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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 290247-III
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

LAMAR OUTDOOR ADVERTISING,

Appellant,

v.

JOSEPH & KRISTI HARWOOD, BELL FRANKLIN, LLC, a
Washington limited liability company, BEL CONDOMINIUM OWNERS
ASSOCIATION, a Washington corporation, BEL FRANKLIN
APARTMENTS, LLC, a Washington limited liability company, and
SPOKANE HOUSING VENTURES, INC., a Washington corporation,

Respondents.

APPELLANT LAMAR OUTDOOR ADVERTISING'S
REPLY MEMORANDUM

Patrick M. Risken #14632
Sean P. Boutz, #34164
Evans, Craven & Lackie, P.S.
818 West Riverside, Suite 250
Lincoln Building
Spokane, WA 99201
(509) 455-5200
Attorneys for Appellants

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I. INTRODUCTION

The respective respondents in this appeal have each responded to specific issues presented by Lamar's Opening Brief rather than each respondent responding individually to all of the issues presented. As such, Lamar has combined its response to Respondents Joseph and Kristi Harwood ("Harwood") and Bell Franklin, LLC particular response as well as those set forth separately by Respondents Spokane Housing Ventures, Inc. ("Spokane Housing"), Bel Franklin Apartments, LLC ("Franklin"), and Bel Condominium Owners Association ("Association") (hereinafter collectively "Respondents") into one Reply Memorandum.

II. REPLY ARGUMENT

Lamar has contended from the inception of the parties' litigation that Respondents did not have the unilateral right to terminate the Ground Lease ("Lease"), especially when Lamar provided Respondents with written notice on October 1, 2008 that the written notice of termination was ineffective by the Lease's own terms. Specifically, Harwood, as the original lessor under the Lease, still maintained an ownership interest in the subject property ("Property"). Because Harwood still had an ownership interest, the special condition Lease term that permitted termination could not be invoked. Respondents disregard Lamar's written notice and the

specific Lease terms, and thereafter willfully removed Lamar's Billboard without legal justification.

The trial court concurred with Respondents' claims that the Lease was terminated by simply providing 90 days written notice, but the trial court failed to interpret the Lease as a whole and all of its particular terms, including the condition precedent to termination that Harwood had to sell the Property. It is undisputed that Harwood still maintained an ownership interest at the time the Billboard was destroyed.

Additionally, the civil rules are meant to provide uniformity for all litigants, but to take Harwood and Bell Franklin, LLC's strained interpretation of CR 55 would alter the intent, purpose, and rationale for providing notice to a party that has not appeared, plead, or otherwise defended a summons and complaint that had been personally served. In fact, Harwood and Bell Franklin, LLC's interpretation would render CR 55(a)(3) useless as written, because a non-appearing party would always be entitled to some kind of notice preventing a default from being entered. Therefore, it is appropriate to reverse the trial court for its improper rulings.

A. Vacating Lamar's Default Judgment Was An Abuse Of Discretion

Harwood and Bell Franklin, LLC contend the trial court's ruling to vacate Lamar's default judgment must be affirmed on various grounds, including a procedural defect, inadvertence and excusable neglect, and meritorious defenses. However, contrary to Harwood and Bell Franklin, LLC, and the trial court's erroneous decision, Lamar's order of default and default judgment were obtained pursuant to the civil rules and pertinent case law. Only under a very contrived and artificial interpretation of CR 55 could Harwood and Bell Franklin, LLC's defenses succeed. Yet, by agreeing with their interpretation the trial court was complicit in Harwood and Bell Franklin, LLC's complete failure to appear in the case or defend against Lamar's Complaint.

The foundation for obtaining an order of default and subsequent default judgment is premised on CR 55(a)(1). If the requirements contained in CR 55(a)(1) are not satisfied it is irrelevant whether the notice provisions set forth in CR 55(a)(3), which are a part of this appeal, are applicable. As such, before rendering a decision on the notice issues presented it is incumbent for this Court to examine the basis for an order of default.

CR 55(a)(1) states, "*When a party against whom a judgment for affirmative relief is sought has failed to appear, plead, or otherwise defend as provided by these rules and that fact is made to appear by motion and affidavit, a motion for default may be made.*" Thus, under CR 55(a)(1), there are two prerequisites to moving for entry of default: (a) the moving party is seeking judgment against a party; and (b) that party has failed to appear, plead, or otherwise defend. If these two elements are not present, then a moving party may not seek an entry of default.

In this case, both elements were present as 1) Lamar moved for an entry of default on November 19, 2008, which was more than twenty days after Harwood and Bell Franklin, LLC had been personally served, and 2) Harwood and Bell Franklin failed to appear, plead, or otherwise defend until December 3, 2008 when their counsel finally made the decision to file a notice of appearance. CP 48. As a non-appearing or non-responding party, Harwood and Bell Franklin were not entitled to notice of the default motion under CR 55(a)(3).

Harwood and Bell Franklin, LLC's strained interpretation to the trial court was that any party who has appeared in the action is entitled to notice of a motion for default **against any other party**. Thus, because the other Respondents had previously appeared they were entitled to notice of the motion for default, which would have apparently caused them to

contact Harwood and Bell Franklin, LLC to inform them of the default motion. CP 62-63.

Harwood and Bell Franklin, LLC's premise is false. A condition precedent to bringing a motion for default is that the moving party is seeking a judgment against a party. CR 55(a)(1). Where no judgment against a party is sought, a motion for default against that party would be pointless and irrelevant. If no judgment is sought against a party, notice of the meaningless motion for default would also be pointless.

CR 55(a)(3) correctly requires notice of a default motion to those parties who have appeared and a default judgment is potentially forthcoming. This prevents the deprivation of property without due process. The provision for formal notice is triggered only when one party seeks a *judgment* against a party who has appeared, thereby substantially affecting that party's rights. By not appearing or defending against a claim, one waives the right to notice of a motion for default – presumably because they either acquiesce to the entry of judgment or they simply don't care. It is absurd to interpret CR 55 to require notice to an appearing party when one is seeking a judgment only against a non-appearing party. Such a strained interpretation is proffered by Harwood and Bell Franklin, LLC merely because it is the only interpretation which supports their position.

Harwood and Bell Franklin, LLC's flawed reasoning cannot be accepted requiring reversal of the trial court's decision.

1. Harwood and Bell Franklin, LLC's Defenses Were Against The Evidence

In their response materials, Harwood and Bell Franklin, LLC claim certain meritorious defenses based upon their prior arguments to the trial court. As such, Lamar incorporates herein its previous arguments on these issues as set forth in its Opening Brief, and as discussed herein in response to Respondents Spokane Housing Ventures, Inc., Bel Franklin Apartments, LLC and Bel Condominium Owners Association response materials.

2. Lamar's Default Judgment Was Properly Obtained Pursuant To The Civil Rules

Harwood and Bell Franklin, LLC have cited absolutely no legal authority for the proposition that an appearing party that is not having a default sought against it is entitled to notice such that it would satisfy the appearance requirements for a non-appearing party prior to entry of a default. To the contrary, a party “must go beyond merely acknowledging that a *dispute* exists and instead acknowledge that a dispute *exists in court*.” *Morin v. Burris*, 160 Wn.2d 745, 756, 161 P.3d 956 (2007). CR 55(a)(3) does not provide the basis to eviscerate properly served defendants legal obligations to appear in an action. Thus, Harwood and

Bell Franklin, LLC's failure to take any action to formally appear or put Lamar on notice, either formally or informally, warrants reversal of the trial court's decision to vacate Lamar's default judgment.

