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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

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**VICKI G. WEATHERS,**  
Respondent,

v.

**WILLIAM L. GHIORSO,**  
Appellant,

and,

**LARRY R. YARBROUGH,**  
Appellant-Defendant.

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**APPELLANT WILLIAM L. GHIORSO'S OPENING  
BRIEF**

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Appellant

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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.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- I. Issues pertaining to Assignment of Error No. 1:**
  - A.** Whether it is improper to maintain an unlawful detainer action when the defendant's defense to the action is that the defendant has greater property interests than a "tenant." **Yes.**
  
  - B.** Whether it is improper to maintain an unlawful detainer action after the trial court evicts the defendant and simultaneously holds that a factual question exists regarding whether the defendant ever agreed to be a "tenant." **Yes.**

C. Whether it is improper for the trial court to enter any additional orders or conclusions after it loses unlawful detainer subject matter jurisdiction and statutory authority by expressly refusing to convert the action into an ordinary civil case. **Yes.**

**II. Issues pertaining to Assignment of Error No. 2:**

A. Whether it is improper to enter contempt sanctions against a party when there is no evidence of any actual loss or prejudice to the opposing party. **Yes.**

B. Whether it is improper to enter punitive sanctions against a party without following the proper procedure for imposing punitive sanctions under RCW 7.21. **Yes.**

C. Whether it is improper to impose sanctions for a discovery violation when there is no evidence of any actual loss or prejudice to the opposing party and the sanctions are sought for an improper purpose. **Yes.**

## STATEMENT OF THE CASE

This case was a no-cause unlawful detainer action filed under RCW § 59.12.030(2) by Plaintiff Vicki Weathers (“Weathers”) against her ex-husband, Defendant Larry Yarbrough (“Yarbrough”). *See* CP – 4.

### **A. Yarbrough was the original owner of the home.**

Yarbrough, a disabled Marine that fought in Vietnam, purchased the subject property of this case with his brother, Jack, in July of 2010. *See* CP – 228; CP – 473; CP – 556, n.2. Yarbrough had recently suffered a heart attack, so Jack helped him purchase a house so that he would have a stable place to live. *See* CP – 231; CP – 213-16. Yarbrough contributed about \$20,000 to the purchase of the home. *See id.*

Yarbrough and Weathers have a son named Josh, who moved into the home with his wife and children after Yarbrough purchased it. *See* CP – 253. If Yarbrough passed away, Yarbrough intended to leave the home to his son and grandchildren. *See* CP – 253-55; CP – 231.

**B. Yarbrough paid for improvements and the mortgage.**

Yarbrough and Josh spent the next few years renovating the home, and greatly increased its value through repairs and landscaping. *See* CP – 253-56. After a few years, the parties were concerned that Josh would not be able to afford to purchase the home from Jack in the event that Yarbrough died. *See* CP – 231; CP – 253-54.

In 2013, Josh asked his mother, Weathers, to purchase the home from Jack to ensure that it stayed in their family’s name. *See id.* Weathers agreed, and she purchased the home in 2014. *See* CP – 265-66. Josh testified that “even after [Weathers] bought the home,” the family agreement “was still supposed to be the same,” and that Weathers “bought it solely to get it out of [Jack’s] name.” *See* CP – 256.

During her deposition, Weathers testified under penalty of perjury that Yarbrough paid the mortgage payments for the home after Weathers became the owner, and paid for Weathers’ closing costs. *See* CP – 174; *see also* CP – 177; CP – 181.

**C. Weathers used a fake rental agreement as the basis for her unlawful detain action.**

Soon after Weathers moved into the home, Josh and his wife divorced. *See* CP – 264. Weathers testified that “everybody moved out and it turned into a mess.” *See* CP – 265. On September 1, 2017, Weathers filed a Complaint to evict Yarbrough from his home. *See* CP – 4.

Paragraph four of Weathers’ Complaint made the following allegation:

**“4. Letting of Premises.** Plaintiff let the Premises to Defendant pursuant to a written rental agreement signed by Defendant on August 1, 2014, for a term commencing on a month to month basis. A copy of a portion of the Agreement is attached hereto as **Exhibit A.**”

*See* CP – 4.

During her deposition, Weathers testified under oath that Yarbrough signed a rental agreement “sometime in 2014.” *See* CP – 264. However, the “rental agreement” attached to Weathers’ Complaint has a copyright date of 2016. *See* CP – 7; *see* CP – 556, n.2.

Weathers' "Oregon Rental Agreement" also contains provisions that were not added to rental agreements in the State of Oregon until after 2014. *See* CP – 94-95; *see* CP – 556, n.2. Yarbrough's signature does not appear in the place where "tenants" actually sign. *See* CP – 96. Instead, his signature appears in the section for "other occupants." *See* CP – 94.

During his deposition, Yarbrough testified that Weathers asked him to sign only as an "occupant" so that "the bank would give her the loan." *See* CP – 232; CP – 556, n.2.

Consistent with that understanding, Yarbrough's Answer to Weathers' Complaint denied the allegation that he was a mere "tenant," and alleged that there "is no lease between the parties." *See* CP – 9 ¶ 8.

**D. Weathers stipulated to converting her unlawful detainer action into an ordinary civil case.**

Around the same time as filing the Answer in the unlawful detainer action, Yarbrough filed his own Complaint which initiated a separate civil case *See* CP – 24-33.

