No. 1015941

SUPREME COURT OF THE STATE OF WASHINGTON

SHERWOOD AUBURN LLC,

Petitioner,

v.

JOEL PINZON and ROSA MENDEZ,

Respondents,

ANSWER TO PETITION FOR REVIEW

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I. Introduction

The Respondent is a tenant who was served a notice that failed to comply with federal law. The Petitioner is a landlord who is seeking review of a decision that required it to comply with federal law. The underlying decision made no error of law, and analyzed the case based on the plain language of the CARES Act, and the notices which the Petitioner issued. This Honorable Court should quickly dismiss the petition as improvident given that the Petitioner has failed to provide any compelling reason for review.

II. Statement of the Case

Respondents, Mr. Joel Pinzon and Ms. Rosa Mendez, are respondents residing in a unit owned by the Petitioner, Sherwood Auburn LLC, an entity which has a federally backed mortgage loan. *See* CP 30 and 33-38. Mr. Pinzon has been a construction worker all his life. RP 23. Because of COVID, his workplace was closed, and Respondents started to fall behind on rent. RP 23.

On December 21, 2021, the Petitioner issued a 14-Day Notice to Pay or Vacate, alleging that the Respondents failed to pay rent during the COVID-19 pandemic, and which state that if the Respondents could not pay rent, they "must vacate the premises." *See* CP 20-21. On the same day, the Petitioner served a separate notice entitled "30-Day Notice (CARES Act)," informing the Respondents that "if a court so orders in any unlawful detainer action, you may be required to vacate the residential unit in not less than 30 days from the date of this notice." CP 26.

On April 7, 2022, a show cause hearing was held. At the hearing, Commissioner Hillman issued the writ of restitution and found that the Petitioner complied with both the CARES Act and state statute when issuing two separate pre-eviction notices with different vacate dates merely because Respondents "[haven't] vacated the premises" at the time of the hearing, even though he

acknowledged that “the requirements of the federal law and the state law being different[ ] certainly could be confusing. . . . ” RP 13.

Respondents then filed a post-judgment relief motion before the Ex Parte Department seeking to stay the writ of restitution pursuant to RCW 59.18.410(3)(e) to pay the full judgment through an emergency rental assistance program. *See* CP 42-44. Despite being authorized to do so, no application has apparently been made on the part of the Petitioner pursuant to this order, and the Petitioner has rejected offers of rental assistance.

Separately, Petitioners sought revision of the commissioner’s ruling before King County Superior Court Judge Shah and reiterated the inadequacy of the pre-eviction notice under the CARES Act. Judge Shah denied Respondents’ motion to revise finding the Petitioner complied with the CARES Act when serving two separate, contradictory notices on the same day: one that indicated

Respondents had fourteen days to vacate and another that suggested they could not be required to vacate until thirty days after service of the notice. *See* CP 45. The Respondents sought review to the Court of Appeals, which vindicated their plan language argument that: (1) the CARES Act prohibits a lessor of a covered dwelling from requiring the tenant to vacate sooner than 30 days after providing a notice; and (2) that a "notice to vacate," which states that if they cannot pay, they "must vacate the premises," does, in fact, require a tenant to vacate.

III. Summary of Argument

The Court of Appeals properly interpreted the CARES Act. Consistent with basic principles of statutory construction, the Court of Appeals properly found that by restricting the behavior of lessors to require respondents to move, the CARES Act implemented a requirement that lessors of certain federally insured or subsidized properties must provide respondents at least 30 days' notice to vacate

before instituting a lawsuit. In Washington State, a longer period to vacate a tenancy for non-payment also creates a longer period to come into compliance, by operation of the Residential Petitioner-Tenant Act. RCW 59.18.410(2) provides that "[b]efore entry of judgment *or* until five days have expired after entry of the judgment," the tenant may pay the amount of money laid out in the statute and be "restored to his or her tenancy."

