

Supreme Court No. **94182-3**

Court of Appeals No. **48083-2-II**

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL L. ROESCH,

Petitioner

v.

CARL and CANDY BOHM,

Respondents.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

	<u>Page</u>
A. IDENTITY OF RESPONDENTS.....	1
B. COURT OF APPEALS DECISION	1
C. RESTATEMENT OF THE CASE	2
D. ANSWER.....	3
1. <u>The “issue of substantial public importance” described by Mr. Roesch does not exist in this case.....</u>	2
2. <u>The Court of Appeals correctly and properly relied on RCW 59.18.380 and the cited cases construing the statute.</u>	7
3. <u>The Court of Appeals neither “recognized” nor “created” a “post-REPSA” agreement or contract for the parties.</u>	7
4. <u>Because the Court of Appeal’s Unpublished Decision does not conflict with any decision of the Supreme Court, review under RAP 13.4(b)(1) is not appropriate</u>	8
5. <u>Because the Court of Appeals’ Unpublished Decision does not conflict with any decisions of the Court of Appeals, review under RAP 13.4(b)(2) is not appropriate</u>	9
6. <u>The issue of title is now being litigated in the Pierce County Superior Court.....</u>	13
7. <u>No errors were made by the trial court or the Court of Appeals in awarding attorney’s fees.....</u>	13
8. <u>Mr. Roesch’s Petition is frivolous because it is</u>	

factually and legally baseless.....16

9. In the event this Court denies review, the Bohms request an award of the expenses and reasonable attorney’s fees they incurred in answering the Petition.....17

E. CONCLUSION17

F. APPENDIX

Exhibit A – *Order on Plaintiff’s Motion for Partial Summary Judgment (Order Converting Action)* (entered 7/29/16)

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Washington Cases</u>	
<i>City of West Richland v. Department of Ecology</i> , 124 Wn. App. 683, 103 P.3d 818 (2004).....	5
<i>Concerned Citizens v. Coupeville</i> , 62 Wash.App. 408, 814 P.2d 243, review denied, 118 Wash.2d 1004, 822 P.2d 288 (1991)	3
<i>Federal Nat. Mortg. Ass'n v. Ndiaye</i> , 188 Wn. App. 376, 353 p.3d 644 (2015)	1, 3, 9, 10
<i>Heaverlo v. Keico Indus., Inc.</i> , 80 Wn.App. 724, 91 P.2d 406 (1996)	7
<i>Josephinum Assocs. V. Kahli</i> , 111 Wn. App. 617, 45 P.3d 627 (2002)	7
<i>Marine Power Equipment Co. v. Washington State Human Rights Com'n Hearing Tribunal</i> , 39 Wn.App. 609, 694 P.2d 697 (1985).....	5
<i>Munden v. Hazelrigg</i> , 105 Wn.2d 39, 711 P.2d 295 (1985).....	7
<i>Port of Longview v. Int'l Raw Materials, Ltd.</i> , 96 Wn. App. 431, 979 P.2d 917 (1999).....	7
<i>Proctor v. Forsythe</i> , 4 Wn. App. 238, 480 P.2d 511 (1971).....	1, 11, 12
<i>Puget Sound Inv. Grp. v. Bridges</i> , 92 Wn. App. 523, 963 P.2d 944 (1998).....	1, 12
<i>Snuffin v. Mayo</i> , 6 Wn. App. 525, 494 P.2d 497 (1972).....	3, 4
<i>State ex rel. Quick-Ruben v. Verharen</i> , 136 Wn.2d 888, 969 P.2d 64 (1998).....	16
<i>State v. Hopkins</i> , 137 Wn. App. 441, 154 P.3d 250 (2007).....	5

State v. Potter, 68 Wn. App. 134, 842 P.2d 481 (1992)3
Sundholm v. Patch, 62 Wn.2d 244, 382 P.2d 262 (1963).....1, 8, 9

Other Authorities

RAP 13.4.....1
RAP 18.1.....16
BLACK’S LAW DICTIONARY (7th ed., 1997).....5

A. IDENTITY OF RESPONDENTS

The Respondents in this proceeding are Carl and Candy Bohm.

B. COURT OF APPEALS DECISION

Petitioner Michael Roesch seeks review of the Court of Appeals Unpublished Decision filed on January 24, 2017. Petitioner Roesch asserts that review should be granted under RAP 13.4(b)(1) (conflict with a Supreme Court decision), (2) (conflict with a Court of Appeals decision), and (4) (existence of an issue of substantial public interest that requires review by this Court).

