SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 98024-1

THOMAS SILVER,

Petitioner,

v.

RUDEEN MANAGEMENT COMPANY, INC.,

Respondent.

RESPONSE TO PETITION FOR REVIEW

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A. IDENTITY OF THE RESPONDENT

The Respondent, Rudeen Management Company, Inc. requests that this Court deny review of the decision of the Court of Appeals designated in Part B of this response.

B. COURT OF APPEALS DECISION

The Petitioner correctly identifies the opinion.

C. ISSUE PRESENTED FOR REVIEW

Is a remedy derived from a violation of the Residential Landlord Tenant Act subject to a two-year statute of limitation?

D. STATEMENT OF THE CASE.

On August 10, 2017, Petitioner Thomas Silver (Silver), filed a complaint in Spokane County Superior Court. CP 3. The Complaint contains an introduction which states that the action is one "to recover trust monies, pursuant to RCW 59.18.280". CP 3. It also states that it is a class action complaint "to recover damages, costs, attorneys' fees and any other relief the court deems just and proper for the Defendant's violations of Washington's Residential Landlord Tenant Act". CP 4.

The Complaint alleges that Silver leased a rental unit from Rudeen Management Company, Inc. (Rudeen) from March 26, 2012 to June 30, 2015. CP 4, 5. Silver paid a $300 refundable damage deposit at the

beginning of the lease. CP 5. Upon Silver's vacating the rental unit, Rudeen immediately sent a statement as the basis for retention of the deposit. CP 5. Silver alleges that this statement was not a complete accounting and therefore a violation of the Residential Landlord Tenant Act. CP 6. The operative portion of the complaint is found in sections V and VI. Section V defines the class of plaintiffs for whom relief is sought. CP 7, 8. Section VI defines the legal theory to grant that relief. CP 9, 10.

1. SECTION V - CLASS ALLEGATIONS

Silver's complaint defines the class of plaintiffs as persons who rented property from Rudeen, and paid a damage deposit at the beginning of the tenancy. CP 7. At the termination of the tenancy, Rudeen must have withheld some or all of the damage deposit without "sending a specific statement of the basis for retaining the deposit, or a portion thereof from the former tenant." CP 7, 8. Silver states that his claims are the same as the members of the class. CP 8.

2. SECTION VI - CAUSE OF ACTION

Silver's complaint defines the cause of action as a "Violation of the Washington Residential Landlord-Tenant Act". CP 9. Silver alleges that Rudeen failed to "provide a full specific statement or return any portion of deposit to the Plaintiff." CP 9. The gravamen of the violation is that

estimated, undisclosed, and anticipated charges do not form a basis for a specific statement as required by RCW 59.18.280, and therefore Rudeen violated the Residential Landlord Tenant Act and is subject to the penalties provided therein. CP 9.

3. PRAYER FOR RELIEF

Silver requested relief in the form of certification of a class of plaintiffs, refund of each class members' deposit, a damage award of two times the deposit retained by Rudeen, and reasonable attorney fees. CP 10. Silver also requested declaratory relief in the form of a decree that Rudeen acted willfully. CP 10.

Spokane County Superior Court Judge Moreno summarily dismissed the complaint upon motion by Rudeen based on her determination that the two-year statute of limitations applied. Judge Moreno denied reconsideration. Silver appealed and the Court of Appeals for Division III affirmed. Division III denied reconsideration.

E. ARGUMENT AGAINST REVIEW

The decision of the Court of Appeals for Division III in this matter is correct and need not be reviewed. Silver claims that the decision is in conflict with other "longstanding authority" of both this Court and other Courts of Appeals. This argument is not supported by Silver's analysis.

Additionally, Silver seeks review based on a public interest element. Silver overstates the affect of the Court of Appeals decision.

