

FILED
Court of Appeals
Division II
State of Washington
3/22/2019 3:42 PM

COURT OF APPEALS II No.: 51392-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

FRANK W. & CHERI L. SCHNARRS

Petitioner/Appellant

v.

WILMINGTON SAVINGS FUND SOCIETY, FSB,
D/B/A CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS
TRUSTEE FOR PRETIUM MORTGAGE
ACQUISITION TRUST, its successors
and/or assigns; JOHN DOE; JANE DOE;

Respondents

APPELLANT'S REPLY BRIEF

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
Case No. 17-2-02356-34

Scott E. Stafne, WSBA#6964
STAFNE LAW
Advocacy & Consulting
239 N. Olympic Avenue
Arlington, WA 98223
(360) 403-8700
scott@stafnelaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. Reply to Argument Trial Court Granted a CR 56 Motion..... 1

II. Reply Arguments Related to the Torrens Act 2

III. Reply to Arguments About the Trustee Deed..... 5

Under CR 12(b)(6) Standard..... 5

IV. Wilmington Has Not Proved Claim or Issue Preclusion Applies..... 8

V. Due Process Arguments 12

 The Judges of Thurston County Have Refused to Comply with the
 Torrens Act since at least 1983 Until the Present. 13

 The Schnarrs Have Been Injured by Thurston County Not Having an
 Operating Torrens System at any Time They Owned Their Home. 14

 Schnarrs Were Precluded From Raising Their Due Process Claims by
 the Trial Court’s and Judge Murphy’s Misinterpretation of the Torrens
 Act 14

VI. Due Process Considerations 15

Ms. Schnarrs Appeal is Properly Before this Court..... 19

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Am. Express Centurion Bank v. Hengstler, No. 48603-2-II, 2017 Wash. App. LEXIS 1104, at *13-14 (Ct. App. May 9, 2017) (*unpublished*).. 16

City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 164 Wn.2d 768, 791-92, 193 P.3d 1077 (2008)..... 9, 10

Civil Serv. Comm'n v. City of Kelso, 137 Wn.2d 166, 172, 969 P.2d 474 (1999). 8

Deegan v. Windermere Real Estate/Center-Isle, Inc., 197 Wn. App. 875, 884, 391 P.3d 582, 586-87 (2017 7

Echavarria v. Filson, Nos. 15-99001, 17-15560, 2018 U.S. App. LEXIS 20668 (9th Cir. July 25, 2018). 15

FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 180 Wn.2d 954, 962-63, 331 P.3d 29, 34 (2014)..... 6

Gibson v. Berryhill, 411 U.S. 564, 578-79, 93 S. Ct. 1689, 1697-98 (1973 15

Hilltop Terrace Homeowner's Ass'n v. Island County, 126 Wn.2d 22, 31, 891 P.2d 29 (1995))..... 9

Hisle v. Todd Pac. Shipyards, 151 Wn.2d 853, 865 (2004) 8

Hurles v. Ryan, 752 F.3d 768, 788 (9th Cir. 2014); 15

In re Election Contest Filed by Coday, 156 Wn.2d 485, 500-01, 130 P.3d 809 (2006))..... 9

In re Murchison, 349 U.S. 133, 136 (1955); *Tumey v Ohio*, (1927)..... 15

<i>Jacob’s Meadow Owners Ass’n. V. Plateau, 44 II, LLC</i> , 139 Wn.App. 743, 754-5, 162 P.3d 1153 (2007)	1
<i>Kinney v. Cook</i> , 159 Wn.2d 837, 842, 154 P.3d 206 (2007)	7
<i>Lassiter v. Department of Social Servs. of Durham Cty.</i> , 452 U.S. 18, at 25-27, 101 S. Ct. 2153 (1981);	19
Majority at 78 (quoting <i>Peoples Nat’l Bank of Wash. v. Ostrander</i> , 6 Wn. App. 28, 31, 491 P.2d 1058 (1971)).	17
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S. Ct. 893 (1976)	19
<i>Olla v. Wagner</i> , Nos. 48784-5-II, 48910-4-II), 2018 Wn. App. LEXIS 1589, at *11 (Ct. App. July 10, 2018)	7
<i>Rippo v Baker</i> , 137 S. Ct. 905 (2017);	15
<i>RMOF II REO Acquisitions II, LLC v. Ward</i> , 189 Wash. 2d 72, 399 P.3d 1118 (2017)	16
<i>Shoemaker v. City of Bremerton</i> , 109 Wn.2d 504, 507, 745 P.2d 858 (1987).	10
Thurston County Case no. 17-2-02356-34	8
<i>Turner v. Rogers</i> , 564 U.S. 431, 131 S. Ct. 2507 (2011);	19
<i>Ward v. Monroeville</i> , 409 U.S. 57, 93 S. Ct. 80 (1972);	15
<i>Warren Frank Schnarrs v. Carol Ann Murphy</i> , Washington Supreme Court Case No. 95545-0	13, 14
<i>Warren Frank Schnarrs v. Carol Ann Murphy, et al.</i> , Washington Supreme Court Case No. 95545-0	20
<i>Williams v. Pennsylvania</i> , 136 S. Ct. 1899 (2016);	15
Statutes	
RCW 5.44.040	6
RCW 59.12.030(6)	17
RCW 61.24	16

