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STATE OF WASHINGTON
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COURT OF APPEALS FOR DIVISION II

STATE OF WASHINGTON

ANGELO PROPERTY CO.,

Plaintiff-Respondent,

v.

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

Defendant-Appellant,

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

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Respondent, Angelo Property, Co. (“Angelo”), filed a statutory unlawful detainer claim against defendant, Abdul Hafiz Abdulmaged, d/b/a The Nile (“Maged”) after giving Maged the required statutory notice. Maged breached the lease in several particulars and failed to either remedy the breaches or vacate the property within the time given in the statutory notice. Maged then abandoned the property in violation of the lease terms. Maged initially answered, alleging only one affirmative defense. Then, Maged filed a counterclaim against Angelo alleging Angelo wrongfully evicted Maged by simply filing the unlawful detainer claim itself. Angelo filed a motion for summary judgment on both issues, which were one and the same. The trial court granted Angelo’s motion for summary judgment. Thereafter, Maged made several attempts to relitigate the issue, but the trial court, in its discretion, refused Maged’s requests. Maged now appeals, assigning error to the trial court’s decision granting Angelo’s motion for summary judgment, as well as to the trial court’s decision refusing to reconsider its summary judgment order.

Maged makes numerous assignments of error; however, many of the assignments are duplicative, and Maged does not include any arguments in support of others. For instance, Maged assigns as error the

trial court decision granting Angelo's motion for summary judgment¹, but also assigns as error the trial court decisions concluding that Maged unlawfully detained the premises,² that Maged breached the lease as alleged in the unlawful detainer complaint,³ that Angelo met its summary judgment burden,⁴ and that Maged failed to set forth specific facts sufficient to defeat summary judgment.⁵ These are all the same. This Court need not address duplicative assignments of error. Additionally, Maged has waived many of the assignments of error by not including any arguments or discussion regarding those assignments in his opening brief.

Angelo will address the various trial court rulings in chronological order, beginning with the summary judgment regarding Angelo's unlawful detainer claim, the summary judgment regarding Maged's breach of quiet enjoyment counterclaim, Maged's motion for reconsideration, and finally the trial court decision awarding Angelo damages.

¹ See Maged's Third Assignment of Error.

² See Maged's Eighth Assignment of Error, at its sixth subpart.

³ See Maged's Eighth Assignment of Error, at its seventh subpart.

⁴ See Maged's Eighth Assignment of Error, at its eighth subpart.

⁵ See Maged's Eighth Assignment of Error, at its ninth subpart.

II. RESPONSE TO ASSIGNMENTS OF ERROR

Maged's various assignments of error are duplicative. The four issues presented in Maged's opening brief are as follows:

1. Did the Superior Court properly grant summary judgment in favor of Angelo on its unlawful detainer claim when the undisputed facts show that Maged had breached the lease and that Angelo had complied with the statutory procedure for unlawful detainer claims?

2. Did the Superior Court properly grant summary judgment in favor of Angelo on Maged's counterclaim alleging the initiation itself of the unlawful detainer action by Angelo constituted a breach of quiet enjoyment and constructive eviction?

3. Did the Superior Court abuse its discretion when it refused to permit Maged to relitigate the issues in the summary judgment motion by submitting untimely affidavits, and in denying Maged's motion for reconsideration?

3. Did the trial court properly award Angelo damages for unlawful detainer?

III. STATEMENT OF THE CASE

A. Factual and Procedural History

Angelo served Maged with a statutory Notice to Comply With the Lease of Vacate the Leased Premises on April 14, 2008, after Maged breached several terms of the lease. CP 28-29. The notice alerted Maged of the lease violations that needed to be remedied. CP 29. Maged had 30 days to remedy the breaches or vacate the premises. CP 28-29.

Maged failed to remedy the breaches or vacate the property within 30 days from the date of the notice, so Angelo filed a statutory unlawful detainer claim against Maged on May 30, 2008, in the Clark County Superior Court. CP 1-5. On June 16, 2008, Maged filed an answer to the complaint, denying he had unlawfully retained the property and asserting no counterclaims. CP 32-34.

On or about July 1, 2008, Maged abandoned the premises by removing everything of value, including fixtures and equipment, and ripping up the flooring before handing the keys back over to an agent for Angelo. CP 47-51. This also constituted a breach of the lease. CP 17.

On July 15, 2008, Maged filed a motion for leave to amend his answer to add a counterclaim. CP 35-43. Maged alleged one claim: the filing of the unlawful detainer action by Angelo was itself wrongful and

caused Maged damages. Maged sought recovery for his alleged injuries under different theories of relief: breach of lease, unjust enrichment and interference with business expectancy. All three of Maged's proposed counterclaims alleged Maged was entitled to recover from Angelo based on nothing more than Angelo's filing of the unlawful detainer action. CP 39-43. Over Angelo's objections, the trial court permitted Maged to amend his answer. CP 63-65; 101-103. In his counterclaim, despite purposefully abandoning the property weeks earlier, Maged alleged he had a "property right in the subject premises," and alleging that Angelo's unlawful detainer suit constituted an interference with Maged's quiet enjoyment of the property. CP 361-364.

