court order on their own by showing up with the municipal police is simply reopening the door to self-help evictions that have been outlawed for over a century. If we are disposing of formality of the writ process, is it ok to rob a person who owes you on a judgment as “it may not be the conventional method” but it “makes no substantive difference?” Garnishing an employer with writs is a burdensome process that could seemingly be greatly expedited by such self-help – after all, you would have a judgment signed by a judge. Isn’t that good enough reason to ignore all those pesky procedures and protections?

Union Street argues on page 21 of its Response Brief that that there “was no legal basis for Charities to continue to occupy the Property.”

That is wrong factually and legally and does not justify ignoring the writ process. Factually, Union Street had accepted \$22,000 of rent for March. This will be discussed below. Legally, we never had a judgment before possession was forcibly changed – and really never received a judgment at all. “A judgment is the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies.” CR 54(1). It is a judgment after a trial that sets in motion the writ process. RCW 59.12.170. Union Street argues there “was no legal basis for Charities to continue to occupy the Property.” Response Brief page 20. Assuming arguendo the truth of such assertion – how does that justify ignoring the statutory writ process? That would be the exception that swallows the rule. Imagine a garden variety non-payment of rent case. In the vast majority of such nonpayment of rent cases, there is really no issue that the rent was not paid. Assume the three-day notice under RCW 59.12.030 is served and on the fourth day, the landlord retakes possession and changes the locks. The tenant complains and the court says, “Well, I think the landlord would have won anyways so I will retroactively approve the landlord’s actions.” If the courts excuse illegally retaking possession based on what the ultimate outcome might be, one would expect landlords to be hiring more U-Hauls and less lawyers. Understand, physical possession shifted in this case while the trial was pending two weeks away. Until the case is litigated to judgment – the notion as who has the right to possession is not determined and possession does not shift in the interim unless the writ process in RCW 59.12.090 is

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utilized where a writ with a bond can be issued and then the tenant can counter-bond under RCW 59.12.100. No court takes this “retrospective approach” urged by the Respondent that it is proper to disregard such process and protection if you might be later proven correct. Until there was a judgment – which really has never happened in this case – Charities was entitled to possession.

e. **The acceptance of rent by South Sound requires the unlawful detainer be dismissed.**

Union Street calls this argument “patently false” and a “misrepresentation of this case”. But then, Union Street starts agreeing with the authority presented and tries to differentiate the situation in that in such cases there was a previous landlord tenant situation and in this case – supposedly – there was not. However, this gets to the heart of the estoppel affirmative defense that Charities never was able to assert. A reasonable fact finder could accept that the officers of Fortune Bank authorized the lease, allowed Charities to act thereunder, and allowed HomeStreet to reap the benefits of it – only to then disavow and ignore it – not even giving notice of the foreclosure.

Charities has shown there is a lease. CP 106-113. Charities has shown payment thereunder prior to the Trustee Sale. CP 75. Charities has shown payment thereunder after the Trustee Sale. CP 223-224. Obviously, in this case there was an intervening party – Management –

that was not present in some of the cases cited. However, the acceptance of the rent – the exact \$22,000 rent – has legal implications. The first is that – by all precedent the undersigned could find – kills a pending unlawful detainer dead. Case after case was cited in the opening brief and not a single contrary case has been presented. Second, also not disputed by Respondent with authority, it serves as an acknowledgment of the lease and a waiver of claimed defaults.

It is Union Bank that is distorting the record below. Union Bank claims Charities invoked the equitable powers of the court in opposition to the initial request for writ. That is not what happened – Charities expounded on the affirmative defense of estoppel and provided proof on the extensive conduct and harm that could befall third parties if the plaintiff was able to disavow its early acts and direction. Moreover, Union Street misrepresents the procedural history to somehow justify the denial of trial. It was Union Street that cited Charities into court with an Order to Show Cause. CP 33-34. Mind you, this process is not even mentioned in RCW 59.12. The “show cause” procedure in evictions relates to the Residential Landlord Tenant Act under RCW 59.12.370. Technically, under RCW 59.12.070, when there is a complaint and an answer that disputes factual issue – the matter goes to trial. “Moreover, if the pleadings in an unlawful detainer action disclose a material issue of fact,

