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OF THE STATE OF WASHINGTON

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DEPUTY

PATRICE CLINTON and RICHARD SORRELS,

Appellants,

v.

CHRISTOPHER HONSE and SALLY HONSE,

Respondents.

BRIEF OF RESPONDENTS HONSE

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I. INTRODUCTION

Appellants Richard Sorrels and Patrice Clinton challenge the trial court's summary judgment conclusion that (1) they were guilty of unlawful possession of real property in Lakebay, Washington that respondents Chris and Sally Honse purchased at a Trustee's Sale and (2) the Honses have a right to possess the property. They also challenge the trial court's order authorizing the Honses to dispose of the substantial volume of junk appellants amassed but left behind, which included 188 vehicles – 173 of which were deemed “junk vehicles” by Pierce County Code Enforcement), 500+ tires, multiple uninstalled toilets, old televisions, piles of video tapes, magazines and books, a collection of more than 100 car batteries and other garbage and debris.¹ The court's finding of unlawful detainer and the issuance and exaction of the Writ of Restitution followed a long and difficult history for the Honses.

The Honses were not only the purchasers at the Trustee's Sale; they were also the foreclosing “lender.” The property they purchased at the foreclosure was once their home. The Honses seller-financed the sale of the property to Clinton in 2006; but by late 2008, she defaulted on the loan. Though she made no payments whatsoever to the Honses

¹ The astonishing condition of the interior home and the surrounding premises is depicted in multiple pictures found at Clerk's Papers (“CP”) 811-850.

after October 2008 (at the time of foreclosure, she owed the Honses more than \$410,000), Clinton nonetheless continued to occupy the property with Richard Sorrels until November 26, 2013, when the Sherriff executed on the Writ of Restitution. But too regain title and possession to this property, the Honses had to endure two foreclosures and five years of litigation with these appellants who are astute at utilizing the judicial system to obstruct and cause delay to their advantage. The litigation included multiple lawsuits, multiple appeals and multiple bankruptcies.

Though issued to address a specific bankruptcy action (the fourth), United States Bankruptcy Court Judge Brian Lynch authored a 10-page Order that accurately described a portion of the long history of appellants' obstructive tactics. Judge Lynch noted that "the debtor and its henchmen² seem bent on using bankruptcy filing to stop foreclosure with no other serious effort to pay the Honses." (CP 254.) In that fourth bankruptcy, Judge Lynch determined that the court "cannot allow the debtor and the various people involved with it to continue its abuse of the bankruptcy system." (*Id.*) He also concluded

² Though the debtor in that particular bankruptcy was Ravenscrest Trust (a party to the unlawful detainer action, but not a party to this appeal), Judge Lynch noted involvement by Clinton and persons related to Sorrels, but found: "It is clear that regardless of involvement of various family members in this effort to forestall foreclosure, Richard Sorrels was intimately involved in and in charge of the process." (CP 252.)

the debtor and its representative filed this bankruptcy as part of a scheme to delay and hinder the Honses with respect to their lien against the Lakebay property, and that scheme was done by means both of transfers between various persons and entities (there are four deeds in the record transferring the Lakebay property, including one to an entity that didn't even exist yet), and by multiple bankruptcy filings (the four filings by debtor and Ms. Clinton combined, three of which were filed within an hour before a scheduled trustee's sale.)

(Id.) This appeal is yet another leg of appellants' continued attempt to manipulate the judicial system, inequitably, to their gain.

Remarkably, despite a five year litigation history that served to extend appellants' occupancy without payment, which history includes four bankruptcies adjudicated to be a scheme to delay and hinder the Honses, a central theme to appellants' current challenge is that they were treated unfairly in this unlawful detainer action. Though there were two superior court judges (Judge Ronald Culpepper and Judge Jack Nevin) and two superior court commissioners (Commissioner Mark Gelman and Commissioner Clint Johnson) that collectively made the substantive decisions challenged here, appellants accuse all of these judicial officers of bias and "finding ways to get around statutory requirements to hammer a defendant the superior [court] showed a clear disdain for." (Appellants' Brief at p. 31.) Appellants were not treated unfairly. They were ultimately evicted because their defenses

to the unlawful detainer action were without merit.

Appellants do not deny in this appeal that they retained possession of the property despite their failure to pay for the property. Instead, appellants complain that they were not afforded certain notices or processes, even though the cited statutes do not afford them such rights. After scouring the foreclosure notices, appellants highlight two inadvertent clerical errors that resulted in no prejudice. Though appellants allowed the Trustee's Sale to proceed without invoking their statutory pre-foreclosure remedies to address these so-called errors, they argue that these ministerial errors may nonetheless be raised post-sale to negate the Honses' right of possession. Though appellants chose not to utilize the four months between the Trustee's Sale and the Sheriff's execution on the Writ to clear the property of their accumulated junk, and though the junk interfered with the Honses' right to quiet possession, appellants complain that the court did not require the Honses to preserve this enormous accumulation for appellants benefit. Finally, appellants complain that the trial court rejected their requests to delay the unlawful detainer proceeding and to set only a nominal bond to stay execution on the trial court's orders.

The trial court properly determined that appellants were guilty of unlawful and that the Honses are entitled to possession. Thereafter,

the trial court made appropriate decisions to resolve matters within its jurisdiction – issues related to the parties’ dispute regarding possession – and to implement its judgment regarding possession. The trial court’s rulings should be affirmed.

II. STATEMENT OF THE CASE

Respondents Chris and Sally Honse own approximately six acres of improved real property located at 8717 Key Peninsula Highway in Lakebay, Washington (“Lakebay Property”) via a Trustee’s Deed recorded on July 26, 2013 under Pierce County Auditor File No. 201307260255. (CP 175, 186.) The Lakebay Property was previously their home. The Honses sold the Lakebay Property to Patrice Clinton in 2006 through a seller-financed transaction in which they accepted a promissory note from Clinton that was secured by a deed of trust against the Lakebay Property. (CP 176-77, 192, 197.)

Clinton moved in and occupied the house with her significant other Richard Sorrels. In 2008, Clinton defaulted on the promissory note, leaving the majority of the purchase price unpaid. After an extremely difficult five-year process that involved two foreclosures, multiple lawsuits and four bankruptcies, the Honses were finally able to successfully foreclose through a Trustee’s Sale held on July 12, 2013 and regain title to the property by a Trustee’s Deed recorded on July

26, 2013.³ (CP 176-77, 186.) At the time of the Trustee's Sale, the Honses were owed more than \$410,000. (CP 177.) Even with the recording of the Trustee's Deed, the Honses still had to obtain from the Bankruptcy Court an order annulling the automatic stay related to the fourth and final bankruptcy filed with regard to the Lakebay Property. (CP 246-57; see *also* CP 240-43.)

Neither Clinton nor Sorrels voluntarily vacated the Lakebay Property after the foreclosure. The Honses were thus required to commence this unlawful detainer action on September 24, 2013. (CP 1-38.) A show cause hearing was set for October 17, 2013 to address the issues of unlawful detainer and right of possession (CP 40-41), and both Clinton and Sorrels were served with the Summons, Complaint and Show Cause Order on September 30, 2013. (CP 42-44.)