RCW 61.24.060(1).....	17
RCW 61.24.130(1).....	17
RCW 61.24.130(1).....	17
RCW 65.12.005	2
RCW 65.12.025 (1).....	2
RCW 65.12.050	3, 21
RCW 65.12.090	3
RCW 65.12.110	2, 13
RCW 65.15	21
RCW 65.15.190	14

Other Authorities

Federalist Paper No. 47.....	4
Federalist Paper No. 78.....	4
2015 Civil Legal Needs Study Update.....	16

Rules

CR 12(b)(6).....	passim
CR 12(b)(6).....	7, 10
CR 56(c).....	1
CR 56(h).....	1
RAP 3.2(a)	20
RAP 9.12.....	1
CJC 2.9(a),	11

I. Reply to Argument Trial Court Granted a CR 56 Motion.

Wilmington argues the trial court analyzed the Schnarrs' Torrens Petition "under both CR 12(b)(6) and CR 56(c)." Wilmington's Answering Brief (WAB), p. 18. According to Wilmington, the Court found under both CR 12(b)(6) and 56(c) that 1.) Schnarrs had no interest in their property sufficient to file a Torrens Application as a result of a Trustee Deed being issued to Wilmington on December 20, 2016. WAB 18-32; and 2.) that res judicata applied to the Schnarrs' Torrens application.

The Schnarrs disagree. CR 12(b)(6) and 56(c) are alternative ways of obtaining a merits judgment without a trial. Had the trial court intended to grant a summary judgment it was required to comply with both CR 56(h) and RAP 9.12, both of which mandate any court's order granting summary judgment to "designate the documents and other evidence brought to the attention of the trial court." *See also Jacob's Meadow Owners Ass'n. v. Plateau, 44 II, LLC*, 139 Wn.App. 743, 754-5, 162 P.3d 1153 (2007).

Wilmington chose not to move for summary judgment and the trial court purposely chose not to follow the rules relating to summary judgment. *See Order 461*. Accordingly, if the intent was, as Wilmington asserts, to grant summary judgment, then the trial court's order doing so

should be reversed at the outset because it is inadequate for appellate review. *Id.*

II. Reply Arguments Related to the Torrens Act

Wilmington devotes a lot of pages to proving its ignorance as to how the Torrens Act works. For example, in a four-page section of its brief entitled “A Third Party Improperly Files a Petition for the Schnarrses, and Procedurally Fails Four Attempts to Default Wilmington” Wilmington suggests that Micah Anderson and David Olive could not file a Torrens Application on behalf of the Schnarrs because they are not attorneys. WAB pp. 5-8.

But this is incorrect and even the slightest bit of research would have revealed this. The first section of the Torrens Act, RCW 65.12.005, specifically authorizes an applicant or agent of the applicant to make an application under the Torrens Act. RCW 65.12.025 (1) also authorizes such an agency and RCW 65.12.024 (2) states the application shall state whether the applicant is married.

Under the statutory process, after an application is filed it is supposed to be immediately referred to a Thurston County Examiner of Titles (Examiner) for an examination. In this regard RCW 65.12.110 states:

Immediately after the filing of the abstract of title, the court shall enter an order referring the application to an examiner of titles, who shall proceed to examine into the title and into the truth of the matters set forth in the application, and particularly whether the land is occupied, the nature of the occupation, if occupied, and by what right, and, also as to all judgments against the applicant or those through whom he or she claims title, which may be a lien upon the lands described in the application; he or she shall search the records and investigate all the facts brought to his or her notice, and file in the case a report thereon, including a certificate of his or her opinion upon the title. The clerk of the court shall thereupon give notice to the applicant of the filing of such report. If the opinion of the examiner is adverse to the applicant, he or she shall be allowed by the court a reasonable time in which to elect to proceed further, or to withdraw his or her application. The election shall be made in writing, and filed with the clerk of the court.