Harwood and Bell Franklin, LLC also rely upon *Skilcraft Fiberglass, Inc. v. Boeing Co.*, 72 Wn. App. 40, 863 P.2d 573 (1993) to support their claims that Lamar obtained its default judgment through procedural irregularity. *Harwood Response Memo.*, p. 8. Notwithstanding the fact that the trial court's Orders made no such findings, *Skilcraft Fiberglass* was abrogated in 2007 by *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956. See, CP 111-12; 462-65; 479-81; 560-61. The *Morin* Court specifically rejected any "informal appearance doctrine", which Harwood and Bell Franklin, LLC successfully achieved at the trial court by relying upon the premise that the appearing respondents were entitled to notice of default even though Lamar's motion did not attempt to seek a default against them. *Morin*, 160 Wn.2d at 757-58; CP 33-35.

The rule of law, as set forth by the Washington Supreme Court in *Morin*, "require[s] defendants seeking to set aside a default judgment to be prepared to establish that **they actually appeared or substantially complied with the appearance requirements and were thus entitled to notice.**" *Morin*, 160 Wn. at 755 (emphasis added). It is undisputed that Harwood and Bell Franklin, LLC neither appeared nor substantially

complied with the appearance requirements before Lamar obtained its default judgment.

Moreover, there were a number of distinguishing facts in *Skilcraft Fiberglass* from those presented in this case. *Skilcraft Fiberglass* involved a contractor/subcontractor lien case wherein the contractor had a contract with Boeing, which was the property owner. *Skilcraft Fiberglass*, 72 Wn. App. at 42. The contractor terminated the subcontractor causing the subcontractor to file a materialmen's lien, and eventually a lawsuit, against the contractor and Boeing. *Id.* The contractor, who was working on behalf of Boeing, filed a notice of appearance, but Boeing did not. *Id.* at 42-43. The subcontractor subsequently obtained a default judgment against Boeing. *Id.* at 43.

Prior to obtaining a default judgment against Boeing, counsel for the contractor had multiple and direct communications with the subcontractor's attorney about releasing the lien and related settlement negotiations. *Id.* at 42-43. The subcontractor's attorney was also fully aware that the contractor was attempting to comply with the lien statutes on behalf of Boeing as well as Boeing's involvement in the lawsuit through the contractor's counsel. *Id.* Moreover, the decision of the *Skilcraft* Court was based upon CR 5(a) violations by the subcontractor's

attorney for including new or additional claims in the default judgment that were not previously a part of the complaint. *Id.* at 43-44; 46-47.

Unlike the actions of the subcontractor, and its counsel, in *Skilcraft Fiberglass*, Spokane Housing Ventures, Inc., Bel Franklin, Apartments, LLC, and Bel Condominium Owners Association never, through counsel or otherwise, acted on behalf of Harwood or Bell Franklin, LLC. They never communicated with Lamar, in any capacity, that they were representing or working with Harwood or Bell Franklin, LLC prior to Lamar obtaining its default judgment. Furthermore, their notice of appearance made no reference to representing Harwood or Bell Franklin, LLC nor was there ever any communication with Lamar from Harwood and Bell Franklin's previous attorney, Mr. Corey Brock. The first communication of any kind that Lamar received from or involving Harwood and Bell Franklin, LLC was not until December 5, 2008 when a notice of appearance was filed and served by Mr. William Spurr. CP 48-49. Therefore, *Skilcraft Fiberglass* is not on point, and is more inclined to provide a completely different circumstance than that presented by the actions, or lack thereof, by Harwood and Bell Franklin, LLC.

Lamar's default judgment was not procedurally irregular given that 1) it personally served Harwood and Bell Franklin, LLC, 2) it waited the requisite time period under the civil rules for filing a motion for default,

and which time period was clearly contained in the summons served upon Harwood and Bell Franklin, LLC, and 3) no appearance, pleading, or otherwise attempt to defend the case was made by Harwood and Bell Franklin, LLC before the default judgment was entered. As such, the trial court's vacation order must be reversed.

3. Harwood And Bell Franklin, LLC Cannot Demonstrate Excusable Neglect And Inadvertence

The essence of Harwood and Bell Franklin, LLC's excusable neglect and inadvertence defense is the proverbial "I forgot to tell my attorney" because it was "assumed that the case was being defended." *Harwood Response Memo.*, p. 10. Yet, such claims are not supported by the record, or the law. First, Harwood and Bell Franklin, LLC were served with the Summons and Complaint on October 28, 2008, but didn't retain the services of their attorney until October 31, 2008. CP 23-26; 65-66. Thus, claims that they forgot to notify their counsel seems inaccurate when they subsequently retained an attorney three (3) days after being served.

Second, Joseph Harwood filed a declaration in support of the motion to vacate wherein he claimed that he had been served "[a]pproximately a week or so later" after retaining counsel on October 31, 2008. CP 65-66. Such a statement is in direct conflict with the return of

service the process server filed with the trial court well before the statements made in Mr. Harwood's declaration and appears to have been nothing more than an attempt to justify intentional neglect. See, CP 23-26.

Third, and likely the most important point, Harwood and Bell Franklin, LLC have not cited any legal authority for the proposition that a "forgot" defense is excusable neglect or inadvertence. In fact, such a defense is viewed by the courts in Washington as inexcusable neglect. See, *Johnson v. Cash Store*, 116 Wn. App. 833, 848-49, 68 P.3d 1099 (2003)(employee forgot to provide company's attorney with complaint after being served and was deemed inexcusable neglect); *Beckham v. Dep't of Soc. & Health Servs.*, 102 Wn. App. 687, 11 P.3d 313 (2000)(same); *Prest v. Am. Bankers Life Assurance Co.*, 79 Wn. App. 93, 900 P.2d 595 (1995)(summons and complaint were "mislaidd" while counsel was out of town deemed inexcusable neglect); *TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 165 P.3d 1271 (2007)(it was inexcusable neglect when a legal assistant failed to inform other employees of the served summons and complaint for forwarding to counsel for response before leaving on an extended vacation).

The fact that the trial court agreed with Harwood and Bell Franklin, LLC under these circumstances was an abuse of discretion. A

“court will not relieve a defendant from a judgment taken against him due to his willful disregard of process, or due to his inattention or neglect in a case....” *Commercial Courier Serv., Inc. v. Miller*, 13 Wn. App. 98, 106, 533 P.2d 852 (1975). The trial court should not have vacated the default judgment when Harwood and Bell Franklin, LLC intentionally disregarded proper service and just simply "forgot" to tell their attorney that they had been served. As such, because Lamar’s default judgment was properly obtained and Harwood and Bell Franklin, LLC's conduct was not excusable neglect or inadvertence, the trial court's ruling was an abuse of discretion.

4. Due Diligence Is Not At Issue In This Appeal

Lamar has conceded in its Opening Brief that Harwood and Bell Franklin, LLC moved diligently to vacate Lamar's default judgment upon learning of its entry. However, Harwood and Bell Franklin, LLC's continued implication that Lamar intentionally avoided communicating that it had obtained a default judgment is nothing more than a red herring.

First, the trial court never made a finding that such conduct occurred. CP 111-112; 462-65; 479-81; 560-61. Second, Harwood and Bell Franklin cannot cite, nor have they, to anything within the record to support such allegations. Third, Lamar never executed on the judgment that would have demonstrated it was even attempting to conceal the

judgment. Fourth, the trial court reviewed materials presented by Lamar's counsel concerning the alleged claims and didn't find it necessary to address the issue. *Id.*; see also, CP 86-99. Finally, because "delay" is not even at issue in this appeal it is unnecessary for any further review or consideration by this Court.

5. Lamar Has Endured Hardship

Lamar incorporates herein its previous arguments on this issue as set forth in its Opening Brief under § V.(B)(1)(d).

