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Court of Appeals Cause No. 373207
Superior Court Cause No. 19-2-00121-38

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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

Plaintiffs/Respondents

v.

MARK S. RITTS,

Defendant/Appellant

RESPONDENTS' OPENING BRIEF

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I. INTRODUCTION

Mark Ritts ("Ritts" or "Mr. Ritts") was properly evicted from farmland that he failed to work, on which he failed to eradicate weeds and that he failed to insure. The factual bases for his eviction are undisputed, and some instances even confirmed by Mr. Ritts' own declaration. The Superior Court did not error in refusing to adopt Mr. Ritts' incorrect interpretation of RCW 59.12.035 and RCW 59.12.060. The Superior Court should be affirmed.

II. RESPONDENTS' ASSIGNMENT OF ERROR AND STATEMENT OF ISSUE

A. Whether the Superior Court's denial of the Defendant's Motion for Revision of Court Commissioner's Action should be affirmed?

III. STATEMENT OF THE CASE

The statement of the case provided by Ritts is extraordinarily incomplete, and largely fails to address the matters before the Superior Court. A succinct statement of facts is presented below.

Plaintiffs Patricia L. West and Cheryl A. Ritts (the "Trustees") are Co-Trustees of the Breeden Family Trust and Survivor's Trust (collectively "the Trusts"). CP 16.¹ Patricia West is Mark Ritts' aunt and

¹ Trustees shall refer to the specific page, and where possible the specific line or paragraph in referring to the Clerk's Papers.

Cheryl Ritts is Mark Ritts' mother. The Trusts own certain farmland (the "Premises") that was leased to Mr. Ritts on a five-year crop share lease on April 9, 2013 (the "Crop Share Lease"). CP 18-29. The term of the Crop Share Lease was five years, expiring on September 30, 2017 or upon completion of the 2017 harvest. CP 18, ¶ 2.

Mr. Ritts held over beyond the expiration of the Crop Share Lease in September of 2017. Mrs. West, acting as a sole trustee attempted to evict Mr. Ritts in 2018. CP 64-65. This attempt was unsuccessful due to the Superior Court determining that Mrs. West was improperly acting as a sole trustee of the Trusts based on an invalid amendment to the Trust Agreement, and she was therefore an improper plaintiff. CP 66-69.

On May 1, 2019, Mrs. West and Mrs. Ritts were appointed as co-trustees of the Trusts following a mental status examination that found their mother (and Mr. Ritts' grandmother), A. Beryl Breeden, was incapacitated. CP 16. At the time of the eviction, Mrs. Breeden (now deceased) was 98 years old, suffered from dementia of the Alzheimer's type, was nearly blind and deaf and lived in an assisted care facility. CP 93-94.

On or about May 2, 2019, Mr. Ritts was provided with notice of default under the Crop Share Lease, identifying nine defaults under the Crop Share Lease. CP 36-37. The defaults were based on failure: (1) To

perform all work in the production of crops, or the fulfillment of soil diversion or other land use and contracts, free and clear of all obligations to the Trusts, in due and proper season; (2) To provide all farm equipment reasonable and necessary for the performance of all work in due and proper season, without cost or obligation to the Trusts; (3) To use reasonable and diligent methods to combat noxious weeds, including the application of chemicals thereon; (4) To provide all seed to be planted upon the property; (5) To properly and timely comply with all Farm Service Agency ("FSA") programs and not, without the consent of the Trusts, exceed any such program; (6) To not permit or commit waste upon the property; (7) To farm the property in a good and farmerlike manner in conformity with approved practices promulgated by governmental agencies and in conformance with good farming practices in the area; (8) To perform all work to carry out the terms of this the lease in due and proper season without expense to the Trusts; and (9) To spray and/or eradicate weeds in the FSA's Conservation Reserve Program on the Birdsell place described on Exhibit "B" of the Crop Share Lease. No response to the notice of default was ever received, and there is no evidence in the record that Mr. Ritts cured any of the defaults. CP 13, ¶ 5; CP 31, ¶ 3; CP 36-37. Notice of forfeiture of the Crop Share Lease was provided to Mr. Ritts on or about June 14, 2019. CP 39.