Both Clinton and Sorrels submitted a written objection to the unlawful detainer action, primarily claiming that the Trustee's Sale was invalid (see CP 47-53; see *also* CP 54-138), but only Sorrels appeared at the show cause hearing (CP 133). After considering testimony and evidence at the show cause hearing, Commissioner Mark Gelman found that the Honses have a right of possession of the Lakebay

³ A detailed description of the events leading to the July 2013 foreclosure are set forth in the Declaration of Christopher Honse in Support of Motion for Summary Judgment at CP 175-81 and also in Judge Lynch's Order Annulling Automatic Stay and Granting Relief from Stay at CP 246-257.

Property, appellants were guilty of unlawful detainer and that a Writ of Restitution should be issued by the Clerk. (CP 133-41.) Commissioner Gelman entered Findings of Fact and Conclusions of Law (CP 133-38) and a Judgment adjudicating appellants guilty of unlawful detainer and declaring their occupancy of the premises terminated. (CP 139-40.) Included in Commissioner Gelman's Findings of Fact was a finding that "prior to conducting the Trustee's Sale, the Trustee provided notice in compliance with RCW 61.24.040 and .060."⁴ (CP 135, Finding 5.)

Sorrels and Clinton challenged the writ of restitution through a motion for reconsideration/revision. (CP 291.) Though they did in their motion assign error to portions of the Judgment, appellants did not assign error to any of Commissioner Gelman's Findings of Fact. (CP 291.) On November 22, 2013, the Honorable Ronald Culpepper denied the motion for reconsideration/revision and affirmed Commissioner Gelman's Findings of Fact, Conclusions of Law and Judgment. (CP 489-91.) That same day, Judge Culpepper also entered an Order Granting Plaintiff's Motion for Partial Summary Judgment holding that the Honses "as a matter of law, have a right of possession

⁴ The Trustee designated by the Honses (as beneficiaries) was Davies Pearson PC and Brian King, an officer of Davies Pearson performed most of the Trustee's duties. (CP 112, 644-47.) King appeared at the show cause hearing and testified (CP 451) and all of the pre-foreclosure notices and the Trustee's Deed were provided to Commissioner Gelman at the hearing (CP 54-56, 112-32.)

of the real property located at 8717 Key Peninsula Highway in Lakebay Washington and the writs of restitution previously issued by the Clerk pursuant to the October 17, 2013 Judgment were properly issued pursuant to chapter 59.12 RCW.” (CP 496-97.)

After Judge Culpepper confirmed the Judgment and the Writ to execute that Judgment, the Pierce County Sheriff executed on the Writ and ousted Patrice Clinton and Richard Sorrels from the Lakebay Property on November 26, 2013, more than four months after we foreclosed and more than a month after Commissioner Gelman issued the writ of restitution. (CP 720-25.)

From the time the Honses sold to Clinton in 2006 until the Sheriff executed on the writ of restitution in November 2013, Clinton and Sorrels occupied the Lakebay Property. When the Honses finally obtained possession of the Lakebay Property, the house was filled with garbage and junk. The home was packed with furniture, magazines, phonebooks, newspapers, batteries, toilets, old electronics, clothes and bed linens and garbage. The 6.7 acres of land was covered with deteriorated recreational vehicles, campers, utility trailers, boats, boat trailers, cars, trucks, and motor cycles, as well as tires, scrap metal and other debris. (CP 770, 811-850.)

Clinton and Sorrels literally converted the property into a junk

yard. The Lakebay Property had been the subject of a prolonged Code Enforcement action by Pierce County that culminated in a misdemeanor conviction against Sorrels. (CP 939-995.) Because the property and the many deteriorated vehicles are visible from Key Peninsula Highway, the Lakebay Property was also a significant source of concern for the community. In fact, the Honses were contacted by Pierce County Councilmember Flemming who communicated clearly that he and the community expected the Honses to promptly clear the junk from the property. (CP 771, 996-97) The Honses wanted to clean the property in order to address County and community concerns and also because they could not hope to re-sell this property if it was not cleared of the substantial junk deposited there. (CP 771.) It was critical that we clear the property as soon as possible.

In anticipation of their responsibilities to clean the Lakebay Property and before the Sheriff executed on the Writ, the Honses requested and received from Judge Culpepper an Order clarifying our obligations on execution of Writ of Restitution. (CP 492-94.) In this Order, Judge Culpepper ruled that the Honses could, without further notice to appellants, dispose of any and all personal property left following execution of the Writ. (*Id.*)

Thereafter, the Honses proceeded to clean out the house. To do

so, the Honses necessarily made multiple trips to Key Center Transfer to recycle and dispose of boxes of newspapers, magazines, phone books, plastic containers and other papers. They have removed from the house and properly recycled over 100 car batteries. They also made several donations. Boxed and canned food that had not expired was donated to a local food bank. Furniture was donated to Habitat for Humanity. 40 lifejackets were donated to Gig Harbor Medic One/Fire. 12 boxes of useable paper, notebooks, folders and binders were donated to Peninsula Middle School. A truck full of 25 old large TVs, 32 printers, typewriters, DVD players, computers, phones, car stereos, fans and wires and cables was delivered to Electronics Recycling. 30 large bags of clothes, 45 boxes of books, 18 large bags of linens, 20 boxes of VHS tapes and multiple boxed of various household items were donated to Goodwill. (CP 776-75.) The Honses did not gain financially from the disposal of the large volume of materials that were accumulated in the house. (CP 777.)

The substantial number of vehicles on the Lakebay Property, presented complex issues and clearing the grounds was much more difficult. First, the Honses were concerned that some of the vehicles on the Lakebay Property may be owned by people other than appellants (or their relatives or appellants' related entities). (CP 771.)

Additionally, Rick Sorrels had been criminally charged and convicted for unlawfully engaging in the sale of vehicles on the Lakebay Property. (CP 941, 988-95.) The Honses wanted to promptly clear the property, but wanted to do so lawfully. (CP 771-72.)

To address these issues the Honses worked closely with Pierce County Code Enforcement, specifically Mark Luppino. Luppino had been involved with the code enforcement actions against Sorrels while occupied the Lakebay Property and was well aware of the situation presented to the Honses. Luppino advised that he, with the assistance of another code enforcement officer, would come to the Lakebay Property and inspect each vehicle to determine if the vehicles qualified as junk vehicles under the Pierce County Code. (CP 772, 939-42.)

Over a period of four months,⁵ with the first visit in December 2013 and the last on March 31, 2014, Luppino and Code Enforcement Officer Jim Howe, made six visits to the Lakebay Property and inspected each and every recreational vehicle, camper, car, truck, utility trailer and boat trailer on the site. (CP 941.) In total, they inspected 188 vehicles. All but 15 qualified as junk vehicles under the Pierce County Code. (CP 941-42.)

⁵ Luppino could not simply block out a single period of time sufficient time to inspect the many vehicles on the property. Rather, he had to work it into his work schedule as time was available to him. (CP 772.)

After each site visit, Luppino returned to his office to run plates to determine if a registered owner could be identified and then prepare a Junk Vehicle Affidavit (“JVA”) for each individual qualified vehicle. Luppino completed and provided to Honse 173 JVAs. (CP 941-42, 772-73.) From the Junk Vehicle Affidavits prepared by Luppino, Honse compiled a complete list of all 173 vehicles inspected and declared junk vehicles and the list is at CP 856-59. The list identifies the license plate number, if available, make and model of each vehicle, as well as a JVA number that Honse assigned for each vehicle for accounting purposes. If the Washington State Department of Licensing had information regarding the registered owner, the name of the registered owner is also listed in the fourth column. In instances in which Luppino could find no record of the registered owner through his search of the Washington State Department of Licensing data base, the word “none” is denoted in the registered owner column. (CP 772-73.)

