

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
CLERK'S OFFICE

Sep 23, 2016, 3:25 pm

RECEIVED ELECTRONICALLY

FILED *E*
OCT 06 2016
WASHINGTON STATE
SUPREME COURT
b/h

NO. 92978-5

SUPREME COURT OF THE STATE OF WASHINGTON

STEPHEN FACISZEWSKI and VIRGINIA L. KLAMON,

Respondents,

v.

MICHAEL R. BROWN and JILL A. WAHLBETHNER,

Appellants.

AMICUS CURIAE MEMORANDUM OF
RENTAL HOUSING ASSOCIATION OF WASHINGTON

Christopher Benis, WSBA No. 17972
Katherine George, WSBA No. 36288
HARRISON-BENIS LLP
2101 Fourth Avenue, Suite 1900
Seattle, WA 98121
(206) 448-0402
Attorneys for Amicus RHA



ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. INTEREST OF AMICI	3
III. ARGUMENT	3
A. “Can Prove In Court” Does Not Mean “Has Proven At Trial”	3
B. A Trial is Not Necessarily Better Than a Show-Cause Hearing	6
IV. CONCLUSION	9

TABLE OF AUTHORITIES

	Pages
<u>Cases</u>	
<i>Hartson Partnership v. Goodwin</i> , 99 Wn.App. 227 (Div. 1, 2000).....	5, 6
<i>Leda v. Whisnand</i> , 150 Wn.App. 69 (Div. 1, 2009).....	6, 7, 8, 9
<i>Meadow Park Garden Associates v. Canley</i> , 54 Wn.App. 371 (Div. 2, 1989).....	9
<u>Statutes</u>	
RCW 59.18.200	4
RCW 59.18.380	1, 5, 7, 8
<u>Other Authorities</u>	
Seattle Municipal Code 22.206.160(C)	4, 5, 6
Seattle Municipal Code 22.206.160(C)(1)(e)	3, 5
Superior Court Civil Rule 8	8
Evidence Rule 603	7

I. INTRODUCTION

For more than a century, Washington state has used summary hearings to quickly resolve landlord-tenant disputes. Appellate courts have consistently upheld the constitutionality of those hearings, while recognizing the Legislature's intent to save time and money for all involved. By requiring judges to question parties and witnesses, and to order a trial only if a "substantial" fact dispute is presented, RCW 59.18.380 balances the right to be heard with the right to quickly regain possession of property in a meritorious case.

There is no reason in law or policy to upset this long-respected balance. Yet the appellants in this case would require a full-blown trial every time an owner wants to personally occupy, or move a family member into, his or her own property. Under the appellants' reasoning, a judge could *never* accept an owner's sworn statement of intent to personally use a home because, supposedly, merely "saying" what's intended is not enough. They would require both a show-cause hearing *and* a full trial to "contest the truth of the owner's stated intention," rather than waiting to see if the owner actually uses the home and imposing penalties for failing to do so, as authorized by Seattle's code.

This approach would frustrate the state's 125-year-old policy to resolve housing disputes efficiently. It would weaken the role of judges, preventing them from summarily disposing of defenses that are based on mere suspicion. Also, it would make it more difficult for owners to deal with personal hardship, such as divorce, financial trouble or illness in the family, which are common reasons for taking homes out of rental status.

It is always possible to question an owner's sincerity regarding an intention that has yet to be carried out, as in this case, where the owner sought to free up his rental home so that his recently widowed mother could live nearby. But, since an owner or family member cannot actually move into a rented home until a court orders eviction, requiring a trial simply delays the owner's opportunity to put words into action. When nothing but speculation casts the owner's intention into doubt, as in this case, holding a trial merely ensures more cost, delay and uncertainty.

Moreover, the daunting prospect of a trial in every case may discourage owners from renting out homes in the first place, squeezing an already tight rental market. In sum, it's bad policy to create a right to trial simply because a tenant does not believe an owner whose intention is stated under oath. Neither the State Legislature nor the City of Seattle has adopted such a policy, and this Court should decline to do so.

