NO. 29024-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION NO. III

LAMAR OUTDOOR ADVERTISING,

Appellant,
v.

JOSEPH & KRISTI HARWOOD, BELL FRANKLIN, LLC, a Washington limited liability company, BEL CONDOMINIUM OWNERS ASSOCIATION, a Washington corporation, BEL FRANKLIN APARTMENTS, LLC, a Washington limited liability company, and SPOKANE HOUSING VENTURES, INC., a Washington corporation,

Respondents.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

BRIEF OF RESPONDENTS SPOKANE HOUSING VENTURES, INC., a Washington Corporation, BEL FRANKLIN APARTMENTS, LLC, a Washington Limited Liability Company, BEL CONDOMINIUM OWNERS ASSOCIATIONS, a Washington Corporation.

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I. ISSUES PRESENTED FOR REVIEW

The Appellant, Lamar Outdoor Advertising, identified the following assignments of error for review:

1. Whether the Superior Court properly granted Joseph Harwood, Kristi Harwood and Bell Franklin, LLC's Motion to Vacate Default Judgment.[1]

2. Whether the Superior Court properly denied Plaintiff's Motion for Partial Summary Judgment regarding its claim for conversion.[2]

3. Whether the Superior Court properly denied Plaintiff's Motion for Reconsideration regarding application of Washington landlord-tenant laws.

II. IDENTIFICATION OF PARTIES

The Appellants are Lamar Outdoor Advertising ("Lamar") (represented by Pat Risken and Sean Boutz). The Respondents, Joseph Harwood and Kristi Harwood ("Harwood"), Bell Franklin, LLC "(Bell")

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[1] As Joseph Harwood, Kristi Harwood and Bell Franklin, LLC are represented by separate counsel, the issue regarding the order vacating the default judgment entered on February 2, 2009 (CP 111-112) will not be addressed in this brief.

[2] Lamar did not identify any assignment of error or provide any legal authority regarding the order granting Defendants' summary judgment (dismissing Spokane Housing) (CP 568-571) or Defendants' motion for summary judgment beyond its conversion claim. (CP 572-574). As will be further discussed in this brief, the issues related to Lamar's claims for breach of contract, tortious interference with business expectancy, intentional interference with contractual relations, trespass, unjust enrichment and the dismissal of Spokane Housing Ventures have been waived on appeal.

are represented by William Spurr. Respondents Spokane Housing Ventures ("Spokane Housing") and Bel Franklin Apartments, LLC ("Franklin") are both represented by this firm.[3] Lamar has abandoned its appeal of the order dismissing Bel Condominium Owners Association. (Brief of Appellant pg. 2, fn 1).

III. STATEMENT OF THE CASE

A. JOINT STATEMENT OF MATERIAL FACTS

The parties filed a joint statement of material facts in connection with the cross-motions for summary judgment. (CP 466-472.) For the purposes of this appeal, the following facts are undisputed.

On September 12, 1994, Pridemark Outdoor Advertising ("Pridemark") entered into a lease agreement ("Lease") with Joseph Harwood and Kristi Harwood "Harwood" as individuals for a ten year lease to maintain a billboard ("Billboard") on the roof of a building that was owned by the Harwoods. (CP 466, CP 22). The building was located at 225 N. Division Street, Spokane, Spokane County, Washington ("Subject Property"). (CP 466). The Lease commenced on February 1,

[3] This brief will refer to Bell Franklin, LLC as "Bell" and Bel Franklin Apartments, LLC as "Franklin" as these were the designations used in the joint statement of facts supplied to the Superior Court CP 466-472 and in all briefing in the cross-motions for Summary Judgment. Lamar has changed these designations in its opening brief and incorrectly refers to Bell Franklin, LLC as "Franklin" and Bel Franklin Apartments, LLC as "Apartments" . To avoid confusion, Respondents will use the designations originally used in the briefing to the Superior Court and references in the Clerk's Papers.

1995. (CP 466). The leased property and location is described in the Lease as follows: "Division & Trent SW (ROOF)". (CP 466, CP 22.) The term of the Lease was for 10 years and successive 10 year terms unless it was terminated. (CP 22).

The Lease could be terminated in one of three ways. The first two methods do not apply to this case. The third method is contained under the section noted "Special Conditions" as follows:

> (90) day cancellation notice required if property is sold and new owner desires sign removal. Mr. Harwood to furnish name and notify of pending sale. (CP 467, CP 22).

In September, 2005 Joseph Harwood formed Bell Franklin, LLC ("Bell"). (CP 467). The members of Bell were Joseph Harwood and Cory Colvin. The membership interest in Bell consisted of a 50% interest for Joseph Harwood and 50% for Cory Colvin. (CP 467). In January, 2006, Joseph and Kristi Harwood conveyed the Subject Property to Bell by statutory warranty deed. (CP 467). At the time of the conveyance, the membership interest in Bell consisted of Joseph Harwood and Cory Colvin as Members and Joseph Harwood as Manager. (CP 467). Subsequently, the membership interest in Bell consisted of 50% interest for Joseph and Kristi Harwood and 50% interest for Cory Colvin and Elisabeth Colvin. (CP 467).

In April, 2007, Bell converted the Subject Property into seven (7) condominium units. These units were designated as Units 001, 002, 101, 102, 200, 300 and 400. (CP 468). On or about April 10, 2007, the Bel Condominium Owners Association ("Association") was formed. (CP 468). On or about April 17, 2007, Units 101 and 102 were sold by Bell to Winthrop Taylor and Allison Taylor. (CP 468). At that time, Bell remained the owners of units 001, 002, 200, 300 and 400. (CP 468).

On July 13, 2007, Spokane Housing Ventures, Inc. ("Spokane Housing") signed a real estate purchase and sale agreement for the purchase of units 200, 300 and 400 (the three top floors of the building) from Bell. The purchase and sale was scheduled to close on or around May 15, 2008. (CP 468). In August 2007, while the parties were negotiating the purchase of these units, Helen Stevenson, head of Acquisitions and Development for Spokane Housing advised Bell that the Billboard would need to be removed from the roof once the transaction closed. (CP 468).

On or about January 4, 2008, Spokane Housing formed Bel Franklin Apartments, LLC ("Franklin"). (CP 468). (Although not contained in the stipulated facts, it is not disputed that Spokane Housing was the manager of Franklin). (CP 351-352).

In January and February, 2008, Ms. Stevenson received several telephone calls from Neal Schreibeis, a representative of Lamar, asking whether the Billboard could remain on the roof. (CP 468, CP 352). Ms. Stevenson advised that the Billboard would need to be removed. (CP 468, CP 352). On March 20, 2008, Ms. Stevenson received another call from Mr. Schreibeis, and Ms. Stevenson again stated that the Billboard would need to be removed. (CP 468, CP 352). On April 14, 2008, Ms. Stevenson sent a letter to Lamar stating that the Billboard would need to be removed. (CP 469, CP 353, CP 375). Lamar was advised that a Notice to Proceed would be given to the contractor chosen to renovate the roof and asked Lamar to begin coordinating for removal of the Billboard. (CP 469, CP 353). In a letter dated April 28, 2008, Lamar acknowledged that once the Subject Property was purchased, the entity which purchased the Subject Property would be within their right to terminate the Lease pursuant to its terms. (CP 469, CP 353, CP 377). However, there is no evidence that Lamar took any action to coordinate removal of the Billboard.

On or about July 7, 2008, units 200, 300 and 400 of the condominium property were conveyed from Bell to Franklin. (CP 469). On July 7, 2008, Defendants Joseph and Kristi Harwood assigned their interest in the Lease to Franklin. (CP 469). Franklin filed a real estate

excise tax affidavit in connection with the purchase of units 200, 300 and 400. (CP 469). The roof was initially designated as a limited common element to unit 101, but later changed and designated as a limited common element for the units owned by Franklin. (CP 468, CP 471).

On July 3, 2008, Allied Escrow Group (the closing agent relating to the sale of the units by Bell to Franklin) sent a letter signed by Joseph Harwood and Kristi Harwood providing 90 days notice of termination of the Lease and requesting removal of the Billboard. (CP 469, CP 352, CP 371). The notice of termination was received by Lamar on July 14, 2008. (CP 469, CP 352, CP 372, CP 373). October 12, 2008 was the 90th day after the notice of termination was received by Lamar. (CP 469).

