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Division II  
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No. 52222-5-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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KRISTIE J. TEDFORD,  
Respondent (Plaintiff),

v.

CHARLES L. GUY and ANGIE C. MATTLER,  
Appellants (Defendants).

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BRIEF OF RESPONDENT

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## **1. INTRODUCTION**

1.1. In this unlawful detainer appeal, the trial court had two show cause hearings. The first was specifically continued to so that live testimony could be heard, in addition to documentary evidence and declarations. Before the second show cause hearing, the trial court put no limitations on testimony or evidence that could be presented. At the second show cause hearing, the trial court allowed the parties to examine, cross examine, and reexamine the witnesses. It allowed the parties to present all relevant testimony and evidence. In short, the trial court granted the parties a short trial to hear all claims and defenses.

1.2. On appeal, Appellant Ms. Mattler and Charles Guy (“Ms. Mattler” and “Mr. Guy,” individually, or “Appellants” collectively) argue that the trial court erred in not granting them a trial to further litigate their defense of retaliatory eviction. Appellants specifically concede that they raise no other issues on appeal other than those related to the defense of retaliatory eviction. They argue no other issues. Thus, all other issues are waived on appeal.

1.3. Dispositive to this appeal is the fact that Appellants voluntarily vacated the subject property in August of 2018, despite the trial court’s writ of restitution and order for writ of restitution being stayed pending appeal. In other words, Appellants do not possess the property and claim no right

to possess the property. Because no court can provide them the basic relief originally sought in their answer to the unlawful detainer complaint, i.e., possession of the property, and because no court can provide them effective relief—this appeal is moot.

1.4. Arguendo, even if this Court somehow reached the merits of the limited issue on appeal, Appellants cannot demonstrate they are entitled to a trial. This is because the trial court properly followed show cause procedures as set forth by caselaw. The trial court determined the viability of the parties' claims and defenses, including the alleged defense of retaliatory eviction, properly allowed relevant evidence and testimony to be presented, and properly found that further testimonial hearings or trial were unnecessary. Substantial evidence supports the trial court's findings. This includes the specific finding that Ms. Tedford did not bring an unlawful detainer action in retaliatory fashion.

## **2. RESTATEMENT OF THE ISSUES**

2.1. Whether Appellants waived all issues on appeal other than whether the trial court properly determined that Ms. Tedford did not bring a retaliatory unlawful detainer action against Appellants, under RCW 59.18.240 or RCW 59.18.250? Yes.

2.2. Whether all issues on appeal are moot because Appellants voluntarily vacated the property, claim no right to possess the property, and

this Court cannot provide the basic relief originally sought of granting possession of the property, nor effective relief? Yes.

2.3. Whether the trial court properly followed show cause procedures, determined the viability of the parties' claims and defenses, including the alleged defense of retaliatory eviction, and properly found that further evidentiary and testimonial hearings or trial were unnecessary? Yes.

2.4. Whether substantial evidence supports the trial court's finding that Ms. Tedford did not bring an unlawful detainer action in retaliatory fashion? Yes.

### **3. RESTATEMENT OF THE CASE**

3.1. Appellee Kristie Tedford ("Ms. Tedford") owns and rents several rental properties in Thurston County. (CP at 108-09). All of her rental properties, except for one commercial in nature, are rented on a month-to-month basis. (CP at 90-93, 108-09; RP July 6, 2018, at 11). Ms. Mattler's rental history includes two prior unlawful detainer proceedings. (CP at 112; RP July 6, 2018, at 37-39). In one of these prior unlawful detainer proceedings, Ms. Mattler argued that she had a one-year lease and not a month-to-month lease, before voluntarily vacating the property (short of any alleged one-year term). (CP at 22, 112).

3.2. In January of 2018, Ms. Tedford listed the subject property for rent on "Craig's List." (CP at 109; RP July 6, 2018, at 11-14). Ms. Tedford

was in Florida during this time. (CP at 22, 109). The property had not been cleaned since the last tenant and the garage had personal belongings and some garbage from the last tenant. (CP at 106-07, 109-10). Ms. Mattler, nevertheless, expressed interest in seeing the property as soon as possible. (CP at 106-07, 109). She contacted Ms. Tedford regarding the property by text message on January 22, 2018. (CP at 33-76, 109). Because Ms. Mattler was an acquaintance of a friend of Ms. Tedford, she was extended the courtesy seeing the property right away before any cleaning had occurred. (CP at 33-76, 106-07, 109-10).

3.3. Ben Amidon showed the rental property to Ms. Mattler on about January 22, 2018. (CP at 33-76, 106-07, 109-10). The property had previously been equipped with four smoke detectors and a carbon monoxide detector in the kitchen. (CP at 63-71, 112, 148). The stove at the property runs off gas, not electricity. (CP at 112).

3.4. Ms. Mattler was extended further courtesies, such as moving in immediately and foregoing a tenant screening, because she was a friend of an acquaintance of Ms. Tedford. (CP at 106-07, 109-10). Ms. Mattler and Ms. Tedford agreed by text message that Ms. Mattler would clean the property in exchange for being able to move in on or about January 23, 2018, but not pay any January rent. (CP at 33-76, 106-07, 109-10).

3.5. As to the garage, Ms. Tedford hired Ben Amidon to clean the

garage. (CP at 33-76, 106-07, 109-10). Ms. Mattler was told she could take anything in the garage that she wanted. (CP at 33-76, 106-07, 109-10).

3.6. Ms. Mattler was given keys to move into the property, was given the original rental agreement to sign and mail to Ms. Tedford, and was given possession of the property on or about January 23, 2018. (CP at 33-76, 106-07, 109-10; RP July 6, 2018, at 13-14). The rental agreement provided that rent was due on the first day of the month, the rental was month-to-month, and \$1,000 deposit was due immediately. (CP at 6-10, 33-76, 90-93, 108-12, 114-36, 145-51; RP July 6, 2018, at 11-12).

3.7. On January 23, 2018, Ms. Mattler, per text messages, stated to Ms. Tedford, “OK got [t]he keys and I’ll be sending the paperwork to you also. . . .” (CP at 44, 109).

3.8. On or before By January 27, 2018, Ben Amidon cleaned the garage of the rental property. (CP at 33-76, 106-07, 109-10).

