No. 96836-5

SUPREME COURT
OF THE
STATE OF WASHINGTON

COURT OF APPEALS DIV. I No. 77510-3

SUBWAY REAL ESTATE, LLC, a Delaware limited liability company,

Appellant,

v.

REBECCA J. ARMOUR AKA REBECCA J. WILSON, an individual,

Respondent.

APPELLANT'S PETITION FOR REVIEW

Daniel J. Oates, WSBA No. 39334
Vanessa L. Wheeler, WSBA No. 48205
Drew F. Duggan, WSBA No. 50796
MILLER NASH GRAHAM & DUNN LLP
Pier 70 ~ 2801 Alaskan Way, Suite 300
Seattle, WA 98121
206.777.7537

Attorneys for Appellant
SUBWAY REAL ESTATE, LLC

TABLE OF CONTENTS

I. IDENTITY OF PETITIONER 1

II. DECISION OF THE COURT OF APPEALS 1

III. ISSUES PRESENTED FOR REVIEW 1

IV. STATEMENT OF THE CASE 2

A. FACTUAL BACKGROUND 2

B. PROCEDURAL BACKGROUND 5

V. ARGUMENT FOR WHY REVIEW SHOULD BE ACCEPTED 7

A. MASTER TENANTS HAVE STANDING TO ENFORCE THEIR SUBLEASE AGREEMENTS WITH SUBTENANTS 8

1. The Washington Supreme Court has Consistently Held that a Master Tenant Has Standing to Pursue an Unlawful Detainer Action Against a Subtenant. 8

2. There is a Substantial Public Interest in Ensuring that Master Tenants Have Standing to Pursue Unlawful Detainer Actions Against Subtenants. 11

B. DISMISSAL WITH PREJUDICE IS IMPROPER UNDER RULE 19 13

VI. CONCLUSION 17

Appendix A……20

TABLE OF AUTHORITIES

Cases

Auto. United Trades Org. v. State,
175 Wn. 2d 214, 285 P.3d 52 (2012).....14

Gildon v. Simon Prop. Grp., Inc.,
185 Wn.2d 483, 145 P.3d 1196 (2006).....15

Hannegan v. Roth,
12 Wash. 695, 44 P. 256 (1896).....14

Harrington v. Miller,
4 Wash. 808, 31 P. 325 (1892).....14

Lakemoor Community Club, Inc. v. Swanson,
24 Wn. App. 10, 600 P.2d 1022 (1979).....14, 16

McRae v. Way,
64 Wn.2d 544, 392 P.2d 827 (1964).....10

Orwick v. Fox,
65 Wn. App. 71, 282 P.2d 12, *review denied*, 120
Wn.2d 1014 (1992).....14, 16

Sanders v. General Petroleum Corp. of Cal.,
171 Wash. 250, 17 P.2d 890 (1933).....10

Stahl Brewing & Malting Co. v. Van Buren,
45 Wash. 451, 88 P. 837 (1907).....9

Statutes

RCW 4.84.330 6

RCW 59.12 .....8, 13

RCW 59.12.030 11

RCW 59.12.030(3).....8

RCW 59.12.130 13

Other Authorities

17 Wash. Prac., Real Estate § 6.64 (2d ed.).....9, 13

14 WA. Lawyer's Prac. Manual, 14.4.14 (2018).....10

I. IDENTITY OF PETITIONER

The Petitioner is Subway Real Estate, LLC the master tenant pursuant to a written lease agreement with landlord Seawest Investment Associates, LLC for commercial property located in Kirkland, Washington.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the unpublished opinion issued by the Court of Appeals for Division I in the case of *Subway Real Estate, LLC v. Rebecca J. Armour aka Rebecca Wilson,* No. 77510-3, on January 14, 2019 (attached as Appendix A).

III. ISSUES PRESENTED FOR REVIEW

1. Whether the court of appeals erred in holding that a master tenant lacks standing to maintain an unlawful detainer action against a subtenant pursuant to a valid sublease agreement?

2. Whether the court of appeals erred in affirming the dismissal with prejudice of a master tenant's unlawful detainer action against its subtenant for failure to join a necessary party, without conducting any analysis under Civil Rule 19?

