No. 55806-8-II

101343-4

SUPREME COURT
OF THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Petitioner,

v.

FOWLER NAT D. AND MARY M.
dba FARM BOY DRIVE IN,

Respondent.

RESPONSE TO PETITIONER'S PETITION FOR REVIEW

By:

Drew Mazzeo, WSBA No. 46506
HARBOR APPEALS AND LAW, PLLC
2401 Bristol Court SW, Suite C-102
Olympia, WA 98502
Email: office@harborappeals.com
Phone: (360) 539-7156
Fax: (360) 539-7205

Attorney for Respondent

TABLE OF CONTENTS

1. IDENTITY OF RESPONDENT 1
2. ANSWER TO ISSUES PRESENTED TO REVIEW 1
3. PERTINENT RESTATEMENT OF THE CASE 1
4. ARGUMENT IN RESPONSE TO PETITION FOR REVIEW 13
   4.1. Labor & Industries' Failure to Comply with RAP 13.4(b) and RAP 13.4(c)(7) Mandate this Petition be Denied. 13
   4.2. Division 2 Uncontroversially Held the Ex-Parte, No Notice, Restraining Order Violated Minimum Due Process Protections Because, For One Reason, There Was No Certification as to Why Mary Should Not be Provided Notice. The Order, Under Well-Settled U.S. Supreme Court and This Court's Precedent, is Void. No Reasons Under RAP 13.4(b) Justify Granting Review. 15
   4.3. In Attempting to Manufacturer a "Waiver" Argument Where None Exists, Labor & Industries is Either Very Confused or Is Attempting to Mislead This Court. .. 21
5. ATTORNEY FEES AND COSTS 25
6. CONCLUSION 27

TABLE OF AUTHORITIES

Cases

American Can Co. v. Mansukhani,
742 F.2d 314 (7th Cir.1984)……21

Bd. of Trustees of Cmty. Coll. Dist. No. 6 v. Krasnowski,
5 Wn. App. 232, 487 P.2d 231 (1971)……19

Black v. Dep't of Lab. & Indus.,
131 Wn.2d 547, 933 P.2d 1025 (1997)……18

Boddie v. Connecticut,
401 U.S. 371, 91 S. Ct. 780 (1971)……25, 26

Dep't of Labor & Indus. v. Fowler,
516 P.3d 831 (2022)……....17

Dike v. Dike,
75 Wn.2d 1, 448 P.2d 490 (1968)……16, 18, 22, 23

Dougherty v. Dep't of Labor & Indus. for State of Washington,
150 Wn.2d 310, 76 P.3d 1183 (2003)……22

Esmieu v. Schrag,
15 Wn. App. 260, 548 P.2d 581 (1976), *aff'd*,
88 Wn.2d 490, 563 P.2d 203 (1977)……...22

Ex parte Milligan,
71 U.S. (4 Wall.) 2, 18 L.Ed. 281 (1866)……20

Hall v. Feigenbaum,
178 Wn. App. 811, 319 P.3d 61 (2014)……..19

In re Estates of Smaldino,
151 Wn. App. 356, 212 P.3d 579 (2009)…..16, 18, 21, 23

In re Marriage of Maxfield,
47 Wn. App. 699, 737 P.2d 671 (1987)……...22

In re Turay,
139 Wn.2d 379, 986 P.2d 790 (1999)……..18

Lybbert v. Grant County,
141 Wn.2d 29, 1 P.3d 1124 (2000)……..24

Marriage of Ebbighausen,
42 Wn. App. 99, 708 P.2d 1220 (1985)……..22

Mellish v. Frog Mountain Pet Care,
172 Wn.2d 208, 257 P.3d 641 (2011)……..24

Olympic Forest Products, Inc. v. Chaussee Corp.,
82 Wn.2d 418, 511 P.2d 1002 (1973)……16, 17, 18, 26

Redding v. City of Spokane,
81 Wash. 263, 142 P. 664 (1914)…….24

Sheldon v. Sheldon,
47 Wn.2d 699, 289 P.2d 335 (1955)……22

Skinner v. Civil Serv. Comm'n of City of Medina,
168 Wn.2d 845, 232 P.3d 558 (2010)……..18

