No. 49588-1-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RANDY REYNOLDS & ASSOCIATES, INC.

Appellant,

vs.

KASEY HARMON ET AL.,

Respondents.

PETITION FOR REVIEW

NORTHWEST JUSTICE PROJECT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL CASES

OTHER STATE CASES

STATUTES

RULES

OTHER AUTHORITIES

PUBLICATIONS

I. IDENTITY OF PETITIONER

Petitioner Kasey Harmon, 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. At the time of her eviction, Ms. Harmon had no income, received rental assistance due to her disability, and had a pending SSI application. When the prevailing party below filed a notice of appeal in this moot case, Ms. Harmon became the Respondent at the Court of Appeals. She did not participate in any briefing or oral argument in the appeal. After learning of the Division II's published decision, the imposition of a sanction and additional attorney's fees, she sought reconsideration. Petitioner seeks review of the published decision designated in Part II of this Petition.

II. COURT OF APPEALS DECISION

The Court of Appeals filed its published decision on October 31, 2017 (Appendix A). Harmon's motion for reconsideration was denied by order dated January 31, 2018 (Appendix B).

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals' application of the public interest exception to the general rule requiring dismissal of moot cases conflicts with decisions of the Supreme Court and other appellate courts 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.

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

3. Whether the Court of Appeals' failure 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 is a matter of substantial public interest that should be determined by the Supreme Court.

IV. STATEMENT OF THE CASE

This matter arises from a Thurston County unlawful detainer action in which the landlord Reynolds prevailed on all issues, obtained a writ of restitution, a judgment and a supplemental judgment within seven days after filing, yet appealed this moot case on the issue of whether a brief stay pending a hearing was granted properly. Reynolds obtained by default a writ of restitution and judgment[1] on Friday September 16,

[1] The default judgment consisted of $1800 principal amount for August and September rent, $700 attorney's fees and $290 costs.

2016. (CP 20-22). The writ was served on September 19th. (CP 75). Harmon had sent her written response to the unfiled Summons and Complaint to Reynolds' attorney on September 14th by certified mail rather than by fax or in person delivery. (CP 25-29, 42-45). Evidently, it was not received by prior to the deadline of September 15th. (CP 42-45). On September 19th, after the writ was served, Harmon requested a stay on the ground that she had responded before the case was filed and default taken. (CP 24). The Court found good cause to stay execution of the writ until a hearing could be held. (CP 24). The writ was stayed until Friday September 23rd at 5:00 p.m., and the hearing was scheduled 10:00 a.m. (CP 24). The writ was served on September 19th, so the earliest possible date the writ could have been executed, even without the stay, was September 23rd, the fourth day following service. RCW 59.18.390.

Reynolds was represented by counsel through all stages of the proceedings. In contrast, Harmon was unrepresented when she tried to serve her response by certified mail rather than by fax or delivery to the attorney's office. She was unrepresented when she sought to stay the writ to allow her the opportunity to be heard before she was evicted and made homeless. She was represented only briefly at the hearing when a volunteer attorney with Thurston County's Housing Justice Project entered an appearance, made an oral argument on her behalf, then

withdrew. (CP 74; CP 72). Reynolds' attorney filed a 10-page Memorandum (CP 30-39) and three declarations (CP 40-69) in the late afternoon of the day before the 10:00 a.m. hearing. There is no evidence in the record that these documents were served on anyone or received by the volunteer attorney prior to his oral argument. Because Harmon was unable prove that Reynolds received her response before the deadline stated in the Summons, the Court lifted the stay and entered judgment for additional attorneys' fees and costs. [2] (CP 81-84).

Harmon disclosed significant health concerns as a basis for the stay of the writ. (CP 23, 28-29). She is receiving rental assistance under the Housing and Essential Needs Program throughout her tenancy.[3] (CP 28, 47) For eligibility she must be "incapacitated from gainful employment by reason of bodily or mental infirmity." RCW 74.04.805. She had no income and was awaiting a decision on her SSI application. (CP 28-29) If requested, a stay as a reasonable accommodation of her disabilities could have been required. Moreover, the fact that Reynolds' attorney filed legal documents using three different office addresses[4]

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[2] The supplemental judgment consisted of $1550 additional attorney's fees (judge reduced the requested amount of $2050 by $500) and $112 in costs.

[3] Harmon's rent was paid by the HEN Program. Reynolds refused to accept rent for August or September after a July 6th 20-day no cause notice was issued. (CP 15, 47).

[4] (CP 15) (Union Avenue address); (CP 30) (Limited Lane Address); (CP 5) (Cleveland Avenue address).

during this short-lived case may have contributed to Harmon's decision to send her response by certified mail which led to the default and subsequent request to vacate the default orders.

This appeal followed on the issue of whether the court's ex parte stay of the writ of restitution was proper. Harmon did not appear in this moot appeal brought by the party who *prevailed* on all issues below. Having been evicted (CP 75), and saddled with a $2790 default judgment (CP 20-22) and a $1662 supplemental judgment (CP 81-84), she no longer had any interest in this moot case concerning whether the stay was proper. Having no income and no home, she had to deal with issues of basic survival in the aftermath of her eviction. She had no legal advice or representation. Although she never appeared, she was sanctioned by the Court of Appeals for failing to file a brief. After the court issued its decision and awarded additional attorney fees to Reynolds, Harmon obtained counsel, appeared and requested reconsideration. The court denied reconsideration on January 31, 2018.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court should grant review under RAP 13.4(b) (2), (3) and (4) because the lower court's ruling impairs the inherent constitutional authority of the Superior Courts to stay proceedings in emergencies and to protect residential tenants from imminent harm. Further, the case is in

conflict with this Court's guidelines for accepting review of a moot case because the appeal lacked the adverseness necessary to properly issue a ruling, was based on improperly admitted evidence from outside the record, and raises an issue of substantial importance regarding the role of the courts in deciding actual cases or controversies. The Court should clarify and reaffirm the long-standing rule that appellate courts should not issue decisions in uncontested cases, particularly without the involvement of one side. The harm, as evidenced in Harmon's case, is a court decision that has a negative impact on tenants statewide based on the allegations of two attorneys in one county.