Franklin's architects and contractors performing the renovation of units 200, 300, and 400, and the roof advised that the roof of the Subject Property needed to be replaced because of structural damages caused by the weight of the Billboard. (CP 470, CP 352,). In order to renovate units 200, 300, and 400, the Billboard needed to be removed. (CP 470, CP 353). Furthermore, Franklin was advised the roof needed to be replaced first in order to proceed with interior work on the units. (CP 470, CP 352-353). At a September 25, 2008 construction meeting Franklin was advised that if the Billboard was not removed by November 1, 2008, construction would be delayed which would, in turn, delay completion of

the units' renovation. (CP 470, CP 353). Since Lamar had indicated that it had no intentions of removing the Billboard, a change order was signed by Spokane Housing (acting as Manager of Franklin) on October 14, 2008 and the Billboard was dismantled on October 15, 2008. (CP 470, CP 353, CP 379).

The Billboard components were also dismantled. Some of the components had to be cut in order to safely remove them from the roof. (CP 470, CP 342). Franklin paid an additional $13,854.00 to have the Billboard dismantled and removed from the roof of the Subject Property. (CP 470, CP 354). After the Billboard had been removed, Everett Fortin, the superintendent of DR Construction (the contractor in charge of the renovations), met with a representative from Lamar concerning the dismantled vinyl sign and Billboard components. (CP 470 471, CP 342-343). Mr. Fortin asked the Lamar representative if Lamar wanted the sign components as well as the vinyl sign. (CP 471). The Lamar representative took the vinyl sign but told Mr. Fortin that Lamar was not interested in the other sign components. (CP 470-471, CP 343).

Prior to the closing, Joseph Harwood provided Franklin with a rent check from Lamar, dated January 23, 2008, which represented the annual rent for the Billboard from February 1, 2008 to February 1, 2009. (CP 471). Since Franklin did not intend to retain the Billboard on the roof

and had sent notice to Lamar that the Lease would be terminated, Mr. Harwood was not asked to endorse the check to Franklin and the check was not deposited into any bank account. (CP 471, CP 445).

On July 23, 2008, Mr. Schreibeis sent a letter to Jayne Auld, Spokane Housing's secretary enclosing a W-9 for payment of all future rent obligations. (CP 469). Since Franklin did not cash the check for rent for 2008, the W-9 was not returned to Lamar. (CP 445). No further rental payments were made by, or required of Lamar and Franklin and never received any further rent. (CP 469-470, CP 445).

B. UNDISPUTED MATERIAL FACTS

The following facts were not contained in the joint statement of material facts. However, these facts were not disputed and are relevant to the matters presented to this Court:

As noted above, the Lease was assigned by Harwood to Franklin. Spokane Housing was not an assignee of the Lease and was, therefore, not a party to the Lease. (CP 469, CP 351, CP 364).

Lamar's Complaint alleged six causes of action: breach of contract, tortiuous interference with a business expectancy, intentional interference with contractual relations, conversion, trespass and unjust enrichment. (CP 16-18). None of Lamar's claims asserted in the Complaint and none of the affirmative defenses asserted in its answer to Franklin's

counterclaim included any allegation that the unlawful detainer statute (RCW 59.12 et.seq.) applied to this matter. (CP 242-244, CP 538). Lamar did not raise this claim in any of the briefing on the cross-motions for summary judgment. Lamar did not raise this issue at the first hearing on summary judgment on October 14, 2009. Instead, this claim was asserted for the first time at oral argument at the **second** hearing on summary judgment held on February 3, 2010 and Lamar's motion for reconsideration. (RP, February 3, 2010 pg. 3, ln. 7-13, CP 504-507).

The Billboard was comprised of sheet metal, steel framing, timbers and a vinyl sign. (CP 342). At the time it was removed, the Billboard was in extremely poor condition and was not stable. (CP 342). The roof of the Subject Property needed to be replaced because of its age and damage done from the weight of the Billboard. (CP 342). The Billboard needed to be removed to replace the roof which would then allow renovation of the interior of Franklin's units in the subject property. (CP 342, 382). Lamar never contacted anyone asking for the return of the sign components and never requested access to the Subject Property to retrieve them. (CP 354). Lamar has never provided any evidence that the Billboard could be removed from the roof by any other manner than dismantling the sign and components.

The Lease, drafted by Lamar, did not state who was responsible to remove the Billboard once the Lease was terminated. (CP 22). Franklin was forced to pay $13,854.00 to have the Billboard removed. (CP 354). The materials were recycled and no profit or gain was realized. (CP 354).

IV. SUMMARY

Lamar rented the roof of the Subject Property pursuant to a one-page lease drafted by Lamar. Lamar did not occupy the property. Instead, the only had the right to erect and maintain the Billboard. The plain language of the document termination with 90 days notice by Harwood if the property was to be sold. Harwood only had to provide the identity of the owner. Notice was not required from the new owner. Clearly, the intent of the parties was that the Billboard would be removed at some point in time. Prior to receiving the notice as required by the Lease, Lamar was repeatedly advised that the Billboard would need to be removed. It is undisputed that the notice was sent and Lamar received the notice. Despite advanced notice and despite receiving notice under the terms and conditions of the Lease, Lamar simply refused to remove it.

Spokane Housing is a non-profit organization founded in 1992 to provide safe, affordable housing to families with low income. Franklin is a Limited Liability Company managed by Spokane Housing. Franklin

purchased units in the property in order to renovate them in order to provide this service. Through a series of transactions the Lease was assigned to Franklin. The Billboard had caused extensive damage to the roof and the entire roof needed to be replaced. In order to replace the roof and renovate the building, Franklin needed to remove the Billboard once the Lease was terminated. The Lease does not specify which party would remove the Billboard once the Lease was terminated. Since Lamar repeatedly refused to do so and in order to replace the damaged roof and proceed with renovations, Franklin paid to have the Billboard removed.

At the first hearing on summary judgment, the Court correctly held that Spokane Housing was the manager of Franklin and was not liable for any claims in tort or contract pursuant to RCW 25.15.125(1). At the second hearing, the Superior Court correctly ruled that the Lease had been terminated. Since Lamar's claims were all premised on the allegation that Lease had not been terminated, the Superior Court correctly ruled that Lamar's claims were without merit.

In addition to abandoning the appeal of the Order dismissing the Association, Lamar has waived appeal of all other claims dismissed on summary judgment except for its conversion claim landlord tenant claim and argument that vacating default and default judgment was in error.

Lamar appealed the Order Granting Summary Judgment dated October 14, 2010 dismissing Spokane Housing. In its opening brief, Lamar does not list this issue as an assignment of error, provides no argument and provides no citation to authority. As such, this issue has been waived on appeal. Even if considered on appeal, Spokane Housing was the manager of Franklin and, as such, cannot be liable for the torts or contracts of a limited liability company.

Lamar also appealed the Order Granting Defendants' Summary Judgment and Order Denying Plaintiff's Motion for Partial Summary Judgment entered March 4, 2010. The assignments of error and citations to authority identified by Lamar are limited to its conversion claim. Lamar did not provide an assignment of error or any citation to any legal authority beyond this legal issue. As such, Lamar's claims for breach of contract, tortious interference with business expectancy, intentional interference with contractual relations, trespass and unjust enrichment dismissed on summary judgment have been waived and cannot be considered on appeal. Even if considered, these claims have no basis as the Lease was properly terminated.

As to the remaining claim for conversion, there is no dispute that the Lease required removal of the Billboard once it had been terminated. Lamar was given proper notice but refused to remove it. In order to

replace the roof and renovate the building, Franklin had no choice but to remove the Billboard. It is also undisputed that the Billboard was in extremely poor condition, was unstable, and had to be removed in pieces in order to safely remove it from the roof. Lamar retrieved the vinyl sign but notified Franklin and Spokane Housing did not wish to retrieve the other sign components. As such, Lamar's property was not converted, Lamar abandoned its property, and Lamar has waived any claim for conversion. Even if actionable, Lamar's claim is limited to the actual value of the structural portions of the sign which were in extremely poor condition. There is no evidence in the record of the value of these items. Further, Lamar's claim for "future" damages is without merit as the Lease had been terminated. Once terminated, Lamar was not entitled to any future revenue.

