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Court of Appeals
Division II
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IN THE COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

Case No. **52593-3-II**

Clark County Superior Court No. 17-2-02006-4

VICKI G. WEATHERS,
Respondent,

v.

WILLIAM L. GHIORSO,
Appellant,

and,

LARRY R. YARBROUGH,
Appellant-Defendant.

**APPELLANT WILLIAM L. GHIORSO'S AMENDED
REPLY BRIEF**

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ASSIGNMENTS OF ERROR

- I. The trial court erred by continuing to assert unlawful detainer subject matter jurisdiction over the case rather than dismissing it or converting it into an ordinary civil case.

- II. The trial court exceeded its authority by entering punitive sanctions against Yarbrough and Mr. Ghiorso without evidence of any actual loss and without following the proper procedure.

ARGUMENT

Weathers has not come forward with any case or statute to support her opposition to Mr. Ghiorso's First Assignment of Error. She has also refused to offer any response to the fact that RCW § 59.16.030, on its own, requires a reversal in this case. *See Wash. Rev. Code § 59.16.030.*

Instead, Weathers continues her transparent effort to inject distractions into this case to prevent Mr. Ghiorso from challenging the jurisdiction of an order imposing sanctions against him.

Before responding to the merits of this appeal, Weathers devotes more than half of her brief to arguing that **(1)** Mr. Ghiorso’s statement of the case is too argumentative; **(2)** Mr. Ghiorso lacks “standing” to challenge the jurisdiction of an order entering sanctions against him; and **(3)** Mr. Ghiorso’s status as an attorney in Oregon somehow prevents him from filing a pro se appeal in Washington.¹

All of these “initial objections” were adequately refuted by Mr. Ghiorso in response to Weathers’ unsuccessful motion to strike Mr. Ghiorso’s opening brief. *See* App. at 2 – 14. Therefore, those arguments are incorporated herein and will not be repeated. *See Seattle Nw. Sec. Corp. v. SDG Holding Co.*, 61 Wash. App. 725, 733, 812 P.2d 488, 493–94 (1991); *see also Angelo Prop. Co., LP v. Hafiz*, 167 Wash. App. 789, 808, 274 P.3d 1075, 1085 (2012).

¹ Weathers’ third argument regarding Mr. Ghiorso’s pro se status was rejected by Commissioner Bearse in an order entered in this appeal on June 25, 2019. *See* A-1; *see also Splash Design, Inc. v. Lee*, 104 Wn. App. 38, 44, 14 P.3d 879 (2000).

A. Weathers has failed to make a cognizable argument in opposition to Mr. Ghiorso’s First Assignment of Error.

Without responding to the case law and statutory authority supporting Mr. Ghiorso’s First Assignment of Error, *see* RCW § 59.16.030, Weathers essentially takes the extreme position that the superior court may exercise unlawful detainer jurisdiction over any counterclaim that it chooses, without limitation. *See* Resp. Brief at 15 – 17. Citing *Angelo*, Weathers argues that there is “nothing the parties can do, or fail to do, that changes the Court’s statutorily vested jurisdiction over unlawful detainer actions.” Resp. Brief at 15.

But this appeal is not about what the parties did or failed to do. This appeal is about what *the superior court* did or failed to do. *Cf. Angelo Property Co., LP v. Hafiz*, 167 Wash. App. 789, 812, 274 P.3d 1075, 1087 (2012) (“Contrary to [Weathers’] argument on appeal, *Munden* did *not* hold that a trial court vested with unlawful detainer jurisdiction may entertain *all* counterclaims . . .”).

1. Weathers argues conversion was not required because she has confused *Munden*'s two rules.

Weathers begins her limited argument on the merits by conflating the “general” rule articulated in *Munden* with the discretionary “collateral rule” that the Court announced in that case. *See* Resp. Brief at 16 (“There is neither statutory authority nor common law mandating a superior court to convert an unlawful detainer action at any time . . .”).

Munden's “general rule” is that the superior court's unlawful detainer subject matter jurisdiction can be exercised **only** to determine “who is entitled to possess the property at issue.” *Angelo*, 167 Wash. App. at 811, 274 P.3d at 1086. Under the “exception” to this “general rule,” a superior court may also determine “incidental issues,” such as restitution of the premises or repayment of rent. *See id.* Additionally, the superior court may hear counterclaims that are “based on facts which excuse a tenant's breach,” as long as “the tenant continues to assert a right to possess the property.” *Id.*

Munden also announced a “collateral rule,” which applies only when “the right to possession ceases to be at issue.” *Id.* at 816, 274 P.3d at 1089. At that time, the unlawful detainer action “*may be converted* into an ordinary civil suit for damages, and the parties may *then* properly assert any cross claims, counterclaims, and affirmative defenses.” *Angelo Prop. Co., LP v. Hafiz*, 167 Wash. App. 789, 816, 274 P.3d 1075, 1089 (2012).

