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COURT OF APPEALS  
SPokane, Washington  
By \_\_\_\_\_

No. 34714-1-III

COURT OF APPEALS, DIVISION 3  
OF THE STATE OF WASHINGTON

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FPA CRESCENT ASSOCIATES, LLC, a Delaware limited liability  
company, Respondent

v.

JAMIE'S LLC; PENDLETON ENTERPRISES, LLC, a Washington  
limited liability company, d/b/a The Daiquiri Factory Spokane; and  
JAMIE PENDLETON, an individual, Appellants.

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BRIEF of APPELLANT

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## **A. ASSIGNMENTS OF ERROR**

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- No. 2. The trial court erred in its Finding of Fact 8 by allowing additional claims to an Unlawful detainer action. Unlawful detainer actions specifically address the right to possession and rent. Additional claims including "contract breach and guarantee claims" are not allowed.
- No 3. The trial court erred in its Finding of Fact 9, wherein it limited the reversal by the Appeals Court to the issuance of the writ of restitution. The Court of Appeals reversed the Summary Judgment in its entirety; it did not limit the reversal to the writ of restitution.
- No. 4. The trial court erred in its Finding of Fact 10, wherein it determined that the Plaintiff has a unilateral right to "reinstate a lease on the same terms and conditions."
- No. 5. The trial court erred in its Finding of Fact 10 regarding return of possession to Defendants. Defendants did not get full possession to the premises on March 28, 2016.

No. 6. The trial court erred in its Finding of Fact 13, wherein it stated that Pendleton appealed only liability under Counts 2 and 4, not damages. If Pendleton is not liable under these counts, there are no damages incurred.

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Defendants were tenants; the same scrutiny, and test was not applied to the Plaintiff's counsel representing the landlord.

- No. 11. The trial court erred in its Finding of Facts 18 and 33 wherein as justification for FPA's attorney fee offset, it reasoned that the case was about "commercial contract law in a unique business setting." The original case involved a statutory unlawful detainer action.
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- No. 13. The trial court erred in its Findings of Fact 16-20. and omitted material facts. The trial court failed to address the fact that it awarded the Plaintiff's 100% of their attorney fees in the Summary Judgment without any scrutiny whatsoever.
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No. 23. The trial court erred in its Conclusion of Law 7 and finding of fact that no party prevailed on Count 3.

No. 24. The trial court erred by not vacating all judgments against the Defendants after the mandate was filed by the Court of Appeals reversing the Summary Judgment.

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

The assignments of error as asserted above can be distilled into two separate issues on which Pendleton seeks review by this Court.

Issue 1. Where the Court of Appeals previously dismissed the entire unlawful detainer action in the first appeal ruling, and reiterated that the action was dismissed in the second appeal order, can the

trial court extract individual alleged contract claims from that action where possession remained at issue throughout the course action?

Issue 2. Does the trial court's breadth of discretion in calculating, awarding, and offsetting attorneys' fees and costs allow it to employ different levels of scrutiny, and means of calculation, and bias between the parties wherein for the original prevailing party the trial court gave no scrutiny to the party's proffered expenses, and after that decision was overturned in appeal, the trial court employed great scrutiny, and different analysis in calculating the costs, and offsets for each party- effectively reducing the prevailing party's fees and costs to a negligible amount?

### **C. STATEMENT OF CASE**

This case has a history in this Court of Appeals, and is being revisited for a third time in this matter.

The original matter commenced, when, on May 28, 2014, FPA CRESCENT ASSOCIATES, LLC, (hereinafter "FPA") filed a Verified Complaint for Unlawful Detainer against the Appellants, JAMIE'S LLC; PENDLETON ENTERPRISES, LLC, a Washington limited liability

company, d/b/a The Daiquiri Factory Spokane; and JAMIE PENDLETON, an individual (hereinafter "Pendleton"). CP 359. On June 12, 2014, the trial court issued a writ of restitution for the premises occupied by the tenant, Pendleton in favor of the landlord, FPA. *Id.* By order dated August 12, 2014, the trial court granted summary judgment in favor of FPA. *Id.* This was followed on September 10, 2014, when the trial court entered an judgment against Pendleton for damages, attorneys' fees, costs, and expenses. *Id.* On October 10, 2014, the trial court entered an Attorneys' Fees and Costs Money judgment in favor of FPA in the amount of \$49,870.50. CP 359. Pendleton appealed this judgment, which was adjudicated by this Court of Appeals. *FPA Crescent Associates, LLC v. Jamie's LLC*, 190 Wn.App. 666 (Div. 3 2015). In this ruling, the Court of Appeals reversed the trial court's grant of summary judgment; held that Pendleton was not guilty of unlawful detainer; dismissed FPA's action against Pendleton; and remanded the issue of "relief pursuant to RCW 59.12.090" to the trial court. *Id.*

On remand, Pendleton moved the trial court for an award of attorney fees and costs in its favor, and to order the premises to be restored to the tenant. CP 1-3. This motion was based on the ruling in *FPA Crescent Associates v. Jamie's LLC*, which reversed the trial court's ruling, and dismissed the action by FPA, making Pendleton the "prevailing party,"

and the terms of the lease agreement that entitled the prevailing party to attorney fees and costs. CP 4-5.