3.9. On January 31, 2018, Ms. Mattler stated to Ms. Tedford, “Hi Krisie, I’m sending check \$1290 for rent and \$350 towards deposit today along with application . . . just an FYI.” (CP at 47, 146-47).

3.10. Ms. Mattler failed to mail and return the original rental agreement. (CP at 33-76, 110). After inquiry by Ms. Tedford, requesting the original rental agreement, Ms. Mattler claimed the original rental agreement was lost in the mail. (CP at 33-76, 110). Text messages from

February 12, 2018, reveal that Ms. Tedford stated to Ms. Mattler, that “I have not received your lease agreement in my mailbox.” (CP at 50, 110). In response to that text message, Ms. Mattler stated, “I’ll put it in the mail today.” (CP at 50, 110).

3.11. On February 2, 2018, Ms. Mattler attempted to pay rent for February 2018 by depositing a check for the amount due in Ms. Tedford’s bank account. (CP at 56, 111, 149). This check was returned for insufficient funds. (CP at 56, 111, 149). The \$1,000.00 deposit was still unpaid. (CP at 10, 12, 30, 31, 33-76, 84, 111, 145-48; RP July 6, 2018, at 12-13).

3.12. On February 12, 2018, Ms. Mattler claimed the garage had not yet been cleaned by Ben Amidon. (CP at 53). Ms. Tedford responded by sending photos, via text message, of the cleaned garage. (CP at 53-56). Ms. Mattler did not respond to Ms. Tedford’s text message with photos of the cleaned garaged. (CP at 53-56, 110).

3.13. On February 25, 2018, Ms. Tedford texted Ms. Mattler, and said, “I’m sure you are aware that your check bounced. I still have not received the rental agreement in my mailbox.” (CP 56, 111). Ms. Matter responded, “Actually I was not aware” and that “I did [send the rental agreement] that very same day I told you . . . [a]long with the paper Ben and I signed . . . I have copies I can resend. . . .” (CP at 56, 111).

3.14. On February 27, 2018, Appellants, were for the first time able

to pay rent, albeit 27 days late. (CP at 111). The \$1,000.00 deposit was still unpaid. (CP at 6-10, 33-76, 90-93, 108-12, 114-36, 145-51; RP July 6, 2018, at 11-12).

3.15. On March 7, 2018, Ms. Tedford and Ms. Mattler, had the following text message exchange, where Ms. Tedford told Ms. Mattler to purchase smoke alarms, if any were missing:

**Ms. Mattler** [on March 7, 2018]: Hi Kristie, I noticed there's no smoke alarms in the house. Are you planning on hiring someone to install them? For safety reason is why I'm asking. Also, out of curiosity when was the the chimney last cleaned? I just don't want to use the woodstove if it is unsafe. Thank you. 

**Ms. Tedford:** Gosh I can't believe that there are none there used to be as you might see[.] The chimney sweep was there 6 months ago [and] he did all my houses[.] Are you still happy? There is also supposed to be a carbon monoxide detector in the kitichen[.] I know there's a spare one at my house but.. it's easier to just ask .... My batter is running completely out [and] I'll need to talk to you later[.]

**Ms. Mattler:** No we looked everywhere maybe thinking they were in a closet or garage. *Would you like us to get them and send you a reciept?* Awesome on the chimney, I love wood stoves and just wanted to be sure before I fire it up. Absolutely happy, I love it! No carbon monoxide but we have one anyways. So no biggie on that.

**Ms. Tedford:** You haven't fired up the wood stove yet? I just bought it when the other renter it's like 8 months ago[.] *Yeah sure go b[u]y the smoke alarms* I can't believe that they're no there[.]

**Ms. Mattler:** *I did last night but panicked.... yeah I'm a scaredy cat like that, especially when my daughter was sleeping. Lol... Oh, did you get the paperwork? I sent it priority.*

**Ms. Tedford:** [. . .] I just charged up my phone I checked my bank account I see that you finally paid your February rent, *with no deposit. I'm still wating on for your March rent.*  
...

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**Ms. Tedford** [on March 9, 2018]: [. . .] If you say you're happy then okay I have to believe that[.] *I'll expect your partial deposit and your rent[.]* And I will send you a receipt for your partial deposit and your rent.

**Ms. Mattler:** I think you misunderstood me. I was not complaining about anything. . . .

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**Ms. Tedford** [on April 6, 2018]: [. . .] I did not receive your email maybe you didn't email me.. so here is my communication. . . .

\*\*\*\*

**Ms. Tedford** [on April 17, 2018]: [. . .] Since you got got the keys in your hand *you owe me a deposit.*

**Ms. Mattler:** Ok I will deposit first thing Thursday morning. And email you a copy of the receipt[.]

**Ms. Tedford** [on April 26, 2018]: I have since sent you 2 emails[.] *Plus as you know I have no depositi money[.]*

(CP at 63-75 (emphasis added); *see also* CP at 61).

3.16. On March 9, 2018, Ms. Mattler was late on March rent by over

week. (CP at 66, 111, 145-51; RP July 6, 2018, at 12-13, 39). She attempted to pay March rent, but this check too was returned for insufficient funds. (CP at 111, 145-51; RP July 6, 2018, at 12-13, 39).

3.17. By the middle of March 2018, Ms. Tedford, in Florida at the time, had her attorney mail another, generic, month-to-month rental agreement to Ms. Mattler. (CP at 71, 110).

3.18. On March 20 and March 22, respectively, Ms. Mattler paid March rent by making two deposits into Ms. Tedford's bank account. (CP at 74, 110-11). The \$1,000.00 deposit owed was still unpaid. (CP 30, 34-35, 42-43, 47, 56, 65-66, 70-71, 74-76, 110-11; RP July 6, 2018, at 12-13).

3.19. On April 6, 2018, Ms. Tedford texted Ms. Mattler and stated, "I . . . sent you a n[e]w lease agreement [on March 20, 2018], for you to sign and send back ...which I haven't seen. . . . [S]o you just decided to keep the lease agreement . . . ?" (CP at 71, 110). Ms. Mattler responds, "Yes it was mailed recently, I apologize for the delay[.]" (CP at 72, 110).