The process did not end with the issuance of the JVAs. Notably, Luppino’s searches revealed that appellant Sorrels was the registered owner of only 13 of the vehicles and Clinton was not the registered owner of any of the vehicles. (See CP 856-59.)⁶ In order to clear title on

⁶ An additional 21 vehicles were owned by entities related to Sorrels (i.e. Key Center Enterprises LLC) or Sorrels’ family members (i.e. Chris Sorrels), but these entities or persons are not parties to this appeal. The vehicles for which Sorrels or a party or

the 72 vehicles with registered owners other than Sorrels or a person or entity related to Sorrels, Honse was required to send a copy of each JVA by certified mail to the registered owner of the vehicle identified in the JVA and allow the owner 14 days to claim the junk vehicle. If no response was received within 14 days, the registered owner lost any claim to the vehicle. (CP 773.)

To comply with the legal requirements, Honse personally sent out 72 letters with JVAs by certified mail to notify the registered owner that Honse had the vehicle and that he or she had 14 days to claim the junk vehicle. It took Honse more than 20 hours to prepare the letters, mail the letters and JVAs and then track the response. (CP 773.) Of the 72 certified mailings, only 23 were actually delivered; the rest were returned as undeliverable. Notably, of the 23 individuals who claimed their certified letters, only three elected to claim the vehicle (further evidence that these vehicles were devoid of value). In those instances, the registered owner was permitted to and did come on to the Lakebay Property to retrieve the junk vehicle. (*Id.*)

Honse was disappointed that this process did not result in the removal of more junk vehicles as it left him with the task of making

person related to Sorrels are the registered owner on shaded on the JVA list. (See CP 773, 856-859.)

arrangements to have the junk vehicles removed – a task that is neither easy nor inexpensive. (CP774.)

Honse has made several contacts to obtain estimates for removal of these junk vehicles. All but one stated that removal of the vehicles would require a significant payment by Honse. Even with a credit for scrap metal, Honse was looking a net cost for towing and dump fees of \$35,000 to \$40,000. Others wanted to destroy the vehicles on site, but that was unacceptable in light of the potential issues associated with disposal of hazardous materials in such a process. (*Id.*)

After many searches, as well as unsuccessful effort to see if public grants may be available to defray the substantial costs, Honse finally found someone who would remove the junk vehicles based only on the value of the vehicles and metals removed and without a cash payment from Honse. (CP 775-75, 861-65.) Before moving on the contract, Honse advised the trial court of his efforts and plan to clear the property of the vehicles with notice to appellants. (CP 730-63, 1000-05, 1108-40.) On May 2, 2014, Judge Jack Nevin entered a Supplemental Order to November 22, 2013 Order Clarifying Obligations on Execution of Writ Confirming Status of Abandoned

Vehicles confirming that Honse was authorized to dispose of the vehicles that appellants left on the property. (CP 899-909.)

After obtaining possession of the Lakebay Property on November 26, 2013, the Honses worked tirelessly to clear the property. Cleaning up the Lakebay Property was a huge financial and emotional strain for the Honse family, but was an absolute necessity in order to use the property or market it for sale. Chris and Sally Honse live in Glide, Oregon. They, along with members of their family, had to make countless trips to the Lakebay Property for this extensive cleanup project. (CP 776-77.) The Honses were able to make some arrangements to reduce their out-of-pocket expenses. For example, because Pierce County declared the Lakebay Property a junk yard, the Honses were able to work with the Washington State Department of Ecology to fund a contract to remove the more than 500 abandoned tires on the Lakebay Property. (CP 776.) By no means, however, were the Honses able to profit from the removal and disposal of substantial junk abandoned on the Lakebay Property. (CP 776-78.) To the contrary, it has been a huge financial drain. (*Id.*)

III. ARGUMENT

A. The Notices To Appellants Sorrels And Clinton Satisfied RCW 59.12.032, RCW 61.24.040 and RCW 61.24.060 And The Writ Of Restitution Was Properly Issued.

1. The relevant statutory framework for unlawful detainer actions following a non-judicial foreclosure.

This appeal follows an unlawful detainer action following a nonjudicial foreclosure conducted pursuant to Chapter 59.12 RCW. It is thus helpful to understand the statutory frame work of the Unlawful Detainer Statute, chapter 59.12 RCW and its relationship to the Deed of Trust Act, chapter 61.24 RCW.

The unlawful detainer process set forth in chapter 59.12 RCW, most commonly invoked to address defaults under commercial leases,⁷ provides for a limited summary proceeding “to preserve the peace by providing an expedited method for resolving the right to possession of property.” *Heaverlo v. Keico Indus., Inc.*, 80 Wn.App. 724, 728, 911 P.2d 406 (1996). While a court presiding over an unlawful detainer action does not sit as a court of general jurisdiction, it “may decide issues related to rightful possession of the subject property,” as well as “issues necessarily related to the parties’ dispute

⁷ The Residential Landlord Tenant Act, chapter 59.18 RCW, sets forth the process that must be followed to evict a residential tenant. The Landlord Tenant Act provides greater protections and statutory remedies to residential tenants than those rights and remedies afforded to under chapter 59.12 RCW. *Compare* chapter 59.18 RCW to chapter 59.12 RCW.

over possession.” *Port of Longview v. International Raw Materials, Ltd*, 96 Wn. App. 431, 438, 979 P.2d 917 (1999).

Relevant to this appeal, chapter 59.12 RCW does not, *per se*, establish a pre-eviction notice process for all unlawful detainer actions commenced under its authority. Instead, at RCW 59.12.030, the statute incorporates pre-suit notice requirements, to the extent they exist, into the definitions of persons that are guilty of unlawful detainer and, thus, subject to the summary proceedings set forth therein. Because a person cannot be deemed guilty of unlawful detainer before pre-eviction notices established in RCW 59.12.030 are given and expire, those notices (to the extent applicable) are jurisdictional prerequisites to commencing suit under the statute. See *Savings Bank of Puget Sound v. Mink*, 49 Wn. App. 204, 206-07, 741 P.2d 1043 (1987).

For example, when a tenant receives a 3-day notice to pay or vacate, that tenant becomes guilty of unlawful detainer only if he retains possession at the expiration of the third day without paying rent; it is only upon the expiration of the third day following notice that he becomes subject to suit under chapter 59.12 RCW. RCW 59.12.030(3). When a landlord provides a 20-day notice to quit the premises at month end for a lease indefinite in term, the tenant

becomes guilty of unlawful detainer only after the 20 days expires. RCW 59.12.030(1). On the other hand, a person is guilty of unlawful detainer without any notice if he retains possession beyond the expiration of a finite express lease term and suit under chapter 59.12 RCW may be commenced immediately. RCW 59.12.030(1).

