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BY  DEPUTY Appeal No. 46747-0-II
Superior Court No. 14-2-07793-4

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

**RICHARD SORRELS, PATRICE CLINTON,
RYANSCREST TRUST**

Appellants,

v.

RICHARD JOHNSON AND SALLY JOHNSON,

Respondent.

APPELLANTS' BRIEF

Martin Burns
Burns Law, PLLC
524 Tacoma Ave. S.
Tacoma, WA 98402
(253) 507-5586
Attorney for *Appellants*

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COMES NOW the Appellants, Richard Sorrels, Patrice Clinton, and Ryanscrest Trust, by and through their attorney Martin Burns of Burns Law, PLLC, and submits their Appellate Brief to the Court of Appeals as follows:

I. ASSIGNMENT OF ERRORS

Error No. 1: Did the trial court err in not dismissing the case due to the use of an improper summons?

Error No. 2: Did the trial court err in allowing the Plaintiffs to proceed under RCW 59.12.032 and RCW 61.24.040 when the Plaintiffs were not a buyer at a trustee sale?

Error No. 3: Did the trial court err in allowing the Plaintiffs to proceed when they had not provided notice under RCW 61.24.060(2)?

Error No. 4: Did the trial court err in allowing an unlawful detainer action to proceed based upon a twenty-day notice against a non-tenant?

Error No. 5: Did the trial court err in allowing the unlawful detainer action to proceed when the underlying trustee sale was conducted based upon an assignment by an entity whose predecessor that had stipulated in a prior superior court action to not having any interest in the property?

Error No. 6: Did the trial court err in allowing the unlawful detainer action to proceed when the underlying trustee sale was finalized while the servicer of such debt was providing conflicting notices?

Error No. 7: Should this court reserve any issue related to potential claim by Appellants for loss of real and personal property?

A. Issues related to the Assignment of Errors

1. Issues pertaining to Error No. 1: As a proper summons has been held to be jurisdictional or necessity to seek relief under RCW 59.12, should the case have been dismissed when the Plaintiffs used a summons under RCW 59.18.365 which contained incorrect information as to when a response was required under RCW 59.12.080?

2. Issues pertaining to Error No. 2: As the plain language of RCW 61.24.040 allows only “purchasers at a trustee sale” to proceed under RCW 59.12, was it error to allow Plaintiffs who were not a purchaser at a trustee sale to so proceed?

3. Issues pertaining to Error No. 3: As RCW 59.12.032 allows unlawful detainer actions after a foreclosure sale has occurred only if RCW 61.24.060 has been complied with, was it error to allow a plaintiff to proceed when such 60 day notice was not provided?

4. Issues pertaining to Error No. 4: As twenty-day notices under RCW 59.12.030(2) apply to landlord-tenant situations, was it error for the court to allow a non-landlord to proceed against a non-tenant based upon a twenty-day notice?

5. Issues pertaining to Error No. 5: As RCW 59.12.032 only allows an unlawful detainer action to be brought after a properly conducted nonjudicial foreclosure, was it error to allow the Plaintiffs to

proceed even though the predecessor to the foreclosing entity had stipulated in a prior court action that it had no interest in the property?

6. Issues pertaining to Error No. 6: As RCW 59.12.032 allows an unlawful detainer action to occur after a properly conducted nonjudicial foreclosure sale, was it error to allow the eviction to proceed given that the servicer in the underlying foreclosure had given conflicting information as to curing during the sale process?

7. Issues pertaining to Error No. 7: Given that RCW 59.18.312 requires an evicting party to store the evicted parties' property when a proper request is provided, and give that the court never decided such issue, should this court find that such matter is reserved to a subsequent action?

II. STATEMENT OF THE CASE

a. Procedural Facts

This case was commenced by the Plaintiffs Richard and Sally Johnson against the defendants which for ease of the appeal will be collectively referred to as "Sorrels" except as specifically named. The case was commenced by the Johnsons pro se based upon a complaint for unlawful detainer. CP 4-13. In the complaint, the Johnsons claimed to terminate the tenancy under a twenty-day notice. CP 6. The complaint was served with a summons that was clearly modeled after the statutory language in RCW 59.18.365. CP 1-3 and 18-20. The summons advised Sorrels that he had until 5 P.M. on April 28, 2014 to respond. CP 1. Prior to Sorrels responding, on April 18, 2014 the Johnsons obtained an order to

show cause with a hearing set for May 7, 2014. CP 16-17. The Johnsons then on April 22, 2014 executed an “Amended Summons for Eviction Unlawful Detainer Action” which set a “deadline for your written response is 5:00 p.m., on May 3rd, 2014. CP 18-20. A Declaration of Service filed on May 1, 2014 recited service on April 25, 2014. CP 21-22.

Sorrels did respond and promptly raised the problem with the summons. CP 26-27. The initial hearing was not held. Much of what had been filed in the case related to prior actions in which Richard Sorrels had involvement but were not related to the present property or plaintiffs. CP 61 -165. Sorrels objected and argued that the Plaintiffs were trying to prevail based upon prejudicing the court instead of complying with the statutes. CP 175. Despite appearance of counsel for Sorrels, the Johnsons obtained an ex parte order to show cause without notice to the undersigned. CP 126-128. The Johnsons then retained counsel who filed additional material. CP 153-161. At the show cause hearing, Commissioner Pro Tem Gregorvich ruled in the Johnsons favor (CP 162-163) wherein he made derogatory comments about Sorrels calling the property a “pigsty”. CP 265. The court then used such observation to set no bond over the objection of counsel. CP 294-296.

The commissioner pro tem only allowed for 10 days for a motion to revise despite the inability to have the matter heard in such a time frame.¹

¹ The Commissioner pro tem hearing was on February 27, 2014, and as revision motions are heard on Friday in Pierce County, even if the matter was noted for revision that very

CP 294-296. The undersigned clarified his position that the request was for a stay for 10 days so as to file a motion for revision, and then if filed, until the revision was heard. CP 210. The Commissioner pro tem refused. CP 211. This necessitated a further attempt before the presiding court to stay the writ until the revision motion was heard. CP 218-220.

