COURT OF APPEALS NO. 44350-3-II

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

GLEN L. WALKER, an individual

Appellant

v.

ESTATE OF WILLIAM P. BREMER,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

The Respondent, Estate of William Bremer, respectfully submits this brief in response to the brief of the Appellant, Glen Walker mainly regarding the Real Estate Contract Forfeiture Act and the Unlawful Detainer Act. However, the structure of Appellant's opening brief adds concerns beyond the record due to inadequate citations both factually to the record and to appropriate case law.

Respondent requests that the Court affirm the trial court's decision on all counts and provide attorney's fees based on the Real Estate Contract and unlawful detainer statutes.

II. ASSIGNMENTS OF ERROR

Respondent asserts the following with regard to the Appellant's Brief and Assignments of Error.

A. Assignments of Error.

1. The trial court committed no error in Dismissing Appellant's Complaint to Vacate Forfeiture and in awarding attorney's fees to Respondent Bremer.
2. The trial court committed no error in denying Appellant Walker's Motion for Revision of the Writ of Restitution and awarding fees to Respondent Bremer.

3. The trial court committed no error in denying Appellant's Change of Judge after Appellant's Attorney sought a ruling from the trial court on a Motion to Consolidate Cases.

B. Issues Related to Assignment of Error.

1. RCW 61.30.140, a special statute, requires that Appellants follow a specific method of service of process, which Appellant failed to execute by the expiration of the statute of limitations.
2. Legislative history affirms that "attorney" was purposely omitted as a class of persons who can be served under RCW 61.30.140.
3. An attorney must be authorized by a client to accept service in order to accept service on the client's behalf. Attorneys represent clients only for those cases the client authorizes, not future litigation.
4. Respondent concedes that Respondent is not the "attorney in fact" and was not the attorney for Mr. Bremer at the time of service.
5. No *lis pendens* was recorded in Pierce County pursuant to statute.
6. Respondents deny that RCW 4.28.080(16) applies in this case. However, should the Court determine that RCW 4.28.080(16) does apply, Respondents argue as follows:
   a) Under RCW 4.28.080(16) Appellant's mailing was deemed complete ten days after the required deadline for service, which in this case made Appellant's service untimely.

b) Respondent's attorney was not a service agent for Respondent for future litigation because it received claims for a Probate matter.

c) Respondent's Estate attorney's address was not Respondent's "usual mailing address."

7. Pursuant to RCW 61.30.100, the Real Estate Contract Forfeiture Act includes unlawful detainer provisions to remove persons remaining in possession of property after the perfection of the forfeiture. As a result, the trial court ruled correctly by entering the Order granting Respondent's Unlawful Detainer Action.

8. A seller seeking forfeiture of a Real Estate Contract under the Real Estate Contract Forfeiture Act must provide notice pursuant to statute. However, in this matter, the Real Estate Contract designated the address to mail the notices. This issue was not raised at the trial court and it is a verity on appeal.

9. The trial court's ruling involving discretion is binding when specifically sought by Appellant's counsel in attempt to circumvent a ruling of another trial court judge on the very same matter.

10. Appellant filed no objections to the Findings of Facts and Conclusions of Law. These new arguments are verities on appeal.

11. The Real Estate Contract specifically allows for Attorney's fees and costs on appeal.

12. Appellant presents disputed facts and facts not supported by the record. Because Appellant failed to timely preserve any objections to facts not supported by the records he, therefore, waives the same. Disputed facts are not reviewed *de novo*.

13. RAP 10.3(5) Requires Reference to the record for each factual statement. Appellant fails to cite to the record for numerous passages. Therefore, Appellant waives his arguments and factual citations.

III. STATEMENT OF THE CASE

A. Real Estate Contract

Along with the co-purchasers, Scott and Elizabeth Hawton, Appellant sought to purchase commercial property under a Real Estate Contract on October 23, 2009, for property located at 15532 Main Street East, Sumner, Washington. (CP p.2, lns 16-18 (#12-2-14006-1)). William Bremer, (hereinafter "Mr. Bremer") now deceased, was the seller (CP p.2, ln 17 (#12-2-140061)). Appellant signed the contract in his individual capacity, and Scott Hawton and Elizabeth Hawton signed as husband and wife. (CP p.8 and 24 (#12-2-14006-1)). The purchasers provided their address in the Real Estate Contract as 23822 16th Lane So, Des Moines, WA 98198. (CP p.8 (#12-2-14006-1)).