IV. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

On June 3, 2015, Subway Real Estate, LLC, ("Subway"), as master tenant, and Seawest Investment Associates, LLC, as landlord ("Seawest" or "Landlord"), entered into a written lease agreement (the "Master Lease Agreement") for a portion of the premises known as Atcon Plaza, 13110 NE 70th Place, Kirkland, Washington (the "Property"). CP 6-51.[1] The Master Lease Agreement contained the following provision:

> Tenant may assign this Lease or sublet the Premises to any bona-fide licensee/franchisee . . . doing business as a SUBWAY® sandwich shop, without the prior consent of or written notice to the Landlord. Such assignment or subletting shall not alter the Tenant's responsibility to the Landlord under this Lease. Landlord agrees to accept rent from the Tenant, its assignee or sublessee.

CP 43. On November 5, 2015, Subway executed a written sublease agreement (the "Sublease Agreement") with Respondent Rebecca J. Armour aka Rebecca J. Wilson ("Wilson" or "Respondent") so that Wilson could open a Subway® restaurant at the Property pursuant to a

[1] "CP" refers to the designated Clerk's Papers in the Court of Appeals for Division I matter *Subway Real Estate, LLC v. Rebecca J. Armour aka Rebecca J. Wilson,* No. 77510-3.

franchise agreement. CP 53-58. The Sublease Agreement stated that Wilson must "perform and observe all of the obligations of [Subway] under the Master Lease Agreement and make all rental payments directly to the Landlord in the manner set forth in the Master Lease." CP 53 at ¶ 4. Respondent further agreed that if she defaulted on the terms of the Sublease Agreement, Subway had the right to "terminate this Sublease on ten (10) days written notice to [Respondent], and upon such termination, [Respondent] shall quit and surrender the leased premises to [Subway]. . . ." CP 53-54 at ¶ 6. In the event of such termination, Respondent remains liable for all rent under the Sublease Agreement. *Id.*

Subway and Respondent were the only signatories to the Sublease Agreement. CP 55. The Landlord was not a party, and Respondent was prohibited from making any agreements with the Landlord that would modify, cancel, or terminate the Master Lease Agreement. CP 54 at ¶ 10. In the event the Landlord failed to perform its duties under the Master Lease Agreement, the Sublease Agreement required that Respondent notify Subway in writing by certified mail and describe the default in detail. *Id.* at ¶ 9. Subway would not take on any obligations of the Landlord, but it would demand prompt performance of the duties agreed

upon in the Master Lease Agreement. *Id.*

After February 1, 2016, Respondent stopped making rent payments. CP 2. On April 27, 2016, an elderly driver jumped the curb in front of the Property and drove into Respondent's storefront, damaging the exterior, and resulting in the closure of Respondent's Subway restaurant. *See, e.g.,* CP 66-67, 85. Respondent did not reopen until August 9, 2016. CP 66. She asserted she was entitled to rent abatement during this time period, as well as an offset for making repairs to the Property following the accident. CP 93-96. The Landlord disagreed,[2] but Respondent never formally notified Subway of any violation of any duty of the Landlord under the Master Lease Agreement.

On January 6, 2017, the Landlord served Subway with a 10-day Notice to Comply or Vacate. CP 204-206. As part of that Notice, Seawest informed Subway that Subway was in default under the parties' Master Lease Agreement because Respondent had failed to pay rent and CAM charges (and late fees) in the total amount of $20,865.00. CP 206. In

[2] The Master Lease Agreement provides that the Tenant is responsible for making any repairs "occasioned by the act or negligence of Tenant['s]. . . invitees. . . ." CP 16. As such, pursuant to the Sublease Agreement, Respondent was responsible for repairing the damage to the premises exterior caused by its invitee, not the Landlord. CP 53 at ¶ 4.

response to that 10-day Notice to Comply or Vacate, Subway served Respondent with a Notice to Pay or Vacate, with which Wilson did not comply. CP 60, 63. Subway then filed this unlawful detainer and writ of restitution action against Wilson. CP 1-4.

