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No. 52917-3-II

Trial Court No. 18-2-01102-18

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

Ahmet Chabuk,

Appellant,

vs.

Frances Miller
and all other occupants,

Respondent.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. Finding of Fact ("FF")#10 through #18 and #20 (CP 155-157) are errors as they have no relevance to the issue of possession of the property and the unpaid rent, were not raised before the trial court, are in violation of the parol evidence rule, and are not supported by substantial evidence.

2. FF #23 (CP 157) is an error as it is irrelevant because Chabuk's notices reinstated Miller's obligation to pay rent, (Ex. #4 through #7 and #10; CP 236-255), and is not supported by substantial evidence.

3. Conclusion of Law ("CL") #2 through #5 (CP 157-158) are errors as they have no relevance to the issues of possession of the property and the unpaid rent and are in violation of the parol evidence rule and are not supported by substantial evidence.

4. CL #6 (CP 158) is an error in conclusion that:

> since the six month period ended in October 31, 2010, the lease now provides for indefinite renewal without any requirement of payment from Miller. Since only a tenant may 'vacate,' only Miller may terminate the agreement.

5. CL #7 (CP 158) is an error in conclusion that:

> The language of the lease gives a clear and unequivocal grant of a lease with perpetual renewal, which under the case of *Tischner v. Rutledge,* 35 Wn. 285 (1904) may be sufficient for a grant of fee simple. This is consistent with the testimony as to the intent of the parties to provide a permanent home for Miller.

6. CL #8 (CP 158) is an error in conclusion that:

> Even if the agreement signed by the parties had required payment of rent by Miller, by taking no action after several years

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7. CL #9 (CP 158) is an error in conclusion that: *"Because MILLER has not violated any covenant she made under the lease, she is not guilty of an unlawful detainer*."

8. CL #10 (CP 159) is an error in conclusion that: *"Although BHA modified the amount it was paying, since Chabuk accepted this modification without protest, no violation of the lease occurred*."

9. CL #11 (CP 159) is an error in conclusion that:

> Chabuk may not obtain an eviction or other remedies against MILLER unless he can establish: a. That MILLER has failed to comply with her duties under the lease. b. That CHABUK has complied with the requirements of Section 8 for removing a compliant tenant. c. That MILLER did not receive a fee simple in the Property by the terms of the lease.

10. CL #12 (CP 159) is an error in conclusion that *"as the prevailing party, MILLER is entitled to REASONABLE ATTORNEY fees under RCW 59.18."*

11. The trial court erred when, during the show cause hearing pursuant to RCW 59.18.380, it refused to let the landlord summarize his evidence already in file, and refused to grant a default order and writ of restitution even though the tenant (Miller) failed to submit any evidence as required by the order to show cause, and failed to show up as required at the show cause hearing. (CP 217-220; CP 36-44.)

12. The trial court erred when it denied Chabuk's motion for clarification of ruling on show cause hearing. (CP 60-61.)

13. The trial court erred when it denied Chabuk's motion for reconsideration of ruling on show cause hearing. (CP 58.)

14. The trial court erred or abused its discretion when it denied Chabuk's pretrial motion for protective order from request for interrogatories and production of documents in this unlawful detainer action under RCW 59.18.380; and for awarding $337.50 attorney's fees against Chabuk. (CP 88.)

15. The trial court erred or abused its discretion when it granted Miller's motion for a continuance of the trial date beyond the 30-day deadline, in violation of RCW 59.18.380, to provide time for Miller's interrogatories and requests for production. (CP 75-76.)

16. The trial court abused its discretion when it failed to award reasonable attorney's fees as CR 11 sanctions against Miller's attorney and in favor of Chabuk. (CP 213.)

17. The trial court erred when it denied Chabuk's motion for reconsideration. (CP 166-221.)

18. The trial court erred in entering Judgment and Order on Fees, dated 9/17/2018, against Chabuk. (CP 161.)

19. The trial court erred in its **oral ruling** (which the court had incorporated in the findings of fact – CP 154) because it has no relevance to the issues of possession of the property and the unpaid rent, was not raised before the trial court, is in violation of the parol evidence rule, and is not supported by substantial evidence.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where FF #10 through #18 and #20 have no relevance to the issue of possession of the property and unpaid rent, did the trial court err by entering them?

2. Where FF #23 (CP 157) is an error as it is irrelevant because Chabuk's notices reinstated Miller's obligation to pay rent, (Ex. #4 through #7 and #10; CP 236-255), and is not supported by substantial evidence, did the trial court err in entering it? (FF #23.)

3. Where CL #2 through #5 have no relevance to the issues of possession of the property and the unpaid rent, did the court err in entering them?

4. Where, as in CL #6, the lease agreement provides automatic extension of the lease unless either party gives at least 20-days notice to vacate, did the trial court err in sua sponte concluding that the lease provides for indefinite renewal without any requirement of payment from Miller?

5. Where, as in CL #7, the lease agreement provides automatic extension of the lease unless either party gives at least 20-days notice to vacate, did the court err in sua sponte concluding that "the language of the lease gives a clear and unequivocal grant of a lease with perpetual renewal, pursuant to *Tischner v. Rutledge*, 35 Wn. 285 (1904)"?

6. Where, Miller did not plead the affirmative defense of waiver, did the trial court err, as in **CL #8**, in sua sponte concluding that Chabuk **waived** the rent payment obligations of Miller — even though,

in the Complaint, Chabuk demanded no previous unpaid rents prior to his reinstatement of the rent obligation?

7. Where, as in CL #9, Miller paid nothing for her share of the rent for the past three years while Chabuk accepted partial rental assistance from Bremerton Housing Authority, and Chabuk provided Miller with notice that he was reinstating Miller's obligation and subsequently served a 3-day notice to pay rent or vacate, but Miller failed to pay or vacate, did the trial court err in concluding that Miller had not violated any covenant under the lease agreement and that Miller is not guilty of an unlawful detainer?

8. Where, as in CL #10, Chabuk accepted partial rental assistance from the Bremerton Housing Authority and Miller paid nothing as her part of the rent, and Chabuk provided Miller with notice to reinstate Miller's obligations, and subsequently served a 3-day notice to pay rent or vacate, but Miller failed to pay or vacate, did the trial court err in concluding that no violation of the lease occurred?

9. In CL #11, did the trial court err in concluding that:

> Chabuk may not obtain an eviction or other remedies against MILLER unless he can establish: a. That MILLER has failed to comply with her duties under the lease. b. That CHABUK has complied with the requirements of Section 8 for removing a compliant tenant. c. That MILLER did not receive a fee simple in the Property by the terms of the lease?

10. Where, as in CL #12, none of the factual and legal arguments made by Miller's attorney were supported by the trial court's findings of fact and conclusions of law (and by the evidence), did the trial court

err in its conclusion that *"as the prevailing party, MILLER is entitled to REASONABLE ATTORNEY fees under RCW 59.18"?*

11. Where Miller failed to submit any admissible evidence in response to her order to show cause; Miller's unsworn "Answer" was from her attorney alone; was not verified; not under penalty of perjury; and she failed to show up for hearing on order to show cause (and failed to show cause), did the court err when it refused to let Chabuk summarize his evidence already in file under RCW 59.18.380; refused to enter a default order and a writ of restitution? (CP 36.)

12. Where the 30-day requirements of civil procedure rules CR 33 and CR 34 for interrogatories and request for production conflict with the 30-days requirements of RCW 59.18.380 for a trial, did the trial court err or abuse its discretion when it denied Chabuk's pretrial motion for protective order from the interrogatories and request for production of documents in this unlawful detainer action; and for awarding $337.50 as attorney's fees against Chabuk? (CP 88.)

13. Where the 30-day requirements of civil procedure rules CR 33 and CR 34 for interrogatories and request for production conflict with the 30-days requirements for a trial under RCW 59.18.380, did the trial court err or abuse its discretion when it granted Miller's motion for continuance of the trial date beyond the 30-day of requirements of RCW 59.18.380 to provide more time for discovery? (CP 75-76.)

14. Did the trial court err or abuse its discretion when it denied Chabuk's motion for reconsideration of the trial ruling? (CP 166-221.)

15. Did the trial court err in entering Judgment and Order on Fees, dated 9/17/2018 against Chabuk? (CP 161.)

16. Based on Miller's attorney's conduct and CR 11 violations, did the trial court err or abuse its discretion when it failed to award reasonable attorney's fees as CR 11 sanctions against Miller's attorney and in favor of Chabuk? (CP 212-213; CP 30-31; CP 40-42.)

II. STATEMENT OF THE CASE

Background Facts and Procedural History

2.1. This case started as a simple unlawful detainer action for $650 unpaid rent and for possession of the premises. However, during the hearing on order to show cause, the court was misled by the opposing attorney's false unfounded and offensive accusations against Chabuk to convert this case into a full two-day trial.

During the trial, no evidence or arguments were offered to support the previous baseless accusations by the attorney against Chabuk. The findings and conclusions have no support for them. Yet, in violation of the law, the trial court ruled against Chabuk and awarded huge sums of attorney's fees against Chabuk and in favor of the opposing attorney.

The legally relevant facts, on the issues of restitution of the premises and the unpaid rent, are not in dispute. The facts here are summarized primarily to demonstrate the conduct of the opposing attorney as CR 11 violations.

Ahmet Chabuk (Chabuk/Appellant/Landlord) was a pro bono attorney for Frances Miller (Miller/Respondent/Tenant) for several years on her ERISA disability claims for her "severe mental illness" (Ex. #9, CP 251) and for certain other legal matters she had. After several

years, Chabuk, along with Miller, her aging mother, her adult daughter, and her son, all considered themselves friends. By late 2007, Miller's entire family was looking for a better house to move into because the house where they lived was aggravating Miller's depression.

Chabuk's testimony is summarized in **"Plaintiff's Response to Interrogatories"** (under penalty of perjury), submitted as Ex. #12 by Miller's own attorney. (Ex. #12, CP 265-269 – copy in Appendix.) In late December 2007, Miller's whole family found the house they really liked. Chabuk purchased the house as an investment. Immediately, Miller's whole family moved in and began paying rent to Chabuk — the amount similar to what they were paying at their previous rented house.

After approximately 2 years, with her disability, Miller qualified for rental assistance from the Bremerton Housing Authority (BHA), which required a new, written lease agreement, which was signed on April 1, 2010, by Chabuk and Miller. (Ex. #3, CP 233; FF #5, CP 155.) BHA paid part of the rent, the balance paid by Miller, with her mother's and son's contributions (Ex. #5, CP 239; CP 196-197.)

A few years later, Miller's family members had all moved away and Miller was left all alone in this fairly large single-family house, in a gated community. (CP 196; Ex. #2, CP 231.) During the past 3 years, Miller paid nothing as her share of the rent while BHA kept paying their share. (CP 197:13.) A number of times, Chabuk sent Miller notices to pay her share but Miller ignored him. (Ex. #12, CP 269:22.) Knowing about her mental illness/disability/depression, Chabuk tried to be

flexible with Miller and tried not to aggravate her depression. (CP 198-199.) However, BHA, with a notice dated 2/8/2018, reduced their assistance from $600 to $519. (Ex. #7, CP 243.)

