

No. 81813-4

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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JOHN AND DARCEE JOHNSTON, husband and wife,  
Petitioners/Appellants,

v.

JULIA TORKILD, an Individual  
Respondent.

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PETITIONERS' SUPPLEMENTAL BRIEF

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SUPREME COURT  
STATE OF WASHINGTON  
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ORIGINAL

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## INTRODUCTION

For the past century, this Court has required landlords to strictly comply with the unlawful detainer statutes.

The forcible entry and detainer statute, being a special proceeding, is not governed by any of the provisions of the general practice act, and its provisions in regard to the time and manner of bringing actions thereunder must be strictly construed.

Smith v. Seattle Camp No. 69, Woodmen of the World, 57 Wash. 556, 557, 107 P. 372 (1910). Last year the Court reaffirmed this basic tenet.

Proper statutory notice under RCW 59.12.030 is a jurisdictional condition precedent to the commencement of an unlawful detainer action. Strict compliance is required for time and manner requirements in unlawful detainer actions. Thus, any noncompliance with the statutory method of process precludes the superior court from exercising subject matter jurisdiction over the unlawful detainer proceeding.

Christensen v. Ellsworth, 162 Wn.2d 365, 372, 173 P.3d 228 (2007) (citations omitted).

The landlord in this case, Julia Torkild, did not strictly comply with the statutory summons required under RCW 59.18.365, omitting the tenants' right to deliver an answer by facsimile or mail. (Summons; CP 132-133) (Attached as Appendix A). Because

these were substantial, material omissions, the tenants, John and Darlene Johnston, respectfully request this Court to rule that the trial court lacked subject matter jurisdiction and to dismiss this unlawful detainer action.

**I. ISSUES COVERED IN THIS SUPPLEMENTAL BRIEF**

The Johnston's petition for review raised five issues for review. (Petition for Review at 1; Issues A-E). This brief will discuss three: (1) the trial court's lack of subject matter jurisdiction (Issue E); and (2) the trial court's authority in an unlawful detainer proceeding to review the fraudulent circumstances surrounding the rental. (Issues A & B). The Johnstons' argument on the remaining two issues – waiver and the lack of default – are in their opening and reply briefs in the Court of Appeals, and their petition for review. (Waiver: Opening Brief at 29-30, Reply at 7-8, Petition at 16-17; Lack of Default: Opening Brief at 31-32, Reply at 8-9, Petition at 17-19).

**II. STATEMENT OF FACTS**

The Johnston's petition for review details how they sold their property in a foreclosure sale to Peter and Julia Torkild's corporation, First Capital, Inc.; leased the property back from the Torkilds; and then were sued for unlawful detainer. Significant here

is that Julia Torkild failed to serve a complete summons when she sued the Johnstons for unlawful detainer.

The defect appears in the third paragraph of the summons.

Torkild's summons reads:

you can respond to the complaint in writing by delivering a copy of a notice of appearance or answer to your landlord's attorney (or your landlord if there is no attorney) to be received no later than the deadline stated above.

(Summons; CP 132-133) (Appendix A). The same paragraph from the statutory form adds the following italicized instructions:

You can respond to the complaint in writing by delivering a copy of a notice of appearance or answer to your landlord's attorney (or your landlord if there is no attorney) by personal delivery, *mailing, or facsimile to the address or facsimile number stated below* **TO BE RECEIVED NO LATER THAN THE DEADLINE STATED ABOVE.** *Service by facsimile is complete upon successful transmission to the facsimile number, if any, listed in the summons.*

RCW 59.18.365(3)(bold original; italics added).

Torkild's summons failed to inform the Johnstons that they could serve their response on their landlord by mail or facsimile, in addition to personal delivery.

## ARGUMENT

### III. STANDARD OF REVIEW

The Court reviews the lack of subject matter jurisdiction *de novo*. City of Medina v. Primm, 160 Wn.2d 268, 274, 157 P.3d 379 (2007) (“a court's subject matter jurisdiction is a question of law, which is reviewed *de novo*”). Furthermore, a party may challenge subject matter jurisdiction at any point in a lawsuit.

Lack of jurisdiction over the subject matter renders the superior court powerless to pass on the merits of the controversy brought before it..While litigants, like the cities involved here, may waive their right to assert a lack of *personal* jurisdiction, litigants may not waive *subject matter* jurisdiction. Any party to an appeal, including one who was properly served, may raise the issue of lack of subject matter jurisdiction at any time. RAP 2.5(a)(1).

Skagit Surveyors and Engineers, LLC v. Friends of Skagit County, 135 Wn.2d 542, 556, 958 P.2d 962 (1998).

The Court reviews dismissal of the Johnstons' defenses to eviction *de novo*. Cf. Puget Sound Inv. Group, Inc. v. Bridges 92 Wn. App. 523, 526, 963 P.2d 944 (1998); Savings Bank of Puget Sound v. Mink, 49 Wn. App. 204, 209, 741 P.2d 1043 (1987).

