94182-3

No.
COA No. 48083-2-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL L. ROESCH,
Petitioner/Appellant,

v.

CARL and CANDY BOHM,
Respondents.

APPEAL FROM THE SUPERIOR COURT OF PIERCE COUNTY
THE HONORABLE PHILLIP K. SORENSEN, JUDGE

PETITION FOR REVIEW

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III. IDENTITY OF PETITIONER

Petitioner, Michael L. Roesch, asks this Court to grant review of the Court of Appeals decision designated in Part IV.

IV. COURT OF APPEALS DECISION

Petitioner asks the Court to grant review of the Court of Appeals decision filed January 24, 2017, with a copy attached as Appendix 1.

V. ISSUES PRESENTED FOR REVIEW

1 In an action for residential unlawful detainer based on the breach of a rental agreement, may a tenant of real property assert a matter of title in an equitable defense an issue of title to the landlord's property based on an expired purchase and sale agreement?

2. In an action for residential unlawful detainer based on the breach of a rental agreement, does the availability of a remedy such as quiet title in an independent proceeding preclude a tenant from asserting a matter of title in an affirmative equitable defense of an issue of title to the landlord's property in the unlawful detainer?

3. Does the Court of Appeals decision conflict with *Federal National Mortgage Association v. Ndiaye*, 188 Wn. App. 376, 353 P. 3d 644, 648 (2015), *Puget Sound Inv. Grp. v. Bridges*, 92 Wn. App. 523, 526, 963 P. 2d 944 (1998), *Proctor v. Forsythe*, 4 Wn. App. 238, 241, 480 P.

2d 511 (1971) and *Sundholm v. Patch*, 62 Wn. 2d 244, 382 P. 2d 262 (1963) ?

4. Did the Court of Appeals err in affirming the trial court's award of attorney fees to respondents?

5. Did the Court of Appeals err in awarding attorney fees to respondents?

6. Is petitioner entitled to attorney fees on appeal?

VI. STATEMENT OF THE CASE

Petitioner, Michael L. Roesch, is the owner of the real property located at 14712 72nd Street East, Sumner, Washington.[1]

In October, 2008, Petitioner and Respondents executed a lease of Petitioner's real property.[2] The lease term commenced November 1, 2008 and terminated on October 15, 2010.[3] In paragraph 4 of the lease, Respondents agreed to pay Petitioner monthly rent in the amount of $802.75.[4]

Respondents entered into possession of Petitioner's property in November, 2009.[5] Respondents failed to pay the rent due under the lease, and on March 5, 2015, Petitioner served Respondents with a three-day

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[1] CP 1.
[2] CP 2, 6, 7, 8.
[3] CP 6.
[4] CP 6.
[5] VRP III p. 404 line 1.

notice to terminate tenancy, alleging delinquent rent for the months of October 2012 to February, 2015, in the amount of $22,447.00, late fees for that period totaling $2,247.56, and attorney fees of $5,381.10, for a total of $30, 105.66.[6] Respondents did not thereafter either vacate the property or pay the sums set forth in the three-day notice.[7]

A. PROCEDURAL HISTORY

Petitioner filed a complaint for unlawful detainer in this action on April 1, 2015.[8] Petitioner filed a summons and an amended summons.[9] Petitioner served Respondent Candy Bohm with summons and complaint.[10] Respondents filed an answer.[11] Petitioner filed a motion for order to show cause why a writ of restitution should not issue.[12] Respondents filed an amended answer, affirmative defenses and counterclaims.[13]

Respondent Candy Bohm filed a motion in opposition to Appellant's motion for order to show cause.[14] Respondents' counsel filed a declaration that attached excerpts of several of the purchase and sale

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[6] CP 2, 10, 11, 12.
[7] CP 2.
[8] CP 1-12.
[9] CP 13-14, 16-17.
[10] CP 81.
[11] CP 21-24.
[12] CP 29-31.
[13] CP 35-44.
[14] CP 45-48.

agreements and addenda mentioned in Respondents' counterclaim.[15] Subsequently, Respondent Candy Bohm filed a supplemental declaration that attached the purchase and sale agreements and related addenda mentioned in Respondents' counterclaim.[16] Respondent Candy Bohm's mother, Geraldine Rudolph filed a declaration in opposition to Petitioner's motion for writ of restitution.[17] Mrs. Rudolph's declaration also attached documents referenced in Respondent's counterclaim.[18]

Petitioner's motion for order to show cause was heard on June 24, 2015.[19] The commissioner found credibility issues were present.[20] The commissioner ruled that he did not have jurisdiction to consider Respondents' counterclaims and therefore denied Petitioner's motion.[21] The commissioner also found possession was undetermined at that point.[22] The commissioner ordered the parties to proceed to trial on the issue of possession.[23] Respondents filed a jury demand.[24]

On July 7, 2015, Petitioner filed a motion for partial summary judgment to dismiss Respondents' counterclaims for lack of subject matter

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[15] CP 49-76.
[16] CP 110-179.
[17] CP 180-211.
[18] *Ibid.*
[19] VRP 062415, p. 1-14.
[20] *Ibid*, p. 8.
[21] *Id.*, p. 11.
[22] *Id.*, p. 12; CP 273.
[23] CP 273.
[24] CP 275-76

jurisdiction and because third party claims are not permitted in a residential unlawful detainer.[25]

Respondents filed a motion to intervene and for joinder of parties and claims.[26] Therein, Respondents sought an order allowing Respondent Candy Bohm's mother, Geraldine Rudolph, to intervene as a party defendant and third party plaintiff, and to add Fred Roesch as a third party defendant.[27] On July 17, 2015, the trial court denied Respondent's motion to intervene and ordered the hearing on Petitioner's motion for partial summary judgment to be heard on the first day of trial, August 17, 2015.[28]

Petitioner filed his ER 904 disclosures which consisted of the following four documents: the declaration of Respondent Candy Bohm in support of motion and declaration for temporary orders in Pierce County Cause No. 13-3-00880-6, the strict reply declaration of Candy Bohm in Pierce County Cause No. 13-3-00880-6, the November 1, 2008 rental agreement for the property at 14712 72nd St. E., in Sumner between Appellant and Respondents, and the letter to Fred Roesch from Candy Bohm re improvement as subject rental property.[29]

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[25] CP 280-92.
[26] CP 320-23.
[27] *Ibid.*
[28] CP 411-12.
[29] *Ibid.*

Respondents filed their ER 904 disclosures on July 22, 2015.[30] Respondents listed 29 documents.[31] Included therein were expired purchase and sale agreements and addenda for 14712 72nd St. E., Sumner, expired purchase and sale agreements and addenda for 16220 and 16224 E. 60th E., Sumner, HUD settlement statements for the close of sale of 16224 60th E. in April 2009, a copy of a cashier's check for $258,389.43, dated April 22, 2009, from Hillard Rudolph to Fred Roesch, a draft of a real estate contract for the property at 16224 E. 60th St. E. from Respondents to Fred Roesch, a reverse mortgage statement to the Rudolphs for 16224 E, copies of checks from Respondent Candy Bohm to Fred Roesch, and a commission disbursement form dated April 10, 2009 for Appellant's realtor, John Troupe.[32]

Petitioner filed objections to Respondents' ER 904 disclosures.[33] Petitioner objected to 28 of 29 of Respondents' proposed exhibits on the ground of lack of subject matter jurisdiction."[34] Petitioner filed his motion in limine.[35]

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[30] CP 421-25.
[31] *Ibid.*
[32] *Id.*
[33] CP 426-435.
[34] *Ibid.*
[35] CP 463-484.