Sorrels then brought a motion to stay the eviction before the presiding judge, Judge Ronald Culpepper. CP 218. The presiding judge denied the stay and failed to set an amount for bond. CP 236-237.

Sorrels also moved to revise the Commissioner Pro Tem's order. CP 165-176. The motion to revise raised numerous issues:

- Plaintiffs did not purchase at the trustee sale. Plaintiffs purchased from the purchaser at the trustee sale.
- Plaintiffs did not provide a notice required under RCW 61.24.060(2);
- Plaintiffs issued a summons that is set forth in RCW 59.18.365 but proceeded under RCW 59.12.032.
- Plaintiffs provided a 20-day notice when there was no tenancy relationship
- In 2009 in Pierce County Superior Court File #09-2-08167-6 Ameriquest Mortgage Company, Inc., and Ameriquest Mortgage Securities, Inc. stipulated in a lawsuit over this property by Patrice

day (after an afternoon docket which finished at 338 (CP 298) the earliest it could be heard in normal order would have been two Fridays hence – 14 days.

Clinton and Ryancrest Trust that "...whereas Ameriquest has no interest in the property at issue in this case, all claims in the case against Ameriquest shall be dismissed with prejudice and Ameriquest shall be dismissed with prejudice from the case...." However, after disclaiming any interest, it was Ameriquest² that acted in this case to appoint a trustee to foreclose a deed of trust on its behalf.

- The Notice of Trustee Sale originally set a March 22, 2013 trustee sale date. However, the loan servicer, Ocwen which took over the servicing rights gave Patrice Clinton until May 10, 2013 to "submit payment by Money Gram, Bank check or Certified Funds..." The Trustees deed recites the sale took place and the deed was recorded on May 5, 2013 – before Ocwen's deadline.
- The title history reflected in the deed to the property show that this property is the product of an illegal short plat.

CP 166. This was heard by Judge Kathryn Nelson who revised the Commissioner Prop Tem's order based upon the use of an improper summons. CP 347-348. Judge Nelson's order provided in pertinent part that "the defendant's [Sorrels'] motion for Revision is granted in relation to summons only. Plaintiffs may remedy and use summons required by

² The reference previously before the trial court was a bit in error as to Ameriquest who, after stipulating to no interest, assigned to Duetsche Bank which then appointed a trustee which then did the trustee sale as trustee for Ameriquest Mortgage Securities, Inc. Asset-backed Securities.

RCW 59.12.” CP 348. In so deciding the court stated: “Thank you. I do find that the summons was defective and it is jurisdictional. The return date was not set in accordance with the particulars of the appropriate summons. So on that basis only, I do find that the commissioner’s order needs to be revised.” 6/27/14 RP 29. The undersigned pointed out to the court that the appropriate thing to do in such situation was to dismiss saying “I think there is some case law that says that the appropriate remedy is to dismiss but we’ll end up at the same spot. There will be another summons and complaint going out, but the writ should be quashed because there is one floating out there.” 6/27/14 RP 29-30. Judge Nelson also refused to quash the writ but merely stayed it pending a subsequent hearing, which she set on July 3, 2014. CP 347-350. At such hearing, the Johnson’s attorney instead of arguing for reconsideration based on the court’ June 27, 2014 order started making offers to resolve the issue saying “We will agree to store Mr. Sorrels’ personal property...we will forego the execution of that writ for an additional ten days from today, allow Mr. Sorrels to come in and get his stuff.” 7/3/14 RP 3-4. Opposing counsel went on to say “If he doesn’t come forward by the 13th, the the writ will be executed on the 14th...and his materials will be stored for the 30 days required by the statute....” 7/3/14 RP 3-4. To which the undersigned objected that the matter was supposed to be a motion and not a settlement conference and that opposing counsel should have simply called before springing such matters out in open court. Still, the case was recessed to allow some discussion. 7/3/14 RP 4-5. And the parties came

up with a stipulated order which was entered that provided for storage and writ extensions. CP 367-370. The Stipulated Order also required the Johnsons to “identify all of the removed property and its location and authorize Defendant to retrieve such property....” CP 368. But the Johnsons did not provide a list or authorize removal so Sorrels brought a motion to set aside the stipulated order, quash the writs and dismiss the case (CP 408-413) based, in part, upon the fact such noncompliance given that despite the stipulated order previously removed cars went unaccounted for and some cars were reportedly crushed. CP 419-420. (Mind you, this was occurring without any execution on the writ which was extended into August. CP 652). In response, and contrary to the much more general discussion in the prior court hearing about storing the personal property and letting Mr. Sorrels “get his stuff” and storing his stuff, the Plaintiffs first claimed it was an innocent mistake (CP 437) but then took a very technical “who is exactly on title approach” in apparently deciding to violate the spirit of the in-court discussions and order and attached voluminous filings from unrelated other cases to smear Mr. Sorrels. CP 425-607. The trial court denied the motion to set aside the prior stipulated order. CP 615-616. This appeal timely followed. It should be noted that the Johnsons filed a motion to clarify their rights as to whether or not they had to store the Appellants’ personal property. CP 306-311. Such motion was never ruled upon.

b. Facts

The subject property is known as 9316 Glencove Road, Gig Harbor, Washington. (“Property”). CP 4. The property had been purchased by Patrice Clinton in 2005. CP 221. It was transferred into the Defendant trust with Patrice Clinton as the trustee. CP 221.