A show cause hearing in Weathers' unlawful detainer action was held on October 25, 2018. Rather than proceeding with the unlawful detainer show cause hearing, Weathers voluntarily stipulated to consolidating her unlawful detainer action with Yarbrough's separately filed civil case. *See* CP – 17; *see also* CP – 34. Weathers admits that she consolidated the cases due to the nature of Yarbrough's defense. *See* CP – 34.

**E. Weathers demanded the expedited calendar priority afforded to unlawful detainer actions despite her stipulation to consolidate the action with Yarbrough's civil case.**

A substantial amount of discovery was required for Yarbrough to fully prepare for the trial. Notwithstanding Weathers' earlier decision to consolidate Yarbrough's civil case with her own, *see* CP – 17, Weathers demanded that the *entire* case be subject to expedited calendar priority. *See* CP – 34.<sup>1</sup>

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<sup>1</sup> *But see Munden v. Hazelrigg*, 105 Wash. 2d 39, 47–48, 711 P.2d 295, 299 (1985) (“In any event, once converted, the civil suit is no longer entitled to the calendar priority afforded an unlawful detainer action by RCW 59.12.130.”).

Due to the prejudice that Yarbrough would face from being forced to rush through the preparation of his defenses, Yarbrough filed a motion to dismiss Weathers' unlawful detainer claim on the ground that the trial court lacked unlawful detainer subject matter jurisdiction following the consolidation. *See* CP – 35.

In the motion to dismiss, Yarbrough argued that the trial court retained general subject matter jurisdiction over the parties and their claims, but that Weathers' unlawful detainer action should be resolved as if it was an action for ejectment. *See id.* Yarbrough argued that Weathers could simply file a motion for summary judgment. *See id.*

Weathers filed a response to Yarbrough's motion to dismiss, and claimed that it was impossible to convert her action into an ordinary civil case. *See* CP – 43. Weathers argued that a conversion could never happen while the "right to possession" remained at issue, notwithstanding the consolidation of the two cases. *See* CP – 43.

**F. Weathers demanded that the trial court bifurcate the two cases or vacate her own stipulated order to consolidate.**

To prevent Yarbrough from having enough time to defend himself in an ordinary civil case, Weathers filed a motion to vacate her own stipulated order consolidating the two parties' cases together. *See* CP – 82. In the motion, Weathers conceded that there were “questions as to the enforceability of a judgment if one is obtained” due to “Yarbrough’s ongoing objection to this Court’s lack of jurisdiction.” *Id.*

Along with her motion to bifurcate, and somewhat inconsistently with it, Weathers filed a motion for an order compelling the production of Yarbrough’s bank records, which she planned to use against Yarbrough’s defense that he was not a “tenant” at all. *See* CP – 72; *see also* CP – 9 ¶ 8.

Yarbrough also filed a motion to amend his Answer to assert additional counterclaims to Weathers’ unlawful detainer Complaint, which Weathers opposed. *See* CP – 65. The trial court held a hearing on all motions on February 2, 2018.

At the hearing, the trial court denied Yarbrough's motion to dismiss, *see* CP – 126, and then granted Weathers' motion to bifurcate the two cases. *See* CP – 133. The trial court granted Weathers' motion to compel the production of Yarbrough's bank records. *See* CP – 136. The trial court also granted Yarbrough's motion to assert additional counterclaims in his Answer to the unlawful detainer Complaint. *See* CP – 132.

**G. Weathers departed from the narrow subject matter jurisdiction of her unlawful detainer action.**

After the hearing on February 2, 2018, Yarbrough filed a pretrial motion to suppress the fake "Oregon Rental Agreement" from being used against him in the unlawful detainer action. *See* CP – 182.

In response, Weathers abandoned the narrow subject matter jurisdiction of her unlawful detainer action – which she had just recently bifurcated into a separate case – and requested a judgment declaring that Yarbrough "holds no legally enforceable interest in the property." *See* CP – 192 – 201.

Yarbrough filed a reply in support of his motion to suppress on February 14, 2019. *See* CP – 276. In his reply, Yarbrough attached pages from Weathers’ recent filings to show the contradicting arguments that Weathers was making. *See* CP 284 – 285.

Yarbrough also attached pages from Weathers’ other motions to show how Weathers went from claiming that Yarbrough signed the “Oregon Rental Agreement” in 2014, to arguing that the “Oregon Rental Agreement” was “backdated.” *See* CP – 286 - 290.<sup>2</sup>

**1. Weathers continued seeking discovery outside the scope of an unlawful detainer action.**

Along with her contradictory motions mentioned above, Weathers filed a motion for contempt against Yarbrough based on the motion to compel that she filed earlier. *See* CP – 291.

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<sup>2</sup> Weathers never amended her pleadings to reflect the fact that she went from relying on a written rental agreement to relying on what is effectively an oral agreement supported by this new “backdated” theory. *See* CP – 4.

Yarbrough filed an objection to the motion for contempt, and pointed out that Weathers was now seeking discovery that she requested while the two cases were still consolidated. *See* CP – 144. Yarbrough argued that Weathers was making a clear effort to depart from the narrow subject matter jurisdiction of an unlawful detainer action so that she could prejudice Yarbrough’s separate civil claims and defenses. *See id.*

Despite insisting that the parties were still in an unlawful detainer action, the trial court granted Weathers’ motion for contempt. *See* CP – 291. The contempt order required Yarbrough to pay \$500 per day until his bank records were produced. *See id.* The order also required Yarbrough to produce images of “cancelled checks” from his bank account. *See id.*

On February 23, 2018, Mr. Ghiorso’s office sent an email to Yarbrough’s bank to confirm that Yarbrough had requested all of his bank records. *See* CP – 457. A manager from the bank signed a letter indicating that Yarbrough had requested his monthly bank statements. *See* CP – 458.