Included in the Real Estate Contract was a provision for attorney's fees, which states:

23. COSTS AND ATTORNEY'S FEES. If either party shall be in default under this contract, the non defaulting party shall have the right, at the defaulting party's expense, to retain an attorney or collection agency to make any demand, enforce any remedy, or otherwise protect or enforce its rights under this contract. The defaulting party hereby promises to pay all costs and expenses so incurred by the non defaulting party, including, without limitation, collection agency charges; ... reasonable attorney's fees and costs, and the failure of the defaulting party to promptly pay the same shall itself constitute further and additional default.

In the event either party hereto institutes, defends, or is involved with any action to enforce the provisions of this contract, the prevailing party in such action shall be entitled to reimbursement by the losing party for its court costs and reasonable attorneys' fees and costs, including such costs and fees that are incurred in connection with any forfeiture, foreclosure, public sale, action for specific performance, injunction, damages, waste, deficiency judgment, unlawful detainer, or to contest the reasonableness of any person's costs or attorneys' fees...appeal, or other proceedings. All reimbursement required by this paragraph shall be payable on demand...

(CP p. 22 (#12-2-14006-1))

B. <u>Partition Action – *Walker v. Hawton, et al.* PCSC Cause Number 11-2-13449-6</u>

In September 2011, Appellant first filed suit against Respondent in Pierce County Superior Court under cause number 11-2-13449-6, *Walker v. Hawton, et al.* as part of a Partition action of the commercial property in Sumner. (CP p. 118, lns 5-9 (#12-2-15451-7)). The suit between the two purchasers of the property included Mr. Bremer as a Defendant because of his role as the seller of the property named in the Real Estate Contract. (CP p. 3 lns. 8-9 (#12-2-15451-7)).

C. Forfeiture Action Initiated.

On June 11, 2012, after receiving no payments from any party effectively since November, 2009, Mr. Bremer initiated a forfeiture action under §19 of the Real Estate Contract. (CP p.28 (#12-2-14006-1)). Initiating the forfeiture triggered the notice requirements under § 24 of the Real Estate Contract. The Real Estate Contract § 24 provides:

> Notices. Subject to the requirements of any applicable statute, any notices required or permitted by law or under this contract shall be in writing and shall be personally delivered or sent by first class certified or registered mail, return receipt requested, with postage prepaid, to the parties' addresses set forth in the Specific Terms of this contract. Either party may change such address for notice...
>
> (CP p.22 (#12-2-14006-1)).

Respondent provided Notice of Forfeiture pursuant to statutory requirements of the Real Estate Contract and RCW 61.30. (CP p. 43-52 (#12-2-14006-1)). Respondent provided the Notice via mailings to the address listed in the Real Estate Contract, as well as the attorneys for the parties, those listed in the pertinent documents, and by posting the Notice on the property. (CP p. 33 (#12-2-14006-1)).

D. Hawton Bankruptcy, Death of William Bremer, & Motion for Relief from Stay

On June 18, 2012, a week after Respondent recorded the Notice of Forfeiture, Scott Hawton and Elizabeth Hawton petitioned for bankruptcy protection. (CP p. 3 lns 3-6 (#12-2-15451-7)). One week

later, on June 25, 2012, William Bremer passed away. (CP p. 1 lns. 19-20 (#12-2-15451-7)).

Appellant Walker sought no Bankruptcy protection. (CP p. 72 ln. 29 – p.72 ln.1 (#12-2-14006-1)). However, as a result of the bankruptcy filing, the property and all efforts at forfeiture of the Real Estate Contract as it pertained to Scott Hawton and Elizabeth Hawton became a matter for the US Bankruptcy Court, which stayed all proceedings regarding forfeiture and the Superior Court case. (CP p. 36 ln. 27 (#12-2-15451-7)).

