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Division III
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No. 36863-7-III

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

MARK WHITMORE,

Respondent,

v.

ZANE LARSEN, individually, AFFORDABLE ADVANCED
AUTOCARE, a Washington Limited Liability Company d/b/a
EVERGREEN TIRE, and OCCUPANTS,

Appellants.

REPLY BRIEF OF APPELLANTS

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A. INTRODUCTION

When Mark Whitmore’s predecessors surreptitiously quieted title to a public road that included a strip of land sitting underneath a separately owned roofing building, they armed a ticking time bomb. The only question was not whether the bomb would go off, causing fierce litigation between property owners, but when. For decades, Whitmore’s predecessors kept this disaster at bay by charging nominal sums of \$100 per year for subsequent building owners to “lease” the land. But eventually, after raising the rent by a factor of 120 to over \$1000 *a month*, time ran out.

Rather than diffuse the situation, by crafting a permanent solution to resolve the competing ownership interests among the various parties, the trial court erred in allowing Whitmore to proceed as an unlawful detainer. Its “solution” of destroying Zane Larsen’s building or sealing it off with a fence, is no solution at all. Whitmore’s responsive brief only confirms that this case should have been tried as an ejectment hearing from the very beginning to resolve the many competing interests to title in this “boundary dispute” among adjoining landowners. This Court should reverse.

B. REPLY ON STATEMENT OF THE CASE

Whitmore’s brief is full of overblown statements of fact, notably his assertion at multiple points in his brief that Larsen “clearly” assumed the obligations in a lease signed by the prior owner of the building, Charles

Chambers. *E.g.*, Resp't br. at 7. This is pure hyperbole. As discussed in greater detail below, Larsen agreed to purchase the building¹ that allegedly encroaches on Whitmore's land only with the knowledge that Chambers' lease was *ending*. RP 177-78; Ex. 115. Contrary to Whitmore's unsupported assertions in his brief at 12, Larsen never made payments in Chambers' lease. Rather, after Chambers informed Whitmore many times that he was letting the lease expire, Larsen and Whitmore immediately began negotiating a *new* arrangement to resolve their competing property interests, which they failed to do. RP 177-78. Their negotiations included discussions with the City of Pullman over historic public roads and discussions with the Washington State Department of Transportation ("WSDOT") over land WSDOT inherited from railroad companies that used to operate in the area. Exs. 113, 119.

The facts of this case show that it is nothing like a typical unlawful detainer, which provides an expedited remedy for landlords. Whitmore admits that this case took years to litigate, including multiple summary judgment motions to "resolve the locations of the railroad right of way boundary." Resp't br. at 16. Multiple surveyors were needed to establish the location of various property interests in the area. RP 66-125, 131-76.

¹ The purchase did not formally close until April 2016. Ex. 111.

Unlike an action for unlawful detainer, the property interests in this case are complex. It is worth noting that the various leases use different language when describing the property in question, referring to various railroad entities and points of description. CP 299; Exs. 9-14. Even Whitmore's expert noted that surveyors made a "mistake" when Whitmore's predecessors originally surveyed the property, and he noted that Whitmore's predecessors were deeded property in the area by parties who "didn't really have the right to deed" property in the first place. RP 79-80. Due in part to these irregularities and mistakes, Whitmore also failed to ever present clear evidence regarding exactly how much the building allegedly encroached on his property. He and his experts argued at various times throughout the case that Larsen's building encroached anywhere from two to ten feet. CP 293 (Whitmore arguing a two to three feet encroachment); CP 57 (expert affidavit claiming "between 4.5 and 4.7 feet" encroachment); RP 101 (expert testifying he "think[s the encroachment] it's about 10 feet.").

The complexity of this case is precisely why the trial court struggled at the show cause hearing and refused to order a quick writ of restitution, the typical remedy in an unlawful detainer. The court opined that the case was "obviously extremely complicated and this is very typical when you

have boundary disputes.” CP 299.² At that point the trial court should have realized that the case was not proper as an unlawful detainer. The proper remedy for resolving this boundary dispute between two parties with ownership interests was an ejectment hearing. The trial court erred in refusing to recognize this fact.

