NO. 90033-7

SUPREME COURT OF THE STATE OF WASHINGTON
[Court of Appeals No. 68727-1-I]

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ROBERT K. HALL, a single man and DAYLIGHT PROPERTIES, LLC, a Washington limited liability company,

Respondents,

v.

MATTHEW FEIGENBAUM,

Petitioner.

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# PETITION FOR REVIEW

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## I. IDENTITY OF PETITIONER

Petitioner Matthew Feigenbaum asks the Supreme Court to accept review of the decision of the Court of Appeals designated in Part II.

## II. COURT OF APPEALS DECISION

*Hall v. Feigenbaum*, __ Wn. App. ___, 2014 Wash. App. Lexis 23 (No. 68727-1-I), filed January 13, 2014. A copy of the Slip Opinion is in the Appendix.

## III. ISSUES PRESENTED FOR REVIEW

1. May a superior court exercise subject matter jurisdiction over a lawsuit filed under RCW ch. 59.12 if the landlord gave the pre-suit notice required by RCW 59.12.040 by mailing notice to and posting notice at the leased premises even though he knew where the tenant resided and did not attempt to serve the pre-suit notice there?

2. Does a superior court have personal jurisdiction over the tenant in a commercial unlawful detainer action when the landlord served the tenant with process by mail addressed to the tenant's residence based on an *ex parte* order permitting service by mail, after securing, on a Monday morning, an *ex parte* order based on a showing of "reasonable diligence" for purposes of RCW 4.28.080(16) that consisted solely of process servers having made six attempts to serve the tenant at the tenant's

residence between 2:03 p.m. on the preceding Wednesday and 10:26 a.m. on the preceding Friday, but not during the ensuing weekend?

3. When a landlord evicts a tenant under RCW ch. 59.12 prior to judgment and pursuant to a writ of restitution without having posted a bond as required by RCW 59.12.090, is the superior court's refusal to vacate the writ and any judgment based thereon harmless error if the tenant fails to "demonstrate prejudice," as the Court of Appeals held?

4. Does it violate the due process clause of Amendment XIV to the U.S. Constitution, and Wash. Const. art. I, § 3, when a superior court, acting *ex parte* under RCW ch. 59.12 and prior to entry of any judgment, issues an order temporarily restraining the tenant from removing any of the tenant's personal property from leased premises, and/or a writ of restitution for possession of the premises, without requiring the landlord to post any bond?

## IV. STATEMENT OF THE CASE

In August 2003, petitioner Matthew Feigenbaum leased commercial space in a building at 211 E. Chestnut Street in Bellingham from Robert K. Hall. CP 1167-75.[1] In 2008-2011, Feigenbaum lived at 2101 Young Street in Bellingham. CP 313, 1122 (¶¶2-3), 1109 (¶16), 1075 (¶8), 1009(¶4).

[1] Hall later assigned his interest to Daylight Properties, LLC, CP 1153 (¶1), but last names are used in this petition. The lease ran through August 2013. CP 773.

On December 1, 2010, Hall filed a Complaint for Unlawful Detainer, CP 1158-80, and an Eviction Summons. According to the Complaint, Hall had served a Three Day Notice to Pay Rent or Vacate on November 5, but Feigenbaum remained in possession without having paid the rent due. CP 1161 (¶¶7-8), 1176-77. The Summons gave Feigenbaum until 5 p.m. on December 16 to respond. CP 1181.

Also on December 1, Hall applied *ex parte* for, and obtained, an Order to Show Cause Why Writ of Restitution Should Not Be Issued, CP 1138-39, and a Temporary Restraining Order, CP 1142-44. The Show Cause Order set a hearing for December 17. CP 1138. The TRO enjoined Feigenbaum from removing personal property from the leased premises. CP 1142-43. The TRO relieved Hall of any bond requirement. CP 1143.

On December 6, 2010, a Monday, counsel for Hall applied *ex parte* for an order allowing him to serve process by mailing. CP 1124-25. Hall relied on attempts by process servers to serve Feigenbaum at 2101 Young Street, Bellingham. CP 1121-23, 1126-36. Hall's counsel advised the court that Hall understood that to be where Feigenbaum lived, representing that, "[b]ased on Plaintiffs' records, Defendants [sic] . . . maintain a residence at 2101 Young Street, Bellingham," and "previously provided this address to Plaintiffs. . ." CP 1122 (¶¶2-3). At a hearing 16 days later, on December 22, Hall's counsel explained that Hall had tried

"last spring" to serve Feigenbaum at the "Young Street" house and elsewhere. CP 292-93.

The attempts to serve Feigenbaum at 2101 Young Street had all been made between 2:03 p.m. on December 1 (a Wednesday) and 10:26 a.m. on December 3 (Friday). Hall filed the papers requesting the order authorizing service by mail and posting at 8:24 a.m. on Monday, December 6. CP 1121, 1124. The court issued Hall's requested *ex parte* order. CP 1119-20. Hall mailed and posted copies of the various documents on December 6. CP 1114-18.

