IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. _____

No. 85225-6

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ESA MANAGEMENT, LLC,

Petitioner,

v.

ALLEN WATKINS and JANIS CLARK,

Respondents.

PETITION FOR REVIEW BY ESA MANAGEMENT, LLC

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I. IDENTITY OF PETITIONER

ESA Management, LLC ("ESA") asks this Court to accept review of the decision designated in Part II.

II. COURT OF APPEALS DECISION

ESA seeks review of the Division One published opinion *Watkins v. ESA Mgmt., LLC*, No. No. 85225-6-I, 547 P.3d 271, filed April 29, 2024. (Appendix A). ESA moved for reconsideration pursuant to RAP 12.4, which Division One denied by Order filed May 23, 2024. (Appendix B).

III. ISSUES PRESENTED FOR REVIEW

(1) Did the Court of Appeals err in not determining whether any current actual possessor of the subject real property—a hotel room—is a necessary, indispensable party under Court Rule 19?

(2) Is a current actual possessor of the subject real property a necessary and indispensable party under Court Rule 19 and due process of law?

IV. STATEMENT OF THE CASE

1. The Parties and Claims Asserted.

ESA owns and manages a hotel property in Tukwila, Washington. Appellants-Respondents Allen Watkins and Janis Clark's ("Respondents") were hotel guests at the property and fell substantially behind on their rent payments. CP 38. ESA initiated an unlawful detainer action, however, later concluded that Respondents had abandoned the property. CP 37. It then no longer pursued its unlawful detainer action.

Respondents initiated a forcible entry and detainer action under RCW 59.12 *et seq*. against ESA on January 5, 2023. CP 1-10. On January 23, 2023, Petitioner filed a motion to dismiss the complaint with an accompanying declaration, stating under penalty of perjury that there are new guests in Respondents' former hotel room who had been there several weeks. CP 33-38. On February 1, 2023, the Commissioner dismissed the complaint after conducting a hearing on ESA's motion to dismiss. CP 48. The trial court then denied Respondents' motion to revise the

Commissioner's order of dismissal, incorporating the Commissioner's findings and conclusions. CP 49-50.

2. Court of Appeals Decisions.

Appellants/Respondents appealed the trial court ruling, and on appeal, the Court of Appeals reversed the trail court's dismissal order and remanded the case for further proceedings, issuing an opinion on March 25, 2024. In its Response brief, ESA argued, in part, that pursuant to CR 19, the current actual possessor of the real property at issue is a necessary, indispensable party to the action. In its opinion, the Court of Appeals determined under RCW 59.12.060, not CR 19, that "appellants must join a new tenant of the unit (if any) to maintain their forcible entry and detainer action."[1] ESA's CR 19 argument was not addressed.

[1] *Watkins v. ESA Mgmt., LLC*, 545 P.3d 356, *opinion superseded on reconsideration*, 547 P.3d 271 (Wash. Ct. App. 2024), *and reconsideration granted, opinion withdrawn*, 85225-6-I, 2024 WL 1905055 (Wash. Ct. App. Apr. 29, 2024), *withdrawn from bound volume* (Apr. 29, 2024).

Respondents filed a Motion for Reconsideration of the March 25, 2024 opinion, arguing in part that the Court erred by "concluding that any hotel guest that exists after remand is a necessary party under RCW 59.12.060" because "RCW 59.12.060 only requires a tenant and subtenant, if any, to be a necessary party when they are in actual possession at the time the complaint is filed." *Appellants' Motion for Reconsideration* filed April 15, 2024 at 6. On April 29, 2023, following Respondents' Motion for Reconsideration, the Court of Appeals concluded "that any tenant or subtenant in the actual occupation of the premises when appellants' complaint was filed is a necessary party under RCW 59.12.060 and must be joined if they assert a right to possess the property." Appendix A at 12.

V. ARGUMENT

RAP 13.4(b) provides that a petition for review will be granted by the Washington Supreme Court:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

A significant question of law under the Constitution of the State of Washington and the Constitution of the United States is involved and must be addressed by this Court.

Specifically, though briefed extensively by both parties in this appeal and assigned error (*see Brief of Appellants* at 40; *Brief of Respondent* at 36-40), the issue of joinder under CR 19 of the current actual possessor of the real property at issue is unresolved. The current actual possessor of real property is a necessary and indispensable party under the rule because the failure to join the current possessor obviates their due process rights provided by the Fourteenth Amendment to the United

States Constitution and Article 1, Section 3 of the Washington State Constitution.[2]

Here, it is manifest error to not consider the substantial, protected property interest of the current hotel guest – actual possession – in determining whether a party is necessary and indispensable under CR 19. Consequently, an open, litigated issue remains involving a significant question of law under the Constitution of the State of Washington or of the United States.

A. A current actual possessor of real property's due process rights are materially controverted if they are not joined in an action seeking restitution of real property.

