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COA No. 373207

(Whitman County Superior Court Case No. 19-2-00121-38)

COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON

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MARK S. RITTS,

Defendant/Appellant,

vs.

PATRICIA L. WEST and CHERYL A. RITTS, as Co-Trustees of the  
Breedon Family Trust and Survivor's Trust

Plaintiffs/Respondents

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APPELLANT'S BRIEF

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....i

I. ASSIGNMENTS OF ERROR.....1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....1

III. STATEMENT OF THE CASE.....1

IV. SUMMARY OF ARGUMENT.....7

V. ARGUMENT.....7

    A. STANDARD OF REVIEW ON APPEAL.....7

    B. SUPERIOR COURT ERRED BY DENYING RITTS’ MOTION.....8

        1. Superior Court should have revised commissioner’s decision.....8

        2. Trustees’ unlawful detainer action should have been dismissed.....10

    C. RITTS REQUESTS ATTORNEY FEES AND EXPENSES.....13

VI. CONCLUSION.....13

CERTIFICATE OF SERVICE.....15

**TABLE OF AUTHORITIES**

<u>Cases</u>	<u>Page(s)</u>
<i>American State Bank v. Sullivan</i> , 134 Wn. 300, 235 P. 815 (1925).....	10-11
<i>Housing Authority of City of Everett v. Terry</i> , 114 Wash.2d 558, 789 P.2d 745 (1990).....	11
<i>In re Dependency of B.S.S.</i> , 56 Wn.App. 169, 782 P.2d 1100 (1989).....	9

<i>Marriage of Gainey</i> , 89 Wn.App. 269, 948 P.2d 865 (1997).....	9
<i>Matter of Estate of Larson</i> , 103 Wn.2d 571, 694 P.2d 1051 (1985).....	9
<i>Pham v. Corbett</i> , 187 Wn.App. 816, 351 P.3d 214 (2015).....	11-12
<i>State v. Charlie</i> , 62 Wn.App. 729, 815 P.2d 819 (1991).....	9
<i>State v. Hoffman</i> , 115 Wn.App. 91, 60 P.3d 1261 (2003).....	7-8
<i>State v. Wicker</i> , 105 Wn.App. 428, 20 P.3d 1007, (2001).....	8
<i>Tedford v. Guy</i> , 462 P.3d 869, 875 (2020).....	7, 8
<u>Rules</u>	
CR 53.2(e).....	8
RAP 18.1.....	13
<u>Statutory Provisions</u>	
RCW 2.24.050.....	8-9
RCW 59.12.035.....	4, 5, 6, 8, 10, 12, 13, 14
RCW 59.12.060.....	6, 8, 11, 12, 13

**I.**

**ASSIGNMENTS OF ERROR**

- A.** The trial court erred and abused its discretion by granting in favor of the Trustees.
- B.** The trial court erred in finding that the Trustees were entitled to a writ of restitution along with attorney fees and costs amounting to \$12,272.53.

**II.**

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- A.** Whether the trial court erred and abused its discretion by granting judgment in favor of the Trustees. (Assignment of Error I.A.)
- B.** Whether the judgment was prejudicial to Ritts.  
(Assignment of Error I.B.)

**III.**

**STATEMENT OF THE CASE**

**A. FACTS**

On November 3, 1997, A. Beryl Breeden and Hollis Breeden established the Breeden Family Living Trust. Under its terms, Hollis and A. Beryl were the original co-trustees and they transferred the farmland known as the Breeden Place into the Breeden Family Trust. (CP 132-144)

The trust could only be amended during the joint lifetimes of A. Beryl and Hollis and, upon the death of the first spouse, the trust estate was to be divided into two trusts: a “Survivor’s Trust” established in Paragraph 6.0 of the Breeden Family Living Trust and a “Family Trust” established in Paragraph 7.0 of the Breeden Family Living Trust. (CP 135-137)

Hollis died on December 20, 2002, and the trust estate was divided into the “Survivor’s Trust” and the “Family Trust” which became irrevocable.