#### IV. THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION

##### A. The Invalid Summons Deprives The Trial Court Of Subject Matter Jurisdiction

To start an eviction proceeding, a landlord must serve tenants with a valid summons, notifying them of the lawsuit.

The purpose of a summons is to give the defendant notice of the action, the time prescribed by law to answer, and the consequences of failing to respond. In the context of a residential unlawful detainer action, the summons must comply with the RCW 59.18.365 to confer both personal and subject matter jurisdiction. Because the unlawful detainer action is in derogation of the common law, courts must strictly construe it in favor of the tenant. RCW 59.18.365 requires that a plaintiff-landlord include a street address and facsimile number, if there is one, in the summons and states that a defendant-tenant may answer by personal delivery, mail, or facsimile.

Truly v. Heuft, 138 Wn. App. 913, 918, 158 P.3d 1276 (2007).

If the landlord fails to use a proper summons, the trial court lacks subject matter jurisdiction and must dismiss the complaint.

The unlawful detainer statute is in derogation of common law, and must therefore be strictly construed in favor of the tenant. By reason of provisions designed to hasten the recovery of possession, the statutes creating it remove the necessity to which the landlord was subjected at common law, of bringing an action of ejectment under Chapter 7.28 RCW with its attendant delays and expenses. However, in order to take advantage of its favorable provisions, a landlord must comply with the requirements of the statute.

Where a special statute provides a method of process, compliance with that method is jurisdictional.

Housing Authority of City of Everett v. Terry, 114 Wn.2d 558, 563-564, 789 P.2d 745 (1990) (footnotes and quotations omitted).

As described above, Julia Torkild failed to use the form summons in RCW 59.18.365(3), omitting the instructions for responding by mail or facsimile. These were material errors, fatal to jurisdiction.

We have required that landlords correctly inform tenants of how much time they have to pay or vacate before an unlawful detainer complaint is filed and how much time they have to answer a summons. Thus it follows that we should require landlords to make tenants fully aware not only of the time in which they must answer, but also of their statutory options for the manner in which they may do so.

Truly, 138 Wn. App. at 921-922.

In her response to the Johnstons' motion to dismiss, Torkild attempts to distinguish Truly on three grounds: (1) Truly involved non-payment of rent; (2) the tenant in that case did not raise arguments at the show cause hearing; and (3) the trial and appellate courts in Truly had not reviewed the merits of the landlord's claim. All of these reasons assume that the parties' actions here somehow excuse the defective summons. But nothing the parties could do would confer subject matter jurisdiction.

If a trial court does not have subject matter jurisdiction, neither the merits of a party's claim nor the parties' actions can cure the defect.

Jurisdiction of the subject matter is essential in every case; a condition precedent, in a way, to the acquisition of authority over the parties. A judgment is a mere nullity if pronounced by a court which undertakes to exercise authority over matters wholly outside the powers conferred upon it by law.

In re Elvigen's Estate, 191 Wash. 614, 622-623, 71 P.2d 672 (1937). The trial court is without authority to act. "A lack of subject matter jurisdiction implies that an agency has no authority to decide the claim at all, let alone order a particular kind of relief." Marley v. Department of Labor and Industries of State, 125 Wn.2d 533, 539, 886 P.2d 189 (1994).

Parties and the courts cannot waive defective subject matter jurisdiction. "While litigants...may waive their right to assert a lack of *personal* jurisdiction, litigants may not waive *subject matter* jurisdiction. Skagit Surveyors and Engineers, LLC v. Friends of Skagit County, 135 Wn.2d 542, 556, 958 P.2d 962 (1998). Whether or not the parties claimed non-payment of rent, presented argument at the show cause hearing, or had a trial, the flawed summons deprived the trial court of subject matter jurisdiction from

the outset. Nothing the parties did or said could give the trial court subject matter jurisdiction where none existed.

Finally, Torkild may argue that the same panel that decided Truly denied the Johnstons' motion to dismiss in this case. The court issued a one-line decision denying the motion, providing no reasoning for the result. (Order Denying Motion to Dismiss for Lack of Jurisdiction). The Johnstons have no explanation for the court's action. It is erroneous as a matter of law.

B. Washington Courts Require Strict Compliance For Good Reason

Given the repercussions from a landlord's non-compliance, the Court may be tempted to loosen the standard. But this would contradict a century of caselaw and create substantial, unintended consequences for landlord-tenant law and other special statutory claims. This Court has historically required strict compliance for good reason.

Unlawful detainer is a special benefit for landlords, allowing them to recover possession quickly and inexpensively.

