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**COURT OF APPEALS OF THE STATE OF  
WASHINGTON**

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**Dwayne Des Longchamps,**

**Appellant,**

**v.**

**Lydia Davis,**

**Respondent.**

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**BRIEF OF APPELLANT**

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## **I. ASSIGNMENTS OF ERROR AND ISSUES**

### **A. Assignments of Error**

1. The trial court erred in entering a writ of restitution and judgment without notice to appellant tenant.

2. The trial court erred in denying appellant tenant's motion for reconsideration.

### **B. Issues Pertaining to Assignments of Error**

1. Where a settlement agreement provides that if appellant does not comply with the terms of the agreement, respondent may obtain a writ of restitution and judgment upon "24 hours faxed prior notice to . . . [appellant's] counsel", are the writ and judgment void when respondent fails to provide such notice as specified in the settlement agreement, and appellant's counsel was unaware of the presentation? (Assignment 1)

2. Has appellant effectively been denied due process of law, where respondent's counsel, on Sunday afternoon, faxed a notice of presentation to appellant's counsel at appellant's counsel's office advising appellant that respondent's counsel would present a writ of restitution the next morning at 8:30 a.m., where appellant's counsel does not normally check his office for faxes on Sunday, and was unaware that the presentation would take place

Monday morning at 8:30 a.m.? (Assignment 1)

2. Should the trial court have considered and given appellant an opportunity to present his *force majeure* and related equitable arguments and the defectiveness in the issuance of the writ and judgment upon appellant's motion for reconsideration? (Assignment 2)

## II. STATEMENT OF THE CASE

Appellant Dwayne Des Longchamps (the "Tenant") rented an RV space from respondent Lydia Davis (the "Landlord") in October, 2006 (CP 91). The rent was \$240 per month, and included an RV space behind the Landlord's house in Woodinville and access to the bathroom and laundry room inside the house (CP 91). The Tenant had a key to the house so that he could make entry and use the bathroom and laundry room (CP 91). The RV space had hookups for water, electricity and a telephone (CP 91).

Access to a telephone was a significant aspect of the rental (CP 91). Initially the telephone service was one service provider (CP 91). In December, 2006, the arrangement was altered (CP 91). The Landlord added an additional line to her Comcast account, which cost \$10.00 per month, and the Tenant agreed to pay \$33.00 per month to the Landlord for use of this land-line telephone (CP 91-92). The Tenant then began paying \$273.00 per

month in January, 2007 (CP 92).

The Tenant and Landlord had no significant problems until the spring of 2008 (CP 92). The Landlord learned that the Tenant was receiving disability checks and began making snide remarks to the other occupants of the house (CP 92). The Tenant is disabled (CP 92). He has a lung condition and also had a heart attack in early 2008 (CP 92).

The Tenant filed a complaint about this disability discrimination with the Human Rights Commission (CP 92). On June 6, 2008, a letter came to the house addressed to the Tenant from the Human Rights Commission (CP 92). The return address was prominently displayed on the envelope (CP 92). The Landlord took the envelope and held it for a day (CP 92). Meanwhile she called Comcast and cancelled the Tenant's telephone service (CP 92). The Tenant wrote her a note stating that if she did not reconnect the telephone, he was not going to pay July rent (CP 92). The Landlord did not reconnect the telephone (CP 92). The Tenant did not pay July rent (CP 92). The Tenant did not pay August rent (CP 92).

On August 20, 2008, the Landlord caused a three-day notice to pay or vacate to be delivered to the Tenant (CP 92). The Tenant did not pay the \$480 claimed to be owing for July and August rent, so the Landlord filed the

within unlawful detainer action against the Tenant (CP 92).

Later the Landlord changed the lock on the door of the house so that the Tenant no longer had access to the bathroom and laundry room (CP 92).

King County in early September, 2008, placed a notice on the RV stating that it could not be inhabited because the site it was on did not meet code (CP 92). The King County Code requires the pad on which the RV sits to be of an impervious material or of four inches of gravel (CP 92). The pad presently consists of just dirt. The Tenant was unable to live in the RV since early September, and thus has been denied the use of what he was paying for (CP 92).

A show cause hearing was held on September 23, 2008, the Tenant appearing pro se, and the commissioner set the matter for trial (CP 9-10). The order required the Tenant to deposit the monthly rent into the court registry pending trial. *Id.* The Tenant complied with this order.

A bench trial was scheduled for November 3, 2008, before Judge McBroom (CP 17). The Tenant filed a trial brief raising the defenses of improper service of the three-day notice (CP 27-29), discrimination (CP 30), termination of the Tenant's utility service (CP 31), retaliation (CP 32-33), the implied warranty of habitability (CP 33-34) and the Landlord's lack of

good faith (CP 35). The Landlord filed a trial brief arguing that the Tenant could not withhold rent (CP 40-41) and that the Tenant's actions were presumed to be in bad faith (CP 42). The Tenant filed a response to the Landlord's trial brief (CP 60-62). In the response, the Tenant argued that the Tenant was not seeking any remedy in the unlawful detainer action, but was merely defending it (CP 60-61). In addition, the Tenant argued that actions mentioned by the Landlord did not show the Tenant's bad faith, but that previous actions of the Landlord showed the Landlord's retaliatory animus (CP 61).