II. INTEREST OF AMICI

The Rental Housing Association of Washington (RHA) is a nonprofit organization of housing providers with more than 5,000 members statewide. Most of its members rent out single-family homes; nearly half own just one rental unit. RHA provides education and assistance to comply with existing laws, and regularly advocates for uniformity and fairness in state and local policymaking.

RHA is interested in this case because it could impair the ability of housing owners to live in, or move family members into, their own properties despite proper notice and genuine intent. Leasing a home is often a temporary use until the owner, an elderly parent or other family member needs it. Reversing the Court of Appeals would make personal use difficult and discourage owners from renting out homes in Seattle.

III. ARGUMENT

A. “Can Prove In Court” Does Not Mean “Has Proven At Trial”.

This case concerns SMC 22.206.160(C)(1)(e), a Seattle ordinance allowing eviction from a rental home when “the owner seeks possession so that the owner or a member of his or her immediate family may occupy the unit as that person’s principal residence.” In arguing that owners invoking this provision must prove their intent in a trial, even if they have certified

their intention under oath, Stephen Faciszewski and Virginia Klamon (“Appellants”) point to SMC 22.206.160(C), which states:

Owners of housing units shall not evict or attempt to evict any tenant, or otherwise terminate or attempt to terminate the tenancy of any tenant *unless the owner can prove in court* that just cause exists.

(Emphasis added).¹ See Supp. Brief of Pet., pp. 3, 7-9. Appellants somehow extrapolate from this language that: 1) “can prove in court” really means “has proven in court”; and 2) “in court” really means “in a trial” rather than in a summary (show cause) proceeding. Supp. Brief of Pet., p. 8. This is a leap from logic as well as plain language.

The term “can prove” means *capable of proving*.² It does not mean “has proven,” as appellants seem to believe. If “can prove” meant the same as “has proven,” an owner could not even “attempt to evict” a tenant or terminate a tenancy without first proving to a judge that there is just cause. SMC 22.206.160(C) (“Owners...shall not...*attempt to evict* any tenant... unless the owner can prove in court that just cause exists”) (emphasis added). Obviously, it is hopelessly circular to say you cannot sue without first winning a suit. Courts “avoid interpretations that are

¹ Seattle’s Just Cause Eviction Ordinance regulates the circumstances under which a landlord may terminate a month-to-month tenancy as authorized by RCW 59.18.200. Whether the ordinance conflicts with state law is not before the Court.

² According to Oxford Dictionaries, “can” means “be able to.” See <https://en.oxforddictionaries.com/definition/can>.

forced, unlikely or strained.” *Hartson Partnership v. Goodwin*, 99 Wn.App. 227, 235 (Div. 1, 2000). Also, under the appellants’ interpretation, an owner would be required to prove “just cause” in court even when termination is uncontested, which makes no sense. The logical reading is that an owner must be *prepared to prove* “just cause” when invoking SMC 22.206.160(C)(1)(e), which is a far cry from always requiring owners to prove contested intentions in a trial.

Moreover, the appellants overlook the first sentence of SMC 22.206.160(C), which makes clear that evictions in Seattle are subject to RCW 59.18.380, the state law authorizing summary dispositions without a trial. SMC 22.206.160(C) says, “owners may not evict residential tenants without a court order, which can be issued by a court only after the tenant has an opportunity in a show cause hearing to contest the eviction (RCW 59.18.380).” Yet the appellants do not mention RCW 59.18.380 anywhere in their supplemental brief. In arguing that owners must “prove in court” that an intention to occupy a home is “bona fide,” appellants utterly fail to explain why the term “in court” necessarily means “in a trial” rather than in a show cause hearing under RCW 59.18.380. In fact, Seattle’s ordinance does not mention a “trial” at all. Rather, it refers to “an

opportunity in a show cause hearing to contest the eviction.” SMC 22.206.160(C).

