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Cause No. 490781-I-II
Clark County
Cause No. 15-2-00924-2

**IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

FEDERAL HOME LOAN MORTGAGE CORPORATION,
Respondent.

v.

PAMELA S. OWEN, ET AL.
Appellant,

APPELLANT'S AMENDED OPENING BRIEF

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P/M: 8/30/16

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....1

 Assignments of Error.....1

 No. 1. The trial court erred in continuing to exercise
 unlawful detainer subject matter jurisdiction after
 Respondent filed IRS Form 1099-A with the
 Federal Government.

 Issues Pertaining to Assignments of Error.....2

 Did the trial court suffer a loss of subject matter
 jurisdiction in this unlawful detainer action when
 Respondent filed IRS Form 1099-A.
 (Assignments of Error 1.).....2

III. STATEMENT OF THE CASE.....2

IV. ARGUMENT.....5

 A. RESPONDENT’S ISSUANCE OF IRS FORM 1099-A
 RESULTED IN THE SUPERIOR COURT LOSING UNLAWFUL
 DETAINER JURISDICTION AND VIOLATING THE FEDERAL
 SUPREMACY AND DUE PROCESS CLAUSES.....5

V. CONCLUSION.....13

TABLE OF AUTHORITIES

Cases

Bain v. Metro. Mortg. Grp., Inc.,
175 Wn.2d 83, 89-108 (2012).....8,10,11, 22, 23, 28

Carpenter v. Longan,
83 U.S. (16 Wall.) 271, 274 (1872).....9

Bassett v. City of Spokane,
98 Wash. 654, 656-57, 168 P. 478 (1917).....12

Beeman v. TDI Managed Care Svcs.,
449 F.3d 1035, 1038 (9th Cir. 2006).....6

| | |
|--|--------|
| <i>Christensen v. Ellsworth</i> , 162 Wn.2d 365, 370, 372-373, 173 P.3d 228 (2007)..... | 6 |
| <i>Finch v. Matthews</i> , 74 Wn.2d 161, 166, 443 P.2d 833 (1968)..... | 12 |
| <i>Freeman v. DirecTV, Inc.</i> , 457 F.3d 1001, 1004 (9th Cir. 2006)..... | 6 |
| <i>Gibbons v. Ogden</i> , 22 U.S. (9 Wheat.) 1 (1824)..... | 7 |
| <i>In re Marriage of Gillespie</i> , 89 Wn. App. 390, 948 P.2d 1338 (1997)..... | 6 |
| <i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat.) 316 (1819)..... | 7 |
| <i>Munden v. Hazelrigg</i> , 105 Wn.2d 39, 45, 711 P.2d 295 (1985)..... | 10 |
| <i>Puget Sound Inv. Group, Inc. v. Bridges</i> , 92 Wn. App. 523, 963 P.2d 944 (Div. One, 1998)..... | 11, 12 |
| <i>Rabkin v. Oregon Health Sciences Univ.</i> , 350 F.3d 967, 971 (9th Cir. 2003)..... | 7 |
| <i>Rainier View Court Homeowners Ass'n, Inc. v. Zenker</i> , 157 Wn.App. 710, 719, 238 P.3d 1217 (2010)..... | 6 |
| <i>Schleining v. Thomas</i> , 642 F.3d 1242, 1246 (9th Cir. 2011)..... | 6 |
| <i>Sprincin King St. Partners v. Sound Conditioning Club, Inc.</i> , 84 Wn. App. 56, 68, 925 P.2d 217 (1996)..... | 9 |
| <i>State ex rel. Seaborn Shipyards Co. v. Superior Court</i> , 102 Wash. 215, 172 P. 826 (1918)..... | 9 |
| <i>Ware v. Hylton</i> , 3 U.S. (3 Dall.) 199 (1796)..... | 7 |

‘;