Stanley v. Illinois,
405 U.S. 645, 92 S. Ct. 1208 (1972)……16, 18

State v. Johnson,
179 Wn.2d 534, 315 P.3d 1090 (2014)……25, 26

State v. Korum,
157 Wn.2d 614, 141 P.3d 13 (2006)……14, 15

Stiles v. Kearney,
168 Wn. App. 250, 277 P.3d 9 (2012)…….26

Rules

CR 12(h)……24

CR 60(b)(5)……..7, 8, 12, 13

CR 65…….*in passim*

RAP 13.4……12, 13, 14, 15, 16, 20, 25, 26, 27

RAP 18.9(a)……26, 27

Other Authorities

Wa. Const. art. I, § 3……18, 22

77 Am.Jur. 2d Venue § 1 (1997)……22

1. IDENTITY OF RESPONDENT

Mary Fowler ("Mary") is the Respondent.

2. ANSWER TO ISSUES PRESENTED TO REVIEW

Under many decades of well-settled precedent from the U.S. Supreme Court and this Court, ex-parte, no notice, restraining orders issued pursuant to CR 65(b)(2) without meeting minimal due process protections are void and may be attacked at any time.

3. PERTINENT RESTATEMENT OF THE CASE

3.1. Mary, 82 years old, is the sole owner of Farm Boy restaurant, as a sole proprietorship.[1]

3.2. On December 15, 2020, Labor & Industries commenced an injunction action. (CP at 1). Citing CR 65(b), it requested an ex-parte, no notice, "Petition" for "Immediate Restraint." (CP at 3-9). The request came less than three hours

[1] Nat Fowler has been dead for many years (but was still named in the suit). Labor & Industries, prior to and during the course of this suit, never spoke with or served anything formally or informally on Mary.

after a sole attempt of notice directed at a confused employee. (CP at 784-85). Mary was never given notice. (CP at 784-85). There is no certification as to why notice could not be given to Mary. (CP 163-65). No summons exists, and no firsthand testimony was filed alleging reasons for ex-parte restraint. The "evidence" presented was double hearsay from *anonymous* sources, describing cars in a parking lot and people in a takeout restaurant. (CP at 10-15; 72-83).

3.3. The trial court granted the request and "*factually* *found that* "*the record . . . establish[ed]*" Farm Boy violated the governor's proclamation:

> *The factual record establishes that*: . . . Following receipt of the [ancillary agency] Order . . . *Farm Boy Drive in has continued to engage in the business activity of indoor dine-in services [in violation of the Governor's proclamation]*.
>
> ***
>
> *Actual and substantial injury will result* [to plaintiffs] by allowing Farm Boy Drive In to continue operation . . . in that employees . . . *will be exposed to risk* of contracting COVID-19.

***

> The Department's Petition for a Temporary Restraining Order is granted. *Farm Boy Drive In is hereby ordered to comply with the Department of Labor & Industries' December 7, 2020, Order of Immediate Restraint*.

(CP 176-79; 362-65) (emphasis added). There was no expiration date. (CP at 362-65). The order incorporated by reference another (agency issued) document as the activity being restrained. (CP at 362-65). Nothing mentioned why there was no notice, nor that "*irreparable harm* . . . will" result if the ex-parte restraint was denied, nor what relief would be granted if Mary failed to appear. (CP at 362-65).

3.1. Trial on the injunction action was to be set in April of 2021. (CP at 358-59).

3.2. On December 29, 2020, the first non-ex-parte hearing was a contempt hearing, and Farm Boy "was essentially given . . . about a four-hour window allowing her to respond to allegations of contempt." (RP December 29, 2020, at 4). Labor & Industries' argued the double hearsay declaration attesting to

alleged anonymous statements by "staff" "unequivocally" indicated indoor dining services. (RP December 29, 2020, at 11). Farm Boy argued people parked in a parking lot or inside the business meant a "multitude of things."[2] (RP December 29, 2020, at 10). The trial court ruled "the State has satisfied its burden to establish that [Mary] willfully" provided indoor dining services. (RP December 29, 2020, at 12-13). It added that Farm Boy may purge the fines, contempt order, and sanctions if it "provided proof that [Farm Boy] ha[s] come into compliance . . . COVID restrictions." (RP December 29, 2020, at 14; CP at 465-68).

