Supreme Court No. 100884-8
Court of Appeals No. 55216-7-II
Trial Court No. 17-2-13272-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ROBERT BIEHL and MICHELLE BIEHL,
Appellants,

vs.
JOSEPH L. OSTHELLER,
Respondents.

ON APPEAL FROM
THE SUPERIOR COURT FOR PIERCE COUNTY
STATE OF WASHINGTON

The Honorable Judge Stephanie Arend

ANSWER TO RESPONDENT'S PETITION FOR REVIEW

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I. INTRODUCTION

This case is a tenant damage case, in which a key disputed issue is whether one of the tenants was part of a contractual relationship with the landlords even after moving out. The court of appeals overruled a summary judgment order in an unpublished opinion, finding that there were disputed issues of fact on the ongoing contractual relationship between the landlord and the tenant. No legal issues exist in this case to warrant Supreme Court review.

II. STATEMENT OF THE CASE

Robert and Michelle Biehl built and owned a home at 5407 69th St. Ct. NW, Gig Harbor, Washington ("Property"). In February of 2015, they entered into a rental contract for this Property with Dr. Joseph Ostheller and his then-wife, Ruth Taylor.[1] The term of the lease was at $2,650 per month for one year, until January 31, 2016, with the specific continuance under the same terms as a month-to-month lease thereafter.

Ostheller and Taylor continued to occupy the property and pay rent through August of 2016. In or about August of 2016, Ostheller and Taylor separated and Ostheller vacated Property.[2] No evidence was presented of

[1] CP 9.
[2] Trial Transcript, p. 338.

either party informing the Biehls of this situation at the time. Ostheller continued to communicate with the Biehls on tenancy issues.[3]

In December of 2016 the Biehls served Ostheller, who was at the Property at the time, with a 20-day notice to terminate lease for both himself and Taylor.[4] Ostheller bargained with the Biehls to permit Taylor to remain on the property and paid rent for January. The Biehls made it clear they were unwilling to rent to Taylor alone, as they were unsure of her ability to pay, but accepted rent from Ostheller.[5] Taylor did remain on the property, and Ostheller paid the rent at least through May.[6] From January 1, 2017, onward Ostheller continued to be the primary contact with the Biehls for any issue with the property or rent payment.[7]

In or about July of 2017, Taylor vacated the property. Taylor was not present at a walk-through of the property on July 21, 2017, but Ostheller was.[8] No evidence was presented of any earlier walkthrough occurring. Upon reviewing the Property, Michelle Biehl identified extensive damages on the Move Out Inspection:[9] Defendant Ostheller signed this document

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[3] Trial Exhibit 3, pp. 54-55.
[4] Finding 10, CP 676.
[5] CP 288.
[6] Trial Transcript, p. 364.
[7] CP 186-188.
[8] Trial Transcript, p. 296; Trial Exhibit 8.
[9] Trial Exhibit 8.

that he was present but disputed the damages.

The Biehls subsequently identified substantial damages on the Property and brought suit after demand for payment.

In 2018, the parties filed cross-motions for summary judgment. Ostheller requested and obtained a summary judgment ruling that he was not liable for rent after December 31, 2016, but that the issue of whether he was liable for other damages should be reserved for trial.[10] Trial was held on June 16th and 17th, 2020.

At trial, the court requested additional briefing on whether damages could be awarded against Ostheller for damage that might have occurred after December 31, 2016. The court's ruling ultimately held, in reliance on the earlier summary judgment holding that there was no tenancy, that no other damages could be awarded against Ostheller unless shown to occur prior to December 31, 2016.[11] This holding then influenced the scope of damages awarded and the award of attorneys' fees at trial.

III. COURT OF APPEALS RULING

The Court of Appeals, Division I, in an unpublished opinion dated March 28, 2022, found that there was factual dispute over the nature of

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[10] CP 288-289.
[11] CP 376, Conclusion 23, CP 680-681.

Ostheller's contractual relationship with the Biehls after December 31, 2016, and that this factual dispute should have prevented summary judgment on that issue.[12] Because the other errors assigned flowed out of the court's summary judgment ruling, the court of appeals did not reach them.

IV. ARGUMENT

A. The Biehls assigned error to the original summary judgment ruling, which was not invited error.

Ostheller argues that the Biehls "invited error" by not demanding the lower court disregard the prior summary judgment motion under CR 54(b). Such argument misinterprets the concept of "inviting error" and misunderstands the nature of the appeal.

The Biehls' appeal clearly assigns error to the original summary judgment motion, decided on December 31, 2016.[13] It further assigns error to the later conclusions which appeared to be based on the trial court's reliance on the earlier summary judgment motion, such as finding that no contractual agreement existed between Dr. Ostheller and the Biehls after

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[12] *Biehl v. Ostheller,* No. 834114-2-I, slip opinion (Mar. 28, 2022), cited herein as "Appellate Opinion."

