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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

NO. 62052-5-I

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HOUSING AUTHORITY OF THE CITY OF EVERETT,  
WASHINGTON, a public body, corporate and politic,

Respondent

vs.

CARROLL KIRBY, and all other persons  
residing in the premises described herein,

Appellant.

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BRIEF OF RESPONDENT

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1. RE-STATEMENT OF ISSUES PRESENTED FOR REVIEW

- a. Whether the Court Commissioner's Order of June 27, 2008, is an appealable order where there is no bar to refileing the action, and where that action was in fact refiled?
- b. Whether the Court Commissioner's Order of June 27, 2008, dismissing the case for lack of subject matter jurisdiction, properly entered as an order without prejudice where, as here, there was no bar to refileing the action?
- c. Whether the Court Commissioner's Order of July 16, 2008, properly denied Kirby's request for an award of attorney's fees under RCW 4.84.250, where the Residential Unlawful Detainer Act provides special fee statutes at RCW 59.18.290 and .410, and where the Complaint did not specify an amount of damages claimed?
- d. Whether the Court Commissioner's Order of July 16, 2008, properly denied Kirby's request for fees under RCW 4.84.330 where, as here, the Lease did not contain a unilateral provision for attorney's fees?
- e. Whether the Court Commissioner, in her Order of July 16, 2008, correctly declined to apply judicial estoppel to insert a clause for attorney's fees in the parties' Lease so that Kirby could seek fees under RCW 4.84.330?
- f. Whether the Court Commissioner abused her discretion in denying, in her Order of July 16, 2008, an award of fees under 59.18.290 where the Defendant admitted possession and nonpayment of rent; where the merits were not otherwise determined; and where the case could be and was re-filed on the same facts of possession and nonpayment?
- g. Whether the Court Commissioner abused her discretion in her Order of August 11, 2008, in concluding that the

action was not frivolously filed within the meaning of RCW 4.84.185, and in denying an award of attorney's fees to Kirby?

- h. Whether the Court Commissioner abused her discretion in denying, in her Order of August 11, 2008, Kirby's requests for attorney's fees as CR 11 sanctions against the Housing Authority and its counsel, Lorna S. Corrigan, and her law firm?

## 2. STATEMENT OF THE CASE

This appeal follows the dismissal without prejudice of an unlawful detainer action filed under Snohomish County Cause No. 08-2-04789-8 (hereinafter "the first" or "the present" Kirby case), for lack of subject matter jurisdiction due to the use of an insufficient summons. See Order of Commissioner Brudvik of June 27, 2008, dismissing the case without prejudice, CP 122, Vol. I. The basis for the unlawful detainer action was Kirby's nonpayment of rent combined with his continued occupancy following the service and expiration of a Notice to Pay Rent or Vacate. See Complaint at ¶¶ II through V, CP 170-71, Vol. I.

The dispute that led to this appeal began when the undersigned counsel to the Housing Authority, having filed and served the Summons and Complaint in the first Kirby case, see Summons and Complaint, CP 167-72, Vol. I, was served with a Notice of Appearance, CP 165, Vol. I, an Answer, CP 160-62, Vol. I, and a

Motion to Dismiss the case pursuant to CR 12(b)(1). CP 146, Vol. I. The motion requested that the court dismiss the action for lack of subject matter jurisdiction due to an insufficient summons. CP 147, Vol. I. At the same time the motion asked the court to retain jurisdiction so that Mr. Peterson, counsel to Appellant Kirby, could "conduct discovery" in hopes that he could establish a claim for attorney's fees for the filing of a frivolous action. See Motion to Dismiss, CP 148, Vol. I.

Immediately upon receipt of the Motion, Housing Authority counsel Lorna Corrigan called Mr. Peterson and suggested that he stop incurring fees until Ms. Corrigan could discuss the jurisdictional issues with her client. See Declaration of Lorna S. Corrigan in Reply to Motion to Dismiss, CP 140, Vol. I, at ll. 8-13. Mr. Peterson stated that he would nevertheless send out interrogatories which he said he had already prepared. *Id.* Mr. Peterson then sent a letter to Ms. Corrigan *via* facsimile indicating that he would be seeking an award of attorney's fees under RCW 59.18, and under the parties' Lease. See Exhibit A to Declaration of Lorna S. Corrigan, CP 142, Vol. I.

Ms. Corrigan wrote back to Mr. Peterson after conferring with her client. In the letter she indicated that she was authorized to dismiss the action, but that she could not sign an agreed order with

a provision for an award of attorney's fees or for continued jurisdiction to conduct discovery or to seek other relief. *Id.* at Exhibit B, CP 143, Vol. I. She did not, as is contended by Kirby, see Brief of Appellant at 10, agree to dismissal on conditions. *Id.* Rather, she indicated that she could enter into an *agreed* order to dismiss only on certain conditions. CP 143.

The contested issues regarding whether the dismissal should be with or without prejudice, whether further "discovery" should be authorized, and whether attorney's fees should be awarded, were not resolved prior to the hearing on Kirby's Motion to Dismiss, and Ms. Corrigan therefore filed a brief in response. CP 133-138, Vol. I. In that brief, she again conceded the need for dismissal due to lack of subject matter jurisdiction, CP 135-136, Vol. I, at ll. 22-23 and 1, but argued that the dismissal should be without prejudice. She also argued that any award of attorney's fees must await the attachment of jurisdiction in a subsequent filing, such that the merits of the claim could be determined. See Reply Brief of Housing Authority, ll. 1-3, CP 138, Vol. I.

After argument on June 27, 2008, Commissioner Brudvik entered the Order dismissing the case for lack of subject matter jurisdiction. See Order of Commissioner Brudvik of June 27, 2008,

CP 122, Vol. I. The Order entered without prejudice to refiling under a new cause number. *Id.*

On July 7, 2008, Kirby filed a Motion for an Award of Attorney's Fees. CP 121, Vol. I. He cited, as the basis for his request, RCW 4.84.080, RCW 4.84.250 and .270, RCW 4.84.330, and RCW 59.18.290(1) and (2). *Id.*

On July 8, 2008, the Housing Authority filed a new unlawful detainer action under Snohomish County Cause No. 08-2-05827-0 against Kirby (this second case being referred to hereinafter as the "second Kirby case"). CP 189-194, Vol. II. That action was again based upon Kirby's possession of the Housing Authority premises from and after May and June, 2008; on his nonpayment of rent for May, 2008; and on that possession and nonpayment of rent despite the service on him and expiration of a notice to pay rent or vacate. See Summons and Complaint in second Kirby case, at ¶¶ III and IV, CP 193, Vol. II.<sup>1</sup>

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<sup>1</sup> A default order entered against Kirby in the second Kirby case. CP 180-181, Vol. II. It is anticipated that Kirby will, in his rebuttal brief, attack the validity of the default order and subsequent proceedings in that case. An appeal was recently filed from those proceedings under Court of Appeals Cause No. 638998. The Housing Authority objects to any argument in this appeal relating to the validity of the Order of Default and subsequent proceedings in the second Kirby case because those proceedings are the subject of a

On July 16, 2008, Kirby's Motion for an award of attorney's fees under RCW 4.84.080, .250, .330, and RCW 59.18.290, in the present Kirby case came on for hearing. The Commissioner denied the Motion on grounds that the court lacked jurisdiction following the dismissal of the case for lack of subject matter jurisdiction to award fees. See Order of Commissioner Waggoner of July 16, 2008. CP 51 at Vol. I. On July 25, 2008, Kirby filed a Notice of Appeal from that decision. CP 33 at Vol. I.

On July 28, 2008, Kirby then filed yet another Motion for an award of attorney's fees, this time pursuant to RCW 4.84.185. CP 28-30, Vol. I He also sought CR 11 sanctions in the form of an award of fees. *Id.*

On August 11, 2008, the Court Commissioner issued her Order in the present Kirby case denying Kirby's Motion for Attorney's fees

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distinct appeal. More important, it is not necessary to reach those issues in order to resolve the current appeal. Kirby has not contended that there was any bar, such as the passage of a statute of limitations, to the re-filing of a complaint in unlawful detainer based upon the same facts as formed the basis for the Complaint in the first Kirby case. See *generally*, Brief of Appellant. The arguments as to the validity of the default order and subsequent proceedings in the second Kirby case are not properly before the Court at this time, and need not be resolved in order for the Court to determine the merits of this appeal.

pursuant to RCW 4.84.185, and denying sanctions pursuant to CR 11. See Order of August 11, 2008. CP 3-11, Vol. I. The Order denying fees entered on the alternate bases that the court lacked subject matter jurisdiction to consider a fee award, CP at p. 10, Vol. I, ll. 5-7; that the action in any event was not frivolous, *id.* at ll. 10-11, and that the fees requested were in any event unreasonable. *Id.* at ll. 13-14.

On August 22, 2008, Kirby filed a Supplemental Notice of Appeal from the Order Of August 11, 2008, denying his request for fees and sanctions. CP 265, Vol. IV. This case is now before the court for argument on the issues presented in the first Kirby case.