Feigenbaum received copies of the summons, complaint, TRO, and show-cause order by mail on December 9. CP 1107 (¶¶ 6-7). He appeared *pro se* at the December 17 Show Cause hearing for the limited purpose of objecting to the court's exercise of personal jurisdiction. CP 761. The hearing was set over to December 22. *Id.;* CP 290, 1109 (¶13). On December 21, Feigenbaum filed a *pro se* notice of limited appearance, a motion to dismiss, CP 1111-13, and a declaration, CP 1106-10, denying that he had evaded service, CP 1109 (¶15), contesting the amount stated to be due in Hall's November 5 Three-Day Notice, CP 1107 (¶5), and contesting personal jurisdiction, CP 1112.

At the December 22 show cause hearing, the court neither granted Feigenbaum's motion to dismiss nor entered any written order; it did order

Feigenbaum to pay Hall's uncontested rent amount and future monthly rent into the court registry. CP 761 (¶2). The court converted the TRO into a temporary injunction – without bond – barring removal of Feigenbaum's personal property from the leased premises. CP 1102-03.

Feigenbaum deposited uncontested back rent, CP 1099, but did not pay January 2011 rent. CP 761 (¶3). On January 7 the court issued an *ex parte* Order for Writ of Restitution. CP 1092-93. The order did not provide for posting of a bond. Hall obtained a writ that day. CP 1065-66. As of January 7, no judgment had been entered, the January 21 hearing on Feigenbaum's jurisdictional objections had yet to be conducted, CP 761 (¶2), and trial-setting was scheduled for February 4. CP 761-62 (¶¶2-4).

On January 21, 2011, Feigenbaum filed a Memorandum in Support of Motion to Dismiss, arguing that the court lacked personal jurisdiction because Hall had not used reasonable diligence to serve him personally. CP 1071-79.

The sheriff evicted Feigenbaum on January 27. CP 1064.

On March 15, 2011, Feigenbaum filed a Motion to Dismiss Pursuant to CR 12(b)(1). CP 1011-15. He argued that Hall's November 5 posting and mailing of a Three-Day Notice at and to the leased premises (see CP 1176-77) had not complied with RCW 59.12.040 because Hall had known where he lived and had not attempted to serve the Notice there;

that Hall thus had not complied strictly with RCW 59.12.040; and that the court had therefore been precluded from exercising subject matter jurisdiction, rendering its orders void. CP 1009 (¶¶ 4-5), 1012-13.[2] Feigenbaum also moved on March 15 for an order requiring Hall to post bonds for the injunction and writ of restitution. CP 1016-18. The court denied Feigenbaum's motions to dismiss and to require a bond. CP 990-91.

On April 13, 2012, the court entered final judgment in Hall's favor for $179,807.29, including $43,000 in attorney fees and costs, CP 1188-93. Feigenbaum timely appealed, CP 96-135, and the Court of Appeals affirmed. *Hall v. Feigenbaum*, ___ Wn. App. __ (Jan. 21, 2014).

[2] Hall did not deny Feigenbaum's assertions at the time. In an October 2011 declaration in support of summary judgment, Hall denied having known where Feigenbaum lived before the lawsuit was initiated. CP 725. Until then, the undisputed evidence before the court consisted of Hall's counsel's oral statements to the court on December 22 relating efforts "last spring" that had yielded the Young Street address for Feigenbaum, RP 292-93; Hall's counsel's December 6 declaration stating that "[b]ased on Plaintiffs' records, Defendants. . . maintain a residence at 2101 Young Street, Bellingham," and had "previously provided this address to Plaintiffs. . ." CP 1122 (¶¶2-3); and Feigenbaum's January 21 motion to dismiss, in which he stated that Hall had known, before his process servers attempted service, where Feigenbaum lived, CP 1075 (¶8).

## V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

### A. Whether a Commercial Tenancy Landlord May Comply with RCW 59.12.040's Pre-Suit Notice Requirement By Posting and Mailing to the Leased Premises Even though He Knows Where the Tenant Resides and Has Not Tried to Serve the Pre-Suit Notice There Presents an Issue of Substantial Public Interest, and Whether the Court of Appeals' Holding Conflicts with Supreme Court and Court of Appeals Decisions Requiring Landlords to Comply Strictly with the Unlawful Detainer Statute's Manner-of-Notice Requirements.

A lease for real property is a kind of contract. When a tenant breaches a lease, the landlord may file a breach of contract lawsuit and wait with plaintiffs in civil cases of other kinds for a day in court. Unlawful detainer actions are special proceedings that enable landlords to obtain priority over all other civil litigants for a superior court's attention. RCW 59.12.130. With the special rights afforded landlords by the Unlawful Detainer Act, RCW ch. 59.12, come attendant responsibilities.

> The unlawful detainer statute is in derogation of common law, and must therefore be strictly construed in favor of the tenant. "By reason of provisions designed to hasten the recovery of possession, the statutes creating it remove the necessity to which the landlord was subjected at common law, of bringing an action of ejectment . . . with its attendant delays and expenses." However, in order to take advantage of its favorable provisions, a landlord must comply with the requirements of the statute.

*Hous. Auth. v. Terry*, 114 Wn.2d 558, 563-64, 789 P.2d 754 (1990) (citations and footnotes omitted). The landlord's responsibilities chiefly concern the giving of notice:

> Proper statutory notice under RCW 59.12.030 is a "'jurisdictional condition precedent'" to the commencement of an unlawful detainer action. . . . Strict compliance is required for time and manner requirements in unlawful detainer actions. . . . Thus, any noncompliance with the statutory method of process precludes the superior court from exercising subject matter jurisdiction over the unlawful detainer proceeding.