C. ARGUMENT IN REPLY

(1) Unlawful Detainer Was Inappropriate Because the Parties Did Not Have a Landlord/Tenant Relationship

The trial court fundamentally erred by allowing the case to proceed as an unlawful detainer. Whitmore’s response centers around his faulty premise that “[c]learly, Mr. Larsen having taken over the building in November 2014 while the lease was in effect, assumed the lease and its provisions.” Resp’t br. at 7. Not true. Whitmore’s own testimony shows that Larsen never assumed Chambers’ expired lease. Whitmore admitted that he never signed a lease with Larsen. RP 55. Whitmore admitted

² The judge who heard the show cause hearing and summary judgment motions, acknowledged how difficult this case was. The court opined at the show cause hearing:

[T]here’s a real genuine controversy and both from a legal standpoint and from a factual standpoint, in this case, it should be clear...it’s complicated. It’s the kind of case where you could probably have 10 trial judges that would come up with different decisions and those decisions would be subject to appeal and who knows, probably have split decisions, opinions on the matter would go on appeal here.

CP 298. This “genuine controversy” over a “boundary dispute” should have been brought as an ejectment action.

Chambers' lease was never formally assigned to Larsen, despite the fact that the lease contained a clause prohibiting assignment and subletting without a written agreement between the parties. CP 116. And Whitmore admitted that he tried to negotiate a new lease with Larsen, "multiple times," even after the lease with Chambers expired in January 2015. RP 53-54.

It is also clear from the parties' subsequent actions that they never intended the lease to govern beyond January 2015 when Chambers let it expire. *See City of Union Gap v. Printing Press Properties, L.L.C.*, 2 Wn. App. 2d 201, 409 P.3d 239, *review denied*, 191 Wn.2d 1003 (2018) (courts must "consider the actions of the parties subsequent to the signing of the contract as evidence of intent at the time of signing."). Notably the subsequent actions of the parties show that they never intended the automatic renewal provision to trigger after Chambers clearly informed Whitmore that he was letting the lease expire. Whitmore and Chambers both testified that they did not even know about the automatic renewal provision when they signed the lease. RP 62, 183. Whitmore never alleged that Larsen was subject to the Chambers lease in his complaint. CP 3-5. He waited 15 months after filing his case before he cooked up this new legal theory, after the trial court refused to issue a writ of restitution at the initial show cause hearing. Whitmore also admits that he only gave Larsen three days' notice to pay rent or quit, despite the fact that the lease called for 20

days' notice. CP 119. The fact that even Whitmore ignored material provisions in the lease, shows that the parties never intended it to last beyond January 2015.

Again, this Court must remember that “[i]n construing a lease in a controversy between lessor and lessee, the lease will be construed against the lessor [and] the same rule...appl[ies] in a controversy between a lessor and one who holds as successor in interest to the lessee.” *Nat’l Bank of Commerce of Seattle v. Dunn*, 194 Wash. 472, 482-83, 78 P.2d 535 (1938). Here, a proper construction of the lease, Whitmore’s concessions, and the intent of the parties shows that it was never meant to apply to Larsen.

Whitmore heavily relies on a Division I case, *Marsh-McLennan Building, Inc. v. Clapp*, 96 Wn. App. 636, 638, 980 P.2d 311 (1999), claiming that it “answers” many of the questions in this case. *E.g.*, Resp’t br. at 7, 25. *Marsh* has no bearing on this case and its facts differ in key respects.

First, *Marsh* is a typical landlord/tenant dispute between a tenant with no ownership interest of any kind who leased space within a commercial office building. This traditional landlord/tenant relationship is a far cry from the case at hand, where Larsen *owns* his building and Whitmore claims title to a four to ten-foot strip of land underneath it. This case is nothing like *Marsh* factually and is much more like the cases cited

in Larsen's brief concerning adjacent property owners or persons with *ownership interests* overlapping with rented land. *E.g., Arnold v. Melani*, 75 Wn.2d 143, 449 P.2d 800 (1968) (refusing to tear down encroaching house on neighboring land); *Bar K Land Co. v. Webb*, 72 Wn. App. 380, 864 P.2d 435 (1993) (ejectment proper remedy against party who remodeled a home as part of an early possession agreement of a mortgage while paying rent). Whitmore simply refuses to recognize the importance of the fact that the building has been separately owned since before his predecessors ever gained title to the disputed land in question. The trial court made the same error.

Second, *Marsh* involves a typical tenant who signed a written lease with a landlord and refused to move out when the lease ended. It does not discuss to whether a new property owner is bound to the terms of a "lease" signed by his processor, after the parties let the lease expire. Again, Larsen *never* signed a lease with Whitmore. And it was clear that the parties never intended the Chambers lease to apply to Larsen. Whitmore's eleventh-hour tactic to enforce the automatic renewal provision fails.