The Petitioner's argument that the Court of Appeals misinterpreted the CARES Act rests in both a misreading of the decision and federal and state law. Further, the Petitioner asks this Honorable Court to issue a ruling that would give permission for Petitioners to provide misleading information to respondents, which would undermine the protections passed in both the federal and state legislatures. No substantive or compelling argument is provided by the Petitioner for these extraordinary requests.

Therefore, this Honorable Court should deny review and let the ruling issued by the Court of Appeals stand.

IV. Argument

A. In Part 5.1 of the Petition, the Petitioner Improperly Urges This Court Accept Review Because They Ignored the Plain Language of the CARES ACT.

The Petitioner's first argument is that they did not prevail "solely because Division One added words to the CARES Act not there, i.e., 'pay or vacate', and held serving a mandatory 14-day notice and a notice informing Defendants of the CARES Act was 'misleading.'" Petition for Review at 10. This is a drastic misstatement of the ruling issued by the Court of Appeals. The Court of Appeals properly read that the CARES Act forbids *lessors* from requiring respondents to vacate in less than 30 days after the *lessor* provides a *notice to vacate*, rather than forbidding *courts* from requiring respondents to vacate in

less than 30 days after the Petitioners provides said notice.[1]

The Petitioner also makes much of uncited or anecdotal statements that rental housing stock will decrease, rent prices will increase, and Petitioners will "erroneously believe they must now add 'comply' and 'cure' periods to pre-eviction notices that statutorily do not require them." *Id*. While concerning, if true, that such negative externalities and a poor legal understanding of the Court of Appeals decision would plague the Petitioner community, these concerns do not seem to be facts properly provided to the Court, nor legally relevant even if properly presented; while RAP 13.4 does allow the Court to take up issues of

[1] Despite the Petitioner's protestations, this is the position that was advanced in oral argument. As the panel correctly noted during oral argument, 15 U.S. Code § 9058(c) *does not* read: "The superior court may not require the tenant to vacate the covered dwelling unit before the date that is 30 days after the date on which the lessor provides the tenant with a notice to vacate."

"substantial public interest," it is limited to those matters that "should be determined by the Supreme Court." The Petitioner's complaint seems to be over a matter of policy that was properly decided by the US Congress in passing the CARES Act, and this Honorable Court should not appropriate to itself any legislative authority to overturn that policy.

Further, the Petitioner complains about how this ruling drastically affects a "staggering" number of Petitioners, but the practical effect of the ruling is that Petitioners who have accepted a federal benefit must give notices that provide at least 30 days to vacate, rather than 14 days, which is exactly what the US Congress required of them in passing the CARES Act. If a "staggering" number of Petitioners have been ignoring the plain language of the CARES Act and issuing improper notices, for an unknown reason, the need to issue new, compliant notices and any potential delays incurred thereby seems

solely the result of that failure to obey federal law. This Court has long held that Petitioners must reconcile federal and state requirements when seeking to evict a tenant that may be subject to federal regulation and this case provides no new issue to be addressed. *See, e.g.,* Hous. Auth. of City of Everett v. Terry, 114 Wn. 2d 558, 568, 789 P.2d 745 (1990) That landlords must follow federal regulations coinciding with federal benefits or federally backed insurance is not an issue of public concern this Honorable Court need concern itself with, despite the urging of the Petitioner to the contrary.

B. In Part 5.2 of the Petition, the Petitioner Ignores Washington State Law That Applies to Compliance Periods.

The Petitioner's next argument rests with the issue that the Court of Appeals properly determined that a 30 day notice to vacate under the CARES Act would also increase the compliance period under Washington State Law.

As noted in the Respondent's opening brief to the Court of Appeals, state law extends the time to cure non-payment to coincide with the maximum time to vacate. As the Court of Appeals noted, a Petitioner cannot commence an unlawful detainer suit until after expiration of the pre-eviction notice. Sherwood Auburn LLC v. Pinzon, 521 P.3d 212, 217 (Wash. Ct. App. 2022) ("only after the proper notice is provided and the cure period has expired can the tenant be said to be unlawfully detaining the premises."). As a result, if the period to vacate is extended by federal law, the Petitioner cannot commence a lawsuit for unlawful detainer until after the prescribed period under federal law expires.