On the first day of trial, the parties settled the case and entered into a stipulation for settlement dated November 3, 2008 (CP 85-87). The stipulation basically provided that the tenant would receive the amounts held in the court registry and by December 31, 2008, would vacate the premises, i.e., remove his 20' RV from the property (CP 85). The stipulation further provided:

If defendants fail to comply with all requirements of this stipulation the plaintiffs will be entitled, upon the filing of a declaration certifying that the defendants are not in compliance, *and 24 hours faxed notice to counsel Dan Young* to the immediate issuance of a writ of restitution and a judgment for all unpaid rents, attorney's fees and court costs. Said writ of restitution and judgment may issue *in ex parte* without

*24 hours faxed* prior notice to the defendants or the defendant's counsel.

(CP 86, ¶ 6) (All italicized language, except "*ex parte*" added in handwriting to the typed original stipulation, and letters "out" following "with" after *ex parte* were lined out, to make "without" read "with".)

The Tenant was unable to remove his RV from the property by December 31<sup>st</sup> because of the unprecedented snow, ice and bad weather occurring during the last two weeks of the year and continuing into January, 2009 (CP 109). The property is accessed through hills, which were too icy to safely remove the RV (CP 109; 110). In addition, on December 31, 2008, the ground was too soft for the RV to be removed and a tree about 6-8" in diameter had fallen in front of the RV blocking it in place (CP 109).

On Thursday, January 1, 2009, the Landlord's attorney, Evan Loeffler, faxed a notice to the Tenant's counsel (CP 122). The notice stated that the Tenant had not vacated the premises and that the Landlord intended "to exercise her rights under the stipulation at the earliest opportunity allowed under its terms" (CP 122). The fax provided no date, time or place for any hearing or presentation (*Id.*)

After the Tenant's counsel got this fax notice from the Landlord's counsel, Tenant's counsel called Mr. Loeffler on Friday, January 2, 2009, to

ask him for an extension of time for the Tenant to comply with removing his RV because of the ice, snow and soft ground at the property making it impossible to remove the RV during the last week of December and early January (CP 97). Mr. Loeffler said he might consider it (CP 97).

Tenant's counsel also spoke to the Landlord's counsel about the date, time and place of any hearing on a writ of restitution and judgment (CP 97). The Landlord's counsel told the Tenant's counsel that the former did not have to give the Tenant's counsel notice of the date and time and place, but only a 24-hour notice (CP 97). The Tenant's counsel vigorously objected, and said that not only did the order require notice of the date, time and place the Landlord would seek judgment and a writ of restitution, but fundamental notions of due process also required such notice (CP 97). The two argued about it at length, but neither of the two changed his views (CP 97).

On Sunday afternoon, January 4, 2009, the Landlord's counsel faxed a notice to the Tenant's counsel informing the latter that a presentation of the judgment and application for a writ of restitution was set the next morning at 8:30 a.m. before Judge McBroom (CP 117, ¶ 22). This fax was not in the record before the trial court, but it is undisputed that the Tenant's counsel does not normally go to his office on Sundays to check for faxes arriving in

the afternoon, and that the Tenant's counsel was completely unaware on Monday morning that the Landlord's counsel was before Judge McBroom at 8:30 a.m. seeking a writ of restitution and judgment of over \$6,000 against the Tenant. Judge McBroom attempted to call the Tenant's counsel on the latter's cell phone, but got no reply and left a voice mail message (CP 98). Judge McBroom then signed the order for writ of restitution and judgment (CP 73-76).

That same afternoon the Tenant's counsel found out about what had happened at 8:30 a.m. earlier that morning, when fortuitously the Tenant's counsel happened to be in Judge McBroom's courtroom for a trial in an unrelated case. Judge McBroom told Tenant's counsel that Mr. Loeffler had come in at 8:30 a.m. that morning, and that the judge had tried to call Tenant's counsel on Tenant's counsel's cell phone (CP 98). Tenant's counsel pulled out his cell phone and retrieved the message, which he had not heard before then (CP 98). If Tenant's counsel had known of the hearing, he would have gone to Judge McBroom's courtroom at 8:30 a.m. to raise *force majeure* and equitable defenses (CP 98). Tenant's counsel mentioned those defenses to Judge McBroom on Monday afternoon, January 5th, and the judge stated that if the judge had known of them at the time, he would not have granted

the writ or entered the judgment (CP 98).

Judge McBroom retired from the bench on January 9, 2009, and Tenant's counsel was unable to file a motion for reconsideration before his retirement (CP 98).

On January 14, 2009, the Tenant filed a motion for reconsideration of the entry by Judge McBroom of the judgment and the writ of restitution on January 5, 2009 (CP 91-96). Judge McBroom was appointed as a pro-tem judge to rule on the motion for reconsideration (CP 111-12).

