

90297-6

No. 68753-1-I

COURT OF APPEALS, DIVISION I,  
OF THE STATE OF WASHINGTON

4105 1ST AVENUE SOUTH INVESTMENTS, LLC,

Respondent,

v.

**FILED**  
MAY 30 2014  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

GREEN DEPOT WA PACIFIC COAST, LLC,  
a Washington limited liability company,

Petitioner,

and

ECOHAUS, INC., a Washington corporation and successor  
in interest to BUILT-E, INC. d/b/a ENVIRONMENTAL HOME  
CENTERS,

Defendant.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Green Depot WA Pacific Coast LLC (“Green Depot”) asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The Court of Appeals denied attorney fees to Green Depot although it succeeded in obtaining the dismissal of the landlord’s unlawful detainer action under RCW 59.12 against it. A copy of the decision is in the Appendix at pages A-1 through A-10. Green Depot moved to publish the opinion, and the Court of Appeals granted the motion. A copy of the order granting publication is in the Appendix at page A-11.

C. ISSUE PRESENTED FOR REVIEW

Where a commercial tenant successfully prevents a landlord from securing a writ of restitution pursuant to RCW 59.12, the commercial unlawful detainer statute, the action is dismissed, and the tenant remains in the premises for the full duration of the lease, is the tenant the prevailing party in the unlawful detainers action under the lease’s attorney fee provision entitling it to recover its fees incurred in connection with the unlawful detainer action?

D. STATEMENT OF THE CASE

The factual recitation in the Court of Appeals is largely correct, but Green Depot provides additional facts pertinent to this Court's review decision.

Green Depot is a part of a family of companies constituting the nation's leading supplier of environmentally friendly building products, services, and solutions at 13 locations and 20 warehouses nationwide, as of March 2012. CP 99. Green Depot has been recognized for its environmental stewardship, receiving a 2010 environmental quality award from the United States Environmental Protection Agency. CP 99-100.

This matter arose out of a lease of approximately 38,000 square feet of commercial space at 4121 1st Avenue South in Seattle, where Green Depot's Seattle store was located until March 22, 2012. CP 100. The lease was originally signed by Bit Holdings Sixty-One, Inc., as landlord, and by Built-E, Inc., as tenant. *Id.* By an assignment and assumption of lease, Green Depot subsequently acquired Built-E's rights under the lease, CP 45-48, 100, and 4105 1st Avenue South Investments, Inc. ("4105") became the assignee of Bit Holdings Sixty-One. CP 100. It is undisputed that the lease terminated by its own terms on March 22, 2012. CP 100, 105.

Even though less than two and a half months remained on the five-year lease, 4105 commenced this action under RCW 59.12 on January 9,

2012, seeking restitution of the premises, double damages and judgment for its costs and disbursements, including reasonable attorney fees, “as authorized by the parties’ written agreement and RCW 4.84.330...” CP 2.<sup>1</sup> At the time of the initial show cause hearings in the case, 4105 actually sought more than \$203,000 in damages plus fees. CP 113, 114. One show cause hearing resulted in no relief for 4105 because it had not paid its corporate fees to the Secretary of State. CP 113, 119. At another, a Commissioner expressed doubts that Green Depot owed 4105 anything, RP 29, and the Commissioner denied a writ of restitution and set the case for expedited trial on March 26, 2012. CP 16-17, 114; RP 28, 29.

Because, by its terms, the lease terminated on March 22, 2012, the parties ultimately agreed to strike the trial date. CP 115.<sup>2</sup> 4105 proposed a stipulated dismissal of its unlawful detainer action. CP 136. Green Depot did not sign that stipulation and filed a motion for fees. CP 87-98. The trial court denied the motion for fees. CP 145-46.<sup>3</sup>

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<sup>1</sup> 4105 also filed a separate breach of contract action. That case settled after mediation before the Court of Appeals opinion here was filed, but the parties specifically reserved the issue of Green Depot’s fee entitlement in the unlawful detainer action for resolution by the courts.

<sup>2</sup> Thus, 4105 accomplished nothing in the unlawful retainer action, except costing Green Depot the fees and costs incurred in its successful defense.