Chabuk considered Miller's past unpaid portions of the rent uncollectible and wrote them off (more than three years of her share of the rent). Therefore, with his notice dated 2/26/2018, Chabuk summarized for Miller his costs of the house and increased the total rent amount from $1250 to $1350, and provided notice that she must pay her share of the rent or, otherwise, find a place she could afford. (Ex. #4, CP 237.) In addition, with his "3 Day Notice to Pay Rent or Vacate," dated 3/6/2018, Chabuk demanded payment for only the latest month's unpaid rent ($650 as her share) or vacate. (Ex. #10, CP 255.) Miller failed to pay and failed to vacate.

2.2. After the Summons and Complaint were served, Miller delivered her unsworn handwritten "response" without an Answer.

In her unsworn "Response," Miller claimed that she had a "romantic relationship" with Chabuk and that Chabuk had promised her he was going to buy her a house and that this rental house was the house. (Ex. #8, CP 245-248.) Her response included some offensive words and threats to cause embarrassment and that she would dare Chabuk to file her "response" in court. *Id.* Yet, Chabuk proceeded and **filed his Complaint, for $650 unpaid rent and for possession** of the premises, (CP 3-4), filed together with his Motion for Order to Show Cause, (CP 5-10), and a redacted copy of her "response" (CP 16-

19.) In his motion for order to show cause, Chabuk asked the court to strike the unsworn and offensive "response." (CP 5:19.)

2.3. Unverified Answer and unfounded accusations by Miller's attorney misled the judge to convert this unlawful detainer action to a full two-day trial.

Shortly before the hearing on Order to Show Cause, an Answer was filed by Miller's attorney, Karen Richmond, with the attorney's own unsupported offensive fabrications against Chabuk (as Affirmative Defenses). (CP 15.) In addition, during the hearing on order to show cause, Miller's attorney made further unfounded and offensive accusations against Chabuk and misled the judge to convert this simple unlawful detainer action to a full two-day trial. (CP 219.)

The Answer had no verifications, no supporting declarations, no evidence of any kind. In her Answer, Miller's attorney falsely alleged:

> AFFIRMATIVE DEFENSES
>
> 1. DURESS. Defendant was prevented from exercising her free will due to control exerted by the Plaintiff at the time when the contract was signed.
>
> 2. MISREPRESENTATION OF THE AGREEMENT. The contract proffered to the court does not reflect the actual agreement of or course of dealings between the parties and cannot form the basis for unlawful detainer.
>
> 3. CR 11: Plaintiff signed the pleadings and motions in this case knowing them not to be well grounded in fact or law. [CP 15.]

Moreover, in her Answer, Miller's attorney frivolously denied virtually all averments of the Complaint with no regard for their truth. (CP 14-15.) Yet, later, after the trial, the trial court's findings of fact and conclusions of law did not provide any support for those unfounded

fabrications, because Miller did not argue or present any evidence for them during the trial. (CP 154-159.)

2.3.1. In his reply to the offensive Answer, in his "Declaration of Landlord in Reply to the Answer," Chabuk asked for CR 11 sanctions against Miller's attorney. (CR 30-31.)

2.4. For the show cause hearing, Miller failed to show up and failed to show cause. Yet Miller's attorney falsely told the judge that Chabuk had coerced Miller into signing the lease agreement and misled the judge to convert this simple unlawful detainer action into a full two-day trial.

Miller's attorney did not ask for a continuance or provide an explanation as to why Miller failed to show up. Yet, she falsely told Judge Bassett that her ***"client was coerced into signing [the lease] and was not ever actually requested to pay under."*** (CP 219:2-5) (emphasis added).

Later, during the subsequent trial, no evidence or arguments were offered to support any of the accusations. Miller's own testimony admitted that she paid rent. Accordingly, the trial court's findings of fact and conclusions of law provide no support for the attorney's unfounded fabrications. (CP 154-159.)

During the hearing on Order to Show Cause, based only on Miller's attorney's hearsay misrepresentations, Judge Bassett wondered:

> Was [Miller] actually paying you rent or, pursuant to what I understand the salacious allegations to be, was there a little hanky-panky going on and something a little more unsavory? That's the question here. If it was a hanky-panky issue, it is not an unlawful detainer action.

(Verbatim Report of Proceedings (RP) 5/11/2018; CP 217-220.)

Even though Chabuk already had his evidence in file, and Miller did not appear or present any evidence whatsoever, the court ruled:

> Mr. Chabuk, **this matter is not going to be taken care of on this hearing, because it has now become a contested matter.** This is going to have . . . a scheduled date for a special hearing.

(Verbatim RP 5/11/2018 at 10:8-12; CP 219:8-12) (emphasis added).

Judge Bassett then urged Chabuk to review *Turner v. White*, 20 Wn. App. 290, 579 P.2d 410 (1978) for the difference between an action for "tenancy at will" as opposed to an action for unlawful detainer under the Landlord Tenant Act. (CP 219:17-25.)

Even though the Answer was unsworn, and from the attorney alone, and Miller failed to show up and failed to show cause, with no evidence, Miller's attorney's unfounded accusations misled Judge Bassett to require a full trial, to be held within 30 days, pursuant to RCW 59.18.380 and *Leda v. Whisnand*, 150 Wn. App. 69, 83, 207 P.3d 468 (2009). Therefore, this simple unlawful detainer action, for $650 unpaid rent, was converted to an unnecessary full two-day trial.

Chabuk filed his **"Motion for Reconsideration of Ruling on Show Cause Hearing."** (CP 36-44.) Chabuk **asked for award of CR 11 sanctions** against Miller's attorney. (CP 40-41.) Chabuk also filed his "Motion for Clarification of Ruling on Show Cause Hearing." (CP 45.) The court denied both motions. (CP 58; CP 60.)

2.5. Interrogatories and Requests for Production of documents were served on Chabuk even though Miller's

Attorney had no evidence of any kind (no prima facie evidence) in support of her offensive fabrications.

Even though she submitted no evidence of any kind (no prima facie evidence) in support of her offensive fabrications against Chabuk (in her Answer, and during the hearing on order to show cause), Miller's attorney served interrogatories (pursuant to CR 33) and requests for production of documents (pursuant to CR 34), and demanded production of some burdensome documents, including Chabuk's **tax returns for ten years,** from 2007 through 2017, within 30 days, (CP 56:23-25), in her efforts to find any evidence in support of her offensive fabrications without any prima facie evidence. (CP 55-57.)

Because of the 30-days requirements of CR 33 and 34, and because the response deadline would fall past the trial date, Miller's attorney asked the court to continue the trial date. (CP 46 and CP 63.) As her "justification," the attorney claimed that the "***discovery from Mr. Chabuk was necessary for a full development of the facts at trial***." (CP 47:11-13) (emphasis added).

During the hearing for a continuance, Miller's attorney falsely complained to the court that Chabuk had filed "a couple appeals" (the motion for discretionary review in the Court of Appeals) and that she "was never given any notice or paperwork," (CP 75), even though she never made such an argument in the Court of Appeals or to Chabuk. (CP 75.) Even though she had no prima facie evidence for the need for her discovery requests, the trial court granted Miller's attorney's motion and continued the trial date to provide time for discovery. (CP 76.)

2.6. Chabuk filed a motion for protective order against the interrogatories and the requests for production of documents.

The interrogatories and requests for production of documents were burdensome — including production of Chabuk's tax returns for the past ten years, in this unlawful detainer action. (CP 77.) Chabuk argued that CR 33 and CR 34 are not applicable to unlawful detainer proceedings because an unlawful detainer action is a special proceeding in which the Civil Rules do not apply to the extent they are in conflict with the unlawful detainer statutes, *Christensen v. Ellsworth*, 162 Wn.2d 365, 374, 173 P.3d 228 (2007); where RCW 59.18.380 provides that the trial (if needed) shall occur within 30 days of the show cause hearing while CR 33 and 34 also provide that the responses to discovery requests must be made within 30 days. (CP 77-80.)

Miller's attorney's written response to the motion was frivolous. (CP 81-84.) During the hearing on the motion, even though this case was an unlawful detainer action, and not an ejection action for a "tenancy at will," Miller's attorney argued that the **"30-day rule [is] not relevant [to] tenancy at will [because it is a] different proceeding then unlawful detainer"** proceedings. (CP 85) (emphasis added).

Miller's attorney also argued in her response brief to Chabuk's motion that there was not any conflict between CR 33 and 34 and the 30-days requirement of RCW 59.18.380 because **"discovery could be**

provided the day of the trial" or "it could be provided after trial." (CP 82:4-6) (emphasis added).

Without an opinion, the court denied Chabuk's motion for protective order and awarded **$337.50 attorney's fees against Chabuk** because the 30-day deadline for response had already passed, which Chabuk paid under protest. (CP 88.)

2.7. In her trial brief and in her opening statements, Miller's attorney argued that the unlawful detainer statutes did not apply in this case and that it should be dismissed, and that Chabuk should use the "tenancy at will" proceedings for ejection pursuant to *Turner v. White*, 20 Wn. App. 290, 579 P.2d 410 (1978).

Miller's attorney falsely argued:

> The rent now nor was never due under . . . the contract . . . [and] never represented the agreement between the parties and, therefore, the unlawful detainer is not the . . . cause of action in this case. [Narrative RP, 7/9/2018, at 2:16-19; CP 184:16-19.]

This argument was contradicted by Miller's own testimony and the documentary evidence. (CP 196-198.) Similarly, in her Trial Brief, Miller's attorney further argued: "it is agreed that in late 2007, Chabuk purchased the Property . . . in this case specifically with the purpose of Miller and her family residing therein." (CP 216.) Therefore, Miller's attorney admitted that the house was purchased, in late 2007, for Miller and her family to move into, long before the rental agreement was signed on April 1, 2010. (Ex. #3; CP 233; FF #5; CP 155.)

After Miller stopped paying her share of the rent, while BHA kept paying their assistance, Chabuk would ask her for the rent and Miller would respond by saying "what do you need the money for?" (CP 189,

190.) Chabuk was 75 years old at that time and had been living by himself, and felt his old age had a lot to do with Miller's plans to get what she could from him. (CP 189-190; Ex. #12; CP 266-269 – copy attached; also Ex. #11, CP 256-261.)

Miller admitted that she had "severe mental illness all her adult life," (Ex. #9; CP 251), admitted in her testimony that she had stopped paying her share of the rent 3 years earlier, (CP 197:13), and that her entire family moved into the house shortly after Chabuk purchased the house in late 2007 (CP 196). Chabuk was previously her attorney, pro bono, for a number of years in her efforts for disability benefits. (Ex. #12, CP 266-267.)

2.8. Miller's attorney requested attorney's fees under the unlawful detainer statute RCW 59.18.290(2) while she also argued that the unlawful detainer act did not apply in this case. (CP 184.)

