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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

Court of Appeals No: 366120

**COURT OF APPEALS  
DIVISION III OF THE STATE OF WASHINGTON**

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SPOKANE AIRCRAFT BOARD,

Petitioner,

v.

EXPERIMENTAL AIRCRAFT ASSOCIATION CHAPTER,

Appellant/Respondent.

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**APPELLANT EXPERIMENTAL AIRCRAFT ASSOCIATION  
CHAPTER'S OPENING BRIEF**

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**TABLE OF CONTENTS**

Table of Authorities .....i

I. ASSIGNMENTS OF ERROR.....1

II. ISSUES PRESENTED ON APPEAL .....1

III. STATEMENT OF FACTS .....2

IV. PROCEDURAL HISTORY .....4

V. SUMMARY OF ARGUMENT .....4

VI. ARGUMENT .....6

    A. Scope of Review .....6

    B. This Division’s 2015 Decision in *FPA Crescent*  
    is Controlling Here.....7

    C. Other Reasons to Reverse Found in the Record .....11

    D. EAA Seeks Attorney’s Fees On Appeal.....15

CONCLUSION .....16

TABLE OF AUTHORITIES

Cases

Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc., 2 Cal.4th 342,  
373, 6 Cal.Rptr.2d 467, 826 P.2d 710 (1992)..... 12

Atherton Condo. Apartment–Owners Ass’n Bd. of Dirs. v. Blume Dev.  
Co., 115 Wash.2d 506, 516, 799 P.2d 250 (1990)..... 7

City of Spokane v. Spokane County, 158 Wn.2d 661, 671, 146 P.3d 893  
(2006)..... 6

Duprey v. Donahoe, 52 Wn.2d 129, 135, 323 P.2d 903 (1958). .... 8

Farmers Ins. Co. v. Miller, 87 Wn.2d 70, 73, 549 P.2d 9 (1976). .... 14

FPA Crescent Associates, LLC v. Jamie’s LLC, 190 Wn.App. 666, 360  
P.3d 934 (2015).....5, 8, 9, 11

Hous. Auth. of City of Everett v. Terry, 114 Wn.2d 558, 563, 789 P.2d  
745 (1990)..... 8

Hous. Auth. of City of Pasco & Franklin County v. Pleasant, 126 Wn.App.  
382, 392, 109 P.3d 422 (2005)..... 8

Hous. Auth. of City of Seattle v. Bin, 163 Wn.App. 367, 373, 260 P.3d  
900, 903 (2011)..... 15

Jensen v. Lake Jane Estates, 165 Wn.App. 100, 105, 267 P.3d 435 (2011)  
..... 14

Johnny's Seafood Co. v. City of Tacoma, 73 Wn.App. 415, 420, 869 P.2d 1097 (1994).....	14
Lunsford v. Saberhagen Holdings, Inc., 166 Wn.2d 264, 270, 208 P.3d 1092 (2009).....	6
MacRae v. Way, 64 Wn.2d 544, 546, 392 P.2d 827 (1964).....	7
Metavante Corp. v. Emigrant Sav. Bank, 619 F.3d 748, 766 (7th Cir.2010), cert. denied, — U.S. —, 131 S.Ct. 1784, 179 L.Ed.2d 653 (2011).....	12
Newsom v. Miller, 42 Wn.2d 727, 731, 258 P.2d 812 (1953).....	14
Patterson v. Bixby, 58 Wn.2d 454, 458, 364 P.2d 10 (1961). ....	14
Pierce County v. State, 144 Wn.App. 783, 813, 185 P.3d 594 (2008) ....	14
Port of Longview v. Int'l Raw Materials, Ltd., 96 Wn.App. 431, 436, 979 P.2d 917 (1999).....	8
Rekhter v. State, Dep't of Soc. & Health Servs., 180 Wn.2d 102, 111–12, 323 P.3d 1036, 1041 (2014).....	12
Riojas v. Grant County Pub. Util. Dist., 117 Wn.App. 694, 697, 72 P.3d 1093 (2003).....	7
Viking Bank v. Firgrove Commons 3, LLC, 183 Wn.App. 706, 713, 334 P.3d 116, 120 (2014).....	14
Wagner v. Wagner, 95 Wn.2d 94, 101, 621 P.2d 1279, 1283 (1980).....	15
Wilson v. Daniels, 31 Wn.2d 633, 643–44, 198 P.2d 496 (1948).....	8

