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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of: PETITION TO AMEND RULE 13(b)(4) OF THE RULES OF PROCEDURE FOR EVICTION ACTIONS	Supreme Court No. R-17-0020 COMMENTS OPPOSING PROPOSED RULE

Commenting Parties Manufactured Housing Communities of Arizona and Michael A. Parham oppose the Petition to Amend Rule 13(b)(4) of the Rules of Procedure for Eviction Actions (the "Proposal") filed by the Arizona Commission on Access to Justice (the "ACAJ"). The Proposal seeks to amend a functioning rule for emotional reasons. It seeks to amend a court rule with no factual or legal justification to solve a problem where there is not one. Realistically, the purpose of this needless Proposal is to delay eviction actions and buy tenants time to live in their landlords' property rent-free while they seek new housing.

In summary, the Proposal would: require both parties in an eviction action to *personally* appear before the judge to discuss the stipulation (regardless of whether they have negotiated the stipulated judgment before court, or whether they have entered into an agreement not to execute the judgment); require the judge to make inquiries of both parties similar to those made in a criminal change of plea hearing where the defendant's life and liberty are at stake and in which the State is an involved party; require that legal advice be given to the tenant on any stipulated judgment form; and require that that the tenant be

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advised that the plaintiff's representative—the landlord attorney—"is not a court employee" (implying that attorneys representing landlords misrepresent themselves as court employees).

If the Proposal is adopted, it will effectively result in the elimination of stipulated judgments in eviction actions, as the motivations for seeking them will be eliminated.

I. INTRODUCTION

On January 1, 2017, severe restrictions were placed on the stipulation process by a "voluntary" pilot program (referred to in the Proposal) requiring all parties to an eviction to appear in person and explain the stipulation to the judge. As part of this "voluntary" program, the first question to be asked by any judge regarding any stipulated judgment is whether the signature appearing on the judgment is actually the tenant's—insinuating that the landlord's attorney might have forged the tenant's signature. Other questions include whether the tenant understands the judgment; whether the tenant understands the possible ramifications of the judgment to his credit record and whether the tenant knows that his wages could be garnished; and whether the tenant realizes that the judgment may affect any Section 8 housing subsidy.

Prior to the adoption of this pilot program, landlord attorneys generally met with tenants appearing in court before an eviction action hearing to discuss the amounts the landlord was seeking, the tenant's position, and whether the tenant wished to stipulate to a judgment. This conversation sometimes resulted in negotiating an extended date for the writ of restitution (giving the tenant more time vacate the landlord's property), or reducing the monetary portions of the judgment. The tenant would receive a copy of the judgment and could leave the courthouse to avoid waiting through the court's entire docket just to see a stipulated judgment entered.

Before the pilot program, stipulated judgments were advantageous to the parties and the Courts because they resolved cases quickly, moved the court's docket along, and allowed tenants to either avoid appearing in court if they stipulated before the hearing date, or to

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leave the courthouse and get to work or other obligations if they stipulated at the courthouse. As most of these advantages have disappeared, most landlord attorneys have stopped meeting with defendants at the courthouse before the initial hearing.

If the courts are required to spend time with each tenant answering a series of questions about the tenant's ability to understand what the tenant signed, there is no benefit to induce landlord attorneys to speak with tenants before the court appearance and seek a stipulated judgment. Landlord attorneys would be doubling their work without benefit—thus stipulations will disappear.

II. BACKGROUND OF THE PROPOSED RULE AMENDMENT

The Rules of Procedure for Eviction Actions ("RPEA") were drafted by the Arizona State Bar Landlord/Tenant Task Force Rules Committee between 2007 and 2009. Rules Committee members extensively debated and carefully vetted the existing rule permitting stipulated judgments. Many modifications to the stipulated judgment rule were made, compromising Committee members' objections and eventually resulting in the current rule. This was included in the RPEA and unanimously approved by the Committee and Task Force before being adopted by the Supreme Court. Only one member of the Rules Committee—Ellen Katz—dissented from the final RPEA proposal submitted to the Supreme Court, and even her objections did not target the rule regarding stipulated judgments.[1]

The existing stipulation rule was not hatched from the minds of evil landlord attorneys. It (and the rest of the RPEA) was the product of years of debate and deliberations by a group of people representing all sides of eviction practice who were familiar with this area of the law.