1. THE COURT OF APPEALS' DECISION IS IN HARMONY WITH OTHER AUTHORITY.

The general rule developed from the case law regarding statutes of limitation relating to statutory remedies can be summarized as follows: remedies which are derived solely by a violation of the statute are afforded a two-year limitation period unless otherwise provided. In the case of the Residential Landlord Tenant Act, the legislature acknowledge the unique remedies contained therein and did not provide for a specific limitation period. Silver argues that the remedies provided by the RLTA are in the nature of an action based on breach of fiduciary duties related to a common law trust, and the Court of Appeals did properly consider the special character of his trust funds. Rudeen believes the Court of Appeals decision recognized the independent nature of the remedies provided in the RLTA and decided the case consistent with the existing case law.

a. THE HOLDING OF A DAMAGE DEPOSIT DOES NOT CREATE A COMMON LAW TRUST.

Silver explains the nature of a damage deposit between a landlord and a tenant as a common law trust. While some principles of trust law

are applicable, the relationship is not one in which a common law trust is formed. The holding of a refundable deposit is much more akin to a performance bond, rather than a trust. The tenant acts as the principal under the bond. The funds are held in trust as a surety that performance will take place. The landlord is the obligee who will receive the funds in the event of default. The landlord is the party who decides if he is entitled to take ownership of the funds. If he does take the funds, he must tell the tenant why. If he follows the procedure, the operation of law allows the change of ownership from tenant to landlord. It is somewhat of a hybrid relationship in the law which is created and governed by the RLTA. The important distinction is that the funds are held for the benefit of the landlord not the tenant. It was a well thought out procedure enacted by the Legislature.

> In sum, it is hard to perceive of a more thoroughly considered piece of legislation than the Residential Landlord-Tenant Act of 1973. The history of that enactment shows the care exercised by the Legislature in writing the act and in delineating the specific rights, duties, and remedies of both landlords and tenants.

State v. Schwab, 103 Wn.2d 542, 693 P.2d 108, (1985)

The RLTA must be read in full context to establish the nature of the relationship. Under the scheme of the RLTA a deposit is held for the

benefit of the landlord while the funds are still owned by the tenant. RCW 59.18.260 describes a refundable deposit as a form of "security for the performance of the tenant's obligations in a lease or rental agreement". RCW 59.18.270 states that the funds are held in a trust account and that the "landlord is entitled to receipt of interest paid on such trust account deposits." (In a true trust situation, if the landlord were a trustee he or she would not be entitled to receipt of the interest.) The reason that the funds are held in a trust account is because of the conditional nature of the claims to ownership of the funds. Until termination of the lease, the tenants' ownership interest in the funds is superior to all other claims. RCW 59.18.270. At the end of the lease, the landlords' claim may become superior to the tenants if he follows the appropriate procedure. RCW 59.18.280.

A landlord is allowed to legally keep the deposit, without court intervention, if he or she follows the procedure described in RCW 59.18.280. The landlord must send an accounting within the time required, and if he does, his claim to the deposit is then superior to that of the tenant by operation of law. He is legally allowed to keep the funds. If the landlord fails to account for the damage deposit or refund it, then he or she forfeits any claim to the funds and "shall be liable to the tenant for the

full amount of the deposit" along with the other remedies provided therein. RCW 59.18.280(2). This liability is based solely on his or her non-performance of the requirements of RCW 59.18.280, not any substantive consideration. The statute imposes strict liability for non-performance. If the landlord fails to follow the statute, he or she is liable. RCW 59.18.280(2). The validity of the substantive reason for keeping the deposit can be the subject of litigation, but those issues are completely independent of any liability provided in RCW 59.18.280 for failing to account for the deposit. This relationship is a far cry from a common law trust in which the landlord is a trustee and is held to a fiduciary standard to protect the assets of the tenant as a beneficiary.

Silver's arguments related to trust law are misplaced. He states that the "lower court erred not only in its factual analysis . . . but also in its indifference toward the special character of tenants' deposit trust funds, as well as the corresponding and continuing rights of tenants as beneficiaries, which exist independently from the statutory remedies provided in RCW 59.18.280". Petition for Review, 7, 8. (Repeated several times through out the Petition.) The reality is that the funds are being held to ensure the landlord of tenant's performance under the lease. The funds are protected by the statutory provisions of RCW 59.18.270 since the tenants are not

beneficiaries as in the context of a common law trust. RCW 59.18.270 protects the funds from all other claims during the time they are held in the landlord's trust account. At the conclusion of the tenancy, RCW 59.18.280 allows the landlord to claim ownership of the funds based on following the procedural protocol set by the statute. What common law trust would allow the trustee to pay the corpus of the trust to himself above a beneficiary at his own discretion without court intervention? This situation is not a common law trust. It is not even analogous of a common law trust.

