

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

PAPINI BROTHERS, LLC,	)	No. 62517-9-I
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
JAUKESIA LAWRENCE and JOHN	)	
DOE, et al.,	)	
	)	
Appellant.	)	FILED: <u>December 7, 2009</u>

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) )  
Schindler, C.J. — Jaukesia Lawrence appeals an order for writ of restitution and judgment for unlawful detainer. Lawrence contends the court lacked jurisdiction because the three-day notice to pay rent or vacate the premises violated the requirements of RCW 59.12.030(3) by demanding payment of past due rent and late fees. In the alternative, Lawrence asserts that because the late fee provision of the lease is unconscionable, that portion of the judgment should be reversed. Because the three-day notice complies with the requirements of RCW 59.12.030(3), the court had jurisdiction to enter the order and judgment in the unlawful detainer action. And because the late fee provision is not substantively unconscionable, we affirm.

FACTS

On December 28, 2007, Carlo Papini entered into a “Washington State Apartment Lease/Rental Agreement and Security Deposit Receipt” (Rental Agreement) with Jaukesia Lawrence to rent an apartment for a one-year period from January 1, 2008 to December 31, 2008.<sup>1</sup> According to the terms of the Rental Agreement, monthly rent of \$800 was due on or before the first day of each month. The Rental Agreement includes a provision for the assessment of late fees for rent received after the third day of the month.

Rent received on or after the third day of each month shall result in assessment against Resident of a \$50.00 late payment charge plus \$10.00 each additional day thereafter that rent has not been paid in full, which shall be considered to be additional rent and must be paid at the time the delinquent rent is paid. . . . Notwithstanding the foregoing, Owner may issue a Three Day Notice to Pay Rent or Vacate immediately after the rental due date without waiting until late payment charges begin to accrue. If for reason of non-payment of rent Owner shall give a statutory Three (3) Day Notice to Pay Rent or Vacate, or if Owner shall lawfully issue any other notice permitted pursuant to RCW 59.12 et seq. or RCW 59.18 et seq., Resident agrees to pay in addition to the delinquent rent and late payment charges provided for above, the sum of \$150.00 for preparing and giving the notice, which shall be paid by the deadline for compliance with the Notice.

In July 2008, Lawrence did not pay the rent until the end of the month. On July 25 Lawrence paid \$750. Thereafter, Lawrence paid the remaining \$50. Lawrence did not pay any late fees.

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<sup>1</sup> There is no dispute that Carlo Papini was the landlord acting on behalf of Papini Brothers, LLC.

Lawrence did not pay the rent due for August. On August 11, Papini served Lawrence with a “Three Day Pay Rent or Vacate Notice RCW 59.12.030(3).”<sup>2</sup> The notice separately set forth the amount of the current rent due for the month of August of \$800, the late charges owed for July of \$330, and a late charge for August of \$130, for a total amount “due and payable” of \$1,260.

The notice states that Lawrence must pay:

the above total in full to the undersigned or the agent named below, within three (3) days from the date of service of this notice upon you, **OR IN THE ALTERNATIVE, to vacate and surrender the premises.** IN THE EVENT of your failure to do so within the said period, you will be guilty of unlawful detainer and subject to eviction as provided by law.

Lawrence did not pay the past due rent and late charges or move out of the apartment.

Papini filed an unlawful detainer action seeking a writ of restitution and judgment for damages “in the amount of rent and late charges owing at the time of judgment” plus reasonable attorney fees. The complaint alleged that Lawrence owed past due rent and late charges as a result of her failure to pay rent under the terms of the Rental Agreement. The complaint also asserts that Lawrence was served with the three-day pay rent or vacate notice and that she had neither paid rent nor vacated the premises.

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<sup>2</sup> Only Carlo Papini’s name appears on the lease. However, the three-day “pay rent or vacate” notice was signed by Nicholas Papini on behalf of Papini Brothers, LLC, and the unlawful detainer action was also initiated by the Papini Brothers entity. In this opinion, we refer to both individuals and the entity as “Papini.”

