

No. 37379-3-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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DIVISION II  
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STATE OF WASHINGTON  
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RANDY GOULD and "JANE DOE" GOULD, husband and wife; BRET DRAGER  
and "JANE DOE" DRAGER, husband and wife; and GREG JOHNSON and  
"JANE DOE" JOHNSON, husband and wife; and DRAGER GOULD  
ARCHITECTS, INC.,

Appellants,

v.

LEDAURA LLC, a Washington limited liability company,

Respondent,

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**APPELLANTS' OPENING BRIEF**

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**ORIGINAL**

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**I.**  
**ASSIGNMENTS OF ERROR**

Appellants Randy Gould, Bret Drager, Greg Johnson and Drager Gould Architects, Inc. assign error to the Trial Court's Findings of Fact and Conclusions of Law entered February 1, 2008 and the Judgment entered on February 1, 2008 as follows:

1. The Trial Court erred in entering Findings of Fact 1.11, 1.13, 1.14, 1.15, 1.24, 1.25, 1.26, 1.27 1.28, 1.29, 1.30, 1.34, 1.44 and 1.45.

2. The Trial Court erred in entering Conclusions of Law 2.1, 2.2, 2.4, 2.5, 2.6, 2.7, 2.8, 2.10, 2.11, 2.12, 2.14, 2.15, 2.16.

3. The Trial Court erred in entering the Judgment.

A copy of the Findings Of Fact is attached as Appendix A and the Judgment is attached as Appendix B.

**II.**  
**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the Trial Court lack subject matter jurisdiction over Greg Johnson and Drager Gould Architects, Inc. because they were not served with a notice to pay rent or vacate as required by RCW 59.12.030 and RCW 59.12.040?

2. Did the Trial Court err in concluding that the Tenants consented to the lease assignment?
3. Did the Trial Court err in finding that the building was “free of debris and broom swept clean” by June 2006 such that the lease commenced on that date?
4. Did the Trial Court err in not excusing the Tenants from payment where, despite repeated notices from the Tenants, the Landlord failed to repair the roof as required under the lease?
5. Did the Trial Court err in finding that the Landlord was the prevailing party?

**III.**  
**STATEMENT OF THE CASE**

1. **Procedural History.**

This case is an unlawful detainer. The Plaintiff, Ledaura LLC, filed its complaint on August 10, 2007. CP 1-27. On August 28, 2007, the Defendants, Randy Gould, Bret Drager, Greg Johnson and Drager Gould Architects, Inc. filed their answer, affirmative defenses and counterclaim for breach of the warranty of habitability. CP 31-35. Prior to trial, the Plaintiff filed a motion in limine to dismiss the

Tenant's counterclaim, which was granted by the Court without prejudice. CP 39-40; 62-63. The case went to trial before the Honorable Linda CJ Lee on November 19-20, 2007. On February 1, 2008, the Trial Court entered its Findings of Fact and Conclusions of Law and Judgment in favor of the Plaintiff. CP 162-172, 173-175. On February 27, 2008, Messrs. Gould, Drager and Johnson and Drager Gould Architects, Inc. timely appealed the decision. CP 176-192.

**2. Statement of Facts.**

In October 2005, Leah Caruthers, co-trustee of the David W. Smith Revocable Living Trust, (hereinafter "Landlord")<sup>1</sup> entered into a listing agreement to lease a portion of a building owned by the Landlord, located at 601 St. Helens in Tacoma, Washington. RP 11/19<sup>2</sup> page 65; Exhibit 2. In December 2005 and January 2006, the

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<sup>1</sup> The Tenants refer to the David W. Smith Revocable Living Trust as the "Landlord" rather than Ledaura LLC, the Plaintiff. During all relevant times the Tenants believed the Trust was the owner and landlord of the building. It was not until much later that they learned the Trust had conveyed the building to Ledaura without first obtaining the Tenants' consent.

<sup>2</sup> RP refers to the Reported Proceedings. The date is provided after the "RP" designation because there was a different court reporter for each day of trial. Consequently, the transcripts are not sequentially numbered.

Landlord through Ms. Caruthers and the Defendants Randy Gould, Bret Drager and Greg Johnson (collectively the "Tenants") negotiated a Lease Agreement for the commercial space. RP 11/19 p. 24, 70-74; Exhibits 3, 4 and 48.

During those negotiations and prior to entering into the lease, the Landlord was advised that Tenants Bret Drager and Randy Gould own and operate Defendant Drager Gould Architects, Inc. P.S. ("DGA"), that DGA was leasing space in another building and that the lease was expiring. RP 11/20 pages 69, 135-137; Exhibit 23. Consequently, during these negotiations, the Tenants advised Ms. Caruthers as follows:

[We wondered] if it might be feasible to move [DGA] into a portion of the 601 St. Helens building before the date stipulated in the lease documents. Our thought is that we could occupy the existing office area temporarily and make do while improvements were completed allowing us to avoid a move from another building. We would of course cover net costs for the areas we use until the building is cleared out and the lease takes effect. Please let me know if this is even a possibility as soon as you can since our current lease expires at the end of this month.

See Exhibit 23; RP 11/19 page 136-137.

The reference to clearing out the building related to the fact that the building was filled with garbage, junk and debris, consisting in part of old equipment, old appliances, old furniture, construction material remnants, old toilets, boxes and a car (collectively the "Debris"). RP 11/19 p. 25, 44, 61, 64, 66, 68, 86, 89, 93, 66; RP 11/20 p. 101; Exhibits 26, 28, 29, 32.

On January 24, 2006, the Landlord and Tenants entered into a Lease Agreement for the space. Finding of Fact 1.7; Exhibits 6, 9 and 45<sup>3</sup>. The Lease consists of a pre-printed form prepared by the Commercial Brokers Association and a Lease Addendum prepared by the parties. Id. Since the Debris occupied all of the space the Tenants intended to lease, the parties prepared an Addendum to the Lease and agreed as follows:

Lease term shall be (3) years whereby **lease commencement date shall be the date the building shall be free of debris and broom swept clean**, approximately (60) days from date of agreement. (Emphasis added).

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<sup>3</sup> Exhibit 6 and 45 are the same. However, the Lease Agreement at Exhibit 6 was only executed by the Landlord. Exhibit 45 is the same Lease Agreement but executed by all of the parties.

...

Tenant shall have months (2) through (11) of the first year of the lease free of rent.

Exhibit 9.

The Tenants then paid the first and last month's rent.

RP 11/19 p. 78; RP 11/20 p. 8, 95-96; CP 156 Finding of Fact 1.17; Exhibit 5.

After the Lease was signed and pursuant to their agreement with the Landlord regarding moving DGA into the building prior to the commencement of the lease term, the Tenants on or about January 25, 2006 began improving the approximately 760 square feet of the building that was once an apartment. RP 11/19 p. 135-138; RP 11/20 p. 20, 96; CP 164 Finding of Fact No. 1.11; Exhibits 25 and 48. Based on the Lease Addendum terms, the Tenants expected the Landlord to provide the building "free of debris and broom swept clean, approximately (60) days from date of agreement", which would have coincided with the completion of improvements to the office. RP 11/20 p. 97-98.

Approximately sixty days later in April 2006, the Tenants completed the improvements to the office. Finding

of Fact No. 1.12. However, the Landlord had failed to remove most of the Debris in the building. Exhibit 26. In fact, the Landlord only started removing the Debris in March 2006, more than a month after the Lease was signed. RP 11/19 p. 89; Exhibit 26. By May 2006, the Landlord had only brought in one dumpster and estimated at that time "it would take dozens and dozens of these 30-yard dumpsters . . . to clear out that building." RP 11/19 p. 93.

The Tenants corresponded via Email with Ms. Caruthers, who lives in Texas, advising her that the Debris had not been removed and further provided pictures of the Debris so that the Landlord could see the condition of the building. RP 11/19 p. 87; Exhibit 26. During that same time, the Landlord had hired an attorney and was engaged in an unlawful detainer action against a third party, Jim Crawford, who was storing some of his personal property in that part of the building to be leased to the Tenants. RP 11/19 p. 44, 101, 144-145; Exhibits 4 and 25.

Later, the Landlord hired third party Robert Munroe to remove the Debris. RP 11/19 p. 94. The Landlord

compensated Mr. Munroe by giving him the right to the salvage value of any items he removed from the building. RP 11/19 p. 95.