Lamar also appealed the order denying its motion for reconsideration that the landlord tenant statute (under RCW 59.12) required an "eviction" prior to removal of the Billboard. This claim was not alleged in Lamar's Complaint or as an affirmative defense to the counter-claims asserted by the parties. This claim was not addressed in any of the briefing on cross motions for summary judgment. Instead, this claim was raised for the first time at oral argument at the second hearing for summary judgment and in Lamar's motion for reconsideration. As a

result, it was not properly before the Court and should not be considered on appeal.

Even if properly before this Court, the unlawful detainer statute does not apply as the Billboard was personal property that was to be removed at the end of the tenancy. Furthermore, Lamar was not a tenant, did not physically "occupy" the roof of the building and no "eviction" was required.

The Superior Court properly concluded that since the Lease had been terminated, Lamar's remaining claims in tort and contract simply had no basis. The Superior Court also properly ignored Lamar's landlord-tenant claim as it was never raised prior to oral argument at the second summary judgment hearing and reconsideration. The Superior Court's Order granting Defendants' motion for summary judgment, denying Plaintiff's motion for partial summary judgment and the Order denying Lamar's motion for reconsideration should be affirmed.

V. ARGUMENT

A. STANDARD OF REVIEW

1. Summary Judgment Standard.

When reviewing an order for summary judgment, the Court engages in the same inquiry as the trial court. *Wilson Court Ltd. Partnership v. Tony Maroni's Inc.,* 134 Wn.2d 692, 698, 952 P.2d 590

(1998). An order on summary judgment will be affirmed if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 698. Summary judgment will be sustained on any theory established in the pleadings and supported by proof. *Washington State Bank v. Medalia Healthcare L.L.C.*, 96 Wn.App. 547, 553, 984 P.2d 1041 (1999).

Civil Rule 56(e) requires the non-moving party to come forward with specific evidence showing that there is a genuine issue of fact. *Charbonneau v. Wilbur Ellis Co.*, 9 Wn. App. 474, 477, 512 P.2d 1126 (1973). In resisting a motion for summary judgment, the non-moving party cannot rely on mere denials, argumentative assertions, or conclusory statements. Instead, the non-moving party must submit sufficient affidavits setting forth specific facts which have the effect of disputing the facts of the moving party. Such facts must rise to the level of creating a genuine issue of material fact, i.e., one upon which the outcome of the litigation (or litigation of specific issues) depends. *Island Air, Inc. v. LaBar*, 18 Wn. App. 129, 136, 566 P.2d 972 (1977).

2. <u>Standard on Motion for Reconsideration.</u>

Motions for reconsideration are within the sound discretion of the trial court and a reviewing court will not reverse that decision absent a showing of a manifest abuse of discretion. *Wagner Development, Inc. v.*

Fidelity Bond and Deposit Co. of Maryland, 95 Wn.App. 896, 906, 977 P.2d 639 (1999) *review denied* 139 Wn.2d 1005, 989 P.2d 1139 (1999).

B. SPOKANE HOUSING WAS PROPERLY DISMISSED AT SUMMARY JUDGMENT

1. Lamar has waived any appeal of the order dismissing Spokane Housing Ventures, Inc.

Lamar appealed the order dismissing Spokane Housing as a party to this lawsuit. However, Lamar did not designate this issue as an assignment of error and cited no legal authority in its brief addressing this issue. As such, it has waived any appeal of this issue. Even if considered by the Court, Spokane Housing was the manager of Franklin, a limited liability company. Pursuant to Washington law, a manager is not personally liable for the torts or contracts of a limited liability company.

The Rules of Appellate Procedure require the appealing party to (1) provide a concise statement of the assignment of error a party contends was made by the Trial Court, (2) provide a concise statement of the facts and procedure related to issues presented for review and (3) provide argument in support of the issues presented for review with citations to legal authority and the relevant parts of the record. RAP 10.3(a)(4), RAP 10.3(a)(5) and RAP 10.3(a)(6). The purpose of this rule is to "...enable the court and opposing counsel efficiently and expeditiously to review the accuracy of the factual statements made in the

briefs and efficiently and expeditiously to review the relevant legal authority." *State v. Cox*, 109 Wn.App. 937, 943, 38 P.3d 371 (2002) citing *Hurlbert v. Gordon*, 64 Wn.App. 386, 400, 824 P.2d 1238 (1992).

An Appellate Court will not consider an argument unless supported by an assignment of error. *State v. Grinier,* 34 Wn.App. 164, 167, 659 P.2d 550 (1983). An Appellate Court will not address issues that a party does not raise appropriately in its brief and does not discuss meaningfully with citations to authority. *Saviano v. Westport Amustments, Inc.*, 144 Wn.App. 72, 84, 180 P.3d 874 (2008), citing RAP 10.3(a)(6). See also *B & B Farms, Inc. v. Matlock's Fruit Farms, Inc.*, 73 Wn. 2d 146, 152, 437 P.2d 178 (1968) (where a party cites no authority in support of a proposed theory, the Court will not presume that such authority exists.) and *In re Marriage of Wallace*, 111 Wn.App. 697, 705, 45 P.3d 1131 (2002), *review denied*, 148 Wn.2d 1011, 64 P.3d 1265 (2003) (contentions unsupported by argument or citations to authority will not be considered on appeal).

Lamar raised eight assignments of error in its brief to this Court. These assignments of error were limited to (1) the order vacating default, (2) Lamar's conversion claim and (3) application of the landlord-tenant law. (Brief of Appellant pg. 2-4). None of the assignments of error referenced the dismissal of Spokane Housing as an assignment of error as

required by RAP 10.3(a)(4). Lamar provided no argument or legal authority in its brief as required by RAP 10.3(a)(6). As such, Lamar's appeal of this Order has been waived.

2. A Manager of a Limited Liability Company is not Liable for claims in Tort or Contract.

Even if considered by this Court, the Order dismissing Spokane Housing should be affirmed as a manager of a limited liability company is not liable for the torts or contracts of the entity. Specifically, RCW 25.15.125(1) provides:

> Except as otherwise provided by this chapter, the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations, and liabilities of the limited liability company; and no member or manager of a limited liability company shall be obligated personally for any such debt, obligation, or liability of the limited liability company **solely** by reason of being a member or acting as a manager of the limited liability company. (emphasis added).

As stated in the statute, a manager of a limited liability company is not liable for debts or obligations whether they arise in tort, contract or otherwise. Instead, only the limited liability company, as an entity, may be liable.

Beyond alleging that Spokane Housing caused the creation of Franklin and acted as its Manager (CP 14), Lamar provided no evidence or

authority that a manager of a limited liability company is somehow liable for claims related to torts or contracts of the company. As such, the Superior Court properly dismissed Spokane Housing at summary judgment.

3. **There is No Privity of Contract Between Lamar and Spokane Housing Ventures.**

Even if the Court considers Lamar's appeal of the Order dismissing Spokane Housing, there was no privity of contract between Lamar and Spokane Housing which would result in any contractual liability. The burden of proving an express contract is on the party asserting its existence. *Bogle and Gates, P.L.L.C. v. Zapel,* 121 Wn.App. 444, 448, 90 P.3d 703 (2004). One cannot be liable on any breach of contract claims where there is no privity of contract. See *Freeman v. Navarre*, 47 Wash. 2d 760, 771, 289 P.2d 1015, 1021 (1955) quoting *Swenson v. Nairn*, 30 A.2d 897, 899 (N.J. Sup. 1943), ("'It is true as a general rule, where the duty violated by the defendant was created solely by contract, that a cause of action arising out of such a violation is limited strictly to the parties in the contract and those in privity with them.'"). See also *State v. Antoine,* 82 Wn.2d 440, 444, 511 P.2d 1351 (1973), *overruled on other grounds*, 420 U.S. 194, S.Ct. 944 (1975) ("A contract...can be enforced only against those party to it").

