

No. 30333-1

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

EXCELSIOR MORTGAGE EQUITY FUND II, LLC,
an Oregon limited liability co.,
Plaintiff-Respondent,
v.
STEVEN F. SCHROEDER,
Defendant-Appellant.

BRIEF OF APPELLANT

Matthew F. Pfefer, WSBA # 31166
CARUSO LAW OFFICES
Attorneys for Defendant-Appellant Schroeder
1426 W Francis Ave. 2nd Floor
Spokane Washington 99205
(509) 323-5210

No. 30333-1

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

EXCELSIOR MORTGAGE EQUITY FUND II, LLC,
an Oregon limited liability co.,
Plaintiff-Respondent,
v.
STEVEN F. SCHROEDER,
Defendant-Appellant.

BRIEF OF APPELLANT

Matthew F. Pfefer, WSBA # 31166
CARUSO LAW OFFICES
Attorneys for Defendant-Appellant Schroeder
1426 W Francis Ave. 2nd Floor
Spokane Washington 99205
(509) 323-5210

TABLE OF CONTENTS

I. Introduction.....	1
II. Assignments of Error	2
A. Assignment of Error	2
B. Issues Pertaining to Assignments of Error	2
III. Statement of the Case	3
IV. Summary of Argument.....	6
V. Argument.....	7
A. Liquidating personal property is beyond the limited scope of the superior court’s statutory jurisdiction under an unlawful detainer summons. (The Only Assignment of Error.)	7
B. The supposed landowner has chosen not to take the necessary steps to acquire legal possession of the farm at 1184 Hodgson Road in Evans, Washington. (The Only Assignment of Error.)	10
C. Mr. Schroeder has not abandoned his belongings. (The Only Assignment of Error.)	13
D. Mr. Schroeder is entitled to his attorney fees for defending against the supposed landowner’s motion to dispose of his personal property.	20
VI. Conclusion.....	21

TABLE OF AUTHORITIES

Cases

Aldrich v. Olson, 12 Wn. App. 665, 669, 531 P.2d 825 (1975)	19
Bar K Land Co. v. Webb, 72 Wn. App. 380, 864 P.2d 435 (1993)	9
Ellis v. McCormack, 218 S.W.2d 391, 391, 309 Ky. 576 (1949)	17
First Union Mgt., Inc. v. Slack, 36 Wn. App. 849, 679 P.2d 936 (1984)	9
Granat v. Keasler, 99 Wn.2d 564, 571, 663 P.2d 830 (1983)	8
Honan v. Ristorante Italia, 66 Wn. App. 262, 269, 832 P.2d 89 (1992)	9
Hous. Auth. of City of Everett v. Kirby, 154 Wn. App. 842, ¶17 (2010)	8
Josephinium Assocs. v. Kahli, 111 Wn.App. 617, 624 (2002)	8
K & C Associates v. Airborne Freight, 20 Wn. App. 653, 655, 581 P.2d 1082 (1978)	19
Little v. Catania, 48 Wn.2d 890, 893, 297 P.2d 255 (1956)	8
Port of Longview v. Int'l Raw Mats, 96 Wn. App. 431 (1999)	10, 12
State Ex Rel. Seaborn Shipyards Co. v. Superior Court, 102 Wash. 215, 172 P. 826 (1918)	8
Tuschoff v. Westover, 65 Wn.2d 69, 395 P.2d 630 (1964)	19
Violante v. White, 26 Wn. App. 391, 392, 613 P.2d 828 (1980)	8, 9

Statutes

Chapter 7.28 RCW	9
RCW 4.84.330	20
RCW 59.12.070	8
RCW 59.12.100	11

Unlawful Detainer Act	1, 7, 10, 21
Other Authorities	
49 Am. Jur. 2d §237.....	17
49 Am. Jur. 2d, Landlord and Tenant § 237 (1997).....	17
Rules	
RAP 18.1	20

I. Introduction

In an unlawful detainer case, the Trial Court erroneously granted the supposed landowner's motion to dispose of personal property for these three reasons:

1. Liquidating personal property is beyond the limited scope of the superior court's statutory jurisdiction under an unlawful detainer summons.

2. The Plaintiff has chosen not to take the necessary steps to acquire legal possession of the farm at 1184 Hodgson Road in Evans, Washington.