Under the Residential Landlord-Tenant Act of 1973, chapter 59.18 RCW, if a tenant breaches a rental agreement by failing to make timely rental payments, a landlord may commence an unlawful detainer action. RCW 59.18.130, .180(1). An unlawful detainer action is a statutorily created proceeding that provides

an expedited method of resolving the right to possession of property.

Christensen v. Ellsworth, 162 Wn.2d 365, 370-371, 173 P.3d 228 (2007). To obtain the benefits of the proceeding, landlords must strictly comply with its statutory requirements.

An unlawful detainer action is a special proceeding which relates only to real estate. RCW 59.12.030. There must be a substantial compliance with the requisites of such a statute. Provident Mutual Life Insurance Co. of Philadelphia v. Thrower, 1930, 155 Wash. 613, 285 P. 654. Where a special statute provides a method of process, compliance therewith is jurisdictional. See Little v. Catania, 1956, 48 Wn.2d 890, 297 P.2d 255.

Sowers v. Lewis, 49 Wn.2d 891, 894, 307 P.2d 1064 (1957).

For over a century, Washington Courts have required landlords to strictly comply.

This is a special statutory proceeding, summary in its nature and in derogation of the common law. It is an elementary rule of universal application in actions of this character, that the statute conferring jurisdiction must be strictly pursued and, if the method of procedure prescribed by it is not strictly observed, jurisdiction will fail to attach and the proceeding will be a nullity.

Big Bend Land Co. v. Huston, 98 Wash. 640, 643, 168 P. 470 (1917); Accord Smith v. Seattle Camp No. 69, Woodmen of the World, 57 Wash. 556, 557, 107 P. 372 (1910) (“time and manner of bringing actions thereunder must be strictly construed”);

Community Investments, Ltd. v. Safeway Stores, Inc., 36 Wn. App. 34, 38, 671 P.2d 289 (1983) (“the time and manner of bringing an unlawful detainer action are to be strictly construed”); Housing Authority of City of Everett v. Terry, 114 Wn.2d 558, 563, 789 P.2d 745 (1990) (“The unlawful detainer statute...strictly construed in favor of the tenant”).

The Court’s rule of strict construction does not just apply to unlawful detainer actions. As a general rule, any special statutory procedure that departs from the common law requires strict compliance. For example, Washington courts require subcontractors and material suppliers to strictly comply with the lien laws.

The rationale for Washington's insistence upon strict compliance with the lien statute is readily explained. Unlike mortgages and deeds of trust, a mechanics' lien is an involuntary encumbrance on the real property itself. The statute provides for a lien, even if there is no direct contractual relationship between the property owner and the lien claimant. In many instances, a property owner may be required to satisfy obligations left unpaid by the general contractor. Such was the case here. For that reason, the statutory lien is perfected only by strict compliance with the provisions of RCW 60.04.091.

DKS Const. Management, Inc. v. Real Estate Improvement Co., L.L.C., 124 Wn. App. 532, 537, 102 P.3d 170 (2004). Strict

compliance recognizes the value of following legislative decrees to the letter – even if the consequences may seem harsh. See e.g., Zink v. City of Mesa, 140 Wn. App. 328, 337, 166 P.3d 738 (2007) (“administrative inconvenience or difficulty does not excuse strict compliance with the PDA”).

If the Court changes the rule of strict construction for the benefit of this case, the consequences would be significant and in some cases, unpredictable. First, the Court would face overruling cases from every decade that have required landlords to strictly comply with the notice provisions of the unlawful detainer laws. Second, it would have to describe, over a series of cases, which provisions of the unlawful detainer laws do not require strict performance and which do. Third, again in a series of cases, the Court would have to determine whether its opinion here revises the rule for other statutory procedures, like lien foreclosures. These are the predictable results from retreating from strict compliance in this case. There are certainly others.

C. Torkild’s Summons Did Not Substantially Comply With The Statute

The alternative to strict compliance is substantial compliance — the legal equivalent to “close enough”.

Substantial compliance “has been defined as actual compliance in respect to the substance essential to every reasonable objective of [a] statute.” In re Habeas Corpus of Santore, 28 Wn. App. 319, 327, 623 P.2d 702 (1981) (citing Stasher v. Harger-Haldeman, 58 Cal.2d 23, 29, 372 P.2d 649, 22 Cal.Rptr. 657 (1962)). “In the cases where substantial compliance has been found, there has been actual compliance with the statute, albeit procedurally faulty.” City of Seattle v. Pub. Employment Relations Comm'n, 116 Wn.2d 923, 928, 809 P.2d 1377 (1991).

Williamson, Inc. v. Calibre Homes, Inc. 147 Wn.2d 394, 406, 54 P.3d 1186 (2002) (Madsen, J., dissenting).

Julia Torkild argues that she substantially complied with the summons language in RCW 59.18.365.

This particular case has been fully and fairly litigated, and all of Appellants’ arguments have been considered and rejected. Appellants do not cite any prejudice to them arising from the Summons used by Torkild, and none could be claimed.

