State of New Hampshire

MERRIMACK, SS. DOCKET #2019-0476

Supreme Court
2020 Term
January Session

Richard Horton & a.

v.

David Clemens & a.

RULE 7 APPEAL OF RICHARD HORTON & a.

FROM THE FINAL DECISION OF THE

2nd CIRCUIT COURT

DISTRICT DIVISION - HAVERHILL

PLAINTIFF'S/APPELLANTS' BRIEF

January 8, 2020

By: Gabriel Nizetic, Esq. #6540
(presenting oral argument)
Plymouth Law Center
66 Highland Street
Plymouth, NH 03264
603-536-5900

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   Preserved: objection to Motion to Dismiss, *appx*. at 5, *Foran trans*. pp. 10-12.

2. Whether eviction notices that only contain the information that is statutorily required by RSA 540:2 (grounds for eviction) and RSA 540:3 (contents of eviction notice) are legally sufficient?

   Preserved: objection to Motion to Dismiss, *appx*. at 5, *Foran trans*. pp. 10-12.

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7. Whether the additional advisory language included in the Circuit Court's latest eviction notice form, addressed only to tenants, functions to provide tenants with unsolicited legal advice, to the detriment of landlords and property owners?

   Preserved: objection to Motion to Dismiss, *appx.* at 5, *Foran trans.* pp. 10-12.

8. Whether the additional advisory language included in the Circuit Court's latest eviction notice, addressed only to tenants, disrupts the careful statutory balance and the self-help provisions of RSA 540 by advising tenants as to how to use the legal mechanism to avoid voluntary relinquishment, to their advantage, and otherwise discourages parties from negotiating for an orderly transition?

   Preserved: objection to Motion to Dismiss, *appx.* at 5, *Foran trans.* pp. 10-12.

9. Whether the trial court erred when it ruled that the subject language on the new form "…is in fact information tenants need as a matter of due process." and "The subject language and information is therefore necessary"?

   Preserved: objection to Motion to Dismiss, *appx.* at 5, *Foran trans.* pp. 10-12.

10. Whether the trial court erred when it dismissed the case?

    Preserved: objection to Motion to Dismiss, *appx.* at 5, *Foran trans.* pp. 10-12.

11. Whether the trial court erred when it *sua sponte* amended its order, recalled the writ of possession, and vacated the Foran's obligation to pay rent?

    Preserved: plain error rule.

STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

Richard & Janice Horton, the Plaintiffs/Landlords in this case ("Hortons")[1], rented one section of their duplex to Emily Foran ("Foran"), and another section to David Clemens and April Hanks ("Clemens"). The property is located in Piermont, which is in Grafton County, subject to the jurisdiction of the 2nd Circuit Court, District Division, in Haverhill. *Appx*. at 12, 34.

In June of 2019, Clemens failed to pay his rent. As a result, on June 24, 2019, the Hortons served Clemens with a demand for rent and an eviction notice based upon his non-payment of rent. *Appx*. at 15, 16. On June of 2019, Foran likewise failed to pay her rent. As a result, the Hortons also served Foran with a demand for rent and an eviction notice based upon her non-payment of rent. *Appx*. at 40,41. In both evictions, the Hortons used the forms previously furnished by the Circuit Court District Division.

On July, 24, 2018 the District Division revised its Landlord/Tenant forms by inserting additional new language. *Appx*. at 43, 44. The new language included information addressed to the tenant for the tenant's benefit only, including advising the tenant that s/he did not have to leave the premises even after being served with the eviction notice, and further advising the tenant that s/he could ask the municipality to pay the tenant's delinquent rent.

Clemens failed to pay his overdue rent and cure within the statutory timeframes. As a consequence, the Hortons commenced an eviction action in

[1] Throughout this brief the plaintiffs/landlords/appellants will be referred to as "Hortons" and the defendants/tenants/appellees as either "Foran" or "Clemens", as appropriate, for consistency, clarity and due to the consolidation of the cases.

the Haverhill Circuit Court against Clemens based upon non-payment of rent. *Appx*. at 12. Foran also failed to pay her overdue rent and cure within the statutory timeframes. Consequently, the Hortons likewise commenced an eviction action in the Haverhill Circuit Court against Foran based upon her non-payment of rent. *Appx*. at 34.