While at the premises, Mr. Munroe represented to the Tenants that he had considerable experience performing demolition work and that he could perform demolition work within the building. RP 11/20 p. 70, 103. As Mr. Munroe was expected to complete his work for the Landlord shortly, on June 7, 2006 the Tenants signed a contract with Mr. Munroe for the demolition work. Exhibit 12. Unfortunately, rather than completing the removal of the Debris, on or about June 9, 2006, Mr. Munroe chose to begin the demolition work, which occurred over a weekend when the Tenants were not present. RP 11/20 p. 70-71, 84-85. The following Monday, June 12, 2006, when the Tenants returned, they discovered that Mr. Munroe had begun the demolition work and immediately halted further demolition work and terminated Mr. Munroe. RP 11/20 p. 70-71, 82; Exhibit 13.

During Mr. Munroe's demolition work, he exposed asbestos in the building that required abatement. RP 11/20 p. 70. The Tenants immediately abated the asbestos, during which time they gathered and consolidated the remaining Debris in the building to allow the Landlord to easily remove the remaining items. RP 11/20 p. 73, 108-109; Exhibit 28. The Tenants completed the work within two weeks of Mr. Munroe's demolition work, abating the asbestos and organizing the remaining Debris by June 30, 2006. RP 11/20 p. 107-108; Exhibit 28. Even during that abatement process, the Landlord had access to the building to continue removing Debris and the Landlord did not complain to the Tenants that it interfered with its work. RP 11/20 p. 107-108. Moreover, Ms. Caruthers was in Texas during this period and not in town to perform any work. RP 11/19 p. 87-89; Exhibit 17.

Although the Tenants had terminated their demolition contract with Mr. Munroe, the Landlord continued to retain

him to remove the remainder of the Debris.<sup>4</sup> RP 11/19 p. 112, 121; RP 11/20 p. 110, 114, 117. In July 2006, Mr. Munroe began rearranging the Debris, scattering it throughout the building and later living in the building. RP 11/19 p. 95; RP 11/20 p. 110-113, 117-118, 162-163; Exhibit 29 and 32. At the end of July, Mr. Munroe began stripping much of the wiring and other metals from the building, damaging the electrical systems, disabling the garage doors and damaging the building. RP 11/19 p. 88-89, 111-112, 114; RP 11/20 p. 55, 85-86; Exhibits 29 and 30. When the Tenants complained, on July 24, 2006, the Landlord issued a written notice terminating Mr. Munroe and evicting him. RP 11/19 p. 100; RP 11/20 p. 119; Exhibit 31. Unfortunately, Mr. Munroe had still not removed all of the Debris that remained in the building. RP 11/20 p. 119; Exhibit 33. Although the Landlord agreed to fix the damage caused by Mr. Munroe, no such repairs were ever performed. RP 11/20 p. 57.

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<sup>4</sup> Ms. Caruthers disputed this, her subsequent testimony and exhibits 30 and 31 demonstrate otherwise, particularly where she was responsible for terminating Mr. Munroe.

Between July 2006 and November 2006, both the Landlord and the Tenants endeavored to remove the remaining Debris. RP 11/20 p. 90. By November 2006, there remained some furniture, old paint cans still containing paint, chemical containers, a 55 gallon drum and miscellaneous other items. CP 166 Finding of Fact No. 1.22; RP 11/19 p. 119; Exhibits 18E, 18F, 18G, 18I. Even though the Landlord could have removed these remaining items at any time, it waited until September 2007 to do so. RP 11/19 page 116-118, 142-143; RP 11/20 p. 14-15. Since the Lease provides one year of free rent, which period did not commence until September 2007 when the building was finally free of debris, the Tenants believed they had until September 2008 to occupy the premises rent free.<sup>5</sup> RP 11/20 p. 64-65, 147.

The Lease Agreement also provides that the Landlord was responsible for maintaining the roof, foundation and exterior walls. Exhibits 6 and 45, page 4 paragraph 11.

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<sup>5</sup> Even though the Tenants believed no rent was due, they still paid the taxes, utilities and insurance for the entire space they intended to lease beginning when they started to convert the 760 square foot apartment into an office. RP 11/20 34-36, 122-138; Exhibits 42, 43, 44.

Prior to executing the Lease, the Tenants advised the Landlord that the roof was leaking and included a diagram of the location of those leaks. Exhibit 23; RP 11/19 p. 39-40, 43, 132-134; RP 11/20 p. 127-128. Immediately after entering into the lease the Tenants again advised the Landlord of the leaks. RP 11/19 p. 102, 139-140; RP 11/20 p. 51-54; Exhibit 25. The Landlord admits that the Tenants continued to complain about the roof leaks and that in November 2006 when Ms. Caruthers inspected the building the roof was still leaking. RP 11/20 p. 7, 37-38, 52-53. Although the Landlord acknowledged responsibility for fixing the roof, it never did so, complaining that in the beginning it did not know it was responsible for the roof and later when it did accept responsibility, the Landlord did not have the money to do so.<sup>6</sup> RP 11/19 p. 26, 139-141. Due to those leaks, including leaks within the small 760 square foot space the Tenants attempted to occupy, the Tenants were unable to use almost all of the 12,000 square feet that they expected to lease. RP 11/20 p. 96-97, 129-131. Otherwise,

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<sup>6</sup> Even though the Landlord complained about money, in January 2006, the Tenants had paid the Landlord \$35,000 for an option on the property and first and last month's rent. RP 11/19 p. 78; RP 11/20 p. 8-9, 95-96; Exhibits 5, 7.

any improvements they constructed would get wet and the improvements they did construct did get wet. Id.

Between November 2006 and May 2007, the Landlord provided no notice to Tenants that it considered that the lease term had commenced or, if so, what it believed the actual commencement date should be. RP 11/20 p. 18-19, 132-133; Exhibit 41. At the end of May 2007, the first communication in 6 months, the Landlord proposed an addendum to the Lease with terms that were very unfavorable to the Tenants. Exhibit 41. When the Tenants rejected the proposal, on July 30, 2007, Tenants Drager and Gould were served with a notice to pay rent or vacate. CP 167 Finding of Fact No. 1.32; Exhibit 11. However, the notice was never served on Tenants Greg Johnson or DGA. CP 167 Finding of Fact No. 132.

The Tenants subsequently learned that the Landlord had conveyed the property to the Plaintiff, Ledaura LLC, who purports to now be the owner and landlord even though the Lease specifically provides that the lease is not assignable without the Tenants' consent, which consent has never been

requested nor granted. RP 11/20 p. 66, 86; Exhibits 6, 10 and 45.

#### **IV. ARGUMENT**

##### **1. The Trial Court Lacked Subject Matter Jurisdiction.**

The Landlord only served Tenants Drager and Gould with the “notice to pay rent or vacate”. Finding of Fact 1.32. The Landlord failed to serve the notice on Tenant Greg Johnson or the sub-tenant DGA. Nevertheless, both Mr. Johnson and DGA were named as parties to this lawsuit and the Trial Court entered an order against both that they were guilty of unlawful detainer. CP 170 Conclusion of Law 2.7. The Trial Court further entered a money judgment against Mr. Johnson even though he was neither served nor present at trial. CP 173-175. For those reasons, the Tenants have assigned error to Conclusion of Law No. 2.2, which states as follows:

2.2 The five day (as required by the Lease) notice to pay rent or vacate was properly served more than five days prior to commencement of this action.  
CP 169.

Pursuant to RCW 59.12.030, as a prerequisite to any suit, the Landlord is obligated to provide a notice to the Tenants to "pay rent or vacate". A notice to pay or vacate must be served in accordance with RCW 59.12.040. RCW 59.12.030(3). The statute allows service to be accomplished through a variety of means, including personally serving the party and, when absent, leaving a copy of the notice with someone of suitable age at the premises and mailing a copy to the tenant's last known address. RCW 59.12.040. The Landlord failed to follow any of those options for service.

