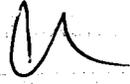


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COURT OF APPEALS  
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Appeal No. 41538-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO AT TACOMA

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JAMES GOUGHNOUR,  
Appellant,

vs.

MARK DOYLE and CAROLYN DOYLE,  
Respondents.

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APPELLANT'S OPENING BRIEF

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Appeal from the order dated Nov. 1, 2010 entered by the Honorable  
Gordon L. Godfrey of the Grays Harbor County Superior Court in the  
matter of Mark Doyle and Carolyn Doyle v. James Goughnour case  
number 10-2-01361-6.

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**A. INTRODUCTION**

This appeal arises from a default judgment (CP 93 - 94) and writ of restitution (CP 95 - 96) in a residential unlawful detainer action governed by RCW 59.18. The Appellant and Defendant in the underlying case, James Goughnour (hereafter “Goughnour”) is the tenant. The Respondent and Plaintiff in the underlying case, Mark Doyle and Carolyn Doyle (hereafter “Doyle”) is the landlord.

The judgment (CP 93 - 94) stating that:

“Defendant failed to adequately appear and is in default,”  
was entered and the writ of restitution was granted after Goughnour timely filed both, an Answer and Counterclaims to Plaintiff’s Complaint (CP 20 - 56) and an Answer to Show Cause (CP 57 - 92); in addition to personally appearing at the show cause hearing (RP 2 – 5).

This appeal has four (4) basic issues:

1. That the default order is in error.
2. That the Appellant (Goughnour) was denied a hearing.
3. Notwithstanding Numbers 1, and 2 above; that the Writ of Restitution is in error on finding of facts and conclusion of error:
  - a. the parties had an actual and/or constructive lease.
  - b. the trial court misread the agreement between the parties specifically by substituting “or” where in fact it reads “and,” meaning collectively (CP 20 - 56 and 57 - 92, Exhibit J, Paragraph 4).
4. Notwithstanding Numbers 1, 2, and 3 above; that this action cannot be classified as an action for unlawful detainer.

The unique nature of this case is the nature of the show cause hearing itself. Doyle’s attorney opened with a very derogatory story regarding Goughnour. Goughnour had no opportunity to tell the trial court, “That story is false, he’s making it up,” or to make any other substantive remark. Within hours of the show cause hearing in a desperate effort to be heard, Goughnour submitted a Request to Reconsider (CP 97 - 101) asking the trial court to strike the order and continue the hearing so

that he (Goughnour) could be heard. At that time, Goughnour was without knowledge that the order entered was in fact a default order. The trial court denied the Request to Reconsider (CP 102).

Upon receipt of the transcript of the Show Cause Hearing, Goughnour had substantial concerns with it's accuracy. Goughnour contacted the Court Reporter regarding the audio record and was informed that the Court Reporter destroyed it immediately upon completion of the transcript. An investigation by the Washington State Department of Licensing is ongoing. Goughnour will address this appeal on the record as it stands.

Notwithstanding any other error, at a minimum the trial court lacked jurisdiction to enter a default via a procedure not statutorily authorized by the Unlawful Detainer Act (RCW 59.18) and abused his discretion by failing to set the matter for trial or evidentiary hearing.

## **B. ASSIGNMENT OF ERRORS**

1. Appellant assigns error to the default order entered on Nov. 1, 2010 (CP 93 - 94); after Appellant timely filed an Answer and

Counterclaims to the complaint, an Answer to the Show Cause Hearing; and personally appeared at the show cause hearing.

2. Appellant assigns error to the Writ of Restitution entered on Nov. 1, 2010 (CP 95 - 96) after the trial court failed to examine the parties even on an informal basis (RP 2 - 5) or set the matter for an evidentiary hearing thereby denying Appellant (Goughnour) due process.

3. Appellant assigns error to the findings of the trial court at the Show Cause Hearing (RP 2 – 5) and denial of Request for Reconsideration (CP 102) inclusive finding of facts and conclusions of law.

4. Appellant assigns error to the classification of this action for unlawful detainer.

### **C. STATEMENT OF ISSUES**

1. Whether the trial court erred in entering a default order against Goughnour after he timely filed a written answer and personally appeared (CP 20 - 56 and 57 - 92) and (RP 2 – 5).

2. Whether the trial court erred in entering a Writ of Restitution at the show cause hearing without an evidentiary hearing or examining Goughnour under oath or even on an informal basis (RP Pages 2 – 5).

