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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.

BRIEF OF APPELLANTS

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A. INTRODUCTION

This case involves the competing interests of two property owners in Pullman, Washington. In late 2014, Zane Larsen agreed to purchase a building that was built in 1950 and has housed several local businesses ever since. One side of the building encroaches between four and ten feet on a gravel roadway that Mark Whitmore claims to own pursuant to a legally flawed quiet title action his grandmother obtained in 1962. Even though the small strip of land was worth a mere \$7,500 and Whitmore's predecessors historically allowed owners of the building the right to use the land for a nominal sum, just \$100 per year, Whitmore sought to extract \$1,500 a month from Larsen in monthly rent. Larsen balked at this request, especially once he learned that the roadway was historically a public right of way that the City of Pullman never vacated. He also questioned how Whitmore's predecessor ever quieted title to the land under the building without naming the building's owner, the City, or the nearby railroad company with an occupational interest in the land.

Despite these legitimate questions and conflicting interests of two abutting property owners, the trial court allowed Whitmore to bring an unlawful detainer to "evict" Larsen. It deemed Larsen to be Whitmore's tenant, awarded unpaid rent and fees under a lease Larsen never signed, and ordered the destruction or partition of his building without compensation to

Larsen.

The trial court erred. The case should have been filed as an ejectment hearing pursuant to chapter 7.28 RCW, which would have allowed the court to fairly resolve the ownership interests of all parties. Whitmore never had a right to possess the land in the first place, as it was a historic public street. And the court's unclear, unworkable, and inequitable order is contrary to law and contrary to modern policy in favor of flexible solutions property disputes. This court should reverse.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred to the extent it made findings, conclusions, or ordered relief at the show cause hearing held on August 11, 2015.

2. The trial court erred in denying Larsen's motion for summary judgment.

3. The trial court erred in denying Larsen's motion for judgment as a matter of law.

4. The trial court erred in entering judgment against Larsen. CP 523-25.

5. The trial court erred in entering finding of fact number I.1.

6. The trial court erred in entering finding of fact number III.

7. The trial court erred in entering finding of fact number V.
8. The trial court erred in entering finding of fact number VIII.
9. The trial court erred in entering finding of fact number IX.
10. The trial court erred in entering finding of fact number XIII.
11. The trial court erred in entering finding of fact number XIV.
12. The trial court erred in entering finding of fact number XV.
13. The trial court erred in entering its writ of restitution dated

June 25, 2019. CP 583-85.

(2) Issues Pertaining to Assignments of Error

1. Did the trial court err in allowing the case to proceed as an unlawful detainer where it was clearly an action to eject an encroaching landowner, and Larsen should have been permitted to raise counterclaims, including challenges to title? (Assignments of error numbers 1-13)
2. Did the trial court err in finding that the parties had a landlord/tenant relationship where they never signed a lease and the prior occupant informed Whitmore that he was not renewing the former lease? (Assignments of error numbers 1-13)
3. Did the trial court err in fashioning a “rigid” remedy where equitable principles apply even in unlawful detainer cases, particularly where the defendant owns permanent improvements on the landlord’s land? (Assignments of error numbers 1-13)
4. Did the trial court err in refusing to recognize the existence of a public road that negated Whitmore’s right to exclusively possess the property in question? (Assignments of error numbers 4, 12, 13)

5. Did the trial court err in awarding damages under the terms of an expired lease that Larsen never signed or had assigned to him? (Assignments of error number 4, 7, 10)

6. Did the trial court err in doubling damages and awarding fees where unlawful detainer was inappropriate and Larsen was not bound by the fee shifting provision in the expired lease that he never signed or had assigned to him? (Assignments of error number 4, 7, 10)

C. STATEMENT OF THE CASE

In 1950, a roofing company built and occupied a building in Pullman, Washington near the corner of North Grand Avenue and Northeast Stadium Way. CP 356; RP 201. Over a decade later, in 1962, Mark Whitmore's grandmother, Maybelle Kaiser, acquired title to a parcel of land adjacent to the eastern side of the building, via default judgment on her quiet title action for adverse possession. Ex. 5; RP 36. This parcel includes a gravel roadway leading to Whitmore's grain elevator, in addition to a four to ten-foot strip of land allegedly running beneath the eastern side of the building.¹ In her quiet title action, Kaiser failed to name the owner of the building as a person with an interest in the land, despite claiming to acquire title to a strip of land beneath the building. Ex. 5. She also failed to name the City or any other governmental entity, even though the gravel roadway

¹ Whitmore never presented clear evidence of just how much Larsen's building allegedly encroaches on the property. His own expert testified he "think[s] it's about 10 feet." RP 101.

was historically a public right of way known as Kaylor Road,² established as early as 1888. *Id.*

Kaiser executed a long-term lease, leasing the small strip of land running underneath the building, along with the right to use the adjacent gravel roadway, to the roofing company for a nominal sum, just \$100 per year. Ex. 9; CP 217-21. In 1966, the roofing company formally assigned the long-term lease to William Martin. Ex. 10. Martin continued to pay just \$100 dollars per year to lease the small strip of land for the next twenty years. Ex. 11. By 1987, Whitmore’s parents inherited the land from Kaiser, and had their first opportunity to renegotiate the lease. They raised the rent *considerably* and executed a lease with Martin’s widow for \$700 *per month*. Ex. 12.