Silver doubles down on this argument at page 9 of his petition stating:

> Common law has created the right of tenants, as beneficiaries, to recovery their deposit monies from their deposit trust accounts, and RCW 59.18.280 supplements that right by adding specific notice and timing requirements that apply in the context of residential tenancies.

Petition for Review, 9. This bold statement is unsupported by any cite to case law. What common law has created the right of tenants, as beneficiaries to recover damage deposits? There is none. It is a creation of the RLTA. This fanciful argument is simply not supported by the law. Silver's complaint is to recover the statutory penalties for Rudeen's alleged failure to comply with RCW 59.18.280. The complaint states no

other theory. The penalties do not supplement a claim based on another legal theory. They are harsh, punitive, provide strict liability for violations and are in derivation of the common law.

b. THE DECISION OF THE COURT OF APPEALS ACCURATELY STATES THE NATURE OF THE REMEDIES UNDER THE RLTA.

The Court of Appeal's decision is based on what it called the nature of the right invaded.

> Thus, the ultimate question concerns the nature of the right invaded. Silver argues that he was seeking return of his damage deposit, a property right protected by RCW 4.16.080(2). If he had filed a replevin action, we would agree with him. However, his complaint is expressly predicated on the landlord's duty under RCW 59.18.280(1) to respond within twenty-one days by either returning a damage deposit or providing a final statement justifying the withholding of some or all of the deposit. He seeks the remedies accorded by that statute. He does not assert that he did less than $300 damage to the apartment.

Silver v. Rudeen Management Company, Inc., 10 Wn.App.2d 850, 449 P.3d 1067, 1069 (2019).

As discussed above, that statutory scheme of the RLTA allows a landlord to take of the funds. The taking of the funds is a change in ownership. As long as the procedure is followed, the taking is allowed. Thus the Court of Appeals decision correctly assesses the nature of Silver's complaint. It is not to recover funds which Silver was otherwise

entitled to recover, it is to impose the statutory penalty. It stands alone as a right created by the statute. When this occurs, the two-year statute of limitations will govern.

> Washington courts have consistently followed *Northern Grain* in holding that the 2-year catch-all statute applies to causes of action arising out of the failure of public officials to perform their official duties. See, e.g., *Constable v. Duke*, 144 Wash. 263, 266-67, 257 P. 637 (1927); *Gates v. Rosen*, 29 Wash.App. 936, 941, 631 P.2d 993 (1981), aff'd sub nom. *Hall v. Niemer*, 97 Wash.2d 574, 649 P.2d 98 (1982); *Peterick v. State*, supra, 22 Wash.App. at 169, 589 P.2d 250. **But where the defendant directly invades a legally protected interest of the plaintiff, the 3-year statute applies.** In *Luellen v. Aberdeen*, 20 Wash.2d 594, 148 P.2d 849 (1944), the plaintiff sought reinstatement to the city police force. **The court held that, because the plaintiff had acquired a property right to his civil service pension, the city invaded that right by firing him**. The court thus applied the 3-year statute, stating that it was intended to cover injury to that kind of property that is intangible in its nature, especially when the injury consists of some direct, affirmative act which prevents another from securing, having, or enjoying some valuable right or privilege. *Luellen*, at 604, 148 P.2d 849.

Lewis v. Lockheed Shipbuilding and Const. Co., 36 Wn.App. 607, 676 P.2d 545, (1984) (footnote omitted, emphasis added.)

The *Lewis* case demonstrates the pattern. If a person possess a right and that right is in some way invaded by another party, the cause of action will be in the nature of deprivation of that right and subject to the three year limitation period. A violation of a statute supplementing that

right is also afforded the three-year limitation period. The *Boeing* case also demonstrates a similar pattern with respect to wages.

