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Supreme Court No. 99984-8
Court of Appeals No. 373207

IN THE
WASHINGTON STATE COURT OF APPEALS
DIVISION III

MARK S. RITTS,

Appellant,

vs.

PATRICIA L. WEST and CHERYL A. RITTS, as Co-Trustees of the
Breedon Family Trust and Survivor's Trust

Respondents

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Mark S. Ritts (“Ritts”), asks this court to accept the review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Ritts seeks review of the decision of the Court of Appeals of the State of Washington, Division Three, filed April 1, 2021, involving the Respondents, Patricia L. West and Cheryl A. Ritts, as Co-Trustees of the Breeden Family Trust and Survivor’s Trust (“Trustees”). A copy of the appellate court’s unpublished opinion is attached as Appendix 1. A copy of the appellate court’s denial of Ritts’ Motion for Reconsideration is attached as Appendix 2.

C. ISSUES PRESENTED FOR REVIEW

1. Does RCW 59.12.035 prohibit a landlord from bringing an unlawful detainer action against a “holdover tenant”?

2. Does RCW 59.12.060 prohibit a landlord from bringing an unlawful detainer action against a tenant who is not in possession at the time the Complaint was filed?

3. If “yes” is the answer to either of the questions posed, should the Trustee’s unlawful detainer case should be dismissed with costs and attorney fees to Petitioner?

D. STATEMENT OF THE CASE

1. Facts

On November 3, 1997, A. Beryl Breeden and Hollis Breeden established the Breeden Family Living Trust. Under its terms, Hollis and A. Beryl were the original co-trustees and they transferred the farmland known as the Breeden Place into the Breeden Family Trust. (CP 132-144) The trust could only be amended during the joint lifetimes of A. Beryl and Hollis and, upon the death of the first spouse, the trust estate was to be divided into two trusts: a “Survivor’s Trust” established in Paragraph 6.0 of the Breeden Family Living Trust and a “Family Trust” established in Paragraph 7.0 of the Breeden Family Living Trust. (CP 135-137)

Hollis died on December 20, 2002, and the trust estate was divided into the “Survivor’s Trust” and the “Family Trust” which became irrevocable.

On April 9, 2013, the Appellant Mark S. Ritts (“Ritts”) entered into a crop share lease agreement for the Breeden Place with A. Beryl as the successor trustee of both the “Survivor’s Trust” and the “Breeden Family Trust.” (CP 18-29) Under its terms of the crop share lease, the lease was to expire either on September 30, 2017, or upon completion of harvest whichever came later.

In the fall of 2017, Ritts completed the harvest 20 days late due to factors beyond his control (i.e., the late arrival of a sub-contractor hired to fertilize property and rain occurring after only part of the land had been seeded). Still, the Trustees allowed the terms of the Lease to hold over through 2018 and permitted Ritts to retain possession of the property after he agreed to pay her \$7,000 for his failure to timely harvest the crop.

In 2018, the leased property was under conversion to a no-till drill barley crop and a spring crop was planted on part of the land while the remainder was chem-falled to be planted with winter wheat in the autumn of that year. However, the planting of the barley crop was delayed by the late arrival of the no-till sub-contractors. After planting finally began, severe rains occurred further delaying planting until the land dried out thereby causing a late crop. On October 10, 2018, one of the Trustees, Patricia L. West, (after amending the trust to appoint herself co-trustee and without any authority granted by the document) moved for a protective order in Whitman County District Court that barred Ritts from entering or being within 1,000 feet of the farm property covered by the terms of the Lease.¹ The court granted the motion and the order went into effect on

¹ A copy of this document was attached to the Declaration of Lloyd A. Herman Opposing Respondents' Motion to Dismiss Appeal Under RAP 18.9(c) as Exhibit #3: Temporary Protective Order, Whitman Co. Dist. Ct., Oct. 10, 2018.

October 24, 2018.² As a result, Ritts was unable to go onto the farm property to fulfill his contractual obligations thereby making his performance impossible. The scope of the Trustee West's protective order barred Ritts from having access to the equipment shop located on the leased farmland where he kept his farming equipment. As a result, he was unable to use his equipment and tools necessary for the planting and harvesting of wheat on his property.