The Court's decision raises serious issues of substantial public concern with respect to the issuance of an advisory opinion on a moot issue, heard on the limited arguments of one side of the issue. The law requires "genuine adverseness and ... quality of advocacy" to issue such an opinion. *Washington State Comm'l Passenger Fishing Vessel Ass'n v. Tollefson,* 87 Wn.2d 417, 419 (1976). Such adverseness and quality of advocacy did not exist before the Court of Appeals. For these reasons, the Court should vacate the Court of Appeals' decision.

A. The Court Should Not Have Decided This Moot Case without Full Litigation of the Issues Below and Adequate Briefing from Both Sides On Appeal

The Court should have declined to treat this case as an exception

to the general rule that where only moot questions or abstract propositions are involved, an appeal should be dismissed. *State v. Beaver*, 184 Wn.2d 321, 330, (2015); *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, (1972). A case is moot if "'the court can no longer provide effective relief.'" *In re Det. of M.W.*, 185 Wn.2d 633, 648 (2016), *quoting State v. Hunley*, 175 Wn.2d 901, 907 (2012).

There is an exception to the general rule that moot cases should be dismissed. Appellate courts have "discretion to retain and decide an appeal which has otherwise become moot" if it "involves matters of continuing and substantial public interest." *Sorenson v. Bellingham*, 80 Wn.2d 547, 558 (1972); *State v. Beaver*, 184 Wn.2d 321 (2015).

In determining whether to apply the "continuing and substantial public interest" exception to the general rule that moot cases should be dismissed, there are several factors to guide courts in exercising their discretion: (1) the public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood that the question will recur. *Beaver*, at 330; *Hart v. DSHS*, 111 Wn.2d 445, 448 (1988).

Although the Court of Appeals addressed these first three factors in its decision to accept this moot case as urged by Reynolds, it did not acknowledge that the Washington Supreme Court also recognizes a

fourth factor: whether there is genuine adverseness and quality advocacy on the issues. *State v. Beaver*, 184 Wn.2d 321, 330 (2015).[5] This fourth factor is "derived from one of the policy considerations underlying the mootness doctrine itself, which is 'to avoid the danger of an erroneous decision caused by the failure of parties, who no longer have an interest in the case, to zealously advocate their position.'" *WSBA Appellate Practice Deskbook, § 13.3, at 13-9* (3d ed. 2005), *quoting Orwick* at 253.

In *Tollefson*, the Supreme Court found that each of the first three factors was present but declined to render an opinion in the moot case because "other considerations" made it "undesirable to treat the case as an exception to the general rule." *Tollefson,* 87 Wn.2d at 419. Courts are deterred from issuing advisory opinions due to the "risk that the question may not have been adequately developed or argued. . . . In all the cases where this court has rendered advisory opinions, the question decided has been adequately briefed and vigorously argued." *Id.*

In *Van Dyke,* the Court of Appeals declined to apply the exception and render an opinion in a moot case because "an important consideration in determining whether to ignore mootness is the quality of

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[5] *Westerman v. Cary*, 125 Wn.2d 277, 286 (1994); *Klickitat Co. Citizens Against Imported Waste v. Klickitat Co.*, 122 Wn.2d 619, 632 (1993); *Hart v. DSHS*, 111 Wn.2d 445, 448 (1988); *Orwick v. City of Seattle*, 103 Wn.2d 249, 253 (1984); *City of Everett v. Van Dyke*, 18 Wn.App. 704, 705-06, (1977); *Washington State Comm'l Passenger Fishing Vessel Ass'n v. Tollefson,* 87 Wn.2d 417 (1976).

the advocacy upon which the court can rely" and whether there have been "genuinely adversary proceedings (sic) on truly justiciable issues." *Van Dyke,* 18 Wn.App. at 705-06. The Court dismissed the moot case because "[a]t no stage was this case presented in a 'genuinely adversary' manner." *Id.* at 706.

According to the Supreme Court, the public interest exception has not been used in statutory or regulatory cases that are limited on their facts. *Id.* at 449. "Decisions of moot cases with limited fact situations provide little guidance to other public officials." *Id.* at 451. The continuing and substantial public interest exception "is not used in cases that are limited to their specific facts." *Sorenson*, at 331.

1. The Court Did Not Address Whether There is Genuine Adverseness and Quality Advocacy of the Issues

In its published opinion, the Court does not address or consider whether there is genuine adverseness of the parties and quality of the advocacy and briefing on the issues. Neither the opinion nor Reynolds' Brief of Appellant mention or discuss this fourth factor appellate courts should consider before exercising their discretion to accept and decide a moot case. The Court cites *Matter of Detention of M.W. v. Dep't of Social and Health Servs.*, 185 Wn.2d 633 (2016) for the factors in exercising discretion to apply the continuing and substantial public

interest exception to the general rule that appellate courts should decline moot cases. In *Detention of M.W.* the Supreme Court skipped over providing any analysis or mention of whether there was genuine adverseness and quality of the advocacy. This is understandable. The petitioners were represented by the Washington Attorney General and the respondents by the Washington Appellate Project. In addition, three well-known and well-respected organizations filed amicus briefs: the ACLU; Disability Rights Washington; and the Washington Defender Association. *Id.* at 640. There was no question of the genuine adverseness of the parties and quality advocacy on the issues.