Clemens' case went to trial first. On June 27, 2019, as the final hearing was about to start, Clemens filed a written Motion to Dismiss at the last minute. *Appx*. at 10. Clemens' Motion to Dismiss only argued that the eviction notice served on him by the Hortons was an older form and therefore had omitted the additional language now inserted in the newer eviction notice forms. The Hortons subsequently filed a written objection arguing that 1) the law does not mandate the landlord to use the Circuit Court's eviction forms, 2) the eviction notice need only contain the information that is statutorily required by RSA 540:2 (grounds for eviction) and RSA 540:3 (contents of eviction notice), 3) the law does not mandate that a landlord use the *most current* version of the Circuit Court's eviction forms, 4) the law provides no penalty for a failure to use the most current eviction form, nor mandates dismissal, 5) the issue is controlled by the holding in *Darbouze v. Champney*, 160 NH 695 (2010), 6) the eviction notice used by the Hortons, which was the Circuit Court's previous eviction notice form, contains the same information requested by the most current eviction notice form, fully complies with the statutory requirements of RSA 540:2 and RSA 540:3, and was properly served upon Clemens in full compliance with RSA 540:5, 7) the omitted language is

not statutorily mandated anywhere in RSA 540, 8) the omitted language is addressed only to tenants and it functions to provide tenants with unsolicited legal advice, to the detriment of landlords and property owners and coaches tenants to not voluntarily and peaceably vacate the premises, and 9) the omitted language disrupts the careful statutory balance and thwarts the self-help provisions of RSA 540 by advising tenants as to how to use the legal mechanism to avoid voluntary relinquishment, to their advantage, and otherwise discourage negotiating for an orderly transition. *Appx*. at 5.

The trial court (Mace, J) took Clemens' case under advisement and on July 24, 2019, issued an order ruling that the current eviction notice form included "…important procedural information for the tenant…" and omitting it was a violation of the law. The trial court further ruled that the subject language on the new eviction notice form "…is in fact information tenants need as a matter of due process." and that "The subject language and information is therefore necessary." *Appx*. at 1. The trial court then granted Clemens' motion to dismiss.

Following Clemens' lead, on July 11, 2019, again also at the last minute, Foran filed the identical Motion to Dismiss at the final hearing. *Appx*. at 33. Foran's Motion to Dismiss argued the identical points that the eviction notice served on her by the Hortons was an older form and therefore had omitted the additional language now included in the newer eviction notice forms. Although Foran's oral arguments at the trial were totally incongruent with her written motion, (*Foran trans*. pp 4-7), the trial court still requested the Hortons

address the issues in Foran's written motion. *Foran trans*. p.10. The Hortons responded to the issues in Foran's written motion by arguing, similarly as in Clemens' case, that 1) the law does not mandate the landlord to use the Circuit Court's eviction forms, 2) the eviction notice need only contain the information that is statutorily required by RSA 540:2 (grounds for eviction) and RSA 540:3 (contents of eviction notice), 3) the law does not mandate that a landlord use the *most current* version of the Circuit Court's eviction forms, 4) the law provides no penalty for a failure to use the most current eviction form, nor mandates dismissal, 5) the issue is controlled by the holding in *Darbouze v. Champney*, 160 NH 695 (2010), 6) the eviction notice used by the Hortons, which was the Circuit Court's previous eviction notice form, contains the same information requested by the most current eviction notice form, fully complies with the statutory requirements of RSA 540:2 and RSA 540:3, and was properly served upon Foran in full compliance with RSA 540:5, 7) the omitted language is not statutorily mandated anywhere in RSA 540, 8) the omitted language is addressed only to tenants and it functions to provide tenants with unsolicited legal advice, to the detriment of landlords and property owners and coaches tenants to not voluntarily and peaceably vacate the premises, and 9) the omitted language disrupts the careful statutory balance and thwarts the self-help provisions of RSA 540 by advising tenants as to how to use the legal mechanism to avoid voluntary relinquishment, to their advantage, and otherwise discourage negotiating for an orderly transition. *Foran trans*. 10-12.