Even though the Trustees had Ritts barred from the property as of October 2018, the lease remained in effect since the Trustees failed to send notice to terminate the tenancy. The Trustees filed an unlawful detainer action on December 3, 2018, in Whitman County Superior Court (Case Number 18-2-00270-38). On May 10, 2019, the Court in the unlawful detainer case considered this fact when it entered an Order stating that since Ritts "held over and retained possession of the Breeden Place for more than 60 days after expiration of the crop share lease," making him a "holdover tenant" throughout the 2019 crop season pursuant to RCW 59.12.035. (CP 66-69) The Court found the Trustees lacked authority to act on behalf of the Breeden Family Living Trust when they brought the

² A copy of this document was attached to the Declaration of Lloyd A. Herman Opposing Respondents' Motion to Dismiss Appeal Under RAP 18.9(c) as Exhibit #1: Protective Order, Whitman Co. Dist. Ct., Oct. 24, 2018.

unlawful detainer action because the trust could not be amended to appoint new trustees. (CP 64-65)

2. Procedural History of Action in Trial Court

Despite the language of RCW 59.12.035 that clearly stated, “a holdover tenant shall not be guilty of an unlawful detainer during said year,” the duly appointed Trustees filed another Summons and Complaint for Unlawful Detainer on July 5, 2019. (CP 1-11) There was a show cause hearing scheduled to be heard before the Court Commissioner on this motion on August 1, 2019. (RP 3-44) On July 31, 2019, the day before the hearing, Ritts filed an Answer and Counterclaims that included a Motion to Dismiss the Trustees’ Unlawful Detainer on grounds the court had no jurisdiction due to the Trustees’ “unauthorized unilateral actions.” (CP 54-55) On the day of the hearing, the Trustees stated the only issue before the court was possession of the property. (RP 7-8)

The court had previously found that Ritts was a holdover tenant according to RCW 59.12.035 when Ritts’ motion to dismiss for lack of possession was argued. (RP 7-8) The Commissioner did not decide these matters and continued the hearing to a later date (*i.e.*, September 5, 2019). (RP 42-43) When the hearing resumed on that date, the Commissioner ignored Ritts’ request to dismiss for lack of possession and signed a Judgment for Writ of Restitution in favor of the Trustees over Ritts’

objection to its form and substance.³ (CP 177-184; RP 79-80) The Trustees then filed a Motion for Award of Attorney's Fees and Costs on September 11, 2019. (CP 185-191). Ritts filed a Motion for Revision of the Court Commissioner's Action on September 16, 2019, with a Proposed Order granting his Motion to Dismiss filed on November 6. (CP 227-240; CP 258-262) A hearing was held for the Trustees' motion for attorney's fees and Ritts' motion for revision on November 12, 2019, during which the Trustees' motion was granted and Ritts' motions were orally denied by the Court.⁴ (CP 268-292; RP 87-101) The written Order denying Ritts' motion for revision was presented to and signed by the Court on December 19, 2019. (CP 281-283; RP 102-104). Ritts filed a Notice of Appeal with Whitman County Superior Court on January 15, 2020, which was received by the Court of Appeals, Division III on January 21, 2020.

3. Procedural History in Court of Appeals

a. Preliminary

³ Also, the Writ ordered Ritts' Counterclaims to be dismissed without prejudice. (CP 179)

⁴ The passage in the transcript of the Court's oral decision on Ritts' motion states as follows:

But [the Commissioner] did determine [the Trustees] were proper plaintiffs, and so I think he, under the record that I see, the defendant [Ritts] was a holdover tenant, and his decision was correct as a matter of law. And so, I will deny the motion for revision on the merits. (RP 100, lines 13-17)

The Trustees moved to dismiss Ritts' appeal on the grounds the issues were moot, and the Court could not provide effective relief to him. The Commissioner's Ruling dated May 28, 2020, denied the Trustees' motion after taking note of Ritts' argument that there should have been dismissal of the unlawful detainer action by the trial court based on the statutory prohibitions contained in RCW 59.12.035 and 59.12.060.

b. Decision of Court of Appeals

On April 1, 2021, Division III of the Court of Appeals of the State of Washington unanimously affirmed the trial court's decision in favor of Respondents Patricia L. West and Cheryl A. Ritts ("the Trustees") and declined to review Ritts' two arguments on appeal:

- (1) Under RCW 59.12.035, Ritts' status as a "holdover tenant" in 2019 prohibited bringing an unlawful detainer action; and
- (2) Under RCW 59.12.060, the trial court had no authority to evict Ritts because he was not in "actual occupation" of the property when the complaint was filed.

c. Motion for Reconsideration

On April 21, 2021, Ritts filed a Motion for Reconsideration of the appellate court's decision. On June 15, 2021, the appellate court's denied Ritts' motion on June 15, 2021, but did order "the last full sentence in footnote 3 on page 9" be deleted.

E. ARGUMENT: WHY REVIEW SHOULD BE ACCEPTED

1. RAP 13.4(b)

RAP 13.4(b) states a petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is **in conflict with a decision of the Supreme Court**; or
- (2) If the decision of the Court of Appeals is **in conflict with a published decision of the Court of Appeals**; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

(Emphasis added.)

