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No. 92978-5

NO. 72611-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STEPHEN FACISZEWSKI and VIRGINIA L. KLAMON,

Respondents

v.

MICHAEL R. BROWN and JILL A. WAHLEITHNER,

Appellants

BRIEF OF APPELLANTS

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I. INTRODUCTION

Michael Brown and his wife Jill Wahleithner rented a house in Seattle from Stephen Faciszewski and his wife Virginia Klamon. A Seattle ordinance prohibits residential landlords from evicting tenants without "just cause." Faciszewski threatened to evict Brown and Wahleithner for refusing to follow his orders about where on the public street they could park their cars. This was plainly not just cause.

About three weeks later, Faciszewski taped a notice of termination of tenancy on Brown and Wahleithner's door. This time, however, he proferred a reason that comes within the definition of just cause. He claimed that he, Klamon, or some unidentified family member intended to occupy the house as his or her principal residence. He made this claim despite the fact he had—for many years—lived in a house with his wife on Magnolia Boulevard which was immediately adjacent to the Wahleithner and Brown rental home. He later signed a declaration saying either he or his mother would be the new occupant.

Believing that the real reason for the eviction was their refusal to be bullied by Faciszewski and his unjustified demands about parking, Brown and Wahleithner stayed in the house. Faciszewski and Klamon then filed this unlawful detainer action. The trial court summarily ruled in their favor and issued a writ of restitution.

The trial court erred in three major respects. First, as a matter of law, Faciszewski failed to serve the notice of termination of tenancy in the manner required by the unlawful detainer statute. The trial court therefore erred in failing to enter judgment in favor of Brown and Wahleithner. Also as a matter of law, the content of the notice was deficient under the Seattle ordinance because it failed to recite any facts to support the claim that Faciszewski or a family member intended to move in. For this reason, too, the trial court erred in failing to enter judgment in favor of Brown and Wahleithner. Finally, the trier of fact could rationally find from the evidence that neither Faciszewski nor his mother actually intended to occupy the house as a principal residence. Accordingly, Brown and Wahleithner were entitled to a trial on the issue of whether Faciszewski can prove just cause.

II. ASSIGNMENTS OF ERROR AND STATEMENT OF ISSUES

A. Assignments of Error

1. The trial court erred in making Finding of Fact No. 4:

"Plaintiff caused to be served upon Defendants, in the manner provided for by RCW 59.12.040, a Notice of Termination of Tenancy in compliance with SMC 22.206.160(C)(1)(e)."[1]

2. The trial court erred in making Finding of Fact No. 3:

[1] All the referenced Findings of Fact and Conclusions of Law were contained in the September 2, 2014 "Order on Plaintiff's Motion for Revision Issuing Findings of Fact, Conclusions of Law, Judgment and Order Issuing Writ of Restitution." CP 243-246.

"Defendants owe monthly rent in the sum of $2,375.00. A pro-rated rent of $79.17 per day from August 1, 2014, through August 31, 2014, has accrued for an amount of $2,375.00 and will continue to accrue until possession of the premises has been returned to Plaintiff."

3. The trial court erred in entering Conclusion of Law No. 1 that Brown and Wahleithner were guilty of unlawful detainer pursuant to RCW 59.12.030.

4. The trial court erred in entering Conclusion of Law No. 4 that, based on the records in front of the commissioner at the time of the show cause hearing, the matter should not have been set for trial, and in granting Faciszewski and Klamon's motion for revision of the commissioner's order.

5. The trial court erred in entering Conclusion of Law No. 5 that Faciszewski and Klamon were entitled to possession of the rental property and to a Writ of Restitution restoring them to possession.

6. The trial court erred in entering Conclusion of Law No. 6 that Brown and Wahleithner were liable for unpaid rent, court costs and attorney's fees, and that a judgment should be entered in favor of Faciszewski and Klamon.

7. The trial court erred in entering Conclusion of Law No. 8 that Faciszewski and Klamon had just cause under SMC 22.206.160(C)(1)(e) and complied with the City investigation by providing a statement under penalty of perjury that a relative would move into the premises.

8. In its September 2, 2014 Order, the trial court erred in entering paragraph 1 of the "Judgment" in which the trial court ordered the issuance of a Writ of Restitution. CP 245.

9. In its September 2, 2014 Order, the trial court erred in entering paragraph 2 of the "Judgment" in which the trial court ruled that there was no substantial issue of material fact concerning Faciszewski and Klamon's right to the relief they sought in their complaint for unlawful detainer. CP 245.

10. In its September 2, 2014 Order, the trial court erred in entering paragraph 3 of the "Judgment" in which the trial court terminated the

tenancy and ruled that Brown and Wahleithner were guilty of unlawful detainer. CP 246.

11. In its September 2, 2014 Order, the trial court erred in entering paragraph 4 of the "Judgment" in which the trial court ruled that Faciszewski and Klamon were entitled to their attorneys' fees and costs, and to daily rent of $79.17 from August 1, 2014, until possession was restored to Faciszewski and Klamon. CP 243, 246.

12. The trial court erred in issuing a Writ of Restitution directing the sheriff to return possession to Faciszewski and Klamon. CP 328-329.

13. The trial court erred in entering judgment in favor of Faciszewski and Klamon for daily rent from August 1, 2014 until entry of judgment and for attorneys' fees and costs. CP 332-334.

14. The trial court erred in failing to enter judgment in favor of Brown and Wahleithner.

15. The trial court erred in failing to award Brown and Wahleithner their reasonable attorneys' fees and costs.

16. The trial court erred in denying Brown and Wahleithner's Motion for Reconsideration of the court's September 2, 2014 "Order on Plaintiff's Motion for Revision Issuing Findings of Fact, Conclusions of Law, Judgment and Order Issuing Writ of Restitution." CP 335-336.

B. Issues Pertaining to Assignments of Error

1. Because the notice to quit the premises was improperly served as a matter of law, did the trial court err in failing to enter judgment in favor of Brown and Wahleithner? (Assignments of Error 1, 3, 4, 5, 6, 8, 9, 10, 11, 12, 14, and 15).

2. Even if Brown and Wahleithner were not entitled to judgment in their favor as a matter of law based on improper service of the notice, was there a genuine factual dispute on this issue, requiring a trial? (Assignments of Error 1, 3, 4, 5, 6, 8, 9, 10, 11, and 12).

3. Because the notice to quit the premises failed as a matter of law to state any facts in support of the reason for terminating the tenancy, as

required by the Seattle Municipal Code ("SMC"), did the trial court err in failing to enter judgment in favor of Brown and Wahleithner? (Assignments of Error 1, 3, 4, 5, 6, 8, 9, 10, 11, 12, 14, and 15).

4. Even if Brown and Wahleithner were not entitled to judgment in their favor as a matter of law based on the deficient content of the notice, was there a genuine factual dispute on this issue, requiring a trial? (Assignments of Error 1, 3, 4, 5, 6, 8, 9, 10, 11, and 12).

5. Was there a material issue of fact as to whether Faciszewski and Klamon had "just cause" under the SMC to terminate the tenancy? (Assignments of Error 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 16).

6. Because Faciszewski and Klamon rejected Brown and Wahleithner's repeated attempts to pay rent for August 2014, did the trial court err in finding and concluding that Brown and Wahleithner were liable for "unpaid" rent? (Assignments of Error 2, 6, 9, 11, and 13).

7. Because Brown and Wahleithner were entitled to judgment in their favor as a matter of law, did the trial court err in failing to award them their reasonable attorneys' fees and costs? Should they also recover their attorneys' fees incurred on appeal? (Assignments of Error 1, 3, 4, 5, 6, 8, 9, 10, 11, 12, 14, and 15).

III. STATEMENT OF THE CASE

A. Faciszewski's Demands that Brown and Wahleithner Park Only in Certain Places on the Public Street

Michael Brown and his wife Jill Wahleithner rented a house ("the rental property") in Seattle from Stephen Faciszewski and Virginia Klamon. CP 1, 14. Faciszewski and Klamon lived together in another house that was immediately adjacent to the rental property. CP 2, 14, 192, 223.

After the lease expired, the tenancy continued on a month-to-month basis. CP 1, 14. Brown, Wahleithner, and their two children continued to

live in the rental property. CP 1, 14, 189. Brown and Wahleithner continued to pay rent, and Faciszewski accepted it. CP 1, 14.