The Complaint for Eviction in this case was filed on July 5, 2019. CP 1. Mr. Ritts answered and asserted counterclaims on July 31, 2019. CP 51. On August 1, 2019, the Court Commissioner held a show cause hearing and determined that the matter would be continued to determine the competency of A. Beryl Breeden and thus determine whether the Trustees had authority to act on behalf of the Trusts. CP 70. The Court Commissioner also modified a two-year Antiharassment Protection Order that had been entered against Mr. Ritts on October 24, 2018, to allow Mr. Ritts to enter the Premises to remove equipment. CP 161-164; CP 70.²

The continued show cause hearing was held on September 5, 2019. CP 177. At this hearing, Ritts stipulated that Mrs. Breeden lacked capacity, and that the Trustees were authorized to act on behalf of the Trusts. RP 45:21 – 46:3.³ Mr. Ritts also stipulated to dismiss his counterclaims. RP 52:6-10. A declaration filed by Mr. Ritts confirmed he breached the Crop Share Lease in a number of ways, including his failure to eradicate weeds, failure to comply with Conversation Reserve Program requirements and failure to farm the Premises in a farmerlike manner. CP 171-175. No proof of insurance for the Premises was ever provided. The

² Mr. Ritts filed a Motion for Reconsideration of the Court Commissioner's order, then abandoned that motion. CP 82; RP 46:9-25. Rather, Ritts argued for dismissal of the unlawful detainer action based on an alleged lack of possession by his client. RP 46:9-25.

³ The Verbatim Record of Proceedings shall be referenced by page, and where appropriate line number.

Court Commissioner entered a Judgment for Writ of Restitution, restoring possession of the Premises to the Trusts and providing Mr. Ritts until October 13, 2019 to remove his equipment. CP 177-184. The Clerk's office issued a Writ of Restitution on September 12, 2019. CP 220-225. The Trustees filed a Motion for Award of Attorney's Fees and Costs on September 11, 2019. CP 185. No response to the Motion for Award of Attorney's Fees and Costs was filed. CP 255-256; RP 100:18 – 101:1.

On September 16, 2019, Ritts filed a Motion for Revision of Court Commissioner's Action. CP 227. At a hearing held on November 12, 2019 the Superior Court denied the Motion for Revision of Court Commissioner's Action and granted the Trustees' Motion for Award of Attorney's Fees and Costs. RP 100:7 - 101:2.⁴ The Order Denying Defendant's Motion for Revision of Court Commissioner's Action and Order Granting Attorney's Fees and Costs were entered on December 19, 2019. CP 281-285. This appeal followed.⁵

IV. ARGUMENT

Before discussing the standard of review and merits, it is necessary to reiterate the basic ground rules for appeals.

⁴ Ritts' statement that the Superior Court heard his "motion to dismiss on November 12, 2019" (Appellant's Brief, pp. 5-6) is false.

⁵ The Notice of Appeal is not included in the Clerk's Papers.

A. Ground Rules for Appeals.

Where an appellant fails to set forth assignments of error and brief issues, such issues are waived. *State v. Sims*, 171 Wn.2d 436, 441-42 (2011); *Escude ex rel. Escude v. King County Pub. Hosp. District No. 2*, 117 Wn. App. 183, 190 n. 4 (2003). The only assignments of error and issues raised in Ritts' brief are that the trial court erred and abused its discretion by "granting in favor of the Trustees" and that the trial court erred in finding the Trustees were entitled to a writ of restitution along with attorney's fees and costs of \$12,2727.53.

Consistent with his past practices, the Trustees anticipate that Ritts' counsel will raise new issues and/or cite new authority either in the reply or at oral argument after the merits of Ritts' briefing are shown to be lacking. The Court should refuse to consider any new authority or new argument as required by the case law and due to obvious prejudice to the Trustees.