In contrast, not only was Harmon unrepresented in this appeal, she did not appear at all. The Court exercised its discretion and applied the public interest exception to this moot case and issued a published decision even though only one party was represented by counsel and the issues on appeal were not fully litigated below.

The factual and legal issues involved in this appeal were not adequately developed and argued in a genuinely adversary manner during the seven days the case was active in Thurston County Superior Court. The Court of Appeals should not have reached beyond the usual practice of appellate courts of exercising their discretion to apply the public interest exception to mootness only in cases where "the facts and

legal issues had been fully litigated by parties with a stake in the outcome of a live controversy" at the trial court level. *Orwick,* at 253. The Court should have declined to exercise its discretion. There was no meaningful adversarial hearing or briefing by both parties before this case became moot. *Orwick,* at 253-54.

2. Because Harmon No Longer Had Any Interest In This Moot Case, She Did Not Appear In This Appeal

Harmon did not appear in the prevailing party's appeal of this moot case. She filed no brief. The absence of any advocacy from one side led to Court to publish an erroneous decision that conflicts with prior court decisions and creates an issue of substantial public interest.

3. The Court of Appeals Improperly Admitted and Relied on Evidence From Outside the Record

Because the underlying facts and legal issues on appeal were not adequately developed and litigated in the lower court, Reynolds needed to introduce new evidence from outside the record on appeal. By Order dated February 17, 2017, the Commissioner authorized the Reynolds to "supplement" the record on appeal with two declarations attached as exhibits to the Brief.[6] Neither declaration nor any exhibit thereto, had been introduced into evidence at the trial court. Instead both declarations

[6] *Brief of Appellant,* at 4, Fn. 3.

were prepared for the appeal, one signed by Reynolds' attorney Michael G. Gusa and the other by an affiliated attorney, Mary Ann Strickler.[7]

It was improper for the Court of Appeals to admit these declarations to "supplement" the record under RAP 9.10 and to rely on them in finding an exception to general rule regarding mootness. The declarations were not "additional clerk's papers and exhibits" from the earlier trial court proceedings. Therefore, they could not "supplement" the record pursuant to RAP 9.10. *Buckley v. Snapper Power Equipment Co.*, 61 Wn. App. 932 (1991). An affidavit not considered by the trial court below cannot be introduced on appeal under RAP 9.10. *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn.App. 590 (1993).[8]

Because the two declarations could not be admitted under RAP 9.10, the reviewing court was required to evaluate them as new evidence under RAP 9.11. The Court of Appeals accepted this additional evidence without analysis of the six mandatory factors under RAP 9.11(a). With the possible exception of (2), none of the factors under RAP 9.11(a)

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[7] One of the three addresses Mr. Gusa used on his pleadings in this case prior to entry of the default judgment is the address of Mary Ann Strickler. Ms. Strickler's paralegal/office manager, Pamela L. Sapp signed a declaration describing receipt of Harmon's Response to the Unlawful Detainer Action filed by Mr. Gusa. (CP 42-45)

[8] *See also, State v. Murphy*, 35 Wn. App. 658 (1983); (Record on appeal may not be supplemented by material which is not included in the trial court record) *State v. Armstead,* 13 Wn. App. 59 (1975). (Affidavits not part of the trial court record will not considered on appeal).

apply. The acceptance and reliance upon this additional evidence from outside the record was contrary to the requirements of RAP 9.11(a)(1), (3), (4), (5) or (6) and was not taken in the trial court with findings of facts as contemplated by RAP 9.11(b).

4. The Court Should Have Declined to Render an Opinion in This Moot Case Absent a More Complete Factual Record of Unlawful Detainer Stay Procedures

The Court of Appeals allowed the introduction of new evidence from outside the record in order to satisfy itself that it should apply the "continuing and substantial public interest" exception to the general rule regarding mootness. This new evidence from outside the record concerned the limited experience of two attorneys in one county. Additional information in the Strickler declaration was clearly self-serving hearsay. *Brief of Appellant,* Appx. A at 1. ("A handful of lawyers do most of the unlawful detainer work for landlords. We talk."). It provides a misleading and inadequate picture of how unlawful detainer practice and stays of writs are handled elsewhere in the state.

The Court did not hear about local practices and procedures in any of the other thirty-eight counties in Washington. It did not hear about the experiences of other attorneys, including those who practice in Thurston County. Had this case been adequately presented to the Court, evidence could have been adduced showing that the appellant's concerns

are not widely shared. Northwest Justice Project, for example, publishes a self-help packet on its website for tenants who proceed pro se.[9] It clearly states that tenants must attempt to notify the landlord prior to appearing in court to request a stay, and that the court will inquire about what attempts were made to reach the landlord. The Court did not hear about the experiences of judicial officers who decide a large volume of these cases. It did not hear about the many courts where a good faith effort at notice prior to granting an ex parte stay of a writ is required. *See* CR 65(b). It did not hear about any differences between pro se tenants and tenants represented by counsel.

The Court should not have relied on misleading, self-serving and incomplete new evidence from outside the record to apply the public interest exception to the general rule on mootness.