In this case, the only parties to the Lease, and the only parties that could be bound by the Lease were Lamar, Harwood and Franklin (as assignee of Harwood). There is no evidence that Spokane Housing was an assignee of the Lease. Instead, Spokane Housing's acted only as the manager of Franklin. As a result, there is no privity of contract between Lamar and Spokane Housing and the Order granting summary judgment should be affirmed.

C. LAMAR'S REMAINING CLAIMS FAIL AS A MATTER OF LAW

1. Lamar's Claims for Breach of Contract, Tortious Interference with Contract and Business Expectancy, Trespass and Unjust Enrichment have been Waived on Appeal.

Lamar appealed the Order granting Defendants' motion for summary judgment dated February 3, 2010 wherein the Superior Court ruled that the Lease was terminated and dismissed Lamar's claims for breach of contract, tortious interference with business expectancy, intentional interference with contractual relations, trespass, unjust enrichment and conversion. (CP 572-574). The only issue identified as an assignment of error is Lamar's conversion claim. The only claim with argument and any reference to any legal authority is the conversion claim. As a result, the appeal of the Order dismissing Lamar's claims for breach of contract, tortious interference with business expectancy, intentional

interference with contractual relations, trespass and unjust enrichment have been waived on appeal. *In re Marriage of Wallace,* 111 Wn.App. 697, 45 P.3d 1131 (2002), *review denied*, 148 Wn.2d 1011, 64 P.3d 1265 (2003). Therefore, only issues before this Court regarding the March 4, 2010 Order is Lamar's conversion claim. As will be discussed further below, even if considered on appeal, these claims have no basis in fact or law and were properly dismissed at summary judgment.

2. <u>Lamar's Conversion Claim was Properly Dismissed.</u>

Lamar's conversion claim fails as a matter of law as Franklin did not deprive Lamar of its property, Lamar abandoned the property, and Lamar waived any claim for conversion. Furthermore, once the Lease was terminated, Franklin had the right to remove the Billboard.

Conversion is the act of (1) willfully interfering with the property of another person without lawful justification and (2) depriving that individual with possession of the property. *Washington State Bank v. Medalia Healthcare, LLC*, 96 Wn.App. 547, 554, 984 P.2d 1041 (1999).

The Billboard was a piece of personal property left behind when the Lease expired. *Clear Channel Outdoor v. Seattle Popular Monorail Authority*, 136 Wn.App. 781, 786, 150 P.3d 649 (2007). (A billboard is a removable fixture as it is not an improvement that enhances the property.)

Lamar agrees and also identifies the Billboard as chattel, or a piece of personal property that is "moveable" as distinguished from real property. See Appellant's brief pg. 40 citing *In re Marriage of Langham*, 153 Wn.2d 553, 565, 106 P.3d 212 (2005).

Lamar's claim for conversion is not actionable as Franklin had the right to dismantle the Billboard and remove it from the Subject Property. The time that fixtures must be removed by the tenant in order to keep them from being part of the realty is during or at the expiration of the tenancy. Washington Real Property Deskbook (Third Edition) §21.3(3)(a), 21-13 (1997) (citing *Hill's Garage v. Rice,* 134 Wash. 101, 104, 234 P. 1023 (1925)).

In this case, Lamar's conversion claim fails as the Lease was properly terminated and Lamar failed to remove the Billboard (Lamar's personal property) before or after termination of the Lease despite having repeated opportunity to do so. Lamar made it clear that it had no intention of removing the Billboard despite repeated notice. It is also undisputed that Franklin had no choice but to remove the Billboard as it had damaged the roof, the roof needed to be replaced and the interior of the building could not be renovated until the roof had been fixed.

a. ***Lamar was not deprived of possession of its property.***

Even if actionable, Lamar's conversion claim is limited to the Billboard, the property allegedly converted. The Billboard was made up of (1) the sign components (i.e. sheet metal, steel framing, and timbers) which made up the structural portion of the Billboard and (2) the vinyl sign which is affixed to the structural components for advertising. (CP 341).

It is undisputed that Lamar retrieved the vinyl sign when the Billboard was dismantled. (CP 341, CP 470-471). As such, Franklin did not retain possession and did not unlawfully deprive Lamar with possession of the vinyl sign. As such, Lamar's claim for conversion is limited to the sign components which made up the structural portion of the Billboard.

b. ***Lamar abandoned its property and waived any claim for conversion.***

Even if the claim for conversion was actionable, there is no claim for conversion if the owner abandons property. Abandonment it is a complete defense to the tort of conversion. *Jones v. Jacobson,* 45 Wn.2d 265, 266, 273 P.2d 979 (1954). Furthermore, if the Plaintiff has the right to demand return of the property, but intentionally fails to do so, the right to property may be waived. *Frisch v. Victor Industries, Inc.*, 51 Wn.App.

377, 384, 753 P.2d 1000 (1988). Finally, the doctrine of mitigation of damages prevents recovery of damages that the injured party could have avoided by reasonable efforts after the alleged wrong was committed. *Bersen v. Big Bend Elec. Co-op, Inc.*, 68 Wn.App. 427, 433, 842 P.2d 1047. (1993).

The Lease does not specify which party would remove the Billboard once the Lease was terminated. (CP 22). It is undisputed that the Billboard had to be removed in order to allow replacement of the roof and renovation of the building. (CP 470). It is undisputed that the sign was in very poor condition and unstable. (CP 342). It is also undisputed that the structural components of the Billboard had to be cut into pieces in order to safely remove them from the roof. (CP 470). Lamar has never provided any evidence that the Billboard could be safely removed from the roof by any means other than dismantling the components. Finally, it is undisputed that Lamar notified Franklin that they did not want the structural components once they were removed. (CP 341-342, CP 471). Lamar's claim for conversion regarding the sign components fails as a matter of law. Lamar abandoned the property, waived any claim for conversion and failed to mitigate its damage by failing to retrieve the property.

Even if actionable, Lamar's damages are limited to the fair market value of the sign components at the time of the alleged conversion. *Potter v. Washington State Patrol*, 165 Wn.2d 67,78,196 P.3d 691 (2008), *Frisch v. Victor Industries, Inc.*, 51 Wn.App. 377, 381, 753 P.2d 1000 (1988). While a Plaintiff does not have to accept the return of property, damages are still limited to the value of the property. *City Loan*, 5 Wn.App. at 563. See also *Merchant v. Peterson,* 38 Wn.App. 855, 859, 690 P.2d 1192 (1984). A party that proves conversion is not entitled to additional damages for breach of contract, lost revenue or attorney fees. *City Loan v. State Credit Ass'n*, 5 Wn.App. 560, 563, 490 P.2d 118 (1971) and *Washington State Bank v. Medalia Healthcare, L.L.C.*, 96 Wn.App. 547, 554, 984 P.2d 1041 (1999).

Lamar's passing reference to extensive damages in its brief for future lost revenue assumes that the Lease was still in effect. This was simply not the case. The Lease was terminated and the Billboard was to be removed. Lamar had no right to future revenue. One is not entitled to damages which are speculative and unsupported by the evidence. *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 19, 390 P.2d 677 (1964). The fact that the Billboard cannot be rebuilt because of a change in the Spokane County Code is irrelevant. The Lease contemplated that the Billboard would be removed at some point in time. The parties in this lawsuit had

no control over changes to the City Code restricting Lamar's ability to maintain a Billboard at a different location once it was removed. Even if the conversion claim regarding the sign components was established, Lamar is not entitled to damages which have no basis in fact or law.

D. LAMAR'S REMAINING CLAIMS FAIL AS A MATTER OF LAW

As previously stated, Lamar raised eight assignments of error in its brief to this Court. The assignments of error identified by Lamar are limited to the Order vacating default judgment and its conversion claim. Lamar failed to assign any error to the Order granting Defendants' motion for summary judgment dismissing its claims for breach of contract, tortious interference with business expectancy, intentional interference with contractual relations, trespass and unjust enrichment. Lamar failed to provide any substantive argument or cite any legal authority regarding any of these claims. As previously noted, any appeal of the Order dismissing these claims has been waived. *In re Marriage of Wallace*, 111 Wn.App. 697, 705, 45 P.3d 1131 (2002) (supra). Even if considered on appeal, each of these claims fail as a matter of law and were properly dismissed.