In her arguments that the unlawful detainer laws do not apply in this case, Miller's attorney cited *Turner v. White*, 20 Wn. App. 290, 579 P.2d 410 (1978) and asked for attorney's fees. Ironically, in *Turner*, initially, judgment (including statutory attorney's fees) had been awarded against the alleged tenant by default under the unlawful detainer laws. *Id.* at 291. But the alleged tenant, in *Turner,* appealed to the Court of Appeals and successfully argued that the judgment should not have been awarded because he had not been a tenant there. *Id.* Thus, the award of attorney's fees against him was vacated. *Id.* Yet, in this case, Miller's attorney's argument for attorney's fees was contrary to her own cited case of *Turner v. White*.

2.9. Trial court ruled against Chabuk even though, during the trial, no evidence was presented (nor argued) to support Miller's attorney's false accusations in her Answer, in her affirmative defenses of duress, of misrepresentation, her request for CR 11 sanctions, and her accusations of coercion. And there was no support for her arguments of "tenancy at will" pursuant to *Turner v. White*, 20 Wn. App. 290, 579 P.2d 410 (1978).

The trial court's findings of fact and conclusions of law provide no support for any of Miller's attorney's fabrications, **which caused this simple unlawful detainer case, for $650 unpaid rent, to be converted into a full two-day trial**.

Miller testified that her family had moved into Chabuk's house shortly after the house was purchased in late 2007. (CP 196:12.) Yet, the trial court ruled against Chabuk with sua sponte findings:

A. In ruling against Chabuk, the trial court sua sponte made a number of findings which had no relevance to the issue of possession of the property and the unpaid rent; and those issues in the trial court's findings had not been raised before the court, are contrary to the parol evidence rule, and are not supported by substantial evidence or any evidence.

B. Contrary to Miller's attorney's arguments, the court found a valid and final rental agreement (FF #5, 6, 7, CL #1, 5-10; CP 155-159.) However, because the rental agreement provided automatic renewals unless either party gave notice of intent to vacate, at least 20 days prior to vacating, the trial court found this language may have given a perpetual renewal for life estate to Miller. The trial court cited

Tischner v. Rutledge,* 35 Wash. 285, 77 P.388 (1904**) in support of its sua sponte ruling in favor of perpetual renewal. (CL #7, CP 158; RP 7/13/18 at 7-9, CP 133-135.) The trial court found this provision of the rental agreement to be ***"of the most significance in the outcome of this case . . . ." (CP 133) (emphasis added). The trial court ruled that it ***"cannot distinguish in any way the language in this particular rental agreement from the language that exists in the Tischner case. The language is clear and unequivocal.***" (CP 134) (emphasis added). But, the holding in *Tischner* is the opposite of the trial court's ruling. In fact, the *Tischner* holding is in Chabuk's favor — against a finding of a perpetual renewal. *See infra* Argument, section 3.4.

C. Because Chabuk had written off Miller's share of the prior unpaid rents, for more than 3 years, the trial court sua sponte ruled that Chabuk had waived Miller's share of the payments. (CL #8, CP 158; RP 7/13/18 at 13-15, CP 139-141) — even though Chabuk had submitted into evidence his notices reinstating Miller's obligation to pay her share of the future rent payments. (Ex. #4, CP 237; Ex. #10, CP 255.) Moreover, in his Complaint, Chabuk demanded payment only for the latest unpaid portion of the rent, and did not demand any payments for the prior unpaid rents. (CP 3.)

Yet, the trial court ruled that Miller was not in unlawful detainer because Chabuk had waived Miller's portions of the rent and **awarded**

$10,851.00 attorney's fees plus **$52.47 as costs** against Chabuk in favor of the opposing attorney, in the attorney's own name. (CP 161.)

Miller's attorney's own fabrications had instigated the judge (during the show cause hearing) to convert this simple case to a full two-days trial and, at the end, she was awarded a huge amount of attorney's fees based on her own misrepresentations for the long trial.

Miller's attorney's claimed hours do not demonstrate time eligible for award of attorney's fees. (CP 113-115.)

2.10. In his motion for reconsideration of the court's trial ruling, Chabuk noted that most of the trial court's findings had no relevance to the issues of possession of the property and the unpaid rent, and that they were not raised before the court and that the court's reading of the plain language of the rental agreement, and its reading of the decision in *Tischner*, were both incorrect. (CP 166-199.)

Chabuk noted that the *Tischner* case was in Chabuk's favor; that waiver was an affirmative defense, which must have been pleaded as an affirmative defense but Miller did not have such an affirmative defense, and that, even if there had been such an affirmative defense; there has been no waiver because, in his Complaint, Chabuk asked for only the last month's unpaid portion of the rent after he notified Miller and reinstated her rent payment obligation; that the lease agreement (Ex. #3, CP 234), item #33, provided: "No oral modification shall be construed to be a waiver of any part of this agreement"; and item #37 provided: "It is further agreed that no waiver of any breach of any covenant, condition, or agreement herein shall operate as a waiver of the covenant, condition or agreement itself." (CP 235.)

The trial court asked for a response and a reply to the motion. Miller's attorney's response (incorrectly designated as a "Reply") failed to address the relevant issues, (CP 200), yet asked for an **additional $742.50** as attorney's fees. (CP 209.)

2.11. Chabuk requested attorney's fees as CR 11 sanctions in reply in his motion for reconsideration because this simple unlawful detainer action had been converted to a full two-day trial only because of the unfounded offensive fabrications of Miller's attorney.

In his Reply, Chabuk again asked for attorney's fees as CR 11 sanctions, (CP 213:11-13), because this simple unlawful detainer action had been converted to a full two-day trial only because of the unfounded offensive fabrications of Miller's attorney, alone, as her "shoot first, aim later," practice and with her burdensome discovery requests with no prima facie evidence to justify their need. (CP 213.)

Moreover, Miller's attorney, herself, had asked for CR 11 sanctions against Chabuk in her "affirmative defenses" section of the Answer. (CP 15.) After the response and reply were filed, the trial court denied Chabuk's motion without an opinion. (CP 224.)

On appeal, the Court of Appeals should reverse the trial court's award and instead award attorney's fees in favor of Chabuk and against Miller's attorney herself, rather than Miller.

The Bremerton Housing Authority has notified Chabuk that their rent assistance to Miller will be terminated at the end of March 2019.

III. ARGUMENT

The Statement of the Case, in Sections 2.1 through 2.11, above, are incorporated in here by reference.

3.1. Standards of Review

Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Sunnyside Valley Irr. Dist. v. Dickie,* 149 Wn.2d 873, 879, 73 P. 3d 369 (2003). Questions of law and conclusions of law are reviewed de novo. *Id.* at 880.

A court's purpose in interpreting a written contract is to ascertain the parties' intent. *Spectrum Glass Co., Inc. v. Public Utility Dist. No. 1 of Snohomish County,* 129 Wn. App. 303, 310, 119 P.3d 854 (2005). To determine the intent of the parties, courts begin with the language of the contract, giving words their ordinary meaning. *Hearst Communications, Inc., v. Seattle Times Co.,* 154 Wn.2d 493, 503-504, 115 P.3d 262 (2005). Extrinsic evidence cannot be considered to vary, contradict, or modify the written word, to show a party's unilateral or subjective intent as to the meaning of a contract word or term, or to show an intention independent of the instrument. *Spectrum,* 129 Wn. App. at 311. Interpreting a contract provision is a question of law when the interpretation does not depend on the use of extrinsic evidence, or only one reasonable inference can be drawn from extrinsic evidence. *Id.*

3.2. The trial court erred when it denied Chabuk's Motion for Reconsideration of the trial ruling.

(Assignment of Error #3, 7, 17, 18.)

In his motion for reconsideration and his reply, (CP 166-199; CP 213), Chabuk demonstrated that most of the findings and conclusions had no relevance to the issue of possession of the property and the unpaid rent; were not raised before the court; are not supported by the evidence, and are contrary to the law, for the following reasons:

3.3. The findings and conclusions in trial court's oral ruling (which the court had incorporated into its formal findings of fact) are irrelevant; were not raised before the court; are not supported by substantial evidence; and are in violation of the parol evidence rule: (CP 154.)
(Assignment of Error #1 and 19.)

The trial court erred when, in violation of the parol evidence rule, it interpreted the rental agreement using extrinsic evidence to ascertain the parties' intent and make findings and conclusions that are inconsistent with the rental agreement's plain, unambiguous terms. The trial court erred by **orally ruling**, inter alia:

> I find that the agreement between the parties was always that the only rent that would be paid would come from the Bremerton Housing Authority.

(CP 141 – the oral ruling, which the court incorporated by reference in its written order. CP 154.) *See also* FF #8 ("The purpose of signing this lease was to continue to obtain Section 8 housing assistance from the BHA.") (CP 155.)

The trial court based its ruling on its erroneous sua sponte consideration of extrinsic non-existing evidence. E.g. FF #2, 3, 9-11, 15-18. The trial court's consideration of all of the extrinsic evidence is in violation of the parol evidence rule which provides in pertinent part:

> Parol or extrinsic evidence is not admissible to add to, subtract from, vary, or contradict written instruments which are contractual in nature and which are valid, complete, unambiguous, and not affected by accident, fraud, or mistake. **It is not a rule of evidence but one of substantive law.** Thus, prior or contemporaneous negotiations and agreements are said to merge into the final, written contract, and any evidence of these, **even if admitted without objection, is rendered incompetent and immaterial by operation of the rule.** . . .
> If, however, the court finds that the parties intended the writing to be a final expression of the terms it contains but not a complete expression of all terms agreed upon—i.e., partially integrated—then the terms not included in the writing may be proved by extrinsic evidence **only insofar as they are not inconsistent with the written terms**.

Emrich v. Connell, 105 Wn.2d 551, 555-556, 716 P.2d 863 (1986) (citations and brackets omitted) (emphasis altered).

The trial court correctly found that the parties' written rental agreement was valid and final: *See* FF #5-7 (the parties signed a rental agreement in 2010 obligating Miller to pay rent of $1,250 a month to Chabuk) (CP 155); CL #1 (Miller was Chabuk's tenant because she was allowed to reside in the premises owned by him under the terms of the agreement) (CP 157); and CL #5-10 (interpreting the language of the rental agreement and erroneously concluding that Miller "has not violated any covenant she made under the lease . . . .") (CP 158-159).

Accordingly, by operation of the parol evidence rule, all of the extrinsic evidence was rendered incompetent and could not be considered by the trial court, even though Chabuk may or may not have objected to its admission during the trial. Furthermore, under the parol evidence rule, even if the trial court had found that the rental agreement

was not a complete expression of the parties' agreement, the trial court still could not consider any extrinsic evidence that was inconsistent with the written terms of the rental agreement in order to interpret it. Here, the trial court's conclusion that "the agreement between the parties was always that the only rent that would be paid would come from [BHA]," (CP 141), is clearly inconsistent with the written terms of the rental agreement, which provides in pertinent part that Miller is obligated to pay $1,250 a month rent to Chabuk (CP 233).