### 3. ARGUMENT

#### A. THE CHARACTERIZATION OF THE ORDER DISMISSING THE FIRST KIRBY CASE FOR LACK OF SUBJECT MATTER JURISDICTION AS WITHOUT PREJUDICE IS NOT APPEALABLE UNDER RAP 2.2 BECAUSE THERE WAS NO BAR TO A SUBSEQUENT SUIT ON THE SAME FACTS.

Kirby appeals from the June 27, 2008, order of the trial court that dismissed the unlawful detainer Complaint in the first Kirby case for lack of subject matter jurisdiction. See Order of June 27, 2008, CP 122, Vol. I. He does so on grounds that the order should have been entered with, rather than without, prejudice. See Brief of Appellant

at 12-14. The rules of appellate procedure, however, do not provide for an appeal of the characterization of the dismissal as being without prejudice where, as here, there was no impediment to the re-filing of the action based upon the same facts.

The appealability of an order is governed by RAP 2.2. See Appendix A. Because there was no final judgment here, see RAP 2.2(a)(1) (allowing appeal from final judgment), Appendix A, the only provision that Kirby could logically utilize to obtain review of the characterization of the dismissal here would be RAP 2.2(a)(3). That rule provides in part that review may be had of "[a]ny written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action." RAP 2.2(a)(3) (amended 2008). When that subsection is applied to the circumstances of the Order at issue here, it is clear that the Order did not determine the action, prevent a final judgment, or discontinue the action. The characterization of that Order as without prejudice is therefore not subject to appeal.

It is settled in Washington law that it is the "*effect* of an order of dismissal," Munden v. Hazelrigg, 105 Wn.2d 39, 44, 711 P.2d 295 (1985) (emphasis added), rather than the nomenclature used, that determines its appealability. *Id.* See also Wachovia SBA Lending v.

Kraft, 165 Wn.2d 481, 487, 200 P.3d 683 (2008). Thus even where, as here, a case is dismissed for lack of subject matter jurisdiction, in the absence of a bar to a later suit, see, generally, Munden at 43-44, a dismissal without prejudice is not appealable. *Id.* at 44. The bar must be complete, such as the expiration of a statute of limitations: a mere discontinuance, postponement or deferral of a final resolution will not permit appeal. See In re the Dependency of A.G., 127 Wn. App. 801, 808, 112 P.3d 588 (2005).

In Munden, a tenant in an unlawful detainer action brought a counterclaim for damage to personalty, *id.* at 40, but then vacated the premises and relinquished all right to possession. *Id.* at 41. The trial court granted the landlord's motion to dismiss the tenant's counterclaim for lack of subject matter jurisdiction, but entered the order without prejudice. *Id.* at 42. The tenant appealed the dismissal, and the Supreme Court was presented with the issue whether the characterization of a dismissal as being without prejudice could be appealed. *Id.* at 44.

The Supreme Court reviewed prior Washington decisions and noted the results that if the decision at issue fell within the language of RAP 2.2(a)(3) or its antecedent versions, then the decision, even if labeled "without prejudice," was appealable. *Id.* at 43-45. On the

other hand, if the decision did not fall within the language of RAP 2.2(a)(3), "no appeal could lie." *Id.* (Citing Lewis Cy. Sav. & Loan v. Black, 60 Wn.2d 362, 374 P.2d 157 (1962), and In re Marriage of Molvik, 31 Wn. App. 133, 639 P.2d 238 (1982)). Turning to the order before it, the Munden court applied RAP 2.2(a)(3) and found that it was "clear that the decision . . . [was] . . . not appealable." *Id.* at 44. The statute of limitations had not run, and the filing of a new action was possible, *id.*, such that the effect of the dismissal was not to determine or discontinue the action.

The same result should follow here where there is no assertion that a statute of limitations has run, or that a subsequent suit was somehow barred. Indeed a subsequent suit was filed based upon the same facts. *Compare* Complaint in the present Kirby case, at ¶¶ III, IV, and V, CP 171, Vol. I, (nonpayment of rent despite possession in May, 2008), *with* Complaint in the second Kirby case, at ¶¶ III and IV, CP193, Vol. II. The order of dismissal without prejudice of June 27, 2008, does not fall within the language of RAP 2.2(a)(3), and Kirby's appeal of that Order should be dismissed.

B. EVEN IF THE ORDER OF DISMISSAL IS APPEALABLE, IT WAS PROPERLY ENTERED WITHOUT PREJUDICE BECAUSE THERE WAS NO BAR TO RE-FILING THE SUIT.

Kirby asserts that the "decision whether to grant a voluntary dismissal and to make it with prejudice lies in the discretion of the trial court, Escude ex rel. Escude v. King County Public Hosp. Dist. No. 2, 117 Wn. App. 183, 192, 69 P.3d 895 (2003). Escude involved the entry of a dismissal *with* prejudice, *id.* at 187, in response to a motion for voluntary dismissal under CR 41. *Id.* The Order here, in contrast, was entered in response to a motion by Kirby to dismiss under CR 12(b), see Motion to Dismiss filed on June 9, 2008, CP 146, Vol. I, and not under CR 41. Whether the standard of review applicable to the propriety of entering an order dismissing a case for lack of subject matter jurisdiction without prejudice is abuse of discretion or an error of law reviewable on a de novo basis, however, the result in this case is the same.

It is well settled that a "dismissal 'without prejudice' means that the existing rights of the parties are not affected by the dismissal but are open to legal controversy as if no judgment or dismissal had been entered." Parker v. Theubet, 1 Wn. App. 285, 291, 461 P.2d 9 (1969) (citing Maib v. Maryland Cas. Co., 17 Wn.2d 47, 135 P.2d 71 (1943);

Bates v. Drake, 28 Wash. 447, 68 Pac. 961 (1902)). A final judgment in contrast, is "a court's last action that settles the rights of the parties and disposes of all issues in controversy." Wachovia, *supra*, 165 Wn.2d at 492. Therefore a dismissal "with prejudice appropriately follows an adjudication on the merits. . . ." Parker at 291.

Kirby deals with the fact that the dates of possession and nonpayment were the same in the second Kirby case as they were in the present Kirby case only by arguing that possession is a "fluid concept," Brief of Appellant at p. 14, and that a landlord may bring more than one unlawful detainer action over the course of a tenancy. *Id.* at pp. 13-14. This observation is correct, but unhelpful. There was no impediment to the re-filing of an action against Kirby for unlawful detainer based upon the same period of possession and nonpayment of rent as had formed the basis for the filing in the present case. Kirby does not argue, for example, that the EHA had accepted rent so as to waive the defaults. Nor does he assert that a statute of limitations had run, such that the Complaint in the second Kirby case was barred. Thus the court's last action that settled the rights of the parties and disposed of the issues in controversy, Wachovia, 165 Wn.2d at 492, did not occur in the present Kirby case.

There was simply no bar by reason of a dismissal of the

present case for lack of subject matter jurisdiction due to the use of a defective summons to the filing of a new suit based upon the same Lease defaults as had formed the basis for the filing of the present case. Indeed, a second suit was filed after the dismissal, see Complaint in the second Kirby case, CP 192, Vol. II, which suit was based upon the same period of possession and nonpayment of rent. *Id.* at ¶¶ III and IV, CP 193, Vol. II. Compare Complaint in the present case at ¶¶ III, IV and V, CP 171, Vol. I. There clearly is no manifest abuse of discretion or untenable ground in the trial court's dismissal of this unlawful detainer action without prejudice. Nor does the dismissal without prejudice constitute an error of law. The order of June 27, 2008, should be affirmed.

C. THE TRIAL COURT'S ORDER OF JULY 16, 2008, PROPERLY DENIED KIRBY AN AWARD OF FEES UNDER RCW 4.84.250, BECAUSE THAT STATUTE DOES NOT APPLY IN UNLAWFUL DETAINER ACTIONS, AND BECAUSE THE HOUSING AUTHORITY DID NOT IN ANY EVENT PLEAD OR PRAY FOR A SPECIFIC AMOUNT AS DAMAGES IN PLAINTIFF'S COMPLAINT.

Kirby seeks an award of fees under RCW 4.84.250 and .270. While the trial court in this case ruled that it lacked jurisdiction to entertain an award of fees, see Order of July 16, 2008, CP 51 at Vol. I, that court may be affirmed on any grounds supported by the

record. Otis Housing Association v. Housing Authority, 165 Wn.2d 582, 587, 201 P.3d 309 (2009); King County v. Seawest Inv. Associates, LLC, 141 Wn. App. 304, 170 P.3d 53 (2007). The request for attorney's fees under RCW 4.84.250 and .270 was properly denied even given subject matter jurisdiction in the lower court. This case was brought in the limited jurisdiction of unlawful detainer for purposes of restoring the landlord to possession, and not as an action for damages brought under the court's general jurisdiction. RCW 4.84.250 applies to the latter type of case, but was simply never intended to apply in residential unlawful detainer actions. Such application would conflict with the attorney's fee provisions of RCW 59.18, *et seq.*, and would not in any event further the purposes of RCW 4.84.250, of encouraging parties to settle small claims and thereby avoid incurring large amounts of attorney's fees. Finally, no specific amount of \$10,000 or less was pleaded in this case, and thus RCW 4.84.250 does not apply in any event.

