

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
OPENING BRIEF

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I. INTRODUCTION

This matter involves a dispute over the interpretation of an advertising Ground Lease Agreement (hereinafter "Lease") that was originally entered into between Pridemark Outdoor Advertising ("Pridemark") and Respondent Joseph and Kristi Harwood ("Harwood") in September 1994. Appellant Lamar Outdoor Advertising ("Lamar"), as the successor in interest to the Lease, acquired Pridemark's assets and leases in a subsequent purchase and sale agreement between the two businesses.

The Lease became effective on February 1, 1995, and Pridemark and Lamar have operated and maintained an advertising structure on the real property since that date until October 15, 2008 when Respondents Harwood, Bell Franklin, LLC, Bel Franklin Apartments, LLC, Spokane Housing Ventures, Inc., and/or the Bel Condominium Owners Association (hereinafter collectively "Parties") made the decision, without consent or authorization from Lamar, to remove and dismantle the structure.

In October 2008, Lamar filed suit asserting various causes of action, including for breach of contract, trespass, and conversion. While other issues arose during the course of the litigation, which are included in this appeal, the primary dispute involves whether Lamar had a right to continue to occupy the property under the Lease terms in the event Harwood still maintained an ownership interest in the property such that

the Lease termination provision was unsatisfied after a portion of the property had been sold.

After various motions were heard by the trial court, including 1) an erroneous decision to vacate Lamar's default judgment against Harwood and Bell Franklin, LLC ("Franklin") in the amount of \$528,568, and 2) the dismissal of Spokane Housing Ventures, Inc. ("Spokane Housing") and the Bel Condominium Owners Association¹ ("Association"), the trial court denied Lamar's Motion for Partial Summary Judgment on conversion and granted Respondents Motions for Summary Judgment. Lamar's claims and lawsuit were then dismissed.

Given the trial court's erroneous rulings in this case, the issues presented on appeal must be overturned.

II. ASSIGNMENTS OF ERROR

Pursuant to RAP 10.3(a)(4), Appellant Lamar assigns error to the following actions by the trial court:

A. That the trial court erred when it granted Respondent Harwood and Franklin's Motion to Vacate Default Judgment even though it is undisputed that they failed to 1) file a notice of appearance or answer the

¹ Spokane Housing Ventures, Inc. and Bel Condominium Owners Association were dismissed after the first summary judgment hearing, although Lamar objected to the dismissal of Spokane Housing Ventures, Inc. To the extent that Bel Condominium Owners Association is referenced as one of the "Parties" herein, Lamar did not object to its dismissal and intends no further reference or responsibility on appeal.

Complaint within the prescribed twenty (20) day time period set forth in the Summons and Civil Rule 4, or 2) make any attempts to communicate with Lamar's legal counsel prior to entry of the default judgment.

B. That the trial court erred when it granted Respondent Harwood and Franklin's Motion to Vacate Default Judgment on the grounds that the judgment was an excessive amount or may have been less in a contested hearing.

C. That the trial court erred when it concluded that Harwood and Franklin's conduct was excusable neglect or inadvertence even though legal counsel for Harwood and Franklin made 1) a tactical decision not to file a notice of appearance prior to the order of default and default judgment's entry with the court, and 2) made no efforts to communicate with Lamar's counsel until over a month after Harwood and Franklin had been legally served with the Summons and Complaint.

D. That the trial court erred when it interpreted CR 55(a)(3) to require that Lamar provide notice of the default and default judgment hearing to legal counsel for the appearing parties even though such parties were not in default and Lamar had no intention of securing a default against those appearing parties.

E. That the trial court erred when it denied Lamar's Motion for Partial Summary Judgment for conversion of Lamar's property given that Lamar

had provided specific notice that its property was to remain on the subject property.

F. That the trial court erred when it denied Lamar's Motion for Partial Summary Judgment for conversion of Lamar's property when the Lease provided that Lamar was to remain the owner of the property at all times.

G. That the trial court erred when it denied Lamar's Motion for Partial Summary Judgment for conversion of Lamar's property after Respondents failed to follow the statutorily mandated landlord tenant laws involving the potential eviction of a holdover tenant.

H. That the trial court erred when it denied Lamar's Motion for Reconsideration in contradiction of the applicable Washington landlord tenant laws.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Default Judgment

Did the trial court err by vacating Lamar's default judgment when Harwood and Franklin failed to either file a notice of appearance or answer Lamar's Complaint within twenty (20) days and made no attempts to communicate with Lamar's counsel prior to entry of the default judgment?

Did the trial court err by improperly considering the amount of the default judgment in granting Harwood and Franklin's Motion to Vacate Default Judgment?

Did the trial court err in granting Harwood and Franklin's Motion to Vacate Default Judgment when it concluded that the pre-default conduct of Harwood and Franklin, their attorney, or both constituted excusable neglect or inadvertence?

Did the trial court err by construing the plain language of CR 55(a)(3) to require Lamar to provide notice of the default hearing to parties other than Harwood and Franklin who had filed notices of appearance, and against whom Lamar was not seeking a default, before Lamar could obtain a default judgment against Harwood and Franklin?

B. Summary Judgment

Did the trial court err in denying Lamar's Motion for Partial Summary Judgment on Lamar's conversion claim when the adverse parties (a) consciously ignored Lamar's specific and express notice that its Billboard was to remain on the leased real property, and (b) improperly dismantled and removed Lamar's Billboard?

Did the trial court err in denying Lamar's Motion for Partial Summary Judgment on Lamar's conversion claim when the Lease clearly provided Lamar with a vested ownership interest in its Billboard?

Did the trial court err by disregarding explicit provisions of the landlord-tenant law related to holdover tenants when it denied Lamar's Motion for Partial Summary Judgment?

C. Motion for Reconsideration

Did the trial court abuse its discretion in denying Lamar's Motion for Reconsideration?

IV. STATEMENT OF THE CASE

This matter arises out of a dispute between Lamar, as the successor in interest, and the original real property owner Harwood over the interpretation of a Lease for the use of such property for Lamar's large commercial advertising structure. *Clerks Papers* ("CP") 11-22, 466-69. The Lease provided certain provisions for termination, including cancellation of the Lease in the event the property was sold and the new owner desired the structure's removal. CP 22.

However, due to multiple property conveyances by Harwood, or the business entity for which they were an owner, the parties disagreed over whether the Lease could be terminated pursuant to its terms given that Harwood still maintained some ownership interest in the subject property. CP 11-22.

Even though the Lease provided that Lamar was to remain the owner of the structure at all times, Lamar provided written notice to all

parties not remove the structure, and Lamar never gave authorization or approval of any kind to remove the structure, which was dismantled and destroyed by the Parties. CP 11, 156, 202-03.

Lamar responded by filing suit alleging multiple causes of action. CP 11-22. Shortly thereafter, and pursuant to the civil rules, Lamar obtained an order of default and default judgment against Harwood and Franklin due to their failure to either file a notice of appearance or answer, or communicate with Lamar's legal counsel in any capacity prior to the default and default judgment's entry with the court. CP 33-47. The trial court subsequently vacated the default judgment on the presumed basis that Harwood and Franklin's conduct was excusable neglect. CP 11-12; *Verbatim Report of Proceedings* ("RP") February 4, 2009, 9-10.

