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No. 69815-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DON KENNEDY PROPERTIES LLC d/b/a Don Kennedy Real Estate as agent for the owner,

Respondent,

v.

JOEL CHRISTOPHER HOLMES and ALL OTHER OCCUPANTS,

Appellant.

RESPONSE BRIEF

LOEFFLER LAW GROUP PLLC

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

Cases

Revised Code of Washington

Civil Rules

II. STATEMENT OF THE CASE

This appeal arises out of a judgment finding Mr. Holmes in unlawful detainer of residential real property. CP at 2. In November 2012, during a routine entry to install carbon monoxide detectors[1] in Mr. Holmes' unit, Don Kennedy Properties discovered Mr. Holmes had allowed his apartment to deteriorate into a state of extreme clutter and disorder; Mr. Holmes had accumulated "an extremely large amount of waste paper, plastic bags of junk, numerous coffee pots, and other junk" in his small apartment. CP at 2. On November 19, 2012, Don Kennedy Properties served Mr. Holmes with a 10 day notice to comply or vacate for allowing excess junk to accumulate on the premises. CP at 2. He did not comply within the 10 days allowed by law. *Id;* see RCW 59.12.030(4). On December 10, 2012, Mr. Holmes was arrested by the Seattle Police Department and held at the King County Jail. That same day, Don Kennedy Properties commenced an unlawful detainer action.

The court set a show cause hearing and later continued the matter to allow the defendant to make arrangements to appear. On December 27, 2012, Mr. Holmes appeared telephonically from the King County Jail. CP at 4. Both sides presented evidence and argument and the court commissioner found Mr. Holmes was in unlawful detainer for failure to

[1] State law was revised to require carbon monoxide detectors in most residences by 2013. RCW 19.27.530.

comply with the notice, directed the clerk to issue a writ of restitution, and granted judgment for partial December rent, reasonable attorney's fees, and taxable costs. Mr. Holmes appeals.

III. ARGUMENT

A. Mr. Holmes does not assign error to a single finding of fact, conclusion of law, or trial court order and the judgment should be affirmed on those grounds alone

On appeal, any unchallenged findings of fact, conclusions of law, and orders are considered conclusively established. The appellant must designated "a separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error." RAP 10.3(a)(4); *Burback v. Bucher*, 56 Wn.2d 875, 877, 355 P.2d 981 (1960). Findings of fact that are not specifically designated in the assignments of error become verities on appeal. *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 110, 267 P.3d 435 (2011); *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Trial court orders and conclusions of law in the judgment that are not similarly designated in the assignments of error are waived and become law of the case. *In re Estate of Campbell*, 87 Wn. App. 506, 512 n.1, 942 P.2d 1008 (1997); *Goldberg v. Sanglier*, 27 Wn. App. 179, 191, 616 P.2d 1239 (1980), *rev'd on other grounds by* 96 Wn.2d 874, 639 P.2d 1347 (1982); *see* RAP 10.3.

The appellant must then discuss each alleged error in the argument section of his brief. RAP 10.3(a)(6); RAP 12.1(a); *Burback*, 56 Wn.2d at 877. Any issue not both identified in the statement of error and discussed in the argument section, with citation to the record and supporting authority, is waived and will not be considered by the appellate court. *Weyerhaeuser Co. v. Comm. Union Ins. Co.*, 142 Wn.2d 654, 692–93, 15 P.3d 115 (2000).

Mr. Holmes' opening brief contains issues statements, see Opening Brief, at 9-10, but does not contain any assignment of error, nor does it designate a single finding of fact, conclusion of law, or trial court order that contain error. Mr. Holmes' failure to properly designate a single finding of fact as error means that the findings of fact are verities on appeal. *Jensen*, 165 Wn. App. at 110. His failure to designate a single conclusion of law or any of the trial court's orders as error mean that the conclusions of law and orders are law of the case. *In re Estate of Campbell*, 87 Wn. App. at 512 n.1.

Mr. Holmes' failure to properly identify errors creates an unreasonable burden on Don Kennedy Properties as the respondent because the scope of Mr. Holmes' appeal is not clear. To properly preserve its judgment, Don Kennedy Properties must brief issues and arguments that Mr. Holmes may not actually be appealing.

This court can affirm the appeal on the doctrine of waiver and law of the case, without addressing the merits of the issues. The judgment should be affirmed on this basis.