Mr. Roesch argues that the Court of Appeals decision affirming the trial court “is in conflict with *Federal National Mortgage Association v. Ndiaye*,¹ *Puget Sound Inv. Grp. v. Bridges*,² *Proctor v. Forsythe*,³ and *Sundholm v. Patch*⁴ because the Court of Appeals “recogniz[ed] an affirmative equitable defense of failure to transfer title in an unlawful detainer[.]”⁵

Mr. Roesch also argues that “whether, in an action for residential unlawful detainer, ... a tenant [may] assert an equitable defense of a claim to the title of the landlord’s property” is “an issue of substantial public

¹ 188 Wn. App. 376, 353 P.3d 644 (2015).

² 92 Wn. App. 523, 963 P.2d 944 (1998).

³ 4 Wn. App. 238, 480 P.2d 511 (1971).

⁴ 62 Wn.2d 244, 382 P.2d 262 (1963).

⁵ Petition for Review, pages 1-2, 17.

importance” that requires review by this Court.⁶

Finally, Mr. Roesch argues that the Court of Appeals “erred in affirming the trial court’s award of attorney fees to respondents and in awarding attorney fees on appeal to respondents.”⁷

C. RESTATEMENT OF THE CASE

Respondents adopt and incorporate the Facts set out by the Court of Appeals in its January 24, 2017 Opinion, including Sections I through VII therein.

D. ANSWER

Because all of Mr. Roesch’s arguments why review should be accepted are based on his mischaracterization of the Bohm’s affirmative defense as “failure to transfer title,” review should be denied.

1. The “issue of substantial public importance” described by Mr. Roesch does not exist in this case.

Mr. Roesch identifies the issue of whether a tenant may “assert an equitable defense of a claim to the title of the landlord’s property” in a residential unlawful detainer action as the issue of “substantial public importance” that requires this Court’s review of the Court of Appeals’ decision. Long-established Washington law is clear: “[u]nlawful

⁶ Petition for Review, page 10.

⁷ Petition for Review, page 19.

detainer actions . . . do not provide a forum for litigating claims to title.”⁸

This “issue” is fabricated from Mr. Roesch’s mischaracterization of the Bohm’s defense to his claim of unlawful detainer, which is correctly described by the Court of Appeals at page 11 of its unpublished decision:

The Bohms’ defense was that Fred’s breach of his obligations under the overall agreement excused them from their obligations to Fred. . . .

The Bohms’ defense, if believed, established that they had a legal justification for nonpayment. . . . This defense “aris[es] out of the tenancy” because it was based upon facts that excused the Bohms’ breach, and therefore the trial court was required to consider it. RCW 59.18.380; *Josephinium Assocs.*, 11 Wn. App. at 625.

Mr. Roesch acknowledges that the Court of Appeals “recognized the rule against litigating claims of title in an unlawful detainer,”⁹ but complains that the Court of Appeals relied upon “obiter dictum” in *Snuffin v. Mayo*¹⁰ to reach its decision. “Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute orbiter dictum, and need not be followed.”¹¹

In *Snuffin*, the discussion of a constructive trust was directly

⁸ *Federal Nat. Mortg. Ass’n v. Ndiaye*, 188 Wn. App. 376, 382, 353 p.3d 644 (2015) citing *Puget Sound Inv. Grp., Inc. v. Bridges*, 92 Wash.App. 523, 526, 963 P.2d 944 (1998).

⁹ Petition for Review, page 11 (citing Unpublished Opinion at page 9).

¹⁰ 6 Wn. App. 525, 494 P.2d 497 (1972).

¹¹ *State v. Potter*, 68 Wn. App. 134, fn7, 842 P.2d 481 (1992) (citing *Bellevue v. Acrey*, 103 Wash.2d 203, 207, 691 P.2d 957 (1984); *Concerned Citizens v. Coupeville*, 62 Wash.App. 408, 416, 814 P.2d 243, review denied, 118 Wash.2d 1004, 822 P.2d 288 (1991)).

related to an issue before that court: “[a] considerable part of the trial involved the issue of whether or not Lorentsen held the 10 acres in a constructive trust for Mayo[.]”¹² The Snuffins claimed that even if there were a constructive trust, they were protected as bona fide purchasers of the land, and rulings on evidentiary matters were based on that premise that the Snuffins were bona fide purchasers.¹³ The Court of Appeals disagreed with that premise, and wrote that the trial court had “no authority to quiet title” in the unlawful detainer action. The Court of Appeals instructed:

It was proper, however, to hear the issue of constructive trust. Even though offsets or counterclaims cannot be asserted in an unlawful detainer action, equitable defenses can be raised. *Motoda v. Donohoe*, 1 Wash.App. 174, 459 P.2d 654 (1969); *Himpel v. Lindgren*, 159 Wash. 20, 291 P. 1085 (1930). A constructive trust is clearly an equitable defense and as Snuffins' rights derived from those of Lorentsen, the resolution of that issue was necessary to a determination of right to possession.¹⁴

This discussion “of equitable defenses and constructive trust” by the *Snuffin* court is not “obiter dictum” because the issue of constructive trust was before the *Snuffin* court. Even if Mr. Roesch were correct that the Court of Appeals relied on “obiter dictum” from the *Snuffin* case, it was not error to do so. First, the so-called obiter dictum is supported by