B. Lamar's Appeal Is Not Frivolous And Harwood and Bell Franklin, LLC Are Not Entitled To Attorney Fees And Costs

Harwood and Bell Franklin, LLC contend their attorney fees and costs should be awarded on the grounds that Lamar's appeal is frivolous. *Harwood Response Memo.*, pp. 11-12. Given the record in this case and the legal arguments presented on appeal, Lamar's appeal does not rise to the level of frivolous. Accordingly, Harwood and Bell Franklin, LLC must not be awarded their attorney fees and costs on appeal.

Initially, Harwood and Bell Franklin, LLC contend that the trial court should have awarded their attorney fees and costs under CR 11. *Harwood Response Memo.*, p.12. Because Harwood and Bell Franklin, LLC did not appeal the trial court's decision it is a verity on appeal and not

at issue. See, *Halvorsen v. Ferguson*, 46 Wn. App., 708, 722, 735 P.2d 675 (1986) (unchallenged findings are verities on appeal).

Additionally, Harwood and Bell Franklin, LLC, again, rely upon *Skilcraft Fiberglass* to support their claim for attorney fees, but as discussed, *supra*, in § II.(A)(2), *Skilcraft Fiberglass* was abrogated and is factually distinguishable from the this appeal. Therefore, an award of attorney fees and costs is not warranted.

Finally, Harwood and Bell Franklin, LLC's seek attorney fees and costs pursuant to RAP 18.9 due to a potentially frivolous appeal, but they fail to set forth any legal citation that would justify the imposition of such terms. *Harwood Response Memo.*, p. 12. Whether the imposition of sanctions under RAP 18.9 is permitted is decided after considering the following factors:

- (1) A civil appellant has a right to appeal under RAP 2.2;
- (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant;
- (3) the record should be considered as a whole;
- (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous;
- (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Clapp v. Olympic View Publishing Co., LLC, 137 Wn. App. 470, 480, 154 P.3d 230 (2007).

In this appeal and the record presented, it cannot be said that Lamar's appeal is frivolous. First, Lamar had the right to appeal the final judgment and order vacating its default judgment under RAP 2.2. Second, any doubt as to whether Lamar's appeal was frivolous must be found in Lamar's favor and given that it had the right to appeal, which included valid arguments for such an appeal, an award of attorney fees and costs would be improper. Third, the entire record evidences reasonable and justified grounds for Lamar's appeal. Fourth, an affirmation of the trial court's decisions is not sufficient to award attorney fees and costs under RAP 18.9, even though Harwood and Bell Franklin, LLC claim otherwise. Fifth, Lamar's appeal is not so devoid of merit that reversal is not a reasonable possibility. In fact, the trial court should be reversed. Therefore, Harwood and Bell Franklin, LLC's claims for attorney fees and costs on appeal must be denied.

C. The Trial Court's Rulings Should Be Reversed

Harwood and Bell Franklin, LLC make several arguments in support of affirming the trial court's rulings, but contrary to such arguments Lamar 1) did not raise the self-help remedies utilized by Respondents in removing Lamar's billboard for the first time at oral argument, 2) it has always contended from the commencement of the litigation that the Lease was not properly terminated, and 3) RCW

62A.2A-525, and the other related provisions under the UCC, have no applicability to this case.

Regardless of whether the Lease had been terminated Respondents did not have the right under the applicable law to willfully and without Lamar's authorization remove the Billboard from the Property. Even if it were assumed that Lamar was a holdover tenant after the Lease had been terminated, Respondents could not unilaterally decide to remove Lamar's Billboard because state law required Respondents to pursue an unlawful detainer action, or some other legal avenue. Self-help remedies are simply not permitted in removing tenants or their personal property.

Therefore, the fact that Respondents failed to observe and follow the legal authority for tenant evictions in the state of Washington and chose instead to willfully remove Lamar's Billboard from the Property demonstrates that their conduct amounted to conversion of Lamar's property.

1. Lamar Has Repeatedly Claimed That Respondents Should Have Obtained Court Approval To Remove Lamar's Billboard

Harwood and Bell Franklin, LLC claim that Lamar raised the issue of self-help eviction for the first time at oral argument. *Harwood Response Memo.*, p. 13. This claim is not supported by the record. As such, Lamar

incorporates its arguments as set forth in its Opening Brief, § V. (C) & (D), and the record herein.

Additionally, Lamar argued during both summary judgment hearings that Respondents were required to seek court assistance, which included the unlawful detainer statutes for evicting an alleged holdover tenant. See, RP 7-8 (10/14/09); 3-5; 14-15 (3/10/10). In moving for partial summary judgment and arguing conversion, Lamar always alleged Respondents did not have the right to take the law into their own hands and disregard state law by removing Lamar's Billboard. If Respondents had an issue with Lamar's tenancy or an interpretation of the Lease terms, it was incumbent upon them to seek a determination from the courts. Appropriate legal measures include an unlawful detainer action, but it was certainly not an exclusive alternative.

The simple fact is that Lamar and Respondents maintained a landlord/tenant relationship and if Respondents wanted to evict Lamar from the Property, even assuming Respondents had terminated the Lease, they were required to obtain a court order evicting Lamar from the Property as a holdover tenant because Washington does not permit self-help evictions. They could have even chosen to pursue summary judgment after filing a lawsuit. The law is clear and should not have been disregarded, as was contended by Respondents at the trial court, because

the issue may not have been fully briefed. A dispute over tenancy and possession of real property is squarely within the gambit of the unlawful detainer statutes, which Respondents failed to follow.

Lamar's partial summary judgment motion involved the issue of conversion and it continually argued Respondents were required to obtain court assistance to remove Lamar and its Billboard. Respondents unauthorized and willful removal of the Billboard, and therefore, subsequent violation of the unlawful detainer statutes was merely evidence that Respondents actions amounted to conversion of Lamar's property.

2. Self-help Evictions Are Not Allowed In Washington

Lamar has claimed from the inception of this case and on appeal that the Lease was not properly terminated. CP 152-99; 220-30; 399-413; 415-17; 454-60; 488-96; 543-58. However, assuming *arguendo* that Respondents had terminated the Lease, Washington law did not allow Respondents to evict Lamar and destroy its property.

Harwood and Bell Franklin, LLC allege that *Olin v. Goehler*, 39 Wn. App. 688, 694 P.2d 1129 (1985), which Lamar cited in its briefing to the trial court in conjunction with *Gray v. Pierce Housing Authority*, 123 Wn. App. 744, 757, 97 P.3d 26 (2004), is "readily distinguishable and inapplicable to the facts of this case." *Harwood Response Memo.*, p. 13; CP 491.

Yet, Harwood and Bell Franklin, LLC never address the rule of law that self-help evictions are not permitted, which was similarly done at the trial court level. CP 532-35. Lamar cited *Gray* for the following proposition: "[N]o landlord, including one not governed by the RLTA [Residential Landlord Tenant Act], may ever use non-judicial, self-help methods to remove a tenant." *Gray*, 123 Wn. App. at 757. Lamar made no further citations from *Gray* or *Olin*. CP 491-96. This rule of law does not change from case to case simply because the facts are unrelated. To the contrary, the rule of law remains the same whether the facts in *Gray* or *Olin* were similar or dissimilar from those in this case.

Furthermore, Lamar never asserted that the cases were factually similar. But both Lamar and the tenants in *Gray* and *Olin* executed an actual real estate lease of premises that involved physical occupation by the respective tenants. Harwood and Bell Franklin, LLC distinguish this case based upon the theory that *Gray* and/or *Olin* involved "human" occupation whereas Lamar maintained a Billboard on the Property. *Harwood Response Memo.*, p. 14. However, "physical occupation by humans" has never been a prerequisite for permitting the destruction of a tenant's personal property in a landlord/tenant relationship. See, RCW 59.18 & RCW 59.12.

