95575-1

NO. 49588-1-11

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RANDY REYNOLDS & ASSOCIATES, INC.

Appellant

v.

KASEY HARMON,

Respondent.

ANSWER TO PETITION FOR REVIEW

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WSBA No. 24059

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I. LANDLORD'S RESPONSE TO THE PETITION

A. The Court Of Appeals did not abuse its discretion by hearing the case

The tenant argues that the Court of Appeals erred by hearing the case (Petition page 6 *et seq.).* A decision to hear a moot case is an exercise of the court's discretion. The definition of abuse of discretion is found in Mayer v. STO Industries, Inc., 115 Wn.2d 677, 685, 132 P.3d 115 (2006):

> An abuse of discretion occurs when a decision is 'manifestly unreasonble, or exercised on untenable grounds, or for untenable reasons.' A discretionary decision rests on `untenable grounds' or is based on 'untenable reasons' if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is 'manifestly unreasonable' if 'the court, despite applying the correct legal standard to the supported facts, [or] adopts a view that 'no reasonable person would take.

(Citations omitted).

The test applied when a court considers whether a moot case presents an issue of continuing and substantial public interest, and should therefore be heard, is discussed in In Re Detention Of M.W., 185 Wn.2d 633, 648, 374 P.3d 1123 (2016):

> **Courts look to three factors** when considering whether a case fits the continuing and public interest exception: [(1)] the public or private nature of the question presented, [(2)] the desirability of an authoritative determination for the future guidance of public officers, and [(3)] the likelihood of future

recurrence of the question.

(emphasis supplied) quoting State v. Hunley, 175 Wn.2d 901, 907, 287 P.3d 584 (2012)).

Here, after considering these three factors, the Court of Appeals concluded that the case presented "issues of continuing and substantial public interest," and properly exercised its discretion to hear the case (Slip Op. page 5).

Citing State v. Beaver, 184 Wn.2d 321, 330, 358 P.3d 385 (2015), Westerman v. Cary, 125 Wn.2d 277, 286, 892 P.2d 1067 (1994), Klickitat Co. Citizens Against Imported Waste v. Klickitat Co., 122 Wn.2d 619, 632 860 P.2d 390 (1993), Hart v. DSHS, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988), Orwick v. City of Seattle, 103 Wn.2d 249, 253, 692 P.2d 793 (1984) City of Everett v. Van Dyke, 18 Wn. App. 704, 705 - 706, 571 P.2d 952 (1977) and Washington State Commercial Passenger Fishing Vessel Ass'n. v Tollefson, 87 Wn. 2d 417, 553 P.2d 113 (1976) the tenant argues that the Supreme Court recognizes a fourth factor, whether there is genuine adverseness and quality advocacy on the issues (Petition pages 7 - 9).

It is true that the Supreme Court "recognizes" this fourth factor. However, as discussed below, many of the cases cited by the tenant are

contrary to her argument. Courts may consider this fourth factor, but are not required to do so and in any event this fourth factor is not "determinative".

In Beaver, the court opined that "[t]o determine whether a case presents an issue of continuing and substantial public interest, **we consider three factors,"** the above-quoted three factors later discussed in *M* W. Beaver, 184 Wn.2d at 330 (emphasis supplied). After analyzing these three factors, the Beaver court opined that "As a fourth factor, the court **may** also consider the level of adversity between the parties." Beaver, 184 Wn.2d at 331 (citing Hart v. DSHS, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988)). *Beaver* makes it clear that an appellate court may consider the level of adversity, but that doing so is not required. *Id.*

The Westerman court opined that:

> **Three factors in particular are determinative: "(1)** whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance to public officers; and (3) whether the issue is likely to recur". **A fourth factor may also play a role: "the level of genuine adverseness and the quality of advocacy of the issues". This factor serves to limit review to cases in which a hearing on the merits has occurred.**

125 Wn.2d at 287 (citations omitted emphasis supplied). Westerman makes it clear that the level of adversity and the quality of advocacy are not determinative; and that if the court elects to consider the adversity and the

quality of advocacy, the adversity and quality of advocacy considered is what occurred before the trial court. *Id.*

It is true that in 1993, in Klickitat County Citizens Against Imported Waste, the Supreme Court indicated that "whether there is genuine adverseness and quality advocacy on the issues" are part of the test. Klickitat County Citizens, 122 Wn.2d at 632. However, the court did so after concluding that the issues in the case were "not moot." *Id.* at 631. Because issues in the case were "not moot," the discussion of the test for deciding whether to hear a moot case was *dicta.*