In February or March of 2014, Faciszewski began demanding that Brown and Wahleithner park their cars only in certain places, and not in others, on the public street. CP 15-16; 189-190. A woman who lived next door to the rental property told Brown and Wahleithner that they could not park their car in front of her home. CP 189, 224-225. This neighbor then complained to Faciszewski, who in turn told Brown and Wahleithner to park on the public street nearly a block away from the rental property. CP 189-190, 224-225.

Faciszewski's demand was unjustified because the street was a public road. CP 15; 190. Nevertheless, Brown and Wahleithner tried to accommodate the neighbor's wishes by attempting to limit their street parking to the area directly in front of the rental property. CP 190. But Faciszewski was unsatisfied. Id. On multiple occasions Faciszewski showed up unannounced at the Brown/Wahleithner home in order to tell them that their cars, legally parked on the public street, were parked in locations that were unacceptable to Faciszewski. Id. Faciszewski also sent Brown and Wahleithner a series of emails to the same effect. Id.

On June 5, 2014, Faciszewski told Brown and Wahleithner in an email that if they failed to comply with his demands about where and where

not to park on the public street, Faciszewski would terminate the tenancy. CP 15-16, 19, 190, 214. Brown and Wahleithner advised Faciszewski that they would not comply with Faciszewski's demands. CP 16, 190.

B. <u>The Notice of Termination of Tenancy</u>

On June 29, 2014, less than a month after threatening to evict Brown and Wahleithner for parking in places on the public street that Faciszewski considered off limits, Faciszewski taped a "Notice of Termination of Tenancy" ("the Notice") on Brown and Wahleithner's door. CP 16, 190-191. Brown and Wahleithner were at home when Faciszewski did this. CP 190, 225. Faciszewski did not personally deliver the Notice to anyone. CP 170-171. Brown and Wahleithner later received another copy in the mail. CP 16, 191, 225.

In Seattle a landlord can terminate a month-to-month tenancy only for "just cause." SMC 22.206.160(C)(1).[2] Only the specific reasons listed in the Ordinance will constitute just cause. Id. One such reason is: "The owner seeks possession so that the owner or a member of his or her immediate family may occupy the unit as that person's principal residence." SMC 22.206.160(C)(1)(e).

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[2] See Appendix A-2 for the full text of Seattle Municipal Code (SMC) 22.206.160.

Faciszewski's Notice said that the tenancy would terminate on July 31, 2014. CP 16, 22. It described the reason for the termination of the tenancy as: "We seek to possess the Property so that at least one immediate family member (or, in the alternative, one of us) may occupy the Property as a principal residence." Id. The Notice provided no information about who would actually occupy the property or why that person would be doing so. CP 22. It described no facts to support the conclusion that Faciszewski, Klamon, or a family member actually intended to occupy the property as his or her principal residence. Id.

Separately from the Notice, Faciszewski told Brown and Wahleithner on June 29, 2014 that he needed the house for his father and mother. CP 190-191. He had never mentioned this "plan" before. CP 225.

C. Evidence that Neither Faciszewski nor any Member of His Family Intended to Occupy the Rental Property as a Principal Residence

Believing that Faciszewski's purported reason for terminating the tenancy was merely a pretext, Brown and Wahleithner did some research via the internet and other public sources. CP 191, 225-226. They learned that Faciszewski's parents owned a home in Aurora, Colorado and that it was not listed for sale. CP 191. They learned that the current class schedule at the Aurora Center for Active Adults showed that Faciszewski's mother, Margaret Faciszewski, was scheduled to teach creative writing classes in

the fall of 2014. CP 191, 217-218. They spoke to a representative of the Aurora Center who confirmed that Margaret Faciszewski would be teaching her class, that people were continuing to register for the class, and that the Aurora Center had never been informed that Ms. Faciszewski had any plans to move from Colorado. CP 191. A representative of the hospital in Denver, Colorado where Margaret Faciszewski had volunteered for many years confirmed that she was continuing to volunteer and that the hospital was unaware that she had any plans to move out of state. CP 225-226.

Jeffrey Wahleithner, Jill Wahleithner's brother and co-signer on the lease for the rental property, then lived in Colorado. CP 227. On August 9, 2014, Jeffrey Wahleithner traveled to the home of Faciszewski's mother in Aurora, Colorado. Id. He saw no "for sale" or "for rent" sign at the house. CP 228.

Faciszewski's stated reasons for terminating the tenancy changed over time. The Notice itself said the new occupant would be Faciszewski, Klamon, or one or more of their family members. CP 22. On July 15, 2014, his attorney wrote that the house had to be vacated so Faciszewski's mother and father could reside there. CP 191. On July 25, 2015, the same attorney wrote that Faciszewski's father had died earlier that month and that his mother would be occupying the house. Id. Then on August 7, 2014, Faciszewski signed a certification that he "or/and" his mother "intends to

occupy" the property and would do so within thirty days after the tenants' departure. CP 222.[3]

Faciszewski, however, was already living with Klamon in a house right next to the rental property. CP 2, 14, 192, 223. That house – the one next to the rental property -- had been Faciszewski's residence for nearly twenty years. CP 192.

Concluding that Faciszewski's asserted reason for terminating the tenancy was merely a pretext and that he in fact had no just cause for doing so, Brown and Wahleithner refused to vacate the property. CP 15-17, 191-192.

D. <u>The Complaint and Answer</u>

Faciszewski and Klamon then filed a complaint for unlawful detainer. CP 1-3. Brown and Wahleithner filed a timely Answer and Counterclaim. CP 14-22. Brown and Wahleithner denied that the Notice to terminate the tenancy had been properly served, denied that the Notice met "legal requirements," and denied that just cause existed for the eviction. CP 2, 14-15. They also alleged that the content of the Notice was deficient because it failed to state any facts supporting the purported reason for terminating the tenancy, as required by SMC 22.206.160(C)(3). CP 16. As

[3] The certification was on a form that the City provided to Faciszewski after Brown and Wahleithner had complained to the City that they did not believe Faciszewski or a family member actually intended to move into the house. CP 22; RP Sept. 2, 2014, at 12, 15, 17.

affirmative defenses, they asserted: (1) that there had been insufficient service of process; (2) that the Notice had not been served as required by RCW 59.12.040[4] and that the court therefore lacked jurisdiction; and (3) that there was no just cause for the eviction. CP 15. Brown and Wahleithner counterclaimed under Seattle Municipal Code 22.206.160(C)(7). That ordinance allows a tenant to recover damages up to $2,000 plus an award of incurred attorneys' fees when--despite the landlord's claim that either he or a family member will occupy the property--the landlord or family member fails to do so.

Faciszewski filed a motion for an order requiring Brown and Wahleithner to show cause why a writ of restitution should not issue to restore Faciszewski to possession. CP 8. The court granted the motion. CP 11-12.

E. The Show Cause Hearing before the Commissioner

The show cause hearing was held on Aug. 12, 2014, before Commissioner Pro Tem Joan Allison. RP Aug. 12, 2014, at 1.[5] Through their attorney, Brown and Wahleithner submitted four declarations to the

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[4] See Appendix A-1 for the full text of RCWA 59.12.040.

[5] The Report of Proceedings consists of the transcripts of (1) the Aug. 12, 2014 show cause hearing, and (2) the Sept. 2, 2014 hearing on Faciszewski and Klamon's Motion for Revision of Commissioner's Order. The transcripts will be cited as cited as "RP [date] at [page]."

commissioner: those of Michael Brown, Jill Wahleithner, Jeffrey Wahleithner, and Wendy Ysasi. CP 187-231.

The Commissioner set the matter for trial "based on the papers before me today." RP Aug. 12, 2014, at 9.

F. <u>The Motion for Revision of the Commissioner's Order</u>

After retaining new counsel, Faciszewski and Klamon filed a motion for revision of the Commissioner's Order. CP 23-24, 32-39. They asked the superior court judge to issue a writ of restitution immediately and to enter judgment in their favor. CP 32, 39.