A significant issue of due process under the United States Constitution, the Washington State Constitution, as well as considerations pursuant Court Rule 19 exist here. "Due process

[2] "While we have repeatedly refused to consider errors raised for the first time on appeal, we will consider constitutional issues raised for the first time on appeal." *State v. Sauve*, 100 Wn.2d 84, 86–87, 666 P.2d 894, 896 (1983) (internal citations omitted). "RAP 2.5(a) reflects this view that a 'manifest error affecting a constitutional right' may be raised for the first time in an appellate court." *Id.*

of law as provided by the fourteenth amendment to the United States Constitution and article 1, section 3 of the Washington State Constitution requires adequate notice and an opportunity to be heard prior to deprivation of a significant property interest." *Staley v. Staley*, 15 Wn. App. 254, 256–57, 548 P.2d 1097, 1099 (1976). The current guest in actual possession holds a significant property interest requiring notice and opportunity to be heard. CR 19 provides the procedure for affording that notice and opportunity to the actual possessor.

On remand, the trial court cannot order issuance of a writ of restitution without vitiating the due process rights of the current guest in actual possession. If any current guest is not joined, then the parties will have litigated the guest's rights without notice or opportunity to be heard. "The trial court could not enter any decree without affecting the rights of the successful party before the board of adjustment; and as such, he was an indispensable party to the review." *Andrus v. Snohomish Cnty.*, 8 Wn. App. 502, 509, 507 P.2d 898, 902 (1973). Complete relief

cannot be obtained in the absence of a current guest because the guest's substantive rights cannot be affected by a decision of the trial court. Joinder of the current guest thus is not only necessary but also mandatory under CR 19 and due process of law afforded by both the Washington State Constitution and the United States Constitution.

If the trial court were to fail to order joinder on remand, then the Sheriff can evict that current guest without any prior notice or opportunity to be heard. The prejudice facing the current tenant is evident and substantial. The Court should find any current guest in actual possession to be a necessary and indispensable party and instruct the trial court to order joinder of any current guest in actual possession of the subject property.

B. Court Rule 19 and due process require joinder of necessary and indispensable parties, such as a current guest in actual possession.

To effectuate justice, Court Rule 19 provides an umbrella of protection to necessary and indispensable parties that the trial court must consider before effectuating judgment that would rob

another tenant of his possessory rights and kick them and their personal property to the proverbial curb without any due process.[3]

Court Rule 19 addresses when joinder of absent parties is needed for just adjudication. CR 19 provides in pertinent part (emphasis added):

> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if
>
> **(1) in the person's absence complete relief cannot be accorded among those already parties**, or
>
> (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may

[3] Court Rule 19 provides wider protection, should the elements be of the rule be met, to current tenants in possession than RCW 59.12.060, which provides, in pertinent part, "No person other than the tenant of the premises, and subtenant, if there be one, in the actual occupation of the premises *when the complaint is filed*, need be made parties defendant in any proceeding under this chapter…"

> (A) as a practical matter impair or impede the person's ability to protect that interest or
>
> […]

Consequently, to provide justice and in accordance with CR 19, the Court should find that any current tenant in possession is a necessary party under both or either CR 19(a)(1) and CR 19(a)(2)[4] – each providing separate, independent grounds for a finding that a party is "necessary." The elements of CR 19 necessarily involve analysis of due process of law afforded by the Constitution insofar as litigation would substantially affect the rights of the party not joined as well as affect the court's ability to provide complete relief.

1. The trial court must order joinder of an indispensable party – the current guest in possession – pursuant to CR 19(a)(1).

CR 19(a)(1) has been construed as requiring, subject to the other provisions of the rule, that a party must be joined when

[4] This is regardless of whether they were living at the premises at the commencement of the litigation as contemplated by landlord tenant act. RCW 59.12.060.

complete relief cannot be granted in his absence. *Nolan v. Snohomish Cnty.*, 59 Wn. App. 876, 880, 802 P.2d 792, 794 (1990). Appellants here seek restoration to their former hotel room that a guest currently occupies (or any guest that may occupy that unit upon remand). However, the rights of the then-current guest cannot be affected by the court if the guest is not joined and provided due process.

Zoning and land use cases in which Washington courts have found the owner of the property affected by a land use decision are indispensable parties and are instructive here. "Numerous Washington decisions hold that the owner of property directly affected by a land use decision or a person with an interest in the property which is the subject of the land use decision is a party to be joined in writ proceedings involving that decision." *Crosby v. Cnty. of Spokane*, 137 Wn.2d 296, 305, 971 P.2d 32, 38 (1999). The landowner is an indispensable party in these cases because:

> [H]e is the person "most affected" in any review proceeding, the purpose of which is to invalidate or otherwise affect the use of his property. A decision invalidating or modifying a land use ruling would not be binding upon the landowner if he is not a party. The court would have no jurisdiction over him. It is thus a clear case where complete relief cannot be obtained in his absence because his substantive rights cannot be affected by the decision of the reviewing court.