Failure to properly serve the notice deprives the court of subject jurisdiction. The Supreme Court stated in *Christensen v. Ellsworth*, 162 Wash.2d 365, 173 P.3d 228 (2007) as follows:

Proper statutory notice under RCW 59.12.030 is a " 'jurisdictional condition precedent' " to the commencement of an unlawful detainer action. *Hous. Auth.*, 114 Wash.2d at 564-65, 789 P.2d 745 (quoting *Sowers v. Lewis*, 49 Wash.2d 891, 894, 307 P.2d 1064 (1957)). Strict compliance is required for time and manner requirements in unlawful detainer actions. *Smith v. Seattle Camp No. 69*, 57 Wash. 556, 557, 107 P. 372 (1910); *Truly v. Heuff*, 138 Wash.App. 913, 920-21, 158 P.3d 1276 (2007);

*Cmty. Invs., Ltd. v. Safeway Stores, Inc.*, 36 Wash.App. 34, 37, 671 P.2d 289 (1983). Thus, any noncompliance with the statutory method of process precludes the superior court from exercising subject matter jurisdiction over the unlawful detainer proceeding. *Hous. Auth.*, 114 Wash.2d at 560, 789 P.2d 745.

As a consequence of the Landlord's failure to serve the notice on Mr. Johnson and DGA, the Tenants in their Answer denied the allegation that the notice to pay rent or vacate had been served on all of the Tenants. CP 3-4; 33. The Tenants further alleged as affirmative defenses "failure to perform a condition precedent", "Improper service of the pre-eviction notice" and "failure to state a claim upon which relief may be granted". CP 34.

During the presentation of the proposed Findings of Fact and Conclusions of Law, the Landlord requested a finding that the Tenants were a partnership. The Trial Court rejected that request, determining that the Landlord failed to prove there was a partnership, and deleted that finding. CP 201 (proposed finding no. 1.7 including the term "partnership"), CP 164 (adopted proposed finding no. 17 excluding the term "partnership"), CP 80. The trial court only entered the following finding of fact regarding service

of the notice:

1.32 A five day notice to pay rent or vacate the Property was served on Defendants Gould and Drager on July 30, 2007. Exhibit 11 and Proof of service on file herein.

Nevertheless, the Court entered an order that both Mr. Johnson and DGA were guilty of unlawful detainer and further awarded a judgment against Mr. Johnson. CP 173-175. As neither Mr. Johnson nor DGA had been served, the trial court lacked subject matter jurisdiction over those parties and both the subsequent order of unlawful detainer and the judgment against them are invalid.

**2. The Landlord's Assignment Of The Lease to Plaintiff Was Improper As It Was Not Consented To By The Tenants As Required By The Lease.**

The Lease provides that "This Lease is not assignable by Landlord without the consent of Tenant." Exhibit 6 page 10 of the Lease Agreement, paragraph 27. The "Landlord" is defined in the Lease Agreement as the David W. Smith Revocable Trust. Exhibits 6 and 45. The Lease further provides that "the covenants and agreements of this Lease shall not be altered, modified or added to except in writing signed by Landlord and Tenant." Exhibit 6

page 12 of the Lease Agreement, paragraph 31(c). The parties had specifically negotiated the assignability term, as the word “not” was handwritten into the Lease to change the provision to expressly create the requirement that the Landlord needed the Tenants’ consent. Although the property was apparently conveyed to the Plaintiff, Ledaura LLC, the Lease itself cannot be assigned to Ledaura, without the Tenants’ express consent, which was never provided.

Nevertheless, the Trial Court found as follows:

1.14 The uncontroverted evidence at trial is that Leah Caruthers told Greg Johnson that Ledaura LLC was being formed, that the Property would be transferred from the David Smith Revocable Living Trust to Ledaura, LLC, and that there was no objection by Mr. Johnson to such transfer.

1.15 Without objection, all of the interest of the David Smith Revocable Living Trust in the Property was transferred to Ledaura LLC on February 16, 2006, by quitclaim deed recorded March 3, 2006, under Pierce County Auditor’s recording number 200603030699. Exhibit 10.

These findings are in error for several reasons:

First, communicating the intent to assign the Lease to only one of the Tenants is not sufficient to gain approval from all

of the Tenants. Second, Mr. Johnson's failure to object cannot be construed as an approval where the Lease provides that any such agreement shall be in writing. Third, in Ms. Caruthers testimony, she states that this conversation occurred prior to the execution of the Lease. RP 11/20 29-30. She further testified that she believed the word "not" was inserted because of that conversation. RP 11/20 p. 29. The Landlord's decision to execute the lease with the requirement that it first obtain the Tenants' approval vitiated any perceived prior approval by Mr. Johnson.

For all of the above reasons, the Plaintiff Ledaura LLC was not the proper party to enforce the Lease and the trial court's finding is in error. Therefore, this case should be reversed and remanded with instructions to the trial court to restore the Tenants' rights under the lease and to dismiss the case.

3. **The Lease Term Did Not Commence Until September 2007 When the Building was "free of debris and broom swept clean".**

The central issue in the case was determining when the Lease commenced. CP 165, Finding of Fact No. 1.19.

The Landlord argued that based on the pre-printed lease form, the lease commencement date was "the date of occupancy", which it maintained was February 2006. CP 165 Finding of Fact No. 1.20. The Tenants argued that the Addendum prepared by the parties altered the commencement date to "the date the building shall be free of debris and broom swept clean."<sup>7</sup> CP 166 Finding of fact No. 1.23; Exhibit 8 paragraph 2. The Trial Court adopted the Tenants' interpretation, finding as follows:

1.25 By hiring Mr. Munroe to do demolition work on the middle and upper floors of the Property in June of 2006, Defendants thereby contributed to the debris in the building and interfered with Ledaura, LLC's ability to make the Property, "broom-swept clean."

1.26 By June 30, 2006, the middle and upper floors of the Property were essentially cleared out except for the demolition debris as depicted in Exhibit 47.

1.27 After June 2006, defendants allowed Robert Munroe to return to the building, and during his access to the building at that time, he vandalized the Property and apparently began moving things back into the middle and upper floors as indicated by Exhibit 32 identifying various "camp" snapshots.

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<sup>7</sup> The tenants have assigned error to Finding of Fact No. 1.11 relating to "possession of the Property" to the extent that the date of possession could be considered the Commencement Date.

1.28 By June of 2006 the Property was in sufficient condition that Defendants took over the middle and upper floors and began the demolition work required to fulfill their own plans for the building.

CP 166-167.

Based on these findings, the Trial Court entered the following conclusions of law:

2.4 The Lease Commencement date is June 1, 2006.

2.5 According to the terms of the Lease, Defendants' obligation to pay rent commenced July 1, 2007.

2.6 Defendants have breached the Lease Agreement dated January 24, 2006 and the Lease Addendum dated January 25, 2007 (sic) (a portion of Exhibits 6 and 45 and Exhibit 9) by failing to pay rent. . . .

2.7 Defendants are in unlawful detainer and are not entitled to possession of the Property.

2.8 The Lease Agreement between the parties dated January 24, 2006, (a portion of Exhibits 6 and 45 and Exhibit 9) is hereby forfeited pursuant to RCW 59.12.170.

CP 169-170.

In making these findings, the Trial Court agreed with the Tenants that the lease did not commence until the property was "broom-swept clean". Based upon the above findings and conclusions, the Trial Court concluded that the

premises were, or should be deemed to have been, “broom-swept clean” by June 2006, and thus that the lease term commenced in June, 2006. CP 166-167.

However, while the Trial Court was correct in concluding that the lease term did not commence until the building was “broom-swept clean”, the Trial Court erred in concluding that the building should be deemed broom-swept clean as of June 2006. Portions of each of the above findings are in error, not being supported by substantial evidence. The Court of Appeals reviews findings of fact to determine if they are supported by substantial evidence. See *Doe v. Boeing Co.*, 121 Wn.2d 8, 846 P.2d 531 (1993) and *Henry v. Bitar*, 102 Wn.App. 137, 142, 5 P.3d 1277 (2000). Each finding is separately addressed below.

**A. Finding of Fact No. 1.25**

Finding of Fact No. 1.25 states as follows:

1.25 By hiring Mr. Munroe to do demolition work on the middle and upper floors of the Property in June of 2006, Defendants thereby contributed to the debris in the building and interfered with Ledaura,

LLC's ability to make the Property, "broom-swept clean."

CP 166.

Although the Tenants did perform demolition work within the building, there is no substantial evidence that they interfered with the Landlord's ability to make the building "free of debris and broom swept clean" as required in the Lease. For example, the demolition work and asbestos abatement occurred between June 10, 2006 and June 30, 2006, a period of less than 3 weeks. RP 11/20 p. 107-108; Exhibit 28. During that time, the Tenants organized the Debris so that it could be conveniently removed. *Id.* The Landlord could continue removing the remaining Debris while demolition work was being conducted and the Landlord did not complain of any interference. *Id.* In fact, the Landlord was not in Tacoma, but rather in Texas, during this work. RP 11/19 p. 87-89; Exhibit 17. Moreover, the Landlord acknowledged that months later, at a meeting in November 2006, she was advised that the remaining Debris still needed to be removed and, despite having complete access to the

building, the Landlord took no action and instead waited almost a year, until September 2007, to remove the remaining Debris. RP 11/19 p. 116-118, 142-143; RP 11/20 p. 14-15.