Woodward v. Blanchett, 36 Wn.2d 27, 32, 216 P.2d 228 (1950)..... 8

Statutes

RCW 59.12.030 ..... passim

## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred by deciding that there was no genuine issue of material fact, and that Plaintiff-Respondent Spokane Airport Board (“SAB”) was entitled to judgment as a matter of law on liability for damages, if any, sustained in an unlawful detainer case filed under RCW 59.12.030(1). This erroneous ruling had the effect of determining that Appellant had no rights to possession of the property, which was error.

## **II. ISSUES PRESENTED ON APPEAL**

1. Did the trial court err in asserting jurisdiction over Spokane Airport Board’s claim for damages where SAB brought this case under RCW 59.12.030(1), where the five year term of the Lease between the parties had not expired?
2. Did the trial court err in determining that there was no genuine issue as to any material fact where the landlord, SAB, claimed that it had converted the Lease from a leasehold for five years to something shorter under an ambiguous Lease clause, and the Landlord’s conversion efforts were always accompanied by promises of a new, relocated tenancy in the airport complex, a promise the Landlord breached?

3. Are there other reasons, like the ambiguity of the Lease and the rule that leases should be construed as a whole, for concluding that the trial court committed error by deciding that Respondent was entitled to possession as a matter of law?
4. Is Appellant entitled to attorney's fees on appeal?

### III. STATEMENT OF FACTS

In 2011, Appellant Experimental Aircraft Association, Chapter 79, and SAB entered into a five year Lease with a five year option to rent a hangar at Felts Field in Spokane.<sup>1</sup> In 2016, the parties entered into a new, virtually identical Lease.<sup>2</sup> EAA had no input into the terms of the Lease. CP 416-417. The 2016 Lease contained several provisions relevant here:

(1) The term of the Lease was five years, ending in 2021 “unless sooner terminated or canceled as provided herein.” 2016 Lease Para. 1A, CP 56. The second sentence of Lease Para. 1A states: “Either party may cancel this Agreement upon one hundred eighty (180) days advance written notice.” *Id.*

(2) Para. 38 of the Lease provides, colloquially, that if and when the SAB determines it needs or wants the leased building for some

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<sup>1</sup> While not germane to any issue in the case, the Court may be interested in EAA, its history, membership and activities. It is an organization begun in 1953, with roughly 219,000 members worldwide, dedicated to all things aviation. See <https://www.eaa.org/ea/about-eea>, <https://www.eaa.org/ea/about-eea/ea-history>.

<sup>2</sup> Exhibits C and D to Complaint, see CP 33-58.

other purpose, at its sole discretion, SAB can relocate EAA at SAB's sole expense. CP 52.

(3) Paras. 23 and 24 of the 2016 Lease provide, as had its predecessor, reasons and timing for cancelation of the Lease by the parties. CP 48-49.

In November, 2017, SAB's chief executive officer, Larry Krauter, began discussions with EAA over ending the Lease for Building 7 and leasing EAA Building 17 when it became available, at roughly the same time, July 2018. CP 448-452. Emails attached to Mr. Krauter's declaration (CP 448) make clear that this was a friendly process, with one lease "terminated" so that the next, relocated, Lease could begin. While the Lease is unclear as to what terms exactly would control if SAB decided it was in its best interests to relocate EAA, SAB repeatedly emphasized that it was "extending" EAA's lease, causing surprise and unhappiness when the proposed lease for the new building was less favorable in multiple respects. CP 417-418.

Over the next several months, SAB extended the "termination period," see Complaint Exhibits F, G and H, CP 62-66. No reason for the extensions appears other than the dates on which the relocation to Building 17 would become available, which were unknown in November

2017. See CP 450-452. In other words, SAB's "termination" was tied to SAB's contractual obligation to relocate EAA.

At about the time EAA started moving out, this lawsuit for unlawful detainer was begun.