The deed of trust on the property was claimed, at the time of the purported trustee sale, to be held by Deutsche Bank National Trust Company, as trustee for Ameriquest Mortgage Securities, Inc., Asset-backed Pass-through Certificate, Series 2005-R11. CP 43. However, in a 2009 Pierce County Superior Court action, 09-2-08167-6, Ameriquest Mortgage Securities, Inc., stipulated that “Defendants Ameriquest Mortgage Securities, inc. and Ameriquest Mortgage Company (“Ameriquest”), by and through their undersigned counsel of record, hereby stipulate and agree that, whereas Ameriquest has no interest the property at issue in this case, all claims in the case against Ameriquest shall be dismissed with prejudice and Ameriquest shall be dismissed with prejudice from the case....” CP 40-4.

Regardless, the trustee sale proceeded under a notice of trustee sale which set a trustee sale on March 22, 2013. CP 43-45.³ While the sale was progressing, the servicer, Ocwen, sent Patrice Clinton a notice of the opportunity to pay by May 10, 2013 and invited efforts to cure or work out

³ The actual courthouse steps sale occurred on April 26, 2013. The record does not show the exact nature of the delay but it is logical that the sale was continued orally as allowed under RCW 61.24.040(6)

a modification. CP 47-51. Despite that, the trustee completed the sale on April 26, 2013 and recorded a trustee's deed conveying the property to the lender, Deutsche Bank as Trustee for Ameriquest Mortgage Security, Inc. Asset-Backed Pass Through Certificates Series 2005-R11. CP 32-34. Notable, the plaintiffs – the Johnsons – were not the purchaser at the trustee sale. CP 32-34.

Deutsche Bank then sold the property to the Johnsons on December 26, 2013. CP 121. The Johnsons claims to have issued a twenty day notice to Sorrels on about February 28, 2014 which provided threats of criminal prosecution saying that “If you do not remove yourself and your property by the end of the 20 day notice, you and all of you will be served with an unlawful detainer action in the manner provided in RCW 59.12.040, and action will be taken to remove you as provided by law. Such persons may also be subject to criminal provisions of chapter 9A.52 RCW⁴ ⁵: CP 110. Appellants did not vacate. Johnson then, pro se, commenced an unlawful detainer lawsuit and issued a summons that provided in pertinent part that “THE DEADLINE FOR YOUR WRITTEN RESPONSE IS 5:00 P.M., on APRIL 28TH 2014” CP 1. An amended summons had similar language but extended the response date to May 3, 2014. CP 18. The complaint recited that the eviction was based upon such 20 day notice while at the same time explicitly stating that the

⁴ RCW 9A.52 is the burglary and trespass statutes.

⁵ There was no name, address, or phone number provided in the 20-day notice or any other contact information provided in the 20 day notice

“Plaintiffs have no Landlord Tenant relationship with the defendants.” CP 6, 10. Noteworthy is the fact that nowhere in the summons, the amended summons and the complaint is any reference to RCW 59.12.032 or RCW 61.24.060.

As referenced in the procedural section above, the trial court did grant a writ of restitution even after finding the summons defective. Additionally, the unrebutted testimony was that Appellants had never received a 60 day notice under RCW 61.24.060. CP 223. The unrebutted testimony is that Richard Sorrels was an occupant/tenant of the Property. CP 225.

Richard Sorrels testified that the personal property upon the property was valuable. CP 226. Sorrels filled out and timely served the request to store the personal property. CP 315. Despite the Plaintiffs’ motion to clarify its responsibility and request that it need not store the personal property, the court never reached such issue. Still, while the writ was stayed, the Johnsons had vehicles towed off the property and crushed. CP 419-420. The Plaintiffs claimed that it was an innocent error. CP 420. It still begs the question as to why the Johnsons were doing anything on the property prior to execution of the writ by the sheriff. The Declaration of Sally Johnson dated August 13, 2014, details some of her and her husband’s efforts well prior to a writ being issued. CP 433-438. The trial court refused to set aside the order based on Plaintiffs’ position that, despite the fact the cars had been in Sorrels possession for years, because they were not technically licensed to Sorrels, there was not a technical

violation of the agreement. 8/15/14 RP 12. The trial court did not address the fact that the Plaintiffs were exercising dominion over the property when no writ had been executed.

Throughout the proceedings, the Johnsons continued to place irrelevant prior proceedings in which Sorrels was involved and which, except for their prejudicial effect, had nothing to do with the case at hand. i.e., CP 73-79, 490-599, 674-767. The undersigned attorney repeatedly implored the courts to decide the case based upon the law and facts of this case and not what had happened in other cases. CP 413.

III. ARGUMENT

a. The trial court erred in not dismissing the case due to the use of an improper summons.

The Johnson's pleadings provides in pertinent part: "Plaintiffs have no Landlord Tenant relationship with the defendants." CP 10. That is true. It also precludes the ability to proceed under either RCW 59.12 or 59.18. This is not a matter of discretion. Washington law is clear that "the alleged existence of defects that will deprive the court of subject matter jurisdiction may be raised at any time. RAP 2.5(a)(1); *Hunter v. Department of Labor & Indus.*, 19 Wash.App. 473, 576 P.2d 69 (1978)." *Matter of Saltis*, 94 Wash.2d 889, 893, 621 P.2d 716, 718 (1980). "Unless clear contrary legislative intent exists, the word 'shall' in a statute is a mandatory directive. *Kabbae v. Dep't of Social & Health Servs.*, 144 Wash. App. 432, 441, 192 P.3d 903 (2008)." *Morris v. Palouse River & Coulee City R.R., Inc.*, 149 Wash. App. 366, 371, 203 P.3d 1069, 1072

(2009). The unlawful detainer statute is in derogation of common law, and must therefore be strictly construed in favor of the tenant. (footnote omitted) *Hous. Auth. of City of Everett v. Terry*, 114 Wn.2d 558, 563, 789 P.2d 745, 748 (1990).