On April 17, 2009, Angelo filed a motion for summary judgment regarding both its unlawful detainer claim and Maged's allegation that the unlawful detainer claim itself constituted an interference with Maged's quiet enjoyment of the property. CP 66-118. In its motion for summary judgment, Angelo argued its unlawful detainer claim and Maged's allegation that the unlawful detainer claim itself constituted a wrongful interference with his quiet enjoyment of the property were one and the same. *Id.* Angelo argued that the filing itself of an unlawful detainer claim cannot be considered either interference with the quiet enjoyment of

the property or a wrongful eviction. *Id.* In its motion for summary judgment, Angelo also argued that Maged's abandonment of the property constituted yet another breach of the lease, defeating Maged's claim that he was wrongfully evicted from the property. *Id.*

In response to the motion for summary judgment, Maged submitted only his own affidavit. CP 119-121. Maged did not submit any evidence contradicting the allegations in Angelo's unlawful detainer complaint. In his response to the summary judgment motion, Maged argued, alternatively, (1) the statutory notice he received from Angelo was defective, and as such, the trial court lacked jurisdiction; (2) the trial court should convert the matter to an "ordinary civil action"; and (3) the trial court should proceed with the matter without converting it to an "ordinary civil matter," but deny the summary judgment motion because there were disputed factual issues. CP 125-137. At oral argument on the motion for summary judgment, the trial court noted that Maged had not submitted any admissible evidence to contradict Angelo's allegations. CP 175-180. Counsel for Maged, in a colloquy with the trial court, stated that he misunderstood the summary judgment standard. CP 175-176. Maged's counsel repeatedly argued that the allegations in his answer establish there were questions of fact warranting a denial of the motion for summary

judgment. *Id.* The trial court stated that a nonmoving party may not simply rely on its answer in opposition to a motion for summary judgment, but must instead submit admissible evidence establishing a question of fact. *Id.*

Maged requested leave to file a supplemental brief on the narrow legal issue of whether a nonmoving party may rest on its pleading in opposition to a motion for summary judgment. *Id.* The trial court granted Maged's request for leave to submit a supplemental brief on this narrow issue, but stated it was not accepting any further evidence. CP 177.

Maged then submitted a supplemental brief, and a supplemental affidavit, seeking to introduce additional evidence into the record. CP 155-164. In his supplemental brief, apparently recognizing the futility of his earlier argument, Maged did not address the issue regarding whether he could rest on his answer in opposition to the motion for summary judgment, but instead requested the trial court accept the untimely affidavit. *Id.* Angelo moved to strike the untimely affidavit because it materially prejudiced Angelo, and because the trial court specifically stated that it would not accept any additional evidence on the motion for summary judgment. CP 165-180.

On June 4, 2009, the trial court issued a letter opinion, striking Maged's supplemental affidavit as untimely and granting Angelo's motion for summary judgment. CP 183-184. Thereafter, an order was entered regarding the motion to strike. CP 185-186. The trial court then entered an order on Angelo's motion for summary judgment. CP 187-190.

On September 9, 2009, Maged filed a motion for reconsideration and attempted to again introduce new evidence into the record. CP 191-226. Angelo then filed a motion to strike Maged's affidavit on the grounds that it did not include any new evidence, but was in substance identical to the untimely affidavit submitted by Maged and stricken by the trial court before. CP 241-242; 230-233. Angelo then opposed Maged's motion for reconsideration on several grounds, but primarily on the grounds that Maged sought only to relitigate the issue already decided by the trial court. CP CP 234-240.

The trial court heard oral arguments on the motion for reconsideration on September 18, 2009. Before any order on the motion for reconsideration was entered, Maged submitted a post-hearing declaration of his counsel, Benjamin L. Wolff, in which Mr. Wolff made arguments and once again sought to introduce new evidence. CP 243-245. Angelo moved to strike the declaration on the grounds that the trial court

had specifically stated that it would not accept any further evidence, and that the affidavit was not newly discovered evidence. CP 247-252.

On November 2, 2009, the trial court issued a letter ruling on Maged's motion for reconsideration and summarized the previous motions and orders. CP 259-261. In the letter, the trial court stated that it never converted the action into a general civil action, but instead treated the unlawful detainer claim and Maged's claim that the unlawful detainer claim was itself wrongful as one issue. CP 260. Finally, in the letter opinion, the trial court denied Maged's motion for revision on the grounds that Maged had simply attempted to introduce new evidence, which is not allowed. *Id.* The trial court subsequently entered an order denying Maged's motion for revision. CP 285-286.

Maged then filed a notice of appeal. CP 262-266. This Court noted the matter on its motion docket on the issue of appealability because no judgment had been entered. CP 267-268. Maged then requested the trial court enter a judgment of unlawful detainer. CP 269-271. Angelo opposed the motion on the grounds that the issue of damages, including fees and costs, had not yet been resolved. CP 275-279. The trial court denied Maged's motion for judgment of unlawful detainer on the grounds that the issue of damages remained unresolved. CP 283-284.

The parties then submitted briefing on the issue of damages and attorney fees, and the trial court entered a final judgment on May 14, 2010. CP 350-352.

IV. ARGUMENT

A. Standard of Review

Maged makes eight assignments of error, with seventeen subparts on the eighth assignment of error. Notwithstanding the numerous assignments of error and Maged's attempts to alter the standard of view in a way that is favorable to him, the standard of review for this Court is relatively simple. Maged assigns error to the trial court decision granting summary judgment to Angelo on Angelo's unlawful detainer claim and on Maged's counterclaim, and also assigns error to the numerous trial court decisions denying Maged's attempts at another bite at the apple. The trial court decision on Angelo's motion for summary judgment is subject to the de novo review discussed below. The remainder of the trial court's decisions to which Maged assigns error are subject to an abuse of discretion standard.

In Washington, summary judgment orders are reviewed de novo and the appellate court engages in the same inquiry as the trial court. *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52, 164 P.3d 454 (2007).

Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 630, 71 P.3d 644 (2003). The trial court views the facts in the light most favorable to the non-moving party, and should grant summary judgment whenever reasonable minds could reach but one conclusion. *Ruff v. County of King*, 125 Wn.2d 697, 703-704, 887 P.2d 886 (1995) (quoting *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 [1995]).

In defending against such a motion, the non-moving party must make a showing sufficient to establish the existence of each essential element to that party's case on which that party will bear the burden of proof at trial. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989), *aff'd in part, rev'd in part on other grounds* 130 Wn.2d 160, 922 P.2d 59 (1996). If the non-moving party fails to establish the existence of material facts as to each essential element of its case, summary judgment should be granted to the moving party. *Id.* at 225.