The Lease in this case was a ground lease agreement for the physical possession and exclusive use of real property wherein Lamar was the tenant and Respondents were the landlord. CP 206. Whether Lamar put a billboard on the Property, or any other personal property for that matter (*i.e.* tools, equipment, ladders, etc.), Respondents did not have the right to impose non-judicial, self-help methods to remove such property. The fact that the tenant was a commercial business entity does not change the rule of law.

Harwood and Bell Franklin, LLC also attempt to distinguish the parties' landlord/tenant relationship by alleging that the "lease is really more of a license agreement, or a lease involving personal property." *Response Memo.*, p. 14. Such claims are not supported by the relevant case law in Washington.

First, in distinguishing a written instrument as either a lease or license, "the court must consider it in its entirety, together with the circumstances under which it was made and determined and the intention of the parties." *Port Susan Chapel of the Woods v. Port Susan Camping Club*, 50 Wn. App. 176, 183, 746 P.2d 816 (1987) (quoting *Conaway v. Time Oil Co.*, 34 Wn.2d 884, 893, 210 P.2d 1012 (1949)).

A lease carries a present interest and estate in the property involved for the period specified therein, and requires a writing to comply with the statute of frauds. It gives

exclusive possession of the property, which may be asserted against everyone, including the lessor. A license authorizes the doing of some act or series of acts on the land of another without passing an estate in the land and justifies the doing of an act or acts which would otherwise be a trespass.

Id., at 183-84.

"If exclusive possession or control of the premises, or a portion thereof, is granted, even though use is restricted by reservations, the instrument will be considered to be a lease and not a license." *McKennon v. Anderson*, 49 Wn.2d 55, 59, 298 P.2d 492 (1956) (citing *Barnett v. Lincoln*, 162 Wn. 613, 617-18, 299 P. 392 (1931)). "A lease is a contract for the exclusive possession of lands or tenements for some certain number of years or other determinate period, and a contract for such exclusive possession is a lease although ... it may be described as a license." *Barnett*, 162 Wn. at 618 (quoting *Woodfall's Law of Landlord and Tenant*, p. 153).

Here, when considering the circumstances in which the Lease was made and determined as well as the intention of the parties at the time of its execution, it is clear that the parties' written agreement was a lease and not a license. The Lease provides that it is a **ground lease** agreement granting Lamar exclusive possession of the property for a designated period of ten (10) years with subsequent successive terms. CP 206. In

addition, the parties never contemplated that Lamar's exclusive possession and occupation of the Property was governed by anything other than a lease. *Id.*

Moreover, Harwood and Bell Franklin, LLC have never claimed, until responding to Lamar's Motion for Reconsideration, that the Lease was a license agreement. CP 532-35. Lamar had a present interest and estate in the Property, including exclusive possession for a specific period of time. Therefore, Harwood and Bell Franklin, LLC's claim that the Lease is a license agreement is inaccurate.

Secondly, the Lease was not a "lease of personal property". Again, the Lease was a ground lease in which Lamar was granted exclusive possession of real property. Lamar was leasing real property from Harwood and not personal property. It is completely contradictory to the terms and conditions of the Lease to claim otherwise. CP 206. The intent of the parties never involved the leasing of personal property and was always a lease wherein Lamar was granted exclusive possession of real property. Thus, any arguments by Harwood and Bell Franklin, LLC that self-help evictions are not applicable to a license agreement or lease of personal property are irrelevant because the Lease herein was a lease of real property.

3. The UCC Does Not Apply

Harwood and Bell Franklin, LLC make further claims that personal property may be disposed of in a commercial setting through self-help remedies and cites Washington's UCC in support of this position. *Harwood Response Memo.*, pp. 14-15. Specifically, Harwood and Bell Franklin, LLC allege that RCW 62A.2A-525 allows for a lessor to dispose of personal property "without judicial process if it can be done without breach of the peace or the lessor may proceed by action." RCW 62A.2A-525(3). In short, such claims are not supportable because the UCC does not apply in this case.

RCW 62A-2A, *et. al*, involves the lease of goods or fixtures¹. Lamar's Lease was a ground lease for exclusive possession of real

¹ Lamar's billboard is not a fixture. Washington has established a three-part test for determining whether an article attached to realty is considered a fixture. *Lake Sewer Dist. No. 1 v. Liberty Lake Utilities Co., Inc.*, 37 Wn. App. 809, 683 P.2d 1117 (1984). The elements for a fixture are "(1) actual annexation to the realty, or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold." *Id.*, at 813. "Of these, the intention of the annexor is the most important." *Id.* "Each element of this three-pronged test must be met before an article may properly be considered a fixture." *Glen Park Assoc., LLC v. State*

property, which should end the discussion. However, Lamar's Billboard is neither a good nor fixture subject to RCW 62A.2A. Moreover, even assuming RCW 62A.2A-525 was applicable, which it is not, Respondents could only take possession of the goods if a default occurred pursuant to RCW 62A.2A-523(1) or (3)(a). RCW 62A.2A-525(2). For RCW 62A.2A-523(1) to apply, Lamar would have had to wrongfully reject or revoke acceptance of goods or fail to make a payment when due before Respondents could take any action. Lamar never rejected or revoked any acceptance of goods nor were they in default in the payment of rent. Thus, RCW 62A.2A-523(1) is inapplicable.

Notwithstanding the fact that Lamar was not in default, even if it was, Respondents did not have the right to remove and destroy Lamar's Billboard. RCW 62A.2A-525(3) permits a party to pursue possession of the goods without judicial process, but it may not remove them. See,

Dep't of Revenue, 119 Wn. App. 481, 481, 82 P.3d 664 (2003). "Evidence of intent is gathered from the surrounding circumstances at the time of installation." *Id.*

In this case, the Lease is clear that Lamar was the owner of the billboard at all times and Respondents never maintained any interest or ownership. This was the intent of all parties, and not just Lamar, from the original execution of the Lease. Thus, the fixture test is not satisfied and the billboard cannot be a fixture.

RCW 62A.2A-525(2). Defendants removed Lamar's Billboard which was a direct violation of the statute.

Finally, Harwood and Bell Franklin, LLC's allegations that no breach of the peace occurred is simply an attempt to deflect the Court's attention away from the real issues. Certainly, if Lamar had been aware that Respondents were going to willfully and intentionally remove its Billboard by cutting it into little pieces it would have taken some action to prevent such conduct. Furthermore, if all that was necessary for a landlord to evict a tenant and their personal property was to go under the cover of darkness and destroy personal property, it would render Washington's unlawful detainer statutes absolutely useless because a landlord could merely state that the UCC permitted it. But this is all moot given that the Lease was a lease of real property and not goods under the UCC.

4. Lamar's Billboard Was Destroyed Causing Damages

Harwood and Bell Franklin, LLC contend that Lamar was not damaged by the removal of the Billboard. This is not true. First, Lamar lost a billboard that was worth several hundred thousand dollars. CP 40-42; 200-219. Second, Lamar lost the opportunity to receive, for multiple years, substantial advertising revenue. *Id.* Third, Lamar will never be able to replace the Billboard with a new billboard in the City of Spokane

because local municipal codes prevent its re-construction in any other location. *Id.* Thus, the advertising revenue is forever lost.