The most basic issue in an unlawful detainer case is if the statute even applies. There are seven sections to the definition of unlawful detainer summarized: 1. Holdover at end of lease; 2. Holdover on month to month after service of 20 day notice; 3. Failure to pay rent after a 3 day pay or vacate notice served; 4. Violation of non-monetary lease term after service of 10-day notice; 5. Commits or permits waste after a 3 day notice to quit; 6. Entry without color of title and refusal to leave after service of 3 day notice; and 7. Gang related activity. RCW 59.12.030. All of these sections are predicated upon an existing or expired lease. None of these apply but the court has to look at the first line of such statute: “**A tenant** of real property for a term less than life is guilty of unlawful detainer either....” The Johnsons had alleged that there is no tenancy relationship “Plaintiffs have no Landlord Tenant relationship with the defendants.” CP 10. Yet, The Johnsons proceeded under a statute aimed at tenants. Now it is expected that the Johnsons may try to bootstrap in under RCW 61.24.060 that provides “The purchaser shall also have a right to the summary proceedings to obtain possession of real property provided in chapter 59.12 RCW.” There are two problems with this. First, the Johnsons were not the purchaser at the deed of trust sale. (See trustee deed and then the deed to the Johnsons). CP 32-36. Second, there is a massive

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problem with the trustee sale discussed *Infra*. A purchaser at such a sale can use RCW 59.12 if the trustee sale complied with RCW 61.24.040 and 61.24.060. The defects as to the trustee sale will be further discussed below. If a situation does not fall under the reasons set forth in RCW 59.12.030 – then it is not allowed to proceed as an unlawful detainer. *Turner v. White*, 20 Wn. App. 290, 579 P.2d 410 (1978) (tenancy at will not under RCW 59.12).

Given that this dispute is beyond the limited authority of RCW 59.12, this court has no jurisdiction to decide the matter:

An unlawful detainer action under RCW 59.12.030 is a summary proceeding designed to facilitate the recovery of possession of leased property; the primary issue for the trial court to resolve is the “right to possession” as between a landlord and a tenant. *Port of Longview v. Int'l Raw Materials, Ltd.*, 96 Wash.App. 431, 436, 979 P.2d 917 (1999); *see also Munden v. Hazelrigg*, 105 Wash.2d 39, 45, 711 P.2d 295 (1985). It is well settled in Washington that,

[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.

Granat v. Keasler, 99 Wash.2d 564, 571, 663 P.2d 830, *cert. denied*, 464 U.S. 1018, 104 S.Ct. 549, 78 L.Ed.2d 723 (1983). **Thus, an unlawful detainer action is a “narrow one, limited to the question of possession and related issues such as restitution of the premises and rent.”** *Munden*, 105 Wash.2d at 45, 711 P.2d 295.

(bold added) *Angelo Prop. Co., LP v. Hafiz*, 167 Wn. App. 789, 808-09, 274 P.3d 1075, 1085 (2012) *review denied*, 175 Wn.2d 1012, 287 P.3d

594 (2012). Such case goes on to state: “If, however, an issue is **not incident to the right to possession, the trial court must hear the issue in a general civil action.** *Kessler v. Nielsen*, 3 Wash.App. 120, 123–24, 472 P.2d 616 (1970).” (bold added) *Angelo Prop. Co., LP v. Hafiz*, at 809.

The Johnsons have alleged there is no landlord-tenant relationship yet proceeds under a statute designed for just that. It is inappropriate and must be rejected.

Given that there is no “landlord tenant relationship” the fact that the case is pled under the “Residential Landlord–Tenant Act” should be a clue that something is amiss. Under the definitions of RCW 59.18.030(9)⁶ and (21)⁷ the litigants here are nowhere near the definitions of landlord and tenant, respectively.

Given that it is evident that RCW 59.18 generally does not apply to post-trustee sale foreclosure, the court should take note that the summons that is being used is the RCW 59.18.365 summons. It is not a more general summons spelled out in RCW 59.12.080. Further by placing the return date on May 3, 2014 instead of allowing the defendant up to the date of the court appearance, it violates RCW 59.12.121⁸. The Johnsons

⁶ “Landlord” means the owner, lessor, or sublessor of the dwelling unit or the property of which it is a part, and in addition means any person designated as representative of the owner, lessor, or sublessor including, but not limited to, an agent, a resident manager, or a designated property manager.

⁷ A “tenant” is any person who is entitled to occupy a dwelling unit primarily for living or dwelling purposes under a rental agreement.

⁸ “On or before the day fixed for his or her appearance the defendant may appear and answer or demur.” RCW 59.12.121.

proceeded using a defective, inapplicable summons. This is also a jurisdictional problem. “To obtain unlawful detainer jurisdiction, the landlord must prove the tenant was properly served with a statutory unlawful detainer summons; compliance with the statutory method of process is mandatory. *Christensen v. Ellsworth*, 162 Wash.2d 365, 372, 173 P.3d 228 (2007); *Truly*, 138 Wash.App. at 918, 158 P.3d 1276; *Canterwood Place LP v. Thande*, 106 Wash.App. 844, 847, 25 P.3d 495 (2001); see *Terry*, 114 Wash.2d at 564, 789 P.2d 745.” *Triune Family Charitable Remainder Unitrust v. Pfeifer*, 157 Wash. App. 1045 (2010). The fact the Johnsons were using the wrong summons would invalidate an otherwise valid eviction under RCW 59.12.032 after a foreclosure sale. Understand, RCW 61.24.060 allows a purchaser at a trustee sale to proceed under RCW 59.12 – it does not allow one to proceed under RCW 59.18.

The ironic part of this is the trial court – Judge Nelson – found that the summons was improper and revised the commissioner pro tem. However, she refused to dismiss the case but rather gave the Johnsons an opportunity to cure. CP 347-348. The court in doing so extended the writ. CP 349-350. This was error. The remedy is to dismiss the case without prejudice:

The appropriate procedure upon proof of a critical deficiency in the summons or complaint would have been for the court to dismiss the unlawful detainer action.

First Union Mgmt., Inc. v. Slack, 36 Wash. App. 849, 853, 679 P.2d 936, 939 (1984). Other cases have reached a similar result:

This argument rests primarily upon *Hous. Auth. v. Kirby*, 154 Wash.App. 842, 226 P.3d 222, *review denied*, 169 Wash.2d 1022, 238 P.3d 503 (2010), and cases cited therein.