In this case, the Honses were not authorized to commence an unlawful detainer action under RCW 59.12.030. Rather, the authority was provided under the Deed of Trust Act, which expressly authorizes the purchaser at a Trustee's Sale to obtain possession of the property pursuant to chapter 59.12 RCW:

The purchaser at the trustee's sale shall be entitled to possession of the property on the twentieth day following the sale, as against the grantor under the deed of trust and anyone having an interest junior to the deed of trust, including occupants and tenants, who were given all the notices to which they were entitled in this chapter. The purchaser shall also have the right to the summary proceedings to obtain possession of real property provided in chapter 59.12 RCW.

RCW 61.24.060(1) (emphasis added).

Chapter 59.12 RCW does not set forth any pre-eviction notice requirements as a pre-requisite to suit in the same jurisdictional manner that it does for other actions authorized under RCW 59.12.030. However, the legislature did provide at RCW 59.12.032:

An unlawful detainer action, commenced as a

result of a trustee's sale under chapter 61.24 RCW, must comply with the requirements of 61.24.040 and 61.24.060.

RCW 61.24.040 sets forth the requirements of the pre-foreclosure Notice of Trustee's Sale provided to all persons with recorded interests in the foreclosed property. As noted earlier, RCW 61.24.060 provides the authority to proceed with a post-foreclosure unlawful detainer action. It also sets forth a very limited requirement for post-foreclosure notices to residential tenants that would normally be afforded rights under the Residential Landlord Tenant Act.

In this case, appellants do not contest the trial court's findings that the Honses had a right of possession or that appellants were not guilty of unlawful detainer. Instead, they allege that the Writ of Restitution was not properly issued because the notices required by the Deed of Trust Act were, accordingly to appellants, deficient.

Significantly, following the show cause hearing, Commissioner Gelman expressly found: "Prior to conducting the Trustee's Sale, the Trustee provided notice in compliance with RCW 61.24.040 and .060." (CP 135, Finding of Fact 5.) Appellants did not challenge this Finding in their motion for revision as required by Pierce County Local Rule

(“PCLR”) 7(1)(11)(C) (see CP 291),⁸ nor did they assign error to the finding in this appeal as required by RAP 10.3(g). The finding is now a verity on appeal. *Recreational Equipment, Inc. v. World Wrapps Northwest, Inc.*, 165 Wn. App. 553, 558, 266 P.3d 924 (2011). Even if the issue was properly before this Court, the substantial evidence in the record supports the unchallenged finding. The notices given to appellants complied with RCW 61.24.040 and RCW 61.24.060.

2. The Honses did not purchase “Tenant-Occupied Property” as defined by the Deed of Trust Act. RCW 61.24.060 is thus inapplicable and no post-sale notice was required.

Appellants first assert that the Honses failed to provide an RCW 61.24.060 60-day post-foreclosure notice to “Richard Sorrels and Key Center Enterprises LLC as tenants.” (Appellants’ Brief at 6.) RCW 61.24.060 has no application in this case, however, because such notice is only required for residential tenants.

RCW 61.24.060 requires no post foreclosure notice to owner occupants and most other occupants of foreclosed property. Post-sale notice is only required when the non-judicially foreclosed property was “tenant-occupied property.” RCW 61.24.060 provides in relevant part:

⁸ While appellants assigned error in their revision/reconsideration motion to Commissioner Gelman’s Judgment declared appellants guilty of unlawful detainer that ordered issuance of the Writ (see CP 291-300), they did not assign error to any of the Commissioner’s separate Findings of Fact and Conclusions of Law, which Findings and Conclusions are at CP 133-38.)

- (1) The purchaser at the trustee's sale shall be entitled to possession of the property on the twentieth day following the sale, as against the grantor under the deed of trust and anyone having an interest junior to the deed of trust, including occupants and tenants, who were given all the notices to which they were entitled in this chapter. The purchaser shall also have the right to the summary proceedings to obtain possession of real property provided in chapter 59.12 RCW.
- (2) If the trustee elected to foreclose the interest of any occupant or tenant, the purchaser of tenant-occupied property at the trustee's sale shall provide written notice to the occupants and tenants at the property purchased in substantially the following form: ... (emphasis added.)

When notice is required under RCW 61.24.060(2), it must be provided at least days 60 before the tenant may be evicted. RCW 61.24.146.

However, "tenant-occupied property" is a defined term in the Deed of Trust Act. It means "property consisting solely of residential real property of a tenant subject to chapter 59.18 RCW ... that is the principal residence of a tenant subject to chapter 59.18 RCW."⁹ RCW

⁹ The Deed of Trust Act separately defines "owner occupied" property to mean "property that is the principal residence of the borrower." RCW 61.24.005(10). Clinton was an "owner occupant.". Clinton was not, however, entitled to pre-foreclosure notice, mediation and consultation rights afforded other residential borrowers because the deed of trust foreclosed was granted as part of a seller-financed sale" as defined by RCW 61.24.031(8)(b); and, thus, the Honses were exempt from requisite participation in the legislatively created program. RCW 61.24.031(7)(a); RCW 61.24.165(3)(c). In any event, appellants do not claim that Clinton was denied any rights afforded to owner occupied property.

61.24.005(15).¹⁰ Chapter 59.18 RCW – the Residential Landlord-Tenant Act – defines “tenant” as “any person who is entitled to occupy a dwelling unit primarily for living purposes under a rental agreement.” RCW 59.18.030(21).

There is no evidence in the record that the Lakebay Property was “tenant occupied property” as defined by the Deed of Trust Act and the 60-day post foreclosure notice was not required.

Appellants presented no evidence that Richard Sorrels and/or Key Center Enterprises LLC were tenants of any kind (much less residential tenants) of the Lakebay Property or that either hold any possessory right in the Lakebay Property. Instead appellants rely exclusively upon the Complaint, which alleges at ¶ 9:

In the course of the Ravenscrest Bankruptcy Proceeding, Ravenscrest Trust asserted that it commercially leased the Lakebay Property to Key Center Enterprises LLC, though there is no recorded lease in the public record. Richard Sorrels is the managing member and registered agent of Key Center Enterprises LLC. In a signed report submitted to the Secretary of State, Richard Sorrels represented that Key Center Enterprises LLC is in the “sale and service” business.

(CP 3.)

¹⁰ “Residential real property” is defined to mean “property consisting solely of a single family home...” RCW 61.24.005(13).

Though there is no recorded lease (CP 1001, ¶¶ 3-4), there is evidence in the record that, in 2009 and 2010, Key Center Enterprises LLC was a commercial tenant of the Lakebay Property. Through a sworn statement submitted to the bankruptcy court in February 2010, Sorrels testified:

On August 3, 2009 Debtor [Ravenscrest Trust] entered into a commercial lease agreement with Key Center Enterprises LLC (d/b/a Key Center Boats and Key Center Boats, Trailers, and RVs) (See Exhibit E). Key Center Boats operates primarily as a used vessel dealer. Key Center Boats, Trailers and RVs performs repairs and prepares/restores and/or refurbishes the boats/trailers/RVs for potential resale.

(CP 1011, ¶ 17; the referenced Exhibit E, commercial lease is at CP 1014). While there is no evidence that the LLC held a lease beyond 2010, the LLC was nonetheless served with the Summons, Complaint and Show Cause Order in the abundance of caution. (CP 45.) Key Center Enterprises LLC did not, however, appear before the trial court (CP 133), nor is it a party to this appeal. Regardless, a commercial tenant is not entitled to post-foreclosure notice. *In re Emerald Outdoor Advertising*, 348 B.R. 552 (E.D. Wash. 2006) (holding tenant to commercial lease is not entitled to post sale notice under RCW 61.24.060.)

