Rental Housing Issues – Tom McGarry and Jose Trejo

1) **Eviction Process**
    - Notice
    - Service
    - Costs
    - UD Docket
    - Show Cause Hearing

2) **Habitability**

a)

- What kind of inspections are permitted under state law? RCW 59.18.125
- Should inspection requirements be waived if they can provide a Section 8 inspection report?
- Can landlords inspect under 59.18.150 with 2 days-notice for no specific reason?
    - RCW 59.18.150 (6) What is reasonable?

Habitability can be a partial defense to an eviction, **Foisy v. Wyman**, 83 Wash.2d 22, 32, 515 P.2d 160 (1973), but diminished rental value is almost never 100%. Attorney fees can still be collected even if judgment is minimal.

b)

- What are tenant remedies?

Practical application under the RCW 59.18.090-59-18-120

City charges $175 for inspection – effect on 59.18.115(2)(b).

3) **Condemnation and Relocation costs. RCW 59.18.085**
- No funds in city budget to pay for relocation.
- City authorized to recover costs, plus interest, in addition to civil penalties after 60 days of $50 per day. **Pham vs. Corbett**, *187 Wn. App. 816*; *351 P.3d 214*; *2015*

4) **Good Cause Evictions**

5) **Mental Health Issues**
- Reasonable Accommodations
- Companion animals
- Continuous evictions related to mental health issues.

6) **Late Charges, Charges for Service, and Related Issues.**

7) **Nuisance statutes in general**

Foisy v. Wyman

83 Wn.2d 22 (1973)

515 P.2d 160

RONALD D. FOISY et al., Respondents, v. RICHARD KENT WYMAN, Appellant.

No. 42605.

The Supreme Court of Washington, En Banc.

October 25, 1973.

John Gant, for appellant.

Thomas J. Isaac, for respondents.

Edwards E. Merges, amicus curiae.

HUNTER, J.

This is an unlawful detainer action in which the plaintiff (respondent), Ronald D. Foisy, is seeking the possession of his real property, unpaid rent and damages. The defendant (appellant), Richard Kent Wyman, appeals from a judgment in favor of the plaintiff.

In his complaint, the plaintiff alleged in effect: (1) That on December 31, 1970, the defendant took possession of a house which the plaintiff is seeking to recover, pursuant

$200 still owing for the 6-month period; (3) that the defendant remained upon the premises after the expiration of the lease; (4) that the rental payment after the expiration of the lease was to be $75 per month; (5) that after the defendant refused to pay the accrued rent, the plaintiff served a 3-day notice to pay rent or vacate upon the defendant on August 27, 1971; (6) that the defendant failed to pay any of the amounts owing after the 3-day notice was served upon him.

The defendant's answer raised several affirmative defenses including breach of implied warranty of habitability.

During trial the defendant testified that he took possession of the house on March 3, 1971. It appears that the *24 parties executed the lease in question on March 8, 1971, although the lease was dated December 31, 1970, and was to cover a term of 6 months, which was to commence on January 1, 1971, and end on June 30, 1971.

The lease in question also contained an option to purchase. The testimony of the defendant indicates that he thought he was purchasing the house rather than renting it. His testimony also indicates that the house contained a number of defects when he entered into the lease and it indicates that he was aware of some of the defects when he agreed to rent the house, but not all of them.

The trial court concluded that the defendant was guilty of unlawful detainer of the premises rented to him by the plaintiff. However, it refused to enforce the provisions of what it termed the "purported lease." It found that the reasonable rental for the period of occupancy of the premises was the sum of $50 per month commencing with March 3, 1971, until such time as the defendant removed himself. In effect, the court held the lease was invalid. The court also held that a writ of restitution should issue to the sheriff to require the surrender of possession if the defendant did not voluntarily withdraw and that damages for the period March 3, 1971, through April 3, 1972, were to be doubled if the defendant did not surrender the premises by April 3, 1972. The defendant appeals, although the plaintiff does not cross-appeal from the court's findings.

The primary contention raised by the defendant is that the trial court erred in refusing to accept evidence as to his affirmative defense of breach of implied warranty of habitability. The defendant argues that the plaintiff's failure to maintain the premises in a habitable condition constitutes a failure of consideration upon the part of the plaintiff and relieves the defendant of his obligation to pay rent. We agree that the tenant should have been permitted to introduce evidence at trial in support of this theory of defense.

23 door, water running through the bedroom, an improperly seated and leaking toilet, a leaking sink in the bathroom, broken water pipes in the yard and termites in the basement. No objection was made to the introduction of this testimony. The testimony of the defendant also indicates that he painted the interior and made repairs upon the premises, but ceased making repairs when he learned of a municipal court action being initiated against the plaintiff as a result of numerous housing code violations within the house. In addition, the record reveals that the landlord was informed of the defects and was prosecuted successfully for violations of the Seattle housing code.

During the trial the defendant attempted to introduce the testimony of two housing inspectors as to the housing code violations which existed on the premises. The trial court sustained the plaintiff's objections to this testimony upon the theory that the condition of the premises was not relevant to the issue before the court. We disagree with the reasoning of the trial court in refusing to accept the evidence as to the condition of the premises, although it should be stated that this issue has not been heretofore specifically addressed in this jurisdiction in relation to our unlawful detainer statutes.

Throughout the United States, the old rule of caveat emptor in the leasing of premises has been undergoing judicial scrutiny.

In Pines v. Perssion, 14 Wis.2d 590, 596, 111 N.W.2d 409 (1961), the court stated:

To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliche, caveat emptor. Permitting landlords to rent "tumble-down" houses is at least a contributing cause of such problems as urban blight, juvenile delinquency, and high property taxes for conscientious landowners.

See Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 *26 (1969); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Lemle v. Breeden, 51 Hawaii 426, 462 P.2d 470 (1969); Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.1970), cert. denied, 400 U.S. 925, 27 L. Ed. 2d 185, 91 S. Ct. 186 (1970), and Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

In Lemle v. Breeden, supra, the court reviewed the rule of caveat emptor and the current trend toward finding an implied warranty of habitability in leases, and stated on page 433:

sale as well as a transfer of an estate in land and is, more importantly, a contractual relationship. From that contractual relationship an implied warranty of habitability and fitness for the purposes intended is a just and necessary implication. It is a doctrine which has its counterparts in the law of sales and torts and one which when candidly countenanced is impelled by the nature of the transaction and contemporary housing realities. Legal fictions and artificial exceptions to wooden rules of property law aside, we hold that in the lease of a dwelling house, such as in this case, there is an implied warranty of habitability and fitness for the use intended.

(Footnote omitted.)

In Javins v. First Nat'l Realty Corp., supra, the court analyzed the various exceptions to the common-law rule that the lessor has no duty to repair and stated on page 1078:

These as well as other similar cases demonstrate that some courts began some time ago to question the common law's assumptions that the land was the most important feature of a leasehold and that the tenant could feasibly make any necessary repairs himself. Where those assumptions no longer reflect contemporary housing patterns, the courts have created exceptions to the general rule that landlords have no duty to keep their premises in repair. It is overdue for courts to admit that these assumptions are no longer true with regard to all urban housing. *27 Today's urban tenants, the vast majority of whom live in multiple dwelling houses, are interested, not in the land, but solely in "a house suitable for occupation." Furthermore, today's city dweller usually has a single, specialized skill unrelated to maintenance work; he is unable to make repairs like the "jack-of-all-trades" farmer who was the common law's model of the lessee. Further, unlike his agrarian predecessor who often remained on one piece of land for his entire life, urban tenants today are more mobile than ever before. A tenant's tenure in a specific apartment will often not be sufficient to justify efforts at repairs. In addition, the increasing complexity of today's dwellings renders them much more difficult to repair than the structures of earlier times. In a multiple dwelling repair may require access to equipment and areas in the control of the landlord. Low and middle income tenants, even if they were interested in making repairs, would be unable to obtain any financing for major repairs since they have no long-term interest in the property.