> We hold the three-year statute of limitations of RCW 4.16.080(3) applies to WMWA claims and take this occasion to overrule *Cannon*. *Cannon* not only failed to address the rights vindication language of RCW 4.16.080(2), it also failed to address the rationale we articulate here. Boeing did not contract with the employees to pay for orientation; therefore, the six-year statute of limitations set forth in RCW 4.16.040(1) for written contracts does not apply. Moreover, RCW 4.16.080(2), the statute the employees contend applies, has generally been applied to torts and tort-like claims, not labor and employment claims. We decline to adopt the employees' suggestion that a claim under the WMWA is akin to a civil rights action or tort action because this approach essentially eviscerates RCW 4.16.130. Any action in court upholds a right of some sort.
>
> **But we note that Washington case law has applied a three-year statute of limitations to claims involving unjust enrichment.** RCW 4.16.080 (3).[7] See *Dam v. General Elec. Co.*, 265 F.2d 612, 614 (9th Cir.1958) (quoting *Halver v. Welle*, 44 Wash.2d 288, 295, 266 P.2d 1053 (1954)); *Cain v. Source One Mortgage Servs. Corp.*, 1999 WL 674776, 97 Wash.App. 1014 (Wash.App.Div.I, Aug. 30, 1999). The employees' WMWA claims are more analogous to claims for unjust enrichment than to tort claims. Although Boeing did not contract with the employees to pay for orientation, there is still a legal obligation imposed in law that an employer must pay an employee at least the minimum wage for work. And because its mandatory pre-employment orientation sessions were deemed work, under the WMWA, Boeing is required to pay the employees not less than the minimum wage for that work, which it did not do. See RCW 49.46.020(1).

> **Thus, in instituting this action, the employees are in essence seeking recovery under an obligation imposed by law, and the WMWA, for Boeing's unjust enrichment** (i.e., receiving the benefit of the employees' work without paying for the work.) As such, the employees' claims are subject to the three-year statute of limitations applicable to implied contracts, as provided under RCW 4.16.080(3).

Seattle Professional Engineering Employees Ass'n v. Boeing Co., 139 Wn.2d 824, 991 P.2d 1126, (2000) (emphasis added.)

As indicated in the *Boeing* case, there is a "legal obligation imposed in law that an employer must pay an employee". The denial of this right gives rise to a cause of action for unjust enrichment to address the infringement of that right and the cause of action is subject to a three-year limitation period. The statute supplementing that right is subject to the three year limitation as well. *Sorey v. Barton Oldsmobile* represents another example.

> The court in *Stenberg* "return[ed] to the original understanding of the statutes: The catchall provision serves as a limitation for any cases not fitting into the other limitation provisions." Id. at 721, 709 P.2d 793. Based on this case law, we conclude that *Cannon* stands for no more than the proposition that a claim based upon wage and hour statutes is not a contract claim. That proposition does not in any way diminish the argument that violation of a wage and hour statute is an invasion of a personal right subject to the three-year statute of limitations and we so hold.

Sorey v. Barton Oldsmobile, 82 Wn.App. 800, 806, 919 P.2d 1276, (1996).

In this matter appellant's right to receive any refund of his damage deposit as described in the complaint is based solely on a violation of the Washington Landlord Tenant Act. His right to recover the damage deposit based on the statutory violation is ***the only remedy*** sought in the complaint. This is the distinction that removes the appellant's claim from all other statutes of limitation, both directly and by analogy. The case law supports this application of the limitation periods.

In the case of the Residential Landlord Tenant Act, a violation of its provisions is actionable. Under the facts in the complaint, the appellant had no independent right to make a claim to his damage deposit. His complaint establishes that the statement of damage done to the premises exceeded the damage deposit over seven fold. An action to enforce the procedural aspects of the Residential Landlord Tenant Act is limited to two years.

