

No. 90179-1

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SUPREME COURT
OF THE STATE OF WASHINGTON

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WESTERN PLAZA, LLC,

Petitioner,

v.

NORMA TISON,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER WESTERN PLAZA, LLC

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ORIGINAL

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A. INTRODUCTION

The Manufactured/Mobile Home Landlord-Tenant Act (“MHLTA”), RCW 59.20.090, is a law with two important policy purposes: to protect owners of mobile and manufactured homes – who are often of limited means and tenants on the land they occupy – while maintaining the economic viability of the parks where these homeowners reside.

Washington’s Legislature and courts have recognized that the best way to achieve the goals of the MHTLA is to balance these two interests. The MHLTA largely controls the content of leases and guarantees their renewability, in exchange for providing park owners some ability to, in good faith, increase rents and other fees *only* when these leases expire.

That policy balance is frustrated if a one-year MHLTA lease that would be unenforceable under the common law is interpreted to apply in perpetuity, through every annual renewal and assignment, and against all successor property owners.

The actions of Western Plaza, LLC in increasing Norma Tison’s rent upon annual renewal did not violate MHLTA. The provision that Tison relies upon to argue that she is entitled to perpetual rent control is from an expired 2001 lease that does not comply with the statute of frauds,

and contains a covenant that does not run with the land. This Court should reverse the Court of Appeals and affirm the trial court's order.

B. ISSUE PRESENTED

Does a former mobile home park landlord's interlineated covenant regarding future rents in an expired 13-year-old lease, apply to a successor landlord, such that the landlord is prohibited from increasing the rent in a current one-year lease as would be otherwise permitted by the Mobile Home Landlord Tenant Act ("MHLTA"), RCW 59.20.090?

C. STATEMENT OF THE CASE

The Court of Appeals' recitation of the facts in its opinion is largely correct, but certain important points omitted by the Court of Appeals in its opinion or discussed only briefly bear emphasis.

First, the original 2001 lease between Tison and Western Plaza's predecessor contained handwritten footnotes. One footnote agreed to freeze the rent at \$345 per month "for two years." CP 20, 23. The other footnote stated: "Every other year rent will be raised no more than \$10 for remaining tenancy." *Id.*

Thus, by the terms of these handwritten interlineations to the lease, the period of the lease is one year, yet cannot be performed within a year. Also, the lease provision that Tison seeks to enforce is from an expired 2001 lease. It is further undisputed that the leases did not comply with

Washington's Statute of Frauds, RCW 59.04.010,¹ that applies to leases requiring performance over more than a year.

Second, the Court of Appeals' statement of the facts omits some facts important to the events in the trial court, and the reasoning leading up to that court's decision. Western Plaza filed an unlawful detainer action on December 2, 2011 alleging that Tison failed to pay rent within five days of service of a notice to pay or vacate pursuant to RCW 59.20.080(1)(b). CP 5-8. At the subsequent show cause hearing, the trial court agreed that Tison did not properly have possession and issued a writ of restitution. CP 94. The trial court ruled that Tison had a one-year rental agreement that could be renewed under its same terms each year, unless there was a proper "objection" by either party to renewing the lease under the same terms. RP (5/5/12):15.

The court entered findings of fact and conclusions of law and an order for unlawful detainer against Tison at that hearing. CP 92-95. Later, the court entered judgment for the past due rent, costs and attorney fees. CP 164. Tison deposited the amount of the judgment into the court registry in order to reinstate her current one-year tenancy, as permitted by RCW 59.18.410. CP 172. She also filed a motion for reconsideration,

¹ "Leases ... shall be legal and valid for any term or period not exceeding one year, without acknowledgement, witnesses or seals."

RCW 59.04.010.

which was denied by the trial court. CP 120-25, 171. Tison then appealed to Division II of the Court of Appeals. CP 174-82.

D. SUMMARY OF ARGUMENT

The one-year lease at issue contains an interlineated, personal rent control covenant that purportedly applies for the remainder of the tenancy. The Court of Appeals concluded that the common law permits enforcement of such a perpetual lease provision against a successor landowner, despite the fact that it does not comply with the Statute of Frauds nor does it touch and concern the land.