The parties eventually exchanged cross motions for summary judgment and after an initial hearing the trial court dismissed Spokane Housing and the Association as defendants. CP 462-65. After the trial court's request for additional factual information and a second hearing, the trial court denied Lamar's Motion for Partial Summary Judgment and granted Harwood, Franklin, and Bel Franklin Apartments, LLC ("Apartments") Motions for Summary Judgment dismissing all of Lamar's claims. CP 479-81.

A. Factual Background

1. The Lease

Lamar is a national advertising business that leases property from certain land owners to construct and maintain, among other things, commercial billboards. CP 201, 221. Lamar operates its advertising business throughout the northwest and maintains an office in Spokane, Washington. *Id.*

On September 12, 1994, Pridemark entered into a Lease with Harwood for a term of ten (10) years beginning on February 1, 1995 for the exclusive use of the subject property to erect and maintain an advertising sign structure (“Billboard”) at 217 N. Division Street in the City of Spokane (“Property”). *Id.*, see also, CP 206, 466-67. Pursuant to its terms, the Lease provided that it would remain in full force and effect for ten (10) years and successive like terms unless terminated at the end of such terms by either party, provided sufficient notice was given. CP 206, 467. The Lease also provided that its terms were “binding upon and insures to the benefit of the heirs, executors, successors, and assigns of Lessee and Lessor.” CP 206.

On December 16, 2005, Lamar, as the successor in interest to Pridemark, recorded the Lease in Spokane County. CP 201. The Lease had previously been renewed for another ten (10) year term in February 2005.

CP 201, 206. Under the Lease, Lamar was to remain the owner of the Billboard at all times. CP 206. Specifically, the Lease stated, “[i]t is agreed between the parties that [Lamar] or its assigns shall remain the owner of the advertising sign structure at all times....” *Id.*

The Lease contained three termination provisions. CP 467. First, Lamar could terminate the Lease at any time by providing thirty (30) days written notice. Second, the Lease could be terminated at the end of each ten (10) year term upon written notice of either party not more than ninety (90) days or less than thirty (30) days prior to the end of the ten (10) year term. *Id.* Third, the Lease could also be terminated under the section noted “Special Conditions”, which stated, “(90) day cancellation notice required if property is sold and new owner desires sign removal. Mr. Harwood to furnish name and notify of pending sale.” CP 467, 206. The first two termination provisions are not at issue in this appeal.

2. Property Conveyances.

In September, 2005 Harwood formed Franklin. CP 467. The owners of Franklin were Joseph Harwood and Cory Colvin. *Id.* The membership interest in Franklin consisted of a 50% interest for Mr. Harwood and 50% for Mr. Colvin. *Id.* In January, 2006, Harwood conveyed the Property to Franklin. CP 467. At the time of the conveyance from Harwood to Franklin, the membership interest in Franklin consisted

of Mr. Harwood and Mr. Colvin, but subsequently changed to a 50% interest for Joseph and Kristi Harwood and a 50% interest for Cory and Elisabeth Colvin. *Id.*

In April 2007, Franklin converted the Property into seven (7) condominium units. CP 306-20, 468. These units were designated as Units 001, 002, 101, 102, 200, 300 and 400. *Id.* On or about April 10, 2007, the Association was formed. On April 11, 2007, Franklin, as Grantor, and the Association, as Grantee, recorded Condominium Declarations ("Declarations") in Spokane County. *Id.* The Declarations designated the roof of the building as a limited common element of the condominium. CP 315-16, 468. The roof was allocated as a limited common element of Unit 101, which was responsible for performing the terms and conditions of the Lease. *Id.*

On or about April 17, 2007, Units 101 and 102 were sold by Franklin to Winthrop and Allison Taylor. CP 468, 276-82. The sale was executed through a statutory warranty deed. CP 276. At that time, Franklin remained the owners of units 001, 002, 200, 300 and 400. *Id.*, CP 468. Winthrop and Allison Taylor never requested that the Billboard be removed, or the Lease terminated. CP 416, 468.

On July 13, 2007, Spokane Housing signed a real estate purchase and sale agreement for the purchase of units 200, 300 and 400 (the top

three floors of the building) from Franklin. CP 284-88, 468. The purchase and sale was scheduled to close on or around May 15, 2008. CP 286, 468.

As a result of the last sale and/or assignment to Spokane Housing, a dispute arose over the interpretation of the third termination provision in the Lease and Lamar's right to remain on the premises given Harwood and Franklin's continued ownership interest in the Property. CP 87.

3. The Dispute.

Since at least March 2007, Harwood and/or Franklin have attempted to nullify their obligations under the terms of the Lease. CP 69, 87. In March 2007, attorney Corey F. Brock, then the attorney for Harwood and Franklin, sent correspondence to Lamar's legal counsel that the Property was to be sold to Franklin. *Id.* At that time, Mr. Brock requested removal of the billboard pursuant to the ninety (90) day cancellation notice in the Lease. *Id.* Upon receipt, counsel for Lamar learned that the owners of Franklin were in fact still Harwood and the purported sale was merely a change in form or identity of the owner, but did not involve an actual beneficial ownership change. *Id.* Subsequently, Lamar's counsel sent Mr. Brock a letter that the purported sale did not satisfy the termination provision since Harwood were still the owners of the Property and the Lease contained a successor in interest provision. CP 87, 206.

On or about January 4, 2008, Spokane Housing formed the Apartments limited liability company. CP 468. Between January and April 2008, Helen Stevenson, head of Acquisitions and Development for Spokane Housing, and Mr. Neal Schreibeis, Lamar's Real Estate Director, engaged in several telephone calls concerning removal of Lamar's Billboard, but the sale of units 200, 300, and 400 had not yet closed. CP 468.

On April 14, 2008, Ms. Stevenson sent a letter to Lamar stating that the Billboard would need to be removed. CP 469. Lamar responded to Ms. Stevenson's correspondence in an April 28, 2008 letter and acknowledged that once the Property was actually sold pursuant to the specific Lease terms the purchasing entity would be able to terminate it accordingly. *Id.* As a result of delays in obtaining financing, the closing date for the purchase and sale of units 200, 300 and 400 was continued until July 15, 2008, pursuant to an addendum to the purchase and sale agreement. CP 469.

On July 3, 2008, Julie R. Stevenson of Allied Escrow Group, Inc. (closing agent on the sale of units 200, 300, and 400) sent a letter signed by Harwood to Lamar providing a ninety (90) day notice of termination of the Lease and requesting removal of the Billboard. CP 371, 469. On or about July 7, 2008, units 200, 300, and 400 were conveyed by statutory

warranty deed from Franklin to Apartments. CP 364-65, 469. Consistent with the sale of units 200, 300, and 400, Franklin filed a real estate excise tax affidavit with the state of Washington. CP 369, 469. Even after the closing of the purchase and sale of units 200, 300, and 400, Harwood and Franklin still maintained an interest in the Property as owners of units 001 and 002. CP 404.