Although the Landlord was not in town, even assuming that the Tenants may have briefly interfered with the Landlord's ability to remove the remaining Debris, shortly after the demolition work was completed, on August 23, 2006, the Tenants specifically proposed that they would remove all of the remaining Debris if the Landlord would remove the remaining hazardous substances, stating as follows:

Debris removal. This has been an ongoing problem. The lease provides that the building was to be "free of debris and broom swept clean" approximately 60 days from the date the lease was signed. We understand the difficulty of your situation and we appreciate your efforts to date; however, over six months later, the leased premises are still not free of debris. For example, there is still furniture and some of your father's items stored on the upper floor. **We are willing to remove all the remaining debris in the lease premises at our own expense, except for the cans of paint and solvents that were on site before we signed the lease. We think it is fair that you should be responsible for the disposal of those materials.** I also propose the removal of all of the items in the attic within 30 days

from the date of this letter. **We would need to know if your dad wants any of that stuff. Who is going to tell us?** (Emphasis added).

Exhibit 34. See also RP 11/20 pages 90-91, 122.

The next day, the Landlord rejected the proposal stating as follows:

I appreciate your proposal. We are obviously looking at these issues differently. I have forwarded your letter to my attorney. In the mean time, I will continue with my original plan to have the elect. reconnected it [sic] the attic for purposes of removing the items remaining.

Exhibit 35.

By offering to remove the debris themselves, the Tenants attempted to provide a method, at no cost to the Landlord, to bring the premises to a condition that was “free of debris and broom swept clean”, which the Landlord expressly rejected. Certainly to the extent the Landlord believed that the Tenants had interfered with its ability to remove the Debris, the Landlord acted unreasonably by not allowing the Tenants to then remove the Debris themselves.

**B. Finding of Fact No. 1.26**

Finding of Fact No. 1.26 states as follows:

1.26 By June 30, 2006, the middle and upper floors of the Property were essentially cleared out except for the demolition debris as depicted in Exhibit 47.

CP 166.

There is no substantial evidence to support the finding that “by June 30, 2006, the middle and upper floors of the Property were essentially cleared out”. As provided in the finding, the Trial Court relied upon Exhibit 47 to conclude that the upper and middle floors were essentially cleared out. However, the photographs in Exhibit 47 only depict a small portion of the building and not the entire building where much of the Debris was stored. See Exhibits 28, 29, and 32 which more accurately depict the amount of Debris still remaining in the building a month later in July 2006. Moreover, Exhibit 47 still depicts a substantial amount of Debris to be removed from the building.

The above referenced photographs present uncontroverted evidence of the condition of the building on July 10, 2006, July 20, 2006 and July 25, 2006. The Tenants’ Emails continue to express concern regarding the

Landlord's failure to remove the Debris throughout the month of July. See Exhibits 28, 29, 30 and 32. The next month, on August 22, 2006 and August 23, 2006, the Tenants issued yet another Email and a separate letter complaining about the debris and the Landlord's failure to remove it. See Exhibits 33 and 34. On August 29, 2006, the Landlord acknowledged that there was additional Debris in the attic to be removed. See Exhibit 37. Lastly, the Landlord admitted at trial that the earliest the building could be considered "free of debris" was November 2006, well after the June 30, 2006 date adopted by the Trial Court. RP 11/19 page 129.

This finding further conflicts with Finding of Fact No. 1.22 whereby the Trial Court found that over a year later, in September 2007, the "remaining items in the building were a 55 gallon drum, some desks, an air canister, and some paint cans" which were then removed. CP 166; Exhibits 18E, 18F, 18G, 18H, 18I. The finding that the building was "essentially cleared out" in June 2006 is at odds with the specific requirement set forth in the Lease requiring the building to be "free of debris and broom swept clean".

Courts are to give words in a contract their ordinary, usual, and popular meaning unless the agreement, as a whole, clearly demonstrates a contrary intent. *Paradiso v. Drake*, 135 Wn.App. 329, 336, 143 P.3d 859 (2006). The terms “free of debris and broom swept clean” clearly requires all of the debris to be removed. Not “almost free”, or “somewhat clean”, but “free” and “broom-swept clean”. The Trial Court’s decision in effect re-writes the parties’ contract and eviscerates the specific provisions drafted by and agreed to by the parties.

At trial the Landlord itself introduced Exhibits 18E, 18F, 18G, 18H, and 18I, each of which depict the Debris remaining in the building in September 2007. Pursuant to the Lease, this Debris was required to be completely removed before the lease was to commence, which based on the Landlord’s own inaction did not occur until September 2007. The Trial Court’s finding that “by June 30, 2006, the middle and upper floors of the Property were essentially cleared out” also conflicts with the Trial Court’s Finding of Fact No. 1.27 as discussed below.

**C. Finding of Fact No. 1.27**

Finding of Fact No. 1.27 states as follows:

1.27 After June 2006, defendants allowed Robert Munroe to return to the building, and during his access to the building at that time, he vandalized the Property and apparently began moving things back into the middle and upper floors as indicated by Exhibit 32 identifying various “camp” snapshots.

Exhibit 32 consists of photographs of the Landlord’s Debris yet to be removed from the building. The amount of Debris demonstrates that the building could not have been “free of debris” as required by the Lease and in conflict with Finding No. 1.26 that the building was “essentially cleared out”.

Finding 1.27 is not supported by substantial evidence to the extent that it holds the Tenants responsible for allowing Robert Munroe back into the building after he was terminated by the Tenants. On June 13, 2006, the Tenants terminated Mr. Munroe. Exhibit 13. However, the Landlord continued to retain Mr. Munroe to remove the Debris, not terminating him until July 24, 2006. Exhibit 31. The Tenants thus had neither the right nor the ability to

prevent Mr. Munroe from returning to the premises.

The evidence clearly shows that, far from wanting or authorizing Mr. Munroe to return to the premises, the Tenants objected to and complained to the Landlord regarding Mr. Munroe's activities following his return to the premises. On July 20, 2006 and July 25, 2006, the Tenants issued Email's to the Landlord complaining about Mr. Munroe. Exhibits 29, 32. The Email included photos of the Debris being spread out by Mr. Munroe and the encampment he had created. Id. Shortly thereafter, Mr. Munroe began stripping the building's electric wiring and severely damaging the building. Exhibit 30. Consequently, the Tenants requested that the Landlord immediately terminate Mr. Munroe and have him removed from the building, which it did. Exhibit 31. The Landlord then agreed to repair the damage, although it never did, further preventing the Tenants from using the building. RP 11/20 p. 57.

Based on the foregoing, Finding No. 1.27 is in error to the extent that it blames the Tenants, rather than the

Landlord, for Mr. Munroe's continued presence in the building and for damage he caused since Mr. Munroe was hired by the Landlord to perform that work and only the Landlord could terminate him.

**D. Finding of Fact No. 1.28**

Finding of Fact No. 1.28 states as follows:

1.28 By June of 2006 the Property was in sufficient condition that Defendants took over the middle and upper floors and began the demolition work required to fulfill their own plans for the building.

CP 167.

As previously discussed, the parties agreed that prior to the commencement of the lease term the Tenants could begin making renovations to the building. Thus there is no dispute that the Tenants took over portions of the building prior to the commencement of the lease term. However, to the extent that Finding 1.28 suggests the Tenants waived the condition that the building be "free of debris and broom swept clean" or accepted the condition of the premises as adequate, that finding is not supported by substantial evidence. The photographs depict the

substantial Debris yet to be removed in July 2006 and continuing thereafter.

Moreover, the finding fails to consider the fact that the Lease required the Landlord to complete the work of removing all of the Debris within approximately 60 days from the date of signing. By June 2006, approximately 150 days had passed and the Landlord's work was not complete, and thus the Landlord was in breach of the lease.