#### **IV. PROCEDURAL HISTORY**

The Summons and Complaint for Unlawful Detainer were filed on August 20, 2018. The Summons for Unlawful Detainer, CP 6, states in all capital letters that it is "notice of a lawsuit to evict you." *Id.* A Writ of Restitution was issued the same day, on the payment of a modest \$1,000.00 bond. CP 74-77. The Complaint itself cites only to RCW 59.12.030(1) as the basis for jurisdiction in unlawful detainer, and states only a cause of action for unlawful detainer.

EAA vacated on or about August 27, 2018, but always contested SAB's right to evict it. CP 416-419; see also CP 211, 331. SAB filed a motion for summary judgment on September 21, 2018, and on January 25, 2019, the honorable John O. Cooney, Superior Court judge, granted the motion. See CP 601.

This appeal followed.

#### **V. SUMMARY OF ARGUMENT**

When reviewing an order granting summary judgment, the appellate court conducts exactly the same inquiry as did the trial court,

that is, to determine whether, on the record before the trial judge, there is no genuine issue as to any material fact and whether the prevailing party was entitled to judgment as a matter of law. Following that standard, this Court should reverse.

Several reasons exist for reversing the trial court decision. Chief among these reasons is the fact that this is not a proper unlawful detainer case at all—at least under RCW 59.12.030(1). That statute provides that a tenant who holds over “after the expiration of the term for which it is let to him or her” is in unlawful detainer.

The term for which Building 7 was let to EAA will not expire for another one-plus years. This division of the Court of Appeals has held that a landlord cannot use a lease-provided right, like the right to terminate for nonpayment of rent, to circumvent the requirements of RCW 59.12.030. *FPA Crescent Associates, LLC v. Jamie's LLC*, 190 Wn.App. 666, 360 P.3d 934 (2015).

In addition, the Lease in this case is at best ambiguous and should be construed against SAB, the drafter, especially where, as here, the tenant had no power to edit or modify any lease term; take it or leave it. See CP 416-418. SAB claims that the Lease “term” was modified by its act of “terminating” the Lease on six months’ notice. But SAB did not comply with the Lease requirement that any termination be conducted “as herein

provided.” SAB did not comply with any termination provision of the Lease, like Articles 23 and 24. Thus, the Lease did not “expire” within the meaning of RCW 59.12.030(1).

Finally, there is a question of fact as to whether SAB misled EAA by making this a relocation clause matter in which SAB had to pay to relocate the tenant when SAB chose to terminate a tenancy for what it believed to be its own best interests. The trial court’s ruling renders the relocation provision a complete nullity. Any time SAB wants to terminate a fully compliant tenant like EAA without paying to relocate, it just has to give six months’ notice, and the problem goes away.

EAA requests its attorney’s fees on appeal, pursuant to the statute, the Lease, and case law holding a tenant who prevails on jurisdictional or other grounds to obtain dismissal of an unlawful detainer case is entitled to attorney’s fees.

## **VI. ARGUMENT**

### **A. Scope of Review**

This court reviews a summary judgment order de novo. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 270, 208 P.3d 1092 (2009) (quoting *City of Spokane v. Spokane County*, 158 Wn.2d 661, 671, 146 P.3d 893 (2006)). When reviewing a summary judgment order, the appellate court engages in the same inquiry as the trial court, viewing the

facts and all reasonable inferences in the light most favorable to the nonmoving party. Riojas v. Grant County Pub. Util. Dist., 117 Wn.App. 694, 697, 72 P.3d 1093 (2003).

Summary judgment is appropriate only if the moving party can show that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). “A material fact is one upon which the outcome of the litigation depends in whole or in part.” Atherton Condo. Apartment–Owners Ass’n Bd. of Dirs. v. Blume Dev. Co., 115 Wash.2d 506, 516, 799 P.2d 250 (1990); FPA Crescent Associates, LLC v. Jamie’s LLC, *supra*, 190 Wn.App. 666, 360 P.3d 934 (2015).

**B. This Division’s 2015 Decision in FPA Crescent is Controlling Here.**

The unlawful detainer action in chapter 59.12 RCW provides an expedited method for resolving the right to possession and hastening the recovery of real property. MacRae v. Way, 64 Wn.2d 544, 546, 392 P.2d 827 (1964). “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.” *Id.* The primary issue to be resolved in an unlawful detainer action is the right to possession. Port of Longview v.