The trial court did not follow this statute because the Thurston County judges refused to comply with the Torrens Act by 1) not establishing those rules and regulations for the process before the registrar as they were required to do pursuant to RCW 65.12.050; and 2) by refusing to appoint an examiner of titles, which the judges were required to do pursuant to RCW 65.12.090.

The trial court's refusal to refer the Torrens Application to Thurston County's Examiner for review of the various issues the trial court adjudicated on its own was a complete subversion of the law. This is because the Torrens Act required the County Registrar and Examiner to

resolve the issues of whether the application was appropriately made and who had title based on an examination.

Let's be clear about what the Schnarrs are claiming the trial court did. The Schnarrs assert the trial court, which was aware that it was purposely not following the Torrens Act as part of the County's effort to repeal the law, aggrandized to itself the authority of the Registrar and the Examiner of Titles under the Torrens Act in violation of the Separation of Powers. This refusal to follow the law the legislature enacted usurped the powers of the other branches of government and exposed the people to the arbitrary and oppressive control of judges.

"Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for THE JUDGE would then be THE LEGISLATOR.

Were it joined to the executive power, THE JUDGE might behave with all the violence of AN OPPRESSOR"

The Federalist Paper No. 47¹. See also The Federalist Paper No. 78²

¹ Last accessed March 22, 2019 at <https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-47>

² Last accessed March 22, 2019 at <https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-78>

III. Reply to Arguments About the Trustee Deed Under CR 12(b)(6) Standard

Wilmington argues it was entitled to have the Schnarrs Torrens Title Application dismissed because the 1) the Trustee Deed it requested be judicially noticed changed the Schnarrs title status and 2) because a preceding adversarial proceeding by another judge involving another piece of property had a claim preclusive or res judicata effect.

In this section, we will discuss the issue of whether the uncertified Trustee Deed submitted at CP 342-344 establishes, without more, the basis for granting a CR 12(b)(6) judgment on these grounds.

Wilmington relies on a copy of an uncertified Trustee Deed³ to establish pursuant to CR 12(b)(6) that Schnarrs had no interest in Title sufficient to file a Torrens Application. *See* WAB 18-19⁴. The Trustee

³ RCW 5.44.040 requires public records like this one to be certified before they can be admitted into evidence. *See* Schnarrs' Opening Brief 34-35. Wilmington does not dispute this. RCW 5.44.040 states:

Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state or any other state or territory of the United States, when duly certified by the respective officers having by law the custody thereof, under their respective seals where such officers have official seals, shall be admitted in evidence in the courts of this state.

⁴ In this regard, the WAB argues the Trustee Deed it submitted establishes Schnarrs loss of title:

"As a result of the Trustee's sale, and issuance and recording of its Deed, as a matter of law the property transferred to Wilmington. ... Having lost

Deed Wilmington requested be judicially noticed over the objection of *pro se* Schnarrs states on its face: “This instrument is being recorded as an ACCOMMODATION ONLY, *with no representation as to the effect on title.*” (Emphasis Supplied).

This disclaimer on an uncertified public record raises an issue under CR 12(b)(6) because the very purpose for which Wilmington seeks to have the uncertified Trustee Deed noticed is for its effect on title.

While Wilmington may have been able to explain this disclaimer away in an affidavit supporting a motion for summary judgment, CR 56(e), it chose not to file any such motion or declaration. Further, Wilmington chose not to file a certified Trustee Deed, which is required to introduce it into evidence. RCW 5.44.040.

The standard for dismissal under CR 12(b)(6) is “[d]ismissal is warranted only if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove any set of facts which would justify recovery.” *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962-63, 331 P.3d 29, 34 (2014) (internal quotation marks omitted) (quoting *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206

ownership of the property, the Schnarrs were not entitled to apply to register title to it under the Torrens Act.”

WAB, pp. 18-19

(2007)) *See also Deegan v. Windermere Real Estate/Center-Isle, Inc.*, 197 Wn. App. 875, 884, 391 P.3d 582, 586-87 (2017). Here, the Trustee Deed Wilmington submitted states on its face that no representation with regard to title is being made. Why is this?