It is a basic rule of contract law that a party must attempt to mitigate damages flowing from a breach by the other party. *Max L. Wells Trust v. Grand Cent. Sauna and Hot Tub*, 62 Wn.App. 593, 605, 815 P.2d 284 (1991). In order to mitigate the Tenants' damages due to this delay, the Tenants attempted to work around the Landlord's Debris. The Tenants effort to mitigate their damages should not be construed as an acceptance of the building in its then condition. Rather, it is simply evidence of the Tenants' good faith and legally required effort to avoid incurring damages as a consequence of the Landlord's

delay.

**4. The Tenants Are Excused From Paying the Rent on the Entire Leasehold.**

In addition to the Landlord's failure to remove all of the Debris, the Landlord was also in breach of its responsibility to repair the roof leaks, which also prevented the Tenants from occupying all but 760 square feet of the 12,000 square foot building. Even within the 760 square feet the roof leaked, damaging the Tenants' equipment. RP 11/20 p. 96-97, 129-131.

Prior to entering into the Lease, the Tenants advised the Landlord that the roof had a number of leaks, which the Landlord acknowledged. Exhibit 23; RP 11/19 page 132-134. The Tenants further provided to the Landlord a diagram depicting the location of the leaks. Exhibit 23. When the parties entered into the Lease, the Landlord expressly accepted responsibility for maintaining the roof in "good condition and repair at Landlord's expense". Exhibits 6 and 45, page 4 paragraph 11. Within days of executing the Lease, the Tenants again advised the Landlord of the leaking roof. RP 11/20 pages 51-54; Exhibit 25.

The Landlord admitted at trial that the Tenants continued to complain about the roof leak and that in November 2006 the roof still continued to leak. RP 11/20 page 37-38. Although the Landlord acknowledged responsibility for fixing the roof, it never did so, complaining that in the beginning it did not know it was responsible for the roof and later when it did, the Landlord did not have the money to do so. RP 11/19 pages 139-141. The Landlord's failure to repair the roof was a breach of its obligations under the Lease and prevented the Tenants from occupying most of the space to be leased, and for which the Tenants should not be obligated to pay rent. For that reason, the Tenants have assigned error to Finding of Fact No. 1.34 and Conclusions of Law 2.10, 2.11, 2.12.

The leaking roof further prevented the Tenants from making improvements to the building. RP 11/20 123-124; 127-131; 140-141; Exhibit 46. Because of this, the Tenants alleged in their answer as affirmative defenses "breach of contract" and "breach of warranty of habitability". In *Port of Pasco v. Stadelman Fruit, Inc.* 60 Wn.App. 32, 802 P.2d 799 (1990) the Court recognized the applicability of

affirmative defenses in an unlawful detainer proceeding,  
stating as follows:

Unlawful detainer actions are summary proceedings to determine the right of possession, restitution of the premises and rent; counterclaims are generally not allowed, although affirmative defenses “ ‘based on facts which excuse a tenant's breach’ ” may be pleaded and argued in an unlawful detainer action. *Munden v. Hazelrigg*, 105 Wash.2d 39, 45, 711 P.2d 295 (1985) (quoting *First Union Management, Inc. v. Slack*, 36 Wash.App. 849, 854, 679 P.2d 936 (1984)).

The Court in *Heaverlo v. Keico Industries, Inc.*, 80 Wn.App. 724, 725, 911 P.2d 406 (1996) also addressed this issue, stating as follows:

RCW 59.12 provides a limited summary proceeding to preserve the peace by providing an expedited method for resolving the right to possession of property. *Skarperud*, 40 Wash.App. at 550, 699 P.2d 786. To protect the summary nature of an unlawful detainer proceeding, other claims, including counterclaims, are generally not allowed. *Munden v. Hazelrigg*, 105 Wash.2d 39, 45, 711 P.2d 295 (1985). There are, however, exceptions. **If the counterclaim, affirmative defense, or setoff excuses the tenant's failure to pay rent, then it is properly asserted in an unlawful detainer action.** *Munden*, 105 Wash.2d at 45, 711 P.2d 295. (Emphasis added).

Two such affirmative defenses are where the landlord breaches the warranty of habitability and/or the warranty of quiet enjoyment. See *Foisy v. Wyman*, 83 Wn.2d 22, 31, 515 P.2d 160 (1973). The landlord has breached those warranties by subjecting the Tenants to a leaking roof which materially affected the Tenants ability to use all but 760 square feet of the space.

The Landlord prevented the Tenants from occupying all but 760 square feet of the building due to its failure to remove the Debris, the damage to the building caused by its employee, Mr. Munroe, and due to its failure to repair the roof. Consequently, the only area that the Tenants "possessed" was that small area, constituting 6% of the lease space. RP 11/20 p. 96-97. Even in that 760 square feet of space, there were leaks damaging the Tenants' equipment and improvements. RP 11/20 p. 130-131. Based on the stated rental rate in the Lease of \$4,500 per month, the Tenants rent for the pro-rata portion of the building it could occupy at best is \$285.00 per month. Even if the Court's conclusion that the Tenants owed rent is not completely reversed, the amount of the rent owed

should be reduced to \$285.00 per month for the months for which rent was indeed due.

**5. The Landlord Was Not The Prevailing Party.**

The Trial Court determined that the Landlord was the prevailing party. CP 169 Finding of Fact No. 1.44. Landlord's position that it is the prevailing party was based exclusively on the facts that the Tenants were held to be guilty of unlawful detainer and that it was awarded a net affirmative judgment. While it is true that Washington courts often define the prevailing party as the party who received an affirmative judgment, such is not always the case. For example, in *Marassi v. Lau*, 71 Wash. App. 912, 916, 859 P.2d 605 (1993), the Court noted that "the net affirmative judgment rule, however, may not lead to a fair or just result in situations where a party receives an affirmative judgment on only a few claims." In such situations, courts use a proportionality approach to determine who is the prevailing party. *Phillips Building Co. v. An*, 81 Wn.App. 696, 702, 915 P.2d 1146 (1996). Additionally, if both parties prevail on major issues, there is no prevailing party. See *Hertz v. Riebe*, 86 Wn.App. 102, 105, 936 P.2d 24 (1997). In this

case, the Tenants prevailed on many of the issues at trial and eliminated most of the Landlord's claim for rent.

The Landlord maintained that the Lease commenced in January 2006 when the Tenants began work on their office. RP 11/19 pages 123-124; Plaintiff's Exhibit 22. The Tenants maintained that the Lease did not commence until the building was "free of debris and broom swept clean" as provided in the Lease Addendum. The Court agreed with the Tenants that the lease did not commence until the building was cleaned, finding that the Lease Addendum controls and that the commencement date was June 2006.<sup>8</sup>

Pursuant to the Landlord's Exhibit 22, the Landlord claimed rent due from February 2006, the month after it claimed the lease commenced, through the date of trial. The Tenants claimed that they were not responsible for the

---

<sup>8</sup> This is also supported by the Lease terms on Exhibits 6 and 45, page 2 paragraph 3.b. where it provides that "If tenant discovers any major defects in the Landlord's Work during this 10-day period that would prevent Tenant from using the Premises for its intended purpose, Tenant shall notify Landlord in writing and the Commencement Date shall be delayed until after Landlord has corrected the major defects . . ." "Landlord's Work" is a defined term in the Lease referencing work to be specified in Exhibit B. Id. Exhibit B is defined in the Lease as the Addendum executed by the parties which includes as the Landlord's obligation the requirement that the building be "free of debris and broom swept clean." Exhibits 6 and 45 page 13 paragraph 32.

payment of rent until 11 months after the commencement date. The Court agreed with the Tenants in finding that the Tenants were entitled to free rent for a period of 11 months.

Lastly, the Landlord requested rent and double damages for 22 months totaling almost \$320,000. RP 11/19 p. 123-124; Plaintiff's Exhibit 22. The Landlord further testified that the rent should start when the Tenants began making improvements in the building, February 2006, and that the Tenants were not entitled to a free rent period as specified in the Lease Addendum. RP 11/20 p. 12-13. The Court only allowed rent and double damages for 6 of those 22 months. CP 167 Finding of Fact No. 134. The Tenant prevailed on 16 of the months at issue. Similarly, the Tenant significantly reduced the amount owed to the Landlord. Including the offsets credited to the Tenants, the judgment was for the following amounts:

Unpaid Rent	\$ 27,321.61
Double	\$ 27,321.61
Interest	\$ 943.08
Late Fees	<u>\$ 1,450.00</u>
Total	\$ 57,063.30

The Landlord thus received less than 18% of the total amount it requested. Based on the above, the Tenants, who

prevailed on 16 of the 22 months at issue and as a result defeated over \$260,000.00 of the Landlord's claims, are the substantially prevailing party and should have received their attorney's fees and costs. Alternatively, the Trial Court should have concluded that there was no prevailing party and neither party should receive its attorney's fees and costs.