(Footnotes omitted.)

[1, 2] We find the reasoning of these cases extremely persuasive. Any realistic analysis of the lessor-lessee or landlord-tenant situation leads to the conclusion that the tenant's promise to pay rent is in exchange for the landlord's promise to provide a livable dwelling.

known package of goods and services a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.

(Footnote omitted.) Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.1970), cert. denied, 400 U.S. 925, 27 L. Ed. 2d 185, 91 S. Ct. 186 (1970). The value of the lease today then, whether it is oral or written, is that it gives the tenant a place to live, and he expects not just space but a dwelling that protects him from the elements of the environment without subjecting him to health hazards.

In House v. Thornton, 76 Wn.2d 428, 457 P.2d 199 (1969), *28 we rejected the doctrine of caveat emptor as it applied to the sale of a new residence and found an implied warranty that the structure is fit for the buyer's intended purpose. In doing so, we noted that the old rule of caveat emptor has little relevance to the sale of a brand-new house by a vendor-builder to a first buyer for the purposes of occupancy. By analogy, the old rule of caveat emptor has little relevance to the renting of premises in our society. There can be little justification for following a rule that was developed for an agrarian society and has failed to keep pace with modern day realities. We therefore hold that in all contracts for the renting of premises, oral or written, there is an implied warranty of habitability and breach of this warranty constitutes a defense in an unlawful detainer action. See Javins v. First Nat'l Realty Corp., supra; Lund v. MacArthur, 51 Hawaii 473, 462 P.2d 482 (1969); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

It can be argued, however, that the defendant should not be entitled to the protection of an implied warranty of habitability since he knew of a substantial number of defects when he rented the premises and the rent was reduced from $87 per month to $50 per month. We believe this type of bargaining by the landlord with the tenant is contrary to public policy and the purpose of the doctrine of implied warranty of habitability. A disadvantaged tenant should not be placed in a position of agreeing to live in an uninhabitable premises. Housing conditions, such as the record indicates exist in the instant case, are a health hazard, not only to the individual tenant, but to the community which is exposed to said individual. As the court recognized in Pines v. Perssion, supra, such housing conditions are at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for the conscientious landowners.

Our belief that public policy demands such a result is reinforced by our review of Laws of

demands this result. Laws of 1973, 1st Ex. Sess., ch. 207, provides in part:

Sec. 6. The landlord will at all times during the tenancy keep the premises fit for human habitation, and shall in particular: (1) Maintain the premises to substantially comply with any applicable code, statute, ordinance, or regulation governing their maintenance or operation, which the legislative body enacting the applicable code, statute, ordinance or regulation could enforce as to the premises rented; (2) Maintain the roofs, floors, walls, chimneys, fireplaces, foundations, and all other structural components in reasonably good repair so as to be usable and capable of resisting any and all normal forces and loads to which they may be subjected; ... (5) Except where the condition is attributable to normal wear and tear, make repairs and arrangements necessary to put and keep the premises in as good condition as it by law or rental agreement should have been, at the commencement of the tenancy; ... (7) Maintain all electrical, plumbing, heating, and other facilities and appliances supplied by him in reasonably good working order; (8) Maintain the dwelling unit in reasonably weathertight condition; ... (10) Except where the building is not equipped for the purpose, provide facilities adequate to supply heat and water and hot water as reasonably required by the tenant; ... Sec. 8. The tenant shall be current in the payment of rent before exercising any of the remedies accorded him under the provisions of this chapter: PROVIDED, That this section shall not be construed as limiting the tenant's civil remedies for negligent or intentional damages: PROVIDED FURTHER, That this section shall not be construed as limiting the tenant's right in an unlawful detainer proceeding *30 to raise the defense that there is no rent due and owing. ... Sec. 10.... ... (6) Nothing in this section shall prevent the tenant from agreeing with the landlord to undertake the repairs himself in return for cash payment or a reasonable reduction in rent, the agreement thereof to be agreed upon between the parties, and such agreement does not alter the landlord's obligations under this chapter.

It may also be argued that the defendant should not be afforded the protection of the doctrine of implied warranty of habitability since the defendant signed a lease which contained an option to purchase. However, as heretofore stated, the trial court failed to recognize the validity of the lease. There is no cross-appeal from this determination and we are therefore bound by the trial court's decision.

The plaintiff argues that the trial court was correct in disregarding the Seattle housing code as it was improperly pleaded and no properly authenticated copy of the housing code was offered. These issues were not before the court when it rejected the testimony of the housing inspectors. It was not until after the court had rejected the testimony of the housing inspectors on the basis of their testimony being irrelevant that the housing code

his pleadings. The argument as to the housing code not being properly authenticated, we believe, is without merit in view of RCW 5.44.080 which states:

When the ordinances of any city or town are printed by authority of such municipal corporation, the printed copies thereof shall be received as prima facie evidence that such ordinances as printed and published were duly passed.

The copy of the housing code that was offered into evidence by the defendant is printed by authority of the City *31 of Seattle and is therefore prima facie evidence that the ordinances as printed and published were duly passed.

[3] The testimony relating to the housing code violations should have been admitted into evidence, and the trial court erred in ruling that the condition of the premises was not relevant to the issue of rent due and owing. While the housing code violations in and of themselves do not establish a prima facie case that the premises are uninhabitable, they are evidence which aids in establishing that the premises are uninhabitable.[1]

The plaintiff argues, in effect, however, that the unlawful detainer statutes are not designed for defenses such as breach of implied warranty of habitability due to the nature of the action. In light of our previous discussion, we believe this to be without merit.

One of the basic issues in an unlawful detainer action of this nature is whether or not there is any rent due. RCW 59.12.170, which governs the entry of judgment and execution in an unlawful detainer action, states that upon a finding of default in the payment of rent, "the judgment shall also declare the forfeiture of the lease, agreement or tenancy." RCW 59.12.030 provides:

A tenant of real property for a term less than life is guilty of unlawful detainer either: ... (3) When he 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 ...

Since the affirmative defense of breach of implied warranty of habitability goes directly to the issue of rent due *32 and owing, which is one of the basic issues in an unlawful detainer action as the above statutes indicate, we now hold said defense is available in an unlawful detainer action of this nature. See Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

[4] The defendant also contends that the trial court erred in rendering judgment in the

In Provident Mut. Life Ins. Co. v. Thrower, 155 Wash. 613, 617, 285 P. 654 (1930), we stated:

As to the form and contents of the notice or demand, a substantial compliance with the statute is sufficient.

See Sowers v. Lewis, 49 Wn.2d 891, 307 P.2d 1064 (1957). See also Erz v. Reese, 157 Wash. 32, 288 P. 255 (1930) (wherein we stated on page 35 that "we have never adopted the strictest rule of construction as to the form or contents of such notices under our unlawful detainer statutes, chiefly for the reason, doubtless, that the statutes prescribe no form."). In the Provident Mutual case the notice was defective in three respects: (1) It contained the signature of the agent rather than the owner; (2) it overstated the amount of rent due by $165 as found by the trial court; and (3) it defectively described the premises. Although we did not specifically address the issue of the overstatement of the amount of rent due, we did hold the notice substantially complied with the requirements of Rem. Comp. Stat. § 812 (now RCW 59.12.030).