B. PROCEDURAL BACKGROUND

Shortly before trial, Respondent filed a trial brief in which she asserted seven different offsets against the rent and CAM charge payments she had failed to make. CP 91-96. The offset charges related to the repairs Respondent made to the Property, for which Subway had no responsibility. CP 98-99. Subway therefore argued to the trial court that because Respondent's offset claims all had to do with alleged actions (and inactions) of the Landlord, Seawest should be a party to any case in which Respondent asserted the offset. *Id.*

The superior court ultimately agreed that Seawest should be a party to the case so that it could answer Respondent's offset counterclaims. *Id.* Rather than conduct any analysis of the propriety, necessity, or ability of the court to add the Landlord as a party under Rule 19, the court instead rendered a conclusory ruling that Subway was not the proper party to bring the unlawful detainer action. CP 99 ("Subway is not the proper

party to bring an unlawful detainer action against the Subtenant in this situation, because: the Subtenant is obligated to pay rent to the Landlord, not to Subway, [and] the Subtenant has rent-offset rights that can be exercised only against the Landlord, not against Subway."). Relying solely on its conclusion that Subway lacked standing to bring the action, the superior court dismissed the action without prejudice, without performing any analysis of the underlying merits of Subway's claims against Respondent arising out of her failure to pay rent and CAM charges in violation of the express terms of the Sublease Agreement. CP 97-99.

Respondent then filed a motion for attorneys' fees, which Subway opposed on the basis that that (1) the contractual fee provision in the Sublease is a unilateral fee provision; (2) because the fee provision at issue is a unilateral fee provision, RCW 4.84.330 controls; and (3) RCW 4.84.330 expressly requires entry of a "final judgment" before fees can be awarded. CP 118-122. Accordingly, as the court's dismissal without prejudice was not a "final judgment," Respondent could not receive a fee award under RCW 4.84.330. *Id*. But in an apparent effort to effectuate a fee award in favor of Respondent, the superior court changed its prior ruling and decided instead to grant dismissal of Subway's claim *with*

prejudice. CP 133-136. Following the dismissal with prejudice, the superior court denied the Respondent's attorneys' fee motion without prejudice, and invited the Respondent to refile the motion for attorneys' fees based on the Amended Order of Dismissal. CP 138. Having changed the dismissal from "without prejudice" to "with prejudice," the superior court then granted the second-filed motion for attorneys' fees, and improperly awarded Respondent her fees against Subway. CP 221-225.

Without any analysis or citation to authority, the court of appeals issued a perfunctory ruling affirming the dismissal with prejudice, holding that Subway lacked standing to enforce its own Sublease Agreement:

> Under the sublease, Wilson owed rent to Seawest, not Subway. Consequently, Subway did not have standing to bring the unlawful detainer action. The trial court did not err in concluding that dismissal was required. The lack of standing will not change. Therefore, dismissal without prejudice would have been pointless. The trial court did not err in dismissing with prejudice.

Subway Real Estate LLC v. Wilson, Cause No. 77510-3-I, Opinion at 4 [hereinafter Opinion]. Subway now brings this petition for review.

V. ARGUMENT FOR WHY REVIEW SHOULD BE ACCEPTED

Subway seeks review pursuant to RAP 13.4(b)(1) and (4), which provide for review "(1) if the decision of the Court of Appeals is in

conflict with a decision of the Supreme Court;" or "(4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court." This Court should reverse the decision of the court of appeals because it contravenes Washington Supreme Court decisions and the public interest in allowing tenants to enforce the terms of valid subleases.

A. MASTER TENANTS HAVE STANDING TO ENFORCE THEIR SUBLEASE AGREEMENTS WITH SUBTENANTS

The court of appeal's decision in this case is predicated on the conclusory assertion that Subway, a master tenant, lacks standing to enforce its own Sublease Agreement with the Respondent. The decision is contrary to long-established precedent from this court, and creates a myriad of problems with leasing arrangements that have the potential to snarl real property transfers throughout the state of Washington for years to come. As such, acceptance of review is appropriate and necessary.

1. The Washington Supreme Court has Consistently Held that a Master Tenant Has Standing to Pursue an Unlawful Detainer Action Against a Subtenant.

Washington courts have jurisdiction to hear unlawful detainer actions by operation of statute. *See* RCW 59.12 *et seq.* RCW 59.12.030(3)

provides that:

> [A] tenant of real property for a term less than life is guilty of unlawful detainer either . . . [w]hen he or she continues in possession in person or by subtenant after a default in the payment of rent, and after notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, served (in manner in RCW 59.12.040 provided) on behalf of the person entitled to the rent upon the person owing it, has remained uncomplied with for the period of three days after service thereof.

