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No. 95575-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RANDY REYNOLDS & ASSOCIATES, INC.

Appellant,

vs.

KASEY HARMAN ET AL.,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENT- KASEY
HARMAN

NORTHWEST JUSTICE PROJECT

Scott Crain, WSBA # 37224
401 2nd Avenue, South, Suite 407
Seattle, WA 98104
(206) 707-0900
Scottc@nwjustice.org

Jennifer Ammons# 38892
715 Tacoma Ave. S.
Tacoma, WA 98402
(253)272-7879
Jennifera@nwjustice.org

Stephen Parsons, WSBA # 23440
715 Tacoma Ave. S
Tacoma, WA 98402
(253)272-7879
Stevep@nwjustice.org

KING COUNTY BAR
ASSOCIATION

Edmund Witter, WSBA # 52339
1200 5th Ave. Suite 700
Seattle, WA 98101
(206)267-7019
Edmundw@kcba.org

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I. INTRODUCTION

Petitioner Kasey Harman (“Harman”), the Defendant and losing party in the unlawful detainer action below, was evicted from her home by a writ of restitution. She did not appeal.

Despite prevailing on every issue below, her landlord, Randy Reynolds and Associates, Inc. (Reynolds), appealed, solely because Harman had received a 4-day stay of the writ of restitution to allow the court to hear her defense. Already homeless, disabled, and without any income, Harman did not participate in the appeal. Nonetheless, the Court of Appeals proceeded to render a decision in the moot case, sanction Harman for not participating, and award attorney fees to Reynolds for appealing as a non-aggrieved party.

This decision not only improperly imposes additional costs and fees on a disabled and indigent tenant, it also puts other similarly situated tenants at risk of losing their housing without ever being heard by the court, because it impermissibly encroaches on the courts’ inherent equitable authority to grant emergency stays when default orders are challenged. This Court should either vacate the Court of Appeals decision as an improperly entered advisory opinion or reverse the Court of Appeals decision on the merits, based on the adequate briefing now available.

II. ASSIGNMENTS OF ERROR & ISSUES FOR REVIEW

1. The Court of Appeals erred by allowing a party who was not aggrieved to seek review.

ISSUE: Whether Randy Reynolds & Associates, Inc. was an aggrieved party under RAP 3.1. (no)

2. The Court of Appeals erred by issuing a ruling in a moot case in the absence of an adverse party, adequate factual development below, and adequate briefing from both sides on appeal.

ISSUE: Whether the Court of Appeals improperly applied the public interest exception to the general rule requiring dismissal of moot cases when there was no adverse party on appeal, inadequate factual development and litigation of the issues below, and an absence of zealous and quality advocacy with adequate briefing of the issues from both sides on appeal. (yes)

3. The Court of Appeals erred by improperly admitting and relying upon evidence from outside the record.

ISSUE: Whether the Court of Appeals improperly admitted and relied on evidence from outside the record contrary to the requirements of RAP 9.10 and RAP 9.11 and in conflict with decisions of other Washington appellate courts. (yes)

4. The Court of Appeals erred by failing to consider CR 62 and the trial court's inherent equitable authority as a basis for support of the trial court's decision to stay the writ of restitution.

ISSUE: Whether CR 62 applies to a stay of a writ of restitution entered by default in an unlawful detainer proceeding. (yes)

III. STATEMENT OF THE CASE

Petitioner, Kasey Harman, hereby adopts her Statement of the Case set forth in her Petition for Review. *See* Petition, 2-5.

IV. ARGUMENT

In addition to the argument set forth in the Petition for Review, Harman submits the following argument in support of her position on the issues above.

A. Reynolds is not an aggrieved party because it suffered no loss as a result of the four-day stay of the writ of restitution

Rule of Appellate Procedure (RAP) 3.1 states that “[o]nly an aggrieved party may seek review by the appellate court.” Randy Reynolds and Associates, Inc. (Reynolds) is not an aggrieved party because it prevailed in the trial court on all of the issues upon which it sought relief. Moreover, Reynolds has not identified any substantial right the commissioner impaired when she stayed the writ for four days. Weighed against the right of a party to be heard on her motion to vacate a default

without being first rendered homeless, any right alleged by Reynolds is insubstantial at best.