In opposing a motion for summary judgment, a party may not simply rest on its pleadings, but must set forth specific facts by affidavit showing there is a genuine issue for trial. CR 56(e); *Mackey v. Graham*, 99 Wn.2d 572, 576, 663 P.2d 490 (1983) ("A party seeking to avoid

summary judgment cannot simply rest upon the allegations of his pleadings, he must affirmatively present the factual evidence upon which he relies.”). In contrast, the moving party need not submit affidavits or declarations to establish it is entitled to summary judgment. CR 56(a) (“A party seeking to recover upon a claim * * * may * * * move with or without supporting affidavits for a summary judgment in his favor[.]”); *Peterson v. Pac. First Fed. Savings & Loan Assoc.*, 23 Wn. App. 688, 691, 598 P.2d 407 (1979) (CR 56 makes clear that a motion for summary judgment need not be accompanied by supporting affidavits, and that, when “a pleading is properly made and uncontradicted, it may be taken as true for purposes of deciding summary judgment.”) (internal citations omitted). Finally, an appellate court may affirm a correct trial court judgment on any theory, even if the trial court reached its result on some improper basis. *Olson v. Scholes*, 17 Wn. App. 383, 391, 563 P.2d 1275 (1977) (citing *Fischnaller v. Sumner*, 53 Wn.2d 332, 333 P.2d 636 (1959)).

All other assignments of error relate to discretionary decisions. For example, Maged’s assignments of error regarding the trial court’s decisions striking affidavits as untimely are reviewed for an abuse of

discretion. *King County Fire Prot. Dist. No. 16 v. Hous. Authority*, 123 Wn.2d 819, 826 P.2d 516 (1994).

B. Record on Review

In his opening brief, Maged relies heavily on the various affidavits stricken by the trial court. For instance, on page 8 of the opening brief, Maged cites 9 times to affidavits stricken by the trial court. The record on review of a summary judgment proceeding does not include affidavits rejected by the trial court as untimely. *O'Neill v. Farmers Ins. Co. Of Washington*, 124 Wn. App. 516, 522, 125 P.3d 134 (2004). In an attempt to circumvent this rule, Maged pretends to assign error to the trial court decisions striking the affidavits, but omits any discussion in his opening brief regarding the propriety of the trial court's decision in this regard. Accordingly, Angelo addresses these issues first in an attempt to clarify for this Court the proper record for review.

Maged's failure to provide any discussion in his opening brief regarding these assignments of error constitutes a waiver of those assignments. RAP 10.3(a)(6); *State v. Goodman*, 150 Wn.2d 774, 782, 83 P.3d 410 (2004), *superceded on other grounds by* RCW 69.50.401 (2005) (a party waives an argument if he or she provides no argument in support of the assertion); *State v. Motherwell*, 114 Wn.2d 353, 358 n. 3, 788 P.2d

1066 (1990) (same) (internal citations omitted); *Valley View Indus. Park v. Redmond*, 107 Wn.2d 621, 630, 733 P.2d 182 (1987) (failure to include argument in an opening brief regarding an assignment of error constitutes waiver) (citing cases so holding); *Milligan v. Thompson*, 110 Wn. App. 628, 635, 42 P.3d 418 (2002) (same) (internal citations omitted).

Moreover, Maged may not present arguments for the first time in a reply brief. *In re Disciplinary Proceeding of Kennedy*, 80 Wn.2d 222, 236, 492 P.2d 1364 (1972) (“Points not argued and discussed *in the opening brief* are deemed abandoned and are not open to consideration on their merits.”) (emphasis added).

Although Maged purports to assign as error the trial court decisions striking (1) Maged’s untimely supplemental affidavit in opposition to the motion for summary judgment, (2) Maged’s affidavit in support of his motion for reconsideration, and (3) the post-hearing declaration of Benjamin L. Wolff, he does not include any discussion of these trial court decisions in his opening brief. Instead, Maged simply assigns error to the trial court rulings striking the affidavits and then relies on the stricken material heavily in his briefing.

Washington appellate court decisions addressing motions to strike affidavits submitted in summary judgment proceedings are legion; the

standard is well-settled. “A ruling on a motion to strike is discretionary with the trial court.” *King County Fire Prot. Dist. No. 16 v. Hous. Authority*, 123 Wn.2d 819, 826 P.2d 516 (1994). This includes untimely affidavits. *Brown v. Park Place Homes Realty, Inc.*, 48 Wn. App. 554, 559-60, 739 P.2d 1188 (1987); *Jobe v. Weyerhaeuser Co.*, 37 Wn. App. 718, 684 P.2d 719 (1984). The trial court abuses its discretion only if its decision is manifestly unreasonable or based on untenable reasons. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107, 864 P.2d 937 (1994).

Assuming this assignment of error is considered despite the lack of argument in the brief, the trial court did not abuse its discretion in striking the affidavits of Maged and Wolff. First, the trial court struck the supplemental affidavit of Maged in opposition to Angelo’s motion for summary judgment as untimely. The trial court was clear in its instructions to counsel at the summary judgment hearing; it was permitting Maged to submit additional *briefing* on the question of whether a nonmoving party may simply rest on the allegations in its pleadings in opposing a motion for summary judgment. When asked by counsel for Angelo whether the trial court was accepting any further *evidence*, the trial court said “no.” CP 175-180. Undeterred by the trial court’s clear directive to the contrary, Maged submitted an untimely affidavit to the trial

court, arguing the trial court could accept the untimely evidence. CP 155-164.

The trial court granted Angelo's motion to strike Maged's affidavit as untimely. CP 183-184. This decision was not manifestly unreasonable or based on untenable reasons. *That affidavit is not even part of the record on review by this Court.*

After the trial court granted Angelo's motion for summary judgment, Maged moved for reconsideration, labeling his motion as one for revision of the order pursuant to CR 54(b). In his motion for reconsideration, Maged attempted to relitigate the issue previously decided by the trial court on Angelo's motion for summary judgment. CP 218-226. It was a transparent attempt by Maged to introduce into the record the evidence the trial court had just stricken as untimely. The affidavit Maged submitted with this reconsideration motion was in substance identical to the affidavit the trial court had previously stricken from the summary judgment record. It recited facts, some of which were inadmissible, that were known, discoverable, and could have been presented in opposition to the motion for summary judgment, but were not.