Faciszewski and Klamon argued that the matter should not have been set for trial, because (1) it was allegedly undisputed that Faciszewski had properly served the Notice to quit the premises on Brown and Wahleithner, (2) the Notice stated that Faciszewski sought possession so he or a member of his immediate family could occupy the property as that person's principal residence, and (3) Brown and Klamon had not vacated the property. CP 33-36. According to Faciszewski, it was not necessary for him to prove that he or a member of his immediate family *actually* intended to move into the rented house. Id. Instead, Faciszewski contended that he had fully complied with the "just cause" ordinance simply by stating in the Notice that he sought possession for that purpose. In short, Faciszewski argued that he need only declare that he sought possession for a purpose

allowed under the statute: his actual intentions, or even his likely retaliatory motive, had no bearing on the proceeding. Id. He also argued that even if his intent or the intent of an immediate family member was a material issue, "no competent evidence was considered by the court" to support Brown and Wahleithner's contention that neither he nor his mother intended to move into the rental property. CP 36.[6]

Brown and Wahleithner filed a brief in opposition to the motion for revision. CP 158-167. They argued that the Notice had not been served in the manner required by the unlawful detainer statute, RCW 59.12.040, and showed that they had raised this defense in the Answer. CP 159, 165-166. They also argued that the content of the Notice failed to satisfy the Just Cause Eviction Ordinance because it failed to contain supporting facts, and that their Answer had properly raised this issue. CP 159-160. They argued that under the Just Cause Eviction Ordinance, an owner may not evict or attempt to evict a tenant "unless the owner can prove in court that just cause

[6] Faciszewski based this this argument solely on the fact that at the time of the show cause hearing, the declarations of Brown, Jill Wahleithner, Jeffrey Wahleithner, and Wendy Ysasi were not yet in the court file. CP 36, n.2. But at that hearing, counsel for Brown and Wahleithner presented the four declarations to the commissioner and to the attorney who was representing Faciszewski at that time. CP 187. And the commissioner considered the declarations. Id. Because Faciszewski and Klamon retained new counsel after the show cause hearing, the lawyer who filed the motion for revision was perhaps unaware that the four declarations had been presented to the commissioner. It now appears to be undisputed that the commissioner in fact reviewed and considered the four declarations at the show cause hearing. The four declarations were filed with the court on August 27, 2014. CP 44-78 (Brown); 79-81 (Jill Wahleithner); 82-84 (Jeffrey Wahleithner); and 85-86 (Ysasi).

exists." SMC 22.206.160(C)(1). They pointed out that, contrary to Faciszewski's contention, the Commissioner in fact considered four declarations tending to show that neither Faciszewski nor any member of his family actually intended to occupy the property as a principal residence. CP 158-161, 163-165. And they made this showing with no ability to conduct discovery of any kind absent having the matter set for trial. Id. And Brown and Wahleithner contended that at a minimum, issues of fact remained as to whether the Notice had been properly served.

At the hearing, the trial court granted the motion for revision. RP Sept. 9, 2014, at 23. The court ruled that there was adequate notice. Id. at 21-22. The sole basis for the court's ruling on this issue appears to be the fact that Brown and Wahleithner actually received the Notice of Termination of Tenancy. Id. Finally, the court ruled that Faciszewski had satisfied the Just Cause Eviction ordinance by submitting a statement under oath that he or a family member would occupy the property. Id. The court stated that "the statutory scheme does not require or even permit a trial once we have this statement under penalty of perjury." Id. at 22-23. In the court's view, even pretextual and arguably false such claims by a landlord had to be accepted on their face.

G. The Trial Court's Findings, Conclusions, and Order Granting Revision and Issuing a Writ of Restitution

The trial court then entered an "Order on Plaintiff's Motion for Revision Issuing Findings of Fact, Conclusions of Law, Judgment and Order Issuing Writ of Restitution." CP 243-246. The court found that "On June 29, 2014, Plaintiff caused to be served upon Defendants, in the manner provided for by RCW 59.12.040, a Notice of Termination of Tenancy in compliance with SMC 22.206.160(C)(1)(e)." Finding of Fact No. 4, CP 244.

The court also entered the following conclusions of law:

> 1. Defendants are guilty of unlawful detainer pursuant to RCW 59.12.030.
>
> . . .
>
> 4. Setting this matter for trial was in error based on the records in front of the commissioner at the time of the show cause hearing. The trial date is stricken.
>
> 5. Plaintiff is entitled to possession of the subject property and a Writ of Restitution should be issued directing the sheriff to restore possession of the premises to Plaintiff.
>
> 6. Defendants are liable [sic] Plaintiff for unpaid rent, court costs, and attorney's fees, and a judgment in favor of Plaintiff and against Defendants should therefore be awarded.
>
> . . .
>
> 8. Plaintiff had just cause under SMC 22.206.160(C)(1)(e) and complied with the City investigation by providing a statement under penalty of perjury that a relative would move into the premises.

CP 244-245.

In addition, the trial court ruled that there was no substantial issue of material fact concerning Faciszewski and Klamon's right to the relief they sought in their complaint for unlawful detainer. CP 245. The court then issued a Writ of Restitution directing the sheriff to return possession of the rental property to Faciszewski and Klamon. CP 328-329.

H. Motion for Reconsideration and Entry of Judgment

Brown and Wahleithner filed a timely motion for reconsideration of the court's September 2, 2014 Order. CP 269-316. The court denied the motion. CP 335-337. Based on the September 2, 2014 Order, the trial court entered Judgment awarding Faciszewski and Klamon rent that had accrued since the termination date recited in the Notice, and their costs and attorneys' fees. CP 332-334.

IV. SUMMARY OF ARGUMENT

Faciszewski taped a copy of the Notice to the door and then mailed a copy to Brown and Wahleithner. RCW 59.12.040 authorizes service in this manner *only* if a person of suitable age and discretion cannot be found at the premises. Brown and Wahleithner testified that they were on the premises at that time and thus could be found. And Faciszewski's declaration of service does *not* say that no person of suitable age and

discretion could be found. On the contrary, his declaration suggests that there was in fact a person present.

Moreover, posting the notice at the premises and mailing a copy to the tenants was not enough to satisfy the statute. Faciszewski was also required to personally deliver a copy "to a person there residing, if such a person can be found." RCW 59.12.040(3). Again, the only conclusion from the evidence is that a "person there residing" could be found.

The content of the Notice was also deficient. Under SMC 22.206.160(C)(3), the notice must state the reasons for the termination of the tenancy "and the facts in support of those reasons." Here, the Notice stated no such facts.

The evidence would support a finding that neither Faciszewski nor his mother intended to occupy the rental property as his or her principal residence. The declaration in which Faciszewski claimed to have such an intent does not satisfy the requirement that he must "prove in court that just cause exists." SMC 22.206.160(C)(1). Brown and Wahleithner were entitled to a trial on this issue.

Faciszewski repeatedly refused to accept payment of rent after the termination date specified in the Notice. Because Faciszewski prevented Brown and Wahleithner from paying rent during that time frame, their

performance of that duty was excused. The trial court erred in holding Brown and Wahleithner liable for rent for that period.

V. ARGUMENT

A. Ruling to Be Reviewed, Scope of Review, and Standard of Review

When an appeal is taken from a superior court judge's ruling on a motion for revision of a commissioner's decision, this court reviews the superior court's decision, not the commissioner's. *In re Estate of Wright*, 147 Wn. App. 674, 680, 196 P.3d 1075, 1079 (2008). When deciding a motion for revision, the superior court considers only the evidence and issues that were presented to the commissioner. *In re Marriage of Moody*, 137 Wn.2d 979, 992-993, 976 P.2d 1240 (1999).

Where the parties' arguments before the trial court were based on written materials only, this court stands in the same position as the trial court and reviews the record *de novo*. *Indigo Real Estate Servs., Inc. v. Wadsworth*, 169 Wn. App. 412, 417, 280 P.3d 506, 508 (2012). In this case the decision below was based entirely on written materials. There was no oral testimony at either the show cause hearing or the hearing on the motion for revision. Accordingly, this court reviews the record *de novo*. Id.

Interpretation of a statute is a question of law and is subject to *de novo* review. *Ruvalcaba v. Kwang Ho Baek*, 175 Wn. 2d 1, 6, 282 P.3d 1083, 1085 (2012).

B. Because the Notice to Quit the Premises Was Improperly Served as a Matter of Law, the Trial Court Erred in Failing to Enter Judgment in Favor of Brown and Wahleithner

A landlord who wishes to terminate a month-to-month tenancy may do so by serving on the tenant a notice to quit the premises at the end of the month specified in the notice. RCW 59.12.030(2); 59.18.200(1)(a). This notice of the termination of the tenancy (or "notice to quit") must be served on the tenant at least twenty days before the end of the specified month. Id.