On July 23, 2008, Mr. Schreibeis sent a letter to Ms. Jayne Auld, Spokane Housing's secretary enclosing a W-9 for payment of all future rent obligations. CP 208, 417, 469. Mr. Schreibeis also indicated that Harwood still maintained an ownership interest in the Property and that the Lease would remain in effect. CP 208, 469. Copies of the letter were also sent to Harwood and Ms. Julie R. Stevenson. *Id.*

On October 1, 2008, in response to Allied Escrow Group's July 3, 2008 letter, counsel for Lamar sent a letter to Ms. Julie R. Stevenson, along with copies to Harwood and Spokane Housing (c/o Jayne Auld & Helen Stevenson), informing them that Harwood had not relinquished ownership in the Property, the Lease had not been terminated, and the Billboard was to remain on the Property. CP 156, 470.

Despite the October 1st letter from Lamar's counsel, and without any authorization or consent from Lamar, its Billboard was dismantled by Harwood, Franklin, Apartments, and/or Spokane Housing on October 15,

2008. CP 470. Lamar only learned of the Billboard's removal after Mr. Neal Schreibeis happened to drive by the Property and witnessed the Billboard's removal. CP 202. Lamar's Billboard was destroyed when it was removed from the Property and pursuant to the City of Spokane Municipal Code, it may never be replaced. CP 41.

B. Procedural Background

1. Complaint, Notice of Appearance, and Default Judgment.

Lamar responded by filing suit against the Parties on October 17, 2008. CP 11-22. Lamar alleged multiple causes of action, including a) breach of contract, b) tortious interference with business expectancy, c) trespass, and d) conversion. *Id.*

On October 22, 2008, Apartments, Association, and Spokane Housing were served with the Summons and Complaint. CP 27-32. On October 28, Harwood and Franklin were served with the Summons and Complaint. CP 23-26. Counsel for Apartments and Spokane Housing filed a Notice of Appearance on November 5, 2008, and a subsequent Amended Notice of Appearance on November 10, 2008 adding legal representation for the Association. CP 88.

On November 19, 2008, after Lamar's legal counsel had neither received a notice of appearance, nor any communication from Harwood or Franklin, Lamar moved for an order of default and default judgment. CP

33-47, 88-89. An order of default and default judgment, in the amount of \$528,568, were entered against Harwood and Franklin only, and at no time did Lamar seek, or obtain an order of default or default judgment against Apartments, Spokane Housing, or the Association. *Id.* On December 5, 2008, attorney William R. Spurr filed a Notice of Appearance on behalf of Harwood, Franklin, and the Association.² CP 48-49.

2. Motion to Vacate Default Judgment

On or around January 22, 2009, Harwood and Franklin filed their Motion to Vacate Default Judgment alleging that a) pursuant to CR 60(b) Harwood and Franklin's failure to respond to the Summons and Complaint was, among other things, due to excusable neglect and inadvertence, and b) Lamar's default was procured through procedural irregularity. CP 52-56. Harwood and Franklin contended that Lamar did not provide counsel for Apartments, Spokane Housing, and the Association with notice of the default and default judgment under CR 55(a)(3). In short, Harwood and Franklin asserted that if Lamar had provided notice to counsel for Apartments, Spokane Housing, and the Association, their counsel could have contacted Mr. Spurr and he would have been able to avoid the default judgment. CP 54.

² Mr. Spurr subsequently filed a Notice of Withdrawal and Substitution of Counsel on May 28, 2009, wherein the attorneys for Apartments and Spokane Housing continued with their original representation of the Association. CP 123-25.

Lamar filed a response contending that Harwood and Franklin were not entitled to notice under CR 55 as they had failed to appear in the case in any capacity, and also, never engaged in any communication with Lamar prior to the entry of the order of default and default judgment. CP 68-99. Furthermore, Lamar contended that Harwood and Franklin's failure to respond to the Summons and Complaint was not due to excusable neglect or inadvertence when an informed and conscious decision was made by Mr. Spurr not to file a notice of appearance until December 5, 2008. CP 57-59, 77. CR 55 only required notice to a party when that party a) had appeared, and b) that party was the one to have an order of default or default judgment entered against them. CP 76.

On February 4, 2009, the trial court heard oral argument on Harwood and Franklin's Motion to Vacate Default Judgment, and subsequently entered an order vacating Lamar's default judgment under CR 60. CP 111-12.

3. Summary Judgment Pleadings

After conducting limited discovery, Lamar moved for partial summary judgment by filing its Motion for Partial Summary Judgment on September 2, 2009. CP 152-237. Lamar alleged that Harwood, Franklin, Apartments, Spokane Housing, and the Association had wrongfully converted Lamar's Billboard causing substantial damages. CP 220-31.

In response, Apartments, Spokane Housing, and the Association filed cross-motions for summary judgment on September 15, 2009, asserting a) the Lease was properly terminated, b) Lamar did not have a claim against Spokane Housing or the Association under limited liability protections and no privity of contract with Lamar, and c) Lamar's claims for tortious interference with business expectancy and contractual relations, conversion, trespass, and unjust enrichment failed as a matter of law. CP 245-381. On or around October 5, 2009, Harwood and Franklin filed a Joinder of Apartments, Spokane Housing, and the Association's cross-motions for summary judgment. CP 396-98. After submitting various responses to the parties' summary judgment materials, the trial court heard oral argument on October 14, 2009. *October 14, 2009*, RP 1-31.

After oral argument, and over the objection of Lamar's counsel, the trial court dismissed Spokane Housing on the basis of limited liability immunity. *Id.*, RP 19-22. The Association was also dismissed, but Lamar did not present any objection. *Id.* Additionally, the trial court reserved judgment on Lamar's partial motion for summary judgment and Harwood, Franklin, and Apartments summary judgment motions until the attorneys could provide the trial court with a statement of undisputed facts. *Id.*, RP 21-29.

On January 8, 2010, a Statement of Facts was filed with the trial court on behalf of Lamar, Harwood, Franklin, and the Apartments. CP 466-72. On February 3, 2010, the trial court again heard oral argument from the remaining Parties. *February 3, 2010*, RP 1-19. Thereafter, without specific findings, the trial court denied Lamar's Motion for Partial Summary Judgment and granted Harwood, Franklin, and Apartments cross-motions for summary judgment. *Id.*, RP 16-18.

4. Motion for Reconsideration

On March 15, 2010, Lamar filed a timely Motion for Reconsideration pursuant to CR 59(a)(7) & (9) asserting the Parties were not authorized under the unlawful detainer statutes to use self-help remedies or forcible entry to remove Lamar's Billboard. CP 488-95. Lamar also sought reversal of the trial court's decision denying its conversion claim. *Id.*

The trial court refused oral argument, and on April 9, 2010, it issued an Order on Motion for [Rec]onsideration denying Lamar's Motion. CP 560-61. Lamar filed a timely Notice of Appeal. CP 562-63.