Charles Chambers later bought the building for his auto tire business and continued to pay rent to Whitmore after Whitmore inherited the parcel from his parents. Ex. 12. Chambers never had the property surveyed nor did he explore Whitmore’s title, rather, he testified that he essentially “inherited” the same lease terms as his predecessor and chose not to fight them. RP 180-82, 191. In 2012, Chambers signed his last lease, agreeing to pay \$1085.50 per month to lease the strip of land and access the roadway

² The roadway has been called different names, including Branham, Kamiaken, Wagon, and Kaylor Road. This brief will refer to it as Kaylor Road.

for the next three years. Exs. 13-14.³ The three-year lease term was set to expire on January 31, 2015. Ex. 14.

Months before the lease expired, Chambers encountered health problems and decided to close his tire business and sell the building. RP 176. In July or August of 2014, Chambers told Whitmore that he would not renew the lease when it expired at the end of January, and that he planned to sell the business by the end of the year. RP 176. Chambers found a willing buyer in Zane Larsen, who planned to operate an auto repair business in the building. RP 187-88. Chambers reiterated to Whitmore multiple times that he was terminating their lease when it expired at the end of January 2015 and that Whitmore needed to negotiate a new arrangement with Larsen. RP 177-78. Chambers also confirmed that the lease expired via a letter he sent to Whitmore in February 2015. Ex. 15.

Larsen agreed to buy the building in October 2014. RP 201. He began moving in the next month to “get [his] feet under [him]” in the business, although the sale did not close until April 4, 2015. *Id.* Larsen began negotiating with Whitmore to lease the strip of land underneath his property, but he soon discovered several “red flags.” RP 204. For one, Whitmore could not produce a sufficient survey of his purported property.

³ Charles bought the building and signed his lease with his wife, Terry Chambers. This brief only refers to Charles as Terry never testified or submitted any documentation below. No disrespect is intended.

Id. Whitmore also pressured Larsen to agree to terms quickly before Larsen could even establish a bank loan. *Id.* During the negotiations, which included discussions with the Washington State Department of Transportation (“WSDOT”) regarding the rest of the land underneath his building, Larsen also learned that the gravel roadway Whitmore claimed to own was historically a public road, known as Kaylor Road. RP 206-07. He learned that the adjacent railroad had used the roadway for years. Ex. 127; RP 315.

Larsen ultimately questioned whether Whitmore owned the land underneath and adjacent to his building and refused to press forward with negotiating a lease without further information. He later hired a surveyor who doubted the location of Whitmore’s land. CP 147-60. He also had the land beneath his building appraised, and its fair market value, if sold, was approximately \$7,500 – *i.e.* substantially less than what Whitmore demanded for an entire year’s rent. Ex. 115. Whitmore filed an unlawful detainer action on June 30, 2015 in Whitman County Superior Court. CP 2-5. Whitmore alleged that Larsen was his tenant pursuant to a “month to month lease,” and sought \$1,500 in monthly rent. CP 3.

The court held a show cause hearing on August 11, 2015 and indicated that it thought Larsen could be bound by the lease Whitmore had with Chambers because Larsen technically moved into the building before

the lease terminated and the court determined that he “held over after the expiration without paying rent.” CP 301. Despite this initial indication, the court struggled with what the ultimate remedy should be. CP 301-02. The court recognized that this was not a typical landlord/tenant dispute, rather, the court described it as a “boundary dispute” involving abutting property owners. CP 298. The court ultimately refused to enter a writ of restitution to remove Larsen from the property and “strongly urge[d] the parties to mediate.” CP 310. Whitmore did nothing for the next 14 months. CP 177.

Suddenly, in November 2016, Whitmore served a notice of trial setting and moved for summary judgment. CP 46-54. For the first time, Whitmore claimed that Larsen was bound to the Chambers lease for an additional three years (through January 2018) because he alleged that the lease contained an automatic renewal provision that Chambers failed to timely cancel in writing. *Id.* This was a surprise, as Whitmore had never previously questioned Chambers’ termination; nor did he ever indicate that he intended to hold Larsen to the Chambers lease. RP 211-12. In fact, both Chambers and Whitmore later testified that they did not even know about the automatic renewal provision in the lease when Chambers moved out. RP 62, 183. Whitmore never amended his complaint to include this post-hoc theory of recovery.

Larsen also moved for summary judgment, arguing that the case was improperly brought as an unlawful detainer action because he was never a party to any lease with Whitmore and had an ownership interest in the property action. CP 192-97. He argued that the case should be refiled as an ejectment action, which is the proper avenue to resolve such “boundary disputes” between adjacent property owners. *Id.* An ejectment action would have allowed the court to settle all the disputed property interests, including Larsen’s challenges to title, his potential counterclaims for the value of the permanent improvements, and the court could have even forced a sale of the land under his building as a permanent solution. *Id.* (citing RCW 7.28.150-.160).

The trial court denied Larsen’s request, denied summary judgment to both parties, and the case eventually went to trial in April 2019. CP 189, 284-85.

Whitmore, Larsen, and Chambers all testified at trial that Chambers repeatedly informed Whitmore that he was letting his lease expire months before the automatic renewal provision triggered and that Whitmore needed to negotiate a new agreement with Larsen, which he tried to do. *E.g.*, RP 177-78. Chambers also confirmed that the lease had expired, in writing, in February 2015, shortly after moving out, which Whitmore never challenged. Ex. 15.