The trial court (Rappa, J) took Foran's case under advisement and on July 16, 2019, (8 days prior to the order in Clemans' case) issued an almost identical order ruling that the current eviction notice form included "…important procedural information for the tenant…" and omitting it was a violation of the law. *Appx*. at 23. The trial court identically ruled that the subject language on the new eviction notice form "…is in fact information tenants need as a matter of due process." and that "The subject language and information is therefore necessary." The trial court then granted Foran's motion to dismiss, however this order also included a rent schedule in the event Hortons filed an appeal. *Appx*. at 23.

Hortons timely filed notices of intent to appeal in both cases. *Appx*. at 26. After the Hortons filed a notice of intent to appeal, Foran failed to pay her rent as ordered by the trial court and a writ of possession was issued. *Appx*. at 24, 25. A week later, the trial court, *sua sponte*, amended its order, and recalled the writ, after it had been served. *Appx*. at 19. Due to the abrupt nature of the trial court's *sua sponte* order, and deadlines for this appeal, the Hortons did not have adequate time to file a motion for reconsideration in the trial court. [2]

[2] The Plaintiffs further add that, subsequent to the filing of this appeal, Foran was evicted in a new proceeding but this appeal is not moot "because it presents legal issues that are of pressing public interest and are capable of repetition yet evading review." *Olson v. Town of Grafton*, 168 N.H. 563, 566 (2016) (quotation omitted).

SUMMARY OF THE ARGUMENT

The Hortons argue that the trial court erred in dismissing the eviction actions based on failure to use the Circuit Court's most current eviction notice form. RSA 540:5, (II) does not require a landlord to use either the Circuit Court's standard eviction notice form, nor the most current eviction notice form. To the extent a landlord choses to use a different eviction notice, it must merely comply with the statutory requirements that are contained in RSA 540:2 and RSA 540:3, as specified by the holding in *Darbouze v. Champney*, 160 NH 695 (2010). The mandatory inclusion of the extraneous advisory language is outside the scope of any language necessitated by law and beyond the scope of the Circuit Court's authority to create forms that comply with existing law.

The Hortons next argue that the additional advisory language included in the Circuit Court's latest eviction notice forms, which is addressed only to tenants, essentially functions to provide tenants with unsolicited legal advice, to the detriment of landlords and property owners. The additional advisory language disrupts the careful statutory balance and the self-help provisions of RSA 540 by informing the tenants that they are under no obligation to vacate the premises, and how to use the legal mechanism to avoid voluntary relinquishment, to their advantage. They also advise tenants to seek financial assistance from the municipality, thereby creating a further incentive for tenants to remain in possession, even if the eviction action is based on other legitimate grounds.

The Hortons next argue that the trial court erred in finding that the advisory language on the new form "…is in fact information tenants need as a matter of due process." and "The subject language and information is therefore necessary". The additional language contained on the most current eviction form is neither lawfully required nor legally mandated pursuant to RSA 540, nor in any other provision of law. It is therefore neither required as a matter of law or due process since the procedural steps for dispossessing a tenant are specifically detailed within the provisions of RSA 540, and are neither vague nor ambiguous.

The Hortons next argue that the trial court erred in determining that dismissal is the proper remedy for failing to use the correct form. Nowhere in RSA 540 does the law provide for any penalty for a failure to use the most current form, or mandate a dismissal for failure to do so. The trial court's reliance on the *dicta* in *Lavoie v Szumiez*, 115 NH 266 (1975) was misplaced. *Lavoie* simply holds that a lower court cannot grant a remedy that is not authorized by statute. The *dicta* was never meant to instill a strict compliance structure in the entirety of RSA 540.