V. ARGUMENT

The trial court's rulings are contradictory to established legal authority, including a very strained interpretation of the applicable civil

rules. Because the trial court's rulings are without legal and factual basis, such rulings should be reversed on appeal.

A. Standards of Review

1. Default Judgment Review Is Abuse of Discretion

"The decision on a motion to vacate an order of default or a default judgment is within the sound discretion of the trial court." *Estate of Stevens*, 94 Wn. App. 20, 29, 971 P.2d 58 (1999) (citations omitted). "That decision will not be reversed on appeal unless it plainly appears that the trial court abused its discretion." *Id.* "Abuse of discretion means that the trial court exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable." *Id.*

2. Interpretation Of A Court Rule Is Subject To De Novo Review

"Interpretation of a court rule is a question of law, subject to de novo review." *Gourley v. Gourley*, 158 Wn.2d 460, 466, 145 P.3d 1185 (2006). "In determining the meaning of a court rule, [the court] appl[ies] the same principles used to determine the meaning of a statute." *Id.* "Foremost, [the court] consider[s] the rule in accord with the intent of the drafting body." *Id.* "If the rule's meaning is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent." *Id.*

3. Summary Judgment Review Is De Novo

"On appeal of summary judgment, the standard of review is de novo, and the appellate court performs the same inquiry as the trial court." *Lybbert v. Grant County, State of Washington*, 141 Wn.2d 29, 1 P.3d 1124 (2000) (citing *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 197-98, 943 P.2d 286 (1997)). "When ruling on a summary judgment motion, the court is to review all facts and reasonable inferences therefrom most favorably toward the nonmoving party." *Id.* (citing *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994)). "A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* (citing *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995)); see also, CR 56(c)).

4. A Motion For Reconsideration Is Reviewed For Abuse Of Discretion.

"Motions for reconsideration are addressed to the sound discretion of the trial court; a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of that discretion." *Wagner Dev., Inc. v. Fid. & Deposit Co. of Maryland*, 95 Wn. App. 896, 906, 977 P.2d 639 (1999) (citation omitted). "A trial court abuses its discretion when it

exercises it in a manifestly unreasonable manner or bases it upon untenable grounds or reasons." *Id.* (citations omitted).

B. The Surprise In The Amount Of Lamar's Default Judgment Does Not Support The Trial Court's Vacation

The trial court abused its discretion by setting aside Lamar's default judgment. The fact that the substantial amount of the judgment may have been a surprise to Harwood and Franklin or may have been a lesser sum in a contested hearing is not sufficient to vacate Lamar's default judgment, especially when Harwood and Franklin made an informed decision after being served with the summons and complaint not to appear in this case before the order of default and default judgment were entered on November 19, 2008.

Harwood and Franklin were legally served on October 28, 2008, and pursuant to the applicable civil rules, Lamar obtained its order of default and default judgment only after the requisite time period had elapsed. Yet, the trial court summarily dismissed Lamar's default judgment by concluding that it was "*no big stretch, and it shouldn't be a surprise that I am going to vacate the default, this is a default for a half a million dollars, more than half a million dollars.*" RP 9-10.

Because the size of a default judgment is insufficient to support vacation, the trial court's decision was an abuse of discretion and must be

overturned, and the reinstatement of Lamar's default judgment is appropriate.

1. The Trial Court Abused Its Discretion in Vacating Lamar's Default Judgment.

“[O]ur Supreme Court [has] held that a trial court abuses its discretion if it sets aside a default judgment solely because the ‘**defendant is surprised by the amount or ... the damages might have been less in a contested hearing.**’” *Rosander v. Nightrunners Transp., Ltd.*, 147 Wn. App. 392, 408, 196 P.3d 711 (2008) (quoting *Little v. King*, 160 Wn.2d 696, 706, 161 P.3d 345 (2007) (emphasis added). Thus, reversal of the trial court's mistaken ruling is required.

CR 55 provides that, “[w]hen 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.” *Morin v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956 (2007) (quoting CR 55(a) (1)). “The rule further provides, ‘[f]or good cause shown and upon such terms as the court deems just, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with rule 60(b).’” *Id.*

“Applying CR 55 and CR 60 liberally, this court has required 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.” *Id.* at 755. “[W]hether or not a party has substantially complied with the rules must be decided against the fact that litigation is a formal process. Those who are served with a summons must do more than show intent to defend; they must in some way appear and acknowledge the jurisdiction of the court after they are served and litigation commences.” *Id.* at 749.

Under CR 60(b), a default judgment may be set aside if the following four elements are met:

- (1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party;
- (2) that the moving party’s failure to timely appear in the action, and answer the opponent’s claim, was occasioned by mistake, inadvertence, surprise or excusable neglect;
- (3) that the moving party acted with due diligence after notice of entry of the default judgment; and
- (4) that no substantial hardship will result to the opposing party.

Id. at 755; see also, *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968).

In this case, Harwood and Franklin's defenses fail to meet the requisite standards that would have warranted vacation of Lamar’s default

judgment. Harwood and Franklin argued to the trial court the following defenses:

- "Defendants suggest that plaintiff's unwillingness to stipulate to the vacation of the default judgment constitutes a tacit recognition of the weaknesses of its claims on the merits."
- "[D]efendants properly terminated [the Lease] in accordance with its terms upon the sale of the property at issue."
- "[D]efendants failure to appear resulted from an unfortunate set of circumstances in which Mr. Harwood, having retained counsel prior to being served, assumed that the case was being defended and failed to notify his counsel and his co-defendant (the client contact for the representation) that he had actually been served with process."³

CP 52-58, 65-66.

a) Harwood and Franklin did not have a prima facie defense.

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 ... where there has been no prima facie showing of a defense on the merits." *Commercial Courier Serv., Inc. v. Miller*, 13 Wn. App. 98, 533 P.2d 852 (1975). "To establish a prima facie defense, affidavits supporting motions to vacate default judgments must set out the

³ The assertion is made that Mr. Harwood had retained counsel prior to being served on October 28, 2008, but according to his declaration filed in support of the motion to vacate, he did not retain Mr. Spurr until October 31, 2008, which would have been three (3) days after he had been served with Lamar's Summons and Complaint.

facts constituting a defense and cannot merely state allegations and conclusions. A court hearing a motion to vacate decides whether the affidavits presented set forth substantial evidence to support a defense to the claim.” *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 239, 974 P.2d 1275 (1999). “Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise.” *Id.*, at 242. “After a party obtains a judgment, it is presumed that he or she has substantial evidence to support his or her claim. If a CR 60 movant cannot produce substantial evidence with which to oppose the claim, there is no point to setting aside the judgment and conducting further proceedings.” *Pfaff v. State Farm Mut. Auto. Ins. Co.*, 103 Wn. App. 829, 834, 14 P.3d 837 (2000).