In 1988, the Hart court described the three factors later discussed in M.W. as "essential," then noted that "[a]rguably a fourth factor exists, that being the level of genuine adverseness and the quality of advocacy of the issues." Hart, 111 Wn.2d at 448. However, the court declined to hear the case because none of the three "essential" factors were present. *Id.* at 450. The Hart court did not even consider the fourth factor it described as "arguable." *Id.* Tollefson and Van Dyke, the two cases principally relied on by the tenant, were decided in 1976 and 1977 respectively. Klickitat County Citizens, Hart, Tollefson and Van Dyke do not reflect the current state of the law.

In an effort to explain away the language in *M* W. that "courts look to three factors" and that the court did not discuss whether there was genuine adverseness and quality advocacy on the issues, the tenant argues that it is understandable that the Supreme Court skipped over providing any analysis or mention of whether there was genuine adverseness and quality of the advocacy because there was no question of the genuine adverseness of the parties and quality advocacy on the issues (Petition pages 9 - 10). Contrary to the tenant's claim, the Supreme Court did not mention these things because they are not factors in the three part test.

The substantial weight of the authority, particularly of the cases decided within the last forty years, is that whether a case presents an issue of continuing and substantial public interest is determined by the three part test in M.W. Certainly, a court may elect to consider additional factors, including the level of adversity and the quality advocacy of the issues, but doing so is not required. In any event, there is no basis in the record to conclude that there was a lack of adversity or a lack of quality advocacy on behalf of the tenant prior to entry of the judgment.

"An unlawful detainer action is a statutorily created proceeding that provides an expedited method of resolving the right to possession."

Christensen v. Ellsworth, 162 Wn.2d 365, 370 - 371, 173 P.3d 228 (2007). In Orwick v. City of Seattle, 103 Wn.2d 249, 692 P.2d 793 (1984) the court opined that:

> [T]he moot cases which this court has reviewed in the past have been cases which became moot only after a hearing on the merits of the claim (citations omitted). In those cases, the facts and legal issues had been fully litigated by parties with a stake in the outcome of a live controversy. After a hearing on the merits, it is a waste of judicial resources to dismiss an appeal on an issue of public importance which is likely to recur in the future.

Id. at 253.

This case became moot only after the writ of restitution was granted, the judgment was entered and the landlord received possession of the property. The findings of fact demonstrate that all of the facts and legal issues necessary to entry of a judgment were fully litigated (CP 81 - 84). If, as the tenant argues, her choice not to file a brief in the appeal precludes hearing and deciding this appeal, instead of filing a brief and risking an adverse decision, a litigant can veto an appeal in any moot case by choosing not to file a brief As in Orwick, it would have been a waste of judicial resources for the Court of Appeals to dismiss this appeal. The Court of Appeals did not abuse its discretion by hearing and deciding this case.

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B. This Case Is Not Limited To Its Facts

Citing Beaver and Hart, the tenant argues that the public interest exception is not used in cases that are limited to their specific facts because such cases provide little guidance to public officials (Petition page 9). That is an accurate statement of the law. However, the Court of Appeals opined that the case would "provide guidance to the superior court so that its procedures may be adjusted to conform to statutory requirements" and that "it is likely that similar questions will reoccur" (Slip Op. page 5). This case is not limited to its facts. If it was, that would be a strong reason to conserve judicial resources by denying review by the Supreme Court and leaving the decision of the Court of Appeals in place.

C. The Court Of Appeals did not err when it allowed the landlord to supplement the record with declarations of Strickler and Gusa

Citing RAP 9.10 and RAP 9.11, the tenant argues that declarations of Strickler and Gusa are not properly part of the record (Petition pages 11 - 13). The declarations were added to the record after the Court of Appeals commissioner granted the landlord leave to supplement the record. The tenant did not oppose the motion to supplement the record.

The tenant's reliance on RAP 9.10 and RAP 9.11 is misplaced. RAP

9.10 addresses situations where a party fails to provide an appellate court with a complete record of the proceedings below. The declarations were proffered to show that the case presents an issue of continuing and substantial public interest, an issue that was not before the trial court. The rule does not apply.

RAP 9.11 provides that "[t]he appellate court may direct that additional evidence on the merits of the case be taken" (emphasis supplied). The declarations are not "evidence on the merits of the case." The rule does not apply. The cases cited by the tenant are distinguishable. They do not pertain to an issue before the appellate court that was not before the trial court. In any event, under RAP 1.2, the Court of Appeals had authority to waive these rules in order to serve the ends of justice.