On April 9, 2013, the Appellant Mark S. Ritts (“Ritts”) entered into a crop share lease agreement for the Breeden Place with A. Beryl as the successor trustee of both the “Survivor’s Trust” and the “Breeden Family Trust.” (CP 18-29) Under its terms of the crop share lease, the lease was to expire either on September 30, 2017 or upon completion of harvest whichever came later.

In the fall of 2017, Ritts completed the harvest 20 days late due factors beyond his control (i.e., the late arrival of sub-contractor hired to fertilize property and rain occurring after only part of the land had been seeded). Still, the Trustees allowed the terms of the Lease to hold over through 2018 and permitted Ritts to retain possession of the property after he agreed to pay her \$7,000 for his failure to timely harvest the crop.

In 2018, the leased property was under conversion to a no-till drill barley crop and a spring crop was planted on part of the land while the remainder was chem-falled to be planted with winter wheat in the autumn of that year. However, the planting of the barley crop was delayed by the late arrival of the no-till sub-contractors. After planting finally began, severe rains occurred further delaying planting until the land dried out thereby causing a late crop. On October 10, 2018, the Trustee, Patricia L. West, (after improperly amending the trust to appoint herself co-trustee and without any authority granted by the document) moved for a protective order in Whitman County District Court that barred Ritts from entering or being within 1,000 feet of the farm property covered by the terms of the Lease.<sup>1</sup> The court granted the motion and the order went into effect on October 24, 2018.<sup>2</sup> As a result, Ritts was unable to go onto the farm property to fulfill his contractual obligations thereby making his performance impossible. The scope of the Trustee's protective order barred Ritts from having access to the equipment shop located on the leased farmland where he kept his farming equipment. As a result, he was

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<sup>1</sup> A copy of this document is attached to the Declaration of Lloyd A. Herman Opposing Respondents' Motion to Dismiss Appeal Under RAP 18.9(c) as Exhibit #3: Temporary Protective Order, Whitman Co. Dist. Ct., Oct. 10, 2018.

<sup>2</sup> A copy of this document is attached to the Declaration of Lloyd A. Herman Opposing Respondents' Motion to Dismiss Appeal Under RAP 18.9(c) as Exhibit #1: Protective Order, Whitman Co. Dist. Ct., Oct. 24, 2018.

unable to use his equipment and tools necessary for the planting and harvesting of wheat on his own property.

Earlier, on May 4, 2018, the Trustees attempted to terminate the crop share lease with Ritts. They then followed up with an unlawful detainer action filed on December 3, 2018 in Whitman County Superior Court (Case Number 18-2-00270-38). In the interim between May and December, Ritts held over and retained possession of Breeden Place for more than 60 days after the expiration of the crop share lease. On May 10, 2019, the Court in the unlawful detainer case took this fact into consideration when it entered an Order stating that since Ritts “held over and retained possession of the Breeden Place for more than 60 days after expiration of the crop share lease,” making him a holdover tenant throughout the 2019 crop season pursuant to RCW 59.12.035. (CP 66-69) The Court found the pseudo-Trustees lacked authority to act on behalf of the Breeden Family Living Trust because the trust could not be amended to appoint new trustees. (CP 64-65)

**B. PROCEDURAL HISTORY OF ACTION IN TRIAL COURT**

Despite the language of RCW 59.12.035 that clearly stated, “a holdover tenant shall not be guilty of an unlawful detainer during said year,” the duly appointed Trustees filed another Summons and Complaint for Unlawful Detainer on July 5, 2019. (CP 1-11) There was a show cause

hearing scheduled to be heard before the Court Commissioner on this motion on August 1, 2019. (RP 3-44) On July 31, 2019, the day before the hearing, Ritts filed an Answer and Counterclaims that included a Motion to Dismiss the Trustees' Unlawful Detainer on grounds the court had no jurisdiction due to the Trustees' "unauthorized unilateral actions." (CP 54-55) On the day of hearing, the Trustees stated the only issue before the court were possession of the property. (RP 7-8)

