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IN THE SUPREME COURT

STATE OF ARIZONA

COMMENTS TO PETITION FOR RULES OF PROCEDURE FOR EVICTION ACTIONS	Supreme Court No. R-07-0023

Pursuant to Rule 28 of the Rules of the Supreme Court, the William E. Morris Institute for Justice submits these comments to the Petition for Rules of Procedure for Eviction Actions submitted to the Arizona Supreme Court.

Statement of Interest

The William E. Morris Institute for Justice ("Institute") is a non-profit program established to advocate, litigate and lobby on behalf of the interests of low-income Arizonans. We work closely with the federally funded legal services programs and community groups. One substantive area the Institute has worked on is housing.

In the Summer of 2004, in response to concerns raised by public interest lawyers that the manner in which eviction cases were handled in Maricopa County Justice Courts violated due process and the Arizona Residential Landlord and Tenant Act, the Institute conducted a study of the practices in eviction cases. The Institute's Director and two summer legal interns observed the court calls in 14 of the 23 Justice courtrooms, with 5 courtrooms observed on more than one occasion. The staff recorded information on each case called; reviewed court files; and conducted interviews of attorneys and Justices. In the summer of 2005, the Institute published its report "Injustice In No Time: The Experience of Tenants in Maricopa County Justice Courts." A copy of the report is submitted as Exhibit 1 to these comments. The report documented the numerous ways

the eviction court proceedings were conducted to favor landlords and deny tenants their constitutional and statutory rights.

The importance and magnitude of eviction cases cannot be overstated. There are over 82,000 evictions filed in Maricopa County each year. In these cases, over 85% of the landlords are represented and fewer than 200 tenants each year are represented. Eviction actions have very short time frames. As an example, summonses are typically served only two days before trial, A.R.S. §§ 33-1377(B), 12-1175(C), and writs of possession are awarded five days after trial. A.R.S. §§ 33-1377(A) and 12-1178(C). Significantly, eviction actions affect housing. Advocates note that evicted persons often become homeless and lose their property as a result of these actions.

In response to the Institute's report, then State Bar President Helen Perry Grimwood requested that the Board of Governors authorize the creation of a Landlord and Tenant Task Force. The Institute's Director, Ellen Katz, was appointed a member of the task force. Attorney Katz served on the task force subcommittee on rules. The proposed rules are a product of that task force subcommittee.

The mandate of the subcommittee stated by the Committee Chair David Rosenbaum and Bar President Helen Perry Grimwood was to ensure due process for all parties. The proposed rules should be evaluated to determine if they meet this standard.

As noted in the petition, the proposed rules were arrived at by "significant" compromises. This Court must evaluate those "compromises" and determine whether the proposed rules are procedural or substantive and whether they protect the due process and statutory rights of tenants. The petition notes the proposed rules also will provide benchmarks for "consistency" in these cases. But consistency, alone, is a shallow criteria if the procedures continue to favor landlords at the due process expense of tenants. The Institute believes there are proposed rules that both change the current substantive law and/or adversely affect tenants' rights.

While in general, if followed, the proposed rules are a step toward enhancement of the administration of justice in eviction cases, the following proposed rules require

modification.

I. Requested Changes to Proposed Rules

A. The Institute Objected to Two Rules During the Committee Process that Substantively Change Current Law and Should Be Modified

During the rules subcommittee meetings, Ellen Katz of the William E. Morris Institute for Justice, objected to two rules. The subcommittee knew of her concerns and acknowledged her right to object to the rules. She objected to the following two rules and they should be modified.

1. Rule 8(e): Counterclaims and Consolidation

This rule is adapted from the Arizona Residential Landlord and Tenant Act ("ARLTA"), A.R.S. § 33-1365. The statutory provision pertains to the situation where the tenant files a counterclaim. Many tenant counterclaims are based on a claim that the rental unit was not maintained in a safe and habitable condition. There is no dispute over the first sentence of the proposed rule as it tracks the language of the statute. The second sentence would allow a court to dismiss a counterclaim if a tenant failed to pay the undisputed rent into court. This provision is not in the statute.

Under A.R.S. § 33-1365(A), a court may order the tenant who filed a counterclaim to pay to the court the undisputed rent and a tenant who deposited the undisputed rent into court may avail herself of the safe harbor provision. Under that provision, even if a tenant withheld more rent than the court found appropriate, judgment for possession would still be awarded to the tenant if: (1) the tenant posted the undisputed rent with the court; (2) the court found the tenant acted in good faith; and (3) the tenant satisfied the judgment for rent awarded to the landlord. A.R.S. § 33-1365(A). As an example, a tenant who withheld half of her monthly rent ($300) because of bad conditions in the apartment, and deposited the undisputed rent into court, will get possession of the unit even if the court finds the tenant should only have withheld $150, if the court finds the tenant acted in good faith and the tenant pays the difference in rent owed.