(Response to Motion to Dismiss at 9). These same arguments are raised whenever defective service or notice invalidates a later proceeding. They do not justify a change in law, however.

Torkild’s request for substantial compliance falters on two grounds. First, landlords can strictly comply with the statute simply by copying the Legislature’s form summons. RCW 59.18.365(3). Because Torkild’s previous attorney failed to update his forms in 2005, this issue is now pending. By now, practitioners have

updated their form summonses to track the statutory language. Strict compliance is not burdensome or difficult. The statute provides exactly what a summons should say.

For this reason, the doctrine of substantial compliance does not excuse defects like those in Torkild's summons — defects in the time and manner for responding.

Unlawful detainer cases often distinguished between "time and manner" requirements, with which a summons had to strictly comply, and "form and content" requirements, for which substantial compliance was sufficient. We have required strict compliance with "time and manner" requirements, like provisions governing the number of days a tenant has to cure and answer...

In Foisy v. Wyman, [96 Wn. App. 636, 640 n. 1, 980 P.2d 311 (1999)] an earlier "form and content" case, the Washington Supreme Court held that a summons which demanded more monetary damages than the trial court found were actually owed substantially complied with the statute. In support of its holding in Foisy, the court cited a 1930 case to explain the reasoning behind allowing substantial compliance with "form and content" requirements:

[W]e have never adopted the strictest rule of construction as to the form or contents of such notices under our unlawful detainer statutes, chiefly for the reason, doubtless, that the statutes prescribe no form.

Id. at 32, 515 P.2d 160 (quoting Erz v. Reese, 157 Wash. 32, 288 P. 255 (1930)).

But the current residential unlawful detainer statute does provide a form for a summons, and that form includes language giving the tenant the option to answer by mail or facsimile.

Truly v. Heuft, 138 Wn. App. 913, 920-921, 158 P.3d 1276 (2007).

Second, Torkild did not substantially comply with the statute. From 1989 on, the introduction to the form summons states: “the summons for unlawful detainer actions for tenancies covered by this chapter shall be substantially in the following form.” RCW 59.18.365. This implies that a valid summons need not follow the form word-for-word. But it does not allow a landlord’s counsel to rewrite the summons without constraint. As the Court of Appeals ruled in Truly, omitting the provisions for delivery by mail or facsimile is a material change.

Although RCW 59.18.365(1) does not include a tenant's options for answering in the list of things that a summons “must contain,” it does require the landlord to provide a street address and, if available, a facsimile number “for service of the notice of appearance or answer.” This implies that a summons lacking an address or facsimile number would be insufficient to confer subject matter jurisdiction. Consequently, the same must be true where the landlord fails to advise the tenant about how to use the required address and facsimile number. Allowing a landlord to tell his tenant that she may only respond by personal delivery would render the portion of the statute requiring the landlord to provide a street address and facsimile number superfluous.

Truly v. Heuff, 138 Wn. App. 913, 922, 158 P.3d 1276 (2007).

Torkild's summons left out important information. A tenant has the right to respond to an unlawful detainer complaint by personal delivery, mail, or facsimile. A landlord cannot edit out the latter two methods and claim that it makes no difference, delivery is delivery. A valid summons must contain the delivery language set out in the statutory form.

Because the summons is invalid, the trial court lacked subject matter jurisdiction from the beginning of this lawsuit. The only appropriate action is to dismiss. Housing Authority of City of Everett v. Terry, 114 Wn.2d 558, 565, 789 P.2d 745 (1990).

**V. THE TRIAL COURT HAD AUTHORITY TO CONSIDER FRAUD UNDERLYING THE LEASE AND TORKILD'S POSSESSION**

Both the trial court and Court of Appeals refused to recognize the Johnstons' defense to the eviction: Torkild purchased the property and leased it back fraudulently. As described in the petition for review, the Johnstons provided substantial evidence to the trial court of the Torkilds' foreclosure rescue scam. (Petition for Review at 2-8). The Court of Appeals ruled as a matter of law that this was not a cognizable defense to unlawful detainer.

In an unlawful detainer proceeding, the court lacks jurisdiction to resolve competing claims to title. The Johnstons' only defense was that they might have a potential claim to possession of the property if another court finds in their favor and restores their title to the property. Unfortunately for the Johnstons, an assertion of contested title is neither a recognized defense to nor an issue that can be resolved by an unlawful detainer proceeding.

Torkild v. Johnston, slip op. at 5 (footnotes and citations omitted)

(Attached as Appendix B).

The Johnstons did present a cognizable defense for three reasons. First, where a landlord's underlying ownership is in question, so is the right to possession, and a tenant can raise that issue in an unlawful detainer action.