In construing a statute, “All of the language used in the statute must be given effect, with no portion rendered meaningless or superfluous.” *Hartson Partnership*, 99 Wn.App. at 235. When giving effect to the language contemplating a show-cause hearing, the Seattle ordinance cannot be construed as requiring a trial to “prove in court” an owner’s contested intention. On the contrary, the show-cause process has worked for 125 years, and is still a constitutionally sound and legislatively preferred way of determining possession in an unlawful detainer action when there’s no substantial factual dispute, as here.

B. A Trial is Not Necessarily Better Than a Show-Cause Hearing.

The issue in this appeal is whether a tenant is entitled to a trial when questioning a landlord’s sworn intention to personally occupy the tenant’s home. The underlying premise of the appeal is that a trial is better for the tenant than a show-cause hearing. As a general proposition, this is not necessarily true. In fact, the main difference between a trial and a show-cause hearing is that the judge, rather than the parties’ attorneys, is responsible for eliciting testimony. *Leda v. Whisnand*, 150 Wn.App. 69, 81-82 (Div. 1, 2009). The parties have less control when relying on a

judge to examine witnesses, but the same evidence is supposed to be elicited either way.

As the Court of Appeals explained in *Leda*, 150 Wn.App. at 81-82:

The Ledas make much of the fact that a RCW 59.18.380 show cause hearing 'is not a trial.' Indeed, it is undisputed that a defendant at such a hearing is not entitled to a full trial...However, it does not follow that trial courts may properly disregard evidence that credibly supports a legitimate defense. ...

A tenant who raises a viable legal defense, either in written submissions or during the show cause hearing, is entitled to testify in support of that defense. The rules of evidence apply to unlawful detainer show cause hearings, and inadmissible evidence may not be therein considered. Under ER 603, unsworn testimony is inadmissible. Whisnand was therefore entitled to be sworn.

Whisnand was also entitled to have the Ledas sworn and examined as to the merits of the asserted defense because RCW 59.18.380 expressly directs the court to 'examine the parties.' RCW 59.18.380 also expressly contemplates testimony by witnesses other than the parties. Examination of such witnesses is also required, if necessary to ascertain the merits of a defense.

How does all this differ from a trial, to which the defendant has no right? The answer is, again, found in the text of the statute itself. At trial, parties have the sole right (within the confines of the rules of evidence) to decide how to present their cases, which questions to ask, and how much noncumulative testimony to present in seeking to establish the elements of any asserted claim or defense. In contrast, RCW 59.18.380 directs *the court* to examine the parties and any witnesses.

(Emphasis in original). Thus, the key difference between a trial and show-cause hearing is that attorneys have a bigger role in a trial, which means both greater control and greater costs. Thus, a trial would tend to favor the party with more resources, not necessarily (nor probably) the tenants.

Nor can it be said that the show-cause process inherently favors one party over another. Placing the judge in the witness-examining role normally played by attorneys may level the playing field where one party has counsel and the other does not. While this can cut both ways, tenants are more likely than landlords to be pro se, and to benefit in that respect from the show-cause process as compared to trial.

The show-cause process allows anyone claiming possession of property to raise a defense orally without the need for a written answer.

RCW 59.18.380. The *Leda* court said:^[1]

[G]iven the relatively low financial stakes in the average residential rental dispute and the resulting difficulty that most persons at risk of eviction face in retaining attorneys, the legislature has relieved such litigants of the burdens of formality associated with Civil Rule 8 pleading.

Thus, the show-cause process is designed to be easier for defendants than a traditional trial process.

