

No. 75212-0-I

COURT OF APPEALS, DIVISION I
FOR THE STATE OF WASHINGTON

BTNA, LLC, a Washington limited liability company,

Respondents

v.

FORMOSA BROTHERS INTERNATIONAL LLC, a Washington limited
liability company, FU MEI CHU, an individual, and JIH-CHENG CHU

and LIHUI CHU, husband and wife,

Appellants.

OPENING BRIEF

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STATE OF WASHINGTON
COURT OF APPEALS, DIVISION I
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II. INTRODUCTION

Unlawful detainer is a special procedure with unique pleading and procedural requirements. *Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985). “The action is a narrow one, limited to the question of possession and related issues such as restitution of the premises and rent.” *Id.* As a special procedure, the ordinary civil rules apply only to the extent they are consistent with unlawful detainer. *Christensen v. Ellsworth*, 162 Wn.2d 365, 374, 173 P.3d 228 (2007); *Markland v. Wheeldon*, 29 Wn. App. 517, 522, 629 P.2d 921 (1981); CR 81(a).

An essential condition precedent to an unlawful detainer action is a valid pre-eviction notice. The purpose of this pre-eviction notice is to give the tenant “at least one opportunity to correct a breach before forfeiture of a lease under the accelerated restitution provisions of RCW 59.12.” *Hous. Auth. of the City of Everett v. Terry*, 114 Wn.2d 558, 569, 789 P.2d 745 (1990). The pre-eviction notice must be valid both in the form and content of the notice, which must substantially comply with the requirements of Chapter 59.12 RCW, and in the time and manner of service, which must strictly comply. *Sowers v. Lewis*, 49 Wn.2d 891, 895, 307 P.2d 1064 (1957); *Marsh-McLennan Bldg., Inc. v. Clapp*, 96 Wn. App. 636, 640 n.1, 980 P.2d 311 (1999); *Comty. Invs., Ltd. v. Safeway Stores, Inc.*, 36 Wn. App. 34, 37-38, 671 P.2d 289 (1983). Unless the landlord serves a valid

pre-eviction notice and waits the necessary time before bringing suit, the trial court cannot “exercise” its jurisdiction to act in unlawful detainer and the tenant is entitled to continue its tenancy. *Hous. Auth. of City of Seattle v. Bin*, 163 Wn. App. 367, 375-77, 260 P.3d 900 (2011).

The unique nature of this appeal is that it is settled that no valid pre-eviction notice was served. Given that posture, this court is asked to decide who the prevailing party is when a landlord brings an eviction without first serving a valid pre-eviction notice.

III. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in its April 12, 2016, order by denying the Defendant’s motion to dismiss.
2. The trial court erred in its May 10, 2016, order by determining the Plaintiff was the prevailing party.
3. The trial court erred in its May 19, 2016, judgment by awarding \$28,446.59 in attorney’s fees and \$1,777.38 in costs without conducting a lodestar analysis.
4. The trial court erred in its June 9, 2016, order by denying reconsideration of its May 10, 2016, order.

5. The trial court erred in its June 24, 2016, judgment by awarding \$16,584.88 in additional attorney's fees and \$98.63 in additional costs without conducting a lodestar analysis.

B. Issues Pertaining to Assignments of Error

1. Did the trial court err in its April 12, 2016, order when it refused to dismiss the case after ruling that the Plaintiff failed to properly serve a valid pre-eviction notice, improperly refused to accept a timely tender of the full amount demanded in the pre-eviction notice, and commenced its case prematurely? (Error No. 1)
2. Did the trial court err when it ruled the Plaintiff was the prevailing party despite the plaintiff's failure to serve a valid pre-eviction notice, improperly refused to accept a timely tender of the full amount demanded in the pre-eviction notice, and commenced its case prematurely? (Error Nos. 2, 4)
3. Did the trial court err when it ruled that its duty to determine the amount of reasonable attorney's fees and taxable costs incurred was "basically ministerial" and when it failed to conduct a lodestar analysis? (Error Nos. 3, 5)

IV. STATEMENT OF THE CASE

Formosa Brothers International LLC (Formosa Brothers) operates a Taiwanese restaurant called MonGa Café at 14603 NE 20th Street, Suite 4B, Bellevue, Washington (the Premises). CP at 143. Since July 2012, it rented the Premises as a subtenant of BTNA LLC (BTNA) pursuant to a five year lease agreement that runs through July 2017. CP at 61. Formosa Brothers is a family-owned Taiwanese restaurant; defendants Jih-Cheng Chu and Lihui Chu own the restaurant and business and act as its managers. CP at 143. Jih-Cheng is also Formosa Brothers' registered agent. CP at 139. Their 20 year old daughter, Yung-Hsuan Chu, sometimes works at the restaurant as a waitress.¹ *Id.*