With regard to Richard Sorrels individually, there is evidence in the record that appellant Sorrels was the registered agent for Key Center Enterprises LLC,¹¹ but no evidence that Sorrels was ever personally a “tenant” of the Lakebay Property. To the contrary, prior to the Sheriff’s execution on the Writ, the address Sorrels provided the court for purpose of service was not the Lakebay Property address (8717 Key Peninsula Highway, Lakebay, Washington), but 9316 Glencove Road in Gig Harbor, Washington. (See CP 50, 53, 306, 418, 441, 443, 484, 696, 717.)¹² Moreover, Sorrels sworn testimony to the bankruptcy court was that he conducted business on the Lakebay Property (which business resulted in a criminal conviction against Sorrels). (CP 279-84.) Thus, even if there was evidence that Sorrels held the status of tenant, he did not occupy the property as his principal residence or solely for residential purposes. The 60-day notice under RCW 61.24.060 was not required in this case.

3. The pre-foreclosure notices to Clinton and Sorrels sufficiently satisfied the requirements of RCW 61.24.040.

Appellants next argue that the Notice of Trustee’s Sale sent to parties with recorded interests in the Lakebay Property and the Notice

¹¹ See CP 1000-01, ¶ 2, CP 930, 934.)

¹² Clinton, on the other hand, continued to identify the Lakebay Property as her address up until the Writ was executed by the Sheriff. (See *id.*)

of Foreclosure sent to Clinton, as the grantor of the deed of trust, did not comply with RCW 61.24.040 and, thus, did not satisfy RCW 59.12.032.

Notably, only Clinton, who was the borrower and the grantor of the foreclosed deed of trust has standing to assert this claim. Relevant to this appeal, RCW 61.24.040(1)(b) requires that the Notice of Trustee's Sale be sent to the borrower and grantor (Clinton) and to persons holding a, lien, lease or other interest pursuant to a recorded document. The Deed of Trust Act only requires that the Notice of Foreclosure be sent to the grantor of the deed of trust (Clinton). RCW 61.24.040(2). Sorrels presented no evidence or argument that he was entitled to receive a Notice of Trustee's Sale or Notice of Foreclosure, much less that he has standing to object to the form of these notices.

Appellants assert that the form of the Notices failed to satisfy RCW 61.24.040 in two regards. First, they claim that the Amended Notice of Trustee's Sale was not properly acknowledged and thus does not comply with form notice set forth in RCW 61.24.040(1)(f). Second, they claim that both the Amended Notice of Trustee's Sale and the Notice of Foreclosure do not satisfy RCW 61.24.040(1) and (2) because there is an inconsistency between the principal debt stated on the Amended Notice of Trustee's Sale and the Notice of

Foreclosure. Neither challenge supports reversal of the trial court's finding that appellants were guilty of unlawful detainer and that the Honses' hold right to possess the property under the Trustee's Deed.

First and foremost, the Deed of Trust Act does not require strict compliance with the form notices presented in the statute. RCW 61.24.040(1)(f) requires that the Notice of Trustee's sale shall be "substantially" in the form presented in the statute. RCW 61.24.040(2) similarly requires only that the Notice of Foreclosure sent to the grantor be "substantially" in the form set forth in the statute. Technical errors in formalities will not be grounds for a finding of noncompliance where errors are correctable or do not result in prejudice or inequities. *Steward v. Good*, Wn App. 509, 514-15, 754 P.2d 150 (1988).

Appellants' challenge the acknowledgement on the Amended Notice of Trustee's Sale appears at CP 237 and is depicted on the following page.

The undisputed testimony establishes that, despite the inadvertent clerical error, the Amended Notice was properly signed in the presence of the notary.

The Successor Trustee in this matter was Davies Pearson, P.C. (CP 644-45.) Brian King is an attorney with and an officer of Davies Pearson (Vice President) and performed most of Davies Pearson's Trustee's duties. (CP 646-47.) King signed the Notice of Trustee's Sale originally sent with regard to the subject foreclosure. (CP 647.) Davies Pearson subsequently prepared an Amended Notice of Trustee's Sale, which was signed by James Tomlinson, another officer of Davies Pearson (Secretary) and authorized signatory, because Brian King was out of the office at the time. King testified that it is not unusual for one officer of the firm to sign a foreclosure notice for another officer when the attorney handling the matter is unavailable. (CP 647.)

Greg Bazur, who is a paralegal with Davies Pearson and a notary (CP 662), provided sworn testimony that he, in fact, witnessed Mr. Tomlinson sign the Amended Notice on behalf of Davies Pearson, the Successor Trustee. (CP 663.) Because the Amended Notice of Trustee's Sale was originally prepared for Brian King's signature, the typed acknowledgement stated that Brian King appeared and signed. Brazur testified that, though he witnessed the signature, he simply

“neglected to cross out Mr. King’s name on the printed notary acknowledgment and replace it with Mr. Tomlinson’s name.” It was “an inadvertent scrivener’s error” (*Id.*) The ministerial error does not, however, change the fact that Tomlinson, with authority, signed the Amended Notice on behalf of the Successor Trustee Davies Pearson and that his signature was witnessed. (*Id.*)

Appellants’ reliance on *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013), is misplaced. In *Klem* the Court addressed a Consumer Protection Act claim brought on behalf of an individual who lost her home to a nonjudicial foreclosure. The claim was lodged against the trustee who conducted the nonjudicial foreclosure (Quality Loan Services) for alleged deceptive practices. The notary employed by the trustee falsely notarized the notice of sale by predating the notary acknowledgement. This falsification permitted the sale to take place earlier than it could have had the notice of sale been dated when it was actually signed. *Id.* at 774. Significantly, this false notary was neither isolated nor inadvertent. *Klem* presented evidence that, for at least a period of four years, Quality Loan Services’ notaries “regularly falsified the date on which documents were signed.” *Id.* at 792. Thus, there was an established practice of having a notary

predate notices of sale.¹³ *Id.* It was in this context, that the Court held that “the act of false dating by a notary employee of a trustee in a nonjudicial foreclosure is an unfair and deceptive act or practice and satisfies the first three elements of the Washington CPA.”¹⁴ *Id.* at 794-95. The practice was deceptive because it defeated the purpose of the notarization, which is to “verify the signor’s identity and the date of the signing by having the signature performed in his presence.” *Id.* at 793.

There are no similarities between this case and *Klem*. Here, the evidence establishes that Tomlinson was authorized to sign the Amended Notice of Trustee’s Sale and that Bazur actually witnessed his signature. Despite the inadvertent scrivener’s error, the purpose of the notary was fulfilled. *Klem* by no means supports a conclusion that such an unintentional clerical error is grounds to negate a purchaser’s possessory rights under their Trustee’s Deed.

Appellants next assert that the Writ of Restitution was improperly issued because there was a discrepancy between the principal debt stated on the Amended Notice of Trustee’s Sale and the Notice of Foreclosure. The Notice of Trustee’s Sale incorrectly identifies the past due monthly payments as the principal owed.

¹³ Such practice is often part of a practice known as “robo-signing” or “assembly line signing and notarizing.” *Klem*, 176 Wn.2d at 792.

¹⁴ Whether the false notary rendered the notice of sale invalid was not before nor decided by the *Klem* court. *Klem*, 176 Wn.2d at 794, n. 15.