As shown by the discussion in *Angelo*, *Munden*’s “general rule” is mandatory: the superior court is not authorized to determine issues that are *not* incidental to the “right to possession” in an unlawful detainer action. *See Angelo*, 167 Wash. App. at 811, 274 P.3d at 1086. The “collateral rule,” however, is discretionary. *See id.* at 816, 274 P.3d at 1089. The superior court can choose to convert the unlawful detainer action into an ordinary civil action, and *then* it may properly determine issues that are outside the scope of the unlawful detainer action. *See id.* at 816, 274 P.3d at 1089.

Contrary to how Weathers attempts to make it seem,² this appeal is not concerned with *Munden*'s discretionary "collateral rule." Instead, the issue that must be resolved in this appeal is limited to the proper application of *Munden*'s mandatory "general rule." Specifically, the question is whether the superior court may determine a *plaintiff's* unlawful detainer claim when the defendant's defense to that claim is that ***he is not a tenant at all***. See RCW § 59.16.030.

² "[Weathers'] inconsistent positions below and on appeal have oversimplified [Mr. Ghiorso's] jurisdictional argument and have injected distractions into this case. We recognize that [Mr. Ghiorso] does *not* argue that the trial court lacked *general* subject matter jurisdiction over [Yarbrough's defense and] counterclaims, . . . or that the trial court lacked *statutory* unlawful detainer jurisdiction over [Weathers'] original unlawful detainer action. Instead, [Mr. Ghiorso's] jurisdictional argument comprises two main points: First, [he] argues that [Yarbrough's defense to the unlawful detainer claim] involved issues beyond the 'right to possession' of the property and other related subjects that a trial court may address under its statutory unlawful detainer jurisdiction. Second, [Mr. Ghiorso] asserts that [the superior court could not determine Weathers' unlawful detainer action without also ruling on the merits of Yarbrough's defense, which was outside the scope of unlawful detainer subject matter jurisdiction]." Cf. *Angelo Prop. Co., LP v. Hafiz*, 167 Wash. App. 789, 809–10, 274 P.3d 1075, 1085–86 (2012).

2. The superior court’s judicial estoppel ruling is outside the scope of review for this appeal.

Weathers makes only one other argument in opposition to Mr. Ghiorso’s First Assignment of Error. *See* Resp. Brief at 17 – 19. Weathers argues that this Court should ignore *Munden*’s general rule because (a few weeks before trial) the superior court held that Yarbrough was judicially estopped from asserting an ownership interest in the property. *See id.*

The main problem with Weathers’ second argument is that the superior court’s judicial estoppel ruling was entered in response to Weathers’ motions in limine, which were filed more than half a year after the subject of this appeal.

Since the judicial estoppel argument was not presented to the trial court until long after this appeal was filed, the argument should not be considered for the first time here. *See Lindblad v. Boeing Co.*, 108 Wash. App. 198, 207, 31 P.3d 1, 5 (2001) (“We will not review an issue, theory, argument, or claim of error not presented at the trial court level.”).

3. The application of *Munden*'s general rule must be made prior to any other determination.

Washington law makes clear that an unlawful detainer action cannot be maintained unless there is no dispute that the defendant is a “tenant” and the plaintiff is a “landlord.” *See* RCW § 59.16.030; *see also Bar K Land Co. v. Webb*, 72 Wash. App. 380, 384, 864 P.2d 435, 437 (1993) (“Ms. Webb *contends* she had greater property interests than those of a tenant. Therefore, this should have been an action for ejectment rather than unlawful detainer, allowing her counterclaims and interests to be decided.”) (emphasis added).

If the defendant even so much as *contends* that he “had greater property interests than those of a tenant,” *see id.*, then the action must be dismissed or converted into an ordinary civil action for ejectment. *See* RCW § 59.16.030; *see also Fed. Nat. Mortg. Ass'n v. Ndiaye*, 188 Wash. App. 376, 384, 353 P.3d 644, 648 (2015) (“[U]nlawful detainer actions are not the proper forum to litigate questions of title.”).