The manager's letter did not state that Yarbrough had specifically requested the "cancelled checks." *See* CP – 458. However, Yarbrough's declaration explained that he believed his request for "all bank records" would "encompass all images of cancelled checks." *See* CP – 478 ¶ 6. Mr. Ghiorso's office emailed all of the bank records received from Yarbrough's bank to Weathers on February 28, 2018. *See* CP – 465.

## **2. Weathers' first motion for sanctions.**

Nearly a month later, Weathers filed a motion for sanctions that requested \$3,500 in attorney fees, \$9,500 in sanctions, and a judgment of default against Yarbrough, due to the missing images of cancelled checks. *See* CP – 294.

On March 30, 2018, Weathers' counsel emailed Mr. Ghiorso to propose a settlement of the dispute over the missing cancelled checks. *See* CP – 470. Weathers' counsel proposed that they would subpoena the cancelled checks themselves, withdraw Weathers' pending motions, and then waive all requests for attorney fees if Yarbrough paid \$12,000. *See id.*

Yarbrough agreed to Weathers' proposal and paid \$12,000 to Weathers on April 5, 2018. *See* CP – 469. In response, Weathers' counsel emailed Mr. Ghiorso and confirmed that the motion for sanctions was withdrawn. *See id.*

Weathers' counsels also confirmed that they sent subpoenas to Yarbrough's bank for the cancelled checks, as the parties had agreed. *See id.* On April 12, 2018, Weathers' counsels also confirmed that the hearing on Weathers' motion for a writ of restitution had been cancelled. *See* CP – 472.

### **3. The second show cause hearing.**

Weathers received all of the cancelled checks from Yarbrough's bank on April 27, 2018. *See* CP – 569 ¶ 15. Three days later, the trial court held a second unlawful detainer show cause hearing. *See* CP – 570 ¶ 16.

The trial court granted a writ of restitution to evict Yarbrough from his home on May 1, 2018. *See* CP – 310-14. However, the trial court agreed “that an issue of fact exists,” and set the matter for a jury trial. *See* CP – 314.

On May 10, 2018, Yarbrough filed a Motion for Clarification, which asked the trial court to specify what “issue of fact” would be submitted to the jury. *See* CP – 325. Yarbrough pointed out that he denied being a “tenant,” and that he was entitled to a jury under RCW § 59.12.130. *See id.*

Weathers opposed the motion, and Yarbrough filed a reply on May 14, 2018. *See* CP - 353. Yarbrough’s reply emphasized that “the existence of mutual assent or a meeting of the minds” was a “question of fact for the jury.” *See id.* On June 1, 2018, the trial court verbally confirmed that Yarbrough was correct, and that he was entitled to a jury on the issue.

#### **4. Weathers’ second motion for sanctions.**

Weathers retaliated against Yarbrough for clarifying the court’s ruling by filing a second motion for sanctions on May 24, 2018. *See* CP – 431. This time, Weathers requested \$116,000 in sanctions and \$3,500 in attorney fees in a judgment entered against Yarbrough’s attorneys. *See id.*

Weathers' second motion for sanctions concerned the same exact cancelled checks that she had received a month earlier. *See* CP – 431. Weathers insisted that she was now entitled to \$2,000 per day for the period between February 28, 2018 and April 27, 2018, the day she received the cancelled checks. *See* CP – 469.

Weathers did not explain how it was possible for her to incur more attorney fees due to the cancelled checks after Yarbrough had already paid her attorney fees to settle the exact same dispute on April 5, 2018. *See* CP – 469-70.

Yarbrough filed a response to Weathers' second motion for sanctions, and argued that Weathers was seeking punitive, criminal sanctions against Yarbrough's attorneys to cause them to withdraw from the case. *See* CP – 441.

Yarbrough also argued that the trial court lacked the authority to enter criminal, punitive sanctions without affording the proper due process protections to Yarbrough, Mr. Ghiorso, and the local sponsoring counsel. *See id.*

**H. The trial court’s ruling on Weathers’ second motion for sanctions.**

On September 26, 2018, the trial court entered its ruling on Weathers’ second motion for sanctions. *See* CP – 567. The trial court found Yarbrough in contempt of court “under RCW 7.21,” CP – 570 ¶ 1, and also held that there was a discovery violation under CR 37(b)(2). *See* CP – 571 ¶ 3.

The trial court imposed a total of \$9,300 in additional sanctions and attorney fees, and allocated responsibility for the total amount among Yarbrough, Mr. Ghiorso, and the local sponsoring counsel. *See* CP – 572 ¶ 8.

Without any explanation, the trial court concluded that Yarbrough’s conduct “substantially prejudiced” Weathers’ ability to “prepare for trial.” *See id.* ¶ 9.<sup>3</sup> The trial court’s ruling found that there was “no reasonable excuse” for the delay in producing the cancelled checks. *See* CP 571 ¶ 9.

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<sup>3</sup> The trial did not take place until November 5 – 6, 2018, nearly seven months after Weathers received the cancelled checks.

The trial court did not conclude that there was any willful conduct. *See* CP 571 ¶ 9. Weathers did not present any evidence to show that she actually incurred any economic loss in addition to what Yarbrough had already paid her to settle the discovery dispute. *See* CP – 469-70. It is also undisputed that Weathers had all of Yarbrough’s cancelled checks in her possession no later than April 27, 2018. *See* CP – 569 ¶ 15.