(Compare CP 235 to CP 227.) The Notice of Foreclosure correctly states the principal balance owed. (See CP 228.) But appellants fail to indicate any prejudice from this apparent clerical error.

There is no evidence in the record that Clinton or Sorrels, or anyone else for that matter, was prepared to pay the debt owed to halt the foreclosure, much less that this discrepancy precluded such payment. Nor is there any evidence that appellants made inquiry with the Trustee regarding the discrepancy, or requested clarification regarding payment necessary to stop the foreclosure. The evidence in the record only reflects that, through numerous email communications before the Trustee's Sale, appellants asked the Honses to agree to settle the matter by accepting an amount less than was owed under the Note and Deed of Trust and that they did not have available the necessary funds to pay the debt. (CP 251, line 23 – CP 252, line 17, CP 697-715.)

The Notices given substantially complied with the requirements set forth in RCW 61.24.040 and, importantly, served the important function of advising appellants of the available remedies to halt the foreclosure. See *Savings Bank of Puget Sound v. Mink*, *supra*, 49 Wn. App at 207-08. Moreover, appellants failed to utilize their statutory pre-foreclosure remedies. Thus, even if appellants had viable challenges to

the Notices, their failure to raise the challenges through the statutory pre-sale remedies precludes them from asserting the challenges post sale to deprive the Honses of their right of possession in this unlawful detainer action.

The Deed of Trust Act provides the only means by which an interested party may avoid a trustee sale once foreclosure has begun. *Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985). The Act allows an interested party to enjoin or restrain a sale “on any proper legal or equitable ground.” RCW 61.24.130; *Plein v. Lackey*, 149 Wn.2d 214, 225, 67 P.3d 1061 (2003). Appellants opted to allow the Trustee’s Sale to proceed rather than pursue their pre-sale remedy.

But the failure to take invoke presale remedies under the Act may result in waiver of the right to object to the sale. *Plein*, 149 Wn.2d at 227. “Waiver is an equitable principle that can apply to defeat someone's legal rights where the facts support an argument that the party relinquished their rights by delaying in asserting or failing to assert an otherwise available adequate remedy.” *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 569, 276 P.3d 1277 (2012). Waiver of any post-sale contest occurs where a party “(1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale,

and (3) failed to bring an action to obtain a court order enjoining the sale.”¹⁵ *Plein*, 149 Wn.2d at 227. Waiver in this context serves all three of the Act's objectives: (1) the nonjudicial foreclosure process should remain efficient and inexpensive; (2) the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure; and (3) the process should promote the stability of land titles. *Plein*, 149 Wn.2d at 227-28; *Albice*, 174 Wn.2d at 567 (citing *Cox*, 103 Wn.2d at 387).

All three elements of waiver are satisfied here. First, Clinton and all others with a recorded claimed interest in the Lakebay Property received notice of their right to enjoin the sale. The Notice of Trustee's Sale specifically stated:

Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the same pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's Sale.

(CP 236, ¶ IX. See also CP 229.)

¹⁵ In 2009, the legislature added RCW 61.24.127 as an amendment to the Act. It provides that a borrower's failure to bring an action to enjoin the foreclosure sale may not be deemed a waiver of a claim for damages. RCW 61.24.127. This amendment clarifies that “[t]he claim may not seek any remedy at law or in equity other than monetary damages” and cannot challenge the Trustee's Deed. RCW 61.24.127(2)(b).

Second, appellants had knowledge of the asserted challenges before the sale. The claimed “defects” in the Notices (the acknowledgment and the discrepancy in principal amount) are obvious on the face of the documents themselves. The evidence in the record establishes that the Notices were duly served as required by RCW 61.24.040 and the Notice of Trustee’s Sale was both published and recorded. (CP 645, 649-50, 652-53, 655.)

Finally, third, appellants failed to initiate suit, much less obtain a preliminary injunction or other order restraining the sale, before the Trustee’s Sale was conducted. Instead, they challenged the sale through untenable and improper bankruptcy proceedings and now post-sale in this unlawful detainer lawsuit. “To allow one to delay asserting a defense until this late stage of the proceedings would be to defeat the spirit and intent of the [Act].” *Peoples Nat’l Bank of Wash. v. Ostrander*, 6 Wn.App. 28, 32, 491 P.2d 1058 (1971).

Appellants’ challenges have no merit. Even if they did, absent a showing of actual prejudice, appellants waived these post-sale collateral challenges to the Trustee’s Sale.¹⁶ See *Frizzell v. Murray*,

¹⁶ This case does not present a circumstance such as in *Albice*, where a post-sale challenge was permitted. In *Albice*, the grantors of the deed of trust were unaware of their challenges before the sale and reasonably believed the default was cured before the sale. 174 Wn.2d at 571-72. Moreover, the trustee was without authority to conduct the sale, because he failed to conduct the sale in the limited time period authorized by the Deed of Trust Act. *Id.* at 568.

179 Wn.2d 301, 307-10, 313 P.3d 1171 (2013); *Stewart v. Good*, 51 Wn. App. 509, 515, 16, 754 P.2d 150 (1988); *Colorado Structures, Inc. v. Blue Mountain Plaza, LLC*, 159 Wn. App. 654, 666, 246 P.3d 835 (2011).

B. The Trial Court Properly Exercised Its Discretion To Deny A Continuance Because Further Discovery Would Not Have Altered The Outcome Of The Summary Judgment, But Would Have Caused Unnecessary Delay.

Appellants complain that the trial court abused its discretion when it denied appellants' request for a continuance of the summary judgment hearing. Notably, the Honses filed their motion for partial summary judgment to confirm their right of possession (as determined by the Commissioner) on October 23, 2013, and noted it for hearing on November 22, 2013. (CP 144.) However, appellants waited until November 12, 2013 to serve their Interrogatories and Requests for Production of Documents (CP 438) – 21 days after the summary judgment motion was filed, 26 days after the October 17 show cause hearing, and 43 days after the Complaint and Show Cause Order were served.¹⁷ Notably, the discovery request was accompanied by the motion for continuance (CP 304, 428), indicating that the purpose of the discovery requests were not to ascertain information necessary to

¹⁷ The Complaint and Show Cause Order was served on appellants on September 30, 2013. (CP 42-44).

defend the lawsuit, but to delay resolution of the action.

Appellants advised the trial court that they served a discovery request and that the responses were not due before the scheduled summary judgment hearing. (CP 305.) Announcement of their discovery plans was not, however, enough to defer summary judgment. (CP 305.) Delay should not be granted unless party seeking delay establishes cause. Denial of a CR 56(f) motion is proper when:

- (1) the requesting party does not offer a good reason for delay in obtaining the desired evidence;
- (2) the requesting party does not state what evidence would be established through discovery;
- or (3) the desired evidence will not raise a genuine issue of material fact.

Pelton v. Tri-State Memorial Hospital, Inc., 66 Wn. App. 350, 356, 831 P.2d 1147 (1992), quoting *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989). Denial is proper on any one of the above prongs. *Id.* A party may not postpone summary judgment by simply identifying evidence that he believes will be obtained through discovery. He must also establish the materiality of such evidence to the issues being addressed on summary judgment. *Id.* at 357. Put another way, the party seeking delay must demonstrate that the evidence sought, if discovered, will create a genuine issue of material fact on the summary judgment issues presented. Appellants failed to meet this burden and the trial court properly denied their motion.