In Kirby, the procedural irregularity was the housing authority's improperly-worded summons. It failed to notify Kirby that he could respond by mail or by facsimile, wording required by RCW 59.18.365. Kirby moved to dismiss for "lack of subject matter jurisdiction." The housing authority agreed to a dismissal, but Kirby continued to incur fees. Based on the mistake in the summons, the court dismissed the action without prejudice to refile under a new cause number. When Kirby requested an award of attorney fees, the court denied it on the basis that once the action was dismissed for lack of subject matter jurisdiction, nothing else could be done. Kirby appealed, raising two issues: (1) the dismissal should have been with prejudice, and (2) the court erred in refusing his request for attorney fees. *Kirby*, 154 Wash.App. at 846–49, 226 P.3d 222.

This court affirmed the decision to dismiss without prejudice, reasoning that the defect in the summons prevented the superior court "from acquiring subject matter jurisdiction" and therefore **the court was powerless to do anything but dismiss the action.**

(bold added) *Hous. Auth. of City of Seattle v. Bin*, 260 P.3d 900, 902-03 (2011). The other ironic twist is that, despite the trial court's error in allowing the Johnsons to use a proper summons – the record is devoid that a further amended summons was ever executed or served as the court indicated should be done in its June 27, 2014 order. CP 347-348. Certainly, as can be seen in the trial court orders, there never was another show cause hearing that resulted from a newly issued summons. The

point is, the Johnsons did not even take advantage of the (erroneous) trial court order to issue a corrected summons. The entire case proceeded without a proper summons with the Appellants objecting the entire way. “The purpose of a summons is to give certain notice of the time prescribed by law to answer and to advise the defendant of the consequences of failing to do so. An unlawful detainer summons implicates both personal and subject matter jurisdiction: an ineffective summons deprives the court of personal jurisdiction because the defendant was not properly hailed into court; it also deprives the court of jurisdiction over the unlawful detainer proceeding, which is a special summary procedure.” (footnotes omitted) *Sprincin King St. Partners v. Sound Conditioning Club, Inc.*, 84 Wash. App. 56, 60-61, 925 P.2d 217, 219-20 (1996). The Johnsons’ summons gave incorrect information as to “time prescribed to answer” and also in doing so misinformed the defendants of the consequences of failing to answer as it does not tell the defendants they could still show up at the hearing and defend. It also requires a “written response” when nothing in RCW 59.12.121 so requires.

b. The trial court erred in allowing the Johnsons to proceed under RCW 59.12.032 and RCW 61.24.040 when the Johnson were not a buyer at a trustee sale.

Washington has an exceedingly clear statute that allows only a purchaser at a trustee sale to utilize RCW 59.12 for an eviction. RCW 61.24.060 discusses “purchaser at the trustee sale” numerous times (bold added):

61.24.060. Rights and remedies of trustee's sale purchaser--
Written notice to occupants or tenants:

(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 borrower and grantor under the deed of trust and anyone having an interest junior to the deed of trust, including occupants who are not tenants, who were given all of the notices to which they were entitled under this chapter. **The purchaser** shall also have a 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:

“NOTICE: The property located at was purchased at a trustee's sale by on(date).

1. If you are the previous owner or an occupant who is not a tenant of the property that was purchased, pursuant to RCW 61.24.060, the purchaser at the trustee's sale is entitled to possession of the property on(date), which is the twentieth day following the sale.

2. If you are a tenant or subtenant in possession of the property that was purchased, pursuant to RCW 61.24.146, **the purchaser at the trustee's sale** may either give you a new rental agreement OR give you a written notice to vacate the property in sixty days or more before the end of the monthly rental period.”

(3) The notice required in subsection (2) of this section must be given to the property's occupants and tenants by both first-class mail and either certified or registered mail, return receipt requested.

The Johnsons convinced the trial court to consider California law and argued policy issues. CP 783-787.⁹ This should not have been allowed. We are dealing with very rudimentary statutory construction principals and a court is not supposed to just ignore clear language to get to the result the court wants or the result that maybe, had the legislature been faced with these facts, might have wanted. A court is supposed to read what the statute says – not what the court thinks the legislature might have meant:

“The initial principle of statutory interpretation is we do not construe unambiguous statutes: ‘In judicial interpretation of statutes, the first rule is “the court should assume that the legislature means exactly what it says. Plain words do not require construction”.’ *State v. McCraw*, 127 Wash.2d 281, 288, 898 P.2d 838 (1995) (quoting *City of Snohomish v. Joslin*, 9 Wash.App. 495, 498, 513 P.2d 293 (1973)), *superseded by statute as cited in State v. Bolar*, 129 Wash.2d 361, 917 P.2d 125 (1996).” *Davis v. State ex rel. Dep't of Licensing*, 137 Wn.2d 957, 963-64, 977 P.2d 554, 556 (1999).

Davis has a footnote that provides: “‘We do not inquire what the legislature meant; we ask only what the statute means.’ Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899). ‘[I]t seems axiomatic that the *words* of a statute – and *not* the legislators’ intent as such – must be the crucial elements both in the statute’s legal force and in its proper interpretation.” Laurence H. Tribe, *Constitutional Choices* 30 (1985).” *Davis* at 964 ft. nt. 1.

⁹ As previously shown in pleadings, the California statute allowing evictions after a trustee sale is based upon completely different statutory language which focuses on the fact a trustee sale occurred without specifying if one has to be the purchaser at the trustee sale. Cal. Civ. Proc. Code §1161(a) as set forth in CP 341-342.