Initially, Mr. Joseph Harwood’s declaration filed in support of the motion to vacate did not contain any specific facts that would demonstrate a prima facie defense to Lamar’s claims. CP 65-66. The only potential evidence contained in Mr. Harwood's declaration was self-serving allegations and conclusions. *Id.* Mr. Harwood simply referenced termination of the Lease and sale of the Property, but nothing further. *Id.* At a minimum, Mr. Harwood's declarations certainly didn’t address or provide a defense to Lamar's claims such as trespass or conversion even if

a dispute existed over the interpretation of the Lease termination provision. See, CP 65-66.

Harwood and Franklin's defense that Lamar's unwillingness to vacate the default judgment "constitutes a tacit recognition of the weakness of its claim on the merits" is simply unfounded. Such a statement has no support in the record and is merely a legal conclusion. The fact that Lamar declined to acquiesce to Harwood and Franklin's request after they, including counsel, intentionally chose not to take any action to notify the court or Lamar's legal counsel of their intention to defend Lamar's claims doesn't affect Lamar's belief in its claims. In fact, Lamar's decision was based upon the direct and specific conduct, or lack thereof, of Harwood and Franklin. Harwood and Franklin never filed a notice of appearance in response to being properly served with the Summons and Complaint until after Lamar had obtained a default judgment. As such, the only tacit recognition is that Harwood and Franklin were unable to adhere to the civil rules, which the trial court erroneously condoned.

Harwood and Franklin also alleged as a defense that the Lease was terminated in accordance with its terms when the Property was sold. However, once again, Harwood and Franklin never provided the trial court with substantial evidence that it terminated the Lease consistent with the

requirements of the pertinent Lease terms. Specifically, that Harwood didn't have any further interest in the Property. Harwood cannot demonstrate both prior to and after the Billboard's removal that they didn't maintain an ownership interest in the Property.

While a dispute may exist over the termination of the Lease, Harwood and Franklin, or any other party, did not have the right, contractually or otherwise, to destroy Lamar's Billboard without receiving prior approval from Lamar, especially when the Lease is clear that the Billboard was to remain the property of Lamar at all times.

When Harwood and Franklin authorized the destruction of the Billboard they willfully converted Lamar's property without lawful justification depriving Lamar of its right to possession.

If it was Harwood and Franklin's belief that they had properly terminated the Lease, contrary to Lamar's written contention otherwise, then their recourse was to seek guidance from the courts as to the proper interpretation of the Lease terms. Instead, Harwood and Franklin, or the other Parties took matters into their own hands and destroyed Lamar's Billboard, which it will never be able to replace under the City of Spokane's Municipal Code. See, S.M.C. 11.17.315.

The trial court's willingness to vacate Lamar's default judgment based upon such limited evidence can only be viewed as having been

accomplished because the trial court was surprised at the size of the default judgment. Such a decision by the trial court is an abuse of discretion.

b) Harwood and Franklin's conduct was not excusable neglect.

Harwood and Franklin's last defense was premised on excusable neglect and inadvertence. In essence, Harwood and Franklin claimed that because of "an unfortunate set of circumstances" they were unable to file a notice of appearance. CP 54. The extent of those "circumstances" is to state that they "assumed the case was being defended" by their counsel, yet, they "failed to notify [their] counsel and [their] co-defendant ... that [they] had been actually served with process." CP 54-55. 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.*, 13 Wn. App. at 106.

Harwood and Franklin's defense of excusable neglect and inadvertence is woefully insufficient to permit vacation of Lamar's default judgment. Again, the facts are that Harwood and Franklin were personally served with the Summons and Complaint on October 28, 2008, which was three (3) days before Mr. Spurr was retained on October 31, 2008. CP 23-26, 65-66. Harwood and Franklin never informed Mr. Spurr that they had

been legally served prior to entry of the default judgment, which was due to their own inexcusable neglect. Harwood and/or Franklin have had detailed knowledge of the circumstances surrounding this Lease since March 2007 when they first attempted to terminate it. Lamar's Complaint asserted multiple causes of action, including breach of contract, conversion, and trespass, stating specific details surrounding the basis for each cause of action, and also sought substantial damages.

The plain language of the Summons required Harwood and Franklin to appear within twenty (20) days, which they failed to do. Harwood and Franklin submitted no evidence that they ever made any attempt to file a notice of appearance prior to the default judgment, either formally or informally, and their "assumptions" as to representation fail to satisfy either excusable neglect or inadvertence.

By failing to appear and defend in a lawsuit, "a defaulting defendant bears the risk of surprise at the size of a default judgment." *Shepard Ambulance, Inc.*, 95 Wn. App. at 240-41 (quoting *J-U-B Engineers, Inc. v. Routsen*, 69 Wn. App 148, 151, n.2, 848 P.2d 733 (1993)). As such, because Lamar's default judgment was properly obtained and Harwood and Franklin cannot prove their conduct was excusable neglect, the trial court's ruling was an abuse of discretion.

c) Lamar does not dispute that Harwood and Franklin acted with due diligence

Harwood and Franklin moved with due diligence in filing their Motion to Vacate Default Judgment upon learning of the default judgment and Lamar does not dispute this fact on appeal.

d) Lamar endured substantial hardship

Lamar has endured substantial hardship, including this appeal, because of the trial court's erroneous ruling to vacate Lamar's default judgment. The issues in this case have been ongoing since March of 2007, of which Harwood and Franklin were acutely aware. The fact that they willfully and wrongfully converted Lamar's Billboard, among other things, without penalty is a travesty that should not be permitted.

Lamar adhered to the requirements of the civil rules in filing its Summons and Complaint, personally serving Harwood and Franklin, and obtaining its default judgment against as provided by law. Lamar has lost the ability to ever construct another billboard in the City of Spokane because of the Parties improper conduct. The permanent loss of the Billboard has caused Lamar substantial damages. See, CP 41-42, 200-04, 209-19. Such damages include the significant revenue that Lamar would have been receiving had the Billboard still been maintained on the Property. Moreover, due to Harwood and Franklin's conduct Lamar had to contend with the potential claims and consequences from those advertisers

that maintained contractual agreements with Lamar to advertise on the Billboard.

Finally, the trial court's subsequent flawed decision to grant the Parties summary judgment motions has now created further hardship for Lamar for having to appeal the trial court's mistaken rulings. Therefore, reversal of the trial court is appropriate.

2. Lamar's Default Judgment Was Not Procedurally Defective.

Even though Harwood and Franklin did not move the trial court to vacate the order of default, nor does the trial court's order vacating the default judgment indicate otherwise, their decision to withhold a response to the personal service of Lamar's Summons and Complaint must run to their detriment and not Lamar's responsibility. Furthermore, Harwood and Franklin's claims that CR 55 purports to allow a defaulted party to rely upon the appearance of another party such that it can rely upon that party's notice of appearance and subsequent internal communication to avoid a default and/or default judgment is not supported by any legal authority.

Harwood and Franklin's interpretation of CR 55 is a strained interpretation at best, and if followed renders the rule internally inconsistent. Moreover, it provides a perverse incentive for potential defaulted defendants to lie in the weeds gauging their defense only to

vacate a default judgment after it is obtained on the guise that an "appearing" party should have been provided notice. In a case such as here, Harwood and Franklin made a tactical decision not to file a notice of appearance or communicate with Lamar's counsel and they should not be permitted to circumvent their legal obligations under the relevant civil rules and law.

