

No. 70956-9-I

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

LANG PHAM,

Appellant,

v.

SHAWN CORBETT and SHAKIA MORGAN,

Respondents.

ON APPEAL FROM
KING COUNTY SUPERIOR COURT

RESPONSE BRIEF

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STATEMENT OF THE CASE

I. DWELLING IN FIVE-PLEX RENTED ILLEGALLY

Lang Pham purchased the residential property in a foreclosure sale in March 2012. (CP 82 ¶ 2.3.1; VRP 28.) The property was permitted for use as a triplex, not a five-plex. (Ex 17-19; VRP 74:9-:10, 75:22-76:7, VRP 78:7-:17.) The use of the property as a five-plex violated City of Seattle land-use and building codes. (CP 82 ¶ 2.3.1; Ex 17-19; VRP 74:9-:10, 75:22-76:7, VRP 78:7-:17.) The permit status of the property was available from the King County Assessor, title documents, and the website of the City of Seattle’s Department of Planning and Development. (CP 87 ¶¶ 2.3.1, 3.5.3, VRP 127.)

Still, Pham set out to rent Unit #5. He repainted the walls and replaced the carpeting. (VRP 28.) As a city inspector found, however, “the overall quality of the installation of the unit was very poor and would never have passed a building inspection at that time ... had it been legalized.” (VRP 114.) The entry stairs lacked a handrail, were “wobbly,” and generally poorly constructed. (VRP 113.) There was unfinished sheetrock, and the back door was “funky” and “poorly installed.” (VRP 114.)

The sewer pipe connected to the unit was improperly installed. (VRP 115.) The sewer pipe went through a pantry and crawl space that was con-

nected to the kitchen by a door. (VRP 117.) This pantry and crawl space was a few feet deep and then abutted dirt. (VRP 117.) The sewer leaked into this space, with raw sewage seeping out in a rivulet. (VRP 115–16.) The door connecting this space to the kitchen was so poorly installed that rats could crawl under it and into the living space. (VRP 118–19.) Further, the bathroom sink lacked a “P-trap,” a plumbing device to prevent sewer gas from coming back through pipes and into the living space. (VRP 116.)

An aluminum ventilation pipe ran through the bedroom closet, connecting the outside with the pantry and crawl space where the sewer pipe was. (VRP 117–18.) The end of the ventilation pipe in the adjoining pantry and crawl space was open and unscreened. (VRP 118.)

In April 2012, Shawn Corbett and Shakia Morgan were a couple, and they were expecting their first child; Morgan was eight month’s pregnant. (CP 82 ¶¶ 2.3.2, 2.3.3; VRP 134.) They had a modest and irregular income. (CP 82 ¶ 2.3.3.) Pham showed them Unit 5, and he knew that Morgan was expecting and would have her baby living there with them. (VRP 54, 135.) The tour of the unit included the crawl space and pantry connected to the kitchen, which had an unlocked door that contained built-in shelves as well as some plumbing for the building. (VRP 51–52, 140, 183–184). On April 25, Corbett and Morgan signed a one-year lease for the

dwelling. (Ex 1.) They paid a nonrefundable deposit, a refundable security deposit, and first and last month's rent upon initiation of the tenancy. (Ex 1.)

After moving in, Morgan and Corbett noticed that there was no door to the bathroom, leaving it open to the rest of the unit. (VRP 141.) From the beginning of their tenancy, they noticed a foul "manure" smell throughout the unit that could not be remedied with cleaning and air fresheners. (VRP 139:18-139:25, 151:1-151:15, 174:14-175:1.) The tenants complained repeatedly to the landlord about this smell; he responded by bringing them a plumbing part called a "p-trap" and doing nothing more. (VRP 174-76).

In August 2012, Morgan first saw and heard a rat inside the apartment. She trapped it where it had escaped through a hole in the corner of the kitchen. She noticed the hole had been chewed through in an area where there already was a gap between the floor and the wall where there was no baseboard. (VRP 141-43; Ex 7.). The tenants notified the landlord of the rats via text message. (Ex 24.) The landlord sent an exterminator who came and sprayed the outer perimeter of the unit and set a couple of baitless traps in the area where "a rodent would run." (VRP 105-06). The exterminator returned to spray the outer perimeter of the dwelling in November 2012. But the landlord did not notify the tenants that he would

be returning so that they could allow him access to enter their unit to inspect and exterminate. (Ex 6; VRP 106-07). The landlord then cancelled the quarterly pest-inspection/treatment service after only the second inspection and after only one inspection that included the interior. (VRP 68-69).

Afterwards the tenants purchased their own traps and caught rats when they placed the traps in the space accessed from their kitchen. (VRP 145). The tenants continued to hear and see evidence of rodents throughout the remainder of their tenancy including holes in the walls and chewed socks near one hole in the closet. (VRP 145:23-148:15, 166:19-25, 180:16-184:13, 139:3-139:14, 141:16-142:20, 181:5-181:16.) When it started to rain heavily in the fall, the tenants noticed major flooding and leaking coming from the pipes in the storage area next to their kitchen. The leaking included raw sewage. (VRP 140:15-140:25, 165 :19-165: 25, 149: 14-150: 25, 183:16-184:17, 185:13-187:3.)

Morgan called the City of Seattle on May 10, 2013 to complain about rats and the sewage odor. (VRP 153:6-154:6.) On May 15, a city inspector came to Morgan and Corbett's unit. (CP § 2.3.8.) The next day, May 16, Pham served a three-day notice to pay rent or vacate. (Ex 4.)

II. EVICTION CASE FILED AFTER CITY INSPECTION

On May 20, Pham filed suit to evict Corbett, Morgan, and their baby. (CP 1–12.) Pham’s complaint alleged they were guilty of unlawful-detainer under RCW 59.12.030(3) for failure to pay rent or vacate the premises as demanded in a three-day notice. (CP 4–5.) The complaint referenced only a single three-day “pay or vacate” notice, which was attached as an exhibit. (*See* CP 3–12.) That notice was dated May 16, 2013—six days after Corbett and Morgan complained to the City of Seattle. (*See* CP 4 ¶ 7, 12.) Pham never amended his complaint. (*See* CP 1–177.) Starting on May 22, the city inspector issued three letters to Pham discussing the illegality and substandard condition of the rental unit, and Pham received them all. (Ex 17–19; VRP 74:9–:10, 75:22–76:7, VRP 78:7–:17.)

Corbett and Morgan filed an answer on May 28. (CP 15–19.) They denied Pham’s allegations that they defaulted on rent, failed to comply with the three-day notice, were liable for damages, and guilty of unlawful detainer. (*Compare* CP 15 ¶ 2, *with* CP 4–5 ¶¶ 6–12.) Corbett and Morgan also pleaded affirmative defenses. (CP 16.) Among other points, they alleged Pham had rented the dwelling illegally and thus owed them relocation assistance under RCW 59.18.085. (CP 16.) They alleged also that Pham owed them for the rent they paid in excess of the diminished value

of the dwelling due to substandard conditions, including rat infestation and sewage problems. (CP 16.) Corbett and Morgan requested judgment for \$2,550 in relocation assistance, \$850 for the last-month's rent payment, \$650 for their security deposit, and "any other damages proven at time of trial." (CP 16.)

III. JUDGMENT GIVEN FOR TENANTS AFTER TRIAL

The case proceeded to a bench trial on July 17, 2013 in King County Superior Court, before the Honorable Judith Ramseyer. (VRP 1.) The landlord was represented by counsel. (VRP 2.) Morgan and Corbett were represented by a pro-bono attorney. (*Id.*) The trial court heard the testimony of five witnesses—the landlord (VRP 25–99), a pest-control worker (VRP 99–111), a housing and zoning inspector from the City of Seattle (VRP 112–33), Morgan (VRP 133–68), and Corbett (VRP 168–202). The trial court admitted 15 exhibits into evidence. (CP 78–80.)