B. Don Kennedy Properties moves this court to dismiss Mr. Holmes' appeal because he did not properly designate the record

The party seeking review bears the burden of designating the clerk's papers and report of proceedings necessary for appellate court review. RAP 9.6(a); *Olmsted v. Mulder*, 72 Wn. App. 169, 183, 863 P.2d 1355 (1993). If the appellant makes a good faith effort to assemble a proper record, the court will direct him to supplement the record before dismissing his appeal. RAP 9.10. Where the record indicates the appellant will not make that good faith effort, the appellate court will dismiss the appeal. *Seattle v. Tokar*, 25 Wn. App. 476, 610 P.2d 379 (1980).

At a minimum, the clerk's papers must include the notice of appeal, the summons and complaint, and the judgment. RAP 9.6(b). A verbatim report of proceedings must include all portions of proceeding necessary to present the issue raised on appeal. RAP 9.2(b).

This court has directed Mr. Holmes to provide a complete record for review on three separate occasions. Each order was continued at least once. To date, Mr. Holmes has filed a designation of clerk's papers that

contains only the final judgment, not any of the other *mandatory* documents,[2] and has not made any significant effort to have the December 27 hearing where the evidence in support of that order was taken transcribed.

The majority of unlawful detainers are resolved at the show cause hearing. *See Indigo Real Estate Servs.. Inc. v. Wadsworth*, 169 Wn. App. 412, 421, 280 P.3d 506 (2012); *Carlstrom v. Hanline*, 98 Wn. App. 780, 788, 990 P.2d 986 (2000); *Leda v. Whisnand.* 150 Wn. App. 69, 81-82, 207 P.3d 468 (2009). The appellate court may look to the trial court's oral ruling to interpret its written orders. *Wallace Real Estate Inv. Inc. v. Groves*, 120 Wn.2d 512, 526, 844 P.2d 389 (1993).

As the only substantive hearing on the matter, Mr. Holmes cannot demonstrate any basis for his appeal without a transcript of that hearing. The court's extensive oral explanation of its ruling at that hearing, incorporated into the written findings, makes transcription that much more important. Based on the foregoing, Don Kennedy Properties moves this court to dismiss this appeal for failure to make a good faith effort to complete the record.

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[2] Mr. Holmes did attach copies of some of these documents as an appendix to his brief. *See* RAP 10.3(a)(8) (appendices are permitted, but may only contain materials included in the record). To expedite review, Don Kennedy Properties filed a supplemental designation of clerk's papers that includes all the required items.

C. This court cannot review the trial court's findings of fact or conclusions of law because Mr. Holmes did not perfect the record

At a residential unlawful detainer show cause hearing, if the landlord shows there is "no substantial issue of material fact," then the landlord is entitled to final judgment and a writ of restitution. RCW 59.18.380; *see Faciszewski v. Brown*, 192 Wn. App. 441, 445-46, 367 P.3d 1085 (2016). The mere existence of a dispute of fact does not bar the landlord from obtaining relief, rather, that dispute must be both substantial and material. *See id.* at 449-54. At the December 27 show cause hearing, Don Kennedy Properties met its burden of proof and Mr. Holmes failed to show any substantial, material dispute.

The findings of fact and conclusions of law in this case were entered following a show cause hearing. While the appellate courts have not previously addressed the standard of review for such findings and conclusions, the bench trial standard should govern because the court commissioner here functioned as a judge presiding over a bench trial, though with a heightened standard of proof.

This court's review of a bench trial is limited to determining whether the challenged findings of fact are supported by substantial evidence and whether the findings of fact support the conclusions of law.

Standing Rock Homeowners Ass'n v. Misich, 106 Wn. App. 231, 242–43, 23 P.3d 520 (2001).

Substantial evidence is the "quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). The appellate court must make all reasonable inferences in the light most favorable to the judgment. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006). There is a presumption in favor of the judgment and the party alleging error has the burden of showing a finding of fact is not supported by substantial evidence. *Fisher Props. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990). Though the trier of fact is free to believe or disbelieve any evidence presented at trial, "[a]ppellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact." *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009). Unchallenged findings are verities on appeal. *Hill*, 123 Wn.2d at 644.

Mr. Holmes has not designated any findings or conclusions for review, so they are conclusively determined before this court. Even if Mr. Holmes had designated any of the findings as error, he did not obtain a report of proceedings that would allow this court to review those findings for substantial evidence.