*Christensen v. Ellsworth*, 162 Wn.2d 365, 372, 173 P.3d 228 (2007) (citations omitted). That has been the law for a very long time.

> The action of unlawful detainer or forcible entry and detainer is a special statutory summary proceeding in derogation of the common law, and to confer jurisdiction upon the court each step provided by the statute must be strictly complied with.

*State ex rel. Seaborn Shipyards Co. v. Superior Court*, 102 Wash. 215, 216, 172 P. 826 (1918). RCW 59.12.030(3) requires landlords to give at least three days' notice to pay rent or vacate before filing an unlawful detainer action because of default in the payment of rent.[3]

RCW 59.12.040 specifies the ways in which a notice may be served. Hall posted his notice to pay rent or vacate at, and mailed a copy of it to, the leased premises. CP 1161 (¶¶ 7-9). That method of serving the mandated pre-suit notice is available, however, only when the tenant's place of residence is not known to the landlord or the landlord has tried but failed to find someone at that residence. RCW 59.12.040 provides:

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[3] A landlord and tenant may contract for a longer notice period. *IBF, LLC v. Heuft*, 141 Wn. App. 624, 632, 174 P.3d 95 (2007). In this case, Hall and Feigenbaum contracted for a notice period of 20 days. CP 1171 (¶21).

> Any notice provided for in this chapter shall be served either . . . (3) if the person to be notified be a tenant, . . . ***and his 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 the person there residing, if such a person can be found, and also sending a copy through the mail addressed to the tenant, . . . at the place where the premises unlawfully held are situated. [Emphasis added.]

Hall never professed to have tried to serve the November 2010 three-day notice on Feigenbaum at his home. As Feigenbaum declared after being served with process and making his special appearance to contest jurisdiction, and as Hall's attorney acknowledged, Hall knew Feigenbaum's place of residence before November 2010. CP 1009, 1075; *and* CP 292-93 and 1122 (¶¶2-3). Because Hall was not entitled to rely on RCW 59.12.040(3), the superior court could not exercise subject matter jurisdiction over his later-filed unlawful detainer action. *Christensen*, 162 Wn.2d at 372.

Hall implicitly conceded in his brief to the Court of Appeals that he had not strictly complied with RCW 59.12.040, arguing that the strict-compliance requirement applies only to *residential* tenancy cases and that, "as an issue of first impression," the Court of Appeals should apply a *substantial* compliance standard to commercial tenancies. *Resp. Br. at 10-11.* The Court of Appeals reasoned that Feigenbaum had not proved to the

superior court's satisfaction that Hall knew where he lived on November 5, 2010. *Slip Op. at 8.* But Hall's own counsel had admitted on December 22, 2010 that Hall had known since "last spring" where Feigenbaum lived, CP 292-93, and Hall claimed on December 6 that process servers had made six attempts to serve Feigenbaum there on December 1-3. The Court of Appeals evidently confused a finding by the superior court that Hall had used diligence to find Feigenbaum before securing the service-by-mail order on December 6, CP 763 (¶1), with a finding that Hall had not known on November 5 where Feigenbaum lived. The superior court did not make such a finding. It did find that Hall had not attempted to serve Feigenbaum with the Three-Day Notice at his residence, CP 764-65 (¶2), yet rejected Feigenbaum's failure-to-strictly-comply argument.

The published Court of Appeals decision implicitly holds that strict compliance with RCW ch. 59.12's notice requirements may be waived or may not always be required, at least in commercial tenancies, despite what *Seaborn Shipyards* and *IBF, LLC v. Heuft*, 141 Wn. App. 624, 632-33, 174 P.3d 95 (2007), hold.[4] Whether strict compliance with RCW

[4] The Court of Appeals did not expressly adopt a substantial compliance standard for commercial tenancy cases, but it did affirm the judgment against Feigenbaum, who was arguing for strict compliance, *see Br. of Appellant at 13-15, 26-31; Reply Br. at 2-5, 12-16*, and it characterized "[t]he purpose" of RCW 59.12.040 as being "to give a tenant 'at least one opportunity to correct a breach before forfeiture of a lease. . .'" *Slip Op. at 7*

59.12.040 is not required in unlawful detainer actions generally and/or is not required in unlawful detainer actions involving commercial tenancies, are issues of substantial public interest that the Supreme Court should decide. Accordingly, review is warranted pursuant to RAP 13.4(b)(4), as well as pursuant to RAP 13.4(b)(1) and (2) because of conflict with *Seaborn Shipyards*, *Christensen*, *Terry*, and *IBF*.

B. The Holding that a Superior Court May Find that Perfunctory Attempts at Personal Service Such as Those on which Hall Relied Here Constitute "Reasonable Diligence" for Purposes of a RCW 4.28.080(16) Order Authorizing Service of Process by Mail Conflicts with Other Court of Appeals Decisions.