3. Whether the trial court erred at the Show Cause Hearing (RP 4 – 5) and in its answer to Goughnour’s Request for Reconsideration (CP 102) in findings of facts and conclusion of law regarding whether:

- a. the parties contractual terms granted Doyle the right to:
  - A. unilaterally terminate tenancy or,
  - B. unilaterally terminate tenancy while simultaneously retaining pro forma rents.
- b. the counterclaims by Goughnour for advance rents retained by Doyle are “in other areas,” not related to tenancy and the right to terminate tenancy (RP 5, Lines 2 – 4).
- c. Doyle is estopped from termination of tenancy by virtue of unclean hands.

4. Whether the trial court erred at the Show Cause Hearing (RP 4 – 5) and in its answer to Goughnour’s Request for Reconsideration (CP 102) in findings of facts and conclusion of law in classifying this action as an action for unlawful detainer.

#### **D. STATEMENT OF THE CASE**

This case was commenced on October 18, 2010 by the filing of the complaint (CP 1 - 6) by Doyle. On that same date Doyle submitted a Motion For Order To Show Cause (CP 4) which was granted. The show cause hearing was scheduled for Nov. 1, 2010.

Goughnour was served with the Summons/Complaint and Order To Show Cause on Oct. 19, 2010 (CP 6).

On Oct 29, 2010; Goughnour timely filed and served a written Answer & Counterclaims to the complaint (CP 20 - 56) and paid the fee of \$230. On that date Goughnour also timely filed and served a written Answer to the Order To Show Cause (CP 57 - 92).

The show cause hearing was held on Nov. 1, 2010. Goughnour personally appeared. Doyle did not appear but was represented by his attorney, Gregory B. Durr. At that time Judge Godfrey, entered a default order on the show cause (CP 93 - 94) and a Writ of Restitution (CP 95 - 96). The trial court did not conduct an evidentiary hearing. No testimony was taken (RP 2 – 5).

Within hours of the hearing, Goughnour timely filed a Request for Reconsideration asking that the he be allowed to be heard (CP 97 - 101). This was denied by Judge Godfrey (CP 102).

Goughnour vacated the subject premises in compliance with the Writ of Restitution.

On Nov. 30, 2010; Goughnour timely filed a Notice of Appeal and paid the fee of \$280 (CP 103 - 107).

The facts of this case and the defects with the process used by the trial court are further detailed in the following:

#### **E. STATEMENT OF FACTS**

##### **General Background:**

Goughnour rented the subject property from Doyle. The original agreement (CP 20 - 56 and 57 - 92, Exhibit A) restricted the rent to that of the mortgage payments made by Doyle. This was stipulated in Paragraph 7 which reads:

“7) Rent will never exceed Landlord’s mortgage payment for the property tenant occupies.”

The intention of the parties was that it would allow Doyle to remain current on his mortgage while refinancing at a lower rate and therefore a lower payment. Goughnour would benefit as subsequent rent would in turn be restricted to that lower payment. This provision was also designed to be self-enforcing in its punitive nature. Should the Landlord (Doyle) fail use the entire rent funds to make the mortgage payments, he would be liable for rents accepted in excess of those mortgage payments.

Breach of Agreement:

Notices began to be left on the door of the rental property requesting that Doyle contact a certain mortgage company. This caused Goughnour to suspect that Doyle was not performing pursuant to the agreement, that is not applying all of Goughnour's rent payments to the mortgage payments (CP 20 - 56 and 57 - 92, Background Affidavit, Paragraph 2). Beginning Jan. 28, 2010 Goughnour began requesting copies of Doyle's canceled checks regarding the mortgage payments (CP 20 - 56 and 57 - 92, Exhibit B).

Concealment of Breach of Agreement:

What followed was approximately two (2) months of Doyle attempting to appease Goughnour's request by flashing copies of a bank

statement indicating an electronic payment to Citibank Mortgage but refusing to leave a copy, while claiming that it is not possible to secure documentation to an electronic payment (CP 20 - 56 and 57 - 92, Background Affidavit, Paragraph 2(b – f)). The only record Doyle would leave with Goughnour during this time was a hand written accounting which claimed that he had made the subject mortgage payments at the amount of \$806.02 per month, not the \$1,000 per month that he originally represented. (CP 20 - 56 and 57 - 92, Exhibits C through G inclusive). Goughnour eventually learned that even those references of payments to Citibank Mortgage related to a different property (CP 20 - 56 and 57 - 92, Exhibit R, Page 2).