In the instant case, the 3-day notice to pay rent or vacate the premises that was served upon the defendant called for the payment of $205, the balance due under the lease, plus $75 per month for July and August. There was no dispute as to the monthly rental payment under the terms of the purported lease; however, there was a conflict as to the amount of the monthly rental due for the months of July and August. The plaintiff testified the rent for those months was to be $75 per month, and the defendant testified that it *33 was to be $50 per month. It appears that the plaintiff's demand for rental in the notice was in conformity with his good faith determination as to the amount of rental due, and that the defendant was not prejudiced as he could have tendered to the plaintiff the amount of rental due according to his understanding of the agreement. See C.J. Peck, Landlord and Tenant Notices, 31 Wash. L. Rev. 51, 61 (1956). In tendering the amount due to the plaintiff, of course, he would deduct that amount due which he believed he was relieved from paying due to the landlord's breach of his implied warranty of habitability.

We believe that under the above facts, the plaintiff's demand for rental was in substantial compliance with the statute and the fact that there was a dispute as to the amount of rent due, which was later determined contrary to the plaintiff, should not invalidate the unlawful detainer proceeding.

The defendant also contends that the portion of RCW 59.12.170, which authorizes the

[5] We need not reach this issue in light of the passage of the "Residential Landlord-Tenant Act of 1973" (Laws of 1973, 1st Ex. Sess., ch. 207), which eliminated the mandatory double damage provision from the law.

Where substantial legislative or decisional changes in the applicable statutory provisions have been made, thereby precluding the imposition of the challenged provision, the constitutional issue need not be resolved. Grays Harbor Paper Co. v. Grays Harbor County, 74 Wn.2d 70, 442 P.2d 967 (1968); State School Directors Ass'n v. Department of Labor & Indus., 82 Wn.2d 367, 510 P.2d 818 (1973). See also State v. Vidal, 82 Wn.2d 74, 508 P.2d 158 (1973); State v. Baker, 81 Wn.2d 281, 501 P.2d 284 (1972).

As we stated in Sorenson v. Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972):

It is a general rule that, where only moot questions or *34 abstract propositions are involved, or where the substantial questions involved in the trial court no longer exist, the appeal, or writ of error, should be dismissed. There is an exception to the above stated proposition. The Supreme Court may, in its discretion, retain and decide an appeal which has otherwise become moot when it can be said that matters of continuing and substantial public interest are involved.... This exception to the general rule obtains only where the real merits of the controversy are unsettled and a continuing question of great public importance exists.

(Citations omitted.)

Given the passage of the new landlord-tenant act and the absence of any actual trial court imposition of double damages in the instant case, the exception to the above rule is not in force and we therefore need not comment further upon this issue.

[6] For the guidance of the trial court at the new trial to which the defendant is entitled, the finder of fact must make two findings where the defendant claims the landlord has breached his implied warranty of habitability: (1) Whether the evidence indicates that the premises were totally or partially uninhabitable during the period of habitation and, if so, (2) what portion, if any or all, of the defendant's obligation to pay rent is relieved by the landlord's total or partial breach of his implied warranty of habitability. If the finder of fact determines that the entire rental obligation is extinguished by the landlord's total breach, then the action for unlawful detainer based on nonpayment of rent must fail. If, on the other hand, the court determines that the premises are partially habitable, and the tenant failed to tender to the plaintiff a sufficient amount to pay rent due for the partially

consistent with this opinion.

HALE, C.J., and ROSELLINI, HAMILTON, STAFFORD, and UTTER, JJ., concur.

*35 BRACHTENBACH, J. (dissenting)

Ignoring the defendant's own testimony, the majority casts this dispute into a traditional landlord-tenant battle and from that relationship creates an implied warranty of habitability. That creation might well be a desirable change in Washington law, but this simply is not the case in which it should be implemented.

The majority's application of such a warranty to the defects presented in this case and even its characterization of the defendant as a mere "tenant" are unsound in light of the defendant's testimony, elicited by his own counsel:

Q. And what was the agreement between you and the Foiseys [sic] relating to the purchase of that house? A. The agreement was that I was to pay $50 a month to buy the house ... Q. So, it was your understanding that the agreement was that you were to buy the house for $50 a month? A. That was my understanding ... Q. At the time you moved in, were there defects on the premises? A. All kinds but I tried my best to bring them up to some remedy of standard ... Q. What was your understanding as to what you had to do to exercise the option? A. My understanding was to clean the house up and fix it up to some degree. Q. So, in other words, you thought that A. Take care of it like a regular home owner. I figure it was mine and I was going to try to do the best I could but I run into all kinds of difficulty with the permit ... Q. So, it was your understanding that you were purchasing the house and that is your only obligation to pay $50 a month? A. That was the whole understanding at the conception of the deal because her mother told me [objection]. Q. So, the only time prior to March you were on the premises was to just look at it? A. Right. I told them I would buy and they said fine. They put me in it for $50 a month. Q. Had you done any work cleaning up the house or anything around the premises before you moved in on [sic] March? A. Oh, yes, I had to. Q. Before you moved in? A. Right, I had to. In the basement there was termites and there was things. Q. When were you doing those things? A. In February . .. Q. At that time did you have any agreement with the Foiseys [sic] as to whether or not you were going to purchase it? A. I had the agreement before I walked in *36 that house. That's when they told me you can have it for $50 a month. They wanted $87 a month. I said it isn't worth it because it's sitting still and the windows are out. [Interruption.] Q. That understanding was that you

I saw a deal and I grabbed it ... Q. As far as you were concerned, you never received any word that you were anything but a purchaser, is that right? A. To my knowledge, that was the only way I would have gone into that house as a purchaser. What would I want to rent it for I had a house of my own.

From that testimony it is perfectly clear that the defendant was fully aware of the defects and deficiencies in the premises. Those defects and deficiencies were the very reason he was willing and able to negotiate lower payments.

It requires no authority to sustain the proposition that a person who takes possession of premises with known defects, intends to repair those defects, bargains for reduced monthly payments and characterizes the transaction as a "deal" which he "grabbed," neither deserves nor needs the protection of an implied warranty of habitability.

The fact of the matter, apparent from the record, is that the defendant encountered difficulties with his continued, anticipated repairs when the housing code violations pending against the plaintiffs came to light. That situation might give rise to other remedies, but they are not asserted here.

But apart from the foregoing, and even if the defendant is to be characterized as a tenant in the strict legal sense of that word, the majority fails to recognize that the Seattle housing code was not properly before the trial court.

In his answer, affirmative defense and counterclaim, the defendant alleged violations of the provisions of the housing, building, fire, health and sanitation codes of the City of Seattle. Such shotgun pleading is a clear violation of CR 9 (i). At the time of trial, absolutely no proof of the housing code was provided, except to offer an unauthenticated, unidentified booklet entitled "Housing Code, City of Seattle." *37 The trial court, on that ground alone, correctly rejected testimony about violations of a city ordinance which had not been properly pleaded, properly authenticated or properly identified.

The trial court should be affirmed.

WRIGHT, J., concurs with BRACHTENBACH, J.

RYAN, J.[*] (concurring in the result of the dissent)

However desirable the majority's endorsement of the doctrine of implied warranty of habitability may be, this is not a proper case for its application.

NOTES

[1] Evidence of one or two minor infractions of a housing code which do not affect habitability are inconsequential and would not entitle the tenant to a reduction in rent. Also, the tenant's defense does not depend on official inspection or official finding of violations of a city housing code. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.1970), cert. denied, 400 U.S. 925, 27 L. Ed. 2d 185, 91 S. Ct. 186 (1970); Diamond Housing Corp. v. Robinson, 257 A.2d 492 (D.C. Cir.1969).