Furthermore, contentions not supported by citations to the record and legal authority should not be considered. *Roger Crane & Associates, Inc. v. Felice*, 74 Wn. App. 769, 779 (1994) (citing *American Legion Post 32 v. Walla Walla*, 116 Wn.2d 1, 7 (1991)). Unchallenged findings of fact are verities on appeal. *Pham v. Corbett*, 187 Wn. App. 816, 825 (2015).

Moreover, the Court of Appeals should decline to review any issue

raised for the first time on appeal. RAP 2.5(a); *In re Det. Of Ambers*, 160 Wn.2d 543, 557 n. 6 (2007). The Court of Appeals is not the proper forum (if there is a proper forum) to throw yet another handful of mud against the wall and hope that something sticks. This Court must decline to consider such arguments.

B. Judicial Estoppel.

Similarly, the Court should expect abrupt reversals of Mr. Ritts' position either in this appeal or from his positions before the Superior Court. The doctrine of judicial estoppel prevents such conduct. Judicial estoppel is an equitable doctrine that precludes a party from taking incompatible positions in court proceedings. *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 906-09 (2001). Judicial estoppel seeks "to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes ... and to avoid inconsistency, duplicity and the waste of time." *Id.* at 906. In short, judicial estoppel prevents a litigant from "playing fast and loose with the courts." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001).

C. Standard of Review.

The Superior Court's Order Denying Defendant's Motion for Revision of Court Commissioner's Action does not require specific findings of fact or conclusions of law. *Tedford v. Guy*, 13 Wn. App. 2d 1,

12 (2020); *Maldonado v. Maldonado*, 197 Wn. App. 779, 789 (2017). Where a motion for revision under RCW 2.24.050 is appealed, the Court of Appeals reviews the Superior Court's ruling, not the Court Commissioner's. *Tedford*, 13 Wn. App. 2d at 12; *Maldonado*, 197 Wn. App. at 789. The Superior Court's findings of fact are reviewed for substantial evidence. *Tedford*, 13 Wn. App. 2d at 12; *Pham*, 187 Wn. App. at 825. Conclusions of law are reviewed de novo. *Tedford*, 13 Wn. App. 2d at 12; *Pham*, 187 Wn. App. at 825.⁶

D. No Error Was Committed by the Superior Court.

Ritts makes two arguments in an attempt to show the Superior Court erred: (1) that Ritts was a holdover tenant and was therefore guaranteed a year of under RCW 59.12.035 regardless of whether he complied with the Crop Lease; and (2) Ritts was not in possession of the Premises and therefore no writ of restitution should have been entered under RCW 59.12.060. As discussed below, the plain language of RCW 59.12.035 required Mr. Ritts to comply with the Crop Share Lease and does not excuse him from such obligations and the facts show Ritts was in possession of the Premises before and after this unlawful detainer action

⁶ *Marriage of Gainey*, 89 Wn. App 269 (1997), *In re Dependency of B.S.S.*, 56 Wn. App 169 (1989) and other authorities Ritts cites on page 9 of his brief for the proposition that the Superior Court can consider new evidence on a motion for revision were abrogated by the Washington Supreme Court in *In re Marriage of Moody*, 137 Wn.2d 979, 993 (1997).

was filed.

1. *RCW 59.12.035 Does Not Excuse Ritts From His Duties Under the Lease.*

Mr. Ritts seems to argue that since he was a holdover tenant he was therefore entitled to a full year of hold over tenancy without complying with the terms of the Crop Share Lease and could not be evicted under RCW 59.12.035. Appellant's Brief, p. 9-11. This argument contradicts the plain language of the statute, the case law and Ritts' own position.

RCW 59.12.035 provides as follows:

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).