On February 3, 2009, Judge McBroom held a telephonic hearing with counsel regarding the motion for reconsideration. The judge was calling from his home and apparently the call was not recorded in any way. Judge McBroom stated that he did not want to get into the merits of the Tenant's motion, but wanted a declaration from the Landlord's counsel as to the facts giving rise to the issuance of the judgment and writ of restitution.

The Landlord's counsel subsequently filed a declaration addressing that issue and other issues (CP 113-124). On February 17, 2009, Judge McBroom entered an order denying the Tenant's motion for reconsideration (CP 125). The Tenant timely filed a notice of appeal to this Court (CP 126-131).

### III. ARGUMENT

#### A. The Standard of Review is De Novo.

Issues of law involving a constitutional challenge are reviewed de novo. *Resident Action Council v. Seattle Housing Authority*, 162 Wn.2d 773, 778, 174 P.3d 84 (2008); *State v. Hatchie*, 161 Wn.2d 390, 394, 166 P.3d 698 (2007).

The process of determining the applicable law and applying it to facts is a question of law reviewed de novo. *Erwin v. Cotter Health Centers, Inc.*, 161 Wn.2d 676, 687, 167 P.3d 1112 (2007); *Emmerson v. Weilep*, 126 Wn. App. 930, 938, 110 P.3d 214 (2005).

This Court reviews a trial court's conclusions of law de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

Accordingly, the issues raised in this appeal are reviewed de novo.

#### B. The Landlord Failed to Provide Proper Notice of Entry of a Judgment and Writ of Restitution, as Required by the Settlement Agreement.

The operative provision of the Stipulation for Settlement was that if the Tenant did not remove the RV from the Landlord's property by December

31, 2008, the Landlord would be entitled to a writ of restitution and judgment upon “24 hours faxed notice to [Tenant’s] counsel Dan Young.” (CP 86, ¶

6.) The actual language is crucial and is reproduced as follows:

If defendants fail to comply with all requirements of this stipulation the plaintiffs will be entitled, upon the filing of a declaration certifying that the defendants are not in compliance, *and 24 hours faxed notice to counsel Dan Young* to the immediate issuance of a writ of restitution and a judgment for all unpaid rents, attorney’s fees and court costs. Said writ of restitution and judgment may issue *in ex parte* with *24 hours faxed* prior notice to the defendants or the defendant’s counsel.

(CP 86, ¶ 6)<sup>1</sup> (Appendix A).

Implicit in this provision is that the notice would contain the date, time and place of the hearing at which the writ and judgment were sought. Otherwise, there would be no reason to provide for 24-hour notice. What good is notice of court action if one cannot go and oppose the relief sought?

Furthermore, the change in language is highly significant. As originally prepared by the Landlord’s counsel, the last sentence of paragraph

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<sup>1</sup>All italicized language, except “*ex parte*” was added in handwriting to the original stipulation, and the letters “out” following “with” after *ex parte* are lined out, so that the words in the last sentence which originally read “[s]aid writ of restitution and judgment may issue *ex parte* without prior notice to the defendants” were changed to read “[s]aid writ of restitution and judgment may issue *in ex parte* with 24 hours faxed prior notice to the defendants . . .” (CP 86, ¶ 6).

6 of the above-quoted language read that the judgment and writ *may issue ex parte without prior notice*. After hand-written language was added, the same words read that the judgment and writ *may issue in ex parte with 24 hours faxed prior notice*. This change in language emphasizes the fact that the lack of notice was objected to by the Tenant's counsel, and the Landlord's counsel wrote in words providing 24 hours' faxed notice prior to going to ex parte to have the judgment and writ issued.

In addition, the language *in ex parte* indicates that ex parte is a place, i.e., the *ex parte* department of the King County Superior Court, not a Latin expression meaning "[d]one or made at the instance of one party only, and without notice to, or argument by, any person adversely interested" as defined in *Black's Law Dictionary* (8<sup>th</sup> ed. 2004). Interestingly, even *Black's Law Dictionary* makes the comment that "[d]espite the traditional one-sidedness of ex parte matters, some courts now require notice to the opposition before what they call an 'ex parte hearing'." *Id.*

The Landlord's counsel seems to argue that once he gave notice on January 1<sup>st</sup>, 2009, of his intent to obtain a writ of restitution and judgment in some unspecified amount at some unspecified time and place in the future, that somehow satisfied the requirement of the 24-hour faxed prior notice in

the stipulation. As noted earlier, the entire purpose of the notice requirement was to provide the Tenant with some opportunity—albeit somewhat limited—to contest the propriety of the amount sought in the judgment and to contest, perhaps on equitable grounds, the issuance of a writ of restitution.