¹² *Snuffin*, 6 Wn. App. at 527, 494 P.2d. 497

¹³ *Id.*

¹⁴ *Id.* at 527 - 528, 530, 494 P.2d 497 (emphasis added).

five other cases and two statutes.¹⁵ The so-called obiter dictum is essentially a summary of Washington law. Second, while not binding, obiter dictum “may be considered persuasive” and may be “instructive.”¹⁶

Finally, Mr. Roesch asserts that “the Court of Appeals failed to identify any other authority supporting litigation of title issues in an unlawful detainer.”¹⁷ However, *Snuffin* was not cited by the Court of Appeals for the proposition that “litigation of title issues in an unlawful detainer” is permissible. In fact, Mr. Roesch acknowledges that the Court of Appeals “recognized the rule against litigating claims of title in an unlawful detainer.” The Court of Appeals also disagreed with Mr. Roesch’s argument that the trial court “allowed the Bohms to litigate the Roesch property’s title despite having dismissed their counterclaims.”¹⁸

The record of proceedings in this case confirms that the Court of Appeals correctly identified the Bohms’ defense. At the September 25, 2015 hearing on Mr. Roesch’s Motion for New Trial or Reconsideration, the following exchange took place:

MR. CONSTANTINE: . . . The evidence that was introduced involved purchase and sale agreements that

¹⁵ *Id.*

¹⁶ BLACK’S LAW DICTIONARY (7th ed., 1997), page 1100. *See also City of West Richland v. Department of Ecology*, 124 Wn. App. 683, 693, 103 P.3d 818 (2004); *State v. Hopkins*, 137 Wn. App. 441, 457, 154 P.3d 250 (2007); *Marine Power Equipment Co. v. Washington State Human Rights Com’n Hearing Tribunal*, 39 Wn.App. 609, 694 P.2d 697 (1985).

¹⁷ Petition for Review, page 12.

¹⁸ Unpublished Decision, page 11.

were more than six years old; purchase and sale agreements that had terminated; purchase and sale agreements where the conditions precedent had not been met¹⁹ --

THE COURT: Purchase and sale agreements that provided the basis for your lease to be in existence in the first place. Purchase and sale agreements that provided a basis for why Candy Bohm intended to be in that home, as opposed to her own home. Purchase and sale agreements that provided Candy Bohm with some rationale for why she should pay her rent up to a certain point. Purchase and sale agreements that provided a basis for why Candy Bohm behaved in the way that she did behave. Purchase and sale agreements that gave the jury a basis, or not, for determining **whether or not there was a reason to excuse Candy Bohm from making payment under the lease.**²⁰

The record in this case is clear that the issue of title was not “litigated.” As the Court of Appeals noted, “the jury’s verdict shows that the unlawful detainer action resolved only one matter: whether the Bohms were ‘excused from making rental payments on the [l]ease.’”²¹

Mr. Roesch bases his request for review under RAP 13.4(b)(4) upon a fabricated, nonexistent “issue.” He mischaracterizes the Bohms’ defense and ignores the fact that title to the subject property was **not** litigated in the context of Mr. Roesch’s unlawful detainer action. Review under RAP 13.4(b)(4) should be denied.

¹⁹ It should be noted that Mr. Roesch did not object to admission of Defendants’ Ex. 9 at trial, which included the October 2008 REPSA and the “lease” agreements appended thereto. 8/18/15 VRP at 145, lines 4-9.

²⁰ 9/25/15 Verbatim Transcript of Proceedings, page 4, lines 7-23 (emphasis added). *See also* CP 989-991.

²¹ Unpublished Decision, page 13.

2. The Court of Appeals correctly and properly relied on RCW 59.18.380 and the cited cases construing the statute.

Quoting RCW 59.18.380, the Court of Appeals wrote, “The defendant in an unlawful detainer action may ‘assert any legal or equitable defense or set-off arising out of the tenancy.’”²² The Court then cited *Josephinium Assocs. V. Kahli*,²³ *Heaverlo v. Keico Indus., Inc.*,²⁴ *Port of Longview v. Int’l Raw Materials, Ltd.*,²⁵ and *Munden v. Hazelrigg*²⁶ to define the limited subject matter jurisdiction in an unlawful detainer action and the meaning of “arising out of a tenancy” under the statute.²⁷

Mr. Roesch faults the Court of Appeals for citing the four cases set out above because “unlike this case,” none of the cited cases “involved any issue of title.”²⁸ The Court of Appeals made no error: this case doesn’t involve “any issue of title,” either. Because Mr. Roesch mischaracterizes the defense raised by the Bohms as “failure to convey title,” his arguments fail.