Moreover, the trial court's opinion that the agreement was always that the rent would be paid only by BHA — and none from Miller — is not supported by substantial evidence because it does not exist in the trial testimony. On the contrary, in her testimony, Miller admits that she signed the rental agreement, in 2010, and repeatedly made rental payments over the years up until 2015, and her mother and son contributed as well**:**

> **DIRECT EXAMINATION:**
> **Q.** Did you ever give [Chabuk] money? **A.** I did and the reason I did [was] because I felt like I should . . . . [CP 196:7.]
> **Q.** You signed this lease, though? **A.** I did sign it.
> **Q.** Did your mother sign the lease with you in 2010?
> **A.** We moved in 2007. But Section 8 did not begin until 2009.
> **Q.** Remember when your mother was living with you?
> **A.** She moved in with us.
> **Q.** Your son was living with you? **A.** Yes, 11th grade.
> **Q.** When did your mother move out? **A.** She moved out not that May but following May. She went to Florida.
> **Q.** 2009? **A.** Correct.
> **Q.** She gave you money with . . . **A.** I believe she gave money to help out with overall cost. She did not believe . . . to pay rent. But she had . . . income.

> **Q.** Did your son ever pay rent? **A.** No, he did not, not until he graduated high school. First job at Safeway ....
> **COURT: Q.** How did the relationship end? **A.** Massive arguments . . .
> **Q.** What about the rent after that?
> **A.** I did stop paying the rent. [CP 197.] . . .
> **Q.** Your relationship ended approximately – what year was that?
> **A.** 2015.
> **Q.** Prior to that you would give him money if he asked you for it?
> **A.** Yes.
> **Q.** At some point prior, you were giving him money if he asked you for it? **A.** Yes.

(CP 196-198) (emphasis added).

The trial court erred in its oral ruling and its findings and conclusions because they are irrelevant, were not raised before the court, are not supported by substantial evidence, and are in violation of the parol evidence rule.

3.4. The Court erred in its sua sponte reading of the lease agreement and the case of *Tischner v. Rutledge*, 35 Wash. 285, 77 P.388 (1904) that "the lease allowed only the tenant to terminate the agreement, which may be sufficient for a grant of fee simple to the tenant." (CL #6, 7.) (Assignment of Error #4, 5.)

> The language of the agreement provides for a six-month term, followed by a single month renewal on the same terms, and then an indefinite month-to-month renewal without any terms and conditions unless "either party notifies the other, in writing, of his/her intentions to vacate." Since the six month period ended in October 31, 2010, the lease now provides for indefinite renewal without any requirement of payment from Miller. Since only a tenant may "vacate," only Miller may terminate the agreement. [CL #6, CP 158.]
>
> The language of the lease gives a clear and unequivocal grant of a lease with perpetual renewal, which under the case of *Tischner v. Rutledge*, 35 Wn. 285 (1904) may be sufficient for a grant of

> fee simple. This is consistent with the testimony as to the intent of the parties to provide a permanent home for Miller. [CL #7.]

The foregoing conclusions are contrary to the law and contrary to the clear language of the lease agreement. The trial court's conclusions of law pertaining to the lease are reviewed de novo. *Viking Bank v. Firgrove Commons 3, LLC,* 183 Wn. App. 706, 712, 334 P.3d 116 (2014). The court's ruling that "only Miller can terminate the rental agreement and has a right to perpetual renewal," is contrary to the law.

In its sua sponte ruling the trial court cited ***Tischner v. Rutledge*, 35 Wash. 285, 77 P.388 (1904)** for a perpetual renewal, and concluded: *"I cannot distinguish in any way the language in this particular rental agreement from the language that exists in the Tischner case.*" (Oral ruling, Narrative RP at 8:18-20, CP 134) (emphasis added). The trial court's interpretation of the plain language of the lease agreement, and its reading of the decision in *Tischner* are both incorrect. *Tischner* is entirely in Chabuk's favor.

Furthermore, unlike in the *Tischner* case, the contract in this case states that "either party" can notify the other, in writing, of his or her intention to vacate, which unambiguously demonstrates that no perpetual renewal was intended. The *Tischner* case did not have such an option to terminate the rental agreement yet the *Tischner* court still held that, even if the contract did not state an option to end by either party, the contract still would not be in perpetuity unless some specific wording such as "in perpetuity" was clearly stated in the text. *Id.* at 289.

The relevant part of the contract in this case provides that the lease shall be automatically renewed every month unless "either party notifies the other, in writing, of his/her intentions to vacate." (Ex. #3, CP 233.) The primary definition of the word "vacate" is: "1. to nullify or cancel; make void; invalidate." BLACK'S LAW DICTIONARY (9th ed.) at 1688. This is consistent with the plain reading of the lease agreement: "either party" (landlord or tenant) has the option to void the contract.

In this case, the trial court erroneously chose to interpret the contract using the secondary definition of the word vacate: "2. To surrender occupancy or possession; to move out or leave." *Id*. The trial court then concluded that only a tenant can vacate. But this interpretation would render meaningless the language which provides that "either party" may vacate, since under the second definition a landlord would never be able to vacate.

The trial court's interpretation is contrary to the law because when interpreting a contract, the Court is required to give effect to every word, clause and sentence if possible. *See Cox v. Helenius,* 103 Wn.2d 383, 388, 693 P. 2d 683 (1985) ("We are required, when possible, to give effect to every word, clause and sentence of a statute."); *GMAC v. Everett Chevrolet, Inc.,* 179 Wn. App. 126, 140, 317 P.3d 1074, ("An interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective."), *rev. denied,* 181 Wn.2d 1008 (2014).

Furthermore, under *Tischner*, the Court is required to read the contract so as to avoid an interpretation that would result in a perpetual renewal:

> Courts will also, whenever it is possible without doing violence to the plain meaning of words, so construe the language used as to avoid a perpetuity by renewal. We think it clearly appears from the instrument in question here, when examined as a whole, that the parties did not intend to provide for perpetual renewals. [*Tischner* at 288-289.]

Moreover, in *Tischner*, the Supreme Court held that the contract did not grant a right to perpetual renewal. The lease agreement in *Tischner* stated that the lease would terminate after one year, "with the privilege at the same rate and terms each year thereafter from year to year." *Id*. at 286. The Supreme Court held:

> [The contract] does not employ the terms 'in perpetuity,' 'forever,' or words of similar import, such as one would expect to find in instruments granting perpetual rights. Moreover, the phrase used which is thought to create the perpetual right is of itself likely to conceal its real meaning. When we speak of a thing as continuing from year to year, it is only on second thought that we conclude it means forever. This we do not think is the direct and unequivocal language necessary to create a lease of the character contended for. [*Tischner* at 289.]

In addition, the trial court in this unlawful detainer action has **no authority to determine an issue of whether Miller may or may not have a fee simple interest in the house.** Recently, Division Two of the Court of Appeals reversed "the trial court's sua sponte order quieting title of real property . . . [b]ecause the trial court exceeded its authority by making a <u>title determination in an unlawful detainer action</u> . . . ." *Tucker v. Tucker*, No. 49840-5-II (Wash. Ct. App.

Div. 2, March 20, 2018) (unpublished, cited pursuant to GR 14.1(a)) (emphasis added). In an unlawful detainer action, the trial court sits as a special statutory tribunal to summarily decide the issues authorized by statute, i.e., whether the landlord is entitled to possession, and not as a court of general jurisdiction with the power to hear and determine other issues. *Id.* (citing *Granat v. Keasler*, 99 Wn.2d 564, 571, 663 P.2d 830 (1983), *cert. denied*, 464 U.S. 1018). "[U]nlawful detainer proceedings do not provide a forum for litigating issues of title . . . ." *Id.* Therefore, the trial court's conclusions should be reversed.

3.5. The trial court erred in sua sponte concluding that Chabuk waived the rent payment obligations even though Miller did not plead affirmative defense of waiver; even though the Complaint did not ask for past unpaid rents; and even though Chabuk reinstated Miller's rent payment obligation. And the lease has a non-waiver clause.
(FF #23, CL #8, 9, 10, 11.) (Assignment of Error #2, 6-9.)

> Even if the agreement signed by the parties had required payment of rent by Miller, by taking no action after several years without payment, Chabuk waived the payment of rent and agreed to a modification of the contract by his extended inaction so that no rent was due from Miller. [CL #8, CP 158.]

The foregoing conclusion is contrary to the law because waiver is an affirmative defense and must be pleaded. CR 8(c). In this case there has been no such **plea of waiver.** An affirmative defense is waived if not pleaded. In *Federal Signal Corp. v. Safety Factors, Inc.,* 125 Wn.2d 413, 437-438, 886 P. 2d 172 (1994), the Supreme Court reversed the trial court and held that the affirmative defense of mitigation was waived because it was not pleaded as an affirmative defense. Here, as in *Federal Signal Corp.*, Miller did not plead the defense of waiver at trial.

Miller also did not argue waiver whatsoever during the trial. Instead, Miller's attorney argued that rent was never due and never paid (contrary to Miller's own testimony), and that this was a "tenancy at will." The trial court erred as a matter of law in sua sponte applying the defense of waiver and must be reversed.

3.5.1. In the alternate, even if Miller had pleaded waiver as an affirmative defense, the trial court's ruling on waiver is still contrary to the law because the Complaint asked for unpaid rent for the last month only, after Chabuk notified Miller of the reinstatement of her obligation to pay her share of the rent.

After writing off the previous unpaid rent, for the past 3 years, Chabuk reinstated Miller's obligation to pay rent with his written notice to Miller, dated February 26, 2018, which stated in pertinent part:

> NOTICE OF CHANGES TO YOUR RENTAL AGREEMENT
>
> As you know, recently [BHA] has decreased the amount of rent assistance to you for the premises you occupy.
> Meanwhile, effective April 01, 2018, we had to increase your rent amount from $1250.00 to $1350.00 per month.
> In addition, you will have to pay for all utilities.
> . . .
> If you cannot pay as stated above, please find a place you can afford and vacate the premisses you presently occupy.

(Ex. #4, CP 237.) (also Ex. #5, CP 239; and Ex. #7, CP 243; - notices from the BHA).

When a waiver is given without consideration, the waiving party may reinstate the rights that have been waived upon reasonable notice that gives a reasonable opportunity to comply. *Cornerstone Equipment Leasing, Inc. v. MacLeod*, 159 Wn. App. 899, 909, 247 P. 3d 790 (2011).

In addition, with his **"3-Day Notice to Pay Rent or Vacate**" (Ex. #10; CP 255 and CP 13), dated March 6, 2018, Chabuk provided additional notice demanding payment, which would go against any argument for a waiver. In the aforementioned written notices, Chabuk gave Miller a reasonable opportunity to comply with his reinstatement of his rights under the rental agreement that she must pay her share of the rent. Miller failed to comply and defaulted.

Here, Miller's attorney repeatedly argued the opposite of waiver. Miller's attorney argued that the rent was never due and was never paid — contrary to Miller's testimony that she did make rent payments. (CP 196-198.) But Miller failed to perform when she failed to pay her share of the rent as provided for in the rental agreement. Chabuk had written off many of the previous unpaid rents prior to his notices dated February 26, 2018, and March 6, 2018, which, under the law, reinstated Miller's obligation to pay rent.

3.5.2. Moreover, **item #33 of the lease** agreement provides: "No oral modification shall be construed to be a waiver of any part of this agreement." (Ex. #3, item 33 – CP 234.)