At the show cause hearing on September 19, Lawrence argued that the landlord should not impose the maximum amount of \$330 in late charges for July. Lawrence asserted that because she paid the rent on July 25, the late charges owed were \$50 less than the \$330 stated in the notice. Lawrence claimed that the error in calculating the late charges deprived the court of jurisdiction. In the alternative, Lawrence argued that the assessment of late charges was an unreasonable penalty. Papini agreed to reduce the amount of the late charges for July. The court entered an order of restitution and a judgment for damages in favor of Papini. Lawrence appeals.

#### ANALYSIS

Lawrence contends that the trial court did not have jurisdiction over the unlawful detainer action because the three-day notice violated RCW 59.12.030(3) by demanding payment of late charges in addition to rent. Lawrence asserts that she was entitled to a separate ten-day notice under RCW 59.12.030(4) for the late charges. Papini asserts that because the late charges are based on the failure to pay rent, the notice complied with RCW 59.12.030(3). Papini also asserts that even if including late charges in the three-day notice was improper, the court had jurisdiction in the unlawful detainer action because the notice substantially complied with the statutory requirements.

The unlawful detainer statute creates an expedited procedure to resolve the right to possession of property. See, e.g., Christensen v. Ellsworth, 162

Wn.2d 365, 372, 173 P.3d 228 (2007); Housing Auth. of City of Everett v. Terry, 114 Wn.2d 558, 564-65, 789 P.2d 745 (1990). RCW 59.12.030(3) defines unlawful detainer and sets forth the requirements for the three-day notice to pay rent or vacate.

When [the tenant] 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 uncomplined with for the period of three days after service thereof. The notice may be served at any time after the rent becomes due; . . .

RCW 59.12.030(4) sets forth the requirements for a ten-day notice when the tenant does not perform a condition or covenant of the lease other than the agreement to pay rent.

When [the tenant] 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 uncomplined 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 . . . .

Proper notice of a default in payment of rent under RCW 59.12.030 is a

“jurisdictional condition precedent” to an unlawful detainer action. Terry, 114 Wn.2d at 566 (quoting Sowers v. Lewis, 49 Wn.2d 891, 894, 307 P.2d 1064 (1957)). The purpose of providing notice is to give the tenant “at least one opportunity to correct a breach before forfeiture of a lease under the accelerated restitution provisions of RCW 59.12.” Terry, 114 Wn.2d at 569. Because the unlawful detainer statute is in derogation of the common law, the statute is construed strictly in favor of the tenant. Terry, 114 Wn.2d at 563.

Under RCW 59.18.410, in the event the landlord prevails against the tenant for default in the payment of rent, “the judgment shall be rendered against the defendant guilty of the forcible entry, forcible detainer or unlawful detainer for the amount of damages thus assessed and for the rent, if any, found due.”

Lawrence argues that because RCW 59.12.030(3) only refers to the payment of “rent” and the three-day pay rent or vacate notice includes a demand for the payment of late fees, the court did not have jurisdiction. Lawrence contends that a demand for payment of late fees requires a ten-day notice under RCW 59.12.030(4).

The interpretation of a statute is a question of law subject to de novo review. Castro v. Stanwood Sch. Dist. No. 401, 151 Wn.2d 221, 224, 86 P.3d 1166 (2004). The primary objective of statutory interpretation is to discern and implement legislative intent. Dep’t of Ecology v. Campbell & Gwinn LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). In determining legislative intent, we first look to

the language of the statute. Absent ambiguity, a statute's meaning is derived from the language of the statute and we must give effect to that plain meaning as the expression of legislative intent. Campbell & Gwinn, 146 Wn.2d at 9-10.

Here, under the express terms of the Rental Agreement, the payment of late fees is based solely on the failure to timely pay rent. Because the unlawful detainer action was unquestionably based solely on the tenant's failure to pay rent, the three-day notice is valid with respect to both the overdue rent and the late fees. Under the plain terms of the unlawful detainer statute, if a tenant is in default for payment of rent and the landlord prevails in the unlawful detainer action, the landlord is entitled to damages related to the default. RCW 59.18.410. Because the late fees are directly related to the failure to timely pay rent, the three-day notice complied with the requirements of RCW 59.12.030(3).