3.20. On April 9, 2018, Ms. Tedford texted Ms. Mattler again, stating, "Still no lease agreement in the mail. . . ." (CP at 72, 110). Ms. Mattler, in later testimony admitted she signed the new lease agreement, sent by Ms. Tedford in April, indicating a month-to-month rental. (RP July 6, 2018, at 35-36; *see also* CP at 90-93).

3.21. By April 18, 2018, Appellants still had not paid the \$1000.00

deposit. (CP 30, 34-35, 42-43, 47, 56, 65-66, 70-71, 74-76, 110-11; RP July 6, 2018, at 12-13). Ms. Tedford had Ms. Mattler personally served a 10-day notice to cure or vacate and a 20-day (no cause) notice to terminate the tenancy. (CP at 11-12, 30-31, 111, 145; RP July 6, 2018, at 11). The 20-day (no cause) termination notice provided that the tenancy would end May 31, 2018. (CP 11, 31, 111, 145; RP July 6, 2018, at 11). In response to the 10-day notice to cure or vacate, Appellants finally paid the \$1,000.00 deposit, due months ago, on April 27, 2018. (CP at 111).

3.22. On June 1, 2018, Ms. Tedford filed the complaint initiating this action. (CP at 4-12). The complaint was based on a 20-day notice to terminate the tenancy for no cause. (CP at 4, 11-12). Ms. Tedford requested a judgment for unpaid rent and holdover damages. (CP at 5). The trial court issued a show cause order, setting a hearing for June 15, 2018. (CP at 15-16). Ms. Tedford provided in a declaration that she “chose to terminate in mid-April 2018, after two checks submitted by defendants were returned for insufficient funds.” (CP at 145; RP July 6 at 12-13).

3.23. Appellants filed a memorandum in response claiming that (1) the security deposit was not due until May 1, 2018; (2) the 10-day notice to comply was premature; (3) the \$1,000.00 deposit was timely paid on April 27, 2018; (4) rent for February to May had been paid in full, except June rent, which was “wrongly refused by the landlord”; (5) the “true”

(unnotarized) rental agreement was for a term of one year from January 2018 to January 2019; and (6) Ms. Tedford was guilty of a retaliatory eviction because the unlawful detainer was in response to Ms. Mattler “asserting their right to have smoke and carbon monoxide detectors in the home.” (CP at 18-20).

3.24. The show cause hearing on June 15, 2018, was continued to July 6, 2018, so that the parties could present testimony at another show cause hearing, and/or proceed to trial if necessary. (CP at 144; RP July 6, 2018, at 2-3).

3.25. In reply to Appellants’ answer to the complaint and counter claims, Ms. Tedford restated that the eviction was based on a 20-day no cause termination notice properly served on April 18, of 2018, ending the tenancy as of May 31, 2018. (CP at 152-59). Ms. Tedford pointed out that when the 20-day notice was served, Ms. Mattler was in breach of the rental agreement because the \$1,000.00 deposit remained unpaid. (CP at 152-59). She further argued that Ms. Mattler had provided a “fraudulent page one” of the rental agreement, attempting to falsely claim the (unnotarized) rental agreement was for a term of one year. (CP at 152-59). Finally, Ms. Tedford pointed out that the parties agreed that Ms. Mattler would purchase smoke alarms in early March, when Ms. Mattler raised the smoke alarm issue, and that Ms. Tedford would reimburse her. (CP at 152-59).

3.26. On July 6, 2018, the court heard testimony. (RP July 6, 2018). Among other things, Ms. Mattler claimed she did not move into the rental property until March 5, 2018, that she sent Ms. Tedford the original rental agreement when first requested, and that lease agreement she signed indicating a month-to-month rental was not what she wanted. (RP July 6, 2018, at 28-33). At this hearing, Appellants' counsel for the first time raised a promissory estoppel theory, claiming that Ms. Tedford promised a one-year lease, not a month-to-month rental agreement. (RP July 6, 2018, at 42-7).

3.27. After hearing testimony and arguments, the trial court ruled in favor of Ms. Tedford and struck the trial date. (CP at 160-62; RP July 6, 2018, at 50-51). A writ of restitution was ordered. (CP at 160-64). Judgment was reserved. (CP at 161). The trial court orally reasoned the following:

(1) there was a misunderstanding between the parties about the lease term;

(2) there was no lease agreement for one year in writing that satisfied the statute of frauds, nor was any lease for one-year signed by the landlord;

(3) the facts, in law or equity, do not support enforcing any alleged one-year lease;

(4) the tenancy was a month-to-month lease under the circumstances, which was terminatable with a 20-day notice to vacate for no cause;

(5) there was a casual conversation about smoke detectors, but no formal demand sufficient to lead the court to find a retaliatory eviction had occurred; and

(6) the claim of promissory estoppel for a year-long lease was not supported, as there was only an offer and no acceptance or promise for a year-long lease.

(RP July 6, 2018, at 48-51).

3.28. On July 9, 2018, Appellants moved for revision. (CP 165-68). The order for writ and writ of restitution were stayed until the revision motion was heard. (CP at 192-93).

3.29. On revision, Appellants argued that the trial court commissioner's findings were (1) incomplete, (2) not supported by the evidence, and that (3) Appellants were prevented from presenting evidence of retaliation at the second show cause hearing with live testimony. Appellants conceded that "testimony was taken" as to the conflicting versions of the lease agreements. (CP at 289). Additionally, Appellants restated their arguments that the house was not habitable until March of 2018, and that there were no smoke detectors in the home. Notably, Appellants conceded that Ms. Mattler never demanded the property be cleaned, and that "The smoke detector issue was resolved with [Ms.] Mattler, with approval of the Landlord, buying and installing smoke

detectors and sending the bill for them as a request for credit.” (CP at 291). Nevertheless, Appellants argued that Ms. Tedford, “rather than accept the request for credit . . . initiated a termination and eviction process.” (CP at 291).