Corbett and Morgan were still living in the unit with their baby. (VRP 134.) But as of the trial date, the city's inspector testified that Pham had not yet obtained a permit to let the building as a five-plex, nor had he made the requisite repairs as part of the permitting process. (VRP 128, 132–33.) In fact, Pham admitted on cross-examination that he had not yet made any changes to the unit. (VRP 75:19–:21.)

After this bench trial, the trial court entered findings of fact and conclusions of law spanning eight pages. (CP 81–88.) The trial court awarded a net amount of \$637.50 for their habitability claim. (CP 86 ¶ 3.4.4.) The trial court awarded \$2,550 in relocation assistance and \$650 for the return of their security deposit under RCW 59.18.085. (CP 87 ¶ 3.5.4.) The trial denied Pham’s motion for reconsideration and awarded reasonable attorney fees to Corbett and Morgan. (CP 151–53.) This appeal followed.

STATEMENT OF ISSUES

The following issues are presented on appeal:

I. RELOCATION ASSISTANCE

A. Whether the landlord can overcome the presumption that substantial evidence supports the trial court’s award of relocation assistance to the tenants under RCW 59.18.085.

B. Whether tenants privately enforcing their right to recover relocation assistance from the landlord under RCW 59.18.085 must wait for a local government agency to formally condemn their dwelling.

C. Whether tenants may be awarded relocation assistance under RCW 59.18.085 as a defense or setoff during an unlawful-detainer proceeding, or whether they must bring a separate action.

II. WARRANTY OF HABITABILITY

A. Whether there was substantial evidence allowing a reasonable finder of fact to conclude that the conditions in the leased apartment presented a significant safety and health risk to the tenants such that the landlord had violated the common-law implied warranty of habitability.

B. Whether a tenant may allege an accumulation of past overpayments of rent due to the landlord's breach of the warranty for a period of many months under *Foisy v. Wyman*, 83 Wn.2d 22, 515 P.2d 160 (1973).

C. Whether a tenant who prepays their "last month's rent" at initiation of the tenancy is entitled to have this pre-paid amount go into effect before the initiation of an unlawful detainer complaint based upon a 3-day pay or vacate notice under RCW 59.12.030.

III. MISCELLANEOUS

A. Whether a tenant's advance payment of "last month's rent" must be counted against the landlord's claim for rent due before the filing of an unlawful detainer complaint based upon a 3-day pay or vacate notice.

B. Whether RCW 59.18.080 did not bar the tenants' remedies under the RLTA because no rent was due and owing and because the landlord acted negligently or intentionally.

IV. ATTORNEY FEES

A. Whether the trial court properly awarded reasonable attorney fees to the tenants at trial for their pro-bono legal representation.

B. Whether the tenants are entitled to an award of reasonable attorney fees on appeal.

ARGUMENT

I. STANDARD OF REVIEW

A. Findings of fact are presumed to be supported by substantial evidence, and the appealing party bears the burden of showing otherwise

Findings of fact after a bench trial must be upheld if supported by “substantial evidence.” *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). The evidence is deemed “substantial” if there is enough “to persuade a rational fair-minded person the premise is true. *Sunnyside Valley*, 149 Wn.2d at 879 (citing *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)). Reviewing courts begin with “a presumption in favor of the trial court’s findings.” *Green v. Normandy Park*, 137 Wn. App. 665, 689, 151 P.3d 1038 (2007). The appealing party—here, Pham—“has the burden of showing that a finding of fact is not supported by substantial evidence.” *Id.*

This presumption is difficult for any appealing party to overcome in

light of the rules for reviewing the evidence. The reviewing court evaluates “the evidence and all reasonable inferences in the light most favorable to the prevailing party”—here, Corbett and Morgan. *State v. Kaiser*, 161 Wn. App. 705, 724, 254 P.3d 850, 860 (2011) (citation omitted). Further, the reviewing court “must defer to the trier of fact” when it “evaluat[es] the persuasiveness of the evidence, and the credibility of witnesses.” *Endicott v. Saul*, 142 Wn. App. 899, 909, 176 P.3d 560 (2008) (citation omitted). Indeed, “credibility determinations are solely for the trier of fact [and] cannot be reviewed on appeal.” *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). Reasonable minds may differ on the findings to be drawn from the evidence. But as long as substantial evidence supports the trial court’s finding, “a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently.” *Sunnyside Valley*, 149 Wn.2d at 879–80 (citation omitted).

Any “unchallenged findings of fact are verities on appeal.” *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004) (citation omitted).

B. Standard for reviewing questions of law and the application of law to fact

After reviewing the findings of fact for substantial evidence, the appellate court “must next decide whether those findings of fact support the trial court’s conclusions of law.” *Landmark Dev., Inc. v. City of Roy*, 138

Wn.2d 561, 573, 980 P.2d 1234 (1999) (citation omitted). A mixed question involving the application of law to fact involves a mixed standard of review; the reviewing court employs “the error of law standard.” *State ex rel. Evergreen Freedom Found’n v. Wash. Educ. Ass’n*, 111 Wn. App. 586, 596, 49 P.3d 894 (2002) (citations omitted). Under this standard, the factual findings are subject to the deferential substantial-evidence standard, and the trial court’s application of the law to those factual findings are reviewed de novo. *Green v. Normandy Park*, 137 Wn. App. 665, 689, 151 P.3d 1038 (2007); *Evergreen Freedom*, 111 Wn. App. at 596 (citations omitted).

II. RELOCATION ASSISTANCE

A. The legislature created the relocation-assistance program to help the low-income victims of illegal and substandard housing

“The people of the state of Washington deserve decent, safe, and sanitary housing,” the legislature has proclaimed. Laws of 2005 ch. 364 § 1. Yet the legislature has found that many tenants “have remained in rental housing that does not meet the state’s minimum standards for health and safety.” *Id.* Low-income tenants remain in such substandard housing, the legislature determined, “because they cannot afford to pay the costs of relocation in advance of occupying new, safe, and habitable housing.” *Id.* To correct these problems, the legislature created a program for tenants to “receive funds for relocation from landlords who fail to provide safe and

sanitary housing after due notice of building code or health code violations.” *Id.* This program was codified at RCW 59.18.085.

The legislature’s relocation-assistance program requires landlords to pay relocation assistance under two scenarios. The first scenario is triggered when a landlord knowingly rents out a unit that is presently illegal to rent. The legislature prohibited any landlord from renting out a unit when “a governmental agency responsible for the enforcement of a building, housing, or other appropriate code has notified the landlord that a dwelling is condemned or unlawful to occupy due to the existence of conditions that violate applicable codes, statutes, ordinances, or regulations.” RCW 59.18.085(1). Landlords who knowingly violate this prohibition are liable to their tenants for at least three month’s rent or treble damages, whichever is more, as well as costs and reasonable attorney fees. RCW 59.18.085(2). Tenants subjected to unlawful or substandard housing may elect to terminate their tenancy, even if the government agency has not ordered that the premises be vacated. RCW 59.18.085(2). Upon this election, culpable landlords are liable also for repaying the tenants’ deposit and any prepaid rent, in addition to the relocation assistance or treble damages. RCW 59.18.085(2), (2)(a), (2)(b). This portion of the relocation-assistance program was created in 1989. Laws of 1989, ch. 342, § 13.