Petitioner's motion for summary judgment was heard on August 17, 2015, the morning of trial.[36] The court dismissed Respondents' counterclaims.[37]

The court inquired whether Respondents would be willing to decline to offer some of their exhibits.[38] In response thereto, Respondents identified Exhibits 6, 7, 9, 13, 14, 16, 17, 28, 29, 30, 36, 37, and 38 as those they intended to rely upon at trial.[39] The court reserved ruling on Petitioner's objection to Respondents' exhibits.[40] The court announced it would allow some of Respondents' exhibits to "*allow for a framework to be established.*"[41] The court concluded that would require consideration of some RESPAs. ""*I think that means you are going to be stuck with some Purchase and Sale Agreements....*"[42]

Petitioner argued that any consideration of the properties other than 14712 72nd St. E. would exceed the court's jurisdiction.[43] Petitioner also argued consideration of the other transactions would contradict the

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[36] VRP I, p. 23-84.
[37] VRP I, p. 82-84; CP 598-600.
[38] VRP
[39] VRP I, p. 84-85.
[40] VRP 1, p. 86.
[41] VRP 1, p. 92.
[42] VRP I, p. 93.
[43] VRP I, p. 76.

court's order on summary judgment and would present a real danger of confusing the jury.[44]

The court voiced its opinion that the actions of Fred Roesch outside of the lease in question were irrelevant. "*...We are dealing with Michael Roesch and a lease agreement that he had with Bohm, and so whatever Fred Roesch did outside of that agreement it seems to me to be irrelevant....*"[45]

Trial in this action commenced on August 18, 2015.[46] Petitioner renewed at trial his objections to Respondents' Exhibits 7, 10, 13, 14, 16, 17, 29, 37, 38, 53, 59, and 60.[47]

Petitioner objected to the inclusion in the court's instructions to the jury of any reference to the October 15, 2008 RESPA in Respondents' proposed Instruction 19, due to the limitations on the court's jurisdiction in unlawful detainers.[48] The court overruled Petitioner's objection and included in the court's Instruction 2 paragraphs 2 and 3 of Respondents' proposed Instruction 19.[49]

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[44] VRP I. p. 90.
[45] VRP I, p. 107.
[46] VRP II, p. 137
[47] VRP II, p. 186 (EX7), VRP II, p. 223 (EX 10), VRP II, p. 201, (EX 13), VRP II p. 204 (EX 14), VRP II p. 206 (EX 16), VRP II p. 207 (EX 17), VRP III, p. 402-03 (EX 29), VRP II p. 215 (EX 37), VRP II p. 218 (EX 38), VRP III, p. 411 (EX 53), VRP II p. 290 (EX 59), VRP III, p. 334-35 (EX 60).
[48] VRP IV, p. 476.
[49] VRP IV, p. 477; CP 970.

The court agreed to give as its Instruction No. 11 Petitioner's proposed Instruction 10 (cited).[50] The court modified Petitioner's proposed instruction by including language regarding Fred Roesch's alleged obligation to pay off the mortgage on the 14712 72nd St. E. property and provide for Petitioner to transfer title to that property to Respondents.[51]

The trial court sent the case to the jury with a special verdict form.[52] On August 21, 2015, the jury returned the verdict with a "yes" answer to the following question: "*Are Defendants Carl and Candy Bohm excused from making rental payments on the Lease?*[53]

Respondents filed a motion for award of attorney fees and costs.[54]

On August 28, 2015, the court entered an Order on Jury Verdict.[55] Therein, the court dismissed Petitioner's claims in this case against Respondents.[56]

On September 11, 2015, the court entered Findings of Fact, Conclusions of Law Re: Attorney Fees and a Judgment on Attorney Fees

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[50] VRP IV, p. 486.
[51] CP 979-80.
[52] VRP IV, p. 546-47; CP 989-91.
[53] VRP IV, p. 551; CP 989.
[54] CP 1000-05.
[55] CP 1055-56.
[56] CP 1056.

and Costs.[57] Therein, the court awarded Respondents attorney fees of $41, 148.00, and costs of $1,010.53.[58]

Petitioner timely filed a notice of appeal.[59] Petitioner's appeal was heard on December 9, 2016 by a panel of Division II of the Court of Appeals. On January 24, 2017, the Court of Appeals issued its unpublished decision affirming the judgment of the trial court.[60]

VII. ARGUMENT

A. THE COURT OF APPEALS DECISION MERITS REVIEW UNDER RAP 13.4 (b) (4).

RAP 13.4 (b) (4) provides: "*A petition for review will be accepted by the Supreme Court only... [i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court.*" Petitioner presents an issue of substantial public importance, whether, in an action for residential unlawful detainer, may a tenant assert an equitable defense of a claim to the title of the landlord's property.

This issue requires an understanding of the limited nature of a residential unlawful detainer and the limitations imposed by the courts upon the nature of the issues that may be considered in such an action. "*Unlawful detainer actions under RCW 59.18 are special statutory*

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[57] CP 1093-97; CP 1098-99.
[58] CP 1098.
[59] CP 1217-1218.
[60] Unpublished Opinion in Case No. 48083-2-II; App. 1.

proceedings with the limited purpose of hastening recovery of possession of rental property, and the superior court's jurisdiction in such action is limited to the primary issue of the right of possession, plus incidental issues such as restitution and rent, or damages." *Phillips v. Hardwick*, 29 Wn. App. 382, 285-86, 628 P. 2d 506 (1981).

As it is a limited remedy, the scope of issues that may be raised in an unlawful detainer is limited to those authorized by the statute. *Granat v. Keasler*, 99 Wn. 2d 564, 570-71, 663 P. 2d 830 (1983). The court does not sit as a court of general jurisdiction with the power to hear and determine other issues. *Ibid.*

Washington courts do not consider an unlawful detainer as a proper forum in which to litigate issues of title. *Federal National Mortgage Association v. Ndiaye*, 188 Wn. App. 376, 353 P. 3d 644, 648 (2015); *Puget Sound Inv. Grp. v. Bridges*, 92 Wn. App. 523, 526, 963 P. 2d 944 (1998); *Proctor v. Forsythe*, 4 Wn. App. 238, 241, 480 P. 2d 511 (1971); *Sundholm v. Patch*, 62 Wn. 2d 244, 382 P. 2d 262 (1963).

The Court of Appeals recognized the rule against litigating claims of title in an unlawful detainer.[61] Nevertheless, the court followed *Snuffin v. Mayo*, 6 Wn. App. 525, 494 P. 2d 497 (1972) to allow Respondent to argue their claim of title to Petitioner's real property as an affirmative

[61] Unpublished Opinion at 9; App. 1.

equitable defense.[62] *"Thus, a trial court may still consider a defendant's affirmative equitable defense even if that defense overlaps somewhat with title-related issues."*[63]

The Court of Appeals misplaced reliance upon *Snuffin v. Mayo.* In *Snuffin*, after discussing the trial court's lack of authority to quiet title as between the parties, and after discussing the tenant's right to assert an equitable defense based upon a constructive trust, the appellate court nevertheless concluded the action should be dismissed, as the lessor failed to give timely notice of termination of the agricultural tenancy in accordance with RCW 59.12.035. The appellate court therefore concluded in light of that failure and the court's very limited jurisdiction in unlawful detainer actions, the case must be dismissed. 6 Wn. App. 529-30.

Because the decision in *Snuffin* was based upon lack of jurisdiction, the court's discussion of equitable defenses and constructive trust is *obiter dictum* and need not be followed. *Grundy v. Thurston County*, 155 Wn. 2d 1, 9-10, 117 P. 3d 1089 (2005). In this case, the Court of Appeals failed to identify any other authority supporting litigation of title issues in an unlawful detainer.