Under the common law, a lease or covenant in a lease that purports to be enforceable for longer than a year must comply with the Statute of Frauds. Even if the Statute of Frauds is not violated, a covenant in a lease that does not touch and concern the land is not enforceable against a successor landowner.

The solution to the larger policy issues Tison raises are already addressed by multiple legal protections that are much stronger than the “equitable” solution she advocates here. The MHLTA, CPA, and common law fraud protections address the hypothetical harms Tison raises.

E. ARGUMENT

(1) A Landlord May Increase Rent at the Expiration of a Lease Term Under MHLTA

As a threshold matter, it is undisputed that under MHLTA a park owner has the right to raise rent upon renewal of an expiring lease. Answer to Petition for Review at 5; RCW 59.20.090(2). The MHLTA does provide that one-year leases may be automatically renewed each year.² RCW 59.20.090(1). However, the new lease does not have to be on the exact same terms as the initial lease. MHLTA permits a park owner to increase the tenant's rent at the time of the annual renewal. Indeed, the MHLTA contemplates that rents may be increased at that time upon proper notice to a tenant:

A landlord seeking to increase the rent upon expiration of the term of a rental agreement of any duration shall notify the tenant in writing three months prior to the effective date of any increase in rent.

RCW 59.20.090(2).

Moreover, this Court and the Court of Appeals have specifically recognized this ability of a park owner not only to raise rent – which MHTLA specifically authorizes but also to alter other provisions of the lease upon the expiration of the lease term or upon assignment. *Little Mountain Estates Tenants Ass'n v. Little Mountain Estates MHC LLC*, 169

² The park owners and tenant may agree to a lease duration exceeding one year, RCW 59.20.050, but one year is the customary duration in park leases, and Western Plaza's lease with Tison is consistent with that customary lease duration. CP 25.

Wn.2d 265, 236 P.3d 193, 195 (2010); *Seashore Villa Ass'n v. Hagglund Family Ltd. P'ship*, 163 Wn. App. 531, 260 P.3d 906 (2011), *review denied*, 173 Wn.2d 1036 (2012); *McGahuey v. Hwang*, 104 Wn. App. 176, 15 P.3d 672, *review denied*, 144 Wn.2d 1004 (2001).

In the words of the Court of Appeals, MHLTA's automatic renewal provision does not create leases that "bind landlords in perpetuity" to forever offer the same terms upon renewal that were agreed-upon in the initial lease. *McGahuey*, 104 Wn. App. at 182. In *McGahuey*, the park owner sent a notice to tenants at the time of the annual renewal of the lease indicating that the park would no longer pay for utilities, and that utility fees would be part of the new lease. The Court of Appeals upheld such a change, *rejecting* the contention that the original lease agreement was frozen forever in time, stating:

Citing RCW 59.20.090(1), which provides that leases automatically renew at the end of their term, the Tenants claim the MHLTA prohibits a landlord from requiring a tenant to pay for utilities once any lease requiring the landlord to do so is signed. According to the Tenants, the landlord is not permitted to increase or add any fee or charge except to increase the rent when the lease agreement expires as provided in RCW 59.20. This reading of the statute is untenable.

Id. at 181-82.

In *Little Mountain*, this Court addressed whether, in the context of a 25-year lease term, the parties could agree that the term of lease would

convert to a one- or two-year lease term upon assignment by the tenant. *Little Mountain*, 169 Wn.2d at 268. This Court concluded that because MHLTA expressly permits parties to negotiate the length of a lease, the parties' agreement to alter the length of the lease upon assignment did not violate MHLTA. *Id.* at 270.

In *Seashore Villa*, tenants' one-year leases initially provided that the amenities of carports and storage sheds were included as part of the rent. *Seashore Villa*, 163 Wn. App. at 535. The park owner later advised tenants of its intent to eliminate carports and storage sheds on the rental premises unless the tenants chose to assume responsibility for those facilities themselves. *Id.* at 536. The trial court enjoined the park owner from removing the amenities in perpetuity, but the Court of Appeals reversed that decision. Citing *McGahuey*, the Court concluded that a landlord could not transfer responsibility for maintenance of the structures, but it was not obligated to offer particular amenities "in perpetuity" and could delete them from the leases upon notice to the tenants. *Id.* at 541, 544.