6. **The Tenants Are Entitled To An Award of Their Attorney's Fees and Costs Incurred On Review.**

Pursuant to RAP 18.1, the Tenants request their attorney's fees and costs be awarded pursuant to paragraph 25 of the Lease, which provides for an award of attorney's fees and costs to the prevailing party in any litigation regarding the Lease.

**V.**  
**CONCLUSION**

Appellants respectfully request that this Court reverse and remand this case back to the Trial Court with instructions to dismiss the Landlord's claims, to restore the Tenants' rights under the lease, and to award the Tenants their reasonable attorney's fees and costs incurred.

Respectfully submitted this 18<sup>th</sup> day August,  
2008.

DAVIS ROBERTS & JOHNS, PLLC

A handwritten signature in black ink, appearing to read 'MARK R. ROBERTS', written over a horizontal line.

MARK R. ROBERTS, WSBA #18811  
Attorneys for Appellants Drager, Gould,  
Johnson and Drager Gould Architects

**CERTIFICATE OF SERVICE**

I hereby certify that on the 19<sup>th</sup> day of August 2008, I caused to be served the foregoing OPENING BRIEF OF APPELLANTS on the following individual in the manner indicated:

Douglas N. Kiger  
BLADO KIGER, P.S.  
3408 South 23<sup>rd</sup> Street  
Tacoma, WA 98405-1609

(X) Via Hand Delivery (ABC Legal Messengers)

SIGNED this 18<sup>th</sup> day of August, 2008, at Gig Harbor, Washington.

  
KRISTINE R. PYLE

FILED  
COURT OF APPEALS  
DIVISION II

08 AUG 18 PM 4:26

STATE OF WASHINGTON  
BY \_\_\_\_\_

# **APPENDIX A**



07-2-10979-5 29107854 FNFLC 02-01-08



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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE**

LEDAURA LLC, a Washington limited liability company,

Plaintiff,

vs.

RANDY GOULD and "JANE DOE" GOULD, husband and wife; BRET DRAGER and "JANE DOE" DRAGER, husband and wife; and GREG JOHNSON and "JANE DOE" JOHNSON, husband and wife; and DRAGER GOULD ARCHITECTS, INC.,

Defendants.

No. 07-2-10979-5

FINDINGS OF FACT AND CONCLUSIONS OF LAW

**ORIGINAL**

THIS MATTER came on regularly before the above-entitled court for trial on November 19, 2007, before Superior Court Judge Linda CJ Lee. The Plaintiff, Ledaura, LLC, was represented by its counsel, Douglas N. Kiger of Blado Kiger, P.S., who was present at the time of trial. The Defendants, Randy Gould and "Jane Doe" Gould, Bret Drager and "Jane Doe" Drager, Greg Johnson and "Jane Doe" Johnson, and Drager Gould Architects, Inc. were represented by their counsel, Mark R. Roberts of Davis Roberts & Johns, PLLC, who was

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 1 OF 11

**BLADO KIGER, P.S.**  
ATTORNEYS AT LAW  
Bank of America Building, 2nd Floor  
3408 South 23rd Street  
Tacoma, WA 98405-1609  
Tel (253) 272-2997 Fax (253) 627-6252

1 present at the time of trial. The court considered the testimony of Leah Caruthers, Aleta  
 2 Benedicto, Randy Gould, and Bret Drager. The court further admitted into evidence Plaintiff's  
 3 Exhibits 1-22 (including 18A-18I and 19A-19F) and Defendant's Exhibits 23-49. Having  
 4 considered the testimony, documentary evidence submitted, and the argument of counsel, and  
 5 now deeming itself fully advised in the matter, the court now, hereby enters the following:

### 7 I. FINDINGS OF FACT

8 1.1 Ledaura, LLC is a Washington Limited Liability Company that has paid all fees  
 9 due the Sate of Washington, and is the owner of certain real property located in Tacoma, Pierce  
 10 County, Washington, the common address for which is 601 St. Helens Avenue, Tacoma, Pierce  
 11 County, Washington, also known as 312 Sixth Avenue, Tacoma, Pierce County, Washington,  
 12 and legally described as:

13  
 14 Lots 1 and 2, Block 607, MAP OF NEW TACOMA, WASHINTON  
 15 TERRITORY, according to plat filed for record February 3, 1875 in the office of  
 the county recorder,

16 Situated in Pierce County, Washington (hereinafter the "Property").

17 1.2 Leah Caruthers, Laura Kuhl, and David Smith are all the members of Ledaura,  
 18 LLC. Leah Caruthers is the manager of Ledaura, LLC.

19 1.3 Randy Gould and "Jane Doe" are husband and wife, constitute a marital  
 20 community, and are residents of Pierce County, Washington.

21 1.4 Bret Drager and "Jane Doe" Drager are husband and wife, constitute a marital  
 22 community, and are residents of Pierce County, Washington.

23 1.5 Greg Johnson and "Jane Doe" Johnson are husband and wife, constitute a marital  
 24 community, are are residents of the state of California.  
 25  
 26

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 2 OF 11

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1 1.15 Without objection, all of the interest of the David Smith Revocable Living Trust  
2 in the Property was transferred to Ledaura LLC on February 16, 2006, by quitclaim deed  
3 recorded March 3, 2006, under Pierce County Auditor's recording number 200603030699.  
4 Exhibit 10.

5  
6 1.16 According to the terms of the lease, Tenants were required to pay first and last  
7 month's rent as a deposit, and begin paying rent of \$4,500 per month commencing in the twelfth  
8 month following the Commencement Date as defined in the Lease (having months 2 through 11  
9 of the lease rent free). Exhibits 6 and 45.

10 1.17 Tenants paid first and last month's rent as a deposit.

11 1.18 According to paragraph 4 of the Lease, rent is due on the first day of each month,  
12 with a late fee of \$100.00 or 5% of the lease payment (whichever is greater) due for any  
13 payments of rent made after the fifth day of each month. Further, according to paragraph 4 of  
14 the Lease, any unpaid sums under the lease shall accrue interest at 12% per annum beginning  
15 five days after any such sum is due and not paid. Exhibits 6 and 45.

16 1.19 The central issue in this case is when the Lease commenced.

17 1.20 Plaintiff argues the lease commenced in February 2006, when Defendants began  
18 working on the remodeling work on the part of the building which the Defendants moved into  
19 and started doing business out of in April 2006.

20 1.21 For the Commencement Date of the Lease, Plaintiff relies on paragraph 3(a) of  
21 the Lease, which provides, "If Tenant occupies the Premises before the Commencement Date  
22 specified in Section 1(b), then the Commencement Date shall be the date of occupancy."  
23 Exhibits 6 and 45.

1 1.22 Defendants argue the lease commenced in September 2007, when the only  
2 remaining items in the building were a 55 gallon drum, some desks, an air canister, and some  
3 paint cans.

4 1.23 Defendants rely on paragraph 2 of the Lease Addendum (Exhibits 9 and 45) that  
5 the lease commences as follows: "Lease term shall be (3) years whereby lease commencement  
6 date shall be the date the building shall be free of debris and broom swept clean, approximately  
7 (60) days from date of agreement."

8 1.24 The court finds that the testimony of Randy Gould was replete with  
9 inconsistencies, and therefore was not credible. By way of example, Mr. Gould testified that he  
10 terminated a worker, Robert Munroe, as soon as he noticed Mr. Munroe was doing demolition  
11 work at the Property. But Exhibit 12 shows that demolition work was exactly what the  
12 Defendants hired Mr. Munroe to do.

13 1.25 By hiring Mr. Munroe to do demolition work on the middle and upper floors of  
14 the Property in June of 2006, Defendants thereby contributed to the debris in the building and  
15 interfered with Ledaura, LLC's ability to make the Property, "broom-swept clean."

16 1.26 By June 30, 2006, the middle and upper floors of the Property were essentially  
17 cleared out except for the demolition debris as depicted in Exhibit 47.

18 1.27 After June 2006, defendants allowed Robert Munroe to return to the building, and  
19 during his access to the building at that time, he vandalized the Property and apparently began  
20 moving things back into the middle and upper floors as indicated by Exhibit 32 identifying  
21 various "camp" snapshots.  
22  
23  
24  
25  
26

1 1.28 By June of 2006 the Property was in sufficient condition that Defendants took  
 2 over the middle and upper floors and began the demolition work required to fulfill their own  
 3 plans for the building.