For the past several years, Formosa Brothers had trouble with BTNA losing or misplacing Formosa Brothers' rent checks. CP at 144-46. At least five times between May 2014 and July 2015, Formosa Brothers tendered payment of rent by check but had to later stop payment on those checks because BTNA lost or chose not to deposit them. *Id.*

On March 21, 2016, BTNA attempted to serve Formosa Brothers with a three day notice to pay rent or vacate for \$20,028.03 in rent, utilities, parking fees, common area maintenance charges, taxes, and late fees. CP at 98-117. BTNA retained a process server who went to MonGa

¹ When necessary for clarity, this brief refers to the Chus by their first names. Yung-Hsuan is sometimes referred to as "Debbie" in the record. *See* CP at 178.

Café to serve the notice. At the restaurant, BTNA's server approached one of the waitresses, Yung-Hsuan, and handed her one copy of the notice. CP at 103. The server did not ask Yung-Hsuan, or anyone else, whether Formosa Brother's registered agent, Jih-Cheng, was present. CP at 103, 139-40, 178. The process server did not attempt to find any manager of the business. CP at 103, 139-40, 178. The server apparently felt justified serving a family member of the registered agent as-if he was serving an individual at his or her home. *See* RCW 4.28.080(16). Likewise, the server did not post the notice at the Premises.

Despite these defects with service, Formosa Brothers attempted to comply with the notice. Jih-Cheng reviewed the notice and determined that the rent alleged delinquent was the result of BTNA losing, or choosing not to deposit, the rent payments. CP at 140. He stopped payment on the checks BTNA claimed it had not received and wrote a new check for what he believed was the correct balance. *Id.* at 140-41, 144-46.

On March 25, Lihui hand-delivered a check for \$14,296.18 to BTNA's accountant. CP at 146. BTNA accepted the check, but then returned it a few hours later. *Id.* Lihui responded by immediately preparing and delivering a check for the full amount requested in the notice. \$20,028.03, though Formosa Brothers believed that demand for

payment was excessive. *Id.* Despite this timely tender of the full amount requested in the three-day notice, BTNA rejected that payment and demanded payment of \$30,000.00 to satisfy the notice, \$9,971.97 more than the amount set-out in the notice. CP at 146.

March 25, during the waiting period allowed by law and the same day BTNA rejected full, timely payment on the notice, BTNA prematurely commenced this unlawful detainer. CP at 1-6.

On April 12, the court conducted a show cause hearing before a court commissioner. At that hearing, BTNA moved for issuance of a judgment and writ of restitution based on the alleged non-payment of rent. CP at 53-55. Formosa Brothers moved to dismiss the case based on the defects in the form and content of the notice and in service of the notice. CP 121-34, 180. The court considered the parties' evidence and arguments and ruled that the notice was substantively defective and was not properly served. CP at 183. However, the court did not dismiss the case, but instead gave BTNA the option of serving a proper notice to pay rent or vacate. *Id.*; 4/12/16 RP at 10.

On April 15, BTNA delivered another notice pay rent or vacate to Formosa Brothers for yet another amount, this time requesting \$25,790.13 in rent and other charges. CP at 257-58. The parties agree that Formosa

Brothers complied with this notice within the waiting period allowed by law. *Id.*

On April 18, Formosa Brothers again moved to dismiss the case, noting a hearing on their motion for April 27. CP at 187-92. The next day, BTNA voluntarily dismiss its complaint without prejudice. CP at 195-98. Both parties then moved for attorney's fees and costs, with both parties asserting they were the prevailing party. CP at 199-208, 248-55.

On May 10, the court heard argument and a judge—not the commissioner who presided at the show cause hearing—ruled that BTNA was the prevailing party for the purpose of awarding attorney's fees. CP at 357-58. On May 19, the court commissioner awarded BTNA just over \$30,000.00 in attorney's fees and costs for losing its case. The court commissioner stated in his oral ruling that establishing the amount of attorney's fees was “basically ministerial.” 5/19/16 RP at 9.