Balanced against *Snuffin's* meager precedential value are clear statements rejecting litigation of title issues in unlawful detainer actions in

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[62] *Ibid.*, at 12.
[63] *Id.*

Federal National Mortgage Association v. Ndiaye, *Puget Sound Inv. Grp. v. Bridges*, *Proctor v. Forsythe*, and *Sundholm v. Patch.* In *Ndiaye*, the appellate court affirmed summary judgment for the lender's nominee in a post-foreclosure unlawful detainer. The court concluded unlawful detainer actions are not the proper forum to litigate questions of title. 188 Wn. App. 384. The court also recognized to allow post-foreclosure litigation of title questions would defeat the spirit and intent of the deed of trust act. 188 Wn. App. 383. An unlawful detainer action is no more a proper forum to litigate questions of title in this case than it was in *Ndiaye*. As in *Ndiaye*, allowing Respondents to litigate questions of title will defeat the spirit and intent of the Residential Landlord Tenant Act. As in *Ndiaye*, the Respondents' failure to exercise another available remedy, quiet title, precludes consideration of Respondents' title issue in this case.

Puget Sound Inv. Grp. v. Bridges, and *Proctor v. Forsythe* compel the same conclusion an unlawful detainer is not a proper forum to litigate questions of title. In *Puget Sound Inv. Grp.*, the plaintiff was a purchaser at a sale of the property following foreclosure of a federal tax lien. The plaintiff sought to evict the former owner in an unlawful detainer action brought under RCW 59.12.030 (6). In affirming dismissal of the unlawful detainer action, the Court of Appeals concluded unlawful detainer actions do not provide a forum for litigating claims to title. 92 Wn. App. 526.

In *Proctor v. Forsythe*, the Court of Appeals affirmed only that portion of the trial court's judgment in an unlawful detainer that determined the defendant, who had been in a meretricious relationship with the plaintiff, was not unlawfully in possession as against the claim of the plaintiff. The court concluded it was unable to consider either party's claim to title to the property, and could only address who was entitled to possession. 4 Wn. App. 241.

In *Sundholm v. Patch*, that portion of the trial court's unlawful detainer judgment granting the tenant's counterclaim for specific performance of an alleged contract for the sale of the property was dismissed on appeal. The court concluded Washington's unlawful detainer statutes did not give the trial court the power to order specific performance of the contract. 62 Wn. 2d 245-46.

The Court of Appeals made only a passing reference to the rule prohibiting litigation of title issues in unlawful detainer.[64] Instead, the Court of Appeals relied upon RCW 59.18.380.[65] The Court of Appeals made no attempt to reconcile that statute with the Washington decisions that prohibit litigating issues of title in unlawful detainer. The Legislature is presumed to know existing case law in areas in which it is legislating and, thus, common law may be considered in ascertaining proper scope of

[64] Unpublished Opinion at 9; App. 1.
[65] *Ibid.*

statute. *In Re King County Foreclosure of Liens for Delinquent Property Taxes for Years 1985 through 1988*, 117 Wn. 2d 77, 86, 811 P. 2d 945 (1991). Thus, RCW 59.18.380 should be interpreted in light of the Washington decisions that prohibit litigating issues of title in unlawful detainer.

In interpreting RCW 59.18.380's requirement that an equitable defense "arise out of" the tenancy, the Court of Appeals instead opted to rely upon *Munden v. Hazelrigg*, 105 Wn. 2d 39, 45, 711 P. 2d 295 (1985), *Josephinium Assocs. v. Kahli*, 111 Wn. App. 617, 45 P. 3d 627 (2002), *Heaverlo v. Keico Indus., Inc.*, 80 Wn. App. 724, 911 P. 2d 406 (1996), and *Port of Longview v. International Raw Materials, Inc.*, 96 Wn. App. 431, 979 P. 2d 917 (1999).[66] Unlike this case, neither *Munden*, nor *Josephinium Assocs.*, nor *Heaverlo*, nor *Port of Longview* involved any issue of title.

Munden does not support Respondents' cause. In *Munden*, the court offered as examples of affirmative equitable defenses that are "*based on facts which excuse a tenant's breach*" a breach of implied warranty of habitability and a breach of covenant of quiet enjoyment. 105 Wn. 2d 45. Nothing in *Munden* remotely supports recognition of an equitable defense of failure to convey title.

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[66] Unpublished Opinion at 9-10; App. 1.

The range of defenses allowed under *Munden* continues to be construed narrowly. *Angelo Property Co., LP v. Hafiz,* 167 Wn. App. 789, 811-16, 274 P. 3d 1075, *review denied,* 175 Wn. 2d 1012, 287 P.3d 594 (2012).

In *Josephinium Assocs. v. Kahli*, the court recognized unlawful discrimination as a defense to an unlawful detainer. 111 Wn. App. 632. The Court of Appeals gave no explanation how an equitable defense of unlawful discrimination supports an equitable defense of failure to convey title.

In *Josephinium Assocs. v. Kahli,* the court repeated the test for determining when an equitable defense arises: "*An equitable defense arises when "there is 'a substantive legal right, that is, a right that comes within the scope of judicial action, as distinguished from a mere moral right'" and the usual legal remedies are unavailing.*" 111 Wn. App. 624-25. The Court of Appeals did not address this test.

Consideration of the test here compels the conclusion Respondents are not entitled to raise issues of title. As indicated by the *Federal National Mortgage Association v. Ndiaye, et al.,* line of cases, Respondents do not have a substantive legal right to raise issues of title in an unlawful detainer. Further, the availability of remedies such as quiet title militates against an equitable defense of failure to transfer title.

Nor did the Court of Appeals address the practical consequences of recognizing an equitable defense of failure to convey title. By allowing such a defense, tenants will be able to evade the rule against issues of title followed in *Federal National Mortgage Association v. Ndiaye*, *Puget Sound Inv. Grp. v. Bridges*, *Proctor v. Forsythe*, and *Sundholm v. Patch.* As a result, as evidenced by the record in this case, by recognizing equitable defense of failure to convey title, an unlawful detainer will for many litigants become something other than the limited summary remedy contemplated by the Legislature.

B. THE COURT OF APPEALS DECISION MERITS REVIEW UNDER RAP 13.4 (b) (1), (2).

RAP 13.4 (b) (1), (2) authorize the Court to accept review upon a showing of conflict with decisions of the Supreme Court or the Court of Appeals. As set forth in Paragraph VIIA, above, by recognizing an affirmative equitable defense of failure to transfer title in an unlawful detainer, the decision of the Court of Appeals is in conflict with *Federal National Mortgage Association v. Ndiaye*, *Puget Sound Inv. Grp. v. Bridges*, *Proctor v. Forsythe*, and *Sundholm v. Patch.*

The Court of Appeals recognized a post-REPSA agreement among the parties.[67] The Court of Appeals described that agreement as consisting of Respondents' oral testimony, trial Exhibit 7, the January 30, 2008 real

[67] Unpublished Opinion at 16-17; App. 1.

estate purchase and sale agreement (REPSA) from Appellant to Respondents regarding the 14712 72nd St. E. property, and the other REPSA and addenda, and Exhibit 9, the October 15, 2008 REPSA from Appellant to Respondents regarding the14712 72nd St. E. property.[68]

The Court of Appeals had previously stated the October 15, 2008 REPSA had terminated. "*Thus, both the final REPSA governing the Roesch property sale and the attached rental agreements had terminated nearly two years before September 2012, when the Bohms ceased making payments to Fred.*"[69]

The Court of Appeals thus created a contract for the parties out of failed purchase and sale agreements. The Court of Appeals cited no authority for its actions. The Court of Appeals' reliance upon those failed REPSAs for any purpose conflicts with well-established Washington law - that absent evidence of waiver or estoppel, a purchase and sale agreement where time of is of the essence becomes a nullity where timely performance is not tendered. *Nadeau v. Beers*, 73 Wn.2d 608, 610, 440 P.2d 164 (1968). "[*O*]*nce a termination date expires, in the absence of an existing waiver or estoppel, the agreement is dead.*" *Mid-Town Partnership v. Preston*, 69 Wn. App. 233, 227, 848 P.2d 1268 (1993); see also *Vacova Co. v. Farrell*, 62 Wn. App. 386, 814 P.2d 255 (1991).

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[68] *Ibid.*
[69] Unpublished Opinion at 14; App. 1.