Unless this court directs Mr. Holmes to obtain a verbatim report of proceedings to supplement the record, *see* RAP 9.10, it must accept the court commissioner's findings as verities. The transcript is particularly important in this case because the trial court incorporated its oral findings into the written record. Likewise, because Mr. Holmes did not assign error to any conclusions of law, they are now binding as law of the case. Assuming the court wishes to review the court commissioner's conclusions for error, the remainder of this brief will address those arguments identified in Mr. Holmes' issue statements.

D. Mr. Holmes' arguments also fail on the merits

i. Mr. Holmes was not required to appear personally at the show cause hearing

Mr. Holmes makes two arguments that both arise out of his failure to appear personally at the show cause hearing. He argues that the court lacked jurisdiction to conduct the show cause hearing because it improperly required him to appear personally. He also argues that he was denied due process because the court commissioner did not order him transported to the hearing to meet this personal appearance requirement. Both arguments fail.

Mr. Homes was not required to appear in person at the show cause hearing. The Residential Landlord-Tenant Act (RLTA) provides for a

preliminary, "show cause" hearing where the parties may appear and present evidence in support of their positions. RCW 59.18.380; *see Faciszewski*, 192 Wn. App. at 450. The hearing is evidentiary in nature and the defendant must be allowed to present evidence and give testimony. *Leda v. Whisnand*, 150 Wn. App. 69, 79-83, 207 P.3d 468 (2009). This procedure is constitutional and the use of a show cause hearing does not deny due process. *See generally Carlstrom v. Hanline*, 98 Wn. App. 780, 990 P.2d 986 (2000). However, the right to give evidence is not absolute. The court, not the parties, has the authority to examine witnesses and evidence in a manner that is appropriate to manage its docket, provided that discretion is exercised in a manner that maintains the defendant's right to due process. *Leda*, 150 Wn. App. at 82-84. This court reviews the trial court's manner of conducting its show cause hearing for an abuse of discretion. *Id.* at 79 n.2.

A civil defendant does not have an absolute right to appear personally at a show cause hearing; an incarcerated defendant's due process right is met if the court gives him a meaningful opportunity to participate. *State v. Dorsey*, 81 Wn. App. 414, 421-22, 914 P.2d 773 (1996). At a show cause hearing under the RLTA, the defendant may present his evidence either orally through testimony or in writing. RCW 59.18.380; *Leda*, 150 Wn. App. at 82-84. The court's decision to allow or

prohibit transporting an incarcerated defendant to a show cause hearing must be viewed in light of its broad discretion in how it chooses to conduct the hearing.

The trial court must balance its need to expeditiously and fairly manage its docket with the defendant's right to "meaningfully" participate in the hearing. In this case, Mr. Holmes both submitted a lengthy written answer and presented oral evidence and argument at the show cause hearing. To expeditiously manage its calendar, the court took Mr. Homes'—an incarcerated defendant's—testimony telephonically.[3] Mr. Holmes brief does not identify any argument or authority that such participation was not "meaningful." *Dorsey*, 81 Wn. App. at 421-22. As a special proceeding conducted on an expedited basis, and considering that Mr. Holmes had already submitted voluminous written materials, a telephonic appearance both a reasonably balanced the various interests and afforded Mr. Holmes a meaningful ability to participate. The trial court's method of conducting the hearing was reasonable under the circumstances, within its discretion, and sufficient to satisfy Mr. Holmes' statutory and due process right to present his defense.

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[3] Mr. Holmes admits in his brief that he was allowed to appear telephonically. Opening Brief, at 8. The court also noted his telephonic appearance in its order. CP at 4.

ii. Don Kennedy Properties' entry into Mr. Holmes apartment to install a carbon monoxide detector and conduct an inspection was lawful

Mr. Holmes claims Don Kennedy Properties performed an illegal search of his unit; Don Kennedy Properties is not a state actor, so it interprets this argument as an unlawful entry. The RLTA strikes a balance between a tenant's right to privacy and a landlord's need to periodically access its property. *See* RCW 59.18.150. In general, the tenant is granted exclusive possession of the unit during the life of the tenancy. The landlord may only enter the rented unit under exigent circumstances or with prior written notice. *Id.* at .150(1), (5)-(7). If the landlord plans to enter a rented unit, the landlord must give written notice to the tenant that includes the exact date and time of the entry and a phone number the tenant may use to request that the landlord reschedule. RCW 59.18.150(6). The notice must be given at least one day in advance if the purpose of the entry is to show the unit to a perspective renter or buyer and at least two days in advance if the entry is for any other purpose. *Id.* The notice need not specify the purpose of the entry. *See id.*