On January 18, 2007, after weeks of debate over stipulations, Gary Restaino, a Rules Committee member (and former CLS attorney) came up with a proposal marrying together

[1] *See* Ellen Katz e-mail dated February 25, 2007 recommending then current version of stipulated judgment draft rule in place of proposed legislative change authorizing them and e-mail dated September 25, 2007 objecting to certain rules included in final Task Force proposal but not stipulated judgment rule, reproduced in accompanying appendix hereto; *see also* William E. Morris Institute for Justice Comments dated May 15, 2008 available at http://www.azcourts.gov/Rules-Forum/aft/150

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many diverse opinions in a successful effort to compromise disagreements that resulted in the current rule.[2] The proposal was embraced by Todd Lang (another Rules Committee member and former CLS attorney) and Steve McMurry (a Justice of the Peace and former attorney for AAMHO, a statewide mobile home park tenants' association).[3] This proposal eventually made its way into the RPEA as Rule 13(b)(4).

Nothing has been alleged by the ACAJ in the eight years since the RPEA were adopted that would justify alteration or elimination of the stipulated judgment rule.

The practice of using stipulations in evictions originated about 25 years ago at the instigation of the Courts as a device to make eviction dockets manageable and ensure that tenants who appeared understood what their landlords were seeking and why. Ending stipulated judgments (the practical consequence of the Proposal) will add to docket times and likely leave unrepresented tenants ignorant of why they are in Court beyond what they can glean from the papers served on them and during their brief appearance in front of a judge.

In November 2016, the ACAJ filed its Proposal and agreed to continue to receive feedback from stakeholders. Most notable about the Proposal is that it identifies no *factual* need for the amendment sought, instead basing it on the widely discredited June 2005 Justice Court Study by the William E. Morris Institute.[4] The Proposal essentially would require in **all** cases where stipulated judgments are submitted to the Court that **both** parties or their attorneys appear and explain to the judge the facts and circumstances leading to the stipulation and that the judge question **both** parties to ensure that all requirements of the RPEA are satisfied. Currently under RPEA Rule 13(b)(4) the court must be satisfied the stipulated judgment is proper just as it must do for any other judgment, and the trial court has the *option* of insisting both parties appear and explain it—but that level of inquiry is not

[2] *See* Gary Restaino e-mail dated January 18, 2007 proposing stipulated judgment rule, reproduced in accompanying appendix hereto.

[3] *See* Lang and McMurry e-mails dated January 22, 2007 tentatively approving Restaino proposal, reproduced in accompanying appendix hereto.

[4] http://www.morrisinstituteforjustice.org/docs/Final_eviction_report.pdf

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mandated.

Clearly something bad must have happened since January 1, 2009, when the stipulated judgment rule (with the support of the Task Force members including Ellen Katz, legal services attorneys, judicial members, landlord attorney members, and Dan McAuliffe, the Task Force liaison to the Rules Committee) went into effect supporting the instant proposal to effectively eviscerate it.

But the ACAJ is silent on that subject. The only apparent reason seems to be a distrust of and disdain for landlord attorneys even though no evidence supports this. The real intent seems be to buy tenants time to live in their landlords' properties rent-free while they seek other housing. This is evident from the following passage in the Proposal:

> The inability to find other housing on short notice can lead to the disruption of children's education, interruption of employment, dislocation from health care providers, loss of personal belongings and homelessness. Thus, the consequences of eviction cases make them very important to tenants and especially low-income tenants, who often lack back-up resources. The result of an eviction may be that a family is living in a car or shelter.

Although hardship provokes sympathy, it is not the basis for a Court procedural rule, especially when the effect is the taking of the landlord's right to possession of his property when there is no **legal** cause for doing so. Giving time to tenants to live rent-free in landlord properties because it would be a hardship to move is a taking and is inconsistent with relevant law.

Approximately 80,000 evictions move through Arizona Justice Courts each year, around 60,000 of which take place in the 26 Maricopa County Justice Courts. In the past, a substantial percentage involved stipulations.

Protections are already built into the RPEA if a tenant believes that he or she has been duped into signing a stipulated judgment. They allow for motions for reconsideration, motions for new hearings, and motions to stay the writ of restitution when cause exists to question the judgment's validity. There is no legal or fact-based justification for requiring

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all tenants stipulating to a judgment to appear personally in the courtroom (often when they would prefer to leave, or when they have already signed an Agreement Not to Execute with their landlord) to be asked a litany of questions similar to those asked during a criminal change of plea hearing. There is no legal or fact-based justification for requiring that legal advice be given on the stipulated judgment form.