Practically speaking, this often means a landlord will serve the proscribed notice on a tenant who has defaulted in the payment of rent. But for more than a century, Washington courts have held that the landlord is not be the only party whose interest is sufficient to support an unlawful detainer action. *See, e.g., Stahl Brewing & Malting Co. v. Van Buren*, 45 Wash. 451, 88 P. 837 (1907) (holding that a master tenant that accepted rental payments from a subtenant in possession had standing to pursue an unlawful detainer action against the subtenant despite having no sublease agreement with the subtenant). Accordingly, virtually all treatises on Washington law provide that a master tenant has standing to pursue an unlawful detainer action against a subtenant for the subtenant's default under the sublease or any portion of the master lease made part of the sublease. *See, e.g.,* Distinction between assignment and sublease, 17

Wash. Prac., Real Estate § 6.64 (2d ed.) ("[T]he head tenant may, for instance, maintain an unlawful detainer action against the subtenant."); 14 Wash. Lawyer's Prac. Manual, 14.4.14 (2018) ("The plaintiff can be the property owner or some other 'landlord' entitled to performance under the lease, *such as a master tenant* or other property manager.") (emphasis added).

Thus, where a sublessor brought an action against its sublessees, the Washington Supreme Court explicitly held that the sublessor, "on nonpayment of the stipulated rent, undoubtedly had the right to bring an action in unlawful detainer and repossess the premises." *Sanders v. Gen. Petroleum Corp. of Cal.*, 171 Wash. 250, 17 P.2d 890, 893 (1933); *see also McRae v. Way,* 64 Wn.2d 544, 392 P.2d 827 (1964) (holding that a subtenant that otherwise had standing to pursue an unlawful detainer action lost that standing because the subtenant assigned its possessory interest in the sublease agreement to a third party before commencing the unlawful detainer action against the subtenant).

Pursuant to the Master Lease Agreement and Sublease Agreement, there is no dispute that Seawest was the Landlord, Subway was the Master Tenant, and Respondent was the Subtenant. The trial court erred, however,

in holding that Respondent did not owe a duty to pay rent to Subway sufficient to support Subway's standing to bring legal action under RCW 59.12.030. Subway, as Master Tenant, is owed rent by Respondent irrespective of where and to whom Subway designates payments be made. And the express terms of the Sublease Agreement grant Subway the right to terminate the Sublease and regain possession of the Property should "Sublessee . . . default in the performance of *any terms of the Master Lease*. . . ." CP 53 (emphasis added). The leasehold interest possessed by Respondent was created by Subway, and it is Subway to whom Wilson owes a duty. Consistent with Washington Supreme Court precedent, and contrary to the court of appeals' decision in this case, Subway absolutely has standing to enforce the Sublease Agreement.

2. <u>There is a Substantial Public Interest in Ensuring that Master Tenants Have Standing to Pursue Unlawful Detainer Actions Against Subtenants.</u>

The court of appeals' decision in this case has a substantially deleterious impact on the public interest. The court of appeals held, as a matter of law, that Subway did not have standing to enforce the express terms of its own Sublease Agreement with the Respondent. Applying this standard across the state not only violates long-standing Washington

Supreme Court precedent, it creates an avalanche of legal problems. First, the court's ruling leaves master tenants without any recourse against breaching subtenants, despite clear duties and obligations created by sublease agreements (including those entitling the master tenant to possession). Second, taken to its logical conclusion, the court of appeals' holding in this case would only permit the Landlord to bring an unlawful detainer action for failure to pay rent. But the landlord is not in privity with the subtenant; only the master tenant is in privity with the subtenant. As such, the landlord also has no standing to bring a claim against the subtenant, because the duties of the subtenant are owed to the master tenant, not the landlord. The court of appeal's decision therefore strips away *all remedies* for breaches by the party in possession of the real estate, eviscerating the rights granted by the unlawful detainer statute. Affirming the trial court's ruling would therefore undermine countless leasehold relationships in Washington. In light of the vast array of commercial leasing relationships in the State of Washington (and ever-increasing cost of real property rights), there is a substantial public interest in assuring certainty in the marketplace, and encouraging parties to enter into long-term, flexible leasing arrangements. Accordingly, this Court

should accept review to undo the damage caused by the court of appeal's decision.