As stated expressly in the statute, if the tenant holds over, the tenant is holding over "under the terms of the lease" and therefore must comply with the lease. *American State Bank v. Sullivan*, 134 Wn. 300,

305 (1925) (cited by Mr. Ritts on page 10 of his brief) makes this clear.⁷ "By the express terms of the statute (Rem. Comp. Stat. § 813) [a predecessor to RCW 59.12.035], this entitled him to hold 'under the terms of the lease' for another full year. The same condition arose at the beginning of the third year of the tenancy; the tenant was again permitted to hold over, and likewise held under the terms of his original lease."

It is undisputed that Mr. Ritts defaulted under the Crop Share Lease and did so after any hold over tenancy began for the September, 2018 to September, 2019 time period. On May 2, 2019, he was sent a notice of default identifying the nine defaults under the Crop Share Lease. CP 36-37. Decl. of Daniel J. Gibbons, Exh. A & C. Ritts never responded to this notice of default and never cured any of the defaults. CP 2, 31, 39. Ritts' own declaration even confirms at least three defaults under the Crop Share Lease. First, the weeds were not eradicated and were overrunning the premises. CP 173. Second, Ritts acknowledged that he failed to comply with FSA's Conservation Reserve Program requirements for the premises, and both he and the trusts could face potential penalties from his failure. CP 173. Third, his declaration

⁷ Ritts also conceded that his hold over tenancy was "subject to the terms of the lease" in his Motion for Reconsideration before the Court Commissioner. CP 87.

confirms that he failed to perform all work in the production of crops and farm the premises in a good and farmerlike manner. CP 171-175.

No part of RCW 59.12.035 excuses Ritts from complying with his obligations under the Crop Share Lease. Rather, the statute **expressly** states that he would only hold "under the terms of the lease." Further, it is undisputed that he was in default of the Crop Share Lease. No error was committed by the Superior Court. RCW 59.12.035 does not in any manner preclude the Trustees from evicting Mr. Ritts where he has defaulted under the Lease. The Superior Court should be affirmed.

2. Ritts Mischaracterizes the Purpose of RCW 59.12.060 and in Any Event Was Occupying the Premises.

Ritts' next argument is that because he claims he was not occupying the leased premises, evicting him was improper under RCW 59.12.060. Again, he misses the mark. The purpose of RCW 59.12.060 is to define who the proper defendants are in an unlawful detainer action, in the event a subtenant is occupying the leased premises. RCW 59.12.060 provides in relevant part:

Parties Defendant. 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.

Obviously, a tenant must be a defendant in an unlawful detainer proceeding in which there is no subtenant, otherwise there would no adverse party to evict and a non-performing tenant would be insulated from eviction. Ritts' reading of the statute would nullify the provisions of the Crop Share Lease (and if accepted by this Court every other lease that requires a tenant to occupy the premises) that requires him to occupy and farm the Premises. Further, the Court of Appeals has found "A party need not directly possess the premises to be subject to unlawful detainer proceedings." *Daniels v. Ward*, 35 Wn. App. 697, 698-99 (1983).

In any event, the undisputed facts show Ritts was occupying the premises. Ritts' farm equipment was left on the premises. Ritts made two requests to the Court Commissioner to modify the Antiharassment Protection Order to allow him to retrieve the equipment, both of which were granted. RP 28:18- 30:5, 48:8 – 51:16. CP 70; CP 179, ¶ 6. Thus, there is clearly substantial evidence for the Superior Court to have found that Ritts was in possession of the Premises.

The Court should also apply judicial estoppel to prohibit Ritts from taking this incompatible position and prohibit him from playing fast and loose with the Court. *Johnson*, 107 Wn. App. at 906-909; *Hamilton*, 270

F.3d at 782. On one hand, Ritts claims some inviolate holdover tenancy through September of 2019 under RCW 59.12.035. Appellant's Brief, p. 4 & 10. Again, that statute provides "In 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...." (emphasis added). Obviously, if Mr. Ritts was not in possession of the Premises, as he now claims, he cannot claim any holdover tenancy under RCW 59.12.035. Yet, before the Superior Court Ritts did just that repeatedly claimed he was entitled to a holdover tenancy through September 2019 due to the 2018 eviction failing. *See e.g.* CP 82 - 83, 86 - 87; CP 172, ¶ 3; RP 23:20 - 24:13. Obviously, Mr. Ritts has also taken this position on appeal. These incompatible positions should be summarily rejected.