At hearing on revision, Appellants’ counsel conceded that all testimony necessary to decide the issue of whether the lease was month-to-month or a one-year lease was elicited in front of the commissioner. (*See* RP August 3, 2018, at 8) (stating, “The only issue that I think might not require more airing is the first one, the one about the form of the lease and what the lease terms in it is. . . . I think the dispute has be aired.”). Appellants’ counsel also conceded that the (alleged) lease for one-year, provided after the unlawful detainer proceeding began, was never signed by Ms. Tedford. (RP August 3, 2018, at 8). Appellants’ counsel noted that his clients voluntarily moved out of the premises on August 1, 2018, but that trial was appropriate to decide whether Appellants should be awarded attorney fees for a retaliatory eviction proceeding. (RP August 3, 2018, at 28).

3.30. Ms. Tedford responded to the motion for revision by arguing that the trial court commissioner’s findings were well supported by the evidence, all issues were properly aired with necessary testimony and evidence, and that there was no evidence to support a preliminary finding

of retaliation by Ms. Tedford. (CP at 303-314). Specifically, as to retaliation, Ms. Tedford pointed out that to assert the defense of retaliatory eviction, the tenant must do so in good faith and must not be in breach of the rental agreement for any presumption in favor of the tenant to apply. (CP at 308-09). Ms. Tedford further pointed out that when the 20-day notice was served on Appellants on April 18, 2018, Appellants were in breach of an uncontested, and agreed, term of rental agreement (CP at 34-36, 42-43, 47); Appellants had not paid the \$1,000.00 rental deposit and had failed to pay rent timely. (*See* RP August 3, 2018, at 23-24).

Additionally, Ms. Tedford correctly stated that the trial court commissioner only denied Mr. Guy from testifying at the second show cause hearing as to rental checks submitted but then returned for insufficient funds. (CP at 310). An issue the commissioner found not relevant. (RP July 6, 2018, at 48).

At oral argument on revision, Ms. Tedford informed the trial court that Appellants voluntarily vacated the premises, two days prior, on August 1, 2018, despite the trial court's writ of restitution being stayed at the time. (CP at 192-93; RP August 3, 2018, at 22).

3.31. On August 3, 2018, the trial court judge assigned on revision noted that as to issue of the commissioner allegedly not allowing testimony of Mr. Guy, Appellants' attorney was "okay" with that because Mr. Guy's

testimony only related to “no sufficient funds” and the commissioner found that not relevant to her ruling. (RP August 3, 2018, at 4-6). Regarding the allegation that the unlawful detainer was retaliatory, the trial court judge also discussed the fact that Ms. Tedford agreed to allow Ms. Mattler to buy smoke detectors and that Ms. Tedford would reimburse her:

**The Court:** Mr. Cushman, I take it you’re referring to attachment C of Ms. Mattler’s declaration again, and on the series of texts. . . . [T]here are texts back and forth as you have attributed, but then apparently Ms. Mattler writes, “No, we looked everywhere maybe thinking they were in a closet or a garage. Would you like us to get them and send you a receipt?” And then she goes on to talk about how happy she is. And then Ms. Tedford makes some statements about the wood stove, but then says, “Yeah, sure. Go buy the smoke alarms. I can’t believe they’re not there.” And Ms. Matter – and again, this is from her declaration. These are the attachments – said, “I did last night.” So she raised the issue. Your client gave a request to be able to go buy them. Ms. Tedford agrees, and your client states she did. So how is this retaliatory?

(RP August 3, 2018, at 16-17). Ultimately, the trial court denied Appellants’ motion for revision, holding that the trial court commissioner took the issues presented by them into account and properly ruled. (RP August 3, 2018, at 30).

3.32. The trial court specifically found that Appellants were served a written notice to terminate the tenancy on April 18, 2018, such notice terminated the tenancy on May 31, 2018, and that Appellants failed to vacate. (CP at 299). It found the proper amount of attorney fees and costs

to be awarded, and that rent was due monthly at \$1,290.00 per month. (CP at 299-301). It found the defense of promissory estoppel was not applicable, and specifically that Ms. Tedford did not retaliate against Appellants in bringing the unlawful detainer action. (CP 300-01).

3.33. Appellants presented no argument as to attorney fee awarded to Ms. Tedford for the revision hearing, and the court granted them. (RP August 3, 2018, at 30-31). A supplemental judgment for \$1,000.00 was entered in favor of Ms. Tedford. (CP at 320-22).

3.34. A notice of appeal was filed on August 6, 2018 (CP at 323-31), and the Opening Brief of appeal was timely filed. Notably, in her Opening Brief, Appellants provide that the trial court “ruled that the parties had a month-to-month lease that was properly terminated by [Ms. Tedford]. . . .” (Opening Brief at 1). No argument, assignment of error, or briefing is provided contesting this ruling. (*See* Opening Brief). Appellants affirmatively state that the issue of whether there was a month-to-month lease or year-long lease is “moot” for purposes of this appeal. (*See* Opening Brief at 4, 11) (acknowledging Appellants voluntarily vacated the property and claims no right to possess the property).

3.35. Instead, in summation, Appellants raise the following arguments, and claim the following errors, by the trial court in their Opening Brief:

- (1) Ms. Tedford unlawfully brought a retaliatory eviction against Ms. Mattler. (Opening Brief at 1) (stating, “the Landlord appears to have made the decision [to terminate the tenancy], following the text [message] exchange about the smoke detectors. . .”). Specifically, Ms. Mattler argues the “timing and text message record makes clear that th[e] termination and eviction process” was unlawfully brought because Ms. Mattler asserted her rights to have installed smoke detectors at the subject property.
- (2) “Rather than consider the defense of retaliation, the Court Commissioner, based on incomplete findings fail[ed] to recognize and account for key facts. . .” Namely, in Ms. Mattler’s view, the trial court erred in finding “that there had been no ‘demand’ [by Ms. Mattler to Ms. Tedford] for smoke detectors.”
- (3) “In upholding the Commissioner, the reviewing judge . . . err[ed] by ruling . . . that [Ms. Mattler] did buy and install smoke detectors, bringing the [Ms. Tedford] into compliance . . . [and] that the subsequent actions [by Ms. Tedford] to remove the tenant were not retaliatory.”

(Opening Brief at 1-2, 4, 9-16).