The court had previously found that Ritts was a holdover tenant according to RCW 59.12.035. Ritts' motion to dismiss was argued. (RP 7-8) The Commissioner made no decision on these matters and continued the hearing to a later date (i.e., September 5, 2019). (RP 42-43) When the hearing resumed on that date, the Commissioner signed a Judgment for Writ of Restitution in favor of the Trustees over Ritts' objection to its form and substance.<sup>3</sup> (CP 177-184; RP 79-80) The Trustees then filed a Motion for Award of Attorney's Fees and Costs on September 11, 2019. (CP 185-191). Ritts filed a Motion for Revision of the Court Commissioner's Action on September 16, 2019 with a Proposed Order granting his Motion to Dismiss filed on November 6. (CP 227-240; CP 258-262) A hearing was held on both the Trustees' motion for attorney's fees and Ritts' motion

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<sup>3</sup> Also, the Writ ordered Ritts' Counterclaims to be dismissed without prejudice. (CP 179)

to dismiss November 12, 2019 during which the Trustees' motion was granted and Ritts' motion was orally denied by the Court.<sup>4</sup> (CP 268-292; RP 87-101) The written Order denying Ritts' motion was presented to and signed by the Court on December 19, 2019. (CP 281-283; RP 102-104). Ritts filed a Notice of Appeal with Whitman County Superior Court on January 15, 2020, which was received by the Court of Appeals, Division III, January 21, 2020.

### **C. PROCEDURAL HISTORY IN COURT OF APPEALS**

The Trustees moved to dismiss Ritts' appeal on the grounds the issues were moot, and the Court could not provide effective relief to him. The motion was denied for the reasons stated in the Commissioner's Ruling dated May 28, 2020 wherein the Commissioner took note of Ritts' argument contending there should have been dismissal of the unlawful detainer action by the trial court based on the statutory prohibitions contained in RCW 59.12.035 and RCW 59.12.060.

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<sup>4</sup> The passage in the transcript of the Court's oral decision on Ritts' motion states as follows:

But [the Commissioner] did determine [the Trustees] were proper plaintiffs, and so I think he, under the record that I see, the defendant [Ritts] was a holdover tenant, and his decision was correct as a matter of law. And so, I will deny the motion for revision on the merits. (RP 100, lines 13-17)

**IV.**

**SUMMARY OF ARGUMENT**

The trial court erred by denying Ritts' Motion for Revision of the Court Commissioner's Action thereby prejudicing Ritts' position.

The Appellant, Mark S. Ritts, respectfully requests this court to:

(1) Reverse the trial court's decision denying his motion for revision and dismissal;

(2) Reverse the trial court's decision granting the Trustees' motion for attorney's fees and costs amounting to \$12,272.53; and

(3) Either grant judgment in Ritts' favor or remand the case back to Whitman County Superior Court.

**V.**

**ARGUMENT**

**A. STANDARD OF REVIEW ON APPEAL**

An appellate court reviews the superior court's ruling, not the court commissioner's. *Tedford v. Guy*, 462 P.3d 869, 875 (2020). The appellate court reviews the superior court's order adopting the commissioner's rulings, findings of fact, and conclusions of law. *Id.* at 876. A superior court's findings of fact in an unlawful detainer action are reviewed for substantial evidence. *Id.* Unchallenged findings of fact are verities on appeal. *Id.* Conclusions of law are reviewed de novo. *Id.* An appellate

court's review of a superior court's decision is more deferential than the superior court's revision of a commissioner's ruling. *State v. Hoffman*, 115 Wn.App. 91, 101, 60 P.3d 1261 (2003). Once the superior court makes a decision on revision, the appeal is from the superior court's decision, not the commissioner's. *Id.* The right to revision, therefore, is different from the ability to appeal to this court. *State v. Wicker*, 20 P.3d 1007, 1009–10, 105 Wn.App. 428, 433 (2001). The superior court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *Tedford*, 462 P.3d at 876. A superior court necessarily abuses its discretion if its ruling is based on an erroneous view of the law. *Id.*

The commissioner and the superior court should have immediately dismissed the case on the grounds that it violated RCW 59.12.035 and RCW 59.12.060.