Superior courts cannot circumvent *Munden*'s "general rule" by judicially estopping a defendant from denying the existence of a landlord-tenant relationship. *See Ndiaye*, 188 Wash. App. at 384, 353 P.3d at 648 ("[U]nlawful detainer actions are not the proper forum to litigate questions of title."). If such a ruling is made, it must still be in the context of an ordinary civil action for ejectment. *See RCW § 59.16.030*.³

Therefore, even if this Court considers Weathers' judicial estoppel argument despite her failure to present it to the superior court during the proceeding below, this Court should nevertheless reject the argument because Weathers misunderstands the proper time that the application of *Munden*'s "general rule" must be made. *See Bar K Land Co. v. Webb*, 72 Wash. App. 380, 384, 864 P.2d 435, 437 (1993).

³ Allowing superior courts to avoid the limitations on unlawful detainer subject matter jurisdiction by estopping the defendant from denying a landlord-tenant relationship would render *Munden*'s "general rule" meaningless. The unlawful detainer estoppel ruling could preclude the defendant from asserting the same defense in a subsequent civil action.

4. The superior court held that Yarbrough's defense created a factual question.

The superior court in this case held that an issue of fact existed regarding Yarbrough's status as a "tenant" on June 1, 2018. *See* Resp. Brief at 12, n.10 ("this was an issue of fact . . ."). Since Yarbrough denied that he was a "tenant" at the show cause hearing, the superior court held that there was an "issue of fact" about whether Weathers was entitled to possession. *See id.*

Once that determination was made, the unlawful detainer action should have been converted to an ordinary civil action for ejectment before purporting to assume jurisdiction over Yarbrough's defense. *See* RCW § 59.16.030. In *Bar K Land Co. v. Webb*, for example, the defendant "contend[ed]" that she had "greater property interests than those of a tenant," and the court dismissed the case because it "should have been an action for ejectment rather than unlawful detainer." *Bar K Land Co. v. Webb*, 72 Wash. App. 380, 384, 864 P.2d 435, 437 (1993).

There is no reason to reach a different conclusion in this case. Yarbrough has maintained that he was not a “tenant” since he alleged that defense in his answer. *See* CP – 9 ¶ 8. When the court ruled that Yarbrough’s defense created a factual issue, the action should have been converted or dismissed. *See id.*⁴

⁴ Weathers misleadingly argues that the Commissioner’s ruling from the motion for discretionary review proceeding concerned the same issue presented by this appeal. *See* Resp. Brief at 8. Reading the Ruling Denying Review itself proves that Weathers’ contention is false. *See* CP – 206. The opinion expressly states that it was answering the question of whether the superior court “effectively converted” the unlawful detainer action into an ordinary civil case. *See id.* It also states that the case was *not* “effectively converted,” in light of the superior court and Weathers’ insistence that the case proceed as an action for unlawful detainer. *See id.* This actually *supports* Mr. Ghiorso’s argument and his reliance on this Court’s reasoning in *Angelo*. *Cf. Angelo Prop. Co., LP v. Hafiz*, 167 Wash. App. 789, 818, 274 P.3d 1075, 1090 (2012) (“Noting, however, the trial court's express statement that it did *not* covert the unlawful detainer action into an ordinary civil action before it purported to assume jurisdiction over Maged's constructive eviction counterclaim, we hold that the trial court lacked subject matter jurisdiction over this counterclaim under the ‘collateral’ rule announced in *Munden*, in addition to lacking subject matter jurisdiction under *Munden*'s ‘general rule’ and ‘exception’ discussed above.”); *Cf.* Opening Brief. In any event, the Commissioner declined to reach the merits of Yarbrough’s motion for discretionary review. *See* CP – 206.

“We reiterate, in an unlawful detainer action, the court sits as a special statutory tribunal to summarily decide the issues authorized by statute and *not* as a court of general jurisdiction with the power to hear and determine other issues.” *Angelo Prop. Co., LP v. Hafiz*, 167 Wash. App. 789, 822, 274 P.3d 1075, 1092 (2012) (quoting *Granat v. Keasler*, 99 Wash. 2d 564, 571, 663 P.2d 830, 834 (1983)) (quotations omitted).