Whether Reynolds was an aggrieved party with a right to appeal depends on what right the trial court affected. “An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected.” *Cooper v. City of Tacoma*, 47 Wn. App. 315, 316 (1987) (citations omitted). “The mere fact that one may be hurt in his feelings, or be disappointed over a certain result . . . does not entitle him to appeal.” *Sheets v. Benevolent Protective Order of Keglers*, 34 Wn.2d 851, 855, 210 P.2d 690 (1949). “He must be ‘aggrieved’ in a legal sense.” *Id.* (citations omitted). Likewise, where the trial court adjudicates all issues in favor of a party in its final judgment, that party cannot be aggrieved in a legal sense. *See Water’s Edge Homeowners Ass’n v. Water’s Edge Assocs.*, 152 Wn. App. 572, 600, 216 P.3d 1110 (2009) (finding case where all claims settled to have no aggrieved party). If a final judgment cures the errors of a previous order of the court, then the party affected is not aggrieved. *See Schulze v. Oregon R. & Nav. Co.*, 41 Wn. 614, 618, 84 P. 587 (1906) (dismissing appeal where previous court order was superseded by final judgment). “Moreover, a party is not entitled to seek review of an issue by a higher court when it prevails on that issue below.” *See State v. Alexander*, 125 Wn.2d 717, 721 n. 6, 888 P.2d 1169 (1995).

In *Cooper v. City of Tacoma*, an injured firefighter sought judicial review of an administrative decision that his injuries were non-duty-related. *Cooper*, 47 Wn. App. at 316-317. The trial court agreed with Cooper and found his injuries were duty-related. *Id.* The city appealed the trial court's finding, but the Court of Appeals dismissed the appeal on the basis that the city was not an aggrieved party. *Id.* The court reasoned the city was not an aggrieved party because the distinction of non-duty or on-duty made no difference, because the city was required to disburse the same amount of money either way. *Id.* Therefore, the City had no pecuniary interest in the outcome of the appeal, nor was the City's personal or proprietary rights substantially affected by the order. *Id.*

In *State v. Tarrer*, a defendant vacated a criminal conviction, but sought review of the trial court's order vacating his sentence because he wanted his guilty plea to stay intact. 140 Wn. App. 166, 165 p.3D 35 (2007). The court dismissed the appeal because Tarrer prevailed on his motion to vacate the conviction and was thus not aggrieved. The court stated: "An aggrieved party must have a present substantial interest in the subject matter of the appeal and he must be aggrieved 'in a legal sense.'" *Id.* at 169 (quoting *State v. Mahone*, 98 Wn.App. 342, 347-48, 989 P.2d 583 (1999)).

The proceedings here may not have gone according to plan, but that does not make Reynolds an aggrieved party under RAP 3.1. The court

issued the stay on September 19, which lasted until September 23. There is no evidence before this Court that Reynolds suffered any harm as a result. The earliest date on which the writ could have been executed but for the stay was September 23. The earliest date on which it could have been executed because of the stay is still September 23. There is no evidence that the Sheriff would have enforced the writ any sooner than September 29. The trial court did not even make a final determination as to whether Reynolds would be entitled to a bond or a writ pending trial—it merely stayed enforcement of the judgment until a full hearing on the merits of the motion to vacate could be had. If the court had found cause to vacate the judgment and set the matter for trial, it could have then imposed a bond pursuant to RCW 59.18.390. Because Reynolds ultimately prevailed and no trial occurred, bond was unnecessary.