Additionally, **item #37 of the lease agreement** clearly states: "It is further agreed that no waiver of any breach of any covenant, condition, or agreement herein shall operate as a waiver of the covenant, condition or agreement itself." (CP 235.) This is commonly known as a **non-waiver clause.**

Miller bore the burden of proving waiver as an affirmative defense. CR 8(c); *Kim v. Lee,* 174 Wn. App. 319, 323, 300 P.3d 431 (2013). Where, as here, the written agreement contains a non-waiver clause, in order to find waiver, the trier of fact must find *"a clear intent to waive both the [non-waiver] clause and the underlying contract provision."* 13 WILLISTON ON CONTRACTS § 39:36 (4th ed. 2013) (emphasis added).

Here, the trial court's sua sponte ruling of waiver failed to make any finding of an intention to waive the non-waiver clause. Furthermore, the trial court failed to even acknowledge whether it considered the non-waiver clause, either in its oral ruling or the written findings and conclusions. The absence of a finding of fact in favor of a party who bore the burden of proof on an issue is construed as an adverse finding on that issue. *State v. Budd,* 185 Wn.2d 566, 580 n.2, 374 P.3d 137 (2016). Since Miller bore the burden of proof on waiver, the trial court's failure to find an intention to waive the non-waiver clause demonstrates that the trial court's sua sponte ruling of waiver is not supported by substantial evidence and must be reversed. The trial court erred as a matter of law in its conclusions of law that Miller had not defaulted due to waiver.

3.6. The trial court erred in concluding that "as the prevailing party, MILLER is entitled to REASONABLE ATTORNEY fees under RCW 59.18" (CL #12) because, under the lodestar method, Miller's attorney is not entitled to any attorney's fees based on her contradictory and unsuccessful arguments. (Assignment of Error #10.)

> Under the lodestar method of determining reasonable fees, the court must first exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims. Second, the trial court may adjust or apply a multiplier to the award either upward or downward to reflect factors not already taken into consideration – specifically, . . . the quality of work performed. The lodestar amount may be adjusted to account for subjective factors such as the level of skill required by the litigation, the amount of potential recovery, time limitations imposed by the litigation, the attorney's reputation, and the undesirability of the case.

Target National Bank, v. Higgins, 180 Wn. App. 165, 184, 321 P.3d 1215 (2014) (emphasis added) (citations and quotation marks omitted).

3.6.1. Miller's attorney is not entitled to an award of any attorney's fees because all of her factual arguments and legal theories were contrary to the trial evidence and to the unlawful detainer laws and they were unsuccessful.

The trial court's sua sponte findings of fact and conclusions of law do not reference or support Miller's attorney's factual allegations or her legal theories. Miller's attorney has always argued that this case was not under the Landlord Tenant Act, and that it should be dismissed and Chabuk should file a separate court action for ejectment as "tenancy at will." In her support, Miller's attorney cited the case of *Turner v. White*, 20 Wn. App. 290, 579 P.2d 410 (1978) for "tenancy at will" actions, while, ironically, at the same time, she asked for attorney's fees under the Landlord Tenant Act (RCW 59.18.290(2)). (CP 90-91.) In *Housing Authority of City of Everett v. Terry,* 114 Wn.2d 558, 571, 789 P. 2d 745 (1990), the Supreme Court held in pertinent part that "[i]n order to be awarded fees and costs as the prevailing party [under RCW 59.18.290(2)], a tenant must prove that the lease was not terminated. . . ." *Id.* But Miller's attorney didn't argue that the lease was not

terminated; instead, she argued only that this was a "tenancy at will." Miller's attorney's theories and arguments were frivolous and unsuccessful and none of the findings of fact and conclusions of law reflect the attorney's arguments. Miller's attorney's frivolous offensive fabrications misled the court to convert this simple and short unlawful detainer action, for $650 unpaid rent, to a full two-day trial.

In contradiction to Miller's own testimony, in her opening statement, Miller's attorney falsely argued:

> The rent now nor was never due under . . . the contract [and] never represented the agreement between the parties and, therefore, the unlawful detainer is not the . . . cause of action in this case. [Narrative RP at 2, July 9, 2018 – CP 184:16-19.]

In her trial brief, the attorney further argued: "it is agreed that in late 2007 Chabuk purchased the Property . . . in this case specifically with the purpose of Miller and her family residing therein." (CP 216.) Therefore, Miller's attorney admitted that the house was purchased for Miller and her family to move into, long before the rental agreement was signed, on April 1, 2010. (Ex. #3, CP 233.)

In her trial brief and opening statements, Miller's attorney falsely argued:

> This is a trial for unlawful detainer. . . . RCW 59.12.030 outlines six situations in which it may be used. Mr. Chabuk is bringing this action under subsection c, taking possession after default in paying the rent. However, under *Turner vs White* none of these situations outlined in the statute apply to tenancy at will. And unlawful detainer is not the proper remedy. <u>The rent now nor was never due</u> under . . . the <u>contract [and] never represented the agreement between the parties</u> and, therefore, the unlawful detainer is not the . . . cause of action in this case.

(Narrative RP at 2, July 9, 2018 – CP 184) (emphasis added).

The trial court's findings recognizes the lease agreement, (Ex. #3; FF #5, CP 155), while Miller's attorney, in her "Affirmative Defense," falsely and offensively alleged: "CR 11: Plaintiff signed the pleadings and motions in this case knowing them not to be well grounded in fact or law." (CP 15.) There is no support in the court's findings and conclusions for Miller's attorney's argument that "the contract never represented the agreement between the parties," and "the rent now nor was never due . . . ." (CP 184) (emphasis added).

Moreover, because of the fabricated allegations **in the Answer**, and during the Show Cause hearing, the fabricated accusations that **Chabuk had "coerced"** Miller to sign the lease agreement, the judge was misled and converted this simple unlawful detainer action to a two-day trial: The "Answer" filed by Miller's attorney had no support of any declarations or any kind of evidence and made some outrageous accusations which, later at the trial, turned out to be fabrications of Miller's attorney alone. The false allegations, in the Answer and in "Affirmative Defenses," in **Section 2.3, above,** of this brief are **incorporated in here by reference.**

Because Miller failed to show up for her hearing on order to show cause, a default order was proper – especially considering the fact that her attorney did not ask for a continuance or offer an explanation as to why Miller failed to show up. A default should have been entered in Chabuk's favor. *See Burlingame v. Consolidated Mines and Smelting Co., Ltd.,* 106 Wn.2d 328, 329, 722 P.2d 67 (1986) (holding that the trial

court properly entered a judgment when the defendant failed to appear at the show cause hearing). Yet, Miller's attorney falsely told Judge Bassett that her **"client was coerced into signing [the lease] and was not ever actually requested to pay under."** (CP 219) (emphasis added). Later at the trial, no evidence or arguments were offered to support the previous fabricated accusations of coercion, undue influence, etc.

The arguments on **the hearing on order to show cause, in Sections 2.3.1 and 2.4 above, are incorporated in here by reference**.

3.6.2. Even if Miller's attorney had been entitled to reasonable attorney's fees under RCW 59.18, the amount demanded is very unreasonable — with a total award of $10,851.00 plus costs for a simple unlawful detainer action for $650 unpaid rent.

(CP 106-116 and CP 161.) (Assignment of Error #12, 18.)

> *Courts must take an active role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Courts should not simply accept unquestioningly fee affidavits from counsel.*

Mahler v. Szucs, 135 Wn.2d 398, 434-35, 957 P.2d 632, 966 P.2d 305 (1998) (emphasis added).

Under the **lodestar** method and under *Target,* 180 Wn. App. at 184, the amount of recovery must also be taken into consideration. In this case, the amount of unpaid rent in the Complaint was $650.00 and possession of the property. The amount of attorney's fees in this case is exorbitant and not "reasonable." Miller's attorney argued that this action cannot be under the unlawful detainer laws, should be dismissed and re-filed as an action for ejectment as "tenancy at will" under *Turner v. White*, which would hardly be a benefit for Miller. The argument is

ironic because there can be no benefit to Miller if the case was dismissed and Chabuk filed a new action for ejectment as a "tenancy at will," where she would still be evicted.

The entire pleadings and arguments made by Miller's attorney missed every single factual and legal issue and they are not supported by the findings and conclusions. Moreover, because of Miller's attorney's false allegations and accusations, and because the trial was converted to a full two-day trial, and Chabuk had endure a large number of pretrial discovery issues, hearings, and the two-day trial — at the end of which Miller's attorney's fabrications turned out to be false. Yet, the attorney was awarded as the fruits of her false accusations $10,851.00 in fees plus $52.47 in costs. (CP 161.) The attorney's time statements show no justifications for award of attorney's fees. (CP 106-116.)

Under the **lodestar** method, the **skill of the attorney** also must be taken into consideration for determination of the attorney's fees. A cursory review of the findings of fact and conclusions of law (which was prepared by the opposing attorney based on the court's oral ruling) demonstrates the level of the skill of the opposing attorney.

Without any contribution to the court's findings and conclusions of law, all of Miller's attorney's time must be deducted under *Target*. Under the lodestar method, the attorney's "hours pertaining to unsuccessful theories or claims" must be excluded. *Id.* at 184. Additionally, "the quality of work performed, . . . level of skill required by the litigation, the **amount of potential recovery**, [and] time

limitations imposed," *id*. (emphasis added), must be considered, which the trial court failed to do.

3.7. The trial court erred or abused its discretion during the hearing on order to show cause when it ordered a full trial without considering the evidence because RCW 59.18.380 required the court to examine the witnesses and any evidence to determine whether there was a need for a further hearing. (Assignment of Error #11, 12, 13.)

The court denied a default order and ordered a full trial, even though no evidence was offered to the court by the defendant, the answer was filed only by Miller's attorney, was not verified, no affidavits were submitted, and Miller failed to appear and failed to show cause.

The statements of the case, in Section 2.3 and 2.4 above are incorporated in here by reference:

During the hearing, Miller's attorney alleged that Chabuk had **coerced** Miller to sign the lease agreement, (CP 219:4), with no explanations as to why Miller failed to show up. Based on Miller's attorney's unsupported false accusations, Chabuk had to go through a number of discovery related proceedings and endure a two-day trial because the court did not question the fabrications of Miller's attorney, who made accusations without any prima facie case. At the end of the trial, the accusations turned out to be false.

Pursuant to RCW 59.18.380, the court was required to examine the witnesses and evidence to determine whether or not there were any issues to be resolved at the trial or a short hearing for possession of the property. Without any evidence, and without Miller's appearance to show cause, it was an error for the court to proceed for a full trial.

After the court's decision for a full trial, Chabuk filed his "Motion for Reconsideration of Ruling on Show Cause Hearing." (CP 36.) The court denied the motion. (CP 58.) RCW 59.18.380 provides that the show cause hearing shall be a special expedited mini-trial for unlawful detainer cases and the "rules of evidence apply to unlawful detainer show cause hearings and inadmissible evidence may not be therein considered." *Leda v. Whisnand*, 150 Wn. App. 69, 82, 207 P.3d 468 (2009). Even though Miller did not show up and failed to show cause, and even though, in a hearing for an order to show cause "an Answer is not an evidentiary submission," *Leda* at 84, in violation of RCW 59.18.380 the court refused to let Chabuk summarize his evidence already in file and ordered a full trial at a later date.