Statutes

| | |
|--|-------|
| U.S. Const. Article VI, Clause 2..... | 7,11 |
| U.S. Const. Amend. 14, Section 1..... | 7,11 |
| Public Law 72-304, 47 Stat. 725..... | 2 |
| Public Law 91-351, 86 Stat. 471..... | 2 |
| P.L. 98-369, Div A, Title I, § 148(a), 98 Stat. 687..... | 2 |
| 12 U.S.C. 1716 et seq., 48 Stat. 1252..... | 2 |
| 26 U.S.C. § 6050J..... | 2,10 |
| 42 U.S.C. § 1983..... | 4 |
| RCW § 7.28.120..... | 12 |
| Chapter 19.86 RCW..... | 4 |
| RCW § 40.16.030..... | 5 |
| RCW § 59.12.032..... | 9, 10 |
| Chapter 61.24 RCW..... | 2,5 |
| RCW § 61.24.005(2)..... | 8,10 |
| RCW § 61.24.040..... | 9, 10 |
| RCW § 61.24.060..... | 9, 10 |
| RAP 2.4..... | 5 |
| RAP 2.5..... | 5 |
| RAP 10.3(a)(6)..... | 5 |

I. INTRODUCTION.

Appellant Pamela S. Owen, (“Owen”), seeks reversal of the Superior Court’s orders in favor of Respondent Federal Home Loan Mortgage Corporation (“Freddie Mac”), which were granted after the Superior Court was presented with newly discovered evidence that the nonjudicial foreclosure proceedings were null, void and unconstitutional as a matter of law.

II. ASSIGNMENTS OF ERROR.

Assignments of Error.

- No. 1. The trial court erred in continuing to exercise unlawful detainer subject matter jurisdiction after Respondent filed IRS Form 1099-A with the Federal Government.

Issues Pertaining to Assignments of Error.

Did the trial court suffer a loss of subject matter jurisdiction in this unlawful detainer action when Respondent filed IRS Form 1099-A. (Assignments of Error 1.)

III. STATEMENT OF THE CASE.

This case arises under the Constitutions and laws of the United States and the State of Washington; from Owen’s execution of a Deed of Trust on November 4, 2005; and from the subsequent sale of Owen’s loan 60 days later to Freddie Mac on January 4, 2006.

The original Lender was Landmark Mortgage Company (“Landmark”), an Oregon Corporation. At the time the Deed of Trust was executed by Owen, Landmark was one of Freddie Mac’s approved lenders, and by rules and contract, entitled to sell its loans to Freddie Mac.

Pursuant to Freddie Mac’s rules and Landmark’s existing contract with Freddie Mac, Landmark was required to use Fannie Mae/Freddie Mac Uniform Instrument, Form 3048 (Washington—Single Family),

revised January 2001 when originating all loans Landmark intended to subsequently sell to Freddie Mac.

Freddie Mac's rules and regulations and Form 3048 further directed Landmark to sever its rights as the "lender" entitled to receive payments and "servicer" entitled to fees for servicing the loan by naming Landmark as "Lender" and Mortgage Electronic Registration Systems, Inc. ("MERS") as the "beneficiary under this security instrument," and holder of the Deed of Trust.

On July 22, 1932, Congress enacted the Federal Home Loan Bank Act, Public Law 72-304, 47 Stat. 725, which created the Federal Home Loan Bank System in the wake of the Great Depression. The Act provided for access to home mortgage funding on a nationwide basis through a network of 12 Federal Home Loan Banks.

On June 28, 1934, Congress enacted the National Housing Act (NHA), Title III, 12 U.S.C. 1716 et seq., 48 Stat. 1252, which authorized the creation of national mortgage associations to "purchase and sell first mortgages... together with the credit enhancements, if any, secured thereby." The Act was intended to add liquidity to the mortgage markets by providing for a secondary mortgage market structure.

In 1965 the Washington State Legislature enacted the Deeds of Trust Act, Chapter 61.24 RCW, to facilitate the State's participation in Our Nation's tax-payer financed national secondary mortgage market.

On July 24, 1970, Congress enacted the Federal Home Loan Mortgage Corporation Act, Public Law 91-351, 86 Stat. 471, which created the Federal Home Loan Mortgage Corporation ("Freddie Mac") to "provide stability in the secondary market for residential mortgages."

Congress enacted 26 U.S.C. § 6050J on July 18, 1984 as part of the "Deficit Reduction Act of 1984," P.L. 98-369, Div A, Title I, § 148(a), 98 Stat. 687. It was the intent of Congress to use this new statute to curb

evasions of the Internal Revenue Code relating to foreclosures and abandonments of security.