<sup>3</sup> 4105 argued below that, the trial court lacked jurisdiction to address the fee issue. CP 135, 136. It is not clear if this argument affected the trial court’s decision. 4105 abandoned the issue on appeal, br. of resp’t at 8, in light of *Housing Authority of*

As noted by the Court of Appeals, op. at 3-4, the parties agreed to Green Depot remaining on the premises until March 22, 2012, the actual end of the lease term and that a writ of restitution could issue on March 23, 2012. Op. at 4. Green Depot vacated the premises on March 22, 2012, the last day of the lease. Op. at 4.<sup>4</sup>

Ultimately, Green Depot moved to dismiss the unlawful detainer action, and it was dismissed on January 11, 2013. CP 173-74. Green Depot's right to secure fees in connection with the unlawful detainer action and 4105's breach of contract action were specifically preserved in the dismissal order. *Id.*

#### E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED<sup>5</sup>

This case presents a simple issue of the enforceability of attorney fee provisions in a commercial lease. The issue, though simple, has serious repercussions in the commercial leasing industry in Washington.

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*City of Seattle v. Bin*, 163 Wn. App. 367, 373, 260 P.3d 900 (2011). The Court of Appeals noted the trial court had jurisdiction to address the fee issue. Op. at 6 n.3.

<sup>4</sup> It is important to note that Green Depot's counsel advised the commissioner at the February 24, 2012 show cause hearing that Green Depot had no intention of holding over past the March 22, 2012 end date of the lease, RP 25-26, and it did not do so.

In sum, Green Depot stayed in the premises through the appointed terminal date of the lease, March 22, 2012, notwithstanding 4105's unlawful detainer action.

<sup>5</sup> This Court is fully familiar with the criteria for review set forth in RAP 13.4(b). This case involves a classic conflict with decisions of this Court and among decisions of the Court of Appeals, RAP 13.4(b)(2). It is also a case involving an issue of substantial public interest this Court should decide. RAP 13.4(b)(4).

Very broad attorney fee provisions are at issue here. The lease provides in section 24.11:

Attorney's Fees. If either party brings an action regarding terms or rights under this Lease, the prevailing party in any action, on trial or appeal, is entitled to reasonable attorneys' fees as fixed by the court to be paid by the losing party. The term "attorney's fees" shall include, but is not limited to, reasonable attorneys' fees incurred in any and all judicial, bankruptcy reorganization, administrative and other proceedings, including appellate proceedings, whether the proceedings arise before or after entry of a final judgment, and all costs and disbursements in connection with the matter.

CP 107-08. Similarly, the assignment and assumption agreement states in paragraph 4:

Attorney's Fees. If any party commences an action against any of the parties arising out of or in connection with the Lease or this Agreement, the prevailing party or parties shall be entitled to recover from the losing party or parties reasonable attorney's fees and all costs of suit, whether or not the action is filed or prosecuted to judgment.

CP 45-46.

The core question at issue here is whether Green Depot is the "prevailing party" in the unlawful detainer action brought by 4105 under RCW 59.12. The Court of Appeals concluded that Green Depot was not the prevailing party because the breach of contract case remained pending:

Because Green Depot vacated the premises at the end of the lease term, the expedited trial date in the unlawful detainer action was stricken and 4105 was entitled to pursue its claim for unpaid rent and damages in the breach of contract

action. As the superior court noted in the order denying Green Depot's motion for an award of attorney fees and costs in the unlawful detainer action, the dispute over the past due rent and damages as well as the request for an award of attorney fees and costs would be resolved in the pending breach of contract action.

Op. at 9. Thus, the Court of Appeals conflated 4105's two actions -- unlawful detainer and damages breach of contract. *See also*, op. at 10.

A critical flaw in the Court of Appeals analysis is its failure to recognize that unlawful detainer actions under RCW 59.12 and an action for damages for rent due and unpaid are *distinct actions*, each with a distinct focus. An unlawful detainer action is a summary procedure, the essence of which is to oust a tenant from possession of the premises. In fact, a tenant may not even assert counterclaims as a defense to such action. *Granat v. Keasler*, 99 Wn.2d 564, 571, 663 P.2d 830 (1983), *cert. denied*, 464 U.S. 1018 (1983). In *Granat*, this Court acknowledged that in an unlawful detainer action, the Legislature intended to limit such an unlawful detainer action "to the landlord's right of possession." *Id.* The principle has been re-affirmed in numerous subsequent decisions. *Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985) (unlawful detainer action limited to possession and related issues of restitution of the premises and rent). *See also*, *Angelo Property Co., LP v. Hafiz*, 167 Wn. App. 789, 274 P.3d 1075, *review denied*, 175 Wn.2d 1012 (2012)

(limitations on trial court's authority over tenant's counterclaims in unlawful detainer action); *Hall v. Feigenbaum*, \_\_\_ Wn. App. \_\_\_, 319 P.3d 61 (2014) (a court hearing an unlawful detainer action does not sit as a general jurisdiction court but as a special statutory tribunal).<sup>6</sup>

Looking to the specific language of the fee provisions at issue here, there is no question that an unlawful detainer action is "an action regarding terms or rights" under the lease or an action "arising out of or in connection with" the lease or the assignment agreement. Moreover, it is *undisputed* that 4105 lost in the unlawful detainer action -- Green Depot remained in possession of the premises for the entire lease term. Green Depot *prevailed* in the unlawful detainer action.

