

ORIGINAL

No. 40868-6-II

WASHINGTON STATE COURT OF APPEALS,
DIVISION II

ANGELO PROPERTY CO.,

Plaintiff-Respondent,

vs.

ABDUL HAFIZ ABDULMAGED, d/b/a "THE NILE,"

Defendant-Appellant,

10/10/17 PM 2:38
STATE OF WASHINGTON
BY DEPUTY

COURT OF APPEALS
DIVISION II

ON APPEAL FROM CLARK COUNTY SUPERIOR COURT
(Hon. John F. Nichols)

APPELLANT'S OPENING BRIEF

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ASSIGNMENTS OF ERROR

Defendant and Appellant Abdul Hafiz Abdulmaged (“Maged”)¹ makes the following assignments of error:

1. The trial court erred by retaining its unlawful detainer jurisdiction over these proceedings. CP 101-103 (August 15, 2008 Order Granting Plaintiff’s Objection to Defendant’s Order to Amend Answer).

2. The trial court erred by striking Maged’s supplemental affidavit. *See* CP 185-86 (June 4, 2009 Order Granting Plaintiff’s Motion to Strike).

3. The trial court erred by granting the motion for summary judgment of Plaintiff and Respondent Angelo Property Co. and by dismissing Maged’s counterclaims with prejudice. *See* CP 187-190 (June 4, 2009 Order Regarding Plaintiff’s Motion for Summary Judgment)

4. The trial court erred by denying Maged’s CR 54(b) motion for revision. *See* CP 283-84 (January 8, 2010 Order Denying Defendant’s Motion for Judgment of Unlawful Detainer Pursuant to CR 54(b)); CP 285-86 (January 8, 2010 Order Denying Defendant’s Motion for Revision Per CR 54(b) and Scheduling Order).

5. The trial court erred by striking Maged’s affidavit in support of his motion for revision under CR 54(b). *See* CP 285-86

¹ The complaint named Maged as “Hafiz Maged” (a name apparently arrived at by dropping his first name “Abdul,” and then taking his middle name “Hafiz” and the last half of his surname “Abdulmaged” and combining those as if they were his first name and surname). The undersigned counsel has taken the liberty of correcting the caption of the case so that it accurately states Maged’s full name.

(January 8, 2010 Order Denying Defendant's Motion for Revision Per CR 54 and Scheduling Order).

6. The trial court erred by striking the Post-Hearing Declaration of Benjamin L. Wolff on an Issue of Fact Raised by Plaintiff. RP VI (October 16, 2009) at 2.

7. The trial court erred by entering the final award and judgment against Maged. *See* CP 350-52 (May 14, 2010 Final Order and Judgment).

8. The trial court erred in entering the following findings of fact and conclusions of law:

- Finding that Maged still maintained the right to legal possession as of the August 1, 2008 hearing. CP 259 (November 2, 2009 letter ruling); CP 286 (order incorporating November 2, 2009 letter ruling).
- Finding that Maged was arguing that 'possession remained at issue' during the summary judgment proceedings. CP 260 (November 2, 2009 letter ruling); CP 286 (order incorporating November 2, 2009 letter ruling).
- Finding that Maged failed to pay rent from June 1, 2008 to June 30, 2008. CP 351 (Final Judgment and Order).
- Concluding that 'the issue of legal possession to the premises is not yet resolved' as of August 15, 2008. CP 102 (Order Granting Plaintiff's Objection to Defendant's Order to Amend Answer).
- Concluding as of August 15, 2008, that the matter should be afforded priority calendaring under RCW 59.12. CP 102 (Order Granting Plaintiff's Objection to Defendant's Order to Amend Answer).
- Concluding that Maged unlawfully detained the premises from June 1, 2008 through July 1, 2008. CP 189 (Order Regarding Plaintiff's Motion for Summary Judgment).

- Concluding that Maged materially breached the lease. CP 189 (Order Regarding Plaintiff's Motion for Summary Judgment).
- Concluding that Angelo Property Co. met its burden of establishing its right to judgment as a matter of law. CP 189 (Order Regarding Plaintiff's Motion for Summary Judgment).
- Concluding that Maged failed to set forth specific facts showing a genuine issue for trial. CP 189 (Order Regarding Plaintiff's Motion for Summary Judgment).
- Concluding that Angelo Property Co. was entitled to attorney fees. CP 189 (Order Regarding Plaintiff's Motion for Summary Judgment); CP 351 (Final Judgment and Order).
- Concluding that the issue to be resolved through summary judgment "was who breached the lease." CP 260 (November 2, 2009 letter ruling); CP 286 (order incorporating November 2, 2009 letter ruling).
- Concluding that Maged was allowed to litigate counterclaims that "referred to the lease itself" under the court's unlawful detainer jurisdiction. CP 259 (November 2, 2009 letter ruling); CP 286 (order incorporating November 2, 2009 letter ruling).
- Concluding that Angelo Property Co. was entitled to unlawful detainer damages for June 1, 2008 through June 30, 2008. CP 351.
- Concluding that Maged's lease was not terminated until June 4, 2009. CP 351 (Final Judgment and Order).
- Concluding that the issue of legal possession/the legal right to possession remained unresolved through June 4, 2009. CP 351 (Final Judgment and Order).
- Concluding that Angelo Property Co. was entitled to rent from July 1, 2008 through July 4, 2009. CP 351 (Final Judgment and Order).
- Concluding that Angelo Property Co. was entitled to money judgment in the amount of \$81,593.00. CP 351 (Final Judgment and Order).

STATEMENT OF ISSUES

The following single issue pertains to all of the assignments of error:

1. Limited Scope of A Trial Court's Unlawful Detainer Jurisdiction. Whether a trial court errs when it dismisses with prejudice a tenant's counterclaim for damages for constructive eviction and awards damages for unlawful detainer to the landlord, when: (1) the trial court does so after declining to convert an unlawful detainer action into a civil damages action; (2) the legal basis for maintaining the action as an unlawful detainer action has been extinguished by the tenant's concession that it has given up possession of its leasehold and waived any right to seek to reenter and regain possession of its leasehold; (3) the tenant has made a legally valid election of remedies to pursue damages for constructive eviction; and (4) the damages awarded to the landlord are substantially for a period after the basis for such an award has been extinguished by the tenant's surrender of the leasehold and waiver of any right to seek to reenter and regain possession of the leasehold.

I. INTRODUCTION

This case illustrates the unjust consequences that can ensue when a trial court fails to recognize that it has lost the legal basis for maintaining an action under its unlawful detainer jurisdiction.

Defendant and Appellant Abdul Hafiz Abdulmaged immigrated to this country from Sudan. He came to America like so many immigrants, hoping to realize his dream -- in Maged's case, earning enough money to

open his own nightclub. Maged did just that, and his nightclub, named “The Nile” after the great river that flows through Sudan, opened in December 2005 in the Cascade Village Center in Vancouver, Washington.

Maged is black and a Muslim. The white owner and patrons of “After Dark,” a bar located in another part of the Cascade Village Center, began harassing Maged and his customers, shouting racist invectives and otherwise attempting to disrupt the business of The Nile. The owner of After Dark openly declared that the campaign of harassment was being carried out to force Maged to close his establishment. Maged demanded that the landlord of the Cascade Village Center, Plaintiff and Respondent Angelo Property Company, take the necessary steps to stop After Dark’s campaign of harassment. Instead, in the Spring of 2008 Angelo Property issued a notice to quit to After Dark *and to Maged*, and followed that notice up with an action in unlawful detainer.

Facing eviction from a location where it had become impossible to continue to do business because of After Dark’s unchecked harassment, Maged elected to surrender possession of the premises and pursue his remedies against Angelo Property for damages (e.g., for constructive eviction). Declaring that he would not try to regain possession of the Cascade Village Center premises, in August of 2008 Maged asked the trial court (Clark County Superior Court, Hon. John F. Nichols) to convert the unlawful detainer action to an ordinary civil action in which Maged would pursue damage claims (e.g., for constructive eviction) based on Angelo Property’s wrongful refusal to end After Dark’s harassment. Angelo

Property resisted conversion, and managed to persuade the trial court that the case should be maintained as an unlawful detainer action. Although the trial court presumed to allow Maged to add a counterclaim for constructive eviction to what the court referred to as a “hybrid” action (a procedural form of its own creation), Angelo Property refused to respond to discovery requests regarding that counterclaim on the ground that they were not proper because the case was still an unlawful detainer action. Angelo Property then moved for a summary judgment dismissing Maged’s counterclaim with prejudice, and for an award of unlawful detainer damages. The trial court granted the motion for summary judgment based on the express understanding that *it had converted the case from an unlawful detainer action to an ordinary civil damages action in August of 2008*. Moreover, the trial court awarded damages to Angelo Property for every month from the date of the notice to quit in 2008 to the grant of summary judgment in June of 2009, *even though Maged in August of 2008 had formally surrendered possession and waived any claim to regain possession, and Angelo Property had regained possession with the authority to re-let the premises under the express authority of an order entered by the court*.

This Court should reverse. When Maged surrendered possession of the premises and formally waived any claim to regain possession, and Angelo Property duly regained possession, the trial court lost jurisdiction to maintain the case as an unlawful detainer action. This result is fatal to the court’s subsequent decisions to dismiss Maged’s constructive eviction

counterclaim with prejudice and to award Angelo Property damages for the period after the case ceased to be legally tenable as an unlawful detainer action. Maged clearly and unequivocally exercised his right to elect the remedy of damages from Angelo Property for its wrongful refusal to protect Maged and his customers from harassment by the owner and patrons of After Dark, and the trial court had no basis for dismissing that counterclaim with prejudice and instead awarding unlawful detainer damages to Angelo Property. This Court should vacate that award, and restore Maged's ability to pursue relief from Angelo Property for its manifest failure to protect one of its tenants from the outrageous and damaging conduct of another tenant.