On March 29, 2010 Goughnour served Doyle with a detailed demand for rents overpayments in excess of his (Doyle's) mortgage payments not represented by even flashing a bank statement at Goughnour. The amount came to \$8,118.40 (CP 20 - 56 and 57 - 92, Exhibit H). On this occasion Doyle admitted to Goughnour that he had not made any mortgage payments whatsoever from the very beginning of the agreement. (CP 20 - 56 and 57 - 92, Background Affidavit, Paragraph 3)

Landlord's (Doyle's) Second Chance and Termination Right:

For the month of April, 2010 rent, Goughnour debited the positive rent balance by \$806.02, the amount that Doyle was then representing as his mortgage payment (CP 20 - 56 and 57 - 92, Exhibit I). Doyle made no dispute regarding this (CP 20 - 56 and 57 - 92, Background Affidavit, Paragraph 4).

Having belief in Doyle's representations of dire financial condition, Goughnour offered to suspend for an unspecified period of time the debiting of the rent overpayment balance against current rents and pay with new funds. Goughnour also offered to modify the terms from that point forward. Doyle accepted and they drafted a new agreement which terminated Doyle's mortgage payment requirement from that time forward without releasing Doyle from his obligation for the positive rent balance at that time. The only release was to release Goughnour from reimbursing Doyle for previous utility payments (CP 20 - 56 and 57 - 92, Background Affidavit, Paragraph 5). Only Mark Doyle and Goughnour were present at this meeting. Mr. Doyle indicated that he would have to present it to his wife before signing. Both Mark Doyle and Carolyn Doyle subsequently returned. Mrs. Doyle requested that the termination clause granting tenant (Goughnour) the right to terminate be made mutual so that both parties

would have to agree to terminate. As Goughnour would pay rent with additional funds only for a time to allow Doyle to get on his financial feet and could revert to debiting the positive rent balance at will, he (Goughnour) saw no harm in this request and agreed (CP 20 - 56 and 57 - 92, Background Affidavit, Paragraph 5). The modification, “and landlord” (not “or landlord”) was penciled in and initialed by both parties. (CP 20 - 56 and 57 - 92, Exhibit J, Paragraph 4).

Landlord (Doyle’s) Efforts to Terminate Tenancy:

Doyle served Goughnour with a notice to terminate tenancy. Doyle did so without regard to the substantial advance rent balance (CP 20 - 56 and 57 - 92, Exhibit O). Goughnour responded with a letter to Doyle asserting that Doyle’s notice to terminate tenancy was flawed and notwithstanding that procedural flaw, that the parties had a constructive and/or actual lease while Doyle continued to hold a positive rent balance (CP 20 - 56 and 57 - 92, Exhibit P). At that time the positive rent balance stood at \$6,714.00 (CP 20 - 56 and 57 - 92, Exhibit R).

Landlord (Doyle) abandoned Rent Claim:

Although Doyle’s original complaint claimed rent owed for two (2) months for which the positive rent balance was debited, Doyle’s

attorney abandoned this claim in the Show Cause Hearing and no judgment of rent was granted (RP 2 - 5) and (CP 93 - 94).

The Complaint and Order to Show Cause:

This case was commenced by the Complaint (CP 1 - 6) and the Motion to Show Cause (CP 4), both filed by Doyle on Oct. 18, 2010. The Order to Show Cause (CP 5) issued on Oct. 18, 2010 directed Goughnour to physically appear in court on Nov. 1, 2010.

Appellant's Timely Response:

Goughnour timely filed and served both, Answer and Counterclaims to Plaintiff's Complaint (CP 20 - 56) and Answer to Show Cause Order by Sworn Statement (CP 57 - 92). Issues related to the parties contract resulting in a constructive and/or actual lease, rent overpayment, a flawed unlawful detainer, and estoppel were raised at a minimum; thirty-two (32) times in the Answer to Show Cause Order by Sworn Statement and twenty-four (24) times in the Answer and Counterclaims to Plaintiff's Complaint.

The Show Cause Hearing:

The Show Cause Hearing occurred on Nov. 1, 2010. Goughnour personally appeared. Doyle did not appear but was represented by his attorney, Gregory B. Durr. No witnesses or principals were sworn in. Mr. Durr's opening remarks included an allegation regarding Goughnour's background without any documents or affidavits of any kind whatsoever. The trial court recessed to review Goughnour's written response. Upon resumption of the hearing the trial court ruled in favor of Doyle. Goughnour was not allowed to make any substantive remarks. (RP 2 – 5)

The trial court entered a Writ of Restitution (CP 95 - 96) and an Order on Show Cause (CP 93 - 94) stating that:

“Defendant failed to adequately appear and is in default.”