3. The Court of Appeals neither “recognized” nor “created” a “post-REPSA” agreement or contract for the parties.

The “agreement” or “contract” discussed by the Court of Appeals

²² Unpublished Decision, page 9.

²³ 111 Wn. App. 617, 45 P.3d 627 (2002).

²⁴ 80 Wn.App. 724, 91 P.2d 406 (1996).

²⁵ 96 Wn. App. 431, 979 P.2d 917 (1999).

²⁶ 105 Wn.2d 39, 711 P.2d 295 (1985).

²⁷ Unpublished Decision, pages 9-10.

²⁸ Petition for Review, page 15.

on pages 16-17 of its Unpublished Decision is not “post-REPSA,” as asserted by Mr. Roesch at pages 17-18 of his Petition. Instead, the Court of Appeals described the evidence submitted at trial (Bohms’ testimony and two REPSAs) that constituted “competent and substantial evidence of the parties’ **overall** agreement[.]”²⁹ The “overall agreement” for the complex “land swap” between the parties is described in documents filed by the Bohms during the summary judgment proceedings below.³⁰

4. Because the Court of Appeal’s Unpublished Decision does not conflict with any decision of the Supreme Court, review under RAP 13.4(b)(1) is not appropriate.

Insisting against all evidence in the record that the Court of Appeals “recogniz[ed] an affirmative equitable defense of failure to transfer title in an unlawful detainer,” Mr. Roesch asserts that the Unpublished Decision conflicts with *Sundholm v. Patch*³¹.

In *Sundholm*, the trial court dismissed an unlawful detainer action in which the defendants filed a cross-complaint for specific performance of an oral contract, asserting they were not tenants, but vendees.³² However, the trial court granted the defendant’s request for specific performance of the oral contract.³³ This Court affirmed dismissal of the

²⁹ Unpublished Decision, page 17

³⁰ CP 443-454; 110-179; CP 180-211.

³¹ 62 Wn.2d 244, 382 P.2d 262.

³² *Id.* at 244-245, 382 P.2d 262.

³³ *Id.* at 245, 382 P.2d 262.

unlawful detainer action and the award of costs to the defendant, but reversed the grant of specific performance, noting, “[i]n an unlawful detainer action, the court sits as a special statutory tribunal to summarily decide the issues authorized by statute and not as a court of general jurisdiction with the power to hear and determine other issues.”³⁴

The Court of Appeals’ Unpublished Decision does not conflict with *Sundholm* because it does not hold that the unlawful detainer statutes give the trial court the power to order specific performance of a contract. In fact, the Court of Appeals wrote, “the parties in an unlawful detainer action may not litigate claims to title.”³⁵ There is no basis for review under RAP 13.4(b)(1).

5. Because the Court of Appeals’ Unpublished Decision does not conflict with any decisions of the Court of Appeals, review under RAP 13.4(b)(2) is not appropriate.

In none of the Court of Appeals cases identified as “conflicting” by Mr. Roesch was there an overarching “land swap” agreement memorialized in several real estate purchase and sales agreements and a claim by the defendant that he or she was never a tenant, but was, instead, a vendee who owed no rent to Mr. Roesch, and therefore had never paid any.

- *Federal National Mortgage Association v. Ndiaye* - In *Ndiaye*,

³⁴ *Id.* at 246, 247, 382 P.2d 262.

Fannie Mae filed an unlawful detainer action to evict Ndiaye, who filed an answer raising three affirmative defenses:

(1) Fannie Mae confused him by providing him 60 and 90 day notices to vacate the home, and then suing to evict prior to 90 days after the sale, (2) Fannie Mae's trustee's deed was invalid because of title defects, and (3) the parties engaged in a loan modification process and he believed the trustee's sale would be postponed until the process ended.³⁶

The trial court granted Fannie Mae's motion for summary judgment and issuance of a writ of restitution, stating:

I realize that the nonjudicial foreclosure issues have caused lots of litigation of late in this state and in other states; however, I am still of the opinion, and I have not seen the case that changes that, that an unlawful detainer action is not the appropriate place to raise a collateral attack on the nonjudicial foreclosure, and so here today here's what I'm going to do. You can call this a summary judgment if you want. I'm not really sure that that's appropriate.

I'm simply granting the writ of restitution to the plaintiff.³⁷

Mr. Ndiaye appealed, arguing "that the trial court should have allowed a collateral attack to the deed of trust foreclosure in this unlawful detainer action."³⁸ Not surprisingly, the Court of Appeals did not agree with Mr. Ndiaye, writing "unlawful detainer actions are not the proper

³⁵ Unpublished Decision, page 9.

³⁶ *Ndiaye*, 188 Wn. App. at 380, 353 P.3d 644.

³⁷ *Ndiaye*, 188 Wn. App. at 381, 353 P.3d 644.