On October 6, 2011, MERS, acting in its unlawful capacity as “beneficiary” and “holder” of Owen’s Deed of Trust, caused an Assignment of Deed of Trust to be recorded in the Office of the Auditor of Clark County Washington as Instrument Number 4799971 in favor of Bank of America, N.A., (“BoANA”), successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP.

On March 17, 2014, BoANA used MERS’s unlawful assignment of the note and deed of trust to appoint MTC Financial, Inc. (“MTC”) as the successor trustee, which appointment was recorded with the Clark County Auditor as Instrument Number 5059964.

On October 15, 2014, Owen filed for bankruptcy in the U.S. Bankruptcy Court, Western District of Washington (Tacoma) under Bankruptcy Petition No. 14-45542-BDL.

On October, 29, 2014, Lisa M. McMahon-Myhran, acting on behalf of BoANA, filed a “Declaration Motion for Relief from Stay, Real Property located at 3912 NE 57th Avenue, Vancouver, WA” in response to Owen’s bankruptcy petition, wherein McMahon-Myhran claimed BoANA was the owner/holder of Owen’s 2005 Note, at the same time FHFA was claiming Freddie Mac was the owner/holder of Owen’s 2005 Note.

On January 16, 2015, BoANA, acting through MTC, sold Owen’s real property to Freddie Mac, who was the highest bidder at the nonjudicial foreclosure sale. MTC untruthfully claimed in the Trustees Deed that the nonjudicial foreclosure sale complied with Washington’s Deed of Trust Act (DTA), Chapter 61.24 RCW.

On March 6, 2015, Freddie Mac caused Owen to be served with a copy of an unlawful detainer summons and complaint, both of which had

not been filed with the Superior Court. Owen did not respond to the unfiled summons and complaint.

On April 2, 2015, Freddie Mac, through its attorneys, filed an unlawful detainer summons and complaint. Clerk's Papers ("CP) at 0001 through 00006.

On April 3, 2015, Freddie Mac, through its attorneys, obtained an ex parte order of default, together with an ex parte Writ of Restitution, after convincing the Court that Owen had been duly and regularly served with a copy of the unfiled unlawful detainer summons and complaint on March 6, 2015.

The ex parte Writ of Restitution filed by the Clerk of the Court on April 3, 2015 at 4:05 p.m. was not signed or dated by a judge or the Clerk of the Court.

At a hearing on May 1, 2015, Owen was unable to persuade the Court to vacate its ex parte default order and judgment; quash the summons and recall the ex parte Writ of Restitution.

On May 7, 2015 Owen filed a notice of appeal to the State Court of Appeals, Division Two. Also on May 7, 2015, Owen filed an action for injunctive and other relief pursuant to Washington's Consumer Protection Act, Chapter 19.86 RCW and 42 U.S.C. § 1983.

On January 28, 2016, Owen removed a copy of IRS Form 1099-A from her mailbox. CP at 0031. This federal tax document, required by 26 U.S.C. § 6050J, indicated Freddie Mac, and not BoANA, was the "Lender" who had both owned Owen's Note and purchased Owen's primary residence on January 16, 2015.

Freddie Mac's issuance of IRS Form 1099-A tends to indicate and prove that:

(1) MERS was an unlawful "beneficiary" with power and authority to assign Owen's Note and Deed of Trust to BoANA and cause

the same to be recorded with the Clark County Auditor in violation of RCW § 40.16.030;

(2) BoANA lacked power and authority to appoint MTC Financial as successor trustee to foreclose and sell Owen's primary residence and cause the appointment to be recorded with the Clark County Auditor in violation of RCW § 40.16.030;

(3) BoANA committed perjury in the federal Bankruptcy Court, through the Declaration of Lisa M. McMahon-Myhran, when claiming to be the holder and owner of Owen's Promissory Note;

(4) MTC Financial committed perjury through the Trustee's Deed given to Freddie Mac when claiming that the nonjudicial foreclosure complied with Washington's Deed of Trust Act, Chapter 61.24 RCW and violated RCW § 40.16.030 when causing the Trustee's Deed to be recorded in the Office of the Clark County Auditor; and

(5) Freddie Mac and its attorneys falsely commenced and maintained a complaint for unlawful detainer in the Clark County Superior Court.