The Court may disregard RAP 3.1 in the “rare situation” where the interests of justice require it. *State v. Watson*, 155 Wn.2d 574, 577-78, 122 P.3d 903 (2005). This is not that situation. Reynolds obtained a judgment for all of the relief it sought—full rent for August and September and the right to amend the judgment to recoup damages to the premises that occurred during the litigation. CP 20-22. Reynolds additionally sought and obtained a supplemental judgment for its attorney fees incurred in opposing the stay. CP 39. Reynolds’s rights were in no way prejudiced by the brief

stay the commissioner granted. Under RAP 3.1, Reynolds is not an aggrieved party.

B. A trial court is not prohibited by RCW 59.18.390 from vacating a default judgment or granting an emergency stay

Nothing in RCW 59.18.390 limits the ability of the court to set aside a default judgment or order or to grant a stay of the writ of restitution. Read properly in the context of the full unlawful detainer statutory structure, RCW 59.18.390 applies only to stays pending trial. This reading is consistent with longstanding policy disfavoring defaults, properly construes the statute in favor of the tenant, harmonizes the relevant court rules and statute, and avoids an improper legislative encroachment on the courts' inherent powers.

1. RCW 59.18.390 is not inconsistent with the civil rules regarding default judgments and stays.

The unlawful detainer statutes¹ create a special proceeding to provide landlords with a rapid method for regaining use of their real property. *Christensen v. Ellsworth*, 162 Wn.2d 365, 370-371, 173 P.3d 228 (2007). Individual provisions of the act should not be interpreted separately but in the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. *Dep't of Ecology v.*

¹ RCW 59.12.030 et seq. and RCW 59.18.365-.410.

Campbell & Gwinn, LLC, 146 Wn.2d 1, 10-11, 43 P.3d 4 (2002). The Civil Rules (CR) apply to unlawful detainer actions unless they are expressly inconsistent with provisions of the unlawful detainer statutes. RCW 59.12.180; *Christensen*, 162 Wn.2d at 373-375. “If a statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both....” *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 980, 216 P.3d 374 (2009).

It is thus important to understand where RCW 59.18.390 fits within the unlawful detainer statutes. At any time after filing an unlawful detainer action, a landlord may apply to the court for an order directing the tenant to appear and show cause why a writ of restitution should not issue directing the sheriff to remove the tenant and restore possession of the property to the landlord. RCW 59.18.370; RCW 59.12.090. The show cause hearing may be—and typically is—held as little as seven days later. RCW 59.18.370. At the show cause hearing, the tenant has an opportunity to present any defenses he or she has and the trial court examines witnesses to determine the merits of the complaint and answer. RCW 59.18.380. The show cause hearing is a “summary proceeding[] to determine the issue of possession pending a lawsuit,” which is not intended to be “the final determination of the rights of the parties in an unlawful detainer action.” *Carlstrom v. Hanline*, 98 Wn. App. 780, 788, 990 P.2d 986 (2000).

RCW 59.18.390 establishes procedures for the execution and stay of the writ of restitution after a show cause hearing but pending trial. To balance the landlord's right to a prejudgment writ, RCW 59.18.390 provides an additional substantive protection for tenants who have lost at a show cause hearing, allowing them to remain in the premises by posting a bond to indemnify the landlord pending the remainder of the civil action:

The sheriff shall, upon receiving the writ of restitution, forthwith serve a copy thereof upon the defendant, his or her agent, or attorney, or a person in possession of the premises, and *shall not execute the same for three days thereafter, and the defendant, or person in possession of the premises within three days after the service of the writ of restitution may execute to the plaintiff a bond to be filed with and approved by the clerk of the court in such sum as may be fixed by the judge*, with sufficient surety to be approved by the clerk of the court, conditioned that they will pay to the plaintiff such sum as the plaintiff may recover for the use and occupation of the premises, or any rent found due, together with all damages the plaintiff may sustain by reason of the defendant occupying or keeping possession of the premises, together with all damages which the court theretofore has awarded to the plaintiff as provided in this chapter, and also all the costs of the action.

RCW 59.18.390 (emphasis added); *see also Housing Authority of Pasco & Franklin County v. Pleasant*, 126 Wn. App. 382, 390, 109 P.3d 422 (2005).