The Landlord also seems to confuse the notice requirement with the term “ex parte” and the requirement for a hearing (CP 116, ¶ 19). The “ex parte” obviously refers to the *ex parte* department on the third floor of the King County courthouse in Seattle, as the word “in” was added before *ex parte* to create the phrase *in ex parte*. The stipulation does not specifically refer to a hearing, but that means neither that a hearing was or was not required. The Tenant’s counsel envisaged that if he were notified of the date, time and place of the presentation of a judgment and writ of restitution, i.e., he was given the “notice” contemplated by the stipulation, then he could go to *ex parte* on that date and at the appropriate time to at least present arguments or evidence as to why, on equitable grounds, the judgment and writ should not issue then. With the snow still on the ground in early January, 2009, and the subject of snow and snow removal still fresh in the popular consciousness, the commissioner would be able to consider the Tenant’s equitable defenses. The commissioner would have at least listened

to a few minutes of argument about these equitable defenses, and then would have made a ruling. The manner in which the Landlord obtained the judgment and writ prevented that process from happening. The court never had an opportunity to consider the Tenant's equitable defenses, which may well have been adopted at the time.

The Landlord clearly failed to comply with this requirement of 24 hours' faxed prior notice in the stipulation. On January 1, 2009, the Landlord faxed a notice to the Tenant's counsel that the Tenant had not vacated the premises and that the Landlord intended "to exercise her rights under the stipulation at the earliest opportunity allowed under its terms" (CP 122). The fax provided no date or time for any hearing or presentation (*Id.*) On Friday, January 2, 2009, in a telephone conversation with the Landlord's counsel, Tenant's counsel specifically asked for this information from Mr. Loeffler, representing the Landlord (CP 97). Mr. Loeffler refused to provide this information and argued that he did not have to (CP 97).

The Landlord's failure to provide notice of the date and time of the hearing violated the most reasonable interpretation of the terms of the order. Had the Tenant known when the hearing was, he would have provided Judge McBroom with additional information which could well have resulted in the

judge's denial of the request for the writ and judgment at that time.

Here, the Landlord should not profit from her own wrong. *Seattle International Corporation v. Commerce & Industry Insurance*, 24 Wn. App. 108, 111, 600 P.2d 612 (1979) (“The basic function of the court is to see that no one takes advantage of his own wrong.”); *Brown v. Fire Protection District*, 21 Wn. App. 886, 895, 586 P.2d 1207 (1978) (“no one should profit by his own wrong”). The Tenant was denied the right accorded him by the terms of the stipulation to have 24 hours’ prior notice of the date, time and place of the presentation before the judgment and writ of restitution were entered against him. The judgment, findings and writ should be set aside.

**C. The Tenant Was Denied Procedural Due Process in Being Deprived of the Opportunity to Argue Against the Issuance of a Writ of Restitution, the Amount of Attorney’s Fees, or the Entry of a Judgment.**

No one testified at 8:30 a.m. on Monday, January 5, 2009, when the Landlord’s counsel presented a judgment against the Tenant for over \$6,000 in rent, attorney’s fees and costs, and an order authorizing the issuance of a writ of restitution. The Landlord’s attorney and Judge McBroom were the only ones present, because the Landlord’s counsel not only failed to give 24 hours’ prior notice of the date, time and place of any presentation, but also

failed to give any reasonable notice of it. The Tenant was totally deprived of all opportunity to make objections to the amount of the judgment or the issuance of the writ of restitution. Obviously, the Landlord did not want any opposition to the amount of the judgment to be presented and to the issuance of a writ of restitution.

The Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976) held that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965)). In *Young v. Konz*, 91 Wn.2d 532, 539, 588 P.2d 1360 (1979) the court stated: "In speaking of due process, we have said: 'The essential elements of the constitutional guaranty of due process, in its procedural aspect, are notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case.'" *In re Hendrickson*, 12 Wn.2d 600, 606, 123 P.2d 322 (1942).

A fundamental requirement of due process is notice and an opportunity to be heard. *Sherman v. State*, 128 Wn.2d 164, 184, 905 P.2d 355 (1995); *State v. Rogers*, 127 Wn.3d 270, 275, 898 P.2d 294 (1995); *In re Moseley*, 34 Wn. App. 179, 184, 660 P.2d 315 (1983); *Olympic Forest*

*Products, Inc. v. Chaussee Corp.*, 82 Wn.3d 418, 422, 511 P.2d 1002 (1973).

The notice must be reasonably calculated to inform the affected party of the pending action and afford him the opportunity to present his objections.

*Duskin v. Carlson*, 136 Wn.2d 550, 557, 965 P.2d 611 (1998); *Pease Hill v.*

*County of Spokane*, 62 Wn. App. 800, 806, 816 P.3d 37 (1991); *State v.*

*Thomas*, 25 Wn. App. 770, 772, 610 P.2d 937 (1980).

Both the Washington and United States Constitutions provide that no person shall be deprived of "life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1; WASH. CONST. art. I, § 3. The Washington Supreme Court has held that our due process protection is largely coextensive with that of the United States Constitution. *State v. Manussier*, 129 Wn.2d 652, 679-80, 921 P.2d 473 (1996), *cert. denied*, 520 U.S. 1201 (1997). If a defendant is denied an opportunity to be heard on the merits of a claim, "he is denied procedural due process of law in violation of § 3, Art. I, of our Constitution." *Ware v. Phillips*, 77 Wn.2d 879, 884, 468 P.2d 444 (1970).