The Court of Appeals' decision thus conflicts with *Nadeau v. Beers*, *Mid-Town Partnership v. Preston*, and *Vacova Co. v. Farrell.*

A court cannot upon general considerations of abstract justice make a contract for the parties that they did not make for themselves. *Wagner v. Wagner*, 95 Wn. 2d 94, 104, 621 P. 2d 1279 (1980); *Dragt v. Dragt/DeTray,* 139 Wn. App. 560, 573, 161 P. 3d 463, *review denied,* 163 Wash.2d 1042, 187 P.3d 269 (2008). The Court of Appeals never inquired as to what was Petitioner's involvement in the post-REPSA agreement. Respondent Candy Bohm testified "*Mike never involved himself in this transaction with me.*"[70] The record contains no viable document signed by Petitioner in connection with that agreement. By conjuring up a contract made of failed purchase and sale agreements, the Court of Appeals' decision conflicts with *Wagner* and *Dragt.*

C. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S AWARD OF ATTORNEY FEES TO RESPONDENTS AND IN AWARDING ATTORNEY FEES ON APPEAL TO RESPONDENTS.

The Court of Appeals' errors discussed above undermine its affirmance of the trial court's award of attorney fees to Respondents and its decision to award Respondents attorney fees on appeal. As a result of those errors, Respondents are not the "prevailing party" for purposes of attorney fees. Respondents did not prevail under the October 15, 2008

[70] VRP II p. 452 line 9.

REPSA with its attorney fee clause. Instead the Court of Appeals affirmed the trial court's judgment based upon a post-REPSA agreement that has no attorney fee clause. The Court of Appeals therefore erred in awarding attorney fees on appeal to Respondents. *CPL (Delaware) LLC v. Conley*, 110 Wn. App. 786, 797-98, 40 P. 3d 679 (2002).

D. PETITIONER REQUESTS AN AWARD OF ATTORNEY FEES IF THE COURT GRANTS REVIEW.

If he prevails, Petitioner requests an award of attorney fees incurred on appeal, pursuant to paragraph 11 of the lease[71], RAP 18.1 and RCW 4.84.330. Paragraph 11 applies here, even if the lease has expired. *Marsh &McLennan Bldg., Inc. v. Clapp*, 96 Wn. App. 636, 644, 980 P. 3d 311 (1999). An award of attorney fees is mandatory. *Singleton v. Frost*, 108 Wn. 2d 723, 727-28, 742 P. 2d 1224 (1987). If the Court remands this case, the Court should pursuant to RAP 18.1 (i) direct the amount of fees and expenses be determined by the trial court after remand.

VIII. CONCLUSION.

If review is granted, the Court should reverse the decision of the Court of Appeals and the trial court's order on jury verdict, verdict, judgment and other orders, and remand for trial. Respectfully submitted,

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[71] EX 9.

IX. APPENDIX.

1. Court of Appeals Decision

2. Statutes and Court Rules

APPENDIX 1

Filed
Washington State
Court of Appeals
Division Two

January 24, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MICHAEL L. ROESCH, Appellant, v. CARL BOHM and CANDY BOHM, Respondents.	No. 48083-2-II UNPUBLISHED OPINION

JOHANSON, J. — Michael Roesch appeals the jury's verdict in an unlawful detainer action that Carl and Candy Bohm were excused from paying Michael rent.[1] We hold that the trial court did not exceed its subject matter jurisdiction and accordingly that it properly admitted the challenged exhibits and instructed the jury. Because we hold that there was substantial and competent evidence to support the verdict, we also hold that the trial court properly denied the CR 50 motions, denied the CR 59(a) motion, entered the order on the jury verdict, and awarded attorney fees to the Bohms. For these reasons, we affirm.

[1] For clarity, where appropriate, we refer to the Bohms and to Fred and Michael Roesch by their first names. The Bohms divorced in 2014; Candy testified that as part of the divorce, she received all of Carl's interest in the property located at 72nd Street in Sumner (the Roesch property).

FACTS

I. BACKGROUND FACTS

At all relevant times, Michael held title to property located on 72nd Street in Sumner (the Roesch property) that was subject to two mortgages. The Bohms owned property on 60th Street E. in Sumner (the Bohm property) subject to a mortgage. Candy's parents, Hillard and Geraldine Rudolph, owned adjoining property on 60th Street E. (the Rudolph property).

In 2008, Michael's brother, Fred, offered to buy the Bohm and Rudolph properties. The Bohms and the Rudolphs were willing to sell if they could obtain another property where they could all reside. The parties entered into a convoluted series of real estate transactions that resulted in the Bohms and the Rudolphs moving to the Roesch property in November 2009. After this "land swap," Michael continued to own the Roesch property and Fred acquired the Rudolph property. 3 Report of Proceedings (RP) at 324. Fred agreed to purchase the Bohm property, but that property was ultimately foreclosed upon.

II. PROCEDURAL BACKGROUND

In April 2015, Michael filed an unlawful detainer complaint alleging that the Bohms resided on the Roesch property and had failed to pay monthly rent to him since October 2012. Michael then filed a motion for an order to show cause why he should not obtain a writ of restitution that would restore possession of the Roesch property and be awarded damages for unpaid rent. A superior court commissioner determined that there was a significant issue as to the right of possession of the Roesch property, denied the writ of restitution, and directed the parties to secure a trial date.

Candy filed an amended answer in which she alleged counterclaims against both Michael and Fred. The trial court dismissed these counterclaims because they exceeded the limited subject matter jurisdiction in an unlawful detainer action.[2] At Michael's summary judgment hearing, the trial court stated that the only issues that the jury could consider were whether there was an enforceable lease and whether the Bohms had an excuse for nonpayment.

III. EVIDENTIARY RULINGS

The Bohms proposed to admit, as relevant here, 11 exhibits consisting of real estate purchase and sale agreements (REPSA) and related addenda regarding the Roesch, Bohm, and Rudolph properties' anticipated sales.[3] The trial court admitted the REPSA and addenda exhibits during trial. Michael contemporaneously stated that he had no objection to the admission of exhibits 9, 12, and 23 through 26.

IV. TRIAL TESTIMONY

A. MICHAEL'S TESTIMONY

Michael testified that he owned the Roesch property, which was subject to mortgages. The Bohms resided at the Roesch property prior to the anticipated closing of that property's sale under the terms of rental agreements that the Bohms had signed. Michael instituted the unlawful detainer

[2] The trial court also denied Candy's motion to have Geraldine Rudolph intervene and to join Fred as a third party defendant. At the intervention hearing, the trial court recognized that the case was "much more complicated than just simply a landlord tenant" dispute. 1 RP at 5. And the trial court expressed that the Bohms should have an opportunity to explain the circumstances under which they were living so they could present "an excuse for not paying." 1 RP at 10.

[3] We refer to these exhibits collectively as the "REPSA and addenda exhibits."

action and sought to collect unpaid rent beginning in October 2012 because he "[became] aware that the payments required under" the rental agreements' terms were not being made. 2 RP at 142.

During cross-examination, Michael testified that the rental agreements were part of the final REPSA between the Bohms and Michael contracting to sell the Roesch property to the Bohms upon the Rudolph property's resale or refinance. This final REPSA regarding the Roesch property stated that it would terminate "10/15/2010 Upon resale or refinace [sic] of" the Rudolph property. Clerk's Papers (CP) at 768. The rental agreements attached to this REPSA similarly stated that they would terminate on October 15, 2010.

Michael had never received any rent payments from the Bohms, although the Bohms made monthly payments required under the lease to someone other than Michael. Michael had indirectly benefited because those payments were in some manner applied toward the mortgages on the Roesch property.

B. THE BOHMS' EVIDENCE

1. BROKER'S TESTIMONY

A real estate broker who assisted in preparing some of the REPSAs testified for the Bohms and explained the anticipated property sales' interrelation. Fred wanted to buy the contiguous Rudolph and Bohm properties in order to develop them. And the Bohms and the Rudolphs were willing to sell if they acquired the Roesch property in return. As expressed in initial REPSAs that governed the Roesch and Bohm properties' sales, it was not intended that the Bohms would have to pay out of pocket to acquire the Roesch property. Fred also wanted the Bohms and the Rudolphs to adjust their boundary line to enlarge the Rudolph property.