Formosa Brothers also moved for reconsideration. After calling for a response, the judge denied reconsideration. CP at 537-39. In the motion for reconsideration and the court's subsequent ruling, the issue of additional attorney's fees was not raised, considered, or granted. CP at 360-72, 437-47, 537-39.

BTNA moved for additional attorney's fees. CP at 541-44. On June 24, again before the court commissioner, the court awarded BTNA

over \$16,000.00 in additional attorney's fees and costs. The court commissioner based his ruling on a mistaken understanding of the procedure leading up to the request. He stated that the judge who denied reconsideration "previously entered an order that approved the fees, and [BTNA's counsel was] charging the same hourly rate." 6/24/16 RP at 12. No such ruling had ever been made by the judge. *See* CP at 537-39. The court commissioner felt bound by this misunderstanding of the procedure, stating the non-existent ruling by the judge was "law of the case" and that the fees had "been previously approved." 6/24/16 RP at 12.

Faced with judgments for nearly \$50,000.00 in attorney's fees and costs for *winning* this unlawful detainer and *retaining* possession of the Premises, Formosa Brothers was compelled to bring this appeal.

V. ARGUMENT

The Unlawful Detainer Act, Chapter 59.12 RCW, provides a special, expedited remedy for landlords to determine the right to possession of real property more quickly and efficiently than other Washington statutes or the remedies available at common law. *IBF, LLC v. Heuft*, 141 Wn.App. 624, 631, 174 P.3d 95 (2007). As a derogation of common law, the requirements of Chapter 59.12. RCW are strictly construed in favor of the tenant. *Laffranchi v. Lim*, 146 Wn. App. 376, 383, 190 P.3d 97 (2008); *Housing Authority of City of Seattle v. Silva*, 94

Wn. App. 731, 734, 972 P.2d 952 (1999). To take advantage of this special, expedited statute, the landlord must strictly comply with the Act; any procedural error by the landlord deprives it of the right to this expedited procedure and dictates that the case must be dismissed. *Terry*, 114 Wn.2d at 566; *Sowers v. Lewis*, 49 Wn.2d 891, 894, 307 P.2d 1064 (1957).

A. This court reviews the disputed trial court rulings de novo

When the trial court rules purely on written submissions, the appellate court stands in the same position as the trial court. Under those circumstances, the appellate court reviews the trial court decisions de novo. *Faciszewski v. Brown*, 192 Wn. App. 441, 445, 367 P.3d 1085, review granted in part by 185 Wn.2d 1040, 377 P.3d 763 (2016). Questions of law are also reviewed de novo. *Indigo Real Estate Servs., Inc. v. Wadsworth*, 169 Wn. App. 412, 417, 280 P.3d 506 (2012).

For the reasons set out below, the factual determinations relevant to this review are undisputed before this court. To the extent they are disputed, the trial court's factual findings were based purely on the written declarations and documentary evidence submitted by the parties. *E.g.* CP at 180-81, 324-25. Therefore, this court reviews all disputed issues de novo.

B. Unchallenged findings of fact are verities on appeal and unchallenged orders become law of the case

On appeal, any orders that are not appealed are considered conclusively established and become the “law of the case.” *King Aircraft Sales v. Lane*, 68 Wn. App. 706, 716, 846 P.2d 550 (1993); RAP 10.3(a)(4); *see* RAP 5.1. Unchallenged findings of fact become verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). An appellant must file notice of appeal designating the orders it seeks to challenge before the appellate court. RAP 5.1(a). The appellant must then designate “a separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.” RAP 10.3(a)(4); *Burback v. Bucher*, 56 Wn.2d 875, 877, 355 P.2d 981 (1960).

If any other party wishes to challenge a portion of the trial court record after receiving notice of appeal, it must file a notice of cross review. RAP 5.1(d).

On appeal, Formosa Brothers designated that portion of the April 12, 2016, order denying its motion to dismiss as error, but does not challenge any other portion of that ruling. *See* Amended Notice of Appeal to Court of Appeals, Division I; Appellant’s Response to Motion to Modify. BTNA does not seek review of anything in the trial court record.

Therefore, all other components of the April 12 order are now law of the case and cannot be challenged.