"Under ER 603, unsworn testimony is inadmissible." *Leda*, at 82. "[C]ounsel's argument is not evidence." *State v. Frost,* 160 Wn.2d 765, 782, 161 P.3d 361 (2007). Yet, the court considered Miller's attorney's fabricated insulting verbal allegations by asking the attorney how old the lease agreement was. Miller's attorney said it was "several years old." (CP 219:3.) The court considered the attorney's offensive fabrications and ruled:

> Mr. Chabuk, **this matter is not going to be taken care of on this hearing, because it has now become a contested matter.** This is going to have . . . a scheduled date for a special hearing.

(Verbatim RP 5/11/2018 at 10:8-12; CP 219:8-12) (emphasis added).

As stated in *Leda,* this ruling by the court is in violation of RCW 59.18.380 and the main purpose of the unlawful detainer statute:

> The proper procedure by which a trial court should conduct a RCW 59.18.380 show cause hearing 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. Because RCW 59.18.380 contemplates a resolution of the issue of possession based solely on the show cause hearing, the court must either 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.

Leda at 83.

In this case, the parties had their day in court and Miller did not show up and failed to show cause. No testimony was taken and no evidence was offered by Miller. The court erred and abused its discretion when it refused to issue the writ of restitution and, instead, ruled for a full trial, which ended up lasting two days.

In *Leda,* the Court of Appeals held:

> The court shall examine the parties and witnesses orally to ascertain the merits of the complaint and answer, and if it shall appear that the plaintiff has the right to be restored to possession of the property, the court shall enter an order directing the issuance of a writ of restitution.
> . . .
> RCW 59.18.380 imposes an affirmative duty on the trial court to ascertain the merits of defenses raised for the first time during an unlawful detainer show cause hearing by examining the parties and any witnesses-i.e., to examine the parties and witnesses orally to ascertain the merits of the Answer.
> . . .
> If no evidence may be presented at an unlawful detainer show cause hearing beyond that which exists in the written pleadings, the exclusive purpose of the show cause hearing - the presentation of evidence-ceases to exist. This would render RCW

> 59.18.380 virtually meaningless - nothing more than a requirement that superior courts hold perfunctory and purposeless hearings on matters to be decided solely on the pleadings. But an answer is not an evidentiary submission.

Leda at 79-84.

As ruled in *Leda*, Miller's Answer is not an evidentiary submission. The trial court had a duty to question the witness about the Answer and any other evidence. Chabuk had his evidence on file in the form of declarations under penalty of perjury. Yet, the court erroneously considered the fabrications in the Answer and the fabricated disrespectful insults of Miller's attorney while denying Chabuk the opportunity to respond and summarize his case.[1]

The court erred and abused its discretion when it refused to order the writ of restitution. "A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. A trial court necessarily abuses its discretion if its ruling is based on an erroneous view of the law." *Leda* at 82. A default order is the proper

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[1] Similarly, in *Faciszewski vs. Brown*, 187 Wn.2d 308, 321, 386 P.3d 711 (2016), the Supreme Court, citing *Leda*, noted: "[T]he show cause hearing often provides the only opportunity for a tenant to **present any evidence**. . . . **The court may not disregard evidence** . . . . Otherwise, RCW 59.18.380 would **be rendered meaningless** . . . ." *Faciszewski* at 321 (emphasis added).

In addition, recently, in *Tafoya v. Hunter*, No. 76798-4-I (Wash. Ct. App. Div. 1, Sept. 17, 2018) (unpublished, cited pursuant to GR 14.1(a)), the Court of Appeals, Division One, also cited *Leda* and rejected appellant's argument that RCW 59.12.130 - which requires a trial "whenever **an issue of fact** is presented by the pleadings" - requires a trial if an issue of fact appears from the complaint and answer:

> [T]he words "issue of fact" normally require a party to establish a fact issue with evidence, **not mere allegations**. CR 56 (c), (e). If trials could be obtained by **mere allegations** in an answer, **show cause hearings would be meaningless** . . . Significantly, the plaintiffs in this case provided the court with evidence of ownership, i.e. a statutory warranty deed. [The defendant] **failed to produce any admissible evidence rebutting** that claim or demonstrating a viable claim of co-ownership.

(*Tafoya*, slip opinion at 6, n. 1) (emphasis added).

remedy when the defendant fails to appear at the show cause hearing as ordered by the trial court. *See Burlingame v. Consolidated Mines and Smelting Co., Ltd.,* 106 Wn.2d 328, 329, 722 P.2d 67 (1986).

In this case, Miller was ordered to show cause why a writ of restitution should not be issued. Chabuk had filed his evidence in court and appeared for the hearing but Miller did not — even though her attorney did — without any declarations, without any verifications, or any other kind of evidence. On appeal, the Court of Appeals should rule that the trial court erred or abused its discretion in denying the writ of restitution and in ordering a full trial; and should order entry of a default order with a writ of restitution.

3.8. The trial court erred or abused its discretion when it granted Miller's motion to continue the trial date in order to provide time for Miller's interrogatories and requests for production because rules CR 33 and CR 34 do not apply in unlawful detainer actions. (Assignment of Error #15.)

After she served her interrogatories and requests for production of documents, Miller's attorney filed in court her motion to continue the trial date to provide time for response to the interrogatories. (CP 63.)

In her declaration, Miller's attorney argued that **"discovery from Mr. Chabuk was necessary for full development of the facts at trial,**" (CP 64) (emphasis added), even though she had no prima facie evidence to justify her need for the interrogatories and the request for production of documents and even though she made no effort to demonstrate her need for it. Her motion was **nothing but "shoot first, aim later" practice**.

The "Defendant's First Set of Interrogatories and Requests for Production," (CP 67), was oppressive and without any justification, which included request for production of Chabuk's tax records for ten years, in Request #4. (CP 73:24.) Over Chabuk's objections, the court granted the request to continue the trial date. (CP 75-76.)

Chabuk **incorporates Section 2.5 and 2.6** above and **3.9** below by reference in here. The Court of Appeals should rule that the discovery rules CR 33 and CR 34 do not apply in unlawful detainer actions and the court erred when it continue the trial date to provide time for discovery under CR 33 and CR 34.

3.9. The court erred or abused its discretion when it denied plaintiff's motion for protective order and awarded $337.50 as sanctions because civil discovery rules CR 33 and CR 34 do not apply to unlawful detainer actions.
(Assignment of Error #14; CP 88.)

Chabuk moved for a protective order with his argument that the court rules CR 33 and CR 34 for interrogatories and request for production of documents have a conflict with certain sections of the Unlawful Detainer Act and do not apply here; that, request for production of documents were oppressive and burdensome with demands for production of tax returns for ten years. (CP 77.) Chabuk incorporates in here Section 2.6 above by reference.

During the hearing on the motion, even though this was an unlawful detainer action, Miller's attorney argued that the 30-day rule was not relevant to "tenancy at will" — different proceedings than the unlawful detainer and asked for attorney's fees. (CP 85.) The attorney

also frivolously argued in her response brief that there was no conflict between CR 33 and 34 and the 30-days requirement of RCW 59.18.380 because "discovery could be provided the day of the trial" or "it could be provided after trial." (CP 82.) The court denied Chabuk's motion for protective order and awarded $337.50 to Miller's attorney. (CP 88.)

Miller's arguments for her discovery requests are inconsistent with the plain meaning of RCW 59.12.030(3). Under CR 81(a), the civil rules apply to all civil proceedings except where inconsistent with rules or statutes applicable to special proceedings. *Christensen v. Ellsworth*, 162 Wn.2d 365, 374, 173 P.3d 228 (2007). Unlawful detainer actions are special proceedings. *Id.*; *Granat v. Keasler*, 99 Wn.2d 564, 571, 663 P.2d 830 (1983). The purpose of the show cause hearing is to provide the landlord with speedy recovery of possession of the premises. *Phillips v. Hardwick,* 29 Wn. App. 382, 386, 628 P.2d 506 (1981).

To serve this purpose, if a trial is required, it shall be held within 30 days. RCW 59.18.380. CR 33 and 34 cannot be held applicable to unlawful detainer trials because the amount of time provided for discovery responses (30 days) would force the trial to be held more than 30 days later, which is inconsistent with the purpose of RCW 59.18.380.

The Court of Appeals should reverse the award of $337.50 as attorney's fees against Chabuk and rule that CR 33 and CR 34 do not apply in unlawful detainer actions.

3.10. ATTORNEY'S FEES: Chabuk is entitled to an award of reasonable attorney's fees because this simple unlawful detainer action for $650 unpaid rent was converted to a useless full two-day trial (with her interrogatories and

requests for production of burdensome documents and the related hearings) — only because of the instigation of Miller's attorney with her unfounded offensive fabrications against Chabuk.

In his "Declaration of Landlord in Reply to Answer," Chabuk asked for award of attorney's fees as CR 11 sanctions against Miller's attorney. (CP 30-31.) Moreover, in his "Motion for Reconsideration of Ruling on Show Cause Hearing," Chabuk again asked for award of attorney's fees as CR 11 sanctions. (CP 40-42.) In addition, in "Plaintiff's Reply on Motion for Reconsideration," Chabuk again asked for attorney's fees as CR 11 sanctions. (CP 213.) The trial court failed to respond and, therefore, denied the motions. (Assignment of Error #16.)

On appeal, Chabuk is asking for award of reasonable attorney's fees against Miller's attorney both in the trial court and in the Court of Appeals, pursuant to CR 11, RAP 18.1, RCW 59.18.290, and the Court's inherent authority to sanction attorneys for bad faith conduct. *State v. S.H.*, 102 Wn. App. 468, 470, 8 P.3d 1058 (2000).

Under RAP 18.1, which permits an award of reasonable attorney's fees on appeal if applicable law grants the party the right to recover reasonable attorney's fees, and RCW 59.18.290,[2] Chabuk is entitled to reasonable attorney's fees in both the trial court and on

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[2] RCW 59.18.290(2) provides in pertinent part:
It shall be unlawful for the tenant to hold over in the premises or exclude the landlord therefrom after the termination of the rental agreement except under a valid court order so authorizing. Any landlord so deprived of possession of premises in violation of this section may recover possession of the property and damages sustained by him or her, and the prevailing party may recover his or her costs of suit or arbitration and reasonable attorney's fees.

appeal because he should be the prevailing party in both the trial court and on appeal. Chabuk **incorporates in here by reference Sections 2.1 through 2.11 and 3.1 through 3.9 above**.

Miller's attorney, Karen Richmond, submitted her Answer, arbitrarily denied virtually all the averments in the Complaint with no regard for their truth, in her affirmative defenses section of the answer, without any foundation, without any declarations, without any verifications, she made false offensive and outrageous accusations against Chabuk and in the same Affirmative defenses, asked CR 11 sanctions against Chabuk. (CP 14-15, CP 215.) In addition, during the oral arguments on order to show cause, Miller's attorney made unsubstantiated/offensive accusations against Chabuk, and misled the judge to convert this short unlawful detainer case to a full two-day trial, with burdensome discovery requests. (CP 219.)