The second scenario where the relocation-assistance program takes effect is when a landlord knows or should have known that a unit will become illegal to rent. This portion of the relocation-assistance program was created in 2005. Laws of 2005, ch. 364. With some exceptions not relevant here, the legislature requires landlords to pay relocation assistance to tenants when “a governmental agency responsible for the enforcement of a building, housing, or other appropriate code has notified the landlord that a dwelling will be condemned or will be unlawful to occupy due to the existence of conditions that violate applicable codes, statutes, ordinances, or regulations,” and the landlord “knew or should have known of the existence of these conditions.” RCW 59.18.085(3)(a). Liable landlords must pay relocation assistance in the amount of \$2,000 or three month’s rent, whichever is more, as well as the tenants’ deposit and any prepaid rent. RCW 59.18.085(3)(b). Tenants have the right to sue for the payments required under subsection (3)(b). *See* RCW 59.18.085(3)(e).

This second scenario is similar in many respects to the first set out in subsections (1) and (2) of RCW 59.18.085, but it differs in others. Landlords are not liable for treble damages. *See* RCW 59.18.085(3)(a)–(g) (not providing for treble damages). But any affected tenants may recover “actual damages” that exceed the amount of relocation assistance. RCW

59.18.085(3)(e). Also, the relocation-assistance program authorizes local governments to advance payments of relocation assistance to “displaced tenants” if any liable landlords do not meet their payment obligation within seven days of an enforcement agency issuing a formal notice of condemnation, eviction, or displacement order. *See* RCW 59.18.085(3)(c).

The legislature enacted protections for tenants during the time period after the enforcement agency’s initial notification to the landlord. *See* RCW 59.18.085(3)(d) (prohibiting three categories of actions by the landlord “[d]uring the period from the date that a governmental agency responsible for the enforcement of a building, housing, or other appropriate code first notifies the landlord of conditions that violate applicable codes, statutes, ordinances, or regulations to the time that relocation assistance payments are paid to eligible tenants, or the conditions leading to the notification are corrected”). During this sensitive time period, landlords may not “[e]vict, harass, or intimidate tenants into vacating their units for the purpose of avoiding or diminishing application of [RCW 59.18.085(3)].” RCW 59.18.085(3)(d)(i). Landlords also may not “[r]educe services to any tenant.” RCW 59.18.085(3)(d)(ii). Finally, landlords may not “[m]aterially increase or change the obligations of any tenant, including but not limited to any rent increase.” RCW 59.18.085(3)(d)(iii).

B. Pham cannot rebut the presumption of substantial evidence supporting the trial court’s award of relocation assistance

1. *Substantial evidence supported the finding that the landlord was not credible in disclaiming any knowledge that the unit was rented unlawfully*

RCW 59.18.085(2) applies when a landlord has actual knowledge that a rental unit is unlawful to occupy. *See* RCW 59.18.085(1). And RCW 59.18.085(3) applies when a landlord has actual or constructive knowledge of the illegality. The trial court found both actual and constructive knowledge, rejecting Pham’s contention at trial that “he did not know the property was permitted for use as a triplex,” rather than a five-plex. (CP 87 § 3.5.3.) This contention was “not credible,” according to the trial court. (*Id.*) Thus, the trial court found both actual and constructive knowledge: “[Pham] knew or should have been aware that rental of Unit 5 was unlawful before he leased it to [Corbett and Morgan].” (*Id.*)

This credibility determination is the end of the matter. As the Supreme Court has held, “credibility determinations are solely for the trier of fact,” and a finding of a lack of credibility “cannot be reviewed on appeal.” *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125, 126 (2003) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)) (per curium). The trial court was in the best position to scrutinize Pham’s demeanor and evaluate his testimony within the context of all the evidence. Pham testified at trial

and was cross examined. (VRP 25–99.) Pham told his story and had every opportunity to present documentary evidence supporting his contention of ignorance. Pham had his chance, but the trial court did not believe him. Because the trial court, sitting as finder of fact, determined Pham lacked credibility, he must live with the consequences on appeal.

Pham argues, however, that “[t]here was no testimony presented at trial or finding of fact in the trial court’s order establishing what a reasonable or experienced landlord should have known.” (Appellant’s Opening Br. at 23.) This argument fails, because the trial court’s finding of actual and constructive knowledge was based principally on the trial court’s credibility determination. But even if the trial court’s credibility determination were subject to scrutiny, substantial evidence supports it. As the trial court found, Pham leased the rental unit to Corbett and Morgan within months of buying the property at a foreclosure sale. (CP 87 § 3.5.3.) The permit status of the property was available from the King County Assessor, title documents, and the website of the City of Seattle’s Department of Planning and Development. (CP 87 §§ 2.3.1, 3.5.3, VRP 127.) And by the time of trial, Pham knew full well that the rental unit was unlawful to occupy, because the City of Seattle told him so. (Ex 17–19; VRP 74:9–:10, 75:22–76:7, VRP 78:7–:17.)

In short, because substantial evidence supported the trial court's finding of actual and constructive knowledge, one of the preconditions for relocation assistance was in place. The other precondition, notice, was too.

2. *Substantial evidence shows Pham had actual or constructive notice that the rental unit was unlawful to occupy*

In addition to the landlord's actual knowledge, the relocation assistance required under RCW 59.18.085(2) is owed when a landlord has been "notified" by a governmental enforcement agency that a rental unit "is" unlawful to occupy. RCW 59.18.085(1). In addition to the landlord's constructive knowledge, the relocation assistance required under RCW 59.18.085(3) is owed when a landlord has been "notified" by a governmental enforcement agency that a rental unit "will be" unlawful to occupy. RCW 59.18.085(3)(a). Pham thinks the trial court was mistaken in finding that Pham had notice that the rental unit was unlawful to occupy. (Appellant's Opening Br. at 17.) But substantial evidence is in the record.

The trial court found, "On May 17, 2013, Seattle's Department of Building and Development formally notified [Pham] that Unit 5 violated land use and building codes because the building was permitted for use as a triplex, not a five-plex." (CP 86 ¶ 3.5.2.) Pham says he received this notice on May 22. (VRP 74:9-:10.) And the agency's notice stated that the occupancy of the unit rented to Corbett and Morgan was *presently* a violation of

the City of Seattle's land-use code (Ex 17), not just that it "will be" a violation, as required to satisfy the notice standard of RCW 59.18.085(3). The city's inspector sent a follow-up letters to Pham on May 22, stating "multiple repairs will be needed to the lower unit if it is to be permitted." (Ex 18.) Pham admitted he received this letter in late May. (VRP 75:22-76:7.) On May 28, Corbett and Morgan filed and served their answer demanding relocation assistance under RCW 59.18.085. (CP 15-19.)

On June 6, moreover, the city inspector sent another letter and spoke with Pham before then as well. (Ex 19, VRP 122:21-:24.) Pham admitted he received this June 6 letter, which described a "permitting process to legalize unit numbers four and five" and catalogued "quite a bit of work" that would need to be done by "a quality contractor" in order to pass inspection for permitting. (Ex 19, VRP 78:7-:17.) Pham does not and cannot dispute these exhibits or this testimony. By the time of trial on July 17, 2013, then, substantial evidence supported the trial court's findings and corresponding conclusion that Pham had been "notified" that Corbett and Morgan's unit both "is" and "will be" unlawful to occupy." RCW 59.18.085(1), (3)(a). Thus, the prerequisites for a demand of relocation assistance had been met.

Substantial evidence supported a demand for relocation assistance on

another, independent ground: Pham had constructive notice from the enforcement agency that the unit was not lawfully permitted *before* he entered the rental agreement with Corbett and Morgan in April 2012. This notice thus triggered the prohibition and corresponding duty to pay relocation assistance set forth in RCW 59.18.085(1)–(2).