In order to proceed with the forfeiture action, Respondent filed a Motion for Relief from Stay with the US Bankruptcy Court on September 7, 2012, and provided notice to Appellant and the Hawtons pursuant to the Real Estate Contract and court rules. (VR 3 ln. 21 – VR 4 ln. 1 November 30, 2012) Service included the addresses provided in the Real Estate Contract. (CP p. 8 (#12-2-15451-7). Respondent provided notice to counsel for the parties as well. (CP p. 40 (#12-2-15451-7). No party filed a response or objection to the Motion for Relief from Stay. (VR 9 lns. 3-4 November 30, 2012)

On October 5, 2012, US Bankruptcy Court Judge Timothy Dore granted the Motion for Relief of Stay and signed the accompanying Order thereby permitting the Estate of William Bremer to proceed with the forfeiture. (CP p. 36-37 (#12-2-14006-1)).

E. Declaration of Forfeiture and Perfection.

On October 11, 2012, Respondent recorded the Declaration of Forfeiture, and posted it on the property at issue at 15532 Main Street East, Sumner, Washington. (CP p. 39 (#12-2-14006-1)) and (CP p. 43 (#12-2-140061)). Respondent also mailed copies to all parties, including Appellant, via certified mail return receipt requested and U.S. mail at the addresses listed in the Real Estate Contract. (CP p. 46-48 (#12-2-140061)). In addition, Respondent provided Appellant's Counsel, Mr. Charles Cruikshank, a copy of the Declaration of Forfeiture on October 12, 2012. (CP p. 50 (#12-2-140061)).

The language in the Declaration of Forfeiture terminated Appellant's right, title and interest with respect to the property. The language provided clear guidance and ample notice regarding the deadline to vacate the premises. The Declaration of Forfeiture states in pertinent part:

> (d.) Termination of Purchaser's Rights/Forfeiture
> 1. The buyer's rights under the above referenced contract are cancelled; and
> 2. All right, title, and interest of the buyer in the property is terminated; and
> 3. The buyer's rights under the contract shall be canceled; and
> 4. All sums previously paid under the contract by the buyers shall belong and shall be retained by the seller; and
> 5. All of the buyer's rights in all improvements made to and on the property shall belong to the seller; and
> 6. **All buyers and all other persons occupying the property whose interests are forfeited shall surrender possession of the property and improvements to seller ten days after the declaration of forfeiture is recorded; and**

7. All right title and interest of any person claiming an interest in all or any portion of the property through the buyer, or whose interest is subordinate to the seller's interest in the property, are terminated.

(emphasis added). (CP p. 40-41 (#12-2-14006-1)).

Surrender of Possession per the Declaration of Forfeiture clearly provides that all buyers and all persons whose rights in the property have been terminated and who are in or come into possession of any portion of the property (including improvements) are required to **surrender such possession to the seller not later than ten days after the declaration of forfeiture is recorded**. (CP p. 41 (#12-2-14006-1)). As a result, surrender should have taken place on or before October 21, 2012. (CP p. 41 (#12-2-14006-1)).

F. Unlawful Detainer – PCSC Cause Number 12-2-14006-1.

Despite failing to cure as provided in the Notice of Forfeiture, Appellant refused to vacate the property by October 21, 2012, pursuant to the Declaration of Forfeiture. (CP p. 4 lns. 19-26 (#12-2-14006-1)). Further, Appellant never entered into or signed a lease agreement with Respondent. (VR 3 lns 12-14 November 30, 2012).

Due to Appellant's failure to vacate the property, on October 24, 2012, the Estate of William Bremer filed a Complaint for Unlawful Detainer and a Motion to Show Cause as to why the trial court should not issue a Writ of Restitution to remove Appellant. (CP p. 1, 297 (#12-2-14006-1)). At the Show Cause hearing on November 9, 2012,

Commissioner Gelman reviewed the facts and signed the Writ of Restitution, allowing removal of Appellant from the property. (CP p. 60 lns. 15-20 (#12-2-14006-1)).