Petitioner would be correct that a mere extension of the time to vacate by the CARES Act would not automatically extend the time to cure if there was no ability of the tenant to cure the breach after expiration of the notice, but state law does provide such a cure. Under RCW

59.18.410(2),[2] a tenant may cure a default in rent even after the pay or vacate notice expires. The result is that if a Petitioner cannot commence an unlawful detainer until after the vacate notice expires, the time to cure is automatically extended under RCW 59.18.410(2).[3] This is exactly what was argued in front of the panel.

Moreover, extending the period to comply completely fits with the purpose of the CARES Act. Congress was working to help prevent a tidal wave of evictions caused by periods of non-payment because of the economic impacts

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[2] "When the tenant is liable for unlawful detainer after a default in the payment of rent, execution upon the judgment shall not occur until the expiration of five court days after the entry of the judgment. Before entry of a judgment or until five court days have expired after entry of the judgment, the tenant . . . may pay into court or to the Petitioner the amount of the rent due, any court costs incurred at the time of payment, late fees if such fees are due under the lease and do not exceed seventy-five dollars in total, and attorneys' fees if awarded".

[3] Notably, the Legislature did not refer to a "14-day notice" in RCW 59.18.410(2) but to a "pay or vacate" notice without any specification of the time period afforded to either paying or vacating.

of the pandemic and the lockdowns, while at the same time working to push out an unprecedented amount of rental assistance to help respondents come current again. Extending the period to comply with a notice to pay or vacate would almost be a necessity for achieving that policy goal.

The Petitioner argues that this question of an extended compliance period was not argued below, and so this Honorable Court should seek review for that reason. However, the trial court did consider the related question of how to read the CARES Act and Washington State's notice provisions in harmony. "'[I]f an issue raised for the first time on appeal is arguably related to issues raised in the trial court, a court may exercise its discretion to consider newly-articulated theories for the first time on appeal.'" Mavis v. King Cnty. Pub. Hosp. No. 2, 159 Wn. App. 639, 651, 248 P.3d 558 (2011) quoting Lunsford v. Saberhagen Holdings, Inc., 139 Wn. App. 334, 338, 160

P.3d 1089 (2007). The issue of the extended compliance theory was extensively briefed by Respondent, largely because the issue was related to how the two provisions should be articulated, and the trial court completely rejected the notion that any extension of time was required. The purpose of the general rule against not considering theories not presented to the trial court "is to give the trial court an opportunity to correct errors and avoid unnecessary retrials." Postema v. Postema Enters., Inc., 118 Wn. App. 185, 193, 72 P.3d 1122 (2003). Since the trial court rejected any argument that the CARES Act provides for protections, the purpose of the rule is not implicated, and no compelling reason is provided for mechanically enforcing it. In any case, the "may" language of RAP 2.5 ultimately grants the appellate court discretion on the matters it will review and especially where the issue is solely of statutory interpretation, the appellate court's need to interpret a law correctly outweighs any restraints

to be subject to evolving interpretations before the trial court. *See* Roberson v. Perez, 156 Wn.2d 33, 42, 123 P.3d 844 (2005). The Petitioner provides no analysis as to how the Court of Appeals abused its discretion.[4]

To the extent that the decision below could be also extended to notices to comply with lease terms (the only other form of notice that includes a compliance period under Washington State law), the Petitioner raises no particular concerns of public interest. RCW 59.18.180 already provides by statute that a tenant be provided 30 days to remedy certain hazardous conditions and provide that they may be remedied even after an unlawful detainer commences. Consistent with this is the option to seek relief from forfeiture under RCW 59.12.190 up to 30 days after judgment terminating the lease has been entered. Washington State courts have long abhorred the forfeiture

[4] We note the Petitioner did not object in his briefing to the issue being raised before the Court of Appeals.

of leases except in situations where it is clear the tenant cannot or will not remedy the breach. *See, e.g.*, Housing Authority of City of Pasco v. Pleasant, 126 Wn. App. 382, 109 P.3d 422 (2005) ("[F]orfeiture or termination of leases is not favored and never enforced in equity unless the right thereto is so clear as to permit no denial."), citing Shoemaker v. Shaug, 5 Wn. App. 700, 704, 490 P.2d 439 (1971). If a tenant comes into compliance prior to the end of the vacate period pursuant to a notice to comply with lease terms or vacate the premises, then this poses no confounding puzzle under Washington State law. The Petitioner simply has no cause to seek to terminate the lease.