3.3. Mary was the fined the maximum of $2,000.00 per day. (CP at 465-68). The temporary restraining order was

[2] There has never been a prohibition on customers purchasing takeout food inside or waiting for food to go or standing or sitting and waiting to pay for such food inside. Obviously, with indoor dining prohibited, the number of takeout customers, and wait times for such food, vastly increased as did the time it takes to box every single order. All of us have experienced this reality during COVID.

reissued with no expiration date in contradiction of CR 65. (CP at 465-68).

3.4. On December 31, 2020, Farm Boy filed a Response to the restraining Order. (CP at 478-84). It argued elements of CR 65 were not met. (CP at 478-84).

3.5. On January 4, 2021, the trial court directed the parties to appear on January 5, 2021, for a "show cause" hearing, the nature of which not provided. (CP at 485-86). Labor & Industries filed a Reply claiming more violations but provided no declarations in support. (CP 489-90). The trial court continued the restraining order and set a hearing for January 19, 2021." (CP at 495).

3.6. On January 13, 2021, Farm Boy filed a Motion to Dismiss. (CP at 508-49). Farm Boy requested an evidentiary hearing, arguing the restraining order violated fundamental constitutional rights, including due process. (CP at 508-49). Objections to "every material finding in the temporary restraining order" were made, including to personal jurisdiction

and the double hearsay anonymous declarations. (CP at 508-49).

3.7. The same day, Alejandra Hamblin, filed an unrebutted declaration stating that Farm Boy "follow[s] all health guidelines such as mask, temperature check before and after shift and cleaning everything that has been touched." (CP at 709-14). She stated that "glass protect[ed] customers in the drive thru and at the register" when customers "pay inside for their food to go", that blinds are down "so people do not come inside for dining but only to pay for food," and that there were no "traces of covid in the restaurant and all our employees have not had covid." (CP at 709-14). This declaration apparently was not sufficient to "purge" the contempt order.

3.8. Labor & Industries moved for contempt again, on shortened time, still providing no firsthand testimony of any violation. (CP at 554-55, 560-575, 587-656). The trial found and ordered: "Actual and substantial injury will result by allowing Farm Boy to continue operation. . . . The TRO was properly issued . . . [,] a preliminary injunction hearing is set for January

19, 2021. . . .[, and] the Court shall . . . entertain any suitable motions or applications related to this matter." (CP at 503-07).

3.9. On January 14, 2021, a second contempt hearing was set for January 19, 2021, on shortened time. (CP 706-07). At which, the trial court orally denied Farm Boy's continuance request, orally found Farm Boy in contempt, and orally granted Plaintiff's preliminary injunction. (CP 742). No written order was entered. Alejandra Hamblin's declaration was ignored.

3.10. On February 1, 2021, the governor's proclamation ended, and there was no longer any basis for an injunction. (CP at 1016-23).

3.11. On February 8, 2021, Farm Boy supplement its motion to dismiss and with a Motion to Dismiss for Lack of Jurisdiction Over the Person and a Motion to Vacate Prior Orders under CR 60. (CP at 758-59, 765-68). No final orders had been entered and Farm Boy argued all prior orders should be vacated as void. (CP at 758-59, 765-68).

3.12. On February 9, 2021, the trial court filed a

$42,000.00 Judgment against Farm Boy, plus $2,000.00 per day in more fines for an indefinite amount of time. (CP at 769-74, 775-76). Neither Farm Boy nor any party got notice of the Judgment.[3] (CP at 986-1015). The Governor's proclamation had been expired since February 1, 2021. (CP at 769-74). The judgment provided that Farm Boy could purge sanctions, contempt orders, and fines at trial. (CP at 769-74; 775-76). The trial court made no mention of Alejandra Hamblin's declaration.

3.13. On February 10, 2021, the trial court granted Farm Boy's Motion for an Order to Show Cause regarding vacating prior orders under CR 60. (CP at 777-78). The Court set a hearing for March 12, 2021. (CP at 777-78).

3.14. On February 22, 2021, Farm Boy supplemented its Motion to Dismiss and Vacate, (CP at 788-870), and moved to

[3] Orders entered by the trial court outside of court were emailed/mailed to parties/attorneys by a judicial assistant and a declaration of service was filed. This February 9, 2021, order, for whatever reason, was not sent to the parties. No declaration of service of service or mailing exists in the record from any judicial assistant because this order was never provided to the parties.

continue the March 12, 2021, hearing date so Labor & Industries could respond. (CP at 875-76). The Supplement expanded upon previous arguments, including due process violations. Farm Boy still had not been provided the February 9, 2021, Judgment. (CP at 788-870) (stating, "No written order [had been] entered.").