RCW 59.12.030(2) requires that notice must be served in the manner prescribed by RCW 59.12.040. The unlawful detainer statutes hasten the recovery of possession of a leasehold without the need to utilize the common-law remedy of an action for ejectment. *Housing Authority of Everett v. Terry*, 114 Wn.2d 558, 563, 789 P.2d 745 (1990). But to take advantage of the unlawful detainer action, the landlord must comply with the requirements of the statute. Id. 563–64. Because they are in derogation of common law, the unlawful detainer statutes are strictly construed in favor of the tenant. Id. at 563.

RCW 59.12.040 provides for three alternative means of service of the notice:

> Any notice provided for in this chapter shall be served either (1) by delivering a copy personally to the person entitled thereto; or (2) if he or she be absent from the premises unlawfully held, by leaving there a copy, with some person of suitable age and discretion, and sending a copy through the mail addressed to the person entitled thereto at his or her place of residence; or *(3)* if the person to be notified be a tenant, or an unlawful holder of premises, and his or her place of residence is not known, or *if a person of suitable age and discretion there cannot be found then by affixing a copy of the notice in a conspicuous place on the premises unlawfully held, and also delivering a copy to a person there residing, if such a person can be found, and also sending a copy through the mail addressed to the tenant,* or unlawful occupant, at the place where the premises unlawfully held are situated.

RCW 59.12.040 (emphasis added).

Here, Brown and Wahleithner both testified that Faciszewski taped the "Notice of Termination of Tenancy" on their door and that they were at home when he did so. CP 190-191, 225. There is no evidence that Faciszewski personally delivered a copy of the Notice to Brown or Wahleithner. Thus, Faciszewski did not comply with subsection (1) of RCW 59.12.040. Similarly, there is no evidence that he left a copy at the house with some other person of suitable age and discretion. Accordingly, Faciszewski did not comply with subsection (2).

This leaves subsection (3). The first requirement for service under subsection (3) is that "a person of suitable age and discretion there cannot be found." Because Brown and Wahleithner testified in their declarations

without rebuttal that they were home at the time Faciszewski taped the notice on their door, there was evidence that they *could* be found at the premises. These declarations were presented to and considered by the commissioner at the show cause hearing. CP 187-231; RP Aug. 12, 2014, at 9.

At the show cause hearing Faciszewski presented his "Declaration of Service of Notice of Termination of Tenancy" to the commissioner. CP 160, 170-171.[7] It says: "I attempted to deliver a copy of said Notice into the hands of the defendants but was unable to do so. I then, on the same date, posted said Notice prominently onto the front door of the premises." CP 171.

Faciszewski's declaration does *not* say that "a person of suitable age and discretion there cannot be found." RCW 59.12.040(3). Instead, it says merely that Faciszewski was "unable" to deliver a copy of the Notice into the hands of Brown and Wahleithner. CP 171. There was no evidence before the commissioner that a person of suitable age and discretion could

[7] It appears that Faciszewski's "Declaration of Service of Notice of Termination of Tenancy" was neither on file with the court at the time of the show cause hearing nor ever filed with the court. It is true that counsel for Faciszewski commented at the hearing on the motion for revision that the declaration was "on file." RP Sept. 2, 2014, at 3. But the court's list of filed documents does not reveal an entry for any declaration of Faciszewski. Faciszewski's Declaration of Service ultimately became a part of the court file only as an exhibit to a declaration filed by Brown and Wahleithner's counsel. CP 168-171. But it was presented to the commissioner at the show cause hearing. CP 160.

not be found at the premises. Thus, as a matter of law the statutory condition for permitting service via posting the Notice on the door was not satisfied.

Indeed, Faciszewski crossed out the following language that appeared on the pre-printed form that he used: "I did not find them [sic] person at the premises, nor did I find any person present at the premises." CP 171. By deleting that language, Faciszewski effectively stated that there *was* someone present at the premises – either the defendants (Brown and Wahleithner) or someone else. Accordingly, the evidence before the commissioner allows only one conclusion: the condition that allows service under subsection (3) by posting the Notice at the premises was not satisfied. Service, therefore, did not comply with RCW 59.12.040.

Even if the evidence before the commissioner could conceivably support a finding that a person of suitable age and discretion could not be found at the premises when Faciszewski taped the Notice on the door, service was still improper. "If a person of suitable age and discretion there cannot be found," RCW 59.12.040(3) requires the person serving the Notice to perform each of three separate acts. First, he or she must post the Notice at the premises. Second, he or she must mail a copy to the defendant. And third, he or she must deliver a copy "*to a person there residing, if such a person can be found.*" RCW 59.12.040(3).

> RCWA 59.12.040 is quite explicit about the manner of serving notice. There are three alternative methods of service, with a preference for personal service. Because notice is statutory and jurisdictional, the statute should be followed precisely. . . . Third, . . . the person serving notice should affix a copy in a "conspicuous place" on the premises; hand a copy to any person "there residing" if such a person is present; *and* mail a copy to the tenant at the *demised* premises. These three steps will accomplish service by the third mode.

17 Stoebuck & Weaver, *Washington Practice, Real Estate* § 6.80 (2d ed.) (italics in original; underlining added).

Subsection (3) of the statute draws a distinction between "a person of suitable age and discretion" and "a person there residing." As noted above, service under subsection (3) is permitted only "if a person of suitable age and discretion there cannot be found."[8] RCW 59.12.040(3). If that condition has been satisfied, then one of the three acts that the server must perform is to deliver a copy "to a person there residing, if such a person can be found." RCW 59.12.040(3). This person need not be someone of "suitable age and discretion." Instead, he or she need only be "a person there residing."

Although Faciszewski performed the first two of the three required acts under RCW 59.12.040(3), he did not perform the third. He posted the

[8] The other condition that permits service under subsection (3) is "if the person to be notified be a tenant, or an unlawful holder of premises, *and his or her place of residence is not known.*" RCW 59.12.040(3) (emphasis added). Since Faciszewski knew where Brown and Wahleithner lived, this condition does not apply.

Notice. He mailed a copy to Brown and Wahleithner. But he did not deliver a copy "to a person there residing." And nothing in the record supports a finding that at the time he posted the Notice on the door, no resident of the house could be found there.

Again, Brown and Wahleithner testified in their declarations that they were at the house when Faciszewski taped the Notice to the door. Again, Faciszewski did *not* say in his declaration that no resident could be found at the house. Again, on the form that he used Faciszewski crossed out the language, "nor did I find any person present at the premises." CP 171. By deleting that language, Faciszewski effectively stated that there *was* someone present at the premises.

Faciszewski bore the burden of at least coming forward with evidence that when he taped the Notice to the door, no resident of the premises could be found there. No such evidence was presented to the commissioner. The only evidence presented to the commissioner supports the opposite conclusion: that a resident of the house *could* be found there. As a matter of law, Faciszewski failed to carry his burden of establishing that no resident of the premises could be found there. To comply with RCW 59.12.040(3), therefore, he was required to personally deliver a copy of the Notice "to a person there residing." It is undisputed that he did not do so.

Thus, as a matter of law, service of the Notice did not comply with RCW 59.12.040.

Brown and Wahleithner raised the issue of improper service of the Notice in their Answer. CP 2, 14-15. Through their declarations, they presented evidence on this issue to the commissioner. They argued the issue in their brief in opposition to the motion for revision. CP 160, 165-166. Faciszewski and Klamon had the opportunity to present argument on this issue and did so, both in their motion for revision and at the hearing on that motion. CP 33-34; RP Sept. 9, 2014, at 3. The only evidence that Faciszewski and Klamon presented on this subject was Faciszewski's declaration of service. As noted above, the evidence before the commissioner leads to only one conclusion: service of the Notice did not comply with RCW 59.12.040.

Under RCW 59.12.030(2), a tenant who maintains possession of the premises after the landlord's service of a twenty-day notice to quit can be guilty of unlawful detainer *only* if the notice was served in the manner provided by RCW 59.12.040. A landlord may not maintain an action for unlawful detainer if the required notice to terminate the tenancy was improper. *Tacoma Rescue Mission v. Stewart*, 155 Wn.App. 250, 254 n.9, 228 P.3d 1289 (2010). Here, as a matter of law, Faciszewski did not serve the Notice in accordance with RCW 59.12.040. Thus, as a matter of law,

Brown and Wahleithner were not guilty of unlawful detainer. The court erred by not entering judgment in their favor.