Appellant remained on the property until threatened with forcible removal by the Pierce County Sheriff's Department on November 13, 2012. (CP p. 306 (#12-2-14006-1)). After vacating the property Appellant attempted to return to the property in violation of the provisions of the Writ of Restitution, which states:

1. **The Defendant be found guilty of unlawful entry pursuant to RCW 59.12.010; and,**
2. A Writ of Restitution be issued forthwith by the clerk of this Court in the form provided by law, restoring to Plaintiffs possession of said premises within ten (10) days after the Writ's date; and,
3. Plaintiffs shall not be required to post a restitution bond; and
4. **Plaintiff is under no obligation to store Defendant's personal property; and**
5. **The Defendant shall remove no property belonging to the Plaintiff currently house or stored on the premises; and,**
6. The Defendant pay damages for unlawful entry in an amount to be proven at trial;
7. The Defendant shall pay for Plaintiff's costs and reasonable attorney's fees in the sum of $__Reserved__; and
8. For judgment against Defendant for unlawful detainer in the amount of charges owing at the time of the judgment; and
9. **The Defendant shall be prohibited to enter onto the premises or any part of the property prior to the enforcement of the Writ of Restitution without written consent;**
10. For such other and further relief as the Court deem just and equitable.

(CP p. 59 (#12-2-14006-1)). (emphasis added).

Appellant filed a Motion for Revision on November 19, 2012. (CP p. 61 (#12-2-14006-1)). On November 30, 2012, the trial court entered on Order Denying the Motion for Revision. (CP p. 157 (#12-2-14006-1)).

G. Vacate Forfeiture – PCSC Cause Number 12-2-15451-7.

The Declaration of Forfeiture provided the date to file and serve the action to set aside the forfeiture.

> ...have the right to commence a court action to set aside by filing and serving the summons and complaint within sixty days after the date the Declaration of Forfeiture is recorded if the seller did not have the right to forfeit the contract or fails to comply with Chapter 61.30 RCW in any material respect. If you wish to exercise this right **you must file and serve a summons and complaint on the seller or the person who signed the Declaration of Forfeiture not later than December 11, 2012.**

(CP p. 41 (#12-2-14006-1)). (emphasis added).

On December 7, 2012, Appellant filed a Complaint to Vacate Forfeiture and for Rescission and Damages in Pierce County Superior Court. (CP p. 1 (#12-2-15451-7)). In this lawsuit, Appellant attempted to vacate the perfected forfeiture action. (CP p. 7 lns. 16-21 (#12-2-15451-7)). Moreover, Appellant's Complaint alleged that the Real Estate Contract was void *ab initio* due to an alleged non-disclosure of environmental hazard purported present on the commercial property. (CP p. 3 ln. 27 – p. 4 ln. 6 (#12-2-15451-7)).

Although Appellant filed timely with the trial court, Appellant's service of the Summons, Complaint, and Case Schedule was untimely

because he failed to meet the statutory requirement of personally serving Kevin Bremer *See Chart Provided by Appellant in Response of Plaintiff's Motion to Dismiss, hereafter known as Appendix "A".* Instead, Appellant served Respondent's attorney and mailed to Kevin Bremer via regular post, a copy of the pleadings on December 10, 2012. (CP p. 52-60 (#12-2-15451-7)). Appellant admits knowing the address of Kevin Bremer in Snohomish County but failed to serve him there. (CP p. 52-60 (#12-2-15451-7)).

Although Appellant's Declaration states that he never attempted to serve Kevin Bremer, he now states in his opening brief that he attempted to serve Kevin Bremer twelve times.

> Between December 7 and December 10, 2012, Walker made some twelve different personal attempts on Mr. Bremer, not including the uncounted, numerous phone calls to the Bremer residence by Walker's brother, all to no avail, effectively ruling out abode service.

(Appellant's Brief, p. 15 lns 12-13, p. 16 lns 1-3). (*See also* Appendix "A," Chart Provided by Appellant).

On December 14, 2013, Respondent filed a Motion to Dismiss, set for hearing on January 4, 2013. (CP p. 10 (#12-2-15451-7)). Despite allowing Appellant's improper service of his reply to the Motion to Dismiss, the trial court entered an Order of Dismissal with Prejudice on January 4, 2013. (CP p. 91 (#12-2-15451-7)).