The purpose of an action for unlawful detainer is to determine the right of possession. Our court has permitted a counterclaim in such an action only when the counterclaim is based on facts which excuse a tenant's breach. Foisy v. Wyman, 83 Wn.2d 22, 515 P.2d 160 (1973) (The affirmative defense of breach of implied warranty of habitability goes directly to the issue of rent due and owing); Income Properties Investment Corp. v. Trefethen, 155 Wash. 493, 506, 284 P. 782 (1930) (rent cannot be recovered where landlord by his own acts has deprived the lessees of the beneficial use of the property); Andersonian Investment Co. v. Wade, 108 Wash. 373, 378-79, 184 P. 327 (1919) (If facts exist which excuse a defendant's breach, the defendant ought to be permitted to show them before ouster).

First Union Management, Inc. v. Slack, 36 Wn. App. 849, 854, 679 P.2d 936 (1984).

Because the Johnstons' defense applies directly to the Torkild's right to possess the property, it is relevant to possession.

'[O]ne may have a right to the possession as against another who has the possession, as in the simple case of one who has been ousted from the land by another.' 1 H. Tiffany, Real Property § 20 (B. Jones 3d ed.1939)). In an unlawful detainer context, it is the right to possession that is pivotal, not mere present possession.

Housing Authority of City of Pasco and Franklin County v. Pleasant, 126 Wn. App. 382, 387-388, 109 P.3d 422 (2005). If the Johnstons prove that the Torkilds obtained their property by fraud, voiding the lease and underlying foreclosure sale, the Torkilds right to possession is also void. Cox v. Helenius, 103 Wn.2d 383, 388, 693 P.2d 683 (1985) ("this trustee's actions, along with the grossly inadequate purchase price, would result in a void sale").

A void sale, in turn, provides a defense to unlawful detainer.

In Cox v. Helenius, the Supreme Court recognized that there may be circumstances surrounding the foreclosure process that will void the sale and thus destroy any right to possession in the purchaser at the sale.

Savings Bank of Puget Sound v. Mink, 49 Wn. App. 204, 209, 741 P.2d 1043 (1987). The Court of Appeals rejected this argument,

concluding “the relationship between the foreclosure process and the unlawful detainer proceeding is far more attenuated” in this case. Torkild, slip op. at 6. But that distinction relies on the weight of the evidence, namely can the Johnstons prove that the foreclosure sale and lease were part of the same fraudulent scheme. Because that is a relevant defense to possession, the Johnstons had a right to present their evidence to the trial court.

Second, the Torkild’s lease is not independent of the fraudulent foreclosure sale. The Johnstons allowed the foreclosure to proceed in part because they would lease the property until they could refinance and purchase it again. (CP52). The Court of Appeals weighed and rejected this evidence improperly when it concluded to the contrary.

Torkild’s claim to possession was not based solely on acquiring the property at a foreclosure sale. Rather, she brought the unlawful detainer action based on a lease signed by the Johnstons which independently proved her right to possession.

Torkild, slip op. at 7. The Court made these factual decisions without a trial. Since these facts are relevant to possession, the Johnstons had a right to present them in the trial court.

Third, the courts have an obligation to strictly construe the unlawful detainer statute in favor of the tenant. Housing Authority

of City of Everett v. Terry 114 Wn.2d 558, 563, 789 P.2d 745 (1990). Here, the Court of Appeals erred by placing a landlord's restriction onto the tenant. In Puget Sound Inv. Group v. Bridges, 92 Wn. App. 523, 963 P.2d 944 (1998), the landlord tried to prove valid title in an unlawful detainer action. The Court of Appeals understandably rejected the argument, concluding that the landlord has to clear title first before trying to evict tenants. "Unlawful detainer actions offer a plaintiff the advantage of speedy relief, but do not provide a forum for litigating claims to title." Puget Sound Inv. Group, Inc. v. Bridges 92 Wn. App. 523, 526, 963 P.2d 944 (1998).

The Court of Appeals inappropriately placed the same bar on the Johnstons, forbidding them from questioning the validity of Torkild's title and right to ownership. But it is the landlord, not the tenant, who has the burden of proving legal ownership and the right to possession. If a tenant can prove that title is fraudulent or void, that becomes a valid defense to the landlord's demand for possession. The Court of Appeals erred by concluding summarily that "in an unlawful detainer proceeding, the court lacks jurisdiction to resolve competing claims to title." Torkild, slip op. at 5. If the

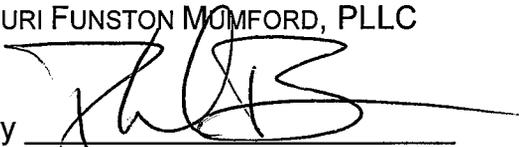
title dispute is relevant to the landlord's right to possession, a tenant may raise it as a defense.