Larsen also presented evidence, including public maps and newspaper articles, as well as testimony by Darrel Carstens, a licensed Washington surveyor, showing that the gravel roadway was, in fact, an established public road dating back to 1888, that was never vacated by the City of Pullman. Exs. 102-10, 123-31; RP 131-76. Thus, Whitmore had no right to acquire title to or exclusively possess the roadway on which Larsen's building allegedly encroached. *Id.*

Despite this evidence, the trial court, the Honorable Gary Libey, found in favor of Whitmore. CP 507-18. In light of Whitmore's ever-changing theories for recovery against Larsen – whether as a month to month tenant as the unamended complaint alleged or pursuant to the renewal provision in the Chambers lease that he raised years later – the trial court refused to definitively state the basis for finding that Larsen was liable for unlawful detainer. *See* CP 514 (Finding of Fact VIII) (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”).⁴ It fixed the damages based on the terms of the Chambers lease, doubled the them pursuant to the unlawful detainer statute, and awarded

⁴ As discussed below, this lack of clarity alone is reason to remand, where the damage calculation for a holdover tenant (or tenant by implied lease) is fixed at fair market rental value as opposed to a tenant who does not pay rent under a valid lease and must pay the rent fixed by the lease.

costs and attorney fees because the Chambers lease allowed for them. CP 523-25.

The trial court also ordered that Whitmore obtain a writ of restitution to deliver him possession of the premises either by: (1) allowing Whitmore to erect a fence along the eastern side of Larsen's building, effectively sealing off that portion of the building from any access, egress, or beneficial economic use; or (2) destroying or removing the portion of Larsen's building that encroaches on Whitmore's land. CP 518. There is no indication in the record that the court considered whether either option was feasible, economically viable, or permissible under building and fire codes. Larsen timely appealed and obtained a stay of the judgment and the writ. CP 519-20, 580.

D. SUMMARY OF ARGUMENT

This Court should reverse the court below and order that the case be tried as an ejectment hearing. This would allow the trial court to resolve all issues and counterclaims and reach a permanent solution that respects the competing ownership interests of both parties. The trial court was wrong to conclude that the parties had a tenant/landlord relationship, where Larsen was never party to any lease, his predecessor clearly let his lease expire, and Whitmore waived his right to assert that the former lease continued by waiting two years to raise any argument that the lease automatically

renewed.

Even if the court disagrees and determines that unlawful detainer was proper, the final order and writ should be reversed where Whitmore failed to prove his affirmative right to exclusive possession of the roadway where the evidence shows that it is a public roadway that was never vacated. At the very least, the order should be remanded with instructions to consider equitable principles that apply even in unlawful detainer actions. Courts abhor the needless destruction of commercially viable property in favor of strict landowner interests devoid of comparable gain. The Court should also remand the damage award where Larsen cannot be held to the terms of the prior lease, including the fee-shifting provision. Assuming *arguendo* Whitmore was entitled to some relief, the proper measure of damages is the fair market value of the lease, which is substantially lower than the court ordered.

E. ARGUMENT

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

The trial court erred in allowing this “boundary dispute” to proceed as an unlawful detainer where it should have been tried as an ejectment hearing. An ejectment hearing would have allowed the court to properly consider all the issues and counterclaims regarding two abutting property

owners and fashion a permanent solution for all parties involved. This Court should reverse.

“[A]n unlawful detainer action is a statutorily created proceeding that provides an expedited method of resolving the right to possession of property.” *Randy Reynolds & Assocs., Inc. v. Harmon*, 193 Wn.2d 143, 156, 437 P.3d 677 (2019). It is a “summary proceeding to determine the right of possession as between landlord and tenant. The 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 39, 45, 711 P.2d 295 (1985). “A court presiding over an unlawful detainer action sits as a special statutory tribunal, not as a court of general jurisdiction. As such, the court lacks authority to address disputes unrelated to possession” including most counterclaims and challenges to title. *Castellon v. Rodriguez*, 4 Wn. App. 2d 8, 18, 418 P.3d 804 (2018).

Ejectment, on the other hand, is a general civil action governed by chapter 7.28 RCW, where a superior court can resolve all issues related to the land, including the right to title and “all...interests claimed by the defendants in the property.” *Grove v. Payne*, 47 Wn.2d 461, 466, 288 P.2d 242 (1955); RCW 7.28.010. This includes the interests of defendants who own permanent improvements on the property. RCW 7.28.150-.160. This court has explained:

Ejectment is a remedy for one who, claiming a paramount title, is out of possession. Ejectment is a mixed action, and damages for the ouster or wrong can be simultaneously recovered. When permanent improvements have been made upon the property by the defendant, in good faith, the value thereof may be allowed as a setoff, or as a counterclaim, against damages for withholding the property, RCW 7.28.150 and .160.

Bar K Land Co. v. Webb, 72 Wn. App. 380, 864 P.2d 435 (1993) (citations omitted).