This particular statute allows tenants a way to remain housed during the potentially lengthy period between a show cause hearing and the final determination of their rights at trial.

In the present case, however, no show cause hearing was held, and the case was not set for trial. Instead, a default judgment was taken without notice to Harman and a writ of restitution issued by default.

Contrary to Reynolds's claims, RCW 59.18.390 does not apply to default judgments. RCW 59.18.390 neither prohibits tenants from seeking to vacate a default judgment pursuant to the Civil Rules nor specifies the procedures for doing so. It immediately follows the statute on show cause hearings and presumes the occurrence of such a hearing. It does not address situations in which tenants had no opportunity to present their case because a default judgment was entered improperly or without jurisdiction.

Since there is nothing in RCW 59.18.390 that specifies the procedure for vacating a default judgment, the Court must look to the Civil Rules for guidance. *See generally Christensen*, 162 Wn.2d 365. The Civil Rules provide for a procedure by which a party seeking to set aside a default judgment or order can seek a stay of the execution of the judgment pending a hearing of the motion. CR 55; CR 60; CR 62. CR 62(b) grants authority to stay enforcement of a judgment for the relatively brief period before a motion may be heard to vacate a default under CR 60. The trial court has

discretion to decide whether a stay should be entered and determine what conditions should be placed upon the stay “for the security of the adverse party.” CR 62(b).

When interpreting the unlawful detainer statutes, those statutes should be “strictly construed in favor of the tenant.” *Housing Authority v. Terry*, 114 Wn.2d 558, 564, 789 P.2d 745 (1990); *Wilson v. Daniels*, 31 Wn.2d 638, 643, 198 P.2d 496 (1948) (“Since unlawful detainer statutes are in derogation of the common law, they must be strictly construed in favor of the tenant.”). A restriction on the tenant’s ability to seek *ex parte* relief for an emergency would create hardship on the tenant. By reading into the unlawful detainer statutes a restriction on the application of *ex parte* stays and the Civil Rules, the Court of Appeals construed them in a manner unfavorable to the tenant and created further restrictions on the tenant not specified by the Legislature.

2. Reading RCW 59.18.390 to apply to default judgments inappropriately limits the equitable powers of the Superior Courts.

Limiting the application of Civil Rules 55, 60 and 62 raises constitutional questions regarding separation of powers and the ability of the Legislature to limit the Court’s exercise of its inherent equitable authority to administer its own cases, set aside its own judgments, maintain the status quo pending a hearing, and to dispose of cases on the merits. The

Superior Court is vested with powers in equity by Article IV, Sec. 6 of the Washington Constitution, including the power to provide immediate relief to a party likely to suffer imminent, irreparable harm in order to prevent an injustice. *Tyler Pipe Industries, Inc. v. State Dept. of Revenue*, 96 Wn.2d 785, 638 P.2d 1213 (1982) (holding that the ability to issue an injunction is an essential equitable power of the court and that the “legislature can never totally deprive the courts of their constitutional equity power.”); *Bowcutt v. Delta North Star Corp.*, 95 Wn. App. 311, 976 P.2d 643 (1999) (“The writ of injunction is the ‘strong arm of equity.’ So any legislation that diminishes the superior court's constitutional injunctive powers is void.”).

Default judgments in unlawful detainer proceedings fall precisely within this situation, where a party was deprived of an opportunity to be heard at the initial hearing and faces imminent loss of housing as a result. Courts across the country have held that the threat of loss of housing is an emergency necessitating ex parte relief. *Tellock v. Davis*, No. 02-CV-4311 (FB), 2002 WL 31433589, at *7 (E.D.N.Y. Oct. 31, 2002), *aff'd*, 84 F. App'x 109 (2d Cir. 2003) (“[t]he threat of eviction and the realistic prospect of homelessness constitute a threat of irreparable harm and satisfies the first prong of the test for preliminary injunctive relief.”); *McNeill v. New York City Hous. Auth.*, 719 F. Supp. 233, 254 (S.D.N.Y. 1989) (“The threat of eviction and the realistic prospect of homelessness constitute a threat of