3.15. While the Motion to Vacate was pending, the parties agreed to continue its hearing date. (CP at 884-86). The trial court enter a continuance order for April of 2021. (CP at 1059).

3.16. Labor & Industries, as ordered by the trial court, proceeded to schedule trial. (CP at 992). It stated that the "Case is ready for trial but is likely to be dismissed on [Farm Boy's Motion to Dismiss or Vacate], or by [Labor & Industries] on mootness grounds." (CP at 992).

3.17. No employee nor customer—at any point in time or to this day—has had COVID nor complained that Farm Boy violated any proclamation.

3.18. The trial court denied Farm Boy's Motion to Vacate

and entered its Final Order at the end of April of 2021. (CP at 1016-23). It discontinued and dismissed the injunction action, cancelling trial on the merits.[4] (CP at 1016-23). The previous rulings—that Farm Boy could purge previous contempt orders and fines by demonstrating at trial that it was not in violation of the governor's proclamations or the trial court's ex-parte, no notice, restraining order—were eviscerated; Farm Boy was denied any trial on the merits. (CP at 1016-23).

3.19. Farm Boy appealed.

---

[4] The administrative law judge hearing Mary's appeal of the citations issued by Labor & Industries has already ruled that Mary, 82 years old with stage 5 health conditions, one partially functioning kidney, and no computer or internet, may appeal all of citations issued. This is so even though she appealed some many months beyond the 20 day deadline. The administrative law judge found Mary was not served or mailed the citations; rather, rogue employees fearing for their jobs and livelihoods and publicly speaking out against the governor's proclamation without Mary's knowledge or consent (so as to attract conservative customers to the restaurant's take out services) were given the citations and withheld them from Mary. Had trial been allowed to occur in this superior court action for an injunction, these same facts would have been brought out. By ending the action, and preventing an actual trial, the trial court judge committed another (moot) due process violation against Mary.

3.20. Division 2, Court of Appeals, reversed the trial court, holding in pertinent part:

- "[T]he first sentence of CR 65(b) sets forth the prerequisites for the issuance of a [no notice, ex-parte, restraining order] and 'ensure[s] that parties are afforded minimum due process protections.'"

- Labor & Industries committed a due process violation by failing to adhere to the requirements of a CR 65(b) ex-parte, no notice, restraining order.

- In particular, "the record shows that [Labor & Industries] did not give notice to the adverse party in this case: the Fowlers. . . . CR 65(b)(2) applies."

- "[Labor & Industries] does not point to anywhere in the record where either actual written or oral notice was ever provided to the Fowlers themselves, be it formal or informal."

- The "petition and the [Assistant Attorney General's] supporting affidavit wholly fail to state the reasons why notice should not be required."

- "This failure to show why the proceeding must go forward, without notice, and without the other party present, is particularly troubling here because the phone contact with the Farm Boy restaurant employee (not the appellant owners) was provided less than three hours before the petition was submitted for ex parte consideration."

- "This is precisely the abuse that CR 65(b)

> proceedings are subject to and precisely the reason that compliance with the rule is required."
>
> - The due process violation resulted in the ex-parte, no notice, restraining order being void and reversible under CR 60(b)(5).
>
> - "It is . . . well settled that disobedience of, or resistance to a void order, judgment, or decree is not contempt."
>
> - "A contempt order may be vacated if the underlying order is void."
>
> - "Because disobedience of a void order is not contempt, we hold that the trial court erred by denying Farm Boy's motion to dismiss and vacate the contempt orders."

3.21. Labor & Industries thereafter filed its Petition for Review. The sole issue presented for review was the following:

> Must a defendant promptly object to a putative defect in a CR 65(b) certification in order to argue for a [ex-parte, no notice, temporary restraining order]'s vacation, particularly when protecting workers and public health in a global pandemic hinges on quick action?

(Petition at 4). Notably, the Petition did not argue any of the specific reason(s) under RAP 13.4(b) for this Court to accept

review.[5] Instead, it re-argued the merits of the case, without citation to nor mentioning RAP 13.4(b):

- Mary Fowler waived the trial court's due process violation by raising it pursuant to CR 60(b)(5) and not "at the threshold of litigation." (Petition at 30).