This is not a difficult application. The Johnsons were not purchasers at a trustee sale. The bank was.¹⁰ The Johnsons then bought from the bank. Nothing in the above statute says anything about “purchasers at a trustee sale or their successors in interest”. The Johnsons just want the right to flow to successors by judicial fiat. But the statute is not unclear and four times limits the application to the “purchaser at a trustee” sale. There is nothing to interpret. That is absolutely clear. It is entirely improper to try to then delve off into intent or what was meant. The plain words limit the class of people who can use RCW 61.24.060 and, thus, limits the class of people who can evict under RCW 59.12.032. There has been no serious argument that the Johnsons actually fit into such class – just policy arguments and citation to California law that has a different statutory scheme and language.

So now the trial court allowed a party to proceed based upon a statute that did not apply to them and allowed them to proceed using an invalid summons from yet another law - the residential landlord tenant act - that does not apply at all to this situation as the Johnsons admit there is no landlord-tenant relationship. The errors are compounding.

¹⁰ In fact, the bank that purportedly purchased at the trustee sale commenced an unlawful detainer in Pierce County and then dismissed the action voluntarily as it had sold the property to a third party. CP 97-106.

c. **The trial court erred in allowing the Plaintiffs to proceed when they had not provided notice under RCW 61.24.060(2).**

The same statute as fully set forth above, RCW 61.24.060, also requires that sixty days' notice be given to "occupants and tenants" prior to conducting a foreclosure under RCW 59.12.032. The record is devoid of any proof that a proper sixty day notice was ever provided. This defect was raised before the trial court. CP 25 and 172. Still, at no time did the trial court require proof of compliance with such provision before evicting the defendants. It is somewhat ironic how the trial courts – which have been hammered on by appellate courts for overlooking defects in 3 day notices, 10 day notices and 20 day notices¹¹ in "normal" eviction cases would cavalierly dispense with a statutory requirement. RCW 59.12.032 is yet another very clear statute: "An unlawful detainer action, commenced as a result of a trustee's sale under chapter 61.24 RCW, must comply with the requirements of RCW 61.24.040 and 61.24.060." RCW 59.12.032. The operative word is "**must**". So the Johnsons must be a purchaser at a trustee sale. The Johnsons must give an occupant 60 days' notice before evicting. They did none of that. In fact, as discussed below – they used a 20 Day notice. They are not entitled to use the unlawful detainer statute. It is just that simple. Now the Commissioner pro tem was worried that there was no remedy then.

¹¹ See, Sowers v Lewis, 49 Wash. 2d 891, 895, 307 P.2d 1064, 1066 (1957) (failure to give 10 day notice required quashing); Sullivan v. Purvis, 90 Wash App. 456, 459, 966 P.2d 912, 914¹(1998)

CP 191. That is not true and the undersigned pointed out the correct method might be an ejectment action. CP 191. As this eviction action does not fit with in the enumerated reasons for eviction under RCW 59.12, such a case has to be dismissed. *Turner v. White*, 20 Wash. App. 290, 292, 579 P.2d 410, 412 (1978). This never was a proper unlawful detainer. Regardless of the facts regarding the defendants and their use...the Johnsons brought the wrong action and time and time again, the trial court bailed them out. The undersigned complained that the trial court was simply ignoring the law because of an unsympathetic defendant. That truly seems to be the case. The fact that courts in criminal settings bend over backwards to give a murder defendant every benefit of doubt and procedure seems completely reversed in a civil context. It is disconcerting that well established rules related to jurisdiction, procedure and substantive law are disregarded when a party has apparently fallen into the bad graces of the court. The law should not change from defendant to defendant. Precedent should be applied evenly from defendant to defendant. Repeatedly the appellants simply asked the trial courts to apply the law. Repeatedly the Johnsons took a tactic of ignoring the law and submitting unrelated pleadings to smear Mr. Sorrels. The undersigned understands the Plaintiffs' tactic: It is the old, "if the facts are in your favor, pound the facts; if the law is in your favor pound the law; if neither is in your favor, abuse the defendant" approach. What is not acceptable is that it worked. The courts should be above this.

d. The trial court err in allowing an unlawful detainer action to proceed based upon a twenty-day notice against a non-tenant.

As mentioned, and as is shown in the court records, the Johnsons served a 20 day notice to terminate tenancy. CP 110. Why? Such notice is only proper under RCW 59.12.030(2). This defect was raised from the very inception of the litigation. CP 27. The trial court just ignored this issue throughout. Not only does the giving of the 20 day notice conflict with the need for the 60 day notice (and confirms tacitly that it was not given) – it again provides misleading information to the occupant. The Johnson’s complaint set forth that their right of possession related to the 20 Day “Notice to Vacate”. CP 10. While, Plaintiff might try to cite to RCW 61.24.060 as support their position that they are entitled to possession 20 days after a sale as to a foreclosed borrower, Richard Sorrels, and the Trust were not borrowers. CP 83. Further, the statutory authority set forth at the inception of the litigation in the Johnsons’ complaint was “RCW 59.12.030 and or RCW 59.18.” CP 10. The case was not brought under RCW 59.12.032 or RCW 61.24.060. The Johnsons’ complaint use these are completely wrong citations and are demonstrative that the Johnsons were simply using anything that vaguely looked correct to cobble together an eviction. It is obviously wrong and this court should not disregard a century of strict compliance requirements by a landlord to make this seriously defective claim slide through.