A trial court must not allow action that should have been brought as an ejectment suit to proceed as an unlawful detainer. For example, in *Bar K*, this Court reversed a ruling in favor of a landowner who brought an unlawful detainer action against a defendant who paid rent as part of an “Early Possession Agreement.” *Id.* at 381-82. In addition to rent, the defendant paid for remodel costs of the home as part of their particular agreement in anticipation of a sale, which the parties agreed to after the defendant failed to qualify for a traditional loan. *Id.* This Court held that because the defendant “had greater property interests than those of a tenant” the case should have been tried as an ejectment hearing and not an unlawful detainer action, which would have allowed her to bring counterclaims for the real improvements she made to the property. *Id.* at 384-86; *see also*, *Puget Sound Inv. Grp., Inc. v. Bridges*, 92 Wn. App. 523, 528, 963 P.2d 944 (1998) (affirming dismissal of unlawful detainer where the “appropriate

procedure is an action in ejectment and quiet title under RCW 7.28”); *Honan v. Ristorante Italia, Inc.*, 66 Wn. App. 262, 270, 832 P.2d 89, *review denied*, 120 Wn.2d 1009 (1992) (holding that trial court erred in permitting unlawful detainer where it was “evident the essence of the action...was one for ejectment, not unlawful detainer”).

Here, too, the trial court should not have allowed the case to proceed as an unlawful detainer where the “essence of the action” is one for ejectment. This is not a typical landlord/tenant dispute, as Larsen has a “greater property interest” than that of a typical tenant. *Bar K, supra*. He owns the permanent improvements sitting on the land that Whitmore claims to own. The permanent improvements have been separately owned since before Whitmore’s predecessors ever gained title to the land. Although somewhat unique, the law has long recognized that such property interests are valid. *See, e.g., SSG Corp. v. Cunningham*, 74 Wn. App. 708, 712, 875 P.2d 16 (1994) (“When a person with no interest in the land affixes an article thereto in the furtherance of his own purposes, the presumption is that he intends to reserve title to the chattel in himself.”); *see also*, RCW 7.28.150-.160 (permitting counterclaims for owners of permanent improvements on another person’s property). Larsen’s interest is especially valid, where the building predated Whitmore’s claim to title by over a decade. Despite purporting to name *all parties* with an interest in the land when they quieted

title, Whitmore's predecessors failed to serve the prior owner of the building and obtained title by default judgment.⁵ Had they properly named the building owner in the first place, this "boundary dispute," as the trial court deemed it, could have been resolved decades ago.

Clearly the essence of this dispute is one for ejectment, calculated to remove an encroaching property owner from land that Whitmore purports to own. Larsen should have been allowed to raise all counterclaims, including his contention that Whitmore's predecessors did not properly quiet title to the property because they failed to name and serve necessary parties. *See, e.g., Bryant Lumber & Shingle Mill Co. v. Pac. Iron & Steel Works*, 48 Wash. 574, 578, 94 P. 110 (1908) ("It is a well-settled rule in this state that, in actions in ejectment, the plaintiff must recover upon the strength of his own title, not upon the weakness of his adversary.").

Additionally, in an ejectment action the court could have forced a sale of the land beneath the permanent improvements or otherwise offset the judgment by the value of the permanent improvements. *Proctor v. Huntington*, 169 Wn.2d 491, 504, 238 P.3d 1117 (2010), *cert. denied*, 562 U.S. 1289 (2011) (holding that forced sale of property beneath permanent

⁵ As discussed below, Whitmore's predecessors also failed to serve or notify the City of Pullman, despite evidence that the land they purported to quiet title to was a public road.

improvements that encroached on neighboring landowner's property was an appropriate remedy); RCW 7.28.150 (allowing ejectment judgment to be offset to account for value of permanent improvements). These remedies would have resulted in a more permanent solution, recognizing the property interests of *both parties* that go far beyond those of a typical landlord/tenant.

The "solution" the court came to in this case is unworkable, unjust, and only evidences the fact that ejectment was the proper course. The normal remedy in an unlawful detainer is to issue a writ of restitution to restore possession of the property at issue. RCW 59.12.090. But, here, possession cannot truly be restored; Whitmore and his predecessors *never possessed* the building that encroaches on his purported property. Importantly, the Legislature foresaw that property owners like Whitmore may try to bring such actions as unlawful detainer cases. Thus, the Legislature enacted RCW 59.16.030 which states that a landowner who sues under an unlawful detainer need not:

prove that the said lands were, at any time, actually occupied prior to the defendant's entry thereupon but it shall be sufficient to allege that he or she is the legal owner and entitled to the immediate possession thereof: PROVIDED, That if the defendant shall, by his or her answer, deny such ownership and shall state facts showing that he or she has a lawful claim to the possession thereof, the cause shall thereupon be entered for trial upon the docket of the court in all respects as if the action were brought [as an ejectment matter pursuant to chapter 7.28 RCW].

Here, Larsen plead a “lawful claim” to the property that Whitmore *never possessed*. Therefore, the case should have been tried as an ejectment hearing, allowing the court to resolve all of Larsen’s “interests” in the property. *Grove*, RCW 59.16.030, *supra*.

Faced with the fact that it could not truly restore possession to Whitmore because he never possessed the property underneath Larsen’s building in the past, the court fashioned an oppressive remedy, rather than a mere restoration of possession typical of unlawful detainer actions. The writ in this case requires the Sheriff to either: (1) erect a fence abutting the entire east side of Larsen’s building; or (2) destroy a portion of Larsen’s building, which has existed since the 1950s, employing and serving many members of the Pullman community through various businesses that have occupied the building for the past 70 years. Both options, more akin to ejectment remedies, are unworkable and inequitable.