Nolan, 59 Wn. App. at 880 (emphasis added).

Similarly, a current guest in possession of the subject property faces a ruling that may invalidate or otherwise affect that guest's right to possession and actual possession of the hotel room. Such a ruling would not be binding upon the current guest, and the court would have no jurisdiction over him insofar as removing them from the room. As such, complete relief cannot be granted to Plaintiff. However, without discussing and opining on the CR 19 issues squarely before the court, the Sheriff effectuates that person's dispossession of the property without notice or an opportunity to be heard. At the very least, the current tenant is a necessary party that must be joined if feasible. At

most, the current guest is an indispensable party because the guest's right to possession and actual possession are litigated without him/her.

2. Separately from CR 19(a)(1), any current guest is a necessary party under CR 19(a)(2).

As held in *Burt v. Washington State Dept. of Corr.*, 168 Wn.2d 828, 833–34, 231 P.3d 191, 194 (2010), *as corrected* (Sept. 14, 2010) (internal citations omitted) (emphasis in original):

> CR 19 requires potentially necessary party to have an interest relating to the subject of the action. Once such an interest is established, the party must be "so situated that the disposition of the action in his absence *may* (A) as a practical matter impair or impede his ability to protect that interest...." CR 19(a)(2)(A) (emphasis added). Use of the term *may* suggests a low standard that requires a showing of possibility that the failure to join will impair or impede the party's interest.

The standard of proof that an unjoined party is necessary to current litigation is low.

To deserve protection under CR 19(a)(2), the "interest relating to the subject of the action," must be shown. As

demonstrated above, a current guest's possessory interest carries significant weight and is squarely at issue here. That guest will be the "most affected" by an adverse judgment here – thrown out into the street by the Sheriff without any notice that the parties litigated *the guest's* property rights, much less opportunity to protect their property right in court.

3. Current guest(s) are necessary parties under CR 19(a) and (b) and thus the Court must analyze whether they may be feasibly joined upon remand.

If the absentees are "necessary," the court determines whether it is feasible to order the absentees' joinder. "If the interested party is necessary and is 'subject to service of process and [his or her] joinder will not deprive the court of jurisdiction over the subject matter of the action,' the party in the action '*shall be joined*' by the court if feasible. *Burt*, 168 Wn.2d at 833–34 (quoting Court Rule 19) (emphasis in original).

The actual possessor of the subject property resides in the subject property located in King County and is consequently subject to service of process. Joinder of the actual possessor is

feasible. The joinder will not conceivably destroy the court's jurisdiction. Although limited as summary proceedings, the trial court's jurisdiction is "confined to [possession] and the unlawful or forcible ouster or detention by defendant…" *Gore v. Altice*, 33 Wash. 335, 338, 74 P. 556, 557 (1903). The issue of possession is squarely at issue here, and a party with a right to that possession and in actual possession could not conceivably rob the trial court of jurisdiction.

Petitioner requests that the Court find that any current guest in actual possession is a necessary, indispensable party and instruct the trial court to order joinder order upon remand.

C. This Petition concerns substantial matters of public interest.

RAP 13.4(b)(4) provides the Court with authority to take up this petition because it "involves an issue of substantial public interest that should be determined by the Supreme Court." Court Rule 19 incorporates due process into its analysis. Petitioner and Respondents both briefed this issue before the trial court and Court of Appeals, and yet, the issue remains untouched. The

public has substantial interest and faith that issues presented to the court are resolved, or at least addressed. Here, resolution of the remaining issue would ensure public trust that substantial rights are considered by the courts when the issue is properly raised.

Moreover, resolving the issue of joinder, or providing guidance to the trial court, now promotes judicial efficiency and conserves judicial resources. The public and the Court have substantial interests in those efficiencies and resources. If left untouched, the issue will reappear in this case on remand and may even reappear on appeal should the parties hereto dispute the analysis of the trial court.

VI. CONCLUSION

Actual possession held by any current guest is a significant property interest requiring joinder. Their right to possession and actual possession cannot be litigated without any kind of notice or opportunity to be heard under due process and CR 19.

The Court of Appeals thought it enough to leave the issue resting on RCW 59.12.060, but CR 19 provides the opportunity to supplement the statute to protect an interested third-party's *substantial* rights. The temporal limitation of RCW 59.12.060 is superfluous – a current occupant's actual possession or rights to possession are not changed by the mere passing of time without more. Both parties briefed this issue before the Court of Appeals, yet the issue remains.

ESA respectfully requests that the Court resolve this issue that will certainly reappear on remand. Specifically, ESA requests that the Court instruct the trial court that, on remand, any current guest in actual possession is a necessary and indispensable party to be joined pursuant due process of law and CR 19.