the issue must be resolved at trial.” Hous. Auth. of City of Pasco & Franklin Cty. v. Pleasant, 126 Wash. App. 382, 392–93, 109 P.3d 422, 427 (2005) (citing RCW 59.12.130 and Meadow Park Garden Assocs. v. Canley, 54 Wash.App. 371, 372, 773 P.2d 875 (1989)). And while there is a Division 1 case approving to conduct show cause proceedings, IBF, LLC v. Heuft, 141 Wash. App. 624, 174 P.3d 95 (2007), the present case had a show cause set on February 18, 2015 which predated the time for response in the answer set forth in the summons – February 23, 2015. This violates RCW 59.12.121 which gives up to the day for his appearance – a defendant may answer. Such statutory language matches the language that is in RCW 59.12.080 which requires a summons to provide a date to “appear and answer”. This is yet another procedural error in this case. Also, in scouring the case file, there appears to be no proof of service of the summons and complaint. Proof of proper notice is a prerequisite to issuing a writ (or presumably a “vacate by....” Order). “Further, a writ of restitution cannot issue without competent evidence to prove substantial compliance with the statutory notice requirements. *Marsh–McLennan Bldg., Inc. v. Clapp*, 96 Wash.App. 636, 641–42, 980 P.2d 311 (1999). For instance, proof of service of the notice under the unlawful detainer statutes requires an affidavit. *Id.* at 640–41, 980 P.2d 311 (citing RCW 59.12.040 and CR 4(g)). There is no affidavit here.” Hous. Auth. of City

of Pasco & Franklin Cty. v. Pleasant, 126 Wash. App. 382, 392, 109 P.3d 422, 427 (2005). This is a serious defect that the trial court overlooked in a rush to rule on this case.

Even if we were to assume, *arguendo*, that the lease was extinguished in the deed of trust foreclosure – the fact that Union Street accepted \$44,000 of rent changes the dynamics of this litigation. Yes, nothing in the order explicitly says “rent” but it is the exact monthly rent amount in the lease. Given we had no trial, if one were to utilize the summary judgment standards – the fact that \$44,000 was rent for two months would be an exceedingly easy inference to make as it was paid in return to continued possession. Black’s Law Dictionary (Abridged 5th Ed.) at page 673 first defines rent as “Consideration paid for the use or occupation of property.” That is obviously what we have. Union Street claims there was no lease – so why would it accept any rent in the first place? Claiming there was no lease and yet accepting rent without objection, reservation or deposit into the registry of the court creates a massively contradictory position. Union Street wants to quibble about who is following court orders. That is not really the point. The point is that a party claiming that there was no lease took full benefit of the terms of the lease by accepting \$44,000 of what really can only be called rent. Should the Superior Court have ordered the rent paid? Almost certainly

not. It is not set forth in any statute or allowed in any cited case before the court. However, faced with an improper order, Union Street had choices such as reconsideration, revision, appeal or requesting the funds be placed in the registry of the court. Instead – it accepted the benefit of the order and is bound to such conduct under Chan v. Smider, 31 Wash. App. 730, 734, 644 P.2d 727, 730 (1982). Union Street confusingly says Charities somehow accepted the benefits of the order and is challenging it on appeal. Not really. Charities all along said there was a lease at \$22,000 per month. The court said to pay the \$22,000 for February and March. Charities did. That is consistent. Charities in the appeal has continued to assert the existence of the lease. There is no contrary position. The commissioner's order required the matter to proceed to trial. Again, Charities has been asking for its trial. It has not taken any contrary position or waived anything. Union Street however has claimed there is no lease yet accepted rent. That is inconsistent and it is an acknowledgment of the lease.

f. The trial court erred procedurally and denied Appellant a proper hearing.

Respondent claims Charities was allowed its day in court and lost. Really? On what date exactly was there a trial on the issue of possession which, as has been briefed, is the paramount issue in an eviction?

Charities is entitled to a trial. The statute explicitly provides for that. RCW 59.12.130. That has never occurred. Witnesses have not been called and examined. The Respondent does not dispute the decisions of the trial court left the Charities in an impossible situation. If it had agreed to the conversion of the case to a normal civil docket – it would have waived the issues of possession. The Respondent does not dispute that throughout Charities has made claim for possession. It is only when such claim for possession is dropped that it is proper to convert the case to a normal civil case under Munden v. Hazelrigg, 105 Wn.2d 39, 45, 711 P.2d 295, 298 (1985). It is only then that Charities could make counterclaims. Munden at 45-47; Angelo Prop. Co., LP v. Hafiz, 167 Wn. App. 789, 816-17, 274 P.3d 1075, 1089 (2012). However, Charities has asserted that it was error to convert the case in the face of the claim for possession. Respondent simply, without argument, presupposes such action by the trial court was proper. Charities has followed the only proper procedure when possession is still at issue – continue to assert such right, take no action to waive such right and procedurally place the case in a posture where it can be appealed. The trial court should have held a trial. The trial court should not have converted the action to a general civil matter when – as shown in the clerk’s minutes on the day of trial (CP 443-444) – “M. Burns states possession is at issue.” The error of the trial court has

been compounded as the case progressed and the proper action is to reverse all of those orders, restore Charities to possession and order the case remanded for further proceedings.