[*] Justice Ryan is serving as a justice pro tempore of the Supreme Court pursuant to Const. art. 4, § 2(a) (amendment 38).

LANG PHAM, *Appellant*, v. SHAWN CORBETT ET AL., *Respondents*.

No. 70956-9-I

COURT OF APPEALS OF WASHINGTON, DIVISION ONE

187 Wn. App. 816; *351 P.3d 214*; *2015 Wash. App. LEXIS 1076*

January 21, 2015, Oral Argument
May 26, 2015, Filed

PRIOR-HISTORY: Appeal from King County Superior Court. Docket No: 13-2-20222-1. Judge signing: Honorable Judith H Ramseyer. Judgment or order under review. Date filed: 09/17/2013.

SUMMARY:

WASHINGTON OFFICIAL REPORTS SUMMARY

Nature of Action: A landlord sought to evict tenants by an action for unlawful detainer. The tenants counterclaimed for relocation assistance and asserted the defenses of setoff and breach of the implied warranty of habitability.

Superior Court: Based on a finding that the landlord breached the implied warranty of habitability, the Superior Court for King County, No. 13-2-20222-1, Judith H. Ramseyer, J., on September 17, 2013, awarded the tenants damages and relocation assistance.

Court of Appeals: Holding that the tenants could plead breach of the implied warranty of habitability as a defense to the landlord's unlawful detainer claim, that the tenants could properly counterclaim for statutory relocation assistance, and that the tenants were entitled to take an offset against past due rent by the amount they prepaid for the last month's rent, the court *affirms* the trial court's award to the tenants.

COUNSEL: *Evan L. Loeffler*, *Christopher D. Cutting*, and *Jeana K. Poloni* (of *Loeffler Law Group PLLC*), for appellant.

Elisabeth Pualani Lindsley; and *Gary Manca* (of *Manca Law PLLC*), for respondents.

Steven R. Rovig and *Jacob M. Wicks* on behalf of King County Bar Association, amicus curiae.

JUDGES: Authored by Michael S. Spearman. Concurring: Mary Kay Becker, Linda Lau.

OPINION BY: Michael S. Spearman

OPINION

¶1 SPEARMAN, C.J. -- Landlord Lang Pham brought this unlawful detainer action against tenants Shakia Morgan and Shawn Corbett (Tenants). The Tenants counterclaimed for relocation assistance under *RCW 59.18.085* and raised defenses of setoff and breach of implied warranty of habitability. The trial court found that Pham had breached the implied warranty and awarded damages and relocation assistance to the Tenants. Pham appeals, disputing the trial court's findings of fact, the Tenants' entitlement to damages, and their right to bring counterclaims in an unlawful detainer action. Finding no error, we affirm the decision of the trial court.

FACTS

¶2 Lang Pham purchased the residential property located at 9312 51st Avenue South, Seattle, Washington (Property), at a foreclosure sale in March 2012. Pham owns and rents other apartment buildings. The Property was metered for five living units, so Pham had assumed it met regulatory requirements for use as a fiveplex. But the Property was permitted only for use as a triplex. Renting the building as a fiveplex violated city land use and building codes. Pham repainted, installed new carpet, and refinished the floors, but did not verify the building's permit status before renting the five units. The permit information could easily have been accessed through the King County assessor and the website of the city of Seattle's, Department of Planning and Development (City).

¶3 On April 25, 2012, Pham and Shawn Corbett and Shakia Morgan entered into a one-year lease agreement for unit 5 (Unit) of the Property, for May 1, 2012 through April 30, 2013. The Tenants were required to pay $850 rent on the first of each month. They paid the first and last month's rent and a security deposit of $650, for a total of $2,350.

¶4 The tenancy presented a number of difficulties. The Tenants' income varied, and they often paid their rent late or in installments. They complained to Pham about the Unit's conditions, including the absence of baseboards; holes and gaps between the floor, walls, and doors; lack of railings on an outside deck and stairs, leaking water/sewage in a large "crawl space;" and the stench of sewage coming from the bathroom sink. Pham characterized the Tenants' complaints as "playing this game" and arising only when rent was due. Verbatim Report of Proceedings (VRP) at 64-65; 68. In contrast, the Tenants said that Pham would tell them to address the issues themselves or would fail to address their concerns at all.

¶5 In August 2012, the Tenants notified Pham that they had seen a rat in the Unit. Pham hired an exterminator to inspect and treat the Property for rodents and insects on a quarterly basis. The exterminator came twice to spray and set traps. Because the exterminator did not see evidence of rats, Pham discontinued the scheduled quarterly visits and opted for annual visits. The Tenants continued to see and hear rats in the Unit, and caught several rats using traps they purchased and placed themselves.

¶6 The Tenants had paid rent in full through April 2013, when the lease expired. The lease provided that the Tenants would be liable for rent and other damages sustained as a result of any holdover. The Tenants did not make any subsequent rent payments and were still in possession of the Unit at the time of trial in July 2013. Because the Tenants did not make payment or payment arrangements for May 2013, Pham testified that he posted and mailed a three-day pay or vacate notice on May 6, 2013, but the Tenants denied receiving it.

¶7 On May 10, 2013, the Tenants filed a complaint with the City regarding the Unit's conditions. Five days later, city housing and zoning inspector Tom Bradrick, inspected the Unit. Bradrick found that "the overall quality of the installation of the unit was very poor and would never have passed a building inspection at that time. ..." VRP at 114.

¶8 On May 16, 2013, the day after the inspection, Pham served the Tenants with another three-day pay or vacate notice. The next day Bradrick mailed a notice of violation to Pham's home address notifying him that the Property was not permitted for use as a fiveplex and that he needed to take corrective action by June 30, 2013.[1] Pham testified that he did not receive this letter until May 22, 2013, five days later.

1 Under the Seattle Municipal Code (SMC), the City has the authority to issue a notice of violation that identifies each violation of the standards and requirements of the Code and the corrective action necessary to bring the building into compliance. SMC 22.206.220(A)(1). The notice of violation must also specify a time for compliance. SMC 22.206.220(A)(2).

¶9 On Monday, May 20, 2013, Pham filed an unlawful detainer action to evict the Tenants because they failed to comply with the May 16, 2013 pay or vacate notice.

¶10 Bradrick sent a follow up letter on Wednesday, May 22, 2013, notifying Pham that the Property must be brought into compliance or the City would require him to pay relocation assistance of $2,000.[2] The letter also advised Pham that multiple repairs would be required before permitting the Unit, and that the sewage leak would need to be repaired immediately.

2 Under SMC 22.206.260(A), whenever a building, housing unit, or premises has been found to be "an imminent threat to the health or safety of the occupants or the public, an emergency order may be issued directing that the building, housing unit or premises be restored to a condition of safety and specifying the time for compli-

ance. In the alternative, the order may require that the building, housing unit or premises be immediately vacated and closed to entry." Subsection (F)(1) requires relocation assistance to be paid to "[a]ny tenant who is required to vacate and actually vacates a housing unit as a result of an emergency order."

¶11 On June 6, 2013, Bradrick sent Pham a third letter listing specific repairs that needed to be done in order to obtain a permit and pass a housing inspection. These repairs included the sewage leak, the absence of a P-trap in the vanity drain under the bathroom sink, and the rodent access to the crawl space and bedroom closet. The letter again instructed Pham that if he did not make the necessary repairs, he would need to discontinue renting the Unit and pay $2,000 in relocation assistance. Pham hired an architect to work on permitting the Property for use as a fiveplex. At the time of trial, because Pham was still waiting to find out whether such use would be permittable, none of the other repairs had been made.