However, even if late fees were improperly included in the three-day notice, because the notice substantially complied with the statutory requirements, the court had jurisdiction. The unlawful detainer statute does not address the contents of an unlawful detainer notice beyond saying that it must be in writing. But case law distinguishes between the "time and manner" requirements for service of notice and the "form and content" of the notice under the unlawful detainer statute. Truly v. Heuft, 138 Wn. App. 913, 920, 158 P.3d 1276 (2007); Marsh-McLennan Bldg., Inc. v. Clapp, 96 Wn. App. 636, 640 n. 1, 980 P.2d 311 (1999).

The case law requires strict compliance with the statute for time and manner requirements. Community Invs., Ltd. v. Safeway Stores, Inc., 36 Wn. App. 34, 37-38, 671 P.2d 289 (1983). By contrast, substantial compliance with the unlawful detainer statute is sufficient for the “form and content” of the notice.

[W]e 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.<sup>3</sup>

Foisy v. Wyman, 83 Wn.2d 22, 32, 515 P.2d 160 (1973), quoting, Erz v. Reese, 157 Wash. 32, 35, 288 P. 255 (1930).

The parties do not dispute that this case involves the “form and content” of the notice. To substantially comply with the “form and content” requirements of the unlawful detainer statute the notice must be “sufficiently particular and certain so as not to deceive or mislead.” IBF, LLC v. Heuft, 141 Wn. App. 624, 632, 174 P.3d 95 (2007). The notice must also be “sufficient to put the tenant on notice that damages [are] being sought. . . .” Truly, 138 Wn. App. at 921. For example, we have held that notice substantially complies with the statute even though it demanded more rent than was actually due. Foisy, 83 Wn.2d at 32-33. Our courts have also found substantial compliance with the “form and content” requirements when overstatement of rent is coupled with other defects, such as a defective description of premises and absence of owner’s signature. Provident Mutual Life Ins. Co. v. Thrower, 155 Wash. 613, 616-17, 285 P. 654 (1930).

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<sup>3</sup> (Footnote omitted.)



The Washington Supreme Court in Sowers, 49 Wn.2d at 895, rejected the argument that the court did not have jurisdiction over the unlawful detainer action because the notice “erroneously included a demand for damages for breach of a covenant with a demand for delinquent rent.” In Sowers, the landlord served the tenant with a three-day pay rent or vacate notice for failure to pay rent and breach of the lease agreement to renew and pay insurance coverage. The notice separately demanded payment of both overdue rent and insurance premiums. The judgment in favor of the landlord included both overdue rent and the insurance premiums. On appeal, the tenant argued the court did not have jurisdiction over the unlawful detainer action because the three-day notice included a demand to pay delinquent rent and insurance premiums. The Washington Supreme Court held that the three-day notice for past due rent substantially complied with the unlawful detainer statute but did not comply with the ten-day notice requirements for breach of a covenant in the lease other than the payment of rent. Sowers, 49 Wn.2d at 895. The court upheld the judgment amount for overdue rent but instructed the trial court to modify the judgment on remand by striking the amount awarded for the insurance premiums. Sowers, 49 Wn.2d at 896.