- e. **The trial court erred in allowing the unlawful detainer action to proceed when the underlying trustee sale was conducted by an entity whose predecessor had stipulated in a prior action to not having any interest in the property.**

This is an odd situation. As shown in the pleadings referenced below, the nonjudicial deed of trust foreclosure sale was performed on behalf of Deutsche Bank as a trustee for Ameriquest Mortgage Securities, Inc., related to asset-backed securities as set forth in the Notice of Trustee's Sale at CP 145. And the Trustee's deed confirmed this by deeding the property to "Duetsche Bank National Trust Company, as Trustee for Ameriquest Mortgage Securities, Inc, Asset-Backed Pass-Through Certificates, Series 2005-R-11" CP 148. But what was interesting is that the Ameriquest Mortgage Securities, Inc., had previously disclaimed an interest in the property in a Pierce County Superior Court case as previously set forth above and as may be found at CP 40-41. And then, after stipulating to no interest in 2009, there was a "Corrective Assignment" in September 2012 which again had as the assignee "Duetsche Bank National Trust Company, as Trustee for Ameriquest Mortgage Securities, Inc, Asset-Backed Pass-Through Certificates, Series 2005-R-11." (CP 53-54) Said belated "Corrective Assignment of Deed of Trust" is signed by a April Caroon who is identified as an "Assistant Secretary" but it is unclear who she works as the identification line above it references "Ameriquest Mortgage Company, a corporation by Citi Residential Lending Inc., as attorney in fact." CP 53-54. There is no record as to how Citi Residential Lending got involved and the notary

jurat really gives no clue either exactly who is April Caroon. CP 54. It also shows, that whatever was being corrected, that Amerquest Mortgage Securities, Inc. was claiming some interest despite its prior stipulation. So an issue had been raised as to the ability of a party whose predecessor had seemingly disclaimed an interest in prior litigation to appoint a successor trustee and then proceed to foreclose the property. The law is clear that more is needed than the existence of trustee's deed to change title in a claimed foreclosure...the foreclosure must be proper. "A **proper** foreclosure action extinguishes the debt and transfers title to the property to the beneficiary of the deed of trust or to the successful bidder at a public foreclosure sale. *In re Marriage of Kaseburg*, 126 Wash.App. 546, 558, 108 P.3d 1278 (2005)." (bold added) *Albice v. Premier Mortgage Servs. of Washington, Inc.*, 157 Wn. App. 912, 920, 239 P.3d 1148, 1152 (2010) affd., 174 Wn.2d 560, 276 P.3d 1277 (2012).

Part of the problem before the superior court is that there seemed to be a big rush to get the matter decided. However, serious issues were raised – supported with legal documents recorded at the auditor's office and filed in the superior court. But it was all brushed over: Improper subpoenas; Improper notices; Lack of notices.... Why? Because Richard Sorrels was involved seems to be the only answer. The appropriate step to have occurred (beyond dismissal discussed above) given such complex and factual issues would be to bind the matter over for trial. "Whenever an issue of fact is presented by the pleadings it must be tried by a jury, unless such a jury be waived as in other cases. The jury shall be formed in

the same manner as other trial juries in the court in which the action is pending; and in all cases actions under this chapter shall take precedence of all other civil actions.” RCW 59.12.130. Appellants raised serious issues as to the ability of a party whose predecessor in interest disclaimed an interest in superior court to then claim an interest later in a trustee sale. This is an unusual case with unusual facts...but that is what trials and discovery are for...not short hearings where Commissioners Pro Tem lightly address their potential multiple errors as “if I’m in for a penny I’m in for a pound.” 5/20/14 RP 295-296.

f. The trial court erred in allowing the unlawful detainer action to proceed when the underlying trustee sale was finalized while the servicer of such debt was providing conflicting notices.

To make matters worse, in the midst of the purported trustee sale, Defendants were given a notice dated April 10, 2013 from the then servicer that:

On or before 5/10/2013, you must submit payment by Money Gram, Bank Check, Money Order or Certified Funds for the entire total due amount state above to the appropriate address listed at the bottom of page two of this notice.

CP 47. However, the Trustee Sale date was on April 26, 2013 as set forth in the Trustee’s deed. CP 33. Patrice Clinton testified she called the servicer, Ocwen, and was told there would be no foreclosure sale as transfer of the servicing rights starts the process all over again. CP 222-223. The document and the statement by the foreclosing party’s own agent raises serious factual issues as to estoppel, waiver, misrepresentation

and other potential defenses. The Ocwen letter itself sets a date for cure beyond the sale date. The rest of the Ocwen letter discusses its desire to work with borrowers to avoid foreclosures. CP 47-51. Still, tying this back to this case, RCW 59.12.032 only allows the use of the eviction statute when there was a properly conducted trustee sale. On many levels, this sale was not. The declaration of Patrice Clinton was unrefuted. It is corroborated by Ocwen's own letter. Case law has found trustee sales that are riddled with errors to be ineffective:

The nonjudicial foreclosure proceedings here were marred by repeated statutory noncompliance. The financial institution acting as the lender also appeared to be acting as the trustee under a different name; the lender repeatedly accepted late payments and, at its sole discretion, rejected only the final late payment that would have cured the default; and the trustee conducted a sale without statutory authority. Equity cannot support waiver given these procedural defects and the purchaser's status as a sophisticated real estate investor or buyer who had constructive knowledge of the defects in the sale.

Albice v. Premier Mortgage Servs. of Washington, Inc., 174 Wash.2d 560, 575, 276 P.3d 1277, 1285 (2012). The court should also be careful with any claims that Appellants waived any rights by failing to utilize pre-trustee sale remedies of waiver. The Ocwen notices and the telephone calls from Ms. Clinton came right near the end of the process. As such it illustrates that there was conduct by the beneficiary (through their agent) that induced inaction prior to the trustee sale date. The failure to utilize presale remedies "may" result in a waiver...but that depends on the facts of the case. Not all cases have found waiver when there is questionable

conduct of the trustee or beneficiary. *See, Klem v. Washington Mut. Bank*, 176 Wash.2d 771, 783, 295 P.3d 1179, 1185 (2013). This issue alone should preclude a summary decision as it raises factual issues. Waiver is a both a factual and legal question.¹²

And we are getting ahead of ourselves here. This is not a quiet title action. This is an eviction action to which Appellants are unable to raise counterclaims or expand the scope of the litigation into a general civil litigation and bring in third party defendants and seek to quiet title. *Angelo Prop. Co., LP v. Hafiz*, 167 Wash. App. 789, 811, 274 P.3d 1075, 1086 (2012). We have an unlawful detainer action. It is the Johnson's obligation to prove they have the legal, procedural and factual basis to proceed. The Johnsons have not shown there is a properly conducted trustee sale. This is a prerequisite under RCW 59.12.032 – similar to a landlord proving he served a three day notice in a failure to pay rent