Fourth, to claim that Lamar would have removed the Billboard in a similar manner as contended is merely preposterous. Lamar was the owner of the Billboard and it would not have destroyed the Billboard by cutting it into little pieces rendering it useless. Whether Lamar would have been able to use all of the Billboard's components is merely speculation at this point because Respondents never gave Lamar the opportunity to remove it.

Fifth, the trial court stated during the first oral argument that damages were not at issue during summary judgment and if the parties proceeded past summary judgment then damages would be determined at trial. RP 8-9; 26 (10/14/09). Thus, the trial court refused to entertain any argument on damages.

The fact is that Respondents' self-help methods most certainly caused Lamar damages and to claim otherwise is only a passing attempt by Harwood and Bell Franklin, LLC to escape their legal liabilities, especially when an interest is still maintained in the real property that is the subject of the Lease. Therefore, reversal of the trial court's rulings is appropriate.

D. The Language Of The Lease Is The Center Of The Dispute

The Lease provided the parties several ways in which it could be terminated, but the Lease provision at issue in this appeal is whether the ninety (90) day cancellation notice provided to Lamar in the event the Property was sold and the new owner desired the Billboard's removal was sufficient to terminate the Lease. CP 206. Franklin contended the notice was sufficient. Lamar contended that it was not. Franklin has set forth the applicable case law for contract interpretation in its briefing materials at pages 27 through 31 and rather than submit redundant contract law, Lamar incorporates Franklin's legal authority herein. *Franklin Response Memo.*, pp. 27-31.

The parties' respective position in this appeal is to be decided by this Court's interpretation of the relevant Lease terms and examining it in its entirety. The Lease governs the parties' relationship and dispute. It is also determinative of Lamar's conversion claim and the trial court's decision to grant Respondents summary judgment motions.

Specifically, however, the determinative issue on appeal is whether Harwood sold the Property as required by the Lease in order to invoke the termination provision, or did Harwood still maintain an interest in the Property, as contended by Lamar, under the Lease that would not have allowed the Lease to be terminated.

Lamar has never disputed that it was provided written notice of a sale, but it disputed Franklin's contentions that the Property was sold such that the pertinent Lease provision permitting its termination could be invoked. Franklin argued to the trial court that once the 90 day written notice was provided nothing else was required. Thus, at the expiration of the 90 days the Billboard could be removed. However, the interpretation of the Lease terms was not that simplistic.

The trial court refused to examine the entire Lease, which provided that the Property must be sold by Harwood in order for the Lease to have been terminated under the 90 day termination provision. This was a condition precedent to invoking the termination provision. CP 206. Harwood did not sell the Property because they still maintained an interest in it. Whether that was individually or through a separate business entity was irrelevant since the Lease contained an assignment and successor clause. CP 206. Either way, Harwood, or Bell Franklin, LLC, was still bound by the terms of the Lease.

Franklin argues that Lamar wants to rewrite the Lease and add additional terms. *Franklin Response Memo.*, p. 30. Franklin also argues that Lamar's unilateral determination that the Lease was still in effect didn't nullify the notice of termination. *Id.* Neither of these contentions is true. First, Lamar has never sought to rewrite the Lease or add additional

terms and merely seeks to have the Lease enforced as written. The Lease provides, in relevant part, that a "(90) day cancellation notice required if property sold and new owner desires sign removal." CP 206. Lamar's contentions from the inception of this litigation have been that the Property was not sold because Harwood was still an owner. CP 156. Thus, the termination provision could not be invoked. Harwood did not sell the Property, but rather only sold particular units contained within the building. Harwood and Bell Franklin, LLC are still the owners of other units within the building and the real property on which the building resides.

Second, the notice of termination was nullified by operation of the specific Lease terms and not Lamar's written correspondence of October 1, 2008. But even if it wasn't, at the very least, the parties were engaged in a bona fide dispute at that time over the interpretation of the Lease terms, which required a legal determination from the courts prior to Respondents unauthorized decision to dismantle Lamar's Billboard.

1. The Property Was Not Sold

Franklin makes several arguments in support of the trial court's erroneous rulings. First, Franklin contends "the Lease contains no language supporting the conclusion that the Harwoods must entirely divest themselves of any interest in the Subject Property before the Lease can be

terminated.” *Franklin Response Memo.*, p. 31. Franklin's point misses the intent of the special conditions Lease provision that requires the sale of the Property and not merely several floors within the building. Again, a condition precedent under the Lease before termination can occur.

In essence, Franklin argues that because Harwood sold three (3) floors of the building to Franklin, the Property had been sold and the Lease could be terminated due to Franklin's desire to have the Billboard removed. However, Franklin's interpretation of the pertinent Lease provision is too narrow and fails to take into consideration the legal definition and meaning of the word property. While Property is not defined in the Lease, case law has established a definition for property that clearly demonstrates property is more than simply three floors of a building.

In *Lacey Nursing Ctr., Inc. v. Dep't of Rev.*, 103 Wn. App. 169, 177-78, 11 P.3d 839 (2000), the court examined the definition of property as set forth in RCW 82.04.040, which is a statute utilized in determining real estate excise taxes in the sale of the ownership of, title to, or possession of property. *Id.* at 174-78. Under the circumstances of a purported sale in this case, the applicability of the definition established in *Lacey Nursing Ctr., Inc.* is certainly relevant to the issue at bar since real

estate excise taxes are computed based upon the sale of property. In *Lacey*

Nursing Ctr., Inc., the court stated,

The term property is commonly used to denote **everything which is the subject of ownership**, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate. BLACK'S LAW DICTIONARY at 1216. Under the ... state constitution, the word property includes everything, whether tangible or intangible, subject to ownership. CONST. art. 7, § 1. We conclude ... that the plain meaning of the word property encompasses real property.

Lacey Nursing Ctr., Inc., 103 Wn. App. at 177-78 (emphasis added).

Here, the entire building and land was subject to ownership by Harwood. Lamar has never disputed that Harwood sold a portion of the Property to Franklin, but they also remained owners of other portions of the Property, including units 001 and 002. In fact, the ownership of units 001 and 002 remain under Harwood's current control.

In lieu of the fact that everything, land, building, and improvements were subject to ownership by Harwood at the time of the sale to Franklin, the mere sale of three units did not constitute a sale of the Property consistent with the special condition allowing for the Lease to be terminated. Thus, before the Lease could be terminated, Harwood was required to sell everything that was subject to their ownership. Since units

001 and 002, and the land underneath the building, remained under their control, the Property was never sold and the Lease was still valid.

Franklin has also argued that the Lease didn't contain any language requiring Harwood to completely divest themselves of any interest in the Property. *Franklin Response Memo.*, p. 31. But given that the sale of the Property, including all units and real property contained therein, was necessary to invoke the Lease's termination, language was certainly present in the Lease that required divestiture.

Franklin further contends that even if Harwood wasn't required to divest themselves of any interest in the Property, they had transferred their interest to a limited liability company. *Franklin Response Memo.*, p. 32. Thus, Harwood had divested any interest they may have had in the Property by assigning or conveying their interest to Bell Franklin, LLC. Notwithstanding the fact that Harwood's conveyance to Bell Franklin, LLC was merely a change in the form or identity of their ownership interest since they continue to control Bell Franklin, LLC², the issue is still resolved in favor of Lamar under the terms of the Lease. The Lease provides,

The wor[d] 'Lessor' as used herein shall include lessors.
This lease is binding upon and insures to the benefit of the

² See, WAC 458-61A-211.

heirs, executors, successors, and assigns of Lessee and Lessor.

CP 206.

The Lease is binding on the successors and assigns of the lessor, which at the time the Lease was executed, Harwood were the lessors. Any subsequent conveyance by Harwood to Bell Franklin, LLC would fall under this Lease provision. Furthermore, any future conveyance, such as Bell Franklin, LLC's conveyance to Franklin would also come within the terms of this Lease condition. As such, the Lease would remain valid and enforceable.