Since the superior court insisted on exercising unlawful detainer subject matter jurisdiction over Yarbrough’s defense, this Court should vacate all of the “orders, rulings, and factual determinations,” *Angelo*, 167 Wash. App. at 822, entered after it held that Yarbrough’s defense to Weathers’ claim for possession created a factual question.⁵

⁵ Weathers suggests that it was Yarbrough’s responsibility to request conversion or some other relief. *See* Resp. Brief at 17, n.18. But a “tribunal's lack of subject matter jurisdiction may be raised by a party or the court at *any* time in a legal proceeding. Without subject matter jurisdiction, a court or administrative tribunal may do *nothing* other than enter an order of dismissal.” *Inland Foundry Co. v. Spokane Cty. Air Pollution Control Auth.*, 98 Wash. App. 121, 123–24 (1999) (emphasis added).

B. The superior court exceeded its authority when it entered punitive sanctions against Mr. Ghiorso.

Mr. Ghiorso's Second Assignment of Error is that the "trial court *exceeded its authority* by entering punitive sanctions against Yarbrough and Mr. Ghiorso without evidence of any actual loss and without following the proper procedure." *See* Assignments of Error, *supra* at 2 (emphasis added).

Predictably, Weathers responds to Mr. Ghiorso's Second Assignment of Error by mischaracterizing it. *See* Resp. Brief at 20 ("Whether a party's actions warrant contempt is a matter within the sound discretion of the trial court . . ."). As a result of that mischaracterization, Weathers argues that the proper standard of review is for abuse of discretion. *See id.*

But a "court's *authority* to impose sanctions for contempt is a question of law, which [is] review[ed] de novo." *In re Dependency of A.K.*, 162 Wash. 2d 632, 644, 174 P.3d 11, 17 (2007) (emphasis added). Mr. Ghiorso's Second Assignment of Error expressly challenges the superior court's *authority*.

Therefore, since Mr. Ghiorso’s Second Assignment of Error is that the court “exceeded its authority” when it entered the sanctions in this case, the Second Assignment of Error is reviewed “de novo,” and not for abuse of discretion. *See id.*⁶

1. Weathers misstates the purpose and the terms of the order entering sanctions against Mr. Ghiorso.

Relying on an unreported decision, Weathers argues that **(1)** the purpose of the sanctions against Mr. Ghiorso was to coerce Yarbrough’s compliance with a prior order; and **(2)** the sanctions order contained a purge clause. *See Resp. Brief at 30.*

First, the superior court’s conclusions of law specify that the purpose of the sanctions was to “pay the losses suffered” by Weathers as a result of the contempt. *See CP – 571 ¶ 2.*

⁶ The case cited by Weathers states that the question of whether “contempt *is warranted* in a particular case is a matter within the sound discretion of the trial court,” and reviewed for abuse of discretion. *See Moreman v. Butcher*, 126 Wash. 2d 36, 40, 891 P.2d 725, 728 (1995) (emphasis added). But the question of whether the superior court had the “authority” to enter those sanctions in the first place is a question of law that is reviewed “de novo.” *A.K.*, 162 Wash. 2d at 644, 174 P.3d at 17.

Second, the superior court’s opinion did not contain a purge clause. *See* CP – 567-73. In fact, the superior court quoted the Division III case in its ruling that stated “a court may find a person in contempt whether or not it is possible to coerce future compliance.” *In re of Rapid Settlements, Ltd's*, 189 Wash. App. 584, 601, 359 P.3d 823, 832 (2015).

Despite arguing to the superior court that the sanctions were appropriate to “pay the losses suffered” by Weathers, and that no purge clause was required, Weathers now inconsistently argues that the sanctions were entered for an entirely different purpose, and that the ruling somehow incorporates the purge clause from the court’s prior order, which did not involve Mr. Ghiorso. *See* Resp. Brief at 30 – 31.

The error in Weathers’ account of events is emphasized by her inaccurate interpretation of *Rockwood v. Hadaller*, 168 Wash. App. 1003 (2012). In that case, the sanctions order “contained a clause that would purge the \$10,000 sanction if Hadaller were to fully comply with the order.” *Id.*

No such clause existed in this case. *Cf.* CP – 567-73. The superior court’s order entering sanctions against Mr. Ghiorso relied exclusively on the court’s authority to impose sanctions for the purpose of paying for Weathers’ “losses suffered,” and it even acknowledged that there was no means for Mr. Ghiorso to purge the contempt and avoid the sanction. *See* CP – 571 ¶ 2.