- Notice and opportunity to be heard are important rights but evolving work-place safety issues, surrounding COVID, justified issuing an ex-parte, no notice, restraining order, without certifying why notice to Mary Fowler should not be required under CR 65(b). (Petition at 31).

- Alternatively, Labor & Industries did certify why no notice was required to be given to Mary when its attorney stated that Farm Boy's alleged refusal to not comply with the governor's proclamation and cease indoor dining "create[d] a risk of immediate and irreparable injury to employees." (Petition at 3, 18).

4. ARGUMENT IN RESPONSE TO PETITION FOR REVIEW

4.1. Labor & Industries' Failure to Comply with RAP 13.4(b) and RAP 13.4(c)(7) Mandate this Petition be Denied.

RAP 13.4(c)(5), requires "[a] concise statement of the

[5] Labor Industries cites "RAP 13.4(b)(1)-(4)" in its introduction (Petition at 3) and in its one sentence conclusion (Petition at 32).

issues presented for review." *State v. Korum*, 157 Wn.2d 614, 624, 141 P.3d 13, 19 (2006). Other issues are not reviewed. RAP 13.7(b); *Korum*, 157 Wn.2d at 625. RAP 13.4(c)(7) requires both a concise statement *and* argument "of the reason why review should be accepted under one or more of the tests established in section [RAP 13.4](b)."

Here, Labor & Industries' provided a single issue for consideration of review:

> Must a defendant promptly object to a putative defect in a CR 65(b) certification in order to argue for a [ex-parte, no notice, temporary restraining order's] vacation. . . ?

(Petition at 4). The argument sections then do not contain any citations to RAP 13.4(b). No concise statements exist explaining how specific provisions of RAP 13.4(b) support the Petition. "[T]he reason why review should be accepted under one or more of the tests established in section [RAP 13.4](b)" is unknown because such "tests" are not mentioned.

Consequently, Mary must guess at which provision of

RAP 13.4(b) the Petition is based. This failure to comply with RAP 13.4 is fatal to this Petition. *See* RAP 13.4(b); RAP 13.4(c)(7); RAP 13.7(b); *Korum*, 157 Wn.2d at 625. It should be denied on this basis alone. Arguendo, if both this request is denied and review is granted, review is limited to the sole issue presented for review. *See id.*

4.2. Division 2 Uncontroversially Held the Ex-Parte, No Notice, Restraining Order Violated Minimum Due Process Protections Because, For One Reason, There Was No Certification as to Why Mary Should Not be Provided Notice.[6] The Order, Under Well-Settled U.S. Supreme Court and This Court's Precedent, is Void. No Reasons Under RAP 13.4(b) Justify Granting Review.

Under CR 65(b)(2), an ex-parte, no notice, restraining order "may only be granted" if "the applicant's attorney certifies . . . in writing . . . the reasons supporting the . . . claim that notice should not be required." This "prerequisite[] exist[s] to ensure that parties are afforded minimum due process protections." *In*

[6] The failure to certify reasons for no notice being provided to Mary is one reason—of many—that the ex-parte restraining order violated Mary's due process rights.

re Estates of Smaldino, 151 Wn. App. 356, 367, 212 P.3d 579, 584 (2009). Once these due process protections are violated, the violation(s) cannot be undone:

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented . . . (N)o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.'

Olympic Forest Products, Inc. v. Chaussee Corp., 82 Wn.2d 418, 430, 511 P.2d 1002, 1009–10 (1973) (citing *Stanley v. Illinois*, 405 U.S. 645, 645, 92 S. Ct. 1208, 1209–10, (1972)). Such void orders may be attacked at "any time." *Dike v. Dike*, 75 Wn.2d 1, 8, 448 P.2d 490, 494 (1968); *Smaldino*, 151 Wn. App. at 367.

Here, while it is unclear what provision of RAP 13.4(b) Labor & Industries is basing its Petition on, the above citations demonstrate RAP 13.4(b)(1), (2), (3), and (4) are a not a basis for review, unless this Court *wants to entertain creating a conflict* with U.S. Supreme Court and this Court's well-settled precedent.