CR 55(a)(3) states,

Any party who has appeared in the action for any purpose shall be served with a written notice of motion for default and the supporting affidavit at least 5 days before the hearing on the motion. Any party who has not appeared before the motion for default and supporting affidavit are filed is not entitled to a notice of the motion, except as provided in rule 55(f)(2)(A).⁴

Contrary to Harwood and Franklin's assertions, CR 55(a)(3) did not require Lamar to provide them with notice of the default judgment hearing because they had not appeared in the case. Further, Lamar was not required to give Apartments, Spokane Housing, and the Association notice because a default judgment was neither sought nor entered against them. **The only parties that are entitled to notice under the rule are those parties that 1) have appeared in the case, and 2) a default judgment will be entered against that appearing party.** Harwood and Franklin did

⁴ The provisions set forth in CR 55(f)(2)(A) do not apply in this case.

not appear in the case and they cannot cast their legal obligations to appear onto the back of Apartments, Spokane Housing, and the Association. That is neither the intent nor the proper interpretation of the rule.

“CR 55 provides a party cannot enter a default judgment against another party who has ‘appeared in the action for any purpose’ **without notice to that party**. If the court enters an order of default in a case where an appearing party lacks notice, the defaulted party is entitled as a matter of right to have the judgment set aside.” *Ellison v. Process Sys. Inc. Constr. Co.*, 112 Wn. App. 636, 642, 50 P.3d 658 (2002) (citations omitted) (emphasis added). “[A] party ‘appears’ in an action when the party ‘answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his appearance.’” *Id.* at 643 (quoting RCW 4.28.210). “[M]ere intent to defend, whether shown before or after a case is filed, is not enough; the defendant must go beyond merely acknowledging that a *dispute* exists and instead acknowledge that a dispute *exists in court*.” *Morin*, 160 Wn. at 756 (emphasis in original). “The language chosen [in CR 55(a)(3)] evidences an intent to impose a notice requirement only in limited circumstances.” *Smith v. Arnold*, 127 Wn. App. 98, 109, 110 P.3d 257 (2005). “Parties formally served with a summons and complaint must respond to the summons and complaint or suffer the consequences of a default judgment.” *Morin*, 160 W.2d at 757.

In this case, Harwood and Franklin asserted in the trial court that Lamar's motion was "procedurally defective" because "pursuant to CR 55(a)(3), plaintiff could not take a default without providing Mr. Garvin's⁵ office with five days' notice of its motion." CP 53-54. Furthermore, Harwood asserts, "If plaintiff had complied with [the] rule prior to entering a default judgment against the moving defendants, Mr. Garvin would have contacted the moving defendants or their counsel and the default judgment would never have been entered." *Id.*

Moreover, counsel for Harwood and Franklin made the following statements concerning their failure to respond:

- "[T]here is no question that we had a communication breakdown on our end." RP 21-23.
- "Since none of my clients had been served and not wishing to trigger immediate discovery and litigation activity ... I did not immediately file a notice of appearance." CP 57-59.

In support of an excusable neglect or inadvertence claim, Harwood and Franklin admit only that they had a communication breakdown with their counsel. However, as the law in this arena is clear, communication

⁵ Counsel for Apartments, Spokane Housing, and the Association.

problems do eviscerate Harwood and Franklin's legal obligations under the civil rules to respond or appear in this case.

Harwood and Franklin, with the assistance of their legal counsel, made an informed decision to not take any action in the case, including filing a notice of appearance with the court or Lamar's counsel. The fact that Harwood and Franklin did not communicate with Mr. Spurr about actual service of the summons and complaint is not Lamar's responsibility. To the contrary, Harwood and Franklin, once service was effectuated, were required to formally appear or potentially suffer the consequences of their action(s), including a sizeable default judgment.

A plain and simple reading of CR 55 renders Harwood and Franklin's interpretation of the rule inaccurate. First, it is undisputed that Harwood did not file a notice of appearance prior to the entry of the default judgment on November 19, 2008. Second, it is undisputed that Harwood and Franklin, or its counsel, never contacted Lamar advising it or its attorney that they intended to defend the lawsuit. In fact, Harwood, Franklin, and their counsel made a conscious decision not to file a notice of appearance.

Third, CR 55 only requires that Lamar provide notice of a default judgment hearing to a party that has actually appeared in the case **and** is having a default entered against that party. See, *Ellison*, 112 Wn. App. at

642. Lamar did not seek or obtain a default judgment against Apartments, Spokane Housing, and the Association. Rather, the default judgment was only obtained against Harwood and Franklin. Thus, Harwood and Franklin's interpretation of the rule is inconsistent with the applicable legal authority.

Fourth, in their Motion to Vacate Default Judgment Harwood and Franklin failed to cite any legal authority for the proposition that another defendant that has filed an appearance is entitled to notice such that the appearing defendant can subsequently contact the non-appearing defendant(s) to inform them that a default judgment hearing is pending. The case law is clear that a defendant "must go beyond merely acknowledging that a *dispute* exists and instead acknowledge that a dispute *exists in court*." See, Morin, 160 Wn. at 756. Harwood and Franklin cannot convey their legal obligation to file an appearance on the coattails of another defendant that has followed the procedural rules. Washington has rejected the informal appearance doctrine. See, Morin, 160 Wn.2d 745. Harwood and Franklin simply attempted to impute the efforts of Apartments, Spokane Housing, and the Association in adhering to the procedural rules with the hopes that such efforts could vacate the default judgment.

Amazingly, the trial court agreed. The trial court stated, "We have all been in this situation where we've gotten a default and then later had some judge say, yes, maybe technically followed the rules, but that's not the way we do things...." *February 4, 2009*, RP 9.

The Court went on to say, "**Here the interesting thing about this particular motion, and I hate to get folksy, because when I do, it invariably ends up in the Court of Appeals' publications somewhere, but I will tell you what I think happened here. I think that, and here is where the folksy stuff is going to come in, and I regret it, I think the plaintiff jumped the gun and then I think the defense was asleep at the switch, and that's as simple as it gets.**" *Id.*, RP 10.

Here, Lamar obtained its order of default and default judgment on November 19, 2008 after waiting more than the required time period set forth in the civil rules. Lamar did not "jump the gun". If Lamar had moved for an order of default and default judgment prior to the requisite time period allowed, then support would have existed for such a statement. But the facts clearly demonstrate that Lamar acted within its rights under the civil rules.

Conversely, Harwood and Franklin, through counsel, affirmatively acted when the decision was made to refrain from either a) filing a notice of appearance after being legally served, or b) not making any contact

with Lamar's counsel. Because such conduct was insufficient to vacate Lamar's default judgment, the trial court erred in its ruling. Lamar was not required to provide Harwood and Franklin, or Apartments, Spokane Housing, and the Association with notice of the default judgment hearing under the rules. Accordingly, reversal on appeal is appropriate.