The concept of a "prevailing party" has been construed with a practical eye by Washington courts. To be a prevailing party for purposes of fees, courts look to see if the party obtained significant relief on the claims it presented to the courts; the party need not prevail on its entire claim. *Hawkins v. Diel*, 166 Wn. App. 1, 10, 269 P.3d 1049 (2011).

In determining if a party "prevailed," this Court has directed that the starting place for any analysis is the language of the specific fee agreement. *Belfor USA Group Inc. v. Thiel*, 160 Wn.2d 669, 671, 160

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<sup>6</sup> These cases document that a party may convert an unlawful detainer action into a traditional civil action once the issue of possession of the premises is resolved. Of course, that was not relevant here where 4105 filed a separate action for damages.

P.3d 39 (2007). Here, the fee provision at issue allowed the winning party to recover fees from the losing party in “any and all” legal proceedings before and after the final judgment. Green Depot avoided its ouster from the premises by 4105 and obtained dismissal of the unlawful detainer action filed against it. It remained in possession of the premises for the entire lease term. In the specific context of unlawful detainer-type situations, Washington courts in numerous cases have concluded that a tenant prevails where the landlord abandons the effort to legally restore its control over the premises.

In deciding that Green Depot was not entitled to a fee award, the Court of Appeals attempted to distinguish decisions in which a dismissal of an unlawful detainer action was sufficient to establish that a tenant prevailed for purposes of a fee award, op. at 9-10, but its effort to distinguish these authorities is ultimately unpersuasive. The real issue as to whether a tenant prevails in an unlawful detainer appropriately focuses on the question of *possession of the premises*.

In *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 288, 787 P.2d 946 (1990), Division I of the Court of Appeals considered a landlord’s effort to enforce the terms of a commercial lease against its tenant. At a trial de novo following mandatory arbitration, the landlord took a voluntary dismissal without prejudice. Like 4105 here, the landlord in *Walji*

asserted that the tenant could not be the prevailing party absent a final judgment. *Id.* at 288. The Court of Appeals disagreed, noting that “a defendant who ‘prevails’ is ordinarily one against whom *no affirmative judgment is entered.*” *Id.* (emphasis added). Both the *Walji* landlord and the landlord here effectively dropped their actions, leaving their tenants in possession of the premises.<sup>7</sup>

In *Hawk v. Branjes*, 97 Wn. App. 776, 986 P.2d 841 (1999), the landlord also discontinued its lawsuit for damages for rent due and an injunction relating to removal of fixtures. The landlord left the tenant in possession of the premises. The Court of Appeals applied a practical view of the definition of a prevailing party, ruling that with the landlord’s “voluntary dismissal, the defendant has ‘prevailed’ in the commonsense meaning of the word.” *Id.* at 782.

In *Council House, Inc. v. Hawk*, 136 Wn. App. 153, 147 P.3d 1305 (2006), prior to trial in a residential unlawful detainer action, the landlord sought and obtained a voluntary dismissal without prejudice and without an award of fees, thereby leaving the tenant in possession of the premises. Hawk appealed the trial court’s denial of her fees and costs as the prevailing party for successfully defending against the unlawful detainer

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<sup>7</sup> Underlining the lack of meaningful difference between *Walji* and this case is the fact that when Green Depot subsequently moved to dismiss 4105 lingering unlawful detainer action, 4105 did not even oppose dismissal, stating “plaintiff too believes that an Order of Dismissal should be entered.” CP 161.

action. RCW 59.18.290. Recognizing that an unlawful detainer defense was at issue, the Court of Appeals reversed the trial court's denial of fees, holding: "Hawk is the prevailing party, because when a plaintiff takes a voluntary dismissal, the defendant has prevailed for purposes of fees." *Id.* at 159-60. *See also, Housing Authority of City of Seattle*, 163 Wn. App. at 377 (tenant who secures order dismissing unlawful detainer action is prevailing party).