3. Mr. Schroeder has not abandoned his belongings.

This Court should reverse the Trial Court's erroneous ruling and remand for the parties to pursue this dispute before a court with general jurisdiction rather than special summary statutory jurisdiction under the Unlawful Detainer Act.

Alternatively, this Court should reverse the Trial Court's erroneous ruling and remand for the supposed landowner to acquire legal possession of the farm at 1184 Hodgson Road in Evans, Washington and allow Mr. Schroeder to continue removing his belongings.

As an additional alternative, this Court should reverse the Trial Court's erroneous ruling and remand for Mr. Schroeder to continue removing his belongings unless and until he chooses to abandon them.

II. Assignments of Error

A. Assignment of Error

The Trial Court erred in granting the Plaintiff's Motion to Dispose of Personal Property. CP 140-142. The Trial Court should have denied this motion.

B. Issues Pertaining to Assignments of Error

1. Liquidating personal property is beyond the limited scope of the superior court's statutory jurisdiction under

an unlawful detainer summons.

2. The Plaintiff has chosen not to take the necessary steps to acquire legal possession of the farm at 1184 Hodgson Road in Evans, Washington.

3. Because Mr. Schroeder has not abandoned his belongings, he is still entitled to continue removing them unless and until he chooses to abandon them.

III. Statement of the Case

The Court entered an order authorizing the issuance of a writ of restitution on December 7, 2010 in this matter. CP 250-252. The supposed landowner has chosen not to have the superior court clerk issue a writ of restitution. The supposed landowner has chosen not to have the sheriff serve a writ of restitution. CP 48:19. The supposed landowner has chosen not to have the sheriff execute on the writ of restitution. CP 48:19-20.

As demonstrated by the numerous photographs

provided by Mr. Schroeder, he has spent countless hours moving his personal property from the farm. CP 54-134. He has also moved some of the belongings of other people that are on the farm as well. CP 40:14-17; 44:17-19; 45:13-21; 46:1-8, 16-21; and 47:1-11. Mr. Schroeder is definitely making a strong effort to remove his items from the farm as quickly as he can.

Even the supposed landowner admits that it would take someone five years to remove the personal belongings from the farm. CP 14:21-22.

The supposed landowner provides an estimate from a moving company which states that they would need "approximately 4 people" "for a minimum of 90 days." CP 22. This estimate specifically **excludes** "the cars and many items that we are just prohibited to move." Id. The ninety day estimate would cover less than three months. Each month has 4.3 weeks per month with 40 business

hours per week. The estimate contemplates approximately 516 hours of moving time for 4 people. If Mr. Schroeder spends 10 hours a week alone, the same moving would take over 206 weeks, almost four years. Of course, this still would not count the items excluded from the estimate.

Even this underestimates that amount of time it would take because of weather and terrain conditions. In the winter, the items outside would be frozen to the ground, stuck in place, and immovable. CP 47:16-17. During the spring thaw, the Stevens County Road Department restricts movement on the highway; and the Stevens County Road Marshall enforces this restriction. CP 47:18-20. During the spring thaw, being able to move around the farm is limited because of slippery ground conditions, especially if one is trying to carry something by hand or tow something behind a vehicle. CP 47:21-

48:2.

IV. Summary of Argument.

The Trial Court erroneously granted the supposed landowner's motion to dispose of personal property for these three reasons:

1. Liquidating personal property is beyond the limited scope of the superior court's statutory jurisdiction under an unlawful detainer summons.

2. The Plaintiff has chosen not to take the necessary steps to acquire legal possession of the farm at 1184 Hodgson Road in Evans, Washington.

3. Mr. Schroeder has not abandoned his belongings.

This Court should reverse the Trial Court's erroneous ruling and remand for the parties to pursue this dispute before a court with general jurisdiction rather than

special summary statutory jurisdiction under the Unlawful Detainer Act.

Alternatively, this Court should reverse the Trial Court's erroneous ruling and remand for the supposed landowner to acquire legal possession of the farm at 1184 Hodgson Road in Evans, Washington and allow Mr. Schroeder to continue removing his belongings.

As an additional alternative, this Court should reverse the Trial Court's erroneous ruling and remand for Mr. Schroeder to continue removing his belongings, unless and until he chooses to abandon them.

V. Argument

A. Liquidating personal property is beyond the limited scope of the superior court's statutory jurisdiction under an unlawful detainer summons. (The Only Assignment of Error.)