Moreover, for purposes CR 12(b)(6) does this disclaimer in the evidence raise any reasonable doubts? Especially, when it is coupled with Micah Anderson's declaration that the sale never took place?

The trial court was required to consider all of the alleged facts in the Torrens Application as true and deny any 12(b)(6) motion if it appeared that any hypothetical set of facts could exist that would justify relief. *FutureSelect*, 180 Wn.2d at 962-63. *See also Olla v. Wagner*, Nos. 48784-5-II, 48910-4-II, 2018 Wn. App. LEXIS 1589, at *11 (Ct. App. July 10, 2018) (*unpublished*). Here, Wilmington points out that the Torrens Application alleges that Schnarrs owns the land free and clear. WAB, p. 34. The trial court could not simply ignore this allegation under CR 12(b)(6).

The uncertified Trustee Deed (CP 342-344) states on its face that it may not change title and because it contradicts the allegations of Schnarrs Torrens Application is not sufficient proof that title has been changed for purposes prevailing on a CR 12(b)(6) motion.

IV. Wilmington Has Not Proved Claim or Issue Preclusion Applies

This section will address the trial court's ruling granting Wilmington's CR 12(b)(6) ruling based on res judicata, or claim preclusion. See WAB p. 33, quoting ROP 12/22/17 p. 4, Ins. 7-15. It will also consider whether the trial court could have found based on the evidence in the record that collateral estoppel or issue preclusion applied.

Res judicata or claim preclusion is an affirmative defense which Wilmington had the burden of proving to the trial court. *See Hisle v. Todd Pac. Shipyards*, 151 Wn.2d 853, 865 (2004) ("The party asserting the defense of res judicata bears the burden of proof" citing *Civil Serv. Comm'n v. City of Kelso*, 137 Wn.2d 166, 172, 969 P.2d 474 (1999)). *Id.* at 865. This means Wilmington had the burden of proving that all of the criteria necessary to establish res judicata or collateral estoppel defense were met before either of these affirmative defenses could be granted.

Wilmington failed in this burden because the only evidence Wilmington submitted in support of its res judicata affirmative defenses was an order granting a motion to dismiss in a *different case involving different property* - namely, Thurston County Case no. 17-2-02356-34 (2017), *See* CP 346-348.

The doctrine of res judicata, or claim preclusion, bars parties from relitigating *claims that were raised or could have been raised in an earlier action*. See *City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 164 Wn.2d 768, 791-92, 193 P.3d 1077 (2008) (quoting *In re Election Contest Filed by Coday*, 156 Wn.2d 485, 500-01, 130 P.3d 809 (2006)). Here, Wilmington concedes in its Answering Brief that Thurston County Case No. 17-2-02356-34 involved a different piece of property and thus had a different subject matter.

Under the circumstances here “[w]hen a subsequent action is on a different claim, yet depends on issues which were determined in a prior action, the relitigation of those issues [may be] barred by collateral estoppel.” *City of Arlington*, 164 Wn.2d at 792 (quoting *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 31, 891 P.2d 29 (1995)). But, as Wilmington notes in its Answering Brief, the trial court erroneously relied on claim preclusion, not issue preclusion, to grant its 12(b)(6) dismissal. “I am going to grant the motion ... for the issue of claim preclusion, or res judicata.” WAB p. 33.

Even if the trial court misspoke and wanted to grant the motion based on collateral estoppel the judge could not have done this because there was no evidence in the record to support such a legal conclusion. For an order for Wilmington to prove a collateral estoppel or issue preclusion defense it had to show by way of evidence in the record that (1) the two cases involved identical issues; and (2) application of the doctrine **would not work an injustice** against the Schnarrs. See *City of Arlington*, 164

Wn.2d at 792 (internal quotation marks omitted) (quoting *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987)).

“In addition, the issue to be precluded must have been actually litigated and necessarily determined in the prior action.” *City of Arlington*, 164 Wn.2d at 792 (quoting *Shoemaker*, 109 Wn.2d at 508).

The only evidence Wilmington submitted to the Court in support of a collateral estoppel (issue preclusion) defense was the order in Case no. 17-2-02356-34 (2017). See CP 346-348. That Order does not indicate the same issues, including a Torrens Application, was adjudicated in that case. Nor does that Order prove that giving it a preclusive effect in this case will not work an injustice on Schnarrs. Here, the evidence documents the Thurston County judges intentionally decided not to appoint an Examiner of Titles until April 2, 2018 to prevent the people of Thurston County from taking advantage of this statute, and then they lied about this decision being made until after Schnarrs case was resolved.