The Court of Appeals properly considered the whole of the legislation when making its ruling and did not read any language into the statute. In contrast, the Petitioner's preferred outcome would have required ignoring words within and rewriting the CARES Act and state law in regard

to compliance periods, but provides no actual cause for this Honorable Court to take up review.

C. In Part 5.3 of the Petition, the Petitioner Largely Reiterates a Flawed Attempt at Statutory Interpretation.

The Petitioner rehashes a good portion of its briefing to insist that the CARES Act's provisions were "temporary," but fails to point to any sunset provision that would affect the expanded notice requirements placed on lessors of covered dwellings. The Petitioner, for example, places much on the fact that that 15 U.S. Code § 9058 is entitled "Temporary moratorium on eviction filings."[5] However, it has long been a standard issue of statutory interpretation that "if the name given to a statute or the designations given to its subdivisions, can ever be resorted to in

[5] The Respondent does not dispute that the moratorium on evictions described in 15 U.S. Code § 9058(b) was temporary and has expired.

determining the purpose and intent of the statute, it can only be done when there is an ambiguity in its text." City of Spokane v. State, 198 Wash. 682, 690–91, 89 P.2d 826 (1939).

The Petitioner also reiterates the mistaken argument that a notice demanding a tenant to pay or vacate should be seen as an "allegation" only. This appears to be based solely in the sentence of RCW 59.18.057, which reads that "You are receiving this notice because the Petitioner alleges you are not in compliance with the terms of the lease agreement by failing to pay rent and/or utilities and/or recurring or periodic charges that are past due." RCW 59.18.057(1). However, the Petitioner then apparently asks this Honorable Court to ignore the subsequent demand in the same statute: "You must pay the total amount due to your Petitioner within fourteen (14) days after service of this notice or you must vacate the premises." *Id.* This

language is replicated in the notice provided by the Petitioner to the Respondent:

14-DAY NOTICE TO PAY RENT OR VACATE THE PREMISES

TO: Joel Pinzon, Rosa M Mendez, ,
AND TO: and all other occupants
ADDRESS: 2901 Auburn Way South #E07
Auburn, WA 98092

You are receiving this notice because the landlord alleges you are not in compliance with the terms of the lease agreement by failing to pay rent and/or utilities and/or recurring or periodic charges that are past due.

(1) Monthly rent due for July 2020 – December 2021: **$ 22567.61**

AND/OR

(2) Utilities due for July 2020 – December 2021: **$ 306.19**

TOTAL AMOUNT DUE: **$ 22873.8**

Note - payment must be made pursuant to the terms of the rental agreement or by electronic means including but not limited to, cashier's check, money order, or other certified funds.

You must pay the total amount due to your landlord within fourteen (14) days after service of this notice or you must vacate the premises. Any payment you make to the landlord must first be applied to the total amount due as shown on this notice. Any failure to comply with this notice within fourteen (14) days after service of this notice may result in a judicial proceeding that leads to your eviction from the premises.

A plain language reading of these words would give rise to the reasonable interpretation that the Petitioner is requiring

the tenant to either comply or *vacate the dwelling unit*. This is exactly what the plain language of the CARES Act forbids.

The Court of Appeals reviewed the plain language of the statute, found no ambiguity, and declined to utilize heading language to alter the plain language of the CARES Act. The Court of Appeals also did not ignore language within Washington State pay or vacate notices that clearly demands the respondents "vacate the premises" if they cannot pay rent. *See* RCW 59.18.057(1). The Petitioner advances no principle of statutory interpretation the Court of Appeals failed to consider or misapplied. This Honorable Court should deny review.