Here, the Tenant's due process rights were clearly violated. The remedy is vacation of the judgment and writ of restitution. An order or judgment based on a hearing in which there was not adequate notice or

opportunity to be heard is void. *Esmieu v. Schrag*, 15 Wn. App. 260, 265, 548 P.2d 581 (1976), *affirmed*, 88 Wn.2d 490, 497, 563 P.2d 203 (1977); *Marriage of Ebbighausen*, 42 Wn. App. 99, 102, 708 P.2d 1220 (1985); *Halsted v. Sallee*, 31 Wn. App. 193, 197, 639 P.2d 877 (1982).

Here, the Tenant was unconstitutionally denied due process of law by not being allowed to object regarding the propriety of the judgment and writ of restitution entered by the trial court. Those orders are therefore void.

**D. The Tenant Was Deprived of the Opportunity to Present Equitable Defenses.**

If Tenant's counsel had known of the hearing on Monday morning, January 5<sup>th</sup>, he would have been present to raise the Tenant's equitable defenses (CP 98).

There were a number of equitable defenses which could well have been presented. In *Sorenson v. Pyeatt*, 158 Wn.2d 523, 146 P.3d 1172 (2006) the court noted that courts have broad equitable powers to fashion remedies:

In matters of equity, "trial courts have broad discretionary power to fashion equitable remedies." *In re Foreclosure of Liens*, 123 Wn.2d 197, 204, 867 P.2d 605 (1994). The Supreme Court reviews the authority of a trial court to fashion equitable remedies under an abuse of discretion standard. *Blair v. Wash. State Univ.*, 108 Wn.2d 558, 564, 740 P.2d 1379 (1987). However, it is a well-established rule that an equitable remedy is an extraordinary, not

ordinary form of relief. Henry L. McClintock, *Handbook of the Principles of Equity* § 22, at 47 (2d ed. 1948). A court will grant equitable relief only when there is a showing that a party is entitled to a remedy and the remedy at law is inadequate. *Orwick v. City of Seattle*, 103 Wn.2d 249, 252, 692 P.2d 793 (1984).

*Sorenson*, 158 Wn.2d at 531.

Given this broad equitable power, the trial court could have determined that there was impracticability of performance under a frustration of purpose theory, which would temporarily suspend the Tenant's duty to perform. See, *Restatement (Second) of Contracts*, § 269 (1981); *Felt v. McCarthy*, 78 Wn. App. 362, 898 P.2d 315 (1995), *affirmed*, 130 Wn.2d 203, 922 P.2d 90 (1996). In *Felt*, the Court of Appeals noted that the Washington Supreme Court has adopted the doctrine of supervening frustration as set forth in section 265 of the *Restatement (Second) of Contracts* (1979): "Discharge by Supervening Frustration . . . Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary." Both the Tenant and Landlord obviously assumed that the weather and road conditions—not to mention the absence of a big tree trunk blocking

the Tenant's RV-- would permit removal of the RV.

Or the trial court could have allowed more time for the Tenant to perform in order to avoid a forfeiture. “[F]orfeitures are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit no denial.” *Hyrkas v. Knight*, 64 Wn.2d 733, 734, 393 P.2d 943 (1964) (quoting *State ex rel. Foley v. Superior Court*, 57 Wn.2d 571, 574, 358 P.2d 550 (1961)). “In order to avoid the harshness of forfeitures and the hardship that often results from strict enforcement thereof, the courts have frequently granted a ‘period of grace’ to a purchaser before a forfeiture will be decreed.” *Moeller v. Good Hope Farms, Inc.*, 35 Wn.2d 777, 783, 215 P.2d 425 (1950); see also *Dill v. Zielke*, 26 Wn.2d 246, 252-53, 173 P.2d 977 (1946). Whether a grace period is warranted depends on the equities in each particular case. *Moeller*, 35 Wn.2d at 783.

The trial court could also have considered an impossibility defense, which is analyzed in accordance with general principles of contract law. *Metropolitan Park Dist. v. Griffith*, 106 Wn.2d 425, 439, 723 P.2d 1093 (1986) (the doctrine of impossibility “excuses a party from performing a contract where performance is impossible or impracticable due to extreme and unreasonable difficulty, expense, injury or loss”); *Thornton v. Interstate*

*Sec. Co.*, 35 Wn. App. 19, 30-31, 666 P.2d 370, *review denied*, 100 Wn.2d 1015 (1983). *Restatement (Second) of Contracts* § 261 (1981). Some courts have referred to this as supervening impracticability. *Washington State Hop Producers, Inc. Liquidation Trust v. Goschie Farms, Inc.*, 51 Wn. App. 484, 487-89, 754 P.2d 139 (1988), *affirmed*, 112 Wn.2d 694, 700, 773 P.2d 70 (1989) (quoting *Restatement (Second) of Contracts* § 265). Section 265 of the *Restatement* provides that “where, after a contract is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged unless the language or the circumstances indicate the contrary.”