1. **The Breach of Contract Claim Fails as the Lease was Terminated.**

It is undisputed that the Lease could be terminated ninety (90) days after written notice from Harwood to Lamar that the property was to be sold. (CP 22). Harwood only had to provide the name of the new owner. (CP 22). In this case, there is no dispute that the notice was sent, Lamar received the notice, Lamar failed to remove the Billboard and Lamar had no intention of removing the Billboard.

A lease is a conveyance of a limited estate for a limited term *Resident Action Council v. Seattle Housing Authority*, 162 Wn.2d 773, 778, 174 P.3d 84 (2008). In this case, the Lease was limited to the right to build and maintain the Billboard and was limited to the roof of the Subject Property. (CP 22).

Leases are both contracts and conveyances. Rules of construction applied to contracts are also applied to leases. *Watkins v. Restorative Care Center, Inc.*, 66 Wn.App. 178, 191, 831 P.2d 1085 (1992). A Court must enforce the contract as written if the language in that contract is clear and unambiguous. *Harwood v. Group Health Northwest,* 93 Wn.App. 569, 574, 970 P.2d 760 (1999) citing *Util. Sys. V. PUD 1*, 112 Wn.2d 1, 771 P.2d 701 (1989). The interpretation of a contract is a question of law for the Court. If the only dispute relates to the legal effect of language in a

written contract, summary judgment is proper. *Allstate Insurance Co. v. Neel*, 25 Wn.App. 722, 724, 612 P.2d 6 (1980). See also *Go2Net, Inc. v. CI Host, Inc.*, 115 Wn.App. 73, 83, 60 P.3d 1245 (2003). (Summary judgment is proper if the written contract, viewed in light of the parties' objective manifestations has only one reasonable meaning.)

In construing a written contract, the intent of the parties controls. The intent of the parties is determined from reading the contract as a whole. The Court must read the entire document with force and effect given to each provision. *Port of Seattle v. Lexington Ins. Co.*, 111 Wn.App. 901, 907-908, 48 P.3d 334 (2002). The language of a contract is given its plain and ordinary meaning and the Court's interpretation of contract language must avoid interpretation that leads to absurd results. *Forest Marketing Services, Inc. v. State Department of Natural Resources*, 125 Wn.App. 126, 132,104 P.3d 40 (2005) and *Allstate Ins. Co. v. Hammonds*, 72 Wn.App. 664, 667, 865 P.2d 560 (1994):

> ...when a court examines a contract, it must read it as the average person would read it; it should be given a practical and reasonable rather than a literal interpretation, and not a strained or forced construction leading to absurd results.

After viewing a contract, if the intent of the parties can be determined from its plain language, the contract must be enforced as written. If a contract is unambiguous, summary judgment is proper even if the parties

dispute the legal effect of a specific provision. *State v. Brown*, 92 Wn.App. 586, 594, 965 P.2d 1102 (1998).

An ambiguity exists only "...if the language on its face is fairly susceptible to two different but reasonable interpretations." *Kish v. Insurance Co. of N. Am.*, 125 Wn.2d 164, 171, 883 P.2d 308 (1994) quoting *Util. Sys. v. PUD 1*, 112 Wn.2d at 11. A court may not read an ambiguity into the contract that is otherwise clear and unambiguous. *State v. Brown*, 92 Wn.App. at 594 and *Util. System v. PUD 1*, 112 Wn.2d 1, 10, 771 P.2d 701 (1989).

There is no ambiguity in this Lease. The Lease plainly provides that it could be terminated if the Subject Property was to be sold and the new owner wished to terminate the Lease. (CP 22). In that instance, Mr. Harwood needed to provide only the name of the owner and notify Lamar of the pending sale. (CP 22). Once this occurred, the Lease was terminated as a matter of law ninety (90) days after notice was sent

There is no dispute that Lamar was notified of the purchaser and the pending sale. It is undisputed that Lamar received written notice that the Lease would be terminated as of October 12, 2008. (CP 469). In fact, Lamar was aware well before the notice was even sent in July, 2008 that the Lease would be terminated and the Billboard would need to be removed. Lamar was repeatedly advised by phone correspondence that

the Lease would be terminated. (CP 352, 353, 468, 469). It is undisputed that Lamar failed to take any action to remove the Billboard within the 90-day period or after the 90-day period expired. According to the plain terms of the Lease, Lamar was provided with proper notice and the Lease was terminated. Once the Lease was terminated, Lamar had no right to maintain the Billboard on the property. *Thayer v. Damiano*, 9 Wn.App. 207, 210, 511 P.2d 84 (1973) ("A contract which by its terms has expired is legally defunct."). As a result, all other claims in tort and contract asserted by Lamar fail as a matter of law.

In its brief to this Court, Lamar claims that the Lease was still in full force and effect even after the notice of termination was sent because (1) Lamar did not provide written notice approving or authorizing removal of the Billboard and (2) Lamar sent a letter after the notice of termination was sent claiming that the Lease was still in effect.

There is nothing in the plain language of the Lease that required written notice from Lamar consenting to the removal of the Billboard after the notice of termination was sent. There is nothing in the plain language of the Lease that a unilateral determination by Lamar that the Lease was still in effect nullified the notice of termination. A Court cannot rewrite a contract or create a new one if it is plain and unambiguous. *S.L. Rowland Const. Co. v. Beall Pipe & Tank Corp.*, 14 Wn.App. 297, 306, 540 P.2d

912 (1975). See also *Willis v. Champlain Cable Corp.*, 109 Wn.2d 747, 758, 748 P.2d 621 (1988):

> Courts must give effect to unambiguous contract terms to promote stability, certainty and fairness in contract enforcement. What the parties expressed as their intent in the contract, the court will not rewrite.

Lamar also makes a passing reference in its brief to this Court that the Lease could not be terminated because the Harwoods continued to have an ownership interest in the Subject Property. With no specific reference or citations to authority, Lamar makes a vague argument that until the Harwoods divested themselves of all ownership of the Subject Property, the Lease remained in full force. As previously stated, Lamar must identify an assignment of error to each legal issue and provide citation to authority on that issue. Any passing reference to this effect should be disregarded as it was not raised as an assignment of error, no substantive argument was provided and no citation to authority was provided.

If considered by this Court, this argument fails for a number of reasons. First, the Lease contains no language supporting the conclusion that the Harwoods must entirely divest themselves of any interest in the Subject Property before the Lease could be terminated. Lamar's argument is simply another attempt to add a term and condition to the Lease that was

never contemplated by the parties and is not within the four corners of the document.

Second, even if there were such a requirement, the Harwoods do not and have not retained any legal interest in the Subject Property since January, 2006 when they conveyed the property to Bell.

A limited liability company formed in Washington is a separate legal entity. RCW 25.15.070(2)(c). The existence of that entity and its separate legal status continues until the limited liability company's certificate of formation is cancelled. *Id.* Washington law defines "legal persons" to include limited liability companies. RCW 1.16.080(1). A limited liability company is an artificial, independent legal entity. *Valley/50th Ave., L.L.C. v. Stewart*, 159 Wn.2d 736, 747, 153 P.3d 186 (2007).

Bell is a Limited Liability Company that was formed in 2005. (CP 476). The members of that LLC were Joseph Harwood and Cory Colvin. (CP 467). Mr. Colvin has absolutely no connection to this lawsuit, the Lease or Lamar. (CP 467). Subsequently, the membership structure was reallocated whereby Mr. Colvin had a fifty percent (50%) interest and Joseph and Kristi Harwood had a fifty percent (50%) interest. (CP 467). The Harwoods transferred the Subject Property to Bell in January, 2006. (CP 467).

There is nothing in the plain language of the Lease that the Harwoods had to "completely divest" themselves in any interest in the Subject Property before it could be terminated. Even if this were a requirement, the Harwoods have not had an individual interest in the Subject Property since 2006, well before the notice of termination was sent.

2. Lamar's Claim for Tortious Interference With Business Expectancy and Intentional Interference with Contractual Relations Contract Fail as a Matter of Law.