Weathers’ second motion for sanctions caused Yarbrough’s local sponsoring attorney to withdraw from the case. *See* CP – 439. Anytime a new attorney agreed to help Yarbrough with his defense, Weathers’ counsels would immediately contact them to try to convince them not to help Yarbrough and to stay out of the case. *See* CP – 564.

## SUMMARY OF ARGUMENT

### **I. The trial court lacked subject matter jurisdiction and statutory authority and therefore the sanctions are void.**

Unlawful detainer actions are expedited summary actions where the court sits as a special statutory tribunal with the narrow jurisdiction and authority to hear only the question of “possession” and incidental issues such as the reimbursement of rent. *See Angelo Prop. Co., LP v. Hafiz*, 167 Wash. App. 789, 808, 274 P.3d 1075, 1085 (2012).

Unlawful detainer actions are available only when there is *no dispute* that the plaintiff is a landlord and the defendant is a tenant. *See Bar K Land Co. v. Webb*, 72 Wash. App. 380, 384 (1993); Wash. Rev. Code § 59.16.030; 35A Am. Jur. 2d Forcible Entry and Detainer § 11.

Consequently, when a defendant responds to an unlawful detainer complaint by *alleging* that he has greater property interests than a simple “tenant,” the case must either be dismissed or converted into a civil case for ejectment. *See id.*

This requirement remains true even when the “right to possession” is still at issue. *See Bar K Land Co. v. Webb*, 72 Wash. App. 380, 384 (1993); Wash. Rev. Code § 59.16.030; 35A Am. Jur. 2d Forcible Entry and Detainer § 11.

In other words, if the defendant contests the “right to possession” by alleging that he is lawfully possessing the property by virtue of a greater property interest than a mere “tenancy,” even the question of “possession” must be resolved in a civil action for ejectment. *See Bar K Land Co. v. Webb*, 72 Wash. App. 380, 384 (1993); Wash. Rev. Code § 59.16.030; 35A Am. Jur. 2d Forcible Entry and Detainer § 11.

When the trial court refuses to convert the case into an action for ejectment, and then exercises unlawful detainer subject matter jurisdiction over issues that are outside the scope of an unlawful detainer action, the trial court’s orders, conclusions, and factual findings entered without jurisdiction or authority are void. *See Angelo Prop. Co., LP v. Hafiz*, 167 Wash. App. 789, 818, 274 P.3d 1075, 1090 (2012).

In this case, Yarbrough has always denied that he was a “tenant.” *See* CP – 9 ¶ 8. On May 1, 2018, the trial court confirmed that a factual question existed regarding Yarbrough’s interest in the property. *See* CP – 314.

That factual question should have been resolved in an ordinary civil case for ejectment, where Yarbrough would not be constrained by the summary statutory nature of an expedited unlawful detainer action. *See Bar K Land Co. v. Webb*, 72 Wash. App. 380, 384 (1993).

When the trial court refused to convert the case into an ordinary civil action for ejectment after it evicted Yarbrough on May 1, 2018, and then simultaneously acknowledged the existence of the factual question, it lost subject matter jurisdiction and statutory authority to enter any further orders or factual findings in the case. *See Angelo*, 167 Wash. App. at 818, 274 P.3d at 1090. Since the order imposing sanctions against Mr. Ghiorso and Yarbrough was entered in the unlawful detainer action after May 1, 2018, the order is void.

**II. The trial court exceeded its authority when it entered the order on Weathers' second motion for sanctions.**

Weathers' second motion for sanctions arose out of Yarbrough's "cancelled checks" that Weathers received months before filing her second motion on April 27, 2018. *See* CP – 569 ¶ 15. Weathers settled the same discovery dispute when Yarbrough paid her \$12,000 on April 5, 2018. *See* CP – 469-70.

The superior court stated that it was imposing sanctions under the contempt statute, "RCW § 7.21.030(3)." *See* CP – 571 ¶ 2. "Courts are authorized to impose two types of statutory sanctions, remedial or punitive." *State v. Sims*, 406 P.3d 649, 651 (Wash. Ct. App. 2017).

"Due process prohibits a court from using either statutory or inherent power to justify its actions if the contempt sanctions are themselves punitive, unless the contemnor is afforded criminal due process protections, including the safeguards of a criminal trial." *In re M.B.*, 101 Wash. App. 425, 453, 3 P.3d 780, 796 (2000).

Remedial sanctions can be imposed only if the purpose of the sanctions is “to compensate the complainant for losses sustained.” *In re of Rapid Settlements, Ltd's*, 189 Wash. App. 584, 608–09, 359 P.3d 823, 836 (2015). Remedial sanctions must “be based upon evidence of [the] complainant’s actual loss.” *Id.* at 609, 359 P.3d at 836.

Weathers presented no evidence of actual loss because she did not suffer any actual loss. It is undisputed that Yarbrough paid all of her attorney fees related to this discovery dispute. *See* CP – 469-70. Furthermore, Weathers had all “cancelled checks” three days before the second show cause hearing and nearly seven months before the “trial.”

Weathers sought the cancelled checks to use against Yarbrough’s defense. *See* CP – 9 ¶ 8. As explained above, the discovery was related to issues that were outside of the scope of unlawful detainer subject matter jurisdiction. *See* RCW § 59.16.030. For the same reasons, the superior court abused its discretion if the sanctions were entered under CR 37 (b)(2).