On December 22, 2015, the Appeal Court Mandate was filed in the trial court. CP 42-57.

The trial court then held a hearing on Pendleton's motion on January 7, 2016. CP 59. At this hearing the trial court issued an "oral ruling," a copy of which is included in the record, in its entirety, in the Defendant's Opening Brief on Remand, but postponed a written ruling until later. CP 63 -142. On January 8, 2016 the trial court sent a letter to counsel declaring that a fundamental issue existed as to whether some of the counts in the original trial court action remained viable, and whether the "Court of Appeals, Div. III dismissal of "FPA's unlawful detainer action against Pendleton", pg 14, *slip op.*, covered all counts in the complaint. CP 60. The trial court then set a briefing scheduled to address this issue. CP 61-62. Pendleton filed its Opening Brief on Remand in response to this scheduling order. CP 63-142.

On March 29, 2016 the trial court entered its Findings of Fact and Conclusions of Law based on the briefings by counsel. CP 250-254. In its Findings of Fact, the trial court determined that the Court of Appeals "did not dismiss FPA's remaining causes of action", and set a scheduling

conference to litigate two counts that it believed were not dismissed by the court of appeals. CP 265. Pendleton promptly filed a Notice of Appeal on this issue alleging the court erred on continuing to consider dismissed claims. CP 255-262.

After this Notice of Appeal was filed, the Appeals Court set a hearing to determine finality in this second appeal, the result of which the Court of Appeals issued an "Order Granting Discretionary Review in Part and Clarifying Opinion" filed on October 20, 2015. CP 270-272. In this order, the Court of Appeals clarified that it Reversed the trial courts summary judgment, and remanded the issue of "Pendleton's costs, attorney fees, and damages". *Id.* This effectively ended the second appeal and halted the trial courts attempts to continue litigating counts that were dismissed in the first appellate action.

After receipt of this order from the Court of Appeals, the trial court set a briefing schedule to address the issue of fees and costs - the issue presented by Pendleton back in November 2015. CP 280-281. After briefing, the trial court entered an Order for Entry of Judgment in the matter. CP 357-365. In this order, the trial court explained its reasoning for the final judgment of fees and costs. CP 360-365. The trial court did no such reasoning nor analysis prior to awarding FPA its attorneys' fees, in

the amount proffered by FPA's counsel, in the original judgment. On October August 28, 2016, the trial court entered a final judgment in this action. CP 366-367. Pendleton is appealing the basis for this judgment.

#### **D. SUMMARY OF ARGUMENT**

The core question at the heart of this appeal is did the trial court give preferential treatment to FPA, the plaintiff, and were the trial court's actions fair, equitable, and consistent with the law. Pendleton argues that the actions of the trial court evidence bias, and that the trial court's findings of fact and conclusions of law are not supported by the laws of Washington.

The multiple errors by the trial court alleged by the appellant, Pendleton, can be grouped into two simple issues: 1) can the trial court join civil breach of contract claims with an unlawful detainer action where possession of the premises remains at issue; and, 2) did the trial court show bias against the defendants/appellants in calculating its damages and offsets?

An unlawful detainer action is limited to the question of rightful possession of the premises, and unpaid rent. *Munden v. Hazelrigg*, 105 Wn.2d 39,45 (1985). Because it is a special proceeding for the specific

purpose of providing an expedited method for resolving the right to possession, it is not a vehicle for hearing other matters such as contract claims. *See Id.* In this case, the court erroneously allowed FPA to segregate contract claims from the possession claims while the possession of the premises was still at issue, and after FPA's failure to provide statutory notice was challenged by Pendleton. See Generally CP 357-365, *FPA Crescent Associates, LLC v. Jamie's LLC*, 190 Wn.App. 666 (Div. 3 2015).

A trial court cannot extract and segregate individual alleged contract claims from an unlawful detainer action where possession remained at issue throughout the course action, especially after the Court of Appeals previously dismissed the entire unlawful detainer action in the first appeal.