B. CR 60 and CR 62 Authorized the Lower Court's Action

The Court focused on the terms and language of RCW 59.18.390 and the direction of notice to the landlord. RCW 59.18.390 permits a tenant to stay a writ issued under the RLTA conditioned on the performance of certain actions. As the Court noted, those actions include notice to the landlord and examination of the bond required.

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[9] *See* https://www.washingtonlawhelp.org/resource/vacating-a-judgment-and-staying-enforcement-o. (last update June 29, 2015).

The posture of this case, however, concerned a motion to stay a default not a tenant who appeared and lost at a show cause hearing. (CP 24). Motions to vacate default judgments and orders are governed by CR 60, not RCW 59.18.390. Default judgments are disfavored, and a defaulted party should be given the opportunity to have their day in court. CR 62(b) further grants authority to the Superior Court, "in its discretion", to stay enforcement of a judgment pending a motion to vacate a default under CR 60. CR 62 governs the stay of a writ of restitution. *One Der Werks II, LLC, v. Duncan*, 177 Wn.App. 1036 (2013) (unpublished); *Calibrate Property Management, LLC v. Nhye*, 196 Wn. App. 1096 (2016) (unpublished). The Court of Appeals did not consider CR 62 in its opinion.

The common procedure when attempting to vacate a default judgment is to obtain an order to show cause, ex parte, setting a date for hearing on the motion. The lower court performs a gate keeping function at this stage, to determine whether or not the defaulted party has an adequate reason to proceed as well as whether a stay is necessary to preserve the defaulted party's claims. *One Der Works II, LLC* at 4, (citing *Boeing Co. v. Sierracin Corp.,* 43 Wn. App. 288, 291 (1986)). Lower courts hearing a motion to stay have the authority to consider a variety of equitable factors. *Id.* Review of trial court decisions about

whether to stay a judgment are reviewed for abuse of discretion. *Calibrate Property Management,* at 2. "A trial court abuses its discretion if the decision is based on untenable grounds or for untenable reasons." *Shaw v. City of Des Moines,* 109 Wn.App. 896, 900–01 (2002).

There was no transcript or recording of the *ex parte* hearing in this matter. However, the record reflects tenable grounds for staying the judgment under CR 62. These include Harmon's allegation that she had filed an answer and Appellant's failure to provide a clear address for service of the Answer, (CP 15; CP 30; and CP 5), as well as details about Harmon's disabilities, which can justify a stay as a reasonable accommodation. (CP 23, 28-29). It was appropriate for the court, as an exercise of its discretion, to stay its judgment under CR 62 at this hearing. This is precisely the procedure that Harmon sought to utilize.

In the absence of the ability to request a stay *ex parte*, courts may require that tenants follow the timeline of local rules on civil motion practice. Those rules usually require a tenant to wait for a hearing for longer than the three days between service and execution of a writ.[10]

A tenant who files and serves a motion to stay on even the same

[10] General court rules require filing and service of a motion five days prior to the hearing. CR 5(d).King County requires six-days notice to bring a motion. LCR 7(4)(A). Lewis County requires seven days. LCR 5(A).

day they are served with a writ may still need to wait at minimum five days before a hearing. The sheriff is statutorily authorized to execute the writ on the fourth day after service. RCW 59.18.390. That is prior to the earliest date by which a tenant could schedule a hearing on the stay. For tenants seeking to remain in possession of a home, a hearing does little good if it occurs after the sheriff has removed the tenant from the home.

The Court focused only on the narrow language of RCW 59.18.390 but should have also considered what authority the lower court had under CR 60 and CR 62 to stay enforcement of the landlord's default judgment pending an opportunity to be heard.

C. Courts Have Inherent Equitable Powers to Grant Emergency Stays To Preserve the Status Quo and Avoid Irreparable Harm

Contrary to Reynolds' assertion, ex parte proceedings need not be prescribed by the legislature as courts have long held that the court's inherent equitable powers permit the issuance of ex parte orders during emergencies. It is an essential function of any judiciary to be able to provide immediate relief to a party likely to suffer imminent, irreparable harm. *Tyler Pipe Industries, Inc. v. State Dept. of Revenue*, 96 Wn.2d 785 (1982) (holding that the ability to issue an injunction is an essential equitable power of the court); *Port of Seattle v. International Longshoremen's & Warehousemen's Union*, 52 Wn.2d 317 (1958)

(describing criteria for temporary and preliminary injunctive relief). Courts have widely held that homelessness and eviction constitute the irreparable harm that would justify an emergency stay. *See, e.g., Mitchell v. HUD*, 569 F. Supp. 701, 705 (N.D. Cal. 1983) ("[i]f plaintiff and her children are unable to locate housing they can afford, they would be homeless and subject to the many perils that homelessness brings."); *Jones v. Allen*, 185 Misc.2d 443 (NY App. Div., 2000) ("The power to grant a temporary stay pending determination of a motion for relief from a judgment ... is a power which a court must have in order to preserve the status quo until the motion has been determined and one which is necessary if its subsequent disposition is not to be rendered a mere exercise in futility."). In fashioning a remedy such as staying a writ to prevent an eviction, the court may exercise its equitable authority to stay an eviction pending a determination on the underlying request for relief. *TMT Bear Creek Shopping Center v. Petco*, 140 Wn.App. 191 (2007); *Rummens v. Guaranty Trust Co.*, 199 Wn. 337 (1939).