RCW 4.28.080(16) allows a court to authorize service by mail when a plaintiff shows that he has used "reasonable diligence" to find and serve the defendant personally at a place of residence. At 8:24 a.m. on Monday, December 6, 2010, Hall sought and obtained the *ex parte* order allowing him to serve by mail based on declarations describing unsuccessful efforts to serve Feigenbaum at home six times on the prior Wednesday afternoon, Thursday, and Friday morning, but not on the intervening weekend. Feigenbaum contends not only that the superior court erred by permitting service by mail on the evidence of perfunctory service attempts that Hall presented, but also that the court was obliged to *vacate* the order,

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(underlining by Court of Appeals). The Court of Appeals was quoting *Christensen,* 162 Wn.2d at 371, which quoted part of a sentence from *Terry*, 114 Wn.2d at 569, where the court had stated, "The Legislature has provided for a tenant to have *at least* one opportunity to correct a breach before forfeiture of a lease. . ."

if it was valid when issued, once Feigenbaum showed, CP 1109, 1075, that Hall had been aware before December 2010 of other ways to contact Feigenbaum, and that on occasions prior thereto Hall had made use of known acquaintances of Feigenbaum to contact him. CP 1075 (¶8). By affirming the superior court's finding that Hall had "conducted a diligent search for [Feigenbaum] before securing [the] order authorizing service by mail," CP 763 (¶1), the Court of Appeals issued a decision that conflicts with *Charbonneau Excavating, Inc. v. Turnipseed*, 118 Wn. App. 358, 363, 75 P.3d 1011 (2003), *rev. denied*, 151 Wn.2d 1020 (2004) (vacating default judgment because plaintiff was later shown to have had information "that might reasonably [have] assist[ed] in determining [the] defendant's whereabouts" but failed to follow up on that information before seeking order allowing service by publication); and *Longview Fiber v. Stokes*, 52 Wn. App. 241, 758 P.2d 1006 (1988) (affidavit offered to support order authorizing service by publication showed only that defendant could not be found in the county, not the state). *Charbonneau* and *Longview Fiber* involved defaults judgments but cannot meaningfully be distinguished from this case, because Hall was proceeding under RCW ch. 59.12, which imposes more exacting notice/service standards than those to which plaintiffs in ordinary civil cases are subject. Review thus should be granted pursuant to RAP 13.4(b)(2).

C. The Holding that It Can Be, and in This Case Was, Harmless Error to Grant a Landlord Pre-Judgment *Ex Parte* Relief without Requiring Bonds to Protect the Tenant Raises an Issue of Substantial Public Interest and Conflicts with Another Court of Appeals Decision.

The Court of Appeals' decision holds that, because Feigenbaum later could not "demonstrate prejudice," it was only harmless error for the superior court to issue prejudgment injunctive orders and a writ of restitution to Hall without requiring bonds. *Slip Op. at 11-13.* The bond requirement of RCW 59.12.090 is mandatory and explicit:

> [B]efore any writ shall issue prior to judgment the plaintiff [landlord] shall execute to the defendant [tenant] and file in court a bond in such sum as the court or judge may order, . . . conditioned that the plaintiff will prosecute his or her action without delay, and will pay all costs that may be adjudged to the defendant, and all damages which he or she may sustain by reason of the writ of restitution having been issued, should the same be wrongfully sued out.

A bond requirement is just as mandatory and clear for TROs and preliminary injunctions. RCW 7.40.080.

The unlawful detainer and injunction statutes protect tenants *up front* with stringent notice and bonding requirements. Appellate decisions have interpreted and enforced the statute accordingly. *E.g., Christensen*, 162 Wn.2d at 632-33. The Court of Appeals' decision holds, in effect, that when a superior court fails, or simply chooses not to afford a tenant his statutory protections against wrongful summary eviction, such a decision is vindicated in retrospect if the tenant failed to present a meritorious

defense and the landlord obtained his requested relief. Giving the landlord a free pass on the bond requirement *in an ex parte proceeding, prior to judgment*, eliminates a principal balancing provision that the Legislature built into the unlawful detainer statute and vitiates strict-compliance requirements. Whether it ever *can* be "harmless" error to relieve a landlord of the statutes' pre-judgment bond-posting requirements should be for the Supreme Court to say on review under RAP 13.4(b)(4).

The Court of Appeals decision also conflicts with *IBF,* 141 Wn. App. at 636, which vacated an unlawful detainer judgment because the landlord's bond indemnified the sheriff but not the tenant. If the decision does not conflict directly with *IBF,* it is only because *IBF* neither addressed "harmless error" nor declared that failure to obtain a bond protecting the tenant was a basis for vacating the judgment independent of the landlord's failure to comply with RCW ch. 59.12 notice requirements. The decision in *IBF* and the Court of Appeals' decision here do conflict, though, in that they cannot be harmonized. Review should be granted under RAP 13.4(b)(2).

In substance, the *ex parte* TRO barring Feigenbaum from removing his personal property from the leased premises and the writ of restitution constituted prejudgment writs of attachment without bond, unlawfully depriving Feigenbaum of his property without due process.

*Connecticut v. Doehr*, 501 U.S. 1, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991). Feigenbaum objected, CP 337, 390-91, 991, 1016, but even if he had not, this argument may be considered on review pursuant to RAP 2.5(a)(3) because it was a manifest error affecting a constitutional right. Review should be granted pursuant to RAP 13.4(b)(3).

## VI. CONCLUSION

For the foregoing reasons, this Court should grant review, reverse the Court of Appeals, vacate the judgment against Feigenbaum, and award him his attorney fees and expenses pursuant to the lease.