With respect to the calculation of attorneys' fees, trial courts have broad discretion. *Mahler v. Szucs*, 135 Wn.2d 398, 435 (1998). But, a trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn.App. 191, 214 (2007 Div. 1). Here, the post-appeal record, and specifically the Findings of Fact, Conclusions of Law and Order entered by the trial court on August 18, 2016 clearly show that the trial court treated Pendleton with a different level of scrutiny than

it did FPA, leading to questions about trial court bias on behalf of Pendleton.

A trial court's breadth of discretion in calculating, awarding, and offsetting attorneys' fees and costs does not allow it to bias one party by treating it differently than the other, nor does it allow the trial court to employ different levels of scrutiny, and means of calculation between the parties in order to reduce the prevailing party's fees and costs to a negligible amount.

Pendleton asks this Court of Appeals to reverse the trial courts order and judgment, to re-calculate the fees and costs due, and to issue an order and judgment to that effect.

## E. ARGUMENT

- 1. A trial court cannot extract and segregate individual alleged contract claims from an unlawful detainer action where possession remained at issue throughout the course action, especially after the Court of Appeals previously dismissed the entire unlawful detainer action in the first appeal.**

An unlawful detainer action is a " narrow one, limited to the question of possession and related issues such as restitution of the premises and rent." *Munden v. Hazelrigg*, 105 Wn.2d at 45. "In such proceedings the superior court sits as a special statutory tribunal, limited to deciding the primary issue of right to possession together with the statutorily designated incidents thereto, i.e., restitution and rent or damages." *FPA Crescent Assocs. v. Jamie's LLC*, 190 Wn. App at 674-675 citing *McRae v. Way*, 64 Wn.2d 544, 546 (1964). *See Also Granat v. Keasler*, 99 Wn.2d 564, 571 (1983). The unlawful detainer action in chapter 59.12 RCW provides an expedited statutory process to deal with tenant default, hastening the recovery of real property for a landlord who acts in compliance with the statutory requirements (having priority over all non-criminal cases other than previously-filed unlawful detainer actions). *FPA Crescent Assocs.* at 675. *See Also* RCW 59.12.130.

In order to ensure the summary nature of unlawful detainer proceedings, counterclaims and setoffs are generally not permitted.

*Heaverlo v. Keico Industries, Inc.*, 80 Wn.App. 724, 725 (1996 Div. 3);

*Granat v. Keasler*, 99 Wash.2d 564 (1983); *First Union Mgt., Inc. v. Slack*, 36 Wash.App. 849(1984 Div. 2), 854; *Young v. Riley*, 59 Wash.2d 50 (1961). An exception to this general rule is made when the **tenants** proffer a counterclaim, affirmative equitable defense, or set-off that is based on facts which excuse a tenant's breach. *Munden v. Hazelrigg*, 105 Wash.2d at 45. Only, where the right to possession ceases to be at issue at any time between the commencement of an unlawful detainer action and trial of that action, may the proceeding may be converted into an ordinary civil suit for damages. *Id* at 45-46. There is no exception that allows landlords/plaintiffs to join general jurisdiction claims to an unlawful detainer proceedings while the right to possession is still in dispute.<sup>1</sup>

At the start of this action, the Plaintiff FPA Crescent Associates, LLC filed a summons for unlawful detainer against Pendleton. CP 65 The Plaintiff's complaint was entitled "**VERIFIED COMPLAINT FOR UNLAWFUL DETAINER UNDER RCW CH. 59.12.**" *Id.* The Plaintiff's complaint commenced by stating "Plaintiff FPA Crescent Associates, LLC, through its attorneys, Thomas T. Bassett, Todd Reuter, and K&L Gates LLP, as a cause of action for unlawful detainer, alleges as follows:" *Id.* The Verified Complaint proffered four causes of action. *Id.* For each of the causes proffered by the Plaintiff, the complaint stated

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<sup>1</sup> Nor can it be converted to an ordinary civil suit after the action is dismissed by a higher court as the trial court allowed in the case here.

"Plaintiff repeats and realleges the foregoing paragraphs as though fully set forth herein." *Id.* Therefore, each cause of action should be read as follows:

1. ACTION FOR ISSUANCE OF WRIT OF RESTITUTION.

Plaintiff FPA Crescent Associates, LLC, through its attorneys, Thomas T. Bassett, Todd Reuter, and K&L Gates LLP, **as a cause of action for unlawful detainer**, alleges [d]espite written demand, Defendants have failed to pay rent and other charges due under the Lease and have failed to surrender possession of the Premises. Plaintiff is entitled to a Writ of Restitution to protect its interest in the Premises. CP 66.