Most significantly to this appeal, it is law of the case that (1) “Plaintiff failed to serve the Notice to an officer, agent, or person having charge of the business of Defendant”; (2) “Defendant tried to cure the Plaintiff’s alleged default asserted on its Notice by providing the full amount on May² 25, 2016”; (3) “Plaintiff received a check in the full amount as requested in its Notice on May 25, 2016”; (4) “Plaintiff failed to comply with the time and manner requirements of RCW 59.12.040”; and (5) “Plaintiff failed to substantially comply with the form and content requirements of RCW 59.12.” CP at 182-83. To the extent any of these rulings are findings of fact, they are equally conclusive as “verities.”

For the reasons set out below, when armed with these undisputed facts and legal conclusions, the court of appeals can reach but one conclusion: Formosa Brothers is the prevailing party.

² The trial court’s April 12, order repeatedly refers to actions taken on “May 25, 2016,” CP at 183, but this is a clear scrivener’s error and each statement should read “March 25, 2016.” The order was issued prior to May 25, 2016, and all the declarations on which the trial court could have relied state the payments were made March 25, 2016. CP at 138, 141, 146, 176.

C. Based on the undisputed portion of the April 12 order, the trial court could not “exercise” its authority to act in unlawful detainer and complaint was fatally defective

Prior to commencing an unlawful detainer, the plaintiff must strictly comply with the time and manner requirements for service of a pre-eviction notice. *Terry*, 114 Wn.2d at 563; *Safeway Stores*, 36 Wn. App. at 36-38. Failure to observe these time and manner requirements mandates that the case fail because the trial court cannot “exercise” its subject matter jurisdiction and because the plaintiff can prove an essential element of its case in chief. *Bin*, 163 Wn. App. at 375; *see Christensen v. Ellsworth*, 162 Wn.2d 365, 372, 173 P.3d 228 (2007); *Safeway Stores, Inc.*, 36 Wn. App. at 36-38.

i. BTNA did not properly serve the notice

The time and manner requirements for service of the pre-eviction notice are set out at RCW 59.12.040. The plaintiff must serve individual tenants 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. Further, if service must be made on a corporation or similar legal entity, the plaintiff does so

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.

Id.

The landlord must provide sufficient copies of the notice to serve every tenant entitled to notice. *See* RCW 59.12.030(3), .040. The landlord must serve the pre-eviction notice “upon the person owing it.” RCW 59.12.030(3). Service upon each person is then dictated by the rules set out above. That process must be followed for each person the landlord seeks to serve, i.e. if the landlord hand-delivers the notice, he must give sufficient copies for each person entitled to notice. RCW 59.12.030(3), .040. If the landlord does not hand-deliver a copy to each person and entity entitled to notice, he must also mail copies to each of them. *Id.*

The plaintiff/landlord bears the burden of proving proper service as a component of its case-in-chief. *Little v. Catania*, 48 Wn.2d 890, 892, 297 P.2d 255 (1956); *see Christensen*, 162 Wn.2d at 374 (the notice “is an element” of unlawful detainer). Failure to prove service, or insufficient service, must result in dismissal.

In an unchallenged ruling, the trial court held that BTNA failed to strictly comply with the service requirements of RCW 59.12.040. CP at 183. BTNA attempted service of the notice on March 21. CP at 103. However, that day, all their process server did was hand-deliver one copy of the notice to Yung-Hsuan, an individual “then present” at the Premises who was not one of the parties entitled to notice under the statute or lease, *see* RCW 59.12.030(1), and was not an “officer, agent, or person having charge of the business.” RCW 59.12.030; *see* CP at 139-40, 178.

On March 21, a proper party for service, Jih-Cheng, was present at the Premises.³ CP at 139-41. A server must demonstrate that he is unable to hand-deliver copies to each person entitled to serve before he may use an alternative means. *Faciszewski*, 192 Wn. App. at 447-48 (service by posting sufficient where landlord’s declaration states he “was unable” to hand-deliver); *Hall v. Feigenbaum*, 178 Wn. App. 811, 820-21, 319 P.3d

³ Jih-Cheng’s declaration does not specifically state he was present, but does state the process server did not post the three-day notice based on personal knowledge, implying he was present on March 21 when the process server attempted to serve the notice.

61 (2014) (evidence that hand-delivery is not possible makes an alternative method of service acceptable). Despite this, the process server's declaration contains no statement that he even attempted to deliver the notice to the correct party or that he posted the notice at the Premises. CP at 103. The declaration merely stated that he delivered a copy to "Debbie," the registered agent's daughter. *Id.* The server did not attempt to serve the correct party, nor did he declare that the correct parties were absent from the Premises, *see* RCW 59.12.030(2), or otherwise unable to be served.