The Bohms and the Rudolphs adjusted their boundary line pursuant to the parties' agreements, and Fred ultimately purchased the Rudolph property. After the Rudolphs received the sale proceeds, they wrote a check for the same amount to Fred.

The Bohms had agreed to sell the Bohm property to Fred, and accordingly, they and the Rudolphs moved to the Roesch property. In an addendum to REPSAs governing the Rudolph and Roesch property sales, Fred agreed to make all future Bohm property mortgage payments. However, Fred did not make those payments, and the Bohm property was foreclosed upon. The Bohm property's sale to Fred never closed.

The Roesch property's sale to the Bohms did not close either because closing was conditioned on Fred reselling or refinancing the Rudolph property, which never occurred. Fred was to use the funds from the resale or refinance to pay off the Roesch property mortgage so that the Bohms could obtain unencumbered title.

The broker also testified that the final REPSA in which the Bohms had agreed to purchase the Roesch property was conditioned on the Bohms' obtaining a loan to pay off the Roesch property mortgages. But the parties never intended for the Bohms to obtain that loan because the money to pay off the mortgages was to come from Fred.

The Bohms began making payments on a total of between $70,000 and $80,000 to compensate Fred for making improvements on the Roesch property.[4] These payments were approximately $790 monthly.

[4] This amount also included the cost to Fred of paying an overage on a reverse mortgage encumbering the Rudolph property when Fred purchased that property.

2. THE BOHMS' AND THE RUDOLPHS' TESTIMONY

The Bohms testified that they and the Rudolphs sought to sell their properties in exchange for the Roesch property and that the Rudolphs agreed to a boundary line adjustment pursuant to the Rudolphs' agreement to sell Fred the Rudolph property. It was never intended for the Bohms to pay out of pocket to acquire the Roesch property; Fred was supposed to satisfy the Roesch property mortgages. The Bohms were never required to obtain a loan to pay off those mortgages. The Rudolphs repaid Fred the proceeds from the Rudolph property's sale so that Fred would use that amount to pay off the Roesch property mortgages.

The Bohms never made—or were required to make—any rent payments to Michael despite the rental agreements' terms. The Bohms did make monthly payments, which were "house payments," to Fred on a total of approximately $77,000, including amounts compensating Fred for making improvements to the Roesch property. 3 RP at 438. The Bohms continued to make these payments even after October 2010, the closing date for the Roesch property under the final REPSA, because they still believed that Fred would pay off the Roesch mortgages. But the Bohms stopped making payments to Fred in September 2012 for the work that he had done. Their excuse for nonpayment was that Fred stopped providing receipts for the improvements that he claimed he had made on the Roesch property. Further, their payments served to increase the Roesch property's equity without any corresponding benefit to themselves.

V. MICHAEL'S MOTION FOR JUDGMENT

Following the Bohms' case, Michael moved for judgment as a matter of law under CR 50(a). The trial court denied Michael's motion and orally ruled that there was sufficient evidence for the jury to consider.

VI. JURY INSTRUCTIONS

The jury instructions included a summary of the parties' claims as instruction 2.

> (1) The plaintiff, [Michael] has brought this case as an unlawful detainer action, asserting that the Defendants, the Bohms, have failed to pay rent payments that [Michael] asserts are owed to him pursuant to a Rental Agreement and that he is, therefore, entitled to have possession of the [Roesch property] restored to him.
>
> (2) The [Bohms] deny that [Michael] is entitled to possession of the property or that they are obligated to make any rent payments to the Plaintiff. The [Bohms] also assert that [Michael] has failed to meet his obligations owing to them under the terms of a Real Estate Purchase and Sale Agreement of which the Rental Agreement was a part.
>
> (3) The Defendant [Candy] has also asserted that they entered into agreements with the Plaintiff's brother, [Fred] and that [Fred] has breached his obligations owing to the Defendant, [Candy] in failing to pay off the mortgage obligations owing against the subject property and then transferring to [Candy] title [to] the subject property, excusing her from making any further payments to either of them and entitling her to the continued right of possession of the [Roesch property].
>
> (4) [Michael] denies these claims.

CP at 970. The trial court included paragraphs (2) and (3) in the instruction despite Michael's objection that those paragraphs exceeded the court's jurisdiction.

Instruction 11 listed the propositions that the Bohms had to prove to prevail on their affirmative equitable defense (the excuse for nonpayment):

> (1) That [the Bohms] entered into Agreements with [Fred];
>
> *(2) That the terms of the Agreements included an obligation on the part of [Fred] to pay off the mortgage obligations on the [Roesch property] and provide for [Michael] to transfer title to this property to the Bohms;*
>
> (3) That [Fred] breached the Agreement in one or more of the ways claimed by [Candy];
>
> (4) That [the Bohms] were not in breach of their obligations under the Agreements with [Fred] or were excused from their obligations;
>
> (5) That [Candy] was damaged as a result of [Fred's] breach.
>
> If you find from your consideration of all the evidence that this affirmative defense has been proved, your verdict should be for the Bohms on this claim. On the other hand, if this affirmative defense has not been proved, then your verdict should be for [Michael] on this claim.

CP at 979-80 (emphasis added).

The trial court overruled Michael's objection to the italicized paragraph on the basis that it was not related to the issue of the premises' possession. However, the trial court declined to instruct the jury regarding any affirmative defenses other than the Bohms' excuse for nonpayment.

VII. VERDICT AND ATTORNEY FEES

The jury returned a special verdict in which it found that the Bohms were "excused from making rental payments on the [l]ease."[5] 4 RP at 551. Pursuant to the verdict, the trial court dismissed Michael's unlawful detainer claim with prejudice. The trial court found that the Bohms and Michael had agreed as part of these transactions that the prevailing party in litigation would be entitled to reasonable attorney fees and awarded fees to the Bohms.

VIII. RENEWED MOTION FOR JUDGMENT AND MOTION FOR NEW TRIAL OR RECONSIDERATION

After the trial, Michael renewed his motion for judgment under CR 50(b) and moved for a new trial or reconsideration under CR 59(a)(1), (6) through (9). In his CR 59(a) motion, Michael argued that the REPSA and addenda exhibits' admission exceeded unlawful detainer's limited subject matter jurisdiction. Michael also renewed his CR 50(a) arguments that there was no evidence to support the jury's verdict.

The trial court denied both motions and reasoned that it was immaterial whether or not the REPSAs had expired because those agreements explained why the Bohms thought that they were excused from making payments under the lease.

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[5] The trial court denied the Bohms' subsequent motion to adjust the jury verdict to state that the Bohms had the right to the Roesch property's possession because "the jury wasn't asked . . . how they would have answered who has the right to possess. The jury was asked, do they have an excuse for not paying." 4 RP at 602-03.

ANALYSIS

I. SUBJECT MATTER JURISDICTION

Underlying Michael's arguments is his contention that the trial court exceeded unlawful detainer's limited subject matter jurisdiction when it allowed the Bohms to explain why they were excused from paying rent.[6] We disagree.

A. STANDARD OF REVIEW AND LEGAL PRINCIPLES

We review de novo whether a trial court had subject matter jurisdiction over a controversy. *Angelo Prop. Co. v. Hafiz*, 167 Wn. App. 789, 808, 274 P.3d 1075 (2012). Lack of subject matter jurisdiction renders a trial court powerless to decide a case. *Angelo Prop. Co.*, 167 Wn. App. at 808.