2. BREACH OF LEASE

Plaintiff FPA Crescent Associates, LLC, through its attorneys, Thomas T. Bassett, Todd Reuter, and K&L Gates LLP, **as a cause of action for unlawful detainer**, alleges Defendants breached the Lease by failing to make all payments due thereunder, including Common Area Costs, Taxes, Operating Expenses and late charges. As a result of Defendants' breach, Plaintiff has been injured in an amount not less than \$2,229.61, and is entitled to judgment against Defendants in the amount of unpaid rent and other charges due under the Lease at the time of judgment. *Id.*

3. BREACH OF LEASE- ILLEGAL ACTIONS

Plaintiff FPA Crescent Associates, LLC, through its attorneys, Thomas T. Bassett, Todd Reuter, and K&L Gates LLP, **as a cause of action for unlawful detainer**, alleges Section 24 of the Lease provides that "Tenant shall not do anything or suffer anything to be done in or about the Premises" which conflicts with law...Plaintiff is thus entitled to judgment against Defendants. (It should

be noted that this claims was found to be superfluous by Commissioner's ruling in the court of appeals<sup>2</sup>). *Id.*

#### 4. BREACH OF GUARANTY AND CONTRACT

Plaintiff FPA Crescent Associates, LLC, through its attorneys, Thomas T. Bassett, Todd Reuter, and K&L Gates LLP, **as a cause of action for unlawful detainer**, alleges Defendant Pendleton is personally liable for all obligations under the Lease due to his execution of the Lease dated October 15, 2013, and the Lease Amendment dated December 20, 2013. Defendant Pendleton breached the Guaranty by failing to make all payments due under the Lease, including without limitation, Base Monthly Rent, Taxes, Operating Expenses and late charges. As a result of Defendants' breach, Plaintiff has been injured in an amount not less than \$2,229.61, and is entitled to judgment against Defendants in the amount of unpaid rent and other charges and damages due under the Guaranty at the time of judgment, including without limitation rent for the balance of the Lease term and costs of re-letting the Premises. CP 67.

Furthermore, the Relief requested by the Plaintiff was "For issuance of a Writ of Restitution, immediately restoring possession of the Premises to Plaintiff" and, "for judgment in favor of Plaintiff against Defendants **for unlawful detainer** and for breach of the Lease...." *Id.* These are the Plaintiff's own words, and its original argument and plea for relief.

On September 10, 2014, the trial court entered a judgment against the Pendleton, and in favor of FPA, for restitution of the premises, and

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<sup>2</sup> Court of Appeals Commissioner's Ruling dated November 3, 2014 stated "Jamie contends the matter is final because the cause of action for breach of the illegal activities clause is "superfluous." This Court agrees.

monetary damages including contract damages, and actual attorney fees. On October 10, 2014, the trial court entered an Attorneys' Fees and Costs Money judgment in favor of FPA in the amount of \$49,870.50.<sup>3</sup> CP 359. Pendleton appealed this judgment, which was adjudicated by this Court of Appeals under cause number 327051. *FPA Crescent Associates, LLC v. Jamie's LLC*, 190 Wn.App. at 666. In this ruling, the Court of Appeals reversed the trial court's grant of summary judgment; held that Pendleton was not guilty of unlawful detainer; dismissed FPA's action against Pendleton; and remanded the issue of "relief pursuant to RCW 59.12.090" to the trial court. *Id.*

Even after the Mandate from the court of appeals was filed in the trial court, the trial court attempted to treat the action as one of general jurisdiction, with the unlawful detainer portion being a "narrow result". CP 68. The trial court differentiated between the reversal of claims 2, 3, and 4, by stating that these was not included with the Court of Appeals dismissal of the unlawful detainer action. *Id.*<sup>4</sup>

This Appeals Court clearly stated in the original appeal ruling that an unlawful detainer proceeding is not one of general jurisdiction; the superior court sits as a special statutory tribunal, limited to deciding the

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3 This judgment for attorney fees and costs in favor of FPA suffered no scrutiny, and was accepted at face value by the trial court without contest or hearing.

4 But, as illustrated above, each of these claims was originally argued and presented "as a cause of action for unlawful detainer."

primary issue of right to possession together with the statutorily designated incidents thereto. *FPA Crescent Assocs. v. Jamie's LLC*, 190 Wn.App. at 674 -675. In this matter, the action was clearly an unlawful detainer action, and each of the claims proffered by the Plaintiff was set forth "*as a cause of action for unlawful detainer.*" *Supra*. No exceptions exist for a plaintiff to join general jurisdiction claims to an action for unlawful detainer, nor to separate a breach of contract claim set forth "*as a cause of action for unlawful detainer.*" after the unlawful detainer claim is reversed and dismissed. Issues unrelated to possession are not properly part of an unlawful detainer action. *Heaverlo v. Keico Industries, Inc.*, 80 Wn.App. at 728.