The first two provisions are present in the instant case. The Appellate Court's decision conflicts with a decision of the Supreme Court and a published decision of the Court of Appeals.

a. Conflict with *Bennett v. Hardy*

The Court of Appeals' decision conflicts with the Supreme Court case of *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990). The *Bennett* court ruled that statutes not addressed at trial court but pertinent to the substantive issues which were raised below can be considered for the first time on appeal. *Id.* at 918. Here, the Court of Appeals refused to review any issues having to with RCW 59.12.035 and RCW 59.12.060 despite the fact these statutes clearly prohibited the Trustees from bringing

their unlawful detainer action in superior court and were the basis of Ritts' motion to dismiss. Like the trial court before it, the Appellate Court read the statutes but chose to ignore them on the supposed grounds they were "inadequately argued" at the trial court level. They came to this conclusion regardless of the evidence of these statutes being extensively discussed during all the trial court hearings including the one for the motion for revision on November 12, 2019. At the start of this case, Ritts alerted both the court commissioner and the superior court to the fact the Trustees' action was improper and prohibited under the statutes governing unlawful detainer and needed to be dismissed. It was also part of Ritts' motion to dismiss, which was filed on July 31, 2019, and brought up during the hearing on August 1, 2019, by the Trustees' counsel, Daniel Gibbons (who also mentioned Ritts' status as a holdover tenant under law).

MR. GIBBONS: There's only one issue that's before the Court and that's **possession of the property**. I'm not — it sounds like you don't have the answer that was filed, but **there was a motion to dismiss that was included in there**, there are a number of counterclaims, and it seems obvious that the strategy here is going to be to throw as much mud against the wall as possible, hope something sticks. But, again, the only issue is possession of the property. At the same time, despite admitting that he's been evicted, he claims that he is a **holdover tenant** and since it's farmland, **he has some type of holdover tenancy under RCW 59.12.035**.

...

And even if we play along further and accept that okay maybe **this protective order, which according to Mr. Ritts somehow bars him from getting onto the property**, I have a copy of it, and you can go over it if necessary. **It's at least ambiguous**, but it would not prevent him from farming the property anyway. But, if we play along and say okay the purpose of this lease has somehow been frustrated, that doesn't mean that Mr. Ritts gets all of the benefits and has, you know, possession of the property, or gets the property, or whatever it is he's trying to argue here. If the purpose of the agreement has been frustrated, the agreement is rescinded, so he has no right to be there at all if that is what indeed he's arguing.

(RP 7-9) (Emphasis added.)

Ritts' counsel, Lloyd A. Herman, next brought up the motion to dismiss in the context of his argument that Ritts' had been barred from the property by a protective order.

MR. HERMAN: And the critical part of that hearing which terminated the [2018] unlawful detainer proceeding makes a finding that **Mark Ritts is a holdover tenant pursuant to RCW 59.12.035 for this hearing is, this order got signed in May**. The hearing was and the oral decision was in March. Why it got delayed this long, I'm not sure. But, in any case, according to this order, by court order, **he is a holdover tenant in '19**.

...

So, those actions that she took at that time were ruled without authority, and **he was given holdover for 2019**.

THE COURT: So, is there any proper administrator of the trust at this point?

MR. HERMAN: Well, so then what happened is that unilaterally and without [A. Beryl Breedon] being represented by counsel, Ms. West had her mother declared, said she's incompetent and so, therefore, she now becomes under the terms of the trust, the trustee, along with Mrs. Ritts. So, now they're -- under that power, they've sent duplicate notice of termination in May of '19 and brought this unlawful detainer action. **The whole nexus of this whole thing turns on a protective order that was entered that I've handed up to you.**

THE COURT: Yes.

MR. HERMAN: **That excluded him from the property.**

THE COURT: Yes.

MR. HERMAN: Okay. On the property is the shop, all of his tools, combines, trucks, **all those things he's been excluded from since October of 2018.** So, he hasn't been able to farm it. Ms. West brought on another tenant farmer in September of 2018 who's left the scene, and so the farm has been sitting there because **he hasn't been able to go onto the property.**

His prior lawyer, Eric Hanson, asked the sheriff for permission to let him go on the property, and they said no we can't because of this protective order. So, he hasn't been able to farm the property. He hasn't been able to use his equipment to farm his own farm because it's all sitting there on the property, and **he's been excluded from going there.**

They've breached the lease in that sense, your Honor. They've deprived him from being able to farm it. There's still time to burn off the weeds and get a winter crop wheat planted, and we want permission, as a result of **the Superior Court order, saying that he's a 2019 holdover tenant.**

We want permission to go on the property, back on the property under the lease and, **his right to holdover,** and to put a crop in the ground. **He hasn't been able to do that and the sheriff won't let him go there.** The sheriff has told him he'll arrest him. His lawyer has told him he can't go there. **This order of protection needs to be reversed to allow him to go farm the farm.**

Now, that order of protection was brought on by Ms. West which has led to their, him not being able to perform under the lease and the breaches that they're saying they have a right to terminate him on. These breaches were self-induced by the plaintiff, not by him. He hasn't been able to do it. He hasn't been able to insure, get insurance because he doesn't have an insurable interest. His insurance company won't allow him to insure something that he doesn't have an interest in.