Importantly, Whitmore never even amended his complaint for unlawful detainer to include a theory of recovery based on the automatic renewal provision. Near the end of his brief, Whitmore claims that this argument is "without merit" because he moved to amend the complaint

during his written closing under RCW 59.12.150. Resp't br. at 26. Whitmore grossly misunderstands that statute.

By its plain language, RCW 59.12.150 allows a plaintiff to cure defects with regard to whether the plaintiff's complaint is styled as an unlawful detainer, a forcible detainer, or a forcible entry.³ The statute does not allow a Whitmore to change his theory of the case during closing statement with regard to whether a party is a month to month tenant or bound to some lease the tenant never signed. Those are fundamentally different claims with different calculations of damages. *Lenci v. Owner*, 30 Wn. App. 800, 803, 638 P.2d 598, 600 (1981), *review denied*, 97 Wn.2d 1014 (1982) (damages for a holdover tenant is the fair market rental value of the premises).⁴ The statute simply does not allow Whitmore to raise an

³ RCW 59.12.150 reads:

When upon the trial of any proceeding under this chapter it appears from the evidence that the defendant has been guilty of either a forcible entry or a forcible or unlawful detainer, in respect of the premises described in the complaint, and other than the offense charged in the complaint, the judge must order that such complaint be forthwith amended to conform to such proofs; such amendment must be made without any imposition of terms. No continuance shall be permitted on account of such amendment unless the defendant shows to the satisfaction of the court good cause therefor.

⁴ It would be unjust to allow a plaintiff to fundamentally change the theory of recovery in this way as late as closing argument without allowing the defendant the chance to conduct needed discovery, such as assessing the fair market value of the premises. RCW 59.12.150 has no application to this case.

entirely new theory of recovery 15 months into the case.⁵ Nor does it change the fact that Whitmore affirmatively stated that “all leases prior had been already paid for” and all business was concluded with Chambers when Larsen entered the picture. RP 204.

The fact that Whitmore waited until his closing statement to formally include the theory that Chamber’s lease controls the outcome of the matter. This “subsequent act” by Whitmore, occurring long after the lease ended, shows that the parties never intended the lease to apply beyond January 2015 and certainly not to a subsequent occupant who was never formally assigned to the lease, like Larsen. *Union Gap, supra*.

(2) The Trial Court Erred in Allowing the Case to Proceed as an Unlawful Detainer and Not an Ejectment Hearing

Whitmore claims that this is not an ejectment case because the “failure to pay rent by Mr. Larsen was the sole basis for the suit.” Resp’t br. at 13. Not true. This dispute is the natural culmination of events dating back to the 1960s when Whitmore’s predecessors quieted title to land underneath a building without naming the owner of the building, the city of

⁵ Again, the mere fact that this case took years to resolve supports the notion that unlawful detainer was an improper remedy. This is not a cut and dry case where a landlord is entitled to expediated relief. But rather it is a complicated boundary dispute between adjacent property owners, involving surveyors, historic documents, and public rights of way. And Whitmore waived his right to the expediated relief afforded by unlawful detainer statutes, by letting his case languish after the trial court held a show cause hearing and refused to issue a writ of restitution.

Pullman, or the nearby railroad in the lawsuit. While the many overlapping ownership interests in the area have laid dormant for decades – due in part to historic “rents” being as low as \$100 per year – this dispute was bound to explode, especially when Whitmore tried to extort Larsen through a grossly inflated lease of adhesion.

Throughout his brief, Whitmore claims that Larsen should bear the consequences of the historical irregularities to title in the area and have his building partially destroyed because he took possession of the building knowing that it encroached on Whitmore’s land. He claims that unlawful detainer is appropriate and Larsen was properly foreclosed from asking for the broad remedies available under an ejectment hearing because “Larsen took over the building with knowledge that the 10 feet of his building was on land previously leased to tenants since 1962.” Resp’t br. at 13. Unsurprisingly, Whitmore fails to cite an example where a successor to property was bound in perpetuity by its predecessors’ actions and could not assert its own rights in an encroachment dispute. The opposite is true.