In his brief, Mr. Holmes admits that the landlord complied with this entry requirement. According to his brief, Mr. Holmes received written notice of Don Kennedy Properties planned entry on Wednesday,

November 14, 2012, and actually entered the unit and documented the offending condition on Friday, November 16. Opening Brief, at 10-11, 33. This meets the notice requirement of the RLTA. *See* RCW 59.18.150(6); *see generally Christensen v. Ellsworth*, 162 Wn.2d 365, 173 P.3d 228 (2007) (computation of time excludes the date of delivery but includes the date of the event). Based on the information to which Mr. Holmes concedes in his brief, the entry occurred only after proper notice and was, therefore, lawful.

iii. The Court properly awarded Don Kennedy Properties its reasonable attorney's fees and costs

Mr. Holmes raises several arguments, the exact nature of which are unclear, about the reasonableness of the costs and fees awarded. As the prevailing party, Don Kennedy Properties is entitled to its reasonable attorney's fees and taxable costs by statute. RCW 59.18.410; RCW 4.84.010, .030. This court will not generally consider an argument raised for the first time on appeal. RAP 2.5(a); *E. Gig Harbor Improvement Ass'n v. Pierce County*, 106 Wn.2d 707, 709, 724 P.2d 1009 (1986); *Shelton v. Powers*, 111 Wash. 302, 303, 190 Pac. 900 (1920). Preserving an issue does not mean merely raising it in some passing manner, but with sufficient detail to allow the trial court to know the issues and legal

precedent before deciding the issue. *E. Gig Harbor Improvement Ass'n*, 106 Wn.2d at 709 n.1.

Mr. Holmes challenge to the costs and fees award is raised for the first time on appeal and the court should not consider them. To the extent they were raised before, Mr. Holmes does not identify any argument or evidence in the record that is sufficient to support his arguments. The costs and fees award should be affirmed.

iv. The Residential Landlord-Tenant Act is lawful as applied to Mr. Holmes

Mr. Holmes argues that either the RLTA or the pre-eviction notice is impermissibly vague as applied to his tenancy. A residential tenant must comply with all applicable costs and ordinances and, in particular, must

> (1) Keep that part of the premises which he or she occupies and uses as clean and sanitary as the conditions of the premises permit; [and]
> (2) Properly dispose from his or her dwelling unit all rubbish, garbage, and other organic or flammable waste, in a clean and sanitary manner at reasonable and regular intervals, and assume all costs of extermination and fumigation for infestation caused by the tenant.

RCW 59.18.130(1)-(2). When a tenant fails to comply with this obligation, the landlord may enforce the terms by issuing a written notice specifying the violation and affording the tenant ten days to come into

compliance with the lease or vacate the premises. RCW 59.12.030(4). A tenant who fails to so comply is guilty of unlawful detainer. *Id.*

The form and content of a ten day notice must substantially comply with the requirements of the unlawful detainer act.[4] *Marsh-McLennan Bldg., Inc. v. Clapp*, 96 Wn. App. 636, 640 n.1, 980 P.2d 311 (1999); *Sowers v. Lewis*, 49 Wn.2d 891, 895, 307 P.2d 1064 (1957). A notice substantially complies if it contains all the material elements and does not deceive or mislead. *IBF, LLC v. Heuft*, 141 Wn. App. 624, 632, 174 P.3d 95 (2007); *see Truly v. Heuft*, 138 Wn. App. 913, 920-21, 158 P.3d 1276 (2007). A notice does not fail because it is "impossible" for the tenant to comply. *Housing Authority of City of Everett v. Terry*, 114 Wn.2d 558, 569, 789 P.2d 745 (1990).

It was not impossible for Mr. Holmes to comply with the notice. The notice required that he "remove all excess property and other items and clean [his] apartment." Neither of these actions is impossible.

Nor was it impossible for Mr. Holmes to comply because of his incarceration. Don Kennedy Properties served the 10 day notice on November 19, 2012. By statute, Mr. Holmes had ten days to bring the unit

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[4] Mr. Holmes cites to *Tacoma Rescue Mission v. Stewart*, 155 Wn. App. 250, 228 P.3d 1289 (2010), for a higher standard of notice. Opening Brief, at 39-40. *Tacoma Rescue Mission* interpreted a specific lease clause that required the landlord to "state the reasons for such termination with enough specificity to enable the resident to understand the grounds for termination." *Id.* at 255. There is no comparable clause here.

into compliance or vacate. RCW 59.12.030(4). Mr. Holmes was not arrested until December 10.[5] CP at 2; *see State v. Holmes*, 183 Wn. App. 1037, *3, No. 70398-6-I (2014). Mr. Holmes had more than the statutory amount of time to comply or vacate before his incarceration.