When this Court of Appeals overturned the trial court's grant of summary judgment to FPA; it held that Pendleton was not guilty of unlawful detainer; and, it dismissed FPA's unlawful detainer action against Pendleton. *FPA Crescent Assocs. v. Jamie's LLC*, at 678-679. This matter, with the exception of the remand to determine damages, was concluded at that point.

Because an unlawful detainer action can not include an action for damages, other than those related to the possession of the premises, i.e. unpaid rent, and, because possession of the premises in this matter was at

issue until the action was dismissed by the Court of Appeals, the trial court had no authority to extract and segregate individual alleged contract claims from an unlawful detainer action where possession remained at issue throughout the course of proceedings..

**2. A trial court's breadth of discretion in calculating, awarding, and offsetting attorneys' fees and costs does not allow it to bias one party by treating it differently than the other, nor to employ different levels of scrutiny, and means of calculation between the parties in order to reduce the prevailing party's award of fees and costs to a negligible amount.**

The unlawful detainer statute provides that "any issuance of a writ of restitution is issued under the condition that the plaintiff will prosecute his or her action without delay, and will pay all costs that may be adjudged to the defendant, and all damages which he or she may sustain by reason of the writ of restitution having been issued, should the same be wrongfully sued out." RCW 59.12.090. On a plain reading of the statute, a writ of restitution, is issued based on three conditions: that the plaintiff will prosecute the action without delay; that the plaintiff will pay all costs that may be adjudged to the defendant; and, that the plaintiff will pay all damages which he or she may sustain by reason of the writ of restitution having been issued, should the same be wrongfully sued out. *See Id.* The Rules on Appeal further instruct the trial court on the effect of reversal on

intervening rights. RAP 12.8. "If a party has voluntarily or involuntarily partially or wholly satisfied a trial court decision which is modified by the appellate court, the trial court shall enter orders and authorize the issuance of process appropriate to restore to the party any property taken from that party, the value of the property, or in appropriate circumstances, provide restitution." *Id.*

The Washington Supreme Court has construed RAP 12.8 as requiring practitioners and courts to look to the common law of restitution to determine the post-reversal remedy. *Ehsaniv. McCullough Family P 'ship*, 160 Wn.2d 586 (2007). In *Ehsani*, the court proceeded to look to Restatement of Restitution § 74 (1937), but noted that the equivalent provision of the current version of the Restatement is Restatement (Third) of Restitution and Unjust Enrichment § 18 (2011). *Id.* pg. 8-9

Trial courts may award attorney fees where authorized by "contract, statute, or a recognized ground in equity." *Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 297 (2006). When authorized to award attorney fees, trial courts have broad discretion. *Mahler v. Szucs*, 135 Wn.2d at 435 (1998). But, a trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal*

*Supplies, Inc.*, 140 Wn.App. 191, 214 (2007 Div. 1).

To determine an attorney fee award, Washington courts generally use the lodestar method. *Mahler*, 135 Wn.2d at 433. Lodestar, at its simplest, is the number of hours reasonably expended on the matter multiplied by a reasonable hourly rate. *Id.* at 434. Once a lodestar has been calculated, the trial court may consider an award adjustment reflecting additional factors. *Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 541 (2007). A trial court may make adjustments based on "two broad categories: the contingent nature of success, and the quality of work performed." *Id.* at 541 (quoting *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 598 (1983)). A trial court may supplement its lodestar determination using the factors listed in former RPC 1.5(a) (2005).[6] *Id.* at 433 n.20. One such factor is "[t]he fee customarily charged in the locality for similar legal services." Former RPC 1.5(a)(3). Although, no single factor is determinative. See *Crest, Inc. v. Costco Wholesale Corp.*, 128 Wn.App. 760, 774 (2005).

The Court of Appeals should reverse an attorney fee award where the trial court used an improper method to calculate the attorney fee award. *Seattle-First Nat'l Bank v. Wash. Ins. Guar. Ass'n*, 94 Wn.App. 744, 762 (1999).

In this matter, the trial court calculated the lodestar attorney fees it deemed due to Pendleton by a different method than it had previously used in awarding FPA fees, and it further offset any attorney fees that it deemed due to Pendleton by any contract damages, and attorney fees that it was determined to award to FPA. *See* CP 357-365. Pendleton asserts that this was a biased and incorrect calculation.