Thus, it is unambiguous from these cases that the MHLTA recognizes the right of a park owner to impose changes in the lease terms, including rent increases, upon proper notice to the tenant.

Lease terms under the MHLTA are effective only until the next annual renewal of the lease. *Nothing* in the MHLTA or the applicable case law prevented Western Plaza from increasing rent at the time of one of Tison's annual renewals.

- (2) When MHLTA Has Been Complied With, This Court Looks to Common Law Contract Principles; the Lease Provision at Issue Does Not Comply With the Statute of Frauds Nor Does Its Rent Covenant Run With the Land³

Although governed by some unique statutory restrictions, MHLTA leases are contracts. Thus, after determining that a lease provision complies with MHLTA, this Court next looks to the common law to examine its enforceability. *Little Mountain*, 169 Wn.2d at 269 n.3. In *Little Mountain*, this Court applied the common law and MHLTA in combination and upheld a provision in a MHLTA lease that altered the term of a lease upon its assignment by the tenant. *Id.* This Court noted that the common law applies where MHLTA is silent. *Id.*

The Court of Appeals found that the perpetual rent control provision at issue here was enforceable because it did not violate MHLTA. *Western Plaza*, 180 Wn. App. at 25. Impliedly, though not explicitly, the Court of Appeals concluded that the lease at issue does not contravene common law contract principles. *Western Plaza*, 180 Wn. App. at 25

³ Although the Court of Appeals did not address these issues in its opinion, they were raised at trial and on appeal. CP 56-58; RP 5/4/12, at 14; Br. of Respondent at 30-31; Reply Br. of Appellant at 15-16, 20-22.

(Court of Appeals cites *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d 318 (2009)) a case applying the common law of contracts as grounds for enforcing the lease here). The Court of Appeals' opinion here treats the interlineated rental cap provisions as creating a permanent lease agreement that is enforceable beyond its stated one-year term, and perpetually renewable under the MHLTA.

However, the Court of Appeals ignored common law contract principles that render the provision at issue unenforceable: (1) a lease that cannot be performed within a year violates the statute of frauds, and (2) covenant in a lease that is personal and does not run with the land is not enforceable against a successor landlord.

(a) A Lease Agreement That Is Longer than a Year But Not Acknowledged Violates the Statute of Frauds

Tison seeks enforcement of her one-year lease agreement that expired in 2002. She asks that the lease be enforced in perpetuity, and that Western Plaza be enjoined from increasing her rent beyond the terms stated in that expired agreement.

The Court of Appeals asserted that a prior park owner may, as a matter of contract common law, include a provision in a one-year lease that is enforceable in perpetuity, beyond the expiration of that one-year lease. Op. at 5-8. However, the Court did not address whether, in order to

be enforceable 13 years after it expired, the agreement must comply with the Statute of Frauds.

In the context of lease agreements, the Statute of Frauds provides:

Tenancies from year to year are hereby abolished except when the same are created by express written contract. Leases may be in writing or print, or partly in writing and partly in print, and shall be legal and valid for any term or period not exceeding one year, without acknowledgment, witnesses or seals.

RCW 59.04.010. A lease agreement, or a covenant within a lease agreement, may not be enforced for longer than one year if it does not comply with these formalities. *Lectus, Inc. v. Rainier Nat. Bank*, 97 Wn.2d 584, 588, 647 P.2d 1001 (1982); *Ben Holt Indus., Inc. v. Milne*, 36 Wn. App. 468, 472, 675 P.2d 1256, 1258 (1984); *Running Covenants: An Analytical Primer*, 52 Wash. L. Rev. 861 (1977).