4 1.29 Based upon all the evidence and testimony presented at trial, the court finds that  
 5 the lease commenced in June of 2006, which is the Lease Commencement Date.  
 6

7 1.30 Based upon the terms of the Lease, Defendants became obligated to commence  
 8 paying rent in June of 2007.

9 1.31 To date, Defendants have not paid any rent other than the first and last month's  
 10 rent deposit.

11 1.32 A five day notice to pay rent or vacate the Property was served on Defendants  
 12 Gould and Drager on July 30, 2007. Exhibit 11 and Proof of Service on file herein.

13 1.33 More than five days have now passed since service of the five day notice to pay  
 14 rent or vacate.  
 15

16 1.34 The total amount of rent, late fees, and interest unpaid and owing from June 2007  
 17 to February 1, 2008, is ~~\$34,307.84~~ <sup>\$29,714.69</sup> calculated as follows (with offsets applied):

*DNK*

Month	Rent	Late Fees	Days (from 5 <sup>th</sup> to 2/1/08)	Interest @ 12% to 2/1/08 (on base-rent only)	Total
June '07	pre-paid dep.	NA		NA	pre-paid dep.
July '07	<del>\$4,500.00</del>	<del>\$225.00</del>	211	<del>22.52</del>	<del>4475.03</del>
Aug. '07	\$4,500.00	\$225.00	180	\$266.40	\$4,991.40
Sept. '07	\$4,500.00	\$225.00	149	\$220.52	\$4,945.52
Oct. '07	\$4,500.00	\$225.00	119	\$176.12	\$4,901.12
Nov. '07	\$4,500.00	\$225.00	88	\$130.24	\$4,855.24
Dec. '07	\$4,500.00	\$225.00	58	\$85.84	\$4,810.84
Jan. '08	\$4,500.00	\$225.00	28	\$41.44	\$4,766.44
Totals	<del>\$31,500.00</del>	<del>\$1,575.00</del>		<del>\$1,232.84</del>	<del>\$34,307.84</del>

*\$27,321.61 \$1,450*

*\$943.08 \$29,714.69*

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 6 OF 11

*WKK*  
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1 1.35 Pursuant to paragraphs 8 and 4 of the Lease (Exhibits 6, 9 and 45) the Tenants are  
2 responsible for the cost of utilities to the premises, excluding the basement, as additional rent.

3 1.36 The basement utilities are on a separate meter from the rest of the property with  
4 the basement utilities being billed as 312 6<sup>th</sup> Avenue, and the rest of the utilities for the property  
5 being billed as 601 St. Helens.  
6

7 1.37 Between May 12, 2006, and June 12, 2006, utilities for the Property (exclusive of  
8 the basement) were \$246.77. Exhibit 14.

9 1.38 Plaintiff paid \$200.00 and Defendants paid \$46.77 of the utilities for the Property  
10 (exclusive of the basement) for the period of time between May 12, 2006, and June 12, 2006.  
11 Exhibits 14 and 44.

12 1.39 The cost of utilities per day for the 31 day period between May 12, 2006, and  
13 June 12, 2006, was \$7.96. With a Lease Commencement Date of June 1, 2006, Tenants were  
14 responsible for eleven (11) days of utilities in June of 2006 totaling \$87.56, leaving a balance  
15 owing to Landlord of \$40.79.  
16

17 1.40 Between June 1, 2006, and July 12, 2007, Tenants paid \$66.51 for basement  
18 utilities.

19 1.41 Pursuant to the Lease at paragraph 9 and the Lease Addendum at paragraphs 4  
20 and 8 (a portion of Exhibits 6 and 45 and Exhibit 9), the Landlord and tenants are each required  
21 to pay a pro rata share of the property taxes. The Tenants paid \$11,732.03 in real property taxes  
22 which was payment for all of 2006 and the first half of 2007. See Exhibits 1 and 43. Since the  
23 lease did not commence until June 2006, the tenants are entitled to a credit for January 2006-  
24 May 2006 in the amount of \$3,395.52. The tenants are also entitled to contribution from David  
25 Smith from June 2006-December 2006 of 27%, which totals \$1,283.51. The tenants are also  
26

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 7 OF 11

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1 entitled to contribution from David Smith from January 2007-June 2007 of 27%, which totals  
 2 \$967.35. This amount is offset by the tenants' obligation to pay 73% of the taxes from July  
 3 2007-December 2007 (which remain unpaid) in the total amount of \$2,615.43. Tenants are  
 4 therefore entitled to a credit of \$3,033.95, which amount should be credited to the unpaid rent.  
 5 *July 2007*

6 1.42 Pursuant to the Lease Addendum (Exhibit 6) at paragraph 4, David W. Smith is  
 7 required to pay his proportionate share of the cost for insurance. The tenants paid for all of the  
 8 property insurance for 2006 and 2007 totaling \$4,238.66. See Exhibit 42. David Smith's 27%  
 9 share of that would be \$1,144.44, which amount shall be credited to the unpaid rent.  
 10 *July 2007*

11 1.43 Pursuant to paragraph 25 of the Lease, the prevailing party is entitled to  
 12 reasonable attorney's fee and costs in the event the services of an attorney are engaged to collect  
 13 monies or request any other relief under the Lease.

14 1.44 Plaintiff is the prevailing party in this matter.

15 1.45 Plaintiff has incurred, or will incur, a \$157.00 filing fee, \$48.35 for serving the  
 16 Five Day Notice to Pay Rent or Vacate, \$19,605.00 in attorney fees, and \$782.48 in other  
 17 miscellaneous costs, all of which are reasonable.

18 Based upon the foregoing Findings of Fact, the court enters the following:

## 19 II. CONCLUSIONS OF LAW

20 2.1 Ledaura, LLC is the proper party Plaintiff, and landlord, in this action.

21 2.2 The five day (as required by the Lease) notice to pay rent or vacate was properly  
 22 served more than five days prior to commencement of this action.

23 2.3 Venue is proper in this court because this is an action for unlawful detainer  
 24 involving real property located in Pierce County, Washington.

25 2.4 The Lease Commencement date is June 1, 2006.

26 FINDINGS OF FACT AND CONCLUSIONS OF LAW - 8 OF 11

**BLADO KIGER, P.S.**  
 ATTORNEYS AT LAW  
 Bank of America Building, 2nd Floor  
 3408 South 23rd Street  
 Tacoma, WA 98405-1609  
 Tel (253) 272-2997 Fax (253) 627-6252

*DNK  
 mmh*

1 2.5 According to the terms of the Lease, Defendants' obligation to pay rent  
2 commenced <sup>in July</sup> ~~June~~, 2007.

3 2.6 Defendants have breached the Lease Agreement dated January 24, 2006 and the  
4 Lease Addendum dated January 25, 2007 (a portion of Exhibits 6 and 45 and Exhibit 9) by  
5 failing to pay rent. This court does not rule upon the validity of the Option to Buy Real Estate or  
6 the Commercial & Investment Real Estate Purchase & Sale Agreement included within Exhibits  
7 6 and 45, the Option to Buy Real Estate provided as Exhibit 7 or the Addendum (Exhibit 9) to  
8 the extent that it applies to the Option to Buy Real Estate or the Commercial and Investment  
9 Real Estate Purchase and Sale Agreement.  
10

11 2.7 Defendants are in unlawful detainer and are not entitled to possession of the  
12 Property.  
13

14 2.8 The lease agreement between the parties dated January 24, 2006, (a portion of  
15 Exhibits 6 and 45 and Exhibit 9) is hereby forfeited pursuant to RCW 59.19.170.

