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No. 95575-1

**SUPREME COURT
OF THE STATE OF WASHINGTON**

RANDY REYNOLDS & ASSOCIATES, INC.

v.

KASEY HARMON

RESPONSE TO BRIEF OF AMICI THURSTON COUNTY VOLUNTEER
LEGAL SERVICES, KITSAP LEGAL SERVICES, AND CLARK COUNTY
VOLUNTEER LAWYERS PROGRAM

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I. THERE IS NO LAWFUL BASIS FOR EX PARTE HEARINGS ON MOTIONS TO STAY WRITS OF RESTITUTION

Amicus Thurston County Volunteer Legal Services *et al.*, (hereafter Thurston County) argues that “[d]ue to the nature of the unlawful detainer process, if a tenant lacks access to an emergency *ex parte* stay of a writ of restitution, the writ could be executed and the tenant removed from the home before a hearing could be scheduled on a motion to stay” (Brief of Thurston County pages 2 - 6). RCW 59.18.390(1) and CR 5(a) prohibit *ex parte* hearings on motions to stay writs of restitution. *Randy Reynolds & Associates, Inc. v. Harmon*, 1 Wn. App. 2d 239, 250 - 252, 404 P.3d 602 (2017).

Thurston County implicitly concedes this, but argues that:

Washington law recognizes other situations where imminent harm justifies *ex parte* action by the court. *See, e.g.* RCW 26.50.070(1)(allowing the court to issue temporary emergency *ex parte* orders for custody of children and protection of victims of domestic violence, stalking and harassment).

(Brief of Thurston County page 6).

It is true that some Washington statutes recognize situations where imminent harm justifies *ex parte* action by the court. As Thurston County notes, RCW 26.50.070(1) is such a statute. Other

such statutes include RCW 7.94.050 which authorizes ex parte extreme risk protection orders and RCW 10.14.080 which authorizes ex parte temporary antiharassment protection orders. That some statutes make express provision for trial courts to grant ex parte orders without notice, and the absence of such a provision in RCW 59.18.390(1) shows that the legislature did not authorize trial courts to grant stays under the statute ex parte. To the contrary, the statute expressly requires that the landlord have notice of the hearing.

II. EX PARTE HEARINGS VIOLATE THE SEPARATION OF POWERS

Under the doctrine of separation of powers, when the activity of one branch invades a prerogative of another, that activity violates the separation of powers. *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974, 980, 216 P.3d 374 (2009). Unlawful detainer actions are special proceedings. *Christensen v. Ellsworth*, 162 Wn.2d 365 at 374. The legislature's power to enact statutes that govern court procedures is broad regarding special proceedings and more limited regarding common law actions. *Putman*, 166 Wn.2d at 982. This standard protects the separation of powers by preserving the Supreme Court's ability to set court rules for common law

actions, but allows the legislature to set rules for proceedings created by statute. *Id.*

Recognizing that the legislature is a co-equal branch of government and the importance of the separation of powers, the Supreme Court adopted CR 81(a) which provides that “[e]xcept where inconsistent with rules or statutes applicable to special proceedings, these rules shall govern all civil proceedings.” In light of RCW 59.18.390(1), which requires that the tenant post a bond as a condition precedent to a stay and that the landlord have notice of the hearing where the bond will be set, the *ex parte* hearing where the trial court granted the stay invaded the prerogative of the legislature and violated the separation of powers. So, too, would any decision of the Supreme Court or court rule that negates the protections afforded to the landlord under the statute.

III. THE DEFAULT JUDGMENT WAS PROPERLY ENTERED

Although Thurston County claims that it is not raising an argument regarding the propriety of the default process, it then argues that entry of the default judgment “conflicts with established case law”. This argument was not raised by Tenant Harmon. The court

may, but usually does not, reach arguments raised only by amicus. *State v. Duncan*, 185 Wn.2d 430, 374 P.3d 83 (2016). In any event, the argument is unfounded. CR 55 authorizes the default judgment obtained by Reynolds. Nothing in Chapter 59.12 or Chapter 59.18 RCW is to the contrary.

The authority cited by Thurston County is distinguishable. At issue in *Faciszewski v. Brown*, 187 Wn.2d 308, 386 P.3d 711 was whether the court in an unlawful detainer action that involves the City of Seattle's Just Cause Eviction ordinance can consider evidence challenging the alleged just cause once the landlord files a certification allowed under the ordinance. *Id.* at 310. In its opinion the Supreme Court did say "For residential property, a landlord seeking a writ of restitution must request a show cause hearing. RCW 59.18.370." However, the case is distinguishable because it did not involve a default judgment. The default judgment was properly entered.

IV. THE TRIAL COURT HAD NO DISCRETION TO ACT CONTRARY TO RCW 59.18.390 AND CODE OF JUDICIAL CONDUCT RULE 2.9(A)

Thurston county argues that "eviction constitutes an

emergency justifying an ex parte hearing for a stay of a writ of restitution” (Brief of Thurston County page 5). On that basis, Thurston County appears to argue that the court has or should have discretion to waive the notice and bond requirements of RCW 59.18.390, and to act contrary to Code of Judicial Conduct rule 2.9(A). The ex parte hearing violated both RCW 59.18.390(1) and Code of Judicial Conduct rule 2.9(A). *Reynolds*, 1 Wn. App.2d at 249 - 252.