D. Evidence regarding procedures and practices in other counties, and the views of other persons, is irrelevant

The tenant argues that the declarations of Strickler and Gusa concern the "experience of two attorneys in one county" (Petition page 13). Next, the tenant claims that the declarations provide "a misleading and inadequate picture of how unlawful detainer practice and stays of writs are handled elsewhere in the State" *(Id.)*. Thereafter, the tenant argues that:

> The Court did not hear about local practices and procedures in any of the other thirty-eight counties in Washington. It did not hear about the experiences of other attorneys, including those who practice in Thurston County. Had this case been

> adequately presented to the Court, evidence could have been adduced showing that the appellant's concerns are not widely shared.

(Id. pages 13 - 14).[1]

That some landlords with unlawful detainer cases in the Thurston County Superior court have not suffered from these *ultra vires* practices and procedures is irrelevant. Procedures and practices in other counties are irrelevant. The landlord is entitled to assert its rights, and to ask that the courts end these *ultra vires* practices, even if not one other person shares its view. The alleged views of other persons are irrelevant.

E. Evidence That The Tenant Claims Is Necessary To The Appeal Is Actually Irrelevant

The tenant argues that:

> Northwest Justice Project, for example, publishes a self-help packet on its website for tenants who proceed pro se. It clearly states that tenants must attempt to notify the landlord prior to appearing in court to request a stay, and that the court will inquire about what attempts were made to reach the landlord

(Petition page 14). What the Northwest Justice Project advises, on its

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[1] Landlord notes that the tenant made no effort to supplement the record before the Court of Appeals with any of this allegedly important information, even in conjunction with the motion for reconsideration. Nothing in the record supports the tenant's claim that the landlord's views are not widely shared.

website or otherwise, is not part of the record and is irrelevant.' The tenant then argues that:

> The Court did not hear about the experiences of judicial officers who decide a large volume of these cases. It did not hear about the many courts where a good faith effort at notice prior to granting an ex parte stay of a writ is required.

(Id.). These things are irrelevant. That the Court of Appeals did not hear about them is immaterial.

F. There is no basis for the tenant's argument that RCW 59.18.390 does not apply when a stay is sought following entry of a default judgment

The tenant argues that RCW 59.18.390 applies only to writs granted following a show cause hearing, not to writs granted *ex parte* in a default judgment (Petition page 16 - 19). A court will not read words into a statute. Nothing in RCW 59.18.390 limits application of the statute in this manner A court will not read words into a statute.

The two unpublished opinions cited by the tenant do not support her argument. In One Der Works II, LLC v. Duncan, 177 Wn. App. 1036 (2013), a landlord and a tenant entered into a stipulated agreement to settle an

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As discussed in § C above, the tenant argues that the Court of Appeals Commissioner acted contrary to RAP 9.10 and RAP 9.11 when it allowed the landlord to supplement the record with the declarations of Strickler and Gusa that support its argument that the Court of Appeals should hear this case. Having made that argument, it is odd indeed that in her petition the tenant refers to material from the website of the Northwest Justice Project that is not in the record.

unlawful detainer action. After the tenant failed to comply with the agreement, the landlord obtained a judgment and a writ of restitution. The tenant's request for a stay was denied. The case does not mention RCW 59.18.390.

Calibrate Property Management, LLC v. Nhye, 196 Wn. App. 1096 (2016) involved a judgment and writ granted at a show cause hearing. Subsequent to the show cause hearing, the tenants sought a stay. The Court of Appeals opined that CR 62(b) addresses the trial court's authority to grant a stay, but did not mention RCW 59.18.390. Neither of the judgments were default judgments. One Der Works and Calibrate Property Management do not support the tenant's argument that "[m]otions to vacate default judgments are governed by CR 60, not RCW 59.18.390."

G. Under CR 81(a), RCW 59.18.390(1) not CR 62(b) applies to unlawful detainer actions

The tenant argues that CR 62 authorized the trial court commissioner to grant the stay, and to do so *ex parte* (Petition pages 14 - 17). CR 62(b) provides that:

> In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a ... motion for relief from a judgment or order made pursuant to rule 60.

CR 81(a) provides that:

> Except where inconsistent with rules or statutes applicable to special proceedings, these rules shall govern all civil proceedings.