RESPECTFULLY SUBMITTED this 12th day of February, 2014.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 11th day of February, 2014, I caused a true and correct copy of the foregoing Petition for Review to be delivered in the manner indicated below to the following counsel of record:

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DATED this 11th day of February, 2014, at Seattle, Washington.

Sue Riippa
Legal Assistant to Mark S. Davidson

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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|---|---|
| ROBERT K. HALL, a single man, and DAYLIGHT PROPERTIES, LLC, a Washington limited liability company, Respondents, v. MATTHEW FEIGENBAUM and JANE DOE FEIGENBAUM, husband and wife, and the marital community comprised thereof, Appellants. | NO. 68727-1-I (Consolidated with No. 68927-4-I) DIVISION ONE PUBLISHED OPINION FILED: January 13, 2014 |

LEACH, C.J. — In this commercial unlawful detainer action, Matthew Feigenbaum appeals multiple trial court orders, based primarily upon allegations that Robert Hall failed to comply with the notice requirements of the parties' lease and applicable statutes. Because Hall complied with these notice requirements and Feigenbaum does not otherwise show reversible error, we affirm and award Hall attorney fees incurred on appeal.

FACTS

In 2003, Matthew Feigenbaum entered into a commercial lease with Robert K. Hall to operate a nightclub (premises). The lease provided that Feigenbaum's failure "to keep and perform any of the covenants and agreements

[that] continues for twenty (20) days after written notice from Lessor" would entitle Hall to either terminate and reenter or continue the lease and sublet the space. The lease specified that "[a]ny notice required to be given . . . to the Lessee" would use the address of the premises or "such other address as either party may designate to the other in writing."

At some point, Feigenbaum stopped operating the nightclub.[1] He did not pay rent for September and October 2010. On November 5, 2010, Hall served Feigenbaum with a three-day notice to pay or vacate by posting and mailing to the premises. On December 1, Hall commenced an unlawful detainer action by filing a summons and complaint and secured ex parte a temporary restraining order and an order to show cause why a writ of restitution should not be issued. The order restrained Feigenbaum from removing property from the premises but did not restrict Feigenbaum's access to them and did not require that Hall post a bond. The return date for both orders was December 17.

Between December 1 and 3, Hall made six unsuccessful attempts to personally serve Feigenbaum with the summons and complaint. After a court commissioner entered an ex parte order allowing service by posting and mailing,

[1] Feigenbaum states that he stopped operating the nightclub and attempted to sell the business in 2010. Hall states that Feigenbaum ceased doing business in 2008.

Hall mailed the pleadings to the premises on December 6 and posted them at the premises on December 7. Feigenbaum received the pleadings on December 9.

The court granted Hall's motion for a preliminary injunction, barring Feigenbaum from removing personal property from the premises. The injunction did not require a bond. The court ordered Feigenbaum to pay $14,400 into the court's registry immediately for unpaid rent and to deposit future rent moneys into the court's registry as they came due. Feigenbaum deposited the $14,400 but did not pay January's rent. On January 7, 2011, the trial court found that "no monthly rent payment currently due has been timely paid to the registry of the court" and entered an order for writ of restitution. Finding that Feigenbaum was properly served and received adequate notice, the court denied Feigenbaum's motion to dismiss for lack of jurisdiction. The court ordered that $12,700 of the funds held in the court's registry be released to Hall.

On August 30, 2011, Hall relet the premises to a new tenant. The new tenant's lease provided for rent lower than the monthly rent that Feigenbaum paid.

On January 9, 2012, Feigenbaum filed a motion asking that the trial court clarify whether the court had converted the unlawful detainer action into an

ordinary civil action. On February 10, 2012, the court entered an order stating that it had done so.

On April 13, 2012, the court granted Hall summary judgment for $136,809.29. The judgment included rent through December 31, 2011, decreased rent from January 1, 2012, to August 31, 2013, and costs related to mitigation and cleaning. On July 2, 2012, the court awarded Hall costs and reasonable attorney fees totaling $43,000.00, bringing the final judgment to $179,807.29. Feigenbaum appeals.

ANALYSIS

Waiver of Certain Issues on Appeal

Feigenbaum appealed a number of the trial court's orders in this lengthy litigation but did not address them in his opening brief. We deem an issue not briefed to be waived.[2] We decline to review these orders. Moreover, although Feigenbaum assigns error on appeal to the trial court's issuance of the temporary restraining order and preliminary injunction, he did not raise the associated issues below. An appellate court "may refuse to review any claim of error which was not raised in the trial court."[3] Consequently, we decline to review them here.

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[2] Kadoranian v. Bellingham Police Dep't, 119 Wn.2d 178, 191, 829 P.2d 1061 (1992); see Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 385 (2011) (declining to consider an inadequately briefed argument).

[3] RAP 2.5(a); Roberson v. Perez, 156 Wn.2d 33, 39, 123 P.3d 844 (2005).

Unlawful Detainer Actions Generally

An unlawful detainer action brought under RCW 59.12.030 is a summary proceeding designed to enable the recovery of possession of leased property.[4] "The action is a narrow one, limited to the question of possession and related issues such as restitution of the premises and rent."[5] Due to the summary nature of the action, a trial court generally does not permit the assertion of counterclaims that are not "'based on facts which excuse a tenant's breach.'"[6] The civil rules are the rules of practice for unlawful detainer actions,[7] but when the civil rules conflict with the unlawful detainer statute, the statute, as a "special proceeding," controls.[8] Washington courts require strict compliance with the time and manner requirements for unlawful detainer actions[9] and strictly construe them in favor of the tenant.[10] The superior court has jurisdiction over unlawful detainer actions.[11] The state constitution vests the superior court with broad authority over real estate disputes, and the unlawful detainer statute explicitly

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[4] Munden v. Hazelrigg, 105 Wn.2d 39, 45, 711 P.2d 295 (1985).