Given the practical position of this Court and Washington courts generally on the definition of a prevailing party and the broad definition of a prevailing party in the applicable attorney fee provisions here, Green Depot prevailed over 4105 in the unlawful detainer action. 4105 sought a writ of restitution to evict Green Depot from the premises prior to the end of the lease, but 4105 received no such writ and Green Depot stayed in the premises for the full term of the lease. Green Depot prevailed in the unlawful detainer action.

The possibility of a separate fee award in the separate breach of contract action between these parties has no bearing on the appropriateness of fees in the unlawful detainer action. The *Walji* court addressed this issue and deemed it "essential" to award fees in the unlawful detainer action at hand, whether or not the same fee provision might later be at issue in a separate action.

[I]t is essential to apply the attorney fee provision of the lease at the time of dismissal to effectuate the intent of the parties. If the litigation is renewed, the attorney fee provision might once more come into play and be applied to the plaintiff's benefit. There would be no inconsistency in such a result. This interpretation will inhibit frivolous or badly prepared lawsuits and will protect parties from the expense of defending claims which do not result in liability.

*Walji*, 57 Wn. App. at 288-89.<sup>8</sup> The same analysis must be applied here. The Court of Appeals conflated the unlawful detainer action with 4105's separate breach of contract action. In the unlawful detainer action, Green Depot prevailed. The question of fees in the breach of contract action was a separate matter to be resolved in that distinct case.

Simply put, the Court of Appeals decision here is contrary to the case law recognizing unlawful detainer actions as being distinct legal proceedings and to the practical definition of a prevailing party for a fee award utilized by Washington courts generally. It is also contrary to the specific results in *Walji*, *Hawk*, and *Council House*. Review is merited to

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<sup>8</sup> The pendency of the separate breach of contract action also does not alter the fact that the rulings in this matter would effectively immunize landlords who file unlawful detainer actions late in a lease term from liability for fees. A landlord could file an unlawful detainer action late in a lease and, if successful, recover fees and costs (assuming the lease, as here, allowed such an award). If, on the other hand, the landlord, as here, were unsuccessful and accomplished nothing in its last-minute unlawful detainer action, and the tenant, as here, remained in possession throughout the lease term and moved out only when the lease ended, according to the Court of Appeals, the tenant would not be entitled to prevailing party fees for its successful defense. The Court of Appeals would thus rewrite bilateral fee provisions into one-way fee provisions in any comparable unlawful detainer actions.

resolve the contradiction between the Court of Appeals decision here and those cases. RAP 13.4(b)(2).

Finally, review is also merited here because this case presents an important question of the application of common attorney fee provisions in commercial unlawful detainer actions. Attorney fee provisions in commercial leases are routine. Parties to commercial leases have occasion to participate in unlawful detainer actions under RCW 59.12. Those commercial landlords and tenants and their counsel would benefit from this Court's delineation of what constitutes a prevailing party in that special setting, regardless of what takes place in any separate action at law for damages. Green Depot believes that this Court should adhere to its practical, real world approach to the definition of a prevailing party. A commercial lease tenant prevails when it successfully avoids ouster from the premises sought by a landlord in the special statutory unlawful proceedings, as here. Review is merited under RAP 13.4(b)(4).

#### F. CONCLUSION

Review is merited to address an important attorney fee issue involving commercial leases. Green Depot prevailed in 4105's unlawful detainer action, regardless of what occurred in the separate breach of contract action for damages, by retaining possession for the entire lease

term. 4105's unlawful detainer action under RCW 59.12 was dismissed and it did not secure possession of its premises.

This Court should grant review and reverse the trial court's order on fees and remand the case to the trial court with directions to enter a judgment for Green Depot's unlawful detainer fees.<sup>9</sup> Costs on appeal, including reasonable attorney fees in accordance with RAP 18.1, should be awarded to Green Depot.

DATED this 1st day of April, 2014.

Respectfully submitted,



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<sup>9</sup> In its response to Green Depot's motion for fees, 4105 did not dispute the availability of fees under the relevant lease to the prevailing party in this action. CP 131-37. Indeed, 4105 itself sought fees under the attorney fee provision of the lease in its complaint, acknowledging its understanding that fee agreements here applied in the unlawful detainer setting. CP 2. Moreover, 4105 did not challenge the amount of fees incurred by Green Depot or the reasonableness of the fees. CP 131-37.

# APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

4105 1 <sup>ST</sup> AVENUE SOUTH	)	No. 68753-1-I
INVESTMENTS, LLC,	)	
	)	DIVISION ONE
Respondent,	)	
	)	
v.	)	
	)	UNPUBLISHED OPINION
GREEN DEPOT WA PACIFIC COAST,	)	
LLC, a Washington limited liability	)	
company,	)	
	)	
Appellant,	)	
	)	
ECHOHAUS, INC., a Washington	)	
corporation and successor in interest to	)	
BUILT-E, INC. d/b/a ENVIRONMENTAL	)	
HOME CENTERS,	)	
	)	
Defendant.	)	FILED: January 13, 2014

SCHINDLER, J. — 4105 1<sup>st</sup> Avenue South Investments LLC filed an unlawful detainer action against Green Depot WA Pacific Coast LLC. Green Depot argues the trial court erred in denying its motion for attorney fees as the prevailing party in the unlawful detainer action. We reject Green Depot's argument and affirm.

FACTS

On March 22, 2007, Bit Holdings Sixty-One Inc. entered into a commercial lease agreement with Built-E Inc. for 38,148 square feet of commercial space located at 4121

No. 68753-1-1/2

First Avenue South in Seattle. The 60-month lease began on March 22, 2007 with agreed upon extensions for two successive terms. The lease sets forth an escalating monthly fixed minimum rent for the 60-month term with a provision that addresses interest on past due amounts owed. The lease contains an attorney fee provision for an award of reasonable attorney fees “to be paid by the losing party.”

4105 1<sup>st</sup> Avenue South Investments LLC (4105) acquired the rights to the lease from Bit Holdings Sixty-One. Built-E assigned its rights under the lease to Green Depot WA Pacific Coast LLC (Green Depot). In February 2011, 4105 and Green Depot entered into an assignment and assumption of the March 22, 2007 lease agreement (Assignment and Assumption).<sup>1</sup> Green Depot agreed to all of the terms and conditions of the lease, including the obligation to pay rent “and all other sums owing thereunder.” The Assignment and Assumption also contains an attorney fee provision stating that the prevailing party in an action “arising out of or in connection with the Lease or this Agreement . . . shall be entitled to recover from the losing party” reasonable attorney fees or costs without regard to whether “the action is filed or prosecuted to judgment.”

In December 2011, 4105 served Green Depot with a three-day notice to pay \$106,194.01 in past due rent or vacate. On January 9, 2012, 4105 filed a commercial unlawful detainer action requesting a writ of restitution and alleging breach of the lease agreement. 4105 alleged Green Depot had not paid \$106,194.01 in past due rent. 4105 sought a judgment for past due rent, damages, and an award of attorney fees “as authorized by the parties’ written agreement,” King County Superior Court Case No. 12-

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<sup>1</sup> The assignment lease was between Built-E as assignor, Green Depot as assignee, and 4105 as landlord.

2-01450-7 SEA. In the answer to the unlawful detainer action, Green Depot denied the claim for past due rent of \$106,194.01 and that 4105 was entitled to a writ of restitution.

On January 27, 4105 filed a separate cause of action against Green Depot alleging breach of the lease agreement and requesting an award for \$106,194.01 in unpaid rent and damages, King County Superior Court Case No. 12-2-03517-2 SEA.

At the show cause hearing on February 24, the court set the unlawful detainer action for an expedited trial. RCW 59.12.130 states that "[w]henver an issue of fact is presented by the pleadings it must be tried by a jury." The court scheduled the trial date for March 26, four days after the end of the lease. The attorney representing 4105 told the court that 4105 had another tenant "lined up" to move into the space, and expressed concern that if Green Depot did not vacate at the end of the lease, 4105 "would be subject to damages in the millions for loss of this new lease agreement." In response, the Green Depot attorney stated his client "[did] not intend . . . to overstay" and agreed that if Green Depot did not vacate by the end of its lease, 4105 "shall be entitled to issuance of a writ of restitution on or after March 23, 2012."

The parties entered into a written memorandum of understanding. In the memorandum, 4105 also agreed to give Green Depot the option to occupy a small portion of the premises through May 31, 2012 at a monthly rate of \$8,164.80. The memorandum of understanding states:

**DATED Feb. 24, 2012**

**Memorandum of Understanding  
As referenced in Ex Parte Case Scheduling  
Order dated February 24, 2012.**

**The undersigned parties agree that Green Depot WA Pacific Coast, LLC, may hold over its occupancy at Suite 4003, consisting of approximately 13,608 [square feet], at the current premises through May 31, 2012, at an all-inclusive monthly cost of \$8,164.80. If Green Depot**

opts not to hold over for either April or May, Green Depot shall notify 4105 1<sup>st</sup> Ave. S Investments, LLC, by the 15<sup>th</sup> of the preceding month. Green Depot's monthly payments shall be due no later than the 22<sup>nd</sup> of the month for the following month.