C. Even if Brown and Wahleithner Were Not Entitled as a Matter of Law to Judgment in Their Favor Based on Improper Service of the Notice, They Were Entitled to a Trial on that Issue

There was no evidence before the commissioner to support the conclusion that the Notice was served as required by RCW 59.12.040. All the evidence supported the opposite conclusion. But if for any reason Brown and Wahleithner were not entitled to judgment in their favor on this ground, they were certainly entitled to a trial on the issue. Accordingly, the trial court erred in striking the trial date, granting the motion for revision, terminating the tenancy, issuing the writ of restitution, and entering judgment in favor of Faciszewski and Klamon.

D. Because the Notice Failed as a Matter of Law to State any Facts in Support of the Reason for Terminating the Tenancy, the Trial Court Erred in Failing to Enter Judgment in Favor of Brown and Wahleithner

Under the Seattle Just Cause Eviction Ordinance, the notice must state the reasons for the termination of the tenancy "*and the facts in support of those reasons.*" SMC 22.206.160(C)(3) (emphasis added). While the Notice stated in very general terms the purported reason for terminating the tenancy, it recited *no* facts in support of those reasons.

The basis for Faciszewski's unlawful detainer action was the June 29, 2014 Notice terminating the tenancy. CP 2. It described the reason for the termination of the tenancy as: "we seek to possess the Property so that at least one immediate family member (or, in the alternative, one of us) may occupy the Property as a principal residence." CP 22. But the Notice did not set forth any facts in support of this conclusion. Id.

The Notice simply parroted the language of SMC 22.206.160(C)(1)(e): "The owner seeks possession so that the owner or a member of his or her immediate family member may occupy the unit as that person's principal residence." SMC 22.206.160(C)(1)(e). The Notice did not identify the person who would be moving into the property by name. It did not identify that person by nature of the relationship to the owner (e.g., parent, grandparent, child, brother, sister, etc.). It did not state whether the putative new occupant would be the owner or one of the owner's family members. Instead, the Notice only said that the person would be a "family member" *or* "one of us." In short, the Notice provided no information whatsoever about the intended new occupant.

The Notice also said nothing about *why* one of the owners or a family member of an owner was going to occupy the property as his or her principal residence. Were Faciszewski and Klamon selling the house where they lived and moving into the rental property? Was one of them planning

to move into the rental property because they were separating and wanted to live in separate (albeit adjacent) houses? Or as Faciszewski's attorney later argued, were Faciszewski's mother and father going to leave Colorado and occupy the rental property so that Faciszewski could assist his ailing father? RP Aug. 12, 2014, at 3. But the Notice was silent on this subject. There can be little doubt that the very reason the statute requires such factual support for the notice is to ferret out whether the eviction is supported by *bona fide* reasons, and not retaliatory or improper ones, as here.

In short, the Notice recited no "facts in support of" the assertion that "at least one immediate family member (or, in the alternative, one of us)" was actually going to occupy the rental property as his or her principal residence. SMC 22.206.160(C)(3); CP 22. As a matter of law, the Notice failed to satisfy SMC 22.206.160(C)(3).

As with the issue of improper service of the Notice, Brown and Wahleithner raised the issue of the Notice's deficient content in their Answer. CP 2, 14-16. Through their declarations, they presented evidence on this issue to the commissioner. They argued the issue in their brief in opposition to the motion for revision and at the hearing on that motion. CP 159-160; RP Sept. 2, 2014, at 11-14, 16. The issue could be resolved simply by comparing the language of the Notice with the requirements of SMC 22.206.160(C)(3). At any rate, Faciszewski and Klamon presented no

evidence to support the conclusion that the Notice included any "facts in support of" the purported reason for terminating the tenancy. The only possible conclusion is that the Notice did not do so and that it failed to comply with SMC 22.206.160(C)(3).

Because the content of the Notice failed to satisfy SMC 22.206.160(C)(3) as a matter of law, the Notice was ineffective. Accordingly, Brown and Wahleithner were entitled to judgment in their favor.

E. Even If Brown And Wahleithner Were Not Entitled to Judgment in Their Favor as A Matter Of Law Based On The Deficient Content of The Notice, They Were Entitled to a Trial on this Issue

There was no evidence before the Commissioner to support the conclusion that the Notice included any "facts in support of" the purported reason for terminating the tenancy. Comparison of the Notice with SMC 22.206.160(C)(3) leads inevitably to the conclusion that the Notice was deficient.

Nevertheless, if for any reason Brown and Wahleithner were not entitled to judgment in their favor based on the failure of the Notice to comply with SMC 22.206.160(C)(3), they were certainly entitled to a trial on that issue. For this reason as well, the trial court erred in striking the trial date, granting the motion for revision, terminating the tenancy, issuing the

writ of restitution, and entering judgment in favor of Faciszewski and Klamon.

F. Because There Was a Material Issue of Fact as to Whether Faciszewski And Klamon Had "Just Cause" under the Seattle Ordinance to Terminate the Tenancy, a Trial Was Required

1. The Residential Landlord Tenant Act applies, the landlord has the burden of proving unlawful detainer, and the existence of an issue of fact requires a trial

Because this case arose out of a residential tenancy, it is governed by the Residential Landlord Tenant Act ("RLTA"), RCW Ch. 59.18. *Indigo Real Estate Services, Inc. v. Wadsworth*, 169 Wn.App. 412, 420, 280 P.3d 506 (2012).[9] In cases governed by the RLTA, the procedures set forth in the Unlawful Detainer statutes, RCW Ch. 59.12, apply to the extent they are not supplanted by those found in the RLTA. *Indigo*, 169 Wn.App. at 420. In cases governed by the RLTA, a landlord who wishes to obtain a writ of restitution must note the matter for a show cause hearing. RCW 59.18.370; *Indigo*, 169 Wn.App. at 421.

In any unlawful detainer action, whether the RLTA applies or not, the burden is on the plaintiff to prove, by a preponderance of the evidence, the right to possession. *Indigo*, 169 Wn.App. at 421. And in any unlawful

[9] The RLTA does not apply to "any lease of a single-family dwelling for a period of a year or more." RCW 59.18.415. In this case the fixed term of the lease was from Aug. 11, 2012 to February 28, 2013 – a period of less than one year. CP 1. Moreover, the events giving rise to this action occurred at a time when the tenancy was on a month-to-month basis. Id. Thus, the RLTA applies here.

detainer action, a material issue of fact must be resolved at a trial. "Whenever an issue of fact is presented by the pleadings it must be tried by a jury, unless such a jury be waived as in other cases." RCW 59.12.130. "[A]s with any suit, where the written or oral presentations of the parties 'disclose a material issue of fact, the issue must be resolved at trial.'" *Indigo*, 169 Wn.App. at 421 (quoting *Hous. Auth. of City of Pasco & Franklin County v. Pleasant*, 126 Wn.App. 382, 392, 109 P.3d 422 (2005), and citing RCW 59.12.130).

2. <u>To prevail, Faciszewski and Klamon were required to prove "just cause"</u>

The Seattle Just Cause Eviction Ordinance provides:

> *[O]wners* of housing units *shall not evict or attempt to evict any tenant,* or otherwise terminate or attempt to terminate the tenancy of any tenant *unless the owner can prove in court that just cause exists*. The reasons for termination of tenancy listed below, and no others, shall constitute just cause . . . .

SMC 22.206.160(C)(1) (emphasis added). In an action to evict the tenant or otherwise to terminate the tenancy, "it shall be a defense to the action that there was no just cause." SMC 22.206.160(C)(5).

The ordinance "prohibits evictions or terminations without just cause and provides a defense to any eviction or termination proceeding." *Housing Authority of the City of Seattle v. Silva*, 94 Wn.App. 731, 734, 972 P.2d 952 (1999). In *Silva*, the landlord commenced an unlawful detainer

action on the ground that the tenant had habitually violated the lease. Id. at 733. The trial court ruled in favor of the landlord. Id. at 733-734. Under the ordinance, a landlord has just cause to evict a tenant who has habitually failed to comply with the material terms of his lease only if the problems result in three 10–day notices to the tenant within a 12–month period. Id. at 736; SMC 22.206.160(C)(1)(d). The landlord had issued only two 10-day notices to the tenant in a 12-month period. *Silva*, 94 Wn.App. at 736. Since the landlord had failed to establish that there was just cause for eviction as defined under the ordinance, this Court reversed the trial court's decision and held that the tenant was entitled to possession. Id.