D. In Part 5.4 of the Petition, The Petitioner Incorrectly Reads the Decision as Creating Compliance Periods.

While as discussed *supra*, an extended notice period would extend a compliance period under state law, nothing

regarding the circumstances of the decision issued by the Court of Appeals creates a compliance period where none would exist otherwise. The Petitioner argues that the written decision “mandates that all pre-eviction notices contain comply and cure periods.” Petition for Review at 22. The Respondent does not see how a decision about a notice that allows for a tenant to come into compliance can be reasonably interpreted in the manner proposed by the Petitioner, and the argument was not advanced by either party. The claimed error seems to imply this Honorable Court should accept review whenever some language in a published decision could be twisted to advance a novel theory in some hypothetical future controversy not before the Court. No citation is provided for this principle and the Court should deny review.

E. In Part 5.5 of the Petition, The Petitioner Urges the Court to Allow Petitioners to Mislead Respondents

The Petitioner below urged the Court of Appeals to accept the premise that Petitioners routinely provide respondents misleading, "superfluous" information, and that this practice was acceptable. The Court of Appeals properly rejected that argument, noting case law required that Petitioners have an affirmative duty, when issuing notices, to notify respondents of their rights. "[N]otice must . . . be sufficiently particular and certain so as not to deceive or mislead." IBF, LLC v. Heuft, 141 Wn. App. 624, 632, 174 P.3d 95 (2007). It is axiomatic that a tenant must be properly informed of what they must do to avoid an eviction lawsuit for a lawsuit to be properly implemented.

The Petitioner attempts to provide a counterpoint by misciting Provident Mutual Life Insurance Co. of Philadelphia v. Thrower, 155 Wash. 613, 617, 285 P. 654 (1930), for the proposition that "[w]here 'the notice to vacate' is 'legally sufficient in the description of the premises and signature by the agent of the owner. . . all

other matter [s are] unimportant.'" Petition for review at 23. This drastically takes the language of the Thrower decision out of context.[6] The chief issue described by the Thrower court was "insufficient in description of the premises . . . ." *Id.* at 616–17. The Thrower court, in fact, was ruling that a notice was sufficient when it described the subject property[7] as "Rooming House at 901 1/2 So. G. Street," the main entrance was at 901 1/2 South G Street, and the appellant, in fact, lived at that property. *Id.* at 617. The

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[6] The full context of the quote is the concluding paragraph of the decision, which reads, in full: "Certain other errors are claimed by appellant which have been examined and found to be without merit. Since the decisive matters to be determined are the questions of whether there was a tenancy created by appellant and whether the notice to vacate the premises was legally sufficient in the description of the premises and signature by the agent of the owner, we consider all other matter unimportant." Thrower, 155 Wash. at 617–18.

[7] The subject property was described by the Thrower court as a "rooming house known as the Victory Apartments of the second and third floors of 901 1/2, 903 1/2, and 905 1/2 South G. Street in Tacoma . . . ." Thrower, 155 Wash. at 614.

Thrower court upheld the notice because it was *not* misleading. In contrast, the Court of Appeals was very clearly indicating to the Petitioner, perhaps futilely, that providing incorrect legal information to respondents, such that they might be misled as to how they could come into compliance, what rights they might have, or how long they have to vacate prior to the instigation of a suit, would be misleading and would be a violation of a Petitioner's duty to provide a notice that would cause an ordinary tenant to be "misled or deceived by the language of the notice." *Id.* This Honorable Court should deny review.

V. Conclusion

For the reasons stated above, this Honorable Court should deny discretionary review of the proper decision of the Court of Appeals enforcing the provisions of the CARES Act.

I certify that this document contains 3,623 words, which complies with RAP 18.17(2)(c)(10).

DATED this 2nd day of February 2023,

Respectfully submitted,

/s/ Dashiell DeGraff
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