The party alleging tortious interference with a contractual relationship or business expectancy must prove (1) the existence of a valid contractual relationship or business expectancy (2) knowledge of the relationship, (3) intentional interference inducing or causing a termination of the relationship or expectancy and (4) resultant damages. *Calbom v. Knudtzon*, 65 Wn.2d. 157, 163, 396 P.2d 148 (1964). A cause of action for tortiuous interference arises from either (1) the defendant's pursuit of an improper objective or harming the plaintiff or (2) the use of wrongful means that result in injury to the plaintiff's contractual or business relations. *Pleas v. Seattle*, 112 Wn.2d 794, 803-804, 774 P.2d 1158 (1989).

The first element requires that the complaining party must "...have a legal right to that which he claims to have lost." *Birkenwald Distributing Co. v. Heublein*, 55 Wn.App. 1, 10,776 P.2d 721 (1989) citing *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 375, 617 P.2d 704 (1980).

Interference is intentional if "...the actor desires to bring about or if he knows that the interference is certain or substantially certain to occur as a result of his actions." *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn.App. 151, 158, 52 P.3d 30 (2002) (citing Restatement (Second) of Torts §766B.) Intent denotes "purposefully improper interference". *Birkenwald Distrib. Co.*, 55 Wn.App. at 11. When one acts to promote lawful economic interest, bad motive is "essential" and incidental interference will not support the claim. *Id.* Absent facts of any intentional interference by a party, summary judgment is appropriate. *Barton v. Dahmen*, 5 Wn.App. 135, 136, 486 P.2d 295 (1971).

Here, Lamar has no legal right to the relief that is being sought. The Lease was terminated 90 days after notice was sent. Furthermore, Franklin did not have an improper objective, use improper means or intentionally interfere with the contracts between Lamar and any third parties and there is absolutely no evidence to support this claim. There is

no evidence that Franklin, or any of the other named Defendants had any specific knowledge of any relationship between Lamar and its customers or that there was any intentional interference by any of the named Defendants. The Lease expressly provides that it could be terminated. Clearly, the parties anticipated that the Billboard would not remain on the roof forever. Once it was terminated, Lamar had no right to maintain the Billboard on the roof of the Subject Property. Any impact on Lamar's contracts with third parties was incidental which will not support a claim for tortious interference with a business expectancy and intentional interference with contract. *Burke & Thomas, Inc. v. International Organization of Masters*, 21 Wn.App. 313, 316, 585 P.2d 152 (1978) affirmed 92 Wn.2d 762, 600 P.2d (1979). As such, there was no intentional interference with any contract between Lamar and any third party and this claim was properly dismissed at summary judgment.

3. <u>Lamar's Claim for Trespass was Properly Dismissed.</u>

Trespass is an interference with the right to the exclusive possession of property. *Grundy v. Brack Family Trust*, 151 Wn.App. 557, 566213 P.3d 619, (2009). Intentional trespass occurs when there is (1) an invasion of property affecting an interest in exclusive possession (2) an intentional act, (3) reasonable foreseeability that the act would disturb the plaintiff's possessory interest and (4) actual and substantial damages. *Id.*

at 568. Generally, when a lease expires by a termination clause, the lease expires and there is no further interest in the leasehold. *State v. Sheets*, 48 Wn.2d 65, 67, 290 P.2d 974 (1956).

Here, it is undisputed that Lamar was notified that the Lease was terminated and the Billboard would need to be removed. Once the Lease was terminated, Lamar did not have the right to maintain the Billboard on the roof.

4. Franklin and Spokane Housing were not Unjustly Enriched.

The party asserting a claim for unjust enrichment must prove the following elements: (1) one party must have conferred a benefit to the other (2) the party receiving the benefit must have knowledge of that benefit (3) the party receiving the benefit must accept or retain that benefit under circumstances that make it inequitable for the receiving party to retain the benefit without paying its value. *Cox v. O'Brien*, 150 Wn.App 24, 37, 206 P.3d 682 (2009).

Lamar's sole basis for its claim for unjust enrichment (again never specifically addressed in its brief to this Court) is that it sent the Harwoods a rent check in January, 2008 for the annual rent payment covering the February 1, 2008 to February 1, 2009, that the named Defendants retained this check, and the retention of the check was unjust. (CP 18-19).

The undisputed facts show the Harwoods did not cash this check. In addition, Franklin did not request Harwood to endorse this check after the Lease was assigned from Harwood to Franklin. Finally, the undisputed facts demonstrate that Franklin did not receive any rental payments after the Billboard was removed. As such, Lamar's claim for unjust enrichment fails as a matter of law as the Harwoods, Bell, Franklin and Spokane Housing have not received or retained any benefits from Lamar.

Lamar failed to raise any assignments of error or provide any legal authority related to its claim for breach of contract, tortious interference with business expectancy, intentional interference with contractual relations, trespass, or unjust enrichment. The appeal of the Order dismissing these claims has been waived. Even if considered by this Court, Lamar's claims have no basis in law or fact and the Superior Court's Order should be affirmed.

E. THE ORDER DENYING LAMAR'S MOTION FOR RECONSIDERATION SHOULD BE AFFIRMED

1. The Court Should Not Consider Claims Raised for the First Time at Oral Argument for Summary Judgment and on a Motion for Reconsideration.

Lamar, for the first time at oral argument at the second hearing on summary judgment, alleged that Franklin was required to file an unlawful

detainer action pursuant to RCW 59.12 to evict it from the premises. Lamar then raised this claim its motion for reconsideration pursuant to CR 59(a)(7) and CR 59 (a)(9). Lamar has the burden to show that the Court's denial of its motion was manifestly unreasonable or is based on untenable grounds. *Wagner Development, Inc. v. Fidelity Bond and Deposit Co. of Maryland*, 95 Wn.App. 896, 906, 977 P.2d 639 (1999). The evidence clearly demonstrates that denial of the motion for reconsideration was not manifestly unreasonable or based on untenable grounds. Instead, the motion was properly denied as the claim was not raised in a timely manner. Even if considered, the claim has no application to this case.

Civil Rule 8(a) requires that a pleading contain a short and plain statement of the claim showing that the party is entitled to relief and a demand for judgment for the relief. *Northwest Line Constructors Chapter of Nat. Elec. Contractors Assn. v. Snohomish County PUD Dist. No. 1,* 104 Wn.App. 842, 848, 17 P.3d 1251 (2001). A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests. *Northwest Line Constructors* at 849. The decision to grant leave to amend the pleadings is within the discretion of the trial court. *Saluteen –Maschersky v. Countrywide Funding Corp.*, 105 Wn.App. 846, 857, 22 P.3d 804 (2001).

In *Saluteen* and *Northwest Line Constructors,* the parties raised new legal theories for the first time in briefing for summary judgment. In both cases, since the complaint failed to provide fair notice of the claims, the Court upheld the trial court's decision to disregard the claims. *Saluteen-Mascherski* 105 Wn.App. 846 Wn.App. at 857 and *Northwest Line Constructors*, 104 Wn.App. at 849.

Lamar's Complaint alleged six causes of action in tort and contract. (CP 16-19). Lamar did not allege any cause of action related to the unlawful detainer statute. Lamar did not raise this claim as an affirmative defense to Franklin's counterclaim. Contrary to Lamar's contention, the primary issue of this litigation was never Lamar's continued right to "occupy" the property because Lamar never raised this issue. Lamar's attempt to essentially amend its Complaint at the eleventh hour was properly disregarded by the Superior Court.

In a summary judgment proceeding, the evidence considered by the Court is that contained in the pleadings, affidavits, admissions and other material properly presented. *Landberg v. Carlson,* 108 Wn.App. 749, 33 P.3d 406 (2001). A motion for reconsideration based on a new legal theory cannot be considered by the Court. *Wilcox v. Lexington Eye Institute*, 130 Wn.App. 234, 241, 122 P.3d 729 (2005) ("CR 59 does not permit a plaintiff to propose new theories of the case that could have been

raised before entry of an adverse decision.") and *JDFJ Corp. v. International Raceway, Inc.*, 97 Wn.App. 1, 7, 970 P.2d 343 (1999):

> Civil Rule 59 does not permit a plaintiff, finding a judgment unsatisfactory, to suddenly propose a new theory of the case. JDFJ's motion for reconsideration was in essence an untimely attempt to amend its complaint in general, violating equitable rules of estoppel, election of remedies, and the invited error doctrine. We refuse to permit such a perversion of the rules.

