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Caldwell Land and Cattle, LLC v. Johnson Thermal Systems, Inc. Appellant's Brief Dckt. 46056

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

CALDWELL LAND & CATTLE, LLC, an Idaho limited liability company a/k/a CALDWELL LAND & CATTLE COMPANY, LLC, Respondent/Appellee, vs. JOHNSON THERMAL SYSTEMS, INC., an Idaho corporation, Defendant/Appellant.	Supreme Court Docket No. 46056-2018 Canyon County Case No. CV-2015-587

APPELLANT'S BRIEF

Appeal from the District Court of the
Third Judicial District for Canyon County

Honorable Christopher S. Nye, District Judge, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

Cases

Statutes

Other Authorities

I. STATEMENT OF THE CASE

A. Nature of the Case.

This case involves an unlawful detainer action filed by Respondent Caldwell Land & Cattle, LLC ("**CLC**") against Appellant Johnson Thermal Systems, Inc. ("**JTS**"). On appeal, JTS challenges an erroneous judgment entered by the Canyon County District Court, the Honorable Christopher S. Nye presiding, that resulted from: (i) legal errors regarding jurisdiction and the plain language of the lease, and (ii) the trial court's abuse of discretion.

For over two and a half years, JTS and Bill and Arlene Gilbert (as the Gilbert Family Limited Partnership) ("**Gilbert**") enjoyed a largely agreeable landlord-tenant relationship. However, in November 2014, CLC and Gilbert entered into a purchase and sale agreement for the building that was being leased by JTS. A month later, even though CLC was aware that JTS was a tenant when it entered the purchase and sale agreement, CLC demanded that Gilbert, as part of the closing on the property, send JTS an eviction notice (drafted by CLC) requiring JTS to vacate the building by January 31, 2015. JTS maintained that in October 2014, it had exercised an option to extend its lease for an additional six months and therefore was entitled to possession until April 15, 2015. Gilbert, under threat of legal action from CLC, reluctantly sent the letter and Gilbert and CLC closed on the property at the end of December 2014. CLC then filed the underlying unlawful detainer action on January 22, 2015—nine days before the January 31, 2015, deadline provided in the eviction letter.

Disregarding the plain language of the lease (and its amendments), the District Court found that JTS failed to exercise its option to extend and that the lease had terminated on October 15, 2014. The District Court then inconsistently found that even though the lease had terminated, JTS was liable under the lease to CLC for various claims, including, incredibly, rent until April 2015. This Court should reverse the legal errors underlying the District Court's ruling and correct the District Court's clearly contradictory and inconsistent findings.

B. Course of Proceedings.

On January 22, 2015, CLC filed a Complaint for Eviction (Unlawful Detainer) alleging one count of unlawful detainer under Idaho Code Section 6-303. [R. 23-31.] In a Verified Amended Complaint filed on March 24, 2015, CLC added three more counts to its unlawful detainer claim, namely, breach of contract, breach of the implied covenant of good faith and fair dealing, and intentional and malicious injury to property. [R. 50-69.] On April 10, 2015, JTS answered and counterclaimed against CLC for constructive eviction, refund of security deposit, and refund of prorated share of February 2015 rent. [R. 93-108.]

One month later, on May 5, 2015, CLC answered JTS's counterclaim and moved for partial summary judgment against JTS on CLC's unlawful detainer claim, and its breach of contract and breach of the implied covenant of good faith and fair dealing claims. [R. 140, 149.] CLC argued that JTS was liable for unlawful detainer because JTS had failed to exercise its six-month extension and therefore the lease had expired on October 15, 2015. [R. 132-33.] Despite arguing that the lease had expired, CLC then also argued that JTS had breached the lease. [R. 133-36.] JTS opposed CLC's motion arguing that, under the plain language of the lease and its amendments, JTS had exercised a six-month extension and was entitled to possession of the property until April 15, 2015. [R. 158-68.] After a hearing, the District Court declined to rule on whether the lease and its amendments were ambiguous, but denied CLC's motion for summary judgment on the basis that even if CLC's interpretation was correct, genuine issues of material fact still existed to preclude summary judgment. [R. 196-201.]

Nine months later, on February 12, 2016, JTS filed a motion for partial summary judgment asking the District Court to find that under the plain language of the lease and its amendments, JTS had, as a matter of law, exercised its option to extend the lease. [R. 246-47.] CLC opposed the motion and cross-moved for partial summary judgment again as to its unlawful detainer claim. [R. 305-19.] The District Court summarily denied both JTS's motion for summary judgment and CLC's cross-motion for summary judgment. [R. 337-38.]

Beginning on August 23, 2017, the District Court held a three-day bench trial on CLC's unlawful detainer and contract claims, as well as JTS's counterclaims. [Tr. Vol. 1, p. 1].[1] At the conclusion of the trial, the District Court ruled that JTS had not complied with the plain language of the lease and its amendments and therefore had failed to exercise the six-month extension. [R. 620.] Thus, the District Court ruled that the lease had expired on October 15, 2014, and that after that date JTS carried on as an at-will tenant and, therefore, pursuant to the December eviction letter, was required to vacate the property by January 31, 2015. [R. 620.] The District Court then found that because JTS did not vacate the property until two weeks after January 31, 2015 [R. 618], JTS was liable for unlawful detainer. [R. 622.] However, despite having concluded that the lease had expired on October 15, 2014, and that JTS, as an at-will tenant, had vacated the premises by February 15, 2015, the District Court went on to find that JTS had breached the expired lease agreement. [R. 624.] The District Court then found that because JTS had over-stayed the lease by two weeks, it was liable for $86,389.26 in damages, including, among other things, rent through April 15, 2015, and damages to a nonparty, Caldwell Peterbilt, Inc. [R. 624.]

JTS timely moved for reconsideration of the District Court's decision and to alter or amend the judgment [R. 815-59], while CLC requested more than double the damages awarded in attorney fees. [R. 667 (requesting $178,734.72 in attorney fees); R. 891 (amending its request to $202,469.44 in attorney fees).] On April 4, 2018, the District Court summarily denied JTS's combined motion for reconsideration and to alter or amend the judgment. [R. 922-24.] On May 15, 2018, the District Court awarded CLC $153,379.20 in fees and costs [R. 974-81] and entered a final judgment of $239,768.46. [R. 983.] JTS timely appealed on May 2, 2018 (amended May 24, 2018, to include the attorney fee award). [R. 946-53, 985-94.]

[1] The transcript is produced in the Record with four pages of transcript on a single page. Thus, citations to the trial transcript are to the volume numbers and individual page numbers provided on the original trial transcript.

C. Statement of Facts.

In February 2012, JTS and Gilbert entered into a commercial lease agreement whereby JTS leased real property located at 1505 Industrial Way, Caldwell, Idaho (the "**Property**") from Gilbert (the "**Original Lease**"). [R. 33-39.] The Original Lease had a commencement date of March 15, 2012, and was set to run until April 15, 2013. [R. 33.] It also contained a provision that allowed JTS to renew the Original Lease for two additional one-year terms. [R. 34.] JTS exercised the first additional one-year renewal provided in the Original Lease on March 22, 2013. [R. 120.] This extended the lease until April 15, 2014. [*Id.*]

Near the end of the first renewal period, JTS approached Gilbert about options for extending the Original Lease. Specifically, JTS did not want to exercise the second one-year renewal provided in the Original Lease, but was interested in amending the Original Lease to allow for a fixed, six-month extension with the option to renew for an additional period of time or go to a month-to-month lease. [R. 230 (subpages 53-54), 236, 295; Tr. Vol. II, p. 228, LL. 1-12; Vol. II, p. 231, LL. 13-15.] The reason JTS was looking for a new renewal option with more flexibility was because JTS was planning to construct its own building sometime within the next year. [R. 295; Tr. Vol. II, p. 231, LL. 13-15; Vol. II, p. 262, LL. 3-9.] As a result of this, Gilbert's leasing agent, Colliers, with Gilbert's approval, began negotiating with JTS for a new renewal option—one separate and distinct from the renewal option already provided in the Original Lease. [R. 295; Tr. Vol. II, p. 262, LL. 3-9; R. 512 (pp. 22-23).] The result of those negotiations was the Third Amendment (the Original Lease together with its various amendments, including the Third Amendment, is hereinafter referred to as the "**Amended Lease**" or "**Lease**"). [Tr. Vol. II, p. 262, LL. 10-13; R. 512 (subpages 22-23).]

The Third Amendment renewed the Original Lease for an additional six months, extending the Original Lease to October 15, 2014. [R. 121.] In addition, to address the flexibility requested by JTS, the Third Amendment also provided JTS the option to extend the lease for an additional six-month period or to continue on a month-to-month basis after the October 15, 2014, date. [*Id.*] Unlike the first renewal, which was provided for in the Original

Lease, the Third Amendment modified the Original Lease and provided JTS new terms for future renewals of the Lease. [*Compare* R. 34, Option to Renew (providing the original terms for renewals of the Original Lease), *with* R. 121 (providing the amended and modified terms for renewals of the Amended Lease). The amended terms were as follows:

> At the conclusion of this lease extension the Tenant shall have the option to extend the lease agreement for an additional period of either six (6) months or on a month to month basis at the following rates:
>
> a. Six Month Term: Base Rent = $6,000/mo
> b. Month to Month Term: Base Rent = $6,250/mo
>
> The Base Rent plus NNN expenses shall be paid monthly, in advance, in accordance with the terms of the Lease.

[R. 121, ¶ 3.]

At some point prior to October 15, 2014, JTS and Gilbert began discussing when JTS thought its new building would be completed. [R. 617-18.] JTS informed Gilbert's leasing agent that while JTS hoped to move out of the Property by December 2014, it could be as late as February or March 2015. [*Id.*] In those discussions, Gilbert's agent never asked JTS which of the two renewal options, i.e., the additional six-month option or the month-to-month option, JTS planned on employing. [Tr. Vol. II, p. 255, LL. 17-21.]

JTS, in accordance with the plain language of the Amended Lease, elected to exercise its option to extend the Amended Lease for an additional six-month period beyond October 15, 2014, and, as required under the Amended Lease, paid Gilbert $6,000/month, plus triple net, which is the amount called for to extend the Amended Lease for an additional six-month term. [R. 121, ¶ 3.] Gilbert accepted this payment without reservation or comment. [R. 242, ¶ 3.]