RCW 59.18.085(1) and (2) must be read to allow for constructive notice. To begin with, there is precedent for holding a landlord has constructive notice of non-compliance with City of Seattle land-use and building codes because a landlord should examine the premises for compliance with these requirements before deciding to enter a rental agreement. *See Pinckney v. Smith*, 484 F. Supp. 2d 1177, 1181 (W.D. Wash. 2007). More importantly, RCW 59.18.085 is a remedial statute, and such laws must be construed liberally to give effect to their remedial purpose of assisting low-income tenants whose poverty and powerlessness traps them in illegal or substandard housing. *Cf., e.g., Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002) (stating this rule of construction for another remedial statute).

Interpreting RCW 59.18.085(1) and (2) to allow only actual notice would create disincentives for landlords to conduct due diligence, place a burden on local governments, and reduce the likelihood that tenants re-

ceive relocation assistance. In this case, in fact, the city's inspector recognized the problem of property owners placing their heads in the sand, noting that real-estate agents "don't wish to divulge" publicly available data about how many dwelling units a property is permitted to have. (VRP 114:19--:20.) Landlords should have incentives to check publicly available information about the permits for their own property. *See Pinckney*, 484 F. Supp. 2d at 1181 ("Lessors may not shield themselves from liability by consciously ignoring the condition of the property before renting to tenants."). And in today's environment of annual budget crises, local governments should be allowed to assume that they do not need to employ armies of inspectors and can instead place permitting information online or in the county assessor's office. This governmental need is particularly acute in dense urban areas such as Seattle, where the limited resources of enforcement agencies must be allocated to police vast quantities of rental housing. If the statute were interpreted otherwise, low-income tenants would be at the mercy of landlords, waiting for cash-strapped enforcement agencies to issue actual notifications of code violations.

A constructive-notice standard also solves a proof problem. In residential unlawful-detainer cases, trials are set for within 30 days after a show-cause hearing to determine whether there is a genuine issue for trial on the

landlord's claim for a writ of restitution. RCW 59.18.380. Because unlawful detainers are special proceedings, this 30-day deadline for trial casts doubt on how much pre-trial discovery may be permitted. *See, e.g.*, CR 33 (allowing a responding party up to 30 days to respond to interrogatories); CR 34 (same timeframe for requests for production). It thus may be difficult in many cases to obtain evidence rebutting landlords' claims that they did not receive actual notice. This problem is solved by a constructive-notice standard.

C. The eviction proceeding was the proper occasion to require the landlords to pay relocation assistance

1. *The legislative program entitled the tenants to take private action to seek the relocation assistance they needed to get out of the unlawful and substandard housing without waiting for permitting and repairs*

Pham argues that a payment for relocation assistance was premature, as Pham was entitled to “an opportunity to cure the defect” and “the premises has not yet been condemned or deemed unlawful to occupy.” (Appellant's Opening Br. at 16, 23.) Pham's argument is predicated on a misreading of the record and RCW 59.18.085.

Pham asserts that “the property was not unlawful.” (Appellant's Opening Br. at 16.) Pham is wrong. The trial court found that the city housing inspector determined that it was illegal for Pham to rent the unit to Corbett and Morgan: “the housing inspector mailed a letter to [Pham]

notifying him that use of the property as a five-plex was not legally permitted.” (CP 83 ¶ 2.3.8.) Substantial evidence supported this finding. Three letters from the housing inspector to Pham discussed this illegality, and Pham acknowledged receiving all of them. (Ex 17–19; VRP 74:9–:10, 75:22–76:7, VRP 78:7–:17.) In fact, during his testimony, Pham never denied that the property was permitted for only three units when he rented the dwelling to Corbett and Morgan. (*See* VRP 25–99.) And as of the trial date, the city’s inspector testified that Pham had not yet obtained a permit to let the building as a five-plex, nor had he made the requisite repairs as part of the permitting process. (VRP 128, 132–33.) Pham admitted he had not yet made *any* changes to the unit. (VRP 75:19–:21.) Simply put, the dwelling was and remained unlawful to occupy.

It is true, as Pham contends, that the City of Seattle had not issued a formal order of condemnation, eviction, or displacement before trial. (VRP 126:22–:24.) But that fact is irrelevant to the demand of Corbett and Morgan for relocation assistance from Pham; it is relevant only if Corbett and Morgan had sought assistance from the City of Seattle, or the city had sought to take action against Pham. Pham misreads RCW 59.18.085(3)(c).

The plain language of RCW 59.18.085(3), read in context, shows Corbett and Morgan did not owe an opportunity to cure and had the right to

demand repayment assistance. *See, e.g., Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (discussing the well-established rule that statutory interpretation begins with the statutory provision's plain language, as read in the broader context of the statute and legislative scheme as a whole). RCW 59.18.085(3)(a) provides that landlords "shall be required to pay relocation assistance" after the landlords receive notice that it "will be unlawful to occupy."

Subsection (3) creates a private right of enforcement in subsection (3)(e) to obtain funds from the landlord: "Displaced tenants shall be entitled to recover any relocation assistance, prepaid deposits, and prepaid rent required by (b) of this subsection," in addition to actual damages exceeding the amount of relocation assistance, as well as any costs and reasonable attorney fees. RCW 59.18.085(3)(e).

In subsection (3)(c), by contrast, the legislature created a procedure for governmental enforcement and for tenants to obtain governmental assistance. It allows local governments to advance the relocation-assistance payments to the tenants if the landlord does not make the payments within seven days of an agency issuing a notice of condemnation, eviction, or displacement order. RCW 59.18.085(3)(c); *see also* RCW 59.18.085(3)(f)–(h) (authorizing local governments to levy civil penalties and initial legal ac-

tion against landlords to recover advances of relocation assistance paid under subsection (3)(c)). Thus, Pham had an opportunity to cure before the *City of Seattle* could take action or advance the funds, and the Notice of Violation dated May 17 makes this clear. It states, “Failure to take corrective action within the specified time period will result in legal action on the part of the City.” (Ex 17.) Thus, subsection (3)(c) establishes the trigger for governmental intervention.

RCW 59.18.085(3)(e) offers even further support for the interpretation that subsection (3)(c) concerns governmental, not private, intervention and assistance. It grants the right to costs and attorney fees to tenants in “any action brought by displaced tenants to recover any payments or damages required or authorized by this subsection (3)(e) *or* (c) of this subsection that are not paid by the landlord or advanced by the city, town, county, or municipal corporation.” RCW 59.18.085(3)(e) (emphasis added). Thus, the statutory context shows the legislature believed that it had created independent and separate avenues for tenants to obtain relocation assistance under RCW 59.18.085(3). And RCW 59.18.085(3)(c) is the only part in the whole legislative scheme that contemplates an opportunity for cure. If tenants do not wish to wait for governmental assistance (an understandable position, given that they are the people forced to live in unlawful

or substandard conditions while the landlords get their act together), they may choose to take private action under RCW 59.18.085(3)(e) to enforce the landlord's duty under RCW 59.18.085(3), and that is what Pham and Morgan did.

Under Pham's theories, the relocation-assistance program would be an illusory promise. Landlords could willfully ignore the illegality or substandard condition of their properties, as Pham did here, and in many cases still avoid their statutory responsibility for paying relocation assistance. Landlords would simply rely on the "opportunity for cure" that Pham insists should be read into the statute. Instead of proactively "curing" problems by ensuring their rental units are lawful and in compliance with building codes, landlords could to save money by "curing" only if forced to. This would be a calculated decision for unscrupulous or incompetent landlords, and they would get away with it in many instances.

In any event, the opportunity for cure which Pham reads into RCW 59.18.085(3) would not apply for another reason: because the conditions for payment under RCW 59.18.085(1)-(2) were satisfied, as also discussed above. Morgan called the City of Seattle on May 10 to complain about rats and the sewage odor. (VRP 153:6-154:6.) On May 15, a city inspector came to Morgan and Corbett's unit. (CP § 2.3.8.) The next day, Pham served a

three-day notice to pay or vacate, and he filed this eviction case on May 20. (CP 1–12.) Starting on May 22, the city inspector issued three letters to Pham discussing the illegality and substandard condition of the rental unit, and Pham received them all. (Ex 17–19; VRP 74:9–:10, 75:22–76:7, VRP 78:7–:17.) By the time of trial, then, Pham had received actual notice that the rental unit was presently illegal to occupy. The conditions of RCW 59.18.085(1)–(2) were thus met. This conclusion is particularly true if a constructive-notice standard were applied.