The trial court could also have considered that the Landlord’s tree trunk blocking the Tenant’s RV hindered the Tenant’s performance, thus excusing a delay. See *Louric v. Dunatov*, 18 Wn. App. 274, 284, 567 P.2d 678 (1977) (where a party to an agreement causes delay in the other party’s performance, the delayed party is excused from timely performance); *Jones Associates, Inc. v. Eastside Properties, Inc.*, 41 Wn. App. 462, 471, 704 P.2d 681 (1985) (“Proof of a party’s interference with the performance of the other

party's obligation under the contract will work to discharge the other party's duty.")

The trial court could also have considered the conditions preventing removal of the RV as caused by an Act of God, an overwhelming, unpredictable event caused exclusively by forces of nature. *Black's Law Dictionary* (8<sup>th</sup> ed. 2004). *Teter v. Olympia Lodge*, 195 Wash. 185, 191, 80 P.2d 547 (1938) (unprecedented winds could be Act of God); *Grant v. Libby*, 160 Wash. 138, 143, 295 Pac. 139 (1931) (lightening, forces of nature could be Acts of God). In these circumstances courts have granted reasonable extensions of time because of supervening impossibility or Acts of God. *Matter of Fuzzy Thurston's Left Guard, Etc.*, 6 Bkr. Rep. 955, 959-60 (Bkcy. W.D. Wis. 1980) (severe storm affecting debtor's ability to timely perform constituted objective supervening impossibility and justified reasonable equitable one-month extension of time to perform the contract).

The trial court could also have considered potential objections to the attorney's fees and costs claimed by the Landlord. The judgment included all \$4,292 of the attorney's fees requested (CP 73; CP 83).

First, it is not clear by the language of the stipulation that the Landlord is entitled to all attorney's fees from the beginning of the case. It

is at least arguable that the attorney fees are those incurred in obtaining the writ and judgment. Otherwise, the attorney's fees constitute a penalty. *Foster v. Montgomery Ward & Co.*, 24 Wn.2d 248, 259, 163 P.2d 838 (1945) (liquidated damages provision is enforceable, while a penalty is not).

Second, even if the Landlord's attorney's fees from the beginning of the case were recoverable, only reasonable fees would be allowed. Certainly some items are unreasonable, e.g., loquacious telephone calls between counsel and his client discussing other matters, such as prevailing in a small claims matter, the Tenant's camping in the woods, etc. billed at \$175 (CP 81); the Tenant's creating a web site "offensive to Ms. Davis" billed at \$50 (CP 80); and drafting a motion to amend the complaint to include a claim which should have been included to begin with, billed at \$225 (CP 81).

Third, the Landlord charged the expenses of a courier service and an ex parte delivery fee (when no order in the ex parte department was obtained) (CP 83-84), totaling \$49. Statutory costs do not include these sums. RCW 4.84.010 defines the costs which may be awarded. Washington courts hold that as to costs "only those defined by RCW 4.84.010 may be taxed." *Travis v. Horse Breeders*, 47 Wn.App. 361, 369, 734 P.2d 956 (1987); *Nordstrom, Inc. v. Tampoulos*, 107 Wn.2d 735, 743, 733 P.2d 208 (1987). Courier

services are not listed in RCW 4.84.010 as a taxable cost.

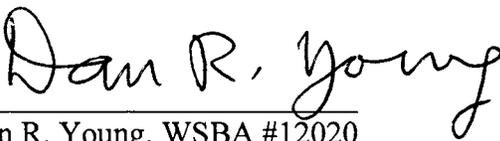
The trial court clearly had the equitable power to grant an extension of time to the Tenant to safely remove his RV from the property. Had the Landlord given notice of the date and time of the hearing, the Tenant could have presented the arguments to Judge McBroom, who could have granted an extension of time. The Tenant had no such opportunity, because he was not given proper notice of the hearing. The Tenant also had no opportunity to object to the attorney fee award and cost bill. It was therefore error for the court to have denied the Tenant's motion for reconsideration.

#### **IV. CONCLUSION**

Since the Landlord failed to notify the Tenant of the day, time and place of the hearing, the judgment and writ of restitution obtained thereby are void and should be vacated.

RESPECTFULLY SUBMITTED on June 10, 2009.

Law Offices of Dan R. Young

By:   
Dan R. Young, WSBA #12020  
Attorneys for Appellant Des Longchamps

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SUPERIOR COURT OF WASHINGTON  
IN AND FOR KING COUNTY

Davis

Plaintiffs,

vs.

Des Longhamps  
and ALL OTHER OCCUPANTS,

Defendants.

Case No.: 08-2-31328-OSEA

STIPULATION FOR SETTLEMENT  
and ORDER DISBURSING  
FUNDS

[Clerk's Action Required]

Per CR 2(A)

The parties undersigned, in order to resolve this matter without the uncertainty and expense of trial, stipulate and agree as follows:

1. The defendants acknowledge service of the summons and complaint for unlawful detainer, ~~stipulates to the accuracy of the allegations contained therein, and waives any defenses.~~
2. The defendants agree to vacate the subject premises located at 16025 NE 175th St., Woodinville, WA 98072 on or before 11:30 p.m. on December 31, 2008
3. For the purposes of this stipulation, the term "vacant" means that all personal belongings of the defendants, any packing materials, detritus or junk will be removed from the subject premises, and all keys to the premises, including (if applicable) access codes and garage door openers, will be returned to the plaintiff. All vehicles to be removed as well.