Moreover, in her trial brief, in her opening statements, and closing arguments, Miller's attorney made significant factual and legal arguments, none of which came out to be true during the trial and none supported in the findings of fact and conclusion of law. Based on Miller's attorney's false accusations, after the case was set for a full trial, without any prima facie evidence, Miller's attorney submitted interrogatories and request for production of documents, with unreasonable and burdensome demands for production of documents, including production of **tax returns for the previous 10 years** (from 2007 through 2017, to be produced within 30 days (CP 56:23-25)

even though she had no prima facie evidence of any kind at any time — with her "shoot first, aim later" practice. (CP 55-57.)

After court ruled against Chabuk at the end the trial, Miller's attorney submitted a long list of hours claiming to have spent on this case for Miller. (CP 106-116.) The attorney demanded and was awarded a judgment for **$10,851.00 attorney's fees plus $52.47 as costs against Chabuk** in **favor of attorney Karen Richmond**. (CP 113-116; CP 209; CP 161.)

CR 11 addresses two types of problems relating to pleadings, motions and legal memoranda: filings which are not well grounded in fact and warranted by law, and filings interposed for "any improper purpose." *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 217, 829 P.2d 1099 (1992). The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system. *Id.* at 219. Both the federal rule and CR 11 were designed to reduce "delaying tactics, procedural harassment, and mounting legal costs." *Id.* CR 11 requires attorneys to "<u>stop, think and investigate more carefully before serving and filing papers.</u>" *Id.* (emphasis added). "<u>Rule 11 has raised the consciousness of lawyers to the need for a careful prefiling investigation of the facts and inquiry into the law.</u>" *Id.* (brackets omitted) (emphasis added).

If a complaint lacks a factual or legal basis, the court may impose CR 11 sanctions <u>if it also finds that the attorney who signed and filed the complaint failed to conduct a reasonable inquiry into the factual and legal basis of the claim</u>. *Bryant* at 220 (citing *Townsend v. Holman*

Consulting Corp., 929 F.2d 1358, 1362 (9th Cir.1990) (a filing may be subject to Rule 11 sanctions where it is both baseless and made without a reasonable and competent inquiry).

The Court also has inherent authority to sanction attorneys for bad faith conduct. *State v. S.H., 102 Wn*. App. 468, 470, 8 P.3d 1058 (2000). In *S.H*., the Court of Appeals held that the trial court's inherent authority to sanction litigation conduct is properly invoked upon a finding of bad faith. The court's inherent power to sanction is governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. *Id*.

Sanctions may be appropriate if an act affects *"the integrity of the court and, [if] left unchecked, would encourage future abuses*." *Id*. (emphasis added) (citing *Chambers v. NASCO, Inc.,* 501 U.S. 32, 46, 111 S.Ct. 2123 (1991) (explaining that sanctions are appropriate *if the "very temple of justice has been defiled" by the sanctioned party's conduct*) (emphasis added)).

In this case, Miller's attorney's actions clearly constitute bad faith litigation. Furthermore, Miller's attorney's request for CR 11 sanctions against Chabuk were frivolous and in bad faith. Many courts have held that a frivolous motion for sanctions is, in itself, sanctionable. *See, e.g., Foy v. First Nat'l Bank*, 868 F.2d 251, 258 (7th Cir. 1989) (sanctioning appellee for his frivolous argument that appellant should be sanctioned for filing appeal, because "it is obvious that the appeal is not frivolous");

Alliance to End Repression v. City of Chicago, 899 F.2d 582, 583 (7th Cir. 1990). A motion for sanctions should not be used as an abusive litigation tactic to intimidate the opposing party or to strengthen the appearance of one's arguments. *See* CR 11(a)(3) (a motion should not be brought to harass a party); *Riccard v. Prudential Ins.* Co., 307 F.3d 1277, 1294 (11th Cir. 2002) (Rule 11 motions should not be prepared in order to emphasize the merits of a party's position).

Miller's attorney's misrepresentations alone is the cause of Miller remaining in Chabuk's house without paying any rent and, now that BHA has terminated their rent assistance, Miller is living in the house without paying any rent. Chabuk is respectfully asking for reversal of the attorney's fees in the trial court, in the amount of $10,851.00 attorney's fees plus $52.47 as costs, and the attorney's fees of $337.50 as discovery violations, and for award attorney's fees in his favor and against the opposing attorney as CR 11 violations and based on the grounds cited above or any other grounds the Court may find proper on appeal as well as in the trial court.

3.11. Request for Different Judge on Remand:

Chabuk requests that this Court remand for any further proceedings necessary before a different judge in the trial court.

Where, as in this case, the trial judge has already expressed her views on the merits, this Court has the authority to order that any further proceedings on remand be presided over by a different judge. *State v. Sledge,* 133 Wn.2d 828, 846 n.9, 947 P.2d 1199 (1997). The

Court of Appeals should also remand to a different judge due to the unusual sua sponte rulings by the trial judge in this case. *See GMAC v. Everett Chevrolet, Inc.,* 179 Wn. App. 126, 135, 317 P.3d 1074 (concluding that a just and expeditious resolution will be best served by remanding to a different judge for further proceedings), *rev. denied,* 181 Wn.2d 1008 (2014).

IV. CONCLUSION

The Court of Appeals should reverse the trial court's order denying possession of the property and awarding the large sum of attorney's fees against Chabuk; should order entry of a default order against Miller with a writ of restitution and judgment in the amount of $650.00 for unpaid rent plus rent to the day of eviction; award Chabuk reasonable attorney's fees against Miller's attorney as sanctions in both the trial court and the Court of Appeals; reverse the award of $337.50 to Miller's trial attorney as discovery sanctions; and remand for further proceedings before a different judge.

Respectfully submitted on this 17th day of April 2019.

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APPENDIX:

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CERTIFICATE OF SERVICE: I certify that on the date this document was filed, I caused a copy of this document to be e-mailed to Karen Richmond, attorney for Respondent, via the Appellate Court Portal.

/s/ Christopher M. Constantine
Christopher M. Constantine

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IN OPEN COURT
SEP 17 2018
ALISON H. SONNTAG
KITSAP COUNTY CLERK

SUPERIOR COURT OF WASHINGTON
COUNTY OF KITSAP

Ahmet Chabuk, **Plaintiff,** **vs.** **Frances Miller** **and all other occupants,** **Defendants.**	**NO. 18-2-01102-18** **Findings of Fact, Conclusions of Law, and Order**

THIS MATTER having come regularly before the court at trial on July 9 and 10, 2018, the plaintiff appearing on his own behalf, the defendant being represented by her counsel, Karen Richmond, the court having considered the testimony of the witnesses and the argument of counsel and being fully advised in the premises, now makes the following

I. FINDINGS OF FACT

A. The Court incorporates its oral ruling on July 13, 2018 by this reference.

1. Plaintiff, Ahmet Chabuk, (CHABUK) purchased the property at 3850 Ambleside Ln, Bremerton, Washington (PROPERTY) on or about December 21, 2007.
2. Defendant Frances Miller (MILLER) took occupancy of the PROPERTY at some point after its purchase, but before April 1, 2009.
3. The house was purchased by CHABUK with the intent of providing a place for MILLER to reside. MILLER's testimony as to the intent of the parties to provide a permanent

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residence for her at the time of initial occupancy was more credible than CHABUK'S, especially given the lack of compliance with requirements of the RLTA.

4. At some point in time after April of 2009, MILLER qualified for Section 8 housing assistance from the Bremerton Housing Authority (BHA), in the amount of approximately $650 a month.

5. CHABUK and MILLER both signed a lease agreement on or about April 1, 2010.

6. The lease agreement stated a rental amount of $1250.00, with a total amount due under the lease of $7500.00

7. The terms of the lease agreement stated as follows:

"1. Length of tenancy: SIX months, from May 1, 2010 through October 31, 2010.

2. At the end of the term of this lease, the lease shall be deemed automatically renewed for one month under the same conditions and terms and thereafter from month to month unless either party notifies the other, in writing, of his/her intentions to vacate, at least twenty (20) days prior to vacating."

8. The purpose of signing this lease was to continue to obtain Section 8 housing assistance from the BHA.

9. The lease provided in evidence did not contain the addendum required as part of any Section 8 housing contract.

10. The amount charged in the lease exceeded the reasonable rental amount for a 2-bedroom house posted by the Department of Housing and Urban Development (HUD) for the relevant time period.

11. No documentation was provided of CHABUK complying with the requirements of HUD

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and BHA for Section 8 housing, including:

a. Complying with the HUD approved rental limits for Bremerton.

b. Obtaining HUD approval on the payment of utilities.

c. Attaching the appropriate HUD documents to the rental contract.

12. No evidence was provided of CHABUK complying with required actions by a landlord under the Residential Landlord-Tenant Act (RLTA) RCW 59.18 et seq., such as:

a. Receipts for payments of security deposit or rent.

b. List of condition of premises.

c. Maintaining a separate bank account for deposit.

d. Reporting income to the IRS.

13. CHABUK is a licensed practicing attorney as well as the owner of multiple residential properties.

14. Prior to entry into the lease agreement CHABUK had assumed responsibility as MILLER's attorney on a number of matters, including prior landlord-tenant matters and an ERISA claim.

15. CHABUK and MILLER had a close, personal relationship which developed subsequent to CHABUK's representation of Miller, but prior to execution of the lease. MILLER'S testimony that the relationship was romantic and sexual in nature is more credible than CHABUK's denial of the same, especially given the degree of personal knowledge of MILLER shown by CHABUK. ~~It is more credible to believe that CHABUK is now denying the romantic relationship in an effort to protect his license.~~

16. CHABUK had extensive intimate personal knowledge of MILLER and her family and

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circumstances, obtained during his representation of her, which he made use of in entering this transaction and bringing this action for enforcement.

17. At the time of signing the lease, MILLER's income was approximately $900 a month in disability payments.

18. As her representative on an ERISA claim and because of his intimate knowledge of MILLER's personal circumstances and history, it is beyond reason that CHABUK was not aware of MILLER's income and its relationship to the rent amount stated in the agreement. His testimony denying such knowledge is not credible.

19. CHABUK received payments from the Bremerton Housing Authority for many years.

20. CHABUK showed no documented payments of rent from MILLER and acknowledged multiple years had gone by without any payments being received.

21. In February, 2018, BHA reduced its share of the rent payment to $519, but continued making the reduced payments.

22. CHABUK accepted this reduced payment from BHA.

23. CHABUK presented no evidence of contacting Miller to modify the agreement or demand rent payment before February 2018; Chabuk then served the 3-day notice to pay rent or vacate which was dated March 6, 2018.

II. CONCLUSIONS OF LAW

1. As an individual allowed to reside in premises owned by another under the terms of an agreement, MILLER was a tenant of CHABUK.

2. Given that CHABUK had represented MILLER, had a close personal relationship with her, and admitted knowledge of her romantic interest in him, he had a duty to clarify when the attorney-client relationship ended. Since he did not do so, the attorney-client

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relationship remained in effect at the time of signing the lease.