D. The Court's Decision Inappropriately Limits the Equitable Powers of the Superior Courts

In its decision, the Court held that if the legislature did not authorize the court to hear an ex parte motion, then the Court had no authority to issue it; however, this is contrary to the Washington

Constitution and separation of powers. As stated *supra*, the legislature cannot diminish the Court's equitable powers, including those to impose restraining orders and injunctions. *Bowcutt v. Delta North Star Corp.*, 95 Wn.App. 311 (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."); *Tyler Pipe Industries, Inc. v. State Dept. of Revenue*, 96 Wn.2d 785 (1982) ("We have held the legislature can never totally deprive the courts of their constitutional equity power.") (*citing O'Brien v. Johnson,* 32 Wn.2d 404 (1949). Other jurisdictions have found that the legislature cannot meddle with such an essential function of the court in issuing temporary stays of evictions. *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.").

Any exception to superior court jurisdiction must be narrowly read, but the Court's decision significantly limits the ability of the courts

to exercise equitable authority when seeking to stay an eviction. *Bowcutt v. Delta North Star Corp.*, 95 Wn.App. 311 (1999) ("we narrowly read exceptions to superior court jurisdiction."). Contrary to established case law, the Court wrongly sought to limit jurisdiction based on the *absence* of legislative action when the proper standard is to find no limitation on jurisdiction unless the legislature clearly indicates its intention to do so. *Id.* ("Unless the Legislature clearly indicates its intention to limit jurisdiction, statutes should be construed as imposing no limitation."). Moreover, CR 65(b) authorizes courts to issue temporary restraining orders without notice to prevent irreparable harm. Except where inconsistent with the express statutory provisions governing unlawful detainer actions, the civil rules constitute the rules of practice in unlawful detainer actions. RCW 59.12.180; CR 81.

VI. CONCLUSION

The Court's application of the public interest exception to mootness in this case and its reliance on additional evidence from outside the record conflict with the rules of appellate procedure and Supreme Court and Court of Appeals precedents. The published decision impairs the inherent constitutional authority of courts to stay proceedings in emergencies and to protect residential tenants from imminent harm. Review is therefore warranted under RAP 13.4.

Respectfully submitted on March 2, 2018.

Northwest Justice Project

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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
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Dated this 2nd day of March, 2018.

_____
Stephen Parsons

APPENDIX A

Reynolds v. Harmon
Published Opinion, October 31, 2017

APPENDIX B

Order Denying Motion for Reconsideration, January 31, 2018

Filed
Washington State
Court of Appeals
Division Two

October 31, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RANDY REYNOLDS & ASSOCIATES, INC. dba REYNOLDS REAL ESTATE, Appellant, v. KASEY HARMON aka KASEY HARMAN, Any Subtenants, and All Others Acting By Or Through Them, Respondents.	No. 49588-1-II PUBLISHED OPINION

JOHANSON, P.J. — Randy Reynolds & Associates Inc. (Reynolds) appeals from the superior court commissioner's ex parte order staying a writ of restitution in an unlawful detainer action that Reynolds brought against a tenant and waiving bond pending a hearing on the merits. Even though the issues raised are moot, we reach the merits of the case because they raise issues of important public policy that are likely to recur. We hold that the superior court commissioner erred when she heard the ex parte motion to stay execution of the writ of restitution and waived the bond without notice to Reynolds in violation of the notice and hearing requirements provided in RCW 59.18.390(1). Consequently, we reverse.

FACTS

In July 2016, Reynolds served Kasey Harmon with a 20-day notice to terminate her tenancy in compliance with the rental agreement and RCW 59.12.030(2). When Harmon failed to timely vacate the property, Reynolds filed and served an unlawful detainer complaint seeking, among other things, restitution of the premises. On September 16, after Harmon failed to appear pursuant to proper notice, the superior court commissioner entered an order of default and judgment granting a writ of restitution in favor of Reynolds.

The sheriff posted notice of the writ at Harmon's residence on September 19. That same day, Harmon brought an ex parte motion to stay execution of the writ. The superior court commissioner stayed execution of the writ based on Harmon's claim that she answered before the case was filed and default was entered, and the court commissioner ordered a show cause hearing. The order granting the stay was on a preprinted form that stated, "Bond is waived until the hearing on the merits of this motion," and Harmon did not post a bond. Clerk's Papers (CP) at 24.

In support of its writ, Reynolds' pleadings asserted that the ex parte hearing to stay the writ was improper and that the stay was invalid because Harmon was required by RCW 59.18.390(1) to post a bond before retaining possession of the premises and obtaining a stay of a writ of restitution. At the show cause hearing, the superior court commissioner held that Harmon had no legally sufficient challenge to the writ of restitution, and it lifted the stay and granted a supplemental judgment including attorney fees and costs to Reynolds. The writ was then executed and Harmon was evicted.

Reynolds appeals from the superior court commissioner's ex parte order that granted a stay of the writ of restitution, waived the bond, and ordered a show cause hearing.[1]

ANALYSIS

I. MOOTNESS

Reynolds acknowledges that the matters presented are moot but argues that we should consider them because they involve "issues of continuing and substantial public interest." Br. of Appellant at 6. We agree.

A. RULES OF LAW

A case is moot if "'the court can no longer provide effective relief.'" *In re Det. of M.W.*, 185 Wn.2d 633, 648, 374 P.3d 1123 (2016) (quoting *State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012)). Generally, we do not consider cases that are moot or present abstract questions. *State v. Beaver*, 184 Wn.2d 321, 330, 358 P.3d 385 (2015).