On November 17, 2014, CLC and Gilbert entered into an agreement for the purchase of the Property ("**Purchase Agreement**"). [Tr. Vol. II, p. 235, LL. 5-7; R. 466-69.] CLC bought the Property with the intention of leasing the Property to Caldwell Peterbilt, Inc. ("**Peterbilt**"). [Tr. Vol. III, p. 374, L. 4 – p. 377, L. 9.] Peterbilt and CLC are owned by the same person. [*Id.*; R. 381-82.] CLC was aware the Property was currently occupied by JTS when it made the offer.

[Tr. Vol. III, p. 373, LL. 7-13.] Indeed, the Purchase Agreement included a requirement that Gilbert provide CLC "copies of any existing tenant leases and amendments or rental agreements. Statement of all current rents, deposits, advance fees, and delinquencies pertaining to the Property." [R. 475, ¶ 3.] Also included in the Purchase Agreement was a requirement that Gilbert deliver to the closing agent, "An Assignment and assumption of all leases, warranties, contracts, and guarantees that effect the Premises . . .," [R. 469, ¶ 12(c)], and a requirement that "[a]ny tenant deposits held by Seller shall be credited to Buyer at Closing." [*Id.* ¶ 13.] The closing date in the Purchase Agreement was set as "no later than" December 31, 2014. [*Id.* ¶ 11.]

In December 2014, after the Purchase Agreement was finalized, but before Gilbert and CLC closed on the Property, JTS made another $6,000, plus triple net, payment as called for under the terms of the Amended Lease for a six-month term. [R. 121, ¶ 3.] Again, Gilbert accepted this payment without reservation or comment. [R. 242, ¶ 3.]

However, on December 5, 2014, although aware that JTS was a tenant of the Property, CLC's president, Blake Jackson, stated in an e-mail to Colliers, "I don't want to be unkind – ***but we don't care about their [JTS and Gilbert's] agreement. When we close on Dec 31 – we are taking possession of the building***." [Tr. Vol. III, p. 464, LL. 3-9 (emphasis added).] That same day, Colliers notified JTS for the first time that Gilbert had sold the Property and that the new tenant, CLC, wanted to occupy the Property as soon as possible. [R. 616; Tr. Vol. I, p. 124, LL. 22-25.] JTS immediately responded that it had exercised its option to extend the lease for an additional six months. [Tr. Vol. I, p. 124, LL. 15-17.] Colliers responded by reiterating that CLC wanted JTS "to vacate the building immediately." [R. 301.]

Prior to CLC's interference with the agreement between Gilbert and JTS, there was no question about whether JTS had exercised the six-month renewal option. Indeed, although very concerned about the rent rate, Gilbert had been accepting JTS's $6,000 plus triple net payments

for the six-month extension for two months before CLC became involved.[2] Indeed, Arlene Gilbert stated on multiple occasions that she wanted to be fair to JTS. [Tr. Vol. I, p. 123, LL. 6-8; Tr. Vol. II, p. 259, LL. 4-17, p. 260, LL. 12-17.] CLC, however, insisted on Gilbert evicting JTS. [Tr. Vol. III, p. 472, LL. 7-13 ("[I]n connection with the pending close on [the Property] we insist that the seller or the seller's agent fill out and serve the attached termination of tenancy notice . . . by the end of the day tomorrow, December 10, 2014." (Emphasis added)).] Indeed, CLC made it a precondition of closing [Tr. Vol. II, p. 280, L. 24 – p. 281, L. 2; R. 528 (subpages 42-44)], and threatened to sue if its demands were not met. [Tr. Vol. II, p. 268, L. 2 – p. 270, L. 25.]

Arlene Gilbert (who was in her mid-80s at the time [Tr. Vol. II, p. 218, L. 6]), although expressing concern about the eviction notice [Tr. Vol. II, p. 259, LL. 4-21], was dealing with her husband's rapidly declining health (he passed away two days before Gilbert and CLC closed on the Property [Tr. Vol. II, p. 264, LL. 16-23]), and under threat of possible legal action from CLC [Tr. Vol. II, p. 268, L. 2 – p. 270, L. 25], went ahead and, on December 11, 2014, sent the eviction notice CLC and Colliers had prepared ("**Eviction Letter**"). [Tr. Vol. II, p. 261, LL. 3-12; R. 87-88.] The Eviction Letter stated that JTS had to vacate the Property no later than January 31, 2015, and had to remove all of its "trade fixtures, fencing, and personal property of any kind, and surrender [the Property] in the same condition, reasonable wear and tear excepted, as [the Property] were in at the beginning of the Lease." [R. 87.]

On January 22, 2015, nine days before the date JTS had been given to vacate the Property, CLC filed its Complaint for Eviction (Unlawful Detainer). [R. 23.] After being served with the lawsuit, JTS, although maintaining that it had exercised the Amended Lease's six-month

[2] That Gilbert was very conscientious of the amount of rent being paid by JTS is reflected in the testimony of Sheri Johnson: "One time . . . [JTS] forgot to put in the 3 percent increase in our rent check and she [Arlene Gilbert] was in like the day she received the check and was very angry." [Tr. Vol. I, p. 4, LL. 12-15.] That Gilberts' agent, Colliers, was also very attentive to the rent rate being paid by JTS is reflected in an e mail from Colliers to JTS in April 2014 reminding JTS to send the additional "$285.93 to Arlene for the remainder of the rent due this month." *See* Trial Exhibit 227.

renewal option by paying the amount required under the Third Amendment for such renewal, accelerated its efforts to vacate the building in an effort to avoid further litigation. [R. 515 (subpage 25, LL. 14-25).] On February 6, 2015, JTS (through counsel) notified CLC's counsel of its intent to vacate the Property by no later than February 18, 2015. [Tr. Vol. III, p. 513, LL. 15-18.] On February 12, 2015, in an additional e-mail to CLC's counsel, JTS notified CLC that it had vacated the Property. Tr. Vol. III, p. 516, LL. 16-24. In its answer to JTS's counterclaim, CLC admitted that JTS vacated the Property on February 12, 2015. [R. 145, ¶ 40.]

After JTS vacated, but before the end of February, Idaho Power came to the Property and removed a temporary 480V transformer that JTS had leased from Idaho Power. [Tr. Vol. III, p. 287, L. 21 – p. 288, L. 24.] Although the Property had alternate sources of power that had satisfied JTS's needs prior to, JTS had installed the temporary transformer in February 2014 to meet JTS's additional power needs. [Tr. Vol. I, p. 108, LL. 9-13.] Pursuant to the terms of its agreement with Idaho Power, JTS paid for the removal of the transformer at the same time JTS paid for its installation. [Tr. Vol. II, p. 300, LL. 1-16.] Neither JTS nor Gilbert ever represented that the 480V transformer was part of the Property [Tr. Vol. I, p. 186, LL. 7–9 ("[D]id any Johnson Thermal employee make any representation about the 480 power? / No.")], and CLC never inquired as to whether the 480V transformer was part of the Property. [Tr. Vol. I, p. 187, L. 25 – p. 189, L. 8 (noting that CLC did not verify the status of the 480V power).]

On February 24, 2015, despite filing an action to evict JTS, and despite the fact that JTS had vacated the Property on February 12, 2015, and despite CLC having possession of the Property no later than February 18, 2015 [Tr. Vol. II, p. 318, L. 11 – p. 319, L. 4], CLC's counsel, at the direction of CLC's president, sent an e-mail to JTS stating, in part, "March rent is due on the 1st." [Tr. Vol. III, p. 528, LL. 11-15.]

II. ISSUES PRESENTED ON APPEAL

1. Whether the District Court exceeded its subject-matter jurisdiction by considering claims outside the scope of the special statutory proceeding to hear the unlawful detainer claim.

2. Whether the District Court erred in concluding that the plain language of the Amended Lease required an additional written amendment or modification before JTS could exercise its option to renew for an additional six months.

3. Whether the District Court erred in awarding damages not related to the unlawful detainer claim.

4. Whether, even if the District Court had subject-matter jurisdiction to award contractual damages in an unlawful detainer action, the District Court erred in doing so.

5. Whether the District Court erred in denying JTS's combined motion for reconsideration and to alter or amend judgment.

6. Whether the District Court erred in concluding that JTS did not succeed on its Counterclaims.

7. Whether the District Court erred in awarding CLC attorney fees.

8. Whether JTS should be awarded its costs and attorneys' fees on appeal under Idaho Code Section 6-324 and the terms of the Amended Lease.

III. STANDARDS OF REVIEW

Issue No. 1 is a jurisdictional question. As such, it is one over which the Court exercises free review. *E.g.*, *Minor Miracle Prods., LLC v. Starkey*, 152 Idaho 333, 335, 271 P.3d 1189, 1191 (2012) ("The issue of whether the district court had jurisdiction over this action is one of law, over which this Court exercises free review.").

Issue Nos. 2-6 involve the determinations of the trial court following a bench trial. As such, review of the trial court's conclusions of law is *de novo. Credit Suisse AG v. Teufel Nursery, Inc.*, 156 Idaho 189, 194, 321 P.3d 739, 744 (2014). ("[T]his Court is not bound by the legal conclusions of the trial court, but may draw its own conclusions from the facts presented."). However, review of the trial court's findings of fact is limited to determining "whether the

evidence supports the findings of fact, and whether the findings of fact support the conclusions of law." *Id.* Issue Nos. 2 and 3 involve the interpretation of an unambiguous contract between the parties. The interpretation of "an unambiguous contract and determining whether there has been a violation of that contract are issue[s] of law subject to free review." *City of Meridian v. Petra Inc.*, 154 Idaho 425, 435, 299 P.3d 232, 242 (2013); *accord Credit Suisse AG*, 156 Idaho at 194, 321 P.3d at 744 ("[I]nterpreting an unambiguous contract is a question of law and subject to free review.").

Issue No. 6 is reviewed under an abuse of discretion standard of review. *Elec. Wholesale Supply Co. v. Nielson*, 136 Idaho 814, 824, 41 P.3d 242, 252 (2001). An abuse of discretion review includes consideration of four elements: "Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 421 P.3d 187, 194 (2018).

IV. ARGUMENT

A. The District Court Exceeded Its Subject-Matter Jurisdiction by Considering Claims Outside the Scope of the Special Statutory Proceeding to Hear the Unlawful Detainer Claim.