On April 22, 2016, Freddie Mac, through its attorneys, moved the Superior Court for an order reissuing the Writ of Restitution, CP at 0007, which was granted on May 20, 2016, CP at 68, 69 and 71.

On June 13, 2016, Owen filed the instant Notice of Appeal. CP at 51.

IV. ARGUMENT.

A. RESPONDENT'S ISSUANCE OF IRS FORM 1099-A RESULTED IN THE SUPERIOR COURT LOSING UNLAWFUL DETAINER JURISDICTION AND VIOLATING THE FEDERAL SUPREMACY AND DUE PROCESS CLAUSES.

The scope of the review undertaken by the court of appeals is governed by RAP 2.4, RAP 2.5, and RAP 10.3(a)(6). The proper standard of review for this appeal and its issues is de novo, which generally applies

for claims involving statutory analysis and the application of legal standards. See, *Schleining v. Thomas*, 642 F.3d 1242, 1246 (9th Cir. 2011) and *Beeman v. TDI Managed Care Svcs.*, 449 F.3d 1035, 1038 (9th Cir. 2006). The appellate court must consider the matter anew, as if no decision previously had been rendered. *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006).

Findings of fact are reviewed for “substantial evidence” and conclusions of law are also reviewed “de novo.” *Rainier View Court Homeowners Ass’n, Inc. v. Zenker*, 157 Wn.App. 710, 719, 238 P.3d 1217 (2010); *In re Marriage of Gillespie*, 89 Wn. App. 390, 948 P.2d 1338 (1997).

The application of the civil rules to the unlawful detainer statutory requirements is a matter of statutory interpretation to be reviewed de novo. *Christensen v. Ellsworth*, 162 Wn.2d 365, 370, 173 P.3d 228 (Wash. 2007). A court’s objective in construing a statute is to determine the legislature’s intent. If the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. An undefined statutory term should be given its usual and ordinary meaning. Statutory provisions and rules should be harmonized whenever possible. If the statutory language is susceptible to more than one reasonable interpretation, then a court may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent. *Christensen v. Ellsworth*, 162 Wn.2d 365, 372-373, 173 P.3d 228 (2007).

“When de novo review is compelled, no form of appellate deference is acceptable.” *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 971 (9th Cir. 2003).

U.S. Const. Article VI, Clause 2, (“Supremacy Clause”), provides that:

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

The assertion of federal authority under the Supremacy Clause Began with *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), where the Court had rendered a state statutory provision that was inconsistent with a treaty executed by the Federal Government null and void.

The full significance of the Supremacy Clause, as applied to legislation, was further developed in the opinions of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), where the nullity of an act, inconsistent with the constitution, is produced by the declaration that the constitution is the supreme law of the land.

U.S. Const. Amend. 14, Section 1, provides in relevant part that:

“ No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Owen’s 2005 Deed of Trust was drafted pursuant to Fannie Mae/Freddie Mac UNIFORM INSTRUMENT – MERS, Form 3048.

Owen's 2005 "Note" was drafted pursuant to Fannie Mae/Freddie Mac UNIFORM INSTRUMENT, Form 3200.

In *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 89-108 (2012), the Court rejected outright MERS's fallacious use of the principle that it could be the statutory beneficiary under RCW 61.24.005(2) because it is named the "beneficiary" of the deed of trust.

Judge John C. Coughenour of the Federal District Court for the Western District of Washington had asked the Washington Supreme Court to answer three certified questions relating to MERS in its role as the beneficiary of the deed of trust. The Court held that:

"A plain reading of the statute leads us to conclude that only the actual holder of the promissory note or other instrument evidencing the obligation may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property. Simply put, if MERS does not hold the note, it is not a lawful beneficiary. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83 at 89.

The *Bain* Court further addressed MERS's contentions that if it is acting as an unlawful beneficiary, its status should have no effect. The Court responded that:

"The difficulty with MERS's argument is that if in fact MERS is not the beneficiary, then the equities of the situation would likely (though not necessarily in every case) require the court to deem that the real beneficiary is the lender whose interests were secured by the deed of trust or that lender's successors. (Footnote omitted.) If the original lender had sold the loan, that purchaser would need to establish ownership of that loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions. Having MERS convey its 'interests' would not accomplish this.