Where an applicable ordinance or statute requires the landlord to establish good cause for eviction, and where the landlord fails to do so, the tenant is not guilty of unlawful detainer. *Silva,* 94 Wn.App. at 734-736; *Indigo*, 169 Wn.App. at 423 (2012). If the landlord has failed to demonstrate the good cause required by the statute or ordinance, the tenant is entitled to remain in possession. *Silva*, 94 Wn.App. at 736; *Indigo*, 169 Wn.App. at 423, 425-426.

An owner has just cause to evict a tenant if "the owner seeks possession so that the owner or a member of his or her immediate family may occupy the unit as that person's principal residence." SMC 22.206.160(C)(1)(e). The owner's spouse, domestic partner, parents,

grandparents, children, brothers and sisters constitute members of his or her immediate family. Id.

3. To prove just cause for eviction, the landlord must prove that he or she, or an immediate family member, actually intends to occupy the property as his or her principal residence

Simply serving a notice stating that landlord seeks possession for himself or an immediate family member is not sufficient. Instead, the landlord must "prove in court" that "the owner seeks possession so that the owner or a member of his or her immediate family may occupy the unit as that person's principal residence." SMC 22.206.160(C)(1) & (1)(e).

The ordinance expressly places the intent of the owner or family member in issue. If the tenant "believes that the owner does not intend to carry out the stated reason for the eviction" and makes a complaint to the City, the owner must file with the City "a certification stating the owner's intent to carry out the stated reason for the eviction." SMC 22.206.160(C)(4). If the owner fails to complete and file the certification, that failure is itself a defense to eviction action. Id.

The trial court mistakenly concluded that if the owner signs the certification of his or her intent, then the owner has conclusively proven just cause for the eviction. RP Sept. 22, 2014, at 22-23. Applying this interpretation of the ordinance, the court ruled that Faciszewski had

conclusively proven just cause by signing a certification that he and/or his mother intended to occupy the property. Id.

But this interpretation renders meaningless the provision that the owner must "*prove* in court that just cause exists." SMC 22.206.160(C)(1). If -- as here -- there is evidence to the contrary, the declaration of a party does not "prove" anything. If the drafters of the ordinance had intended that an owner's signature on a declaration constituted absolute proof of his intent, they would have said so. They did not. Faciszewski's certification is evidence of his intent, but it by no means conclusively establishes that he or his mother actually intended to occupy the rental property as his or her principal residence. That proposition, under the plain language of the ordinance, he must prove in court. Of note is that even in the absence of the ability to conduct discovery or challenge Faciszewksi's claims regarding the future use of the house, Brown and Wahleithner raised serious doubt about the credence of Faciszewski's assertions.

4. <u>The evidence established an issue of fact with regard to the alleged intent of Faciszewski or his immediate family member</u>

The timing of the Notice of Termination of Tenancy in relationship to Faciszewski's threat to evict Brown and Wahleithner for disobeying his commands about parking is itself strong evidence that neither Faciszewski nor any member of his family actually intended to occupy the rental

property as a principal residence. On June 5, 2014, Faciszewski told Brown and Wahleithner that if they did not comply with his demands about where they could park on the public street, "such would necessitate lease non-renewal." CP 15-16, 19, 190, 214. At that time, the lease had long since expired and the tenancy had been continued on a month-to-month basis. In that context, Faciszewski's threat of "lease non-renewal" was a threat to end the tenancy.

At the time of the June 5, 2014 threat, Faciszewski said nothing about needing the property for himself, his father, or his mother. CP 225. The trier of fact could reasonably conclude that at that time Faciszewski was unaware of the Just Cause ordinance and therefore made no attempt to hide his real reason for terminating the tenancy.

Less than a month after sending his June 5, 2014 email, Faciszewski carried out his threat. But by this time he had become aware of the Just Cause ordinance. Accordingly, his June 29, 2014 Notice declared that he, Klamon, or a family member would occupy the Property as a principal residence. CP 22. By the time of his August 7, 2014 certification to the City, the putative new occupant was Faciszewski or his mother.

A reasonable trier of fact could have found from the evidence that Faciszewski's mother had no intention of making the rental property her principal residence. First, there was not a word from her in the record.

Since Faciszewski bore the burden of proof, this silence was itself sufficient to establish that his mother in fact did *not* intend to move into the rental property. Her silence was certainly enough to require a trial.

In addition, the home that she owned in Aurora, Colorado was not listed for sale. CP 191. Jeffrey Wahleithner went to that home and saw no "for sale" or "for rent" sign there. CP 228. Faciszewski's mother was scheduled to teach classes at the Aurora Center for Active Adults in the fall of 2014. CP 191, 217-218. The Aurora Center had never been informed that Ms. Faciszewski had any plans to move away from Colorado. CP 191. And she was continuing to volunteer at a local hospital that was unaware she had any plans to move out of the state. CP 225-226.

Even more unbelievable was Faciszewski's claim that *he* needed his rental property for his primary residence. The rental property adjoins the yard of the home where Faciszewski has lived for nearly two decades. CP 192, 223. There was no plausible reason for Mr. Faciszewski to spontaneously decide to move from his home into his rental house.

The evidence would support a finding that neither Faciszewski nor any member of his immediate family actually intended to occupy the rental property as his or her principal residence. A trial was required.

G. Because Faciszewski and Klamon Rejected Brown and Wahleithner's Repeated Attempts to Pay Rent for August 2014, the Trial Court Erred in Finding and Concluding That Brown And Wahleithner Were Liable for "Unpaid" Rent

Brown and Wahleithner tendered rent for August, 2014 – the month following the termination date stated in the Notice. RP Aug. 12, 2014, at 8. But Faciszewski refused to accept it. Id. They then tendered the rent payment two more times, but Faciszewski continued his refusal to accept it. CP 161-162, 168, 174-177. "One who prevents a thing may not avail himself of the nonperformance which he has occasioned." *Payne v. Ryan*, 183 Wash. 590, 597, 49 P.2d 53, 56 (1935). Having prevented Brown and Wahleithner from paying the August rent, Faciszewski is not entitled to recover damages for their inability to do so. Since Faciszewski had clearly demonstrated that he would not accept rent after the July 31, 2014 termination date stated in the Notice, further attempts by Brown and Wahleithner to pay rent from that time up to the entry of judgment would have been futile. Faciszewski was not entitled to recover "unpaid" rent which he had repeatedly refused to accept.

H. Because Brown and Wahleithner Were Entitled to Judgment in Their Favor as a Matter Of Law, the Trial Court Erred in Failing to Award Them Their Reasonable Attorneys' Fees and Costs; They Should also Recover Attorneys' Fees on Appeal

The Residential Landlord Tenant Act allows the prevailing party in an unlawful detainer action to recover reasonable attorneys' fees and costs.

RCW 59.18.290; *Council House, Inc. v. Hawk*, 136 Wn.App. 153, 157, 147 P.3d 1305 (2006).

This Court's agreement that Brown and Wahleithner are entitled to judgment as a matter of law means then that they are the prevailing parties. In that event, they are entitled to an award of their reasonable fees and costs in the trial court.

If attorney fees are allowable at trial, the prevailing party may recover fees on appeal. RAP 18.1; *Scheib v. Crosby*, 160 Wn. App. 345, 353, 249 P.3d 184, 188 (2011). This Court should therefore award Brown and Wahleithner their attorneys' fees incurred on review. RAP 18.1.

VI. CONCLUSION

This Court should direct the entry of judgment in favor of Brown and Wahleithner:

(1) Requiring Faciszewski and Klamon to return to Brown and Wahleithner all sums paid in satisfaction of the erroneous judgment entered by the trial court, plus interest; and

(2) Awarding Brown and Wahleithner their reasonable attorneys' fees and costs incurred in the trial court and on review.

In the alternative, the Court should remand this matter for trial.

Dated this 26th day of May, 2015.