So, this whole thing needs to get put back in place. He needs to get back on the property. **He needs to be able to perform under his rights granted him by this Superior Court that he's a holdover tenant for 2019. He has a right to go on the property and to farm it. The only thing that's prevented him from having it is this District Court order that the sheriff says he's going to honor and not allow, and if he goes to the property, he's going to be arrested.**

I mean on the property are 500 bushels of seed wheat he can't get to. There are his tanks for gasoline and fuel that are there, his combine, his truck, his pump trailer, all of his tools for repairing his equipment. He basically shut down because **he can't get to those items in the shop,** and the shop is part of the whole operation. It's part of the lease. And **it's only fair that the Superior Court order here gets honored that he be allowed back on the property.** They've induced this breach. **He can't perform if he can't go on the property.**

Meanwhile, their tenant they came up with has left the scene. So, nothings been done to the property. **Somebody needs to get on it right away.** He has, my client, has the ability to get on it to burn off the weeds and to — it's been put into no-till drill by application with the proper authorities, and once he gets the weeds burned off, he can no-till it and get a winter wheat crop planted. So, there will be some profit brought to this trust as of next year. There's — it's pretty clear that this has been an undoing brought on by the plaintiff, not by my client. He's been always willing and able to go on the farm and farm it. He has one, he has his own farm that he's been farming. **He needs to be able to get on the ground and complete the**

rights he has under the court order for being a holdover tenant in 2019.

(RP 10-14) (**Emphasis added.**)

Later at the hearing, the Trustees' counsel Gibbons again mentioned Ritts being unable to go on the property and his holdover tenant status under RCW 59.12.035.

MR GIBBONS: "Respondent [Ritts] is **restrained from entering or being within 1,000 presumably feet of petitioner's residence and any farm ground owned or managed by petitioner** in which the respondent has no current ownership or leasehold interest."

...

Again, the — back to the statute, **59.12.035** that provides that if you have farmer tenants on the property and they stay past the term of the lease, that they get an extra year. Okay. Fine.

(RP 17 and 18) (**Emphasis added.**)

Ritts' counsel, Herman, followed up by again mentioning "the protective order prevented [Ritts] from going on the land." (RP 23) He added Ritts had "the skill, the ability, and the equipment if this protective order is lifted to go on the land" and "get a crop put in" if "he should be given possession." (RP 23) Unfortunately, this was not possible since Ritts "hasn't been allowed to go" and that the sheriff had been used to prevent his entry and another tenant to keep him "out of there." (RP 23-24)

Herman requested the court granting Ritts, as a holdover tenant, the right to go in and plant a crop. (RP 24)

The Commissioner said he would examine the matter of Ritts holdover tenancy and the content of RCW 59.12.035 and took a recess to “review the statute and be more fully apprised of what we’re dealing with here.” (RP 29-30) When he returned, he stated:

THE COURT: All right. Well, **I have looked at 59.12.035**, and you attorneys have read it. It’s quite short and quite specific. It says:

In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than sixty days after the expiration of his or her term without any demand or notice to quit by his or her landlord or the successor in estate of his or her landlord, if any there be, **he or she shall be deemed to be holding** by permission of his or her landlord or the successor in estate of his or her landlord, if any there be, and shall be entitled to hold under the terms of the lease for another full year.

(RP 32-33) (**Emphasis added.**)

Despite all this, the Commissioner did not decide on Ritts’ motion to dismiss the unlawful detainer, his holdover tenancy, and the fact he could not go on the property when he continued the hearing to September 5, 2019. (RP 42-43) However, nothing came of those issues when the hearing resumed on September 5th even though Ritts’ counsel pointed out

to the Commissioner that his client could not be “guilty of unlawful detainer” because he hadn’t “even had possession.” (RP 66) The Commissioner signed the Judgment for Writ of Restitution in favor of the Trustees despite Ritts’ objection to its form and substance. (CP 177-184)

THE COURT: All right. This was an eviction action, so I’ve tried to specify those issues which were properly before the Court. So, although it doesn’t flow as well as I would like, and I would reword it if I had the opportunity, I have inserted some language which now says this.