This attempt at service is insufficient as a matter of law. Prior to using one of the alternative methods to personal service on the tenant, the person attempting service of a pre-eviction notice must make a good faith attempt to hand-deliver the notice to the proper parties. RCW 59.12.040; *Hall*, 178 Wn. App. at 820-21. In *Hall*, this court held Hall's service of the pre-eviction notice by posting and mailing was sufficient when the business was closed and the landlord did not know the tenant's home address when attempting service. *Id.* at 820. Hall's use of option (3) of posting and mailing is a "logical choice" when the other two are not readily possible. *Id.* Unlike in *Hall*, here the hand-delivery option was

readily available and BTNA failed to establish any reason that hand-delivery was not possible.⁴

BTNA bears the burden of proving why it used the service method that it did and that it strictly complied with the requirements of that method of service. *See Christensen*, 162 Wn.2d at 372 (strict compliance with time and manner required); *Little*, 48 Wn.2d at 892 (plaintiff's burden of proof). Yet, BTNA's service declaration is silent on why the server could not hand-deliver the notice *and* BTNA failed to strictly comply with the time and manner requirements of any method of service. The trial court so ruled and that ruling is not challenged on appeal.

BTNA never served a proper pre-eviction notice and could not lawfully commence an unlawful detainer.

- ii. Formosa Brothers fully complied with the notice within the statutory waiting period

Even if BTNA had properly served a pre-eviction notice on April 21, it improperly rejected full compliance within the waiting period. The purpose of this pre-eviction notice is to give the tenant "at least one opportunity to correct a breach." *Terry*, 114 Wn.2d at 569. If the tenant corrects its breach within this waiting period, the tenant is never in

⁴ BTNA did not even attempt to use any of the alternative methods. They only delivered one copy, did not post the notice or attempt to post it, and only mailed one copy.

unlawful detainer and the landlord has no basis for a lawsuit. *See* RCW 59.12.030(3).

Whenever a landlord affects service of the pre-eviction notice by any method other than hand-delivery to the tenant entitled to be served, the landlord must also send a copy by mail. RCW 59.12.040. In these circumstances, the tenant is permitted one additional day to comply with the notice to allow the mailed copy to travel through the postal system.⁵ *Id.* To calculate the waiting period allowed for payment, the court excludes the day service was completed and includes the final day of the waiting period. *Christensen*, 162 Wn.2d at 377. Therefore, a notice delivered and mailed on a Monday allows all day Friday to comply; the landlord may not bring suit until the notice remains uncompleted with on Saturday.⁶ *See id.*

BTNA attempted to complete service on March 21, 2016, a Monday, and that service, even if it was valid, required an additional day for mailing the notice. CP at 103. Thus, Formosa Brothers had until

⁵ In this case, the lease provides for three extra days when the notice is served by mail. CP at 24. When a contract provides for a longer waiting period than the statutory waiting period, that longer period is enforceable. *Hall*, 178 Wn. App. at 820-22; *Safeway Stores*, 36 Wn. App. at 37-38. Based on the lease provision, Formosa Brothers would have until Sunday, March 27 to comply with a notice served on March 21 and BTNA could not commence an unlawful detainer until March 28 at the earliest. However, the court does not need to decide this issue because, even with only one day added for mailing, BTNA commenced its case prematurely.

⁶ *See* footnote 5. Under the lease in this case, BTNA could not commence its case until Monday.

Friday, March 25⁷ to comply with the notice and avoid being in unlawful detainer. *Christensen*, 162 Wn.2d at 377.

The trial court found that Formosa Brothers tendered the full \$20,028.03 on March 25, 2016, a date within the waiting period. CP at 146, 183. That order is not challenged on appeal. Therefore, Formosa Brothers fully complied with the pre-eviction notice within the waiting period and was never in unlawful detainer. *See* RCW 59.12.030(3).