B. DISMISSAL WITH PREJUDICE IS IMPROPER UNDER RULE 19

The issue that ultimately led to the dismissal of Subway's claims in this matter was Respondent's assertion of the right to an offset for rent due and owing to the Landlord. Specifically, the court of appeals held that because any offset claim could only be asserted against the Landlord, the Landlord was a necessary party to the litigation, and the failure to include the Landlord was fatal to Subway's standing.[3] Opinion at 3-4.

However, any dismissal predicated on the propriety or necessity of adding parties to the litigation is governed by CR 19. Under the plain language of Rule 19, the proper remedy for failing to add a necessary party to the litigation is not dismissal; it is adding the necessary party. CR 19(a)(1) ("A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the

[3] As a practical matter, Respondent's claimed offset for rent has no bearing whatsoever on Subway's right of possession under the Sublease Agreement. The essential purpose of an unlawful detainer action is to swiftly adjudicate the right to possession. *See, e.g.,* RCW 59.12.130 (noting that unlawful detainer actions take precedence over all other civil actions); Unlawful Detainer Under RCW Chapter 59.12, 17 Wash. Prac. § 6.80 (2d ed.). As such, adjudicating the right of possession is of paramount importance.

action shall be joined as a party in the action if. . . in the person's absence complete relief cannot be accorded among those already parties.").

CR 19 requires the court to engage in a three part analysis: (1) whether an absent party is indispensable, i.e., necessary for just adjudication; (2) if an absent party is necessary, whether it is feasible to order the absent party's joinder; and (3) if joining a necessary party is not feasible, whether "in equity and good conscience" the action should still proceed without the absentee. *Auto. United Trades Org. v. State*, 175 Wn.2d 214, 221, 222, 285 P.3d 52 (2012). Dismissal for failure to join a necessary party should typically be done without prejudice. *Orwick v. Fox,* 65 Wn. App. 71, 82 n.6, 282 P.2d 12, *review denied*, 120 Wn.2d 1014 (1992); *see also Hannegan v. Roth*, 12 Wash. 695, 697, 44 P. 256, 256 (1896); *Harrington v. Miller,* 4 Wash. 808, 31 P. 325 (1892). Moreover, once the court determines that an action must be dismissed, "it should dismiss the case without making any further rulings." *Lakemoor Community Club, Inc. v. Swanson*, 24 Wn. App. 10, 17-18, 600 P.2d 1022 (1979).

Here, Respondent asserted and the court agreed, that Seawest was a necessary party from whom relief could be sought for Respondent's

counterclaims. CP 135; Opinion at 3-4. As an initial matter, there is considerable dispute about whether Seawest arises to the level of an "indispensable" party, particularly given the language in the Master Lease Agreement that expressly imposes repair costs on the tenant for damages caused by invitees.[4] *See Gildon v. Simon Prop. Grp., Inc.,* 185 Wn.2d 483, 495, 145 P.3d 1196 (2006) (holding that the burden of proof for establishing indispensability is on the party urging dismissal).

Second, the ultimate answer to the necessary party issue is irrelevant because it is indisputable that it was feasible to add Seawest as a party. Seawest is a Washington limited liability company with a registered agent for service in Kirkland. CP 30, 170. As it is subject to service of process, and would not deprive the court of jurisdiction, Seawest could (and should) have been added as a party, thereby ending the analysis under Rule 19.

However, *even if* the court determined that Seawest could not be made a party, at a minimum, the court should have determined whether the case could continue without Seawest, or at worst, it should have dismissed

[4] The case was dismissed before trial on Respondent's motion. As such, any factual disputes relating to the propriety of the offset were never adjudicated.

the case *without prejudice* for failure to join Seawest. *Orwick v. Fox,* 65 Wn. App. 71, 82 n.6, 282 P.2d 12, *review denied*, 120 Wn.2d 1014 (1992). First, there are ample reasons why the case could continue without Seawest—the issue in an unlawful detainer action is possession, not damages. As such, the court could have adjudicated the issue of breach and possession while dismissing or reserving the damages issues, without any prejudice to any party. Second, if the court had determined that a just adjudication without Seawest would be impossible, it should have simply dismissed the case without prejudice. And following such dismissal, the court should not have entertained and ruled upon a motion for attorneys' fees. *Lakemoor Community Club, Inc. v. Swanson*, 24 Wn. App. 10, 17-18, 600 P.2d 1022 (1979).