“There is no substantial issue of material fact as to the rights of the plaintiff as to the right to assume full possession of the property, and to affect the removal of defendant’s personal property, and to declare the lease terminated to be granted relief as prayed for in the complaint and provided by statute.”

MR. HERMAN: The termination of the lease, your Honor, is based upon certain [allegations] that we’re, that are contested. And I --

THE COURT: And I found those issues --

MR. HERMAN: -- **would object to that language.**

THE COURT: -- I found those issues contrary to your client. So, I’m going to leave that in. But I don’t -- but by that, it certainly should not be read to say that any requests for, excuse, which are not relative to the eviction are being determined at this time.

(RP 79-80) (**Emphasis added.**)

Ritts brought up the dismissal of the unlawful detainer on grounds again when he filed his Motion for Revision of the Court Commissioner’s Action on September 16, 2019, and his Proposed Order granting his Motion to Dismiss filed on November 6. (CP 227-240; CP 258-262) Nonetheless, when the hearing was held for Ritts’ motion to dismiss

November 12, 2019, Ritts' dismissal motion was orally denied by the Court. (CP 268-292; RP 87-101).

MR. HERMAN: And so, based on that, your Honor, **we've asked for a revision of the Court's, court commissioner's judgment of restitution under the unlawful detainer action and ask that this lawsuit be dismissed.** If they want to give him a --

THE COURT: **There's no motion on to dismiss.**

MR. HERMAN: **What, what's that?**

THE COURT: **There is no motion on asking the Court to dismiss.**

MR. HERMAN: Well, we're asking that that's the remedy for the failure to give proper notice.

THE COURT: Are you saying if I choose to revise the court commissioner's ruling, **the ruling I should grant is that the lawsuit would be dismissed?**

MR. HERMAN: **Yes.**

...

MR. HERMAN: Well, the order entered, the judgment of writ of restitution was entered on September 5th, filed on September 5th, your Honor. And the order adjudged and decreed as follows: that the Court has jurisdiction over the matter which it didn't because of the defective notice; the crop share lease expired September 2017 and **the holdover tenancy terminated by this Court order on August 1, 2019; the defendant, Mark Ritts, has been prohibited from entering the property since October 24, 2018,** with a substantial amount of personal property remaining on the leased premises and remains there to this day. There's no substantial issue of material fact as to the rights of the plaintiff to -- it's hard -- full possession of the property and to effect removal of the defendant's personal property. Again, relief prayed in the complaint. So, Mr. has determined to be a Ms. Breeden was determined to be incompetent. That's when that finding was made. Writ of restitution to be issued by the clerk of the court and so on. So, your Honor, the order in this, the only order issued by

the Court, other than the continuance, was this writ of restitution, judgment for writ of restitution filed September 5th. And our timely request for revision was within ten days of that, your Honor. Thank you.

THE COURT: I guess I disagree with both attorneys. I don't think that the August 1 order is the order that triggered the timeline for the motion to revise because the commissioner still had pending the issue of whether the plaintiffs were proper party plaintiffs. And until you decide that you haven't issued a final order. But he did determine they were proper plaintiffs, and so I think he, under the record that I see, **the defendant was a holdover tenant**, and his decision was correct as a matter of law. And so, I will deny the motion for revision on the merits.

(RP 92-93) and (RP 99-100) (**Emphasis added.**)

The above passages from the hearing transcripts do not even represent all the instances the issues connected to Ritts' holdover status under RCW 59.12.035 and not being in possession of the property according to RCW 59.12.060 were argued by the trial court in this case. And yet, somehow, the Court of Appeals came to the determination these issues were new and did not merit review.

2. **Appellate Court's Decision conflicts with *Roberson v. Perez and In re Adoption of T.A.W.***

Ritts does not concede any failure on his part to mention during his trial court hearings and his Motion to Revise the issues pertaining to his holdover status under RCW 59.12.035 and not being in possession of the property according to RCW 59.12.060. However, even if he did not mention them, that still would not preclude him from raising the issues on

appeal. The Court of Appeals based their refusal to consider Ritts' arguments on appeal upon the first sentence of RAP 2.5(a) which says, "The appellate court may refuse to review any claim of error which was not raised in the trial court." However, the Appellate Court neglected to consider the remainder of RAP 2.5(a) which addresses the rule's exceptions.

[A] party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) **failure to establish facts upon which relief can be granted**, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

(**Emphasis added.**)

The Supreme Court determined this meant RAP 2.5(a)(2) allows for appellants to raise for the first time on appeal an opposing party's failure to establish facts upon which relief can be granted. *Roberson v. Perez*, 156 Wn.2d 33, 39-40, 123 P.3d 844 (2005). The subsequent case of *In re Adoption of T.A.W.*, 188 Wn.App. 799, 354, P.3d 46 (2015), had Division II of the Court of Appeals further state this exception applied where proof of particular facts is required to sustain a claim. *Id.* at 807-808.