¶12 A bench trial was held on July 17, 2013. The parties presented testimony from five witnesses: Pham, Eric Bittenbender from Paratex Pest Control, Bradrick, Morgan, and Corbett. The trial court found that the Unit's habitability had been reduced by 25 percent for the nine-month period in which the Tenants lived with the sewer and rodent issues. The trial court determined that the Tenants had overpaid rent for that period, but also that they owed rent because they remained in the Unit for two additional months without paying. The Tenants were awarded a net amount of $637.50 for the habitability claim, $2,550.00 in relocation assistance under *RCW 59.18.085*, and $650.00 for their security deposit. The trial court denied Pham's motion for reconsideration and awarded attorney fees to the Tenants. Pham appeals.

DISCUSSION

¶13 "When a trial court has weighed the evidence in a bench trial, appellate review is limited to determining whether substantial evidence supports its findings of fact and, if so, whether the findings support the trial court's conclusions of law. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true." *Hegwine v. Longview Fibre Co., 132 Wn. App. 546, 555-56, 132 P.3d 789 (2006)* (citations omitted). A reviewing court begins with a presumption in favor of the trial court's findings and the appellant has the burden of showing that a finding of fact is not supported by substantial evidence. *Green v. Normandy Park Riviera Section Cmty. Club, Inc., 137 Wn. App. 665, 689, 151 P.3d 1038 (2007)*. Unchallenged findings are verities on appeal. *Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992)*. Conclusions of law are reviewed de novo. *Hegwine, 132 Wn. App. at 556* (citing *Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003))*.

Counterclaims in an Unlawful Detainer Action

¶14 Pham argues that the Tenants cannot bring counterclaims for relocation assistance and for damages for breach of implied warranty of habitability in an unlawful detainer proceeding.[3] The Tenants argue that these claims are equitable defenses that directly relate to the issue of possession, and if proved, would excuse a breach of lease.

3 Pham also argues that the Tenants are not entitled to a monetary award because they failed to pay the required filing fee for a counterclaim or obtain a waiver. But because he cites no authority for the argument, we decline to consider it.

¶15 Pham correctly cites the rule that counterclaims are not allowed in unlawful detainer actions, except for those "'based on facts that would excuse a tenant's breach.'" Br. of Appellant at 19 (quoting *Josephinium Assocs. v. Kahli, 111 Wn. App. 617, 625, 45 P.3d 627 (2002)*). The exception properly applies when resolution of the counterclaim is "necessary to determine the right of possession." *First Union Mgmt., Inc. v. Slack, 36 Wn. App. 849, 854, 679 P.2d 936 (1984)*.

¶16 Under this exception, Washington courts have permitted counterclaims for breach of warranty of habitability and breach of the covenant of quiet enjoyment. *See Foisy v. Wyman, 83 Wn.2d 22, 32, 515 P.2d 160 (1973)*; *Income Props. Inv. Corp. v. Trefethen, 155 Wash. 493, 284 P. 782 (1930)*. The *Foisy* court approved of the affirmative defense of breach of warranty of habitability, because it "goes directly to the issue of rent due and owing, which is one of the basic issues in an unlawful detainer action. ..." *83 Wn.2d at 31-32*. Pham claims that the *Foisy* standard is "limited to the diminution in rental value" only, not claims for damages, but cites no authority for this argument. Br. of Appellant at 21. On the contrary, *Foisy* is often cited as the authority allowing counterclaims for damages for breach of the implied warranty of habitability. See *Munden v. Hazelrigg, 105 Wn.2d 39, 45, 711 P.2d 295 (1985)*; *Angelo Prop. Co. v. Hafiz, 167 Wn. App. 789, 811-12, 274 P.3d 1075 (2012)*; *Heaverlo v. Keico Indus., Inc., 80 Wn. App. 724, 729, 911 P.2d 406 (1996)*. Furthermore, *RCW 59.18.400* enables a tenant to "assert any legal or equitable defense or set-off arising out of

the tenancy." We reject Pham's arguments and hold that the Tenants are permitted to raise the defense of breach of warranty of habitability in this action.

¶17 We also find that the Tenants' claim for relocation assistance was properly raised in this action. An unlawful detainer action is a limited statutory proceeding to resolve the right to possession between the landlord and the tenant. *Chapter 59.12 RCW*; *Munden, 105 Wn.2d at 45*. The law draws a distinction between possession and the right of possession. *Kessler v. Nielsen, 3 Wn. App. 120, 126, 472 P.2d 616 (1970)*. Once an unlawful detainer action is commenced and the defendant does not concede the right to possession, he or she has the right to have the issue determined. *Hous. Auth. & County v. Pleasant, 126 Wn. App. 382, 389, 109 P.3d 422 (2005)*.

¶18 Pham argues that the trial court "fail[ed] to explain how relocation assistance relates to possession of the property." Br. of Appellant at 21. And he claims it is contradictory for a tenant to ask for assistance to vacate while he or she continues to assert a right to possession. We disagree. By seeking relocation assistance, the Tenants do not concede the right to possession. Instead, they claim the right has been compromised by the Unit's unlawful status, which, in turn, gives rise to the claim for relocation assistance. Thus, the issue of the right to possession is intimately tied to the lawful status of the Unit and the Tenants' right to relocation assistance. Furthermore, the relocation assistance claim is also based on facts that would excuse a tenant's breach, because it requires a finding that the dwelling is or will be unlawful to occupy. A landlord would be precluded from renting a dwelling that was illegal to occupy, and any tenants would be absolved of their duty to pay rent.[4]

4 Even if Pham were correct that a relocation assistance claim did not relate to possession, there is no reason why the trial court could not have resolved the question of possession and then converted the unlawful detainer action to a civil action at that time. This would have permitted the trial court to address the relocation assistance claim in the same proceeding, while preserving the special nature of the unlawful detainer action. Where the right to possession ceases to be at issue at any time between the commencement of an unlawful detainer action and trial of that action, the proceeding may be converted into an ordinary civil suit for damages. *Munden, 105 Wn.2d at 45-46*. Despite Pham's contention at oral argument that this is "not the law," a trial court has "inherent power to fashion the method by which an unlawful detainer action is converted to an ordinary civil action." *Id. at 47*. Once the case has been converted, the trial court's general jurisdiction is restored and it can hear claims between the parties that were excluded from the unlawful detainer action. *Id. at 45-46*.

¶19 The Tenants also argue that excluding relocation assistance claims from unlawful detainer proceedings would undermine the goals of the statute. We find this argument persuasive. The legislature's stated purpose when it enacted *RCW 59.18.085* was to prevent tenants from being forced to "remain[ ] in rental housing that does not meet the state's minimum standards for health and safety because they cannot afford to pay the costs of relocation in advance of occupying new, safe, and habitable housing." LAWS OF 2005, ch. 364, § 1. Requiring displaced tenants to bring separate actions for relocation assistance on the regular civil calendar would impose unnecessary delay and costs on top of the financial burdens involved in the moving process. In accordance with the statute's purpose, we hold that an unlawful detainer action is an appropriate forum for relocation assistance claims under *RCW 59.18.085*.

Implied Warranty of Habitability

¶20 Pham claims that the trial court's finding of breach of the implied warranty of habitability is not supported by substantial evidence. He argues that the sewer leak did not present a habitability issue or, if it did, he was not notified or given opportunity to cure. He also argues that there was no evidence of a rodent infestation. The Tenants argue that the record contains sufficient evidence to show that Pham breached the implied warrant of habitability.