Although it states that it is a one-year lease, the 2001 lease cannot be performed within a year. One provision is explicitly enforceable for at least *two years*. CP 20, 23. Also, the restrictions on future rent increases purport to be enforceable in perpetuity, as long as Tison chooses to remain a tenant. Moreover, to the extent that the Court of Appeals concluded the 2001 interlineated rental caps are an unalterable part of Tison's lease, the lease is also assignable to Tison's successors in perpetuity under RCW 59.20.073.

The Court of Appeals interpretation of the lease, combined with the application of the MHLTA, renders it a perpetual lease that may never be altered by Western Plaza. Perpetual leases “are disfavored and leases are interpreted to avoid this result whenever possible.” *Oak Bay Properties, Ltd. v. Silverdale Sportsman's Ctr., Inc.*, 32 Wn. App. 516, 519, 648 P.2d 465, 467 (1982); *see also generally* 50 Am.Jur.2d, Landlord and Tenant s 1171 (1970).

The 2001 lease does not comply with the Statute of Frauds, and the Court of Appeals erred in concluding it was perpetually enforceable. *Western Plaza*, 180 Wn. App. at 25-26. It is not acknowledged and is not enforceable beyond its 2002 expiration. Thus, the interlineated rental caps were not enforceable for a period beyond a year. In *Labor Hall Association v. Danielsen*, 24 Wn.2d 75, 163 P.2d 167 (1945), a lease was valid for a term of a year with an option for another year. This Court held that because the lease failed to comply with the Statute of Frauds, it was not enforceable beyond that period. *Id.* at 94; *see also, Stevenson v. Parker*, 25 Wn. App. 639, 643, 608 P.2d 1263 (1980).

The addition of features to the lease that made it impossible to perform within a year, without complying with RCW 59.04.010's formalities, renders the lease subject to the default provisions of the MHLTA. MHTLA does not prohibit rent increases.

(b) The Interlineated Rent Provision in the Expired 2001 Lease Is a Covenant that Does Not Run With the Land and Does Not Apply to Erlitz's Successor, Western Plaza

Even assuming this Court found that the 2001 lease did not have to comply with the Statute of Frauds for its rent provision to be enforceable now against Tison's former landlord, Erlitz, the provision is not enforceable against Western Plaza because it is a covenant that does not run with the land.

A covenant in a lease is not enforceable against a successor landlord unless it runs with the land. *Mullendore Theatres, Inc. v. Growth Realty Investors Co.*, 39 Wn. App. 64, 65, 691 P.2d 970 (1984). A lease covenant does not run with the land unless it touches or concerns the land. *Lake Arrowhead Cmty. Club, Inc. v. Looney*, 112 Wn.2d 288, 295, 770 P.2d 1046, 1050 (1989); *Rodruck v. Sand Point Maintenance Comm'n*, 48 Wn.2d 565, 295 P.2d 714 (1956); *Seattle v. Fender*, 42 Wn.2d 213, 254 P.2d 470 (1953); *Leighton v. Leonard*, 22 Wn. App. 136, 139, 589 P.2d 279 (1978). To do so, it must be so related to the land as to enhance its value and confer a benefit upon it. Otherwise, it is a collateral and personal obligation of the original lessor. *Rodruck*, 48 Wn.2d at 575, 295 P.2d 714.

For a covenant to run with the land, a number of conditions must be met:

(1) the covenants must have been enforceable between the original parties, such enforceability being a question of contract law except insofar as the covenant must satisfy the statute of frauds; (2) the covenant must “touch and concern” the land to be benefitted and the land to be burdened; (3) the covenanting parties must have intended to bind their successors in interest; (4) there must be vertical privity of estate, *i.e.*, privity between the original parties to the covenant and the present disputants; and (5) there must be horizontal privity of estate, or privity between the original parties. W. Stoebuck, *Running Covenants: An Analytical Primer*, 52 Wash.L.Rev. 861 (1977).

Lake Arrowhead, 112 Wn.2d at 294-95; citing *Feider v. Feider*, 40 Wn. App. 589, 593, 699 P.2d 801 (1985).