The certification for trial states, in pertinent part: "[P]laintiff shall be entitled to issuance of a writ of restitution on or after March 23, 2012 subject to terms agreed upon by parties in the Memorandum of Understanding incorporated herein by reference."

In a March 6 e-mail, the attorney representing Green Depot confirmed that the expedited trial date should be stricken. The attorney reiterated that if Green Depot did not vacate at the end of the lease, 4105 would be entitled to a writ of restitution. The e-mail from the attorney representing Green Depot provides, in pertinent part:

[I]n light of the February 24 hearing and the parties' agreement that if Green Depot has not vacated the premises by March 23 (subject to the option to occupy a portion of the premises through May) Plaintiff will be entitled to receive a Writ of Restitution, right to possession of the premises is no longer in dispute and the expedited trial date of March 26<sup>th</sup> should be stricken.

The attorney representing Green Depot also acknowledged that 4015 could "still pursue its separate breach of contract action." In reply, the attorney representing 4105 requested Green Depot sign and return the lease amendment. The e-mail from the attorney representing 4105 also states that "[a]ssuming of course your client opts to vacate on or before [March 23,] I will also draft and send to you for signing a stipulation and order of dismissal of the eviction lawsuit." On March 20, the parties confirmed with the court that the March 26 trial date should be stricken.

On March 22, Green Depot moved out of the leased premises except for the portion it was allowed to continue to occupy. The next day, 4105 sent Green Depot a

stipulation and order of dismissal of the unlawful detainer action. Green Depot did not return the stipulation.

On March 26, Green Depot filed a motion for an award of attorney fees and costs of \$28,231. Green Depot claimed it was entitled to the award of fees as the “prevailing party” under the terms of the lease because it successfully defended against the unlawful detainer action, and 4105 “has received exactly none of the relief sought.”

In opposition, 4105 asserted Green Depot was not the prevailing party because there was a separate pending breach of contract action to resolve the dispute over rent and damages.

The court denied Green Depot’s motion for an award of attorney fees and costs as the prevailing party in the unlawful detainer action. On January 11, 2013, the court entered an agreed order dismissing the unlawful detainer action without prejudice to Green Depot’s request for an award of attorney fees and costs in the pending breach of contract action. The order states, in pertinent part:

Green Depot’s Motion is GRANTED and [4105]’s claims . . . are dismissed with prejudice, PROVIDED that nothing in this Order shall prejudice either (1) [4105]’s rights, if any, to pursue its breach-of-contract claims raised in King County Cause No. 12-2-03517-[2] or (2) Green Depot’s rights, if any, to pursue an award of its fees and costs incurred in this matter.

Green Depot appeals.<sup>2</sup>

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<sup>2</sup> Green Depot filed a motion for discretionary review of the court’s order denying its motion for fees. Because 4105 agreed the attorney fees order in the unlawful detainer action was final, we treated the discretionary review as an appeal.

## ANALYSIS

Green Depot contends the court erred in denying the motion for an award of attorney fees and costs as the prevailing party in the unlawful detainer action.<sup>3</sup> Green Depot asserts that under the attorney fee provision of the lease, it is the prevailing party in the unlawful detainer action because it retained possession of the leased premises, successfully defended against issuance of a writ of restitution, and no judgment was entered against it.<sup>4</sup>

Interpretation of the lease provision is a question of law that we review de novo. Torgerson v. One Lincoln Tower, LLC, 166 Wn.2d 510, 517, 210 P.3d 318 (2009). Washington follows the objective manifestation of contracts theory. Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Our primary goal in interpreting a contract is to ascertain the intent of the parties. Hearst, 154 Wn.2d at 503.

We determine intent by focusing on the objective manifestation of the parties in the written agreement rather than the unexpressed subjective intent of either party. Hearst, 154 Wn.2d at 503. Accordingly, a court considers only what the parties wrote; giving words in a contract their ordinary, usual, and popular meaning unless the agreement as a whole clearly demonstrates a contrary intent. Hearst, 154 Wn.2d at

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<sup>3</sup> There is no dispute that the court had jurisdiction to award attorney fees to the prevailing party even after an unlawful detainer action has been dismissed or possession has become moot. See Housing Authority of Seattle v. Bin, 163 Wn. App. 367, 260 P.3d 900 (2011).