In the alternative, MERS suggests that if we find a violation of the act, "MERS should be required to assign its interest in any deed of trust to the holder of the promissory note, and have that assignment recorded in the land title

records, before any non-judicial foreclosure could take place.” Resp. Br. of MERS at 44 (Bain). But if MERS is not the beneficiary as contemplated by Washington law, it is unclear what rights, if any, it has to convey. Other courts have rejected similar suggestions. *Bellistri*, 284 S.W.3d at 624 (citing *George v. Surkamp*, 336 Mo. 1, 9, 76 S.W.2d 368 (1934)). Again, the identity of the beneficiary would need to be determined. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83 at 111-112.

The above quoted passages make clear that MERS plays a central, “unlawful” role, in the scheme to defraud by being named the “beneficiary under this security instrument.”

Further, said the *Bain* Court: “Washington’s deed of trust act contemplates that the security instrument will follow the note, not the other way around. MERS is not a “holder” under the plain language of the statute.” *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83 at 104.

Over 140 years ago, the U.S. Supreme Court stated the same principle in similar fashion in *Carpenter v. Longan*, 83 U.S. (16 Wall.) 271, 274 (1872):

“The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.”

In this appeal, Freddie Mac seeks a ruling that will affirm the Superior Court’s exercise of unlawful detainer subject matter jurisdiction without requiring its compliance with the mandatory provisions of RCW § 59.12.032 and RCW §§ 61.24.040 and 61.24.060.

The unlawful detainer chapter, RCW 59.12, provides a summary proceeding for obtaining possession of real property. *State ex rel. Seaborn Shipyards Co. v. Superior Court*, 102 Wash. 215, 172 P. 826 (1918).

The court’s jurisdiction in unlawful detainer proceedings is limited to the right to possession of real property. *Sprincin King St. Partners v.*

Sound Conditioning Club, Inc., 84 Wn. App. 56, 68, 925 P.2d 217 (1996); *Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985).

Unlawful detainer actions offer a plaintiff the advantage of speedy relief, but do not provide a forum for litigating claims to title. To commence and maintain an unlawful detainer action, the State Legislature, under RCW § 59.12.032, requires mandatory compliance with RCW §§ 61.24.040 and 61.24.060:

“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.”

The State Legislature’s use of the conjunction “and,” makes it apparent that Freddie Mac was required to comply with both RCW §§ 61.24.040 and 61.24.060 before being entitled to commence and maintain an action for unlawful detainer.

Freddie Mac did not issue any notices. Nor was it involved in MERS’s assignment of the note and deed of trust to BoANA. Freddie Mac was not involved in BoANA’s appointment of a successor trustee pursuant to the assignment of the note and deed of trust to BoANA by MERS, Inc. acting as “beneficiary.” Nor were any of the foreclosure proceedings initiated and maintained in the name of or on behalf of Freddie Mac.

By issuing IRS Form 1099-A pursuant to federal law, 26 U.S.C. § 6050J, Freddie Mac was also claiming to be the lawful beneficiary under RCW § 61.24.005(2), which claim necessarily rejected MERS’s claim to be “beneficiary.”

When enacting 26 U.S.C. § 6050J(a), Congress also used the conjunction “and” to create the test for the information return to be made to the Treasury Secretary relating to any foreclosure or other acquisition of property in full or partial satisfaction of a debt secured by that property:

“(a) In general

Any person who, in connection with a trade or business conducted by such person, lends money secured by property and who—

(1) in full or partial satisfaction of any indebtedness, acquires an interest in any property which is security for such indebtedness, or

(2) has reason to know that the property in which such person has a security interest has been abandoned,

shall make a return described in subsection (c) with respect to each of such acquisitions or abandonments, at such time as the Secretary may by regulations prescribe.”

By filing IRS Form 1099-A with the IRS, Freddie Mac was declaring under penalty of perjury that it was both the “lender” who had loaned money secured by Owen’s property and was also the purchaser of Owen’s property on January 16, 2015 during the nonjudicial foreclosure sale conducted by MTC.

In rejecting outright MERS’s fallacious use of the principle that it could be the statutory “beneficiary,” the Supreme Court squarely held that: “Simply put, if MERS does not hold the note, it is not a lawful beneficiary. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83 at 89.