Even when cases are moot, we have discretion to address questions "of continuing and substantial public interest." *M.W.*, 185 Wn.2d at 648. When considering whether a case involves issues of continuing and substantial public interest, we consider (1) "'the public or private nature of the question presented,'" (2) "'the desirability of an authoritative determination for the future guidance of public officers,'" and (3) "'the likelihood of future recurrence of the question.'" *M.W.*, 185 Wn.2d at 648 (internal quotation marks omitted) (quoting *Hunley*, 175 Wn.2d at 907).

[1] Reynolds raises no arguments on appeal challenging the order of a show cause hearing and challenges only the court's granting the ex parte motion to stay the writ of restitution and the waiver of the bond contained in the order.

Matters involving statutory interpretation tend to be more public in nature, more likely to arise again, and more helpful to public officials. *Hart v. Dep't of Soc. & Health Serv.*, 111 Wn.2d 445, 449, 759 P.2d 1206 (1988). And courts may consider "'the likelihood that the issue will escape review because the facts of the controversy are short-lived.'" *In re Marriage of Horner*, 151 Wn.2d 884, 892, 93 P.3d 124 (2004) (quoting *Westerman v. Cary*, 125 Wn.2d 277, 286-87, 892 P.2d 1067 (1994)).

B. ANALYSIS

Because the superior court commissioner already lifted the writ's stay and Harmon has been evicted, we can no longer provide effective relief regarding the stay and the waiver of bond pending the show cause hearing. *See M.W.*, 185 Wn.2d at 648. As such, the case is moot. *M.W.*, 185 Wn.2d at 648.

However, the three factors for determining whether a matter is of continuing and substantial public interest each weigh in favor of a conclusion that we should consider the issues. *See M.W.*, 185 Wn.2d at 648. First, the questions presented are public because they involve statutory interpretation to determine the proper notice and hearing procedures for certain proceedings under the Residential Landlord-Tenant Act of 1973, ch. 59.18 RCW. *See Hart*, 111 Wn.2d at 449.

Second, it is desirable to have an authoritative determination of proper procedures for obtaining a stay of a writ of restitution and satisfying the bond requirement under RCW 59.18.390(1) to guide future public officers. *See M.W.*, 185 Wn.2d at 648. The superior court commissioner here heard the motion to stay ex parte and waived the bond requirement on a preprinted form that is evidently used routinely in this county in orders to stay writs of restitution.

It is desirable to provide guidance to the superior court so that its procedures may be adjusted to conform to statutory requirements.

Third, it is likely that similar questions will reoccur. *See M.W.*, 185 Wn.2d at 648. Superior courts routinely adjudicate unlawful detainer actions by landlords, so these issues will certainly be raised again.

We may also choose to hear the merits because eviction proceedings are designed to be an expedited process. *Christensen v. Ellsworth*, 162 Wn.2d 365, 375-76, 173 P.3d 228 (2007) ("[T]he purpose of the unlawful detainer statute . . . is to provide a landlord with a speedy, efficient procedure by which to obtain possession of the premises after a breach by the tenant."). As such, the issues presented are likely to escape review. *See In re Marriage of Horner*, 151 Wn.2d at 892. Because Reynolds raises issues of continuing and substantial public interest, we choose to reach the merits of the issues. *See M.W.*, 185 Wn.2d at 648-49.

II. CR 5(a)

Reynolds argues that the superior court commissioner erred when it heard, ex parte, the motion to stay execution of the writ of restitution.[2] Specifically, Reynolds asserts that its right to notice for "'every written motion other than one which may be heard ex parte'" under CR 5(a) was violated when the superior court commissioner heard ex parte motions prohibited by Code of

[2] Reynolds also argues that the stay was "void ab initio" under the common law. We do not review issues that are not adequately developed in the briefs. *State v. Corbett*, 158 Wn. App. 576, 597, 242 P.3d 52 (2010). Reynolds provides only three sentences regarding the "void ab initio" issue in his brief, and the single case he cites examines matters under the due process clause rather than the common law doctrine of "void ab initio." Because Reynolds provides inadequate briefing, we decline to discuss the matter further.

Judicial Conduct (CJC) Rules 2.9(A) and 2.6(A).[3] Br. of Appellant at 13 (quoting CR 5(a)). We agree.

A. RULES OF LAW

We review both the interpretation and the application of court rules de novo. *State v. McEnroe*, 174 Wn.2d 795, 800, 279 P.3d 861 (2012). We interpret court rules using principles of statutory interpretation. *Jafar v. Webb*, 177 Wn.2d 520, 527, 303 P.3d 1042 (2013). However, when interpreting court rules, we are not concerned about usurping the role of the legislature because we are uniquely positioned to declare the correct interpretation of any court-adopted rule. *Jafar*, 177 Wn.2d at 527. "If the rule's meaning is plain on its face, we must give effect to that meaning as an expression of the drafter's intent." *Jafar*, 177 Wn.2d at 526. When a court rule is ambiguous, we must discern the drafter's intent by "'reading the rule as a whole, harmonizing its provisions, and using related rules to help identify'" the intended meaning. *Jafar*, 177 Wn.2d at 526-27 (quoting *State v. Chhom*, 162 Wn.2d 451, 458, 173 P.3d 234 (2007)). The use of "may" in a statute indicates that the provision is permissive and not binding, while the use of "shall" indicates a mandatory provision. *Scannell v. City of Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435 (1982).