The second sentence of the proposed rule goes beyond the statute to allow the court to dismiss the counterclaim if the undisputed rent is not posted. This proposed rule would allow the court to require the tenant to post money to have his counterclaim heard. This sentence conditions access to the courts to have a claim heard on the posting of money into the court when there is no legal authority for this provision. Tenants should not have to post any money to have a counterclaim heard.

As noted, a tenant who does not post the undisputed rent for any reason cannot avail herself of the safe harbor provision. The "penalty" in the statute for not depositing the undisputed rent is loss of the safe harbor, not dismissal of the counterclaim. This sentence of the rule will have an adverse effect on tenants' rights to pursue a counterclaim. Eviction cases move very quickly and continuances, when granted, are for short periods (3 days in justice courts). A.R.S. § 33-1377(C). If tenants, who are overwhelmingly low and modest income, are not allowed to bring and pursue counterclaims in eviction cases, these claims will not be brought.

There is no reason for the second sentence in proposed Rule 8(e). It is contrary to adjudicating cases on the merits and conditions access to the court to have a claim heard on payment of money into the court. This rule will restrict tenants' rights. It is unlike other provisions in the draft rules that require certain actions by landlords, such as the proper pleading of claims or the use of a handout explaining the parties' rights. Those proposed rules "regulate pleading practice and procedure" in eviction cases and are authorized under A.R.S. § 12-109(A). Moreover, in those rules, the landlords' rights are not restricted or adversely affected.

Therefore, the Institute requests that the Supreme Court delete the second sentence in Proposed Rule 8(e).

2. Rule 17(d): Appeals

The Forcible Entry and Detainer Statute, A.R.S. § 12-1179, establishes the substantive requirements for an appeal from justice court to superior court in an eviction action. The statute provides that a tenant must post certain amounts of money to remain

in the residential unit during the appeal. Specifically, to stay the writ of restitution for possession, the tenant only must post the rent accruing since the judgment, plus costs and attorney's fees, and the periodic rent as it comes due during the appeal. A.R.S. § 12-1179(d). Nothing else is required.

Proposed Rule 17(d) would change the current law substantively in several respects when the appeal is from a finding of material and irreparable breach that involves underlying allegations of "violent conduct, crimes against children, criminal activity involving serious property damage or drug related activity." In those situations, the rule would allow the court to deny the tenant the right to remain in the unit pending appeal and to impose other conditions on the tenant. The proposed rule changes the substantive law on appeals in the following ways. The proposed rule:

(1) Authorizes the court to deny a tenant the statutory right to remain in the housing pending appeal, even if the rent bond is paid.

(2) Places the burden on the tenant to affirmatively request in writing that the tenant wishes to remain in the unit pending appeal.

(3) Requires the court to review only the evidence in the record without a hearing and balance the interests of the tenant, other residents, the landlord and "the public at large" in deciding if the writ of possession should be stayed.

(4) Allows the court to impose conditions on the tenant remaining in the unit during appeal, including the exclusion of certain residents such as children or teenagers from the unit pending appeal.

(5) Allows the court to hold a hearing for an emergency motion to lift the stay of the writ of possession during the appeal if the landlord claims the tenant breached the conditions of appeal.

This rule not only substantively changes the requirements for tenant appeals in the statute, but changes the substantive requirements to make it more difficult and thus less likely tenants will file appeals. These are sufficient reasons to delete the rule. The right

to appeal is determined by statute and cannot be modified by a rule. *See State v. Berry*, 133 Ariz. 264, 276, 650 P.2d 1246, 1249 (App. 1982) ("The right to appeal is strictly statutory."); *County of Pima v. State Department of Revenue*, 114 Ariz. 275, 277, 560 P.2d 793, 795 (1977) (The right to appeal is limited by the terms of the statute and "where the right is neither given nor denied by the Constitution, it is within the discretion of the legislative authority to say in what cases and under what circumstances appeals may be taken." (citations omitted)). Proposed Rule 17(c) would amend the statute and should be rejected for that reason.

An additional reason to delete this rule is the adverse effect it will have on vulnerable persons, such as victims of domestic violence. Tenant advocates state that landlords include very broad "crime free" lease provisions in leases that many advocates believe violate the ARLTA. These lease provisions make the tenant liable for any criminal activity on or near the premises that anyone a tenant knows commits. Tenant advocates also state that landlords routinely file "material and irreparable breach" cases for minor tenant infractions to get the case into court quicker; reduce the time required to obtain possession of the unit; and reduce the likelihood of an appeal. In "material and irreparable" breach cases, ARTLA shortens the time period for a case to be heard to no more than the third day after filing of the complaint and after a finding of material and irreparable breach allows the writ of possession to issue within 12 to 24 hours. A.R.S. § 33-1377(E).