2. Evidence of actual losses must be presented to support an award of punitive compensatory sanctions.

Weathers briefly states without further explanation that there “is no requirement for a showing of damages to support the court’s contempt sanctions.” *See* Resp. Brief at 31.

Weathers is wrong. Ordinarily, a court cannot enter sanctions to “punish” for a “past contempt” without affording the proper criminal due process protections. *See In re M.B.*, 101 Wash. App. 425, 453, 3 P.3d 780, 796 (2000). However, an exception exists “if the purpose [of the sanctions] is to compensate the complainant.” *In re of Rapid Settlements, Ltd's*, 189 Wash. App. 584, 608, 359 P.3d 823, 836 (2015).

Presumably, the superior court recognized that the sanctions it was entering against Mr. Ghiorso were punitive, which explains why it stated that the sanctions were being entered under the exception that permits punitive sanctions to compensate a party for her “losses suffered.” CP – 571 ¶ 2.

As Mr. Ghiorso explained in his opening brief, however, Weathers could not have suffered any loss to support the award of punitive sanctions because Weathers had already been paid \$12,000 for any losses that resulted from the same cancelled checks. *See* CP – 469-70. Weathers makes no effort to refute this fact in her responding brief.

The superior court’s order can be affirmed only if a proper basis existed to enter punitive compensatory sanctions against Mr. Ghiorso in a civil case. *See State v. Boatman*, 104 Wash. 2d 44, 46, 700 P.2d 1152, 1153 (1985). Since Weathers failed to present evidence of any actual losses to support the superior court’s ruling, *see* CP – 469-70, the order entering sanctions against Mr. Ghiorso should be vacated.

3. The superior court's sanctions cannot be affirmed under CR 37(b)(2).

For the same reason that the superior court lacked the authority to award the particular sanctions it entered against Mr. Ghiorso, it also abused its discretion if the sanctions were entered under CR 37(b)(2) instead. *See* CP – 571 ¶ 3.

Under CR 37, if a party fails to respond to a request for production of documents, the superior court may enter an order requiring the party “to pay the reasonable expenses, including attorney fees, caused by the failure.” Wash. Super. Ct. Civ. R. 37 (b)(2). As stated above, however, Weathers presented no evidence of “reasonable expenses” or “attorney fees,” because all expenses and fees had already been paid. *See* CP – 469-70.

Since the superior court attempted to compensate Weathers for losses that had already been paid, *see id.*, the superior court's decision was “based on untenable grounds.” *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d 299, 339, 858 P.2d 1054, 1075 (1993).

C. Mr. Ghiorso filed a meritorious appeal.

Weathers ends her response by arguing that she should be awarded attorney fees on the ground that Mr. Ghiorso’s opening brief is “a disguised attempt at re-litigating his former client’s unlawful detainer matter.” Resp. Brief at 34. Weathers also repeats that Mr. Ghiorso “was not a party to [the unlawful detainer] action,” and does not have “standing” to challenge the jurisdiction of an order entered against him. *See id.* at 35.⁷

Once again, Weathers is wrong. *See* A – 6-14. When the court sanctions an attorney, the attorney becomes a party. *See Splash Design, Inc. v. Lee*, 104 Wn. App. 38, 44, 14 P.3d 879 (2000). “***Any party*** to an appeal . . . may raise the issue of lack of subject matter jurisdiction at ***any time***.” *Skagit Surveyors & Engineers, LLC v. Friends of Skagit Cty.*, 135 Wash. 2d 542, 556, 958 P.2d 962, 969 (1998) (emphasis added).

⁷ Weathers’ “standing” argument appears to be the result of her confusion between the concepts of “jurisdictional” standing and “prudential” standing. *See Spokane Airports v. RMA, Inc.*, 149 Wash. App. 930, 938 (2009). These are not the same thing.

CONCLUSION

Since the superior court purported “to retain statutory unlawful detainer jurisdiction over the case” when it did not, this Court should vacate all “orders, rulings, and factual determinations” entered after the show cause hearing, which includes the order improperly entering sanctions against Mr. Ghiorso. *See Angelo Prop. Co., LP v. Hafiz*, 167 Wash. App. 789, 795, 274 P.3d 1075, 1078 (2012).⁸

Dated August 26, 2019



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⁸ “In an unlawful detainer action, the court sits as a special statutory tribunal to summarily decide the issues authorized by statute and *not* as a court of general jurisdiction with the power to hear and determine other issues.” *Id.* at 822, 274 P.3d at 1092. Without subject matter jurisdiction, a court . . . may do ***nothing*** other than enter an order of dismissal.” *Inland Foundry Co. v. Spokane Cty. Air Pollution Control Auth.*, 98 Wash. App. 121, 123–24 (1999) (emphasis added).