³⁸ *Id.* (citing *Puget Sound Inv. Grp., Inc. v. Bridges*, 92 Wash.App. at 525, 963 P.2d 944 (1998)).

forum to litigate questions of title.”³⁹

There was no nonjudicial foreclosure in this case, and no litigation related to title. The trial court admitted REPSAs and testimony explaining use of a “rental agreement” within the overarching “land swap” for the purpose of allowing the Bohms to show why they were excused from paying rent to Mr. Roesch. The Court of Appeals’ Unpublished Decision does not conflict with *Ndiaye*.

• *Puget Sound Investment Group, Inc. v. Bridges* is nothing like this case:

After the Internal Revenue Service foreclosed on the residence of Robert Bridges, Puget Sound Investment Group (Puget Sound) purchased it at a tax sale. In this appeal, Puget Sound seeks authority to dispossess Bridges by means of an unlawful detainer action. We hold that dispossession may not be achieved through an action for unlawful detainer when title has not been cleared. In this appeal from Judge Wynne's order, Puget Sound seeks a ruling that will permit it to proceed under the unlawful detainer statute to evict a person who continues to occupy a residence after it has been purchased at a tax foreclosure sale.

...

As a means to gain possession of real property, unlawful detainer is available to one who holds a title as a purchaser at a deed of trust foreclosure sale, or at a sale in lieu of foreclosure on a real estate contract, because the statutes governing those proceedings authorize a purchaser to bring suit under RCW 59.12.5 The Legislature has not provided a purchaser of real property at a federal income tax foreclosure sale with similar authority to bring an unlawful

³⁹ *Id.* at 384.

detainer action.

...

Because this case does not come within the terms of RCW 59.12.030(6), the summary procedures of unlawful detainer are not available to Puget Sound. We affirm the trial court's order dismissing Puget Sound's unlawful detainer action.⁴⁰

The Court of Appeals did not hold that “dispossession may . . . be achieved through an action for unlawful detainer when title has not been cleared,” and thus, the Unpublished Decision does not “conflict” with *Bridges*.

• *Proctor v. Forsythe* was an unlawful detainer action in which the trial court was requested to quiet title.⁴¹ The *Proctor* court wrote:

The judgment of the trial court in this case cannot quiet title as between the parties and its precise effect is very narrow. The form of summons and complaint invoked only the unlawful detainer jurisdiction of the court (RCW 59.12). When this is invoked, the court sits as a special statutory tribunal to summarily decide the issues authorized by statute and not as a court of general jurisdiction with the power to hear and determine other issues. [Citations omitted.] The court is, therefore, unable to rule on the request of both Proctor and Mrs. Forsythe to quiet title and can only determine who is entitled to possession as between the parties.⁴²

No “questions of title” were litigated in Mr. Roesch’s unlawful detainer action, as the Court of Appeals correctly notes in the Unpublished

⁴⁰ *Bridges*, 92 Wn. App. at 525-527, 963 P.2d 944.

⁴¹ *Proctor*, 4 Wn. App. at 241, 480 P.2d 511.

⁴² *Id.*

Decision.⁴³ Because the Court of Appeals' Unpublished Decision does not hold that the issue of quiet title can be raised and decided in an unlawful detainer action, it does not "conflict" with *Proctor*.

6. The issue of title is now being litigated in the Pierce County Superior Court.

On September 25, 2015, Mr. Roesch filed the Notice of Appeal in this case. On November 20, 2015, Mr. Roesch started a second unlawful detainer action against the Bohms, based on the identical facts as in this case, under cause number 15-2-13910-5. On July 29, 2016, the Superior Court converted Mr. Roesch's second unlawful detainer case into a regular civil action.⁴⁴ Trial is now scheduled for August 14, 2017 on Mr. Roesch's claims for ejectment, **quiet title**, and declaratory relief.⁴⁵ Contrary to Mr. Roesch's arguments, title was not "litigated" in this case, as the jury verdict makes clear, but is now being litigated for the **first** time in a separate action.

7. No errors were made by the trial court or the Court of Appeals in awarding attorney's fees.

The premise of Mr. Roesch's arguments about attorney fees is that the fee awards are based on the "errors" made by the Court of Appeals in allowing title to be "litigated" in the unlawful detainer action. Because

⁴³ See Unpublished Decision, pages 11-13.

⁴⁴ **Appendix, Ex. A** (7/29/16 Order on Plaintiff's Motion for Partial Summary Judgment with "Order Converting Action" included).

title was not litigated in the unlawful detainer action, Mr. Roesch's argument fails. Contrary to Mr. Roesch's assertion, the Bohms are the "prevailing party," and, as the Court of Appeals noted, Mr. Roesch "does not dispute the trial court's basis for awarding attorney fees to the 'prevailing party.'"⁴⁶

The trial court awarded fees based on RCW 4.84.330 and, *inter alia*, Paragraph 11 of the Lease/Rental Agreement.⁴⁷ As Mr. Roesch correctly asserts, "[p]aragraph 11 applies here, even if the lease has expired."⁴⁸ The trial court made no error, and the Court of Appeals correctly affirmed the trial court's award of fees.