RESPECTFULLY SUBMITTED this 20th day of June, 2024.

I certify that this document contains 2,917 words in compliance with RAP 18.17.

s/Joseph A. Toups

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CERTIFICATE OF FILING AND SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 20th day of June, 2024, I caused a true and correct copy of this document to be delivered to the following counsel of record via the Court of Appeals Filing Portal to:

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ALLEN WATKINS and JANIS CLARK, Appellants, v. ESA MANAGEMENT, LLC, Respondent.	No. 85225-6-I DIVISION ONE PUBLISHED OPINION

FELDMAN, J. — Allen Watkins and Janis Clark (appellants) filed a complaint asserting forcible entry and detainer claims against ESA Management LLC (ESA), which owned and managed the Extended Stay of America property where they resided before ESA entered the unit, removed their belongings, and denied reentry. ESA, in turn, filed a motion to dismiss the complaint, and the superior court granted that motion. In doing so, the trial court erred in two significant respects. First, the superior court erred by failing to treat ESA's motion to dismiss as one for summary judgment and give appellants a reasonable opportunity to present pertinent evidence pursuant to CR 12(b)(6). Second, the superior court erred in granting ESA's motion even though appellants effectively rebutted ESA's substantive argument. We therefore reverse the superior court's order of dismissal and remand the matter for further proceedings. Lastly, any tenant or subtenant in the actual occupation of the premises when appellants' complaint was filed is a

necessary party under RCW 59.12.060 and must be joined if they assert a right to possess the property.

I.

Appellants were hotel guests residing at an Extended Stay of America property in Tukwila, Washington owned and managed by ESA. In August 2022, ESA filed an unlawful detailer proceeding, claiming that appellants were substantially behind in their payment of rent. A show cause hearing was scheduled for October 18, 2022, but continued on two occasions and finally scheduled for December 2, 2022. However, prior to the hearing, ESA purportedly concluded that appellants had abandoned the property. Based on this belief, ESA entered appellants' unit, removed their belongings, and denied appellants reentry. Having engaged in self-help, ESA voluntarily dismissed its unlawful detainer action.

Unable to reenter their unit, appellants filed the instant action for forcible entry and detainer on December 29, 2022 and filed a writ of restitution to return to the unit pending the result of the action. A commissioner set a hearing on the writ of restitution for January 23, 2023 and directed that ESA file a response by January 18 and appellants file a reply by January 20. Instead of complying with the briefing schedule, ESA filed a motion titled "DEFENDANT'S MOTION TO DISMISS" on January 23, 2023 and noted the motion for a hearing the same day. In its motion, ESA argued that appellants had abandoned the property and therefore were not in possession of the property as required to obtain relief under RCW 59.12.010 (forcible entry) and RCW 59.12.020 (forcible detainer). To support its abandonment argument, ESA attached to its motion a declaration of a general manager of the Extended Stay of America property asserting that appellants

abandoned the premises following a "huge fight." After ESA filed its motion, the court continued the hearing to February 1, 2023. Appellants then filed a responsive brief on January 30, 2023 titled "PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR WRIT OF RESTITUTION PURSUANT TO RCW 59.12.090 and RESPONSE TO DEFENDANT'S MOTION TO DISMISS."

At the hearing on February 1, 2023, a commissioner heard oral argument on ESA's motion to dismiss despite appellants' assertion that the motion had not properly been noted for decision and was, in effect, an untimely response to their motion for a writ of restitution. Addressing the merits of the motion to dismiss, and without permitting appellants to testify, the commissioner concluded that appellants had not provided a sufficient basis to rule in their favor on their underlying claims for forcible entry and detainer. The commissioner granted ESA's motion to dismiss and declined to rule on ESA's oral motion for a judgment for unpaid rent. Finally, appellants filed a motion for revision. A superior court judge denied the motion to revise, adopted the commissioner's oral findings and rulings, and granted ESA's motion to dismiss. *Id.* This timely appeal followed.

II.

A.

Appellants claim that the superior court erred when it "converted ESA's motion to dismiss into a motion for summary judgment without giving appellants an opportunity to submit pertinent evidence." We agree.

"Generally, we review the superior court's ruling, not the commissioner's. But when the superior court denies a motion for revision, it adopts the commissioner's findings, conclusions, and rulings as its own." *State ex rel. J.V.G.*

v. Van Guilder, 137 Wn. App. 417, 423, 154 P.3d 243 (2007) (citing *In re Marriage of Stewart*, 133 Wn. App. 545, 550, 137 P.3d 25 (2006)). As discussed below, the dispositive issue here is the proper application of CR 12(b)(6), which governs motions to dismiss. The application of a court rule to a particular set of facts is a question of law subject to de novo review. *Wiley v. Rehak*, 143 Wn.2d 339, 343, 20 P.3d 404 (2001).