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on **August 26, 2019**, I caused to be served, via electronic service, a true and correct copy of this **Appellant William L. Ghiorso's Amended Reply Brief** to the following individual(s):

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APPENDIX

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2019..... **A-1**

Appellant William L. Ghiorso’s Response to
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June 25, 2019

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CASE #: 52593-3-II

Vicki G. Weathers, Respondent v. William Ghiorso, Appellant

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On the above date, this court entered the following notation ruling:

A RULING BY COMMISSIONER BEARSE:

Vicki Weathers moves to strike William Ghiorso's opening brief. The motion to strike is denied.

Ghiorso may proceed with a pro se challenge to the imposition of sanctions on him. *Splash Design, Inc. v. Lee*, 104 Wn. App. 38, 44, 14 P.3d 879 (2000), review denied, 143 Wn.2d 1022 (2001). To the extent that Weathers believes the issues he raises are outside the scope of appeal or are not properly raised by Ghiorso on his own behalf, Weathers may present these arguments in her response brief. Similarly, she may ask for an award of fees and costs under RAP 18.9 in her brief. The response brief remains due on July 15, 2019.

Very truly yours,

Derek M. Byrne
Court Clerk

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State of Washington
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VICKI G. WEATHERS,
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**APPELLANT WILLIAM L. GHIORSO'S RESPONSE TO
RESPONDENT'S MOTION TO STRIKE**

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Appellant

ASSIGNMENTS OF ERROR

- I. The trial court erred by continuing to assert unlawful detainer subject matter jurisdiction over the case rather than dismissing it or converting it into an ordinary civil case.
- II. The trial court exceeded its authority by entering punitive sanctions against Yarbrough and Mr. Ghiorso without evidence of any actual loss and without following the proper procedure.

POINTS AND AUTHORITIES

Defendant has requested an order striking Mr. Ghiorso's entire opening brief for five reasons: **(1)** it is "inconsistent" with the notice of appeal in violation of RAP 5.3(a)(3); **(2)** the statement of the case is too argumentative; **(3)** Mr. Ghiorso "lacks standing" to challenge the jurisdiction of the trial court's order; **(4)** Mr. Ghiorso is not an attorney in Washington; and **(5)** the opening brief is "frivolous and filed solely for the purpose of delay." *See* Resp. MTS at 7.

A. Mr. Ghiorso did not “violate” RAP 5.3(a)(3).

Defendant’s first argument is that Mr. Ghiorso’s opening brief is “inconsistent” with his notice of appeal, which defendant claims is a “violation of RAP 5.3(a)(3).”

There is no legal basis for this argument. RAP 5.3(a)(3) requires the notice of appeal to “designate *the decision* or part of the decision which the party wants reviewed.” *Id.*¹ That is exactly what Mr. Ghiorso did. *See* CP – 246. The “decision” designated for review is attached to the notice of appeal. *See id.*

There is nothing “inconsistent” about Mr. Ghiorso asserting a jurisdictional challenge for his first assignment of error. *See Angelo Prop. Co., LP v. Hafiz*, 167 Wash. App. 789, 808, 274 P.3d 1075, 1085 (2012) (“A judgment entered by a court lacking subject matter jurisdiction is void; *and a party may challenge such judgment at any time.*”) (emphasis added).

¹ *See 2A Washington Practice Series*, RAP 5.3 (8th ed.) (“The rule does *not* mean that the notice of appeal must designate the particular error claimed by the appellant.”).

The Washington Supreme Court described the process for the formation of the issues on appeal as follows:

“Initially, the notice of appeal must properly designate the decision or part of the decision that the party wants reviewed. ***This designation also subjects to potential review any related order that prejudicially affected the designated decision and was entered before review was accepted.*** After a decision or part of a decision has been identified in the notice of appeal, ***the assignments of error and substantive argumentation further determine precisely which claims and issues the parties have brought before the court for appellate review.***”

Clark Cty. v. W. Washington Growth Mgmt. Hearings Review Bd., 177 Wash. 2d 136, 144–45, 298 P.3d 704, 708 (2013) (internal citations and quotations omitted) (emphasis added).