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[3] Reynolds argues that the superior court violated "Canons" 2.6(A) and 2.9(A) of the CJC by hearing and granting Harmon's ex parte motions. It is notable that we may not *directly* remedy a violation of the CJC. The Commission on Judicial Conduct is responsible for adjudicating complaints regarding CJC violations. *See* STATE OF WASHINGTON, COMMISSION ON JUDICIAL CONDUCT, https://www.cjc.state.wa.us/ (last visited Oct. 24, 2017). As such, the judicial conduct argument will be addressed as it relates to a possible violation of the civil rules requiring notice to parties.

Improper ex parte communication under the CJC may provide grounds for a new trial under CR 59(a)(1). *Buckley v. Snapper Power Equip. Co.*, 61 Wn. App. 932, 938, 813 P.2d 125 (1991). In addition, the CJC may provide a basis for a definition of ex parte contacts that may be used to determine whether aggrieved parties are entitled to a remedy separate from the judicial code. *See State v. Watson*, 155 Wn.2d 574, 578-79, 122 P.3d 903 (2005).

B. ANALYSIS

1. NOTICE UNDER CR 5(a)

Reynolds asserts that CR 5(a) is "clear on its face" such that "[n]otice of the motion and the hearing were required." Br. of Appellant at 13. We agree.

CR 5(a) states that "every written motion other than one which may be heard ex parte . . . shall be served upon each of the parties." In addition, under Rule 2.9(A) of the CJC,

> [a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, before that judge's court except as follows:
>
> (1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters . . . is permitted, provided:
>
> (a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
>
> (b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

CR 5(a) creates a general rule that "every written motion other than one which *may* be heard ex parte . . . *shall* be served upon each of the parties." (Emphasis added.) Because "shall" creates a mandatory obligation, CR 5(a) *requires* every motion to be "served upon each of the parties," excepting those which "*may* be heard ex parte." CR 5(a) (emphasis added); *see Scannell*, 97 Wn.2d at 704. CR 5(a) does not provide which motions "may" be heard ex parte. *See* CR 5(a).

But "may" indicates a permissive provision. *Scannell*, 97 Wn.2d at 704. Thus, CR 5(a) requires every motion to be served upon each party, except those *permitted* to be heard ex parte. And it follows that, if an ex parte motion is permitted, there must be some source of authority permitting it. Thus, the plain meaning of CR 5(a) is that there must be a source of legal authority permitting the motion to be heard ex parte, and absent such authority, notice is required. *See* CR 5(a). There is no legal authority authorizing a court to hear an ex parte motion to stay execution of a writ of restitution. *See* ch. 59.18 RCW.

2. CODE OF JUDICIAL CONDUCT

Reynolds also argues that the ex parte motion and hearing were prohibited ex parte communication because they violated the CJC. We may look to the CJC to determine whether a motion may be heard ex parte under the Civil Rules. *See Buckley*, 61 Wn. App. at 938; *Watson*, 155 Wn.2d at 575-79.

For example, in *Buckley*, Division One of this court stated that a judge's improper ex parte communication with a guardian ad litem in violation of the CJC was grounds for a new trial because it "prevented appellant from having a fair hearing." 61 Wn. App. at 938. The court also stated that CR 59(a)(1), which provided that a new trial may be granted if proceedings were irregular, authorizes a new trial for violation of the CJC's prohibition on ex parte contacts. *Buckley*, 61 Wn. App. at 938-39.

Similarly, our Supreme Court, in *Watson*, interpreted the term "ex parte communication" to determine whether a memorandum about drug offender sentencing by a county prosecuting attorney to all county superior court judges was an invalid ex parte contact. 155 Wn.2d at 575-77. Relevant here, the court first analyzed the CJC to determine if it provided a definition of ex parte

communication. *See Watson*, 155 Wn.2d at 578-79. At that time, the CJC did not provide a definition of prohibited ex parte communications, but the case suggests that the CJC can provide a basis for a definition of ex parte contacts that may be used to determine whether aggrieved parties are entitled to a remedy separate from the judicial conduct code. *See Watson*, 155 Wn.2d at 578-79.

3. IMPROPER EX PARTE COMMUNICATION

The CJC states that a motion is properly heard ex parte if it concerns administrative or scheduling matters or if the communication is heard for emergency purposes. CJC Rule 2.9(A). In addition, to be proper, the ex parte communication may not address substantive matters, and the judge must reasonably believe that "no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication." CJC Rule 2.9(A)(1)(a).

Here, Reynolds had no notice of the motion or hearing on Harmon's ex parte motion to stay enforcement of the writ, which would allow Harmon to retain possession of the premises. As Reynolds asserts, this is not a "scheduling" or "administrative" matter.

Even considering Harmon's ex parte motion as an emergency, given that she was going to lose possession of her residence if the sheriff executed the writ of restitution, it was still improper. An ex parte communication, even one for "emergency purposes," is, however, authorized only if the communication does not "address substantive matters" and if the judicial officer "reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication." CJC Rule 2.9(A)(1), (1)(a). The motion here addressed substantive matters because the matter impacted Reynolds' right to regain possession of its property under the writ of restitution. And the motion gave Harmon a substantive advantage because it allowed her

to remain on the premises until the subsequent show cause hearing. Thus, the ex parte communication was not proper under the CJC. CJC Rule 2.9(A).

Accordingly, CR 5(a) required that Reynolds receive notice of the motion. Reynolds did not receive notice of the motion to stay, so it was denied proper notice.[4]

III. RCW 59.18.390(1) REQUIRES NOTICE AND HEARING

Reynolds next argues that it did not receive mandatory notice of the hearing and opportunity to be heard regarding the bond as required under RCW 59.18.390(1). We hold that the superior court commissioner erred by waiving the bond in violation of notice and hearing requirements provided in RCW 59.18.390(1).