#### **4. STANDARD OF REVIEW**

“Where the trial court has weighed the evidence, [an appellate court’s] review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether those findings of fact support the trial court’s conclusions of law. *Green v. Cmty. Club*, 137 Wn. App. 665, 689, 151 P.3d 1038, 1050 (2007); *Merklinghaus v. Bracken*, 2018 Wash. App. LEXIS 2618, \*2, 2018 WL 6046910 (unpublished opinion) (holding “courts review a trial court’s findings of fact in an unlawful detainer [show cause hearing] for substantial evidence.”). “Substantial

evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise.” *Green*, 137 Wn. App. at 689; *Bracken*, 2018 Wash. App. LEXIS 2618, \*2, 2018 WL 6046910. “If that standard is satisfied, [appellate courts] will not substitute [their] judgment for that of the trial court even though [they] might have resolved disputed facts differently.” *Green*, 137 Wn. App. at 689; *Bracken*, 2018 Wash. App. LEXIS 2618, \*2, 2018 WL 6046910. “There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence.” *Green*, 137 Wn. App. at 689; *Bracken*, 2018 Wash. App. LEXIS 2618, \*2, 2018 WL 6046910.

Arguments not raised before the trial court are stricken or not considered on appeal. *Kellar v. Estate of Kellar*, 172 Wn.App. 562, 578-79, 291 P.3d 906 (2012). The trial court's judgment may be affirmed on any theory argued below. *Carlson v. Gibraltar Sav. of Washington, F.A.*, 50 Wn. App. 424, 429, 749 P.2d 697, 700 (1988). Evidentiary decisions, including those related to summary judgment, are reviewed for abuse of discretion. *Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 416, 58 P.3d 292 (2002). “[A] party may not set up an alleged error and then complain about the error on appeal.” *In re Estate of Muller*, 197 Wn. App. 477, 484, 389 P.3d 604, 609 (2016). “[A] party may not challenge a trial court's ruling excluding

evidence unless ‘the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.’” ER 103; *Adcox v. Children's Orthopedic Hosp. & Medical Ctr.*, 123 Wn.2d 15, 26, 864 P.2d 921, 928-929 (1993). “[A]n error will be considered not prejudicial and harmless unless it affects the outcome of the case.” *Havens v. C & D Plastics, Inc.*, 124 Wash. 2d 158, 169-70, 876 P.2d 435, 441 (1994).

## 5. ARGUMENT

- 5.1. Appellants Waived All Issues on Appeal Other Than Whether the Trial Court Properly Determined Ms. Tedford Did Not Bring a Retaliatory Unlawful Detainer Action, under RCW 59.18.240 or RCW 59.18.250.

“It is well settled that a party's failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error.” RAP 10.3(a)(4); RAP 10.3(a)(6); *Emmerson v. Weilep*, 126 Wash. App. 930, 939-40, 110 P.3d 214, 218 (2005); *Cowiche Canyon Conservancy v. Bosley*, 118 Wash. 2d 801, 809, 828 P.2d 549, 553 (1992); *Sacco v. Sacco*, 114 Wash. 2d 1, 5, 784 P.2d 1266, 1268 (1990); *Smith v. King*, 106 Wash. 2d 443, 451, 722 P.2d 796, 801 (1986); *Puget Sound Plywood, Inc. v. Mester*, 86 Wash. 2d 135, 142, 542 P.2d 756, 761 (1975); *Bracken*, 2018 Wash. App. LEXIS 2618, \*2, 2018 WL 6046910.

In *Bosley*, *Smith*, and *Mester*, the Supreme Court held, en banc, that the plaintiffs' waived or abandoned issues on appeal because they did not present adequate argument or cite case law. *Bosley*, 118 Wash. 2d at 809; *Smith*, 106 Wash. 2d at 451; *Mester*, 86 Wash. 2d at 142. In the unlawful detainer show cause hearing context, Division 1 held the same thing. *See Bracken*, 2018 Wash. App. LEXIS 2618, \*2, 2018 WL 6046910

Here, Appellants' Opening Brief provides no assignment of error or argument or appeal regarding the trial court's ruling that the term of tenancy was month-to-month, and not a year-long lease. (*See* Opening Brief). They provide no assignment of error or argument or request that they should be restored possession of the property under any theory, in law or equity. (*See* Opening Brief). In fact, Appellants expressly concede that the trial court's ruling that the parties had a month-to-month lease is "moot" for purposes of this appeal. (Opening Brief at 4).

Accordingly, the only issue Appellants have not waived on appeal has to do with RCW 59.18.240 and RCW 59.18.250, and whether the trial court properly determined that Ms. Tedford was not attempting to evict Appellants in a retaliatory fashion. The trial court's decision on all other matters and issues should be affirmed without further review. *See* RAP 12.1(a); *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 64, 837 P.2d 618,

622 (1992); *Bosley*, 118 Wash. 2d at 809; *Bracken*, 2018 Wash. App. LEXIS 2618, \*2, 2018 WL 6046910.

5.2. All Issues on Appeal are Moot because Appellants Voluntarily Vacated the Property, Claim No Right to Possess the Property, and this Court cannot Provide the Basic Relief Originally Sought of Granting Possession of the Property, Nor Effective Relief.

A case is moot if the court cannot provide the basic relief originally sought or can no longer provide effective relief. *Josephinium Assocs. v. Kahli*, 111 Wn. App. 617, 622, 45 P.3d 627 (2002); *Orwick v. Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793, 796 (1984). Courts of appeal “generally will not review a case which has become moot.” *Orwick*, 103 Wn.2d at 253. “This is to avoid the danger of an erroneous decision caused by the failure of parties, who no longer have an existing interest in the outcome of a case, to zealously advocate their position.” *Id.* Additionally, in unlawful detainer proceedings, a tenant may prevent his or her eviction, as well as recover attorney fees and costs in the action, if they demonstrate they were subject to a retaliatory eviction:

In any action or eviction proceeding where the tenant prevails upon his or her claim or defense that the landlord has violated this section, the tenant shall be entitled to recover his or her costs of suit or arbitration, including a reasonable attorney's fee. . . .

RCW 59.18.250.