Lamar raised this legal issue for the first time at **oral argument** on February 3, 2010 (the second hearing on summary judgment) and in its motion for reconsideration. As such, the Superior Court properly ignored this claim and this Court should also disregard the claim on appeal.

2. <u>The Unlawful Detainer Statute Does Not Apply.</u>

Even if Lamar's appeal of the Order denying its motion for reconsideration is considered, the Superior Court's denial was proper and should be affirmed. Civil Rule 59 states eight specific grounds for granting reconsideration including the catchall provision, "failure to do substantial justice." A motion based on CR 59(a)(9) should rarely be granted. *Larson v. Georgia Pac. Corp.*, 11 Wn.App. 557, 562, 524 P.2d 251 (1974). Here, Franklin provided substantial evidence that the Lease was terminated, Lamar failed to remove the Billboard, and it had no choice but to remove the Billboard in order to proceed with repair of the

roof and renovation to the building. Lamar's motion for reconsideration pursuant to CR 59(a)(9) was properly denied.

In regard to a motion brought pursuant to Civil Rule 59(a)(7), Lamar must show that there is no evidence or reasonable inference from the evidence to justify the Court's decision. A motion for reconsideration admits the truth and all reasonable inferences from the opposing party's evidence and requires that all of the evidence be interpreted against the moving party. *Rawlins v. Nelson*, 38 Wn.2d 570, 579, 231 P.2d 281 (1951) and *Davis v. Early Constr. Co.*, 63 Wn.2d 252, 254, 386 P.2d 958 (1963). The evidence clearly demonstrates that Lamar's claim has not basis.

Lamar first argues to this Court that the Billboard was chattel and a piece of personal property that was wrongfully converted. (Brief of Appellant pg. 39-41). In regard to the unlawful detainer claim, Lamar then changes that position and argues that it was a "tenant" subject to eviction to support its new legal theory. Lamar cannot have it both ways. The character of improvements on real or personal property is determined as of the date of construction. *SSG Corp. v. Cunningham*, 74 Wn.App. 708, 712, 875 P.2d 16 (1994). Clearly, the Billboard was personal property. See *Clear Channel Outdoor v. Seattle Popular Monorail Authority*, 136 Wn.App. at 786 (supra). Clearly, the Billboard was a

fixture on the roof and a moveable object. Washington Real Property Deskbook (Third Edition) §21.3(3)(a), 21-13 (1997) (citing *Hill's Garage v. Rice,* 134 Wash. 101, 104, 234 P. 1023 (1925) (a billboard is a removable fixture that needs to be removed at the end of a lease). The Billboard was not a tenant. Instead, it was a piece of personal property Lamar refused to move when the Lease was terminated.

The purpose of the unlawful detainer statute is to provide a limited summary proceeding to provide a method for removing a tenant from possession of the property and restoring possession to the landlord. *Heaverlo v. Keico Industries, Inc.*, 80 Wn.App. 724, 728, 911 P.2d 406 (1996). The Court must interpret a statute to give effect to the legislature's intent. *Parker v. Taylor*, 136 Wn.App. 524, 528, 150 P.3d 127 (2007). The Court looks no further than the plain language of the statute if it is unambiguous on its face. *Id.* Pursuant to the statute, "unlawful detainer" exists when a tenant holds over in possession after the expiration of the term of a lease. RCW 59.12.030(1). The statutory scheme only deals with removing the tenant from the property in a summary proceeding. *Kessler v. Nielsen*, 3 Wn.App. 120, 123, 472 P.2d 616 (1970) ("In such proceedings the superior court sits as a special statutory tribunal, limited to deciding the primary issue of right to

possession together with the statutory designated incidents thereto, i.e. restitution and rent or damages.")

The unlawful detainer statute does not apply to issues regarding personal property. *Sowers v. Lewis*, 49 Wn.2d 891, 895, 307 P.2d 1064 (1957) (Holding that title to personal property cannot be determined in an unlawful detainer action) and *Little v. Catania,* 48 Wn.2d 890, 892, 297 P.2d 255 (1956) (Unlawful detainer action does not apply to determination of the ownership of property located on the premises.).

The Billboard was a piece of personal property left on the building after the Lease expired. The Lease does not provide who would remove the Billboard once the Lease expired. The undisputed facts demonstrate that it had to be removed to renovate the property and had to be cut into pieces to safely remove it from the building. Lamar was not a "tenant" as it was not physically occupying the Subject Property. Since the only item removed from the roof was personal property, the statute does not apply.

Lamar cites *Heaverlo v. Keico Indus., Inc.* 80 Wn.App. 724, 728, 911 P.2d 406 (1996) and *Phillips v. Hardwick,* 29 Wn.App. 382, 628 P.2d 506 (1981) for the proposition that a landlord must use the statutory scheme outlined in RCW 59.12 et. seq. to remove the tenant's personal property. *Heaverlo* makes no such pronouncement. Instead, the case is clearly limited to the law in Washington that issues ***unrelated*** to

possession of the real property are not properly part of an unlawful detainer action. *Heaverlo v. Keico Industries, Inc.*, 80 Wn.App. 724 at 729. In this case, Lamar's failure to remove a piece of personal property is not related to possession.

Similarly, the *Phillps* case reiterates the law of Washington: unlawful detainer actions are special statutory proceedings for the limited purpose of recovering possession of rental property by the landlord. *Phillps v. Hardwick*, 29 Wn.App. at 385-386. This case does not stand for the proposition that an unlawful detainer action must be commenced in order to remove personal property of a tenant. Second, *Phillips* deals with real property subject to the residential landlord-tenant act under RCW Chapter 59.18, which is wholly inapplicable here.

In this case, Lamar was not occupying the premises. Lamar had a Billboard on the top of the Subject Property. Lamar did not have the right to physically occupy the premises other than for the purpose of building and maintaining the Billboard on the roof. The record clearly reflects that Lamar did not need to physically vacate the property as it was not in actual physical possession. Lamar acknowledges that the Billboard was a piece of personal property. The Lease did not specify who was to remove the Billboard after the notice of termination was sent. Lamar received the notice but refused to remove it. Franklin had to remove the Billboard to

fix the roof and renovate the interior of the Subject Property. Franklin removed a piece of property from the roof after the Lease expired. Removal of the Billboard has nothing to do with ejecting a tenant from the premises and restoring possession to the landlord.

Lamar's attempt to raise a new cause of action after summary judgment was granted was properly ignored by the Superior Court and should be disregarded on appeal. Even if considered, the unlawful detainer statute has no application to this case. The Superior Court's denial of Lamar's motion for reconsideration was not a manifest abuse of discretion and should be affirmed.

F. LAMAR'S REQUEST FOR ATTORNEY FEES ON APPEAL SHOULD BE DENIED

Lamar's request for attorney fees on appeal should be denied as there is no basis in law or equity for this request.

Attorney fees are not recoverable unless permitted by contract, statute or a recognized ground in equity. RAP 18.1 and *Aldrich & Hedman, Inc. v. Blakely,* 31 Wn.App. 16, 19, 639 P.2d 235 (1982). In this case, it is undisputed the Lease does not provide for the award of attorney fees. Lamar has not provided any statutory authority for the award of attorney fees.

A limited exception allows an award of attorney fees where one is exposed to litigation with a third person due to the conduct of another party. *Aldrich,* 31 Wn.App. at 19 ("Where the natural and proximate consequence of the acts or omissions of a party to an agreement have exposed one to litigation with **a third person**, equity may allow attorney's fees as an element of consequential damages."). (emphasis added) See also *Aldrich& Heldman, Inc. v. Blakely*, 31 Wn.App. 16, 20, 639 P.2d 235 (1982).

Three elements are necessary to create this equitable right to recover attorney fees: (1) a wrongful act or omission by A towards B; (2) such act or omission exposes or involved B in litigation with C; and (3) C was not connected with the original wrongful act or omission of A.

Even if Lamar established a wrongful act by Franklin, there is no evidence in the record that Lamar has been exposed or involved in litigation with a third party not connected to the alleged omission. The request for attorney fees should be denied.

Once again, Lamar makes a veiled reference to Lamar's "exposure" to litigation, yet provides no facts to support this contention. As this was not properly raised is Lamar's brief, it should be disregarded.