Wilmington’s Answering Brief suggests that it was the Thurston County’s superior court judges own assessment of their best interests, not the evidence in the record, which resulted in the 12(b)(6) dismissal of Schnarrs Torrens Application. In this regard, Wilmington’s Answering Brief argues that Schnarrs ignored the trial courts threats that it would decide the case before it, now on appeal, based on his *ex parte* discussions with another judge. See WAB, p. 35. In this argument Wilmington actually sets forth the trial court’s threats to Schnarrs, made just shortly before Frankie Schnarrs died.

THE COURT: Has Judge Murphy [hired a title examiner] for the same property or is it a different property?

MR SCHNARRS: Different Property, same bank.

THE COURT: *That's what I thought ...*

THE COURT: *I will be monitoring the other case with Judge Murphy, and depending on what happens there, that could influence things here as well. ...*

THE COURT: *So I will be following this closely, staying abreast of things, just in terms of efficiency in addressing the issues and making sure that things don't happen inconsistently. ...*

WAB, p. 35 citing ROP 10/27/2017, p. 9, line 16-p. 10, li. 18 (Emphasis in Original)

The Schnarrs claim the trial court's conduct of "keeping abreast" with what was going on in a different case, through a series of *ex parte* contacts with a different judge, was not appropriate because Schnarrs was claiming Thurston County Superior Court Judges were violating the Torrens Act and it appears the communications between the judges were more for shoring up their positions on this issue than for any valid adjudicatory purposes. Furthermore, this collaboration between the judges on this issue also violated CJC 2.9(a), which states: "A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter,..." Yet, that is

exactly what the trial court said it was going to do, and it appears to have done.

Because no evidence in the record supports a factual finding or legal conclusion proving the existence of any affirmative defense, it would appear that the most likely grounds for the trial court dismissing the Schnarrs case was the ex parte conversations between these judges, which are not capable of being reviewed on appeal.

Under these circumstances the Superior Court's dismissal of Schnarrs' case should be reversed because it is not supported by the evidence, and to reassure the people of Thurston County that the rule of law has not become extinct in its superior courts.

V. Due Process Arguments

Wilmington argues no due process violations occurred because:

1. Schnarrs has not proved Thurston County never had an examiner from 1983 (when they originally bought their house) until April 2, 2018. WAB 39-40;
2. Even if Thurston County Judges never had an Examiner of Titles, the Schnarrs were not prejudiced because after the Trustee Deed was purportedly issued they purportedly had no interest in their homestead. WAB p. 40.

3. Schnarrs should have raised the claim, *i.e.* that the trial court did not provide a fair hearing before a fair forum before the case ended. WAB pp. 40-41.

The Judges of Thurston County Have Refused to Comply with the Torrens Act since at least 1983 Until the Present.

The record in this case shows the Schnarrs asked the trial court to refer the matter to the Examiner of Titles pursuant to RCW 65.12.110. Because the trial court knew Thurston County had no Examiner the judge construed this motion as one to appoint an Examiner. Indeed, that is what Judge Murphy had purportedly tried to do individually⁵, but without success until April 2, 2018 - well after this case was over.

As this Court knows, this issue, *i.e.* whether Thurston County had an operating Torrens Act in recent times, was an issue which was litigated before the Supreme Court Commissioner in a special proceeding against the Thurston County superior court judges. *See Warren Frank Schnarrs v. Carol Ann Murphy*, Washington Supreme Court Case No. 95545-0. The Commissioner found the Torrens Act had fallen in disuse and that the judges had cured these deficiencies by entering an order appointing an

⁵ RCW 65.15.090 required that all the judges of the Thurston County superior court should appoint an Examiner, not just one judge. In this regard this statute provides:

The judges of the superior court in and for the state of Washington for the counties for which they were elected or appointed shall appoint a competent attorney in each county to be examiner of titles and legal adviser of the registrar....

Examiner and accepting the Examiner's oath of office on April 2, 2018. *Id.* at 5-7. The Commissioner also observed Schnarrs had a potential remedy to cure the trial court's violations of the Torrens Act by way of this appeal. *Id.* at 7.