Here, again, Appellants provide no argument or request that they should be restored possession of the property under any theory, in law or equity. (*See* Opening Brief). In fact, they cannot credibly provide any such argument or make any such request because they were not evicted at all. (CP at 192-93; RP August 3, 2018, at 22, 28). Rather, Appellants voluntarily vacated, and abandoned, the property on August 1, 2018, despite having already posting supercedeas bond and having the order for writ and writ of restitution stayed pending appeal. (CP at 192-93; RP August 3, 2018, at 22, 28).

Given that Appellants were never actually evicted by anyone, any proceeding, or any court—and their tenancy was voluntarily terminated and abandoned by and on their own volition—one may wonder what exactly they are appealing now. It appears that Appellants are appealing the ruling that they were not granted a trial on the issue of *whether Ms. Tedford attempted to evict them in a retaliatory fashion*. The problem for Appellants is that Ms. Tedford is no longer attempting to evict them because they abandoned the property. This case is over, and moot, because Appellants by moving out on August 1, 2018, decided not to pursue alleged rights they might have had regarding possession of the property. (*See* Opening Brief; CP at 192-93; RP August 3, 2018, at 22, 28).

In other words, “[T]he basic relief originally sought,” by Appellants, i.e., not being evicted, and to preserve their right to possess the property, cannot be provided by the court. *See Josephinium Assocs.*, 111 Wn. App. at 622. Moreover, they cannot “prevail” in an “eviction proceeding,” under RCW 59.18.250, because they have no possessory interest in the property for which there could be an eviction proceeding, let alone a trial. *See* RCW 59.18.250. The entire eviction proceeding, and any alleged defenses, including retaliation, are moot. Appellants moved off the property voluntarily and abandoned any defenses to being evicted that they once had.

Thus, their requested relief on appeal makes no sense and this Court cannot provide effective relief. *See Orwick*, 103 Wn.2d at 253. They want this matter to be remanded for a trial—not to decide who should have possession of the property and whether any defenses would prevent eviction—but on the (declaratory) issue of whether they should be granted attorney fees for successfully defending an eviction *that never actually took place and cannot now take place*. Having a trial, let alone under the limited, expedited, jurisdiction of an unlawful detainer action, to decide whether Appellants are entitled to attorney fees for successfully defending an eviction that did not occur and now cannot occur is non-sensical. This sound, practical, argument is buttressed by the fact Appellants are not claiming any right to possess the property and voluntarily relinquished

possession—even after obtaining a supersedeas bond and staying the trial court’s decision.

In sum, RCW 59.18.240 and RCW 59.18.250 are statutes that provide *defenses* to being evicted. The former defines and prohibits retaliatory evictions by landlords. RCW 59.18.240. The latter effectuates that prohibition by statutorily creating “rebuttable presumption[s] affecting the burden of proof” in unlawful detainer actions. RCW 59.18.250. Neither statute, however, creates an independent cause of action, nor counterclaim, for tenants to assert after they voluntarily terminate a tenancy and abandon a landlord’s rental property. Implied or express, the condition precedent to any successful defense, or any attorney fee award, in favor of tenant under RCW 59.18.240 and RCW 59.18.250 is that the tenant is facing eviction, and actually claims a right to possession of the property. *See Josephinium Assocs.*, 111 Wn. App. at 622. Appellants are not facing eviction, nor do they claim any right to possession; they voluntarily moved off the property and their appeal is thus moot. *See Josephinium Assocs.*, 111 Wn. App. at 622; *Orwick*, 103 Wn.2d at 253.

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5.3. The Trial Court Properly Followed Show Cause Procedures, Determined the Viability of the Parties' Claims and Defenses, including the Alleged Defense of Retaliatory Eviction, and Properly Found that Further Evidentiary and Testimonial Hearings or Trial were Unnecessary.

An unlawful detainer action is a statutorily created proceeding that provides an expedited method of resolving the right to possession of property. *Christensen v. Ellsworth*, 162 Wn.2d 365, 370-71, 173 P.3d 228 (2007). Upon filing an action for unlawful detainer, the plaintiff may apply for an order directing the defendant to appear and show cause why a writ of restitution should not issue restoring possession of the property to the plaintiff. RCW 59.18.370. At the show cause hearing, "It is undisputed that a defendant . . . is not entitled to a full trial." *Leda v. Whisnand*, 150 Wn. App. 69, 81, 207 P.3d 468, 475 (2009).

Rather, at the show cause hearing the tenant is entitled to answer the complaint and may assert any legal or equitable defenses arising out of the tenancy. RCW 59.18.380; *Leda*, 150 Wn. App. at 80. A tenant who raises a viable legal defense, either in written submissions or during the show cause hearing, is entitled to testify in support of that defense and to present other witnesses as well. *Leda*, 150 Wn. App. at 82. The court may conduct that examination itself or allow the parties or counsel to do so, and it may set the matter over for a longer hearing if necessary. *Id.* at 83. The trial court must

consider sufficient admissible evidence from parties and witnesses to determine the merits of any viable asserted defenses. *Id.*

Importantly, the trial court presiding over the show cause hearing has the authority under RCW 59.18.380 “*to limit testimony to that which is strictly necessary to properly decide the issue of interim possession of the property.*” *Leda*, 150 Wn. App. at 83 (emphasis added). Put another way, the trial court has discretion to manage the scope and manner of evidence presented so that the hearing can maintain its expedited nature:

Washington law simply does not countenance eviction of people from their homes without first affording them some opportunity to present evidence in their defense, but that right is not absolute: *it is tempered by a grant of authority to trial courts to manage the scope and manner in which evidence is presented*, rather than leaving it to the discretion of attorneys or pro se litigants.

*Leda*, 150 Wn. App. at 83 (emphasis added).

In summation, the proper procedure by which a trial court should conduct a show cause hearing, under RCW 59.18.380, is as follows:

(1) the trial court must ascertain whether either the defendant’s written or oral presentations potentially establish a viable legal or equitable defense to the entry of a writ of restitution and (2) the trial court must then consider sufficient admissible evidence (including testimonial evidence) from parties and witnesses to determine the merits of any viable asserted defenses.

*Leda*, 150 Wn. App. at 83. This is because the legislature intended unlawful detainer proceedings to be decided with evidentiary hearings that are short of a full trial:

Because RCW 59.18.380 contemplates a resolution of the issue of possession based solely on the show cause hearing, either the court must manage its examination in a sufficiently expeditious manner to accommodate its calendar while still preserving the defendant's procedural rights or it must briefly set the matter over for a longer show cause hearing in which those rights are respected.