"An unbroken line of cases establishes that '[i]n an unlawful detainer action, the court sits as a special statutory tribunal to summarily decide the issues

authorized by statute and *not* as a court of general jurisdiction with the power to hear and determine other issues.” Hous. Auth. of City of Everett v. Kirby, 154 Wn. App. 842, ¶17 (2010) (citing Granat v. Keasler, 99 Wn.2d 564, 571, 663 P.2d 830 (1983)).

The issues authorized by statute are “limited to settling the right of possession.” Josephinium Assocs. v. Kahli, 111 Wn.App. 617, 624 (2002). If an issue is unrelated to possession of real property, it is “not properly part of an unlawful detainer action.” Id. (citation omitted).

“There are good reasons for not expanding the jurisdiction of the court in an unlawful detainer action with its 6- to 12 day summons.” Violante v. White, 26 Wn. App. 391, 392, 613 P.2d 828 (1980) (citing RCW 59.12.070, Little v. Catania, 48 Wn.2d 890, 893, 297 P.2d 255 (1956), and State Ex Rel. Seaborn Shipyards Co. v. Superior Court, 102 Wash. 215, 172 P. 826 (1918)).

“It is well settled that additional claims cannot be joined in an unlawful detainer action.” Honan v. Ristorante Italia, 66 Wn. App. 262, 269, 832 P.2d 89 (1992) (citing First Union Mgt., Inc. v. Slack, 36 Wn. App. 849, 679 P.2d 936 (1984)).

The supposed landowner could have raised and addressed the issues of possession of real estate outside of an unlawful detainer context and in manner that would allow them to bring other issues unrelated to possession of real estate before the Court. See Honan v. Ristorante Italia, 66 Wn. App. 262; Violante v. White, 26 Wn. App. 391. If the supposed landowner had chosen to proceed with a twenty-day summons and, e.g., an action for ejectment under Chapter 7.28 RCW, this Court would have the authority to address issues that are not related to possession of real estate. See Bar K Land Co. v. Webb, 72 Wn. App. 380, 864 P.2d 435 (1993) (stating

that a party can be removed from possession by means of an ejectment suit).

Instead, the Trial Court had no authority to grant the supposed landowner's motion to dispose of Mr. Schroeder's personal belongings. The Trial Court erred in granting the supposed landowner's motion without jurisdiction. This Court should reverse the Trial Court's order and remand for the parties to pursue this dispute before a court with general jurisdiction rather than special summary statutory jurisdiction under the Unlawful Detainer Act.

B. The supposed landowner has chosen not to take the necessary steps to acquire legal possession of the farm at 1184 Hodgson Road in Evans, Washington. (The Only Assignment of Error.)

In Port of Longview v. Int'l Raw Mats, 96 Wn. App. 431 (1999), the landlord filed an unlawful detainer action and received a writ of restitution signed by the Trial Court on the same day. Id. at 435. The tenant complained that

the Trial Court had issued the writ without providing the tenant with notice and opportunity to be heard. Id. at 446. The tenant's argument presupposes that the tenant has a due process right to notice and opportunity to be heard before issuance of a writ and presupposes that the issuance of a writ is significant enough to implicate these due process concerns. The Court of Appeals disagreed with these presuppositions. Id.

As the Court of Appeals noted, "the sheriff shall serve the writ of restitution 'forthwith' on the defendant, 'and shall not execute the same for three days thereafter, [not] until after the defendant has been served with summons in the action' RCW 59.12.100." Id. The statute allows the writ to "be issued ex parte." Id. When a writ is issued ex parte, the defendant has "notice of the action" as well as "an opportunity to respond before the writ will be executed." Id. On the view of the Court of

Appeals, the defendant “received notice before the writ of restitution was to be enforced.” This was significant and defeated the tenant’s due process argument in Port of Longview because a **“writ of restitution does not have any immediate effect on the tenant’s property interests.”** Id. (emphasis added).

In this case, no writ of restitution was ever issued, served, or executed on Mr. Schroeder. CP 48:19-20. Because no writ of restitution was ever issued, served, or executed on Mr. Schroeder, he remains entitled to legal possession of the farm until the supposed landowner has the Clerk issue and the Sheriff serve and execute a writ of restitution.