Int'l Raw Materials, Ltd., 96 Wn.App. 431, 436, 979 P.2d 917 (1999);  
FPA Crescent, supra, 190 Wn.App. at 674-675.

The burden is on the landlord in an unlawful detainer action to prove his or her right to possession by a preponderance of the evidence. Hous. Auth. of City of Pasco & Franklin County v. Pleasant, 126 Wn.App. 382, 392, 109 P.3d 422 (2005). “The possession of a tenant is originally lawful, and is so presumed until the contrary appears.” Duprey v. Donahoe, 52 Wn.2d 129, 135, 323 P.2d 903 (1958).

“The unlawful detainer statute is in derogation of common law.” Hous. Auth. of City of Everett v. Terry, 114 Wn.2d 558, 563, 789 P.2d 745 (1990). “The action of unlawful detainer is the legal substitute for the common-law right of personal re-entry for breach.” Woodward v. Blanchett, 36 Wn.2d 27, 32, 216 P.2d 228 (1950). The statutory action relieves a landlord of having to file an expensive and lengthy common law action of ejectment. Terry, 114 Wn.2d at 563, 789 P.2d 745 (quoting Wilson v. Daniels, 31 Wn.2d 633, 643–44, 198 P.2d 496 (1948)).

To take advantage of an unlawful detainer action and reap the benefits of the summary proceeding, a landlord must comply with the requirements of the statute. Id. at 563–64, 789 P.2d 745. Because the statute curtails the application of common law, any ambiguities must be strictly construed in favor of the tenant. Id.; see also FPA Crescent, supra,

190 Wn.App. at 675.

With these principles in mind, the agreed termination date provided by Lease had not expired in August 2018, and will not expire until 2021. A tenant in EAA's position is not in unlawful detainer until "after the expiration of the term for which it is let to him or her." Because the "term" will not "expire" until 2021, it follows that EAA is not in unlawful detainer and is not subject to proceedings under RCW 59.12.030(1).

This Division's holding in *FPA Crescent* is in point. There, the landlord terminated a term lease for nonpayment of rent (which the Lease permitted), then brought an action under RCW 59.12.030(1) because the tenant was by then, technically, a holdover.

This Division disagreed, explaining that, under the principles mentioned above (strict construction in tenant's favor, trial court sitting as a special statutory tribunal with limited jurisdiction), the landlord cannot end-run the statutes by cherry-picking whichever term (lease or unlawful detainer statute) is more favorable. This Division stated:

FPA contends that the unlawful detainer provision for holdover tenants, RCW 59.12.030(1), applies because Pendleton stayed in possession after FPA terminated the lease. FPA argues that because the lease allowed for termination for nonpayment of rent, and because FPA enforced that provision of the lease, the term of the lease had expired. Thus, FPA maintains that the statutory

provision provides a basis to find Pendleton in unlawful detainer. We disagree. Because *Terry* requires us to construe ambiguities in the unlawful detainer statute strictly in favor of tenants, we distinguish “expiration of the term for which [the property] is let” from a unilateral termination, such as what occurred here. We thus hold that a landlord must comply with RCW 59.12.030(3)’s notice and opportunity to cure procedures prior to bringing an unlawful detainer action against a tenant whose lease it unilaterally terminated for nonpayment of rent.

190 Wn.App. at 676. A “unilateral termination” does not change the period of time “for which the property is let.” This Division added:

RCW 59.12.030(1) has no application here because it applies only to tenants who continue in possession “after the expiration of the term for which [the property] is let.” Even if we were not charged with construing ambiguities in the unlawful detainer act strictly in favor of tenants, we would hold that this construction is required by the plain language of the statute. “Expiration” is defined in *Black’s Law Dictionary* as “[t]he ending of a fixed period of time.” BLACK’S LAW DICTIONARY 700 (10th ed.2014). “Let” means “[t]o offer (property) for lease.” BLACK’S, *supra*, at 1043. Thus, under the plain language of the statute, a tenant is guilty of unlawful detainer if the tenant remains in possession of property past the fixed period of time for which the property is leased.