Formosa Brothers complied with its right to pay the full amount within the waiting period and avoid entering unlawful detainer. BTNA should never have commenced this suit.

iii. BTNA commenced suit prematurely

Even if Formosa Brothers did not comply within the waiting period, BTNA commenced suit prematurely and the case should have been dismissed. To strictly comply with the time and manner requirements of Chapter 59.12 RCW, the landlord must not commence suit until the waiting period is over. *Christensen*, 162 Wn.2d at 376; *IBF, LLC*, 141 Wn.App. at 632; *Safeway Stores*, 36 Wn. App. at 38. When the landlord commences an unlawful detainer during the waiting period, it denies the tenant its fundamental right to “at least one opportunity to correct a breach.” *Terry*, 114 Wn.2d at 569. The period after service is a waiting

⁷ *See* footnote 5. Under the lease in this case, BTNA could not commence its case until Monday.

period during which the landlord *cannot act*. *Christensen*, 162 Wn.2d at 376. Once the landlord commences suit prematurely, i.e. during the waiting period, the lawsuit is fatally defective. *Safeway Stores*, 36 Wn. App. at 38. This is an incurable defect; the plaintiff *cannot* subsequently amend its pleadings to correct this defect. *Id.*

BTNA attempted to serve notice on March 21, 2016, and so alleged in its complaint. CP at 3, 103. BTNA commenced suit on March 25, only 4 days later. CP at 6; *see* CR 3 (case is commenced at the earlier of service or filing). When a case is commenced even one day early, the plaintiff deprives the defendant of its statutory right to comply with the pre-eviction notice and avoid eviction. *Safeway Stores*, 36 Wn. App. at 38; *see Christensen*, 162 Wn.2d at 376 (landlord cannot act during the waiting period). This error by the plaintiff is fatal to its case.

Even if Formosa Brothers had not complied with BTNA's notice on March 25, BTNA still could not commenced its case that day and the case must be dismissed.

- iv. The form and content of the notice was substantially misleading

If this court were to go beyond BTNA's failure to properly serve a pre-eviction notice, its failure to accept a timely tender of the full amount in the notice, and its failure to wait through the entire mandatory waiting

period, this unlawful detainer would still fail because the form and content of the notice is also defective.

The form and content of a pre-eviction notice must substantially comply with the requirements of Chapter 59.12 RCW. *Marsh-McLennan Bldg.*, 96 Wn. App. at 640 n.1. The form and content substantially complies if it is “sufficiently particular and certain so as not to deceive or mislead.” *IBF, LLC*, 141 Wn.App. at 632. A three day notice may only contain a demand for payment of rent. RCW 59.12.030(3). All other demands for performance must be in a ten day notice. RCW 59.12.030(4). A notice which contains both a proper and an improper demand for performance substantially misleads the tenant unless the proper and improper demands are separately articulated, allowing the defendant to distinguish between them. *Sowers*, 49 Wn.2d at 895.

The form and content of BTNA’s notice does not substantially comply with the requirements of Chapter 59.12 RCW. The trial court ruled that the form and content did not substantially comply and that ruling is not challenged on appeal. CP at 183 ¶ 10. Among other things, the notice merely demands payment of \$20,028.03 and lists some invoice numbers. CP at 45-47. The notice does not identify what charges make up that demand for payment. Only after service of the complaint did BTNA identify that the notice to “pay rent or vacate” actually demanded

payment of utilities, parking fees, common area maintenance charges, taxes, and late fees. CP at 106-17. Those charges were not distinguished from rent in the notice or the complaint. The notice was misleading and did not substantially comply with Chapter 59.12 RCW.

The trial court ruled the form and content of the pre- eviction notice did not substantially comply with the statutory requirements. CP at 183. Even if BTNA met the time and manner requirements, the complaint must still be dismissed.

D. Formosa Brothers should be the prevailing party because it retained possession of the Premises

Both parties agree that the prevailing party is entitled to attorney's fees under the lease. CP at 24, 203, 254. The parties dispute the test the court applies to determine the prevailing party in an unlawful detainer.

The general rule in Washington is that the defendant is the prevailing party for the purpose of enforcing an attorney's fees provision in a contract when the plaintiff takes a voluntary nonsuit. *Walji v. Candyco. Inc.*, 57 Wn. App. 284, 288, 787 P.2d 946 (1990). This is because the defendant is considered the prevailing party when no judgment is entered against it. *Id.*

Likewise, the specific rule in unlawful detainers is that the tenant is the prevailing party when the landlord voluntarily dismisses a case without

prejudice. *Council House, Inc. v. Hawk*, 136 Wn. App. 153, 160, 147 P.3d 1305 (2006). This is because unlawful detainers are about possession, and when the plaintiff dismisses a case, the tenant retains possession and thus prevails on the central issue of the case. *See Munden*, 105 Wn.2d at 45 (possession is the central issue; rent is a “related” issue); *Josephinium Assocs. v. Kahli*, 111 Wn. App. 617, 624-25, 45 P.3d 627, 631 (2002).