C. The Trial Court Mistakenly Ruled That The Destruction Of Lamar's Billboard Without Authorization Did Not Amount To Conversion Of Lamar's Property.

The trial court committed reversible error when it denied Lamar's Motion for Partial Summary Judgment on conversion. It is undisputed that 1) the Lease provided Lamar was to remain the owner of the Billboard at all times, 2) Lamar never gave any notice, written or otherwise, approving or authorizing the removal of the Billboard on October 15, 2008, and 3) Lamar's legal counsel sent all Parties involved a letter on October 1, 2008 that the Lease had not been terminated pursuant to its terms and prohibiting the Billboard's removal.

Yet, less than two weeks after receipt of the October 1st letter, Lamar's Billboard was cut into small pieces and removed from the Property. CP 470. Furthermore, even though a dispute over the interpretation of the Lease terms had occurred, nothing in the record evidences any intent or action on the part of the Parties to seek court assistance to ascertain the intent and meaning of the Lease provisions

before the Billboard was removed. CP 1-576. Lamar, as a tenant, had rights under the Lease and rights set forth in the unlawful detainer statutes to be free from unjustified and willful interference with its property. See, RCW 59.12. The trial court's decision must therefore be reversed and Lamar's summary judgment motion granted.

"A cause of action in conversion is deeply ingrained in this state's jurisprudence, having been recognized since territorial times. Conversion is a derivative of the common law action of trover, 'which redressed an interference with one's interest in a chattel that was substantial enough to justify compelling the wrongdoer to pay for it as in a forced sale.'" *Potter v. Washington State Patrol*, 165 Wn.2d 67, 78, 196 P.3d 691 (2008) (internal citations omitted).

"Conversion is the unjustified, willful interference with a chattel which deprives a person entitled to the property of possession. The burden is on the plaintiff to establish ownership and a right to possession of the converted property." *Meyers Way Dev. Ltd P'ship v. Univ. Sav. Bank*, 80 Wn. App 655, 674-75, 910 P.2d 1308 (1996). "[T]he plaintiff need only establish 'some property interest in the goods allegedly converted.'" *Id.* at 675.

A common law action for trespass to chattel is committed when a party *intentionally* dispossesses another of the chattel or uses or

intermeddles with the chattel in another's possession. Restatement (Second) of Torts § 217. A cause of action for trespass to chattels or conversion requires that the defendant has seized or taken dominion over the plaintiff's property without legal authority. *Bakay v. Yarnes*, 431 F.Supp.2d 1103 (W.D.Wash., 2006). The trespasser is liable to the possessor of the chattel if: he *dispossesses* the other of the chattel, **or** the chattel is impaired, **or** the possessor is deprived of the use of the chattel, **or** bodily harm is caused to the possessor or to some thing in which the possessor has a legally protected interest. Rest. (Second) Torts § 218. In Washington, the owner has no duty to accept the property converted if it is tendered to him. *City Loan Co. v. State Credit Ass'n*, 5 Wn. App. 560, 563, 490 P.2d 118 (Div. 2, 1971); see also, *Washington State Bank v. Medalia Healthcare LLC*, 96 Wn. App. 547, 554, 984 P.2d 1041, 1045 (1999)

“A chattel is ‘[a]n article of personal property, as distinguished from real property. A thing personal and moveable. It may refer to animate as well as inanimate property.’” *In re Marriage of Langham*, 153 Wn.2d 553, 565, 106 P.3d 212 (2005) (quoting *Black's Law Dictionary* 236 (6th ed.1990)).

Here, the trial court's ruling contradicts the applicable law and facts of this case. First, Lamar maintained exclusive ownership of the

Billboard. CP 11. At no time did any of the involved Parties have a possessory interest in the Billboard. The Lease provided, "[i]t is agreed between the parties that [Lamar] or its assigns shall remain the owner of the advertising sign structure at all times...." CP 11. More importantly, however, all of the interested Parties confirmed in their respective answers to Lamar's Requests for Admissions that Lamar was the sole owner of the Billboard. CP 158-99. Therefore, Lamar's ownership interest is undisputed.

Second, Lamar never permitted the Parties to remove the Billboard. CP 202. Third, the Parties failed to notify Lamar, at any time that they intended to demolish and remove the Billboard from the Property. CP 202-03. Instead, the Parties took the unilateral action to willfully remove Lamar's Billboard without even attempting to determine, through court action, if their interpretation of the Lease terms was appropriate under the circumstances. It was akin to old adage, "It's my way or the highway." Fortunately, that is not the law in the state of Washington.

Harwood, Franklin, and Apartments argued during the summary judgment hearings that the Lease had been terminated and notice of the Billboard's removal was unnecessary, but such termination did not extinguish Lamar's possessory interest in the Billboard based upon their

sole interpretation. To the contrary, court intervention was required to determine the intent of the Lease terms, and specifically, Harwood's ownership interest in the Property. Yet, the trial court summarily dismissed Lamar's claims after the fact, which was error.

The trial court concluded that the July 3, 2008 letter from Julie R. Stevenson satisfied the written notice provision for termination of the Lease. *February 3, 1010*, RP 16-18. As such, when Lamar didn't remove the Billboard, the Parties were authorized to remove it. *Id.*

The trial court's ruling disregards several important factors. First, Lamar was a commercial tenant under the Lease and maintained, in addition to its contractual rights, certain statutory protections under the pertinent landlord tenant laws. See, RCW 59.12. The most important of these protections is that landlord's are not permitted to use self-help remedies or forcible entry to evict a tenant. *Id.*; see also, *Gray v. Pierce Housing Authority*, 123 Wn. App. 744, 97 P.3d 26 (2004) (no landlord may ever use non-judicial, self-help remedies to evict a tenant). The physical removal and destruction of Lamar's Billboard under the relevant facts cannot be classified any other way than a self-help remedy or forcible eviction.

Second, Lamar's contractual rights under the Lease were essentially abrogated by the Parties because once the Billboard was

removed any dispute over Lamar's further tenancy evaporated due to Lamar's inability to ever replace the Billboard under the City of Spokane's Municipal Code.

Third, once Lamar provided the interested Parties with written notice of the Lease dispute on or about October 1, 2008, including that the Billboard was not to be removed, the Parties did not have the unilateral right to conclude that the eviction of the tenant, Lamar, was statutorily permitted. Even assuming Lamar was in breach of the Lease by being a holdover tenant that would not warrant the action to unlawfully remove Lamar's Billboard.

The Parties actions in seizing dominion over Lamar's Billboard without legal authority and subsequently dispossessing Lamar of its rights to use the Billboard demonstrates clearly that they converted Lamar's property. Lamar maintained a legally protected ownership interest in the Billboard, which is readily admitted, yet they individually and collectively made the decision to willfully remove it from the Property. Such willful conduct caused Lamar to incur significant financial damages for which it should be fully compensated, including but not limited to the value of the Billboard, Lamar's lost revenue, and other consequential damages. See, CP 19-20, 41-42, 200-04, 209-19.