## ARGUMENT

### **I. The trial court erred when it continued asserting unlawful detainer subject matter jurisdiction over the case.**

“Whether a trial court had subject matter jurisdiction over a controversy is a question of law,” which is reviewed “de novo.” *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.” *Id.*

#### **A. An unlawful detainer action has narrow subject matter jurisdiction.**

Unlawful detainer actions “are special statutory proceedings with the limited purpose of hastening recovery of possession of rental property.” *Bar K Land Co. v. Webb*, 72 Wash. App. 380, 383, 864 P.2d 435, 437 (1993). They are designed for “cases involving landlords and tenants when the only questions are possession and rent.” *Id.*

The “superior court's jurisdiction in such actions is limited to the primary issue of possession and incidental issues such as restitution and rent, or damages.” *Id.* As this Court explained in *Angelo*:

“[A]lthough a superior court is normally a court of general jurisdiction and it may resolve most civil claims, when the superior court hears an unlawful detainer action under RCW 59.12.030, it sits in a statutorily limited capacity and lacks authority to resolve issues outside the scope of the unlawful detainer statute.”

*Angelo Prop. Co., LP v. Hafiz*, 167 Wash. App. 789, 809, 274 P.3d 1075, 1085 (2012) (internal citations omitted).

**B. The superior court cannot resolve issues not incident to the right to possession.**

Any issues that are “not incident to the right of possession” must be resolved “in an ordinary civil action.” *Bar K Land Co. v. Webb*, 72 Wash. App. 380, 383, 864 P.2d 435, 437 (1993). This limitation applies to any *issue* in the case, regardless of whether its raised by the plaintiff or the defendant.

Consequently, any claims and defenses raised by a defendant in an unlawful detainer action cannot be determined unless they are “based on facts which would excuse a tenant’s breach.” *Angelo*, 167 Wash. App. at 811, 274 P.3d at 1086.

Similarly, the plaintiff is not entitled to an unlawful detainer action when questions of title are involved with the plaintiff’s claim. *See Fed. Nat. Mortg. Ass’n v. Ndiaye*, 188 Wash. App. 376, 382, 353 P.3d 644, 647 (2015) (“Unlawful detainer actions offer a plaintiff the advantage of speedy relief, but do not provide a forum for litigating claims to title.”).

Therefore, when a defendant in an unlawful detainer action alleges that he has “greater property interests than those of a tenant,” the action cannot be maintained as an action for unlawful detainer, and *must* be either dismissed or converted into a civil action for ejectment before the case can be resolved either way. *See Bar K Land Co. v. Webb*, 72 Wash. App. 380, 384, 864 P.2d 435, 437 (1993).

A civil action for ejectment “is a remedy for one who, claiming a paramount title, is out of possession,” and “damages for the ouster or wrong can be simultaneously recovered.” *Id.* at 383. An action for ejectment is appropriate in cases where the defendant’s defense is that he is not a tenant at all, because it affords the proper procedural protections to the defendant before depriving him of his property rights.

The requirement for a potential non-tenant’s rights to be determined in an ordinary civil action rather than an action for unlawful detainer has been explained in a treatise on the issue as follows:

“Title disputes generally cannot be determined in a forcible entry and detainer proceeding. Thus, when a *question* as to the plaintiff’s title is directly and inextricably involved in an action for unlawful detainer and related damages, the action will not lie, and *cannot be maintained*. Instead, the plaintiff must establish the plaintiff’s paramount title in an action for ejectment.”

35A Am. Jur. 2d Forcible Entry and Detainer § 11 (emphasis added).

Even by statute, Washington law requires unlawful detainer actions to be converted into ordinary civil actions for ejectment whenever the defendant alleges he has greater property interests than a mere tenant:

“[I]f the defendant shall, by his or her answer, deny [the plaintiff’s] ownership and shall *state* facts showing that he or she has a lawful claim to the possession thereof, the cause shall thereupon be entered for trial upon the docket of the court in all respects as if the action were brought [as an action for ejectment under RCW 7.28].”

Wash. Rev. Code § 59.16.030 (emphasis added).

**C. Insisting on unlawful detainer jurisdiction**

**removes the authority to determine issues in the case.**

Failing to comply with the requirement referenced above will deprive the superior court of the authority to enter any further orders or findings in the case. *See Angelo Prop. Co., LP v. Hafiz*, 167 Wash. App. 789, 821–22, 274 P.3d 1075, 1092 (2012). That was the consequence of the superior court’s decision in *Angelo*. *See id.*

In that case, the defendant (“Maged”) admitted to being the plaintiff’s “tenant,” but he vacated the rental property shortly after the unlawful detainer complaint was filed against him. *See id.* at 797, 274 P.3d at 1079. Maged responded to the unlawful detainer complaint by raising a counterclaim for constructive eviction. *See id.* at 801, 274 P.3d at 1081.

Maged, like Yarbrough in this case, “urged that the court not ‘fast track’ the matter as an unlawful detainer action,” because Maged “needed to conduct discovery for his counterclaims.” *Id.* at 799, 274 P.3d at 1080.

The trial court disagreed with Maged, and refused to convert the unlawful detainer action into an ordinary civil case. *See id.* at 806, 274 P.3d at 1084 (“the trial court [stated] that it had *not* ‘converted’ the unlawful detainer lawsuit . . .”).