Even when a covenant concerning land complies with the Statute of Frauds, it does not run with the land unless it renders less valuable a grantor’s legal interest in his land and renders more valuable the legal interest of the grantee in the grantor’s land. *Feider*, 40 Wn. App. at 593. In *Feider*, the Court of Appeals concluded that a covenant providing a right of first refusal from one landowner to a neighboring landowner was not enforceable against the neighbor’s heirs, because it was a personal right that did not affect the parties’ legal interest in the land. *Id.*

When a covenant involves a promise to pay money it must restrict the use of the funds to the benefit of the property. *Rodruck*, 48 Wn.2d at

578; *Mullendore*, 39 Wn. App. at 66. In *Mullendore*, the Court of Appeals considered whether a provision in a lease requiring a lessor to refund a security deposit was binding upon a successor landowner. *Id.* at 65. The Court of Appeals concluded that because the lease did not provide that the security deposit must be used exclusively for the benefit of the land, it did not touch and concern the property. *Id.* at 66.

The covenant here is a restriction on rent increases. A rent control provision does not touch and concern the land. There was no restriction in the covenant at issue here regarding how rent money would be spent. Erlitz was not required to spend the money for repairs or maintenance, or in any other way related to the property. He was not even required to transfer it to Western Plaza. The covenant was not directly related to, and did not touch and concern, the property.

Since it does not touch and concern the land, the covenant cannot run, even if Tison and Erlitz intended that it would. Intent is not enough to make a running covenant out of one which is by its nature personal. *Mullendore*, 39 Wn. App. at 66, citing *Fresno Canal & Irr. Co. v. Rowell*, 80 Cal. 114, 22 P. 53 (1889); *Johnson v. Myers*, 226 Ga. 23, 172 S.E.2d 421 (1970); *McDonald's Corp. v. Blotnik*, 28 Ill.App.3d 732, 328 N.E.2d 897 (1975); *Sjoblom v. Mark*, 103 Minn. 193, 114 N.W. 746 (1908); *Caullett v. Stanley Stillwell & Sons, Inc.*, 67 N.J.Super. 111, 170 A.2d 52

(1961); *Eagle Enterprises, Inc. v. Gross*, 39 N.Y.2d 505, 384 N.Y.S.2d 717, 349 N.E.2d 816 (1976); *Raintree Corp. v. Rowe*, 38 N.C.App. 664, 248 S.E.2d 904 (1978); *Abbott v. Bob's U-Drive*, 222 Or. 147, 352 P.2d 598 (1960); *Hurxthal v. St. Lawrence Boom & Lumber Co.*, 53 W.Va. 87, 44 S.E. 520 (1903).

Erlitz's 2001 covenant within a one-year lease did not touch and concern the land, and is thus not enforceable against Western Plaza.

(3) Enforcing a Rent Restriction Contained in a One-Year Lease in Perpetuity Does Not Serve the Policy of MHLTA, Nor Are Tenants Without Recourse to Prevent Bad Faith Actions by Landlords

(a) MHLTA Has Been Carefully Crafted to Strike the Right Balance Between Tenants' Security and Park Viability

The MHLTA regime for handling property issues is an unusual one, severely restrictive of park owners' customary property rights. The Court of Appeals' opinion implies that a personal covenant in a lease between the parties, once it is present, may *never* be changed by a successor park owner at the time of the annual renewal under RCW 59.20.090(1).

The Court of Appeals' decision upsets the balance that the Legislature has struck between the right of tenants to stable, renewable lease agreements and the rights of park owners to reasonably modify the

terms of those agreements as they must to sustain their businesses. This balance was created by amendments to MHLTA that reflected the economic reality of park ownership.

For example, before 1998, the MHLTA provided that a one-year rental agreement automatically renewed for an additional six months, but afforded the landlord a legal right to provide written notice of nonrenewal without cause. 1999 c 359 § 4. Then, the Legislature removed nonrenewal without cause; however, the park owner's right to change rental terms remained. *Id.*

Allowing automatic renewals but also allowing park owners to change terms of the rental agreement as renewed reflect a balance between the park owner's property rights and the tenants' right to receive sufficient notice of the park owner's intentions. This quid pro quo is consistent with the Court of Appeals' decisions in *McGahuey* and *Seashore Villa*, and this Court's decision in *Little Mountain*.