¶21 In a residential unlawful detainer action, a tenant may raise a defense based on a landlord's breach of the implied warranty of habitability. *Foisy, 83 Wn.2d at 32*. For a breach of this warranty, the trier of fact must find "(1) Whether the evidence indicates that the premises were totally or partially uninhabitable during the period of habitation and, if so, (2) what portion, if any or all, of the defendant's obligation to pay rent is relieved by the landlord's total or partial breach of his implied warranty of habitability." *Id. at 34*. A warranty's applicability is a mixed question of law and fact. *Burbo v. Harley C. Douglass, Inc., 125 Wn. App. 684, 694, 106 P.3d 258 (2005)*. Conditions that "present a substantial risk of future danger" will give rise to a claim for breach of warranty of habitability. *Westlake View Condo. Ass'n v. Sixth Ave. View Partners, LLC, 146 Wn. App. 760, 771, 193 P.3d 161 (2008)*.

¶22 The record contains ample evidence of conditions in the Unit that would cause a fair-minded, rational person to find a substantial risk of future danger. As long as substantial evidence supports the trial court's findings, "a reviewing

court will not substitute its judgment for that of the trial court even though it might have resolved a factual dispute differently." *Sunnyside, 149 Wn.2d at 879-80.* Pham misstates the evidence when he claims that Bradrick testified that "the habitability issues were not so egregious as to warrant an order of condemnation, eviction or displacement, even though he had authority to issue such orders." Appellant's Reply Br. at 11. Bradrick testified that he did not consider the sewer leak to be "egregious to the point where I was going to get excited and create an emergency on it or anything, but I did want it to be addressed relatively quickly." VRP at 115. He further testified that "[i]f I went back to inspect today, and the sewage had not been rectified, I would immediately put out an emergency order, yes." VRP at 132. The Tenants also testified about the sewage leak and smell and presented evidence that Pham had been informed that the lines needed to be replaced. The Tenants' testimony about the persistence of rodents as well as Bradrick's testimony and letter all supported a likelihood that rodents were present. Bradrick also testified about the poor condition and installation of the stairs and handrails, back door, sewer pipe, door to the crawl space, and bathroom sink, and dangerous electrical violations. We find that the record contains sufficient evidence to support a finding of breach of the warranty of habitability.

¶23 Pham argues the Tenants failed to provide him with notice and opportunity to cure any defects as required by *RCW 59.18.070.* Br. of Appellant at 11. The argument is without merit. The record shows that Pham had ample notice of the defects and an opportunity to cure them. In addition to the complaints from the Tenants, Pham received at least three letters from Bradrick advising him of the defects. Pham presented no evidence that to the extent he acted in response to these complaints, the defects were ever cured.

¶24 Pham argues that the trial court applied the wrong standard when it found him in breach of the implied warranty of habitability. He contends the trial court erroneously required him to take "'all reasonable measures'" to ensure that the unit was rodent-free because the Tenants had a small child. Br. of Appellant at 12-13. In support of this argument Pham points to the court's oral ruling, in which, citing *Landis*, it stated that "'[t]here is no doubt that a rodent infestation can create an actual or potential safety hazard'" and that this was "'especially true where, as here, an infant is in the home.'" Clerk's Papers (CP) at 85. The trial court also stated that Pham "had a responsibility to take all reasonable measures to keep rats from the unit, which he failed to do." *Id.* But the trial court's written findings show that its conclusion was based on the totality of the circumstances, including the sewage leak, the rats, the odors, the faulty handrails, the holes in the floor, and Pham's failure to remedy any of the conditions.[5] A written order controls over any apparent inconsistency with the court's earlier oral ruling. *Shellenbarger v. Brigman, 101 Wn. App. 339, 346, 3 P.3d 211 (2000).* Accordingly, we reject Pham's argument that the trial court relied on an improper standard of habitability when it concluded that he breached the implied warranty of habitability.

5 Pham also argues that the trial court erred in finding that he breached the duty imposed by the implied warranty of habitability, because the duty requires nothing more than for a landlord to act with "reasonable diligence to eliminate dangers that pose an actual or potential safety hazard to its occupants." Br. of Appellant at 12. He contends "There is no breach if the landlord's efforts are reasonable but unsuccessful." *Id.* But the case Pham cites, *Lian v. Stalick, 106 Wn. App. 811, 818, 25 P.3d 467 (2001)*, supports neither proposition. Nowhere in *Lian* does the court suggest that a finding of breach is precluded if a landlord merely takes reasonable measures to cure.

Award of Relocation Assistance

¶25 Pham argues that the trial court erred in finding that the Tenants were entitled to relocation assistance under *RCW 59.18.085(3).* Pham's first argument is one of statutory interpretation. He argues that the Tenants are not entitled to relocation assistance because the City never issued a "notice of condemnation, eviction or displacement order." Br. of Appellant at 17. The Tenants argue that an order is not required because the obligation to provide relocation assistance arose when Pham was notified that the dwelling was unlawful.

¶26 This court reviews questions of statutory interpretation de novo. *State v. Wentz, 149 Wn.2d 342, 346, 68 P.3d 282 (2003).* In interpreting statutes, we strive to discern and implement the legislature's intent. *State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).* Where the plain language of a statute is unambiguous and "the legislative intent is apparent ... we will not construe the statute otherwise." *Id.* (citing *State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994)).* Plain meaning, however, may be gleaned "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 11, 43 P.3d 4 (2002).*

¶27 Pham bases his argument on *RCW 59.18.085(3)(c)*'s reference to a "notice of the condemnation, eviction, or displacement order."[6] Amicus King County Bar Association (KCBA) argues that the obligation to pay relocation assis-

tance under *subsection (3)(a)* does not require that a unit actually *be* condemned or unlawful to occupy. It is enough for an agency to notify a landlord that the dwelling *will be* condemned or *will be* unlawful to occupy.

6 *RCW 59.18.085(3)(a)(i)-(ii)* also refer to a "condemnation or no occupancy order." These are the exceptions under which a landlord will not be required to pay relocation assistance, and neither apply here.

¶28 We agree with the Tenants and KCBA. The plain language of *RCW 59.18.085(3)* supports this interpretation. *Subsection (3)(a)* applies when a landlord has been notified that the dwelling will be condemned or unlawful to occupy due to conditions that violate applicable codes, statutes, ordinances, or regulations. At that point, a landlord who knew or should have known of the conditions shall be required to pay relocation assistance, unless the conditions are a result of illegal activity, natural disaster, or acquisition by eminent domain. *RCW 59.18.085(3)(a)(i)-(iii)*.

¶29 If a landlord refuses to pay relocation assistance under *RCW 59.18.085(3)(a)* and the governing agency is forced to condemn the dwelling, then the enforcement mechanisms in *subsections (3)(c)*, *(f)*, *(g)*, and *(h)* come into play. At that point the landlord must pay the required relocation assistance within 7 days of receiving notice of the condemnation, eviction, or displacement order. If a landlord does not pay within that period, the governing agency may advance payment to the tenants and seek to recover from the landlord, with interest. The governing agency is entitled to its fees and costs and the landlord may face civil penalties if more than 60 days have passed.