**B. SUPERIOR COURT ERRED BY DENYING RITTS' MOTION.**

**1. Superior Court should have revised commissioner's decision.**

Ritts' Motion for Revision of the Court Commissioner's Action was made pursuant to CR 53.2(e) and RCW 2.24.050, which states:

All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court. Any party in interest may have such revision upon demand

made by written motion, filed with the clerk of the superior court, within ten days after the entry of any order or judgment of the court commissioner. Such revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner, and unless a demand for revision is made within ten days from the entry of the order or judgment of the court commissioner, the orders and judgments shall be and become the orders and judgments of the superior court, and appellate review thereof may be sought in the same fashion as review of like orders and judgments entered by the judge.

The superior court's review of a court commissioner's findings and order is reviewed de novo on the record. *State v. Charlie*, 62 Wn.App. 729, 732, 815 P.2d 819 (1991). The superior court is permitted—but not required—to take new evidence when considering a motion to revise the ruling of a court commissioner. *Marriage of Gainey*, 89 Wn.App. 269, 274, 948 P.2d 865 (1997). The superior court may conduct whatever proceedings it deems necessary to resolve the matter. *In re Dependency of B.S.S.*, 56 Wn.App. 169, 171, 782 P.2d 1100 (1989).

The superior court in reviewing a commissioner's decisions should enter its own findings of fact and conclusions of law into the record, rather than simply adopting the commissioner's findings as its own. *Matter of Estate of Larson*, 103 Wn.2d 571, note 1, 694 P.2d 1051 (1985).

Unfortunately, in this case, the superior court did not do this. The superior court should have revised the commissioner's decision because of the

commissioner's failure to consider that Ritts was a holdover tenant and no unlawful detainer action may be instituted during that term.

2. **Trustees' unlawful detainer action should have been dismissed.**

This brings us to what is at the heart of Ritts' appeal: The Trustees' disregard of the relevant unlawful detainer statutes included in RCW 59.12. Unlawful detainer is a creature of statute. The statute was adopted in 1891 and for over 100 years the statute remained virtually unchanged. In particular, one the unlawful detainer statutes relevant to this case, RCW 59.12.035, states the following:

Holding over on agricultural land, effect of. In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than sixty days after the expiration of his or her term without any demand or notice to quit by his or her landlord or the successor in estate of his or her landlord, if any there be, he or she shall be deemed to be holding by permission of his or her landlord or the successor in estate of his or her landlord, if any there be, and shall be entitled to hold under the terms of the lease for another full year, **and shall not be guilty of an unlawful detainer during said year**, and such holding over for the period aforesaid shall be taken and construed as a consent on the part of a tenant to hold for another year. **(Emphasis added.)**

The court in *American State Bank v. Sullivan*, 134 Wn. 300, 235 P. 815 (1925), came to the same conclusion when it held a tenant who enters under written lease for a year and is permitted to hold over after expiration

of term for more than 60 days, without demand or notice to quit from landlord, is entitled to hold under terms of original lease for another full year. *Id.* at 305.

The other relevant unlawful detainer statute, RCW 59.12.060 (Parties defendant), states:

**No person other than the tenant** of the premises, and subtenant, if there be one, **in the actual occupation of the premises when the complaint** is filed, need be made parties defendant in any proceeding under this chapter, nor shall any proceeding abate, nor the plaintiff be nonsuited, for the nonjoinder of any person who might have been made party defendant; but when it appears that any of the parties served with process, or appearing in the proceeding, are guilty of the offense charged, judgment must be rendered against him or her. In case a person has become a subtenant of the premises in controversy after the service of any notice in this chapter provided for, the fact that such notice was not served on such subtenant shall constitute no defense to the action. All persons who enter the premises under the tenant, after the commencement of the action hereunder, shall be bound by the judgment the same as if they had been made parties to the action. **(Emphasis added.)**