Thereafter, the trial court entered a judgment in favor of the plaintiff, and against Maged on his constructive eviction counterclaim. *See Angelo Prop. Co., LP v. Hafiz*, 167 Wash. App. 789, 807, 274 P.3d 1075, 1084 (2012).

On appeal, this Court observed that although the trial court *could* have converted the action into a civil case after the “right to possession” was no longer at issue, and *then* properly considered Maged’s counterclaims, the trial court expressly stated “that it did *not* covert the unlawful detainer action into an ordinary civil action.” *Id.* at 818, 274 P.3d at 1090.

As a consequence, the trial court “lacked subject matter jurisdiction under RCW 59.12.030 to hear any further proceedings.” *Id.* at 810, 274 P.3d at 1086.

**D. Unlawful detainer is not the appropriate remedy when a defendant denies being a “tenant.”**

The critical difference between what happened to Maged in *Angelo* and what happened to Yarbrough in this case is that, from the very beginning, Yarbrough completely denied that he ever agreed to be a “tenant” at all. *See* CP – 9 ¶ 8. From day one, Yarbrough has argued that he has “greater property interests than those of a tenant.” *Bar K Land Co. v. Webb*, 72 Wash. App. 380, 384, 864 P.2d 435, 437 (1993).

By statute, the trial court was required to afford Yarbrough the right to have his defense resolved in an ordinary civil case for ejectment. *See* Wash. Rev. Code § 59.16.030. The statute also confirms that this requirement to convert the case to an action for ejectment remains true even when the defendant is contesting the right to “possession.” *See id.*

That is exactly what the Court of Appeals held in *Bar K Land Co. v. Webb*. There, Ms. Webb, who (like Yarbrough) could not qualify for financing to buy a home, entered into an “early possession agreement” with the seller, Bar K, where she agreed to pay “rent” until she could obtain a loan. *See Bar K Land Co. v. Webb*, 72 Wash. App. 380, 382, 864 P.2d 435, 436 (1993).

While she was paying “rent” to the seller of the property, Ms. Webb (like Yarbrough) contributed to improving the condition of the home “far in excess of an amount a renter would pay to improve rental property.” *Bar K Land Co. v. Webb*, 72 Wash. App. 380, 385, 864 P.2d 435, 438 (1993).

Ms. Webb argued that “the early possession agreement was part of the sale and not a separate agreement for rent.” *Id.* at 384, 864 P.2d at 437. “As a result,” the Court of Appeals held that “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.” *Id.*

**E. This should have been an action for ejectment.**

The same result as *Bar K* is required here. Just like Ms. Webb, it is undisputed that Yarbrough contributed a substantial amount of money and labor for improvements to the home, “far in excess of an amount a renter would pay to improve rental property.” *See* CP – 253-56; CP – 167, lines 23-24; CP – 175.

Weathers testified that Yarbrough gave her \$4,000 to pay for her closing costs when she purchased the house. *See* CP – 181. Weathers inherited tens of thousands of dollars in equity when she purchased the home due to the improvements and payments that Yarbrough had made. *See* CP – 177.

Weathers even testified that Yarbrough contributed to the *mortgage payments* for the home *after* Weathers became the owner of the home. *See* CP – 174. When she was asked whether she was the one paying the mortgage, Weathers stated “I was not.” *Id.* After Josh moved out of the home, Weathers testified that “[Yarbrough] and I were *splitting* the [mortgage] payments until *we* got another renter.” *Id.* (emphasis added).

Weathers admitted that Yarbrough paid for the entire utility bill for the home, and collected contributions from the other residents. *See* CP – 175. Weathers confirmed that Yarbrough’s conduct was unlike that of a “tenant.” *See id.*

At the show cause hearing, the superior court expressly held that an issue of fact existed regarding whether Yarbrough had greater property interests than a mere “tenant.” *See* CP – 314. Yarbrough even filed a Motion for Clarification emphasizing the fact that his defense was to the very existence of a landlord-tenant relationship. *See* CP - 325.

Under Wash. Rev. Code § 59.16.030, the trial court had a non-discretionary duty to treat the case as if it had been filed as a civil action for ejectment. *See* Wash. Rev. Code § 59.16.030. The same requirement is illustrated by the result in *Bar K Land Co. v. Webb*, 72 Wash. App. 380, 385, 864 P.2d 435, 438 (1993) (“[T]his should have been an action for ejectment rather than unlawful detainer . . .”).

This requirement remains true *even if the right to possession is at issue*. RCW § 59.16.030 expressly recognizes that conversion to a civil case is required even though the defendant alleges “facts showing that he or she has a lawful claim to the possession thereof.” Wash. Rev. Code § 59.16.030.

Similarly, Ms. Webb was still contesting the “right to possession” in *Bar K Land Co. v. Webb*, 72 Wash. App. 380, 385, 864 P.2d 435, 438 (1993). It was the fact that Ms. Webb’s defense rested on a denial that she was a tenant that required it to be an action for ejectment. *See id.* The same is true here. *See also* 35A Am. Jur. 2d Forcible Entry and Detainer § 11.

**F. The trial court did not have jurisdiction or authority when it entered the order for sanctions.**

The consequence of the trial court's failure to dismiss or convert the unlawful detainer action is illustrated by the outcome in *Angelo*, which is discussed above. *See Angelo Prop. Co., LP v. Hafiz*, 167 Wash. App. 789, 819, 274 P.3d 1075, 1090 (2012).