[5] Munden, 105 Wn.2d at 45.

[6] Munden, 105 Wn.2d at 45 (quoting First Union Mgmt., Inc. v. Slack, 36 Wn. App. 849, 854, 679 P.2d 936 (1984)).

[7] RCW 59.12.180.

[8] CR 81(a); Christensen v. Ellsworth, 162 Wn.2d 365, 374, 173 P.3d 228 (2007).

[9] Christensen, 162 Wn.2d at 372.

[10] See Hous. Auth. v. Terry, 114 Wn.2d 558, 569, 789 P.2d 745 (1990).

[11] RCW 59.12.050. Superior courts have broad general jurisdiction over real estate disputes. See WASH. CONST. art. IV, § 6.

gives jurisdiction over unlawful detainer actions to the superior court.[12] This jurisdiction "remains constant regardless of procedural missteps by the parties,"[13] but a party filing an action after improper notice "'may not maintain such action or avail itself of the superior court's jurisdiction.'"[14]

Sufficiency of Service and Notice

A challenge to the adequacy of notice presents a mixed question of law and fact,[15] which we review de novo.[16]

RCW 59.12.040 provides that

> [a]ny 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

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[12] WASH. CONST. art. IV, § 6; Hous. Auth. v. Bin, 163 Wn. App. 367, 373-74, 260 P.3d 900 (2011).

[13] Bin, 163 Wn. App. at 373-74 (citing Tacoma Rescue Mission v. Stewart, 155 Wn. App. 250, 254 n.9, 228 P.3d 1289 (2010)).

[14] Bin, 163 Wn. App. at 374 (quoting Tacoma Rescue Mission, 155 Wn. App. at 254 n.9).

[15] Speelman v. Bellingham/Whatcom County Hous. Auths., 167 Wn. App. 624, 630, 273 P.3d 1035 (2012) (citing Miebach v. Colasurdo, 102 Wn.2d 170, 175, 685 P.2d 1074 (1984)).

[16] Speelman, 167 Wn. App. at 630 (citing Humphrey Indus., Ltd. v. Clay St. Assocs., 170 Wn.2d 495, 501-02, 242 P.3d 846 (2010)).

> to the tenant, or unlawful occupant, at the place where the premises unlawfully held are situated.

The purpose of the notice is to give a tenant "'at least one opportunity to correct a breach before forfeiture of a lease under the accelerated restitution provisions of RCW 59.12.'"[17] Service by mail adds an additional day to the notice requirement; therefore, when a landlord serves by mail, a tenant is not guilty of unlawful detainer until four days after service.[18]

The lease required that "any notice required to be given" to Feigenbaum be sent to the premises. In case of default, the lease provided for 20 days' notice before the start of any legal action. On November 5, 2010, Hall served Feigenbaum with the 3-day notice to pay or vacate pursuant to RCW 59.12.040(3), affixing and then mailing a copy of the notice to the premises. Hall filed the eviction summons and complaint on December 1, 2010: over 20 days after posting and mailing the notice to pay rent or vacate.

Hall knew the nightclub was no longer operating, but Feigenbaum did not change his address for lease notice purposes, as required by the lease. The repeated use of the word "or" in RCW 59.12.040 implies that (1), (2), and (3) are equal alternatives for notice under chapter 59.12 RCW, with alternative (3) a

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[17] Christensen, 162 Wn.2d at 371 (quoting Terry, 114 Wn.2d at 569).
[18] RCW 59.12.040; Christensen, 162 Wn.2d at 371.

logical choice when a plaintiff does not know a defendant's home address.[19] Feigenbaum argues that Hall knew his home address and so did not comply with RCW 59.12.040. However, Feigenbaum offers no evidence to support this assertion and does not assert that he provided Hall with a written notice of a changed address for receiving written notices, pursuant to the lease. At best, Feigenbaum raises a factual dispute that the trial court resolved in favor of Hall. Substantial evidence supports the trial court's findings.

Feigenbaum also argues that Hall's service of a 3-day notice to pay or vacate, when the lease required 20 days' notice of default before a legal action could be filed, invalidated service and precluded the trial court from obtaining personal or subject matter jurisdiction. He relies on Community Investments, Ltd. v. Safeway Stores, Inc.,[20] where the plaintiff landlord served the commercial tenant with a 10-day notice when the lease required 20 days' notice to cure any default. This reliance is misplaced. In Community Investments, what the court

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[19] See 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 6.80, at 441 (2d ed. 2004) ("RCWA 59.12.040 is quite explicit about the manner of serving notice. . . . [I]f service cannot be made by the first method, or if either step of the second method cannot be accomplished, then 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.").