Under CR 81(a), when a civil rule is "inconsistent" with a statute that governs special proceedings, the statute applies. *Christensen,* 162 Wn.2d at 374 - 375. An unlawful detainer action is a special proceeding. *Id.* at 374 (citing State ex rel. Smith v. Parker, 12 Wn. 685, 688, 42 P. 113 (1895)). RCW 59.18.390(1) and CR 62(b) are inconsistent in three significant respects.

First, under RCW 59.18.390(1) as a condition precedent to obtaining a stay, the tenant must "execute to the plaintiff a bond to be filed with and approved by the clerk of the court in such sum as may be fixed by the judge." In contrast, CR 62(b) provides only that the court may stay execution of any judgment "on such conditions for the security of the adverse party as are proper." Under CR 62(b), when granting a stay, a court may elect not to require a bond.

Second, RCW 59.18.390(1) specifies how the bond will be calculated. The bond must be:

> such sum as the plaintiff may recover for the use and occupation of the premises, or any rent found to be due, together with all damages the plaintiff may sustain by reason of the defendant occupying or keeping possession of the premises, together with all damages which the court theretofore has awarded to the plaintiff as provided in this chapter, and also all the costs of the action.

In contrast, CR 62(b) has no standard for calculating the amount of a bond.

Third, RCW 59.18.390(1) requires notice to the landlord. The statute provides that:

> The plaintiff, his or her agent or attorneys, shall have notice of the time and place where the court or judge thereof shall fix the amount of the defendant's bond, and shall have notice and a reasonable opportunity to examine into the qualification and sufficiency of the sureties upon the bond before the bond shall be approved by the court.

The Court of Appeals held that under this provision, the landlord was entitled to notice of the hearing on the tenant's motion for a stay (Slip Op. pages 1 and 11 - 12). In contrast, CR 62(b) has no notice requirement. The tenant argues that the rule authorizes the court to act *ex parte* (Petition pages 14 - 17). Because of these inconsistencies, under CR 81(a), RCW 59.18.390(1), not CR 62(b), applies in unlawful detainer cases.

H. Nothing in the Court Of Appeals opinion prevents the tenant from seeking a stay

The tenant argues that default judgments are disfavored, and that a defaulted party should have an opportunity to have her day in court (Petition page 15). Nothing in the Court of Appeals opinion indicates that the tenant could not seek a stay. The opinion holds only that prior to a hearing on a motion for a stay, the notice requirements of RCW 59.18.390(1) must be met (Slip Op. Page 1).

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I. The tenant's claim that as a result of the Court of Appeals opinion tenants will have to comply with timelines in local rules for hearing motions is unfounded

The tenant claims that "[i]n the absence of the ability to request a stay *ex parte,* courts may end up requiring that tenants follow the time line of local rules governing civil motion practice (Petition page 16). That is an unfounded a straw man. The tenant correctly notes that:

> The common procedure when attempting to vacate a default judgment is to obtain an order to show cause, ex parte, setting a date for hearing on the motion.

(Petition page 15). Nothing in the Court of Appeals opinion necessitates a change in that procedure or necessitates that tenants to follow local rules that govern civil motion practice.

J. The trial court had no authority to ignore RCW 59.18.390(1)

Citing TMT Bear Creek Shopping Center v. Petco, 140 Wn. App. 191, (2007), Rummens v. Guaranty Trust Co., 199 Wash. 337, 92 P.2d 228 (1939) and two foreign cases, the tenant asserts that the trial court commissioner had inherent authority to ignore RCW 59.18.390(1) and "fashion a remedy such as staying the writ" (Petition pages 17 - 18). The Washington cases do not authorize the trial court commissioner to ignore RCW 59.18.390(1). At issue in Mitchell v. HUD, 569 F. Supp. 701 (N.D. Cal. 1983) was a request for a preliminary injunction. Jones v. Allen, 185

Misc. 2d 443 (N.Y. App. Div. 2003) involves the constitutionality of a statute. The Supreme Court of New York is the highest trial-level court in the New York system. At issue was the constitutionality of a statute enacted to regulate evictions. None of the cases cited by the tenant support her argument that the trial court had authority to ignore RC W 59.18.390(1).

K. The decision of the Court of Appeals did not inappropriately limit the equitable powers of the superior courts

Citing Bowcutt v. Delta North Star Corp., 95 Wn.App,311 (1999), Tyler Pipe Industries, Inc., v. State Dept. Of Revenue, 96 Wn.2d 785 (1982) and Jones, 185 Misc. 2d 443, the tenant argues that the decision of the Court of Appeals inappropriately limits the equitable powers of the superior courts. Although Bowcutt and Tyler Pipe discuss standards that apply to legislation that limits the jurisdiction of the courts, the cases are not authority for the tenant's claim that RCW 59.18.390 unconstitutionally limits the powers of superior courts.