The trial court did not abuse its discretion in granting Angelo's motion to strike Maged's affidavit submitted with the motion for reconsideration. The ruling was not manifestly unreasonable or based on untenable reasons. The trial court correctly found that the declarations attempted to introduce new evidence that was clearly available at the time of the original motion, and thus are not considered on a motion for reconsideration. CP 261. Maged makes no attempt on appeal to establish why or how the trial court decision was manifestly unreasonable or based on untenable reasons. The affidavit was properly stricken, and as a result, is not a part of the record on review.

The trial court struck the post-hearing declaration of Maged's attorney Benjamin L. Wolff for the same reasons. CP 261. That is, the trial court struck the declaration because it was an attempt to introduce new evidence into the record that was available at the time of the original motion. This discretionary ruling was not manifestly unreasonable or based on untenable reasons. The post-hearing declaration of Benjamin L. Wolff is not part of the record on review of the motion for summary judgment or the motion for reconsideration.

C. The Trial Court had Jurisdiction to Decide this Case

In opposition to Angelo's motion for summary judgment at the trial court, Maged argued the trial court lacked jurisdiction to rule on the summary judgment. The trial court properly ruled that jurisdiction existed.

Maged first argues the trial court was divested of jurisdiction when he abandoned the property. Maged made this argument to the trial court while at the same time filing a **counterclaim** alleging Angelo was wrongfully interfering with Maged's use and enjoyment of the property. To the extent the trial court erroneously ruled on any jurisdictional issue, this amounts to invited error. The invited error doctrine "prohibits a party from setting up an error at trial and then complaining of it on appeal." *In re Personal Restraint of Breedlove*, 138 Wn.2d 298, 312, 979 P.2d 417 (1999) (internal citations omitted). Maged sought the trial court's jurisdiction by filing his counterclaim, so this jurisdictional argument has no merit.

Subject matter jurisdiction exists independent of the parties' arguments regarding the matter. That is, subject matter either exists or it does not, regardless of position or arguments of the parties. For instance, "[p]arties cannot confer subject matter jurisdiction on the court by agreement between themselves; a court either has subject matter

jurisdiction or it does not.” *In re Marriage of Furrow*, 115 Wn. App. 661, 667, 63 P.3d 821 (2003) (citing *In re Habeas Corpus of Wesley*, 55 Wn.2d 90, 93-94, 346 P.2d 658 (1959)). Accordingly, a trial court may have subject matter jurisdiction even when the parties and the trial judge are of the opinion that the court lacks jurisdiction.

In this case, the trial court had subject matter jurisdiction, either under its statutory unlawful detainer jurisdiction or under the general grant of subject matter jurisdiction by article IV, section 6 of the Washington Constitution. Maged’s attempts to inject confusion into the matter by simultaneously arguing the trial court lacked subject matter jurisdiction while seeking to recover for Angelo’s alleged “interference” with Maged’s “property right in the subject premises” does not alter the fact that the trial court had jurisdiction. Maged’s abandonment of the property defeated his claim for breach of quiet enjoyment, but it did not divest the trial court of jurisdiction because the *right* of possession was still at issue until the trial court ruled in favor of Angelo on the unlawful detainer claim and on Maged’s claim for breach of quiet enjoyment. Even in his amended answer, Maged continued to allege he had a property right in the premises. CP 361-64.

Maged argued to the trial court that possession was no longer at issue because Maged had abandoned the premises. However, Maged was still asserting he had a property interest in the premises. “[T]he law draws a distinction between possession and the right of possession.” *Hous. Auth. v. Pleasant*, 126 Wn. App. 382, 387, 109 P.3d 422 (2005) (citing *Kessler v. Nielsen*, 3 Wn. App. 120, 126, 472 P.2d 616 (1970)). “In an unlawful detainer context, it is the right to possession that is pivotal, not mere present possession.” *Id.* (citing *Little v. Catania*, 48 Wn.2d 890, 893, 297 P.2d 255 (1956); *First Union Mgmt., Inc. v. Slack*, 36 Wn. App. 849, 853-54, 679 P.2d 936 (1984); *Motoda v. Donohoe*, 1 Wn. App. 174, 175, 459 P.2d 654 (1969)).

The law is clear in this regard:

The Washington Supreme Court has specifically held that an unlawful detainer case is not moot simply because the tenant does not have possession of the premises at the time of appeal. Even though the landlords were in possession at the time of the appeal, the tenants who were still asserting their possessory right had to be precluded as to this right. The action was not moot until this issue had been determined vis-a-vis the parties. Here, Ms. Pleasant continues to assert a right to possession. The issue is therefore not moot.

Id. (citing *Kessler v. Nielsen*, 3 Wn. App. 120, 126, 472 P.2d 616 (1970)).

Maged argued to the trial court that, after he abandoned the property, the issue of possession ceased to exist. Maged is wrong and overlooks the fact that he was still maintaining a claim for breach of quiet enjoyment and wrongful eviction *based on the initiation of the unlawful detainer claim by Angelo*. Thus, the right to possession was still at issue. The trial court is divested of jurisdiction only if the right of possession is no longer at issue. *Kessler v. Nielsen*, 3 Wn. App 120, 472 P.2d 616 (1970). Maged had not conceded the wrongful detainer claim, and was instead maintaining a counterclaim against Angelo, alleging Angelo's unlawful detainer action interfered with Maged's property right in the premises.

Here, Maged did not concede the right to possession, as evidenced by his maintenance of the counterclaim alleging the unlawful detainer action itself constituted a breach of quiet enjoyment and a wrongful eviction, and his allegation in his counterclaim that he had a "property right in the subject premises." CP 363. "A tenant's relinquishment of the property does not necessarily mean the right to possession is undisputed." *Id.* at 389 (citing *Sullivan v. Purvis*, 90 Wn. App. 456, 459, 966 P.2d 912 (1998)). Maged's maintenance of his claim for breach of quiet enjoyment and eviction against Angelo based on Angelo's initiation of the unlawful

detainer action kept the issue of right of possession alive. It is of no moment that Maged asserted he abandoned the premises. As such, the trial court had statutory subject matter jurisdiction under the unlawful detainer statutes.