Both *Roberson* and *Adoption of T.A.W.* conflict with the Appellate Court's decision in this case since RCW 59.12.035 and 59.12.060 tie into the Trustees' failure to comply with the requirements needed to establish their unlawful detainer claim. Ritts cited both statutes but the Appellate Court ignored them by adopting its discretionary authority to not review the issues since they were supposedly not raised by the trial court. (Opinion, pgs. 7-9.). In particular, RCW 59.12.060 states that "no person other than the tenant of the premises, and subtenant, if there be one, **in the actual occupation of the premises when the complaint is filed**, need be made parties defendant in any proceeding under this chapter." (**Emphasis added.**) In other words, the tenant must be in possession at the time the complaint for unlawful detainer is filed. While Ritts contended that he had the right to possession, that is a far cry from "being in possession." Ritts was not in possession at the time the complaint was filed because the trustees had a restraining order preventing Ritts from being closer than 1000 feet from the property. The Trustees' complaint does not allege that Ritts was in possession of the property at the time the Complaint was filed on July 5, 2019. (CP 1-11) There is no Affidavit of Service stating that Ritts was in possession of the property at the time of service, nor can there be because it was of public record that Ritts was barred from being on or near the property. To summarize, the Trustees never established the

necessary facts upon which relief could be granted in their unlawful detainer action. Somehow this failure on their part got by the trial court and the Court of Appeals.

G. CONCLUSION

The Supreme Court should grant discretionary review for the reasons stated. The Appellate Court's decision in this case is a misinterpretation of RAP 2.5(a) and conflicts with the Supreme Court's holdings in *Bennett v. Hardy* and *Roberson v. Perez* and the Division II of the Court of Appeals case of *In re Adoption of T.A.W.*

RESPECTFULLY SUBMITTED this 15 day of July 2021.

LLOYD A. HERMAN & ASSOCIATES, P.S.

A handwritten signature in cursive script, appearing to read "Lloyd A. Herman", written over a horizontal line.

LLOYD A. HERMAN

WSBA # 3245

Attorney for the Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of July 2021, I caused to be served a true and correct copy of the foregoing by the method indicated below and addressed to the following:

Daniel J. Gibbons Witherspoon and Kelley 422 W. Riverside Ave., Ste. 1100 Spokane, WA 99201 Ph. (509) 624-5265 Fax (509) 458-2728	<input type="checkbox"/> PERSONAL SERVICE <input type="checkbox"/> U.S. MAIL <input type="checkbox"/> HAND DELIVERED <input type="checkbox"/> OVERNIGHT MAIL <input type="checkbox"/> TELECOPY (FAX) <input checked="" type="checkbox"/> EMAIL DJG@witherspoonkelley.com
--	--


Christopher Herman

APPENDICES

APPENDIX # 1

FILED
APRIL 1, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

PATRICIA L. WEST and CHERYL A.)	No. 37320-7-III
RITTS, as Co-Trustees of the Breeden)	
Family Trust and Survivor's Trust,)	
)	
Respondents,)	
)	UNPUBLISHED OPINION
v.)	
)	
MARK S. RITTS,)	
)	
Appellant.)	

LAWRENCE-BERREY, J. — Mark Ritts appeals after the trial court directed a writ of restitution to be issued restoring possession of the agricultural property to its owner. We affirm.

FACTS

A. Beryl Breeden was the successor trustee of the Breeden Family Trust and the Breeden Family Living Trust. The trusts owned real property, including the agricultural property that is the subject of this dispute.

Ms. Breeden has two daughters, Patricia West and Cheryl Ritts. Cheryl Ritts is the mother of Mark Ritts.

In 2013, Ms. Breeden, as successor trustee of the trusts, leased agricultural property to Mark Ritts. The lease term ended September 30, 2017, or upon completion of the 2017 harvest, whichever was later. Mr. Ritts held over more than 60 days beyond the lease term.

By October 2018, Ms. Breeden was 97 years old, had issues with her eyesight and memory, and was not capable of making her own decisions. That month, Ms. West obtained a protective order that prohibited Mr. Ritts from being within 1,000 feet of the farm property, including the building in which he stored his agricultural equipment.¹

In December 2018, Ms. West, purportedly on behalf of the trusts, commenced the first of two unlawful detainer actions against Mr. Ritts. In March 2019, a superior court commissioner heard the matter. The commissioner orally determined that Ms. West lacked the power or authority to act on behalf of the trusts. On May 10, 2019, written findings of fact and conclusions of law were entered, together with a formal order.