The essential purpose of a CR 12(b)(6) motion to dismiss is "'to determine if a plaintiff can prove any set of facts that would justify relief.'" *Freedom Found. v. Teamsters Local 117 Segregated Fund*, 197 Wn.2d 116, 139, 480 P.3d 1119 (2021) (quoting *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012)). "Generally, in ruling on a CR 12(b)(6) motion to dismiss, the trial court may only consider the allegations contained in the complaint and may not go beyond the face of the pleadings." *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725, 189 P.3d 168 (2008). But in ruling on a motion to dismiss, a court "may take judicial notice of public documents if their authenticity cannot be reasonably disputed" and may likewise consider "[d]ocuments whose contents are alleged in a complaint" even when such documents "are not physically attached to the pleading." *Id.* at 725-26.

The issue here is what procedural protections apply when a moving party submits with a CR 12(b)(6) motion, and the court does not exclude, documents that are not subject to judicial notice or attached to or referenced in the operative pleading. Addressing that issue, CR 12(b) states,

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not

> excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

The rule is clear and unequivocal: if matters outside the pleading are presented to and not excluded by the court in deciding a motion to dismiss, the motion *shall* be treated as one for summary judgment and all parties *shall* be given reasonable opportunity to present pertinent evidence.

"A court rule 'must be given its plain meaning, and when the language is clear a court cannot construe it contrary to its plain language.'" *In re Carlstad*, 114 Wn. App. 447, 455, 58 P.3d 301 (2002) (quoting *City of Kirkland v. Ellis*, 82 Wn. App. 819, 826, 920 P.2d 206 (199)). Thus, for example, this court held in *Zurich Services Corporation v. Gene Mace Construction* that "once extrinsic evidence is admitted and considered, a motion on the pleadings should be converted to a motion of summary judgment" and "[i]n that event, all parties must be given reasonable opportunity to present all material made pertinent to such a motion by CR 56." 26 Wn. App. 2d 10, 21, 526 P.3d 46 (2023) (quoting *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d at 206, and CR 12(c)). The court also recognized in *Zurich* that "affidavits . . . are extrinsic evidence that may not be considered as part of the pleadings." *Id.*

Here, the superior court was required to treat ESA's motion to dismiss as a motion for summary judgment because ESA presented-—and the court did not exclude-—a declaration that presented matters outside the pleading, including *factual assertions* regarding appellants' purported intent to abandon the property. Because ESA submitted this declaration and the superior court did not exclude it,

the court was required by CR 12(b) to treat ESA's motion as one for summary judgment and give appellants a reasonable opportunity to present all material made pertinent to such a motion by CR 56. The court erred when it failed to do so.[1]

B.

The superior court's procedural error, as recounted above, requires that the matter be remanded for summary judgment proceedings in accordance with the substantive and procedural requirements of CR 56. We need not do so here because appellants also argue, and we again agree, that dismissal of their claims "cannot be upheld under CR 12(b)(6) [or] CR 56."

Because ESA's motion was, in substance, a summary judgment motion, "the standard of review on appeal is the same as for summary judgment." *Blenheim v. Dawson & Hall Ltd.*, 35 Wn. App. 435, 438, 667 P.2d 125 (1983); *Zurich*, 26 Wn. App. 2d at 24. A motion for summary judgment may be granted when there is "no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Ramey v. Knorr*, 130 Wn. App. 672, 685, 124 P.3d 314 (2005) (quoting CR 56). "The standard of review for a summary judgment order is de novo . . . viewing the facts and reasonable inferences in the light most favorable to the nonmoving party." *Id.*

[1] Although Appellants asserted at the February 1, 2023 hearing that ESA had not properly noted its motion to dismiss for decision, they did not argue that the court could not properly consider the attached declaration without treating the motion to dismiss as one for summary judgment and giving appellants a reasonable opportunity to present pertinent evidence. The better practice is to specifically object, citing the controlling portion of CR 12(b), as failure to do so could potentially constitute waiver. *See e.g. Zurich,* 26 Wn. App. 2d at 35 ("court may imply an otherwise unstated waiver . . . where it appears affirmatively from the record no affected party was prejudiced"); *Podbielancik v. LPP Mortg. Ltd.* 191 Wn. App. 662, 666, 362 P.3d 1287 (2015) ("If a party fails to object to an affidavit or bring a motion to strike improper portions of an affidavit, any error is waived.").

Summary judgment motions are governed by "'a burden-shifting scheme.'" *Welch v. Brand Insulations, Inc.*, 27 Wn. App. 2d 110, 114, 531 P.3d 265 (2023) (quoting *Bucci v. Nw. Tr. Servs., Inc.*, 197 Wn. App. 318, 326, 387 P.3d 1139 (2016)). "The moving party bears the initial burden 'to prove by uncontroverted facts that there is no genuine issue of material fact.'" *Id.* (quoting *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977)). If the moving party satisfies its burden, then the burden shifts to the nonmoving party to "'set forth specific facts evidencing a genuine issue of material fact for trial.'" *Id.* (quoting *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995)).