Appellants bear allegation that they needed discovery for the purpose of ascertaining deficiencies in the notices required by the Deed of Trust Act defies logic. For example, appellants sought confirmation that they were not served with an RCW 61.24.060 60-day notice. (Appellants' Brief at p. 19.) In this case, the Honses did not and do not deny that appellants were not given an RCW 61.24.060 60-day notice – appellants were not entitled to such notice. Regardless, to the extent that appellants were entitled to certain notices, they could readily present evidence through sworn declarations that they did not receive such notices.

Appellants had in their possession all of the pre-foreclosure notices issued in this case and filed those documents for consideration at the Show Cause hearing. (See CP 54-56, 112-132.) They failed to demonstrate that discovery was necessary to obtain documents not otherwise available to provide evidence sufficient to establish a disputed material issue of fact. The decision to grant or deny a continuance is within the discretion of the trial court and reversible only for abuse of that discretion. *Turner v. Kohler, supra*, 54 Wn. App. at 693. The trial court did not abuse its discretion here.

C. The Commissioner Properly Exercised Its Discretion When He Set The Bond Amount Required To Stay Execution On The Writ.

Appellants next assert that Commissioner Clint Johnson abused

his discretion when he set the bond amount to stay execution on the Writ at \$295,000. (CP 718-19.)

Appellants correctly note that the setting of a bond is within the discretion of the trial court and reviewed only for abuse of that discretion. See *Jensen v. Torr*, 44 Wn. App. 207, 211-12, 721 P.2d 992, 994-95 (1986). This was not an unlawful detainer action founded upon a failure to pay rent. It was an unlawful detainer action that followed a nonjudicial foreclosure and Clinton's failure to pay in excess of \$400,000 in principal, interest, late fees and real property taxes owed under the promissory note and deed of trust foreclosed. (CP 176-77.) The Commissioner was well within his discretion when he set the bond at \$295,000, which was a fraction of the amount owed.

Moreover, RCW 59.12.200 does not provide that, in an unlawful detainer action following a nonjudicial foreclosure, a bond must be limited to the amount of rent owed and expected to accrue during the appeal. In fact, since appellants failed to invoke the pre-sale remedies provided by the Deed of Trust Act and failed to post the requisite bond to restrain the foreclosure, it could be argued that appellants waived their right to post any bond to stay the unlawful detainer judgment. Regardless, the Commissioner acted within his discretion when he allowed a bond and set the amount at \$295,000.

Finally, even if the Commissioner did abuse his discretion, which he did not, such error is not grounds to reverse the trial court's holdings that appellants are guilty of unlawful detainer and that the Honses are entitled to immediate possession of the foreclosed property. If appellants other ground for appeal are denied, any error with regard to the bond amount would be harmless and without prejudice to appellants. See *Hall v. Feigenbaum*, 178 Wn. App. 811, 319 P.3d 61 (2014)

D. The Trial Court Correctly Concluded That Sorrels And Clinton Were Not Entitled To Rights Conferred By The Landlord-Tenant Act, Chapter 59.18 RCW, And Properly Concluded That Horse Had No Obligation To Store The Substantial Junk, Including 173 Junk Vehicles, That Sorrels And Clinton Left On The Property.

Though the Honses were entitled to possession of their property 20 days following the trustee's sale, appellants were not evicted until 127 days after the sale. Appellants knew the eviction was coming, yet despite the significant additional time, chose not to clear the property of their personal property. Thus, even when the Honses finally obtained possession following the Sheriff's execution on the Writ, the remaining personal property continued to interfere with their right of possession and use of the property.

The trial court determined that, under RCW 59.12, the Honses had no obligation to store or return personal property left behind

following execution of the writ. Thus, the trial court held that the Honses were authorized to dispose of the substantial abandoned property after the Writ was executed. The trial court's decision was consistent with the law, necessary to restore the Honses with rightful possession and within its conferred jurisdiction.

Although the court [in an unlawful detainer action] does not sit as a court of general jurisdiction to decide issues not related to possession of the subject property, it may resolve any issues necessarily related to the parties' dispute over such possession.

Excelsior Mortgage Equity Fund II, LLC v. Schroeder, 171 Wn. App. 333, 344, 287 P.3d 21 (2012), quoting *Port of Longview v. International Raw Materials, Ltd.*, 96 Wn. App. 431, 438, 979 P.2d 917 (1999). This jurisdiction includes entering orders that provide a framework to enforce a Judgment granting the unlawful detainer plaintiff possession and restitution of real property. *Excelsior*, 171 Wn. App. at 344-45.

Appellants claim that they had an absolute right, pursuant to RCW 59.12.312 to require the Honses to store, in Sorrels' words, the "tremendous" volume of personal property appellants left behind. (RP [11/22/13] at 18.) Characterization of appellants' substantial leavings (which included 188 vehicles, 500 tires and various types of other junk) as personal property in this case is generous. Regardless, a

requirement to store the tremendous volume of property would have imposed an equally tremendous hardship upon the Honses.

Nonetheless, on October 23, 2013, defendant Sorrels served a Request for Storage of Personal Property pursuant to RCW 59.18.312(3), which is a provision of the Residential Landlord-Tenant Act. (CP 316, 319.) But, RCW 59.18.312(3) imposes no obligations upon the Honses to store the property, because their unlawful detainer action was not made pursuant to the Landlord Tenant Act, chapter 59.18 RCW, but pursuant to chapter 59.12 RCW, which imposes no obligation to store or return property left behind following eviction.¹⁸ See also, *Excelsior Mortgage Equity Fund*, supra, 171 Wn. App at 338.

In *Excelsior*, an unlawful detainer plaintiff voluntarily elected to utilize portions of the RCW 59.18.312, specifically notice and sale provisions, to address substantial personal property left behind in a post-foreclosure unlawful detainer action brought pursuant to chapter 59.12 RCW. The court noted that the plaintiff was not obligated to afford the defendant any RCW 59.12.312 remedies because chapter 59.19 RCW was not applicable. 171 Wn. App at 338. The *Excelsior* court nonetheless held that the trial court's approval of plaintiff's voluntary plan to invoke the notice and sale portions of the statute was

¹⁸ Again, the Deed of Trust Act, specifically RCW 61.24.060, expressly authorizes unlawful detainer actions post-foreclosure pursuant to chapter 59.12 RCW.

both reasonable and within the court's jurisdiction to implement the judgment and restore the premises to plaintiff following a finding of unlawful detainer. *Id.* at 338-39, 342-45.

Finally, appellants' reliance upon RCW 59.18.312(5) as imposing any obligations upon the Honses is misplaced. This provision does nothing more than require the Sheriff to provide certain notice when it serves any Writ issued under either chapter 59.12 or chapter 59.18 RCW. The obligations imposed in this subsection are limited to the Sheriff and may further certain policy interests, to include protection of the Sheriff when it carries out its duties with regard to executing Writs. But this subsection does not afford any rights to chapter 59.12 unlawful detainer defendants nor does it impose any obligations upon chapter 59.12 RCW unlawful detainer plaintiffs. As noted by the *Excelsior* court, chapter 59.18 RCW is "not applicable by its terms" in chapter 59.12 RCW unlawful detainer actions. 171 Wn. App. at 338.