3. As her attorney, CHABUK failed to fulfill his ethical obligation to ensure MILLER gave informed consent to a transaction with himself.
4. As a landlord, CHABUK failed to follow the requirements of the RLTA.
5. Because he is the drafter of the agreement and had an attorney-client relationship with MILLER, all terms of the agreement must be construed against CHABUK.
6. The language of the agreement provides for a six-month term, followed by a single month renewal on the same terms, and then an indefinite month-to-month renewal without any terms and conditions unless "either party notifies the other, in writing, of his/her intentions to vacate." Since the six month period ended in October 31, 2010, the lease now provides for indefinite renewal without any requirement of payment from Miller. Since only a tenant may "vacate," only Miller may terminate the agreement.
7. The language of the lease gives a clear and unequivocal grant of a lease with perpetual renewal, which under the case of *Tischner v. Rutledge*, 35 Wn. 285 (1904) may be sufficient for a grant of fee simple. This is consistent with the testimony as to the intent of the parties to provide a permanent home for MILLER.
8. Even if the agreement signed by the parties had required payment of rent by MILLER, by taking no action after several years without payment, CHABUK waived the payment of rent and agreed to a modification of the contract by his extended inaction so that no rent was due from MILLER.
9. Because MILLER has not violated any covenant she made under the lease, she is not guilty of an unlawful detainer.

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10. Although BHA modified the amount it was paying, since CHABUK accepted this modification without protest, no violation of the lease occurred.

11. CHABUK may not obtain an eviction or other remedies against MILLER unless he can establish:

    a. That MILLER has failed to comply with her duties under the lease.

    b. That CHABUK has complied with the requirements of Section 8 for removing a compliant tenant.

    c. That MILLER did not receive a fee simple in the Property by the terms of the lease.

12. As the prevailing party, MILLER is entitled to reasonable attorney fees under RCW 59.18.

Wherefore, it is hereby

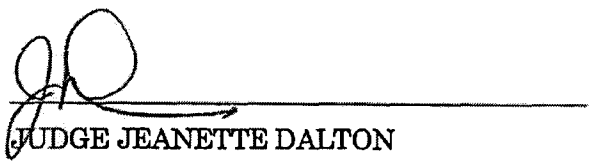
ORDERED, ADJUDGED AND DECREED

1. No writ of restitution shall be issued.

2. MILLER shall retain possession of the Property until she provides notice of intent to vacate.

3. CHABUK shall pay attorney's fees in the amount of $10,851.00 costs of $52.47.

DONE IN OPEN COURT this 17 day of Sept., 2018.



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☐ STATE Exhibit No. 12

☐ PLAINTIFF ☐ DEFENDANT

☐ PETITIONER ■ RESPONDENT

☐ OTHER _____

Case No. 18-2-01102-18

AHMET CHABUK vs. FRANCES MILLER (ET AL)

[X] Admitted [ ] Refused
[ ] Withdrawn [ ] Not Offered

Date of Court's Ruling: JUL 09 2018

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IN THE SUPERIOR COURT OF WASHINGTON
FOR KITSAP COUNTY

Ahmet Chabuk, Plaintiff, vs. Frances Miller and all other occupants, Defendants.	NO: 18-2-01102-18 PLAINTIFF'S RESPONSE TO INTERROGATORIES AND FOR PRODUCTION

INTERROGATORY NO. 1: Describe when and how you became acquainted with Frances Miller:

ANSWER: Sometime in late 2002, Frances Miller contacted me for help to represent her in a legal matter – upon a recommendation by a friend .

INTERROGATORY NO. 2: Describe the nature of your relationship with Frances Miller beginning in 2002 and through the present.

ANSWER: The nature of my relationship with Frances Miller is a classic example of the saying "No good deed goes unpunished." And I had not seen her or talked with her for about three years – until I saw her in the courthouse during the initial hearing in this case.

Frances Miller was employed at Verizon Wireless when I began to represent her, in several unrelated legal matters, which took several years to completion.

Ms. Miller told me she had been having serious mental illness problems, including bipolar disorder, all her adult life. For those and related reasons, she was later terminated by Verizon Wireless – approximately a year after I met her.

Frances Miller made unemployment income and a disability income claim to Verizon Wireless ERISA disability insurance plan (regulated by Federal laws). The "plan" denied her claim. I tried to help her to appeal the denial to the higher level of review. However, ERISA disability plan regulations were very complex. I contacted a number of attorneys who were known to have experience in that area of the law. None would take Ms Miller's case on pro bono or on contingency basis. I tried to find one who could be a mentor to me in that area of the law while I would give a try myself

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but I could not find a "mentor." Therefore, I ordered a number of law books and publications on ERISA law. I was informed by some "informal" mentors that ERISA laws were very complex and difficult to win but not hopeless. I was told by a few informal "mentors" that I had done a good job in my briefs in the federal court as well as in the Ninth Circuit Court of Appeals. We had the oral arguments before a panel of judges of the Ninth Circuit Court of Appeals but unfortunately we lost.

This ERISA case, in the federal courts, took a number of years. And during the trial process, over her mental disability claim, I had access to most (if not all) of medical records of Frances Miller. I learned that she had considered committing suicide a number of times. She had also told me the same in several occasions. I developed sympathy her situation and tried to be helpful in any way I could.

Earlier, when I met her, she was renting a two story single family house in Silverdale Washington with her pre-teen age son. After some months or perhaps a year later, her aging mother moved from Florida to her same rented house, in Silverdale, to live with Ms Miller. A year or two later, Ms Miller's adult daughter also moved, from the East Coast, into her same rented house to live with the Ms Miller. Her adult daughter was also employed, as an assistant manager, at Verizon Wireless and also had an impressive income and an expensive foreign car. The house had a beautiful water view of the Dyes Inlet in Silverdale and a two-car garage.

At that time, I was impressed with the amount of money Ms Miller was making at Verizon. In addition, Ms Miller had just purchased a brand new and fairly expensive foreign car.

Some months later, Ms Miller, together with her minor son, her aging mother and her adult daughter, moved into another rental house – into one unit of a duplex in Chico area of Bremerton. Unfortunately for them, this duplex house was not getting any direct sunlight and Ms Miller informed me that this second house was depressing for her. The main windows were facing the North, with no direct sunlight for the living room and was not good for them.

After about a year, they all began to look for a better house to rent. A friend informed us that there was a nice house in their gated community in Bremerton. After the whole family saw this "the third house," they all agreed that it was a very nice house. But I told them that it was more expensive. Ms Miller's mother reminded me that she would also be paying a part of the rent.

I owned several rental houses. And I made an offer to buy this "third house" and the seller accepted my offer. Early in January 2008, they all moved into my new rental house and began to pay rent, which was below market value but covered most of my mortgage payments and the expenses.

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Some months later, the adult daughter was promoted by Verizon Wireless from her assistant manager position in Kitsap County to a branch manager position in Stanwood area, North of Seattle. Therefore, the daughter had to move to Stanwood area. Ms Miller, her son and ageing mother remained in my rental house and kept paying the rent. Sometime later during those days, Ms Miller informed me she had lost her job at Verizon Wireless because of her performance problems related to her severe mental illness but that she would be still getting disability and retirement income and that she would be also eligible to get some rent assistance from the Bremerton Housing Authority. Ms Miller's mother and son were also contributing to their rent payment.

After about two more years, I was informed that a new written rental agreement was required by the Bremerton Housing Authority for the rental assistance. Early in 2010, we signed the rental agreement and, I was informed that the Housing Authority had allowed the mother and Ms Miller's minor son to remain living there because, apparently, the mother's assistance was needed by Ms Miller with her disability.

For some time, Ms Miller (with help from her mother and son) kept paying the rent. However, sometime later, Ms Miller's mother moved back to Florida. And Ms Miller's son reached the age of adulthood – with unpredictable plans as to where he would end up living – while, for some time, still contributing to their rent payments.

During a period of time, Ms Miller rented out one of the three bedrooms in my rental house to another woman. The Bremerton Housing Authority has been paying their share of the rent but Ms Miller was falling behind again and again in paying her share. When I asked her for her rent, she would ask me why I would need the money.

Several times I served Ms Miller with my 3-day notice to pay rent or vacate but she ignored all of my notices and demands. I complained informally a number of times to the Bremerton Housing Authority but the only assistance I received from them was that I should evict her, in which case, I was informed, she would lose her eligibility for rent assistance.

Ms Miller's adult daughter (a branch manager at Verizon Wireless) purchased a waterfront home in Stanwood area, North of Seattle. Ms Miller spends a great deal of time visiting them (and her grand children) there while my 3-bedroom rental house, in a gated community, remains mostly unused and while I have been getting only a fraction of the fair market value of rent from the Housing Authority and nothing from Ms Miller. Meanwhile, the Bremerton Housing Authority kept reducing their share of the rent payments.

I have been hoping that soon Ms Miller would move with her daughter and her

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grand children without myself having to take a legal action for her eviction.

Every year, the Bremerton Housing Authority reviews Ms Miller's declarations of income and her need for assistance. I was informed that every year Ms Miller had claimed she had been paying her share of the rent to the landlord while, in fact, she was not. Now that the Bremerton Housing Authority has notice of this unlawful detainer action, I was informed that their rent assistance to Ms Miller will be terminated.

More I was lenient with her, more negligent she became to pay the rent. I knew that Ms Miller is having serious mental illness with bipolar disability and she can be suicidal. So, I found myself between "a rock and a hard place." Shall I evict her and let her get into serious panic or depression or should I be more patient. The Housing Authority could not help me to make a decision.

A few years ago, the radiator of Ms Miller's car needed to be replaced. She said she could not pay for it at that time but she would pay me back if I could get it repaired for her. After I paid for the repair, about $900, she would not pay anything. And therefore, she ended up signing the title to me.

Most of the years since I have known Ms Miller, I have been living alone, with my two dogs and two cats. Meanwhile, after he adult daughter, her mother, and her son moved out, some years ago, she lives by herself, in this 3 bedroom fairly large house, in a gated community. I have been having my concerns for her mental illness and the waste she has been causing while I have been paying the mortgage and the property taxes, the association dues, the county sewer bills, etc etc., while she pay nothing now.

Initially, the Housing Authority was paying a large portion of the rent payment. But they kept reducing it for some time and, lately they reduced it to only $519 a month, for this fairly large house in a gated community (copy of the notice attached).

For the past three years, I have not seen Ms Miller, I have not talked with Ms Miller. I sent her a number of notices to pay but she ignored them all. During the past few years, at my ago of 75, I realized that Ms Miller thinks of me as a man with a soft heart, who does not need the rent money. And, as a result, I have not talked with her nor seen her during the past three years or so - perhaps even more.

INTERROGATORY NO. 3: Describe when you acquired the property herein, i.e. 3850 Ambleside Ln., Bremerton, WA 98311.

ANSWER: I purchased the property during the last week of 2007.

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OF COUNSEL INC PS

April 17, 2019 - 3:33 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
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Appellate Court Case Title:	Ahmet Chabuk, Appellant v. Frances Miller et al., Respondent
Superior Court Case Number:	18-2-01102-9

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