In dismissing the case with prejudice the court has not only damaged Subway (both by threatening its ability to enforce its valid subleases, and in wrongfully awarding attorneys' fees), but, for the reasons stated herein, has also greatly damaged all parties with leasehold interests throughout the state of Washington. The public holds a strong interest in ensuring the uniformity of application and enforcement of

sublease agreements, and as such, this court should accept review of the erroneous court of appeals decision.

VI. CONCLUSION

Subway, as Master Tenant, has standing to bring unlawful detainer actions against its breaching subtenants. If Seawest was a necessary party, the court should have joined them as such, but at a minimum, it should not have dismissed the case with prejudice. Subway asks that this Court accept review of the court of appeals' erroneous decision to correct an egregious error that has the potential to upend a century of established precedent, and inject substantial uncertainty into Washington's real property leasing marketplace.

DATED this 13th day of February, 2019.

MILLER NASH GRAHAM & DUNN LLP

s/Daniel J. Oates
Daniel J. Oates, WSBA No. 39334
s/Vanessa L. Wheeler
Vanessa L. Wheeler, WSBA No. 48205
s/Drew F. Duggan
Drew F. Duggan, WSBA No. 50796
Pier 70 ~ 2801 Alaskan Way, Suite 300
Seattle, WA 98121
Tel: 206-777-7537
Fax: 206-340-9599

Email: *Dan.Oates@millernash.com*
Drew.Dugga@millernash.com

Attorneys for Appellant
SUBWAY REAL ESTATE, LLC

DECLARATION OF SERVICE

I, Jennifer L. Schnarr, hereby declare under penalty of perjury under the laws of the State of Washington that on this 13th day of February, 2019, I caused the foregoing to be filed with the Supreme Court of the State of Washington via electronic means and that a true and correct copy of the same was sent via US First Class and electronic mail to the following at the addresses listed below:

Scott Milburn, WSBA No. 15355
ADVOCATES LAW GROUP PLLC
22525 SE 64th Place, Suite 2276
Issaquah, WA 98027
Tel: 206-890-0491
Email: *smilburn@advocateslg.com*
Attorneys for Rebecca Wilson

SIGNED in Seattle, Washington on this 13th day of February, 2019.

s/Jennifer L. Schnarr
Jennifer L. Schnarr, Legal Assistant

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SUBWAY REAL ESTATE, LLC, a Delaware limited liability company, Appellant, v. REBECCA J. ARMOUR, aka REBECCA J. WILSON, an individual, Respondent.	No. 77510-3-I DIVISION ONE UNPUBLISHED OPINION FILED: January 14, 2019

APPELWICK, C.J. — Subway, a lessee, brought an unlawful detainer action against sublessee, Wilson. The trial court found that under the leases Subway's lessor, not Subway, was the proper party to bring the unlawful detainer action against Wilson. The trial court dismissed with prejudice Subway's claims and awarded Wilson attorney fees. Subway argues that its claims should have been dismissed without prejudice, and that the court erred in awarding attorney fees. We affirm.

FACTS

Seawest Investment Associates LLC leased space in Kirkland to Subway Real Estate LLC. Subway then subleased the premises to franchisee Rebecca Armour, also known as Rebecca Wilson (Wilson), for Wilson to operate a Subway restaurant. The sublease required Wilson to pay rent directly to Seawest, the landlord under the master lease.

On January 6, 2017, Seawest served Subway with a 10 day notice to comply or vacate, alleging that Subway owed $20,865.44 in outstanding rent and late fees.[1] On April 26, 2017, Subway served Wilson with a notice to pay outstanding rent or vacate within five days. Subway then filed an unlawful detainer action against Wilson on May 4, 2017. In response, Wilson argued that she did not owe rent, but was actually owed credit for repairs she had made.