The Schnarrs Have Been Injured by Thurston County Not Having an Operating Torrens System at any Time They Owned Their Home.

Thurston County has never had an operating Torrens Registration System at any time the Schnarrs owned their home. So the point is the Schnarrs could have never registered their home as the law allowed them to do, because Thurston County chose to break the law. The statute of limitations for a violation of the Torrens Act is six years, so their claims for violations of the Torrens Act extended back six years. (RCW 65.15.190)

Schnarrs Were Precluded From Raising Their Due Process Claims by the Trial Court's and Judge Murphy's Misinterpretation of the Torrens Act

It was only after Schnarrs brought an original action in the Washington Supreme Court that the Thurston County superior court judges came clean and admitted that they had never properly appointed an Examiner, notwithstanding their misrepresentation to Schnarrs that they had. *See* WAB p. 35 quoting the Trial Court's colloquy with Schnarrs.

VI. Due Process Considerations

Under the United States Constitution "[a] fair trial in a fair tribunal is a basic requirement of due process." *Rippo v Baker*, 137 S. Ct. 905 (2017); *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016); *Aetna Life Ins. Co. v Lavoie*, 475 U.S. 813 (1986); *Gibson v. Berryhill*, 411 U.S. 564, 578-79, 93 S. Ct. 1689, 1697-98 (1973); *Ward v. Monroeville*, 409 U.S. 57, 93 S. Ct. 80 (1972); *In re Murchison*, 349 U.S. 133, 136 (1955); *Tumey v Ohio*, (1927).

A tribunal is not fair when judges are deciding cases in which they have a direct interest related to a litigant or outcome. *Id.* See also *Hurles v. Ryan*, 752 F.3d 768, 788 (9th Cir. 2014); *Echavarria v. Filson*, Nos. 15-99001, 17-15560, 2018 U.S. App. LEXIS 20668 (9th Cir. July 25, 2018). Any judges who are purposely, recklessly or negligently not following Washington statutory law and causing their constituents injury have an interest in how the law is applied to their conduct both for themselves personally and their colleagues.

Schnarrs, like most litigants in Washington and around the country, could not afford a lawyer and had to file his Torrens Application *pro se* with the help of an agent. In 2015 a Task Force of the Washington Supreme Court observed: "*Justice is absent for 70% of the state's low income Washingtonians who frequently experience serious legal*

problems.”⁶ 2015 Civil Legal Needs Study Update, p.3 (hereafter referred to as 2015 Update). This is because persons without lawyers are almost always run over roughshod by attorneys representing people with money before judges who are told that *pro se* litigants must meet the standards of lawyers in order to obtain relief. See e.g. *Am. Express Centurion Bank v. Hengstler*, No. 48603-2-II, 2017 Wash. App. LEXIS 1104, at *13-14 (Ct. App. May 9, 2017) (*unpublished*)

In 2017 four members of the Washington Supreme Court observed in dissent in *Selene RMOF II REO Acquisitions II, LLC v. Ward*, 189 Wash. 2d 72, 399 P.3d 1118 (2017) that “the remedies available to protect against wrongful foreclosures are insufficient, particularly for low-income homeowners faced with the daunting task of enjoining a trustee's sale without the aid of legal counsel.” *Id.* 189 Wn.2d at 91.

These justices pointed out:

Ward's story is not unique in this regard. She seemingly attempted to assert her challenge at the appropriate time, but her case was dismissed before the court could adjudicate the merits. Am. Verbatim Report of Proceedings at 18, 21. The remedies provided under chapter 61.24 RCW are not crafted for the *pro se* homeowner in mind, resulting in prejudice against those low-income homeowners most at risk of

⁶ 2015 Civil Legal Needs Study Update. Last accessed on March 22, 2019 at: http://ocla.wa.gov/wp-content/uploads/2015/10/CivilLegalNeedsStudy_October2015_V21_Final10_14_15.pdf,

foreclosure. If Ward had had the benefit of legal counsel, this case may have unfolded quite differently.