II. STATEMENT OF THE CASE

A. **Angelo Property Company Leases Premises to Maged For Maged's Night Club "The Nile," Fails to Prevent Another Tenant's Racially-Motivated Harassment of Maged's Establishment, And Ultimately Resolves to End the Controversy by Evicting *Both* The Nile and the Offending Tenant.**

Defendant and Appellant Abdul Hafiz Abdulmaged came to this country from Sudan, viewing the United States as the land of opportunity. CP 191.² Maged worked as an airplane mechanic and started a small company providing medical transportation services before investing

² The trial court struck this affidavit and certain other records cited to in this fact section during proceedings over which the trial court had no jurisdiction. Because the trial court lacked subject matter jurisdiction, it also lacked the authority to strike those records. Although Maged will cite to those stricken records, none of the stricken material is relied on to demonstrate that the trial court lacked jurisdiction over the proceeding. For clarity, cites to CP 163, 191-93, 195-96, 199-200, and 243-46 reference stricken material.

\$500,000 in a nightclub to be called “The Nile.” CP 192.³ On December 19, 2005, Maged leased space for The Nile at Suite 50 of the Cascade Village Center, a multiple occupancy area of retail, office, and service buildings. CP 80. The lease was for a 5 year term starting no later than April 1, 2006. CP 83. Plaintiff and Respondent Angelo Property Co. (“Angelo Property”) was the landlord. CP 80.

Angelo Property had leased Suite 21 in Cascade Village to “Pete,”⁴ who operated a bar called “After Dark.” CP 163, 192. Maged is black and a Muslim; at some point before May 2007, Pete, along with his employees and After Dark customers, began a campaign of racially-motivated harassment against Maged, his employees, and his customers. CP 163, 192. Pete indicated an intent to drive The Nile out of business. CP 193.

Maged informed Angelo Property’s property manager, Ms. Stacey Sullivan, of those harassing incidents. CP 163. Sullivan treated Maged’s complaints dismissively. CP 163. On May 18, 2007, Maged wrote directly to Mr. Craig Angelo to express his concerns regarding the conduct of the owner, employees and patrons of After Dark, including his concern that Angelo Property and After Dark were working together to drive The Nile out of business. CP 195-96. Maged met with Sullivan and Mr. Albert Angelo to express his concern that Sullivan’s treatment of his complaints reflected racial animus. CP 163.

³ The name The Nile referred to the river Nile, whose White and Blue branches meet at Khartoum, the capital of Sudan.

⁴ The record does not appear to contain Pete’s last name.

One month later, Maged sent a letter to Angelo from Maged and his general manager regarding incidents that had occurred on July 15, 2007. The letter notified Angelo that an After Dark customer yelled about it smelling like “wetbacks”⁵ inside The Nile as an Hispanic female and a black male customer were walking up to The Nile. CP 199. The same After Dark customer returned minutes later with another After Dark customer and both were denied entry into The Nile. CP 199. They returned with 6 more people, yelling about the “niggers” that wouldn’t let them in; the first After Dark customer lifted up his shirt to display a Nazi swastika tattoo on his chest, saying that the “niggers” needed to remember who it was that brought them here on a boat. CP 199; *see also* CP 193 (describing how After Dark Customers regularly visited The Nile, displayed Nazi swastika tattoos and called The Nile customers and staff “niggers.”).

The Nile’s general manager called 911, but police were not dispatched. CP 200. An After Dark doorman later came over to say he was sorry for what had happened. CP 200.

Angelo Property took no action to prevent further racial harassment arising from After Dark, harassment that continued to interfere with Maged’s operations. CP 163, 193. On April 14, 2008, however,

⁵ Stating the facts pertaining to the circumstances giving rise to what Maged contends was the wrongful eviction of The Nile by Angelo Property unfortunately requires reciting racially offensive terminology, because that terminology was employed against customers of The Nile by the owner, employees and patrons of After Dark and was a material aspect of the harassment.

Maged received a 30 day “notice to comply with the lease or vacate the leased premises.” CP 28. While the notice to quit was addressed to The Nile, at Suite 50, the body of the notice referred to the premises at issue as Suite 21, which was the space occupied by After Dark. CP 28-29. Maged was initially gratified, thinking that Angelo Property was finally taking action against After Dark; it later became clear, however, that Angelo Property’s solution to the problems After Dark had wrought upon The Nile was to evict them *both*. CP 193.

Angelo Property’s notice to quit alleged 13 actions that breached the lease; it is unclear whether Angelo Property was alleging that After Dark or The Nile had committed the particular breaches alleged since the following paragraph listed Suite 21 as the leased premises. CP 29. The covenants of the lease allegedly breached related to using the premises for lawful purposes, interfering with the rights of other tenants, committing waste, keeping the premises in good repair, and overburdening the parking area. CP 28. The circumstances constituting the breaches allegedly included (1) drug use, (2) litter in common areas, (3) drug paraphernalia, (4) vandalism caused by customers to vehicles, (5) vandalism caused by customers to the building, (6) underage drinking, (7) disorderly conduct by customers, (8) disorderly conduct by employees, (9) allowing weapons, (10), damage to fixtures on premises, (11) threats or disturbance to other tenants, (12) noise complaints by other tenants, and (13) depicting naked persons on advertisements. CP 29.

B. Angelo Property Initiates An Unlawful Detainer Action Against The Nile. Maged Responds by Shutting Down The Nile, Moving the Business Out of the Premises Leased from Angelo, and Making *Absolutely Clear* That He Would Not Seek to Regain Possession And Instead Would Seek to Pursue Only a Damages Action For Constructive Eviction and Related Claims. The Trial Court Nonetheless Presumes to *Maintain* the Case as an Action for Unlawful Detainer.

On May 30, 2008, Angelo Property Company filed a complaint for unlawful detainer under RCW 59.12. CP 1. The complaint asserted that Maged failed to either perform the conditions of the lease agreement described in the notice to quit, or surrender the premises within 30 days. CP 1-3. The complaint described the acts Maged allegedly continued to permit in violation of the notice to quit. CP 3-4. The complaint alleged that Angelo Property was entitled to possession of the premises and that Maged wrongfully remained in possession. CP 1-3. Angelo Property asked for relief in the form of a writ of restitution, an order terminating the tenancy, and damages in the form of double lease payments during Maged's continued possession of the premises. CP 4-5.

Maged answered the complaint and denied that he had failed to comply with the notice to quit. CP 32-33. On June 18, 2008, Maged's lawyer, Mr. Ben Wolff, notified Angelo Property's counsel that Maged had been unlawfully evicted and no longer intended to operate The Nile. CP 50. On July 1, 2008, Maged returned his keys to Stacey Sullivan, surrendering possession of the premises. CP 37, 47-48. Maged also paid \$6,834.95, the rent for June 2008, into the court registry. CP 40; RP I (August 1, 2008) at 4.

On July 15, 2008, Maged moved for the action to proceed under the trial court's ordinary civil jurisdiction so that his counterclaims could be heard without him having to file a separate suit. CP 35-37. Maged argued that an unlawful detainer proceeding should be converted to an ordinary civil suit for damages when the right to possession ceases to be at issue. CP 35-37. Maged supported his motion with a declaration from his lawyer that he had "surrendered possession" of the property to Angelo Property on July 1, 2008. CP 37.

In tandem with his request that the superior court proceed to exercise its normal civil jurisdiction over the action, Maged moved for leave under CR 15(a) to file an amended answer and to add counterclaims against Angelo Property based on its unjustified but ultimately successful efforts to terminate the lease. CP 35. In his amended answer, Maged stated that he had complied with the terms of the lease and the terms of the April 14, 2008 notice. CP 40.⁶ Maged alleged in his breach-of-lease counterclaim that Angelo Property's groundless unlawful detainer notice and complaint interfered with his right to quiet enjoyment and constituted constructive eviction. CP 40-42. Maged's additional claims against Angelo Property were for unjust enrichment and interference with business expectancy. CP 40-42.

Angelo Property opposed Maged's motion to bring his counterclaims through an action under the court's ordinary civil

⁶ Maged inadvertently interposed "Plaintiff" and "Defendant" in this pleading. *See* RP (August 1, 2008) at 15.

jurisdiction, accusing him of attempting an end-run around the unlawful detainer statute. CP 53. Angelo Property acknowledged that Maged had relinquished *physical* possession but claimed that he “apparently contends he still has (or had) a *legal right* to possession.” CP 53 (emphasis added). On that basis, Angelo Property argued that the trial court should continue to exercise its unlawful detainer jurisdiction because the issue of who was entitled to possession remained for the court to decide in that proceeding.

Angelo Property then contended that Maged’s counterclaims exceeded the narrow scope of counter-claims permitted under the trial court’s unlawful detainer jurisdiction. CP 53-54. Angelo Property argued that none of the counter-claims, including the unjust enrichment and interference with business expectancy claims, were based on facts that would have excused Maged’s alleged breaches of the lease, as set forth in the notice to quit and complaint. CP 57. As for Maged’s constructive eviction counterclaim, Angelo Property stated that “*the claim has nothing to do with the right to possession* and may not be added to the current action.” CP 57-58 (emphasis added).

Angelo Property also advanced the theory that Maged’s surrender of the premises was voluntary and that the voluntary abandonment amounted to a breach of the lease on Maged’s part. CP 58-59. Angelo Property argued that Maged’s breach meant that he could no longer claim a right to possess the property since he had “voluntarily” abandoned that right. CP 58-59.