Kirby argues that he is entitled to a fee award under RCW 4.84.250 and .270 because the Court dismissed the case. Brief of Appellant at 26. RCW 4.84.250 provides for an award of fees in actions for damages where the amount pleaded is \$10,000.00 or less.

[I]n any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorney's fees. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.

RCW 4.84.250 (amended 1984). The defendant is deemed the prevailing party within the meaning of RCW 4.84.250,

if the plaintiff . . . in an action for damages where the amount pleaded, exclusive of costs, is equal to or less than the maximum allowed under RCW 4.84.250, recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the defendant. . . .

RCW 4.84.270 (1980). The purpose of RCW 4.84.250 is to "enable a party to pursue a meritorious small claim without seeing his award diminished in whole or in part by legal fees." Public Utilities District No. 1 v. Crea, 88 Wn. App. 390, 394, 945 P.2d 722 (1997) *rev. denied*, 134 Wn.2d 1021, 958 P.2d 316 (1998). That statute and the ensuing subsections also "encourage out-of-court settlement of small claims and penalize parties who 'unjustifiably bring or resist small claims.'" In re Honda Accord, 117 Wn. App. 510, 523, 71 P.3d 226 (2003).

An unlawful detainer action, in contrast, is a "special summary proceeding for the recovery of possession of real property." Negash

v. Sawyer, 131 Wn. App. 822, 825-26, 129 P.3d 824 (2006) (citing Housing Authority v. Terry, 114 Wn.2d 558, 563, 789 P.2d 745 (1990); MH2 Co. v. Hwang, 104 Wn. App. 680, 684, 16 P.3d 1272 (2001)). The action provides an expedited method for resolving the right to possession," Heaverlo v. Keico Industries, Inc., 80 Wn. App. 724, 728, 911 P.2d 406 (1996), in order to "preserve the peace," *id.*, between the landlord and the tenant. It is therefore narrow in scope, and claims unrelated to possession are not allowed. *Id.* at 45.

The legislature clearly contemplated that the payment of rent is incident to possession, for one of the several bases for an unlawful detainer action is the nonpayment of rent following the giving of the requisite notice. See RCW 59.12.030 (amended 1989), Appendix B. Because the payment of rent is incident to possession, the landlord may in an unlawful detainer action recover an award of unpaid rent. RCW 59.12.170 (1891), Appendix C (the court or jury may find the amount of rent due).

Appellant Kirby asserts that because landlords are not required to affirmatively claim an award of rent in order to prosecute an unlawful detainer action based upon non-payment of rent, any such claim for an award of rent is a claim for "damages" within the purview of RCW 4.84.250. His argument is without merit, because the

purposes of RCW 59.12, *et seq.*, 59.18, *et seq.*, and 4.84.250 would be frustrated by such a construction.

Use of the settlement procedures of 4.84, *et seq.*, could result in mandatory fee awards that would conflict with the discretion of the Court to award fees under RCW 59.18.290 and .410. If, for example, a tenant who had in fact paid no rent were permitted to make an offer of settlement to pay less rent than was originally demanded by the landlord, and the landlord ultimately recovered less than what was offered, the tenant would be deemed to have prevailed under RCW 4.84.270, (defendant prevails if the plaintiff recovers less than was offered, or recovers nothing). As the prevailing party, the tenant would be *entitled* to an award of attorney's fees under 4.84.250, because fee awards under that statute are mandatory. Kingston Lumber Supply Co. v. High Tech Development, Inc., 52 Wn. App. 864, 865, 765 P.2d 27 (1988). This result would follow under the facts posited even though the tenant was guilty of unlawful detainer because, while he or she actually owed less rent than the landlord had originally sought, the tenant had in fact had paid *no* rent.

RCW 4.84.250, *et seq.*, could also be used by a landlord to obtain a mandatory fee award against a *tenant*. For example, a landlord could make an offer of settlement of a rent claim for slightly

less rent than is owed to him or her. If the tenant fails to accept that offer and the landlord recovers “as much or more than amount offered in settlement . . .”, RCW 4.84.260 (1973), see Appendix D, the landlord would be entitled to a mandatory fee award under RCW 4.84.250. Kingston Lumber at 865.

Under the Residential Landlord Tenant Act, RCW 59.18, *et seq.* (hereinafter the "RLTA"), however, attorney's fee awards are, in the absence of a contract provision, see Wright v. Miller, 93 Wn. App., 189, 198, 963 P.2d 934 (1998) *rev. denied* 138 Wn.2d 1017, 989 P.2d 1143 (1999) (the RLTA does not prohibit attorney's fee clauses that benefit both parties), discretionary with the Court. There are two statutes in residential unlawful detainers that may apply to authorize an award. The first is RCW 59.18.290. That statute permits an award of fees where the landlord has resorted to self-help in violation of the Act, or where the tenant has held over without an appropriate order from the court.

(1) It shall be unlawful for the landlord to remove or exclude from the premises the tenant thereof except under a court order so authorizing. Any tenant so removed or excluded in violation of this section may recover possession of the property or terminate the rental agreement and, in either case, may recover the actual damages sustained. The prevailing party may recover the costs of suit or arbitration and reasonable attorney's fees.

(2) It shall be unlawful for the tenant to hold over in the premises or exclude the landlord therefrom after the termination of the rental agreement except under a valid court order so authorizing. Any landlord so deprived of possession of premises in violation of this section may recover possession of the property and damages sustained by him, and the prevailing party may recover his costs of suit or arbitration and reasonable attorney's fees.

RCW 59.18.290 (1973), Appendix E. Additional authority for an award of attorney's fees is found in RCW 59.18.410, which provides in relevant part that if the verdict is for the plaintiff in a residential unlawful detainer that is based upon non-payment of rent, the "judgment shall be rendered . . . for the rent, if any, found due, and the court *may* award statutory costs and reasonable attorney's fees. . . ." RCW 59.18.410 (1973), Appendix F. (Emphasis added.) Thus in direct contrast with awards under RCW 4.84.250, fee awards under 59.18.290 and 59.18.410 are discretionary. Council House, Inc. v. Hawk, 136 Wn. App. 153, 158, 147 P.3d 1305 (2006) (The RLTA uses the word "may" in the permissive sense). The legislature therefore clearly intended that the trial court be vested with the discretion to determine whether a fee award to either party in a residential unlawful detainer action is appropriate.

The application of RCW 4.84.250 to residential unlawful

detainers would foil this legislative intent with respect to attorney's fees in residential unlawful detainers by allowing either party in certain circumstances to negate an award or the determination of the court not to make an award, under RCW 59.18.290 or .410. This result cannot have been intended by the legislature, which has carefully prescribed that absent agreement of both parties to a lease, fee awards in residential unlawful detainers are left to the discretion of the courts.

The application of RCW 4.84.250 to unlawful detainer actions that are based upon nonpayment of rent could lead to further absurd results. A settlement offer, if accepted by the landlord, for example, could waive the default and reinstate the tenancy. Washington law is clear that a landlord may accept partial payments of rent that do not bring the tenant current as to periods preceding the issuance of a notice to pay rent or vacate. See Housing Resource Group v. Price, 92 Wn. App. 394, 402, 958 P.2d 327 (1998). The effect on the tenancy of the acceptance of an offer of settlement after the expiration of the underlying notice, and after the filing of a complaint, however, has not been addressed by the courts. That effect could be a waiver of the entire default, and hence of the landlord's right to proceed with the eviction.

The purpose of RCW 4.84.250 in discouraging the unnecessary expenditure of attorney's fees on small claims would not be served in unlawful detainer actions in any event. The landlord must still prove in court that rent is owed in order to pursue the eviction. In cases involving allegations of unpaid rent of \$10,000 or less, the landlord may need to fully litigate the evidentiary facts with respect to the rent even if an offer of settlement on the claim for an affirmative award of rent were made and accepted. There is thus no savings to the parties or the courts, as the same attorney's fees will still be incurred in the determination of the right to possession (which will necessitate proof that rent was unpaid).

Finally, even if RCW 4.84.250 were found to have application to unlawful detainer actions, the prerequisite to application of the statute of an amount pleaded of \$10,000 or less, cannot be met here. The complaint does not plead a specific amount of damages, but rather seeks judgment for "any rent due and owing," Complaint at ¶ VI, Vol. I of CP at 171. Nor does the prayer for relief claim a specific amount due: rather it asks only for an award of the rent determined to be due through the date of judgment or trial. Vol. I of CP at 172. Appellant Kirby's appeal of the trial court's denial of an award of attorney's fees under RCW 4.84.250 and .270 is without

merit, and the decision of the trial court should be affirmed.

- D. THE COMMISSIONER PROPERLY DENIED KIRBY'S REQUEST FOR FEES UNDER RCW 4.84.330 BECAUSE THE LEASE DOES NOT CONTAIN A UNILATERAL PROVISION FOR ATTORNEY'S FEES, AND BECAUSE THE DOCTRINE OF JUDICIAL ESTOPPEL WILL NOT APPLY TO CREATE SUCH A PROVISION.