Further, the Supreme Court has stated that the trial court may exercise its unlawful detainer jurisdiction to resolve a tenant's counterclaim to an unlawful detainer action when the tenant alleges a breach of quiet enjoyment. *Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985). Here, Maged alleged breach of quiet enjoyment. Therefore, the trial court properly exercised its subject matter jurisdiction.

Alternatively, if this Court is of the opinion that Maged's abandonment of the property somehow divested the trial court of its *statutory* subject matter jurisdiction, the trial court had *general* subject matter jurisdiction over the dispute. The Supreme Court, in *Munden*, stated that when the right possession is no longer in issue, an unlawful detainer action can be converted into an ordinary lawsuit for damages. 105 Wn.2d at 46. The purpose of this rule is to prevent tenants, such as Maged, "who have violated the covenants of their lease from frustrating the ordinary and summary remedy provided by statute for restitution of the premises." *Id.*

Maged argued to the trial court that Angelo did not comply with RCW 59.12.030. CP 126-27. In its complaint, Angelo alleged it complied with RCW 59.12.030. CP 2. In his answer, *Maged admitted this allegation*. CP 33. Maged's one and only affirmative defense alleged Angelo did not comply with RCW 59.12.040. *Id.*

Maged argued to the trial court that a typographical error in the notice regarding the suite number was an error that deprived the trial court of subject matter jurisdiction. CP 126-27. However, Maged conceded that substantial compliance with the notice requirements was sufficient. CP 127. Washington appellate courts have consistently held that, "[a]s to the form and contents of the notice or demand, a substantial compliance with the statute is sufficient. It is only necessary that the description should be sufficient to identify the premises." *Provident Mut. Life. Ins. Co. v. Thrower*, 155 Wash. 613, 617, 285 P. 654 (1930) citing 26 C.J. 838; *McLennan v. Grant*, 8 Wash. 603, 36 Pac. 682; *Newman v. Worthen*, 57 Wash. 467, 107 Pac. 188; *Wilson v. Barnes*, 134 Wash. 108, 234 Pac. 1029). *See also Erz v. Reese*, 157 Wash. 32, 35, 288 P. 255 (1930) ("[W]e have never adopted the strictest rule of construction as to the form or contents of such notices under our unlawful detainer statutes, chiefly for the reason, doubtless, that the statutes prescribe no form.").

Maged's only contention to the trial court was that a single typographical error in the contents of the notice rendered the notice invalid, and thus deprived the trial court of jurisdiction. This argument failed because the notice clearly refers to Maged Hafiz and The Nile. CP 28. It also refers to suite 50. *Id.* This is more than sufficient to constitute substantial compliance with the statutes because the references to Maged, The Nile, and to suite 50 were sufficient to identify the premises.

The trial court had subject matter jurisdiction to resolve the dispute, whether the court was exercising its statutory unlawful detainer jurisdiction, or the general grant of subject matter jurisdiction from the Washington Constitution.

D. The Trial Court Properly Granted Summary Judgment to Angelo on its Unlawful Detainer Claim Because Maged Failed to Establish there was a Genuine Issue for Trial

Angelo filed an unlawful detainer claim against Maged on May 30, 2008. In its complaint, Angelo alleged Maged was properly served with the statutory notice required by RCW 59.12.030. CP 2, Paragraph 6. Angelo further alleged that Maged had not complied with the notice and had continued to be in breach. *Id.* Maged filed an answer, admitting that

he had been properly served with notice. CP 33. Maged alleged only that Angelo failed to comply with RCW 59.12.040. *Id.*

Over Angelo's objections, Maged was then permitted to amend his answer to add a counterclaim for breach of lease because that claim referred to the lease itself. CP 259. Ordinarily, counterclaims are not permitted in an unlawful detainer action. *Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985). However, there is an exception to this general rule that permits counterclaims for, among others, breach of quiet enjoyment. *Id.* (internal citations omitted). Maged's counterclaim was treated as one for breach of quiet enjoyment.

Angelo filed a motion for summary judgment on both its unlawful detainer claim and Maged's counterclaim. In support of the motion, Angelo submitted the declaration of Kelly M. Walsh, attaching to the declaration the lease. Angelo also relied on the previously submitted declarations of Kelly M. Walsh and Stacey Sullivan in support of Angelo's opposition to Maged's motion to amend his answer, as well as the exhibits attached thereto. CP 67. The pleadings on file, including Angelo's complaint, contained the lease, the statutory notice to Maged from Angelo, the declaration of service of the notice to Maged from Angelo, and the

certified mail receipt regarding the statutory notice to Maged from Angelo.
CP 7-31.

The documents attached to, and incorporated into the complaint by reference, are made a part of the complaint. This has been a proper method of pleading for over a hundred years in Washington. *See, e.g., Fitch v. Applegate*, 24 Wash. 25, 30-31, 64 P. 147 (1901) (contract submitted as exhibit to the complaint and incorporated by express language “made a part of the complaint.”); *Marshall v. Hillman Inv. Co.*, 151 Wash. 529, 276 P. 564 (1929) (earnest money agreement made a part of the complaint by exhibit and incorporation).

When a pleading is properly made and uncontradicted by admissible evidence, it may be taken as true for purposes of summary judgment. *Peterson v. Pac. First Fed. Savings & Loan Assoc.*, 23 Wn. App. 688, 691, 598 P.2d 407 (1979). Here, it was incumbent on Maged to submit admissible evidence by affidavit or otherwise consistent with CR 56 in opposition to the motion for summary judgment.

The only evidence submitted by Maged was his own affidavit. CP 119-121. The affidavit did not contradict the allegations in Angelo’s unlawful detainer complaint. Instead, the affidavit addressed various issues unrelated to the motion.