On August 1, 2008, the trial court heard Maged's motion to convert the proceedings to an ordinary civil action, amend his answer, and add counterclaims for damages under the court's ordinary civil jurisdiction. Angelo Property argued that the right to possession remained at issue and expressed a concern about its ability to re-let the premises. RP I (August 1, 2008) at 3. Maged, however:

- agreed that he was making no further claims to the rest of the tenancy and was instead seeking to litigate who had breached the lease;
- did not object to Angelo Property re-letting the premises; and
- stipulated that he would not be moving back into the premises under any scenario.

Id. at 6:11-15, 8:16-19, 21:11-14. Maged also urged that the matter *not* be fast tracked as an unlawful detainer proceeding, so he could conduct counterclaim-related discovery regarding the lack of foundation for the claims alleged in Angelo Property's notice to quit and complaint. *Id.* at 19:6-13 (August 1, 2008).

The parties came back before the court on August 15, to resolve dueling orders arising out of the August 1 hearing. Maged reiterated that the issue of physical possession and the legal right to possession had been resolved, stating once again that *he was not seeking possession* as a remedy for Angelo Property's breach of the lease. RP II (August 15, 2008) at 5:13-15. The trial court agreed, finding that Maged had "relinquished possession" of the premises and did not "wish to re-take

possession of the premises, even if successful in defending this lawsuit.” CP 101. The court authorized Angelo Property to re-let the premises. CP 102. And the court *did not* agree with Angelo Property’s proposed finding that Maged’s relinquishment had been “voluntary.” CP 101; RP II (August 15, 2008) at 7:15-21.

The trial court, however, also concluded that the issue of “legal” possession of the premises had not been resolved, and apparently on that basis ordered that the matter be afforded continued priority calendaring as an unlawful detainer action. CP 102. The court granted in part Maged’s motion for leave to amend his answer, allowing the constructive eviction counterclaim but not permitting Maged’s interference with business expectancy counterclaim to be raised under the unlawful detainer proceedings. CP 102. The trial court explained that counterclaims were “allowed so long as they referred to the lease itself, e.g., breach by the landlord.” CP 259. Regarding the splitting up the counterclaims into two separate actions which would result from the trial court’s rulings, the trial court found that “[f]rom a procedural aspect, *it’s stupid, but* from a procedural aspect *that’s the way you have to do it.*” RP II (August 15, 2008) at 6:13-14 (emphasis added).⁷

⁷ Angelo Property never answered Maged’s constructive eviction counterclaim. CP 157.

C. Angelo Property Blocks Maged From Conducting Discovery on His Constructive Eviction Counterclaim, Then Discards the Stated Basis for Its Unlawful Detainer Notice and Complaint and Instead Moves for Summary Judgment on an Abandonment Claim that Was Never Pled. The Trial Court Grants the Motion, and Dismisses Maged’s Counterclaim *With Prejudice*.

Having successfully fought to maintain the case as an unlawful detainer action, Angelo Property refused to respond to Maged’s written discovery directed to his counterclaims on the ground that such discovery was not allowed because the case was still an unlawful detainer action. *See* CP 246.⁸ Then on April 17, 2009, Angelo Property moved for summary judgment on its unlawful detainer cause of action and on Maged’s counterclaim. CP 66. Angelo Property, however, did not argue that there were no questions of material fact as to its allegations that Maged had failed to perform the conditions of the lease agreement described in the notice to quit. Angelo Property instead asserted that the facts related to proving the allegations underlying its unlawful detainer complaint “are no longer material facts[.]” CP 69.

What mattered for purposes of summary judgment, according to Angelo Property, was Maged’s allegedly voluntary abandonment of the premises. Specifically, Angelo Property argued that Maged voluntarily abandoned the lease prior to adjudication of the unlawful detainer proceedings, that Maged breached the lease by abandoning the premises,

⁸ Angelo Property, in violation of its obligations as established by the Supreme Court in *Fisons*, did not move for a protective order. *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 354, 858 P.2d 1054 (1993) .

and that he should be prohibited from seeking damages on his counterclaim when he was the party who allegedly breached the lease. CP 68-70. “As a result,” Angelo Property concluded that “the Unlawful Detainer action is moot (as possession is no longer an issue) and [Maged] has no right to damages for breach of contract.” CP 66.

Under Angelo Property’s new theory, all the issues were rolled into one:

Hafiz [Maged] continues to allege a legal right to possession, likely because without the right to possession, he has no claim for the egregiously high damages he seeks. All of [Maged’s] alleged damages flow from the fact that he is allegedly deprived of three-years use of the property. If he has no right to possess the property, then he has no right to damages. Because [Maged]’s abandonment of the property created a situation where possession is no longer at issue, [Maged]’s counterclaim should be dismissed with prejudice.

CP 152 (fn. 21). Pursuing the new theory through the summary judgment hearing, Angelo Property argued that “if you dismiss that counterclaim you then have cut off the legal possession.” RP III (May 15, 2009) at 17:10-11. Thus, under the logic of Angelo Property’s new theory, a party in Maged’s position, who had relinquished possession of the premises at issue, could only pursue a counterclaim for damages for constructive eviction if that party also continued to insist on the legal right to reenter and repossess those premises; since Maged was no longer insisting on the right to reenter and repossess Suite 50, Maged was barred from pursuing his counterclaim.

As Maged noted in his response to Angelo Property’s motion, Angelo Property’s shift away from claims pled in its unlawful detainer

complaint introduced “some confusion” into the summary judgment proceedings and compelled Maged to present the court with several arguments in the alternative. CP 127. Consistent with his earlier pleadings, Maged urged the court to convert the matter into an ordinary civil action where he could bring the full spectrum of his counterclaims in a unified action. CP 128. Recognizing that the court had already ruled against that request, Maged also argued that Angelo Property had not established the breaches alleged in its unlawful detainer notice and complaint. CP 132-35.

During oral argument on the summary judgment motion, the trial court now insisted that, since it had already determined that possession was not at issue, *the case had already been transformed into a regular civil suit*:

BW [Benjamin Wolff for Maged]: Well first in – the – the first issue is the Unlawful Detainer action with the guise under which we’re here. We shouldn’t even be in – in an Unlawful Detainer action because possession isn’t an issue.

JUDGE: Well I don’t think they are denying that.

BW: Well yes they are. Well in any event - okay. So if – if that’s the case –

JUDGE: If that’s the issue, I can resolve that and say no –

BW: possession is not an issue – we’re giving up possession –⁹

⁹ Cf. CP 260 (In its later letter ruling denying Maged’s motion to revise, the trial court stated that, “defendant [Maged] then argued that ‘possession remains at issue’” during the May 15, 2009 summary judgment proceedings). That assertion is *not* supported by the record.

JUDGE: and due to the timing of giving up possession, you come right into the *Munden versus Hazelrigg* case which allows it to be transformed into a regular civil suit.

BW: Correct.

JUDGE: So –

BW: And *Aldridge v.* –

JUDGE: **I've resolved that issue.**

RP III (May 15, 2009) at 35-36 (emphasis added); *see also id.* at 58 (JUDGE: “Number one, yes this is – it becomes a general civil suit based upon the *Munden* case”).

Maged then argued that Angelo Property was not entitled to summary judgment on its unlawful detainer claim because it had discarded the basis for its unlawful detainer notice and complaint:

BW: There's absolutely no proof in the record there were any violations on the post cure – during the post cure period.

COURT: But – and I – I think you're on the wrong track there. I think you're better off leaving that alone. But since you've brought it up by them taking the – the action to file an Unlawful Detainer based on that thirty days, they're alleging that it wasn't cured. Your response has been it wasn't [sic] founded in the first place so we didn't have anything to cure. I guess that is what you're saying.

But the bottom line is that issue is off the table now because of the fact that we aren't talking about possession so we haven't got to the merits of those claims. We have not got to the merits of those claims. They have not had to put on anything at this point in time that they – that they have to prove anything because the issue so possession was gone and so it's never been heard. We've never had – taken testimony with regard to that.

BW: And that's precisely why we can't – can't enter a summary judgment motion today. Because their – the basic – the fundamental basis of their claim has not been proven and there's no evidence in the record one way or the other

RP III (May 15, 2009) at 41-42.

The trial court nevertheless determined that Maged had not sufficiently rebutted Angelo Property claim that he breached the lease by voluntarily abandoning the premises. *Id.* at 50-55; CP 260. As for a moving party plaintiff's burden on a motion for summary judgment, the trial court stated:

JUDGE: The Plaintiff [Angelo Property] – **they don't have to do anything.**

BW: - pardon?

JUDGE: They really don't have to do anything in their affidavit other than say we sent out a notice. They don't – they don't have to do anything more. It puts the burden upon the defense in the Motion for Summary Judgment to establish a material issue of fact.

RP III (May 15, 2009) at 56 (emphasis added).

Maged then sought to clarify the basis for the trial court's ruling:

BW: Your honor I'm not clear on – there were two components for Summary Judgment. One is the Plaintiff's asserting of Unlawful Detainer. And the other is the Defendant's counterclaim. The two pieces.

JUDGE: Um-hum. Well right now we don't – aren't worried about Unlawful Detainer because that's limited to possession – and we've already established the possession is not at issue right now.

BW: Well, that's where you said – it's already converted to a normal civil suit.

JUDGE: Yeah. **So it becomes a general civil suit – which you're claiming breach of lease and they've listed the breaches that took place vis a vis the notice.** Your response is huh-uh – but you haven't supplied anything that support that this – that the contents of the notice was in – invalid – unfounded. And that's what I have to look at for summary judgment purposes.

RP (May 15, 2009) at 60-61 (emphasis added).