A court may only rule on matters that are within its statutory authority to adjudicate. *Kantor v. Kantor*, 160 Idaho 803, 808, 379 P.3d 1073, 1078 (2016). When a court rules on matters in excess of its authority it exceeds its subject-matter jurisdiction—even if the parties consent to the court's adjudication. *Id.* ("[N]either estoppel nor consent will confer subject matter jurisdiction on a judge to try a case which by statute and court rule is clearly in excess of his authority to adjudicate.").

In *Texaco, Inc. v. Johnson*, this Court explained the limits of a court's authority when a party invokes Idaho's unlawful detainer statute:

> Unlawful detainer statutes were enacted for the purpose of providing a landlord or lessor with the benefit of a special summary process whereby he could regain possession of real property from a tenant or lessee who was unlawfully holding over and therefore was no longer in rightful possession. *The sole issue before a court in such a proceeding (after determining that a landlord-tenant relationship exists) is the question of who has the right to possession.* ***No other extraneous issues are to be injected by either party*** to cloud the proceedings for to allow either party to interpose questions unrelated to the issue of possession would frustrate the purpose and objective of the unlawful detainer provisions.

96 Idaho 935, 938, 539 P.2d 288, 291 (1975) (emphasis added) (internal footnotes omitted); *accord Carter v. Zollinger*, 146 Idaho 842, 845, 203 P.3d 1241, 1244 (2009) ("This court has four separate times held that, in an action for unlawful detainer, ***the sole question involved is right of possession, and no other issues may be injected***." (emphasis added) (quoting *Richardson v. King*, 51 Idaho 762, 10 P.2d 323, 324 (1932)).

In *Richardson*, the plaintiff brought an action for unlawful detainer in the probate court. 51 Idaho at 764, 10 P.2d at 323. The parties agreed that the action should be removed to the District Court because the matter involved more than just possession of the property. *Id.* The matter, including allegations of fraud, breach of contract, and lack of consideration, was heard and the District Court found that the transaction was a mortgage not a lease, and that certain contracts between the parties were void for lack of consideration. *Id.* at 765, 10 P.2d at 324.

On appeal, this Court held that it was error for the District Court to rule on matters beyond the unlawful detainer claim, holding: "in an action for unlawful detainer, the sole question involved is right of possession, and no other issues may be injected." *Id.* "Being thus limited in its scope and purpose, a judgment rendered in such an action [unlawful detainer] can have no broader application than the proceeding itself, and, the latter being confined solely to the one issue of possession, ***judgments rendered therein cannot be extended to include other matters***." *Id.* (emphasis added) (alteration in original). The Court went on to strike all parts of

the District Court's findings of fact and conclusions of law that went beyond ruling on the unlawful detainer action. *Id.* at 767, 10 P.2d at 325.

The same result is required here. Just as the plaintiff in *Richardson*, CLC originally brought a complaint entitled Complaint for Eviction (Unlawful Detainer). [R. 23.] CLC's sole cause of action was for unlawful detainer under Idaho Code Section 6-303. [R. 30.] Then, again just as in *Richardson*, the parties injected other matters into the proceedings. CLC amended its complaint and added, in addition to the unlawful detainer claim, claims for breach of contract [R. 64], breach of implied covenant of good faith and fair dealing [R. 65], and intentional and malicious injury to property [R. 66]. In response, JTS brought counterclaims for constructive eviction [R. 102], refund of security deposit [R. 103], and refund of rent [R. 104]. Again, as in *Richardson*, the District Court ruled on all these claims and extended the judgment to include these extraneous matters. [R. 616-26.] Like in *Richardson*, it was error for the District Court to do so. *See Richardson*, 51 Idaho 762, 10 P.2d at 323.

As this Court did in *Richardson*, the Court should strike all matters from the District Court's ruling that go beyond ruling on the unlawful detainer issue. Specifically, the District Court's rulings that JTS is liable for breach of contract and the covenant of good faith and fair dealing should be struck. As should the District Court's rulings regarding JTS's counterclaims. Because CLC elected to pursue its remedy under Idaho's unlawful detainer statute, the only matter the District Court had subject-matter jurisdiction to consider was the unlawful detainer claim. *E.g.*, *Carter*, 146 Idaho at 845, 203 P.3d at 1244 (2009) ("This court has four separate times held that, in an action for unlawful detainer, *the sole question involved is right of possession, and no other issues may be injected*."); *Kantor*, 160 Idaho at 808, 379 P.3d at 1078 (holding that a court does not have subject-matter jurisdiction to try matters "which by statute and court rule is clearly in excess of [its] authority to adjudicate.").

Accordingly, even if the Court finds that JTS did not comply with the plain language of the Amended Lease in exercising its option to renew for six months (it did), the District Court's findings of breach of contract and breach of the covenant of good faith and fair dealing (as well

as the damages and attorney fees that flow from those rulings as explained *infra*) should be struck.

B. Under the Plain Language of the Amended Lease, JTS Properly Exercised Its Six-Month Renewal.

"The interpretation of a contract begins with the language of the contract itself. If the language of the contract is unambiguous, then its meaning and legal effect must be determined from its words." *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 308, 160 P.3d 743, 747 (2007) (internal quotation marks and citations omitted). "When the language of a contract is clear and unambiguous, its interpretation and legal effect are questions of law. An unambiguous contract will be given its plain meaning." *Bakker v. Thunder Spring-Wareham, LLC*, 141 Idaho 185, 190, 108 P.3d 332, 337 (2005). In determining whether a contract is ambiguous, "a court looks at the face of the document and gives the words or phrases used their established definitions in common use or settled legal meanings." *Swanson v. Beco Constr. Co.*, 145 Idaho 59, 62, 175 P.3d 748, 751 (2007).

Here, the Amended Lease is unambiguous. The Original Lease contains the following relevant provisions:

> **OPTION TO RENEW:** Upon Lessor's receipt of written notice by the Lessee at least sixty (60) days prior to the expiration of this Lease Agreement, Lessor grants to Lessee an option to renew this Lease for an additional two (2) terms of one (1) year each commencing with the expiration for this Lease Agreement. Rent shall increase on a basis of three percent (3%) with the commencement of each new term. All other terms of the renewed Lease shall be negotiable.

[R. 110.]

> **MODIFICATION:** This agreement may not be amended, modified or changed except by a writing signed by all parties hereto.

[R. 113.]

Thus, under the Original Lease there were two ways JTS and Gilbert could extend the Original Lease: (1) JTS could exercise its option to renew under the option to renew provision of the Original Lease; [R. 110], or (2) JTS and Gilbert could execute an amendment under the modification provision of the Original Lease by "a writing signed by all parties hereto." [R. 113.]

The first time JTS and Gilbert extended the Original Lease they did so using the first option. [R. 120 ("WHEREAS, Tenant desire's [sic] to exercise its first one (1) year lease renewal option . . . .").] Consistent with the terms of the option to renew provision, this extended the Lease for an additional year from April 15, 2013, to April 15, 2014, and increased the rent by three percent (3%). [R. 120.] However, the second time JTS and Gilbert extended the lease they did so utilizing the second manner; that is, JTS and Gilbert utilized the modification provision of the Original Lease and *amended* the Original Lease.

As required by the modification provision of the Original Lease, JTS and Gilbert entered into an amendment to the Original Lease, signed by all parties. [R. 121.] Instead of a one-year term and a three percent (3%) rate increase as provided in the option to renew provision of the Original Lease, the Third Amendment changed the terms of renewal to a six-month extension and a ten percent (10%) rate increase. [*Compare* R. 110, Option to Renew (providing for a one-year extension and three percent (3%) rate increase), *with* R. 121 (providing a six-month extension and ten percent (10%) rate increase).] Additionally, and critical here, the Third Amendment modified how JTS and Gilbert could extend the lease going forward. Specifically, the Third Amendment provided:

> At the conclusion of this lease extension the Tenant shall have the option to extend the lease agreement for an additional period of either six (6) months or on a month to month basis at the following rates:
>
> a. Six Month Term: Base Rent = $6,000.00/mo
>
> b. Month to Month Term: Base Rent = $6,250.00/mo
>
> The Base Rent plus NNN expenses shall be paid monthly, in advance, in accordance with the terms of the Lease.

[R. 121, ¶ 3.]

As a properly executed amendment to the Original Lease, the Third Amendment became part of the Lease and was binding on the parties. *See Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 362-65, 93 P.3d 685, 693-96 (2004) (holding that amendments executed in the manner prescribed in the underlying agreement were binding and enforceable). Thus, the only question for the Court is whether JTS properly exercised its option to extend the Lease for six months "in the manner prescribed in the [Third Amendment]." *See, e.g.*, *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 309, 160 P.3d 743, 748 (2007) (noting that the obligation of the optionor is triggered when the optionee exercises "the option in the manner prescribed in the parties' contract"); *Dennett v. Kuenzli*, 130 Idaho 21, 28–29, 936 P.2d 219, 226–27 (Ct. App. 1997) (holding that an option was complete upon the optionees' fulfillment of the plain requirements of the contract); *Dante v. Golas*, 121 Idaho 149, 150–51, 823 P.2d 183, 184–85 (Ct. App. 1992) (holding that an option was exercised when optionee complied with the plain language of the contract); *cf. Riley v. Spiral Butte Dev., LLC*, 155 Idaho 469, 474, 314 P.3d 151, 156 (2013) (refusing to find option was exercised when optionee did not comply with the plain language of option).

In *Dante v. Golas*, the Idaho Court of Appeals was asked to determine, among other things, whether the optionees had properly executed their option. 121 Idaho 149, 150, 823 P.2d 183, 184 (Ct. App. 1992). The option in that case involved the option to assume a mortgage and stated:

> NOTICE—If lessees wish to assume mortgage prior to 12/31/88, they agree to give owners at least 30 days notice prior to the date they wish to assume. This will enable owners to obtain and complete the proper papers.
>
> 1. At the end of this lease, the lessees have the option of assuming the mortgage at the prevailing rate and terms.

Id. The optionees did not provide notice 30 days in advance of the date they wanted to assume the mortgage. *Id.* Thus, the optionors argued that the optionees had failed to properly execute the option. Court of Appeals disagreed, holding:

> This provision addresses two situations: assumption before the end of the lease on December 31, 1988, and assumption "at the end of the lease." . . . .
>
> The above-quoted language of the lease-option does not provide that an option to be exercised "at the end of [the] lease" was subject to the thirty-day notice requirement; this requirement was expressly limited to an assumption of the mortgage "prior to" December 31, 1988.

Id.