irreparable injury, and satisfies the first prong of the test for preliminary injunctive relief. Even in areas outside of New York City, where the low income housing shortage is less acute, courts have held that the threat of eviction constitutes a threat of ‘irreparable injury.’”); *Owens v. Hous. Auth. of City of Stamford*, 394 F. Supp. 1267, 1271 (D. Conn. 1975) (“Third, equitable factors weigh heavily in favor of exercising federal jurisdiction. With impending eviction from their homes almost a certainty, the plaintiffs’ harm is great and immediate; with low rent public housing as scarce as it is, the injury suffered by eviction is irreparable.”); *Tenants for Justice v. Hills*, 413 F. Supp. 389, 393 (E.D. Pa. 1975) (“Unless evictions are stayed, plaintiffs will clearly suffer great and irreparable harm.”).

Furthermore, the court has inherent authority to regulate its own procedures and fashion appropriate remedies with respect to its procedures to ensure the protection of substantive rights. *City of Spokane v. J-R Distributors, Inc.*, 90 Wn.2d 722, 727, 585 P.2d 784 (1978); *Rummens v. Guaranty Trust Co.*, 199 Wn. 337, 347-348, 92 P.2d 228 (1939). “The power to regulate the practice and procedure of the superior courts is one which is inherently judicial. . . . That judicial power may not be abrogated or restricted by any legislative act.” *J-R Distributors*, 90 Wn.2d at 727. While the Legislature may regulate such procedures, “the courts are not required to recognize a legislative restriction which has the effect of

depriving them of a constitutional grant or of one of their inherent powers.”
Blanchard v. Golden Age Brewing, 188 Wn. 396, 407 63 P.2d 397, 418
(1936).

Similarly, in other states, the Courts have found that a legislative restriction on the court’s ability to stay an eviction pending a full hearing could not be supported. *See, e.g., Jones v. Allen*, 185 Misc.2d 443 (NY App. Div., 2000) (“We fail to see how it can be said that a statute which binds the hands of the court and requires it to stand idly by while its process is used to effectuate an unjust eviction does not interfere with a core function of the court. Inasmuch as the Legislature’s limitation of the traditional judicial authority over the granting of temporary stays substantially detracts from the ability of the court to achieve a just resolution of the summary proceeding, it cannot withstand constitutional scrutiny.”)

The ability of the court to set aside a default judgment is an exercise of equitable power vested in the court. *Morin v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956 (2007); *Roth v. Nash*, 19 Wn.2d 731, 738, 144 P.2d 271, 275 (1943) (stating that the procedure for vacating a default is “equitable in its character, administered upon equitable principles, and extended upon equitable terms.”). The exercise of the court’s authority to set aside defaults is within its stated policy to dispose of cases on the merits. *Morin*, 160 Wn.2d at 754 (“[W]e do not favor default judgments...[w]e prefer to give

parties their day in court and have controversies determined on their merits.”).

To read RCW 59.18.390 as a limitation on the court’s ability to stay execution of a default judgment would be an unconstitutional encroachment on the equitable power of the court. Any construction of the unlawful detainer statutes requires that the Court interpret the statute in a constitutionally-consistent manner. *See City of Seattle v. Webster*, 115 Wn.2d 635, 802 P.2d 1333 (1990) (holding that, where possible, court should construe language of statute to uphold constitutionality). In creating the unlawful detainer statutes, the Legislature did not intend to limit the court’s vested authority to vacate default judgments, especially where there the court lacked jurisdiction to enter the default judgment in the first place; rather, a proper reading of the statute is that the Legislature intended to preserve the court’s ability to fashion an equitable remedy and to leave fully intact the court’s authority to stay its own orders and judgments in order to avoid an unjust result.