This lack of legal counsel is critical because RCW 61.24.130(1) does not provide the same protections as the unlawful detainer statute. Under RCW 59.12.030(6), color of title is sufficient to halt the summary proceedings to first resolve the issue of ownership. The trial court acts as a safeguard for the rights of the homeowner whose title may have been fraudulently transferred to the party seeking possession. On the other hand, in nonjudicial foreclosure proceedings, the burden rests with the homeowner to bring a lawsuit enjoining the trustee's sale. While this certainly avoids “time-consuming judicial foreclosure proceedings” and “save[s] substantial time and money to both the buyer and the lender,” the lack of judicial oversight carries real consequences that may not, in practice, be alleviated by the remedy provided under RCW 61.24.130(1). Majority at 78 (quoting *Peoples Nat'l Bank of Wash. v. Ostrander*, 6 Wn. App. 28, 31, 491 P.2d 1058 (1971)). A remedy that few can reasonably access in practice is no remedy at all.

In sum, Selene had no statutory right to utilize unlawful detainer proceedings through RCW 61.24.060(1). That right lay with LaSalle alone and disappeared the moment LaSalle conveyed the property to a new owner. Selene could access unlawful detainer proceedings only through RCW 59.12.030(6), and Ward's signed, partially notarized deed gave her color of title sufficient to halt those proceedings. It may be, in a separate quiet title action, that Selene's chain of title prevails on account of Ward failing to enjoin the nonjudicial foreclosure proceedings in 2009. Nevertheless, these facts highlight the very real possibility that low-income homeowners cannot reasonably access the statutory remedies designed to prevent wrongful foreclosures. For these reasons, I respectfully dissent.

Id. 189 Wn.2d 72 at 91-92.

The lack of justice for most of us is not something this Court can continuously ignore because virtually all studies on the subject demonstrate that homelessness causes death, substantially shortened life spans, and loss of liberties⁷. These types of injuries are sufficient to invoke

⁷ <https://www.govinfo.gov/content/pkg/BILLS-111hconres325ih/pdf/BILLS-111hconres325ih.pdf>;

Project Homeless, "Once again, homeless deaths in King County appear to break record" as reported by Seattle Times on January 9, 2019, which was last accessed on February 14, 2019 at <https://www.seattletimes.com/seattle-news/homeless/homeless-deaths-in-2018-appear-to-break-records-once-again/>;

Kathryn Lane, et al., "Burden and Risk Factors for Cold-Related Illness and Death in New York City" *Int J Environ Res Public Health*. 2018 Apr; 15(4): 632.(2018), which was last accessed on February 14, 2019 at

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5923674/>

Romaszko, Jerzy et al. "Mortality among the homeless: Causes and meteorological relationships" *PloS one* vol. 12,12 e0189938. 21 Dec. 2017, doi:10.1371/journal.pone.0189938, which was last accessed on February 14, 2019 at

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5739436/>.

The Guardian, "Mortality rate for homeless youth in San Francisco is 10 times higher than peers" (April 14, 2016), which was last accessed on February 14, 2019 at <https://www.theguardian.com/us-news/2016/apr/14/san-francisco-homeless-youth-ten-times-more-likely-to-die>;

Vásquez-Vera, Hugo, et al., Foreclosure and Health in Southern Europe: Results From the Platform for People Affected by Mortgages, 93.2 *Journal of Urban Health* 312 (2016), which was last accessed on February 14, 2019 at

<https://www.ncbi.nlm.nih.gov/pubmed/26940706>;

Burgard, Sarah A. et al., Housing Instability and Health: Findings From the Michigan Recession and Recovery Study, 75.12 *Social Science & Medicine* 2215 (2012), which was last accessed on February 14, 2019 at

http://www.npc.umich.edu/publications/policy_briefs/brief29/NPC%20Policy%20Brief%20-%202029.pdf;

Osypuk, Theresa L., et al., The

Consequences of Foreclosure for Depressive Symptomatology, 22.6 *Annals of Epidemiology* 379 (2012), which was last accessed February 14, 2019 at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3378648/>;

Houle, Jason N., and Michael T. Light. The Home Foreclosure Crisis and Rising Suicide Rates, 2005 to 2010, 104.6 *American Journal of Public Health*, 1073-1079 (2014), which

the need for those procedural protection necessary to assure due process. See e.g. *Turner v. Rogers*, 564 U.S. 431, 131 S. Ct. 2507 (2011); *Lassiter v. Department of Social Servs. of Durham Cty.*, 452 U.S. 18, at 25-27, 101 S. Ct. 2153 (1981); *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976).