Here, as in *Dante*, there was more than one way in which JTS could have effectuated an extension under the Amended Lease. One way was under the modification provision, another was under the option to renew provision, and the third way, added by amendment to the Lease, was under the Third Amendment. While the first and second ways to extend the Lease both explicitly required some sort of writing (the option to renew provision requires written notice and the modification provision requires a signed writing), the language in the Third Amendment contained no such provision. Indeed, similar to the "at the end of this lease" language in the *Dante* option, the language in the Third Amendment option states: "At the conclusion of this lease extension [JTS] shall have the option . . . ." Like in *Dante*, the Third Amendment option, as opposed to the option to renew or modification provisions, does not require any written notice or signed writing. Rather, the written requirements are expressly limited to the modification and option to renew provisions. *See Dante*, 121 Idaho at 150, 823 P.2d at 184 ("The above-quoted language does not provide that an option to be exercised 'at the end of [the] lease' was subject to the thirty-day notice requirement; this requirement was expressly limited to an assumption of the mortgage 'prior to' December 31, 1988." (alteration in original)).

Thus, if JTS wished to extend the lease under the option to renew provision or modification provision, it would have to provide written notice or a signed writing, respectively.

However, the plain language of the Third Amendment simply does not require that any written agreement or notice be given in order to exercise the six-month option to renew. It clearly provides that "[a]t the conclusion of this lease extension [JTS] *shall* have the option . . . ." [R. 121.] There is no written agreement or notice requirement and the addition of any such requirement would impermissibly rewrite the Third Amendment. *E.g.*, *Shawver*, 140 Idaho at 362, 93 P.3d at 693 (2004) ("Courts do not possess the roving power to rewrite contracts[.]").

There is no question that under the plain language of the Third Amendment, JTS was not required to "execute a written agreement" or to provide "written notice" to exercise its option to renew the lease for a six-month term. Rather, JTS was only required to comply with the requirements listed in the Third Amendment to effectuate the renewal. Those requirements are clearly articulated as: (1) "At the conclusion of this lease extension"; (2) "the Tenant shall have the option to extend the lease agreement . . . at the following rate[]: Six Month Term: Base Rent = $6,000.00/mo"; and (3) "[t]he Base Rent plus NNN expenses shall be paid monthly[.]" [R. 121.] It is undisputed that JTS did all three of these things by: (1) at the conclusion of the lease extension; (2) paying a base rent of $6,000.00; and (3) paying the base rent "plus NNN expenses" monthly. [R. 618 (finding that JTS paid Gilbert "$6000/month, plus triple net, for November and December, 2014"; R. 242, ¶¶ 2-3.]

Having properly exercised its option to extend the lease for six months "in the manner prescribed in the [Third Amendment]," there was nothing left for JTS to do. Gilbert, as the optionor, was bound to the six-month extension it had offered. *See Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 309, 160 P.3d 743, 748 (2007) (noting that the obligation of the optionor is triggered when the optionee exercises "the option in the manner prescribed in the parties' contract"); *Dante v. Golas*, 121 Idaho 149, 150–51, 823 P.2d 183, 184–85 (Ct. App. 1992) (holding that an option was exercised when the optionees complied with the plain language of the contract).

However, despite the fact that the Third Amendment clearly and unambiguously does not contain any writing requirement, the District Court concluded that the "plain language of the

Lease Agreement required all . . . changes to be in writing and signed by the parties . . . . The Lease Agreement required any renewal, including a renewal under the Third Amendment, to be put in writing." [R. 620.] As discussed above, that conclusion is contrary to the plain language of the Third Amendment.

Accordingly, because the Third Amendment modified and amended the Original Lease by changing: (1) the terms of and (2) how future renewals would occur, and because the plain language of the Third Amendment does not require a written agreement, JTS respectfully requests that the Court reverse the District Court's conclusion of law that JTS did not comply with the plain language of the Lease. Further, having complied with the plain language of the Lease, JTS successfully exercised its option to extend the Lease another six months and therefore was entitled to remain on the Property until April 15, 2015. As such, JTS was not liable for unlawful detainer (or breach of contract or breach of the implied covenant of good faith and fair dealing) and the District Court's rulings to the contrary should be overturned as well.

C. The District Court Erred When It Awarded Damages Unrelated to CLC's Unlawful Detainer Claim.

Even assuming that JTS failed to comply with the plain language of the Amended Lease (it did not), CLC may only recover its damages related to JTS's alleged unlawful detainer. Damages related to any alleged breach of contract or breach of the implied covenant of good faith and fair dealing cannot be combined with an action for unlawful detainer. *See supra*, Part IV.A; *e.g.*, *Richardson v. King*, 51 Idaho 762, 10 P.2d 323, 324 (1932) ("[A] judgment rendered in such an action [unlawful detainer] can have no broader application than the proceeding itself, and, the latter being confined solely to the one issue of possession, ***judgments rendered therein cannot be extended to include other matters***.") (emphasis added).

Even assuming that JTS did not properly exercise the six-month renewal (it did), and therefore, as a month-to-month tenant, was required to vacate the Property by January 31, 2015, JTS was only in possession of the Property for twelve days beyond the timeframe set forth in the notice to vacate. [R. 145, ¶ 40 (admitting that JTS vacated the Property on February 12, 2015).]

Thus, CLC should only be allowed to recover, if at all, for any damages incurred for the twelve days JTS allegedly unlawfully detained the Property.

Under Idaho Code Section 6-316, a landlord may recover "in addition to possession of his property; damages and rent found due." *Texaco, Inc. v. Johnson*, 96 Idaho 935, 940, 539 P.2d 288, 293 (1975). In order to recover for damages, the landlord "has the burden of proving that the claimed damages are the proximate or direct result of the unlawful detention." *Id.*

In *Texaco*, Texaco placed Johnson in possession of its Twin Falls bulk plant and entered into an agreement with Johnson to sell and distribute Texaco's automotive products. *Id.* at 936, 539 P.2d at 289. Sometime thereafter, Texaco terminated its agreement with Johnson and served Johnson with notice to vacate the bulk plant. *Id.* Johnson refused to vacate and remained in the bulk plant for an additional five months. *Id.* Texaco then filed an unlawful detainer action. *Id.* Shortly after filing the unlawful detainer action, Texaco entered into a lease for different land in Twin Falls for the purpose of construction of a temporary bulk plant while it evicted Johnson. *Id.* In addition to rent, Texaco claimed as damages the costs it incurred in leasing the different land and constructing the temporary bulk plant. *Id.* at 937, 539 P.2d at 290. The District Court awarded Texaco damages equal to what the rent would have been under Texaco and Johnson's agreement for the five months Johnson unlawfully detained the permanent bulk plant, but denied Texaco's request for damages related to its construction of a temporary bulk plant, ruling that this cost was not the natural and proximate result of Johnson's unlawful detainer. *Id.*

On appeal, Texaco argued that the expenses it incurred in establishing a temporary bulk plant were necessitated by the actions of Johnson holding over in its permanent bulk plant. It argued that its expenditures in constructing the temporary bulk plant were the natural and proximate result of Johnson's unlawful detainer. *Id.* at 940, 539 P.2d at 293. This Court disagreed. *Id.*

Here, unlike Johnson who unlawfully detained for five months, JTS only allegedly unlawfully detained the Property for twelve days beyond the timeframe set out in the notice to

vacate. [R. 145, ¶ 40 (admitting that JTS vacated the Property on February 12, 2015).] Despite this fact, the District Court found that JTS was liable for:

> rent due under the Lease Agreement through April 15, 2015 ($7,603.12) (Ex. 22); damages and costs caused by Defendant's removal of the transformer ($7,929) (Exs. 22 and 26); Peterbilt's rent and triple-net for its old lease ($14,587.92) (Exs. 22-24); cost of Peterbilt's idle employee ($7,696.22) (Exs. 22 and 25); costs to repair the Property ($2,600.00) (Exs. 22, 27, and 28); and Peterbilt's lost profits ($45,973.00) (Exs. 22 and 29).

[R. 624.] Regardless of the fact that none of these damages should have been allowed in the first place (because JTS complied with the plain language of the Lease to extend for an additional six months), there is no question that, with the exception of rent, none of these damages are "the proximate or direct result of [JTS's alleged] unlawful detention." *Texaco*, 96 Idaho at 940, 539 P.2d at 293.

Indeed, the District Court explicitly found that the removal of the temporary 480V transformer was a breach of contract. [R. 623.] And the evidence at trial was that JTS's twelve day holdover did not actually affect CLC "a whole lot." [Tr. Vol. II, p. 350, LL. 4–11 ("[JTS's moving out in mid-February] didn't change a whole lot of the remodel. It changed – what changed it was the power being pulled.").]

Thus, CLC may only recover for damages, if any, that are directly and proximately related to the twelve days JTS remained on the Property. After that, any such damages, while possibly related to some other cause, for example, as the District Court noted for alleged breach of the contract by removal of the temporary 480V transformer, would not be related to any detention of the Property. That is, while CLC alleges that the removal of the temporary transformer may have caused other damages to CLC, those damages are not related to JTS's alleged detention of the Property—they are related, if to anything, to JTS's alleged breach of contract.

Therefore, any such damages related to the removal of the temporary transformer, such as CLC's (or Peterbilt's) expenses or lost profits related to having to remain in other buildings (like

in *Texaco*) are not recoverable in an unlawful detainer action. *See Texaco,* 96 Idaho at 940, 539 P.2d at 293 (noting that damages claimed under Idaho Code Section 6-316 must be from "the proximate or direct result of the ***unlawful detention***" (emphasis added)). Accordingly, CLC's recovery on its unlawful detainer action, if any, should be limited to the rent due from February 1, 2015, to February 12, 2015, the length of JTS's alleged unlawful detention.

In sum, even if JTS did not properly extend the Lease (it did), any award of damages related to JTS's alleged breach of contract or breach of the implied covenant of good faith and fair dealing should be struck from the District Court's judgment. *Richardson*, 51 Idaho at 767, 10 P.2d at 325 (striking those parts of the trial court's decision that did not properly relate to the unlawful detainer claim). As such, the only damages, if any, that are "the proximate or direct result of [JTS's alleged] unlawful detention," are rent for the twelve days JTS allegedly unlawfully detained, or $3,312.56 ($7,730 / 28 days x 12 days). Trial Exhibit 22 (showing the rent amount paid by JTS for February). Moreover, JTS paid CLC a full month's rent for the month of February and CLC retained this amount in full. [R. 145, ¶ 42 (admitting that CLC retained JTS's February rent).] Therefore, CLC is not entitled to any rent for the alleged 12-day unlawful detainer.