The first option – sealing off an entire side of Larsen’s building with a fence – is clearly unmanageable, would destroy the beneficial use of the large portions of the building, and makes no mention of applicable fire or building codes regarding necessary access/egress, etc. Moreover, it does not solve any problems. Larsen would *still possess* the disputed strip of land at issue. This invites the question whether Whitmore could bring another lawsuit in the future for unpaid rent for the disputed land that would

still sit underneath Larsen's building. Larsen should not be bound in perpetuity to such uncertainty. By failing to "restore" possession, the fence serves no practical purpose; the only purpose of this "remedy" is to punish Larsen and restrict the beneficial economic use of his building.

Likewise, the purpose behind the second option, destroying part of Larsen's building, is to damage its beneficial economic use so that Whitmore can enter a small strip of land that has little comparative value.⁶ Washington Courts disfavor such wasteful judgments that impose hardships on property owners.

Our Supreme Court has long "recognize[d] the evolution of property law in Washington away from rigid adherence" to a rule requiring the removal of permanent improvements that encroach on another's property "and toward a more reasoned, flexible approach." *Proctor*, 169 Wn.2d at 504. The *Proctor* court cited the seminal case *Arnold v. Melani*, 75 Wn.2d 143, 449 P.2d 800 (1968). There, a house and fence encroached on an adjacent lot. The *Arnold* court affirmed a judgment awarding damages rather than removal of the house, reasoning that the offending house was worth far more than the land on which it encroached. The court listed

⁶ This second option also does not solve the issue of the public roadway. The City could still assert its legal rights to Kaylor Road sometime in the future, in which case, destroying Larsen's building would be for naught.

several factors to consider when requiring the removal of permanent improvements that encroach on another's land including:

(1) The encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure; (2) the damage to the landowner was slight and the benefit of removal equally small; (3) there was ample remaining room for a structure suitable for the area and no real limitation on the property's future use; (4) it is impractical to move the structure as built; and (5) there is an enormous disparity in resulting hardships.

Id. at 152.

Relying on these factors, the *Proctor* court affirmed a judgment that forced the sale of an entire acre of property, after a couple unwittingly built their house entirely on their neighbor's property. The court determined that it would not be "fair and just" to require the couple to destroy their house at great cost, where the only benefit would be the landowner gaining a single acre of land that "would not appreciably increase the value or size of [the landowner]'s parcel, which total[ed] 30 acres." *Id.* at 503-04.

Here, too, Whitmore's only benefit would be obtaining a four to ten-foot strip of land with a fair market value of approximately \$7,500, to Larsen's great detriment. Ex. 12. The other *Arnold* factors also weigh in favor of Larsen, especially where the building existed for over a decade *before* Whitmore's predecessors quieted title to the small strip of land underneath its east side without even naming the owners of the building in

the quiet title action. Larsen should have been allowed to argue these factors and either force a sale of the land beneath his building or offset his damages to come to a more permanent and reasonable solution as part of an ejectment hearing.

Of course, the trial court refused to consider issues that are properly considered at ejectment hearings, including Larsen's counterclaims or requests other forms of relief, such as a forced sale. It also refused to entertain Larsen's challenges to title, which is proper at an ejectment hearing, where the default order contained obvious defects, including the failure to name the owner of the building when quieting title to the land underneath it.⁷ The court erred, and this Court should reverse so that all of Whitmore and Larsen's ownership interests can be considered as part of an ejectment hearing. *Bar K, Honan, Proctor*, RCW 59.16.030, *supra*.

It's worth noting that the only benefit to proceeding as an unlawful detainer as opposed to an ejectment case (other than wrongfully restricting Larsen's ability to defend his own ownership interests) is that unlawful detainer normally provides "expedited" relief to the landowner. *Randy Reynolds*, 193 Wn.2d at 156. Here, Whitmore waived that benefit by failing to diligently pursue his claim. He let the case languish for 14 months after

⁷ Again, Whitmore's predecessor also failed to join the City and the nearby railroad that had an easement and historically used the land. RP 99-100.

the show cause hearing without contacting Larsen's counsel to mediate, without moving for summary judgment, and without setting the case for trial. CP 177. He showed no interest in quickly possessing the land, because it has little, if any, real value to him.⁸ Rather, this has become a personal crusade against Larsen for refusing to cave and sign a grossly inflated lease of adhesion. The trial court should have seen through these tactics and required that the case be refiled as an ejectment hearing. This Court should reverse.

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

Not only should the trial court have dismissed the unlawful detainer and required that Whitmore refile it as an ejectment action, but the court erred in allowing the case to proceed as an unlawful detainer despite the fact that the parties did not have a landlord/tenant relationship. As stated above, Whitmore's decision to file this case as an unlawful detainer was a purposeful tactic to deprive Larsen the opportunity to defend his property interests via counterclaims. It should have been dismissed and refiled as an ejectment action where the two never had a landlord/tenant relationship.

⁸ Whitmore was also content to ignore the trial court's urge to mediate and let the case languish for over a year because he knew he would argue for double damages later. This gamesmanship should not be permitted.

It is undisputed that Larsen and Whitmore never signed any lease. It is also undisputed that Chambers never assigned his lease to Larsen. Such an assignment needed to be approved by Whitmore, which never occurred. Ex. 14.