A. RULES OF LAW

We review the meaning of a statute de novo. *Jongeward v. BNSF Ry. Co.*, 174 Wn.2d 586, 592, 278 P.3d 157 (2012). When interpreting a statute, our goal is to "ascertain and carry out the legislature's intent." *Jongeward*, 174 Wn.2d at 592. If a statute's meaning is plain on its face, we must "'give effect to that plain meaning as an expression of legislative intent.'" *Jongeward*, 174 Wn.2d at 594 (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). The plain meaning is determined based on all of the statutory language. *Jongeward*, 174 Wn.2d at 594. "Plain meaning may also be discerned from 'related statutes which disclose legislative intent about the provision in question.'" *Jongeward*, 174 Wn.2d at 594 (quoting *Campbell & Gwinn*, 146 Wn.2d at 11). "Shall," when used in a statute, is presumptively

[4] Reynolds also argues that the superior court commissioner erred by failing to impose a bond under RCW 59.18.390(1). Because we reverse on other grounds, we do not reach this issue.

imperative and operates to create a duty, rather than to confer discretion. *In re Parental Rights to K.J.B.*, 187 Wn.2d 592, 601, 387 P.3d 1072 (2017).

RCW 59.18.390(1) provides in relevant part, "The plaintiff . . . shall have notice of the time and place where the court or judge thereof shall fix the amount of the defendant's bond, and shall have notice and a reasonable opportunity to examine into the qualification and sufficiency of the sureties upon the bond before the bond shall be approved by the clerk."

B. ANALYSIS

The landlord "shall" have notice of the time and place of the hearing at which the tenant's bond is set and "shall have notice and a reasonable opportunity to examine into the qualification and sufficiency of the sureties upon the bond before the bond shall be approved." RCW 59.18.390(1). Unless there is contrary evidence of legislative intent, the word "shall" is presumed to be imperative; thus, the presumption here is that "before" the bond amount is set, the landlord is entitled to notice of the bond hearing and an opportunity to be heard regarding the sufficiency of the sureties. *See K.J.B.*, 187 Wn.2d at 601. Because landlords are entitled to notice and hearing required before the court approves the bond, it follows that landlords must also be entitled to notice and a hearing before the bond is waived altogether. *See* RCW 59.18.390(1).

Here, Harmon brought a motion to stay execution of the writ of restitution without notice to Reynolds. The superior court commissioner heard the motion ex parte and waived the bond requirement without Reynolds receiving notice of the hearing nor an opportunity to inquire into the adequacy of the bond to secure Reynolds' interests. Thus, the superior court commissioner

erred as a matter of law when the commissioner waived the bond in violation of statutory requirements.[5] *See* RCW 59.18.390(1).

IV. ATTORNEY FEES

Reynolds requests attorney fees and costs, arguing that its rental agreement provides that the prevailing party is entitled to reasonable attorney fees and costs accrued on appeal. We agree.

Under RAP 18.1(a), "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule." "A contract providing for an award of attorney fees at trial . . . supports such an award on appeal." *Hall v. Feigenbaum*, 178 Wn. App. 811, 827, 319 P.3d 61 (2014).

Under Reynolds' rental agreement with Harmon, "the prevailing party shall be entitled to recover its reasonable attorney fees and court costs incurred in the event any action, suit or proceeding commenced to enforce the terms of this Agreement." CP at 13. Reynolds' unlawful detainer action is a "proceeding commenced to enforce the terms" (CP at 13) of the rental agreement, so the prevailing party is entitled to attorney fees and costs, including those associated with the appeal. *See Hall*, 178 Wn. App. at 827. Reynolds is the prevailing party in this appeal. Thus, subject to its compliance with RAP 18.1, we award Reynolds its attorney fees on appeal in an amount to be determined by a commissioner of this court. *See Hall*, 178 Wn. App. at 827.

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[5] Reynolds argues that the superior court commissioner violated Reynolds' due process rights under article I, section 3 of the Washington Constitution when the commissioner heard matters that materially affected Reynolds' rights without providing it with an opportunity to be heard. We decline to reach this issue because we decide this case on nonconstitutional grounds. *See Wash. State Farm Bureau Fed. v. Gregoire*, 162 Wn.2d 284, 291 n.7, 174 P.3d 1142 (2007).

We hold that the superior court commissioner violated CR 5(a) and RCW 59.18.390(1) when the commissioner heard the ex parte motion to stay execution of the writ of restitution and waived the bond without notice to Reynolds. We reverse.

Johanson, J.
JOHANSON, P.J.

We concur:

J. J
LEE, J.

Melnick, J.
MELNICK, J.

Filed
Washington State
Court of Appeals
Division Two

January 31, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RANDY REYNOLDS & ASSOCIATES, INC. dba REYNOLDS REAL ESTATE, Appellant, v. KASEY HARMON aka KASEY HARMAN, Any Subtenants, and All Others Acting By Or Through Them, Respondents.	No. 49588-1-II ORDER DENYING MOTION FOR RECONSIDERATION

Respondents move for reconsideration of the Court's October 31, 2017 opinion. Appellant filed a motion to extend time to file a response to the motion for reconsideration. Upon consideration, the Court grants the motion to extend time and accepts the Appellant's response for filing and denies the motion for reconsideration. Accordingly, it is

SO ORDERED.

PANEL: Jj. Johanson, Lee, Melnick

FOR THE COURT.

Johanson, J.

JOHANSON, J.

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