Accordingly, because all the other damages (except rent, which was paid by JTS) were related to JTS's alleged breach of the Lease and covenant of good faith and fair dealing and not the alleged unlawful detainer, the District Court exceeded its subject-matter jurisdiction in awarding said damages and, as in *Richardson supra*, this Court should strike all other damages.

D. Even if the District Court Had Subject-Matter Jurisdiction to Award Contractual Damages in an Unlawful Detainer Action, the District Court Erred in Doing So.

In addition to being liable for unlawful detainer, the District Court concluded that JTS: (1) was "liable for breach of contract because it failed to vacate the Property after its term expired; removed the transformer after the term expired and without Plaintiff's permission; and failed to make repairs"; and (2) "breached the implied covenant of good faith and fair dealing when it failed to give timely notice of when it would vacate the Property, and failed to pay the

higher rent amount for the month-to-month option." [R. 623.] For the reasons discussed below, even if the District Court could have ruled on these matters in an unlawful detainer action (it could not), these conclusions, and the findings of damages resulting from them, should be reversed.

As an initial point, as discussed above, JTS complied with the plain language of the Third Amendment and properly exercised its option to extend the Amended Lease by an additional six months. *See supra*, pt. IV.B. Thus, JTS cannot be liable for a breach of contract or a breach of the implied covenant of good faith and fair dealing because it was entitled to remain on the Property until April 15, 2015. However, even if the District Court did not err in concluding that JTS did not properly exercise its option to renew the Lease for six months, the District Court erred in concluding that JTS breached its contract and in awarding damages.

1. JTS did not breach the Amended Lease or the covenant of good faith and fair dealing.

a. Under the plain language of the Amended Lease, JTS did not breach the Amended Lease by removing the temporary 480V transformer because JTS was entitled to remove it and, therefore, is not liable for any damages related to its removal.

The District Court concluded that JTS breached the Lease by removing the temporary 480V transformer. Because this is a legal conclusion based on the plain language of the Lease, this Court has free review of this issue. *City of Meridian v. Petra Inc.*, 154 Idaho 425, 435, 299 P.3d 232, 242 (2013) (noting that the interpretation of "an unambiguous contract and determining whether there has been a violation of that contract are issue[s] of law subject to free review.").

Even assuming that the Lease expired (it did not), provisions of the Lease dealing with trade fixtures and improvements, "as provided by the Original Lease, [are] carried over into the new tenancy." *Lewiston Pre-Mix Concrete, Inc. v. Rohde*, 110 Idaho 640, 646, 718 P.2d 551, 557 (Ct. App. 1985).

The Lease explicitly provided that "Lessee shall be entitled to remove its trade fixtures and personal property upon the termination of the Lease." [R. 113, Surrender of Premises.] Thus, under the plain language of the Lease, JTS was entitled to remove its trade fixtures and personal property "upon the termination of the Lease." Notably, the plain language states, "upon the termination of the Lease." It does not say *before* the expiration or termination of the Lease. Rather, it expressly provides that upon, i.e., after, the expiration or termination of the Lease, JTS was entitled to remove its trade fixtures and personal property. Moreover, the December 11, 2014 eviction letter, which was sent at CLC's insistence, clearly states that JTS was required to remove its "trade fixtures . . . and personal property of any kind[.]" [R. 87.] Thus, not only was JTS entitled, under the plain terms of the Lease, to remove any of its trade fixtures once the Lease terminated, i.e., after January 31, 2015, JTS was required to do so by the December 11, 2014 eviction letter.

In *Steel Farms, Inc. v. Croft & Reed, Inc.*, the Idaho Supreme Court provided three general tests to apply in determining whether a fixture has become a permanent fixture that is to remain with the property when the lessee departs:

> (1) annexation to the realty, either actual or constructive; (2) adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and (3) intention to make the article a permanent accession to the freehold.

154 Idaho 259, 268, 297 P.3d 222, 231 (2012) (quoting *Rayl v. Shull Enters. Inc.*, 108 Idaho 524, 527, 700 P.2d 576, 579 (1984)). The Court then went on to explain that it is the third factor, the intention to make the article a permanent accession, that is the most important. *Id.* ("Of these three factors, whether the party installing the object had the intention to annex the object to the land at the time of installation, as objectively demonstrated by the circumstances surrounding the disputed item's installation, is the most significant."). "The remaining two factors are intended to assist the fact finder in determining the parties' intent." *Id.*

Here, the objective circumstances surrounding the installation of the temporary 480V transformer clearly indicate that the temporary 480V transformer was never intended to be a "permanent accession." Indeed, this is clearly demonstrated by the fact that JTS leased the 480V transformer from Idaho Power and paid for the removal of the temporary 480V transformer when JTS entered into the lease agreement. [Tr. Vol. II, p. 299, LL. 12-16 (Idaho Power testifying that: "So in February of 2014, [JTS] came to you [Idaho Power] and said 'We want this. We're going to pay for you to install it and we're going to pay for you to remove it,' and they had to do all that up front and then you went and installed it? / Yep, yep.").] That the 480V transformer was always intended to be temporary is further buttressed by the testimony of the Idaho Power representative that leaving the 480V transformer on the Property would be "out of our realm of how we [Idaho Power] do business," and that "[i]t's temporary so it's coming back out? / Yeah." [Tr. Vol. II, p. 302, LL. 10-22.] Finally, by its very nature, it is clear that the transformer was intended to be a temporary trade fixture, acquired for the sole purpose of providing JTS temporary power in addition to the power that already serviced the Property. [Tr. Vol. I, p. 108, LL. 9-20 ("[W]hen we had brought the extra machinery in to bring all our processes in-house, we needed more power so we asked for a temporary transformer from Idaho Power and that's the 480-volt breaker panel and transformer . . . . It was booked and bought and rented under a temporary transformer. We were obligated to give it back to Idaho Power[.]").]

Moreover, removal of the temporary 480V transformer simply returned the Property to the same power source it had when JTS moved in. [Tr. Vol. II, p. 310, LL. 7-8 ("Was that old transformer replaced by the new one that was put in? / It was not."); Tr. Vol. II, p. 307, LL. 19-20 ("So the building was not without power? / No."); Tr. Vol. III, p. 552, LL. 17-18 (CLC's Blake Jackson testified that there was power to the building after the temporary 480V transformer was removed: "And there was power to the building? / Well, there was 110, right.").]

Thus, although the first factor in *Steel Farms* suggests a finding that the transformer was an improvement because it was attached to the ground, the second factor, militates in favor of

finding it was a temporary trade fixture because its sole purpose was one of a temporary nature, i.e., to provide JTS temporary power in addition to the power that already serviced the Property while JTS was on the Property. Thus, when the temporary transformer was removed, the Property was left with the same power source it had when JTS took possession of the Property in 2012. But, more importantly, the third—and most significant—factor, makes it absolutely clear that the temporary 480V transformer was a trade fixture because the objective circumstances surrounding its installation clearly indicate that it was always intended to be a temporary power source and not a "permanent accession" to the Property. *See Duff v. Draper*, 98 Idaho 379, 382, 565 P.2d 572, 575 (1977) (above-ground components of irrigation system were not permanent improvements, even though they were bolted to a concrete foundation embedded in the ground).

Based on the above, it is clear that the temporary 480V transformer was a trade fixture, not an improvement, and as such, under the plain language of the Lease and the December eviction letter, JTS was not only entitled, but was required, to remove it. The District Court's conclusion otherwise was contrary to the plain language of the Lease and should be reversed.

Moreover, even if the temporary 480V transformer was an improvement rather than a trade fixture, the Lease is silent as to whether the lessor or the tenant was entitled to keep improvements. However, the Lease did provide: "Upon the expiration of this agreement, the Lessee shall quit and surrender the premises in ***the same state of condition***, reasonable wear and tear expected, ***that the premises was in at the beginning of this Agreement***." [R. 113, Surrender of Premises (emphasis added).] It is undisputed that at the beginning of the Original Lease the Property had power and that power was 110V power, not 480V power. It is also undisputed that after the temporary 480V transformer was removed from the Property, the Property had the same source of power it had when JTS took possession of the Property. [Tr. Vol. III, p. 552, LL. 17-18 (CLC's Blake Jackson testified that there was power to the building after the temporary 480V transformer was removed: "And there was power to the building? / Well, there was 110, right.").] Consequently, after the temporary 480V transformer was removed from the Property,

the Property was returned to CLC as required by the Lease with the same source of power that existed when JTS entered into the Lease and took possession of the Property in 2012. *Id.*

Finally, the December 11, 2014, eviction letter sent at CLC's insistence, explicitly states that JTS shall remove its "trade fixtures, fencing, and personal property of any kind, and surrender [the Property] in the same condition, reasonable wear and tear excepted, as [the Property] were in at the beginning of the Lease." [R. 87.] It is undisputed that the Property did not have 480V power "at the beginning of the Lease." Tr. Vol. II, p. 299, LL. 12-15 (noting that JTS had the temporary 480V power installed in February 2014, which was approximately two years after the beginning of the Lease). It is further undisputed that the Property was surrendered with the same power source it had "at the beginning of the Lease." [*See* Tr. Vol. II, p. 310, LL. 7-8 ("Was that old transformer replaced by the new one that was put in? / It was not."); Tr. Vol. II, p. 307, LL. 19-20 ("So the building was not without power? / No."); Tr. Vol. III, p. 552, LL. 17-18 ("And there was power to the building? / Well, there was 110, right.").] Thus, not only was JTS complying with the plain terms of the Lease by removing the temporary 480V transformer, JTS was following the explicit instructions of the eviction letter that CLC insisted be sent before it would close on the Property.

Ultimately, because the temporary 480V transformer was a temporary trade fixture and because it is undisputed that the Property had power from sources other than the temporary 480V transformer when the Lease was originally entered into by JTS and Gilbert, JTS was entitled, under the plain language of the Lease regarding trade fixtures—and required under the language of the Lease and the December eviction letter requiring JTS to return the Property in the same condition as at the beginning of the Lease—to remove the temporary 480V transformer. The District Court's conclusion otherwise was contrary to the plain language of the Lease and should be reversed.