2. *A demand for relocation assistance may be considered in an unlawful-detainer proceeding because it concerns the right to possession and the duty to pay rent, and no adequate alternative civil remedy is available*

An issue is whether tenants defending an unlawful-detainer action may demand payment of relocation assistance under RCW 59.18.085. The appellate courts have not yet ruled on this question, but well-established principles compel a holding in favor of tenants.

Pham’s unlawful-detainer suit was based on RCW 59.12.030(3). This statute provides that a tenant “is guilty of unlawful detainer” if the tenant “continues in possession in person or by subtenant after a default in the payment of rent” and service of a three-day notice to pay or vacate. RCW 59.12.030, .030(3). A pure defense to this claim is thus the argument that the tenant is entitled to continue in possession or the landlord is not enti-

tled to the rent claimed. In this vein, the tenant is permitted to offer evidence showing that the landlord's "failure to maintain the premises in a habitable condition constitutes a failure of consideration upon the part of the plaintiff and relieves the defendant of his obligation to pay rent." *Foisy v. Wyman*, 83 Wn.2d 22, 24, 515 P.2d 160 (1973).

And a demand for relocation assistance under RCW 59.18.085 is essentially the same theory recognized in *Foisy*. Evidence of code violations is admissible to establish that dwelling is uninhabitable. *Foisy*, 83 Wn.2d at 31. This same evidence establishes the landlord duty to pay relocation assistance. *See* RCW 59.18.085(1), .085(3)(a). Pham offers no justification for why a tenant should be held in default on the rent if the tenant is entitled to receive relocation assistance in an amount exceeding the amount of rent owed. It would be the height of formality to require the tenant to first pay any rent owing, and for the landlord to then turn around and pay that money right back to the tenant as part of a relocation-assistance payment. Such a rule would also make it less likely that the tenant would ever get relocation assistance and make it more difficult for the tenant to accumulate the cash required to pay the deposit and rent for a different dwelling, undermining the legislature's remedy for low-income tenants who are stuck in substandard housing "because they cannot afford to pay the costs

of relocation in advance of occupying new, safe, and habitable housing.”

Laws of 2005 ch. 364 § 1.

Not only is a demand for relocation assistance akin to a pure defense, but also it fits in the category of affirmative defenses and setoffs that may be plead in an answer to a residential unlawful-detainer suit. RCW 59.18.400 allows an answer to “assert any legal or equitable defense or set-off arising out of the tenancy.” “Where a defense exists that arises out of the tenancy, the court must consider it.” *Josephinium Assocs. v. Kahli*, 111 Wn. App. 617, 625, 45 P.3d 627 (2002). The allowable scope is usually described as those counterclaims, affirmative defenses, or setoffs “based on facts which excuse a tenant’s breach.” *Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985) (quoting *First Union Management, Inc. v. Slack*, 36 Wn. App. 849, 854, 679 P.2d 936 (1984)). An “equitable defense” is defined as a situation where “there is a substantive legal right, that is, a right that comes within the scope of judicial action, as distinguished from a mere moral right and the usual legal remedies are unavailing.” *Josephinium Assocs. v. Kahli*, 111 Wn. App. 617, 624–25, 45 P.3d 627 (2002) (quotations and citations omitted).

The appellate courts have catalogued several instances where the standard has been met over the years. In *Foisy*, the Supreme Court held

that habitability issues could be treated as an “affirmative defense,” and that “said defense is available in an unlawful detainer action of this nature.” 83 Wn.2d at 31–32. Similarly, in *Income Properties Inv. Corp. v. Trefethen*, 155 Wash. 493, 284 P. 782 (1930) the Supreme Court upheld an equitable defense based on the question of “whether rent can be recovered by a lessor when by his own acts he has deprived the lessee of the beneficial use of the property.” *Id.* at 506. In *Josephinium*, this Court held a claim of unlawful discrimination in violation of the anti-discrimination laws, where the discrimination bore on the right to possession, was a permissible equitable defense. 111 Wn. App. at 625. At least as early as 1919, moreover, the Supreme Court recognized tenants’ right in an unlawful-detainer action to raise any legal or equitable defense, including equitable estoppel, justifying their continued possession of the premises. *Andersonian Inv. Co. v. Wade*, 108 Wash. 373, 378-79, 381, 184 P. 327 (1919).

This Court should hold that a landlord obligated to pay relocation assistance is not entitled to possession until the landlord actually discharges this duty to pay. Thus, a claim for relocation assistance must be an available equitable defense. There is no adequate civil remedy. If a landlord obligated to pay relocation assistance were permitted to evict the tenant before actually paying that assistance, the tenant would be deprived of the timely

financial assistance which the legislature has deemed necessary to help the tenant move to a habitable dwelling.

An alternative holding would undermine the goals of the statute. Landlords would be free to evict low-income tenants before having to answer demands for relocation assistance, even if the landlords were renting out units illegally or in substandard conditions. Tenants would be forced to file separate civil suits, with the financial burdens of paying filing fees and process servers. Tenants would thus be faced with the longer case schedules of ordinary civil cases. And at the moment when they could least afford it, the low-income tenants whom the legislature meant to help would face greater financial burdens. The timing of these financial burdens could not be worse; when tenants are forced to move, they must scrape together money to pay first month's rent, a deposit, usually a non-refundable fee or two (Pham collected \$250 from Corbett and Morgan (Ex 1)), and often last month's rent (Pham took \$850 for this from Corbett and Morgan (Ex 1)). Saving low-income tenants from this financial trap was the overriding purpose of the legislature's relocation-assistance program. Yet this result is precisely what Pham's proposed rule would achieve.

3. *The lack of a filing fee for a counterclaim does not require dismissal because a pleading for relocation assistance is a defense or setoff in this context, not a counterclaim, and pleadings can be amended after judgment in any event*

Pham faults Corbett and Morgan for not paying a filing fee for a counter claim. (Appellant’s Opening Br. at 19 n.3.) But Pham cites no authority for the proposition that a filing fee deprives the trial court of the authority to exercise its jurisdiction over a demand for relocation assistance. Further, *Foisy* treats a breach-of-warranty claim as a defense, not a counterclaim, in the context of an unlawful detainer action. *See Foisy*, 83 Wn.2d at 28 (“[T]here is an implied warranty of habitability and breach of this warranty constitutes a defense in an unlawful detainer action.”). The same should be true for a demand for relocation assistance.

Or it may be treated as a permissible setoff under RCW 59.18.400. As Tegland notes, “courts and commentators have not always agreed on whether the defendant’s right to a setoff is an affirmative defense (which must be pleaded as such under CR 8), or the proper subject of a counterclaim, or something else.” 14 Karl B. Tegland, *Pleading Affirmative Defenses and Setoffs*, Washington Practice: Civil Procedure § 12:17 (2d ed. & Aug. 2013 Westlaw Supp.).