The trial court wrongfully found that Larsen could be bound by the terms of the Chambers lease because he took possession of the premises, knowing that his predecessor was bound by a lease. CP 513. However, Larsen also knew that the lease was ending. Chambers told Whitmore multiple times, and confirmed in writing, that he was letting the lease expire and that Whitmore needed to negotiate a new arrangement with Larsen. RP 177-78. The parties tried to negotiate an entirely new deal, which they failed to do. RP 204. In fact, Larsen testified that the proposed lease Whitmore presented Larsen, affirmatively stated that “all leases prior had been already paid for” and all business was concluded with Chambers. *Id.* With no valid lease in place, Whitmore’s proper remedy at that point was to file an ejectment action. *Bar K, Honan*, RCW 7.28.010, *supra*. It is unjust and inequitable to bind Larsen to the terms of his predecessors in perpetuity where he purchased the building after Chambers’ lease expired.

Whitmore’s post-hoc justification for holding Larsen to the Chambers lease also fails. Larsen was not bound to the lease for three additional years because Chambers was technically late in providing written

notice terminating the three-year renewal. The parties never intended that provision to control their agreement and Whitmore affirmatively waived its application by failing to raise this argument until nearly two years after Larsen took over the property.

When deciding a contract dispute, this Court's objective is to determine "the intent of the parties." *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 248, 215 P.3d 990 (2009), *review denied*, 168 Wn.2d 1024 (2010). To do so, this Court considers the "contract as a whole and in the light of all the circumstances surrounding the contract." *Id.* This includes the "subject matter and the objective of the agreement, the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of their respective interpretations." *Id.* "In 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 it is clear from the "surrounding circumstances" and the "subsequent acts and conduct of the parties," that no one ever intended the automatic renewal provision to trigger after Chambers clearly informed Whitmore multiple times that he was letting the lease expire. Whitmore

accepted this termination as evidenced by his affirmative assurances to Larsen during negotiations that all prior leases had ended. RP 204. Whitmore admitted that he did not even know about the automatic renewal provision in the lease when Chambers moved out. RP 64. And he failed to raise the issue until November 2016, two years *after* Larsen entered the building and 15 months *after* he filed an unlawful detainer complaint (which he never amended) asserting that Larsen was bound by a “month to month” lease, not a three-year extended term. CP 2-5. To the extent there is any doubt, the Court should construe these affirmative actions against the lessor and in Larsen’s favor.

Even if the court disagrees and finds that the parties intended the automatic renewal provision to apply, generally speaking, parties are not strictly bound to the terms in leases when it comes to the technical requirements in extension clauses. *See, e.g., Gen. Tel. Co. of Nw., Inc. v. C-3 Associates*, 32 Wn. App. 550, 552, 648 P.2d 491, 492 (1982) (holding that a tenant’s hand delivery of notice to renew sufficed even though the lease required notice by registered mail). This is especially true where it would be inequitable to strictly enforce a lease provision against a lessor, such as where the lessee has made permanent improvements to the property. *Wharf Rest., Inc. v. Port of Seattle*, 24 Wn. App. 601, 609, 605 P.2d 334 (1979) (holding that special circumstances existed to extend a tenant’s time

to renew beyond the terms of the terms of the lease, especially where tenant had made permanent improvements to the property).

Here, in addition to multiple, clear verbal notices that Chambers was not renewing the lease, he confirmed his intentions in writing shortly after the deadline for written notice in the lease. It would be inequitable to bind Larsen's lease due to this technical failing of his predecessor. This is especially true where Whitmore waited two years before even mentioning the renewal provision, thus waiving his right to assert that the renewal provision triggered. This Court should reverse.

(3) Even in an Unlawful Detainer Case, the Court Has the Power to Apply Equitable Principles

Even if the court disagrees and finds that an unlawful detainer was proper, the trial court still erred in its "rigid" approach to this "boundary dispute." *Proctor, supra*. Courts have long held that equitable principles apply to unlawful detainer cases and that such principles warrant a departure from strict application of unlawful detainer rules and procedures.

"[A] trial court clearly has discretion to resolve an unlawful detainer action on equitable grounds." *Indigo Real Estate Servs., Inc. v. Wadsworth*, 169 Wn. App. 412, 426 n.10, 280 P.3d 506 (2012). Courts have long recognized that special circumstances in unlawful detainer cases "such as permanent improvements to the property...justify the application of

equitable principles.” *Lenci v. Owner*, 30 Wn. App. 800, 803, 638 P.2d 598, 600 (1981), *review denied*, 97 Wn.2d 1014 (1982) (citing *Wharf Rest.*, 24 Wn. App. 601); *see also*, *Recreational Equip., Inc. v. World Wrapps Nw., Inc.*, 165 Wn. App. 553, 566, 266 P.3d 924 (2011) (holding that tenant was entitled to equitable grace period to extend lease despite the language in the lease, especially where the tenant made permanent improvements to the property). Again, these applications of equity, even in unlawful detainer actions, reflects the “recognize[d]...evolution of property law in Washington away from rigid adherence to an injunction rule and toward a more reasoned, flexible approach.” *Proctor*, 169 Wn.2d at 504.