### CONCLUSION

Julia Torkild's failure to use the statutory form summons, deleting important instructions to the tenant, deprived the trial court of subject matter jurisdiction. John and Darcee Johnston respectfully request this Court to dismiss the Torkild's unlawful detainer action, and award reasonable attorneys' fees. In the alternative, the Johnstons request the Court to reverse the Court of Appeals, vacate the judgment and writ of restitution against them, and remand for trial.

DATED this 5<sup>th</sup> day of January, 2009.

BURI FUNSTON MUMFORD, PLLC

By 

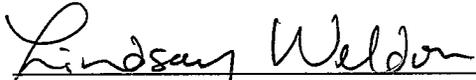
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**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of Petitioner's Supplemental Brief to:

Mark Lee  
Brownlie Evans Wolf and Lee  
230 E. Champion Street  
Bellingham, WA 98225

DATED this 5<sup>th</sup> day of January, 2009.

  
\_\_\_\_\_  
Lindsay Weldon

# APPENDIX A



1 The notice of appearance or answer must include the name of this case (plaintiff and  
2 defendant), your name, the street address where further legal papers may be sent, your  
telephone number (if any), and your signature.

3 If there is a number on the upper right side of the eviction summons and complaint, you  
4 must also file your original notice of appearance or answer with the court clerk by the deadline  
for your written response.

5 You may demand that the plaintiff file this lawsuit with the court. If you do so, the  
6 demand must be in writing and must be served upon the person signing the summons. Within  
fourteen days after you serve the demand, the plaintiff must file this lawsuit with the court, or  
7 the service on you of this summons and complaint will be void.

8 If you wish to seek the advice of an attorney in this matter, you should do so promptly  
so that your written response, if any, may be served on time.

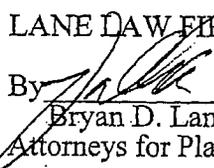
9 You may also be instructed in a separate order to appear for a court hearing on your  
10 eviction. If you receive an order to show cause you must personally appear at the hearing on  
the date indicated in the order to show cause in addition to delivering and filing your notice of  
11 appearance or answer by the deadline stated above.

12 IF YOU DO NOT RESPOND TO THE COMPLAINT IN WRITING BY THE  
13 DEADLINE STATED ABOVE YOU WILL LOSE BY DEFAULT. YOUR LANDLORD  
MAY PROCEED WITH THE LAWSUIT, EVEN IF YOU HAVE MOVED OUT OF THE  
PROPERTY.

14 The notice of appearance or answer must be delivered to: Bryan D. Lane, Lane Law  
15 Firm, PLLC, 114 W. Magnolia, Fourth Floor, Bellingham, Washington 98225.

16 DATED this 18 day of December, 2005.

17 LANE LAW FIRM, PLLC

18 By   
Bryan D. Lane, WSBA No. 18246  
19 Attorneys for Plaintiff

# APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JULIA A. TORKILD, an individual, )

Respondent, )

v. )

JOHN R. JOHNSTON and DARCEE L. )  
JOHNSTON, husband and wife, and )  
any and all other occupants. )

Appellants. )  
\_\_\_\_\_ )

No. 58303-4-1

DIVISION ONE

UNPUBLISHED OPINION

FILED: February 4, 2008

AGID, J.—In this case the tenants challenge a successful unlawful detainer action by their landlord. The trial court granted a default judgment and a writ of restitution in favor of the landlord. The court ruled that the tenants had failed to timely answer the statutory summons and the lease had expired, entitling the landlord to possession of the property. The tenants contend that the trial court erred by issuing the writ and refusing to set the case for trial. In their response to the landlord's motion to show cause, they filed a copy of their complaint from a separate case against the landlord and her husband, in which they alleged that they were the victims of a foreclosure rescue scam. But that does not excuse their failure to timely answer the summons, and they have presented no cognizable defense to the unlawful detainer action. We therefore must affirm.

## FACTS

On April 6, 2004, John and Darcee Johnston (the Johnstons) signed a lease for property on Lummi Island. Julia Torkild (Torkild) signed the lease on behalf of the lessor, First Capital, Inc., as its president. The lease was for a period of 25 months, beginning on April 6, 2004, and ending on April 31, 2006. The Johnstons had trouble paying the rent on time and in full. On December 6, 2005, Torkild<sup>1</sup> provided the Johnstons with a three day notice to pay rent or vacate the property that included a list of all the times the Johnstons had failed to pay and stated that the total amount due was \$5,223.40. On December 18, 2005, Torkild had the Johnstons served with an unlawful detainer summons, which explained that the Johnstons had 12 days to answer the summons or risk a default judgment. The Johnstons did not answer the summons or pay the rent owed, but they did continue to pay the monthly rent on the property.