While the basis for the trial court's ruling never became entirely clear, it is at least clear from the record that the trial court determined that the issue to be resolved in the summary judgment proceeding was "who breached the lease." CP 260; *see also* RP (May 15, 2009) at 62 (JUDGE: "once possession is no longer at issue, what you basically have is a breach of lease claim"). And the trial court also evidently determined that, since Angelo Property had proved that it issued a notice to quit, this showing was somehow competent to prove as well that Maged had *in fact* breached the lease.

The trial court provisionally ruled in Angelo Property's favor, but allowed Maged to submit supplemental briefing on the issue of whether his pleadings could have met the burden imposed by the trial court of creating a material issue of fact as to whether Angelo Property lacked a foundation for the unlawful detainer notice. *See* RP III (May 15, 2009) at 58-69. As the trial court explained:

Said declaration [from Maged, *see* CP 119] does not dispute the contents of the plaintiff's notice. . . . Defendant [Maged] merely submits that he elected to vacate the premises and thus in his opinion terminates the lease. This declaration does not provide any information to support a counterclaim that there were "false allegations" in the April 14, 2008 notice or constructive eviction.

CP 183.¹⁰ Maged argued in his supplemental briefing that the facts section of his counterclaim established that Angelo Property had no good

¹⁰ The trial court's understanding was that Maged "vacated but maintained that the Notice was defective in that [Maged] was not in violation of the terms of conduct of the lease and counterclaimed to this effect." CP 183.

faith basis for pursuing its unlawful detainer action. CP 157. In that counterclaim, Maged alleged that “he had complied with the terms of the lease, and the terms of the April 14, 2008 notice.” CP 40. Because Angelo Property had failed to answer his counterclaim or deny the allegations contained therein, Maged argued that he was entitled to rely on Angelo Property’s admission as to those facts. CP 157. Maged also submitted a supplemental affidavit, but Angelo Property succeeded in having this affidavit stricken on the basis that the trial court had not authorized Maged to supplement his testimony opposing Angelo’s summary judgment motion. CP 160-64, 184.

The trial court issued a letter ruling granting Angelo Property’s motion for summary judgment. In that ruling, the trial court reiterated its understanding stated during the hearing on Angelo Property’s motion that “[s]ince possession was not at issue at the time of the show cause hearing, the unlawful detainer action was converted into a general civil suit.” CP 183.¹¹ In its order granting Angelo Property’s motion for summary judgment, the trial court concluded that Maged unlawfully detained the premises from June 1, 2008 to July 1, 2008. CP 189. The trial court also concluded that Maged breached the lease and that his tenancy was terminated. CP 189. Finally, the trial court dismissed Maged’s constructive eviction counterclaim *with prejudice*. CP 189.

¹¹ Since there never was a show cause hearing, the trial court was presumably referring to the August 1 and 15, 2008 hearings. As Maged addresses later in this brief, the trial court would later reverse itself as to that finding, while insisting that its summary judgment ruling in favor of Angelo Property would not be reversed. CP 260

D. The Trial Court Denies Maged's Motion For Revision Under CR 54(b).

The trial court's summary judgment left open the question of damages. After Angelo Property took no steps for several months to bring a motion to determine damages, Maged moved (on September 9, 2008) for revision under CR 54(b). Maged asked the trial court to vacate its judgment that he was in unlawful detainer, modify its dismissal of his counterclaim so as to be without prejudice, and to revise its August 15, 2008 order by granting Maged leave to file all permissible counterclaims. Regarding the unlawful detainer finding, Maged contended that Angelo Property did not prove, or even attempt to prove, the allegations constituting unlawful detainer as set out in its complaint but instead moved for summary judgment on the theory that Maged breached the lease by abandoning the premises. CP 221. As Maged argued, if the trial court based its summary judgment ruling on a finding that Maged had breached the lease through abandonment, then there was no period of time in which Maged unlawfully detained the premises. CP 221-22. Maged also urged that the trial court could not have found that he breached the lease for the reasons set forward in the complaint because Angelo Property had discarded those allegations. CP 221-22.

During oral argument on the CR 54 motion, Maged's counsel reminded the trial court that its August 15, 2008 order had left the action under the court's unlawful detainer jurisdiction, contrary to the trial court's stated understanding in its June 4, 2009 letter ruling that the case had been converted to an ordinary civil action at the time of its August

2008 rulings. RP V (September 18, 2009) at 2. The trial court initially resisted the suggestion that its finding of June 2009 was in error:

JUDGE: **but my ruling is yes, it was converted.** I don't care what they say. I mean they're wrong. Okay? They're wrong. My letter [of June 4, 2009, *see* CP 183] says yes, it was converted into a civil suit and they moved for Summary Judgment. There was no countervailing [sic] affidavit from the defense so what does it matter if I – I – I – let's assume I disagree with the Plaintiffs here. And I agree with my letter. And I – frankly I – I read that and I said well I don't think that's quite true. As I recall – and jump in here if you want –

KW [Kelly Welsh for Angelo Property]: Um-hum.

JUDGE: – at the time that we came up with the Show Cause hearing in response to the – at that time – prior to the hearing – actually we had two hearings on it and as I recall the defense said we're not contesting possession. We're – we're – you know – we're giving – we're moving out. We're not putting up with possession. There was a lot of talk about whether that terminated the lease – didn't terminate the lease.”

But the bottom line they said no, we've handed over the keys, we've handed over this – we're out of it. I said okay, if possession is not the issue at this time, then yes, we can honor your counterclaims but they've now brought a Motion for Summary Judgment on your counterclaims but they've now brought a Motion for Summary Judgment on your counterclaims and that's what we discussed and that's what I ruled in favor of the Plaintiffs because they never responded with a valid affidavit to maintain their – their counterclaim.

RP V (September 18, 2009) at 3-4.

Maged argued that the narrow statutory scope of the superior court's unlawful detainer jurisdiction prevented him from fully prosecuting his unlawful eviction counterclaim in that action because the counterclaim exceeded the scope of the court's jurisdiction over that action:

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The question of unlawful eviction – a common law claim for damages after you’ve abandoned the premises – moved out, is of a different scope – it is of a broader scope. So when they insisted this case should remain an Unlawful Detainer case, they limited the scope of the jurisdiction over the counterclaim.

RP V (September 18, 2009) at 21:8-13. Angelo Property, on the other hand, maintained that Maged’s counterclaim was the very issue that had prevented the court from converting the action out of its unlawful detainer jurisdiction, supposedly because if Maged were to prevail on that counterclaim then Angelo Property would have rather been compelled to restore Maged to his legal right to possess the premises instead of honoring his election of remedies:

And the reason that legal possession was such an issue is because – if you’ll recall – Defendant wanted to raise a claim that he was going to be due all of his lost profits for being put out of business. Well an Unlawful Detainer needs to be resolved as to legal possession because if – if we just walk away from the law – Unlawful Detainer – and convert it to a civil action, then we have no ability to say – if [he] wins – you know – if he wins and the court and a jury would were to say you know Mr. Hafiz, you actually do have a right to stay on the premises and now you’re entitled to all these damages, well if we had litigated the Unlawful Detainer and they’d said you still have the right to be in there, then instead of my client being on the hook for potentially – you know – hundreds of thousands of dollars for whatever his speculative lost profits are over the term of the lease, we can just let him get back on the premises and open his business back up.

And so that is hugely important in resolving this issue – that’s why legal possession was such a huge issue at the outset that we couldn’t just abandon it and convert it to a civil action without resolving that issue of legal possession.

RP V (September 18, 2009) at 14:15-15:12.

Angelo Property did not agree that the narrow scope of the unlawful proceedings prejudiced Maged’s ability to litigate his counterclaims. Instead, *Angelo Property represented that the parties had*

engaged in full discovery on the counterclaims, supporting the trial court's theory that the parties had essentially waived any objection to the limited scope of the superior court's subject matter jurisdiction when presiding over unlawful detainer actions:

JUDGE: . . . Frankly it is my feeling that once we allowed the counterclaims – they took advantage of the counterclaims – they filed the counterclaims – and the fact that actual possession was not in issue, then we're in a different ball field. It may be a hybrid, correct. It may be some type of hybrid. But the const – I think the only question I have is that paragraph four which says we still retain priority status which – what does that mean?

KW: Right.

JUDGE: But it – it does – it raises some issue – some question in my mind.

KW: I would certainly just point out that the parties did engaged in discovery. **I don't think Mr. Wolff would disagree that we did get a chance to exchange documents –**

JUDGE: Sure.

KW: – **and Interrogatories and depositions and all of that.**

JUDGE: And I – I don't see how amending the order, allowing counterclaims, taking advantage of it – there may be some judicial estoppel with regard to that – and then bringing – you would be entitled to bring a Summary Judgment saying we're not going to waste any more time on discover[.]

RP V (September 18, 2009) at 28-29 (emphasis added).

But Mr. Wolff, Maged's counsel, *did* disagree with the accuracy of Angelo Property's representations about discovery. As previously stated, Maged had attempted to conduct discovery on his constructive eviction counterclaim by serving interrogatories on Angelo Property, *and Angelo Property at least twice refused to provide responses on the basis that*

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“[t]his is an unlawful detainer action.” CP 246 (emphasis added). Moreover, Mr. Wolff brought his disagreement with Angelo Property’s assertions to the trial court’s attention following the hearing by submitting a declaration setting forth the actual facts regarding Angelo Property’s refusal to respond to discovery regarding Maged’s constructive eviction counterclaim. CP 243-46. Angelo Property moved to have this declaration stricken, CP 247-52, and the trial court *granted the motion to strike*. RP VI (October 16, 2009) at 2:12-13.

On November 2, 2009, the trial court issued a letter ruling denying Maged’s motion to revise. CP 259.¹² The trial court acknowledged that the paragraph in its June 4, 2009 letter referring to the action having been converted into an action under the court’s ordinary civil jurisdiction “was in error”:

[T]he action **had not** been converted into a general civil action – a fact that the Order of August 15 clearly states. I would further note that this sentence was neither necessary to the ruling nor accurate in view of the case history and prior rulings.