Additionally, any issue that may arise over Bell Franklin's divestiture of its interest in the Property through its July 2008 conveyance of units 200, 300, and 400 to Franklin such that the Lease could be terminated fails because Harwood and/or Bell Franklin, LLC continue to maintain an ownership interest in the Property as owners of units 001 and 002 and the land on which the building sits. Therefore, when the trial court refused to even examine these issues, which were necessary to invoke the special conditions termination provision, and also a condition precedent to such termination, it committed reversible error.

2. Lamar Did Not Abandon Its Billboard

Franklin argues that Lamar abandoned its Billboard. *Franklin Response Memo.*, p. 23. This argument is unsupported by the record as evidenced by Lamar's written letter, dated October 1, 2008, to all Respondents. CP 156. The letter, provided by Lamar through counsel stated, in relevant part, the following:

Based [on] my communications with Lamar and review of the [relevant] documentation it does not appear that Joseph and Kristi Harwood, or their successors in interest to the Lease, have relinquished full ownership in the subject property. Therefore, until such time as Mr. and Mrs. Harwood have sold their entire interest in the property, Lamar will continue to honor the terms and conditions of the Lease, including maintaining the structure i[n] its current location.

CP 156.

Franklin's allegations that Lamar abandoned its Billboard in lieu of its October 1st letter are simply inaccurate. As of October 1, 2008, Respondents were on notice that Lamar disputed the ownership interest and purported sale of the Property. The Lease could not be terminated by operation of its own terms.

Lamar fully intended to honor the terms of the Lease, which included leaving the Billboard in its current location. Lamar did not abandon the Billboard, as alleged by Franklin, but rather, it provided Respondents with written notice that it believed the terms of the Lease to

be valid and enforceable. Lamar clearly established that it believed the Lease had not been terminated pursuant to the special conditions contained in the Lease. However, Respondents intentional disregard of Lamar's written notice and subsequent willful removal of the Billboard from the Property less than two weeks later, and without approval or authorization from Lamar, was improper.

E. The Trial Court Improperly Dismissed Lamar's Conversion Claim

Franklin contends that Lamar's conversion claim was properly dismissed because Lamar was not deprived of its Billboard, it abandoned its Billboard, it waived a claim for conversion, and once the lease had been terminated, Franklin had the right to remove the Billboard. *Franklin Response Memo.*, p. 21. Contrary to Franklin's contentions, Lamar was most certainly deprived of its Billboard when Respondents dismantled it by cutting into small pieces. Additionally, it certainly didn't abandon its Billboard as evidenced by Lamar's October 1, 2008 letter to Respondents. Moreover, Lamar has not waived its claim for conversion as it is the subject of this appeal. Finally, Franklin's right to remove the Billboard because the Lease had been terminated is at the heart of this appeal. The trial court agreed with that mistaken Lease interpretation, which Lamar asserts should be reversed on appeal.

1. Lamar Was Deprived Of Possession Of Its Billboard

Franklin's assertions that Lamar was not deprived possession of its Billboard are astonishing given the circumstances. The Billboard was an enormous steel structure. The vinyl sign, or advertising copy alone was fourteen (14) feet by forty-eight (48) feet. CP 203. Thus, to contend that Lamar was not deprived of possession, or the Billboard's value, when Respondents made the decision to dismantle and destroy it is against the record in this case. Lamar specifically instructed Respondents not to remove the Billboard. CP 156. It would have made absolutely no sense for Lamar to have confirmed in writing that the Billboard was to remain on the Property, and then two weeks later without any conversation or dialogue between the parties, agree that it no longer wanted possession. It is simply contradictory to the facts and record on appeal.

2. Lamar Is Entitled To Conversion Damages

Franklin makes various allegations concerning abandonment and condition of Lamar's Billboard. *Franklin Response Memo.*, pp. 23-24. Lamar incorporates herein its argument, *supra*, on Lamar's purported abandonment of the Billboard. However, clarification is warranted on several issues. First, at no time did Lamar ever consent to any interference with its right to the Billboard. Franklin cannot point to a single instance in the record where Lamar agreed that its Billboard could be interfered with

by Respondents. In fact, the evidence is explicitly to the contrary wherein Lamar provided Respondents with multiple letters and verbal communications that it believed the Lease to be valid, it remained the legal owner of the Billboard, and it was to remain on the Property without interference. See, e.g., CP 156.

Second, Lamar never abandoned its property, as alleged, especially in lieu of its October 1, 2008 letter to Respondents explaining Lamar's position on the Lease and further adherence to its terms. CP 156. Third, the Lease did not provide, as argued, that it could be cancelled at any time during the ten (10) year term. CP 206. The Lease could only be terminated under certain conditions, which unless those conditions were satisfied, could not provide for Lease termination. Such is the case in this dispute where Harwood still maintained an ownership interest in the Property. As such, termination of the Lease unilaterally by Respondents was improper.

Franklin also argues that Lamar waived its claim for conversion damages and/or failed to mitigate its damages. *Franklin Response Memo.*, p. 24. Lamar did not have any legal obligation to retrieve the damaged Billboard after it had been cut up into pieces and was not salvageable for any future use. See, *City Loan Co. v. State Credit Ass'n*, 5 Wn. App. 560, 563, 490 P.2d 118 (1971)(when conversion occurred owner is under no obligation to accept back property); See also, *Washington State Bank v.*

Medalia Healthcare LLC, 96 Wn. App. 547, 554, 984 P.2d 1041, 1045 (1999)(same). Franklin's assertions that Lamar waived its rights to damages because it didn't demand return of the Billboard structure is unsupported by the relevant legal authority and the record on appeal. Lamar retrieved the vinyl sign from DR Construction Services, LLC because it was able to be salvaged, but it was under no legal obligation to retrieve and/or dispose of the Billboard structure after Respondents had destroyed it by cutting it up into small pieces.

Franklin further claims that Lamar is not permitted to recover damages other than the fair market value of the Billboard, including lost revenue or related damages. *Franklin Response Memo.*, pp. 25-26. Contrary to Franklin's claims, Lamar is permitted to recover such damages and other consequential damages where the Respondents conduct was willful.

Absent willful conduct, "the measure of damages for conversion is the fair market value of the property converted." *Potter v. Washington State Patrol*, 165 Wn.2d 67, 85, 196 P.3d 691 (2008); see also, *Merchant v. Peterson*, 38 Wn. App. 855, 690 P.2d 1192 (1984) (same). "Given the compensatory nature of an award of damages, the meaning of fair market value varies with the context in which the standard is applied." *Merchant*, 38 Wn. App. at 858. In other words, fair market value is "the value for

which the property could have been sold in the course of a voluntary sale between a willing buyer and a willing seller, taking into account the use to which the property is adapted or could reasonably be adopted." *Id.* at 859. However, "fair market value necessarily implies not only a willing buyer, **but a willing seller.**" *Id.* at 860 (emphasis added).

"An owner is also entitled to loss of use damages for the period of time during which the owner was wrongfully deprived of the converted property." *Potter*, at 85 (emphasis added). **"Finally, consequential damages may be available in some circumstances."** *Id.* at 86; see also, *Dennis v. Southworth*, 2 Wn. App. 115, 124, 467 P.2d 330 (1970) (allowing damages for loss of profits on the converted property).