In summary, because it was not a breach of the plain language of the Lease to remove the temporary 480V transformer, the District Court's finding of damages related to the removal of the temporary 480V transformer was not supported by the evidence. *See Credit Suisse AG v.*

Teufel Nursery, Inc., 156 Idaho 189, 194, 321 P.3d 739, 744 (2014) (noting that a trial court's findings must be supported by substantial and competent evidence). As such, any contract damages (if allowed) cannot include any damages that flowed from the removal of the temporary 480V transformer.

b. JTS did not breach the implied covenant of good faith and fair dealing and should not be required to pay any damages related to any alleged breach of the same.

The District Court found that JTS "breached the implied covenant of good faith and fair dealing when it failed to give timely notice of when it would vacate the Property, and failed to pay the higher rent amount for the month-to-month option." [R. 623.] This finding is at odds with (1) the facts of the case; and (2) the District Court's finding that the Lease expired and JTS and Gilbert entered into a month-to-month or at-will tenancy. As such, it should be reversed as not being supported by substantial and competent evidence. *See Credit Suisse AG*, 156 Idaho at 194, 321 P.3d at 744 (2014) (noting that a trial court's findings must be supported by substantial and competent evidence).

First, the District Court found that after October 15, 2014, due to JTS's failure to exercise the renewal options in the Third Amendment, JTS "carried on as a month-to-month or at-will tenant." [R. 620.] As the District Court noted, at a minimum, Gilbert's acceptance of rent payments from JTS in November and December created a new at-will tenancy. [R. 621 (citing *Lewiston Pre-Mix Concrete, Inc. v. Rhode*, 110 Idaho 650 (Ct. App. 1985)).] However, the District Court then found that JTS breached the implied covenant of good faith and fair dealing when JTS "failed to pay the higher rent amount for the *month-to-month option*." [R. 623 (emphasis added).] These two findings are incompatible. Either JTS exercised one of the options to renew found in the Third Amendment and thereby was bound to pay the rent listed for that option, or JTS, by failing to execute a written agreement, did not exercise either renewal option and became an at-will tenant. It is inconsistent to find that JTS did not properly renew the Lease and thereby became an at-will tenant, and then, later, find that JTS breached an implied

covenant of good faith and fair dealing for failing to pay rent based upon the month-to-month option that the District Court concluded JTS did not exercise, and therefore was not bound to pay.

Rather, by accepting JTS's payment of $6,000, plus triple net for the months of December and November, the only consistent conclusions would be either (1) JTS properly exercised its option to renew for six months by paying the six-month rate; or (2) JTS did not properly renew the Lease, but by accepting payment, the parties entered into a new, at-will tenancy at the monthly rate of $6,000 plus triple net. The District Court's conclusions that JTS both failed to renew the Lease and then breached the covenant of good faith and fair dealing by failing to pay rent *at the renewal rate* that the District Court found JTS did not exercise, are incongruous—at least one or the other of those conclusions is unsupported. Both simply cannot be true. Thus, even if this Court finds that JTS failed to renew the Lease, it should reverse the District Court's conclusion that JTS breached the covenant of good faith and fair dealing by failing to pay rent at the *renewal* rate.

Second, the District Court found that JTS was an at-will tenant and therefore its tenancy could be terminated "by giving written notice to the tenant at least one (1) month before the termination date/date to vacate." [R. 621.] It then found that JTS's tenancy was terminated by Gilbert's December 11, 2014, notice to vacate and JTS was "liable for breach of contract because it failed to vacate the Property after its term expired." [R. 623.] Thus, according to these rulings, once the "timeframe set forth in the notice to vacate" passed, [R. 622], JTS's term had expired and it was required to vacate the Property. As such, no notice to vacate from JTS was required because the term had already expired.

JTS was not the one who terminated the tenant/landlord relationship and therefore was under no obligation to "notify" CLC of when it was planning to move out because, according to the District Court's ruling, JTS was already obligated to move out by January 31, 2015. Concluding that JTS breached the covenant of good faith and fair dealing by failing to provide notice of its intent to vacate the Property is not supported by the District Court's own finding that

JTS had been evicted, and should be reversed as well. *See Credit Suisse AG*, 156 Idaho at 194, 321 P.3d at 744 (2014).

Finally, even though JTS was not required to provide any notice of its intent to vacate, JTS did provide notice of its intent to vacate. It is undisputed that on February 6, 2015, JTS's counsel sent notice to CLC's counsel that JTS intended to vacate the Property no later than February 18, 2015. [Tr. Vol. III, p. 513, LL. 15-18; Trial Exhibit 258 (KBD 139).] It is also undisputed that JTS vacated the Property on February 12, 2015. [R. 145, ¶ 40 (admitting that JTS vacated the building on February 12, 2015); Trial Exhibit 258 (KBD 139) (e-mail from JTS's counsel informing CLC that it had vacated the building).]

Ultimately, the District Court's conclusion that JTS breached the covenant of good faith and fair dealing by failing to provide notice of its intent to vacate is unsupported by the clear facts of the case and even the District Court's own findings of fact. The District Court's legal conclusion that JTS breached the covenant of good faith and fair dealing should be reversed.

2. Because CLC should not be able to recover for damages related to the removal of the temporary 480V transformer or breach of the implied covenant of good faith and fair dealing, CLC's contract damages, if allowed, should be reduced to only those directly related to JTS's alleged failure to timely vacate.

The Court found that JTS was liable for:

> [R]ent due under the Lease Agreement through April 15, 2015 ($7,603.12) (Ex. 22); damages and costs caused by Defendant's removal of the transformer ($7,929) (Exs. 22 and 26); Peterbilt's rent and triple-net for its old lease ($14,587.92) (Exs. 22-24); cost of Peterbilt's idle employee ($7,696.22) (Exs. 22 and 25); costs to repair the Property ($2,600.00) (Exs. 22, 27, and 28); and Peterbilt's lost profits ($45,973.00) (Exs. 22 and 29).

[R. 624.] However, as discussed above, even if CLC could combine its breach of contract claims with its unlawful detainer claims (it cannot), CLC did not breach the Lease by removing the temporary 480V transformer or by failing to pay rent at a renewal rate it did not exercise or by not giving notice it was not obligated to give. Thus, the only remaining theories under which CLC could have breached the Lease would be by failing to timely vacate and failing to make

repairs. [R. 623 (concluding that JTS breached in three ways: failure to timely vacate, removing the transformer, failing to make repairs and breached the covenant of good faith and fair dealing, which itself is a contract claim, by failing to give notice of when it would vacate and failing to pay rent for an option it did not exercise).] Accordingly, there was no basis for the District Court to award damages outside February 1, 2015, to February 12, 2015, which is the timeframe of JTS's alleged failure to vacate the Property.

a. Rent due.

Here, the District Court found that the Lease was not renewed. It explicitly found that JTS failed to exercise the six-month option to renew under the Third Amendment by not executing a written agreement. [R. 620.] To then conclude that JTS is liable for "rent due under the Lease Agreement" after the District Court had already found that the Lease had expired on October 15, 2014, is, at best, confounding, and these damages should be disallowed as being unsupported by the evidence and the District Court's own finding. Either JTS exercised the six-month option to renew the Lease and was bound to pay rent until April 15, 2015, or it failed to exercise the six-month option to renew the Lease and it was not bound to pay rent until April 15, 2015. Both cannot be true. If JTS did not exercise its six-month option to renew the Lease, then it created an at-will tenancy and JTS was only obligated to pay rent on a month-to-month basis. The amount of the rent due under the at-will tenancy was the amount offered by JTS and accepted by Gilbert, i.e., $6,000 plus triple net. Further, it is undisputed that JTS paid rent for the entire month of February, which more than covered its 12 days as a holdover tenant. [R. 145, ¶ 42; Tr. Vol. I, p. 82, LL. 8-10.]

Accordingly, the District Court's finding that JTS was liable for "rent due" is not supported by the undisputed evidence that JTS in fact paid rent for the month of February. The District Court's finding of damages for "rent due" should be overturned as unsupported by the evidence.

b. The costs to repair the Property.

Although JTS disagrees with the District Court's finding that JTS should have to pay for the costs to repair the Property, JTS acknowledges that this was likely a factual issue and that there was sufficient evidence for the District Court to so conclude. As such, to the extent any such damages are allowed as contractual damages (as opposed to damages for unlawful detainer), JTS accepts liability for said costs in the amount found by the District Court.

c. Peterbilt's damages.

Peterbilt is not a party to this action and CLC should not be allowed to recover damages incurred by Peterbilt. It is undisputed that CLC and Peterbilt are separate entities. [R. 381, 382.] Blake Jackson, the owner of both CLC and Peterbilt, made a conscious decision to take advantage of the protections offered by organizing as separate entities. [R. 402, (subpage 73, LL. 9-16); Tr. Vol. III, p. 458, LL. 5-9.] As such, CLC and Peterbilt must also take with that choice the consequences. One of which is the fact that CLC, as a separate entity from Peterbilt, cannot recover damages on Peterbilt's behalf. Simply put, Peterbilt is not a party to this action. Accordingly, CLC does not have standing to bring claims against JTS for damages allegedly suffered by Peterbilt. *Bayes v. State*, No. 37469, 2010 WL 9589689, at *2 (Idaho Ct. App. Dec. 20, 2010) ("Ordinarily a person must be asserting his or her own legal rights and interests in order to have standing." (citing *Powers v. Ohio*, 499 U.S. 400, 410 (1991); *State v. Doe*, 148 Idaho 919, 936, 231 P.3d 1016, 1033 (2010)).

Furthermore, even if Peterbilt was a party, Peterbilt itself does not have standing to recover against JTS. *See Wing v. Martin*, 107 Idaho 267, 272, 688 P.2d 1172, 1177 (1984) ("It is axiomatic in the law of contract that a person not in privity cannot sue on a contract."). Peterbilt did not "exchange the promissory words" with JTS and therefore is not in privity to the Lease and consequently does not have standing to recover any of its alleged damages against JTS. *Id.* ("Privity" refers to "those who exchange the [contractual] promissory words or those to whom the promissory words are directed." (quoting Calemari and Perillo, CONTRACTS § 17–1 (2d ed. 1977))).

Thus, because Peterbilt is not a party to the action and because even if it were a party to the action, it would not have standing to recover against JTS, all damages provided to CLC on behalf of Peterbilt are simply unrecoverable in this action. The District Court's conclusion that JTS was liable to CLC for any of Peterbilt's alleged losses is not supported by the law or the facts of the case and should be reversed.

d. Even if allowed, any damages awarded to Peterbilt should be reduced.