CP 260 (bold in original). The trial court nonetheless refused to revise any of its prior summary judgment rulings, including its dismissal with prejudice of Maged’s constructive eviction claim.

The trial court entered its final order and judgment on May 14, 2010, concluding that the “issue of legal possession and/or right to possession remained unresolved through June 4, 2009, when the Court

¹² The November 2, 2009 letter ruling was incorporated by reference into the trial court January 8, 2010 order denying Maged’s motion for revision. CP 285-286.

terminated [Maged's] tenancy." CP 351.¹³ The court awarded Angelo Property double rent for the period of June 1, 2008, through June 30, 2008, and rent from July 1, 2008, through June 4, 2009, the entire period of time requested by Angelo Property. CP 351. The trial court also awarded Angelo Property attorney fees under Section 42 of the lease agreement in the amount of \$45,000. CP 351. The total judgment, including unpaid rent, fees, pre-judgment interest, attorney fees, and costs, imposed against Maged was \$134,876.05. CP 350. Maged timely appealed.

III. STANDARD OF REVIEW

A trial court's conclusions of law are reviewed de novo. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). On appeal, the trial court's findings of fact must support its conclusions of law; the findings must be supported by substantial evidence. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999).

Whether a trial court has subject matter jurisdiction is a question of law reviewed de novo. *Young v. Clark*, 149 Wn.2d 130, 132, 65 P.3d 1192 (2003).

¹³ Following this issuance of this order, and with Angelo Property still making no move towards resolving the issue of damages, Maged filed a protective notice of appeal. That appeal was later dismissed without prejudice as the parties finally moved towards the entry of a final judgment. *See* Cause No. 40079-1-II.

IV. ARGUMENT

A. **The Unlawful Detainer Statute Grants the Superior Court Subject Matter Jurisdiction Limited to a Summary Determination of the Landlord's Right of Possession.**

“An unlawful detainer action under RCW 59.12 is a summary proceeding designed to facilitate recovery of possession of leased property and, in such a proceeding, the primary issue is the right to possession.” *Port of Longview v. Int'l Raw Materials, Ltd.*, 96 Wn. App. 431, 436, 979 P.2d 917 (1999). By suing under the unlawful detainer statute, a landlord invokes a special, limited jurisdiction of the superior court. *Sprincin King Street Partners v. Sound Conditioning Club, Inc.*, 84 Wn. App. 56, 66, 925 P.2d 217 (1996); RCW 59.12.050 (providing jurisdiction to the superior court of the county where the property is situated).

The unlawful detainer statute is strictly construed in favor of the tenant. *IBC, LLC v. Heuft*, 141 Wn. App. 624, 632, 174 P.3d 95 (2007). A landlord's failure to follow the statute defeats the superior court's jurisdiction. *Kessler v. Nielson*, 3 Wn. App. 120, 123, 472 P.2d 616 (1970).

In an action to recover possession based on a covenant breach, a tenant of real property is not guilty of unlawful detainer unless he:

continues in possession in person . . . after a neglect or failure to keep or perform any other condition or covenant of the lease or agreement under which the property is held . . . than one for the payment of rent, and after notice in writing requiring in the alternative the performance of such condition or covenant or the surrender of the property Within ten days¹⁴ after the service

¹⁴ The parties to a lease may contract for a longer time period to cure the breach than the minimum allowed by the statute. *Income Properties Inv. Corp. v. Trefethen*, 155 Wash. 493, 502, 284 P. 782 (1930). Here, the parties generally contracted for a 30 day period after the giving of written notice. CP 17.

of such notice the tenant . . . may perform such condition or covenant and thereby save the lease from such forfeiture.

RCW 59.12.030(4) (emphasis added).¹⁵ A landlord seeking to recover possession “must set forth the facts on which he or she seeks to recover” in its complaint for unlawful detainer. RCW 59.12.070.

Three conditions must be met before a landlord may obtain relief under the unlawful detainer statute:

[1] There must exist a breach or breaches of the covenants of the lease; [2] the landlord must notify the tenant of the existence of such breach or breaches, and give him [at least] ten days to correct them; [3] the tenant must fail or neglect to correct such breach or breaches. The tenant is then guilty of unlawful detainer, and the landlord is entitled to possession.

Wilson v. Daniels, 31 Wn.2d 633, 643, 198 P.2d 496 (1948).

The giving of the notice is a condition precedent to an unlawful detainer action — it is a fact to be established before the court may pronounce a judgment of unlawful detainer. *Little v. Catania*, 48 Wn.2d 890, 892, 297 P.2d 255 (1956). “Failure to comply with the notice requirement defeats the court’s jurisdiction over the action.” *IBC, LLC*, 141 Wn. App. at 632 (citations omitted). Notices that do not inform tenants “of the *particular* acts or omissions asserted to constitute a breach” cannot form the basis of an unlawful detainer cause of action. *Woodward v. Blanchett*, 36 Wn.2d 27, 31, 216 P.2d 228 (1950) (emphasis added).

¹⁵ And when the breach alleged is waste, a tenant of real property is not guilty of unlawful detainer unless “he or she commits or permits waste upon the demised premises, or when he or she sets up or carries on thereon any unlawful business, or when he or she erects, suffers, permits, or maintains on or about the premises any nuisance, and remains in possession after the service . . . upon him or her of three days’ notice to quit.” RCW 59.12.030(5).

Thus, where a landlord alleges that a tenant is unjustifiably continuing in possession after failing to correct the acts or omissions asserted in the notice to constitute a breach, the unlawful detainer statute provides “for a summary proceeding to determine the right of possession as between a landlord and a tenant.” *Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985). The unlawful detainer “action is a narrow one, limited to the question of possession and related issues such as restitution of the premises and rent.” *Munden*, 105 Wn.2d at 45. “In order to protect the summary nature of the unlawful detainer proceedings, other claims, including counterclaims, are generally not allowed.” *Id.*

An “exception to the general rule is made when the counterclaim, affirmative equitable defense, or set-off is ‘based on facts which excuse a tenant’s breach.’” *Munden*, 105 Wn.2d at 45, citing *First Union Mgt., Inc. v. Slack*, 36 Wn. App. 849, 854, 679 P.2d 936 (1984). While a tenant may not assert unrelated counter-claims in the unlawful detainer action, a court’s unlawful detainer jurisdiction ceases to exist when possession ceases to be at issue, at which point the tenant may assert his counterclaims in an ordinary civil suit:

Where the right to possession ceases to be at issue at any time between the commencement of an unlawful detainer action and trial of that action, the proceeding may be converted into an ordinary civil suit for damages, and the parties may then properly assert any cross claims, counterclaims and affirmative defenses.

Munden, 105 Wn.2d at 45-46.

For example, in *Munden*, a dispute arose between a tenant and a landlord over rent owed versus damages to the tenants’ car from a

landslide on the property. 105 Wn.2d at 41. The landlord initiated an unlawful detainer action, seeking possession and back rent. *Id.* The tenants asserted an ‘affirmative defense/counterclaim’ for damages and then “vacated the premises and specifically relinquished any right to possession.” *Id.*

The Washington Supreme Court reversed the trial court’s dismissal of the counterclaim and remanded the matter for a determination of parties’ claims outside of the trial court’s unlawful detainer jurisdiction:¹⁶

Since the tenants’ right to possession was [] relinquished prior to trial, possession was no longer a live issue, and the action could have properly been converted to an ordinary civil suit. In such suit, the tenants’ counterclaim for damages to their automobile is properly before the court.

Munden, 105 Wn.2d at 47.¹⁷ This holding is supported by a common sense rationale: barring tenants from raising issues unrelated to the tenant’s alleged breach in unlawful detainer proceedings prevents tenants who have violated lease covenants from frustrating the prompt restitution

¹⁶ *Munden* left it within the trial court’s inherent power to fashion the method by which an unlawful detainer action is converted to an ordinary civil suit: “The court may require amended pleadings to convert the unlawful detainer to a civil suit. It may grant a continuance. In any event, once converted, the civil suit is no longer entitled to the calendar priority afforded an unlawful detainer action by RCW 59.12.130.” 105 Wn.2d at 47-48.

¹⁷ By so holding, *Munden* distinguished *Tuschoff v. Westover*, 65 Wn.2d 69, 395 P.2d 630 (1964), where the court had held that an unlawful detainer proceeding could not be converted into an ordinary civil action for damages. In *Tuschoff*, the issue of the right to possession remained unresolved despite the defendants’ admitted physical relinquishment of the premises because the defendants put the legal right to possession at issue through their claim that they had been unlawfully and forcibly ousted. To the extent *Tuschoff* remains good law, Maged’s unlawful eviction counterclaim *does not* put the right to possession at issue because he elected against pursuing that remedy under *Aldrich v. Olson*. 12 Wn. App. 665, 672, 531 P.2d 825 (1975).

of the premises to the landlord. But once the remedy of restoring possession is achieved, considerations of judicial economy call for allowing the parties to continue litigating the remaining damages issues and all counterclaims in one action under the trial court's ordinary civil jurisdiction. *Munden*, 105 Wn.2d at 46-47, citing *Union Oil Co. v. Chandler*, 4 Cal. App. 3d 716, 722, 84 Cal. Rptr. 756 (1970).

B. The Trial Court Erred By Presuming to Retain Its Unlawful Detainer Jurisdiction After the Right to Possession Ceased to be at Issue.