The Court’s decision in *Bain v. Metro. Mortg. Grp., Inc.*, maintains harmony and consistency with the Supremacy and Due Process Clauses, while the holdings of the Superior Court creates conflicts with federal law where none exists.

Where, as here, the issue of title predominate the issue of possession, a putative owner claiming unlawful detainer must first establish superior title to a person who holds a statutory warranty deed through an action in ejectment and quiet title before the remedy of

unlawful detainer may be pursued. *Puget Sound Inv. Group, Inc. v. Bridges*, 92 Wn. App. 523, 963 P.2d 944 (Div. One, 1998).

Under State law, the superior title, whether legal or equitable, must prevail. RCW § 7.28.120; *Finch v. Matthews*, 74 Wn.2d 161, 166, 443 P.2d 833 (1968). Unlawful detainer actions are not the proper forum to litigate questions of title. *Puget Sound Inv. Grp., Inc. v. Bridges*, 92 Wn. App. at 526 (1998).

Freddie Mac's claim of "color of title" pursuant to the Trustee's Deed Upon Sale also fails as a matter of State law. In 1917, the Supreme Court in *Bassett v. City of Spokane*, 98 Wash. 654, 656-57, 168 P. 478 (1917), stated that: "Color of title is that which is a semblance or appearance of title, but is not title in fact nor in law." *Bassett v. City of Spokane*, 98 Wash. at 656.

The Bassett court also suggested that one must act in good faith in order to have color of title. *Bassett v. City of Spokane*, 98 Wash. at 656-657. In *Daubner v. Mills*, 61 Wn. App. 678, 811 P.2d 981 (Div. Three, 1991), the court reiterated the notion of good faith by stating that: "Color of title must purport to pass title, and the claimant must believe it to be a valid title." *Daubner v. Mills*, 61 Wn. App. 678 at 682.

Owen had valid color of title through her possession of a statutory warranty deed. Freddie Mac's lack of belief that it had "color of title" through the Trustee's Deed Upon Sale became apparent when issuing Form 1099-A.

Under Washington case law, one cannot possess color of title if it knows that the title is invalid. Here, MERS, Inc. was not a lawful "beneficiary" with power and authority to assign Owen's Note and Deed of Trust to BoANA. In this light, the issue of possession was no longer before the Superior Court.

V. CONCLUSION.

Owen seeks reversal of the trial court's orders with directions to dismiss Respondent's complaint for unlawful detainer with prejudice.

Under the Supremacy and Due Process Clauses and Chapters 59.12 and 61.24 RCW, the Superior Court lost jurisdiction over Freddie Mac's unlawful detainer action when it was presented with a copy of IRS Form 1099-A.

Dated: August 29, 2016

Respectfully submitted,

A handwritten signature in cursive script that reads "Pamela S. Owen". The signature is written in black ink and is positioned above a horizontal line.

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IN THE COURT OF APPEALS, DIVISION II
 OF THE STATE OF WASHINGTON

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| FEDERAL HOME LOAN MORTGAGE) | |
| CORPORATION,) | Clark County No. 15-2-00924-2 |
| Respondent,)) | |
| vs.) | PROOF OF SERVICE |
| PAMELA S. OWEN, et al.,) | |
| Appellant.)) | |
| _____) | |

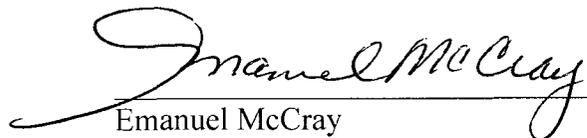
EMANUEL MCCRAY DECLARES AS FOLLOWS:

- I am over the age of 18, am not a party to the within action, and make this declaration based upon personal knowledge and belief.
- On August 30, 2016, I served a copy of **APPELLANT'S AMENDED OPENING BRIEF** by placing the same in the U.S. Mail in a sealed envelope with postage fully prepaid, for delivery to:

| | |
|--|--|
| Joseph H. Marshall RCO Legal, P.S. 13555 SE 36 th Street, Suite 200 Bellevue, WA 98006 | Kasey J. Curtis Reed Smith LLP 355 South Grand Avenue, Suite 2900 Los Angeles, CA 90071 |
|--|--|

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 30th day of August, 2016 at Vancouver, Washington.


 Emanuel McCray