Three statutes govern proof of appellants' claims. First, regarding forcible entry claims, RCW 59.12.010 states as follows:

> Every person is guilty of a forcible entry who either—(1) By breaking open windows, doors or other parts of a house, or by fraud, intimidation or stealth, or by any kind of violence or circumstance of terror, enters upon or into any real property; or—(2) Who, after entering peaceably upon real property, turns out by force, threats or menacing conduct the party in actual possession.

Second, the forcible detainer statute, RCW 59.12.020, states in relevant part:

> Every person is guilty of a forcible detainer who . . . in the nighttime, or during the absence of the occupant of any real property, enters thereon, and who, after demand made for the surrender thereof, refuses for the period of three days to surrender the same to such former occupant. The occupant of real property within the meaning of this subdivision is one who for the five days next preceding such unlawful entry was in the peaceable and undisturbed possession of such real property.

Lastly, RCW 59.12.140, titled "Proof in forcible entry and detainer," states:

> On the trial of any proceeding for any forcible entry or forcible detainer the plaintiff shall only be required to show, in addition to a forcible entry complained of, that he or she was peaceably in the actual possession at the time of the forcible entry; or, in addition to a

> forcible detainer complained of, that he or she was entitled to the possession at the time of the forcible detainer.

Thus, to obtain relief for forcible entry and detainer, appellants were required to show that (1) ESA entered their unit in their absence, (2) ESA refused to allow them to reenter the unit for three days, and (3) they were in peaceable and undisturbed possession of the property for five days preceding the forcible entry.

ESA argued below that appellants' claims failed as a matter of law because they abandoned the property and therefore were not in peaceable and undisturbed possession of the property for five days preceding the forcible entry. Construing RCW 59.12.140 (quoted above), our Supreme Court has held that a plaintiff, "on the question of possession, [is] only required to show that he was, for the period of five days next preceding… entry, in the peaceable and undisturbed possession of the property." *Randolph v. Husch*, 159 Wash. 490, 495, 294 P. 236 (1930). The Court has also explained that to have peaceable and undisturbed possession "[i]t is not essential that there be a continuous personal presence on the land, but there must be exercised at least some actual physical control with the intent and apparent purpose of asserting dominion." *Id.* at 496. "The true intent of the statute by these words and by the five-day limitation is to exclude a momentary or scrambling actual possession; not to describe a constructive possession." *Id.*

ESA's motion to dismiss and accompanying declaration do not establish, as a matter of law, that appellants were not in peaceable and undisturbed possession of the property for five days preceding the forcible entry. The declaration states that on November 6 or 7, 2022 appellants got into a "huge fight" and police were called to the property to intervene. Then, shortly after the fight, appellants "left the

Property." Based on these events—leaving the property for a few days following a fight—ESA's declarant summarily concludes that appellants "chose to voluntarily leave the Property." This declaration, consisting entirely of self-serving speculation and bald assertion, falls well short of proving by uncontroverted facts that there is no genuine issue of material fact as to whether appellants abandoned the property.

But even if ESA met its initial burden of production on summary judgment, appellants' verified complaint sets forth specific facts evidencing a genuine issue of material fact for trial. While Washington courts have not squarely decided the issue, the Ninth Circuit has held that "a verified complaint may serve as an affidavit for purposes of summary judgment if it is based on personal knowledge and if it sets forth the requisite facts with specificity." *Moran v. Selig*, 447 F.3d 748, 759, n.16 (9th Cir. 2006). We apply that rule here because the verified complaint sets forth the requisite facts with specificity and states, under penalty of perjury, that the statements in the complaint are true and correct. Thus, the complaint is in all material respects comparable to a declaration.

As to the content of the verified complaint, it asserts that "Mr. Watkins was temporarily absent from his unit beginning on or about November 9, 2022. Mr. Watkins intended to return to his unit and left all his belongings inside the unit as well as his car in the parking lot." These facts sufficiently rebut ESA's abandonment argument because they show that appellants left their belongings in the unit, as well as a car in the parking lot, evidencing an intent to return and not abandon the unit. That is especially so when the assertions in the verified complaint are viewed in the light most favorable to appellants (the nonmoving parties), as required. *See Ramey*, 130 Wn. App. at 685.

Indeed, not only does the record preclude dismissal, the commissioner's oral ruling, which the superior court ultimately adopted, similarly recognizes an extant controversy regarding whether appellants were in peaceable and undisturbed possession at the time of the forcible entry:

> Counsel, I'm going to -- I am going to grant the motion to dismiss. I don't believe at this point that you have sufficient basis here for this Court to either certify or rule on an unlawful detainer case given the facts that we have here. *There may have been a difference of opinion about whether your clients had vacated voluntarily. They left their things there, and it's -- that's not an uncommon scenario when tenants leave. Sometimes they have no other place to go and they can't take their things and they leave them. I don't know, it's speculation on my part.* But I -- but it is not enough for me to say that this matter should go forward to trial.