Recently, in *White Water Investment, LLC v. Cool Beans Eastlake, LLC*, 186 Wn. App. 1033, 2015 WL 1453458 (2015),⁶ the court considered

⁶ *White Water* is unpublished and may be cited as persuasive authority under GR 14.1. It has “no precedential authority, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.” See *Crosswhite v. Washington State Dep’t of Soc. & Health Servs.*, 197 Wn. App. 539, 544, 389 P.3d 731, review denied, 188 Wn.2d 1009 (2017).

a case where a party bought a building knowing that it wrongfully encroached on an area governed by a reciprocal easement agreement with the neighboring property owner. The neighbor sued to have the encroaching building partially demolished and argued that the new owner could not assert equitable defenses, such as offsets for the permanent improvements. The court rejected the neighbor’s argument that the new owner “was not an innocent party because it purchased the property with knowledge that the footprint of the...building violated the terms of the” easement. *Id.* at *5. Rather, because the new owner was “not responsible for constructing the encroaching structure,” the new owner was entitled to have the court balance the equities and conclude that that “removal of the...building would result in disproportionate harm.” *Id.* at *6-7. The court also noted that the neighbor’s “delay” in pursuing its lawsuit tended to show that it had not “suffered a great deal of harm.” *Id.* at *6.

Here, too, Larsen is an innocent party even though he purchased a building with knowledge that it might encroach on Whitmore’s land. He had no part in the original construction of the building.⁷ He had no part in his successors agreeing to pay rent (historically a nominal sum of just \$100

⁷ If anything, Whitmore’s predecessors are the guilty party. Had they properly named the original building owner, nearby railroad, and city of Pullman, when they originally quieted title to the land beneath the building, this dispute could have been resolved half a century ago.

a year) rather than pursuing their legal options for coming to a more permanent solution. He knew Whitmore agreed to a lease, but, importantly, he knew the lease was *ending* when he purchased the building. Not only did Larsen's predecessor clearly inform Whitmore that he was letting his lease expire, but Whitmore affirmatively told Larsen during their negotiations that that all prior leases had ended. RP 204.

It was grossly unjust and inequitable to allow Whitmore to proceed in an unlawful detainer action and evict Larsen by destroying part of his building without considering the comparable equities of the situation. As explained in Larsen's opening brief, the trial court's decision is antithetical to all modern approaches to property disputes. Appellants br. at 19-22 (citing, e.g., *Proctor v. Huntington*, 169 Wn.2d 491, 238 P.3d 1117 (2010), *cert. denied*, 562 U.S. 1289 (2011) (recognizing that modern property law must take a "reasoned, flexible approach")). Even in unlawful detainer actions, courts should consider the equities. *Indigo Real Estate Servs., Inc. v. Wadsworth*, 169 Wn. App. 412, 426 n.10, 280 P.3d 506 (2012).

Here, the equities weigh in favor of Larsen where he had no part in constructing the building and was not even alive when Whitmore's predecessors quieted title to land underneath the building without naming the building owner in the quiet title action. An ejectment case would allow all interested parties to come to a more permanent, fair, and economically

beneficial solution. Because Larsen has a greater property interest than that of a mere tenant, the “essence” of this action is truly one for ejectment and the trial court erred in allowing it to proceed as an unlawful detainer. *Honan v. Ristorante Italia, Inc.*, 66 Wn. App. 262, 270, 832 P.2d 89, *review denied*, 120 Wn.2d 1009 (1992).

(a) This Court Can Consider Evidence of the Meager Value of the Strip of Land Beneath Larsen’s Building

Whitmore also claims that this Court cannot consider clear evidence that the disputed land beneath Larsen’s building is valued at just \$7,500 because the appraiser’s report was admitted and later withdrawn at trial. Resp’t br. at 1. Whitmore is wrong for several reasons.

First, it is obvious from the record that the disputed land in question has very little value if sold. It is a four to ten-foot strip of land beneath and abutting a busy auto shop with no prospect for future development. Whitmore admits that much larger plots of land in the area have a rental value of just \$150 a month. Resp’t br. at 3 (admitting that nearby railroad leases are “approximately \$1,900 per year”); Ex. 119 (Whitmore lease with WSDOT for nearby parcel, five times bigger than the disputed land, for \$1,760 *per year*). And Whitmore’s delay and failure to pursue timely relief shows that the land has little value to him. *E.g., White Water, supra*. Indeed, by proposing the alternative remedy that Larsen’s building be

sealed off with a fence shows that Whitmore has no interest in actually obtaining possession of the disputed strip of land. Rather, Whitmore's interest is to destroy the beneficial use of Larsen's building to force him off the land, as further evidenced by his failed attempt to surreptitiously acquire additional land beneath his building from WSDOT, after Chambers informed him that he was letting his lease expire. Ex. 115.