By: _____

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VII. APPENDIX

1. RCWA 59.12.040 – Service of notice-Proof of Service . . . passim

2. Settle Municipal Code, 22.206.160 – Duties of owners . . . passim

West's RCWA 59.12.040
59.12.040. Service of notice--Proof of service
Effective: June 10, 2010
Currentness

Any notice provided for in this chapter shall be served either (1) by delivering a copy personally to the person entitled thereto; or (2) if he or she be absent from the premises unlawfully held, by leaving there a copy, with some person of suitable age and discretion, and sending a copy through the mail addressed to the person entitled thereto at his or her place of residence; or (3) if the person to be notified be a tenant, or an unlawful holder of premises, and his or her place of residence is not known, or if a person of suitable age and discretion there cannot be found then by affixing a copy of the notice in a conspicuous place on the premises unlawfully held, and also delivering a copy to a person there residing, if such a person can be found, and also sending a copy through the mail addressed to the tenant, or unlawful occupant, at the place where the premises unlawfully held are situated. Service upon a subtenant may be made in the same manner: PROVIDED, That in cases where the tenant or unlawful occupant, shall be conducting a hotel, inn, lodging house, boarding house, or shall be renting rooms while still retaining control of the premises as a whole, that the guests, lodgers, boarders, or persons renting such rooms shall not be considered as subtenants within the meaning of this chapter, but all such persons may be served by affixing a copy of the notice to be served in two conspicuous places upon the premises unlawfully held; and such persons shall not be necessary parties defendant in an action to recover possession of said premises. Service of any notice provided for in this chapter may be had upon a corporation by delivering a copy thereof to any officer, agent, or person having charge of the business of such corporation, at the premises unlawfully held, and in case no such officer, agent, or person can be found upon such premises, then service may be had by affixing a copy of such notice in a conspicuous place upon said premises and by sending a copy through the mail addressed to such corporation at the place where said premises are situated. Proof of any service under this section may be made by the affidavit of the person making the same in like manner and with like effect as the proof of service of summons in civil actions. When a copy of notice is sent through the mail, as provided in this section, service shall be deemed complete when such copy is deposited in the United States mail in the county in which the property is situated properly addressed with postage prepaid: PROVIDED, HOWEVER, That when service is made by mail one additional day shall be allowed before the commencement of an action based upon such notice. RCW 59.18.375 may also apply to notice given under this chapter.

22.206.160 - Duties of owners

A. It shall be the duty of all owners, regardless of any lease provision or other agreement that purports to transfer the owner's responsibilities hereunder to an operator, manager or tenant, to:

1. Remove all garbage, rubbish and other debris from the premises;
2. Secure any building which became vacant against unauthorized entry as required by Section 22.206.200 of this Code;
3. Exterminate insects, rodents and other pests which are a menace to public health, safety or welfare. Compliance with the Director's Rule governing the extermination of pests shall be deemed compliance with this subsection 3;
4. Remove from the building or the premises any article, substance or material imminently hazardous to the health, safety or general welfare of the occupants or the public, or which may substantially contribute to or cause deterioration of the building to such an extent that it may become a threat to the health, safety or general welfare of the occupants or the public;
5. Remove vegetation and debris as required by Section 10.52.030;
6. Lock or remove all doors and/or lids on furniture used for storage, appliances, and furnaces which are located outside an enclosed, locked building or structure;
7. Maintain the building and equipment in compliance with the minimum standards specified in Sections 22.206.010 through 22.206.140 and in a safe condition, except for maintenance duties specifically imposed in Section 22.206.170 on the tenant of the building; provided that this subsection 7 shall not apply to owner-occupied dwelling units in which no rooms are rented to others;
8. Affix and maintain the street number to the building in a conspicuous place over or near the principal street entrance or entrances or in some other conspicuous place. This provision shall not be construed to require numbers on either appurtenant buildings or other buildings or structures where the Director finds that the numbering is not appropriate. Numbers shall be easily legible, in contrast with the surface upon which they are placed. Figures shall be no less than 2 inches high;
9. Maintain the building in compliance with the requirements of Section 3403.1 of the Seattle Building Code; [11]
10. Comply with any emergency order issued by the Department of Planning and Development; and
11. Furnish tenants with keys for the required locks on their respective housing units and building entrance doors.

B. It shall be the duty of all owners of buildings that contain rented housing units, regardless of any lease provision or other agreement that purports to transfer the owner's responsibilities hereunder to an operator, manager or tenant, to:

1. Maintain in a clean and sanitary condition the shared areas, including yards and courts, of any building containing two or more housing units;
2. Supply enough garbage cans or other approved containers of sufficient size to contain all garbage disposed of by such tenants;
3. Maintain heat in all occupied habitable rooms, baths and toilet rooms at an inside temperature, as measured at a point 3 feet above the floor and 2 feet from exterior walls, of at least 68 degrees Fahrenheit between the hours of 7:00 a.m. and 10:30 p.m. and 58 degrees Fahrenheit between the hours of 10:30 p.m. and 7:00 a.m. from September 1st until June 30th, when the owner is contractually obligated to provide heat;

4. Install smoke detectors on the ceiling or on the wall not less than 4 inches nor more than 12 inches from the ceiling at a point or points centrally located in a corridor or area in each housing unit and test smoke detectors when each housing unit becomes vacant;

5. Make all needed repairs or replace smoke detectors with operating detectors before a unit is reoccupied; and

6. Instruct tenants as to the purpose, operation and maintenance of the detectors.

C. Just Cause Eviction.

1. Pursuant to provisions of the state Residential Landlord-Tenant Act (RCW 59.18.290), owners may not evict residential tenants without a court order, which can be issued by a court only after the tenant has an opportunity in a show cause hearing to contest the eviction (RCW 59.18.380). In addition, owners of housing units shall not evict or attempt to evict any tenant, or otherwise terminate or attempt to terminate the tenancy of any tenant unless the owner can prove in court that just cause exists. The reasons for termination of tenancy listed below, and no others, shall constitute just cause under this section 22.206.160:

   a. The tenant fails to comply with a three day notice to pay rent or vacate pursuant to RCW 59.12.030(3); a ten day notice to comply or vacate pursuant to RCW 59.12.030(4); or a three day notice to vacate for waste, nuisance (including a drug-related activity nuisance pursuant to RCW Chapter 7.43) or maintenance of an unlawful business or conduct pursuant to RCW 59.12.030(5);

   b. The tenant habitually fails to pay rent when due which causes the owner to notify the tenant in writing of late rent four or more times in a 12 month period;

   c. The tenant fails to comply with a ten day notice to comply or vacate that requires compliance with a material term of the rental agreement or that requires compliance with a material obligation under RCW 59.18;

   d. The tenant habitually fails to comply with the material terms of the rental agreement which causes the owner to serve a ten day notice to comply or vacate three or more times in a 12 month period;

   e. The owner seeks possession so that the owner or a member of his or her immediate family may occupy the unit as that person's principal residence and no substantially equivalent unit is vacant and available in the same building. "Immediate family" shall include the owner's domestic partner registered pursuant to Section 1 of Ordinance 117244 [12] or the owner's spouse, parents, grandparents, children, brothers and sisters of the owner, of the owner's spouse, or of the owner's domestic partner. There shall be a rebuttable presumption of a violation of this subsection 22.206.160.C.1.a if the owner or a member of the owner's immediate family fails to occupy the unit as that person's principal residence for at least 60 consecutive days during the 90 days immediately after the tenant vacated the unit pursuant to a notice of termination or eviction using this subparagraph as the cause for eviction;

   f. The owner elects to sell a single-family dwelling unit and gives the tenant at least 60 days written notice prior to the date set for vacating, which date shall coincide with the end of the term of a rental agreement, or if the agreement is month to month, with the last day of a monthly period. For the purposes of this section 22.206.160, an owner "elects to sell" when the owner makes reasonable attempts to sell the dwelling within 30 days after the tenant has vacated, including, at a minimum, listing it for sale at a reasonable price with a realty agency or advertising it for sale at a reasonable price in a newspaper of general circulation. There shall be a rebuttable presumption that the owner did not intend to sell the unit if:

      1) Within 30 days after the tenant has vacated, the owner does not list the single-family dwelling unit for sale at a reasonable price with a realty agency or advertise it for sale at a reasonable price in a newspaper of general circulation, or

2) Within 90 days after the date the tenant vacated or the date the property was listed for sale, whichever is later, the owner withdraws the rental unit from the market, rents the unit to someone other than the former tenant, or otherwise indicates that the owner does not intend to sell the unit;

g. The tenant's occupancy is conditioned upon employment on the property and the employment relationship is terminated;

h. The owner seeks to do substantial rehabilitation in the building; provided that, the owner must obtain a tenant relocation license if required by Chapter 22.210 and at least one permit necessary for the rehabilitation, other than a Master Use Permit, before terminating the tenancy;

i. The owner (i) elects to demolish the building, convert it to a cooperative, or convert it to a nonresidential use; provided that, the owner must obtain a tenant relocation license if required by Chapter 22.210 and a permit necessary to demolish or change the use before terminating any tenancy, or (ii) converts the building to a condominium provided the owner complies with the provisions of Sections 22.903.030 and 22.903.035;

j. The owner seeks to discontinue use of a housing unit unauthorized by Title 23 after receipt of a notice of violation thereof. The owner is required to pay relocation assistance to the tenant(s) of each such unit at least two weeks prior to the date set for termination of the tenancy, at the rate of:

1) $2,000 for a tenant household with an income during the past 12 months at or below 50 percent of the County median income, or

2) Two months' rent for a tenant household with an income during the past 12 months above 50 percent of the County median income;

k. The owner seeks to reduce the number of individuals residing in a dwelling unit to comply with the maximum limit of individuals allowed to occupy one dwelling unit, as required by Title 23, and:

1) a) The number of such individuals was more than is lawful under the current version of Title 23 or Title 24 but was lawful under Title 23 or 24 on August 10, 1994;

b) That number has not increased with the knowledge or consent of the owner at any time after August 10, 1994; and

c) The owner is either unwilling or unable to obtain a permit to allow the unit with that number of residents.