Tenant advocates state many landlords evict a victim of domestic violence for being the victim of a crime under a crime free lease provision. As an example, a landlord files an eviction because a tenant was a victim of domestic violence; the victim called the police; the abuser was arrested; and the landlord claims the domestic violence (criminal activity) violated the terms of the crime free lease provision. There could be property damage—the abuser punched a hole in the wall, or abuse to a child—the abuser hit his child and the child had to go to the hospital. Under the proposed rule, if the victim of abuse wanted to challenge her eviction and remain in her home, the court could order her

to move. Or the court could order that the abuser remain away from the residential unit. If he returned, even against the wishes of the tenant-victim, the court could lift the stay of the writ of possession pending the appeal. These cases are common. This rule will allow landlords to continue to misuse the immediate and irreparable breach and the crime free lease provisions.

This proposed rule restricts tenants' statutory rights. It is unlike other provisions in the draft rules that require certain actions by landlords, such as the proper pleading of claims or the use of a handout explaining the parties' rights which are appropriate rules under A.R.S. § 12-109(A). In the other rules, the landlords' rights are not restricted or adversely affected.

For all these reasons, the Institute requests that the Supreme Court delete Proposed Rule 17(d) in its entirety.[1]

B. Other Changes to the Proposed Rules Should Be Made

While during the committee process, the Institute did not reserve a formal objection to the following proposed rules, upon timely reflection, the Institute believes that the following rules should be modified. Therefore, the Institute requests the Supreme Court also consider the following changes to the proposed rules.

1. Rule 1: Application of the Rules of Civil Procedure

Proposed Rule I states that "The Arizona Rules of Civil Procedure shall not apply in eviction actions except as specifically incorporated by reference by these Rules."

The Institute recommends that the rule be changed to read: "The Court and parties shall look to the Arizona Rules of Civil Procedure for guidance, where appropriate." The Arizona Rules of Civil Procedure are comprehensive. They should be looked to for guidance.

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[1] Landlords recently have attempted through proposed legislation to modify the ARLTA and the mobile home park statutes concerning tenant appeal rights, among other matters, but have been unsuccessful. *See* SB 1346 this legislative session (mobile home parks) and HB 2361 in the 2007 legislative session (ARLTA).

2. Rules 13 (c)(2)(D) and (d): Fees and Rental Concessions

Proposed Rule 13 substantively expands the types of fees and items landlords may obtain in eviction court. Because this rule is not limited to procedural matters, it must be modified. Currently, A.R.S. § 33-1377(F) provides that if a tenant is found "guilty," the judgment shall be for "late charges stated in the rental agreement, for costs" and at the landlord's option, for rent due. In A.R.S. § 33-1377(D), the statute also provides that the court "may assess damages, attorneys' fees and costs as prescribed by law." A.R.S. § 33-1368(C) provides the landlord may recover all "reasonable damages," "court costs," "reasonable attorney fees" and all quantifiable damage caused by the tenant to the premises. Because A.R.S. § 33-1377(F) is very specific as to which charges in the rental agreement may be obtained in a judgment, other charges in a rental agreement not referenced in the statute are not allowed. "A well established rule of statutory construction provides that the expression of one or more items of a class indicates an intent to exclude all items of the same class which are not expressed." *State v. Roscoe*, 185 Ariz. 68, 71, 912 P.2d 1297, 1300 (1996) (citation omitted).

Proposed Rule 13(d) allows the Court to include in the judgment against the tenant a rental concession if the rental concession was included in the rental agreement. As noted above, rental concessions are not listed in ARTLA as allowed charges in a rental agreement. Currently, as noted in the petition, there is a split among the Justices on whether rental concessions are allowed. Because rental concessions are not "damages" and do not fit within any other allowed specified category in ARTLA, to approve Proposed Rule 13(d) would be to substantively modify the current law.

The same analysis applies for the "additional fees" such as pet fees, storage fees, common area "assessments" and "other charges" specified in the rental agreement that would be allowed in Proposed Rule 13(c)(2)(D). The rule substantively expands the kind of rental agreement fees allowed by the statute.

For these reasons, Proposed Rules 13(c)(2)(D) and (d) should be deleted in their entirety as they allow additional fees and costs to be assessed against tenants that are not

authorized by ARTLA. [2]

Conclusion

The William E. Morris Institute for Justice requests that the Proposed Rules of Procedure for Eviction Actions be adopted with the above modifications to promote public laws and policies that enhance the profession and support the administration of justice.

Respectfully submitted this 15th day of May 2008.

WILLIAM E. MORRIS INSTITUTE FOR JUSTICE

By_____

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Original and six copies of this Comment and attached Exhibit, and CD Rom (in Microsoft Word for comment and wordperfect and pdf for attached exhibit) personally filed with the Clerk of the Supreme Court of Arizona this 15th day of May 2008

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[2] In contrast, the Forcible Entry and Detainer Statute, A.R.S. §12-1178(A), allows the landlord to obtain a judgment "for all charges stated in the rental agreement." But only the procedural sections, not the substantive sections of the forcible statute, apply to ARTLA. A.R.S. § 33-1377(A).

COPY of the foregoing served by mail
this 15th day of May 2008, to:

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