Even if considered, Lamar's claim for attorney fees has no basis. At summary judgment, Lamar argued that termination of two contracts (the Bulletin Contract and the Production Contract) with third parties

exposed them to litigation. (CP 229-230). However, Lamar never provided any facts showing that termination of these contracts actually resulted in litigation or exposed Lamar to litigation. Furthermore, the terms of these contracts clearly show that Lamar has not and cannot be sued even if they were terminated or Lamar was prevented from performing

The Bulletin Contract between Lamar and the Coeur d'Alene Casino commenced on January 11, 2008 and expired on February 25, 2009. (CP 298-302). The Production Contract (dated August 7th, 2008), dealt with the production of vinyl by Lamar. (CP 298-302). Both contracts have expired and there is no evidence that the parties to these contracts have commenced litigation.

In addition, there is no possibility that Lamar will be exposed to litigation. The Bulletin Contract states that in the event Lamar was unable to provide advertising for any reason, the contract remained in full force and effect. (CP 300-301). If services could not be provided, the party to the contract was to be given a credit for advertising. (CP 300-301). The Production states that it could be unilaterally terminated by Lamar at any time. (CP 302-303).

In regard to the Bulletin Contract, even if Lamar was required to provide a credit, the only conceivable manner in which Lamar could be

sued by a third party is if Lamar failed to provide it. There is no evidence in the record that there was even the potential of litigation related to the Bulletin Contract.

In regard to the Production Contract, Lamar reserved the right to unilaterally terminate the contract. Therefore, Lamar cannot be sued because its own contract allowed it to unilaterally terminate it for any reason.

There are no facts that the actions of Franklin or any other named Defendant in this lawsuit resulted in litigation with third parties or exposed Lamar to litigation with third parties. Lamar's request for attorney fees is based solely on the claim that the named Defendants involved them in the lawsuit now before this Court. This does not fall within the limited exception allowing an award of fees in equity. The request should be denied.

VI. CONCLUSION

The Lease drafted by Lamar specifically provides that it could be terminated ninety (90) days after written notice. Lamar received the notice of termination. Lamar knew prior to the notice that the Lease would be terminated and the Billboard would need to be removed. There is no language in the Lease that required Lamar's consent to terminate the Lease and remove the Billboard once the notice of termination was sent.

Lamar refused to remove the Billboard after it was terminated. In order to renovate the Subject Property, the Billboard needed to be removed. In order to safely remove the Billboard, it had to be cut up and taken off the roof. Lamar retrieved the vinyl sign and abandoned the sign components. Lamar's claim for conversion, the only substantive claim raised on appeal, is without merit. Even if conversion was established, it is limited to the value of the sign components. Lamar has not provided any evidence of its value. Since the Lease was terminated, Lamar is not entitled to future advertising revenue.

Lamar's claim that the unlawful detainer statute required an eviction was not properly raised and should not be considered by this Court. Even if considered, it has no merit. The Billboard was personal property that was not removed at the expiration of the Lease. The landlord tenant laws simply do not apply.

The remaining claims for breach of contract, tortious interference with a business expectancy, intentional interference with contractual relations, trespass and unjust enrichment were not raised as assignments of error and Lamar provided no argument or citation to authority. They have been waived on appeal. The order dismissing Spokane Housing was also not properly raised or addressed and has been waived on appeal. Even if considered, Lamar's claims are without merit as the Lease was terminated,

there was no intentional conduct or improper methods employed by any of parties to this lawsuit and no benefit retained by any parties to this lawsuit Furthermore, a manager of a limited liability company is not liable for the torts or contracts of the company.

The Superior Court's order granting Defendants' motion for summary judgment, denying Plaintiff's motion for partial summary judgment and denying Plaintiff's motion for reconsideration should be affirmed.

DATED this 17th day of December, 2010

WORKLAND & WITHERSPOON, PLLC

By:_____

Peter A. Witherspoon, WSBA #7956
Lawrence W. Garvin, WSBA #24091
Attorneys for Spokane Housing Ventures, Inc, Bel Franklin Apartments, LLC, and Bel Condominium Owners Association

APPENDIX

RCW 1.16.080

"Person" — Construction of "association," "unincorporated association," and "person, firm, or corporation" to include a limited liability company.

(1) The term "person" may be construed to include the United States, this state, or any state or territory, or any public or private corporation or limited liability company, as well as an individual.

(2) Unless the context clearly indicates otherwise, the terms "association," "unincorporated association," and "person, firm, or corporation" or substantially identical terms shall, without limiting the application of any term to any other type of legal entity, be construed to include a limited liability company.

RCW 25.15.070

Certificate of formation.

(1) In order to form a limited liability company, one or more persons must execute a certificate of formation. The certificate of formation shall be filed in the office of the secretary of state and set forth:

(a) The name of the limited liability company;

(b) The address of the registered office and the name and address of the registered agent for service of process required to be maintained by RCW 25.15.020;

(c) The address of the principal place of business of the limited liability company;

(d) If the limited liability company is to have a specific date of dissolution, the latest date on which the limited liability company is to dissolve;

(e) If management of the limited liability company is vested in a manager or managers, a statement to that effect;

(f) Any other matters the members decide to include therein; and

(g) The name and address of each person executing the certificate of formation.

(2) Effect of filing:

(a) Unless a delayed effective date is specified, a limited liability company is formed when its certificate of formation is filed by the secretary of state. A delayed effective date for a certificate of formation may be no later than the ninetieth day after the date it is filed.

(b) The secretary of state's filing of the certificate of formation is conclusive proof that the persons executing the certificate satisfied all conditions precedent to the formation.

(c) A limited liability company formed under this chapter shall be a separate legal entity.

RCW 59.12.030

Unlawful detainer defined.

A tenant of real property for a term less than life is guilty of unlawful detainer either:

(1) When he or she holds over or continues in possession, in person or by subtenant, of the property or any part thereof after the expiration of the term for which it is let to him or her. When real property is leased for a specified term or period by express or implied contract, whether written or oral, the tenancy shall be terminated without notice at the expiration of the specified term or period;

(2) When he or she, having leased property for an indefinite time with monthly or other periodic rent reserved, continues in possession thereof, in person or by subtenant, after the end of any such month or period, when the landlord, more than twenty days prior to the end of such month or period, has served notice (in manner in RCW 59.12.040 provided) requiring him or her to quit the premises at the expiration of such month or period;

(3) When he or she continues in possession in person or by subtenant after a default in the payment of rent, and after notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, served (in manner in RCW 59.12.040 provided) in behalf of the person entitled to the rent upon the person owing it, has remained uncomplied with for the period of three days after service thereof. The notice may be served at any time after the rent becomes due;

(4) When he or she continues in possession in person or by subtenant 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, including any covenant not to assign or sublet, 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, served (in manner in RCW 59.12.040 provided) upon him or her, and if there is a subtenant in actual possession of the premises, also upon such subtenant, shall remain uncomplied with for ten days after service thereof. Within ten days after the service of such notice the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform such condition or covenant and thereby save the lease from such forfeiture;

(5) When 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 (in manner in RCW 59.12.040 provided) upon him or her of three days' notice to quit;

(6) A person who, without the permission of the owner and without having color of title thereto, enters upon land of another and who fails or refuses to remove therefrom after three days' notice, in writing and served upon him or her in the manner provided in RCW 59.12.040. Such person may also be subject to the criminal provisions of chapter 9A.52 RCW; or

(7) When he or she commits or permits any gang-related activity at the premises as prohibited by RCW 59.18.130.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by the method indicated below to the following this 17th day of December, 2010.

☐ U.S. MAIL ☒ HAND DELIVERED ☐ OVERNIGHT MAIL ☐ TELECOPY (FAX)	Patrick M. Risken Sean P. Boutz Evans, Craven & Lackie, P.S. 818 W. Riverside, Suite 250 Spokane, WA 99201-0910
☒ U.S. MAIL ☐ HAND DELIVERED ☐ OVERNIGHT MAIL ☒ TELECOPY (FAX) ***206.682.2587***	William Robert Spurr Law Office of William R. Spurr 1001 4th Ave, Ste 3600 Seattle, WA 98154-1130

Lawrence W. Garvin