Goughnour was not given an opportunity to review the order. Only at a later date did Goughnour learn that it was a default order. Once the trial court stated, “You’ll be out by Friday at noon;” (RP 5, Line10) there was complete, prolonged silence indicating that the hearing was concluded. Goughnour felt that the state of the trial court's temperament at that time was such that saying anything would be most imprudent. Therefore Goughnour simply left believing that the hearing was concluded.

The last statement of the transcript is of Mr. Durr informing the court that he has handed up an order (RP 5, Lines 12 – 13). That statement was not made during Goughnour's presence.

Request to Reconsider:

Within hours subsequent to the Show Cause Hearing, Goughnour submitted to the trial Court a Request to Reconsider (CP 97 - 101). Goughnour's primary request was that as he was not allowed to make any substantive statement at the hearing, that it be continued so that he (Goughnour) could be given an opportunity to be heard. The trial court denied the request (CP 102).

**F. SUMMARY OF ARGUMENT**

The argument is basically fourfold:

1. The trial court's order that Goughnour is in default is in error.
2. The trial court denied Goughnour a hearing and due process.
3. The trial court erred in facts and conclusion of law.
4. This action cannot be classified as an action for unlawful detainer.

There are three (3) significant facts about the Show Cause Hearing itself:

1. Goughnour was denied the opportunity to be heard at the hearing (RP, Pages 2 – 5).
2. Without presentation to Goughnour, Doyle’s attorney submitted and the trial court signed a default order stating, “Defendant failed to adequately appear and is in default” (CP 93 - 94) even though:
  - a. Goughnour timely filed and served Doyle’s attorney an Answer and Counterclaims to Plaintiff’s Complaint (CP 20 - 56).
  - b. Goughnour timely filed and served Doyle’s attorney an Answer to Show Cause Order (CP 57 - 92).
  - c. Goughnour personally appeared at the Show Cause Hearing (RP, Pages 2 – 5)
3. Goughnour had substantial concerns about the accuracy of the transcript. He contacted the Court Reporter regarding obtaining the audio record. The Court Reporter claimed to have destroyed the audio record of the Show Cause Hearing immediately upon completion of the transcript.

These facts raise legitimate concerns about the integrity of the underlying process in this matter.

## **G. ARGUMENT**

### **The trial court's order that Goughnour is in default is in error:**

The trial court's Order on Show Cause (CR 93 - 94) is a default order against Goughnour. The order states:

“Defendant failed to adequately appear and is in default.”

Goughnour had no opportunity to preview the order. Neither the trial court or Doyle's attorney mentioned default during the Show Cause Hearing (RP 2 – 5). Goughnour only learned of the nature of the order later while reviewing the court file.

Goughnour appeared in both, writing and by personal appearance at the Show Cause Hearing.

1. In writing, Goughnour timely filed and served Doyle's attorney an Answer and Counterclaims to Plaintiff's Complaint (CP 20 - 56) and an Answer to Show Cause Order (CP 57 - 92). Issues related to the parties contract resulting in a constructive and/or actual lease, rent overpayment, a flawed unlawful detainer, and estoppel were raised at a minimum:
  - a. thirty-two (32) times in the Answer to Show Cause Order by Sworn Statement.



and without allowing Goughnour an opportunity to respond (RP 2 – 5) is abuse of discretion. Only in the subsequent Request for Reconsideration (CP 97 - 101) did Goughnour have a voice to refute the story told by Doyle's attorney and let it be known that on the contrary, he (Goughnour) has a long history of being an exemplary tenant. In the Letter (CP 102) denying Goughnour's Request for Reconsideration, the judge twice referred to information available to the court at the time of the hearing. That rings hollow when the Defendant (Goughnour) is not allowed the opportunity to be heard at the hearing.

To not allow a party to be heard is to deny that party a hearing. To not allow a party to make any substantive remarks at all is denial of due process. That the trial court recessed to review Goughnour's written response does not satisfy the requirement established by *Leda v. Whisnand*, 150 Wn. App. 69 (2009).