Appellant Kirby does not directly assign error to the Commissioner's Order of July 16, 2008, denying his request for attorney's fees under RCW 4.84.330, but instead urges that the Housing Authority should be judicially estopped from denying the existence of a fee provision in its Lease. See Brief of Appellant at pp. 30-32. He makes this argument even though Kirby does not, and cannot, contend that such a provision exists. The authorities cited by Kirby do not support his position, and judicial estoppel will not apply where: 1) the Housing Authority did not take an inconsistent position; 2) the Housing Authority did not take an inconsistent position in different proceedings; 3) Kirby himself demanded the filing of a copy of the Lease; and 4) the Lease does not in fact contain a unilateral provision for an award of fees.

Kirby argues that the Housing Authority's request in its Complaint, for "costs and attorneys' fees pursuant to the Lease," see Complaint, CP 172 at Vol. I, was inconsistent with the Housing

Authority's position in its response to Kirby's Motion for attorney's fees that attorney's fees were not available under the Lease. Brief of Appellant at 31. What the Housing Authority actually argued, in the full context of its brief in opposition to the motion for award of fees, was that there was no "[i]ndependent provision for fees," see Plaintiff's Reply Memorandum in Response to Defendant's Motion for Award of Attorney's Fees and Costs, CP 78, Vol. I, ll. 5-6, in the Lease. That argument by the Housing Authority does not give rise to estoppel.

According to the authority cited in Kirby's brief, judicial estoppel requires that the party estopped have taken a "clearly inconsistent," Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn. App. 222, 224, 108 P.3d 147 (2005), position. *Id.* If a position is not diametrically opposed, there is no rationale for applying estoppel. Seattle-First National Bank v. Marshall, 31 Wn. App. 339, 343-344, 641 P.2d 1194 (1982). In this case, the Housing Authority prayed for "costs and attorneys' fees pursuant to the Lease." See Complaint at CP 172, Vol. I. The Lease provided for termination in accordance with RCW 59.118 [sic] and related statutes. See Lease attached to Declaration of S. Bud Alkire, at ¶ 20.b, CP 67, Vol. I. RCW 59.18.290 and .410 each provide for possible fee awards in the

event of unlawful detainer actions. See RCW 59.18.290 at Appendix E. See also RCW 59.18.410 at Appendix F. The Housing Authority thus did not take "clearly inconsistent," Cunningham at 224, positions.

The doctrine of judicial estoppel is also applicable not to statements made or positions asserted in a single proceeding, but rather to clearly inconsistent statements or positions taken in different proceedings. Thus, when a party asserts one position in a court proceeding, and later in a subsequent proceeding seeks an advantage by taking a clearly inconsistent position, see Arkinson v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007), the doctrine may come into play. See Cunningham at 225 (doctrine as barring testimony from prior judicial proceedings.) The cases cited by Kirby all consider the doctrine of judicial estoppel in the context of the failure of a debtor to disclose a claim as an asset in bankruptcy, followed by an attempt by the debtor after the conclusion of the bankruptcy to assert the claim in a new action. See Arkinson at 537. See also Bartley-Williams v. Kendall, 134 Wn. App. 95, 98-99, 138 P.3d 1103 (2006); Skinner v. Holgate, 141 Wn. App. 840, 843, 173 P.3d 300 (2007). They do not relate to the position or positions taken by a party in a single action.

Judicial estoppel would not assist Kirby in obtaining an award

of attorney's fees pursuant to the Lease in this case in any event. The doctrine may operate to bar evidence, but it does not permit Kirby or the court to *create* evidence. The evidence in this case demonstrates clearly that the Lease did not contain a unilateral, much less any, independent provision for attorney's fees. There is therefore no basis on which RCW 4.84.330 could be applied.

RCW 4.84.330 provides in relevant part that

[i]n any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's 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 is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

...

[1977 ex.s. c 203 § 1.]

The statute is not a "fee-shifting statute . . . designed to 'punish frivolous litigation and encourage meritorious litigation.'" Wachovia SBA Lending, Inc., v. Kraft, 165 Wn.2d 481, 489, 200 P.3d 683 (2009). Rather, it applies only where a contract "provides for fees and costs exclusively to *one* of the parties." Hawk v. Branjes, 97 Wn. App. 776, 779, 986 P.2d 841 (1999). The purpose of the statute is solely to make unilateral contract provisions bilateral. Wachovia at 489. It

is therefore reversible error to apply RCW 4.84.330 to a contract that contains a bilateral fee provision. See Wachovia at 490.

The Lease here contains no independent provision for an award of attorney's fees. See Lease attached to Declaration of S. Bud Alkire, CP 66, Vol. I. Rather, it states only that terminations after the end of the initial term are to be conducted in accordance with RCW 59.118 [sic] and related statutes. CP 67, ¶ 20.b, Vol. I. Thus the lease authorizes attorney's fees only to the extent otherwise provided by RCW 59.18 or related laws. The lease does not contain a unilateral provision for an award of "fees and costs exclusively to *one* of the parties," Hawk at 779, and RCW 4.84.330, can therefore have no application. Wachovia at 489-90. The Commissioner's Order of July 16, 2008, CP 51 at Vol. I, denying a fee award under RCW 4.84.330, should be affirmed.

- E. TRIAL COURT IN ITS ORDER OF JULY 16, 2008, PROPERLY DENIED KIRBY AN AWARD OF FEES UNDER RCW 59.18.290, WHERE KIRBY ADMITTED POSSESSION AND NONPAYMENT OF RENT; WHERE THE CASE WAS RE-FILED BASED UPON THE SAME FACTS; AND WHERE KIRBY HAS NOT SHOWN THAT HIS LEASE WAS NOT TERMINATED OR THAT HE HELD OVER UNDER A VALID COURT ORDER.

Kirby seeks reversal of the trial court's Order of July 16, 2008, CP 51 at Vol. I, denying his request for attorney's fees under RCW

59.18.290(2). He argues that he is a prevailing party within the meaning of the statute. See Brief of Appellant at 22. He cites, however, only cases in which the plaintiff voluntarily dismissed the action after significant litigation had already occurred, see, e.g., Council House, Inc. v. Hawk, 136 Wn. App. 136, 153, 147 P.23d 1305 (2006), Brief of Appellant at 23, and in which the parties appear to have litigated the case to judgment before the action was dismissed for inadequate notice. See Soper v. Clibborn, 31 Wn. App. 767, 644 P.2d 738 (1982). Kirby fails in the meantime to disclose to the court or to distinguish the opinions in Housing Authority of the City of Everett v. Terry, 114 Wn.2d 558, 789 P.2d 745 (1990), or Laffranchi v. Lim, 146 Wn. App. 376, 190 P.3d 97 (2008). A review of these decisions indicates that unless the plaintiff has abandoned the merits through a voluntary dismissal, an award of attorney's fees and costs under RCW 59.18 must await the result of a determination on the merits of issues pertinent to RCW 59.18. Because the Housing Authority never voluntarily abandoned the merits of its claim that Kirby unlawfully possessed the premises, and because the court did not reach the substantive issues presented in unlawful detainer, the Commissioner properly denied an award of fees in this action based upon RCW 59.18.290.

In Housing Authority of the City of Everett v. Terry, 114 Wn.2d 558, 789 P.2d 745 (1990), the Washington State Supreme Court considered a tenant's request for attorney's fees under RCW 59.18.290. The request was made after the case was dismissed following trial due to the landlord's use of a three-day nuisance, rather than a ten-day cure, notice. *Id.* at 561. The tenant in Terry sought fees under RCW 59.18.290(2). That portion of the statute provides as follows:

(2) It shall be unlawful for the tenant to hold over in the premises or exclude the landlord therefrom after the termination of the rental agreement except under a valid court order so authorizing. Any landlord so deprived of possession of premises in violation of this section may recover possession of the property and damages sustained by him, and the prevailing party may recover his costs of suit or arbitration and reasonable attorney's fees.

Terry, like Kirby here, was never in fact excluded from the premises, Terry at 562 (indicating that Terry proceeded to trial), either with or without a court order. Subsection (1) of the statute, see Appendix E, was therefore inapplicable.

The Supreme Court rejected the request for fees. *Id.* at 571. It stated that Terry could have appealed from the superior court's initial decision denying Terry's motion to dismiss for lack of subject matter jurisdiction and thus have avoided the increased costs of trial.

*Id.* The Court also noted that fees were expended at trial on the issue of handicap discrimination, which issue the court did not reach. *Id.*

An award of fees under RCW 59.18.290 is discretionary, Council House at 159, and considerations whether a party could have appealed before trial are relevant to the exercise of that discretion. Those considerations do not address, however, the initial qualifications for an award of fees under the statute. In the latter regard, the Supreme Court held that "in order to be awarded fees and costs as the prevailing party, a tenant must prove either that the lease was not terminated, or that the tenant held over under a valid court order." *Id.* at 570-571. Under the reasoning of the Terry decision, the tenant cannot have held over if the lease was never terminated. In such a case the tenant would be entitled to fees. Alternatively, the tenant would be entitled to fees if he proved that he held over after termination of the lease, but that he did so under a valid court order.

The Supreme Court's construction of the statute in Terry is the only logical construction, because to hold otherwise would mean simply that the prevailing party in an unlawful detainer action is entitled to an award of fees. The latter interpretation is untenable, because it would render superfluous the language of the statute referencing termination of a lease and holding over with a court order.