The trial court's refusal to convert the action into a civil case led this Court in *Angelo* to hold that it must "vacate all of the trial court's orders, rulings, and factual determinations" that it entered after it lost subject matter jurisdiction, and "remand the case for trial in an ordinary civil action." *Id.*

In this case, at the very latest, the trial court lost subject matter jurisdiction after it evicted Yarbrough from his home, and then simultaneously ruled that a factual question existed regarding whether Yarbrough had greater property interests than a tenant. *See* CP – 314. That ruling was made on May 1, 2018. *See id.*

The trial court's order on Weathers' second motion for sanctions was entered on September 25, 2018, more than four months after it confirmed the existence of a factual question regarding Yarbrough's status and should have converted the unlawful detainer action into a civil case. *See* CP – 573.

Therefore, because the trial court's order on Weathers' second motion for sanctions was entered *after* it lost subject matter jurisdiction over the unlawful detainer action, this Court should vacate that order, as well as “all of the trial court's orders, rulings, and factual determinations” made after May 1, 2018. *See* CP – 314.

**II. The trial court exceeded its authority when it granted Weathers' second motion for sanctions.**

The issue of whether a trial court had “authority to impose contempt sanctions” is reviewed “*de novo*.” *See State v. Sims*, 406 P.3d 649, 652 (Wash. Ct. App. 2017), review granted, 190 Wash. 2d 1012, 415 P.3d 1201 (2018).

**A. There is a distinction between remedial sanctions and punitive sanctions.**

“Courts are authorized to impose two types of statutory sanctions, remedial or punitive.” *State v. Sims*, 406 P.3d 649, 651 (Wash. Ct. App. 2017).

Remedial sanctions are imposed for two purposes, either: (1) to “coerce the defendant into compliance with the court’s order;” or (2) “to compensate the complainant for losses sustained.” *In re of Rapid Settlements, Ltd's*, 189 Wash. App. 584, 608–09, 359 P.3d 823, 836 (2015).

If the purpose is to “compensate the complainant for losses sustained,” the sanction must “be based upon evidence of [the] complainant’s actual loss.” *Id.* at 609, 359 P.3d at 836 (quoting *United States v. United Mine Workers of Am.*, 330 U.S. 258, 304 (1947)).

Punitive sanctions, on the other hand, are sanctions “imposed to punish a past contempt of court for the purpose of upholding the authority of the court.” *Sims*, 406 P.3d at 652.

The difference was explained in *Rhinevault* as follows:

“A punitive sanction is imposed for a past contempt, while remedial sanctions coerce performance where the contempt involves a person omitting or refusing to perform an act yet in their power to perform. Thus, a sanction is punitive if there is a determinate sentence and no opportunity to “purge” the contempt. But it is remedial where it is indeterminate and the contemnor is released upon complying with the court's order. A punitive sanction generally is imposed to vindicate the court's authority, while a remedial sanction typically benefits another party.”

*Rhinevault v. Rhinevault*, 91 Wash. App. 688, 694, 959 P.2d 687, 690 (1998).

RCW § 7.21.040(1) states that, unless a sanction is imposed for a party's conduct that occurs in the court's immediate presence, a “punitive sanction for contempt of court may be imposed *only* pursuant to this section.” Wash. Rev. Code § 7.21.040(1) (emphasis added).

That chapter “provides a procedure to ensure that a person facing such a sanction actually committed the contemptuous act,” including a trial “before a *neutral* judge.” *Sims*, 406 P.3d at 652 (emphasis added).

“Due process prohibits a court from using either statutory or inherent power to justify its actions if the contempt sanctions are themselves punitive, unless the contemnor is afforded criminal due process protections, including the safeguards of a criminal trial.” *In re M.B.*, 101 Wash. App. 425, 453, 3 P.3d 780, 796 (2000); *see also In re Marriage of Didier*, 134 Wash. App. 490, 501, 140 P.3d 607, 612 (2006) (“Criminal contempt imposes a punitive sanction and civil contempt imposes a remedial sanction.”).

**B. No evidence of actual loss supported the sanctions so they cannot be considered remedial.**

The superior court’s order states that it was imposing sanctions pursuant to “RCW § 7.21.030(3)” to pay for Weathers’ “losses suffered” as a result of the contempt. *See* CP – 571 ¶ 2. Such a sanction must “be based upon evidence of [the] complainant’s actual loss.” *In re of Rapid Settlements, Ltd's*, 189 Wash. App. 584, 609, 359 P.3d 823, 836 (2015).

**1. No evidence of actual loss was presented for the attorney fees.**

Weathers did not present evidence of any “actual loss” arising out of the cancelled checks. *See* CP – 469-70. It is undisputed that Yarbrough paid \$12,000 to Weathers, which included her attorney fees. *See id.* Weathers’ counsel waived the rest of the attorney fees in exchange for Yarbrough’s payment. *See* CP – 460-70.

Weathers did not incur attorney fees for the cancelled checks after April 5, 2018, the date of Yarbrough’s payment, because all her attorneys did was wait for the cancelled checks to arrive in the mail. *See* CP – 469-70.

Looking at “the nature of the relief the proceeding will afford,” *In re Rebecca K.*, 101 Wash. App. 309, 314, 2 P.3d 501, 503 (2000), the attorney fees did not compensate Weathers because Yarbrough accomplished that on April 5, 2018. *See* CP – 469-70. Therefore, the superior court lacked the authority to enter a sanction of \$3,500 in attorney fees against Yarbrough.