[13] Appellants' Brief, p. 1.

that date.[14]

Further, the Biehls' memorandum of law on the applicability of the summary judgment order to the final verdict, while it does not request the court to overrule the prior ruling under CR 54(b), does specifically request the court to find that a contractual relationship did exist between the Biehls and Ostheller after that date:

> Plaintiffs would contend, however, that Judge Spier's ruling, which is summary in nature and lacks factual findings, does not necessitate a finding that there was no contract from January 1, 2017 onward. It is equally consistent with a finding that the contract was on a month-to-month basis between the parties and its terms are governed entirely by the course of dealing shown between the parties at that time.[15]

The Biehls have never assigned error to the trial court's failure to modify the prior ruling under CR 54(b). That was not the basis for the appeal nor for the appellate court's ruling. Therefore, there is no error that was invited.

Although it is possible for a court to modify an earlier ruling under

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[14] Appellants' Brief, Appendix A, pp. 5-6.

[15] CP 349

CR 54(b), nowhere in CR 54(b) is it required that a party request modification of a prior ruling in order to preserve that matter for appeal. Under RAP 2.2(d), appeal is available only on the final judgment of all claims, unless there is an express direction for entry of judgment and express determination, supported by written findings, that there is no just reason for delay. This rule also does not require the party to request the overturning of earlier orders in order to preserve their right to appeal once final judgment is entered.

The question of whether it is necessary to request a ruling to be modified under CR 54(b) should be looked at in the same manner as whether it is necessary to pursue an interlocutory appeal when it would be permissible under CR 54(b) and RAP 2.2(d). The Court in reviewing that question has determined these rules are clearly permissive rather than mandatory:

> It therefore makes no sense to mandate an immediate appeal from a partial final judgment entered under CR 54(b), even though the judgment might qualify as appealable under RAP 2.2(d). Such a requirement would simply encourage multiple and perhaps

unnecessary appeals in multi-party and multi-claim cases.[16]

Similarly, requiring a party to request the court to revisit prior rulings is never mandated by the language of CR 54(b). Turning that possibility into a requirement would drastically increase the number of motions and the cost and timeliness of litigation as parties would find it necessary to constantly revisit prior rulings of the court in order to ensure their positions were preserved for appeal.

Ostheller's cases cited reference entirely different situations in which the party actively requested the error later appealed:

- Requesting specific language in a jury instruction, which they later wanted to appeal.[17]
- Moving to permit testimony from particular witnesses, and then objecting to that testimony being heard.[18]
- Setting up a case deliberately as a "test case" and failing to appeal

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[16] *Fox v. Sunmaster Products, Inc*., 115 Wn.2d 498, 505, 798 P.2d 808, 812 (1990)

[17] *State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999);

City of Seattle v. Patu, 147 Wn.2d 717, 719, 58 P.3d 273, 273 (2002)

[18] *In re Dependency of K.R*., 128 Wn.2d 129, 147, 904 P.2d 1132, 1141 (1995)

the underlying issues.[19]

None of the cases cited have any relation to CR 54(b) nor are they remotely analogous situations. Each involve the appellant affirmatively requesting a particular action from the trial court and then claiming on appeal that action was error.

In contrast, here at most the appellant failed to avail himself of every theoretical opportunity to have the trial court reverse its own decision. This is not an affirmative act that could be labeled "invited error." CR 54(b) is permissive, not mandatory. The Biehls never asked the court to find that there was no contractual relationship between the Biehls and Ostheller after December 31, 2016.

The appeal from the earlier partial summary judgment was timely made after final judgment. The Biehls also specifically requested that the trial court limit the application of the earlier summary judgment ruling, and assigned error when it failed to do so. No error was assigned on appeal based on a court action that was requested by the Biehls.

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[19] *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762, 764 (1984), overruled by *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995)

B. The basis for the appellate courts' decision was the finding of a factual dispute, which raises no legal questions for further review.

Ostheller's remaining grounds for appeal all assert various legal issues on which the Court of Appeals purportedly ruled in error. However, none of the errors cited were in fact the basis for the Court of Appeals' decision, and therefore further review would provide no helpful guidance for the lower courts.

1. The appellate court's decision was consistent with *Spokane Airport Board* because it was based on the freedom of the parties to contract.

Ostheller claims that the appellate court's finding that there might have been a tenancy after December 31, 2016 contradicts the Supreme Court's recent ruling in *Spokane Airport Board.*[20] It did not; instead, it was entirely consistent with the same rule of law as applied in *Spokane Airport Board*: that parties set the terms of their own agreements.

Spokane Airport Board had to do with a commercial lease, in which the landlord had exercised an early-termination option under the lease but the tenant refused to vacate. The Supreme Court held that the parties were bound by their actual agreement, and since the early

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[20] *Spokane Airport Bd. v. Experimental Aircraft Ass'n, Chapter 79*, 198 Wn.2d 476, 495 P.3d 800 (2021).

termination option was part of the agreement, it operated to terminate the leasehold.[21]

The larger point of *Spokane Airport* is clearly that, as the appellate court held below, leaseholds are contracts.[22] "Leases are conveyances whose covenants are interpreted under contract law, where we aim to ascertain the intent of the parties."[23] Their terms are controlled by the agreement and actions of the parties.