Second, it is immaterial that the appraisal report, exhibit 115, was withdrawn at trial where the main thrust of this appeal is that the trial court erred in allowing the case to proceed as an unlawful detainer. The trial court erred by taking a rigid approach to this property dispute by refusing to consider the equities of the situation. *Proctor*, 169 Wn.2d at 504. This included refusing to consider the negligible value in returning a four to ten-foot strip of land to Whitmore that he never possessed in the first place. Exhibit 115 is essentially an offer of proof, supported by the other evidence considered by the trial court described *supra*, showing what Larsen would have argued had the trial court properly realized that this "boundary dispute" was not proper as an unlawful detainer, but rather as an action for ejectment where the ownership interests of all parties could be balanced.

An ejectment action would have allowed Larsen to argue for a forced sale of land of comparatively low value or to offset any damages based on the permanent improvements. RCW 7.28.150; *Proctor, supra*.

These issues were off the table, due to the trial court's error in allowing the action to proceed as an unlawful detainer, and thus it makes no difference whether exhibit 115 was admitted at trial. The Court should reverse and remand with instructions that the case must proceed as an ejectment action.

(b) Fencing Off Larsen's Building Serves No Legitimate Purpose

Whitmore also argues that the trial court fashioned an equitable remedy by allowing Whitmore to seal off one side of Larsen's building by erecting a fence. Resp't br. at 20. Whitmore fails – as did the trial court – to explain what purpose this “remedy” would serve.

Again, this “remedy” would not restore possession to the disputed strip of land beneath Larsen's building. The fence would only serve to destroy the economic use of his building without consideration for fire codes or regulations regarding access and egress to commercial property, potentially rendering the building uninhabitable. Moreover, the trial court *cannot* “restore possession” of the land in question where neither Whitmore nor his predecessors ever possessed the property beneath Larsen's building. *See FPA Crescent Associates, LLC v. Jamie's, LLC*, 190 Wn. App. 666, 675, 360 P.3d 934, 938 (2015) (explaining that “unlawful detainer is the legal substitute for the common-law right of personal *re-entry*”) (emphasis added).

The Legislature recognized long ago that such improperly filed disputes would arise, where a “landlord” files an unlawful detainer to recover property it never possessed. That is precisely why it chose to add RCW 59.16.030, which mandates⁸ that such actions brought by plaintiffs who never possessed disputed land proceed as ejectment cases. That should have happened here, and reversal is warranted.

(3) The Trial Court Erred in Finding That the Land Was Not Part of an Established Public Road

As discussed in Larsen’s opening brief, the trial court erred in finding that Whitmore proved⁹ his right to exclusive possession of the property where historical records confirm that the disputed driveway is a historic public road, known as Kaylor Road, that was designated by Whitman County and operated for a number of years as far back as the late 1800s.¹⁰ Appellants br. at 28-32. Whitmore’s arguments to the contrary are full of legal and factual errors.

⁸ The statute uses mandatory not permissive language. RCW 59.16.030 (mandating that the case “*shall*...be entered...in all respects as if the action were brought [as an ejectment matter].” (emphasis added).

⁹ Ultimately, “[t]he burden is on the landlord in an unlawful detainer action to prove his or her right to possession by a preponderance of the evidence.” *FPA Crescent Associates, LLC*, 190 Wn. App. at 675.

¹⁰ Again, the road is referred to by several different names in the historical records and the record on appeal, including Branham, Kamiaken, Wagon, and Kaylor Road. Larsen’s briefing refers to it exclusively as Kaylor Road for ease of reference.

First, Whitmore argues that “title is not to be litigated in an unlawful detainer matter.” Resp’t br. at 21. For support, Whitmore cites *Decker v. Verloop*, 73 Wash. 10, 131 P. 190 (1913) and *Hall & Paulson Furniture Co. v. Wilbur*, 4 Wash. 644, 30 P. 665 (1892). But more recently the Supreme Court has clarified, “If land is public land—the title in the government—a tenant is not bound by the ordinary rule which forbids him to dispute his landlord’s title.” *Laurelhurst Club v. Backus*, 161 Wash. 185, 190, 296 P. 819 (1931).