¶30 Pham argues that "the legislative history" supports his interpretation and at oral argument cited *RCW 59.18.085*, notes. But the notes, titled "**Purpose**," are consistent with our reading of the statute's plain language. The notes read:

> Certain tenants in the state of Washington have remained in rental housing that does not meet the state's minimum standards for health and safety because they cannot afford to pay the costs of relocation in advance of occupying new, safe, and habitable housing. In egregious cases, authorities have been forced to condemn property when landlords have failed to remedy building code or health code violations after repeated notice, and, as a result, families with limited financial resources have been displaced and left with nowhere to go.

Subsection (3)(a) addresses the first issue of tenants being forced to stay in substandard housing by requiring landlords to pay relocation assistance. *Subsections (3)(c)*, *(f)*, *(g)*, and *(h)* were enacted for the "egregious cases" where a landlord has notice and has refused to pay relocation assistance, and a governing authority is forced to condemn the property.

¶31 Based on the language of the statute, we find that if *RCW 59.18.085(3)(a)* applies, a landlord is required to pay relocation assistance if the building will be condemned or deemed unlawful to occupy. In this circumstance, it is irrelevant whether the landlord has received notice of an order of condemnation, eviction, or displacement.

¶32 Pham next argues that he was never notified that the unit will "be condemned" or will "be unlawful to occupy." Br. of Appellant at 17. The Tenants argue that Pham received three letters informing him that the units were illegal. The record shows that Pham received notice that the dwelling was unlawful to occupy because (1) it was permitted only for use as a triplex and (2) its condition was substandard and violated multiple provisions of the housing code. The initial notice of violation states, in all caps, that Pham must

> DISCONTINUE THE MAINTENANCE/USE OF 9312 51st AVE SOUTH AS A FIVEPLEX OR OBTAIN A PERMIT AND FINAL APPROVAL INSPECTION TO ESTABLISH THE USE. A FIVEPLEX IS NOT THE LEGALLY ESTABLISHED USE OF THE PROPERTY; THE CURRENT PERMITTED USE OF THIS PROPERTY IS AS A TRIPLEX.

CP at 69. The second letter reads, "The units will have to be legalized, under a permit, or the tenants removed (you will have to pay them $2000 for tenant relocation assistance) and the units shut down and never rented again until they are legalized," and "multiple repairs will be needed to the lower unit if it is to be permitted." CP at 76. The final letter, dated June 6, 2013, indicated that there were numerous housing violations that would need to be addressed before the building would be legal to rent. Pham's contention that the City did not notify him that the dwelling "is unlawful to occupy" is contradicted by the explicit text of the notice and letters. Br. of Appellant at 17.

¶33 Third, Pham argues that the statute and the Residential Landlord-Tenant Act of 1973 (RLTA), ch. *59.18 RCW*, provide him with opportunity to cure before being required to pay relocation assistance. The Tenants argue that there is no cure period and to infer one would defeat the statute's purpose, because landlords would take advantage of such period and delay taking any action until forced to do so.

¶34 We find that there is no safe harbor for landlords once they have been notified that the dwelling will be condemned or will be unlawful to occupy, even if they are in the process of permitting.[7] The statute inherently requires notice before the violation is issued because it applies only to landlords who "knew or should have known" about the conditions. *RCW 59.18.085(3)(a)*. There is no additional opportunity to cure, and to impose one would allow landlords to delay the process and continue to rent unlawful dwellings without penalty.

> 7 At oral argument, Pham claimed that without additional notice and opportunity to cure, the statute as written would open the floodgates for relocation assistance claims because tenants would be able to sit idly in substandard conditions and notify their landlords only when they were facing eviction. Again, the statute requires that a landlord be notified that a building is unlawful to occupy and to have actual or constructive knowledge of the conditions giving rise to the illegal status before requiring them to pay relocation assistance.

¶35 Pham argues that the statute must contain an additional implicit notice requirement and cure period because *RCW 59.18.085* notes indicate that a landlord is to receive "due notice." LAWS OF 2005, ch. 364, § 1. The notes read, "The purpose of this act is to establish a process by which displaced tenants would receive funds for relocation from landlords who fail to provide safe and sanitary housing after due notice of building code or health code violations." *Id.* Again, the legislature already provided for "due notice" by requiring a "governmental agency responsible for the enforcement of a building, housing, or other appropriate code" to "notif[y] the landlord that a dwelling" is or will be "condemned" or "unlawful to occupy," before imposing a duty to provide relocation assistance. *RCW 59.18.085(1), (3)(a)*.

¶36 According to Pham, the City's letter also gives him opportunity to cure. He claims he is not required to pay relocation assistance because the City gave him the option and he chose to permit the unit. The Seattle Municipal Code (SMC) imposes its own requirements for payment of relocation assistance upon the issuance of an emergency order to vacate. SMC 22.206.260(F). The City's procedures do not affect the Tenants' rights or a landlord's obligations under the RLTA. Nothing in the Seattle Municipal Code "is intended to affect or limit a tenant's right to pursue a private right of action pursuant to *Chapter 59.18 RCW* for any violation of *Chapter 59.18 RCW* for which that chapter provides a private right of action." SMC 22.206.305. Moreover, even if Pham had obtained the permits, the Unit was still unlawful to occupy because of the multiple violations of the housing code that had not been remedied.

¶37 Pham makes several additional perfunctory arguments against the Tenants' entitlement to relocation costs. We reject each of them. Pham's claim that substantial evidence did not support the trial court's finding that the building was unlawful to occupy is meritless. The explicit language in the City's letters demonstrate otherwise. Pham's argument that the statute does not allow assistance to be paid to tenants who choose to relocate is simply incorrect. *RCW 59.18.085(3)* does not address a tenant's choice to relocate, but *subsection (2)* specifically allows a tenant who "elects to terminate the tenancy as a result of the conditions leading to the posting" to recover additional damages if a landlord knowingly violates *subsection (1)*. The trial court stated that the tenants "elected to be relocated" but found that Pham had to only pay relocation assistance under *RCW 59.18.085(3)(a)*. CP at 88. Thus, the trial court's comment is of no consequence to the Tenants' entitlement to relocation assistance. Even if the tenants had chosen to relocate, it would not negate the mandatory payment required by *subsection (3)(a)*.

¶38 Pham also argues that a tenant can sue under *RCW 59.18.085(3)(e)* only if relocation assistance has been ordered and the landlord fails to pay. The Tenants argue that subsection *(3)(e)* creates a private right of action against a landlord, independent of governmental enforcement. We agree with the Tenants and find that subsection *(3)(e)* allows a tenant to bring a private action to recover relocation assistance due under *subsection (3)(a)*. The text of *subsection (3)(e)* distinguishes the governmental enforcement and the private right by allowing attorney fees and costs to be awarded for actions brought under subsections *(3)(e)* or *(3)(c)*.

¶39 Finally, Pham argues that the trial court was required to find that he brought the eviction to avoid paying relocation assistance.[8] Appellant's Reply Br. at 6. This is not correct. *RCW 59.18.085(3)(a)* requires payment of relocation assistance regardless of whether any retaliatory action has been taken against the tenants.

8 *Subsection (3)(d)* prevents a landlord from taking retaliatory or collateral action against tenants after receiving a notice of violation. This does not have any effect on a landlord's duty to pay relocation assistance under *subsection (3)(a)*.

Tenants' Default

¶40 Pham argues that the trial court wrongfully applied the Tenants' last month's rent to bring them out of default. He claims that in order to apply the last month's rent, the Tenants had to (1) give 20 days' notice of intent to vacate, (2) indicate that they wanted to apply the last month's rent to that final month, and (3) actually vacate. Br. of Appellant at 14. The Tenants claim that they are entitled to apply the prepaid last months' rent as an offset for any amount due and owing.