In *Spokane Airport* one party exercised a contractual option to terminate the lease, and the lease was terminated. In this case, the Biehls did terminate the lease, but then after that fact, Ostheller pleaded for them to extend the lease and occupancy continued. Just as parties can act to end a lease, they can also act to renew it.

What no court has ever held anywhere, certainly not in any case cited by Ostheller, is that once a lease is terminated it is impossible for the parties to enter into a new agreement. The parties remain free contractual agents and can enter into new arrangements at any time. The opinion below did nothing to hold that the parties could not terminate the leasehold

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[21] *Spokane Airport Board,* p. 488.

[22] Appellate Opinion, p. 12

[23] *Spokane Airport Board*, p. 484

in December of 2016; it merely held that there was a dispute of fact over whether the subsequent actions of the parties renewed the leasehold.

2. The decision below did not raise the question of whether a tenant can be bound solely by the acts of a co-tenant, because the decision looked to Ostheller's actions, not those of his co-tenant.

Ostheller also claims that the court review is needed because Washington courts have not addressed the question of whether one holdover tenant can bind a co-tenant who vacated. Whether or not court direction on this matter is needed, this is not the case to provide it. This case is not based on Ostheller being bound by the actions of Taylor, but on Ostheller being bound by his own actions: "Ostheller negotiated and communicated with the Landlords about the rent, and he made most, if not all, of the payments. And when Taylor moved out in July 2017, Ostheller prepared the property for turnover, he alone returned the property to the possession of the Landlords by accompanying Michelle during her inspection of the property, and he signed the Move Out Inspection Report."[24]

The court did note that it did not appear that physical presence on the premises was dispositive on its own, since Ostheller apparently had not physically lived at the property for several months, during a time in which

[24] Appellate Opinion, pp. 12-13

it was not disputed that he remained a party to the lease.

Ostheller argues that possession, and possession alone, is dispositive of whether a leasehold or contractual relationship exists between the parties. This is absurd. Ostheller cites no authority for his statement, "if a tenant vacates and is not holding over, then he has not formed a new tenancy, has no contract with the landlord and, thus, no contractual duties exist." No such authority exists; a tenant can enter into a new contract with the landlord at any time.

It is not the Court of Appeals that is in error in looking to contract law to interpret the lease; it is Ostheller who is in error in believe that a lease follows its own rules without regard to the actions and agreements of the parties.

Parties are free to contract in any number of ways. A tenant may negotiate a lease and for whatever reasons of his own, not occupy the property. That does not make the lease vanish or negate his obligations under the lease. The question is whether he has the right to possession, not the manner in which he exercises that right.

It is apparently uncontested that Ostheller remained a tenant from August through December of 2016, even though it appears that he did not in fact occupy it during that time. There is no reason why, therefore, he could not have entered into a continued lease after that date without

physically returning to the property.

3. The question of whether a contract existed is a question of fact properly remanded to the trial court.

Finally, Ostheller asserts that the Biehls failed to establish the elements of a contract "as a matter of law," and therefore review should be granted. However, Ostheller's arguments center on the words only of the parties, and entirely ignore that mutual assent may be shown instead by the actions of the parties. Washington follows the rule that it is the objective manifestation of the parties that governs a contract, and such objective manifestation may be deduced from *their acts and course of dealing*.[25]

It is not enough to say that the words of the parties did not ever settle on new contract terms; if the parties behave in a way that show they have an agreement, that can be sufficient to establish a new contract. Here, the appellate court found that there were sufficient actions, viewed in the light most favorable to the Biehls, to consider that the parties had entered into a new agreement.

Obviously this is a matter that is extremely fact-specific. The Court of Appeals' ruling was entirely consistent with existing case law on

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[25] *Hoglund v. Meeks*, 139 Wn. App. 854, 870, 170 P.3d 37, 46 (2007).

contract interpretation, and the specific application of that case law to the facts of the case is an appropriate matter for remand, not review.

V. CONCLUSION

The Biehls never requested the court to find that Ostheller had no contract with them after December 31, 2016, and therefore did not invite the error; requesting reconsideration of preliminary rulings under CR 54(b) is not mandatory. The basis for the Court of Appeals' ruling was a finding of a factual dispute over whether a new contract was entered into, in compliance with well-established principles of contract and landlord-tenant law, and provides no reasonable basis for further review. The Court of Appeals' ruling should stand.

RESPECTFULLY SUBMITTED this 24th day of May, 2022.

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CERTIFICATE OF SERVICE

The undersigned certifies that she is an employee of Richmond & Richmond, Ltd., and is a person of such age and discretion as to be competent to serve papers;

I certify that on May 24th, 2022, I served the foregoing on the person(s) herein after named via electronic service, addressed as follows:

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DATED this 24th day of May, 2022.

_/s/Debi Smith_____
Debi Smith, Paralegal
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