The subject matter jurisdiction in unlawful detainer is limited because unlawful detainer is a summary proceeding for recovering leased property's possession. *Angelo Prop. Co.*, 167 Wn. App. at 808; *see* RCW 59.12.030. The proceeding is "'limited to the question of possession and related issues such as restitution of the premises and rent.'" *Angelo Prop. Co.*, 167 Wn. App. at 809 (quoting *Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985)). Thus, the parties in an unlawful detainer action may not litigate claims to title. *Puget Sound Inv. Grp., Inc. v. Bridges*, 92 Wn. App. 523, 526, 963 P.2d 944 (1998).

The defendant in an unlawful detainer action may "assert any legal or equitable defense or set-off arising out of the tenancy." RCW 59.18.380. In order to protect unlawful detainer's

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[6] In his reply brief, quoting *People's National Bank of Washington v. Ostrander*, 6 Wn. App. 28, 31, 491 P.2d 1058 (1971), Michael briefly argues that the usual legal remedies were available to the Bohms so that they were not entitled to an affirmative equitable defense. We decline to address this argument because it is first raised in Michael's reply brief. *See* RAP 10.3(c).

summary nature, defenses "'arise out of'" a tenancy only if they affect the right of possession or are based on facts excusing the tenant's breach. *Josephinium Assocs. v. Kahli*, 111 Wn. App. 617, 625, 45 P.3d 627 (2002) (quoting *Munden*, 105 Wn.2d at 45). When the unlawful detainer action is based upon the tenant's failure to pay, we look to whether there is a "'legal justification for nonpayment.'" *Josephinium Assocs.*, 111 Wn. App. at 625 (quoting *Heaverlo v. Keico Indus., Inc.*, 80 Wn. App. 724, 731, 911 P.2d 406 (1996)).

B. THE BOHMS' AFFIRMATIVE EQUITABLE DEFENSE

1. MATTERS THAT "ARISE OUT OF" THE TENANCY

Michael argues that only a "very narrow range of matter[s]" "'*aris[e] out of*'" the tenancy and excuse a tenant from paying rent and that the Bohms' affirmative defense of nonpayment falls outside that range. Br. of Appellant at 24-25 (quoting RCW 59.18.380). We disagree.

It is well established that an unlawful detainer action is narrow in scope. *See Josephinium Assocs.*, 111 Wn. App. at 624. Nevertheless, trial courts must consider a defense that "arises out of the tenancy." *Josephinium Assocs.*, 111 Wn. App. at 625. Thus, our courts have permitted tenants to assert affirmative equitable defenses that are based on facts excusing a tenant's breach. *Munden*, 105 Wn.2d at 45; *see Josephinium Assocs.*, 111 Wn. App. at 626-27; *Port of Longview v. Int'l Raw Materials, Ltd.*, 96 Wn. App. 431, 444, 979 P.2d 917 (1999).

At trial, the Bohms provided evidence that the agreement between the Bohms, the Rudolphs, and Fred and Michael included an obligation on Fred's part to pay off the Roesch property mortgages so that the Bohms could acquire unencumbered title to the Roesch property from Michael. The testimony was uncontroverted that Fred had not done so. The Bohms maintained that their agreements with Fred and Michael did not include an obligation to pay

Michael rent but only an obligation to make "house payments" to Fred. 3 RP at 438. The Bohms' defense was that Fred's breach of his obligations under the overall agreement excused them from their obligations to Fred.

The Bohms' defense, if believed, established that they had a legal justification for nonpayment. *See Josephinium Assocs.*, 111 Wn. App. at 625. The Bohms defended on the basis that Fred's failure to enable Michael to transfer the Roesch property's title to them excused them from any obligation to make payments to either Fred or Michael. This defense "aris[es] out of the tenancy" because it was based upon facts that excused the Bohms' breach, and therefore the trial court was required to consider it. RCW 59.18.380; *Josephinium Assocs.*, 111 Wn. App. at 625. Thus, the Bohms' excuse for nonpayment was within the limited subject matter jurisdiction in an unlawful detainer action.[7]

2. NOT LITIGATION OF "TITLE"

Next, Michael argues that the trial court erred because it allowed the Bohms to litigate the Roesch property's title despite having dismissed their counterclaims. Again, we disagree.

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[7] Michael cites to several cases involving equitable affirmative defenses or counterclaims in unlawful detainer actions as support for the proposition that "only a very narrow range of matter" excuses nonpayment of rent. Br. of Appellant at 25. But only one of these cases barred breach of contract as a counterclaim or affirmative defense in an unlawful detainer action. *Savings Bank of Puget Sound v. Mink*, 49 Wn. App. 204, 209, 741 P.2d 1043 (1987). In *Savings Bank*, Division One affirmed the dismissal of a homeowner's litany of counterclaims and affirmative defenses related to a trustee's conflict of interest, including a breach of contract claim, in a postforeclosure unlawful detainer action. 49 Wn. App. at 209. The appellate court stated that the counterclaims and defenses "do not directly relate to the 'question of possession.'" *Savings Bank*, 49 Wn. App. at 209. But *Savings Bank* is distinguishable. The breach of contract claim derived from a conflict of interest claim. *Savings Bank*, 49 Wn. App. at 209-10. And while a conflict of interest could be a basis for destroying the purchaser's right of possession, the homeowner failed to support the conflict of interest or related claims with evidence. *Savings Bank*, 49 Wn. App. at 210.

Before trial, the trial court dismissed the Bohms' counterclaims as outside unlawful detainer's limited subject matter jurisdiction. The trial court orally ruled that "the only issue . . . is was there a lease, was it enforceable, [and] did [the Bohms] have a reason to stop paying?" 1 RP at 96. But the trial court noted that its dismissal of the counterclaims would not foreclose the Bohms from having an opportunity to explain why they did not have any obligation to pay.

Snuffin v. Mayo supports the conclusion that the trial court did not err. 6 Wn. App. 525, 494 P.2d 497 (1972). There, we held that a trial court could hear an affirmative equitable defense despite unlawful detainer's statutorily limited jurisdiction. *Snuffin*, 6 Wn. App. at 528. Although the trial court "had no authority to quiet title" to the land at issue, that did not foreclose the court from determining whether another party held the land in constructive trust for the defendant. *Snuffin*, 6 Wn. App. at 528. "A constructive trust is clearly an equitable defense and as [the plaintiffs'] rights derived from those of [the alleged constructive trustee], the resolution of [the constructive trust] issue was necessary to a determination of right to possession." *Snuffin*, 6 Wn. App. at 528. Thus, a trial court may still consider a defendant's affirmative equitable defense even if that defense overlaps somewhat with title-related issues. *See Snuffin*, 6 Wn. App. at 528.

Here, similarly to *Snuffin*, the Bohms' affirmative equitable defense—their excuse for nonpayment—overlapped with title-related issues. Determining whether Fred had breached his obligations was necessary to determining whether the Bohms were excused from making payments. Nevertheless, the affirmative equitable defense remained within the trial court's subject matter jurisdiction. *See Snuffin*, 6 Wn. App. at 528.

Michael asks this court to assume that because the trial court admitted some of the same exhibits the Bohms relied on as evidence of their dismissed counterclaims, the jury necessarily

determined the Roesch property's title. But Michael fails to explain how the REPSA and addenda's mere admission amounted to litigating title. Although the excuse for nonpayment overlapped with title issues, the jury's verdict shows that the unlawful detainer action resolved only one matter: whether the Bohms were "excused from making rental payments on the [l]ease." CP at 989. We reject Michael's arguments to the contrary.

We hold that the trial court did not exceed its subject matter jurisdiction because it properly allowed the Bohms to present an affirmative equitable defense arising out of the lease and presenting a legal justification for nonpayment.

II. Issues Related to Subject Matter Jurisdiction

Michael argues that the trial court erred when it (1) admitted the REPSA and addenda exhibits and (2) included certain jury instructions because the trial court exceeded unlawful detainer's limited subject matter jurisdiction. As discussed above, we hold that the trial court did not exceed its subject matter jurisdiction; thus, we reject Michael's evidentiary and jury instruction arguments because he relies solely upon his failed argument that the trial court exceeded its subject matter jurisdiction.[8]

III. Motions for Judgment as a Matter of Law

Michael contends that the trial court erred when it denied his CR 50 motions. Again, we reject his arguments.