The courts have uniformly declared that “unlawful detainer statutes are in derogation of the common law and must be strictly construed in favor of the tenant.” *Housing Authority of City of Everett v. Terry*, 114 Wash.2d 558, 563, 789 P.2d 745 (1990). If the plain language of a statute is unambiguous, and the legislative intent is apparent, the court will not construe the statute otherwise. *See Pham v. Corbett*, 187 Wn.App. 816,

831, 351 P.3d 214 (2015). Both RCW 59.12.035 and RCW 59.12.060 function as statutory prohibitions forbidding actions for unlawful detainer during the length of a tenant's holdover tenancy or if the tenant is not in possession at the time the Complaint is filed. The language of the statutes is clear and unambiguous that an unlawful detainer action shall not lie against a holdover tenant. Therefore, the case must be dismissed.

Here, the Trustees' unlawful detainer action should have been dismissed by the Commissioner or the superior court on the basis of strict statutory construction of the terms, "shall not" (RCW 59.12.035) or "in the actual occupation of the premises when the complaint is filed" (RCW 59.12.060). Each of these two unlawful detainer statutes prohibited the commencement of this unlawful detainer action.

The Trustees' unlawful detainer action involved a farm lease wherein the tenant, Ritts, was forced out of possession during the holdover period by the landlord's restraining order. The restraining order had no relevance to the lease except it prevented the tenant from actual occupation of the farm property. RCW 59.12.060 provides that the tenant must be "in the actual occupation of the premises when the complaint is filed...." Ritts was barred from possession by the Trustees' restraining order. Ritts was not in "actual occupation of the premises when the Complaint was filed."

The Trustees filed their Summons and Complaint for Unlawful Detainer on July 5, 2019 despite the fact Ritts was not in possession as required by the statute. The commissioner erred by ignoring the earlier Whitman County Superior Court decision on May 10, 2019 wherein the judge entered findings of facts and conclusions of law as part of the Order holding Ritts had held over and retained possession of the property for more than 60 days after expiration of the crop share lease and was therefore a holdover tenant for the year of 2019\_pursuant to RCW 59.12.035. Instead, the commissioner granted a limited right of access for Ritts to enter the property for the purpose of harvesting the acreage of barley crop and gave him permission to remove his equipment, property, and material.

**C. RITTS REQUESTS ATTORNEY FEES AND EXPENSES**

Ritts requests the Court to award him attorney fees and expenses related to this appeal pursuant to RAP. 18.1 and Paragraph 13 (Enforcement), page 6 of the Lease. (CP 23)

**VI**

**CONCLUSION**

The trial court erred and abused its discretion by ignoring RCW 59.12.035 and RCW 59.12.060 and granting a judgment contrary to the clear unambiguous language of the statutes. In order to cure this

miscarriage of justice, the trial court's decision must be reversed, and the case remanded to Whitman County Superior Court for dismissal of the Trustees' unlawful detainer claim and awarding of attorney's fees and costs amounting to \$12,272.53.

RESPECTFULLY SUBMITTED this 29 day of July 2020.

LLOYD A. HERMAN & ASSOCIATES, P.S.



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LLOYD A. HERMAN

WSBA # 3245

Attorney for the Appellant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 29<sup>th</sup> day of July, 2020,  
I caused to be served a true and correct copy of the foregoing by the  
method indicated below and addressed to the following:

Daniel J. Gibbons Witherspoon and Kelley 422 W. Riverside Ave., Ste. 1100 Spokane, WA 99201 Ph. (509) 624-5265 Fax (509) 458-2728	<input type="checkbox"/> PERSONAL SERVICE <input type="checkbox"/> U.S. MAIL <input type="checkbox"/> HAND DELIVERED <input type="checkbox"/> OVERNIGHT MAIL <input type="checkbox"/> TELECOPY (FAX) <input checked="" type="checkbox"/> EMAIL <a href="mailto:DJG@witherspoonkelley.com">DJG@witherspoonkelley.com</a>
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Christopher Herman

**LLOYD A HERMAN & ASSOCIATES**

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