The trial court erred by denying Maged's request to convert the unlawful detainer proceedings into an ordinary civil action as soon as possession ceased to be at issue. Here, both physical possession and the legal right to possession ceased to be at issue no later than the trial court's order of August 15, 2008. By that point, Maged:

- was physically out of the premises, and had removed "everything of value," CP 47;
- announced to Angelo Property that he "wished to return the premises to Angelo Property Co." CP 47;
- returned his keys to Angelo Property, CP 48;
- made no attempt to reenter the premises, CP 48;
- represented to the trial court that he had "surrendered possession of the property," CP 37;
- agreed that he was making no further claims to the rest of the tenancy, RP I (August 1, 2008) at 6;

- did not object to Angelo Property re-letting the premises, RP I (August 1, 2008) at 8;
- stipulated that he would not be moving back into the premises under any scenario, RP I (August 1, 2008) at 21;
- agreed that “actual possession was resolved and legal possession is resolved,” RP II (August 15, 2008) at 5;
- stated that he was not seeking possession of the premises, RP II (August 15, 2008) at 5; and
- did not seek to be reinstated in the premises in the prayer for relief section of his proffered amended answer and counterclaim. CP 42-43.

In the face of these facts, the trial court found that Maged had “relinquished possession,” and that he did not wish to re-take possession. CP 101. In turn, the trial court authorized Angelo Property to re-let the premises. CP 101-02. None of the findings in the August 15, 2008 order, however, supported the trial court’s *ultimate* conclusion that “the issue of legal possession to the premises is not yet resolved.” CP 102. Angelo Property, however, then seized on this ultimate conclusion to manufacture the existence of an ongoing dispute over the right of possession, all to support its attempt to prevent Maged from asserting his counterclaims. Despite Maged’s stipulation that he did not wish to re-take possession of the property under any circumstances, Angelo Property argued that it was Maged who was contending that he still had a legal right to possession, thereby preserving that issue for prompt judicial determination. CP 53-54.

Angelo Property had no legitimate support for its attempt to blame Maged for somehow suggesting that the legal right to possession remained at issue. Angelo Property cited nothing more than Maged's statement that the "actual possession of the real property is no longer at issue." CP 36, 56. The problem with that sentence, according to Angelo Property, was not its substance — neither party disputed the fact that Angelo Property enjoyed actual possession of the premises. Rather, Angelo Property insisted that Maged should have also expressly disclaimed in that same sentence any legal rights arising in any way out of the right to possession. CP 56. And on the basis of nothing more than the absence of such a "magical" phrase from one sentence, Angelo Property accused Maged of orchestrating an end-run around the unlawful detainer statute.

Contrary to Angelo Property's accusation, Maged never suggested that he was seeking to regain possession of the premises. In fact, Maged consistently expressed the opposite position, stating (for example) that "[w]e're making an election of remedies. We do not want possession as a remedy for his breach your honor." RP II (August 15, 2008) at 5:13-15.

Nevertheless, the trial court agreed with Angelo Property by concluding that the issue of the right to possession remained alive. CP 102. The trial court did not state a legal or factual basis for its conclusion, although it appears to have believed that the legal right to possession would remain at issue as long as Maged maintained his constructive eviction counterclaim against Angelo Property. *See* RP II (August 15,

2008) at 5-6.¹⁸ And the presumptive basis for that belief was the notion that Maged could have requested the reinstatement of his legal right to possess the premises as a remedy for Angelo Property's constructive eviction. That conclusion about the right to possession remaining at issue, however, finds no support in the record, runs contrary to case law and cannot be reconciled with the trial court's other findings and conclusions in the August 15, 2008 order.

1. A Wrongfully Ousted Tenant May Cede Future Possessory Rights to the Premises at Issue and Elect Instead to Pursue an Action for Damages Based on the Loss of Those Rights.

Maged did not dispute Angelo Property's ongoing legal right to possess the premises by asserting that it had breached the lease covenant of quiet enjoyment. While specific performance is one remedy available to a party suing to enforce a lease provision, the injured party "always has a choice between specific performance and money damages." *See Crafts v. Pitts*, 161 Wn.2d 16, 24, 27, 162 P.2d 382 (2007). Actual or constructive eviction "confers upon a lessee the alternative remedies of (1) seeking to regain possession and recouping damages; or (2) abandoning

¹⁸ JUDGE: [What Maged is saying is], we would be in possession of those premises but for the actions of [Angelo Property] They screwed us over.

BW: But for the absence of their eviction --

JUDGE: Yeah

BW: -- we would be in possession, yes.

JUDGE: Okay. **So there you go.**

PH [Phillip Haberthur, counsel for Angelo Property Co.]: Then we need the trial to determine if we can -- if we're entitled to the eviction.

RP (August 15, 2008) at 5-6 (emphasis added).

the premises with a reasonable time and recouping damages.” *Aldrich v. Olson*, 12 Wn. App. 665, 672, 531 P.2d 825 (1975).¹⁹ As this Court has put the point:

An eviction by the lessor suspends the lessee's obligation to pay rent during the time he is kept out of possession. *And instead of resorting to an action to recover possession, the lessee may treat the lease as terminated*, thus relieving himself of any obligation to pay rent which would otherwise accrue thereafter. This rule applies when the eviction is constructive as well as when it is actual. *In addition, the lessee may sue for damages for breach of the covenant of quite enjoyment.*

Aldrich, 12 Wn. App. at 672 (citations omitted) (emphasis added).

Here, Maged unequivocally made an election of remedies, choosing to treat the lease as terminated and to pursue money damages instead of resorting to an action to recover possession, an entirely understandable decision given Angelo Property’s demonstrated unwillingness to protect Maged’s right to quiet enjoyment. RP II (August 15, 2008) at 5. Indeed, the trial court recognized Maged’s election in its August 15, 2008 order: “Defendant does not wish to re-take possession of the premises, even if successful in defending this lawsuit.” CP 101. That finding can only support the conclusion that the right to possession had ceased to be at issue by August 15, 2008.

No findings support the trial court’s conclusion that the issue of legal possession remained at issue. And nothing in the record would have supported such a finding had it been made. Angelo Property based its

¹⁹ In fact, a tenant must abandon to have cause of action for constructive eviction. *See Brine v. Bergstrom*, 4 Wn. App. 288, 289, 480 P.2d 783 (1971).

accusation about Maged's supposed unlawful detainer end-run on nothing more than a citation to the absence of three words from a single sentence. When that sentence is considered in light of the overwhelming evidence as accepted by the trial court, that Maged did not wish to re-take possession of the premises under any circumstances, no reasonable fact-finder could have found that Maged sought to recover his legal right to possess the premises.

Yet despite accepting Maged's repudiation of any future right to retake possession of the premises, the trial court appeared to conclude that Maged's constructive eviction counterclaim somehow kept alive the issue of who was legally entitled to possess the premises. That conclusion has no legal basis. This Court's decision in *Aldrich* provides clear authority for a constructively evicted tenant to treat the lease as terminated (instead of attempting to recover the right to possession) and to sue for damages based on the landlord's breach of the covenant of quiet enjoyment.

2. By Granting Angelo Property the Right to Re-Let the Premises, the Trial Court Definitively Restored to Angelo Property Its Right to Possess the Premises.

The trial court's conclusion that the right to possession remained unresolved is irreconcilable with the trial court's order authorizing Angelo Property to re-let the premises. Based on Maged's stipulation that he did not want possession of the premises, the trial court authorized Angelo Property to re-let the premises. CP 102. By doing so, the trial court restored to Angelo Property the legal right to possess the premises — a landlord may not re-let premises without also having the legal right to

possess those premises. “In every leasing there is implied a covenant that the landlord has the legal power to create the intended leasehold estate.” 17 W. Stoeckel & J. Weaver, Washington Practice: Real Estate: Property Law § 6.29 at 350 (2nd ed. 2004). Put another way: if a landlord does not have the legal right to possess the premises, that right cannot be conveyed to the prospective tenant: “Implied in every lease is a covenant to deliver possession to the tenant.” *Draper Machine Works, Inc. v. Hagberg*, 34 Wn. App. 483, 486, 663 P.2d 141 (1983). Accordingly, by authorizing Angelo Property to re-let the premises, the trial court definitively resolved the issue of the legal right to possess the premises no later than August 15, 2008.

3. **Washington Law Does Not Hold That a Constructively Evicted Tenant Who Sues for Damages Invokes the Superior Court’s Unlawful Detainer Jurisdiction.**

In *Woodward v. Blanchett*, 36 Wn.2d 27, 216 P.2d 228 (1950), the landlord sued the tenant before the term of the lease had expired, alleging that the tenant had breached a lease covenant to cultivate the land in a farmlike manner. *See* 36 Wn.2d at 30. The tenant denied breaching the lease and brought a counterclaim for damages, alleging that the landlord had breached the implied covenant of quiet enjoyment through constructive eviction. *Id.* at 30, 37. The landlord was in actual possession of the premises during the litigation. *Id.* at 32. While the Supreme Court in *Woodward* did not expressly determine whether the tenant’s counterclaim put the legal right of possession in play, the court did address

the nature of the action before the superior court. Notably, the Supreme Court in *Woodward* did not hold that the action sounded under the superior court's unlawful detainer jurisdiction, even though the tenant in *Woodward*, like Maged, was claiming that the landlord owed him damages for wrongful eviction in breach of the covenant of quiet enjoyment.²⁰ 36 Wn.2d at 32. Thus, Washington case law does not hold that a tenant who has been forced from the premises invokes a court's unlawful detainer jurisdiction by counterclaiming for damages caused by the constructive eviction. The trial court in this case therefore had no legal basis to conclude that Maged kept the right to possession issue alive merely by maintaining a counterclaim against Angelo Property for constructive eviction.