III. HISTORICAL BACKGROUND OF STIPULATED JUDGMENTS IN EVICTION ACTIONS

Undersigned counsel Michael A. Parham has maintained a substantial eviction practice since 1978. He witnessed and participated in the events leading to the stipulated judgment practice.

In the 1980s, a real estate industry boom fueled the construction of tens of thousands of apartment units. Eventually supply exceeded demand, forcing landlords to offer low rent incentives and even "free rent," and to reduce credit standards to attract tenants. Around 1989 the market crashed and apartment landlords were forced to raise rents and discontinue rent incentives. Tenants, in unusually large numbers, became the subjects of eviction actions, many having lost their jobs due to the market crash. The high numbers of evictions had a huge impact on Arizona's justice courts. Courts in precincts that had experienced high growth in apartment construction were suddenly faced with large increases in eviction filings. The Glendale Justice Court at one time handled its eviction calendars by splitting its main courtroom in half and having two judges simultaneously calling cases just to get through the calendar is less than half a day.

Most eviction cases are straightforward and tenants do not dispute the relief being sought. But when tenants appeared in court, judges were forced to explain, case-by-case, what the landlord was seeking. Judges began asking landlord attorneys to meet with tenants before the calendar was called to explain what was being sought and, if there was no disagreement, to obtain stipulations. Until that time, seeking stipulated judgments was not a common landlord attorney practice.

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The motive of the Courts was to reduce the time required to process eviction calendars. Before this practice developed, it was not unusual for such a calendar to take several hours to half a day, depending on the precinct and the time of the month (most evictions are heard during the last half of the month).

Arizona and Maricopa County have experienced several booms and busts since then, and each has resulted in increased eviction workloads on justice courts. The eviction workload of the Courts to this day is enormous and the current stipulated judgment practice enables judges to move their increased calendars along.

IV. THE ACAJ PROPOSAL

This Proposal would require both parties to appear and explain the stipulated agreement in Court. The Court would be required to ask the tenant a litany of questions. Based on the questions used in the current pilot program, those questions would be similar to those asked pursuant to *Boykin v. Alabama*, 395 U.S. 238 (1969) during criminal change of plea hearings to ensure that criminal defendants are pleading guilty knowingly and voluntarily. Several of them would focus on whether the landlord's attorney lied to the tenant or forged the tenant's signature in order to obtain a stipulated judgment. As a result, the stipulation practice will no longer expedite eviction calendars. It makes no sense for landlord attorneys to continue seeking stipulations since under this Proposal the benefits will disappear.

The ACAJ states that it "is informed and believes that the 26 Justice Courts in Maricopa County will in January 2017 voluntarily implement the procedure outlined in this rule petition." While it is debatable whether the program was voluntary, the inadequacies in the proposed rule were immediately demonstrated in the pilot program. Since its adoption, landlord attorneys have ceased speaking with tenants and seeking stipulations. In response to seeing the practical effect of the proposed rule, many Justices of the Peace have complained that the proposed rule has created a backlog of court cases and has served no benefit to tenants. Further, tenants appearing in court as defendants in eviction actions have

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complained that the rule requires them to stay in court, thus preventing them from quickly returning to work. These would be the same effects if the proposed rule is adopted.

Ultimately, the Proposal could actually benefit landlord attorneys by relieving them of workload shifted by the courts years ago and freeing up time for other activities.

V. CONSEQUENCES OF PROPOSAL

Nowhere is the law of unintended consequences more evident than with this Proposal. In reading it, one is unable to find a legitimate reason for regulating stipulated judgments. The Proposal speaks about the hardships of evictions on tenants and describes the process by which stipulations are obtained. But it does not say how stipulated judgments (as opposed to non-stipulated judgments) add to these hardships. The unstated reason, however, is clear. The ACAJ implies (with no factual basis) that landlord attorneys are browbeating tenants into stipulating to judgments against their best interests.

It is important to be clear. This Proposal will not regulate stipulated judgments; as a practical matter, it will end them. As a result of the pilot program in Maricopa County the practice has already ended there.