Because Mr. Schroeder remains in legal possession of the farm, his personal belonging on the farm remain in his possession. For this reason, he cannot have abandoned those belongings. Moreover, to the extent that

one inquires as to the reasonableness of time for his removal of those belongings, the clock for a reasonable amount of time has not even started.

Consequently, the Trial Court erred in granting the supposed landowner's motion to dispose personal property. This Court should reverse the Trial Court's erroneous ruling and remand for the supposed landowner to acquire legal possession of the farm at 1184 Hodgson Road in Evans, Washington and allow Mr. Schroeder to continue removing his belongings.

C. Mr. Schroeder has not abandoned his belongings. (The Only Assignment of Error.)

The parties to this matter have discussed only one case regarding a former occupant's forfeiture of his rights to his personal belongings. CP 33-34. In that case, coal "was mined from this property until October 1939." Ellis v. McCormack, 218 S.W.2d 391, 391, 309 Ky. 576 (1949). A "slack pile at the opening of the first mine" "remained

there until December 1946.” Id. at 392. The “slack pile,” which appears to be coal shavings, was sold and the proceeds (\$1,500.00) went to “the owner of the land.” Id.

The Ellis court said that “this is a clear case of abandonment.” Id. Abandonment “consists of two elements: (1) voluntary relinquishment of possession, and (2) intent to repudiate ownership.” Id. The Ellis court also stated that lapse “of a long time after relinquishment of possession is significant evidence of the intention to abandon. In the [Ellis] case [the lessee] did not assert ownership of this slack pile for over seven years after he left it on the premises of another.” Id.

In this matter, the parties have cited only one case regarding a former occupant’s forfeiture of his rights to his personal belongings. CP 33-34. As the discussion above notes, the holding of that case is that a former occupant continues to own his personal belongings unless or until

he **abandons** them. As shown above, the case also identifies the two elements of abandonment, namely, voluntary relinquishment of possession and intent to repudiate ownership.

“The evidence is convincing that this slack had very little, if any, value in 1939, and apparently it never occurred to appellee to claim it or wish to sell it until the coal strike in 1946 when it suddenly had some value.” Ellis, at 392.

If the landowner claims abandonment and the former occupant denies abandonment, the test to see whether the former occupant has abandoned those possessions is whether the former occupant has refrained from demonstrating his interest in and intent to keep the possessions for an unreasonable time.

“What constitutes a reasonable time is usually a question of fact to be determined by a jury, and that

question was submitted in this case. However, the facts and circumstances point so conclusively to an abandonment of the slack pile as to leave no room for a supportable contrary determination.” Id. This paragraph shows that the Ellis court denied that the facts of the Ellis case allow a jury to decide whether the former occupant had waited an unreasonable time to assert his interests.

On the facts of Ellis, the passing of seven years was an unreasonable amount of time for the former occupant to forego asserting any interest in his personal property. For this reason, the former occupant forfeited that property.

In this case, Mr. Schroeder has definitely not abandoned his possession at the farm on Hodgson Road. Not even the supposed landowner claims abandonment.

In the supposed landowner’s Motion to Dispose of

Personal Property, the supposed landowner states that, "in the context of a lease, a lessee will forfeit the right to recover their property if it is not removed from the leased premises within a reasonable time after termination of the lease." CP 5:3-5. As legal authority for that proposition, the supposed landowner cites "49 Am. Jur. 2d §237."

A "lessee may forfeit the right to recover property belonging to him by not removing it from the leased premises within a reasonable time after termination of the lease." 49 AM. JUR. 2d, Landlord and Tenant § 237 (1997). This statement depends on a footnote that says, "Ellis v McCormack, 309 Ky 576, 218 SW2d 391, holding that it was a jury question whether the lessee's failure to remove the slack pile for 7 years after termination of the lease was reasonable." Id. (footnote 15) (underlining added).

As has already been demonstrated above, Ellis

actually found on its facts that it was not a “jury question.” See page 15 above, lines 6 and following. The explanation of American Jurisprudence 2nd for the rule of this case is in error here.

The supposed landowner tries to frame the question as to whether Mr. Schroeder, the former occupant, has removed his belonging fast enough. The explanation in American Jurisprudence 2nd would tend to support this frame for the question.