2. PETITIONER OVERSTATES THE IMPACT OF THE PUBLIC INTEREST.

The public interest in the Court of Appeals decision is limited to the Residential Landlord Tenant Act. The decision states that an action to enforce remedies created by the RLTA are subject to a two-year statute of limitations. It does not affect trust beneficiaries. Silver claims that the

decision will impact every statute which establishes a trust fund. His efforts to demonstrate this position fall short. The following were cited by Silver:

a. HEALTH CLUBS

Silver cites RCW 19.14.060 [sic] as a statute affected by the Court of Appeals decision. Petition for Review, 15. RCW 19.142.060 states that "The trust account shall be designated and maintained for the benefit of health studio members." This is a common law trust. Additionally, RCW 19.142.100 provides that a violation of the chapter is a per se violation of the consumer protection act, thus afforded a four-year statute of limitations. This statute is not affected by the *Silver v. Rudeen* decision.

b. DEBTORS SUBJECTED TO DEBT COLLECTION ACTIONS.

Silver cites RCW 19.16.240 as a statute affected by the Court of Appeals decision; "alleged debtors subjected to debt collection actions". Petition for Review, 15. This statute requires a collection agency to open a trust account for moneys collected on behalf of its clients. It has nothing to do with protecting debtors from debt collection actions. Additionally, the statute does not provide its own remedy. The funds in the trust account belong to the collection agency's clients, and there is no statutory

mechanism to change ownership of the funds like there is in the RLTA, RCW 59.18.280. This trust would be in the nature of a common law trust. This statute is not affected by the *Silver v. Rudeen* decision.

c. CONSUMERS OF MOTOR VEHICLES AND MANUFACTURED HOMES.

Silver cites RCW 46.70.180(9) and RCW 46.70.029 as statutes affected by the Court of Appeals decision. Petition for Review, 15. RCW 46.70.190 provides a one-year limitation period for violations of that chapter: "A civil action brought in the superior court pursuant to the provisions of this section must be filed no later than one year following the alleged violation of this chapter." RCW 46.70.190. This statute is not affected by the *Silver v. Rudeen* decision.

d. RETAIL TRAVEL SERVICES.

Silver cites RCW 19.138.140 as a statute affected by the Court of Appeals decision. Petition for Review, 15. RCW 19.138.140 provides its own statute of limitations:

> Any person or persons who have suffered monetary loss by any act which constitutes a violation of this chapter or a rule adopted under this chapter may bring a civil action in court against the seller of travel and the surety upon such bond or approved alternate security of the seller of travel who committed the violation of this chapter or a rule adopted under this chapter or who employed the seller of travel who committed such violation. A civil action brought in court pursuant to the provisions of this section **must be filed no**

> **later than one year** following the later of the alleged violation of this chapter or a rule adopted under this chapter or completion of the travel by the customer;

RCW 19.138.140(7)(a)(v). This statute is not affected by the *Silver v. Rudeen* decision.

e. CREDIT SERVICE ORGANIZATION.

Silver cites RCW 19.134.030 as a statute affected by the Court of Appeals decision. Petition for Review, 15. RCW 19.134.030 reads: "If a credit services organization is in compliance with RCW 19.134.020(1), the salesperson, agent, or representative who sells the services of that organization is not required to obtain a surety bond and establish a trust account." That statute is certainly not affected. RCW 19.134.070(5) reads: "A violation of this chapter by a credit services organization is an unfair business practice as provided in chapter 19.86 RCW." This affords the violation of four year limitation period. This statute is not affected by the *Silver v. Rudeen* decision.

Silver overstates the affect of the Court of Appeals decision. The decision has no further reach than as applied to the remedies created by the RLTA.

3. RUDEEN IS ENTITLED TO JUDGMENT FOR REASONABLE ATTORNEY FEES FOR RESPONDING TO THE PETITION.

The appellant's action is based on RCW 59.18.280: " In any action brought by the tenant to recover the deposit, the prevailing party shall additionally be entitled to the cost of suit or arbitration including a reasonable attorneys' fee." RCW 59.18.280(2). The statute applies on appeal. Rudeen requests an award of reasonable attorney fees pursuant to RAP 18.1.

F. CONCLUSION

The decision of the Court of Appeals for Division III is correct and should not be reviewed by this court.

Respectfully Submitted, on
April 15, 2020.

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Timothy W. Durkop, WSBA #22985
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