#### **Original Calculation of Fees by Trial Court (in favor of Plaintiff)**

In the original matter before this Court, the trial court accepted the lodestar as proffered and calculated by the Plaintiff, FPA, for pre-appeal attorney fees. The trial court entered a judgment in favor of FPA in the amount of \$49,870.50. CP 359. This judgment was entered without any scrutiny by the trial court. CP 79. By the definition of a lodestar, this figure should represent the number of hours reasonably expended on the matter by a reasonable hourly rate. *See Mahler v. Szucs*, 135 Wn.2d at 433.

This judgment was subsequently overturned by the Court of Appeals. *FPA Crescent Associates, LLC v. Jamie's LLC*, 190 Wn.App. 666.

### **Calculation of Pendleton's Fees by Trial Court**

In its original motion for attorney fees and costs, the Plaintiff, FPA, stated that "the lease provides attorney fees to the prevailing party." CP 291. In Washington, the "prevailing party" means the party in whose favor a final judgment is rendered. RCW 4.84.330. In awarding FPA its fees and costs in the original judgment (that was subsequently reversed by this court), the trial court stated that "[b]ased on the argument of counsel, the pleadings, order, and evidence presented, the Court finds the attorneys' fees and costs incurred by plaintiff are reasonable." *Id.*

But, after the judgment in favor of FPA was reversed, once its unlawful detainer action was dismissed by the court of appeals, and when the shoe was on the other foot, the trial court took a much different approach in calculating the fees. *See Generally* CP 357-365. These actions are specifically pointed out in the Assignments of Error asserted above.

In the trial court's Findings of Fact, Conclusions of Law and Order of the judgment that is the basis of this appeal, the trial court found that: the lease does provide that the prevailing party is entitled to an award of attorneys' fees and costs, and that it previously awarded FPA fees and costs in the amount of \$49,870.50. CP 359. But, the trial court failed to

state in its findings that this judgment was reversed by the Court of Appeals. *See* CP 359.

Then the trial court began to scrutinize Pendleton's application for fees and costs. CP 360.

Although the entire action was an unlawful detainer action (as argued above), the trial court arbitrarily determined that only "one third of Pendleton's arguments in research, briefs, and argument" could be attributed to the unlawful detainer action. *Id.* The trial court then claimed that the Appeals Court rejected Pendleton's argument that an unlawful detainer action could not be joined with other claims. *Id.* Pendleton does not infer that result from the Appeals court's letter, and presents that argument for final clarification on that issue above.

The trial court further attributed only part of the time in the remand phase as applicable, asserting that some of the time spent was "unproductive time regarding want of prosecution dismissal." *Id.* With respect to this statement, Pendleton did file an additional motion to ensure that the action would be dismissed by the trial court according to the Court of Appeals ruling, frankly, having little faith in the trial court in following that ruling - a premonition that clearly had merit given the proceedings since the original appellate ruling was entered. CP 19-21, CP 361.

Because the trial court concluded that the "contract" claims survived the dismissal of the action, the trial court made its own determination, based on its finding that some causes still survived the Court of Appeals dismissal of the action, that only some of the work following the Court of Appeals' clarifying decision was successful. *Id.*

In all of this, the trial court ignored the statutory rule that the "prevailing party" means the party in whose favor a final judgment is rendered. RCW 4.84.330

Then the trial court turned to the "Reasonableness" of the fees. CP 361.

When examining the fee base, the trial court admitted that Pendleton's counsel charged a rate less than counsel for FPA. Then the trial court compared that fee to "[c]ounsel regularly practicing in the general unlawful detainer field[], most [of whom] represent multiple landlord clients. *Id.* First, the trial court made no such analysis with respect to FPA's counsel, and secondly, Pendleton was the **tenant!**<sup>5</sup> The trial court went on to assert that this was a complex case involving "interlocking issues of commercial contract law in a unique business setting." *Id.* It was not. This was a simple unlawful detainer case where the landlord did not provide the proper statutory notice. Counterclaims, setoffs, and

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<sup>5</sup> Not a landlord as the trial court's analysis implied.

general jurisdiction claims like "[i]nterlocking issues of commercial contract law in a unique business setting" are not permitted in an unlawful detainer action. *See Heaverlo v. Keico Industries, Inc.*, 80 Wn.App. at 724, 725.