(Emphasis added.) Because there is a genuine issue of material fact as to whether appellants were in peaceable and undisturbed possession of the property for five days preceding the forcible entry, their claims were not properly subject to dismissal under CR 56. The superior court's dismissal order, whether premised on CR 56 or CR 12, is accordingly reversed.[2]

C.

Finally, ESA argues that appellants cannot properly seek a writ of restitution to their former premises without joining the tenant currently residing in the unit as an indispensable party under CR 19 and controlling case law. Because this issue

[2] Although we review the trial court proceedings under CR 56, we would reach the same result even if we were to conclude that the superior court could properly decide ESA's motion to dismiss under CR 12. "We review the trial court's ruling on a motion to dismiss de novo. Factual allegations are accepted as true, and unless it appears beyond doubt that the plaintiff can prove no set of facts consistent with the complaint that would entitle him or her to relief, the motion to dismiss must be denied." *Becker v. Cmty. Health Sys., Inc.*, 184 Wn.2d 252, 257-58, 359 P.3d 746 (2015). Additionally, the court "must assume the truth of facts alleged in the complaint, as well as hypothetical facts, viewing both in the light most favorable to the nonmoving party." *Didlake v. State*, 186 Wn. App. 417, 422, 345 P.3d 43 (2015). For the same reasons set forth above, the facts alleged in appellants' verified complaint—accepted as true and viewed favorably to appellants—preclude dismissal under CR 12(b)(6) as well as CR 56.

may recur on remand, we choose to address the issue and hold, consistent with ESA's arguments, that appellants must comply with RCW 59.12.090.

Under RCW 59.12.090, a

> plaintiff at the time of commencing an action of forcible entry or detainer or unlawful detainer, or at any time afterwards, may apply to the judge of the court in which the action is pending for a writ of restitution restoring to the plaintiff the *property in the complaint described*, and the judge shall order a writ of restitution to issue.

(Emphasis added.) Here, appellants described the property for which they sought relief in their verified complaint as "15451 53rd Ave S, #110, Tukwila, WA 98188." Because appellants specifically described their previous unit in their complaint, they may only be restored to that unit under RCW 59.12.090.

It necessarily follows that to maintain their forcible entry and detainer action, appellants must join the tenant or subtenant (if any) who occupied the specified unit when appellants' complaint was filed if they assert a right to possess that property. *Laffranchi v. Lim*, 146 Wn. App. 376, 383, 190 P.3d 97 (2008), is instructive on this point. In *Laffranchi*, DeVore leased a four-bedroom house from Lim. *Id.* at 378. At the time the lease was signed, the property was subject to a deed of trust between Lim, as grantor, and Lender Homecomings Financial Network, Inc., as beneficiary. *Id.* at 379. When Lim failed to make payments on the obligation secured by the deed of trust, Laffranchi purchased the property at a trustee's sale. *Id.* Laffranchi subsequently filed an eviction summons and complaint for unlawful detainer and served it at the property's address with the caption "Tony Laffranchi v. Tomas Oscar Lim and Maida Lim, et al." *Id.* at 379. Laffranchi obtained a writ of restitution directing the sheriff to remove the defendants and all others from the property. *Id.* at 380.

On appeal, we held that "Laffranchi's failure to join DeVore as a defendant deprived the court of subject matter jurisdiction under chapter 59.12 RCW." *Id.* at 384.[3] We applied RCW 59.12.060, which states: "[n]o person other than the tenant of the premises, and subtenant, if there be one, in the actual occupation of the premises when the complaint is filed, need be made parties defendant in any proceeding under this chapter . . . ." Applying that statutory requirement, we concluded that if DeVore continues to assert a right to possession, Laffranchi must join him as a party to maintain his unlawful detainer action. *Laffranchi*, 146 Wn. App. at 387.

As in *Laffranchi*, we conclude that any tenant or subtenant in the actual occupation of the premises when appellants' complaint was filed is a necessary party under RCW 59.12.060 and must be joined if they assert a right to possess the property. Accordingly, we remand the matter for further proceedings consistent with RCW 59.12.060 (if applicable).[4]

Reversed and remanded.

Feldman, J.

WE CONCUR:

Cox, J.

Smith, C.J.

[3] Although *Laffranchi* refers to "subject matter jurisdiction," we have since clarified "[i]f the type of controversy is within the superior court's subject matter jurisdiction, as it is here, then all other defects or errors go to something other than subject matter jurisdiction." *MHM & F, LLC v. Pryor*, 168 Wn. App. 451, 460, 277 P.3d 62 (2012) (internal quotation marks omitted).