OTHER ARGUMENTS

Finally, the Hortons argue that the trial court erred when it when it *sua sponte* amended its order, recalled the writ of possession, and vacated Forans's obligation to pay rent. No one had made any motion to amend or to recall the writ, and the trial court's action further provided Foran with additional remedies without even holding a hearing. The trial court's *sua sponte* recall, in

the absence of a pleading or hearing, was a violation of the Hortons' due process rights and an abuse of discretion. The trial court's actions effectively authorized a non-paying tenant to remain in possession indefinitely pending resolution of this appeal.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DISMISSED THE HORTONS' LANDLORD/TENANT WRITS.

A. A landlord is not required to use the Circuit Court's most current eviction notice forms.

RSA 540:5 provides that:

> I. Any notice of a demand for rent or an eviction notice may be served by any person and may be served upon the tenant personally or left at his or her last and usual place of abode. In the case of commercial rental property, service of process may be made at such property provided that a copy of the demand for rent or eviction notice shall be sent by certified mail to the commercial tenant at his or her last known legal address or, for non-residents, by certified mail to the tenant's registered agent if there is a registered agent for the tenant duly registered with the New Hampshire secretary of state or, if there is no such registered agent, by certified mail to the tenant's last known legal address. Proof of service must be shown by a true and attested copy of the notice accompanied by an affidavit of service, but the affidavit need not be sworn under oath. A notice of a demand for rent shall be sufficient if served upon the tenant at any time after the rent becomes due and prior to or simultaneously with the service of an eviction notice.
>
> II. The district court shall provide forms for a demand for rent and eviction notice in the district court clerks' offices and on the New Hampshire judicial branch website. Although a landlord shall not be required to use the forms, a valid demand for rent or eviction notice shall include the same information as is requested and provided on such forms.

The plain language of the statute is clear on its face that a landlord is not required to use the Circuit Court's eviction forms. The plain language also

does not mandate that a landlord use the Circuit Court's most current eviction forms.

Since a commercial tenant must also be served by additional means and the Circuit Court's eviction notice form does not contain the requisite additional service confirmation for commercial tenants, the use of the Circuit Court's residential eviction notice form would always be defective in commercial evictions. The Circuit Court does not provide a separate set of compliant demand and eviction notice forms for commercial tenants (although it does for manufactured housing unit evictions). See form NHJB 3065-D (02/21/2019), *Appx*. at 46.. Furthermore, the subject language in controversy would be wholly inapplicable to commercial tenants thus making the demand for rent and eviction notice forms totally confusing for commercial tenants.

In summary, eviction notices need only contain the information that is statutorily required by law in order to be valid.

B. **The trial court erred in ruling that the Hortons' eviction notices had to contain the additional advisory language included in the Circuit Court's most current eviction notice form.**

The provisions of RSA 540:5 (II) were added to the statute in 2006, which primarily functioned to rename the notices to be served in landlord/tenant eviction actions. *Darbouze v. Champney,* 160 NH 695 (2010). Prior to 2006, landlords issued and served what were then termed as "notices to quit". The 2006 amendments changed the name of the notices of termination of tenancy from "notice to quit" to "eviction notice" but did not otherwise change the contents of the notices nor alter the process for eviction. Presumably, the

change to a more recognizable vernacular was made to effect a better understanding of the legal function of the notice, but it did not otherwise alter its contents or requirements.

"RSA 540:2 governs the process for evicting a tenant from residential property and requires a landlord to give to the tenant 'a notice in writing to quit the premises in accordance with RSA 540:3' and RSA 540:5 (relating to service, which is not an issue here)". *Darbouze* at 697.

"The plain language of RSA 540:3 sets forth three requirements that a landlord must include in any notice to evict a residential tenant for rent arrearage. The landlord must provide notice of at least seven days, must state with specificity the reason for the eviction, and, if the eviction is based on nonpayment of rent, must inform the tenant of his or her right to avoid the eviction by paying arrearages and liquidated damages." *Darbouze* at 698. The Hortons' eviction notice did comply with these requirements and, in fact, the trial court's order even acknowledges that it did. *Darbouze's* holding, analysis, or reasoning has been neither modified nor overruled.