<sup>4</sup> For the first time on appeal, Green Depot also relies on the attorney fee provision in the Assignment and Assumption. Because Green Depot did not cite to or rely on the Assignment and Assumption below, it has waived any argument based on this provision. See Hansen v. Friend, 118 Wn.2d 476, 485, 824 P.2d 483 (1992). Nonetheless, we note that the Assignment and Assumption also states, "[T]he prevailing party or parties shall be entitled to recover from the losing party or parties reasonable attorney's fees and all costs of suit, whether or not the action is filed or prosecuted to judgment."

503-04. “Where the terms of a contract are plain and unambiguous, the intention of the parties shall be ascertained from the language employed.” Marine Enters., Inc. v. Sec. Pac. Trading Corp., 50 Wn. App. 768, 773, 750 P.2d 1290 (1988) (quoting Schauerman v. Haag, 68 Wn.2d 868, 873, 416 P.2d 88 (1966)). The court must harmonize and give effect to all the language in a contract. Nishikawa v. U.S. Eagle High, LLC, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007).

Section 24.11, the attorney fee provision of the lease between 4105 and Green Depot, states:

**Attorney’s Fees.** If either party brings an action regarding terms or rights under this Lease, the prevailing party in any action, on trial or appeal, is entitled to reasonable attorneys’ fees as fixed by the court to be paid by the losing party. The term “attorney’s fees” shall include, but is not limited to, reasonable attorneys’ fees incurred in any and all judicial, bankruptcy, reorganization, administrative and other proceedings, including appellate proceedings, whether the proceedings arise before or after entry of a final judgment and all costs and disbursements in connection with the matter.

Under the plain and unambiguous language of the attorney fee provision, the “the prevailing party in any action, on trial or appeal, is entitled to reasonable attorneys’ fees as fixed by the court to be paid by the losing party.” Because Green Depot was not the prevailing party in the unlawful detainer action and 4105 was not the losing party, the court did not err in denying Green Depot’s request for an award of attorney fees and costs under the terms of the lease.

An unlawful detainer action is a limited statutory proceeding to resolve the right to possession between the landlord and the tenant. Chapter 59.12 RCW; Munden v. Hazelrigg, 105 Wn.2d 39, 45, 711 P.2d 295 (1985). The primary issue in an unlawful detainer action is the “question of possession and related issues such as restitution of the premises and rent.” Munden, 105 Wn.2d at 45. If, based on the pleadings, “the

plaintiff has the right to be restored to possession of the property, the court shall enter an order directing the issuance of a writ of restitution.” RCW 59.18.380. But if the answer to the writ presents a genuine issue of material fact pertaining to a legal or equitable defense, the court shall enter an order directing the parties to proceed to trial within 30 days. RCW 59.18.380. And if “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 unlawful detainer action “may be converted into an ordinary civil suit for damages.” Munden, 105 Wn.2d at 45-46.

4105 filed an unlawful detainer action against Green Depot requesting a writ of restitution and entry of a judgment for past due rent in the amount of \$106,194.01, and damages in the amount of “\$21,470 triple net per month.” 4105 also filed a separate breach of contract action against Green Depot for the past due rent, damages, and an award of attorney fees and costs under the lease.

In response to the unlawful detainer action, Green Depot denied owing past due rent. At the show cause hearing, the court set an expedited trial date for March 26, 2012. Green Depot stipulated that it would vacate the premises by the end of the lease term and in the event it did not, agreed 4105 was entitled to a writ of restitution.

We reject Green Depot’s argument that it was the prevailing party in the unlawful detainer action because it successfully defended against issuance of a writ of restitution. By contesting past due rent at the show cause hearing, the court was required to set the case for trial rather than issue an immediate writ of restitution. See RCW 59.12.130. A show cause hearing “is not the final determination of the rights of

No. 68753-1-1/9

the parties in an unlawful detainer action.” Carlstrom v. Hanline, 98 Wn. App. 780, 788, 990 P.2d 986 (2000).

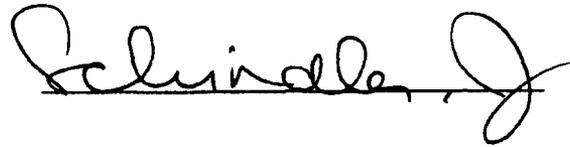
Because Green Depot vacated the premises at the end of its lease term, the expedited trial date in the unlawful detainer action was stricken and 4105 was entitled to pursue its claim for unpaid rent and damages in the breach of contract action. As the superior court noted in the order denying Green Depot's motion for an award of attorney fees and costs in the unlawful detainer action, the dispute over past due rent and damages as well as the request for an award of attorney fees and costs would be resolved in the pending breach of contract action.