[4] ESA also argues that even if appellants did not abandon the premises, it is entitled to use self-help if no breach of the peace occurs. However, "no landlord, including one not governed by the [Residential Landlord Tenant Act], may ever use nonjudicial, self-help methods to remove a tenant." *Gray v. Pierce County Hous. Auth.*, 123 Wn. App. 744, 757, 97 P.3d 26 (2004). Further, RCW 59.18.290 states that it "is unlawful for the landlord to remove or exclude from the premises the tenant thereof except under a court order so authorizing." Thus, we reject this argument.

FILED
4/29/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

ALLEN WATKINS and JANIS CLARK, Appellants, v. ESA MANAGEMENT, LLC, Respondent.	No. 85225-6-I ORDER GRANTING MOTION FOR RECONSIDERATION AND WITHDRAWING AND SUBSTITUTING OPINION

The appellants, Allen Watkins and Janis Clark, have filed a motion for reconsideration of the opinion filed on March 25, 2024. The court has determined that said motion should be granted and that the opinion filed on March 25, 2024, shall be withdrawn and a substitute unpublished opinion be filed. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is granted; it is further

ORDERED that the opinion filed on March 25, 2024, is withdrawn and a substitute published opinion shall be filed.

Feldman, J.

Coburn, J.

Smith, C.J.

APPENDIX B

FILED
5/23/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

ALLEN WATKINS and JANIS CLARK,

Appellants,

v.

ESA MANAGEMENT, LLC,

Respondent.

No. 85225-6-I

ORDER DENYING MOTION FOR RECONSIDERATION

The respondent, ESA Management, has filed a motion for reconsideration. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Feldman, J.
Judge

APPENDIX C

CR 19
JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if

(1) in the person's absence complete relief cannot be accorded among those already parties, or

(2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may

(A) as a practical matter impair or impede the person's ability to protect that interest or

(B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and the person's joinder would render the venue of the action improper, the joined party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person joinable under (1) or (2) of section (a) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include:

(1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties;

(2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;

(3) whether a judgment rendered in the person's absence will be adequate;

(4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons joinable under (1) or (2) of section (a) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of rule 23.

(e) Spouse or Domestic Partner Must Join--Exceptions. [Reserved. See RCW 4.08.030.]

[Adopted effective July 1, 1967; Amended effective July 1, 1980; April 28, 2015.]

APPENDIX D

PDF **RCW 59.12.060**

Parties defendant.

No person other than the tenant of the premises, and subtenant, if there be one, in the actual occupation of the premises when the complaint is filed, need be made parties defendant in any proceeding under this chapter, nor shall any proceeding abate, nor the plaintiff be nonsuited, for the nonjoinder of any person who might have been made party defendant; but when it appears that any of the parties served with process, or appearing in the proceeding, are guilty of the offense charged, judgment must be rendered against him or her. In case a person has become a subtenant of the premises in controversy after the service of any notice in this chapter provided for, the fact that such notice was not served on such subtenant shall constitute no defense to the action. All persons who enter the premises under the tenant, after the commencement of the action hereunder, shall be bound by the judgment the same as if they had been made parties to the action.

[**2010 c 8 § 19008**; **1891 c 96 § 7**; RRS § 816. Prior: **1890 p 75 § 6**.]

APPENDIX E

Fourteenth Amendment to the Constitution (1868)

Amendment XIV.

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

PREAMBLE

We, the people of the State of Washington, grateful to the Supreme Ruler of the universe for our liberties, do ordain this constitution.

ARTICLE I

DECLARATION OF RIGHTS

SECTION 1 POLITICAL POWER. All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

SECTION 2 SUPREME LAW OF THE LAND. The Constitution of the United States is the supreme law of the land.

SECTION 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

SECTION 4 RIGHT OF PETITION AND ASSEMBLAGE. The right of petition and of the people peaceably to assemble for the common good shall never be abridged.

SECTION 5 FREEDOM OF SPEECH. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

SECTION 6 OATHS - MODE OF ADMINISTERING. The mode of administering an oath, or affirmation, shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered.

SECTION 7 INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

SECTION 8 IRREVOCABLE PRIVILEGE, FRANCHISE OR IMMUNITY PROHIBITED. No law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature.

SECTION 9 RIGHTS OF ACCUSED PERSONS. No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

SECTION 10 ADMINISTRATION OF JUSTICE. Justice in all cases shall be administered openly, and without unnecessary delay.

SECTION 11 RELIGIOUS FREEDOM. Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: PROVIDED, HOWEVER, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional, and mental institutions, or by a county's or public hospital district's hospital, health care facility, or hospice, as in the discretion of the legislature may seem

WILLIAMS KASTNER

June 20, 2024 - 4:39 PM

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