What is equally clear is that notice was not provided to Mary before the trial court entered its ex-parte, no notice, restraining order.[7] Nor was a certification provided to the trial court as to why notice could not be provided to her.[8] *Dep't of Labor & Indus. v. Fowler*, 516 P.3d 831, 843 (2022).

---

[7] Astonishingly, the trial court also dispositively determined the entire action, ex-parte without one word heard from Mary, when it ruled "*the factual record establishes that . . . Farm Boy Drive In has continued to engage in indoor dine-in services* [in violation the governor's proclamation]." This finding is even more shocking because it was based on anonymous double hearsay; an impartial tribunal this trial court was not as required by due process. *See Olympic Forest Products, Inc.*, 82 Wn.2d at 431 (due process requires "an informed evaluation by a neutral official"). The ex-parte request for a restraining order should have been denied, and at most a contested hearing set with assurances that Mary would receive notice beforehand.

[8] Labor & Industries argues—well beyond the scope of the Petition's concise statement of issues as to why review should be granted—that the agency's attorney did certify why notice could not be given to Mary. (Petition at 3, 18). This argument is meritless. Alleging that "Farm Boy" refused to comply with the governor's proclamation did not come close to satisfying CR 65(b)(2)'s burden of demonstrating for what reasons notice was not given to Mary before the ex-parte, no notice, restraining order was applied for (and granted). At best, alleging that there was "a risk of immediate and irreparable injury to employees" spoke to, but did not meet, the requirement of CR 65(b)(1).

Thus, Division 2—uncontroversially—reversed the trial court, citing the plain language of CR 65(b)(2) and caselaw repeated over many decades regarding due process requisites. *Id.* The law is well-settled that no notice, ex-parte, restraining orders in violation of minimal due process protections are a grave injustice, void, and may be attacked at any time. *E.g.*, *Stanley*, 405 U.S. at 645; Wa. Const. art. I, § 3; *Olympic Forest Products, Inc.*, 82 Wn.2d at 430; *Dike*, 75 Wn.2d at 8; *In re Groen*, 22 Wash. 53, 60 P. 123 (1900); *Smaldino*, 151 Wn. App. at 367.

Labor & Industries' Petition ignores and avoids attempting to distinguish directly applicable U.S. Supreme Court precedent as well as this Court's own precedent. Its citations to cases involving substantial compliance with time periods for filing "notice[s] of appeal", and the like[9], are shockingly irrelevant.

[9] *Black v. Dep't of Lab. & Indus.*, 131 Wn.2d 547, 552, 933 P.2d 1025 (1997); *In re Turay*, 139 Wn.2d 379, 390, 986 P.2d 790 (1999); *Skinner v. Civil Serv. Comm'n of City of Medina*, 168 Wn.2d 845, 856-57, 232 P.3d 558 (2010).

The cases cited mentioning injunctions or restraining orders[10] are plainly inapplicable and readily distinguishable.

As to Labor & Industries' claim that "COVID" is a catch-all justification for blatant, avoidable, constitutional violations—it is not. This executive branch agency should be reminded of this—as a matter of checks and balances—with an order denying this Petition. Protecting a citizen's due process rights in the ex-parte, no notice, context of CR 65(b)(2) is paramount to all other concerns of any court, in all times, in all places, and under all circumstances. Period, end of Constitutional discussion. Anything less is arbitrary political rule by arbitrary men, not rule

---

[10] *Hall v. Feigenbaum*, 178 Wn. App. 811, 817, 319 P.3d 61, 64 (2014) (finding party was "properly served and received adequate notice" of a preliminary injunction); *Bd. of Trustees of Cmty. Coll. Dist. No. 6 v. Krasnowski*, 5 Wn. App. 232, 233, 487 P.2d 231, 232 (1971) (constitutional due process not mentioned; rather, First Amendment issues raised; case involved actual documented damage to a college from riotous activity occurring before restraining order was entered; limited record mentioned provided, "Attempts were made to give oral notice of the proceedings to all those named"; ex-parte notice arguments were not raised; instead, party argued under CR 65 that preliminary injunction hearing should have been set sooner).

of law by the consent of the governed. *See e.g. Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21, 18 L.Ed. 281, 295 (1866) (U.S. Supreme Court during civil war holding "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances", that allowing the government to violate the constitution in an emergency leads to the most "pernicious consequences" that "was ever invented by the wit of man", and that constitutional provisions cannot be "suspended during any of the great exigencies of government.").