[20] 36 Wn. App. 34, 36-37, 671 P.2d 289 (1983).

found improper was not the form of the notice but the insufficient waiting period: the landlord commenced a legal action 19 days after giving notice.[21]

First Union Management, Inc. v. Slack[22] is on point. In First Union, defendant tenants contended that their landlord's 3-day notice was improper because their lease required 10 days' notice.[23] The court disagreed, concluding that the clause in the lease did not address notice required in an unlawful detainer action but only specified that the landlord could not bring suit under the lease unless the tenants failed to pay rent within 10 days of the due date, i.e., when tenants were in default for the prescribed period.[24] This court noted that the tenants did not allege that the landlord terminated their lease or their right of possession before the requisite 10-day period had elapsed.[25]

Hall's notice was titled "3-Day Notice to Pay Rent or Vacate." However, Hall did not exercise his rights by commencing a legal action until December 1, more than 20 days after serving notice to Feigenbaum. Feigenbaum does not contend that he was misled or deceived by the language of the notice or that Hall terminated his lease or his right of possession before 20 days had elapsed.[26]

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[21] Cmty. Invs., 36 Wn. App. at 37-38.
[22] 36 Wn. App. 849, 679 P.2d 936 (1984).
[23] First Union Mgmt., 36 Wn. App. at 859.
[24] First Union Mgmt., 36 Wn. App. at 859.
[25] First Union Mgmt., 36 Wn. App. at 859.
[26] See Davis v. Jones, 15 Wn.2d 572, 576-78, 131 P.2d 430 (1942) (finding notice valid when the initial notice and summons "performed the function

Feigenbaum made no attempts to cure his default, either within 3 days or 20 days. Hall complied with both RCW 59.12.040 and the terms of the lease in giving Feigenbaum notice of default.

RCW 59.12.070 describes the requirements for the unlawful detainer summons and complaint. The statute specifies that

> [a] summons must be issued as in other cases, returnable at a day designated therein, which shall not be less than seven nor more than thirty days from the date of service, except in cases where the publication of summons is necessary, in which case the court or judge thereof may order that the summons be made returnable at such time as may be deemed proper, and the summons shall specify the return day so fixed.

After attempting to personally serve Feigenbaum from December 1 to 3, Hall obtained an order from the trial court permitting him to post and mail the summons and complaint to the premises. The court also set a show cause hearing for December 17. Hall mailed the pleadings on December 6 and posted them at the premises on December 7.

Feigenbaum contends that he had 90 days to answer the summons under CR 4(d)(4) and that Hall's service of the mailed eviction summons did not give the notice required by CR 6(e).[27] While the civil rules govern unlawful detainer

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of giving notice according to the statutory requirements with such particularity as not to deceive or mislead").

[27] CR 6(e) provides,

> **Additional Time After Service by Mail.** Whenever a party has the right or is required to do some act or take some proceedings

proceedings, where the civil rules conflict with the unlawful detainer statute they are inapplicable because unlawful detainer actions are "special proceedings" within the meaning of CR 81(a).[28] RCW 59.12.070 requires the return date for an unlawful detainer summons "shall not be less than seven nor more than thirty days from the date of service." This is consistent with the statute's purpose as a summary means of resolving leased property disputes. Feigenbaum admits receiving the summons and complaint by mail on December 9. The return date for the show cause hearing was December 17. Thus, Hall served Feigenbaum not less than 7 days before the summons's return date. Feigenbaum received sufficient notice of the return date to respond to the summons and complaint. We conclude that statutory process was proper and thus that the trial court properly exercised its jurisdiction.

The Requirement of an Injunction Bond

On April 22, 2011, the court denied Feigenbaum's motions to dismiss and to require the court to set a bond for the preliminary injunction and a bond for the writ of restitution. Feigenbaum assigns error to the court's issuance of the injunction and writ without requiring a bond.

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within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

[28] Christensen, 162 Wn.2d at 374.

RCW 7.40.080 states, "No injunction or restraining order shall be granted until the party asking it shall enter into a bond, in such a sum as shall be fixed by the court or judge granting the order." The Washington State Supreme Court has held that while the amount of a bond for an injunction under RCW 7.40.080 is within the discretion of the trial court,[29] the requirement of an injunction bond is mandatory.[30]

Similarly, RCW 59.12.090 requires that before a writ of restitution is issued prior to judgment, the plaintiff "shall execute to the defendant and file in court a bond in such sum as the court or judge may order."

The form order for the temporary restraining order and order to show cause entered by the trial court had two "check the box" alternatives: "without posting of a bond by the Plaintiff" and "upon posting of a bond in the amount of $____ by Plaintiff." The trial court here checked the space next to the first alternative. Neither the court's order granting the preliminary injunction nor its order authorizing the writ of restitution required a bond. The trial court erred by not ordering a bond as required by chapter 59.12 RCW and chapter 7.40 RCW.

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[29] See RCW 4.44.470; Hockley v. Hargitt, 82 Wn.2d 337, 345, 510 P.2d 1123 (1973).

[30] Evar, Inc. v. Kurbitz, 77 Wn.2d 948, 951, 468 P.2d 677 (1970); Irwin v. Estes, 77 Wn.2d 285, 286, 461 P.2d 875 (1969).

"'[E]rror is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'"[31] Feigenbaum demonstrates no prejudice from this error. Therefore, we do not consider this issue further.