Mr. Ghiorso properly designated the superior court’s decision imposing sanctions against him in his notice of appeal. *See* CP – 246. It is also well-settled that parties can challenge the jurisdiction for a decision at any time. *See Angelo*, 167 Wash. App. at 808, 274 P.3d at 1085. Therefore, nothing is “inconsistent” about Mr. Ghiorso challenging the jurisdiction of the decision that he designated in his notice of appeal.

B. Defendant has not suffered any prejudice from Mr. Ghiorso's statement of the case.

RAP 10.3(a)(5) provides that an opening brief should contain a "fair statement of the facts and procedure relevant to the issues presented for review, without argument." RAP 10.3(a)(5). As stated above, Mr. Ghiorso's statement of the case is relevant to his assignments of error. Mr. Ghiorso is entitled to challenge the jurisdiction of the superior court's decision. To the extent that defendant repeats her "inconsistency" argument, the motion to strike should be denied.

Defendant also argues that the statement of facts is too argumentative and violates RAP 10.3(a)(5). To justify striking Mr. Ghiorso's opening brief, however, defendant must be able to show that the purported RAP violation has caused her prejudice. *See, e.g., State v. Todd*, 101 Wash. App. 945, 949–50, 6 P.3d 86, 89 (2000) ("Sanctions are appropriate only if the requesting party can show that he or she was prejudiced by the other party's violation of the RAP.").

Defendant’s motion to strike does not so much as *mention* the word “prejudice” a single time. Defendant has made no effort to explain how Mr. Ghiorso’s statement of the case has caused her any prejudice at all. Defendant can simply write her own statement of the case. Since defendant has shown no prejudice, the motion to strike should be denied.

C. Mr. Ghiorso has standing to challenge the jurisdiction of an order imposing sanctions against him.

Defendant’s third argument is that Mr. Ghiorso “lacks standing” to assert a jurisdictional challenge to the superior court’s order. Defendant is wrong again.

When a non-party attorney is sanctioned by the superior court, the non-party attorney “becomes a party for purposes of appeal.” *Splash Design, Inc. v. Lee*, 104 Wash. App. 38, 44, 14 P.3d 879, 882 (2000). “[C]ontempt decisions can be challenged *if the court lacks jurisdiction of the parties or of the subject matter.*” *Seattle Nw. Sec. Corp. v. SDG Holding Co.*, 61 Wash. App. 725, 733, 812 P.2d 488, 493–94 (1991) (emphasis added).

The fact that the superior court also imposed sanctions against other parties in the case does not mean that Mr. Ghiorso is somehow precluded from appealing the order himself or from challenging its jurisdiction.

Similarly, the fact that a ruling in Mr. Ghiorso's favor in this appeal might incidentally benefit another party in the case has no bearing on whether Mr. Ghiorso himself is entitled to appeal the decision. The superior court entered sanctions against Mr. Ghiorso and Mr. Ghiorso has standing to appeal that decision. Defendant's motion to strike should be denied.

D. Mr. Ghiorso is entitled to represent himself on appeal.

Defendant's fourth argument fails for the same reason as her "standing" argument. Defendant claims that Mr. Ghiorso is raising another party's arguments and therefore practicing law without a license, simply because a ruling in Mr. Ghiorso's favor in this appeal would incidentally benefit another party. Defendant is obviously wrong and has cited no authority to support this proposition.

The superior court entered sanctions against Mr. Ghiorso, so Mr. Ghiorso is entitled to represent himself in an appeal from that decision. *See Splash Design, Inc. v. Lee*, 104 Wash. App. 38, 44, 14 P.3d 879, 882 (2000), as amended (Jan. 11, 2001) (“In Washington, a lawyer sanctioned under CR 11 is an ‘aggrieved party’ and may therefore seek review of the sanctions under RAP 3.1.”).

Moreover, Mr. Ghiorso is entitled to appeal that decision on any theory that any other party would be entitled to argue, *including a challenge to the superior court’s jurisdiction*. *See Seattle Nw. Sec. Corp. v. SDG Holding Co.*, 61 Wash. App. 725, 733, 812 P.2d 488, 493–94 (1991) (“[C]ontempt decisions can be challenged if the court lacks jurisdiction of the parties or of the subject matter.”).

Again, the fact that a ruling in Mr. Ghiorso’s favor would incidentally benefit another party does not mean that Mr. Ghiorso is suddenly practicing law without a license. Defendant is wrong and her motion to strike should be denied.