H. Appellant's Motion to Consolidate Cases Denied by Two Judges.

On December 13, 2012, Appellant filed a Motion to Consolidate Cases, set for hearing in each of the two cases on December 21, 2012. (CP p. 117 (#12-2-15451-7)). The Motion to Consolidate intended to bring together Appellant's lawsuit for Partition (#11-2-13449-6) with Appellant's lawsuit to Vacate Forfeiture (#12-2-15451-7). (CP p. 117 ln. 27 – p. 118 ln. 4 (#12-2-15451-7)). Appellant filed the same Motion into both cases, one set for hearing before Judge Garold Johnson, (#11-2-13449-6) and one set for hearing before Judge John Hickman (#12-2-15451-7). (CP p. 48 and p. 153 (#12-2-15451-7)).

After hearing arguments from counsel for Appellant and counsel for Respondent, Judge Johnson denied Appellant's Motion to Consolidate (CP p. 154 (#12-2-15451-7)). Then, shortly thereafter that same day, Appellant's counsel specifically sought to have his Motion to Consolidate heard again before Judge Hickman during hearings for a Motion for Attorney's Fees and a Motion for Presentation of Findings of Fact and Conclusions of Law in a case unassociated with his Motion to Consolidate. (CP p. 48-49 (#12-2-15451-7)). *See also* Appendix "C," Memorandum of Journal Entry. After hearing arguments of counsel, Judge Hickman denied the Motion to Consolidate. *See* Appendix "C."

As the hearing returned to the Motion for Attorney's Fees and Motion for Presentation of Findings of Fact and Conclusions of Law, PCSC cause number 12-2-14006-1, the Findings of Fact and

Conclusions of Law were entered on December 21, 2012. (CP p. 275 (#12-2-14006-1)). They included the following:

> 10. Findings of Fact and Conclusions of Law were entered supporting the attorney's fees in this case providing: "In calculating the Lodestar fee, the Court considered: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment; (5) the customary fee in the community for similar work; (6) the contingent nature of the fee; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; and (11) awards in similar cases. *Bowers v. Transamerica Title Ins. Co*, 100 Wn. 2d 581, 596 (1983).
>
> 11. The Court determined the Plaintiff seeking fees provided reasonable documentation of work performed in order to calculate the number of hours and that the rate is considered as reasonable. *Washington State Physicians Ins. Exch. & Ass'n v. Fison Corp*, 122 Wn.2d 299, 335 (1993) (citing *Bowers*, 100 Wn.2d at 597).
>
> 12. The fees and costs requested by Plaintiff's attorney and set forth above in the Court's findings are properly recoverable under §19(c) of the Real Estate Contract RCW 61.30.100(3) and as dictated under RCW 59.12.170 for twice the amount of damages.
>
> 13. Fees are awarded in the amount of $7,500.00.
>
> (CP p. 274 ln. 16 – p. 275 ln. 10 (#12-2-14006-1)).

IV. SUMMARY OF ARGUMENT

As a special statute, the Real Estate Contract Forfeiture Act requires a specific method of service of process. (RCW 61.30.050). In his efforts to vacate the forfeiture, Appellant failed to timely and properly serve Respondent with that specific method and, therefore, the action to vacate

stands barred by the statute of limitations. (CP p. 52-60 (#12-2-15451-7)).

The Real Estate Contract Forfeiture Act also requires unlawful detainer actions to proceed under specific statute. (RCW 61.30.050). Respondents followed the dictates of the statute to remove Appellant from the property, after allowing him 161 days from the Notice of Forfeiture to remove his personal belongings. (CP 306-310 (#12-2-14006-1)). No error took place in the trial court awarding a Writ of Restitution to forcibly remove Appellant from the premises.

The trial court properly awarded attorney's fees to Respondent under the Real Estate Contract and the unlawful detainer statute. The attorney for the Respondent submitted a complete accounting of all the time spent and fees and costs associated with litigating the case. (CP p. 266-275 (#12-2-15451-7)). The trial court deemed the fees and costs reasonable and fair given the complexity the case and underlying issues. (CP p. 263-275 (#12-2-14006-1)). Appellant's attorney enjoyed ample opportunity to review and challenge the submission of the fees and costs total. (CP p. 275 (#12-2-15451-7)). Following the trial court's reduction in the total, Judge Hickman ruled that the fees were fair and reasonable. (CP p. 275 (#12-2-15451-7)).

V. ARGUMENT

A. Trial Court Committed No Error in Dismissing Appellant's Complaint to Vacate Forfeiture and Awarding Attorney's Fees to Respondent.