In *State v. Curry*, Slip. Op. 94681-7 decided August 16, 2018, the Supreme Court discussed the discretion possessed by trial court judges:

A trial judge afforded discretion is not free to act at whim or in boundless fashion, and discretion does not allow the trial judge to make any decision he or she is inclined to make:

“The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by

tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains.

(Page 6 quoting Benjamin Cardozo, The Nature of the Judicial Process 141 (1921).

A statute that affords "discretion to the trial court allows the trial court to operate within a 'range of acceptable choices.'" *Curry*, Slip Op. 94681-7 page 6 citing *State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012)(quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). RCW 59.18.390(1) and code of Judicial Conduct rule 2.9(A) do not afford the trial court discretion to hear a motion for stay ex parte. Although RCW 59.18.390(1) gives the trial court limited discretion in setting the amount of the bond, the bond must meet the standard in the statute.

V. THE REQUEST THAT TRIAL COURTS BE GIVEN AUTHORITY TO HEAR MOTIONS FOR STAY EX PARTE IS PROPERLY DIRECTED TO THE LEGISLATURE

Thurston County appears to request that the Supreme Court rewrite RCW 59.18.390(1) to authorize ex parte hearings on motions

to stay writs. Litigants frequently make such requests. One example is *State v. Peeler*, 183 Wn.2d 169, 185, 349 P.3d 842 (2015). Responding to concerns raised by the State about the potential impact of ruling in favor of the defendant, the Supreme Court responded:

[W]e do not rewrite [the law] to insert our own policy judgments. The State's argument about balancing of convenience and economy with timely and orderly disposition of charges is best directed to the legislature.

The *Peeler* court then went on to opine that while practical and policy concerns raised by the State and by the dissent were important “we disagree that these concerns can override the plain, unambiguous statutory language.” *Id.* at footnote 10.

Eviction certainly can be a significant event in the life of a tenant. Landlord notes, however, that in this instance, the eviction was based on a 20 day notice that terminated the tenancy July 31 (CP 15). The tenant had no substantive defense to the notice. *Reynolds*, at 243. The landlord obtained possession of the premises September 29, almost two months after her tenancy ended (CP 75). Any alleged hardship on the tenant is not a basis for the trial court to disregard the plain language of RCW 59.18.390(1) or Code of

rule 2.9(A), or for the Supreme Court to re-write the statute.

VI. EX PARTE STAYS WILL NOT PROMOTE JUDICIAL EFFICIENCY

Thurston County argues that ex parte emergency stays best serve the purpose of judicial efficiency (Brief of Thurston County pages 6 - 7). Thurston county argues that unless tenants can obtain a stay ex parte and without a bond, tenants who have valid defenses may be compelled to appeal before a record is developed in the trial court. That argument is entirely unfounded.

As noted in landlord's response to the brief of Tacoma-Pierce, the court can set a hearing before the writ can lawfully be executed under RCW 59.18.390(1) and require timely service of notice of the hearing. Alternatively, the tenant can vacate the dwelling but continue to assert his or her rights, or the tenant can post a bond that meets the standard in RCW 59.18.390(1).

On appeal, under RAP 8.1, in order to stay execution of the writ, the tenant would be required to post a supersedeas bond. Under RAP 8.1(c)(2):

The supersedeas amount shall be the amount of any money judgment, plus interest likely to accrue during the pendency of appeal and attorney fees, costs and

expenses likely to be awarded on appeal entered by the trial court plus the amount of the loss which the prevailing party in the trial court would incur as a result of the party's inability to enforce the judgment during review. Ordinarily, the amount of loss will be equal to the reasonable value of the use of the property during review.

Given the length of time that appeals take, in all probability, the supersedeas amount would exceed many times over the bond that the tenant must post under RCW 59.18.390(1). Inability to obtain an ex parte stay from the trial court, or to obtain a stay without posting a bond that meets the standard of RCW 59.18.390(1) will not compel tenants to appeal.

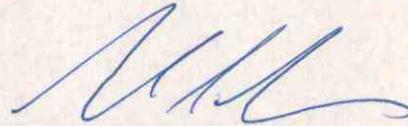
CONCLUSION

In enacting the Residential Landlord-Tenant Act the Legislature exercised great care "in delineating the specific rights, duties, and remedies of both landlords and tenants." *State v. Schwab*, 103 Wn.2d 542, 551, 693 P.2d 108 (1985). The trial court cast aside the protections afforded to the landlord by RCW 59.18.390(1) that are conditions precedent to a stay. If a trial court can waive a landlord's statutory right to a bond and to notice of the hearing where a bond is set, what landlord's right can a trial court not waive? Landlord

Reynolds respectfully requests that the Supreme Court hold that while a tenant may obtain an order to show cause ex parte, a bond that meets the standard of RCW 59.18.390(1) is a required condition precedent to a stay; and that the landlord is entitled to notice of the hearing where the stay will be considered.

DATED: October 8, 2018

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "M. Gusa", written over a horizontal line.

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