Furthermore, as stated above, not occupying the premises, in and of itself, is a breach of the Crop Share Lease and Ritts is again conceding he was not farming the land in a farmerlike manner since at least October 24, 2018 when the permanent Antiharassment Protection Order was entered against him. In addition, **if** Mr. Ritts was not occupying the premises it is unclear why he has fought tooth and nail against an eviction that would meant nothing to him. This included contesting the incapacity of his then 98-year-old grandmother who suffered from dementia of the

Alzheimer's type, who was nearly blind and deaf and lived in an assisted care facility. Rather than stipulating to restoring the premises to the Trustees, both sides incurred significant attorney's fees and costs. Ritts is clearly playing fast and loose with the courts and the application of judicial estoppel is long overdue to preclude him from doing so.

Ritts' argument that the Antiharassment Protection Order somehow excused him from complying with the Crop Share Lease is equally unavailing. The Antiharassment Order was issued because Ritts violated the law by harassing his aunt. "The legislature further finds that the prevention of such harassment is an important government objective. This chapter is intended to provide victims with a speedy and inexpensive method of obtaining civil antiharassment protection orders preventing all further unwanted contact between the victim and the perpetrator." RCW 10.14.010. Mrs. West was **entitled by law** to be free of Mr. Ritts' harassment. The Court Commissioner agreed when he entered the Antiharassment Protection Order on October 24, 2018.⁸ Ritts **cannot** be discharged from his contractual obligations **where he is the party** responsible for the occurrence that renders the contract frustrated or his

⁸ The Antiharassment Protection Order is not included in the Clerk's Papers. Although improper to look outside the record, the Trustees have no objection to the Court referring to the copy attached to Mr. Herman's declaration filed in this appeal. However, it should be noted that Ritts failed to provide the necessary record on appeal. *State ex rel. Dean by Motett v. Dean*, 56 Wn. App. 377, 382 (1989).

performance impractical. *Felt v. McCarthy*, 130 Wn.2d 203, 207-08 (1996) (*quoting* Restatement (Second) of Contracts § 265 (1979)). *See also* Restatement (Second) of Contracts § 261. Simply stated, Mr. Ritts *was not* relieved of his contractual obligations under the Crop Share Lease by violating RCW 10.14.010 *et seq.* and harassing his aunt. No error was committed by the Superior Court. The order denying the Motion to Revise should be affirmed.

3. *Dismissal is an Improper Remedy.*

Even if the Court disagrees with the above arguments, dismissal of this unlawful detainer action is not available to Mr. Ritts. Where the right to possession ceases to be at issue, the proceeding may be converted to an ordinary civil suit for damages. *Munden v. Hazelrigg*, 105 Wn.2d 39, 45-46 (1985). "One purpose of this rule is to prevent tenants from frustrating [by vacating the premises] the ordinary and summary remedy provided by statute for restitution of the premises." *Id.* at 46. "Thus, when restitution of the premises is no longer sought because possession is no longer at issue, the reason for the rule [limiting the summary proceedings in unlawful detainer to possession of the property, restitution of the property and unpaid rent] evaporates. At this point an ordinary civil action becomes the more appropriate vehicle for resolving disputes between the parties." *Id.* at 46. If a tenant voluntarily vacates, possession is no longer

a live issue, and it is appropriate to convert an unlawful detainer action to an ordinary civil suit. *Id.* at 47. Thus, if the Court were to rule in Mr. Ritts favor, the Trustees are still free to amend their complaint to add claims for damages as a result of Ritts' undisputed breach of the Crop Share Lease. Dismissal cannot be ordered.