¹ The protective order is not part of the record, so we do not know what findings the trial court made prior to its entry. Mr. Ritts asserts his aunt refused to modify the order but does not explain why he never sought court modification.

Conclusion of law 2.4 states: “Defendant, Mark S. Ritts, is a hold over tenant pursuant to RCW 59.12.035.”² Clerk’s Papers (CP) at 69.

That month, because Ms. Breeden had dementia, Ms. West and Ms. Ritts were formally appointed cotrustees of the trusts. They promptly sent a notice of default to Mr. Ritts. The notice claimed he was in violation of nine lease covenants, including failure to farm the property in “a good and farmerlike manner.” CP at 36-37. Referencing section 11 of the lease, the notice warned Mr. Ritts that if he failed to cure the violations within 15 days, the lease would be declared forfeited. Because the protective order barred him from the property, Mr. Ritts could not timely cure the violations (unless he hired someone to farm the property for him).

² We quote RCW 59.12.035 in its entirety, italicizing language we later refer to in this opinion and underlining language relied on by Mr. Ritts in his appeal:

In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than sixty days after the expiration of his or her term without any demand or notice to quit by his or her landlord or the successor in estate of his or her landlord, if any there be, he or she shall be deemed to be holding by permission of his or her landlord or the successor in estate of his or her landlord, if any there be, and shall be entitled to hold under the terms of the lease *for another full year, and shall not be guilty of an unlawful detainer during said year*, and such holding over for the period aforesaid shall be taken and construed as a consent on the part of a tenant to hold *for another year*. (Emphasis added.)

On June 14, 2019, the cotrustees sent Mr. Ritts a written confirmation of the termination of the lease. The notice said that Mr. Ritts had failed to timely cure the defaults and the lease was forfeited.

On July 5, 2019, the cotrustees filed a second complaint for unlawful detainer against Mr. Ritts. They asserted that Mr. Ritts had defaulted under the lease yet remained in unlawful possession and requested a writ of restitution to restore possession to them. Mr. Ritts answered the complaint by asserting he had been declared a holdover tenant in the first unlawful detainer action, that the October 2018 protective order was illegal because Ms. West had no legal authority to bar him from the property, and he requested the trial court to restore possession to him.

On August 1, 2019, the court commissioner once again heard the parties' arguments. The commissioner modified the protective order to permit Mr. Ritts to harvest the barley but continued the hearing for evidence of Ms. Breeden's competency to determine whether the cotrustees had properly replaced her. The cotrustees filed and served pleadings prior to the continued hearing that established that Ms. Breeden indeed was incompetent.

On September 5, 2019, the commissioner issued an order granting a writ of restitution. The order stated in pertinent part:

2. The Crop Share Lease expired in September of 2017, and any holdover tenancy was terminated by this court's order on August 1, 2019.

3. . . . Mark L. Ritts has been prohibited from entering the property since October 24, 2018 but a substantial amount of his personal property remained on the leased premises and remains there to this day.

4. There is no substantial issue of material fact as to the rights of Plaintiffs as to the right to reassume full possession of the property and to effect the removal of the Defendant's personal property and to declare the lease terminated . . . ;

5. Ms. Breeden has been determined to be incompetent and the Plaintiffs are the proper successor trustees.

6. A Writ of Restitution shall be issued . . . evicting Defendant and any current occupants of said premises; PROVIDED, that Defendant may enter onto the property up through midnight on October 13, 2019 for the limited purpose of removing any or all of his personal property.

. . . .

11. The Court reserves jurisdiction to consider fees, costs and sanctions

CP at 178-79.

On September 11, 2019, the cotrustees filed their request for attorney fees and costs in the amount of \$12,272.53. Soon after, the county clerk issued the writ directing the sheriff to restore the premises to the cotrustees.

On September 16, 2019, Mr. Ritts filed a motion for revision. In his written pleading, he raised two arguments: (1) the notice of default was improper and (2) the cotrustees' complaint was moot because the cotrustees were in possession. He does not raise the first argument on appeal. He did raise the second argument, but only briefly in the following sentence:

In this case, revision by the Court is necessary due to the Commissioner's failure to consider that [sic] fact the Plaintiffs already had possession of the property so their complaint for unlawful detainer was moot and should have been dismissed.

CP at 229.

At the revision hearing, Mr. Ritts told the court that possession was at issue, and he raised only his first argument—that the notice of default was improper:

[Your May 2019] order found that Ms. [West] didn't have authority to act as a trustee [and on that basis the] unlawful detainer action [was] dismissed.