On May 9, 2006, after the lease had expired, Torkild filed a motion for an order of default and obtained an order to show cause why a writ of restitution should not issue. The Johnstons filed a response to the order to show cause in which they claimed that Torkild was involved in a "fraudulent scheme to deprive them of their home." They also filed a copy of their complaint in a separate action against Torkild and her husband. There they raised a number of claims related to the allegedly fraudulent manner in which Torkild's husband convinced them to sell their home to his wife at a foreclosure sale and induced them to lease it back with an oral promise that at the end of the two

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<sup>1</sup> This notice and all later legal documents show Torkild as the plaintiff in her individual capacity. Nothing in the record explains how or when Torkild assumed First Capital's ownership interest in the property. But the Johnstons do not contest this fact.

year lease they would be able to buy it back. Through this separate action, the Johnstons sought to regain title to the property.

On May 26, 2006, after a show cause hearing, the court entered an order of default and granted a writ of restitution. At the hearing, the court explained that the Johnstons could not successfully contest the unlawful detainer action because (1) they failed to answer the summons, entitling Torkild to a default judgment and (2) the lease had expired, leaving them without any legal claim to possession of the property. On June 23, 2006, the court entered final judgment for the same reasons. The Johnstons appeal.

## DISCUSSION

### I. Unlawful Detainer Action

A landlord commences an unlawful detainer action by serving his tenant with the statutory summons.<sup>2</sup> Failure to timely answer the summons will result in a default judgment in favor of the landlord.<sup>3</sup> The landlord may also request a separate show cause hearing to regain possession of the property.<sup>4</sup> At the show cause hearing, the landlord has the burden of proving his or her right to possession by a preponderance of the evidence.<sup>5</sup> And the tenant may "assert any legal or equitable defense or set-off arising out of the tenancy."<sup>6</sup> An unlawful detainer show cause hearing is a summary

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<sup>2</sup> RCW 59.12.070; RCW 59.18.365; Big Bend Land Co. v. Huston, 98 Wash. 640, 645, 168 P. 470 (1917).

<sup>3</sup> RCW 59.12.120.

<sup>4</sup> RCW 59.18.370.

<sup>5</sup> Hous. Auth. of City of Pasco & Franklin County v. Pleasant, 126 Wn. App. 382, 392, 109 P.3d 422 (2005) (citing Duprey v. Donahoe, 52 Wn.2d 129, 135, 323 P.2d 903 (1958)).

<sup>6</sup> RCW 59.18.380.

proceeding.<sup>7</sup> The court's jurisdiction in an unlawful detainer action is limited to determining the right to possession of the property.<sup>8</sup> A landlord proves his right to possession by showing that the tenant held over or failed to pay rent.<sup>9</sup> If it appears that the landlord has the right to be restored to immediate possession of the property, the court must issue a writ of restitution.<sup>10</sup> But, if the tenant's answer raises a material issue of fact, the court must set the case for trial.<sup>11</sup>

Here, the trial court found that Torkild was entitled to a writ of restitution and a default judgment because the lease had expired and the Johnstons failed to answer the summons. Although not specified in their assignments of error, the Johnstons appear to contest not only the issuance of the writ of restitution but also the court's failure to set the case for trial, its decision that Torkild was entitled to a default judgment, and its later entry of final judgment in Torkild's favor.<sup>12</sup>

## II. Default

The Johnstons argue that the trial court erred by entering the default order. They contend it was improper because the trial court should have treated their written submissions filed in response to the order to show cause as an answer to the unlawful detainer summons. But the obligation to answer the unlawful detainer complaint within the time period specified by the statutory summons is unrelated to the date of the show

<sup>7</sup> Pleasant, 126 Wn. App. at 392 (citing Carlstrom v. Hanline, 98 Wn. App. 780, 788, 990 P.2d 986 (2000)).

<sup>8</sup> Heaverlo v. Keico Indus., Inc., 80 Wn. App. 724, 728, 911 P.2d 406 (1996).

<sup>9</sup> RCW 59.12.030.

<sup>10</sup> RCW 59.18.380.

<sup>11</sup> RCW 59.12.130; RCW 59.18.380; Pleasant, 126 Wn. App. at 392-93 (citing Meadow Park Garden Assocs. v. Canley, 54 Wn. App. 371, 372, 773 P.2d 875 (1989)).

<sup>12</sup> Torkild argues that this case is moot because, in a separate action, another court apparently dismissed some of the Johnstons' title claims. Although this court ordinarily considers mootness as a threshold issue, here, because the mootness claim relies on evidence from a collateral proceeding that is not properly part of this record, we decline to address it.

cause hearing.<sup>13</sup> And the unlawful detainer statutory summons, which Torkild properly served on the Johnstons, is specifically designed to inform the tenant that, in order to avoid a default judgment, an answer to the summons is required in addition to any response to an order to show cause:

You may also be instructed in a separate order to appear for a court hearing on your eviction. If you receive an order to show cause you must personally appear at the hearing on the date indicated in the order to show cause IN ADDITION to delivering and filing your notice of appearance or answer by the deadline stated above.