The Circuit Court's most current eviction notice form was adopted on July 24, 2018. *Appx.* at 43, 44. But there was no necessity to change the eviction notice form since the legislature made no changes to either RSA 540:3 or the residential eviction process since 2006. The information requested and provided on the Circuit Court's eviction notice form prior to July 24, 2018, was in full compliance with the prerequisites of RSA 540:3. The function of RSA 540:5 (II) was to facilitate the eviction initiation process by providing legally

sufficient, easy to fill, standardized forms, and ensure that a landlord's eviction notice complied with the statutory requirements of RSA 540:3.

A comparison of the eviction notice form used by the Hortons and the Circuit Court's 2018 eviction notice form reveals that there is no difference in the information requested to be provided on both forms. It is the identical information that is requested and provided on both forms. Accordingly, the eviction notice used by the Hortons contains the same information requested by the current form of the eviction notice, fully complies with the statutory requirements of RSA 540:2 and RSA 540:3, and was properly served upon both Foran and Clemens in full compliance with RSA 540:5.

It was never the intention of the legislature to leave it in the discretion of the Circuit Court to dictate what specific information a tenant must be provided in order to adequately defend or defeat an eviction. Nowhere in RSA 540:3-or anywhere else in RSA 540-does the law mandate a landlord to advise a tenant that the eviction notice does not require the tenant to vacate the property, that the tenant may remain in place and dispute the eviction, or that a tenant can attempt to stay longer by applying for rental assistance or welfare. Forcing a landlord to provide such information is the functional equivalent of mandating the landlord to advise the tenant of ways by which a tenant may continue to remain in possession of the premises in defiance of the eviction notice. The Circuit Court's eviction notice thus goes far and beyond the statutory prerequisites contained in RSA 540:3.

The advisory language that the Hortons omitted is not statutorily mandated anywhere in RSA 540. The omitted advisory language is addressed solely to tenants and it functions to, in essence, provide tenants with unsolicited legal advice, to the detriment of landlords and property owners, and coaches tenants on ways to not voluntarily and peaceably vacate the premises. The omitted advisory language disrupts the careful statutory balance and thwarts the self-help provisions of RSA 540 by advising tenants as to how to use the legal mechanism to avoid voluntary relinquishment to their advantage, and otherwise discourages tenants from negotiating directly with their landlords for an orderly relinquishment.

If the decision of the trial court is affirmed, then there is no limit to the types or amount of "information" that a landlord can be mandated to provide in eviction notice forms. Tenants can be "informed" that they can seek fuel assistance, file 540-A petitions, avoid certain clauses in their leases, or be referred to organizations that will agree to represent them for free. There would be no conceivable limit to the panoply of "information", deleterious to a landlord's position, that the Circuit Court could mandate landlords to furnish to the very same tenants that they are trying to evict.

The trial court's ruling that the subject language on the new form "…is in fact information tenants need as a matter of due process…" and "The subject language and information is therefore necessary" was in error. The legal process for evicting tenants is precisely set forth in the provisions of RSA 540. Our law attempts to balance the interests of landlords who wish to regain

possession of their property from tenants as soon as possible, with the interests of tenants who are not typically capable of relocating at a moment's notice or otherwise securing suitable alternative housing arrangements within a few days. Our statutory scheme thus establishes an orderly process, with some provisions for curing, negotiating, and extensions of time, without a breach of the peace or a violation of the tenant's privacy or peace, prior to the landlord filing for a judicial order of removal. Indeed, if every landlord dispossession required a judicial order, the deluge of cases would likely quickly overtax the capacity of the courts of this State. The trial court's ruling upsets that conscientious balance and tips the scale in favor of the tenant. It actually violates due process by disrupting the careful balance established by statute. But, most significantly, it mandates the distribution of information, detrimental to a landlord's interest, which is not even required to be furnished by law.