The trial court should have recognized that this case is not a typical landlord/tenant dispute and should have valued Larsen’s ownership interest in the permanent improvements that allegedly encroached on Whitmore’s land. It should have fashioned a more equitable remedy other than sawing 10 feet off of Larsen’s building or sealing that side with a fence with no regard to building/fire codes, beneficial economic use of the land, or consideration of the comparative value of the parties’ interests. Even if the Court finds that unlawful detainer was appropriate, the “rigid” application of property law conflicts with Supreme Court authority demanding a “more reasoned, flexible approach.” *Proctor, supra*. At the very least, the Court

should vacate and remand with instructions to consider equitable remedies to account for Larsen's equally valid ownership interests.

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

Even if the Court finds that unlawful detainer was appropriate, the trial court erred in finding that Whitmore proved his right to exclusive possession of the property. Larsen presented ample evidence that the land in question is a public road that has existed since 1888, and therefore Whitmore had no right to exclusively possesses it.

The plaintiff in an unlawful detainer has the burden to affirmatively prove his or her right to possession. *Housing Auth. of City of Pasco and Franklin County v. Pleasant*, 126 Wn. App. 382, 392, 109 P.3d 422 (2005). Even in an unlawful detainer where title is normally not an issue, "evidence of title is admissible for the limited purpose of establishing or clarifying one's right to immediate possession." Am. Jur. 2d, *Landlord and Tenant*, § 868.

Whitmore's title and right to exclusively possess the roadway is invalid because party cannot adversely possess "lands held for any public purpose." RCW 7.28.090; *see also*, RCW 4.16.160. Thus, a party may not obtain title to a public street owned by a city unless the city vacates the street prior to the action to obtain title. *Kiely v. Graves*, 173 Wn.2d 926,

935, 271 P.3d 226 (2012) (voiding title to an alley obtained via adverse possession because a city had not vacated its easement interest in the alley before the party obtained title).

Here, historical records show that Whitman County established a public roadway on the subject property as far back as 1888. Exs. 102-10, 123-31.⁹ This was well-supported by documentary evidence, including county maps and newspapers. *Id.* The City of Pullman annexed the area from the County in 1949, RP 106, thus taking control of all existing roadways. *Evergreen Trailways, Inc. v. City of Renton*, 38 Wn.2d 82, 228 P.2d 119 (1951) (“When territory is annexed to a city, the authority of the city *ipso facto* extends over the new territory, and it becomes subject to the control and supervision of the municipal authority.”) (holding that city gained control of public roadways after annexing territory); *see also*, AGO 1961-62 No. 16. There was no record that the road was ever vacated, RP 152, and, therefore, Kaylor Road remains part of the city’s public rights of way to this day. *Kiely, supra*.

Larsen presented testimony from an expert surveyor who confirmed this history, explained the significance of the documentary evidence, and

⁹ Again, the road was known by several names including Wagon Road. For example, exhibit 127 is a map of the railroad’s right of way. It clearly shows Wagon Road plotted to the east of the railroad tracks where the roadway adjacent to Larsen’s building exists now. This includes a railroad crossing just north of Larsen’s building that still exists to this day.

opined that Kaylor Road still exists on the subject property. RP 131-76. Larsen's expert relied on statements from a county planner and city attorneys who supported the notion that Kaylor Road was never vacated. Exs. 124-25; RP 133. Larsen presented interview statements from long-time Pullman residents who saw the road being used. Ex. 105. Larsen also testified that he witnessed numerous persons over the years utilizing Kaylor Road as a fire lane, for the maintenance of public utilities, and for access to his property as well as access to properties located to the north of the building. RP 209-10. This ongoing public use supports the notion that the City never vacated the roadway.

Whitmore's evidence to the contrary was wholly lacking. The trial court relied on a single newspaper article from 1913 indicating that the Pullman City Council approved acquiring a second road to the left of the railroad tracks, because Kaylor Road was "rocky." Ex. 130; CP 516. From this single newspaper article, the Court found that Kaylor Road was "moved." Ex. 130. Aside from this single article, the court based its finding that the road did not exist entirely on Whitmore's testimony that the public allegedly did not use Kaylor Road for a period of years after it was established in the 1880s. CP 516. The court erred in making these findings for several reasons.

First, neither Whitmore nor any witness who testified on his behalf, had personal knowledge of who used the road 100 years ago. This finding is based purely on speculation and cannot withstand review. *E.g., Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 922, 32 P.3d 250 (2001) (holding that a verdict cannot be founded on mere “speculation or conjecture”).

Second, the newspaper article the court referenced did not indicate that any entity planned to “move” Kaylor Road, as the court determined. CP 516 (citing Ex. 130). Rather, the article indicates that the City planned to “secure” a *new* right of way to the left of the railroad tracks, not move Kaylor Road. Ex. 130. Nor could the City move Kaylor Road in 1913, it had not annexed that road from Whitman County yet; Kaylor Road remained county property until Pullman annexed the area in 1949.