IF YOU DO NOT RESPOND TO THE COMPLAINT IN WRITING  
BY THE DEADLINE STATED ABOVE YOU WILL LOSE BY  
DEFAULT.<sup>[14]</sup>

Thus, even if we considered the Johnson's submissions in response to the show cause order to be an answer, it was still untimely. We hold that the trial court did not err by finding that Torkild was entitled to a default order and issuing the writ of restitution after the show cause hearing without setting the case for trial.

### III. Absence of Defense to Unlawful Detainer Action

Even if the Johnstons had timely answered the unlawful detainer summons, they would not be entitled to a full trial because, as the trial court properly explained, they failed to present a cognizable defense to an unlawful detainer action. In an unlawful detainer proceeding, the court lacks jurisdiction to resolve competing claims to title.<sup>15</sup> The Johnstons' only defense was that they might have a potential claim to possession of the property if another court finds in their favor and restores their title to the property.

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<sup>13</sup> RCW 59.18.365; RCW 59.18.370. In fact, there may not be a show cause hearing unless the landlord indicates one.

<sup>14</sup> RCW 59.18.365.

<sup>15</sup> Puget Sound Inv. Group, Inc. v. Bridges, 92 Wn. App. 523, 526, 963 P.2d 944 (1998).

Unfortunately for the Johnstons, an assertion of contested title is neither a recognized defense to nor an issue that can be resolved by an unlawful detainer proceeding.<sup>16</sup>

The Johnstons contend that by filing a copy of the complaint from a separate lawsuit contesting title to the property, they presented sufficient evidence of a potential claim to possession to survive the show cause hearing and have the matter set for trial. To support this contention, they rely on language from our decision in Savings Bank of Puget Sound v. Mink<sup>17</sup> to suggest that evidence of an actual conflict of interest on the part of the trustee in a foreclosure sale, under chapter 61.24 RCW, could be used to contest an unlawful detainer action brought by the purchaser. But this is not the holding in Mink. In fact, we held there that Mink's allegations of breach of regulation Z and the truth in lending act, slander of title, breach of contract, and fraud, among other things, were not cognizable defenses to an unlawful detainer action.<sup>18</sup> While appellant in Mink raised the possibility of a defense based on a conflict of interest that would void the foreclosure sale, we held that Mink presented insufficient evidence of the alleged conflict to survive summary judgment.<sup>19</sup>

And this case is factually distinguishable from Mink. There the bank brought an unlawful detainer action against the former owners of property the bank had recently purchased at a foreclosure sale.<sup>20</sup> Here, the relationship between the foreclosure process and the unlawful detainer proceeding is far more attenuated. Torkild's claim to possession was not based solely on acquiring the property at a foreclosure sale.

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<sup>16</sup> We note that, while these claims are not appropriately considered in an unlawful detainer proceeding, if the Johnstons succeed in their separate lawsuit, they may be entitled to damages resulting from the unlawful detainer proceeding.

<sup>17</sup> 49 Wn. App. 204, 741 P.2d 1043 (1987).

<sup>18</sup> Id. at 209.

<sup>19</sup> Id. at 209-10.

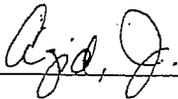
<sup>20</sup> Id. at 206.

Rather, she brought the unlawful detainer action based on a lease signed by the Johnstons which independently proved her right to possession. In addition, the Johnstons raised no objections to the foreclosure sale until after they had already leased the property from Torkild for 25 months. Given these facts, we hold the trial court properly ruled that the Johnstons' assertion of irregularities in inducing them to sell the property at the foreclosure sale was not a cognizable defense to the unlawful detainer action. Consequently, even if Torkild were not entitled to a default judgment based on the Johnstons' failure to answer, the Johnstons would not be entitled to a full trial on the merits because they failed to present a cognizable defense to the unlawful detainer action.<sup>21</sup>

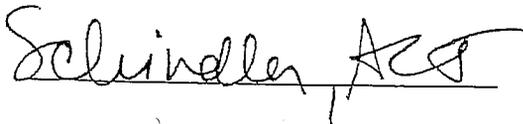
IV. Attorney Fees

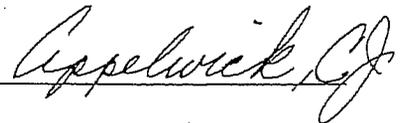
Torkild requests attorney fees on appeal under RAP 18.1. RCW 59.18.290(2) allows an award of attorney fees to a landlord who prevails in an unlawful detainer action. Because Torkild is the prevailing party, we grant her request for attorney fees, subject to compliance with RAP 18.1(d).

We affirm.

  
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WE CONCUR:

  
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<sup>21</sup> The Johnstons also argue that default judgment was improper because Torkild waived her right to pursue the December 2005 unlawful detainer action for non-payment of rent by accepting later rent payments. But, because they have presented no cognizable defense to the unlawful detainer action, we need not reach this argument.