The remaining damages awarded by the Court are directly related to the delay caused by the lack of 480V power. CLC testified that the main factor affecting the amount of time it took Peterbilt to move into the Property was directly related to the lack of 480V power and not due to JTS moving out in mid-February. [Tr. Vol. II, p. 350, LL. 4–11 ("[JTS's moving out in mid-February] didn't change a whole lot of the remodel. It changed – what changed it was the power being pulled."); Tr. Vol. II, p. 364, LL. 17–19 (noting that the two-month extension for Peterbilt's old building was sent on March 2, 2015, because "that's the date we became aware that the power had been – the 480 power had been pulled from the building.").]

However, as discussed above, under the plain language of the Lease and December eviction letter, JTS was required to remove the temporary 480V transformer. *See supra*, pt. IV.D.1. Thus, although the lack of 480V power may have delayed Peterbilt from moving into the Property, that delay was not a result of any breach of contract by JTS. Indeed, as required by the Lease and the December eviction letter, JTS returned the Property to CLC with the same source of power the Property had when JTS entered into the Lease with Gilbert and took possession of the Property. [*See* Tr. Vol. II, p. 310, LL. 7-8 ("Was that old transformer replaced by the new one that was put in? / It was not."); Tr. Vol. II, p. 307, LL. 19-20 ("So the building was not without power? / No."); Tr. Vol. III, p. 552, LL. 17-18 ("And there was power to the building? / Well, there was 110, right.").]

Therefore, damages related to nonparty Peterbilt's rent and triple-net for its old lease, if allowed, should be reduced to cover only the month of February, which is the only month

directly related to JTS's alleged breach of contract by failing to timely vacate. Based on the District Court's finding, this would total, at most, $4,862.62. [*See* R. 624 (awarding $14,587 total for three months (February, March, and April) of Peterbilt's old lease rent and triple net / 3 months); Pl.'s Trial Exhibits 22–24.] The remaining amounts for Peterbilt's rent and triple-net for its old lease, those attributable to March and April, are directly related to Peterbilt's delayed acquisition of 480V power for which, as explained above, under the plain language of the Lease, JTS is not liable.

Similarly, the cost of Peterbilt's idle employee, if allowed, should be reduced to the twelve days directly related to JTS's alleged breach of the Lease by failing to timely vacate, or approximately $1,026.16. [*See* R. 624 awarding $7,696.22 / 3 months / 30 days x 12); Trial Exhibits 22 and 25.] Likewise, Peterbilt's lost profits damages, if allowed, should also be reduced to twelve days, or approximately $6,129.73. [*See* R. 624 (awarding $45,973.00 for three months lost profits / 3 months / 30 days x 12); Pl's Trial Exhibits 22–24.]

Ultimately, even if the Court reads a written agreement or notice requirement into the Third Amendment and finds that JTS did not properly exercise the six-month renewal option; and even if the Court determines that Peterbilt can recover damages; damages should still be limited to only those directly related to JTS's failure to timely vacate the Property and should not include those related to the removal of the temporary 480V transformer or the alleged implied breach of the covenant of good faith and fair dealing. Thus, at most, even if Peterbilt is entitled to recover damages in an action to which it is not a party and under a Lease it was not in privity with, the damages related to JTS's failure to timely vacate would only total $4,930.09, not the more than $80,000 the District Court awarded. [*See* R. 624.]

Damages Related to 12-Day Breach of Contract	
12 Days of Feb. Rent ($7,730 / 28 days x 12 days)	$3,312.56
Cost of Idle Employee for 12 days	$1,026.16
Feb. Rent for Peterbilt's Old Lease	$4,862.64
Costs to Repair Property	$2,600.00
12 days of Peterbilt's Lost Profits	$6,129.73

JTS's Feb. Rent Payment [Pl.'s Trial Exhibit 22]	($7,730)
JTS's Security Deposit [Pl.'s Trial Exhibit 22]	($5,271)
Total	$4,930.09

The District Court's conclusion that JTS's breach of the Lease by removing the temporary 480V transformer was contrary to the plain language of the lease. Similarly, the District Court's conclusion that JTS breached the convent of good faith and fair dealing is contrary to the terms of the Lease and inconsistent with its own findings of fact. As such, even if the District Court did not err by allowing CLC's unlawful detainer and contract claims to be heard in the same proceeding (it did), JTS, at most, would only be liable for breach of contract for (1) failing to vacate by January 31, 2015, and (2) failing to repair the premises. The District Court's award for damages related to the removal of the transformer and damages awarded to Peterbilt are not supported by the evidence and should be reversed. *See, e.g.*, *Credit Suisse AG v. Teufel Nursery, Inc.*, 156 Idaho 189, 194, 321 P.3d 739, 744 (2014) (noting that a trial court's findings must be supported by substantial and competent evidence)

E. The District Court Erred in Concluding that JTS did Not Succeed on its Counterclaims.

JTS brought three counterclaims: (1) constructive eviction, (2) refund of security deposit, and (3) refund of prorated share of February 2015 rent. [R. 102-08.] In ruling on JTS's counterclaims, the District Court concluded that "in light of the Court's decision, Defendant [JTS] cannot prevail on its counterclaims. Defendant's security deposit is set off against Plaintiff's award." [R. 625.]

First, if this Court concludes that JTS complied with the plain language of the Lease in exercising its six-month extensions, this Court should reverse the District Court's conclusion regarding JTS's counterclaims. Second, even if this Court concludes that JTS failed to properly exercise its six-month extension, as discussed *supra*, the District Court's ruling regarding JTS's counterclaims should be struck as exceeding the District Court's subject-matter jurisdiction and impermissibly ruling on issues beyond the unlawful detainer claim. *See* Part IV.A (and

authorities cited therein); *Carter v. Zollinger*, 146 Idaho 842, 845, 203 P.3d 1241, 1244 (2009) ("[I]n an action for unlawful detainer, the sole question involved is right of possession, and no other issues may be injected.").

F. The District Court Erred in Denying JTS's Combined Motion for Reconsideration and to Alter Judgment.

The District Court summarily denied JTS's combined motion for reconsideration and to alter judgment. [R. 922–24.] In doing so, the District Court simply referred back to its prior rulings. [R. 924.] This Court reviews a district court's order denying a motion for reconsideration under the same standard of review "the lower court used in deciding the motion for reconsideration." *Westby v. Schaefer*, 157 Idaho 616, 621, 338 P.3d 1220, 1225 (2014). In turn, a District Court applies the same standard in ruling on a motion to reconsider as it used when deciding the original order. *Id.* As such, because the District Court did not add any additional findings or conclusions but simply referred to his prior ruling, the District Court also erred, for the reasons outlined above, in denying JTS's combined motion for reconsideration and to alter judgment. S*ee* Part IV.A to D (incorporated here by reference) (explaining how JTS complied with the plain language of the Lease in exercising its six-month extension and how, even if JTS did not properly extend the Lease, the District Court exceeded its subject-matter jurisdiction by awarding damages outside of the unlawful detainer claim).

G. The District Court Erred in Awarding CLC Attorney Fees.

"An award of attorney fees is a matter best left to the sound discretion of the trial court, and the burden is upon the appellant to demonstrate that the trial court abused its discretion." *Elec. Wholesale Supply Co. v. Nielson*, 136 Idaho 814, 824, 41 P.3d 242, 252 (2001). An abuse of discretion is determined by considering: "Whether the trial court (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and

(4) reached its decision by the exercise of reason." *Lunneborg v. My Fun Life*, 163 Idaho 856, 421 P.3d 187, 194 (2018).

The District Court awarded attorney fees under "the parties' contract and I.C. § 6-324." [R. 981.] First, under either the Lease or Idaho Code Section 6-324, fees are only available to the prevailing party. [R. 113]; I.C. § 6-324. As detailed above, JTS did not breach the Lease and did not commit unlawful detainer. As such, CLC was not the prevailing party. Because CLC should not have been the prevailing party, the District Court failed to act consistently with the applicable legal standard in awarding CLC attorney fees and did not reach its decision by the exercise of reason. Such was an abuse of discretion and the District Court's award of fees should be reversed. Further, if the Court determines that JTS complied with the plain language of the Lease and properly exercised its option to renew for six-months, JTS would be the prevailing party on CLC's unlawful detainer action and, pursuant to Idaho Code Section 6-324 and the Amended Lease, JTS would be entitled to its fees in the District Court. [R. 113]; I.C. § 6-324.

Next, even if the District Court was correct in determining that CLC was the prevailing party on the unlawful detainer claim, as explained above, the District Court erred in considering the claims and matters beyond the unlawful detainer claim. Thus, even if JTS was liable for unlawful detainer (it was not), the District Court erred in awarding fees related to CLC's pursuit of contractual damages as well as its remedy under the unlawful detainer statute. Idaho Code Section 6-324 provides: "*In any action brought under the provisions of this chapter . . .* the prevailing party shall be entitled to an award of attorney fees." (Emphasis added.) Thus, CLC is only entitled to recover fees attributable to work on the unlawful detainer claim, not the three other claims asserted (breach of contract, breach of implied covenant of good faith and fair dealing, and intentional and malicious injury to property). *See also Richardson v. King*, 51 Idaho 762, 10 P.2d 323, 324 (1932) ("[A] judgment rendered in such an action [unlawful detainer] can have no broader application than the proceeding itself, and, the latter being confined solely to the one issue of possession, ***judgments rendered therein cannot be extended to include other matters***." (emphasis added) (alteration in original)).

As proponent of the fees, the burden is on Plaintiff to properly document its fees. *Welch v. Met. Life Ins. Co.,* 480 F.3d 942, 948 (9th Cir. 2007) ("[t]he fee applicant bears the burden of documenting the appropriate hours expended in the litigation[.]"). Presumably, this includes appropriately apportioning between recoverable and nonrecoverable fees. Only fees attributable to the unlawful detainer claim should be deemed recoverable. If the fees are unapportionable between fees attributable to the unlawful detainer claim and the other causes of action asserted by a plaintiff, the entirety of the fees should be disallowed. *See Brooks v. Gigray Ranches, Inc.*, 128 Idaho 72, 78, 910 P.2d 744, 750 (1996) (affirming the denial of the requested attorneys' fees where the nonrecoverable fees could not be isolated from the recoverable fees). Accordingly, because the fees claimed by Plaintiff in this matter are unapportionable between the fees attributable to the unlawful detainer claim and the three other causes of action asserted by Plaintiff (breach of contract, breach of implied covenant of good faith and fair dealing, and intentional and malicious injury to property), the entirety of the fees should be disallowed.