1 4. The parties agree that rent and other fees is due to the plaintiff in the total amount of <sup>paid into the court registry</sup>  
2 ~~\_\_\_\_\_ This amount shall be paid to the plaintiff according to the following~~ <sup>disbursed defendant immediately</sup>

3 schedule: *in care of*  
4 a. *Dan R. Young*  
5 b. *1000 Second Ave, Suite 3310*  
6 c. *Seattle, WA 98104-1046*

7 5. If defendants comply with all requirements of this stipulation the plaintiffs will dismiss  
8 this action with prejudice and without costs or attorney fees awarded to either side.  
9 ~~Upon payment of all amounts indicated in this stipulation~~ <sup>T</sup> the defendants will be  
10 considered to have paid all amounts due and owing to plaintiff.

11 6. If defendants fail to comply with all requirements of this stipulation the plaintiffs will be  
12 entitled, upon the filing of a declaration certifying that the defendants are not in  
13 compliance, <sup>and 24 hours faxed notice to counsel Dan Young</sup> to the immediate issuance of a writ of restitution and a judgment for all  
14 unpaid rents, attorney's fees and court costs. Said writ of restitution and judgment may  
15 issue <sup>in</sup> *24 hours faxed* ~~ex parte~~ without prior notice to the defendants or the defendants' counsel.

16 7. Defendants object to storage of personal property on the subject premises.  
17 8. The continued tenancy of the defendants at the subject premises is governed by the  
18 terms and conditions of the rental agreements as modified by the terms of this  
19 stipulation for settlement. The terms of this stipulation control over any inconsistent  
20 term in the rental agreement.

9. Time is of the essence in this agreement.

Agreed this 3 day of November, 2008.

[Signature]

Plaintiff

[Signature]

Defendant

LAW OFFICE OF EVAN L. LOEFFLER PLLC

[Signature]

Evan L. Loeffler  
WSBA No. 24105  
Attorney for plaintiffs

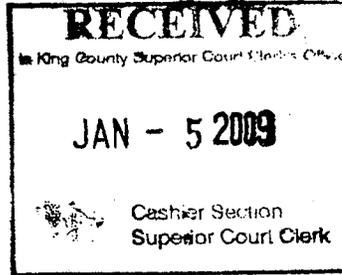
[Signature]  
Dan Young WSBA 12020

ORDERED

This Court hereby approves of this stipulation and its terms.

The Clerk of the court shall immediately disburse the funds in the court registry as indicated in paragraph 4 of this stipulation.

[Signature]  
Superior Court Judge



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

LYDIA DAVIS,

Plaintiff,

vs.

DWAYNE E. DES LONGCHAMPS,

Defendant.

Case No.: 08-2-31328-0 SEA

FINDINGS OF FACT, CONCLUSIONS OF  
LAW, JUDGMENT AND ORDER ISSUING  
WRIT OF RESTITUTION

[Clerk's action required]

**JUDGMENT SUMMARY**

Judgment Creditor:	Lydia Davis
Judgment Debtors:	Dwayne E. Des Longchamps
Attorney for Judgment Creditor:	Evan L. Loeffler
Principal Judgment Amount:	\$480.00
Plus daily rent of \$8.00 from September 1, 2008 to January 2, 2009 or until possession is restored to Plaintiff	\$992.00
Interest on Judgment:	\$0.00
Attorney's Fees:	\$4,667.00
Costs:	\$476.00

**PRINCIPAL JUDGMENT, ATTORNEY'S FEES AND COSTS SHALL BEAR INTEREST AT  
THE RATE OF 12% PER ANNUM UNTIL PAID IN FULL**

THIS MATTER having come on regularly for hearing before the Court on this date on the  
motion of the Plaintiff appearing through counsel, the Law Office of Evan L. Loeffler PLLC; and

FINDINGS OF FACT, CONCLUSIONS OF  
LAW, JUDGMENT AND ORDER ISSUING  
WRIT OF RESTITUTION

**LAW OFFICE OF EVAN L. LOEFFLER PLLC**  
2033 Sixth Avenue, Suite 1040  
Seattle, WA 98121-2527  
Phone: 206.443.8678 Fax: 206.443.4545

1 Defendant having been given notice of the hearing pursuant to a stipulation for settlement; and the Court  
2 having examined the parties and witnesses present, considered the evidence and pleadings; and being  
3 fully advised in the premises, now makes the following:

4 **FINDINGS OF FACT**

- 5 1. Plaintiffs have rented and still do rent to Defendants the premises described in the Complaint.
- 6 2. Defendants took possession of the described premises immediately after tenancy commenced  
7 and possession has continued since that time.
- 8 3. Defendants owe monthly rent in the sum of \$240.00. The amounts due and owing are as  
9 follows: \$240.00 for July 2008 unpaid rent and \$240.00 for August 2008 unpaid rent. A pro-  
10 rated rent of \$8.00 per day from September 1, 2008 to January 2, 2009 has accrued for an  
11 amount of \$992.00 and will continue to accrue until possession of the premises has been  
12 returned to Plaintiff.
- 13 4. On August 20, 2008, Plaintiff, caused to be served upon Defendants in the manner provided for  
14 by RCW 59.12.040, a 3-day notice to pay rent or vacate and 20-day notice of termination of  
15 tenancy. Defendants did not comply with said notices within the compliance period allowed by  
16 law.
- 17 5. Defendant was duly served with a summons and complaint for unlawful detainer on September  
18 2, 2008.
- 19 6. The parties entered into a stipulation for settlement on November 3, 2008. Defendant did not  
20 comply with the terms of the stipulation by failing to vacate the premises on or before  
21 December 31, 2008 and removing all vehicles from the premises.
- 22 7. The terms of the stipulation for settlement provide that if the defendant failed to comply with its  
23 requirements the plaintiff would be entitled to immediate issuance of a writ of restitution and a  
24 judgment for all unpaid rents, attorney's fees and court costs upon 24 hours faxed notice to the  
25 defendant or the defendant's counsel.

1 8. Counsel for the plaintiff gave faxed notice to counsel for the defendant of defendant's failure to  
2 comply with the terms of the stipulation for settlement.

3  
4 From the foregoing Findings of Fact, the Court makes the following:

5 **CONCLUSIONS OF LAW**

- 6 1. Defendant failed to comply with the terms of the stipulation for settlement.  
7 2. Defendant is guilty of unlawful detainer pursuant to RCW 59.12.030.  
8 3. Plaintiff is entitled to immediate possession of the subject property and a Writ of Restitution  
9 should be issued directing the sheriff to restore possession of the premises to Plaintiff.  
10 4. Defendants are liable Plaintiff for unpaid rent, court costs and attorney's fees, and a judgment in  
11 favor of Plaintiff and against Defendants should therefore be awarded.  
12 5. The issue of damage to the premises is reserved for later adjudication and is not a part of this  
13 judgment.

14 **JUDGMENT**

15 The Court having made and entered its Findings of Fact and Conclusions of Law, NOW,  
16 THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

- 17 1. The clerk of the court shall issue a writ of restitution forthwith, returnable ten (10) days after its  
18 date of issuance, directing the sheriff to restore to Plaintiff possession of the property located at  
19 **16025 NE 175th Street, Woodinville, Washington, 98072** provided that if return is not  
20 possible within ten (10) days, the return on this writ shall be automatically extended for a  
21 second ten (10) day period. The writ shall also authorize the sheriff to break and enter as  
22 necessary.  
23 2. There is no substantial issue of material fact concerning the right of Plaintiff to be granted relief  
24 as prayed for in the complaint for unlawful detainer and as provided for by statute.  
25

1 3. Defendants are guilty of unlawful detainer and the tenancy of Defendants in the subject  
2 premises is hereby terminated.

3 4. Plaintiff is awarded judgment against Defendants as set forth in the judgment summary above.

4 Said sums shall accrue interest at the rate of twelve percent (12%) per annum until paid.

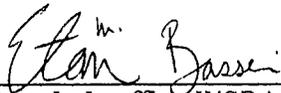
5  
6 **DONE IN OPEN COURT** this 5 day of January, 2009

7  
8 **DOUGLAS D. McBROOM**

9 JUDGE/COURT COMMISSIONER

10 Presented by:

11 LAW OFFICE OF EVAN L. LOEFFLER PLLC

12 

13 Evan L. Loeffler, WSBA No. 24105

14 Etan M. Basseri, WSBA No. 39766

15 Attorneys for Plaintiff

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SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

Lydia Davio

Plaintiff/Petitioner,

vs.

Dwayne E. DesLongchamps

Defendant/Respondent.

NO. 08-2-31328-0 SEA

ORDER ON CIVIL MOTION

The above entitled court having heard a motion by the defendant  
to reconsider its order entered on January 5, 2009,  
having reviewed defendant's motion and the Declaration  
of Plaintiff's Attorney received by the court on February  
16th 2009

IT IS HEREBY ORDERED that Defendants Motion to  
Reconsider the Courts order of January 5, 2009, is  
DENIED

DATED: February 17, 2009

Douglas D. McEwen  
Judge Pro Tem

Presented by:

DECLARATION OF SERVICE

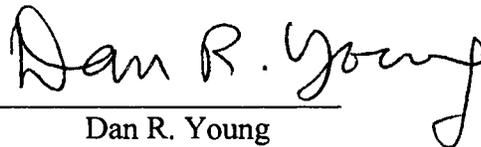
I, Dan R. Young, declare to be true under penalty of perjury under the laws of the State of Washington as follows:

1. I am an attorney representing the appellant Dwayne DesLongchamps in this action.
2. On June 10, 2009, I delivered, a copy of the foregoing Brief of Appellant to the office

of the following:

Evan Loeffler, Esq.  
2033 Sixth Avenue, Suite 1040  
Seattle, WA 98121-2527

Dated: June 10, 2009, at Seattle, Washington.

  
\_\_\_\_\_  
Dan R. Young