The Supreme Court adopted a construction that gives meaning to all of the language of a statute, and not one which would render portions of the language superfluous. State v. Kistner, 105 Wn. App. 967, 970, 21 P.3d 719 (2001).

The decision in Terry is also controlling here, for the facts in the case at bar demonstrate circumstances in which, although the court lacked subject matter jurisdiction due to the use of a defective summons, see Order of Dismissal of June 27, 2008, CP 122, Vol. I, the parties have not reached the merits of necessary substantive issues. For example, the parties have not litigated the issues whether the Housing Authority gave a notice that was effective to terminate the tenancy, or whether the tenant held over under a court order. In other words, Kirby's Lease may well have been terminated through the service of a proper notice to cure or vacate, but that evidence was not reached in this case. Kirby is therefore not entitled to seek fees under RCW 59.18.290, because he proved neither that the Lease was not terminated nor that he held over under a valid court order. Terry at 570-571.

The ruling in Terry was followed by the decision in Laffranchi v. Lim, 146 Wn. App. 376, 190 P.3d 97 (2008). In that case, the tenant, a Mr. DeVore, *id.* at 378, sought an award of fees under RCW

59.18.290(1): he vacated under threat of a writ of restitution, even though he had not been named in the unlawful detainer lawsuit or writ. *Id.* at 381. Because Mr. DeVore had not been named, the court held that it was deprived of subject matter jurisdiction over him. *Id.* at 384. Nevertheless, it denied DeVore an award of fees under RCW 59.18.290(1): "[t]o be awarded fees and costs under this statute, DeVore must prove that Laffranchi removed or excluded him from the disputed property without a court order authorizing him to do so." *Id.* at 387.

The court made it clear at the same time that once the court acquired jurisdiction, DeVore would have the opportunity to establish that he qualified for an award of fees. While stating that "[a]t this point in the litigation, DeVore has not met the requirements of RCW 59.18.290(1) and is not entitled to an award. . . .," *id.*, (emphasis added), the court remanded the case for further proceedings. *Id.* The Terry and Laffranchi cases thus fully support the trial court's denial of Kirby's request for fees in the present case under RCW 59.18.290.

This result is not altered by Kirby's citation to Soper v. Clibborn, 31 Wn. App. 767, 644 P.2d 738 (1982), see Brief of Appellant at 23, or by his citation to Council House, Inc. v. Hawk, 136 Wn. App. 153, 147 P.2d 1305 (2006). Brief of Appellant at 23. Soper was decided

before the Supreme Court's decision in Terry. The Soper decision did not in any event involve circumstances in which, as here, the dismissal for lack of subject matter jurisdiction was unrelated to the notice that was given to terminate the tenancy.

Nor is the decision in Council House helpful to the court. Council House involved the *abandonment* of the merits through a voluntary dismissal where the tenants' counsel had already expended hundreds of hours litigating constitutional issues. Council House, 136 Wn. App. at 156. That decision stands for the proposition that where the plaintiff enters a voluntary dismissal after a defendant has been forced to prepare for a trial in unlawful detainer, the defendant becomes a prevailing party for purposes of fees under RCW 59.18.290. *Id.* at 160. (Adopting analysis of the court in Anderson v. Gold Seal Vineyards, Inc., 81 Wn.2d 163, 505 P.2d 790 (1973), to the effect that where a defendant has spent time and money preparing the case, a voluntary dismissal under CR 41 means that the plaintiff failed to prove its claim).<sup>2</sup>

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<sup>2</sup> While Council House cites Hawk v. Branjes, 97 Wn. App. 776, 986 P.2d 841 (1999), for the proposition that when a plaintiff takes a voluntary dismissal, the defendant has prevailed for purposes of fees, Council House at 160, Hawk involved a suit to enforce a commercial lease, not an unlawful detainer action. Hawk at 778. The  
(continued...)

Like the tenants in Terry and Laffranchi, Kirby is not entitled to a fee award under RCW 59.18.290. He did not seek fees under RCW 59.18.290(1) and thus did not prove or attempt to prove that his landlord excluded him from the premises, with or without a court order. Nor did he prove that his landlord did not terminate the Lease or that he held over under a valid court order, so as to be entitled to an award of fees. The parties never reached the issue whether the Lease had been terminated.

Because the case at bar was dismissed for lack of subject matter jurisdiction, see Order of June 27, 2008, CP 122, Vol. I, shortly after Kirby's Appearance, CP 165, Vol. I, the trial court never reached the merits of the unlawful detainer action, except to the extent that Kirby conceded in his Answer that he was in possession but had not paid the rent. See Answer at ¶¶ III and V, CP 160-61, Vol. I. A new suit based upon the same defaults was instituted. *Compare*

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<sup>2</sup>(...continued)

issue before the court in the latter case was whether there was an entitlement to fees under the parties' lease, *id.* at 778, not under the unlawful detainer statutes. The language adopted by the parties to the lease in Hawk provided for an award of fees to the "successful," *id.*, party. The court's construction of that language is therefore not persuasive with respect to the more specific and detailed language of the unlawful detainer statutes.

Complaint in the second Kirby case, CP 192-94, *with* the Complaint in the present case, CP 170-72. Thus not only did the court not reach the merits in the case at bar; the landlord here did not commence and then abandon the merits by seeking and obtaining a voluntary dismissal. On the contrary, the record reflects that the Housing Authority promptly re-filed the case, see Complaint in the second Kirby case, CP 192-94. The parties to the present action thus approached the merits only to the extent that Kirby admitted possession and nonpayment of rent in his Answer. CP 160-61, Vol. I, at ¶¶ III and V. The Commissioner's Order of July 16, 2008, CP 51 at Vol. I, denying Kirby an award of fees under RCW 59.18.290(2), should be affirmed.

F. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO DENY KIRBY'S REQUEST FOR ATTORNEY'S FEES UNDER THE FRIVOLOUS CLAIMS STATUTE, RCW 4.84.185, BECAUSE THE ACTION WAS WELL GROUNDED IN FACT AND IN LAW.

The trial court provided alternate grounds for its ruling of August 11, 2008, CP 3-11, denying Kirby's request for fees under RCW 4.84.185. One ground was the lack of subject matter jurisdiction that had been determined by the court's order of June 27, 2008. See Order of August 11, 2008, at CP 10, Vol. I. A second

ground was its conclusion that the action was not frivolous. *Id.* This Court may affirm the trial court on any correct grounds, Gontmakher v. The City of Bellevue, 120 Wn. App. 365, 369-70, 85 P.3d 926 (2004), citing Heath v. Uruga, 106 Wn. App. 506, 515, 24 P.3d 413 (2001), quoting Nast v. Michels, 107 Wn.2d 300, 308, 730 P.2d 54 (1986); King County v. Seawest Inv. Associates, LLC, 141 Wn. App. 304, 310, 170 P.3d 53 (2007), and even with subject matter jurisdiction to award fees, the court properly ruled that the action was not frivolous within the meaning of RCW 4.84.250.

The Commissioner concluded, with respect to RCW 4.84.185, that "the original action was not frivolous as both the nonpayment of rent and possession of the premises was admitted in Defendant's Answer." See Order of August 11 at ¶ 3, CP 10, Vol. I. Because Kirby cannot show an abuse of discretion in the trial court's denial of fees under RCW 4.84.185, the appeal of this issue should be dismissed, even if the trial court incorrectly ruled that it lacked jurisdiction to decide fee requests after the dismissal.

RCW 4.84.185 allows the court upon written findings that an action was frivolous and advanced without reasonable cause . . . , RCW 4.84.185 (amended 1991), see Appendix G, to require the non-prevailing party to pay the prevailing party . . .," *id.*, his or her

attorney's fees in defending against the frivolous action. The purpose of the statute is to

discourage the abuse of the legal system by providing for an award of expenses and legal fees to any party forced to defend itself against meritless claims asserted for harassment, delay, nuisance or spite.

Suarez v. Newquist, 70 Wn. App. 827, 832-33, 755 P.2d 1299 (1993) (citing Biggs v. Vail, 119 Wn.2d 129, 134-36, 830 P.2d 350 (1992)).

The decision whether to award fees under the statute is within the trial court's discretion. That discretion will not be disturbed, Timson v. Pierce County Fire Dist. No. 15, 136 Wn. App. 376, 386, 149 P.3d 427, *as amended* (2006) (quoting Rhinehart v. Seattle Times, 59 Wn. App. 332, 339-40, 798 P.2d 1155 (1990), absent a clear showing of abuse. *Id.* This deference results from the "trial court's 'personal and sometimes exhaustive contact with the case.'" Reid v. Dalton, 142 Wn. App. 113, 125, 100 P.3d 349 (2004), *rev. denied* 155 Wn.2d 1005, 120 P.3d 578 (2005). The appellate court's inquiry is therefore limited "to whether the judge's exercise of her discretion was manifestly unreasonable or based on untenable grounds." *Id.* No such clear abuse can be shown in this case.