In its order of dismissal, the trial court observed that Wilson is obligated to pay rent to Seawest, not Subway. And, it stated that Wilson had rent-offset rights[2] that she can exercise only against Seawest, not Subway. The trial court concluded that Subway was not liable for Wilson's counterclaims, and that Subway was not the proper party to bring the unlawful detainer action against Wilson. The court then dismissed without prejudice Subway's claims against Wilson.

Wilson moved for attorney fees under a fee provision in the sublease and RCW 4.84.330. Subway opposed the motion. Subsequently, the trial court filed an amended order of dismissal, dismissing Subway's claims "with prejudice," "because Subway has no standing to assert such claims against [Wilson] on behalf of the Landlord, Seawest." Wilson then moved for attorney fees based on the

---

[1] The notice is dated January 6, 2016, but is also stamped as "received [January] 11, 2017." (Capitalization omitted.)

[2] While counterclaims are generally not allowed in unlawful detainer proceedings, there is an exception when the counterclaim, affirmative equitable defense, or set-off is based on facts which excuse a tenant's breach. Munden v. Hazelrigg, 105 Wn.2d 39, 45, 711 P.2d 295 (1985).

amended order of dismissal. The trial court granted the motion, awarding Wilson attorney fees pursuant to RCW 4.84.330. Subway appeals.[3]

DISCUSSION

Subway asserts that the trial court erred in dismissing its claims "with prejudice," and in awarding Wilson attorney fees. It does not argue that dismissal was improper, but instead asserts that the trial court's original dismissal without prejudice was correct, and that the trial court erred in amending its order to a dismissal with prejudice.

I. Dismiss with Prejudice

Subway argues that its claims against Wilson should not have been dismissed with prejudice. It asserts that (1) there was no decision on the merits of all of Subway's claims against Wilson, and (2) Subway "has to be in a position to assert its breach of contract claims" under the sublease against Wilson in a future action that Seawest may bring against both it and Wilson.

CR 41(a)(4) provides the trial court with the discretion to make the dismissal with prejudice in an appropriate case. Escude v. King County Pub. Hosp. Dist. No. 2, 117 Wn. App. 183, 192, 69 P.3d 895 (2003). "'A trial court's discretion under CR 41(a)(4) to order dismissal with prejudice should be exercised only in limited circumstances where dismissal without prejudice would be pointless.'" Gutierrez v. Icicle Seafoods, Inc., 198 Wn. App. 549, 557, 394 P.3d 413 (2017) (quoting Escude, 117 Wn. App. at 187). A voluntary dismissal is a final judgment when the

[3] Subway appeals the amended order of dismissal, the order denying its motion for reconsideration, and the order granting Wilson's motion for attorney fees.

court elects to dismiss with prejudice, because then it does not leave the parties as if the action had never been brought. Elliott Bay Adjustment Co., Inc. v. Dacumos, 200 Wn. App. 208, 214, 401 P.3d 473 (2017). The court's decision to dismiss with prejudice bars the plaintiff from bringing the same claim against the defendant. See id.

Subway's complaint alleged that Wilson failed to pay rent and was still in possession of the premises. Subway asked the trial court to terminate the sublease, restore its rights to the premises, and enter a judgment against Wilson for outstanding rent, damages, and attorney fees. Unlawful detainer actions are brought pursuant to RCW 59.12.030, which provides generally for a summary proceeding to determine the right of possession as between landlord and tenant. Munden, 105 Wn.2d at 45. The action is a narrow one, limited to the question of possession and related issues such as restitution of the premises and rent. Id.

Under the sublease, Wilson owed rent to Seawest, not Subway. Consequently, Subway did not have standing to bring the unlawful detainer action. The trial court did not err in concluding that dismissal was required. The lack of standing will not change. Therefore, dismissal without prejudice would have been pointless. The trial court did not err in dismissing with prejudice.

Subway contends that the trial court did not reach its breach of contract claims against Wilson. That is true. But, even if it could have brought the unlawful detainer action, contract claims are outside the scope of the unlawful detainer action, and must be raised in a separate action. The trial court took no action to

rule on any putative contract claims Subway may choose to assert subsequently in such an action.