Stated another way, if due process protections could not be lawfully suspended during the civil war—they could not be suspended during COVID to trample minimal due process rights afforded to Mary. *See id*. This especially true since no person, employee, or customer has ever complained about, let alone ever caught COVID at, Mary's restaurant. Division 2 correctly reversed the trial court. There is no reason review should be granted under RAP 13.4(b)(1), (2), (3) or (4).

4.3. In Attempting to Manufacturer a "Waiver" Argument Where None Exists, Labor & Industries is Either Very Confused or Is Attempting to Mislead This Court.

"[O]ur entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute. . . ." *Smaldino*, 151 Wn. App. at 370 (citing *American Can Co. v. Mansukhani*, 742 F.2d 314 (7th Cir.1984)). "[T]he procedural hurdles of Rule 65 are intended to force both the movant and the court to act with great care in seeking and issuing an ex parte restraining order." *Id.* Rule 65(b) "is no mere extract from a manual of procedural practice. . . . It is a page from the book of liberty." *Id.* "The specific requirements of Rule 65(b) are not mere technical legal niceties." *Id.* "They are strongly worded, mandatory provisions. . . ." *Id.* This is because a "temporary injunction can be an extremely powerful weapon, and when such an order is issued ex parte, the dangers of abuse are great." *Id.*

A judgment, decree, or order entered by a court entered

without inherent authority to do so, or in violation of the due process clause without notice and meaningful opportunity to be heard, is void. Wa. Const. art. I, § 3; *Dike*, 75 Wn.2d at 8; *Sheldon v. Sheldon*, 47 Wn.2d 699, 702, 289 P.2d 335, 336 (1955); *Esmieu v. Schrag*, 15 Wn. App. 260, 265, 548 P.2d 581, 585 (1976), *aff'd*, 88 Wn.2d 490, 563 P.2d 203 (1977); *In re Marriage of Ebbighausen*, 42 Wn. App. 99, 102, 708 P.2d 1220, 1222 (1985). Such due process violations are sometimes described as a court's "lack of jurisdiction over a [party]." *e.g.*, *In re Marriage of Maxfield*, 47 Wn. App. 699, 704, 737 P.2d 671, 674 (1987)). The word "jurisdiction" in such context is used generally to describe the lack of "power and authority of the court to act." *See e.g.*, *Dougherty v. Dep't of Labor & Indus. for State of Washington*, 150 Wn.2d 310, 315, 76 P.3d 1183, 1185 (2003) (defining "jurisdiction" generally) (citing 77 Am.Jur. 2d Venue § 1, at 608 (1997)).

"A void order, judgment, or decree is a nullity and may be attacked collaterally" because it is as if the order never existed.

Dike, 75 Wn.2d at 8. Void orders are not subject waiver and may be "attacked at any time." *See id.*; *Smaldino*, 151 Wn. App. at 366.

Here, the law is well-settled. Waiver does not apply to CR 65(b) restraining orders entered ex-parte, where minimal due process protections—including notice and meaningful opportunity to be heard and/or the requisites of CR 65(b)(2)—have not been met. When hearing ex-parte matters under CR 65(b), "the dangers of abuse are great" and the trial court "must act with great care." If the trial court fails to respect the absent restrained party's minimal due process protections—there is no authority to act. Any order is "void", a "nullity", and may be "attacked at any time." *Dike*, 75 Wn.2d at 8; *Smaldino*, 151 Wn. App. at 366.

On the other hand, in other limited contexts, "waiver" as to personal jurisdiction can apply to insufficiency of process of

pleadings, or as to improper venue, or the like.[11] Notices of appeal can be subject to substantial compliance standards. *See e.g., fn 9, supra*. These contexts implicate due process rights, which are flexible in one situation but not in another, to a much lesser extent. In other words, the "dangers of abuse" and procedural rights at issue are not as "great" when allowing an appeal to go forward, or when allowing waiver to apply to the sufficiency of service of pleading for which no immediate, ex-parte, court relief is requested.

The Petition relies on cases dealing with the latter category. (Petition at 21-30).[12] The agency is attempting to manufacture a waiver argument where none exists, is genuinely confused, or is misleading this Court. Regardless, its cited cases provide no support for granting its Petition under RAP

---

[11] *See e.g.*, CR 12(h).