The trial court erred in facts and conclusion of law:

A rent overpayment in the amount of \$6,714 (CP 20 - 56 and 57 - 92, Exhibit R) at the time of the Show Cause Hearing was established by Doyle's failure to perform according to the terms of the parties original agreement of May 12, 2009 (CP 20 - 56 and 57 - 92, Exhibit A, Paragraph

7). Specifically Doyle failed to use Goughnour's rent payments to make his (Doyle's) mortgage payments which rendered the purpose of the agreement and Goughnour's intended benefit unachievable. Rent paid by Goughnour without dollar for dollar mortgage payment by Doyle was intended by the parties to result in rent overpayment as an inherent enforcement mechanism. This rent overpayment, also referred to as the positive rent balance, was not released by the subsequent agreement of April 14, 2010 (CP 20 - 56 and 57 - 92, Exhibit J) or any other means. Doyle has never disputed the rent overpayment after engaging in a two (2) month long campaign to conceal his failure to make any mortgage payments pursuant to the agreement. At the end of those two (2) months Doyle finally admitted that he made no mortgage payments from the beginning (CP 20 - 56 and 57 - 92, Background Affidavit Paragraphs 2 – 3, Exhibits B – G).

The trial court erred in separating Doyle's obligation to Goughnour from the landlord/tenant dispute (RP 4, Line 20 – 5, Line 4). The written response that the trial court reviewed was absolutely clear that the positive rent balance represented approximately 8 months of advance rent at that time. The trial court erred in holding the view that,

“If you have a contractual dispute that he owes you money in other areas, that’s your problem” (RP 5, Lines 2-4).

It is clear that it is not another area, but an integral element to the question of the landlord’s ability to terminate tenancy while simultaneously retaining those substantial advance rents.

Additionally, the trial court erred by misreading the termination clause in the agreement between the parties (CP 20 - 56 and 57 - 92, Exhibit J, Paragraph 4). The clause originally allowed only the tenant (Goughnour) to terminate until the phrase “and landlord” was penciled in to require collective termination. The trial court read it as though it said “or Landlord.” It in fact says, “and landlord.”

Further, Doyle failed to apply Goughnour’s rent payments to mortgage payments per the original agreement (CP 20 – 56 and 57 – 92, Exhibit A, Paragraph 7) and undertook extraordinary effort to conceal that fact (CP 20 – 56 and 57 – 92, Background Affidavit, Paragraphs 2 – 3, Exhibits B – G). This should result in Doyle being estopped from terminating tenancy while retaining the rent overpayments by virtue of unclean hands as argued in Goughnour’s Answer to Show Cause Order (CP 57 - 92, Document’s Page 4, Lines 6 – 18).

Cannot be classified as an action for unlawful detainer:

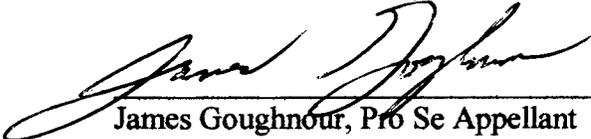
An action involving claims in addition to a claim with respect to the possession of premises cannot be classified as an action for unlawful detainer; *Honan v. Ristorante Italia*, 66 Wn. App. 262, 832 P.2d 89. The trial court's finding that Goughnour's claim against Doyle is "in other areas" (RP 5, Lines 2-4) is in error. The claim relates to retained rent overpayments derived from the contract that established the landlord-tenant relationship, created an actual and/or constructive lease, and is inherently intertwined with possession of the premises. This relationship is firmly documented in Goughnour's written answers (CP 20 - 56 and 57 - 92) and (Appendix A).

**H. CONCLUSION**

The Appellant (Goughnour) asks the court for the following relief:

1. That the default Order to Show Cause be reversed and vacated.
2. That the inherently derogatory Writ of Restitution be reversed and vacated.

Respectfully submitted,

  
James Goughnour, Pro Se Appellant

DATED this 31 st day of May, 2011

**Declaration of Service:**

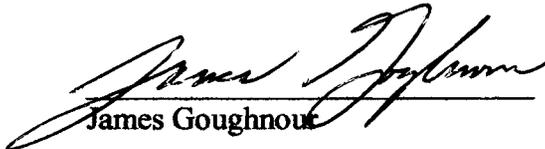
I, James Goughnour certify and declare that I served by first-class mail, postage pre-paid, from Elma, Washington; a complete copy of this document on May 31, 2011 to Plaintiff's/Respondent's counsel of record at: Gregory B. Durr  
305 West First St.  
Aberdeen, WA 98520

  
James Goughnour DATED: May 31, 2011

**Declaration of Mailing:**

I, James Goughnour certify and declare that I mailed by first-class mail, postage pre-paid, from Elma, Washington; one (1) original and one (1) complete copy of this document on May 31, 2011 to:

Attn: Cheryl, Case Manager  
Clerk of the Court's Office  
Wash. State Court of Appeals, Div. II  
950 Broadway, Suite 300  
Tacoma, WA 98402

  
James Goughnour DATED: May 31, 2011

11:00 AM  
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