¹² (footnotes omitted) *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wash.2d 432, 440-41, 191 P.3d 879, 885-86 (2008): (This court has said both that waiver is a question of fact, *Bowman v. Webster*, 44 Wash.2d 667, 670, 269 P.2d 960 (1954), and that it is a mixed question of law and fact, *Lawson v. Helmich*, 20 Wash.2d 167, 180-81, 146 P.2d 537 (1944). The existence of waiver has both factual and legal components, as the Tenth Circuit Court of Appeals explained: “Whether facts on which a claim of waiver is based have been proved, is a question for the trier of the facts, but whether those facts, if proved, amount to a waiver is a question of law.” *Advantor Capital Corp. v. Yeary*, 136 F.3d 1259, 1267 (10th Cir.1998) (quoting *Gary v. Blatchford Calf Meal Co.*, 119 F.2d 973, 975 (7th Cir.1941)); *see also* 28 Am.Jur.2D *Estoppel and Waiver* § 227 (2000 & Supp.2008). This court has held that where, as here, the parties present a mixed question of law and fact but do not dispute the facts, the question is one of law for the court. *Baker v. Yakima Valley Canal Co.*, 77 Wash. 70, 75, 137 P. 342 (1913). This court reviews questions of law de novo. *City of Tacoma v. William Rogers Co.*, 148 Wash.2d 169, 181, 60 P.3d 79 (2002).)

situation.¹³ To the extent the Johnsons try to rely on the facial recitations in the trustee's deed – the Appellants have certainly raised factual issues that would require a trial. RCW 59.12.130 (“Whenever an issue of fact is presented by the pleadings it must be tried by a jury....”)

g. This court should reserve any issue related to potential claim by Appellants for loss of personal and real property.

This is more of a request that the court explicitly make clear in any holding that there is clear language that Appellants retain any and all rights to bring an action against the Johnsons for destruction and loss of the personal property. The reason for this request is because Sorrels had properly filled out the request to store property that was served with the writ. CP 306-311, 621. Johnsons then brought a motion to clarify that they had no duty to store the property. CP 306-311. The trial court never granted such motion. Moreover, it would have been erroneous to do so as there is an obligation to store the property if so requested:

(1) A landlord shall, upon the execution of a writ of restitution by the sheriff, enter and take possession of any property of the tenant found on the premises. The landlord may store the property in any reasonably secure place, including the premises, and sell or dispose of the property as provided under subsection (3) of this section. **The landlord must store the property if the tenant serves a**

¹³ “The giving of the statutory three-day notice is a condition precedent to an unlawful detainer action. It is a fact to be established upon the trial before the court may pronounce a judgment of unlawful detainer. In the case at bar, the three-day notice was neither pleaded nor proved; therefore, any judgment of unlawful detainer was erroneous. State ex rel. Robertson v. Superior Court, 95 Wash. 447, 164 P. 63; Davis v. Palmer, 39 Wash.2d 219, 235 P.2d 151.” *Little v. Catana*, 48 Wash.2d 890, 892, 297 P.2d 255, 256 (1956)

written request to do so on the landlord or the landlord's representative by any of the methods described in RCW 59.18.365 no later than three days after service of the writ....

(5) When serving a tenant with a writ of restitution pursuant to RCW 59.12.100 and 59.18.410, the sheriff shall provide written notice to the tenant that: (a) Upon execution of the writ, the landlord must store the tenant's property only if the tenant serves a written request on the landlord to do so no later than three days after service of the writ.

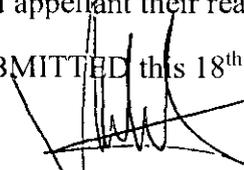
(bold added) RCW 59.18.312. This action was brought under RCW 59.12. RCW 59.12.100 is the portion of such statute authorizing the sheriff to issue writs: “The sheriff shall, upon receiving the writ of restitution, forthwith serve a copy thereof upon the defendant....” The storage is mandatory – “must store”. RCW 59.18.312 discusses further how one goes about selling such property and notices to be given...none of which are in the record. However, the issue as to the Johnson’s duty to store was placed before the trial court which did not grant the Johnsons’ motion and, as such, the question as to damages arising from the failure to comply with the statute should be explicitly reserved for a subsequent action. Had the court ruled that storage was not needed – that would have been in error. Still, as appellate courts normally do not deal with what a trial may or may not do – it seems best to simply make clear that such issue has never been decided and nothing in this case should preclude a later claim for improperly disposed personal property and loss of use of real property.

Given that the property remedy is for dismissal of the action, appellants should retain all rights as if the action had never been filed.

IV. CONCLUSION

This action should have never been commenced as an unlawful detainer action. In trying to be expedient or impose a subjective notion of fairness into a statutory proceeding, the courts below did violence to the statutes and existing case law. The case should be reversed with directions to dismiss and award appellant their reasonable fees and costs.

RESPECTFULLY SUBMITTED this 18th day of March, 2015.



MARTIN BURNS
Attorney for Appellants
WSBA No. 23412

CERTIFICATE OF SERVICE

I certify that on the 18th day of March, 2015, I caused a true and correct copy of this Statement of Arrangements to be served on the following via U.S. Mail and email to:

Attorney for Plaintiffs:

Steven William Davies
Comfort, Davies & Smith
1901 65th Ave W Ste 200
Fircrest, WA 98466
Fax (253) 564-5356
Email: Attorneys@cdsps.com

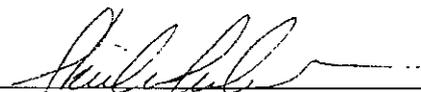
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Counsel for Respondent

DATED this 18th day of March, 2015, at Tacoma, Washington.

BURNS LAW, PLLC

By


Sheila Gerlach
Paralegal

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