The cases Green Depot relies on to argue it was the prevailing party are distinguishable. In Walji v. Candyco, Inc., 57 Wn. App. 284, 286, 787 P.2d 946 (1990), the landlord filed a lawsuit to enforce a commercial lease. The landlord did not prevail in the mandatory arbitration and requested a trial de novo. At the conclusion of the landlord's case, the trial court granted the motion for a voluntary nonsuit under CR 41(a)(2), and awarded the tenant attorney fees and costs under the terms of the lease. Walji, 57 Wn. App. at 286. On appeal, we held that when the plaintiff obtains a voluntary nonsuit, the defendant is the prevailing party. Walji, 57 Wn. App. at 288-89; see also Council House, Inc. v. Hawk, 136 Wn. App. 153, 159-60, 147 P.3d 1305 (2006) (holding that the residential tenant had prevailed for purposes of fees under the unlawful detainer statute where the landlord requested a voluntary dismissal of its unlawful detainer action); Hawk v. Branjes, 97 Wn. App. 776, 779, 781, 986 P.2d 841 (1999) (holding that the commercial tenants were entitled to attorney fees after the landlord

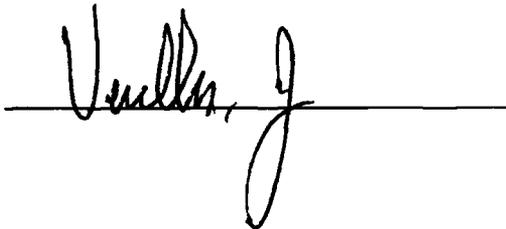
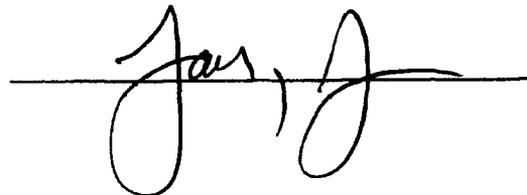
voluntarily dismissed its complaint where the lease provided for fees to the " 'successful party' " in any action to enforce the agreement).

Here, unlike in Walji, Council House, or Hawk, dismissal of the unlawful detainer action did not leave the parties in the position "as if the action had never been brought." Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 492, 200 P.3d 683 (2009). 4105 filed a separate breach of contract action against Green Depot to recover the past due rent and damages that was still pending.

We affirm the order denying Green Depot's motion for attorney fees as the prevailing party in the unlawful detainer action. Under the terms of the lease, upon compliance with RAP 18.1, 4105 is entitled to an award of reasonable attorney fees and costs on appeal.

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WE CONCUR:

A handwritten signature in cursive script, appearing to read "Vukobratovic J", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Jans J", written over a horizontal line.

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

4105 1<sup>ST</sup> AVENUE SOUTH )  
INVESTMENTS, LLC, )  
 )  
Respondent, )  
 )  
v. )  
 )  
GREEN DEPOT WA PACIFIC COAST, )  
LLC, a Washington limited liability )  
company, )  
 )  
Appellant, )  
 )  
ECHOHAUS, INC., a Washington )  
corporation and successor in interest to )  
BUILT-E, INC. d/b/a ENVIRONMENTAL )  
HOME CENTERS, )  
 )  
Defendant. )

No. 68753-1-I  
DIVISION ONE

ORDER GRANTING MOTION  
TO PUBLISH

Appellant Green Depot WA Pacific Coast LLC filed a motion to publish the opinion filed on January 13, 2014 in the above case and the respondent has filed an answer to the motion. A majority of the panel has determined that the motion should be granted;

Now, therefore, it is hereby

ORDERED that appellant's motion to publish the opinion is granted.

DATED this 16<sup>th</sup> day of March, 2014.

FOR THE COURT:



Judge

DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Petition for Review in Court of Appeals Cause No. 68753-1-I to the following parties:

Scott R. Sleight  
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Alhers & Cressman PLLC  
999 3rd Ave., Suite 3800  
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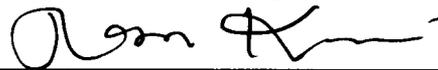
Scott W. Campbell  
Wallace Campbell PLLC  
1700 7th Avenue, Suite 2100  
Seattle, WA 98101

Original delivered by ABC messenger to:

Court of Appeals, Division I  
Clerk's Office  
600 University Street  
Seattle, WA 98101

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

DATED: April 1, 2014, at Tukwila, Washington.



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Roya Kolahi, Legal Assistant  
Talmadge/Fitzpatrick

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STATE OF WASHINGTON  
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