The *Backus* court explicitly rejected *Hall’s* application to modern unlawful detainer actions because it concerned a lease that predated Washington statehood. *Id.* at 189. Thus, there were no laws officially establishing public roadways and thoroughfares. The court explained that a defendant to an unlawful detainer action may argue that an alleged landlord cannot claim title to public “alleys, streets, avenues, boulevards, waterways and other public places” because doing so would be contrary to Washington laws establishing those roads for the public. *Id.* at 191 (holding that landlord could not claim title to public waterway). By relying on outdated authority, Whitmore only highlights the legal errors made by the trial court, which relied on the same faulty caselaw. CP 517 (trial court citing *Hall* in its final findings and conclusions).

Next, Whitmore muddies the law claiming that the county road was never annexed into the city of Pullman because he claims that annexation only applies to “newly incorporated” cities. Resp’t br. at 10. It is unsurprising that he fails to cite any caselaw to support his position, because he is wrong. Regardless of the laws applying to newly incorporated cities, the Supreme Court has clarified:

We have long recognized and held that upon annexation of new territory to a city or town such territory immediately becomes an integral part of the municipality, and *ipso facto* becomes subject to all the laws and ordinances then in force regulating activities within the city limits.

Hoops v. Burlington N., Inc., 83 Wn.2d 396, 401, 518 P.2d 707 (1974); *accord, Evergreen Trailways, Inc. v. City of Renton*, 38 Wn.2d 82, 228 P.2d 119 (1951). Thus, existing cities necessarily take control of existing county roadways like Kaylor Road when annexing new territory. Whitmore’s attempt to mislead the Court by insinuating the RCW 35.02.180 is the only authority for annexation is telling.

Third, Whitmore completely misunderstands the nonuser statute, RCW 36.87.090. Resp’t br. at 9. That statute provides for automatic vacation of public roads that are designated by counties, but never actually opened for use within five years of that designation. It *does not* provide for automatic vacation when a county road that is open to the public falls out of favor and goes unused for a period of five years sometime after it opens

as Whitmore claims. *Id.* at 10 (claiming that the road was vacated because it was not used for a period of five years “from on or about 1913 until 1959”). The purpose of the nonuser statute is to curtail speculative platting. It is simply not meant to divest the public of its right to use historic roads that go unused for a period of time after opening. Such roads must be formally vacated, and until that time, no party may gain title to them by adverse possession, quiet title, or any other action. *Kiely v. Graves*, 173 Wn.2d 926, 935, 271 P.3d 226 (2012); *see also, Nelson v. Pac. County*, 36 Wn. App. 17, 23, 671 P.2d 785 (1983), *review denied*, 100 Wn.2d 1037 (1984) (holding that public rights of way cannot be informally abandoned, especially where “[t]he statutory procedures were necessary to protect the interests of [abutting property owners] and other members of the public in that area”).

Here, the evidence clearly shows that the public used the road for years after it was opened, as evidenced by eyewitness and newspaper reports. Exs. 102-10, 123-31. Whitmore’s predecessors had no right to quiet title to the road, especially through covert process where they failed to name the city, the railroad, and the roofing company, all of whom had ownership interests in the property in question. RCW 7.28.010 (quiet title actions must include the “tenant in possession” and all persons “claiming the title [to the property] *or some interest therein*”) (emphasis added).

Nor does it matter whether public use dwindled or whether prior leases referred to the roadway as a “private road,” as Whitmore argues in his brief. Resp’t br. at 8-9. As courts have recently held, “The mere fact that the right-of-way is used almost exclusively by the residents who live alongside it does not mean that the [public’s] interest has been extinguished.” *Kelley v. Tonda*, 198 Wn. App. 303, 323, 393 P.3d 824 (2017) (noting that a historic county road could not be claimed by a private citizen); *see also, Kiely, supra* (private parties cannot claim public rights of way that are not formally vacated). The trial court erred in missing this point.

Finally, Whitmore mistakes the facts, claiming that “[i]n 1913, the city of Pullman began the process of relocating the road east of the railroad tracks (Kaylor...Road[]) to the west side of the track.” Resp’t br. at 8. But in 1913, the city of Pullman had no authority over Kaylor road north of Stadium Way. That road was *county property* until the city annexed it in 1949, as Whitmore admits elsewhere in his brief. Resp’t br. at 2. Moreover, there is *nothing in the record* to support the notion that anyone sought to “relocate” Kaylor Road or that it was ever vacated north of Stadium way. The record merely shows that locals sought to establish a “new” public roadway west of the tracks because Kaylor Road was rocky.