### **Calculation of FPA's Fees by Trial Court**

After scrutinizing Pendleton's fees and costs, the court turned its attention to the calculation to FPA's fees setoffs, consisting of both contract damages and attorneys fees that were due to FPA. CP 362.<sup>6</sup>

#### *Contract Damages*

With respect to the contract damages, the trial court left the original contract damages judgment in favor of FPA in place, by claiming that the "Court of Appeals left in place the trial court's methodology of computing FPA's contract damages." While the "methodology" for calculating contract damages (i.e. back rent) was left in place, the basis for it was not. The Court of Appeals reversed the Judgment and dismissed the action.

Contract damages in an unlawful detainer action are limited rent and/or damages caused by the tenant committing or permitting waste upon

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<sup>6</sup> FPA had no judgment in its favor, thereby failing the definition of a "prevailing party" as defined in RCW 4.84.330.

the demised premises. See RCW 59.12.030 and 59.12.050. In this matter, there was no allegation of waste nor any incident related thereto, therefore the contract damages are limited to rent alone.

RCW 59.12.070 requires requires a plaintiff to set forth the facts in its complaint which may include "compensation for occupation of the premises,...[and], in case the unlawful detainer charged be after default in the payment of rent, the complaint must state the amount of such rent." RCW 59.12.070. Judgments under the unlawful detainer statute are addressed in RCW 59.12.170. In that statute it starts by stating "If upon the trial ... the finding of the court is in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and if the proceeding be for unlawful detainer after neglect or failure to perform any condition or covenant of a lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of the lease, agreement, or tenancy...." Here those findings were expressly reversed by the Court of Appeals. The only damage applicable in this case is the back rent that was due at the time of the proceeding, and that was, as clearly stated in the Answer and initial record, tendered by the tenant and actively refused by the Plaintiff – TWICE.

The only "contract damages" that were due consisted of rent due at the time that FPA filed the action. Rent that Pendleton tendered and that FPA refused to accept. It is untenable that a party can benefit from and be awarded the value of accrued interest on monies that it refused to accept.

### *Attorney Fees*

After addressing "contract damages" the court proceeded to calculate the attorneys fees earned by FPA from which it would offset Pendleton's award. CP 363. The trial court asserted that FPA's hours were reasonable (none of which were reduced or questioned). *Id.* And, the trial court found that FPA spent 54.3 hours that was "reasonably spent toward a successful outcome on contract remedies." *Id.* In short, the trial court asserted that FPA had a successful outcome on a judgment that was reversed, and an action that was dismissed by this Court of Appeals. *Id.* Given that, in Washington, the "prevailing party" means the party in whose favor a final judgment is rendered, it is untenable to grant an award of attorney's fees (even as an offset) to a party whose favorable judgment was reversed, and who had no final judgment in its favor. *See RCW 4.84.330*

After determining that FPA was the prevailing party absent any

judgment in its favor, the trial court turned its attention to the reasonableness of FPA's fees. The trial court concluded that the hourly fee was appropriate because "[t]he case involved interlocking issues of commercial contract law in a very unique business setting." Contrast this with the same scrutiny given to Pendleton where the trial court implied that the fees were high for "counsel regularly practicing in the general unlawful detainer field"<sup>7</sup> *See Supra*. Also contrast this with the trial court's scrutiny of FPA's original application for attorney fees and costs.

In the end, the court awarded Pendleton \$53,700 for attorney's fees and costs for the entire action consisting of the proceedings leading up to the first judgment, the first appeal, the post appeal work, the second appeal, and the briefing leading up to this final judgment. CP 363. This is only \$4000 more than the court previously accepted as the lodestar proffered by FPA for just the first pre-appeal work. *See Id.*

Equity is defined as "freedom from bias or favoritism." Free Merriam Webster Dictionary: Equity.

<https://www.merriam-webster.com/dictionary/equity>. In other words, what's good for the goose is good for the gander.

At minimum, the same attorney fees awarded to the Plaintiff should be

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<sup>7</sup> This is a meritless implication given the fact that I, as counsel for Pendleton, had never previously practiced in the field of unlawful detainer.

awarded to the Defendant for the same time frame. Any other outcome would result in bias toward one party - an outcome that would be in violation of the Appearance of Fairness Doctrine.

Defendant, Spokane Downtown Daiquiri Factory, admits that some rent was due at the time of the action, although it disputed the Landlords calculation of that rent. Nonetheless, the Defendant tendered the amount due to the Landlord twice, both of which were rejected by the landlord. That amount may be applied to offset award of attorney fees and costs owed to the Defendants.

There is only one prevailing side. And that side here is the appellant Pendleton. FPA lost on all claims, and is therefore excluded from recovery any attorney fees or costs. The only offset available to the Plaintiff is the rent that was due, and attempted to be paid by the tenant at the beginning of the action.