Respondents' actions clearly demonstrate that their conduct was willful. Respondents were provided written notice of Lamar's position on the Lease termination and to refrain from removing the Billboard from the Property. Such notice was intentionally disregarded and the Billboard was removed anyway. This was the result of Respondents' mistaken belief that their interpretation of the Lease prevailed over that of Lamar, but Respondents didn't have the authority to make such a legal determination on the terms of the Lease. Respondents' decision to remove the Billboard without legal justification was willful under the circumstances and

justifies compensation for loss of use damages and related consequential damages.

The Billboard was a highly visible and profitable location. CP 200-204. It had been continuously rented for many years by the Coeur d'Alene Casino, which is undisputed, and there is no evidence to dispute the fact that such advertising would not have continued but for Respondents conduct. *Id.*

The fact of the matter is that the fair market value depends on a willing seller and Lamar had absolutely no intention to sell the Billboard given its profitability and long term Lease. Lamar cannot ever, pursuant to local Spokane Municipal Codes, replace the Billboard, either on the Property or by placing another billboard in another location around town. Yet, even if Lamar could construct a billboard to replace the one that was intentionally removed, it could not recover the same amount of revenue generated by the location of the removed Billboard. The Billboard was in a location that was very advantageous for businesses to advertise, which is only further supported by the fact that the Coeur d'Alene Casino chose to continue advertising there year after year. CP 200-204.

Lamar has provided the value of the sign components as it relates to its replacement. *Id.* That is the fair market value since Respondents destroyed the Billboard. Because Lamar was not intending to sell the

Billboard the only attempt to provide for any fair market value is its replacement value. All of the damages sought by Lamar are relevant and justified, especially considering the destruction committed. The only reason that this dispute arose is due to Respondents willful conduct and they should not be permitted to elude their financial obligations.

F. The Trial Court's Order On Lamar's Motion For Reconsideration Should Be Reversed

Franklin argues that Lamar alleged an unlawful detainer argument for the first time during oral argument and again in its Motion for Reconsideration. *Franklin Response Memo.*, pp. 37-38. Lamar has contended, and argued, since the beginning of this litigation that Respondents were required to obtain judicial authority to remove Lamar's Billboard. Whether court assistance was through an unlawful detainer action or some other cause of action, the fact is that Respondents could not utilize self-help remedies to remove Lamar's Billboard. Respondents' removal of the Billboard was in direct violation of Washington law, including the parties Lease, and demonstrates their willful conduct and evidence of conversion.

Franklin's additional argument is that the unlawful detainer statute does not apply to this case under the theory that the unlawful detainer statute does not apply to removal of personal property and the Billboard

was not the tenant of the roof. *Franklin Response Memo.*, pp. 41-44. However, Franklin's contentions, which the trial court concurred although incorrectly, are based upon the faulty theory that Lamar did not have possession of the roof. The Lease terms specifically state otherwise, which granted Lamar an exclusive right to access and possess the real property, including the roof for its Billboard. Such exclusiveness under a lease can also be to the exclusion of the lessor. See, *Conaway v. Time Oil Co.*, 34 Wn.2d 884, 893, 210 P.2d 1012 (1949); CP 206.

Lamar's partial summary judgment motion involved conversion and it raised the issue of an unlawful detainer action as evidence of Respondents ability to obtain quick court assistance with removal of Lamar and its Billboard from the Property if they believed the Lease had actually been terminated after Lamar provided notice that Harwood still maintained an ownership interest such that the termination provision had not been invoked. Franklin, along with Harwood and Bell Franklin, LLC argue that such action was unnecessary because the Lease had been terminated, but just as they have contended that Lamar couldn't unilaterally decide that the Lease wasn't terminated, nor could they unilaterally decide that the Lease was terminated, especially in lieu of Harwoods' interest in the Property. The terms of the entire Lease must be considered.

Thus, it was incumbent upon Respondents to obtain judicial intervention and interpretation of the Lease terms, either through an unlawful detainer action or some other legal avenue. When Respondents declined to seek court approval for removal of Lamar's Billboard, it was at that time that the conversion of Lamar's property occurred.

It was not Lamar's legal responsibility to prove an unlawful detainer claim because its partial summary judgment motion involved only a conversion claim, but more importantly, Respondents had already dismantled Lamar's Billboard. It was completely unnecessary, and inapplicable, for Lamar to allege an unlawful detainer cause of action since the court's limited jurisdiction concerning right to possession had been eliminated. See, *Sprincin King Street Partners v. Sound Conditioning Club, Inc.*, 84 Wn. App. 56, 66-69, 925 P.2d 217 (1996)(once right to possession ceases to be at issue the courts' limited jurisdiction is unavailable). Lamar's reference and citation to the unlawful detainer statute was to illustrate the means available to determine possession prior to the Billboard's removal. It wasn't, and has never been, intended to be a cause of action because it simply wasn't available. Alternatively, Respondents could have just as easily filed a lawsuit, moved for summary judgment, and sought a writ of restitution requiring Lamar to vacate the Property. But that wasn't done either.

Again, the issue is that Lamar's Billboard was wrongfully converted because the Lease had not been terminated by its own terms. At the point that the parties disagreed over the Lease's termination, Respondents had available a legal forum in which to quickly determine possession. Respondents declined to ascertain the effect or interpretation of the Lease terms through court intervention and when they subsequently removed Lamar's Billboard the conversion occurred.

1. Lamar's Motion for Reconsideration Was Appropriate

Given the trial court's outright refusal to even consider all of the Lease terms and the application to the facts in this case, which if properly reviewed would have revealed that the Lease, by its own terms, had not been terminated because the special condition permitting termination had not been met, the trial court committed reversible error.

Lamar's position in its Motion for Reconsideration was neither a new legal theory nor did it raise the issue of court intervention for the first time. It has continually raised the issue from the beginning of the parties' dispute. Franklin argues that "the primary issue of this litigation was never Lamar's continued right to 'occupy' the property because Lamar never raised this issue." *Franklin Response Memo.*, p. 39. This statement could not be farther from the truth as the right to occupy the property is exactly what this case is about. The Lease is for the occupation of property for

Lamar's Billboard. Lamar is an advertising company that constructs and maintains Billboards on real property through ground lease agreements. It is without question that this case has always been about possession. The Lease states, "Lessor hereby leases and grants exclusive use of the property ... for the purpose of erecting and maintaining a back to back sign structure." CP 206. Occupation by Lamar and its continued right to remain on the Property is at the core of this appeal, not to mention Lamar's fundamental existence. To contend otherwise is to dismiss the entire Lease and its respective terms.

Franklin keeps contending Lamar is raising arguments at the "eleventh hour", but that simply isn't true. *Franklin Response Memo.*, p. 39. Rather, Lamar is merely asking this Court, because the trial court erroneously decided, that the Lease terms, in their entirety, demonstrate that the Lease had not been terminated. The Lease is the document that governs the parties dispute and it cannot be thrown away as if it doesn't exist, which Franklin would have this Court do when it is convenient for its purposes.

Moreover, Lamar's October 1, 2008 letter to Respondents clearly demonstrates that Lamar's occupation of the Property was at issue. CP 156. Lamar specifically informed Respondents that it intended to honor the terms of the Lease, including maintaining the Billboard on the

Property. *Id.* Respondents subsequent and unlawful removal of Lamar's Billboard without court assistance was a willful conversion of Lamar's property.

2. Unlawful Detainer Is Applicable

Franklin alleges that the unlawful detainer statute does not apply because the removal involved personal property and not a tenant. *Franklin Response Memo.*, pp. 41-43. The mere fact that the Billboard was removed is not the determining factor in a landlord/tenant relationship. The removal of the Billboard is just an issue of damages because Lamar no longer had possession and use of its personal property. But Lamar was the tenant under the Lease, CP 206. Lamar was the lessee, and therefore the tenant. CP 206. The Billboard was Lamar's personal property that was improperly removed because Respondents did not have the unilateral right to determine that some lease terms were applicable while other lease terms were not.