2) The owner has served the tenants with a 30 day notice, informing the tenants that the number of tenants exceeds the legal limit and must be reduced to the legal limit,

3) After expiration of the 30 day notice, the owner has served the tenants with and the tenants have failed to comply with a ten day notice to comply with the limit on the number of occupants or vacate, and

4) If there is more than one rental agreement for the unit, the owner may choose which agreements to terminate; provided that, the owner may either terminate no more than the minimum number of rental agreements necessary to comply with the legal limit on the number of occupants, or, at the owner's option, terminate only those agreements involving the minimum number of occupants necessary to comply with the legal limit;

l. 1) The owner seeks to reduce the number of individuals who reside in one dwelling unit to comply with the legal limit after receipt of a notice of violation of the Title 23 restriction on the number of individuals allowed to reside in a dwelling unit, and:

a) The owner has served the tenants with a 30 day notice, informing the tenants that the number of tenants exceeds the legal limit and must be reduced to the legal limit; provided that, no 30 day notice is required if the number of tenants

was increased above the legal limit without the knowledge or consent of the owner;

b) After expiration of the 30 day notice required by subsection 22.206.160.1.1.a above, or at any time after receipt of the notice of violation if no 30 day notice is required pursuant to subsection 22.206.160.1.1.a, the owner has served the tenants with and the tenants have failed to comply with a 10 day notice to comply with the maximum legal limit on the number of occupants or vacate; and

c) If there is more than one rental agreement for the unit, the owner may choose which agreements to terminate; provided that, the owner may either terminate no more than the minimum number of rental agreements necessary to comply with the legal limit on the number of occupants, or, at the option of the owner, terminate only those agreements involving the minimum number of occupants necessary to comply with the legal limit.

2) For any violation of the maximum legal limit on the number of individuals allowed to reside in a unit that occurred with the knowledge or consent of the owner, the owner is required to pay relocation assistance to the tenant(s) of each such unit at least two weeks prior to the date set for termination of the tenancy, at the rate of:

a) $2,000 for a tenant household with an income during the past 12 months at or below 50 percent of the county median income, or

b) Two months' rent for a tenant household with an income during the past 12 months above 50 percent of the county median income;

m. The owner seeks to discontinue use of an accessory dwelling unit for which a permit has been obtained pursuant to Sections 23.44.041 and 23.45.545 after receipt of a notice of violation of the development standards provided in those sections. The owner is required to pay relocation assistance to the tenant household residing in such a unit at least two weeks prior to the date set for termination of the tenancy, at the rate of:

1) $2,000 for a tenant household with an income during the past 12 months at or below 50 percent of the county median income, or

2) Two months' rent for a tenant household with an income during the past 12 months above 50 percent of the county median income;

n. An emergency order requiring that the housing unit be vacated and closed has been issued pursuant to Section 22.206.260 and the emergency conditions identified in the order have not been corrected;

o. The owner seeks to discontinue sharing with a tenant of the owner's own housing unit, i.e., the unit in which the owner resides, seeks to terminate the tenancy of a tenant of an accessory dwelling unit authorized pursuant to Sections 23.44.041 and 23.45.545 that is accessory to the housing unit in which the owner resides or seeks to terminate the tenancy of a tenant in a single-family dwelling unit and the owner resides in an accessory dwelling unit on the same lot. This subsection 22.206.160.C.1.o does not apply if the owner has received a notice of violation of the development standards of Section 23.44.041. If the owner has received such a notice of violation, subsection 22.206.160.C.1.m applies;

p. A tenant, or with the consent of the tenant, his or her subtenant, sublessee, resident or guest, has engaged in criminal activity on the premises, or on the property or public right-of-way abutting the premises, and the owner has specified in the notice of termination the crime alleged to have been committed and the general facts supporting the allegation, and has assured that the Department of Planning and Development has recorded receipt of a copy of the notice of termination. For purposes of this subsection 22.206.160.C.1.p a person has "engaged in criminal activity" if he or she:

1) Engages in drug-related activity that would constitute a violation of RCW Chapters 69.41, 69.50 or 69.52, or

2) Engages in activity that is a crime under the laws of this state, but only if the activity substantially affects the health or safety of other tenants or the owner.

2. Any rental agreement provision which waives or purports to waive any right, benefit or entitlement created by this subsection 22.206.160.C.1.p shall be deemed void and of no lawful force or effect.

3. With any termination notices required by law, owners terminating any tenancy protected by this section 22.206.160 shall advise the affected tenant or tenants in writing of the reasons for the termination and the facts in support of those reasons.

4. If a tenant who has received a notice of termination of tenancy claiming subsection 22.206.160.C.1.e, C.1.f, or C.1.m as the ground for termination believes that the owner does not intend to carry out the stated reason for eviction and makes a complaint to the Director, then the owner must, within ten days of being notified by the Director of the complaint, complete and file with the Director a certification stating the owner's intent to carry out the stated reason for the eviction. The failure of the owner to complete and file such a certification after a complaint by the tenant shall be a defense for the tenant in an eviction action based on this ground.

5. In any action commenced to evict or to otherwise terminate the tenancy of any tenant, it shall be a defense to the action that there was no just cause for such eviction or termination as provided in this section 22.206.160.

6. It shall be a violation of this section 22.206.160 for any owner to evict or attempt to evict any tenant or otherwise terminate or attempt to terminate the tenancy of any tenant using a notice which references subsections 22.206.160.C.1.e, 1.f, 1.h, 1.k, 1.l, or 1.m as grounds for eviction or termination of tenancy without fulfilling or carrying out the stated reason for or condition justifying the termination of such tenancy.

7. An owner who evicts or attempts to evict a tenant or who terminates or attempts to terminate the tenancy of a tenant using a notice which references subsections 22.206.160.C.1.e, 1.f or 1.h as the ground for eviction or termination of tenancy without fulfilling or carrying out the stated reason for or condition justifying the termination of such tenancy shall be liable to such tenant in a private right for action for damages up to $2,000, costs of suit or arbitration and reasonable attorney's fees.

(Ord. 123564, § 3, 2011; Ord. 123546, § 4, 2011; Ord. 123141, § 1, 2009; Ord. 122728, § 1, 2008; Ord. 122397, § 2, 2007; Ord. 121408 § 1, 2004; Ord. 121276 § 19, 2003; Ord. 119617 § 1, 1999; Ord. 118441 § 2, 1996; Ord. 117942 § 2, 1995; Ord. 117570 § 2, 1995; Ord. 115877 § 1, 1991; Ord. 115671 § 17, 1991; Ord. 114834 § 2, 1989; Ord. 113545 § 5(part), 1987.)

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STEPHEN FACISZEWSKI and VIRGINIA L. KLAMON, Plaintiffs, vs. MICHAEL R. BROWN and JILL A. WAHLEITHNER, Defendants.	**No. 72611-1-I** **CERTIFICATE OF SERVICE**

I hereby certify that on the date set forth below a copy of Appellants Brief was served as follows:

Evan L. Loeffler
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Seattle, WA 98101

- ☒ U.S. Mail, First Class Postage Prepaid
- ☒ Fax
- ☐ Legal messenger
- ☐ Express mail

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

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DATED at Seattle, Washington this 26th day of May, 2015.

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