As shown above, however, the case law on the issue frames the question as to whether Mr. Schroeder, the former occupant, has abandoned his belongings. This latter frame actually finds support in case law discussing this sort of situation. Additionally, the courts should be able to use well established case law on whether a lessee has abandoned her leasehold interest by analogy to address this issue. See, e.g., Tuschoff v. Westover, 65

Wn.2d 69, 395 P.2d 630 (1964). In such a case, the proponent of a claim of abandonment should also have to show such by “clear, unequivocal and decisive evidence.” Aldrich v. Olson, 12 Wn. App. 665, 669, 531 P.2d 825 (1975) (cited by K & C Associates v. Airborne Freight, 20 Wn. App. 653, 655, 581 P.2d 1082 (1978)).

For the above reasons, Mr. Schroeder encourages this Court to adopt the abandonment test from Ellis, the only case cited by either party that discusses a former occupant’s forfeiture of his belongings.

One loses one’s rights to one’s property left behind after one ceases occupancy if one **abandons** one’s property. Because Mr. Schroeder has not abandoned his property, the Trial Court erred in granting the supposed landowner’s motion. This Court should reverse the Trial Court’s erroneous ruling and remand for Mr. Schroeder to

continue removing his belongings unless and until he chooses to abandon them.

D. Mr. Schroeder is entitled to his attorney fees for defending against the supposed landowner's motion to dispose of his personal property.

Under RCW 4.84.330, a court must award the prevailing party their attorney's fees where the parties have an agreement with an attorney's fee provision. The Deed of Trust contains an attorney fee provision. CP 222. When this Court reverses the Trial Court, Mr. Schroeder will be the prevailing party. As such, he is entitled under the parties' attorneys' fee provision to recover his legal fees for defending against the supposed landowner's motion to dispose of his personal property at the trial court level. For the same reason, and under RAP 18.1, Mr. Schroeder is also entitled to his fees on appeal.

VI. Conclusion

The Trial Court erroneously granted the supposed landowner's motion to dispose of personal property for these three reasons:

1. Liquidating personal property is beyond the limited scope of the superior court's statutory jurisdiction under an unlawful detainer summons.

2. The Plaintiff has chosen not to take the necessary steps to acquire legal possession of the farm at 1184 Hodgson Road in Evans, Washington.

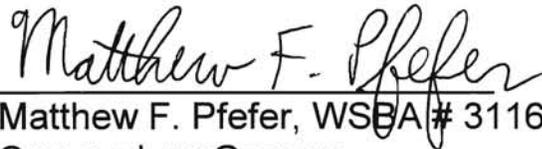
3. Mr. Schroeder has not abandoned his belongings.

This Court should reverse the Trial Court's erroneous ruling and remand for the parties to pursue this dispute before a court with general jurisdiction rather than special summary statutory jurisdiction, under the Unlawful Detainer Act.

Alternatively, this Court should reverse the Trial Court's erroneous ruling and remand for the supposed landowner to acquire legal possession of the farm at 1184 Hodgson Road in Evans, Washington and allow Mr. Schroeder to continue removing his belongings.

As an additional alternative, this Court should reverse the Trial Court's erroneous ruling and remand for Mr. Schroeder to continue removing his belongings, unless and until he chooses to abandon them.

Respectfully submitted this 6th day of February 2012.



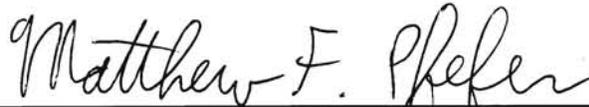
Matthew F. Pfefer, WSBA # 31166
CARUSO LAW OFFICES
Attorneys for Plaintiff/Petitioner Schroeder
1426 W Francis Ave, 2nd Floor
Spokane Washington 99205
(509) 323-5210

DECLARATION OF SERVICE

Pursuant to GR 13, I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am the attorney of record for the Plaintiff, am over the age of 18, am competent to testify, and make these statements upon my own personal knowledge.
2. I have written agreements with Phillip J. Haberthur as attorneys for Respondent allowing service by email.
3. I served the Brief of Appellant on February 6, 2012 via email to PHaberthur@schwabe.com, HDumont@schwabe.com, RHigbie@schwabe.com, and CRussillo@schwabe.com.

Signed this 6th day of February 2012 in Spokane, Washington.



Matthew F. Pfefer, WSBA #31166
CARUSO LAW OFFICES
Attorneys for Appellant
1426 W Francis Ave
Spokane WA 99205
(509) 323-5210