*Id.*

Finally, under RCW 59.18.240, “*So long as the tenant is in compliance with this chapter*, the landlord shall not take or threaten to take reprisals or retaliatory action against the tenant because of any good faith and lawful [complaints to governmental authority].” (emphasis added). The statute continues stating, “Assertions or enforcement by the tenant of his rights and remedies under this chapter” can be the basis of a retaliatory eviction. RCW 59.18.240(2). However, giving a tenant notice to evict them under a month-to-month tenancy is not retaliatory by itself. *See Stephanus v. Anderson*, 26 Wn. App. 326, 329, 613 P.2d 533, 536 (1980). Moreover, under RCW 59.18.250, tenants are only entitled to a rebuttable presumption that an eviction proceeding was begun in retaliation, if the tenant was in compliance with their “lease” when the landlord provided the tenant the notice to terminate the tenancy. RCW 59.18.250. If the tenant is not in

compliance with their lease when the notice to terminate the tenancy was provided, the presumption favors the landlord, and the court presumes that the eviction proceeding was not retaliatory. RCW 59.18.250. Even if the tenant is in compliance with their lease at all times, and he or she is entitled to a presumption that the eviction proceeding was begun in retaliation, the presumption is “rebuttable” by the landlord at hearing. RCW 59.18.250.

Here, Appellants argue that parties’ statements in the text messages, as well as testimony provided at the show cause hearing, raise a presumption that Ms. Tedford’s unlawful detainer proceeding was retaliatory. (Opening Brief at 11-16). They further argue that the court erred by not allowing or eliciting more testimony at the second show cause hearing. (Opening Brief at 11-16). Specifically, Appellants argue that a full trial was necessary because Ms. Tedford offered to reimburse Ms. Mattler for any missing fire alarms. (*See* Opening Brief at 11-16). In Appellants’ view, the declarations supplied over several weeks, testimony elicited at the second show cause hearing, and the only evidence of communication regarding smoke detectors, i.e., the text messages, were not adequate to resolve the issue of whether Ms. Tedford unlawfully brought the unlawful detainer proceeding in retaliation against them. (*See* Opening Brief at 11-16).

Appellants misunderstand the proper balance of inquiry required to resolve such issues at (expedited) unlawful detainer show cause hearings.

Practically speaking, the second show cause hearing was essentially a trial and a longer trial was unnecessary. The witnesses with firsthand knowledge of the smoke detector issue/defense, i.e., Ms. Mattler and Ms. Tedford, were examined and cross examined and reexamined. (RP July 6, 2018). The meaning of the text messages was thoroughly debated both in declarations and live testimony. (CP at 21-93, 106-07, 108-36, 145-51; RP July 6, 2018, at 11-48). When Ms. Tedford served the 20-day notice to vacate, other evidence clearly demonstrated that Appellants were not in compliance with undisputed terms of the rental agreement, including the payment of \$1,000.00 deposit and paying the rent on time. (*See e.g.*, (CP 30, 34-35, 42-43, 47, 56, 65-66, 70-71, 74-76, 110-11; RP July 6, 2018, at 12-13). Thus, the trial court commissioner “consider[ed] sufficient admissible evidence (including testimonial evidence) from parties and witnesses to determine the merits of any viable asserted defenses” while “manag[ing] its examination in a sufficiently expeditious manner to accommodate its calendar. . . .” *See Leda*, 150 Wn. App. at 83.

Stated another way, all necessary testimony and evidence was presented at the two show cause hearings and a longer trial was unnecessary. Weeks went by between the complaint and the second show cause hearing allowing the parties to gather evidence and testimony. The trial court did not limit any evidentiary submissions before the second show cause

hearing. Substantial evidence supports the trial court's findings, including the finding that Ms. Tedford did not bring an unlawful detainer action in retaliatory fashion. *See* CP at 299-301; *Leda*, 150 Wn. App. at 83; *Bracken*, 2018 Wash. App. LEXIS 2618, \*2, 2018 WL 6046910. This evidence included the following. First, it is uncontested that Appellants failed to pay rent timely and had multiple checks returned for insufficient funds. (CP at 30, 34-35, 42-43, 47, 56, 63-75, 70-71, 74-76, 110-11, 145-51, 149; RP July 6, 2018, at 12-13, 39). This is a common reason for any landlord to terminate the tenancy of any tenant and common reason to bring an unlawful detainer proceeding. *See e.g.*, RCW 59.12.030(3). But, again, a 20-day notice is a no cause eviction and no reasons are necessary at all. RCW 59.12.030(2). Second, when Ms. Tedford had Appellants served with the 20-day (no cause) notice to terminate the tenancy, and the 10-day notice, on April 18, 2018 (CP at 12, 30-31), Appellants were in breach of uncontested terms of the rental agreement; i.e., to pay the \$1,000.00 deposit along with first month's rent, and failure to pay rent on time. (CP at 30, 34-35, 42-43, 47, 56, 63-75, 70-71, 74-76, 110-11, 145-51, 149; RP July 6, 2018, at 12-13, 39). Third, all necessary evidence and testimony regarding the parties' communication about smoke detectors was admitted and presented to trial court; this included the text messages discussing smoke detectors as well as the parties' testimony further explaining those text

messages. (CP at 21-93, 106-07, 108-36, 145-51; RP July 6, 2018, at 11-48).

Notably, Mr. Guy was not prevented from testifying about those text messages, nor was he prevented from testifying about any relevant retaliatory eviction issue:

**The Court:** Okay. Mr. Cushman, any very brief –

**Mr. Cushman:** Yeah, I have some brief questions for Mr. Guy.

**The Court:** Okay. And is that about the retaliation issue?

**Mr. Cushman:** It's about the NSF checks, which goes to the defense to the retaliation issue.

**The Court:** Okay. I'm not finding that relevant.

**Mr. Cushman:** *Okay.*

**The Court:** All right. Thank you. Okay. I really appreciate everyone being here. I know everyone couldn't be here at the last hearing . . . .