[8] Further, Michael waived his objections to exhibits 9, 12, and 23 through 26's admission when he stated at trial that he had no objection to these exhibits' admission.

A. STANDARD OF REVIEW AND APPLICABLE LAW

We review de novo the denial of judgment as a matter of law, applying the same standard as the trial court. *Paetsch v. Spokane Dermatology Clinic, PS*, 182 Wn.2d 842, 848, 348 P.3d 389 (2015). Judgment as a matter of law should be granted only when "no competent and substantial evidence exists to support a verdict." *Paetsch*, 182 Wn.2d at 848. We construe all facts and reasonable inferences in the nonmoving party's favor. *Paetsch*, 182 Wn.2d at 848.

B. FRED OBLIGATED TO PAY BOHM PROPERTY MORTGAGE

Michael claims that the final REPSA governing the Roesch property's purchase superseded all other agreements and contained no obligation on Fred's part to pay the Bohm property mortgage. Thus, Michael argues that there was no evidence before the jury that Fred had an obligation to pay the Bohm property mortgage. This argument fails.

The final REPSA regarding the Roesch property sale states that the closing date was "10/15/2010 Upon resale or refinace [sic] of" the Rudolph property. CP at 768. The Rudolph property was never resold or refinanced. The rental agreements attached to this REPSA terminated by their own terms on October 15, 2010. Thus, both the final REPSA governing the Roesch property sale and the attached rental agreements had terminated nearly two years before September 2012, when the Bohms ceased making payments to Fred.

Michael's arguments fail to explain why the REPSA and addenda, none of which were still in force when the Bohms ceased making payments, were not admissible to provide background explaining the parties' obligations after October 2010. Thus, Michael fails to establish that the final Roesch property REPSA alone should be considered in determining whether Fred had an obligation to pay the Bohm property mortgage. Michael's arguments also ignore the broker's trial

testimony that Fred agreed to make the Bohm property mortgage payments and then failed to do so.

Further, even if there were no evidence that Fred had an obligation to pay off the Bohm property mortgage, that argument fails to establish that there was no competent and substantial evidence to support the verdict. The Bohms defended their failure to pay rent on the basis of Fred's failure to pay the Roesch mortgages, not Fred's failure to pay the Bohm property mortgage. Thus, Michael's argument that there is no evidence of Fred's breach of an obligation to pay the Bohms' mortgage and thus that there is no evidence to support the jury's verdict must fail.

C. THE BOHMS NOT REQUIRED TO OBTAIN LOAN AS A CONDITION PRECEDENT

Next, Michael argues that the final Roesch property REPSA required the Bohms to obtain a loan as a condition precedent to the Roesch property's sale, which the Bohms admitted they never did. Thus, Michael claims that he no longer had a duty to close on the Roesch property sale. We reject Michael's arguments.

To prevail on their affirmative equitable defense, the Bohms had to prove, among other things, that they "were not in breach of their obligations under the Agreements with [Fred] or were excused from their obligations." CP at 980. As discussed in the previous section, the final Roesch property REPSA requiring the Bohms to obtain the loan expired "10/15/2010 Upon resale or refinace [sic] of" the Rudolph property. CP at 768. Michael fails to explain why the expired REPSA's terms are dispositive to understanding the parties' existing overall agreement's terms.

The Bohms presented evidence that they were not obligated to obtain a loan for the Roesch property purchase. For example, the real estate broker who facilitated the agreements testified that it was the parties' intent that the Bohms would not pay out of pocket to acquire the Roesch property

and that the Bohms were never obligated to obtain that loan because the money to pay off the mortgages was to come from Fred.[9] The Bohms similarly testified that they were never required to obtain a loan. Thus, there was competent and substantial evidence to support the Bohms' contention that they were not required to obtain a loan as a condition precedent to the Roesch property purchase. Accordingly, there was substantial evidence that the Bohms were not in breach of their obligations or were excused from those obligations, one of the elements that the Bohms had to prove to prevail on their affirmative equitable defense. We reject Michael's arguments to the contrary.

D. FRED TO PAY ROESCH PROPERTY MORTGAGES

Michael also claims that the Bohms failed to provide any evidence of oral or written agreements with Fred that Fred would apply the Rudolph property sale's proceeds toward the Roesch property mortgages other than exhibit 7, an expired REPSA. This argument fails.

To prevail on their affirmative equitable defense, the Bohms had to establish, among other things, that "the terms of the Agreements included an obligation on the part of [Fred] to pay off the mortgage obligations on the [Roesch property] and provide for [Michael] to transfer title to this property to the Bohms." CP at 980. Michael is incorrect that the Bohms failed to provide evidence that the agreements' terms included an obligation for Fred to pay the Roesch property mortgages. The Bohms both testified that the parties agreed that Fred would satisfy the existing Roesch property mortgages. This agreement was also reflected in exhibit 7, an older REPSA in

[9] Michael objects that this is impermissible parol evidence used to contradict the final Roesch property REPSA's terms. But the broker's testimony was not offered to contradict a valid agreement's terms; it was offered to explain the terms of the parties' agreement after the final Roesch property REPSA had terminated.

which the Bohms agreed to purchase the Roesch property. And as discussed, although this REPSA expired, it, like the other REPSA and addenda, is competent and substantial evidence of the parties' overall agreement when the Bohms ceased to make payments.

Further, the final REPSA between Michael and the Bohms regarding the Roesch property sale itself provides support for Fred's obligation to pay off the Roesch property mortgages. This REPSA's terms conditioned the Roesch property sale's closing on Fred's resale or refinance of the Rudolph property. Thus, it was a reasonable inference from this REPSA's terms that the resale or refinance funds were necessary before the Roesch property closing could occur because Fred was to use the Rudolph property resale or refinance funds to pay off the Roesch property mortgages. For these reasons, there was competent and substantial evidence to support Fred having an obligation to pay off the Roesch property mortgages as part of the agreement under which the Bohms lived on the Roesch property.

Because all of Michael's arguments fail, it cannot be said that "no competent or substantial evidence exists to support a verdict." *Paetsch*, 182 Wn.2d at 848. Viewing the evidence in the light most favorable to the Bohms and drawing reasonable inferences from that evidence, the Bohms established substantial evidence supporting their affirmative equitable defense, including that they were not in breach of their obligations under the agreements and that Fred had an obligation to pay the Roesch property mortgages. The trial court properly denied Michael's CR 50 motions.

IV. CR 59(A) MOTION AND FINAL VERDICT

Relying entirely upon his subject matter jurisdiction and lack of substantial evidence arguments, Michael argues that the trial court abused its discretion when it denied his CR 59(a)

motion for new trial or reconsideration and erred when it entered its order on the jury verdict that dismissed the unlawful detainer action with prejudice. These arguments necessarily fail.

We review a trial court's denial of a CR 59(a) motion for abuse of discretion. *Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002). CR 59(a) permits a trial court to grant a motion for new trial or reconsideration if the moving party establishes one of the following grounds:

> (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;
>
> . . . .
>
> (6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;
>
> (7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;
>
> (8) Error in law occurring at the trial and objected to at the time by the party making the application; or
>
> (9) That substantial justice has not been done.

In his CR 59(a) motion, Michael argued that the trial court exceeded its subject matter jurisdiction when it allowed the Bohms to assert their affirmative equitable defense. Thus, he moved for a new trial or reconsideration under CR 59(a)(1), (6), (8), (9). Michael also argued that there was no evidence to support the verdict and relied on his motion for judgment as a matter of law. Michael moved for a new trial under CR 59(a)(7). CP at 1107.