The unlawful detainer action from which this appeal was taken was filed based upon Kirby's failure to pay rent for the month of May,

2008, and upon his continued occupancy after the service of a notice to pay or vacate. See Complaint at ¶ V, CP 171, Vol. I. Kirby argues that the *lawsuit* has "no basis in law," Brief of Appellant at 16, but he actually admitted the nonpayment of rent and continued possession in his Answer. See Answer at ¶¶ III, IV and V, CP 160-62. Whether or not those admissions bind Kirby in subsequent litigation, they certainly must preclude him from claiming that the Complaint, and thus the action in this case, was "meritless." Suarez, 70 Wn. App. at 832-33.

In any event, the only basis for Kirby's argument that the trial court's decision was a clear abuse of discretion was the allegation that counsel failed to conduct a reasonable inquiry into the form of the summons used. Brief of Appellant at 16. The frivolous claim statute, however, references actions, counterclaims, cross-claims, third-party claims, and defenses. RCW 4.84.185. See Appendix G hereto. Nothing in that statute references procedurally defective pleadings. Moreover, "[t]he lawsuit as a whole, that is, in its entirety, must be determined to be frivolous and to have been advanced without reasonable cause before an award of attorney's fees may be made under the statute." State ex rel. Quick-Reuben v. Verharen, 136 Wn.2d 888, 903, 969 P.2d 64 (1998).

Kirby provides no authority to support his theory that the use of a defective summons, Brief of Appellant at 17, constitutes a frivolous "*action*." [Emphasis added.] The "*action*" here was one of unlawful detainer based upon allegations of possession without the payment of rent following notice to pay rent or vacate. See Complaint at ¶ V, CP 171, Vol. I. When that action is evaluated, it is clear that it was well-founded in law and fact as intended by RCW 4.84.185.

RCW 59.12.030 defines unlawful detainer. It provides in relevant part that

[a] tenant of real property for a term less than life is guilty of unlawful detainer . . .

. . .

(3) When 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) in 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. The notice may be served at any time after the rent becomes due;

RCW 59.12.030(3) (amended 1998). See also Appendix B. The Complaint here thus made out a cause of action for unlawful detainer in alleging continued possession without the payment of rent, following the service of a Three-Day Notice. Kirby has not shown and

cannot therefore show that the *action* as alleged in the Housing Authority's Complaint was not well-founded in law.

Nor can Kirby show that the Complaint was not well-founded in fact. Kirby admitted possession, see Kirby's Answer, CP 160, Vol. I, at line 37, and nonpayment. *Id.* at line 43. He alleged, with respect to notice, only that he was "*unable* to admit or deny anything relating to any notices . . .," *id.* at line 45 (emphasis added), and that the notices should speak for themselves. CP 162, ll. 1-3. While the EHA made out a *prima facie* case of unlawful detainer, Kirby has not shown, and cannot show, that the court would have been factually precluded from entering judgment for the Housing Authority. The trial court's decision denying attorney's fees under RCW 4.84.185 did not constitute an abuse of discretion, and should be affirmed.

G. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION TO DENY KIRBY'S MOTION FOR CR 11 SANCTIONS AGAINST THE HOUSING AUTHORITY AND ITS COUNSEL WHERE THE HOUSING AUTHORITY DID NOT SIGN THE SUMMONS, WHERE THE ACTION WAS WELL-GROUNDED IN FACT, AND WHERE THE USE OF THE DEFECTIVE SUMMONS DID NOT CONSTITUTE EGREGIOUS MISCONDUCT.

The court determined in its order of August 11, 2008, Vol. I of CP at 11, that CR 11 sanctions were not appropriate. It further determined that the scope of the request for fees was unreasonable

in any event. *Id.* at ll. 13-14. As indicated above, the trial court may be affirmed on any grounds that are supported by the record. Otis Housing Association v. Housing Authority, 165 Wn.2d 582, 587, 201 P.3d 309 (2009). See also, Gontmakher v. The City of Bellevue, 120 Wn. App. 365, 369-70, 85 P.3d 926 (2004). Even given jurisdiction to entertain a motion for sanctions under CR 11 following dismissal for lack of subject matter jurisdiction, the trial court did not abuse its discretion in denying that CR 11 sanctions were indicated here, either against the Housing Authority, which did not sign the pleading in question, or against its counsel.

CR 11 sanctions apply to an attorney or a party who signs a pleading in violation of the rule. CR 11(a) (amended 2005). See Appendix H. They are intended not as "another weapon in a litigant's arsenal," Biggs v. Vail, 124 Wn.2d 193, 198, 876 P.2d 448 (1994), but rather as a tool to redress "egregious conduct." *Id.* A decision of the trial court to deny sanctions under CR 11 is therefore reviewed for abuse of discretion. Bryant v. Joseph Tree, Inc., 57 Wn. App. 107, 114, 791 P.2d 537 (1990). The trial court did not abuse its discretion here in denying sanctions, and Kirby's requests for CR 11 sanctions against the Housing Authority and/or its counsel were properly denied.

Under CR 11, the court may impose upon the person who

signed an improper pleading, a sanction in appropriate cases. CR 11(a) (amended 2005). "If a pleading . . . is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction. . . ." CR 11(a). See full text of rule in Appendix H hereto. It thus may apply to a party and, if there is counsel of record, to that counsel. See, e.g., Layne v. Hyde, 54 Wn. App. 125, 136, 773 P.2d 83 (1989). Sanctions are imposed against a party, however, only where the party is solely responsible for the frivolous filing. TEGLUND, 3A Wash. Prac. CR 11 (2006) (citing In re Cooke, 93 Wn. App. 526, 969 P.2d 127 (1999), in which a party signed baseless statement of issues on an attorney's pleading paper). Kirby does not contend, nor is there any support in the record for a contention here, that the Housing Authority signed the summons in this case or authorized its particular form. There is no basis for the imposition of any sanction against the Housing Authority.

Nor is there any basis for such an award here against the Housing Authority's counsel. CR 11 provides in relevant part that the signature of an attorney on a pleading constitutes a certificate that the pleading is (1) well grounded in fact; (2) warranted by existing law, and (3) not interposed for an improper purpose. CR 11 (amended

2005). It is clear from the case law interpreting this rule that the rule has as its focus: (1) the veracity of factual assertions; and (2) the validity of positions on substantive law. The rule has not been applied to and is not intended to cover inadvertent procedural errors, including errors that have significant consequences.

CR 11 sanctions may be imposed upon three conditions:

(1) the *action* is not well-grounded in fact, (2) it is not warranted by existing law, and (3) the attorney signing the pleading has failed to conduct a reasonable inquiry into the factual or legal basis of the *action*.

Madden v. Foley, 83 Wn. App. 385, 389-90, 922 P.2d 1364 (1996).

(Emphasis added.) An "action lacks a factual or legal basis if it is both 'baseless' and signed without reasonable inquiry." *Id.* A "filing is in turn 'baseless' if (a) not well grounded in fact, or (b) not warranted by existing by (i) existing law or (ii) a good faith argument for the alteration of existing law." *Id.* CR 11 is not, in any event, to be "used as a fee-shifting mechanism," Biggs v. Vail, 124 Wn.2d 193, 198, 876 P.2d 448 (1994), (citing Bryant v. Joseph Tree, Inc., 119 Wn.2d 210 at 220, 829 P.2d 1099 (1992)). Given these standards for the application of CR 11, it is clear that the court did not manifestly

abuse its discretion in denying sanctions in this case.<sup>3</sup>

Kirby provided no evidence that the "action," Madden at 385, was not well-grounded in fact or supported by existing law. *Id.* He cannot show that it was not well-grounded in fact where he has admitted his possession and failure to pay the rent, see Answer at CP 160, ll. 43-45, and the action was dismissed, not on the merits, but rather for lack of subject matter jurisdiction due to a defective summons. See Motion to Dismiss for Lack of Subject Matter Jurisdiction, CP 146, Vol I. See *also* Order of Commissioner Brudvik dated June 27, 2008. CP 122, Vol. I. Nor can he show that the action was not well-grounded in law: if a tenant fails to pay rent in Washington State, the landlord is entitled, upon proper notice, to bring an unlawful detainer action. See RCW 59.12.030.

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<sup>3</sup> Indeed it was the conduct of Kirby's counsel that drew the attention of the Court. See, *e.g.*, decision of August 11, 2008, at n. 1, CP 4, Vol. I (court notes ethical concerns regarding declarations signed by attorney Peterson); see *also* August 11, 2008, Order at n. 4, ll. 18-22, CP 6, Vol. I (noting that attorney Peterson without having moved for reconsideration, presented an order on July 16, 2008, to Commissioner Wagoner that would have changed the substance of Commissioner Brudvik's Order of June 27, 2008); Order of August 11, 2008, at CP 9, Vol. I, 19-21, and CP 10, Vol. I, ll. 1-2; (court notes attorney Peterson's use of "ambush tactics.") Order of August 11, 2008, CP 3, at ll. 4-11 (attorney Peterson indicated that he would sent out "discovery" although counsel for the Housing Authority had already conceded the lack of jurisdiction.)