In *Council House v. Hawk*, Council House, the landlord, took a voluntary dismissal under CR 41 when the tide of litigation began to turn against it. *Council House*, 136 Wn. App. at 156-57. After a pretrial hearing, the court asked for additional briefing on one of Hawk’s constitutional defenses. *Id.* Following that call for briefing, Council House dismissed its case. *Id.* Hawk appealed, seeking attorney’s fees for prevailing after the nonsuit. *Id.* at 157. On review, the court rejected Council House’s various arguments that Hawk was not the prevailing party and awarded attorney’s fees to her for maintaining possession of the premises. *Id.* at 161.

Similarly here, on April 12, the trial court entered an order that BTNA’s pre- eviction notice was substantively defective and improperly served. CP at 180-84. On April 18, Formosa Brothers again moved to dismiss the case. CP at 187-92. The next day, while Formosa Brothers’ most was pending and before taking any further action in the case, BTNA

nonsuited its case. CP at 195-96. As in *Council House*, the tide of litigation was turning against the plaintiff and the plaintiff chose to voluntarily dismiss its case. As in *Council House*, the defendant succeeded in the central issue of the case—retaining possession of the Premises.

Formosa Brothers received all the relief it could possibly obtain in this case. It kept possession of the premises and avoided a judgment. It is hard to imagine a more favorable result for Formosa Brothers than what it achieved through the dismissal.

Notwithstanding this, BTNA proposes the rule that because Formosa Brothers paid BTNA rent during the waiting period and *without any court order so requiring* that BTNA was the prevailing party. Before the trial court, they cited no authority for this proposition. CP at 254. Even if this legal theory is correct, it does not match the facts of this case.

Under BTNA's own theory, it should not receive attorney's fees. BTNA credits its legally defective complaint for obtaining a payment from Formosa Brothers, but this is plainly contrary to the facts adopted by the trial court and undisputed on appeal.

At the April 12 hearing, the trial court found that Formosa Brothers timely tendered full payment of the money demanded in BTNA's March 21 pre-eviction notice. CP at 183 ¶¶ 7-8. BTNA improperly rejected this

payment. *Id.* The only reason BTNA did not have every penny that it demanded in rent and other charges on March 25 was its own error in rejecting a full, timely payment.

BTNA then brought a premature suit to obtain possession of the premises and a judgment for the money that it improperly rejected. CP at 1-6. Next, it lost a motion for that relief because of its own errors. CP at 180-84. It then asked for, and received, the money that it previously improperly rejected and credits the lawsuit that it never needed to bring for obtaining that payment. CP at 254, 257-58.

On March 25, BTNA commenced a case that it never should have commenced. The complaint, as pled, was defective and because the defect arose, in part, on the premature nature of the complaint, it could not be cured by BTNA's later action. The cause of BTNA receiving payment was not its defective complaint, but rather one or both of its notices to pay rent or vacate. From March 21 through the end of this case, Formosa Brothers fully complied with every notice BTNA prepared within the statutory waiting period. BTNA never had any basis to begin an unlawful detainer.

As in *Council House*, the tenant is the prevailing party for avoiding a judgment and keeping possession of the premises. This court should

reverse the award of attorney's fees to BTNA and award fees to Formosa Brothers.

E. The trial court must conduct a lodestar analysis to determining the reasonable amount of attorney's fees

If this court affirms the determination of BTNA as the prevailing party, it should still vacate the award of the amount of attorney's fees and remand for a new determination of a reasonable fee. The trial court erred when it ruled that it's duty to determine an appropriate fee was "basically ministerial" and merely granted the plaintiff's request in full without conducting a lodestar analysis. 5/19/16 RP at 9, l. 5; *see* CP at 435-36.

Washington uses the lodestar method to determine reasonable attorney's fees. The defendants correctly state that the burden rests with them to prove that the requested hours and rate are reasonable. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993). An award of attorney's fees is determined by, among other things, the time and skill required, the customary fee in the community for the category of work, the amount of money at issue, and awards in similar cases. *Scott Fetzer Co.*, 122 Wn.2d at 150; *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 596, 675 P.2d 193 (1983). Courts must take an active role in the process of determining an appropriate fee, and "should not simply accept unquestioningly fee affidavits from counsel." *Deep Water*

Brewing, LLC v. Fairway Rest. Ltd., 152 Wn. App. 229, 282, 215 P.3d 990 (2009).