It is also important to understand that the losers in this proposal are not landlords and their attorneys but tenants, their attorneys, and the court system. Here are a few of the consequences:

A. *Tenants Represented by Private Counsel*

Several private attorneys represent tenants in eviction actions. Private tenant attorneys seek to keep fees low since tenants facing eviction typically cannot afford much. Their clients often want to settle by getting more time to pay or vacate. It is common practice to agree with the landlord's attorney that if the tenant moves out after the stipulated judgment is entered, the landlord will vacate the judgment thus avoiding undue harm to the tenant's credit. By calling opposing counsel and seeking a stipulation, tenant attorneys can not only obtain a settlement but are able to minimize fees since they do not have to charge for a court appearance.

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The Proposal will reduce the number of tenants able to hire private attorneys to represent them by increasing their legal fees as a result of requiring unnecessary court appearances.

B. ***Uninformed Tenants***

Since January 1 of this year, landlord attorneys have mostly stopped seeking stipulations. Tenants are not meeting with landlord attorneys before their court appearances to learn what is being sought. Instead, they usually appear before judges knowing nothing more than what is shown in the Complaint.

Discussing a stipulation before court allows both parties to identify errors and defenses before the court appearance, and a stipulation is entered only when there is agreement based on those discussions.

C. ***Tenant Inconvenience***

In those few instances where stipulations are obtained if this Proposal is accepted, tenants will no longer be able to leave court immediately to get to work or for other reasons after signing it. They will need to waste time on a case with which they have no disagreement. This is significant because court calendars are taking more time under the new policy.

Tenants will no longer be able to sign a stipulated judgment and an Agreement Not to Execute, and avoid having to attend any court appearance altogether. Instead, even if they have already worked out a signed contract with their landlord, tenants will be required to attend a court appearance to state that the landlord's attorney did not forge their signature or lie to them in order to get them to sign the judgment.

D. ***Lost Tenant Opportunities***

If the Proposal is adopted, tenants will lose the opportunity to strike beneficial deals. For example, it is common for tenants to get additional time to move after a judgment when the landlord's lawyer hears of significant hardships and other factors. It is common for tenants receiving Section 8 to stipulate to a judgment and sign an Agreement Not to Execute

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with their landlord that calls for vacating the judgment if the tenant has complied with all terms of the agreement, thereby preserving the tenant's ability to receive Section 8 benefits. This is likely the single most important factor for a Section 8 tenant facing an eviction.

E. ***Special Mobile Home and RV Park Tenant Consequences***

Tenants in mobile home and RV park cases may lose the opportunity to have a discussion with the landlord's lawyer regarding working out arrangements to store the tenant-owned mobile home or RV on-site in the landlord's park after the tenant vacates. Additionally, stipulated judgments and Agreements Not to Execute are particularly common in mobile home and RV cases and often allow the tenant more time to move and address the issue of what will be done with the tenant's home. This is especially important in mobile home and RV cases, which involve more intricacies and potential ramifications than residential evictions. It is critical for tenants to have the opportunity to negotiate potential outcomes beyond what may be discussed in court before the judge. Unfortunately, there is an absence of judicial training in this area of the law. Commenting party MHCA regularly provides training in this area of law for community managers pursuant to A.R.S. § 33-1437

F. ***Impact on Courts***

As discussed above, the courts originally encouraged stipulations to reduce calendar congestion. Ending stipulations (the practical effect of the Proposal) will cause all tenants showing up at court to sit through long calendars. Witnesses in contested cases will be required to wait through long calendars before their cases are called.

G. ***Attorneys' Fees Will Increase***

If the Proposal is accepted, stipulations will cease as has been shown via the pilot program. Without stipulations, court dockets will slow down, requiring attorneys to spend more time in court. If this practice continues, it will likely result in more attorneys being needed to cover the same number of courts. As a result, attorneys' fees in eviction actions will increase. This will directly harm tenants as they are required to pay their landlords'

attorneys' fees to reinstate their leases. It is in the tenants' best interest that attorneys' fees remain at current minimal rates.

VI. CONCLUSION

The Proposal seeks to help tenants for reasons related to sympathy, emotion, and mistrust of and disdain for landlord attorneys, rather than evidence-based problems with the current rule. The Proposal's effect would be quite the opposite—Courts and tenants will suffer, not benefit.

The fact that the ACAJ has submitted the proposal, but asked for time to re-write it after the initial comment period, demonstrates that the proponents of the rule are unfamiliar with the practical effects such a rule would have. The Proposal should be rejected.

DATED: March 14, 2017

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A copy of these comments has been e-mailed
this 14th day of March, 2017 to:

Hon. Lawrence Winthrop

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