The only thing that Kirby has shown here is that the Summons was defective. See Order of Commissioner Brudvik. He has not shown that the Housing Authority was not substantively entitled to file and serve a summons in unlawful detainer. The filing of the lawsuit and of a summons here were not baseless for the purposes of CR 11, and the procedural error made in the form of the Summons used was not the type of egregious conduct to which our Supreme Court has indicated that CR 11 applies. See Biggs, 124 Wn.2d at 193.

The award of CR 11 sanctions is in any event discretionary: "the court . . . *may* impose . . . an appropriate sanction, which *may* include . . . an order to pay . . . a reasonable attorney's fee." CR 11 (amended 2005).<sup>4</sup> Even if a sanction under CR 11 were deemed to be appropriate here, the Supreme Court has repeatedly indicated that such sanctions "must be limited to the minimum necessary. . . ." Biggs at 201 (citing Bryant, 119 Wn.2d 210, 220, 225, 829 P.2d 1099 (1992)). Sanction enough has already resulted to counsel for the

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<sup>4</sup> Kirby cites Business Guides, Inc., 498 U.S. 533, 541, Ill. S. Ct. 922, 928 (1991), for the proposition that the court "shall" impose sanctions. Brief of Appellant at 19. The Business case, however, was decided prior to the 1993 amendment to the rule which removed the mandatory language and instead left the determination whether to impose sanctions in the discretion of the court. See CR 11 (amended 1993 and 2005).

Housing Authority in having to commence a new unlawful detainer action in the second Kirby case. See Declaration of Lorna S. Corrigan In Opposition to Motion for Award of Fees Under RCW 4.84.185 and CR 11. CP 24, Vol. I. Given this background, an award of fees in this case would simply constitute a "fee-shifting mechanism," Biggs at 220; 225; Bryant at 201, in contravention of the decisions of our Supreme Court. *Id.* Counsel to the Housing Authority did not engage in "egregious conduct," Biggs at 198, in this case. Rather, she conceded the procedural error promptly upon learning of it. See Declaration of Lorna Corrigan in Reply to Motion to Dismiss at CP 140, ll. 8-21. The trial court acknowledged that prompt correction. See Order re Attorney's Fees of August 11, 2008, at CP 4, ll. 4-11. It "tasted the flavor of the litigation. . .," Miller v. Badgley, 51 Wn. App., 285, 300, 753 P.2d 530 (1988), and was "in the best position to make . . .," Miller at 300, decisions regarding the motion for sanctions. The denial of sanctions in this case was not a manifest abuse of discretion, and should be affirmed.

H. THE COMMISSIONER'S DETERMINATION THAT KIRBY'S REQUEST FOR FEES AS A SANCTION WAS UNREASONABLE WAS A PROPER EXERCISE OF HER DISCRETION TO DENY FEES.

In her Order of August 11, 2008, denying Kirby's fee request,

the Commissioner ruled in the alternative that the scope and extent of the fee request was unreasonable. CP 10, Vol. I, ll. 13-14. Kirby has objected to the Commissioner's determination that his fee request was unreasonable. Brief of Appellant at 28-30. The Commissioner's findings in support of its conclusion that the fee request was unreasonable were not assigned error on appeal, however, and are thus verities on appeal. Levine v. Jefferson County, 116 Wn.2d 575, 581, 807 P.2d 363 (1991). Those findings support the Commissioner's exercise of discretion in determining that the fee request was unreasonable. The Commissioner found that no substantive defense was offered to the motion to dismiss on grounds of lack of subject matter jurisdiction, CP 7, Vol. I, ll. 16-17. She also found that much of the time charged was spent on briefing authority for attorney's fees, *id.* at ll. 19-21, on an issue as to which Kirby did not prevail (dismissal with or without prejudice, CP 8, Vol. I, n. 5, ll. 20-25). The Commissioner further entered a finding, for example, that fees were needlessly increased. This finding was supported by the evidence. Fees were sought for work on appellate issues that were performed before an appeal was necessary. CP 9 at ll. 11-13. Kirby also sought fees for 4.2 hours of consultation and preparation by two attorneys for a hearing that was unopposed except for

attorneys' fees. *Id.* at ll. 15-19. Given the findings set forth in the Order of August 11, 2008, CP 7-10, Vol. I, the Commissioner's exercise of discretion in the alternative in denying a sanction in the form of attorneys' fees because the fee request was unreasonable was based on tenable grounds and should be affirmed.

I. KIRBY HAS NOT SUPPORTED HIS REQUEST FOR FEES ON APPEAL WITH AUTHORITY OR ARGUMENT AS IS REQUIRED UNDER RAP 18.1, AND THAT REQUEST SHOULD BE DENIED.

Kirby's requests fees on appeal. Brief of Appellant at 32. Even if Kirby prevails to any extent in this appeal, his fee request fails to comply with the requirements of RAP 18.1(b). That rule states in relevant part that a "party must devote a section of its opening brief to the request for the fees or expenses." RAP 18.1(b) (amended 2006). Compliance with the rule is mandatory, Wilson Court Ltd. Partnership v. Tony Maroni's, Inc., 134 Wn.2d 692, 710-11, n.4, 952 P.2d 590 (1998); Marriage of Taddeo-Smith and Smith, 127 Wn. App. 400, 407, 110 P.3d 1192 (2005), and "requires more than a bald request for attorney fees on appeal." Wilson Court at 710-11, n. 4, citing Thweatt v. Hommel, 67 Wn. App. 135, 148, 834 P.2d 1058 (1992), *review denied*, 120 Wn.2d 1016, 844 P.2d 436 (1992). Furthermore, both argument and citation to authority are

required. . . ." Wachovia SBA Lending v. Kraft, 165 Wn.2d 481, 493, 200 P.3d 683 (2009), citing Wilson Court at 710-11, n.4., in order to inform the court of bases for an award.

In the present case, Kirby has done little more than make a "bald request . . .," Wilson at 710-11, n.4, for fees, by impertinently referring the court generally to his brief for supporting authority and argument. Brief of Appellant at 32. This request does not comply with the mandatory provisions of RAP 18.1(b), *id.*, and the request for fees should be denied.

#### 4. CONCLUSION

The trial court properly dismissed this action without prejudice to re-filing, and Kirby is not entitled to consideration of a fee award under RCW 59.18.290 where he admitted possession and nonpayment of rent, and where the trial court did not otherwise reach the merits of the case. He is also not entitled to a fee award under RCW 4.84.250. That statute does not apply in residential unlawful detainer actions, and the Housing Authority did not in any event plead an amount less than \$10,000. Nor is Kirby entitled to an award of fees under RCW 4.84.330, because the Lease did not contain an independent, unilateral provision for fees. Finally, the action clearly was not frivolous and did not form the basis for a CR 11 violation,

where the defendant admitted possession and nonpayment, and where the action was in fact re-filed. The Commissioner's Orders of June 27, 2008, dismissing the case below without prejudice; of July 16, 2008, denying Carroll Kirby's Motion for Attorney's Fees under RCW 59.18.290, 4.84.330 and 4.84.250; and of August 11, 2008, denying fees under RCW 4.84.185 and CR 11, should be affirmed. Finally, Kirby's request for attorney's fees on appeal should be denied.

Respectfully submitted this 28<sup>th</sup> of August, 2009.

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## APPENDIX A

### RAP 2.2 DECISIONS OF THE SUPERIOR COURT THAT MAY BE APPEALED

(a) Generally. Unless otherwise prohibited by statute or court rule and except as provided in sections (b) and (c), a party may appeal from only the following superior court decisions:

(1) Final Judgment. The final judgment entered in any action or proceeding, regardless of whether the judgment reserves for future determination an award of attorney fees or costs.

(2) (Reserved.)

(3) Decision Determining Action. Any written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action.

(4) Order of Public Use and Necessity. An order of public use and necessity in a condemnation case.

(5) Juvenile Court Disposition. The disposition decision following a finding of dependency by a juvenile court, or a disposition decision following a finding of guilt in a juvenile offense proceeding.

(6) Termination of All Parental Rights. A decision depriving a person of all parental rights with respect to a child.

(7) Order of Incompetency. A decision declaring an adult legally incompetent, or an order establishing a conservatorship or guardianship for an adult. (. . . continued)

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**APPENDIX A**  
**(. . . continued)**

(8) Order of Commitment. A decision ordering commitment, entered after a sanity hearing or after a sexual predator hearing.

(9) Order on Motion for New Trial or Amendment of Judgment. An order granting or denying a motion for new trial or amendment of judgment.

(10) Order on Motion for Vacation of Judgment. An order granting or denying a motion to vacate a judgment.

(11) Order on Motion for Arrest of Judgment. An order arresting or denying arrest of a judgment in a criminal case.

(12) Order Denying Motion To Vacate Order of Arrest of a Person. An order denying a motion to vacate an order of arrest of a person in a civil case.

(13) Final Order After Judgment. Any final order made after judgment that affects a substantial right.

(b) Appeal by State or a Local Government in Criminal Case. Except as provided in section (c), the State or a local government may appeal in a criminal case only from the following superior court decisions and only if the appeal will not place the defendant in double jeopardy:

(1) Final Decision, Except Not Guilty. A decision that in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing an indictment or information, or a decision granting a motion to dismiss under CrR 8.3(c).