C. **The trial court's reliance on the *dicta* in *Lavoie v Szumiez*, 115 NH 266 (1975), was misplaced.**

Clemens and Foran invited the trial court to rely on *Lavoie v Szumiez*, 115 NH 266 (1975). The *Lavoie* case addressed the landlord's inclusion of a claim for unpaid rent in an eviction action and interpreted an older version of RSA 540 which did not allow a landlord to seek monetary damages, only possession. See RSA 540:3 (III) now specifically allowing claims for unpaid rent. The landlord in *Lavoie* requested both possession and money damages, both of which the lower court awarded. The tenant filed a motion to vacate only the award for damages which the lower court denied. "As there [was] no provision in RSA ch. 540 authorizing the district court to award damages under the circumstances of this case, [tenant's] motion in that court to vacate such a judgment by it should have been granted." *Lavoie* at 267-268. The circuit

courts frequently dismiss cases based on their reliance on this *dicta* in *Lavoie*: "Since these statutes establish rights and benefits which a landlord did not enjoy at common law, strict compliance with their terms is required." *Lavoie v. Szumiez*, 115 N.H. 266, 267 (1975). However, this quotation is construed out of context since this language only pertained to the limited issue presented before the Supreme Court-namely the authority of the lower court to award a remedy that was not authorized by statute-and not to the remedy for every violation of RSA 540, in general.

It is now commonplace for the circuit courts to apply this *dicta* broadly across the board to even the most trivial of variations from process. But it is important to note that the *Lavoie* court did not remand for dismissal of the entire case, nor did it hold that dismissal was the appropriate remedy. In fact, RSA 540:5 provides no penalty within it. There is no language in RSA 540:5 that mandates dismissal, or provides any party with any remedy for any violation thereof. If the Legislature had intended that any failure to conform or to meet the requirements listed in the statute will result in a penalty, it would have specifically so provided as it has done so in other areas of the law. See i.e. RSA 540:13-c, dismissal if affidavit of non-compliance not filed within 14 days, RSA 540:13-d, dismissal appropriate when premises are maintained in violation of standards of fitness, *State v. Cotell,* 143 NH 275 (1998), imposition of the extreme sanction of dismissal should be only in extraordinary situations, *State v. Traxler*, 110 NH 410 (1970) no suppression for failure to notify defendant of test results within 48 hours when statute did not specifically mandate suppression.

This case provides the Supreme Court with an opportunity to address and clarify whether the *dicta* in *Lavoie* was intended to apply to the issues presented in *Lavoie*, or to all eviction cases, and whether dismissal is the only available remedy for violations of RSA 540.

II. THE TRIAL COURT ERRED WHEN IT *SUA SPONTE* AMENDED ITS ORDER, RECALLED THE WRIT OF POSSESSION, AND VACATED FORAN'S OBLIGATION TO PAY RENT.

The date on the trial court's order of dismissal was July 17, 2019. The trial court further ordered that in the event the Hortons filed an appeal, Foran was to pay weekly rent in the amount of $219.40. The Hortons timely filed their notice of appeal on July 22. The trial court then issued a follow up order on said same day advising Foran of the rent schedule. Foran failed to pay the $219.40 as she was ordered. On July 29, the Hortons notified the trial court of Foran's failure to pay the rent and requested the trial court issue the writ of possession. The trial court issued the writ of possession on July 30 further instructing Foran that if she paid the entirety of the weekly rent in arrears, the trial court would recall the writ of possession. On August 7, after the Hortons had delivered the writ of possession to the Grafton County Sheriff for service, and the Sheriff had done the first posting, the trial court *sua sponte* intercepted the second service of the writ of possession and ordered it vacated. Neither the Hortons nor Foran had filed any motion requesting such action. The Hortons were never provided with any advance notice that the trial court was vacating the writ of possession, and no notice of hearing was provided to either party. The trial court further added: "In most cases it would be much more efficient and cost effective for the plaintiff/landlord to simply initiate a new eviction process." Due to the fact that the trial court initiated the vacating of the writ of possession *sua sponte* with absolutely no notice and no hearing, and the looming deadline to file this appeal, the Hortons had no ability or time to address the trial court's order, file a motion to reconsider, or take any action other than amend their notice of appeal. The trial court thus deprived the Hortons of their ability to object, file a motion to reconsider, or otherwise contest the merits or reasoning of the trial court's spontaneous order. The Hortons filed their appeal in Foran's case on August 16.