¶41 We find no error in the trial court's assessment. Pham received a month's worth of prepaid rent from the Tenants. The lease does not contain any provisions specifying how this prepaid rent will be applied, or any conditions that must be met before it may be credited. Again, under *RCW 59.18.400*, a defendant in an unlawful detainer action "may assert any legal or equitable defense or set-off arising out of the tenancy." The Tenants raised the defense that they were current in rent because they prepaid the last month's rent. The trial court appropriately applied the prepayment as an offset and found that the Tenants prevailed on their defense that no rent is due and owing.

¶42 Pham argues that the Tenants were barred by *RCW 59.18.080* from exercising remedies under the RLTA because they were not current in rent. The Tenants argue that they can exercise RLTA remedies because *RCW 59.18.080* does not limit the right to raise a defense that there is no rent due and owing.[9]

9 Alternatively, the Tenants argue that the statute does not limit the tenant's "civil remedies for negligent or intentional damages" and that the standards required for relocation assistance should qualify as a civil remedy for negligent or intentional damages. Given our disposition of this case, we do not address this argument.

¶43 *RCW 59.18.080* requires a tenant to "be current in the payment of rent including all utilities ... before exercising any of the remedies accorded him or her under the provisions of this chapter ... PROVIDED FURTHER, That this section shall not be construed as limiting the tenant's right in an unlawful detainer proceeding to raise the defense that there is no rent due and owing." As discussed earlier, the Tenants raised the defenses that they did not owe any rent due to their claims of setoff and breach of warranty of habitability. The trial court found that they prevailed on those claims and that they were current in the payment of rent.

¶44 Pham also argues that the tenants had not proved any diminution in value for the alleged defects in the premises. According to him, the trial court's conclusion that the premises were 25 percent uninhabitable was not supported by evidence and, even if it were, the Tenants are still required to tender rent for the diminished value. We disagree. First, the Tenants have already paid full rent for the entire lease term, and rent for May 2013 was prepaid. The trial court also required the Tenants to tender rent for June and July 2013 and calculated that amount into the offset, even though the Unit had been deemed illegal to inhabit at that time.[10] Second, there is substantial evidence in the record to support a finding of significantly reduced habitability as a result of the sewer leak, the rodent problem, the structural defects, the electrical violations, and the "very poor" overall quality of the Unit's installation. VRP at 114. At trial, the Tenants proposed a percentage of 25 based on an estimate of the percentage of actual uninhabitable space in the Unit. This included "the pantry area, any areas where there were rats ... [or] sewage smell." VRP at 217. Pham accepted the estimate at that time but later disputed it in his motion for reconsideration. From the record, a rational, fair-minded person could easily find that the Unit's habitability had been reduced by 25 percent.

10 The trial court in its discretion awarded Pham rent for that period because the Tenants were still in possession. We note, however, that Pham's entitlement to rent during that time is questionable given his knowledge that the Unit was unlawful to occupy. Nonetheless, because the Tenants did not appeal the issue, we will not disturb that award.

¶45 Pham argues that the trial court should have found that the terms of the lease agreement continued to apply after the lease expired. He claims he should have been allowed to charge late fees for the months that the Tenants held over and failed to pay rent. The Tenants claim that they were not subject to late fees because they were not late--they had already overpaid based on the unit's condition.

¶46 The relevant portion of the trial court's finding reads:

> As Plaintiff acknowledges, late fees are a provision of the lease that expired April 30, 2013, and Defendants paid rent through that date. No evidence was offered to suggest the parties orally agreed that the lease terms continue into a month-to-month tenancy. Accordingly, Plaintiff's claim for late fees has no legal basis. For the reasons stated below, the Court finds that Defendants are excused from payment of rent after expiration of the lease. ...

CP at 84-85. The lease states, "If any rent is not paid on or before the due date, Tenant agrees to pay a late charge of [$]25 for each day that the same is delinquent, including the day of payment ... ." CP at 56. Pham correctly cites the general rule that the terms of a fixed lease apply to the terms of a holdover tenancy, even in the absence of language in a holdover provision. *Marsh-McLennan Bldg., Inc. v. Clapp, 96 Wn. App. 636, 644-48, 980 P.2d 311 (1999)*. Under this rule, the terms of the lease would have extended to the holdover tenancy and Pham would have been entitled to charge late fees if the Tenants had been in default.[11]

> 11 This assumes that the building would have been lawful to occupy. It was not lawful to occupy during the time that Pham argues that he is entitled to charge late fees.

¶47 We find that the terms of the lease apply to the holdover tenancy. However, we agree with the trial court's assessment that Pham's claim for late fees "has no legal basis" because the Tenants were found to be current in rent. CP at 84. An appellate court may "sustain a trial court's judgment upon any theory established by the pleadings and supported by proof." *Wendle v. Farrow, 102 Wn.2d 380, 382, 686 P.2d 480 (1984)* (citing *Gross v. City of Lynnwood, 90 Wn.2d 395, 401, 583 P.2d 1197 (1978))*. Based on Pham's breach of the warranty of habitability, the trial court concluded that as of April 2013, the Tenants had overpaid rent for nine months, and that overpayment had already covered the rent due for May, June, and July 2013. Therefore, at the time of trial, there was no rent that had "not [been] paid on or before the due date." CP at 56.

¶48 The Tenants request an award of attorney fees as the prevailing party on appeal. Under *RCW 59.18.290* and *RAP 18.1*, the Tenants are entitled to an award of reasonable attorney fees and costs on appeal.

¶49 Affirmed.

BECKER and LAU, JJ., concur.

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§ 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.

§ 59.12.040. Service of notice - Proof of service

Any notice provided for in this chapter shall be served either (1) by delivering a copy personally to the person entitled thereto; or (2) if he or she be absent from the premises unlawfully held, by leaving there a copy, with some person of suitable age and discretion, and sending a copy through the mail addressed to the person entitled thereto at his or her place of residence; or (3) if the person to be notified be a tenant, or an unlawful holder of premises, and his or her place of residence is not known, or if a person of suitable age and discretion there cannot be found then by affixing a copy of the notice in a conspicuous place on the premises unlawfully held, and also delivering a copy to a person there residing, if such a person can be found, and also sending a copy through the mail addressed to the tenant, or unlawful occupant, at the place where the premises unlawfully held are situated. Service upon a subtenant may be made in the same manner: PROVIDED, That in cases where the tenant or unlawful occupant, shall be conducting a hotel, inn, lodging house, boarding house, or shall be renting rooms while still retaining control of the premises as a whole, that the guests, lodgers, boarders, or persons renting such rooms shall not be considered as subtenants within the meaning of this chapter, but all such persons may be served by affixing a copy of the notice to be served in two conspicuous places upon the premises unlawfully held; and such persons shall not be necessary parties defendant in an action to recover possession of said premises. Service of any notice provided for in this chapter may be had upon a corporation by delivering a copy thereof to any officer, agent, or person having charge of the business of such corporation, at the premises unlawfully held, and in case no such officer, agent, or person can be found upon such premises, then service may be had by affixing a copy of such notice in a conspicuous place upon said premises and by sending a copy through the mail addressed to such corporation at the place where said premises are situated. Proof of any service under this section may be made by the affidavit of the person making the same in like manner and with like effect as the proof of service of summons in civil actions. When a copy of notice is sent through the mail, as provided in this section, service shall be deemed complete when such copy is deposited in the United States mail in the county in which the property is situated properly addressed with postage prepaid: PROVIDED, HOWEVER, That when service is made by mail one additional day shall be allowed before the commencement of an action based upon such notice. RCW 59.18.375 may also apply to notice given under this chapter.