[B]efore your ruling came down, in October of '18, Ms. West went to District Court and got a protective order denying Mr. Ritts' [sic] access to any properties that she managed for the trust which involved the very property that she was leasing to him under the trust. Based upon your order that was entered in May of '19, she had no authority to . . . manage the trust.

That District Court order really lacks the same legality that her unlawful detainer action brought, but they continued to enforce that against Mr. Ritts and bar him from the property—the farm that he had a lease.

[Y]our 2019 May order gave Mr. Ritts a right to hold, to be a holdover tenant for 2019. *So, he had a holdover right to farm the land in 2019* [but] they were enforcing the protective order preventing him from going on the property. All of his, [much] of his equipment, tools that he gathered over 20 years are still there on the property, and *Mr. Ritts always maintained he had a right to possession, but they wouldn't let him farm it.*

[Mr. Ritts then makes his legal argument that the notice of default was improper, and the action must therefore be dismissed.]

So, that's exactly where we're at in this case, your Honor. My client has tried to get possession. . . . We tried to get the court commissioner to

give him possession. . . . *So, the entire case turns [on] whether there was a proper notice.*

Report of Proceedings (RP) (Nov. 12, 2019) at 88-91 (emphasis added).

The trial court disagreed with Mr. Ritts's notice argument, agreed with the court commissioner's decision, denied revision, and granted the cotrustees' request for attorney fees and costs. It later entered an order granting attorney fees and costs.

Mr. Ritts timely appealed.

ANALYSIS

Mr. Ritts raises two arguments on appeal. Citing RCW 59.12.035, he argues his status as a "holdover tenant" in 2019 prohibited his eviction. Next, citing RCW 59.12.060, he argues the trial court had no authority to evict him because he was not in "actual occupation" of the property when the complaint was filed. We decline to review either of these unpreserved claims of error.

Our Supreme Court has explained the rule of error preservation:

The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal This standard comes from RAP 2.5(a), which permits a court to refuse to consider claimed errors not raised in the trial court, subject to certain exceptions. . . .

The purpose underlying our insistence on issue preservation is to encourage "the efficient use of judicial resources." *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Issue preservation serves this purpose by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals.

State v. Robinson, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011).

Mr. Ritts's first argument on appeal focuses on language in RCW 59.12.035 that arguably prohibits an unlawful detainer action from being brought against a holdover tenant. *See* underlined statutory language quoted in footnote 2, *supra*. Mr. Ritts did not raise this argument in his written revision motion. During the revision hearing, he did argue he was a holdover tenant during 2019 and had a right of possession. But he never raised the argument he now raises on appeal, that RCW 59.12.035 *prohibits* an unlawful detainer action from being brought against a holdover tenant. The revision court did not rule on the issue Mr. Ritts now raises because Mr. Ritts did not argue it below. For this reason, we will not review it on appeal.

Mr. Ritts's second argument on appeal focuses on language in RCW 59.12.060 that arguably requires a tenant to be in "actual occupation" when an unlawful detainer action is commenced. He very briefly alluded to this argument in his written revision motion by stating that the action was moot because the cotrustees were in possession. He did not cite RCW 59.12.060 in that argument or any case authority. During the revision hearing, he did not discuss or develop this argument. We may decline to consider an issue that was inadequately argued below. *State v. Lazcano*, 188 Wn. App. 338, 355, 354 P.3d 233 (2015). To be adequate for appellate review, the argument below should have

been more than fleeting. *Id.* The revision court did not rule on the issue Mr. Ritts now raises because Mr. Ritts so cursorily and vaguely argued it in his written motion. For this reason, we will not review it on appeal.³

Attorney fees and costs

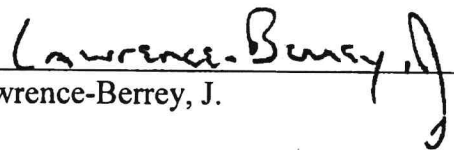
Both parties request an award of reasonable attorney fees and costs, and both rely on the contractual attorney fee clause in the lease. Subject to their compliance with RAP 18.1(d), we grant the cotrustees' request for reasonable attorney fees and litigation costs.

³ We note that Mr. Ritts's status as a holdover tenant expired one year after the lease terminated in late 2017. *See* italicized statutory language quoted in footnote 2, *supra*. For this reason, Mr. Ritts did not have any legal basis to remain on the property in 2019. Although the May 2019 order in the first unlawful detainer action concluded that Mr. Ritts "is a hold over tenant," the tense is likely a scrivener's error. CP at 69.

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Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Lawrence-Berrey, J.

WE CONCUR:


Fearing, J.


Staab, J.

APPENDIX # 2

LLOYD A HERMAN & ASSOCIATES

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Transmittal Information

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