**2. No evidence of actual loss was presented to support the daily sanctions.**

It is undisputed that Weathers had all of Yarbrough's cancelled checks in her possession no later than April 27, 2018. *See* CP – 569 ¶ 15. Weathers had the cancelled checks three days before her second show cause hearing, and nearly seven months before the “trial” on November 5 – 6, 2018. *See id.*

The superior court's order imposing sanctions simply states, without any explanation, that Yarbrough's “actions substantially prejudiced [Weathers'] ability to prepare for trial.” *See* CP 572 ¶ 9. There is no evidence of any “actual loss” to support such a conclusion, and the superior court made no effort to explain it. *See id.*

The sanctions were not based on a prior court order. The superior court stated it was imposing a \$100 daily sanction between February 28, 2018 and April 27, 2018, without further specification. *See* CP – 571 ¶ 5. Mr. Ghiorso was not subject to any prior order. *See id.*

Therefore, the daily sanctions were punitive because they covered a determinate period of time in the past, there was no opportunity to “purge” the fine, and they did not compensate Weathers for any “actual loss.” *See Rhinevault v. Rhinevault*, 91 Wash. App. 688, 694, 959 P.2d 687, 690 (1998).

**3. The punitive sanctions were imposed without affording due process.**

“Due process prohibits a court from” imposing contempt sanctions if the sanctions “are themselves punitive, unless the contemnor is afforded criminal due process protections, including the safeguards of a criminal trial.” *In re M.B.*, 101 Wash. App. 425, 453, 3 P.3d 780, 796 (2000).

None of the procedural protections under RCW 7.21 were provided to Yarbrough or Mr. Ghiorso before the sanctions were imposed. *See CP – 567*. Since the sanctions were punitive, the proper process was not provided to Yarbrough and Mr. Ghiorso and the trial court lacked the authority to enter them.

**C. The trial court abused its discretion if the sanctions were entered under CR 37(b)(2).**

As an alternative ground, the superior court stated that Yarbrough's conduct constituted a "discovery violation" under CR 37(b)(2). *See* CP – 569 ¶ 3. The standard of review for sanctions under CR 37 (b)(2) is for abuse of discretion. *See Mayer v. Sto Indus., Inc.*, 156 Wash. 2d 677, 684, 132 P.3d 115, 118 (2006).

Under the abuse of discretion standard of review, sanctions are inappropriate when they are "manifestly unreasonable" or "based on untenable grounds." *See Johnson v. Jones*, 91 Wash. App. 127, 133, 955 P.2d 826, 830 (1998).

A decision is "manifestly unreasonable" if the court adopts a view "that no reasonable person would take." *State v. Rohrich*, 149 Wash. 2d 647, 654, 71 P.3d 638, 642 (2003). A decision is "based on untenable grounds" if it "relies on unsupported facts or applies the wrong legal standard." *Mayer*, 156 Wash. 2d at 684, 132 P.3d at 118.

The trial court's sanctions were "manifestly unreasonable" because Yarbrough settled this discovery dispute with Weathers when he paid her \$12,000 and her attorneys agreed to subpoena the cancelled checks. *See* CP – 469-70. Yarbrough did not produce them because the parties conferred about the issue and settled the dispute. *See id.*

Furthermore, as explained above, Weathers requested the discovery when her unlawful detainer action was still consolidated with Yarbrough's separate civil case. *See* CP – 17. The discovery was sought by Weathers to use against Yarbrough's defense, which, as explained above, was outside the scope of unlawful detainer subject matter jurisdiction. *See* CP – 9 ¶ 8.

The superior court also did not conclude that there was any intentional conduct, only that there was "no reasonable excuse" for not producing the cancelled checks. *See* CP 571 ¶ 9. Yarbrough requested "all bank records," and thought that included the cancelled checks. *See* CP – 478 ¶ 6.

Furthermore, CR37(b)(2) sanctions are limited to sanctions against a party that “*fails to obey an order.*” *Mayer v. Sto Indus., Inc.*, 156 Wash. 2d 677, 686, 132 P.3d 115, 119 (2006). Mr. Ghiorso was never subject to any order and did not fail to obey any order. CR37(b)(2) sanctions are similarly not meant to be punitive. *See* RCW § 7.21.040(1).

Weathers’ purpose for pursuing the sanctions was also clearly inappropriate in light of the policy expressed by the Washington Supreme Court. *See Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wash. 2d 299, 356, 858 P.2d 1054, 1085 (1993) (“Furthermore, requests for sanctions should not turn into satellite litigation or become a ‘cottage industry’ for lawyers.”).

Weathers filed the second motion for sanctions to cause Yarbrough’s local counsel to withdraw from the case. *See* CP – 439. Weathers counsels spent the next several months calling every attorney that agreed to help Yarbrough to try to convince them not to help him. *See* CP – 564.

## CONCLUSION

Unlawful detainer actions are not available when the defendant disputes being a tenant. Parties cannot circumvent the procedural protections afforded to defendants in a civil case by using fake rental agreements to take advantage of expedited statutory proceedings. For the reasons explained above, the superior court lacked subject matter jurisdiction and authority to enter any additional orders after May 1, 2018. The sanctions entered on September 25, 2018 should therefore be vacated, along with all other orders entered after May 1, 2018, and this case should be remanded to proceed as an ordinary civil case.

DATED APRIL 8, 2019.

  
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## CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on April 8, 2019, I caused to be served, via electronic service, a true and correct copy of this BRIEF OF APPELLANT WILLIAM L. GHIORSO to the following individual(s):

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