At minimum, fees incurred after JTS vacated the premises on February 12, 2015, were not incurred to regain possession of the Property from Defendant, and thus, were <u>not incurred to regain possession</u> from a hold-over tenant pursuant to Idaho Code Section 6-303(1), but instead, to recover <u>contractual and tort damages</u> on CLC's theories of breach of contract and malicious injury to property. To the extent allowed, only fees incurred between January 31, 2015, and February 12, 2015 (the period of Defendant's unlawful detainer), should be deemed recoverable under Idaho Code Section 6-324. At most, fees recoverable under Idaho Code Section 6-324 should be cut off by March 9, 2015, the date CLC filed its Amended Complaint admitting that Defendant had vacated the premises in mid-February 2015. [R. 62, ¶ 58 (noting that Defendant vacated the property on or around February 12, 2015).]

Although the District Court recognized the award of fees as being within its discretion, it abused that discretion by awarding fees unrelated to CLC's unlawful detainer claim. Idaho law is clear. A claim for unlawful detainer cannot be combined with other claims and under Idaho Code Section 6-324, only fees incurred in pursuit of the unlawful detainer claim are recoverable.

The District Court disregarded these legal principals, failed to exercise reason, and acted outside the bounds of its discretion when it awarded CLC its attorney fees related to its breach of contract, breach of implied covenant of good faith and fair dealing, and intentional and malicious injury to property claims. As such, the award should be reversed.

Likewise, the court erred in awarding fees under the Lease. The District Court found that the parties' agreement was not renewed, and after October 15, 2014, carried on as a month-to-month tenancy-at-will. [R. 620.] ("Based on a review of the record and applicable law, the Court finds that Defendant did not properly exercise the 6-month option, but carried on as a month-to-month or at-will tenant after October 15, 2014."). However, despite this ruling, the District Court awarded fees under the expired Lease. [R. 978-79.] In doing so, the District Court relied on *Bauchman-Kingston Partnership, LP v. Haroldsen*, 149 Idaho 87, 94, 233 P.3d 18, 25 (2008), for the proposition that "A party may be awarded attorney fees based on an agreement so providing, even when the court determines that the agreement is not enforceable." *Id.*

However, there are two problems with this. First, *Bauchman* relied on another case, *O'Connor v. Harger Construction, Inc.*, 145 Idaho 904, 188 P.3d 846 (2008), for the proposition that an unenforceable contract could still provide the basis for attorney fees. *O'Connor* makes it clear that an unenforceable contract may be the basis for an attorney fee award only where the contract has a severability clause. 145 Idaho at 912, 188 P.3d at 854 ("Even though the contract was unenforceable, it was a contract and had a severability clause, so the attorney fee provision is capable of enforcement."). Here, the Lease contains no such severability provision; as such the District Court's reliance on *Bauchman* is misplaced.

Second, the District Court did not find that the Lease was not enforceable—it found that it had terminated. A terminated or expired contract, unlike an unenforceable one with a severability clause, cannot support an attorney fee award. *See Ellis v. Butterfield*, 98 Idaho 644, 650, 570 P.2d 1334, 1340 (1977) ("[H]aving ***terminated*** the contract, they cannot later assert the attorney fee clause in it[.]")(emphasis added); *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190,

206 (1991) ("[A]n expired contract has by its own terms released all its parties from their respective contractual obligations."); *Alday v. Raytheon Co.*, 693 F.3d 772, 784 (9th Cir. 2012) ("As a general rule, where the contract at issue has expired, the parties are released . . . from their respective contractual obligations."); *see also* Hon. Jesse R. Walters, Jr., *A Primer for Awarding Attorney Fees in Idaho*, 38 IDAHO L. REV. 1, 63 (2001).

The District Court cannot find that CLC (via Gilbert) terminated the Lease by sending the notice to vacate and then find that CLC was entitled to fees under the very contract that it insisted was terminated. Such a finding defies the applicable legal standards and defies reason. The District Court abused its discretion by so doing and should be reversed.

As an additional point, this Court should disallow all costs and fees sought by CLC because CLC's Memorandum of Attorney Fees and Costs filed on January 17, 2018 [R. 627], does not comply with Idaho Rule of Civil Procedure 54(d)(4), which states:

> (4) *Memorandum of Costs.* At any time after the verdict of a jury or a decision of the court, but not later than 14 days after entry of judgment, any party who claims costs may file and serve on adverse parties a memorandum of costs, itemizing each claimed expense. ***The memorandum must state that to the best of the party's knowledge and belief the items are correct and that the costs claimed are in compliance with this rule.*** Failure to timely file a memorandum of costs is a waiver of the right to costs. A memorandum of costs prematurely filed is considered as timely.

I.R.C.P. 54(d)(4) (emphasis added). Under Idaho Rule of Civil Procedure 54(e)(5), attorney fees are considered costs and therefore are governed by Rule 54(d)(4). I.R.C.P. 54(e)(5) ("Attorney fees . . . are costs in an action and [are] processed in the same manner as other costs included in the memorandum of costs.").

Here, neither CLC's Memorandum of Attorney Fees and Costs [R. 627-29], nor the supporting Affidavit of William B. Ingram [R. 632-39], "state that to the best of the party's knowledge and belief the items are correct and that the costs claimed are in compliance with this rule," as Rule 54(d)(4) indicates a "memorandum of costs" must do. This certification is

mandatory and is absent.[3] In the absence of the mandatory certification language from Rule 54(d)(4), none of CLC's January 17, 2018, filings qualifies as a proper "memorandum of costs" under Idaho law. Since CLC has not filed a document that complies with Rule 54(d)(4), CLC has failed to meet the jurisdictional requirements of Idaho Rule of Civil Procedure 54 and is not entitled to an award of costs and attorney fees.

H. JTS Is Entitled to its Attorney Fees on Appeal.

If the Court holds that under the plain language of the Amended Lease, JTS properly exercised its option to renew for six months, it will have prevailed on appeal. As such, JTS is entitled to its attorney fees under the Amended Lease and Idaho Code Section 6-324. Additionally, even if JTS only prevails in reducing the damages to only those related to the unlawful detainer, this Court may determine that JTS is the prevailing party and similarly award JTS its attorney fees on appeal pursuant to the Amended Lease.

V. CONCLUSION

CLC chose to bring an unlawful detainer action.[4] As such, it is limited to recovering those damages that are a proximate and direct result of JTS's unlawful detainer, if any. The

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[3] Although JTS recognizes that in *Estate of Holland v. Metro. Prop. & Cas. Ins. Co.*, 153 Idaho 94, 102, 279 P.3d 80, 88 (2012), this Court made a passing inference that only "substantial" compliance with Rule 54(d)(5) is required, this Court has been clear in stating that when the word "shall" is used in relation to an element of a rule or statute it is mandatory and substantial performance with that element of the statute or rule does not suffice. *See, e.g.*, *Rife v. Long*, 127 Idaho 841, 908 P.2d 143 (1995) ("When used in a statute, the word 'may' is permissive rather than the imperative or mandatory meaning of 'must' or 'shall"'); *Obendorf v. Terra Hug Spray Co.*, 145 Idaho 892, 900, 188 P.3d 834, 842 (2008) (rules of statutory construction apply to both statutes and rules of civil procedure) (citations omitted).

[4] Indeed, CLC chose to prematurely bring the action nine days before the time JTS was given to vacate the Property provided in the eviction letter. [R. 23 (showing original complaint was filed January 23, 2015); R. 48 (showing that JTS was given until January 31, 2015, to vacate the Property).] Idaho Code Section 6-303(1) provides that before bringing an unlawful detainer action "in case of a tenancy at will, it must first be terminated by notice, as prescribed in the civil code." In light of this premature filing, the Court should find that JTS was not liable for unlawful detainer simply on the fact that at the time the Complaint was filed no unlawful detainer had occurred. Thus, not only should CLC's contract claims be struck because the

District Court exceeded its subject-matter jurisdiction in allowing CLC to combine its actions for unlawful detainer and breach of contract and should be reversed. *Carter v. Zollinger*, 146 Idaho 842, 845, 203 P.3d 1241, 1244 (2009) ("This court has four separate times held that, in an action for unlawful detainer, the sole question involved is right of possession, and ***no other issues may be injected***." (emphasis added)).

Moreover, under the plain language of the Amended Lease, JTS properly extended the Amended Lease for an additional six months by: (1) at the conclusion of the lease extension; (2) paying a base rent of $6,000.00; and (3) paying the base rent "plus NNN expenses" monthly, which is all the plain language required to extend the Amended Lease. The District Court's addition of a writing requirement in order to renew under the Third Amendment was an impermissible redraft of the Amended Lease and should be reversed.

Further, even if CLC could combine its unlawful detainer and contract claims into one proceeding, and even if the Third Amendment included a written requirement, the District Court's findings of contractual damages should be reduced to only include those damages directly related to JTS's alleged twelve-day breach of the Lease. And, in any event, the District Court should not have awarded damages to Peterbilt, a non-party lacking privity with the Lease.

Finally, the District Court's award of attorneys' fees was an abuse of discretion. As such, JTS respectfully requests that the Court reverse the District Court's conclusions that JTS committed unlawful detainer and breached the Lease and the covenant of good faith and fair dealing. For the same reasons, JTS also requests that the District Court's conclusion that JTS failed to succeed on its counterclaims be reversed as well. Alternatively, even if liable for unlawful detainer (it is not), JTS requests that all findings, conclusions, damages, and attorney

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District Court erred by allowing CLC to combine its unlawful detainer and contract claims, the unlawful detainer claim should be struck as well for filing before the claim was ripe. *See Blankenship v. Washington Trust Bank*, 153 Idaho 292, 296, 281 P.3d 1070, 1074 (2012) (matter was not ripe because there was no actionable default as of yet); *Noh v. Cenarrusa*, 137 Idaho 798, 801, 53 P.3d 1217, 1220 (2002) (matter was not ripe where voters filed a prospective suit to declare a proposition invalid before it became law).

fees and costs related to CLC's breach of contract claims be struck as being outside the permissible scope of an unlawful detainer action.

DATED: November 21, 2018.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By /s/ Lynnette M. Davis
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Attorneys for Defendant/Appellant Johnson Thermal Systems, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of November, 2018, I caused to be served a true copy of the foregoing APPELLANT'S BRIEF by the method indicated below, and addressed to each of the following:

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