The affidavit stated that Maged or his employees called the police to control illegal or dangerous conditions on many occasions. CP 120. This was consistent with Angelo's complaint and theory of the case. CP 29. The affidavit also contained inadmissible hearsay, and statements regarding Maged's investment in the property, as well as his expected income, none of which related to or contradicted the allegations in Angelo's complaint. CP 120.

When the trial court noted the failure of Maged to contradict plaintiff's motion, counsel for Maged expressed that he had been confused regarding the standard on summary judgment. CP 175-177. ("I'm sorry your Honor. I thought the burden was on the non-moving party * * * I'm sorry, on the moving party."). Maged's counsel requested leave to brief the issue of whether a nonmoving party may rest on its pleadings in opposing a motion for summary judgment. CP 177. The trial court granted Maged's request for leave. *Id.*

Instead of briefing the issue of whether a nonmoving party may simply rest on its pleadings in opposing a motion for summary judgment, Maged then attempted to introduce new evidence into the record. CP 155-164. The trial court struck the submissions from the record as untimely. CP 183-84. The trial court then granted Angelo's motion for summary

judgment because Maged failed to demonstrate there was a genuine issue for trial. *Id.*

The allegations of Angelo's complaint, including the attachments made thereto and properly incorporated therein, were taken by the trial court as true because Maged failed to contradict them with admissible evidence. In its de novo review, this Court should also take the allegations in Angelo's complaint as true because there is no admissible evidence in the record to contradict them. If this Court takes the allegations in Angelo's complaint as true, Angelo is entitled to summary judgment on its unlawful detainer claim and this Court should affirm the trial court.

E. The Trial Court Properly Granted Summary Judgment to Angelo on Maged's Counterclaim for Breach of Quiet Enjoyment, Premised Only on the Theory that Angelo's Initiation of the Unlawful Detainer Action Itself Constituted an Actionable Breach of Quiet Enjoyment

Maged abandoned the property in violation of the lease terms and filed a counterclaim for breach of lease, alleging Angelo's initiation of the unlawful detainer action itself constituted a breach of quiet enjoyment. CP 40; 363. Maged never alleged any other conduct on the part of Angelo constituted constructive eviction or interference with quiet enjoyment. *Id.*

Maged's attempts to now argue on appeal that the actions of After Dark's patrons in the Spring of 2007 constituted constructive eviction

should be disregarded in their entirety. First, the record contained no facts to support these arguments. Instead, these arguments rested entirely on the affidavits stricken by the trial court. Those affidavits are not part of the record on review by this Court.

Next, where a tenant like Maged, “remains in possession of premises and pays rent therefor, he cannot claim that acts of the landlord interfering with his enjoyment of the premises during his occupancy thereof amount to an eviction.” *Hockersmith v. Sullivan*, 71 Wash. 244, 249, 128 P. 222 (1912) (internal citations omitted).

Finally, there is no support for the argument that the actions of a neighbor’s patrons amount to constructive eviction under Washington law. To be actionable, the eviction must be accomplished by the landlord or one under the landlord’s control. *Robertson v. Waterman*, 123 Wash. 508, 212 P. 1074 (1923); *Johnson-Lieber Co. v. Berlin Mach. Works*, 87 Wash. 426, 151 P. 778 (1915). Maged’s one and only theory on his counterclaim was that the initiation of the unlawful detainer claim itself constituted breach of quiet enjoyment and constituted an eviction. These arguments failed and Angelo was therefore entitled to summary judgment.

In its summary judgment motion before the trial court, Angelo argued its unlawful detainer claim and Maged’s counterclaim were one

and the same. The issue to be decided by the trial court on summary judgment was whether Angelo was entitled to judgment as a matter of law on its unlawful detainer claim. If Angelo was entitled to summary judgment on the unlawful detainer claim, it follows that the initiation of the claim cannot amount to an actionable breach of quiet enjoyment.

Maged's counterclaim alleged the initiation of the unlawful detainer claim was itself an actionable breach of quiet enjoyment and an eviction. CP 363. This argument fails as a matter of law. When Angelo prevailed on its unlawful detainer claim, Maged's claim for breach of quiet enjoyment necessarily failed because Maged had no right to possession. However, Maged's claim also failed because there was absolutely no support for Maged's argument that the initiation of an unlawful detainer action itself constitutes breach of quiet enjoyment or constructive eviction.

Although this issue does not appear to have been addressed by the Washington appellate courts, it has been addressed by the appellate courts of neighboring jurisdictions. Those courts have generally held that the claim is either not actionable at all, or requires a showing that the claim was brought in bad faith and without cause.

In *Medical Multiphasic Testing, Inc. v. Linnecke*, 602 P.2d 182, 185, 95 Nev. 752 (1979), the Nevada Supreme Court stated that the

assertion that the initiation of an unlawful detainer claim constitutes constructive eviction is specious. It held that a landlord is not guilty of constructive eviction by commencing an unlawful detainer claim.

In *Brown v. State Central Bank*, 459 F. Supp. 2d 837 (S.D. Iowa 2006), the Federal District Court for the Southern District of Iowa ruled that a letter from the landlord to the tenant, notifying the tenant to vacate, did not constitute wrongful or constructive eviction.

In *Crawley v. Price*, 692 N.W. 2d 44, 49 (Iowa Ct. App. 2004), the Iowa Court of Appeals held that the Iowa forcible entry and detainer statutes do not provide a cause of action to a party who claims to have been wrongfully ousted, and as such, it declined to recognize such a claim. The Washington statutes at issue here – RCW 59.12 – likewise do not provide for a cause of action to a party who claims to have been wrongfully ousted in contravention of the statutory procedures. This Court should likewise rule that Washington law does not recognize a claim for wrongful eviction or breach of quiet enjoyment.

The California Court of Appeals has ruled that the initiation of an unlawful detainer action is protected by the litigation privilege. *Feldman v. 1100 Park Lane Assoc.*, 160 Cal. App 4th 1467, 74 Cal. Rptr. 3d 1 (2008). This Court should also find that the initiation of an unlawful

detainer action, without more, is protected by a litigation privilege. A holding to the contrary would be tantamount to ruling that a landlord is subject to liability for simply exercising its statutory rights.