4. All the Trial Court's Subsequent Actions Are Mooted by Its Foundational Jurisdictional Error.

Because the superior court lacked subject matter jurisdiction to hear any further proceedings under the exercise of its unlawful detainer jurisdiction, it did not have the power to decide any further issues in this matter. On that basis alone, this Court should remand these proceedings to the trial court to determine the parties' competing claims for damages under its ordinary civil jurisdiction.

²⁰ In fact, the Supreme Court in *Woodward* went even further, "noting that, had this been an action for unlawful detainer, [the tenant] could not have counterclaimed for damages suffered because of wrongful eviction" because the duty to operate in farmlike manner and the duty not to disturb enjoyment are not so related that the landlord's breach would excuse the tenant's breach. 36 Wn.2d at 32, 34.

The trial court appeared to reason that the parties consented to litigating the merits issue at the heart of the pending ordinary civil suit for damages — who breached the lease — under its unlawful detainer jurisdiction by skirmishing about Maged’s counterclaims:

JUDGE: Frankly it is my feeling that once we allowed the counterclaims – they took advantage of the counterclaims – they filed the counterclaims; – and the fact that actual possession was not in issue, then we’re in a different ball field. *It may be a hybrid, correct. It may be some type of hybrid.*

RP V (September 18, 2009) at 29 (emphasis added).

Where a trial court lacks subject matter jurisdiction to hear counterclaims under its unlawful detainer jurisdiction, as this trial court did over Maged’s counterclaims, the parties cannot waive the court’s jurisdictional shortcomings through their subsequent conduct. *See First Union*, 36 Wn. App. at 854. “Lack of jurisdiction over the subject matter renders the superior court powerless to pass on the merits of the controversy brought before it.” *Skagit Surveyors & Eng’rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998). “[D]ismissal without prejudice is the limit of what a court may do.” *Housing Auth. v. Kirby*, 154 Wn. App. 842, 850, 226 P.3d 222 (2010), rev. denied 169 Wn.2d 1022, 238 P.3d 503 (2010).²¹

²¹ Consistent with *Munden*, the superior court also retains the authority to convert the proceedings to an action under the superior court’s ordinary civil jurisdiction with the full spectrum of counterclaims allowed as an alternative to dismissing without prejudice and requiring re-filing. 105 Wn.2d at 46-48. Regardless of the method employed, which is in the trial court’s discretion, the end result is the same.

Moreover, Maged never asked the court to allow him to litigate any of his counterclaims under the court's unlawful detainer — or, as the trial court would have it, its “hybrid” — jurisdiction because the scope of any counterclaim he could have litigated in that action would have been much too narrow to allow for its full development. As shown in the next section of this brief, Maged's constructive eviction counterclaim was far too broad to be permissible as a counterclaim under the trial court's unlawful detainer jurisdiction, presenting Maged with a hopelessly constricted incentive to fully litigate that counterclaim in the wrong forum.

Maged would not have been free to fully develop his counterclaims until those claims were before the trial court under its ordinary civil jurisdiction. At that point, he could have completely developed his counterclaims without Angelo Property resisting discovery on the basis of the limited scope of unlawful detainer proceedings and without attempting to ensure that his constructive eviction counterclaim stayed within the narrow confines of those counterclaims allowed in an unlawful detainer proceeding.

Indeed, Maged attempted to flesh out his constructive eviction counterclaim as soon as it appeared that the trial court had converted the proceedings into an ordinary civil suit for damages. After the trial court's statements during the May 15, 2009 summary judgment hearing suggested, for the first time, that the trial court (falsely) thought of the action as having been converted over, Maged offered evidence sufficient to establish a prima facie case for constructive eviction. *See* RP III (May

15, 2009) 35-36, 58, 61; CP 160-164 (Maged's May 20, 2008 supplemental affidavit); *see generally Eskanos & Supperstein v. Irwin*, 637 P.2d 403, 405 (Colo. Ct. App. 1981) ("A constructive eviction of a lessee can occur when that lessee is denied full use and enjoyment of his leasehold as a result of acts committed by an adjoining tenant renting from the same landlord, when the landlord knows of the latter's actions and does not stop or control them."); *Blackett v. Olanoff*, 371 Mass. 714, 718, 358 N.E.2d 817, 820 (Mass. 1977) (allowing constructive eviction defense where the disturbing conduct of another tenant was found to be within landlord's control); *Bocchini v. Gorn Management Co.*, 69 Md. App. 1, 11-12, 515 A.2d 1179, 1184-1185 (Md. 1986) (subscribing to "modern view" by recognizing cause of action against landlord for constructive eviction based on disturbance by another tenant where landlord is in a position to correct or terminate that disturbance); *Gottdiener v. Mailhot*, 179 N.J. Super 286, 290-92, 431 A.2d 851, 853-854 (N.J. 1981) (actions of neighboring tenant which could have been prevented by common landlord may constitute constructive eviction and legally justify tenant's vacating).

Because the trial court lost jurisdiction over the unlawful detainer proceedings no later than August 15, 2008, it was powerless to pass on the merits of this case after that point. Maged accordingly requests that this Court reverse *all* of the trial court's rulings after August 15, 2008, and remand these proceedings to the trial court to allow Maged to fully prosecute his claims under the trial court's ordinary civil jurisdiction.

C. The Trial Court Exceeded the Narrow Scope of Its Limited Statutory Jurisdiction by Presuming to Create a “Hybrid” Action to Entertain Maged’s Counterclaim, When that Claim’s Resolution Was Not Necessary to Determine the Right to Possession.

Consistent with well-established unlawful detainer case law, Maged’s pleading presented the trial court with two options in response to his motion to amend his answer and add counterclaims under the court’s ordinary civil jurisdiction: the trial court could either (1) find that the right of possession had ceased to be at issue, convert the action into one for damages, and allow Maged’s counterclaims; or, (2) deny Maged’s motion and sideline all of his counterclaims until it had satisfied itself that the legal right to possession ceased to be at issue. As there were no further determinations for the trial court to make in order to resolve the right to possession, the trial court therefore lacked the jurisdiction to hear any claims or counterclaims under its by-then-expired unlawful detainer jurisdiction. Thus, the trial court erred by denying Maged’s motion to amend.

The trial court, however, did not simply deny Maged’s motion. It compounded its error in denying that motion by deciding to *both* retain its unlawful detainer jurisdiction over the action *and* to allow Maged’s constructive eviction counterclaim, creating, as the trial court put it, a “hybrid” action. RP V (September 18, 2009) at 29. The trial court’s decision to create a “hybrid” action was not a permissible jurisdictional option.

Moreover, the trial court used the wrong test to determine whether it could allow Maged's counterclaim under its unlawful detainer jurisdiction. In *Foisy v. Wyman*, 83 Wn.2d 22, 515 P.2d 160 (1973), the Washington Supreme court expressly recognized a limited exception to the general rule against unlawful detainer counterclaims. See 83 Wn.2d at 31-32. In *Foisy*, the Supreme Court held that a tenant accused of unlawful detainer following an uncured breach of the covenant to pay rent was allowed to assert an affirmative defense based on the landlord's breach of implied warranty of habitability because the landlord's breach could excuse the tenant's duty to pay rent. See *id.* at 27-28, 31-32. Thus, as Angelo Property itself has agreed,²² an unlawful detainer defendant may only assert counterclaims "based on facts which would excuse a tenant's breach." See *Munden*, 105 Wn.2d at 45, citing *Foisy* and *First Union Mgt. Inc.*, 36 Wn. App. at 854.²³

Put another way, a superior court's unlawful detainer jurisdiction remains limited to resolving issues necessarily related to the parties' dispute over possession. *Port of Longview*, 96 Wn. App. at 438,²⁴ citing

²² See CP 57.

²³ The Supreme Court in *Munden* also cited to *Income Properties Inv. Corp. v. Trefthen*, 155 Wash. 493, 284 P. 782 (1930), for the proposition that a counterclaim alleging a breach of the covenant of quiet enjoyment may be allowed under the exception to the general rule against counterclaims. But in *Income Properties*, unlike here, the breach alleged was the failure to pay rent. Thus, the superior court justifiably entertained the tenant's claim for breach of the covenant of quiet enjoyment as an equitable defense and offset against the amount of rent due. See 155 Wn. at 501, 504.

²⁴ The *Port of Longview* court held that the tenant was allowed to pursue a retaliatory eviction claim under the trial court's unlawful detainer jurisdiction, but that tenant, unlike Maged, had not made an election of remedies and was pursuing the counterclaim as an
(Footnote is continued on next page.)

First Union, 36 Wn. App. at 854. Accordingly, a similar test to determine whether the trial court has subject matter jurisdiction over a counterclaim in an unlawful detainer action is whether “resolution of the damages claim is [] necessary to determine the right of possession.” *First Union*, 36 Wn. App. at 854 (holding that the superior court had no jurisdiction to hear counterclaim).

Even under the counterfactual assumption that the legal right to possession remained a live issue, the resolution of Maged’s counterclaim for damages could not have been necessary to determine whether Angelo Property was entitled to possession according to its unlawful detainer complaint. Angelo Property alleged in its unlawful detainer notice and complaint that Maged had breached a number of lease covenants related to using the premises for lawful purposes, interfering with the rights of other tenants, committing waste, keeping the premises in good repair, and overburdening the parking area. CP 28. On the basis of those allegedly uncured breaches, Angelo Property prayed for relief in the form of an order terminating the lease and restoring possession of the premises to Angelo Property. CP 5.

Maged’s counterclaim that Angelo Property breached the lease covenant of quiet enjoyment could not have excused his duty to comply with the covenants of the lease he allegedly breached. For example, assuming that Maged had in fact used the premises for unlawful purposes

affirmative defense in order to prove that it was entitled to remain in possession. 96 Wn. App. at 438. Thus, the counterclaim was related to possession of the leased premises.

by continuing to commit liquor control violations following the notice to quit (an allegation Angelo Property never attempted to prove and which Maged denied), it would be no defense for Maged to say that his breach was excused by Angelo Property's interference with his possessory rights.²⁵ Those issues are unrelated, as Angelo Property recognized when it argued that the constructive eviction counterclaim "has nothing to do with the right to possession and may not be added to the [unlawful detainer] action." CP 58.