Consequently, even if the three-day pay rent or vacate notice improperly included the demand to pay late charges for failure to timely pay rent, the court had jurisdiction over the unlawful detainer action. As in Sowers, the notice to pay

rent separately listed and itemized the overdue rent and late charges<sup>4</sup> and

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<sup>4</sup> Lawrence asserts that late fees may not be treated as rent simply by characterizing the charges as such in the lease. See First Union Management v. Slack, 36 Wn. App. 849, 857 n.7, 679 P.2d 936 (1984) (utilities charges are not rent for purposes of the statute governing damages in unlawful detainer action). But as previously noted, the late charges are based solely on the failure to timely pay rent and the notice specifically separates the amounts due for rent and late fees.

substantially complied with the “form and content” requirements of the statute.<sup>5</sup>

In the alternative, Lawrence contends that the late fee provision in the lease is unconscionable and the amount awarded for late fees should be vacated. Specifically, Lawrence claims that the provision is substantively unconscionable.<sup>6</sup>

Substantive unconscionability exists when a provision in the contract is one-sided. Alder v. Fred Lind Manor, 153 Wn.2d 331, 344, 103 P.3d 773 (2004). In determining if a contractual provision is one-sided or overly harsh, we look at whether the provision is “[s]hocking to the conscience,’ ‘monstrously harsh,’ and ‘exceedingly calloused.’” Alder, 153 Wn2d at 344-45 (quoting, Montgomery Ward & Co. v. Annuity Bd. of S. Baptist Convention, 16 Wn. App. 439, 444, 556 P.2d 552 (1976)).

In Buchanan v. Kettner, 97 Wn. App. 370, 984 P.2d 1047 (1999), this court considered a similar late fee provision in a residential lease and held it was enforceable. In Buchanan, the rent was \$275 per month due the first day of each

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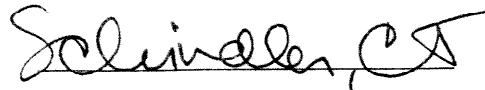
<sup>5</sup> Although Lawrence points out that in addition to the late fee provision, the lease also imposed a \$150 fee requiring the tenant to cover the costs of preparing and serving a three-day pay rent or vacate notice, we note that the landlord did not seek to impose the fee and it is not a part of the court’s award.

<sup>6</sup> For the first time in her reply brief, Lawrence argues that the late fee provision in the lease is an adhesion contract. We need not address arguments raised for the first time on appeal and for the first time in a reply brief. See Stelter v. Dep’t of Labor & Indus., 147 Wn.2d 702, 711 n. 5, 57 P.3d 248 (2002); King v. Rice, 146 Wn. App. 662, 673 n. 30, 191 P.3d 946 (2008). Nonetheless, Lawrence expressly states in her opening brief that she does not claim procedural unconscionability. Whether the provision is an adhesion contract is only considered in determining procedural unconscionability. See Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 393, 858 P.2d 245 (1993).

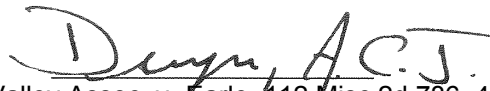
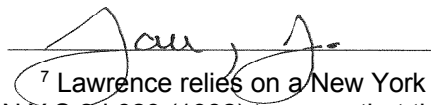
month. The lease imposed a late fee of \$20 on the fifth day of the month, and \$2 per day for each day thereafter. The resulting maximum possible late fee for a 30-day period was \$70, or 25% of the monthly rental amount. The tenant characterized the late fees provision as a claim for overdue rent and argued that it resulted in a penalty with an effective annual rate of interest of over 261%. The landlord argued that the late fees constituted damages related to eviction, “including but not limited to overdue rent.” Buchanan, 97 Wn. App. at 374. We agreed with the landlord and concluded that the late fee provision was not a liquidated damages amount. We also noted that even if the late fee provision constituted liquidated damages, it was not a penalty and was enforceable.<sup>7</sup> Buchanan, 97 Wn. App. at 374.

Likewise here, the late charge provision in the lease is not substantively unconscionable and is enforceable. As in Buchanan, the claim is for eviction and related costs including overdue rent and late fees.

We affirm entry of the order for writ of restitution and judgment for unlawful detainer.



WE CONCUR:



<sup>7</sup> Lawrence relies on a New York case, Spring Valley Assoc. v. Earle, 112 Misc.2d 786, 447 N.Y.S.2d 629 (1982) to argue that the late fee provision is unconscionable. However, in Buchanan, we expressly declined to follow the New York case.