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NO. 52222-5-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

**(Thurston County Superior
Court No. 18-2-02847-34)**

**KRISTIE J. TEDFORD,
Respondent (Plaintiff)**

v.

**CHARLES L. GUY and ANGIE C. MATTLER
Appellants (Defendants)**

**APPELLANTS CHARLES L. GUY and ANGIE C. MATTLER'S
REPLY BRIEF**

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1. INTRODUCTION

The Appellants Charles Guy and Angie Matter, through their attorney Ben D. Cushman of Deschutes Law Group, PLLC submit their Reply Brief in this matter. Appellants appealed a judgment in favor of their former landlord in an unlawful detainer action. That judgment, in addition to granting an eviction, awarded fees and other damages to the landlord and denied attorney's fees sought by the tenants under RCW 59.18.240-250.

The eviction proceeding was a retaliatory action by the landlord to remove tenants who were insistent on their rights. Most specifically and obviously, the lease was terminated in retaliation because the tenants had demanded a clean and habitable house (free from human waste and garbage left by squatters, which the tenants had to clean up themselves) and smoke detectors (smoke detectors are required by RCW 43.44.110 (and thus by RCW 59.18.060(1)) and RCW 59.18.060(12)) and had otherwise acted in a manner that showed they would be similarly insistent that they receive the full benefits of their tenancy from an absentee landlord reluctant to spend money, even on things that are the landlord's obligation. Retaliation under RCW 59.18.240. RCW 59.18.240 is one of the few defenses that applies to protect tenants from termination of month-to-month leases and evictions based on that termination.

However, after a truncated hearing on the nature of the lease (which determined it was a month-to-month lease and not a year lease, an issue not appealed by the tenants, who chose to voluntarily hand-over the premises and move rather than remain in them), the Court Commissioner who handles the unlawful detainer calendar in Thurston County dismissed the retaliation defense and claim and issued a judgment for unlawful detainer. The Commissioner struck the trial, essentially refusing to hear full testimony on the retaliation issue. The Commissioner's basis for her ruling was that there had been no "demand" for smoke detectors despite text messages that clearly, if politely, demand smoke detectors. That ruling also failed to consider the manner and outcome of the tenants' previous demand that the house be cleaned and habitable.

In Response, the landlord primarily argues that this appeal is moot because the tenants are no longer in possession of the house. This argument fails to recognize that there is a diametric difference between an eviction, which results in an eviction judgment and attorney fee award to the landlord, and a voluntary surrender of the premises by tenants who successfully assert a retaliation defense against a wrongful eviction, which would result in a judgment and attorney fee award in favor of the tenants. This case should have resulted in a judgment in favor of the tenants following a trial on the retaliation claim. This matter should be reversed and remanded to the Superior Court for such a trial.

2. LIMITS ASSIGNMENTS OF ERROR

The landlord argues that the tenants “waived all issues on appeal other than whether the Trial Court properly determined Ms. Tedford did not bring a retaliatory unlawful detainer action.” There is no waiver here. However, the only issues on appeal are those involving the retaliation defense and claim. Specifically, while there was a dispute below about the lease term and the authenticity of dueling written lease documents, those issues related primarily to the tenants’ right to continuing possession, and therefore were not appealed. While the tenants were entitled to remain in possession, based on the stay and supersedeas bond they posted with the Superior Court, they chose not to do so and further chose not to appeal those issues that involved only the right to possession.

However, in asserting that other issues are “waived,” the landlord may be attempting to deny the tenants further hearings on additional rights. Specifically, following the hand-over of the property (and after this appeal was filed), the landlord wrongfully failed to refund the security deposit paid by the tenants. The tenants have filed a lawsuit under RCW 59.18.280. (Thurston County Superior Court No. 18-2-04591-34.) This action is independent of the matter on appeal, arising from separate and subsequent facts from those at issue in the case on appeal. Nothing in this case should prejudice or waive any issues or claims in the pending deposit case in Superior Court.

3. MOOTNESS

The three-part test for standing to sue is (1) injury in fact to the plaintiff (2) caused by the defendant (3) that can be remedied, in whole or in part, by the requested Court action. Bras v. California Public Utilities, 59 F.3rd 869 (9th Cir. 1995.) "A case is moot if the issues it presents are 'purely academic'" State v. Turner, 98 Wn.2d 731, 733, 658 P.2d 658 (1983). That is, an issue or defense is moot and will not be considered only if effective relief can no longer be provided by the Court at which relief is sought. Orwick v. Seattle, 103 Wn.2d 249 at 252-253, 692 P.2d 793 (1984); In Re Cross, 99 Wn.2d 373 at 376-377, 662 P.2d 828 (1963); Washam v. Democratic Central Committee, 69 Wn. App. 453 at 458, 849 P.2d 1229 (1993); and Kottler v. State, 136 Wn.2d 437 at 449; 963 P.2d 834 (1998).