In addition to the above-cited cases, other courts have held that an unlawful detainer claim does not constitute breach of quiet enjoyment or constructive eviction unless the action is brought maliciously and without cause. *See, e.g., Roseneau Foods, Inc. V. Coleman*, 140 Mont. 572, 374 P.2d 87 (1962) (detainer claim by landlord does not constitute breach of quiet enjoyment, even when landlord loses on the detainer claim, unless brought maliciously and without cause); *D.M. Dev. Co. v. Osburn*, 51 Or App 207, 625 P.2d 157 (Or App 1981) (“The mere commencement of an action to evict does not constitute a breach of [the covenant of quiet enjoyment]” * * * at least in the absence of showing that lawsuit was groundless and maliciously brought.”) (citing Restatement (Second), Property, § 4.3 (d) (1977); Annotation, 41 ALR2d 1414, 1433 (1955), and *Roseneau Foods, Inc. V. Coleman*, 140 Mont. 572, 374 P.2d 87(1962)).

Maged did not allege the unlawful detainer action was maliciously brought and without cause. Moreover, no evidence would support such an allegation. This Court should decline to hold that a landlord like Angelo may be liable for simply exercising its statutory rights. Parties should be

free to “access the courts without fear of penalty should the claim be deficient.” *D.M. Dev. Co.*, 51 Or App at 209.

The unlawful detainer judgment determined that Maged had materially breached the lease, Angelo was entitled to possession, and that the lease was terminated, among other things. Maged would not be entitled to relitigate the issue of right of possession. This is in accord with holdings of courts from other jurisdictions that have analyzed this issue. *See, e.g., Zimmerman v. Stotter*, 160 Cal. App 3d 1067, 1074, 207 Cal. Rptr. 108 (1984) (“Appellant may not now relitigate this same primary right (the right to possession) which was necessarily determined in the unlawful detainer judgment.”); *Keeseey v. Superior Mobile Homes, Inc.*, 2001 Ohio App. LEXIS 1403 (Ohio Ct. App., Tuscarawas County Mar. 20, 2001) (holding that, after losing on summary judgment on the landlord’s detainer claim, tenant was estopped from raising the issue in a subsequent wrongful eviction claim).

Finally, although denominated as a counterclaim, Maged’s assertion that the unlawful detainer action was wrongful was in fact an affirmative defense. When a party has mistakenly designated a defense as a counterclaim, the court shall treat the pleading as if there had been a proper designation. CR 8(c). “[T]he court will treat the allegations for

what they are in fact and will ignore the erroneous label." Jack H. Friedenthal et al., CIVIL PROCEDURE § 5.20, at 300 (3d ed. 1999) (construing FED. R. CIV. P. 8(c), the federal counterpart of CR 8(c)).

Maged's "counterclaim" related to the issue of the right to possession, regardless of any election of remedies on the part of Maged, because a wrongful eviction claim is a lawsuit by a former tenant against one who has put the plaintiff out of possession, alleging that the eviction was illegal. To prevail on a wrongful eviction claim, regardless of the remedy sought, Maged was required to establish he had a right to possession of the property.

Washington appellate courts have held that "[a] court presiding over a unlawful detainer action may decide issues related to rightful possession of the subject property. * * * [I]t may resolve any issues necessarily related to the parties' dispute over such possession." *Port of Longview v. Int'l Raw Mats.*, 96 Wn. App. 431, 438, 979 P.2d 917 (1999) (citing *Young v. Riley*, 59 Wn.2d 50, 52, 365 P.2d 769 (1961) and *First Union Management, Inc. v. Slack*, 36 Wn. App. 849, 854, 679 P.2d 936 (1984)).

The trial court properly granted Angelo summary judgment against Maged's allegation that the initiation of the unlawful detainer action

constituted breach of quiet enjoyment and eviction. Dismissal with prejudice was appropriate because any attempt by Maged to refile the claim would have been futile. This Court should affirm the ruling of the trial court.

F. The Trial Court Did not Abuse its Discretion When it Denied Maged's Motion for Reconsideration

Maged assigns as error the trial court's denial of his motion for reconsideration. However, Maged provides no discussion of this assignment of error in his opening brief. Accordingly, this assignment is waived, and Maged may not assert arguments regarding this assignment of error for the first time in his reply brief. RAP 10.3(a)(6); *State v. Motherwell*, 114 Wn.2d 353, 358 n. 3, 788 P.2d 1066 (1990); *Indus. Park v. Redmond*, 107 Wn.2d 621, 630, 733 P.2d 182 (1987); *In re Disciplinary Proceeding of Kennedy*, 80 Wn.2d 222, 236, 492 P.2d 1364 (1972); *Dickson v. United States Fid. & Guar. Co.*, 77 Wn.2d 785, 787-88, 466 P.2d 515 (1970).

After the trial court granted Angelo's motion to strike Maged's supplemental affidavit as untimely, and granted Angelo's motion for summary judgment, Maged filed a motion for reconsideration. Although Maged styled the pleading a motion for revision pursuant to CR 54(b), he

sought only to reargue the issues that had just been decided on Angelo's motion for summary judgment, and again sought to introduce into the record Maged's affidavit, which was in substance identical to the supplemental affidavit the trial court had earlier stricken from the record. Maged argued the trial court should follow CR 59(a) in analyzing Maged's motion for revision. The trial court properly treated the motion as a motion for reconsideration.

The trial court did not abuse its discretion when it denied Maged's motion for reconsideration. "Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion." *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005). In a motion for reconsideration, the party must "identify the specific reasons in fact and law as to each ground on which the motion is based." CR 59(b). Under CR 59(a), "reconsideration is warranted if the moving party presents new and material evidence that it could not have discovered and produced" previously. *Wagner Dev., Inc. v. Fid. & Deposit Co. of Md.*, 95 Wn. App. 896, 906, 977 P.2d 639 (1999). If the evidence was available but not offered until after the opportunity passed, the party is not entitled to submit the evidence. *Id.* at 907.