The Lease was a ground lease involving real property and to contend that Lamar's rights were extinguished or had no legal effect under the laws of this State would render the unlawful detainer statute otherwise meaningless. Lamar was a tenant and Respondents willful removal of the Billboard also caused the removal of Lamar. It is not a question of removing only personal property. This is a case about removing a tenant,

Lamar, and its personal property. As such, the unlawful detainer statute does apply.

"The critical question in determining the existence of [a landlord/tenant] relationship is whether exclusive control of the premises has passed to tenant." *Regan v. City of Seattle*, 76 Wn.2d 501, 504, 458 P.2d 12 (1969) (citations omitted). "If this control has passed, even though the use is restricted by limitations or reservations, then a landlord-tenant relationship is established." *Id.* Under the Lease, Lamar was given exclusive control. Thus, the unlawful detainer statutory scheme applies to Lamar and Respondents.

In support of its claim, Franklin argues that *Heaverlo v. Keico Indus., Inc.*, 80 Wn. App. 724, 728, 911 P.2d 406 (1996) and *Phillips v. Hardwick*, 29 Wn. App. 382, 628 P.2d 506 (1981) are inapplicable because the cases involve either the residential landlord tenant act ("RLTA") or the unlawful detainer statute doesn't apply because the parties were not resolving the right to possession. *Franklin Response Memo.*, pp. 43-45. Lamar doesn't dispute that the RLTA does not apply to commercial tenancies or that possession was no longer an issue, but that was only the result of Respondents willfully removing Lamar's Billboard without legal justification. At the time the parties maintained differences over the interpretation of the Lease terms, the unlawful detainer statute

was clearly in play. Lamar and Respondents had a dispute over the occupation and possession of the Property under their Lease and as governed by RCW 59.12.

The unlawful detainer statute purpose is to resolve the right to possession and restoring such possession to the landlord. See, Heaverlo v. Keico Indus., Inc., 80 Wn. App. 724, 728, 911 P.2d 406 (1996) (**removal of a tenant's personal property is an issue related to possession**); Accord, Phillips v. Hardwick, 29 Wn. App. 382, 385-86, 628 P.2d 506 (1981). Restoring possession also involves removing not only the tenant but the tenant's personal property. *Id.* Self-help methods for removing and/or restoring possession of the property are applicable to both the tenant and its personal property. *Id.* A landlord cannot obtain full possession of certain property if tenants maintain all of their personal property on the premises. "[N]o landlord, **including one not governed by the RLTA**, may ever use non-judicial, self-help methods to remove a tenant." *Gray v. Pierce Housing Authority*, 123 Wn. App. 744, 757, 97 P.3d 26 (2004)

Thus, the unlawful detainer statute is also applicable to commercial tenancies and forms the basis for courts to issue writs of restitution requiring tenants and their property to be physically removed by law enforcement officials. See, RCW 59.12.

Franklin makes a further argument that the unlawful detainer statute does not apply to issues regarding personal property citing *Sowers v. Lewis*, 49 Wn.2d 891, 895, 307 P.2d 1064 (1957) for the proposition "that title to personal property cannot be determined in an unlawful detainer action." *Franklin Response Memo.*, p. 43. Again, Franklin misconstrues the parties' dispute. Lamar's dispute involves its right to continue exclusive control of the Property pursuant to the Lease terms and conditions. This case has never been about title to the Billboard because it is undisputed that Lamar was the owner. CP 206. A landlord/tenant relationship existed and it is not eliminated under the guise that the Billboard cannot invoke the unlawful detainer statute. Additionally, Lamar's summary judgment motion on conversion is due to the fact Respondents improperly removed Lamar and its Billboard because to allege that the two do not co-exist is to defeat the entire purpose of a landlord/tenant relationship and the unlawful detainer statutes.

Franklin also claims the billboard is a fixture and cites *Clear Channel Outdoor v. Seattle Popular Monorail Authority*, 136 Wn. App. 781, 786, 150 P.3d 649 (2007) in support of its position. *Franklin Response Memo.*, pp. 41-42. The *Clear Channel* Court's reference is to a "removable fixture", and then opines in footnote 11 that the term "appears to be somewhat of an anomaly", but it has been used in passing by United

States and Washington Supreme Courts in 1945 and 1929, respectively.³ However, as set forth, *supra*, in footnote 1, Washington has established a three-part test for determining whether an article attached to realty is considered a fixture. *Lake Sewer Dist. No. 1 v. Liberty Lake Utilities Co., Inc.*, 37 Wn. App. 809, 683 P.2d 1117 (1984). The elements for a fixture are "(1) actual annexation to the realty, or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold." *Id.*, at 813. "Of these, the intention of the annexor is the most important." *Id.* "Each element of this three-pronged test must be met before an article may properly be considered a fixture." *Glen Park Assoc., LLC v. State Dep't of Revenue*, 119 Wn. App. 481, 481, 82 P.3d 664 (2003). "Evidence of intent is gathered from the surrounding circumstances at the time of installation." *Id.*

In this case, the surrounding circumstances are clear that Lamar was the owner of the Billboard at all times and Respondents never maintained any interest or ownership. This was the original intent of the

³ *United States v. General Motors Corp.*, 323 U.S. 373, 379, 65 S. Ct. 357, 89 L.Ed 311 (1945); *M.H.B. Co. v. Desmond*, 151 Wn. 344, 351, 275 P. 733 (1929).

parties, and not just Lamar, from the original execution of the Lease. Thus, the fixture test is not satisfied and the Billboard cannot be a fixture.

Finally, Respondents made the unilateral decision, and for that matter, a legal determination, that their interpretation of the Lease was correct. The trial court concurred with that interpretation, but given the applicable law and the terms of the Lease, the trial court's ruling was an abuse of discretion. Lamar moved for partial summary judgment on the issue of conversion because its Billboard had been converted illegally. Respondents failed to obtain court approval to remove Lamar and its personal property. Accordingly, it is proper to reverse the trial court.

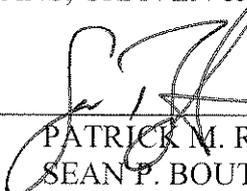
III. CONCLUSION

Based upon the foregoing authorities and argument, and that set forth in Lamar's Opening Brief, and the record in this case, Lamar respectfully requests that the trial court's orders be reversed.

RESPECTFULLY SUBMITTED this 18th day of January, 2011.

EVANS, CRAVEN & LACKIE, P.S.

By



PATRICK M. RISKEN, #14632
SEAN P. BOUTZ, #34164
Attorneys for Appellant Lamar

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of Lamar's Reply Memorandum to be served on the following in the manner indicated below:

Counsel for Defendants Joseph & Kristi
Harwood, Bell Franklin, LLC and Bel
Condominium Owners Association

William R. Spurr	Via Regular Mail	[]
1001 4th Ave., Suite 3600	Via Certified Mail	[]
Seattle, WA 98154	Via Facsimile	[]
206-682-2692	Hand Delivered	[]
Email bill@williamrspurr.com	Email	[]

Counsel for Bel Franklin Apartments,
LLC and Spokane Housing Ventures,
Inc.

Peter A. Witherspoon	Via Regular Mail	[]
Lawrence Garvin	Via Certified Mail	[]
Workland & Witherspoon, PLLC	Via Facsimile	[]
714 Washington Mutual Financial Ctr	Hand Delivered	[]
601 West Main Avenue		
Spokane, WA 99201-0677		

Dated at Spokane, Washington this 18 day of January, 2011.



Sean P. Boutz