Reynolds advocates for a decision that would unduly restrict the trial court’s ability to stay its own orders or provide immediate relief pending a hearing. Such a reading would be hostile to the fair administration of justice and create unfair results. For example, the King County Bar Association’s Housing Justice Project regularly helps tenants who have been improperly

defaulted in an unlawful detainer despite having served and filed a notice of appearance in the action. The tenant will file a motion to vacate the default and seek a stay of the execution of the writ pending determination of the underlying motion to vacate the default. While the Housing Justice Project will take steps to afford proper notice by fax, phone, and email to the opposing party so that the opposing party may appear, it is not always possible to locate the opposing party before the writ could be executed. As a result, a tenant in such circumstances will need an *ex parte* stay in order to avoid an unjust eviction pending a full hearing on the merits. In such circumstances, it is a proper exercise of the court's equitable authority pursuant to the Civil Rules to stay execution of the writ and judgment until a full hearing can be heard. *See Rummens v. Guaranty Trust Co.*, 199 Wn. At 347-349 (discussing court's ability to fashion an appropriate remedy where one does not exist). Similarly, where the tenant is contesting the default judgment on the basis that rent is paid, that no landlord-tenant relationship exists, or that the court lacked jurisdiction to hear the case, there is no basis to limit the court's ability to maintain the status quo until a full hearing can be heard.

C. The landlord's argument about waiving the bond does not apply to these facts because the court was trying to determine whether to vacate a default judgment, not stay a writ pending trial

As discussed *supra*, the bond provisions of RCW 59.18.390 are inapplicable to the instant case. When a tenant files a motion to vacate a default judgment, the court may stay the execution of the judgment and writ on such conditions as the court deems proper. CR 62(b) (“In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceeding.”). Unlike the language used in RCW 59.18.390, Civil Rule 62 leaves the requirement of a bond or surety to the discretion of the court. Since a party seeking to vacate a default judgment may be doing so on the basis that the court lacks jurisdiction or, in the case of an unlawful detainer, that the rent allegedly owed has been paid, the court should have discretion to waive the requirement as it would be unduly burdensome to require a duplicative or unnecessary payment to maintain the status quo.

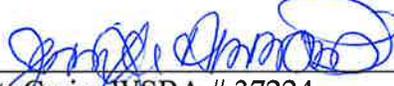
V. CONCLUSION

The Court of Appeals erred by reviewing a case for a party who was not aggrieved. It further erred by applying the public interest exception to mootness in this case and relying on additional evidence from outside the record. Because of these errors, this Court should vacate the Opinion of the Court of Appeals, including its award of attorney fees and the sanction against Harman.

If this Court chooses to reach the merits of the case, now that the issues have been adequately briefed by both sides of the case, it should hold that RCW 59.18.390 does not apply to stays of writs of restitution entered by default and reverse the Court of Appeals' ruling, including its award of attorney fees and the sanction against Harman, for the reasons above.

Respectfully submitted on July 6, 2018.

Northwest Justice Project

By: 
Scott Crain, WSBA # 37224
Stephen Parsons, WSBA # 23440
Jennifer Ammons, WSBA #38892
Attorneys for Petitioner

King County Bar Association
Housing Justice Project

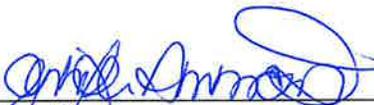
Edmund Witter, WSBA # 52339
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I certify that on this date I caused to be served by filing with the Court's electronic filing portal the foregoing Petition for Review to:

Gusa Law Office
3025 Limited Lane NW Ste. 104
Olympia, WA 98502

Dated this 6th day of July, 2018.



Jennifer Ammons

NORTHWEST JUSTICE PROJECT

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- edmundw@kcba.org
- lesliewowen@gmail.com
- mmorzol@gmail.com
- scottc@nwjustice.org
- stevep@nwjustice.org
- thornton.kimberlee@yahoo.com

Comments:

Sender Name: Evan Purcell - Email: evanp@nwjustice.org

Filing on Behalf of: Jennifer Ammons - Email: jennifera@nwjustice.org (Alternate Email:)

Address:

715 Tacoma Ave. S.

Tacoma, WA, 98406

Phone: (253) 272-7879

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