Oddly, Mr. Roesch asserts that "the Court of Appeals affirmed the trial court's judgment based upon a post-REPSA agreement that has no attorney fee clause."⁴⁹ The trial court entered Findings of Fact and Conclusions of Law re: Attorney Fees & Costs, including the following Findings:

1. On October 20 & 21, 2008, Defendants Bohm sign and on October 15 2008 Plaintiff Michael L. Roesch signed a document dated October 15, 2008, entitled "Residential Real Estate Purchase and Sale Agreement (see Trial Exhibit #9) (the "Agreement").

⁴⁵ Appendix, Ex. A.

⁴⁶ Unpublished Decision, page 19.

⁴⁷ CP 1093-1097.

⁴⁸ Petition for Review, page 20 (citing *Marsh & McLennan Bldg., Inc. v. Clapp*, 96 Wn. App. 636,644-645, 980 P.2d 311 (1999)).

⁴⁹ Petition for Review, page 20.

2. The Agreement contained a number of “Addenda” including NWMLS Form Nos. 64A & 68 (Rental Agreement (Occupancy prior to Closing) and Lease/Rental Agreement, respectively -- collectively referred to herein as the “Rental Agreement”) (see part of Trial Exhibit #9) (all of these documents together will be referred to as “the Agreements”).

3. The Agreement contained a provision that the prevailing party in litigation would be entitled to reasonable attorneys’ fees and expenses (See Form 21 “General Terms” at paragraph q.)

4. The Rental Agreement documents also contained provisions authorizing the “prevailing party” to recover their reasonable attorney fees and costs in the event of litigation (See “Rental Agreement” paragraph 10 and see Lease/Rental Agreement at paragraph 11).

5. The Jury found that the Defendants were “excused from making rental payments on the Lease” (See Special Verdict Form, jury’s response to question No. 1).

8. Defendant successfully defended against all of the Plaintiffs’ claims and prevailed in this unlawful detainer litigation.⁵⁰

The Court of Appeals states in its Unpublished Opinion:

The final Roesch property REPSA provides that if either party employs an attorney ‘to enforce any terms of this Agreement,’ the prevailing party is entitled to reasonable attorney fees.” Because neither party disputes that the prevailing party on appeal is entitled to their attorney fees and because we hold that the Bohms prevail, we award the Bohms their reasonable fees on appeal.⁵¹

Neither the trial court nor the Court of Appeals erred in awarding

⁵⁰ CP 1094-1095.

⁵¹ Unpublished Opinion, page 19.

attorney's fees.

8. Mr. Roesch's Petition is frivolous because it is factually and legally baseless.

Mr. Roesch's request for review is based entirely upon a deliberate mischaracterization of the Bohms' defense in the unlawful detainer action, and is for that reason "frivolous." "An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there [is] no reasonable possibility of reversal."⁵²

The trial court dismissed the Bohms' counterclaims and admitted documents memorializing the complex "land swap" not to "litigate title," but to give "the jury a basis, or not, for determining **whether or not there was a reason to excuse Candy Bohm from making payment under the lease.**"⁵³ If title had been "litigated" in the unlawful detainer action, Mr. Roesch would not at this time be seeking to quiet title to the subject property in a different case.

Reasonable minds cannot differ where the issues and arguments presented are based on a fabrication. Mr. Roesch's Petition is totally

⁵² *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 905, 969 P.2d 64 (1998) (citing *Presidential Estates Apartment Assocs. v. Barrett*, 129 Wash.2d 320, 330, 917 P.2d 100 (1996) (quoting *Fay v. Northwest Airlines, Inc.*, 115 Wash.2d 194, 200-01, 796 P.2d 412 (1990)); *State v. Rolax*, 104 Wash.2d 129, 136, 702 P.2d 1185 (1985)).

⁵³ 9/25/15 Verbatim Transcript of Proceedings, page 4, lines 7-23 (emphasis added). See also CP 989-991.

devoid of merit. There is no reasonable possibility that the Court of Appeals decision will be reversed because the “errors” identified by Mr. Roesch in his Petition did not occur. Mr. Roesch’s Petition has caused Ms. Bohm to incur unnecessary legal expenses that she cannot afford and constitutes a misuse of judicial resources.

9. In the event this Court denies review, the Bohms request an award of the expenses and reasonable attorney’s fees they incurred in answering the Petition.

RAP 18.1(j) provides, in pertinent part:

If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review.

In the event this Court denies review, it should award the Bohms the reasonable attorney’s fees and expenses incurred in answering Mr. Roesch’s Petition.