Ex. 130. Whitmore’s arguments and the trial court’s findings on this point lack any support in the record; this Court should reject them.

The evidence is overwhelming, especially where Larsen’s expert confirmed the location of the historic road and that it still exists on the property Whitmore claims to own. RP 131-76. Even Whitmore’s expert agreed at one point during trial that Larsen’s buildings “are all within the right-of-way of Branham or Kaylor Road, if that’s what we’re going to determine.” RP 80. The trial court was wrong to ignore this evidence that Whitmore lacked title to and/or the right to possess a public road. *Backus, supra*. This Court should reverse.

(4) The Trial Court Erred in Calculating Damages

As discussed in Larsen’s opening brief, the trial court committed reversible error by awarding damages pursuant to the Chambers lease and doubling them, where Larsen was never a party to that lease and never had a landlord/tenant relationship with Whitmore. *Lenci*, 30 Wn. App. at 800. Appellants br. at 32-34. Moreover, the trial court’s order is materially ambiguous where it never definitively stated the terms of Larsen’s supposed “tenancy.” CP 514 (finding that Larsen wrongfully occupied the premises “on a month to month basis and/or pursuant to a lease agreement that has not expired and/or by an implied lease.”). This ambiguity matters where damages under these various theories are calculated differently. *Lenci*,

supra. Whitmore argues otherwise, but even he cites cases holding that “[t]he measure of ‘damages’ for unlawful detainer is based on the fair market value of the use of the premises.” *Sprincin King St. Partners v. Sound Conditioning Club, Inc.*, 84 Wn. App. 56, 63, 925 P.2d 217 (1996) (cited in resp’t br. at 24).

Here the fair market value of the disputed land is far below over \$1000 a month, where both Larsen and Whitmore rent larger, nearby tracts from WSDOT for less than \$2000 *per year*. Exs. 113, 119. The damage award is unsupported here as well, where Whitmore failed to even present clear evidence of just how much Larsen’s building allegedly encroaches on the property. Whitmore argued early in the case that the building encroached by approximately “[two] or [three] feet,” CP 293. His expert signed an affidavit that the building encroached “between 4.5 and 4.7 feet,” CP 57, only to change his testimony at trial, saying he “think[s the encroachment] it’s about 10 feet.” RP 101. This is yet another material ambiguity in the judgment that must be resolved.

The damage award should be reversed, and an ejectment action held, so that all the interests in “complicated” “boundary dispute” can be sorted out.

(5) The Court Should Deny Fees on Appeal

The Court should reject Whitmore's request for fees on appeal where his only basis for requesting fees is the terms of the lease between himself and Chambers. Resp't br. at 26. As discussed above, Larsen was never a party to that lease, never had it assigned to him, never had the chance to negotiate over the lease's key terms, including the attorney fee provision, and only bought the building with knowledge that the lease was expiring. Because the lease does not control, attorney fees should be denied.

However, as stated in Larsen's opening brief, assuming *arguendo* that the Court determines that the Chambers lease governs any part of this dispute but reverses or remands for any of the reasons stated above, Larsen reserves the right to request attorney fees under the lease at a future date should he prevail, including for time spent on this appeal. He also reserves the right to argue for fees under any other basis in law or equity, where Whitmore improperly pushed through this action as an unlawful detainer that should have been brought as an ejectment.

D. CONCLUSION

The trial court erred in allowing this case to proceed as an unlawful detainer rather than requiring that it be filed as an ejectment action. The Court should vacate the judgment and writ and remand for an ejectment hearing for that reason. Alternatively, the court should remand with

instructions to consider equitable principles to come up with a more permanent solution – such as concluding where the exact boundary line lies and offsetting damages for permanent improvements. At the very least, the Court should remand with instructions to recalculate damages based on the fair market value of the leased property.

DATED this 9th day of March, 2020.

Respectfully submitted,



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DECLARATION OF SERVICE

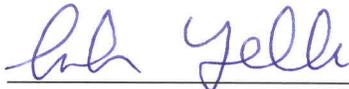
On said day below, I electronically served a true and accurate copy of the *Reply Brief of Appellants* in Court of Appeals, Division III Case No. 36863-7-III to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: March 9, 2020, at Seattle, Washington.



Sarah Yelle, Legal Assistant
Talmadge/Fitzpatrick

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