The Hortons argue that the trial court's *sua sponte* amending of its order, vacating the writ of possession, and vacating Foran's obligation to pay rent constituted plain error. No one had made any motion to amend or to recall the writ, and the trial court's action provided Foran with additional remedies without even holding a hearing. The trial court's *sua sponte* recall, in the absence of a pleading or hearing, was a violation of the Hortons' due process rights and an abuse of the trial court's discretion. The trial court's actions effectively authorized a non-paying tenant to remain in possession of the premises indefinitely pending resolution of this appeal.

The Hortons urge this Court to consider this argument under the Supreme Court's plain error rule. *See S.Ct. R.* 16-A. Under the rule, the Supreme Court considers the following elements: "(1) there must be error; (2) the error must be plain; and (3) the error must affect substantial rights. Id. If all three of these conditions are met, we may then exercise our discretion to correct a forfeited error, only if a fourth criterion is met: the error must seriously affect the fairness, integrity or public reputation of judicial proceedings. *Id.* We use this rule sparingly, limiting it to those circumstances in which a miscarriage of justice would otherwise result." *Laramie v. Stone,* 160 NH 419, 432 (2010)

First, there is error. The trial court self-initiated a reversal of a material portion of its previous order, ostensibly on a *sua sponte* basis, without any input from any party actually involved in the case. If the trial court believed that it had committed a clear legal error, then it should have scheduled a hearing and noticed the parties. The respective merits of the trial court's decision could have been argued and the parties may have developed grounds to move for recusal. Without identifying the source for the trial court's revision, it would be difficult to assess the underlying motivation for abruptly vacating an order that had been lawfully issued only a week earlier.

Second, the error is plain. In its most fundamental form, fairness requires that all sides involved in a case be able to present their arguments, have a full opportunity to be heard, and answer any lingering issues presented by the facts. It doesn't become much plainer than that.

Third the error did fundamentally affect the substantial rights of the Hortons. The Hortons paid their counsel to inform the trial court of Foran's delinquency, request the writ of possession and forward it to the Sheriff for service. The eviction was based on Foran's failure to pay rent and she continued to not pay any rent. The trial court's actions permitted Foran to remain in possession, free from any responsibility to pay any rent, and without any input from the Hortons on the matter.

Finally, the trial court's error seriously affected the fairness, integrity or public reputation of judicial proceedings. The order vacating the writ of possession was issued on a no party basis, corrected an error nobody complained about or believed had occurred, violated the Hortons' rights to be heard on the issues, prevented the Hortons from fully litigating the issue, and significantly impaired the Hortons' ability to argue the underlying merits on appeal.

CONCLUSION

The trial court should not have dismissed the Hortons' landlord/tenant writs. By ruling that the subject language on the new forms "…is in fact information tenants need as a matter of due process." and "The subject language and information is therefore necessary" it imposed a new judicial mandate on landlords to provide legal advice to tenants they are trying to evict, without any legislative authority. The holding in *Darbouze v. Champney*, 160 NH 695 (2010) adequately establishes the requirements for eviction notices. *Lavoie v Szumiez*, 115 NH 266 (1975) does not mandate automatic dismissal in

every case whenever a trial court encounters any minor error during an eviction. The trial court should not have *sua sponte* recalled the writ of possession and vacated the Foran's obligation to pay rent, without at least notifying the parties of its concerns and giving each a fair opportunity to be heard.

Dated: January 9, 2020

Respectfully submitted,

Richard and Janice Horton,
Plaintiffs/Appellants
By their Attorney,

Plymouth Law Center

__/s/Gabriel Nizetic_____
Gabriel Nizetic, Esq., NH Bar #6540
66 Highland Street
Plymouth, NH 03264
(603) 536-5900

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Richard and Janice Horton request that their counsel, Gabriel Nizetic, Esq., be allowed 15 minutes for oral argument.

I hereby certify that on January 9, 2020, copies of the foregoing will be forwarded to David Clemens, April Hanks, and Emily Foran.

Dated: January 9, 2020

__/s/Gabriel Nizetic_____
Gabriel Nizetic, Esq.