But even if the demand were a counterclaim, the remedy is not to dismiss the claim, but rather to permit amendment of the answer under CR

8(c) or CR 15(b). *See* 14 Tegland, *supra*, § 12:17 (“Under CR 8(c), the court may overlook a mistake in identifying an affirmative defense as a counterclaim, or vice versa, ‘if justice so desires.’”); CR 15(b) (permitting pleadings to be amended to conform to the evidence, even after judgment and over the objection of the other party). Pham cannot show any prejudice, because Pham had ample notice, by way of the answer, of the relocation-assistance issue, and the evidence overlapped with the habitability defense. *See* 14 Tegland, *supra*, § 12:17 (“So long as the defendant gives notice of a claim for a setoff, as required by the statute, the plaintiff would be hard-pressed to show any prejudice from the misidentification.”). Thus, even if the Court agrees that relocation assistance was a counterclaim in this context and a filing fee should have been paid, the remedy is to allow post-judgment amendment of the pleadings and payment of the filing fee. That is what justice requires, and Pham suffered no prejudice.

III. WARRANTY OF HABITABILITY

A. Background and purpose of the implied warranty of habitability

Beginning in the late 1960s, developments in landlord-tenant law recognized a landlord’s duty under the common-law theory of the implied warranty of habitability. Edward Chase & E. Hunter Taylor, Jr., *Landlord and Tenant: A Study in Property and Contract*, 30 *Vill. L. Rev.* 571, 645–47

(1985). Washington courts have refined the standard for the warranty such that a landlord impliedly warrants that they will provide a dwelling that does not “create a substantial risk of future danger” to his tenants. *Landis & Landis Const., LLC v. Nation*, 171 Wn. App. 157, 166, 286 P.3d 979 (2012) (citation omitted). The implied warranty of habitability in the context of a residential lease has been analogized and developed along the rationales of the implied warranty of merchantability for the sale of goods under U.C.C. § 2-314. *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1075–76 (D.C. Cir. 1970); *see also* Chase & Taylor, *supra*, at 645-647. In *Javins*, for example, the D.C. Circuit held that the tenant, like a “purchaser of a package of goods and services,” has neither the ability, knowledge, nor occasion to adequately inspect the product before the transfer occurs. *Javins*, 428 F.2d at 1074. Like the buyer of a car would, the tenant relies on the good faith and competence of the landlord. *Javins*, 428 F.2d at 1079.

In 1973, the Supreme Court of Washington in *Foisy* further recognized the application of the warranty to residential leaseholds as a necessary development in the legal obligations of a modern-day residential landlord. According to the Court, “caveat emptor”—the age-old property and conveyances standard—was under widespread scrutiny by courts across the country and could no longer reasonably and justly apply to Washington

state residential landlord-tenant relationships and contracts. *Foisy*, 83 Wn. 2d at 25. The Court explained that the exchange of payment of rent for the right to occupy a residence includes within it the promise on the part of the landlord that the leased premises include more than just the walls and roof. The modern-day landlord is not just providing land and a structure, but also must provide the tenant with the elements necessary to make the property livable, such as plumbing, heat, lighting, ventilation, and the absence of safety and health hazards. *Foisy*, 83 Wn.2d at 27. The value of the lease is that it provides the tenant with protection from the elements “without subjecting him to health hazards.” *Id.*

Under the implied warranty of habitability as set forth in *Foisy* a seller or lessor of property warrants to the purchaser or lessee that the property is fit for its intended use. A landlord who fails to maintain a habitable residence is liable for damages caused by such a breach of the lease contract. *See, e.g., Foisy*, 83 Wn.2d 22; *Landis*, 171 Wn. App. at 163. Washington courts have further held that the state’s Residential Landlord Tenant (RLTA), ch. 59.18 RCW, does not supersede common-law remedies. *Landis*, 171 Wn. App. at 162; *Dexheimer v. CDS, Inc.*, 104 Wn. App. 464, 467, 470, 17 P.3d 641 (2001); *see also Foisy*, 83 Wn.2d at 28–30 (mentioning the passing of the bill that would become RCW 59.18). Further, RCW

59.18.070 expressly preserves a tenant’s right to pursue “remedies otherwise provided to him or her by law,” and RCW 59.18.400 provides that a defendant tenant in an unlawful detainer action “may assert any legal or equitable defense or set-off arising out of the tenancy.”

The standard for the implied warranty of habitability was clarified in *Atherton Condo. Apartment-Owners Ass’n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 519–22, 799 P. 2d 250 (1990). The *Atherton* standard asks whether habitability problems “present a substantial risk of future danger.” *Westlake View Condo. Ass’n v. Sixth Ave. View Partners, LLC*, 146 Wn. App. 760, 771–72, 193 P.3d 161 (2008). The *Atherton* court held that a seller of property breaches their duty to the purchaser under the common law implied warranty when applicable fire-safety provisions in the building codes were violated during construction. The court rejected the interpretation offered by the defendant development company that a court would need to find “egregious defects” relating to the “fundamental structure” to find a breach of the warranty. They specifically held that it was important to weigh the facts of each case on a case-by-case basis and analyze larger policy considerations that argue for applying the warranty in an individual circumstance. *Atherton*, 115 Wn.2d at 519.

The policy considerations the *Atherton* court considered were: (1) pur-

chasers or lessees of property need protection from defects especially when they are latent or unapparent in nature at the time of a superficial walk-through of the property; (2) liability for defect should apply to the owner because they are in a better position to actually prevent or resolve defects in the structure and habitability; and (3) the purchaser or lessee has a right to expect that for which s/he bargained for which is a dwelling that is fit for the purposes intended. *Id.* at 521-522. As to the third policy consideration, the court held specifically that the purchaser had a right to expect that the building complied with fire and safety codes and the application of the common law warranty in this instance was “neither unreasonable nor harsh on a buildor-vendor.” *Id.* at 522.

With these background principles, the record in this case gains clarity.

B. There was substantial evidence presented to find a breach of the implied warranty of habitability

1. Standard of review

Whether there was sufficient evidence for a finding that there was a rodent infestation, a sewage leak, and a strong sewage smell throughout the apartment is a factual question and the reviewing court must view the trial court’s findings under the substantial-evidence standard. *See, e.g., State v. Halstien*, 122 Wn.2d 109, 129, 857 P.2d 270 (1993).

2. *Reviewing the record for evidence of breach of the implied warranty of habitability*

The record includes significant testimonial evidence as well as exhibits allowing the trier of fact to find: (1) the landlord breached the implied warranty of habitability and that therefore the tenants were entitled to a dismissal of the action; and (2) the damage amount they were entitled to include the reimbursement for the months in which they overpaid rent for a partially uninhabitable apartment.

The exhibits and the testimony of the tenants indicated many habitability concerns. The major concerns included: (1) rat infestation evidenced by hearing and seeing rats inside the unit (VRP 141:24–143:20, 145:23–148:15, 166:19–25, 180:16–184:13); (2) holes in walls that allowed for or resulted from the presence of rats (Ex 7; VRP 139:3–139:14, 141:16–142:20; 181:5–181:16); (3) pervasive sewage gas entering unit from sink drains causing foul smell in apartment (VRP 139:18—139:25, 151: 1–151:15; 174:14–175:1); and (4) sewage leak in one area of the leased premises that was shown to them and readily accessible from their kitchen for their sole use (*see* VRP 140:15–140:25, 165:19–165:25 (describing being shown the area in the walk-through and also that it contained shelves)); VRP 149:14–150: 25 (describing flooding and leaking that occurred); VRP 183:16–184:17 (describing being shown the area by Pham)); VRP 185 :13–187: 3).

Further, the city inspector testified about the conditions of the unit that he witnessed and the associated hazards to the residents' health and safety. (VRP 115:18–116:6, 132:2–132:4 (sewage leak); VRP 116:23–117:4 (sewage gas); VRP 118:1–119:4 (access into unit for rodents); VRP 119:15–119:16 (danger and health hazard of rodents); VRP 121:16–121:21 (open electrical outlets where walls weren't aligned and installation was improper and hazardous)). The inspector also documented these hazardous and substandard conditions in his Notice of Violation and follow-up letters to Pham. (Ex 17–19.)