E. The opening brief is not frivolous or made for purposes of delay.

Defendant's final argument in support of her motion to strike simply repeats the four arguments described above, and then baselessly claims that Mr. Ghiorso's opening brief is frivolous and filed solely for purposes of delay. Since none of defendant's other arguments support the harsh sanction that she requests, it follows that her final argument does not.

The Commissioner should take note, however, of counsel for defendant's strategy in filing this motion to strike. Throughout the motion, defendant's counsel relies heavily on inflammatory language and accusations in a very obvious effort to instill bias against the opposing party.

Defendant's counsel then attempts to cause confusion about the actual wording of the rules that govern this dispute, and apparently hopes that this confusion combined with her inflammatory language will result in a decision in her favor and prevent Mr. Ghiorso's legitimate appeal.

Defendant’s first argument in her motion to strike is a great example of this strategy. RAP 5.3(a)(3), the rule that defendant relies on for her first argument, states that a party must “designate the *decision*” for review in their notice of appeal. *See* RAP 5.3(a)(3).

After devoting nearly seven full pages to an argument about why defendant’s counsel thinks the sanctions were appropriate, she proceeds to purposely misinterpret RAP 5.3(a)(3) to give the impression that it requires a notice of appeal to designate each and every *assignment of error* that will be argued on appeal. That is not what RAP 5.3(a)(3) says.²

This same tactic is apparent throughout the rest of defendant’s motion to strike. For example, defendant littered her motion with references to the discretionary review proceeding that was filed earlier in the case below.

² *See 2A Washington Practice Series*, RAP 5.3 (8th ed.) (“The rule does *not* mean that the notice of appeal must designate the particular error claimed by the appellant.”).

Defendant is attempting to cause confusion about what issues were actually decided in the discretionary review proceeding. Mr. Ghiorso anticipated that defendant's counsel would do this, and so Mr. Ghiorso's opening brief fully explains how the discretionary review proceeding actually *supports* his first assignment of error.

To the extent that the Commissioner even entertains defendant's irrelevant effort to cause confusion about the discretionary review proceeding, the Commissioner should refer to the portion of Mr. Ghiorso's brief that responds to it and establishes that defendant is wrong.

The bottom line for purposes of defendant's motion to strike is as follows:

(1) The superior court entered a decision that imposed sanctions against Mr. Ghiorso, which makes Mr. Ghiorso an aggrieved party that is entitled to an appeal from that decision. *See Splash Design, Inc. v. Lee*, 104 Wash. App. 38, 44, 14 P.3d 879, 882 (2000) (so stating);

(2) Mr. Ghiorso properly designated “the decision” imposing those sanctions in his notice of appeal as required by RAP 5.3(a)(3), *see Clark Cty. v. W. Washington Growth Mgmt. Hearings Review Bd.*, 177 Wash. 2d 136, 144–45, 298 P.3d 704, 708 (2013) (“This designation also subjects to potential review any related order that prejudicially affected the designated decision and was entered before review was accepted.”); and

(3) Mr. Ghiorso’s first assignment of error challenges the superior court’s subject matter jurisdiction for that decision, which Mr. Ghiorso is absolutely entitled to do. *See, e.g., Angelo Prop. Co., LP v. Hafiz*, 167 Wash. App. 789, 808, 274 P.3d 1075, 1085 (2012) (“A judgment entered by a court lacking subject matter jurisdiction is void; and a party may challenge such judgment at any time.”); *Seattle Nw. Sec. Corp. v. SDG Holding Co.*, 61 Wash. App. 725, 733, 812 P.2d 488, 493–94 (1991) (“[C]ontempt decisions can be challenged if the court lacks jurisdiction of the parties or of the subject matter.”).

CONCLUSION

Defendant's motion to strike does not assert an appropriate ground to strike Mr. Ghiorso's opening brief and should therefore be denied in its entirety.

DATED JUNE 21, 2019.



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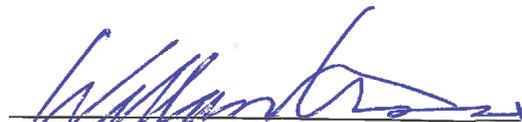
CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on June 21, 2019, I caused to be served, via electronic service, a true and correct copy of this APPELLANT WILLIAM L. GHIORSO'S RESPONSE TO RESPONDENT'S MOTION TO STRIKE on the following individual(s):

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