(RP July 6, 2018, at 48) (emphasis added). Rather, his attorney expressly stated he only wanted to ask Mr. Guy questions about checks returned for insufficient funds. (RP July 6, 2018, at 48). Any argument otherwise on appeal, i.e., that Mr. Guy was to testify about anything else—given the exchange between the trial court commissioner and Mr. Guy's attorney directly before the trial court ruled—is barred by the invited error doctrine. *See Estate of Muller*, 197 Wn. App. at 484. Appellants cannot agree to *not*

ask Mr. Guy questions at the show cause hearing, and then complain that the trial court erred by not letting him testify. *See id.* That would improperly be setting up an error on appeal. *See id.*

Alternatively, Appellants failed to preserve the issue of Mr. Guy testifying about anything relevant. (*See* RP July 6, 2018, at 9, 48). Therefore, any alleged error that the trial court improperly denied his testimony cannot be raised now. *See* ER 103; *Adcox*, 123 Wn.2d at 26 (holding “a party may not challenge a trial court's ruling excluding evidence unless ‘the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.’”). In other words, Appellants only proffered irrelevant testimony by Mr. Guy<sup>1</sup>, and did not proffer any relevant testimony. (*See* RP July 6, 2018, at 9, 48). Thus, the argument that trial court erred in not hearing his testimony is a red

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<sup>1</sup> As stated by Appellants’ counsel in opening arguments at the show cause hearing, Mr. Guy’s testimony had to do with alleged repeated problems he had paying rent via his autopay method of paying rent. (RP July 6, 2018, at 9) (stating “But with regard to the clunkiness about the first month's payment of rent, I will have Mr. Guy testify about some problems he had with an auto pay that were resolved early and that, by the time this came to a head, there was no noncompliance.”). Such “problems” were not relevant to the retaliatory eviction defense because Mr. Guy’s testimony could not refute that agreed rental terms, i.e., the deposit and rent being paid on time, were breached at the time Ms. Tedford served the 10-day and 20-day notices on April 18, 2018. The dispositive fact is that rent was not paid on time, nor was the deposit, at the time Ms. Tedford personally served the notices. Mr. Guy’s proffered testimony about being unable to set up “auto pay” regarding the rent due is thus not relevant. Nor is any claim that he became current on rent and the deposit *after the 20-day notice was served*. *See* RCW 59.18.250 (stating “That if at the time the landlord gives notice of termination of tenancy pursuant to chapter 59.12 RCW the tenant is in arrears in rent or in breach of any other lease or rental obligation, there is a rebuttable presumption affecting the burden of proof that the landlord's action is neither a reprisal nor retaliatory action against the tenant.”).

herring. Arguendo, if any error it was harmless because Mr. Guy could not refute any dispositive issues or change the outcome of the case. *See e.g.*, fn. 1, *supra*.

Accordingly, as to the issue of retaliation, all pertinent and necessary testimony and evidence was before the trial court at the time it issued the order for a writ of restitution. Since Appellants were in breach of the rental agreement, for failure to pay the rental deposit, and for repeatedly failing to pay rent on time, they were not entitled to any presumption that the 20-day notice to terminate and eviction proceeding against them were retaliatory in nature. *See RCW 59.18.240* (stating “*So long as the tenant is in compliance with this chapter*, the landlord shall not take or threaten to take reprisals or retaliatory action against the tenant because of any good faith and lawful”) (emphasis added). Rather, Ms. Tedford was entitled to the opposite presumption, i.e., that the court presumed “the landlord’s action [wa]s neither a reprisal nor retaliatory action against the tenant.” *See RCW 59.18.250* (stating “That if at the time the landlord gives notice of termination of tenancy pursuant to chapter 59.12 RCW the tenant is in arrears in rent or in breach of any other lease or rental obligation, there is a rebuttable presumption affecting the burden of proof that the landlord’s action is neither a reprisal nor retaliatory action against the tenant.”).

Even if somehow, arguendo, Appellants were entitled to a rebuttable presumption that the eviction was retaliatory in nature, the trial court properly heard all of the necessary evidence and testimony to decide all relevant issues, including the retaliatory eviction defense. *See Leda*, 150 Wn. App. at 83. The trial court made the specific finding that Ms. Tedford did not bring the unlawful detainer action in retaliatory fashion. (CP at 300). This finding is supported by substantial evidence, as stated above. Therefore, because Ms. Tedford argued she rebutted any presumption of retaliatory eviction with the evidence and (live and written) testimony she presented at the first and second show cause hearings, this Court should affirm the trial court's ruling that trial was unnecessary, and that Ms. Tedford did not bring an unlawful detainer action in retaliatory fashion. *See Carlson*, 50 Wn. App. at 429 (holding trial court's judgment may be affirmed on any theory argued below).

## **6. ATTORNEY FEES**

Pursuant to RAP 18.1, Ms. Tedford requests attorney fees on appeal. The basis before the trial court for this award was RCW 59.18.410, which allows "costs and attorney fees" to be awarded to a landlord when a tenant is found guilty of unlawful detainer at show cause hearing.

On appeal, Appellants arguments are moot and without merit. The parties had a month-to-month rental agreement that fell under the

Residential Landlord Tenant Act. Ms. Tedford is deserving of an attorney fee award. Moreover, the reason for this appeal appears to be spite and to cause Ms. Tedford financial harm, not restitution of the premises; Appellants have voluntarily vacated the property, are not claiming any right of possession to the property, and know they are judgment-proof to the degree that pursuing this appeal costs them little to nothing. Justice in such circumstances should afford Ms. Tedford an attorney fee award.

Respectfully submitted this 12th day of December, 2018,



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Drew Mazzeo WSBA No. 46506  
Attorney for Appellee

**CERTIFICATE OF SERVICE**

I declare under penalty of perjury under the laws of the state of Washington that on December 12, 2018, I caused to be served:

1. Brief of Respondent

On:

Ben Cushman  
Attorney for Appellants Angie Mattler and Charles Guy  
400 Union Ave., Suite 200  
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Via email and electronic service by the Court of Appeals

Dated December 12, 2018, at Olympia, Washington.

  
\_\_\_\_\_  
Stacia Smith

**LIFETIME LEGAL, PLLC**

**December 12, 2018 - 10:55 AM**

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