The trial court need not have relied solely on the testimony of the tenants and the city inspector to find sufficient evidence that the apartment was at least partially uninhabitable for at least eight months. The testimony of the landlord himself revealed the extent to which tenants complained to him about conditions in the unit including sewage smells and rats inside the unit. (*See* VRP 67:2–67:6.) At least on a few separate occasions, the landlord also received *written* notice, not just oral or constructive notice, of major problems that were never adequately fixed. (*See* Ex 24.)

The record shows that the landlord contradicted his own characterization of the complaints as part of a “game” played by tenants when he repeatedly stated that tenants would complain “every time” and “each

month” when rent was due but then stated that the complaints were not very frequent and that they were “8 or 9 months apart.” (VRP 37:7–37:11, VRP 64: 24–64:25, 65: 1–65:9.) A reasonable trier of fact could easily decide not to find the landlord’s characterization of the complaints credible and that his unresponsive attitude to the complaints resulted from his decision to ignore or disbelieve his tenants’ habitability concerns.

The landlord’s testimony also shows that the space where a sewage pipe leaked that was adjacent to their kitchen was connected to their kitchen by an unlocked door that could lock only from one direction and which allowed the tenants’ access to the space at all times. (VRP 51:13—52: 1.)

Finally, the landlord testified that what he had called his “Quarterly Pest Prevention Program” was really just his hiring of an exterminator to come out twice—and on only one occasion actually enter the unit—before he cancelled the “quarterly” inspection service and reverted to a yearly program. He testified that after he heard a complaint about rats he initiated the pest *prevention* program and later cancelled it because he had not heard any more complaints at that time. (VRP 68:14–69:17).

3. *Substantial evidence showed the landlord failed to make necessary repairs and failed to provide a regular pest-prevention program.*

The trial court was not in error when it found that the landlord breached his obligation to the tenants to “take all reasonable measures to

keep rats from the unit.” (CP 85.) Requiring a landlord to take such “reasonable” measures is squarely within the landlord’s larger obligation to maintain the premises in a safe, habitable condition under the statutory requirements of the RLTA as well as the common law implied warranty which requires providing a residence without conditions that “create a substantial risk of future danger” to the tenants. *Landis*, 171 Wn. App. at 167.) “[A]ll reasonable measures” (CP 85) would certainly include the statutory requirement that the landlord “provide a reasonable program for the control of infestation by insects, rodents and other pests” under RCW 59.18.060(4).

The record is heavy with testimony and exhibits that could allow a reasonable trier of fact to find that the conditions of the unit were serious and presented potential safety and health hazards to tenants and the actions of the landlord were inadequate to address the conditions. (*See Ex 24*; VRP 37:7–37:11, 67:2–67:6, 73:15–73:19, 68:14–69:14, 197: 18—197:23.) For example, the city inspector’s testimony showed that the sewage leak and other dangerous conditions were present still in May 2013, and stating that if he found the sewage leak still no repaired as of July then he would have issued an emergency evacuation order. (VRP 115:18–116:6, 116:23–117:4, 118:1—119:4, 132:2—132:4.)

4. *Substantial evidence shows the landlord knew about the baby and yet did nothing to adequately address conditions that presented risk of danger.*

The trial court found that the presence of rodents was a breach of the landlord's duties to provide a safe and livable dwelling and added that "[t]his is especially true where, as here, an infant is in the home." (CP 85). The trial court properly considered the safety implications of an infant baby living in the home. The question for the trial court was whether, based on the evidence before it, the rodent infestation "create[d] an actual or potential safety hazard." *Landis*, 171 Wn. App. at 166. And what constitutes such a safety hazard depends on the circumstances of the particular case. See *Atherton*, 115 Wn.2d at 520.

The court's finding that the landlord breached his duties to his tenants under the implied warranty of habitability does not, however, rely solely upon the presence of their infant son and his exposure to the rodents and sewage. The age and resulting vulnerability of their son is included in the trial court's findings as an additional emphasis of the breach.

At any rate, the city inspector's testimony, together with prior case law, substantiate the trial court's finding that the presence of rats presented a health risk. (VRP 119:15-119:16.) *Landis*, 171 Wn. App. at 165-66 ("There is no doubt that a rodent infestation can create an actual or potential safety hazard."); *Apostle v. City of Seattle*, 70 Wn.2d 59, 65, 422 P.2d

289 (1966) (referring to the “ever-present danger of disease transmission” that accompanies a rodent infestation). The danger is significant regardless of a person’s age or condition, and the awareness of the presence of an infant merely emphasizes the extent to which the landlord breached his duties to provide a safe and livable dwelling.

5. *A move-in/move-out checklist that is signed by tenants is not un rebuttable proof of the good condition of the unit at move-in nor is it a waiver of the tenant’s rights under the common law to claim a breach of the implied warranty of habitability for a livable, safe dwelling unit*

A move-in checklist which fails to indicate hazardous or unhealthy conditions is not dispositive, as held in *Landis*, 171 Wn. App. at 166. In *Landis*, the court dismissed the property owner’s argument that because the lessees had not indicated the presence of rats on the checklist that this was evidence that the rats were not, in fact, present at that time. The court reasoned that the lessor had the opportunity to clean and in other ways temporarily conceal the violating condition before showing the property to the lessees. The court further holds that, in the case of a rodent infestation, the observation of an individual on any given day is not conclusive proof by any means of the nonexistence of such an infestation. *Id.* at 167.

Here, as in *Landis*, the trial court correctly found that the fact that the move-in/move-out checklist signed by the tenants at the time they were shown the apartment does not indicate major problems with the unit, is

not dispositive of the actual condition at that time. The court based this finding on evidence in the record that the landlord himself filled it out and merely asked them to sign it, and that the apartment was still being readied for occupancy and full inspection would have been very difficult. (CP 85). These facts are evidenced by the landlord's own testimony (VRP 53:5), and the tenants' testimony (VRP 141:11-141:12, 156:6-156:7, 165:7-165:18, 169:3-169:9). On this record, the trial court had substantial evidence to reject the checklist as dispositive proof of the good condition of the apartment at the time tenancy was initiated, let alone throughout the one-year term of the lease.

6. *Where a tenant has repeatedly overpaid in rent for a unit that is found to have been continuously partially uninhabitable under the standard set forth in Foisy v. Wyman, that tenant may claim an accumulation of such an amount as credit for rent for the remaining period.*

The trial court did not err when it found that the accumulated amount of overpayment due to the percentage of the unit was uninhabitable for eight months allowed the tenants to withhold this accumulated amount from their rent even though this resulted in the tenant's obligation to pay nothing in the month of May. *Foisy* makes it clear that a tenant may deduct the amount they believe they are relieved from paying due to the conditions that amount to a breach of the landlord's duty. *Foisy* explains that "[i]n tendering the amount due to the [landlord], of course, he would de-

duct that amount due which he believed he was relieved from paying due to the landlord's breach of his implied warranty of habitability." *Foisy*, 83 Wn.2d at 33. In *Foisy*, the breach only occurred during a two month period and therefore the tenant would have only needed to deduct the amount calculated due to the breach for two months. The holding in *Foisy* specifically does not preclude a tenant, who, after living in a partially uninhabitable unit for more than two months and after repeated overpayments, deducts such overpayments from the amount they would need to tender to continue their tenancy.

In this case, such amount was more than the amount they would have owed for one-month's rent when the landlord initiated the unlawful-detainer action. The result was that at that time the landlord alleged unlawful detainer, the tenants actually owed nothing. On this fundamental basis, the court correctly dismissed the unlawful detainer action because there was no basis for the non-payment allegations.