Instead of applying the test established by Washington case law as explained above, the record shows that the trial court allowed Maged's counterclaim because it had determined that the counterclaim "referred to the lease itself." CP 259.²⁶ Whether the counterclaim refers to the lease is simply not the correct test. Here, Maged's counterclaim referred to the lease, but it could not have excused the breaches alleged in Angelo Property's notice and complaint. And even more fundamentally, the resolution of Maged's counterclaim would not have impacted Angelo Property's ongoing right to possess and re-let the premises, because Maged had made an unequivocal election of remedies.

²⁵ This example is representative of the other breaches alleged: while Maged did not interfere with the rights of other tenants, commit waste, fail to keep the premises in good repair, or overburden the parking lot, Angelo Property's breach of the covenant of quiet enjoyment could not have excused any of the acts alleged to have constituted those breaches in Angelo Property's notice and complaint

²⁶ Angelo Property advocated for this standard during oral argument on Maged's motion to revise: "I think the statutes are – or the case law is quite clear that you can bring counterclaims on an Unlawful Detainer action that are related to the lease." RP V (September 18, 2009) at 23.

Angelo Property managed to take that last issue and flip it on its head throughout the litigation of this action, both encouraging and capitalizing on the trial court's misunderstanding. Angelo Property argued that so long as Maged pursued his constructive eviction claim, he was contesting Angelo Property's right to possession. Thus, Maged's counterclaim, once allowed in the unlawful detainer action became, according to Angelo Property, the very basis for the court's continuing unlawful detainer jurisdiction. Angelo Property never acknowledged that a constructively evicted tenant has the right to elect his remedies. *See, e.g.,* RP V (September 18, 2009) at 14-15.

D. The Trial Court Erred by Granting a Summary Judgment In Favor of Angelo Property's Unlawful Detainer Complaint.

This case never should have proceeded to summary judgment under the trial court's unlawful detainer jurisdiction because the trial court had long since determined that Angelo Property was legally entitled to possess and re-let the property in question. But when Angelo Property's motion did come before the court, Angelo Property never met its burden of showing as a matter of law that Maged was or had been in unlawful detainer of the premises. Angelo Property gave Maged notice of 13 particular acts or omissions that it asserted constituted breaches of various lease covenants. CP 28-29. Angelo Property's complaint for unlawful detainer under RCW 59.12 alleged that Maged failed to either perform the conditions of the lease agreement described in the notice to quit or surrender the premises within 30 days. CP 1-3. The complaint described

the acts Maged allegedly continued to permit in violation of the notice to quit. CP 3-4. Maged denied that he had failed to comply with the notice to quit in his answer. CP 32-33.

Angelo Property did not attempt to establish the absence of an issue of material fact related to whether Maged had in fact committed any of the breaches alleged in Angelo Property's notice to quit and complaint. Instead, Angelo Property asserted that Maged had "shifted" the focus of the summary judgment proceedings through his allegedly voluntary abandonment of the premises. CP 70-71. As to the facts relevant to the 13 breaches originally alleged, Angelo Property stated that "[t]hey are no longer material facts since [Maged] voluntarily abandoned the Lease and the Premises." CP 69. Nor did Angelo Property offer any evidence intended to establish that no reasonable juror could have come to any conclusion other than that Maged had failed to correct the alleged breaches of which he was notified. *See* CP 47-48, 50-51, 67, 78-118, 138-47 (material offered in support of Angelo Property's motion for summary judgment). In fact, based on the evidence offered, no reasonable juror could have found that Maged had failed to correct those alleged breaches because Angelo Property completely discarded that theory of unlawful detainer.

To support the new theory that Maged had shifted the focus of the proceedings, Angelo Property cited to the admissions Maged had made months earlier in support of his unsuccessful argument against the Court's continued exercise of its unlawful detainer jurisdiction. *See* CP 75-76.

Angelo Property cited that evidence as proof that Maged's abandonment had been "voluntary," notwithstanding the trial court's August 15, 2008 finding — based on same evidence later offered by Angelo Property — that Maged's relinquishment had not been voluntary. *See* CP 101; RP II (August 15, 2008) at 7. The record shows that Angelo Property, not Maged, was the party who shifted the focus of the proceedings.

Angelo Property, however, neglected to lay the proper foundation for that shifted focus. Specifically, Angelo Property never provided notice to Maged under RCW 59.12.040 alleging that his voluntary abandonment constituted a breach of the lease and that he would be found in unlawful detainer if he neglected to correct the breach within the 30 day period to cure allowed by the lease. While Angelo Property might assert that giving such a notice would have been futile, it is the act of continued possession after having received a notice to quit that defines the statutory violation. *See* RCW 59.12.030(4); *Wilson*, 31 Wn.2d at 643 (setting forth the three element-test consisting of breach, notice, and failure to correct).

In other words, even a tenant who is breaching a lease covenant is not guilty of unlawful detainer until that tenant also fails to comply with the notice requiring the performance of such covenant within the statutory or contractual cure period. *See* RCW 59.12.030(4); *Little*, 48 Wn.2d at 892 (the giving of the notice is a fact to be established before the court may pronounce a judgment of unlawful detainer). Moreover, a landlord may not merely provide a blanket notification covering all breaches that may arise later — the notice must inform the tenant "of the particular acts

or omissions asserted to constitute a breach” in order to form the basis for an unlawful detainer cause of action. *Woodward*, 36 Wn.2d at 31. And the landlord’s subsequent complaint “must set forth the facts on which he or she seeks to recover.” RCW 59.12.070.

Angelo Property might argue that CR 15(b) and RCW 59.12.150 generally provide a trial court with the discretion to amend a complaint in conformance with the evidence proved at trial. Such a remedy would have been unavailable here even if Angelo Property had asked for it or if the trial court had ordered amendment *sua sponte*. First, CR 15(b) or RCW 59.12.150,²⁷ by their terms, only allow amendments in conformance with the proof presented at trial. This case never went to trial. Second, as set forth above, it is the failure to remedy the particular acts asserted to constitute a breach that give rise to an unlawful detainer cause of action. Thus, where Angelo Property never gave Maged notice under the unlawful detainer statute that his supposedly voluntary abandonment breached a lease covenant, the condition precedent for adding an unlawful detainer cause of action on those grounds was never satisfied, and the complaint could not have been so amended.

²⁷ “When upon the *trial* of any proceeding under this chapter it appears from the evidence that the defendant has been guilty of either a forcible entry or a forcible or unlawful detainer, in respect of the premises described in the complaint, and other than the offense charged in the complaint, the judge must order that such complaint be forthwith amended to conform to such proofs; such amendment must be made without any imposition of terms” (emphasis added).

E. The Trial Court Erred by Dismissing Maged's Counterclaim with Prejudice.

As Maged argued during the hearing on his motion to revise, the trial court, having assumed extra-jurisdictional authority over Maged's constructive eviction counterclaim, erred by dismissing that counterclaim with prejudice. *See Skagit Surveyors & Eng'rs, LLC*, 135 Wn.2d at 556; *Hous. Auth. v. Kirby*, 154 Wn. App. at 850. The trial court first impermissibly invented a "hybrid" action, then allowed Angelo Property to receive a summary judgment dismissal of Maged's counterclaim with prejudice without meeting the burden of a party seeking summary judgment under the Civil Rules. The trial court expressly declared its belief that Angelo Property did not have to offer proof beyond the fact of its notice to quit, in order to be entitled to a summary judgment. RP III (May 15, 2009) at 56. Literally nothing in the law supports this remarkable statement of the trial court, which among other things ignored Maged's right to elect his remedies and pursue a claim for damages (e.g., for constructive eviction). Moreover, the trial court ignored that Maged's ability to prosecute his counterclaim had been frustrated by Angelo Property's -- wholly wrongful -- refusal to respond to discovery requests pertaining to the counterclaim, on the -- utterly specious -- ground that Maged was barred from conducting such discovery because the action still sounded in unlawful detainer.

**V. REQUEST FOR ATTORNEY'S FEES
UNDER RAP 18.1.**

Section 42 of the lease provides that the prevailing party in an action under the lease shall be entitled to attorney fees. CP 94. Accordingly, Maged requests that he be awarded the attorney fees incurred on appeal should he prevail. *TMT Bear Creek Shopping Center, Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 214-15, 165 P.3d 1271 (2007).

VI. CONCLUSION

This Court should reverse the trial court's judgment in favor of Angelo Parking, reinstate Maged's counterclaim for constructive eviction, and award Maged his attorney's fees and costs incurred in the prosecution of this appeal.

RESPECTFULLY SUBMITTED this 17th day of November, 2010.

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ORIGINAL

NO. 40868-6-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

ANGELO PROPERTY
COMPANY, a Washington
Limited Partnership,

Respondent,

vs.

MAGED HAFIZ, an individual
d/b/a THE NILE,,

Appellant.

CERTIFICATE OF SERVICE

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
10 NOV 17 PM 3:38
DEPUTY

The undersigned, under penalty of perjury, hereby declares as follows:

1. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.

2. On November 17, 2010, I served by US Mail, one copy of the following document:

***Appellant's Opening Brief
Motion for Leave to File Overlength Brief
Copies of Verbatim Report of Proceedings***

On:

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DATED this 17th day of November, 2010.

CARNEY BADLEY SPELLMAN, P.S.

By Patti Saïden
PATTI SAIDEN