Third, and perhaps most importantly, neither Whitmore’s testimony nor the 1913 newspaper article shows that Kaylor Road was formally vacated by any entity before Whitmore’s predecessors gained title via default action without naming the City or the County in its lawsuit. Kaylor Road was still a part of Whitman County in 1913, and Whitmore presented no evidence that the County ever vacated the land.¹⁰ Additionally, mere

¹⁰ Whitmore argued below that the road was automatically vacated pursuant to RCW 36.87.090, which provides for automatic vacation of county roads if they are not used within five years of designation. However, here we have newspaper articles and witness accounts showing that the road was always used after designation. Exs. 102-10, 123-31. Indeed, the article the trial court relied on most heavily showed that in 1913 the

lack of use by the public does not divest a city's interest in a public roadway, and absent formal vacation, the title was void. *Kiely, supra*. This Court should reverse where Whitmore failed to meet his burden to prove his right to exclusively possess the public roadway.¹¹

(5) The Trial Court Erred in Calculating Damages

For all the reasons stated above, the trial court's judgment should be vacated, especially the award of double damages which is unique to unlawful detainer actions and not available as part of an ejectment hearing. RCW 59.12.170. Even if the court disagrees and holds that unlawful detainer was proper, the trial court erred by fixing damages based on a lease that was no longer in effect.

As discussed above, it is undisputed that Larsen never signed a lease with Whitmore, nor did Chambers ever assign his lease to Larsen. Chambers terminated the lease, which Whitmore acknowledged by the very fact that he brought the unlawful detainer against Larsen as a tenant on a "month to month" lease. CP 2-5. At worst, Larsen could be considered a

City chose to acquire a new road west of the railway because residents who used Kaylor road found it too rocky. This necessarily shows that the county road was used after it was designated and RCW 36.87.090 does not apply.

¹¹ Intuitively, it makes much more sense that the building was built encroaching on a public roadway, rather than private land. The roofing business that existed for over a decade before Whitmore's grandmother ever quieted title likely relied on this public roadway to conduct its business.

holdover tenant to an expired lease, given that Chambers never assigned his lease to Larsen, and Whitmore and Larsen never signed any lease.¹²

“The amount of damages occasioned by an unlawful detainer and holding over is based upon the fair value of the use of the premises rather than the amount of rent agreed upon by the parties under a lease no longer in effect.” *Lenci*, 30 Wn. App. at 803.¹³ Here, the trial court erred by awarding damages based on the amount of rent in the Chambers lease, where that did not reflect the fair value for leasing the small strip of land.

The fair market value of the lease is far below \$1085.50 per month. If sold outright, the land is valued at a mere \$7,500. Ex. 12. Historically, Whitmore’s predecessors leased the land for a mere \$100 per year. And, as recently as 2017, Whitmore leased adjacent land from WSDOT for a mere \$1,760 *per year*. Ex. 119. That parcel, leased from WSDOT is over *five times larger* than the parcel at issue here, yet the trial court wrongfully awarded rent in excess of \$12,000 a year for the disputed small strip of land.

¹² The trial court’s lack of specificity on this issue alone justifies remand. *See* CP 514, finding of fact VIII (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”).

¹³ To the extent Washington law recognizes “implied” tenants, the same is true; rent would need to be fixed at a reasonable amount. *See Davis v. Jones*, 15 Wn.2d 572, 574, 131 P.2d 430 (1942) (discussing rent for a common law “tenancy by sufferance”); *Cf.* 17 *Wash. Prac., Real Estate* § 6.17 (2d ed.) (“There is doubt and confusion over whether the common law tenancy at sufferance exists in Washington.”).

Id. Larsen also executed a lease with WSDOT for the land under the rest of his building for \$1,986.52 per year. Ex. 113. The fair market value of the land is far below what Whitmore sought to charge and what the trial court imposed. This court should reverse.

Simply put, the amount designated in the Chambers lease is not the fair value of the lease. Nor is it a freely bargained-for price. This is a contract of adhesion as evidenced by this very lawsuit. Whitmore essentially gave Larsen the option of accepting an exorbitant monthly rent inherited by his predecessor or face legal action to eject him from the land (under the guise of an unlawful detainer action). Larsen should not be punished for his predecessor's decision to pay inflated rent, rather than assert his legal rights as an owner of permanent improvements. Larsen has a right to demand a fair deal. The inequity is evident, especially where Whitmore's predecessors improperly obtained the land beneath Larsen's building by default without notice to the building owner. This Court should reverse.

(6) The Fee Award Should Be Vacated¹⁴

Like the trial court's erroneous monthly rent payment, the court awarded attorney fees and costs solely based on the terms of the Chambers

¹⁴ "Whether a party is entitled to an award of attorney fees is a question of law that [courts] review de novo." *Bloor v. Fritz*, 143 Wn. App. 718, 747, 180 P.3d 805 (2008).

lease. CP 514. Because Larsen was never a party to that lease, it was likewise not appropriate to award fees under an agreement “no longer in effect.”¹⁵ *Lenci, supra*. If the Court does not vacate the entire judgment or remands to calculate damages based on a fair value of the lease, the Court should strike the fee award.

F. CONCLUSION

This is not an unlawful detainer case between a typical landlord and tenant. The trial court erred in allowing this case to proceed rather than requiring that it be filed as an ejectment action. The Court should vacate the judgment and writ and remand for that reason. At the very least, the Court should vacate and remand so the trial court can consider equitable principles and craft a workable, permanent solution that respects the property rights of both parties. The Court should award Larsen his costs on appeal.

¹⁵ Assuming *arguendo* that the Court determines that the Chambers lease governs the terms 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.

DATED this 22nd day of November, 2019.

Respectfully submitted,



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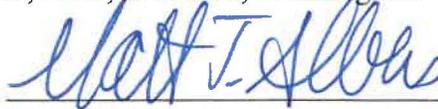
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: November 22, 2019, at Seattle, Washington.



Matt J. Albers, Paralegal
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