The calculation of overpayment for past months wherein the unit was partially uninhabitable comes directly out of the holding in *Foisy* and the trial court merely applied the evidence on the record at trial to this formula. The trial court found that 25% of monthly rent payments, starting in August 2012, was "a fair approximation" of the damage from the breach

of the warranty of habitability. (CP 86 ¶ 3.4.4.) Mathematical certainty was not required, as contract damages need to be proven only with reasonable certainty. *See, e.g., Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wn. App. 66, 83, 248 P.3d 1067 (2011). The trial court found the dwelling's condition was "particularly noxious." (CP 86 ¶ 3.4.4.) Having adjudged the demeanor and testimony of the witnesses, the trial court was in the best position to determine the amount of damages with reasonable certainty. And, as discussed thoroughly already, substantial evidence is in the record to support the trial court's findings.

Because the tenants had overpaid rent by \$1,912.50 (CP 86 ¶ 3.4.4), moreover, Pham was not entitled to late fees.

IV. MISCELLANEOUS

A. A tenant who prepays their "last month's rent" at the initiation of the tenancy is entitled to have this pre-paid amount go into effect before filing of an unlawful detainer complaint based upon a 3-day pay or vacate notice under RCW 59.12.030

The trial court relied upon multiple bases for its dismissal of the unlawful detainer action based upon non-payment. In addition to the reasoning analyzed previously, that the tenants did not in fact owe the amount alleged as owing because they had overpaid for a partially uninhabitable unit for many months, the court also found that they did not owe the alleged amount because they had pre-paid for "last-month's rent" at the

initiation of their tenancy and this had not been accounted for by the landlord prior to initiating the action.

On April 25, 2012, the tenants and landlord signed a lease agreement for a one-year term for the apartment. (Ex 1.) Included in this agreement was the payment of both first and “last month’s rent” at the time of initiation of the tenancy. No specific terms were provided for the application of the last month’s rent payment upon a certain date or in a certain way. Both parties acknowledge that \$850.00 was included in the tenants’ initial payment to the landlord that was to be used as “last month’s rent.” (Ex 1.) Washington’s Residential Landlord Tenant Act and landlord-tenant common law do not provide a specific mechanism nor specific guidelines for the application of pre-paid “last month’s rent” money. A written notice to terminate tenancy by either party in accordance with the law would clearly be one example of a triggering act to apply the tenants pre-paid rent to that month. Another triggering act may be a landlord’s issuance of a 3-day notice to pay or vacate as required by the unlawful detainer act and codified in RCW 59.12.030. If a tenant has pre-paid for one-month’s rent that has not already been accounted for then a landlord’s notice to pay or vacate would only logically serve as a default notice that they will be applying such pre-paid amount to that month’s rent if they don’t receive pay-

ment within the 3-day period. An unlawful detainer act based upon non-payment is illogical and without foundation if the tenant has in fact pre-paid one month's rent, and such payment has been effectively held in trust by the landlord for application to rent owed when the time came.

In this case, the tenants' one-year lease from May 1, 2012 through April 30, 2013 had expired at the time the landlord served the tenants with the 3-day notice to pay or vacate on May 16, 2013 upon which the complaint for unlawful detainer in this action was based. At this time the tenants were entitled to continue their tenancy on a month-to-month basis with an outstanding credit of \$850.00 to be applied at any time. The landlord could not legitimately ask them to pay or vacate before they must apply such amount for one month's rent. It is uncontested that, until May 2013, the tenants had paid each month's rent in full and each payment was accepted by the landlord.

B. RCW 59.18.080 did not bar the tenants' remedies under the RLTA because no rent was due and owing and because the landlord acted negligently

Pham asserts incorrectly that RCW 59.18.080 barred Corbett and Morgan from obtaining any remedies. The statute requires tenants to be current in their rent before invoking the remedies available under the RLTA. RCW 59.18.080. But the statute expressly provides that it "shall

not be construed as limiting the tenant's civil remedies for negligent or intentional damages." *Id.* Given the standards in RCW 59.18.085 for the landlord's actual or constructive knowledge, relocation assistance should be interpreted as a remedy for negligent or intentional damages. Even if that were not so, RCW 59.18.080 provides that it "shall not be construed as limiting the tenant's right in an unlawful detainer proceeding to raise the defense that there is no rent due and owing." Corbett and Morgan's defense centered on their argument that it was Pham who owed *them* money for rent overpayments, and no rent was due and owing. Further, because the trial court found Corbett and Morgan's overpayments exceeded the amount of rent for May, the tenants were current on their rent in compliance with RCW 59.18.080.

V. ATTORNEY FEES

A. The trial court properly awarded attorney fees to Corbett and Morgan because the rental agreement and statutory provisions granted the right to attorney fees

The trial court properly awarded attorney fees to Corbett and Morgan at trial. The rental agreement provided for an award of reasonable attorney fees to the "prevailing party" in any action to enforce the agreement. (Ex 1 ¶ 11.) Further, under RCW 59.18.290, the prevailing party in an unlawful-detainer action is entitled to an award of reasonable attorney fees. *See*

Council House, Inc. v. Hawk, 136 Wn. App. 153, 159, 147 P.3d 1305 (2006). And under RCW 59.18.085(2) and (3)(e), a tenant who prevails on a request for relocation assistance is entitled to an award of reasonable attorney fees. Thus, there were ample contractual and statutory grounds for the trial court's award. See *McKee v. AT & T Corp.*, 164 Wn.2d 372, 400, 191 P.3d 845 (2008) ("Washington follows the American rule, and each party is expected to pay the party's own attorney fees unless otherwise provided by statute or contract." (citation omitted)). And Corbett and Morgan were the prevailing party because the judgment was entered in their favor. See, e.g., *Andersen v. Gold Seal Vineyards, Inc.*, 81 Wn.2d 863, 865, 505 P.2d 790 (1973) ("The prevailing party in a lawsuit is that party in whose favor judgment is entered."). The Court of Appeals should affirm the trial court.

B. Even though Corbett and Morgan have received legal representation pro bono, Pham must pay attorney fees

Although Corbett and Morgan, as low-income tenants, obtained legal representation pro bono, this fact does not relieve Pham of his obligation to pay attorney fees. See, e.g., *Blair v. Wash. State Univ.*, 108 Wn.2d 558, 571, 740 P.2d 1379 (1987) ("The trial court abused its discretion in even considering the plaintiffs' public interest representation."); *Council House*, 136 Wn. App. at 160 ("[U]nless a statute expressly prohibits fee awards to pro bono attorneys, the fact that representation is pro bono is never justifi-

cation for denial of fees.”). The hourly rate used to calculate the attorney fees must reflect market rates, even though the attorney’s provided their representation free of charge to the clients. *Cf., e.g., Blair*, 108 Wn.2d at 570 (“[R]easonable fees in a federal civil rights action are to be calculated by prevailing market rates regardless of whether the attorney is a private or nonprivate counsel.”).

C. Corbett and Pham are entitled to an award of reasonable attorney fees on appeal if the judgment remains in their favor

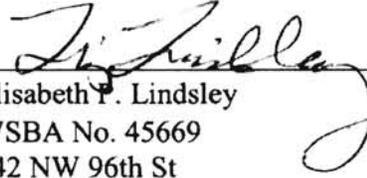
As required by RAP 18.1, Corbett and Morgan request an award of attorney fees on appeal. The same grounds that supported the award at the trial court justify an award here. *See, e.g., Council House*, 136 Wn. App. at 160 (awarding reasonable attorney fees to the prevailing party on appeal under RCW 59.18.290); *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001) (“If fees are allowable at trial, the prevailing party may recover fees on appeal as well.”). Accordingly, upon this Court’s affirmation of the trial court’s judgment, Corbett and Morgan request an award of reasonable attorney fees on appeal.

CONCLUSION

FOR THE FORGOING REASONS, the judgment of the trial court should be affirmed and reasonable attorney fees awarded to the respondents on appeal.

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