There is a big difference between being in court on a day and having your day in court. Charities has been requesting a trial and the trial court erred in not allowing it.

g. The issues before the court are not moot.

Respondent wants this court to adopt a precedent that is essentially: “Violate a parties rights so badly by ignoring statutes, bonding and appeal rights, by ordering a trial and then summarily denying the trial and turn a blind eye to a writ-less eviction so that you can then call it moot.” One thing that is not contested, and is clear in the record, is that throughout, Appellant has always maintained a right to possession. This is clear in the clear’s minute entry on the date of trial (CP 444) and was reiterated in the pleadings leading up to the dismissal with prejudice. (CP 470-476). Case law is not unclear on this point:

In the context of an unlawful detainer proceeding, the law distinguishes between possession and a right to possession. An unlawful detainer action is not moot just because the tenant no longer has possession of the contested premises. As long as the tenant continues to assert a right to possession, he or she has the right to have the issue determined.

(footnotes omitted) Laffranchi v. Lim, 146 Wash. App. 376, 382, 190 P.3d 97, 100 (2008) abrogated on other grounds by MHM & F, LLC v. Pryor, 168 Wash. App. 451, 277 P.3d 62 (2012).

But an unlawful detainer action is not moot simply because the tenant no longer has possession of the premises. *Housing Auth. v. Pleasant*, 126 Wash.App. 382, 388, 109 P.3d 422 (2005) (citing *Lochridge v. Natsuhara*, 114 Wash. 326, 330, 194 P. 974 (1921)). If the tenant does not concede the right of possession, she has the right to have the issue determined. *Id.* at 389, 109 P.3d 422. Further, if a tenant has a monetary stake in the outcome of the case, such as payment of rent and attorney fees, our Supreme Court has held that “[o]bviously, [such a] case is not moot.” *McGary v. Westlake Investors*, 99 Wash.2d 280, 284, 661 P.2d 971 (1983).

IBF, LLC v. Heuft, 141 Wash. App. 624, 631, 174 P.3d 95, 98 (2007).

Not only has the Appellant not conceded the right to possession, it has resisted the bait from the trial court’s improper attempt to convert it to a civil action and has resisted asserting counterclaims which would have waived the issue as explained in the opening brief. Moreover, there is the issue that \$44,000 in rent was paid. How is it that Union Street gets to take February and March rent and then kick Charities out on March 7, 2015? Again, Respondent cites broad sweeping generalities of law in citing to Josephinium Associates v. Kahli, 111 Wash. App. 617, 622, 45 P.3d 627, 630 (2002) but fails to mention that the court in such case still

reviewed the case and did not dismiss it as moot. The on point authority makes clear that the case is not moot.

III. CONCLUSION

This case was handled horribly before the trial court. Every safeguard was ignored. The proper process of rendering judgment and issuing writs was ignored. The claim to possession was ignored. Affirmative defenses were ignored. The statutory right to have a trial was ignored. The impact of the acceptance of rent was ignored. Legal authority related to converting an unlawful detainer to a normal civil proceeding was ignored. Charities wants its day in court.

It is said bad cases make bad laws. If the court affirms based upon the horrible procedure in this case – it sets a very bad precedent that will open up many doors to justify illegal evictions, ignoring writ procedures, denying parties trials mandated by statute. What happened here was an illegal eviction that the courts have tacitly sanctioned. It is time for this to end – declare error where there is error, reverse and restore possession and remand for further proceedings.

RESPECTFULLY SUBMITTED this 26th day of July, 2016.



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CERTIFICATE OF SERVICE

I certify that on the 26th day of July, 2016, I caused a true and correct copy of this Reply Brief to be served on the following via U.S.

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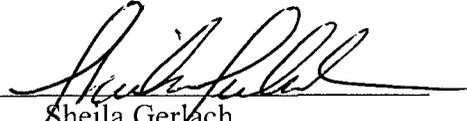
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DATED this 26th day of July, 2016, at Tacoma, Washington.

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