The trial court's decision to deny Lamar's Motion for Partial Summary Judgment in light of the relevant facts and law demands that the trial court be reversed.

D. The Trial Court's Denial Of Lamar's Motion for Reconsideration Was An Abuse Of Discretion As A Holdover Tenancy In A Landlord Tenant Dispute Does Not Permit Non-Judicial Intervention.

The trial court's decision to deny Lamar's Motion for Reconsideration is not supported by the evidence or applicable legal authority. The trial court should have granted Lamar's Motion for Partial Summary Judgment and denied the cross-motions for summary judgment because as set forth in Section V. (C), *supra*, which is incorporated herein, the Parties willfully converted Lamar's Billboard and did not take steps to obtain judicial approval to remove the Billboard once Lamar indicated that a Lease dispute had arisen over its terms and tenancy.

The purpose of the unlawful detainer statute is to resolve the right to possession and restore 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. Thus, courts issue writs of restitution requiring tenants and their property to be physically removed by law enforcement officials and not landlords. See, RCW 59.12. Such action was entirely omitted in this case.

Moreover, the trial court's disregard of Lamar's contractual rights to remain on the Property was an abuse of discretion because it was denied an opportunity to receive judicial interpretation of the specific Lease terms that were in dispute. The trial court's conduct and disregard of the well established legal authority was an abuse of discretion that requires reversal.

VI. CONCLUSION

Justice Talmadge of the Washington Supreme Court once commented on the purpose of court rules and the dangers which may arise when a court disregards them. "We adopt court rules for the purpose of fair and efficient presentation of issues in our court system. If we carve judicial exceptions to every court rule we have adopted, we give little guidance to litigants or to the courts as to the operation of our system of justice. This is both unwise and unfair." *State v. Ford*, 137 Wn.2d 472, 490, 973 P.2d 452 (1999) (Talmadge dissenting).

By court rule and decisional law, Harwood and Franklin were obligated to "appear" in the action before they were entitled to notice of the default hearing. The arguments of Mr. Spurr are mere post hoc rationalizations, intended to deflect attention away from both his and his clients' clear failure to comply with CR 55. The trial court's decision granting the motion to vacate Lamar's default judgment injects uncertainty, rather than clarity, into the rule's application in future cases. Instead of applying the plain language of CR 55, the trial court carved out a "folksy" exception to the rule when it vacated Lamar's default judgment. This has created substantial inconvenience and expense for Lamar. The ruling vacating the default judgment was a manifest abuse of discretion and should be reversed.

Similarly, dismissal of Lamar's conversion claim on summary judgment is inconsistent with the undisputed material facts before the trial court. Lamar established its conversion claim with substantial evidence. The Parties' conclusory allegations and argumentative assertions to the contrary are insufficient to overcome a motion for summary judgment. Thus, Lamar's summary judgment was improperly denied and the Parties' summary judgment was improvidently granted. This also merits reversal.

For the reasons set forth herein, Lamar respectfully requests this Court GRANT the relief requested above.

VII. MOTION FOR ATTORNEY'S FEES AND COST ON APPEAL

Pursuant to RAP 18.1, Lamar hereby moves the Court for an award of its attorney's fees and costs on appeal. Lamar has incurred significant attorney fees and costs at both the trial court level and on appeal that it otherwise would not have incurred if the Parties had not breached the Lease. Lamar abided by the terms of the Lease and only through the wrongful acts of the particular Parties has it become involved in this litigation. Thus, equity requires that it be awarded all of its attorney's fees and costs.

Attorney's fees are generally not recoverable unless permitted by contract, statute, or a recognized ground of equity. *Aldrich & Hedman, Inc. v. Blakely*, 31 Wn. App. 16, 19, 639 P.2d 235, 237 (1982). "Where the natural and proximate consequences of the acts or omissions of a party to an agreement or an event have exposed one to litigation with a third person, equity may allow attorney's fees as an element of consequential damages." *Id.* "Three elements are necessary to create this equitable right to recover attorney's fees: (1) a wrongful act or omission by A towards B; (2) such act or omission exposes or involves B in litigation with C; and (3) C was not connected with the original wrongful act or omission of A toward B." *Id.* at 20, 639 P.2d at 237.

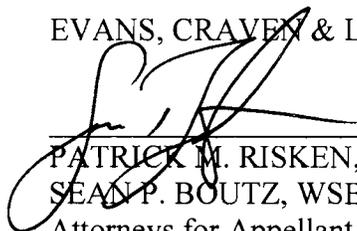
Here, the facts support an award of Lamar's attorney's fees and costs. First, as set forth *supra*, the Parties committed wrongful acts towards Lamar when it unilaterally chose to destroy Lamar's Billboard by ordering its removal and destruction. The Parties converted Lamar's Billboard for their own use and willfully deprived Lamar of its rightful possession.

Second, the Parties' wrongful acts have exposed and involved Lamar in litigation that it otherwise would not have become involved in under the terms of the Lease. Third, the Parties' original wrongful acts against Lamar in removing the Billboard, whether individually or collectively were not attributed to, potentially, certain Parties.

As such, the Parties' wrongful acts of destroying and removing the Billboard have involved Lamar in litigation in which it would not have otherwise become involved if the terms of the Lease had not been breached. Therefore, Lamar is entitled to recovery of all of its attorney's fees and costs.

RESPECTFULLY SUBMITTED this 17th day of November, 2010.

EVANS, CRAVEN & LACKIE, P.S.



PATRICK M. RISKEN, WSBA #14632

SEAN P. BOUTZ, WSBA #34164

Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of this Statement of Arrangements to be served on the following in the manner indicated below:

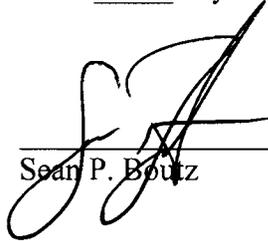
Counsel for Defendants Joseph & Kristi
Harwood, Bell Franklin, LLC and Bel
Condominium Owners Association

| | | |
|-------------------------------------|--------------------|-------------------------------------|
| William R. Spurr | Via Regular Mail | <input checked="" type="checkbox"/> |
| 1001 4th Ave., Suite 3600 | Via Certified Mail | <input type="checkbox"/> |
| Seattle, WA 98154 | Via Facsimile | <input type="checkbox"/> |
| 206-682-2692 | Hand Delivered | <input type="checkbox"/> |
| Email <u>bill@williamrspurr.com</u> | Email | <input checked="" type="checkbox"/> |

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

| | | |
|-------------------------------------|--------------------|-------------------------------------|
| Peter A. Witherspoon | Via Regular Mail | <input type="checkbox"/> |
| Lawrence Garvin | Via Certified Mail | <input type="checkbox"/> |
| Workland & Witherspoon, PLLC | Via Facsimile | <input type="checkbox"/> |
| 714 Washington Mutual Financial Ctr | Hand Delivered | <input checked="" type="checkbox"/> |
| 601 West Main Avenue | | |
| Spokane, WA 99201-0677 | | |

Dated at Spokane, Washington this 17th day of November, 2010.



Sean P. Bouz