Here, the landlord argues that the tenants' voluntary surrender of the premises moots the issues on appeal, including the retaliation defense and claim. In making this argument, the landlord wrongly asserts that the only issue in this case (or any unlawful detainer case) is possession of the property. This case (as with many unlawful cases) didn't just result in an order requiring surrender of the property. It also resulted in a money judgment in favor of the landlord (for fees and damages). Further, it did not result in a money judgment in favor of the tenants under RCW 59.18.240-250.

These money judgments are the dueling outcomes that remain in dispute after the voluntary surrender of the premises by the tenants. Quite aside from any person's right to occupy the premises, the landlord has received an incorrect and premature money judgment against the tenants. The Trial Court issued that judgment despite never having an evidentiary hearing on the tenants' retaliation defense and claim. The tenants have a due process right to have a hearing on their retaliation defense and claim. Further, even without such a hearing, because, given the timing of the eviction, the retaliation claim operates as a rebuttable presumption against the landlord (RCW 59.18.250), and a hearing is required for the landlord to rebut the claim. The Trial Court improperly, and without hearing, applied a reverse presumption contrary to the statute.

This matter should be remanded for a full and proper hearing on the retaliation defense and claim. The outcome of that hearing should result in a judgment in favor of the tenants for attorney's fees and (potentially) moving costs and reimbursement for the costs incurred by the tenants performing landlord obligations prior to their moving out. That judgment in favor of the tenants would supplant the appealed judgment in favor of the landlord. That would be very real alternative outcome of this case that provides substantial and effective relief to the tenants. Therefore, this case is not moot.

4. IMPROPER PROCEDURE BELOW

The landlord finally argues that the result below should stand because the Trial Court “properly followed show cause procedures.” The Trial Court did not properly follow the procedures required to address a retaliation defense under RCW 59.18.240-250. The Trial Court did not even allow an evidentiary hearing on the merits of that defense, improperly asserting (despite clear contrary evidence) that the tenants asserted no right and voluntarily corrected the problems through self-help.

However, the intent and mutually understood meaning of the text message communications here are matters of fact that require testimony at a hearing. Similarly, whether the tenants corrected the defects in the premises (both the unhygienic conditions and the lack of smoke detectors) as true volunteers or under reservation of rights requires testimony. The Trial Court, by resolving this matter without hearing any testimony on those issues, prematurely decided (indeed, improperly, summarily, and categorically denied) the retaliation claim and defense.

The Court Commissioner, after hearing testimony on and ruling on the lease terms, issued its order. However, the terms of the lease are not particularly relevant to the subsequent issue of retaliatory eviction. The tenants’ retaliation defense is separate and independent defense (and one that actually has some characteristics of an allowed counterclaim). A hearing was necessary to determine its merits. No hearing was held.

Further, to the extent some peripheral information about the retaliation issue came out in the hearing on the lease terms, the Trial Court mishandled that information. The Trial Court's ruling makes sense only as a ruling that the tenants failed to meet a burden of proof of retaliation. However, RCW 59.18.250 imposes the burden of proof on the landlord, not the tenant, by providing a rebuttable presumption where (as here) an eviction is started "within ninety days after a good faith and lawful act by the tenant as enumerated in RCW 59.18.240." Thus, in the absence of proof (which arose only because the Trial Court refused to hear evidence), the case should have been decided against the landlord, not against the tenants, due to the presumption of retaliation.

This case is fairly simple. The landlord initiated eviction proceedings within ninety days of an inconvenient (to the landlord) assertion of a right by the tenants. The tenants raised the defense of retaliation. The statute provides that there is a presumption of retaliation under such circumstances. The Trial Court refused to hear evidence on retaliation and, ignoring the statutory presumption, struck the trial and denied the defense. This resulted in the judgment against tenants now on appeal. That judgment should be reversed and this case should be remanded to the Trial Court for a trial on the merits of the retaliation defense, and the landlord should bear the burden of proof on remand as a result of the statutory presumption in RCW 59.18.250.

5. ATTORNEY FEE PROVISIONS

Pursuant to RAP 18.1, Appellants request recovery of their attorney's fees in having to bring this action. RCW 59.18.250 provides for a fee award for a tenant who is wrongfully evicted in an act of retaliation as defined in RCW 59.18.240. These Tenants were so wrongfully evicted and are therefore entitled to attorney's fees.

6. CONCLUSION

This Court should reverse and remand this case for trial on the tenants' retaliation claim. In doing so, this court should vacate the judgment in favor of the landlord and overturn rulings in the Thurston County Superior Court regarding Appellant tenants' lawful assertion of a right to have smoke detectors as required by RCW 43.44.110 (and thus by RCW 59.18.060(1)) and RCW 59.18.060(12).

DATED this 7th day of January 2019.

DESCHUTES LAW GROUP, PLLC


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Attorney for Appellants

CERTIFICATE OF SERVICE

I certify that on the date signed below, I caused the foregoing document to be e-filed with this Court, and served upon the Respondent's attorney by email.

DECLARED UNDER PENALTY OF PERJURY ACCORDING TO THE LAWS OF THE STATE OF WASHINGTON.

Dated this 7th day of January, 2019, in Olympia, Washington.



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