The first step is to establish a reasonable hourly rate. When an attorney has an established billing rate, that rate is the starting point in the analysis. *Bowers*, 100 Wn.2d at 597. In setting a reasonable rate, the court considers the efficiency of the attorney's work and the prevailing rate for similar work in the community. *Id.* at 600.

Once a rate is established, the court must then determine an appropriate number of hours required to achieve the positive result. To determine a reasonable number of hours, the court considers the actual hours expended and excludes those spent that were excessive or unnecessary. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987); *see Bowers*, 100 Wn.2d at 597. The court only awards fees for those hours that lead to the successful outcome. *Mahler v. Scucz*, 135 Wn.2d 398, 435, 957 P.2d 632 (1989).

Finally, the court may adjust the resulting figure up or down based on circumstances about the case not yet included in the calculation. *Ethridge v. Hwang*, 105 Wn. App. 447, 461-62, 20 P.3d 958 (2001); *McGreevy v. Oregon Mut. Ins. Co.*, 90 Wn. App. 283, 295, 951 P.2d 798 (1998).

Where the trial court fails to create an adequate record for the appellate court to review its lodestar analysis, the appellate court will vacate the judgment remand the case for a redetermination of the award following an appropriate analysis. *Mahler*, 135 Wn.2d at 435; *Bowers*, 100 Wn.2d at 601.

In this case, there were two judgments awarding attorney's fees. In both instances, the trial court failed to conduct any lodestar analysis at all. CP at 435-36; 5/19/16 RP at 9. At both hearings, the court apparently believed the correct fee was already determined and that it was acting in a "ministerial" capacity in approving an award already reviewed by another judicial officer. 5/19/16 RP at 9, l. 5; 6/24/16 RP at 6-8, 12. At the second hearing, the court commissioner expressed skepticism about BTNA's hourly rate, but the commissioner stated he was bound by the judge's prior order accepting that rate, though no such order was ever requested or signed. 6/24/16 RP at 12.

Even if this court affirms the determination that BTNA was the prevailing party, the amount of fees was entered in error and without an adequate lodestar analysis and should be vacated.

F. Formosa Brothers is entitled to attorney's fees on appeal

Under RAP 18.1, a prevailing party may be awarded fees on appeal if there is a basis in law, contract, or equity to award them. Both

parties requested attorney's fees before the trial court and the lease agreement provides for attorney's fees for the prevailing party. CP at 24 ¶ 28. The trial court awarded attorney's fees to BTNA based on this contract term. CP at 324-25; 5/10/16 RP at 3. Formosa Brothers request reasonable attorney's fees and costs should it prevail on appeal.

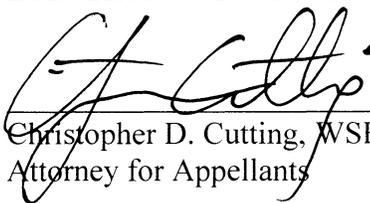
VI. CONCLUSION

Washington's firmly established public policy is that a tenant must always receive at least one opportunity to correct a breach before the landlord may exercise the harsh remedy of unlawful detainer. Here, the tenant took advantage of that opportunity. Though the landlord improperly served a defective demand for payment, the tenant paid in full and on time.

The landlord proceeded with suit anyway and lost. Yet, the court awarded attorney's fees to the landlord. That award should be reversed.

Respectfully submitted this 26th day of October, 2016.

LOEFFLER LAW GROUP PLLC



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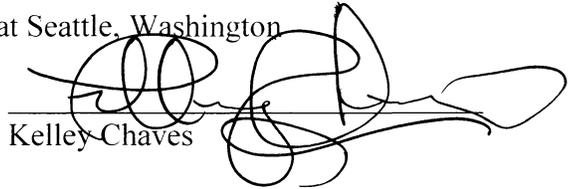
Certificate of Service

I hereby certify that on October 24, 2016, I caused to be served the foregoing on the following parties by delivering to the following address:

Donna Barnett
Perkins Coie LLP
10885 NE Fourth Street, Suite 700
Bellevue WA 98004-5579

- By: U.S. Postal Service, ordinary first class mail
 U.S. Postal Service, certified or registered mail
 return receipt requested
 legal messengers
 E-mail

DATED October 24TH, 2016, at Seattle, Washington



Kelley Chaves

2016 OCT 24 PM 4:03
SUPERIOR COURT
STATE OF WASHINGTON