4. *The Court of Appeals Commissioner Did Not "Take Note" of Ritts' Argument for Dismissal.*

In an attempt to bolster his losing arguments, Mr. Ritts refers to the Trustee's Motion to Dismiss Appeal being denied by the Court of Appeals Commissioner. Appellant's Brief, p. 6. The argument for dismissal of the appeal was that because, out of an abundance of caution, Mr. Ritts had been served with a notice terminating any right to a hold over tenancy after September 30, 2019 the appeal was moot under RAP 18.9(c) because there was no relief the Court of Appeals could grant him. The Commissioner's Ruling makes clear that the reason the appeal was not moot was because a money judgment for attorney's fees and costs was entered against Ritts that could potentially be reversed if the Judgment for Writ of Restitution was reversed. Ritts no interest in the Premises following notice that any holdover tenancy he could claim was terminated as of September 30, 2019. Even if the Court of Appeals were to reverse the Superior Court, Ritts cannot claim any interest in the Premises. A

copy of the notice is attached as Exhibit 6 to the Declaration of Daniel J. Gibbons in Support of Motion to Dismiss Appeal as Moot Under RAP 18.9(c) filed on April 3, 2020.

The denial of the Motion to Dismiss Appeal has no bearing on the merits of this appeal. For the reasons stated above, no error occurred, and the Superior Court should be affirmed.

5. The Order Granting the Trustees' Motion for Fees and Costs Was Not Appealed.

The Order Granting Motion for Attorney's Fees and Costs was not identified in the Notice of Appeal and was not attached to the Notice of Appeal. As stated above, Ritts never objected to the Trustees' Motion for Award of Attorney's Fees and Costs. Objection was required by WCLCR (1)(b). During the hearing, Ritts' counsel raised no objection to the Trustees' Motion for Award of Attorneys' Fees and Costs. RP 100-101.

E. The Trustees Should Be Awarded Attorney's Fees and Costs on Appeal.

Pursuant to RAP 18.1(a) and the Paragraph 13 of the Crop Share Lease (CP 23), the Trustees request attorney's fees and costs relating to this appeal.

V. CONCLUSION

For the reasons stated above, the Superior Court should be affirmed. Mr. Ritts' interpretation of RCW 59.12.035 contradicts the plain language of the statute, and the applicable case law in that the hold over tenancy he claimed was subject to the Crop Share Lease, and there is no dispute he breached the Crop Share Lease. Neither the statute nor the Superior Court's order in the 2018 eviction case excused Mr. Ritts from his obligations under the Crop Share Lease. Likewise, RCW 59.12.060 offers no escape. That statute pertains to identifying the proper defendants in an unlawful detainer action. But in any event, the facts are undisputed that Mr. Ritts was in possession of the Premises due to him leaving his equipment on the property. The Superior Court should be affirmed.

RESPECTFULLY SUBMITTED, this 2nd day of October, 2020.

WITHERSPOON • KELLEY

/s/ Daniel J. Gibbons
DANIEL J. GIBBONS, WSBA No. 33036
Counsel for Plaintiffs/Respondents

DECLARATION OF SERVICE

On the 2nd day of October, 2020, I caused a true and correct copy of the foregoing document to be sent by the method indicated below addressed to the following parties:

Lloyd A. Herman LLOYD A. HERMAN & ASSOCIATES, P.S. 213 North University Rd. Spokane Valley, WA 99206 Email: lloydherm@aol.com <i>Attorney for Appellant/Defendant</i>	<input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By U.S. Mail <input type="checkbox"/> By Overnight Mail <input type="checkbox"/> By Facsimile <input checked="" type="checkbox"/> By Electronic Mail/E-Service
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED, this 2nd day of October, 2020.

/s/ Daniel J. Gibbons
DANIEL J. GIBBONS, WSBA No. 33036

WITHERSPOON KELLEY

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