For the reasons discussed above, we hold that the trial court did not exceed its subject matter jurisdiction. Accordingly, we hold that the trial court did not abuse its discretion when it rejected Michael's CR 59(a)(1), (6), (8), and (9) arguments. And because there was substantial evidence to support the jury's verdict, the trial court did not abuse its discretion when it rejected Michael's CR 59(a)(7) argument. Finally, we reject Michael's argument that the trial court erred

in entering the order on the jury verdict because, as discussed, Michael's subject matter jurisdiction and CR 50 arguments fail.

V. TRIAL COURT'S ATTORNEY FEES AWARD

Michael argues that because the trial court allegedly exceeded its subject matter jurisdiction in this action, the Bohms have not "prevailed," and we should reverse the trial court's attorney fee award to the Bohms. But as discussed, the trial court did not commit error, and the Bohms were the prevailing party at trial. Michael does not dispute the trial court's basis for awarding attorney fees to the "prevailing party." Accordingly, we affirm the trial court's attorney fee award.

VI. APPELLATE ATTORNEY FEES

The parties agree that the prevailing party is entitled to appellate attorney fees, but each claims to have prevailed. We award the Bohms their attorney fees on appeal.

"Where a statute authorizes fees to the prevailing party, they are available on appeal as well as in the trial court." *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 716, 9 P.3d 898 (2000). RCW 4.84.330 mandates a fee award to the "prevailing party" "[i]n any action on a contract or lease . . . where such contract or lease specifically provides that attorneys' fees and costs" in enforcing the contract's or lease's provisions be awarded to the prevailing party.

The final Roesch property REPSA provides that if either party employs an attorney "to enforce any terms of this Agreement," the prevailing party is entitled to reasonable attorney fees. CP at 781, 783. Because neither party disputes that the prevailing party on appeal is entitled to their attorney fees and because we hold that the Bohms prevail, we award the Bohms their reasonable attorney fees on appeal.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, J.
JOHANSON, J.

We concur:

Bjorgen, C.J.
BJORGEN, C.J.

Melnick, J.
MELNICK, J.

APPENDIX 2

RCW 4.84.330:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.
Attorneys' fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorneys' fees is void.
As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

RCW 59.12.030 (6):

A person who, without the permission of the owner and without having color of title thereto, enters upon land of another and who fails or refuses to remove therefrom after three days' notice, in writing and served upon him or her in the manner provided in RCW 59.12.040. Such person may also be subject to the criminal provisions of chapter 9A.52 RCW...

RCW 59.12.035:

In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than sixty days after the expiration of his or her term without any demand or notice to quit by his or her landlord or the successor in estate of his or her landlord, if any there be, he or she shall be deemed to be holding by permission of his or her landlord or the successor in estate of his or her landlord, if any there be, and shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during said year, and such holding over for the period aforesaid shall be taken and construed as a consent on the part of a tenant to hold for another year.

RCW 59.18.380:

At the time and place fixed for the hearing of plaintiff's motion for a writ of restitution, the defendant, or any person in possession or claiming possession of the property, may answer, orally or in writing, and assert any legal or equitable defense or set-off arising out of the tenancy. If the answer is oral the substance thereof shall be endorsed on the complaint by the court. The court shall examine the parties and witnesses orally to ascertain the merits of the complaint and answer, and if it shall appear that 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, returnable ten days after its date, restoring to the plaintiff possession of the property and if it shall appear to the court that there is no substantial issue of material fact of the right of the plaintiff to be granted other relief as prayed for in the complaint and provided for in this chapter, the court may enter an order and judgment granting so much of such relief as may be sustained by the proof, and the court may grant such other relief as may be prayed for in the plaintiff's complaint and provided for in this chapter, then the court shall enter an order denying any relief sought by the plaintiff for which the court has determined that the plaintiff has no right as a matter of law: PROVIDED, That within three days after the service of the writ of restitution issued prior to final judgment, the defendant, or person in possession of the property, may, in any action for the recovery of possession of the property for failure to pay rent, stay the execution of the writ pending final judgment by paying into court or to the plaintiff, as the court directs, all rent found to be due, and in addition by paying, on a monthly basis pending final judgment, an amount equal to the monthly rent called for by the lease or rental agreement at the time the complaint was filed: PROVIDED FURTHER, That before any writ shall issue prior to final judgment the plaintiff shall execute to the defendant and file in the court a bond in such sum as the court may order, with sufficient surety to be approved by the clerk, 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. The court shall also enter an order directing the parties to proceed to trial on the complaint and answer in the usual manner.
If it appears to the court that the plaintiff should not be restored to possession of the property, the court shall deny plaintiff's motion for a writ of restitution and enter an order directing the parties to proceed to trial within thirty days on the complaint and answer. If it appears to the court

that there is a substantial issue of material fact as to whether or not the plaintiff is entitled to other relief as is prayed for in plaintiff's complaint and provided for in this chapter, or that there is a genuine issue of a material fact pertaining to a legal or equitable defense or set-off raised in the defendant's answer, the court shall grant or deny so much of plaintiff's other relief sought and so much of defendant's defenses or set-off claimed, as may be proper.

RAP 13.4 (b):
Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:
(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 18.1:

(a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.
(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court, except as stated in section (j). The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.
(c) Affidavit of Financial Need. In any action where applicable law mandates consideration of the financial resources of one or more parties regarding an award of attorney fees and expenses, each party must serve upon the other and file a financial affidavit no later than 10 days prior to the date the case is set for oral argument or consideration on the merits; however, in a motion on the merits pursuant to rule 18.14, each party must serve and file a financial affidavit along with its motion or response. Any

answer to an affidavit of financial need must be filed and served within 7 days after service of the affidavit.
(d) Affidavit of Fees and Expenses. Within 10 days after the filing of a decision awarding a party the right to reasonable attorney fees and expenses, the party must serve and file in the appellate court an affidavit detailing the expenses incurred and the services performed by counsel.
(e) Objection to Affidavit of Fees and Expenses; Reply. A party may object to a request for fees and expenses filed pursuant to section (d) by serving and filing an answer with appropriate documentation containing specific objections to the requested fee. The answer must be served and filed within 10 days after service of the affidavit of fees and expenses upon the party. A party may reply to an answer by serving and filing the reply documents within 5 days after the service of the answer upon that party.
(f) Commissioner or Clerk Award Fees and Expenses. A commissioner or clerk will determine the amount of the award, and will notify the parties. The determination will be made without a hearing, unless one is requested by the commissioner or clerk.
(g) Objection to Award. A party may object to the commissioner's or clerk's award only by motion to the appellate court in the same manner and within the same time as provided in rule 17.7 for objections to any other rulings of a commissioner or clerk.
(h) Transmitting Judgment on Award. The clerk will include the award of attorney fees and expenses in the mandate, or the certificate of finality, or in a supplemental judgment. The award of fees and expenses, including interest from the date of the award by the appellate court, may be enforced in the trial court.
(i) Fees and Expenses Determined After Remand. The appellate court may direct that the amount of fees and expenses be determined by the trial court after remand.
(j) Fees for Answering Petition for Review. If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review. A party seeking attorney fees and expenses should request them in the answer to the petition for review. The Supreme Court will decide whether fees are to be awarded at the time the Supreme Court denies the petition for review. If fees are awarded, the party to whom fees are awarded should submit an affidavit of fees and expenses within the time and in the manner provided in section (d). An answer to the request or a

reply to an answer may be filed within the time and in the manner provided in section (e). The commissioner or clerk of the Supreme Court will determine the amount of fees without oral argument, unless oral argument is requested by the commissioner or clerk. Section (g) applies to objections to the award of fees and expenses by the commissioner or clerk.

X. CERTIFICATE OF SERVICE

The undersigned hereby declares that on February 22, 2017, the undersigned served upon Respondents, Carl Bohm and Candy Bohm, the PETITION FOR REVIEW, addressed to the following:

Klaus O. Snyder
Snyder Law Firm
16719-110th Ave Ste C
Puyallup, WA 98374-9156

Dated this 22nd day of February, 2017 at Tacoma, WA.