## F. CONCLUSION

The State of Washington has an Appearance of Fairness Doctrine that not only requires a judge to be impartial, it also requires that the judge appear to be impartial. *State v. Finch*, 137 Wash.2d 792, 808 (1999).

Under the Appearance of Fairness Doctrine, it is not necessary to show a decision maker's bias actually affected the outcome, only that it could have. *Buell v. City of Bremerton*, 80 Wn.2d 518, 523 (1972).

The Appearance of Fairness Doctrine mirrors the principals of judicial ethics in the Canons of the Code of Judicial Conduct (the "CJC") that all judges must observe. Under the CJC, "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." CJC Rule 1.2. This canon is restated later in CJC Rule 2.2 wherein it states that "[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."

There is no question that a judge has wide discretion with respect to calculating and awarding attorneys fees. *Mahler v. Szucs*, 135 Wn.2d 398, 435 (1998). But discretion must still operate within the boundaries of impartiality. *See State v. Finch*, 137 Wash.2d 792, 808 (1999).

Throughout the long history of this case, there are several examples of the appearance of the court showing partiality to the plaintiff, FPA, to mold the law in favor of the supporting its initial ruling, rather than reversing that ruling to fit the law. In the first part of this action, when the Pendleton argued that FPA, the plaintiff, did not follow the statutory requirements, the court agreed with FPA that the lease was "expired", not "terminated", and that notice was not required. The appeal of this ruling presented the issue of whether a landlord may bypass the notice and right to cure provision of RCW 59.12.030(3) by declaring a tenant in default for nonpayment of rent, then terminating the tenancy, and then arguing that the tenant is a holdover tenant unlawfully detaining under RCW 59.12.030(1). *FPA Crescent Associates, LLC v. Jamie's LLC*, 190 Wn.App. at 666. This Court answered "no" to that issue. *Id.* This Court then properly dismissed FPA's action.

Following that ruling, FPA argued that the dismissal did not apply to all claims in its unlawful detainer action. Once again, the trial court accepted that argument and attempted to commence litigation on those claims leading to the second appeal. That appeal was settled when this Court made clear that it did not intend to reopen any issues for the trial court to litigate.

And, finally, we come to the current issue where FPA and the trial court still maintain that some of the claims under the dismissed action still survive, and based on that assertion, awarded attorney fees to FPA, a non-prevailing party, in order to offset the award to Pendleton. In its final Finding of Facts and Issues of Law, the trial court proffers several claims that illustrate that Pendleton was subject to an entirely different level of scrutiny than FPA.

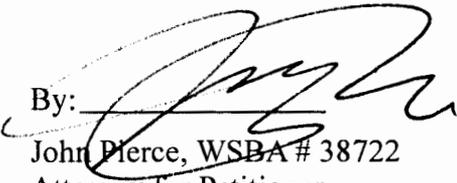
Here, again, the law is clear. The prevailing party in this action has a right to recover its attorney fees and costs. A prevailing party that is defined as " the party in whose favor a final judgment is rendered." RCW 4.84.330.

There is only one prevailing side. And, that side here is the appellant, Pendleton. FPA claims were dismissed, and is therefore excluded from recovery any attorney fees or costs. The only offset available to the Plaintiff is the rent that was due at the time the action was filed; rent that the tenants tendered to to the landlord prior to it filing the unlawful detainer action; rent that the landlord refused to accept.

Appellants respectfully request that this Court grant the following relief:

1. To reverse the judgment of the trial court on attorney fees and costs;
2. For this Court to re-calculate the attorney fees and costs due to Pendleton instead of remanding it to the trial court;
3. To enter a judgment in favor of Pendleton and against FPA for its attorney fees and costs; and,
4. To provide such other relief as the Court deems just and proper.

Respectfully Submitted this 20th Day of December, 2016

By: 

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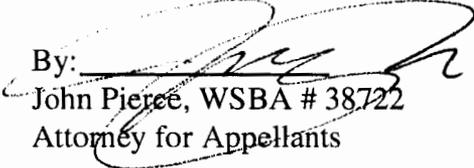
**CERTIFICATE**

I certify that a copy of the foregoing was delivered by the method  
below, and addressed to the following:

Todd Reuter  
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618 W. Riverside Ave., Ste. 300  
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- First Class Mail, Postage Pre-paid
- Hand Delivered
- Overnight Mail
- Telecopy (Fax)
- Email:

Dated this 20th day of December, 2016.

By:   
John Pierce, WSBA # 38722  
Attorney for Appellants