II. Attorney Fees

Subway argues that the trial court should not have awarded Wilson attorney fees under RCW 4.84.330, because to receive an award Wilson must have been entitled to a final judgment. And, Subway argues that the court "did not resolve the issue of whether [Wilson] owed unpaid rent to Subway under the subcontract between those two parties."

An award of attorney fees is proper when authorized by the parties' agreement, by statute, or by a recognized ground in equity. Hous. Auth. v. Bin, 163 Wn. App. 367, 377, 260 P.3d 900 (2011).

Subway relies on Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 492, 200 P.3d 683 (2009). In Wachovia, our Supreme Court defined a final judgment as "'[a] court's last action that settles the rights of the parties and disposes of all issues in controversy.'" Id. (quoting BLACK'S LAW DICTIONARY 859 (8th ed. 2004)). The court held that a voluntary dismissal is not a final judgment by this definition because it "leaves the parties as if the action had never been brought." Id. Wachovia differs from this case, because there the court asked whether there is a prevailing party under RCW 4.84.330 when the trial court dismisses without prejudice. Id. at 490. Here, the trial court dismissed with prejudice, and Subway cannot refile the unlawful detainer action against Wilson.

The purpose of RCW 4.84.330 is to make unilateral contract provisions bilateral. Id. at 489. The statute expressly awards fees to the prevailing party in a

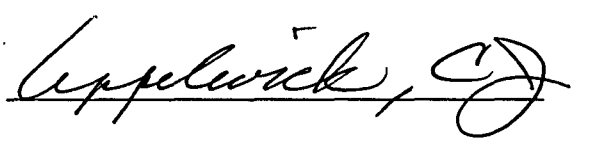
contract action. Id. It further protects its bilateral intent by defining a prevailing party as one that receives a final judgment. Id.

The sublease between Subway and Wilson contains an attorney fee provision. The trial court dismissed Subway's claims with prejudice, which is a final judgment in favor of Wilson. Thus, pursuant to RCW 4.84.330, the trial court did not err in awarding Wilson attorney fees and costs.

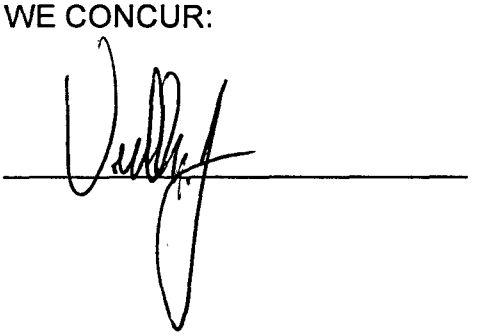
III. Attorney Fees on Appeal

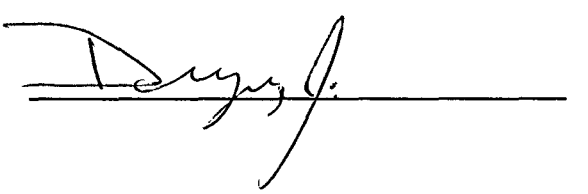
Wilson asks this court to award her attorney fees on appeal. Because Wilson is the prevailing party on appeal, she is entitled under the sublease to an award of attorney fees for this appeal, subject to compliance with RAP 18.1. Bin, 163 Wn. App. at 378.

We affirm.



WE CONCUR:





MILLER NASH GRAHAM & DUNN

February 13, 2019 - 4:05 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Subway Real Estate, LLC, Appellant v. Rebecca J. Armour, Respondent (775103)

The following documents have been uploaded:

- PRV_Petition_for_Review_20190213160112SC000322_5275.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Subway Petition for Review.pdf

A copy of the uploaded files will be sent to:

- dan.oates@millernash.com
- drew.duggan@millernash.com
- drussell@kellerrohrback.com
- jennifer.schnarr@millernash.com
- smilburn@advocateslg.com
- vanessa.wheeler@millernash.com

Comments:

Sender Name: Emily O'Neill - Email: emily.oneill@millernash.com
Filing on Behalf of: Daniel J Oates - Email: Dan.Oates@millernash.com (Alternate Email:)

Address:
Pier 70
2801 Alaskan Way, Suite 300
Seattle, WA, 98121
Phone: (206) 777-7542

Note: The Filing Id is 20190213160112SC000322