E. CONCLUSION

Because Mr. Roesch’s identified “issue of substantial public interest that should be determined by a the Supreme Court” is based on a misrepresentation of the Bohms’ defense to unlawful detainer, review under RAP 13.4(b)(4) should be denied.

Because the Court of Appeals Unpublished Decision does not

conflict with *Sundholm v. Patch* or any other Supreme Court opinion, review under RAP 13.4(b)(1) should be denied.

Because the Court of Appeals Unpublished Decision does not conflict with *Federal National Mortgage Association v. Ndiaye*, *Puget Sound Inv. Grp. v. Bridges*, *Proctor v. Forsythe*, or any other decision of the Court of Appeals, review under RAP 13.4(b)(2) should be denied.

Respectfully submitted this 24th day of **March, 2017**.

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Attorney for Respondents

F. APPENDIX

Exhibit A – Order on Plaintiff’s Motion for Partial Summary Judgment
(Order Converting Action) (entered 7/29/16)

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

MICHAEL L. ROESCH,

Plaintiff,

v.

CARL BOHM and CANDY BOHM,

Defendants.

No. 15-2-13910-5

**ORDER ON PLAINTIFF'S MOTION
FOR PARTIAL SUMMARY JUDGMENT**

ORIGINAL

THIS MATTER having come on regularly for hearing before the court on **June 10, 2016**, upon the motion of the Plaintiff herein for an Order for Partial Summary Judgment dismissing the Defendant's Affirmative Defenses, Counterclaim and Third Party Complaint with prejudice and with an award of attorney fees and costs to the Plaintiff. The Court having also been asked by the Defendants to convert the Plaintiff's Unlawful Detainer Action into an Action for Ejectment. The Plaintiff appearing through his attorney Christopher M. Constantine, the Defendants, Candy and Carl Bohm appearing through their attorney Klaus O. Snyder of the Snyder Law Firm, LLC. The Court having directed the parties' counsel to submit further briefing on the Court's authority and jurisdiction to convert the Plaintiff's Unlawful Detainer action into an ordinary civil Action for Ejectment, which counsel has done. The court having considered the following pleadings:

Eviction Summons & Complaint for Unlawful Detainer	Amended Eviction Summons & Amended Complaint for Unlawful Detainer	Summons on Counterclaim & 3rd Party Complaint & Answer and Affirmative Defenses, Counterclaim and 3rd Party Complaint
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**ORDER ON PLAINTIFF'S MOTION
FOR PARTIAL SUMMARY JUDGMENT - 1**

SNYDER LAW FIRM LLC
15306 MAIN STREET E, SUITE B
SUMNER WA 98390-2640
(253) 863-ATTY (2889)- FAX: (253) 863-1483

<p>Plaintiff's Answer to Counterclaim and Third Party Complaint</p>	<p>Plaintiff's Motion for Partial Summary Judgment to Dismiss Defs.' Affirmative Defenses and Counterclaim and Third Party Plaintiff's Third Party Complaint</p>	<p>Declaration of Kenyon E. Luce in Support of Plaintiff's Motion for Partial Summary Judgment to Dismiss Defs.' Affirmative Defenses and Counterclaim and Third Party Plaintiff's Third Party Complaint (& Exhibits thereto)</p>
<p>First Amended Answer and Affirmative Defenses, Counterclaim and Third Party Complaint</p>	<p>Defendants' Response to Plaintiff's Motion for Partial Summary Judgment</p>	<p>Declaration of Klaus O. Snyder in Opposition to Plaintiff's Motion for Partial Summary Judgment (& Exhibits thereto)</p>
<p>Defendant's Motion to Amend Answer to Change Third Party Plaintiff's Status & to Drop Geraldine Rudolph as a Third Party Plaintiff</p>	<p>Plaintiff's Reply to Defendants' Response to Plaintiff's Motion for Partial Summary Judgment</p>	<p>Declaration of Fred A. Roesch in Support of Plaintiff's Motion for Summary Judgment Dismissal of Defs.' Counterclaims</p>
<p>Declaration of C.M. Constantine in Support of Plaintiff's Motion for Partial Summary Judgment to Dismiss Defs.' Affirmative Defenses and Counterclaim and Third Party Plaintiff's Third Party Complaint (& Exhibits thereto)</p>		<p>All Pleadings which were filed in the case of <u>Roesch v. Bohm</u>, Pierce County Cause No. 15-2-07406-2</p>

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The court having also heard argument from counsel for the parties and being otherwise fully advised in the premises, the court hereby ORDERS as follows:

1. The Plaintiff's Motion for Partial Summary Judgment is **DENIED**.

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ORDER CONVERTING ACTION

The Defendants having asked this Court to convert the Plaintiff's Unlawful Detainer Action into an action for Ejectment and the court having asked the parties to submit briefing on the issue of this Court's authority to enter such an Order converting the Plaintiff's action to one for Ejectment and the parties having submitted their briefing as follows:

Plaintiff's Second Motion for Partial Summary Judgment to Dismiss Defs.' Equitable Affirmative Defenses Third Party Plaintiff's Third Party Complaint (specifically Section M. (page 16)) and

Defendant's Response to Plaintiff's Second Motion for Partial Summary Judgment to Dismiss Defs.' Equitable Affirmative Defenses Third Party Plaintiff's Third Party Complaint (specifically Section A. (pages 4-9))

The Court having considered the parties' briefing, the argument of counsel and finding itself fully advised in the premises and the Court finding that it has personal jurisdiction over the parties and subject matter jurisdiction over the causes of action and the authority to so convert the Plaintiff's action, the Court hereby Orders as follows:

2. The Plaintiff's cause of action for Unlawful Detainer is hereby CONVERTED to an Action for Ejectment.

KAS
(DMD)

3. The Plaintiff is ordered to file a Second Amended Complaint accordingly and a Summons (for an ordinary civil case) within ~~20~~²⁴ days of this Order. The Court hereby directs the Defendants' counsel, Mr. Snyder to accept service of the Amended Summons and Complaint on behalf of the Defendants once delivered to him by Plaintiff's counsel.

4. The Defendants are ordered to file and serve upon Plaintiff's counsel an Answer to the Second Amended Complaint within 20 days of accepting service of the Second Amended Complaint.

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~~5. The Clerk is directed to issue an Order Setting Case Schedule setting forth a Trial date of _____, 201_____ and providing for all Case Schedule events as otherwise called for pursuant to PCLR 3(g) and (h)(2) for an Expedited Case.~~

Furthermore,

~~As the case is, therefore, not fully adjudicated, pursuant to the provisions of CR 56(d)¹, the court hereby finds that the following material facts exist without substantial controversy:~~

- ~~a. The parties entered into a *Real Estate Purchase and Sale Agreement* (REPSA), dated October 15, 2008, which REPSA included a number of Addenda, including NWMLS Forms 65A (*Rental Agreement (Occupancy Prior to Closing)*) and Form 68 (*Lease/Rental Agreement*);~~
- ~~b. The Plaintiff has sought to enforce the provisions of only NWMLS Form 68 from the October 15, 2008 REPSA in this current action;~~
- ~~c. The Defendants never paid "rent" to the Plaintiff pursuant to the provisions of either NWMLS Form 65A or 68;~~
- ~~d. The Defendants secured a Jury Verdict and an Order on Jury Verdict, in their favor in the case of *Roesch v. Boehm*, Pierce County Superior Court Cause No. 15-2-07406-2, an Unlawful Detainer action brought by the Plaintiff, in which the Jury found that the Defendants had no obligation~~

¹ CR 56(d) Case Not Fully Adjudicated on Motion. If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

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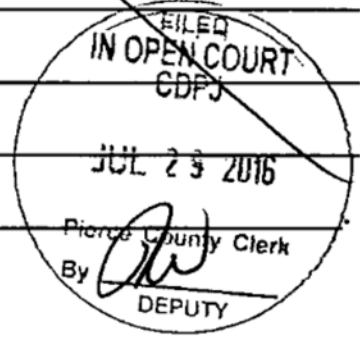
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It is further

ORDERED:

DONE IN OPEN COURT this 29th day of JULY, 2016.



[Signature]
JUDGE MICHAEL E. SCHWARTZ

Presented by:

SNYDER LAW FIRM, LLC.

[Signature]

KLAUS O. SNYDER, WSB #16195
Attorney for Defendants Bohm

Approved for entry

Notice of Presentation waived:

LUCE & ASSOCIATES PS

[Signature]

KENYON E. LUCE, WSB #3081
CHRISTOPHER M. CONSTANTINE, WSB #11650
Attorneys for Plaintiff

**ORDER ON PLAINTIFF'S MOTION
FOR PARTIAL SUMMARY JUDGMENT - 5**

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CERTIFICATE OF SERVICE & DELIVERY VIA EMAIL

The undersigned does hereby declare that on **MARCH 24, 2017**, the undersigned emailed a copy of the ***ANSWER TO PETITION FOR REVIEW*** for filing and/or service in the above-entitled case to the following Courts and persons:

Clerk, Washington State Supreme Court
Temple of Justice
PO Box 40929
Olympia WA 98504-0929
supreme@courts.wa.gov

Clerk, Washington State Court of Appeals – Division II
950 Broadway, Suite 300 MS TB 06
Tacoma WA 98402-4427
coa2filings@courts.wa.gov

Kenyon Luce
Chrisopher Constantine
Luce & Associates PS
4505 Pacific Hwy E., Ste A
Tacoma WA 98424-2638
Ken.Luce@lucelawfirm.com & guardhi@aol.com
ofcounsl1@mindspring.com

DATED this **24TH** day of **MARCH, 2017**.

By: _____
KLAUS O. SNYDER