16 2.9 The Clerk of the Superior Court for Pierce County, Washington, shall issue a Writ of  
17 Restitution, forthwith, without bond, returnable twenty (20) days after its date of issuance, restoring  
18 to the Plaintiff possession of the Property described in the Complaint, namely, 601 St. Helens Ave.,  
19 Tacoma, Pierce County, Washington, also known as 312 Sixth Ave., Tacoma, Pierce County,  
20 Washington. If the writ is not returned within twenty (20) days after its issuance, it shall be  
21 automatically extended for another twenty (20) days.  
22

23 2.10 Defendants are responsible for rent and late fees as follows: (a) base rent of  
24 ~~\$31,500.00~~ <sup>\$27,321.61</sup> for the time period of June 2007 to January 2008 and (b) late fees of ~~\$1,575.00~~ <sup>\$1,450.00</sup> for the  
25 same period.  
26

*DNK  
MLL*

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 9 OF 11

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1 2.11 Defendants are responsible for, and a judgment should be entered against them for,  
2 pre-judgment interest at 12% per annum on the unpaid base rent commencing on the 5<sup>th</sup> day of each  
3 month the payment became due until February 1, 2008, which amount of prejudgment interest is

4 ~~\$1,232.84~~ <sup>943.08</sup> *DNK MWW*

6 2.12 Pursuant to RCW 59.12.170 the amount of unpaid rent set forth in paragraph 2.10 of  
7 these findings and conclusions should be doubled and therefore a judgment in the principal amount

8 of ~~\$63,000.00~~ <sup>\$54,643.22</sup> should be entered for unpaid rent, in addition to ~~\$1,575.00~~ <sup>\$1,450</sup> for late fees, and  
9 ~~\$1,232.84~~ <sup>\$943.08</sup> for pre-judgment interest. ~~However, said judgment shall be~~ <sup>has been</sup> offset by the \$4,178.39 owed

10 to tenants for payment of taxes (\$3,033.95) and insurance (\$1,144.44) ~~reducing the principal~~  
11 ~~judgment to \$60,390.01.~~ *(See paragraph 1.34) MWW*

13 2.13 The difference between what the Landlord should have paid for utilities during the  
14 term of the lease and what Tenants should have paid for utilities during the lease is de minimis and  
15 said amounts should offset each other.

16 2.14 Plaintiff is the prevailing party in this matter as defined in the lease and is therefore  
17 entitled to reasonable attorney fees and costs incurred herein.

18 2.15 Attorney fees of \$19,605.00, and costs of \$987.83 are reasonable and a judgment  
19 should be entered against Defendants in favor of Plaintiff for such amounts.

20 *(Including Deage Gould Architects, Inc.)*  
21 2.16 Defendants should be jointly and severally liable for all judgments entered pursuant  
22 to these Findings of Fact and Conclusions of Law.

23 **III. INCORRECTLY DESIGNATED FINDINGS OR CONCLUSIONS**

24 3.1 Any conclusions of law labelled findings of fact herein shall be treated as  
25 conclusions of law.

26 ///

1 3.2 Any findings of fact labelled as conclusions of law herein shall be treated as findings  
2 of fact.

3 ENTERED this 1 day of February, 2008.

4  
5  
6 THE HONORABLE LINDA CJ LEE  
7 Superior Court Judge, Dept. 19

8  
9 Presented by:

Approved as to Form and  
Notice of Presentation Waived:

10  
11 **BLADO KIGER, P.S.**

**DAVIS ROBERTS & JOHNS, PLLC**

12  
13 Douglas N. Kiger  
14 DOUGLAS N. KIGER, WSBA #26211  
15 Attorney for Plaintiff

16  
17 Mark R. Roberts  
18 MARK R. ROBERTS, WSBA #18811  
19 Attorney for Defendants



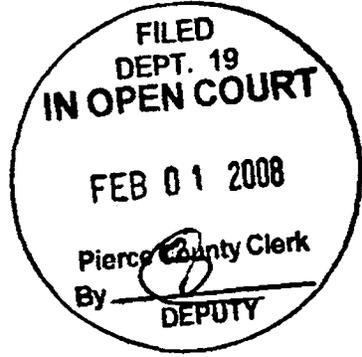
FINDINGS OF FACT AND CONCLUSIONS OF LAW - 11 OF 11

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# **APPENDIX B**



07-2-10979-5 29107857 JD 02-01-08



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

LEDAURA LLC, a Washington limited liability company,	)	
	)	
Plaintiff,	)	No. 07-2-10979-5
	)	
vs.	)	JUDGMENT
	)	
RANDY GOULD and "JANE DOE" GOULD,	)	
husband and wife; BRET DRAGER and	)	
"JANE DOE" DRAGER, husband and wife;	)	
and GREG JOHNSON and "JANE DOE"	)	
JOHNSON, husband and wife; and DRAGER	)	
GOULD ARCHITECTS, INC.,	)	
	)	
Defendants.	)	

ORIGINAL

JUDGMENT SUMMARY

- 1. Judgment Creditor: Ledaura, LLC
- 2. Judgment Debtors: Randy Gould and "Jane Doe" Gould; Bret Drager and "Jane Doe" Drager; Greg Johnson and "Jane Doe" Johnson; ~~Drager Gould Architects, Inc.~~ *DNK mllh*
- 3. Principal Judgment Amount: ~~\$60,396.61~~ *\$4,643.22* ~~\$56,093.22~~ *\$56,093.22*
- 4. Interest to Date of Judgment: ~~\$1,232.84~~ *\$1,456.00* ~~\$943.08~~ *\$943.08*

- 1 5. Attorneys Fees: \$19,605.00  
 2 6. Costs: \$987.83  
 3 7. Other Recovery Amounts: N/A  
 4 8. Interest Rate of Judgment: 12%  
 5 9. Attorney for Judgment Creditor: Douglas N. Kiger  
 6 10. Attorney for Judgment Debtors: Mark R. Roberts

7  
 8 THIS MATTER came on regularly before the above-entitled court for trial on November  
 9 19, 2007, before Superior Court Judge Linda CJ Lee. The Plaintiff, Ledaura, LLC, was  
 10 represented by its counsel, Douglas N. Kiger of Blado Kiger, P.S., who was present at the time  
 11 of trial. The Defendants, Randy Gould and "Jane Doe" Gould, Bret Drager and "Jane Doe"  
 12 Drager, Greg Johnson and "Jane Doe" Johnson, and Drager Gould Architects, Inc. were  
 13 represented by their counsel, Mark R. Roberts of Davis Roberts & Johns, PLLC, who was  
 14 present at the time of trial. The court having heard the testimony of the parties and witnesses,  
 15 considered the evidence presented at trial, and having entered Findings of Fact and Conclusions  
 16 of Law, and the court deeming itself fully advised in the matter, now, therefore, it is hereby:  
 17 ORDERED, ADJUDGED AND DECREED as follows:

- 18 1. The Lease between the parties dated January 24, 2006, is hereby forfeited.  
 19 2. The Clerk of the Superior Court for Pierce County, Washington, shall issue a Writ of  
 20 Restitution, forthwith, without bond, returnable twenty (20) days after its date of issuance, restoring  
 21 to the Plaintiffs possession of the property described in the Complaint, namely, 601 St. Helens Ave.,  
 22 Tacoma, Pierce County, Washington, also known as 312 Sixth Ave., Tacoma, Pierce County,  
 23 Washington. If the writ is not returned within twenty (20) days after its issuance, it shall be  
 24 automatically extended for another twenty (20) days.  
 25

*(excluding Drager Gould Architects, Inc.)*

*DNK  
mmh*

3. That the Plaintiff is granted Judgment against Defendants, jointly and severally in the principal amount of ~~\$60,396.61~~ <sup>156,093.22</sup>, plus prejudgment interest of ~~\$1,222.84~~ <sup>1943.08</sup> to the date of judgment, plus reasonable attorney fees of \$19,605.00, and reasonable costs of \$987.83, and that said amounts (exclusive of pre-judgment interest) shall bear post-judgment interest at 12% per annum until paid.

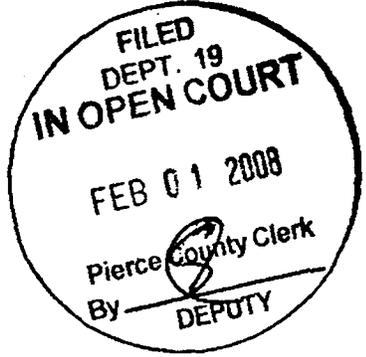
DONE IN OPEN COURT this 1<sup>st</sup> day of February, 2008.

*[Signature]*  
HONORABLE LINDA CJ LEE  
Superior Court Judge, Dept. 19

Presented by:

**BLADO KIGER, P.S.**

*[Signature]*  
DOUGLAS N. KIGER, WSBA #26211  
Attorney for Plaintiff



Approved as to Form and Notice of Presentation Waived by:

**DAVIS ROBERTS & JOHNS, PLLC**

*[Signature]*  
MARK R. ROBERTS, WSBA #18811  
Attorney for Defendants