Conversion of the Case from Unlawful Detainer to Ordinary Civil Case

In an unlawful detainer action, "'the court sits as a special statutory tribunal to summarily decide the issues authorized by statute and not as a court of general jurisdiction with the power to hear and determine other issues.'"[32] Due to the summary nature of unlawful detainer proceedings, other claims, such as counterclaims, are generally not permitted.[33] However,

> "[w]here the right to possession ceases to be at issue at any time between the commencement of an unlawful detainer action and trial of that action, the proceeding may be converted into an ordinary civil suit for damages, and the parties may then properly assert any cross claims, counterclaims, and affirmative defenses."[34]

The trial court "has inherent power to fashion the method by which an unlawful detainer action is converted to an ordinary civil action."[35]

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[31] State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986) (quoting State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)).

[32] Angelo Prop. Co. v. Hafiz, 167 Wn. App. 789, 808-09, 274 P.3d 1075 (quoting Granat v. Keasler, 99 Wn.2d 564, 571, 663 P.2d 830 (1983)), review denied, 175 Wn.2d 1012 (2012).

[33] Munden, 105 Wn.2d at 45 (quoting Granat, 99 Wn.2d at 570).

[34] Munden, 105 Wn.2d at 45-46.

[35] Munden, 105 Wn.2d at 47.

Feigenbaum paid no rent after his deposit of $14,400 into the registry of the court in December 2010. The court entered an order for a writ of restitution restoring the property to Hall on January 7, 2011. We hold that the trial court, finding that possession of the premises was no longer at issue, acted within its discretion when it converted the case from an unlawful detainer to an ordinary civil action for damages on February 10, 2012.

The Order on Summary Judgment and Award of Damages

Feigenbaum claims the court erred in entering summary judgment awarding Hall damages, statutory costs, and attorney fees. This court reviews de novo a trial court's summary judgment order. We engage in the same inquiry as the trial court, considering the facts and all reasonable inferences from the facts in the light most favorable to the nonmoving party.[36] "Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[37]

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[36] Right-Price Recreation, LLC v. Connells Prairie Cmty. Council, 146 Wn.2d 370, 381, 46 P.3d 789 (2002).

[37] Phillips v. King County, 136 Wn.2d 946, 956, 968 P.2d 871 (1998); CR 56(c).

After hearing oral argument on 12 separate occasions and reviewing pleadings, motions, memoranda, declarations, and affidavits from both parties, the trial court found that Feigenbaum was in breach of the lease for nonpayment of rent. The court found that Hall did not breach or default on any of his obligations under the lease and that he mitigated damages by reletting the premises.

Feigenbaum conceded to the court that he had not complied with the court's order to deposit future rent into the court's registry. In spite of over two years of litigation, Feigenbaum raised no genuine issue of any material fact regarding his unlawful detainer of the premises and breach of the lease. We hold that the trial court did not err in granting summary judgment to Hall.

The trial court awarded Hall $136,807.29, comprised of $108,969.00 for rent due under the lease, $21,016.00 for the deficiency between Feigenbaum's rent and the rent paid by the new lessee during the balance of Feigenbaum's lease term, and $6,822.29 for Hall's costs for mitigation and cleaning.

The lease provided that in case of Feigenbaum's default, Hall had the right to either

> terminate the Lease and re-enter the Premises, or . . . without terminating this Lease, re-enter said Premises, and sublet the whole or any part thereof for the account of the Lessee upon as favorable terms and conditions as the market will allow for the balance of the term of this Lease and Lessee covenants and

> agrees to pay to Lessor any deficiency arising from a re-letting of the Premises at a lesser amount than herein agreed to.

RCW 59.12.170 provides that the court "shall assess the damages occasioned to the plaintiff . . . alleged in the complaint and proved on the trial, and . . . find the amount of any rent due."[38]

RCW 59.12.170 entitles Hall to damages and "any rent due," and the lease entitles him to any deficiency in rent payments arising from the need to relet following default. Feigenbaum failed to raise any genuine issue of material fact about what he owed Hall. We affirm the trial court's order on summary judgment and award of damages and costs to Hall.

Attorney Fees

Feigenbaum also appeals the trial court's award to Hall of $43,000 in reasonable attorney fees and costs. This court applies a two-part review to awards or denials of attorney fees: (1) the court reviews de novo whether a legal basis exists for awarding attorney fees by statute, under contract, or in equity and (2) the court reviews the reasonableness of an attorney fee award for abuse of discretion.[39] A trial court abuses its

[38] RCW 59.12.170 also provides for double rent and damages; Hall has waived this claim on appeal.

[39] Gander v. Yeager, 167 Wn. App. 638, 647, 282 P.3d 1100 (2012).

discretion when its decision is manifestly unreasonable or based on untenable grounds.[40]

Here, the lease provides for attorney fees and costs to the prevailing party. In determining the appropriate amount, the trial court apparently took into consideration not only Hall's request but also Feigenbaum's objection to the inclusion of fees associated with vacated judgments. We hold that Hall was entitled to attorney fees as a matter of law and that the trial court did not abuse its discretion in its award.

Hall requests fees on appeal. A contract providing for an award of attorney fees at trial also supports such an award on appeal. Hall is the prevailing party in this appeal. Subject to his compliance with RAP 18.1, we award Hall his attorney fees on appeal in an amount to be determined by a commissioner of this court.

Affirmed.

Leach, C.J.

WE CONCUR:

[40] Dix v. ICT Grp., Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).