The trial court did not abuse its discretion when it denied Maged's motion for reconsideration styled as a motion for revision. The trial court saw the motion for what it was: a transparent attempt by Maged to reargue the issues that had just been decided by the court on Angelo's motion for summary judgment.

G. The Trial Court Properly Awarded Angelo Damages, Including Attorney Fees

Maged also assigns as error the trial court's award of damages to Angelo, including an award of attorney fees. As with many other assignments of error, Maged includes absolutely no discussion in his opening brief regarding the award of damages and attorney fees. As such, these assignments of error are waived and Maged may not present arguments regarding these assignments for the first time in his reply brief.

Angelo understands Maged's arguments in this regard to be that it was error to award Angelo damages because it was error to grant summary judgment in favor of Angelo. Maged presents no arguments in support of this assignment of error. If the trial court properly granted summary judgment to Angelo, it properly awarded Angelo damages. Maged is estopped from arguing otherwise because he has failed to address these assignments in his opening brief.

H. The Trial Court did not Issue Findings of Fact and Conclusions of Law, and the Seventeen Subparts to Maged's Eighth Assignment of Error are Either Duplicative of Other Assignments of Error or are not Addressed by Maged in His Opening Brief

Maged's eighth assignment of error contains seventeen subparts and purports to be an assignment of error regarding findings of fact and conclusions of law. The trial court did not issue findings of fact and conclusions of law. This is in part because the case was resolved on Angelo's motion for summary judgment, not after a trial. To the extent that Maged's arguments concern comments made the trial court in the various letter opinions, those are not findings of fact or conclusions of law. *See, e.g., Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 249 n. 10, 178 P.3d 981 (2008) (findings of fact and conclusions of law inappropriate on summary judgment).

Even if the trial court had issued findings of fact and conclusions of law as to the summary judgment ruling, which it did not, they are not considered by the appellate court in its de novo review of a trial court decision on a motion for summary judgment.

Maged's eighth assignment of error is also an attempt by Maged to alter the standard of review on appeal. This Court should see through this tactic and not permit Maged to end run around the summary judgment

proceedings. Maged failed to submit admissible evidence in opposition to the motion for summary judgment, and has continually misunderstood the summary judgment standard. Summary judgment was proper and Angelo is not now subject to some heightened evidentiary standard.

Next, the seventeen subparts to Maged's eighth assignment of error are either duplicative of other assignments of error, or are not addressed in Maged's brief. Assignments of error that all flow from the same issue need not be addressed by the court separately. *See, e.g., Lindsay v. Pac. Topsoils, Inc.*, 129 Wn. App. 672, 678 n. 3, 120 P.3d 102 (2005) ("Lindsay also assigns error to the trial court's denial of his motion for reconsideration and the trial court's order on satisfaction of judgment in full. As these assignments of error all flow from the same issue, we do not address them separately."). The sixth, seventh, eighth, and ninth subparts of the eighth assignment of error are duplicative of Maged's third assignment of error.

The third, tenth, eleventh, thirteenth, fifteenth and seventeenth subparts of the eighth assignment of error are not addressed in Maged's opening brief and are therefore waived. Along the same lines, Maged failed to present arguments relating to his second, fifth, sixth and seventh assignments of error, so they are also waived.

I. Request for Fees

Pursuant to RAP 18.1 and Section 42 of the Lease Agreement, Angelo respectfully requests this Court award it fees and costs incurred in this action. CP 21.

V. CONCLUSION

The trial court properly granted summary judgment to Angelo on both its unlawful detainer action against Maged and on Maged's allegation that the initiation of the unlawful detainer claim constituted a breach of quiet enjoyment and constructive eviction. Maged failed to meet his burden in opposing the motion. The trial court did not abuse its discretion when it denied Maged's motion for reconsideration, nor did it abuse its discretion when it struck the affidavits of Maged and Wolff. The trial court properly entered judgment in favor of Angelo. This Court should affirm the trial court decisions.

DATED this 22nd day of March, 2011.

DAVIS ROTHWELL EARLE & XÓCHIHUA P.C.

By *William A. Davis*

William A. Davis
Washington State Bar No. 14020
Of Attorneys for Respondent

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DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

7	ANGELO PROPERTY CO.,)	
)	Appellate No. No. 40868-6-II
8	Plaintiff-Respondent,)	
)	Clark County Superior Court
9	v.)	No. 08 2 03400 7
)	
10	ABDUL HAFIZ ABDULMAGED, d/b/a "THE)	AFFIDAVIT OF MAILING
	NILE,")	
11)	
	Defendant-Appellant.)	

13 STATE OF OREGON)
) ss.
 14 County of Multnomah)

15 I, Tammy Hendrix, being first duly sworn, upon my oath depose and say that I am
 16 a citizen of the United States, am over the age of eighteen years, am not a party to this action, and
 17 that on March 22, 2011, I caused to be mailed a true and correct copy of the Brief of Respondents
 18 and this Affidavit of Mailing by first-class mail to:

Michael B. King
 CARNEY BADLEY SPELLMAN, P.S.
 701 Fifth Avenue, Suite 3600
 Seattle, Washington, 98104-7010

22 and

Benjamin Lee Wolff
 Attorney at Law
 315 W. Mill Plain Blvd., Ste. 212
 Vancouver, WA 98660

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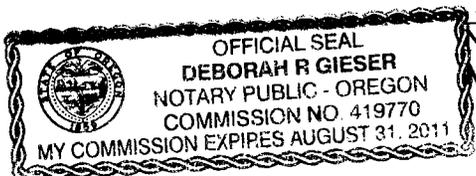
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by depositing such copies in the United States mail in the post office at Portland, Oregon, on said date, with the postage thereon prepaid.



Tammy Hendrix

SIGNED AND SWORN to before me this 22nd day of March 2011 by Tammy Hendrix.



Notary Public for Oregon
My Commission Expires August 31, 2011