Courts have repeatedly held that the show-cause process, although designed to be more efficient than trials, comports with constitutional

^[1] *Leda*, 150 Wn.App. at 80-81.

requirements for fairness. *Leda* at 83 (the right to present evidence in defense of eviction is “not absolute,” but “tempered by a grant of authority to trial courts to manage the scope and manner in which evidence is presented, rather than leaving it to the discretion of attorneys or pro se litigants”); *Meadow Park Garden Associates v. Canley*, 54 Wn.App. 371, 376 (Div. 2, 1989) (unlawful detainer defendants are not entitled to a jury trial at the show-cause stage). It should be noted, too, that the show-cause process includes an opportunity for review of a court commissioner’s decision by a Superior Court judge – as happened in this case. In sum, while it is certainly possible for any party to do better in a trial than in a show-cause hearing, one proceeding is not *inherently* more or less fair than the other. Requiring a full-blown trial, simply because a tenant questions a landlord’s intentions, wrongly assumes that an attorney-driven hearing is more reliable than a judicially conducted hearing followed by judicial review. It overlooks the additional time and expense involved for the parties and for courts, and most obviously, it overlooks the futility of contesting an owner’s intentions before the owner can carry them out.

IV. CONCLUSION

For the foregoing reasons, this Court should affirm the ruling of the Court of Appeals.

Dated this 23rd day of September 2016.

By: 
Katherine George, WSBA No. 36288
Christopher Benis, WSBA No. 17972
HARRISON-BENIS LLP
2101 Fourth Avenue, Suite 1900
Seattle, WA 98121
Cell (425) 802-1052
kgeorge@harrison-benis.com

CERTIFICATE OF SERVICE

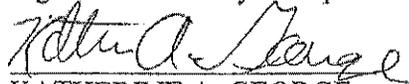
The undersigned declares under penalty of perjury under the laws of Washington that on September 23, 2016, I caused service of the foregoing Amicus Curiae Memorandum and related motion to the following:

By email, per agreement:
Christopher D. Cutting
Loeffler Law Group PLLC
500 Union Street, Suite 1025
Seattle, WA 98202
Attorney for Respondents
ccutting@loefflerlegal.com

Sidney Charlotte Tribe
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
Attorney for Respondents
Sidney@tal-fitzlaw.com

By messenger delivery:
T. Jefferey Keane
Keane Law Offices
100 NE Northlake Way, Suite 200
Seattle, WA 98501-4264
Attorney for Appellants
tjk@tjkeanelaw.com

Signed this 23rd day of September, by:


KATHERINE A. GEORGE

OFFICE RECEPTIONIST, CLERK

To: Katherine George
Cc: Christopher Cutting; Sidney@tal-fitzlaw.com; tj@tjkeanelaw.com; Christopher Benis
Subject: RE: amicus filing in Faciszewski v. Brown, No. 92978-5

Received 9-23-16

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

Questions about the Supreme Court Clerk's Office? Check out our website:

http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/

Looking for the Rules of Appellate Procedure? Here's a link to them:

http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=app&set=RAP

Searching for information about a case? Case search options can be found here:

<http://dw.courts.wa.gov/>

From: Katherine George [mailto:kgeorge@hbslegal.com]

Sent: Friday, September 23, 2016 3:24 PM

To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>

Cc: Christopher Cutting <ccutting@loefflerlegal.com>; Sidney@tal-fitzlaw.com; tj@tjkeanelaw.com; Christopher Benis <cbenis@hbslegal.com>

Subject: amicus filing in Faciszewski v. Brown, No. 92978-5

Dear Clerk and Counsel,

Please find attached for filing an Amicus Curiae Memorandum of Rental Housing Association of Washington, with related motion and certificate of service, in Case No. 92978-5, *Stephen Faciszewski and Virginia Klamon v. Michael Brown and Jill Wahleithner*.

The person filing this document is Katherine George, WSBA #36288, phone number 425 802-1052, email kgeorge@harrison-benis.com.

Thank you,

Katherine A. George
Of counsel
Harrison-Benis LLP
2101 Fourth Avenue, Suite 1900
Seattle, Washington 98121
Cell phone: 425-802-1052
Fax: 206 448-1843