*Id.* at 676-77 (emphasis supplied). This Division concluded:

Thus, RCW 59.12.030(1) is applicable only after the expiration of the fixed term as specified in the lease agreement. Here, the lease contained a fixed term of 90 months with the option to extend for an additional fixed period. The initial 90 months had not expired prior to FPA’s summons for unlawful detainer. FPA could not rely on RCW 59.12.030(1) to determine the right of possession.

*Id.* at 677.

Just as in *FPA Crescent*, the parties here had a Lease for a specified term. SAB tried to change that term unilaterally, and once it had done so, it improperly invoked the provisions of RCW 59.12.030(1) to claim that EAA was in unlawful detainer. This is exactly what the landlord attempted in *FPA Crescent*. As in that case, this Court should reject SAB's position and reverse.<sup>3</sup>

### **C. Other Reasons to Reverse Found in the Record**

The record shows that there are other reasons why the trial court should not have rendered final judgment that EAA had no right to possession of the premises. For example, the record shows that the Lease "termination" was not a "termination" at all—it was an exercise of SAB's contractual duty to relocate a good tenant, on SAB's nickel, when SAB decided it needed the leasehold space for other reasons. See Declarations of Hohner and Krauter, CP 416-418, 448-452. A factfinder could conclude, even absent a breach of a specific provision of the contract, that SAB breached a duty of good faith owed to EAA:

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<sup>3</sup> SAB's position is actually less favorable than the facts of *FPA Crescent*. Article 39 provides that if EAA holds over at the end of the term, "with or without the consent of the Airport," EAA's tenancy becomes a month to month tenancy. RCW 59.12.030 provides for terminations of other month to month tenancies, but SAB neither invoked those provisions of RCW 59.12.030 nor followed them. Thus, EAA's tenancy was *not* terminated by letter when EAA did not vacate as demanded; EAA became a month to month tenant, entitled to occupancy and other properties of a tenancy of real property, subject to termination under RCW 59.12.030 if the landlord can establish the right to possession under that statute. SAB did not do so here. Simply put, EAA was not in unlawful detainer on August 20, 2018, it was a month to month tenant.

DSHS argues that as a matter of law, the jury cannot find a violation of the duty of good faith and fair dealing without first finding a violation of a contractual term. We disagree. As the Seventh Circuit has said, “It is, of course, possible to breach the implied duty of good faith even while fulfilling all of the terms of the written contract.” *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 766 (7th Cir.2010), *cert. denied*, — U.S. —, 131 S.Ct. 1784, 179 L.Ed.2d 653 (2011). Similarly, the California Supreme Court observed that the “breach of a specific provision of the contract is not a necessary prerequisite [to a breach of good faith and fair dealing claim]. Were it otherwise, the covenant would have no practical meaning, for any breach thereof would necessarily involve breach of some other term of the contract.” *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal.4th 342, 373, 6 Cal.Rptr.2d 467, 826 P.2d 710 (1992) (citation omitted). The Seventh Circuit's and California Supreme Court's reasoning applies here. If DSHS's assertion were true, there could never be a violation of a duty of good faith and fair dealing unless there were also a violation of an express contract term. Such a requirement would render the good faith and fair dealing doctrine superfluous, and thus DSHS's claim is incorrect.

*Rekhter v. State, Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 111–12, 323 P.3d 1036, 1041 (2014) (emphasis supplied). If it was a breach of the duty of good faith to do so, as a factfinder could conclude, then SAB would not even be in a position to argue unlawful detainer. As of August 20, 2018, when SAB filed this lawsuit, EAA had every right to occupy the leased premises, until the relocation building could be turned over.<sup>4</sup>

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<sup>4</sup> The Declaration of Jack Hohner paints a picture akin to bait-and-switch. The parties were almost to the point of moving EAA to Building 17 when SAB presented a lease with less favorable and more onerous provisions than existed in the existing Lease. CP 416-418.

The same result is reached when we recognize the ambiguity inherent in the Lease and construe Article 1A of the Lease against the drafter, and when we construe it as a whole, so as not to render any provision superfluous. These are guiding principles of contract construction.