(b) Converting the 2001 Rent Restriction into a Perpetual Lease Term on "Equitable Grounds" Is Not the Best Way to Protect MHTLA Tenants from the Hypothetical Harms Tison Raises

Tison in her answer to the petition for review argued that MHLTA requires this Court to apply equitable principles in interpreting her lease. Tison answer at 6-8. Tison also maintained that if her 2001 rent covenant

is not enforced in perpetuity, other tenants may fall victim to unscrupulous park owners who might deceive them by offering rent control in their one-year leases and then revoking it when those leases expire. *Id.* at 11.

In response to Tison's argument about equity, the MHTLA does not require Courts to balance equities in interpreting leases, and no Washington court has so held. The statement from *McGahuey* to which Tison refers simply states that the MHTLA *contains provisions* that provide equity by limiting a park owner's ability to overcharge tenants for fees and utilities. *McGahuey*, 104 Wn. App. at 182. The MHTLA does not mandate that all leases be subject to a balancing of equities.

However, the MHTLA does require park owners and tenants alike to conduct themselves in good faith,⁴ and that is stronger protection than the case-by-case "equitable" relief proffered by Tison. RCW 59.20.020. Western Plaza acknowledges the need for mobile and manufactured homeowners to have security from bad faith or fraudulent rent increases, but disagrees that tenants must resort to equitable remedies, or that this Court should alter the common law to enforce an unacknowledged 13-year-old lease covenant in perpetuity.

Should a park owner engage in the kind of despicable conduct Tison suggests, it would not only violate MHTLA's good faith provision,

⁴ There is absolutely no evidence that Western Plaza has engaged in bad faith conduct in seeking to bring Tison's rent in line with the rent paid by other tenants.

it would also be common law fraud and violate the Consumer Protection Act (“CPA”). Those remedies exist at law and are much more powerful than an “equitable” lease interpretation that controverts the common law.

(4) Western Plaza Is Entitled to an Award of Fees under RCW 59.20.110

Park owners may recover fees that they incur in litigation with tenants under the MHLTA. RCW 59.20.110; *McGahuey*, 104 Wn. App. at 185 (prevailing party under RCW 59.20.110 may include park owner). The trial court awarded fees to Western Plaza below. CP 164.

Western Plaza is entitled to an award of fees if this Court concurs in the trial court's analysis of the MHLTA and RCW 59.04.010. RAP 18.1(a).

F. CONCLUSION

Western Plaza’s decision to increase Tison’s rent upon proper notice before renewal of her lease did not violate the MHLTA. The 2001 lease covenant on which she relies is unenforceable and common law. Nothing in MHTLA contradicts the common law on this point.

This Court should reverse the Court of Appeals and reinstate the trial court's judgment. Costs on appeal, including attorney fees, should be awarded to Western Plaza.

DATED this 10th day of November, 2014.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Supplemental Brief of Petitioner Western Plaza in Supreme Court Cause No. 90179-1 to the following parties:

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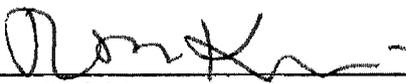
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Original E-filed with:

Washington Supreme Court
Clerk's Office
415 12th Street W
Olympia, WA 98504-0929

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: November 10th, 2014, at Seattle, Washington.



Roya Kolahi, Legal Assistant
Talmadge/Fitzpatrick

OFFICE RECEPTIONIST, CLERK

To: Roya Kolahi
Subject: RE: Western Plaza, LLC, v. Norma Tison Cause No. 90179-1

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Cc: walt@olsenlawfirm.com; Janice Munson; danryoung@netzero.net; jwh@hbjlaw.com
Subject: Western Plaza, LLC, v. Norma Tison Cause No. 90179-1

Good Morning:

Attached please find the Supplemental Brief of Petitioner Western Plaza, LLC in Supreme Court Cause No. 90179-1 for today's filing. Thank you.

Sincerely,

Roya Kolahi
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