E. The Order Extending The Writ Of Restitution Was Properly Entered.

Finally, appellants argue that the Writ of Restitution was improperly extended. Appellants' argument is disingenuous and without merit.

Appellants neglect to advise the Court that they were provided a copy of the *ex parte* Order Extending Writ of Restitution. Honse did not “sneak”¹⁹ anything. To the contrary, execution on the Writ was delayed and the extension was obtained to accommodate appellants’ request for additional time and appellants were well aware of the extension. Appellants were advised orally that the Writ would be extended before the motion was submitted to the electronic *ex parte* system (CP 1004); and were promptly provided with a copy of the order extending the Writ the day after it was obtained (CP 1004-05, 1077-79).

At 10:34 a.m. on October 31, 2013, counsel for Honse sent an email attaching a copy of the October 30, 2013 Order Extending Writ of Restitution²⁰ with the following message:

In light of your request for additional time to vacate the premises, we obtained an extension of the return date on the Writ of Restitution to provide the opportunity for the parties to discuss acceptable terms. However, my clients still have the ability to proceed immediately, so it remains critical that you continue to cooperate if additional time is to be allowed.

As we discussed on the phone earlier this week, in order to evaluate options or extension proposals, my clients need to have access to the property so that they may take inventor of the property both in the home and on the premises. You indicated that

¹⁹ Appellants’ brief at p. 30.)

²⁰ Appellants received the Order Extending Writ of Restitution on the same day it was provided to the Sheriff. (CP 720.)

you do not object to such access as long as you are present. We would like to come inspect the property tomorrow afternoon, November 1. Please call me as soon as possible so we may discuss inspection tomorrow.

(CP 1077-79.) That same morning, counsel for Honse telephoned Sorrels, and in that conversation, again advised of the extension order. Sorrels voiced no concern about or objection to the *ex parte* entry in the Order in the phone conversation. (CP 1004-05.) Nor did he voice objection when he confirmed receipt of the email later that evening. (CP 1084-85.)

The Unlawful Detainer statute does not preclude issuance of a writ of restitution *ex parte*. Rather, it only requires that the defendants be provided with notice of the action and given an opportunity to respond before the writ is executed. RCW 59.12.090, 59.12.100; *Port of Longview v. International Raw Materials, Ltd., supra*, 96 Wn. App. at 446; *Hughes v. Crowley*, 165 Wash. 580, 584, 5 P.2d 982 (1931).²¹ Here, appellants received significant advance notice and were provided an opportunity to respond before the original Writ of Restitution was entered. Furthermore, as a copy of the extension order was provided on October 31, 2013 (a day after it was entered);

²¹ Appellants rely on the Civil Rules to argue that the extension order could not be requested without notice. But the Civil Rules do not apply to the extent they differ from rights and obligations set forth in the Unlawful Detainer Statute. RCW 59.12.180; CR 81(a); *Christensen v. Ellsworth*, 162 Wn.2d 365, 374-75, 173 P.3d 228 (2007).

appellants were thus aware of the extension 22 days before the November 22, 2013 Revision Motion and Summary Judgment hearings, and 26 days before the Sherriff executed on the Writ. The Honses' action of obtaining the extension *ex parte* was consistent with the Unlawful Detainer Statute.

Moreover, *ex parte* entry of the order did not prejudice appellants. Though appellants received the Order Extending Writ of Execution on October 31, 2013, they voiced no objection to the extension in any of their subsequent pleadings in support of their motion for reconsideration/revisions and in opposition to the summary judgment motion. (CP 1005, 410-37, 440-41, 484-, 694-96.) They likewise did not object or even mention the extension at the November 22 hearing on those motions. (CP 1005, Report of Proceedings ("RP") 11/22/13.) Though appellants were fully aware of the original 10 day return, they did not argue to the Court that the Writ was irreparably expired or defunct because it was not timely executed or extended. (*Id.*) Of course, at that time, the extension was benefiting appellants as it presented an avenue to potentially negotiate still more time to remain on the premises.

It was only months after appellants had been removed from the premises, and when the extension ceased to present opportunities for

appellants, that they voiced any objection to the extension or the “failure” to execute on the Writ and evict appellants within the original 10 day return. (See April 30, 2014 pleadings at CP 876, 883-84.) Appellants were not prejudiced.

They were not deprived of the opportunity to assert that “there was no writ to extend” or that it “expired on its own terms.” (Appellants’ Brief at 29.) Appellants’ claim that the Writ expired could have been presented at the November 22 revision and summary judgment hearing. Instead, they chose to stay silent while benefited by the extension and allowed appellants to stay on the premises an additional 30 days. Under the circumstances presented here, appellants’ disingenuous, belated complaint asserted on appeal is not well taken.

Appellants next argue that the trial court was without authority to extend the Writ. The trial court’s extension, however, was proper.

As appellants note in their opening brief, the Writ of Restitution is no more than a means of execution on the Judgment by the court. This is correct. In this case, the Commissioner found at the show cause hearing that, pursuant to their Trustee’ deed, the Honses had a right of possession to the property and appellants were guilty of unlawful detainer and entered judgment accordingly. (CP 149-41.) The Writ of Restitution was issued to authorize the Sheriff to enforce that

Judgment. (*Id.*) When the Order Extending Writ of Restitution was entered, there had been no change in the conditions that led to issuing the Writ – Honse continued to have the right to possess the property and appellants remained guilty of unlawful detainer.

Under these circumstances, the Court has inherent power to extend and there is no bar to the court extending the Writ. In fact, the Clerk could even have issued additional writs without further order from the court. Our Supreme Court explained in *Hughes v. Crowley*, *supra*:

An application having been made to the court, and the court having determined judicially that a writ should issue, it would seem unnecessary, when the issued writ fails for some reason other than a change of conditions to accomplish its purpose, that another application to the court, presenting the exact conditions already passed upon, should necessarily be made. ...where, as here, no possible change is suggested, it would seem to be an idle thing to as the court to pass a second time on identically the same question. ...the court having found that the conditions justified the issuance of a writ of restitution, and the prerequisites having been met and the machinery having set in motion, we see no real need for direct statutory authority to continue the operation until the result is fully accomplished. The statute having authorized the issuance of a writ of restitution and the court having found that conditions existed justifying its issuance and having directed its issuance, the clerk, as an officer of the court, had, we think, the inherent power, if the original writ failed, to issue as many aliases as might be necessary to fully

accomplish the authorized purpose, just as he may issue alias executions.

165 Wash. at 584.

Significantly, after the Order Extending the Writ of Restitution was entered, but before it was executed by the Sheriff, the Honses' right of possession was confirmed on summary judgment. (CP 495-97, 720-25.) This summary judgment order served to confirm that the conditions had not changed when the Order Extending Writ was entered. The extension was proper.

IV. CONCLUSION

For the foregoing reasons, respondents Christopher and Sally Honse request the Court to affirm the decisions of the trial court.

Dated this 2nd day of February, 2015.

Respectfully submitted,

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OF STATE OF WASHINGTON

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DEPUTY

CHRISTOPHER HONSE and SALLY
HONSE,

Respondents,

vs.

PATRICE CLINTON and RICHARD
SORRELS,

Appellants.

NO. 45616-8

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 2nd day of February, 2015, I did
serve via U.S. Postal Service, true and correct copies of Brief of
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