[12] *E.g.*, *Lybbert v. Grant County*, 141 Wn.2d 29, 38-40, 1 P.3d 1124 (2000); *Redding v. City of Spokane*, 81 Wash. 263, 265, 142 P. 664 (1914); *Mellish v. Frog Mountain Pet Care*, 172 Wn.2d 208, 221-22, 257 P.3d 641 (2011).

13.4(b)(1), (2), (3), or (4).

The frivolity of this Petition is showcased with citations to *State v. Johnson*, 179 Wn.2d 534, 558, 315 P.3d 1090 (2014) and *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S. Ct. 780, 786, 28 L. Ed. 2d 113 (1971). In *Johnson*, the court straightforwardly held the appellant's *argument on appeal* was waived, not any alleged due process violation. The *argument* was too insufficient and "naked" to warrant "consideration." The citation to *Boddie* is a downright misleading. When mentioning "waiver" in passing there, Justice Harlan clearly meant that if an indigent party pays filing fees in consideration of a trial court adjudicating his or her marriage dissolution—*when he or she did not have to pay such fee under the due process clause because of his or her indigency status*—the party may have waived his or her ability to compel a refund.

5. ATTORNEY FEES AND COSTS

Under RAP 18.9(a), "An appeal is frivolous when the [it] presents no debatable issues on which reasonable minds could

differ and is so lacking in merit that there is no possibility of reversal." *Stiles v. Kearney*, 168 Wn. App. 250, 267–68, 277 P.3d 9, 17 (2012). In *Stiles*, frivolity was found, and fees awarded, because the arguments lacked merit, relied on "misunderstandings", and were not adequately brief. This Petition was cut from the same cloth.

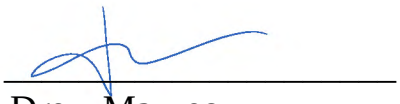
It was not adequately briefed as the heart of the Petition—a single reason to grant review under RAP 13.4(b)—is not cited nor articulated. Its "naked castings into [RAP 13.4(b)] are not sufficient to command judicial consideration and discussion." *See Johnson*, 179 Wn.2d at 558. Only a profound misunderstanding of waiver doctrine applied to due process violations was supplied. There was an entire failure to address dispositive cases such *Olympic Forest Products, Inc.*, 82 Wn.2d 418. The agency grossly misrepresented several cited cases, *e.g.*, *Johnson*, 179 Wn.2d 534, *Boddie*, 401 U.S. 371. Mary should not have had to pay an attorney thousands of dollars to educate the most powerful law firm in this state on many decades of well-

settled caselaw. Mary should recover attorney fees under RAP 18.9(a).

6. CONCLUSION

Pursuant to RAP 13.4, Mary respectfully requests this Court deny review, for the reasons stated herein, and award attorney fees pursuant to RAP 18.9(a) for having to respond to this frivolous Petition.

Respectfully submitted this 5th day of December, 2022,



Drew Mazzeo
WSBA No. 46506
Attorney for Respondent

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENT

This document contains 4,949 words and is compliant with type-volume, typeface and type-style requirements, being 14-point, Times New Roman font, and less than maximum allowable words, excluding the parts of the document exempted from the word count by RAP 18.17.

HARBOR APPEALS AND LAW,

PLLC

Drew Mazzeo WSBA No. 46506
Attorney for Respondent

HARBOR APPEALS AND LAW, PLLC

December 05, 2022 - 2:37 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	55806-8
Appellate Court Case Title:	Dept of Labor and Industries, Resp v. Nat D. Fowler, et al., Apps
Superior Court Case Number:	20-2-02460-8

The following documents have been uploaded:

- 558068_Answer_Reply_to_Motion_20221205143644D2191759_8755.pdf
  This File Contains:
  Answer/Reply to Motion - Response
  The Original File Name was FARM BOY appeal response to petition for review FINAL.pdf

A copy of the uploaded files will be sent to:

- anastasia.sandstrom@atg.wa.gov
- brian.dew@atg.wa.gov
- liolyce@atg.wa.gov
- michael.hall@atg.wa.gov

Comments:

Sender Name: Andrew Mazzeo - Email: office@harborappeals.com
Address:
2401 BRISTOL CT SW STE C102
OLYMPIA, WA, 98502-6037
Phone: 360-539-7156

Note: The Filing Id is 20221205143644D2191759