Likewise, the notice and statute are not unconstitutionally vague. The applicable statute only requires that the landlord give notice "notice in writing requiring in the alternative the performance of such condition or covenant or the surrender of the property." RCW 59.12.030(4). Don Kennedy Properties' notice identified specific statutory duties that Mr. Holmes was violating both by citation and quotation. The notice could not have been much more precise.

The obligation itself is not unconstitutionally vague. A statute is not unconstitutionally vague merely because the exact boundary of the prohibited act cannot be easily predicted. *State v. Harrington*, 181 Wn. App. 805, 824, 333 P.3d 410 (2014). Mr. Holmes' argument is not that the requirement to maintain a clean and orderly unit is vague, but that he cannot tell *how clean and orderly* his unit should have been. This is a measure of degree and not subject to an attack as vague. The condition of

[5] Washington rules prohibit citation to unpublished opinions as authority. GR 14.1. This citation is provided for the date Mr. Holmes was arrested, not as legal authority. Mr. Holmes' refers in his brief to the date he was incarcerated on December 11, 2012, but that date is not included in the record. Opening Brief, at 2. The court may disregard this point if it chooses to reject Mr. Holmes' argument for failure to preserve it below.

the unit was below any reasonable standard of order or cleanliness and the judgment should be affirmed.

E. Mr. Holmes makes several other arguments that are not sufficiently articulated to require a response

Mr. Holmes also makes a variety of miscellaneous arguments related to economic theory, the alleged presence of surveillance cameras, the landlord's actions in enforcing the writ of restitution, and other issues. These issues are not accompanied by citation to the record, were not raised below, and frequently do not contain any citation to legal authority. *See Weyerhaeuser Co.*, 142 Wn.2d at 692-93 (the court will not address issues that are not discussed in the statement of error and supported by citation to the record); *E. Gig Harbor Improvement Ass'n*, 106 Wn.2d at 709 (the appellate court will not consider issues raised for the first time on appeal). Don Kennedy Properties requests the court decline to review those arguments.

F. Don Kennedy Properties should be awarded attorney's fees on appeal

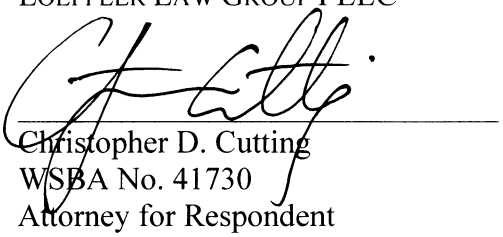
The RLTA provides for attorney's fees if the landlord prevails in litigation. RCW 59.18.410. When attorney's fees are available before the trial court, they are likewise available on appeal. Don Kennedy Real Estate requests attorney's fees and costs should it prevail in this appeal.

IV. CONCLUSION

This residential unlawful detainer was conducted within the procedural and factual requirements of the RLTA and the due process protections of the Constitution. Don Kennedy Properties' judgment against Mr. Holmes should be affirmed.

Respectfully submitted this 1st day of June, 2016.

LOEFFLER LAW GROUP PLLC



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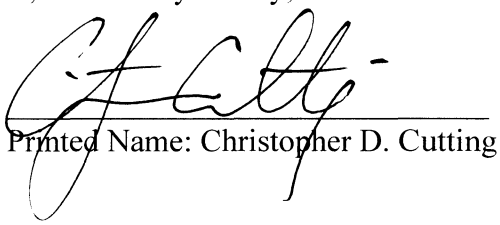
CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of July, 2016, I caused the foregoing to be served on the following parties by delivering to the following address:

Joel Christopher Holmes
Hudson House
1712 Summit Avenue
Apt. 2
Seattle, WA 98122

By:
[X] U.S. Postal Service, ordinary first class mail
[ ] U.S. Postal Service, certified or registered mail
[ ] return receipt requested
[ ] legal messengers
[ ] facsimile
[ ] electronic service
[ ] other (specify) _____

DATED at Seattle, Washington, this 1st day of July, 2016.



Printed Name: Christopher D. Cutting