Article 1A is ambiguous because it provides for termination of the Lease “as provided herein,” and Articles 23-24 of the Lease are specific termination/cancellation provisions containing procedures for termination. Article 1A also states that “[e]ither party may cancel this Agreement upon one hundred eighty (180) days advance notice.”<sup>5</sup> The section does *not* indicate whether procedures required by Articles 23-24 are to be used. This Article does *not* state that 180 day cancellations can be made without just cause. Indeed, if SAB needs to end the Lease but has no cause to do so, the relocation provisions of Article 38 control, as they were invoked by SAB in this case.

Ambiguities in a lease or other contract are construed against the drafter:

If a contract provision's meaning is uncertain or is subject to two or more reasonable interpretations after analyzing the language and considering extrinsic evidence (if appropriate), the provision is ambiguous. *See Jensen v. Lake Jane Estates*, 165 Wn.App. 100, 105, 267 P.3d 435

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<sup>5</sup> The Lease is found at Exhibit D to the Complaint for Unlawful Detainer, CP 6, 55.

(2011). We generally construe ambiguities against the contract's drafter. *Pierce County v. State*, 144 Wn.App. 783, 813, 185 P.3d 594 (2008); *see also Johnny's Seafood Co. v. City of Tacoma*, 73 Wn.App. 415, 420, 869 P.2d 1097 (1994) (noting that ambiguities in lease drafted by a lessor are resolved in favor of the lessee). However, if the drafter is unknown or if the parties drafted the contract together, we will adopt the interpretation that is the most reasonable and just. *See Berg*, 115 Wn.2d at 672, 801 P.2d 222.

*Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn.App. 706, 713, 334

P.3d 116, 120 (2014). Article 1A is ambiguous. EAA does not believe it allows uncontrolled, without-cause terminations of the Lease, indeed, it believes such a Lease would be illusory, because one party, SAB, has total control over EAA's occupancy rights. SAB evidently believes that Article 1A of the Lease allows it to do whatever it wants, on 180 days' notice.

Provisions in a contract should be construed as a whole, not leaving any provision meaningless or superfluous:

In construing a contract, a court must interpret it according to the intent of the parties as manifested by the words used. *See Patterson v. Bixby*, 58 Wn.2d 454, 458, 364 P.2d 10 (1961). Courts can neither disregard contract language which the parties have employed nor revise the contract under a theory of construing it. *Cf. Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 73, 549 P.2d 9 (1976). An interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective. *Newsom v. Miller*, 42 Wn.2d 727, 731, 258 P.2d 812 (1953).

Wagner v. Wagner, 95 Wn.2d 94, 101, 621 P.2d 1279, 1283 (1980). That the trial court's apparent construction of the Lease renders the relocation provision of this Lease superfluous is shown by the facts of this case. While the process was begun as a relocation, when EAA balked at more onerous terms in a new lease presented to them late in the day, SAB just proceeded with a termination, which saved it the cost of moving EAA to Building 17.

This Court should reverse. The right to possession in this case should not be decided on summary proceedings, provided by a statute SAB did not follow. The proper action is Ejectment, which would allow EAA to make the arguments set forth above.

**D. EAA Seeks Attorney's Fees On Appeal.**

Pursuant to RAP 18.1, EAA seeks its attorney fees on appeal. Such fees are provided for by contract, see Lease Article 26, CP 6, 44. Under Washington law, a tenant may recover attorney fees under the lease once the court dismisses the unlawful detainer action. Hous. Auth. of City of Seattle v. Bin, 163 Wn.App. 367, 373, 260 P.3d 900, 903 (2011).

## CONCLUSION

Based upon the foregoing, EAA respectfully requests this Court to reverse, and remand with instructions.

RESPECTFULLY SUBMITTED this 17 day of  
October, 2019.

  
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**CERTIFICATE OF SERVICE**

I certify that I am a citizen of the United States of America and a resident of the State of Washington, over the age of eighteen years, and competent to be a witness herein.

On the date designated below I caused to be served the foregoing document via e-mail, pursuant to the parties' e-service agreement, upon designated counsel:

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I am filing this document with the Division III Court of Appeals for the State of Washington at 2:00 p.m. on October 17, 2019.

Dated: 10/17/2019

  
Milton G. Rowland  
Law Office of Milton G. Rowland., PLLC