L. The Notice Requirement In RCW 59.18.390(1) Is A Valid Exercise Of Legislative Power

TPPhe legislature may adopt, by statute, rules that govern court procedures. State v. Gresham, 173 Wn.2d 405, 428, 269 P.3d 207 (2012). RCW 59.18.390(1) is a valid exercise of that power. The Supreme Court has inherent power to promulgate rules that govern the courts. Waples v. Yi, 169

Wn.2d 152, 158, 234 P.3d 187 (2010). Even if RCW 59.18.390(1) otherwise exceeded the authority of the legislature, CR 81(a) provides that the statute and not CR 62 apply. CR 81(a) is certainly within the power of the Supreme Court to promulgate rules that govern the courts.

II. AN ISSUE RAISED IN THE LANDLORD'S BRIEF SHOULD BE REVIEWED

In its brief, the landlord argued that the trial court commissioner erred by waiving the bond required by RCW 59.18.390(1). This issue was also raised in Hawthorne v. Pommerleau 48745-4-II (2017)(unpublished). The Court of Appeals decided both cases on other grounds and did not reach this issue (Slip Op. page 10 footnote 4).

The longstanding practice of the Thurston County superior court bench is to waive the bond required by RCW 59.18.390(1)(Appendix "A" to the landlord's brief page 1 line 16 - page 2 line 1). Since 2012, in at least eight instances, members of the Thurston county bench waived the bond.' This practice is evidenced by the form order often used by the court which states "Bond is waived until the hearing on the merits of this motion" (CP24 and Appendix "A to the landlord's brief, declaration of Strickler and Exhibits "B," "D," "E" and "F" thereto).

Six times identified in the declaration of Strickler (Appendix "A" to the landlord's brief) and two times identified in the declaration of Gusa (Appendix "B" to the landlord's brief).

When considering whether a case involves issues of continuing and substantial public interest a court looks at three factors:

> (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for the future guidance of public officers, and (3) the likelihood of future recurrence of the question.

In re Detention of M.W., 185 Wn.2d 633, 648 (2016).

"Matters involving the interpretation and application of statutes tend to be more public in nature, more likely to arise again, and more helpful to public officials." Hart, 111 Wn.2d at 449. In Kim v. Lakeside Adult Family Home, 185 Wn.2d 532, 554, 374 P.3d 121 (2016) the supreme court reasoned that a moot issue should be reviewed, in part, because a similar issue had been raised at least once before.

Each of the three factors for determining whether a matter is of continuing and public interest weigh in favor of the court considering this issue. First, this is a public issue that involves interpretation of RCW 59.18.390(1). Slip Op. Page 4. Second, it would be desirable to have an authoritative determination of proper procedures for obtaining a stay of execution of a writ of restitution and satisfying the bond requirement to guide future public officers. *Id.* Third, it is likely that similar issues will arise again. As the Court of Appeals noted, Superior courts routinely adjudicate unlawful detainer actions, so this issue is likely to be raised again. *Id.* page

5. As the Court of Appeals noted, one basis to hear a moot case is that superior courts routinely adjudicate unlawful detainer actions by landlords and this issue is likely to occur again. *Id.* Whether a court has authority to waive the bond required by RCW 59.18.390(1) is an issue of first impression.

A court can also "consider the likelihood" that unless the case is heard, "the issue will escape review because the facts of the controversy are short lived." Marriage of Horner, 151 Wn.2d 884, 892, 93 P.3d 124 (2004)(citing Westerman, 125 Wn.2d at 277. This issue has escaped review for more than a decade (Appendix "A" to the landlord's brief page 4 lines 3 - 4). If this case is not heard, this issue will probably continue to escape review. Moreover, because this case has been fully adjudicated, there is a complete record. That would not exist in a future case considered on discretionary review.

Finally, the tenant's petition asks that the Supreme Court review the Court of Appeals decision that under RCW 59.18.390(1) that the landlord was entitled to notice of hearing on the motion for stay. This involves another issue involving the same statute. The test for hearing a moot case is met. Review is well warranted. This is an issue of substantial public interest that should be determined by the Supreme Court and qualifies for review under RAP 13.4(b)(3).

Dated this 11th day of April 2018

Respectfully submitted,

/s

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