**(. . . continued)**

**APPENDIX A**

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**APPENDIX A**  
**(. . . continued)**

(2) Pretrial Order Suppressing Evidence. A pretrial order suppressing evidence, if the trial court expressly finds that the practical effect of the order is to terminate the case.

(3) Arrest or Vacation of Judgment. An order arresting or vacating a judgment.

(4) New Trial. An order granting a new trial.

(5) Disposition in Juvenile Offense Proceeding. A disposition in a juvenile offense proceeding that is below the standard range of disposition for the offense or that the state or local government believes involves a miscalculation of the standard range.

(6) Sentence in Criminal Case. A sentence in a criminal case that is outside the standard range for the offense or that the state or local government believes involves a miscalculation of the standard range.

(c) Superior Court Decision on Review of Decision of Court of Limited Jurisdiction. If the superior court decision has been entered after a proceeding to review a decision of a court of limited jurisdiction, a party may appeal only if the review proceeding was a trial de novo and the final judgment is not a finding that a traffic infraction has been committed.

(d) Multiple Parties or Multiple Claims or Counts. In any case with multiple parties or multiple claims for relief, or in a criminal case with multiple counts, an appeal may be taken from a final judgment that does not dispose of all the claims or counts as to all the parties,  
**(. . . continued)**

**APPENDIX A**

**A-3**

**APPENDIX A**  
**(. . . continued)**

but only after an express direction by the trial court for entry of judgment and an express determination in the judgment, supported by written findings, that there is no just reason for delay. The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. The time for filing notice of appeal begins to run from the entry of the required findings. In the absence of the required findings, determination and direction, a judgment that adjudicates less than all the claims or counts, or adjudicates the rights and liabilities of less than all the parties, is subject only to discretionary review until the entry of a final judgment adjudicating all the claims, counts, rights, and liabilities of all the parties.

[Amended December 5, 2002; September 1, 2006; September 1, 2008.]

**APPENDIX A**

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## APPENDIX B

### RCW 59.12.030

#### Unlawful detainer defined.

A tenant of real property for a term less than life is guilty of unlawful detainer either:

(1) When he or she holds over or continues in possession, in person or by subtenant, of the property or any part thereof after the expiration of the term for which it is let to him or her. When real property is leased for a specified term or period by express or implied contract, whether written or oral, the tenancy shall be terminated without notice at the expiration of the specified term or period;

(2) When he or she, having leased property for an indefinite time with monthly or other periodic rent reserved, continues in possession thereof, in person or by subtenant, after the end of any such month or period, when the landlord, more than twenty days prior to the end of such month or period, has served notice (in manner in RCW 59.12.040 provided) requiring him or her to quit the premises at the expiration of such month or period;

(3) When 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) in 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. The notice may be served at any time after the rent becomes due; (. . . continued)

## APPENDIX B

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**APPENDIX B**  
**( . . . continued)**

(4) When he or she continues in possession in person or by subtenant after a neglect or failure to keep or perform any other condition or covenant of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than one for the payment of rent, and after notice in writing requiring in the alternative the performance of such condition or covenant or the surrender of the property, served (in manner in RCW 59.12.040 provided) upon him or her, and if there is a subtenant in actual possession of the premises, also upon such subtenant, shall remain uncomplished with for ten days after service thereof. Within ten days after the service of such notice the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform such condition or covenant and thereby save the lease from such forfeiture;

(5) When he or she commits or permits waste upon the demised premises, or when he or she sets up or carries on thereon any unlawful business, or when he or she erects, suffers, permits, or maintains on or about the premises any nuisance, and remains in possession after the service (in manner in RCW 59.12.040 provided) upon him or her of three days' notice to quit;

(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; or ( . . . continued)

**APPENDIX B**

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**APPENDIX B**  
**( . . . continued)**

(7) When he or she commits or permits any gang-related activity at the premises as prohibited by RCW 59.18.130.

[1998 c 276 § 6; 1983 c 264 § 1; 1953 c 106 § 1. Prior: 1905 c 86 § 1; 1891 c 96 § 3; 1890 p 73 § 3; RRS § 812.]

**Notes:**

Termination of month to month tenancy: RCW 59.04.020, 59.18.200.

Unlawful detainer defined: RCW 59.16.010.

**APPENDIX B**

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RCW 59.12.030 - 3.

## **APPENDIX C**

### **RCW 59.12.170**

#### **Judgment – Execution.**

If upon the trial the verdict of the jury or, if the case be tried without a jury, the finding of the court be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and if the proceeding be for unlawful detainer after neglect or failure to perform any condition or covenant of a lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of the lease, agreement or tenancy. The jury, or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and, if the alleged unlawful detainer be after default in the payment of rent, find the amount of any rent due, and the judgment shall be rendered against the defendant guilty of the forcible entry, forcible detainer or unlawful detainer for twice the amount of damages thus assessed and of the rent, if any, found due. When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant or any subtenant, or any mortgagee of the term, or other party interested in its continuance, may pay into court for the landlord the amount of the judgment and costs, and thereupon the judgment shall be satisfied and the tenant restored to his estate;

**(. . . continued)**

## **APPENDIX C**

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**APPENDIX C**  
**( . . . continued)**

but if payment, as herein provided, be not made within five days the judgment may be enforced for its full amount and for the possession of the premises. In all other cases the judgment may be enforced immediately. If writ of restitution shall have been executed prior to judgment no further writ or execution for the premises shall be required.

[1891 c 96 § 18; RRS § 827. Prior: 1890 p 80 § 18.]

**APPENDIX C**

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## APPENDIX D

RCW 4.84.260

**Attorneys' fees as costs in damage actions of ten thousand dollars or less — When plaintiff deemed prevailing party.**

The plaintiff, or party seeking relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250 when the recovery, exclusive of costs, is as much as or more than the amount offered in settlement by the plaintiff, or party seeking relief, as set forth in RCW 4.84.280.

[1973 c 84 § 2.]

## APPENDIX D

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RCW 4.84.260

## **APPENDIX E**

### **RCW 59.18.290**

Removal or exclusion of tenant from premises — Holding over or excluding landlord from premises after termination date.

(1) It shall be unlawful for the landlord to remove or exclude from the premises the tenant thereof except under a court order so authorizing. Any tenant so removed or excluded in violation of this section may recover possession of the property or terminate the rental agreement and, in either case, may recover the actual damages sustained. The prevailing party may recover the costs of suit or arbitration and reasonable attorney's fees.

(2) It shall be unlawful for the tenant to hold over in the premises or exclude the landlord therefrom after the termination of the rental agreement except under a valid court order so authorizing. Any landlord so deprived of possession of premises in violation of this section may recover possession of the property and damages sustained by him, and the prevailing party may recover his costs of suit or arbitration and reasonable attorney's fees.

[1973 1st ex.s. c 207 § 29.]

## **APPENDIX E**

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RCW 59.18.290

## APPENDIX F

### RCW 59.18.410

#### **Forcible entry or detainer or unlawful detainer actions — Writ of restitution — Judgment — Execution.**

If upon the trial the verdict of the jury or, if the case be tried without a jury, the finding of the court be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and if the proceeding be for unlawful detainer after neglect or failure to perform any condition or covenant of a lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of the lease, agreement or tenancy. The jury, or the court, if the proceedings be tried without a jury, shall also assess the damages arising out of the tenancy occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and, if the alleged unlawful detainer be after default in the payment of rent, find the amount of any rent due, and the judgment shall be rendered against the defendant guilty of the forcible entry, forcible detainer or unlawful detainer for the amount of damages thus assessed and for the rent, if any, found due, and the court may award statutory costs and reasonable attorney's fees. When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant or any subtenant, or any mortgagee of the term, or other party interested in the continuance of the tenancy, may pay into court for the landlord the amount of the judgment and costs, and thereupon the judgment shall be satisfied and the tenant restored to his tenancy; (. . . continued)

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**APPENDIX F**  
**(. . . continued)**

but if payment, as herein provided, be not made within five days the judgment may be enforced for its full amount and for the possession of the premises. In all other cases the judgment may be enforced immediately. If writ of restitution shall have been executed prior to judgment no further writ or execution for the premises shall be required.

[1973 1st ex.s. c 207 § 42.]

**APPENDIX F**

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## **APPENDIX G**

### **RCW 4.84.185**

#### **Prevailing party to receive expenses for opposing frivolous action or defense.**

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

The provisions of this section apply unless otherwise specifically provided by statute.

[1991 c 70 § 1; 1987 c 212 § 201; 1983 c 127 § 1.]

Notes:

Administrative law, frivolous petitions for judicial review: RCW 34.05.598.

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RCW 4.84.185

## APPENDIX H

CR 11(a)

### RULE CR 11 SIGNING OF PLEADINGS, MOTIONS, AND LEGAL MEMORANDA: SANCTIONS

(a) Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, whose address and Washington State Bar Association membership number shall be stated. A party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address. Petitions for dissolution of marriage, separation, declarations concerning the validity of a marriage, custody, and modification of decrees issued as a result of any of the foregoing petitions shall be verified. Other pleadings need not, but may be, verified or accompanied by affidavit. The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, (. . . continued)

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**APPENDIX H**  
**( . . . continued)**

a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

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