Ms. Schnarrs Appeal is Properly Before this Court

As stated in the beginning of this brief this proceeding involves a Torrens Application, which was supposed to be reviewed by an Examiner, but got shanghaied into an adversarial process because Thurston County superior court judges decided not to comply with the law. The Torrens Act allows for agents to file applications on behalf of applicants. It also allows for applicants to name their spouses in the application. Here, the

was last accessed on February 14, 2019 at <https://www.ncbi.nlm.nih.gov/pubmed/24825209>;
McLaughlin, "Homeless die 30 years younger than average (December 11, 2011) last accessed on February 14, 2019 at <https://www.nhs.uk/news/lifestyle-and-exercise/homeless-die-30-years-younger-than-average/>
Cf. "Description of Homeless Deaths Investigated by the King County Medical Examiner Office (MEO), 2012-2017," which was last accessed on February 14, 2019 at https://www.kingcounty.gov/depts/health/locations/homeless-health/healthcare-for-the-homeless/~/_media/depts/health/homeless-health/healthcare-for-the-homeless/documents/medical-examiner-analysis-homeless-deaths.ashx;
"May 2015, Thurston County Homeless Census Report, Fact Pack," which was last accessed on February 14, 2019 at <http://www.co.thurston.wa.us/health/sscp/pdf/2015thurstoncountypithomeless.pdf>;
"The Hard Cold Facts About the Deaths of Homeless People", National Health Care for the Homeless Council (2006), which was last accessed on February 14, 2019 at <https://www.nhchc.org/wp-content/uploads/2011/09/HardColdFacts.pdf>.
O'Connell, JJ, "Premature Mortality in Homeless Populations: A Review of the Literature" National Health Care for the Homeless Council (2005).

applicant's spouse, Cherri Schnarrs, was named in all the applications.

When her husband died she carried on the appeal of the application to the case in her own name as the wife of the applicant. Under these circumstances it is not clear there was a need for any formal substitution.

RAP 3.2(a) states:

The appellate court will substitute parties to a review when it appears that a party is deceased or legally incompetent or that the interest of a party in the subject matter of the review has been transferred.

In Warren Frank Schnarrs' mandamus action, *Warren Frank Schnarrs v. Carol Ann Murphy, et al.*, Washington Supreme Court Case No. 95545-0, Schnarrs wife Cherri was not a named party, but she asked to be substituted as a party as Frank's wife in a motion to that Court after he died. The Supreme Court allowed this. *Id.*

Here, it is the applicant's wife - who has always been a participant in these proceedings - who has filed and is prosecuting this appeal. She should be allowed to do so just as she was allowed to prosecute Frank's special proceedings against the Thurston County superior court judges.

CONCLUSION

The trial court's order dismissing the Schnarrs' Torrens Application should be reversed and remanded for proceedings consistent

with Chapter 65.15 RCW and the rules and regulations adopted by the
Thurston County Superior Court judges pursuant to RCW 65.12.050.

Dated this 22nd day of March 2019 at Arlington, Washington.

By: s/ Scott E. Stafne
STAFNE LAW *Advocacy & Consulting*
239 N. Olympic Ave.
Arlington, WA 98223
(360)403-8700

. CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2019 I electronically filed the foregoing *Motion to Modify Commissioners Ruling Dismissing Original Action Pursuant to RAP 17.7* and *Stafne's Declaration in Support of Motion to Modify* with the Clerk of the Court for the Washington State Supreme Court by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 22nd day of March, 2019.

By: s/LeeAnn Halpin
LeeAnn Halpin, Paralegal
OID No. 91161

STAFNE LAW *Advocacy & Consulting*

STAFNE LAW ADVOCACY & CONSULTING

March 22, 2019 - 3:42 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51392-7
Appellate Court Case Title: Frank Warren Schnarrs, etal, Appellants v Wilmington Savings Fund Society, Respondent
Superior Court Case Number: 17-2-02356-3

The following documents have been uploaded:

- 513927_Briefs_20190322154036D2005713_4967.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was 2019.03.22 Appellants Reply Brief.pdf

A copy of the uploaded files will be sent to:

- amarshall@afrc.com
- bbollero@afrc.com
- kyle@stafnelaw.com
- leeann@stafnelaw.com
- micah@stafnelaw.com
- pam@stafnelaw.com
- tburt@afrc.com

Comments:

Appellant Schnarrs Reply Brief

Sender Name: Scott Stafne - Email: Scott@StafneLaw.com

Address:

239 N OLYMPIC AVE
ARLINGTON, WA, 98223-1336

Phone: 360-403-8700

Note: The Filing Id is 20190322154036D2005713