1. Appellant Failed to Comply with Process of Service Per Special Statute RCW 61.30.140 on Three Counts.

The Court reviews issues of statutory construction and constitutionality as questions of law *de novo*. *See State v. Evans*, 177 Wn.2d 186, 191, 298 P.3d 724 (2013). The Real Estate Contract Forfeiture Act, RCW 61.30.140, requires a clear specific method of process of service in order to vacate the forfeiture. RCW 61.30.140(2) provides in pertinent part as follows:

> An action to set aside the forfeiture permitted by this section may be commenced by a person entitled to be given the required notice under RCW 61.30.040 (1) and (2). For all persons given the required notices in accordance with this chapter, such an action **shall be commenced by filing and serving the summons and complaint not later than sixty days after the declaration of forfeiture is recorded. Service shall be made upon the seller or the seller's attorney-in-fact, if any, who signed the declaration of forfeiture.** Concurrently with commencement of the action, the person bringing the action **shall record a *lis pendens* in each county** in which any part of the property is located.
>
> (emphasis added).

"Unless clear contrary legislative intent exists, the word "**shall**" in a statute is a mandatory directive" *Morris v. Palouse River and Coulee city Railroad, Inc.*, 149 Wn.App 366, 371, 203 P.3d 1069 (*citing Thayer v. Edmonds*, 8 Wn.App 36, 40, 503 P.2d 1110 (1972). (emphasis added).

The mandate for service under the statute is clear and concise. "Where a statute is unambiguous, the court assumes the legislature means what it says and will not engage in statutory construction past the plain meaning of the words." *Morris v. Palouse River and Coulee City Railroad, Inc.*, 149 Wn.App 366, 371, 203 P.3d 1069 (2004). (citations omitted).

The special statute, RCW 61.30.140, requires that Appellant meet the following requirements to initiate his lawsuit: (1) the filing **and** serving of both the **summons and complaint** not later than sixty days after the Declaration of Forfeiture was recorded; (2) service must be **upon the seller or the seller's attorney in fact**, if any, who signed the declaration of forfeiture; and (3) **A *lis pendens* shall be recorded concurrently with commencement with the action**. *See* RCW 61.30.140. (emphasis added).

a) Untimely and No Personal Service on Respondent.

Appellant failed to timely file **and** serve the Summons and Complaint on Respondent. (emphasis added). RCW 61.30.140, provides that service "shall be made upon the seller or the seller's attorney-in-fact" and that service shall effectuate "not later than sixty days after the declaration of forfeiture is recorded." The statute requires personal service on Respondent Bremer in addition to timely service.

In *Hastings v. Grooters*, 144 Wn.App 121, 182 P.3d 447 (2008), the court determined that the language "upon" in RCW 61.30.120 also

implied "personal service." The court stated, "The fact that service is to be made "upon" any of three different individuals indicates that the service contemplated is personal service." *Id.* at 126. In this case only two identifiable parties appear suitable for service: "the seller or the seller's attorney in fact, if any who signed the declaration of forfeiture." *See* RCW 61.30.140. However, in this specific instance, as the only signer on the Declaration of Forfeiture, Kevin Bremer emerges as the only identifiable person servable per statue. (CP p. 41 (#12-2-14006-1)). Kevin Bremer never received personal service. (CP p. 52-60 (#12-2-15451-7)).

Civil Rule 4 regulates personal service. *See id.* Civil Rule 4 also provides additional options for service including RCW 4.28.080 and RCW 4.28.090 [Summons and Service on Corporation without officer in state upon whom process can be served], 23B.05.040 [Service on Corporation], 23B.15.100 [Service on foreign corporation], 46.64.040 [Nonresident's use of highways-Resident leaving state-secretary of state as attorney' in fact], and 48.05.200 and 48.05.210 [Commissioner as attorney for service of process-Exception] and other statutes which provide for personal service."

Under RCW 4.28.080(15) service allows for: "In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein." (RCW 4.28.080(15). In *Hastings v.*

Grooters, 144 Wn.App 121, 128, 182 P.3d 447 (2008), the Court determined that RCW 4.28.080(15) provided a "catch all" and stated that "Defendant" included "a person required to make answer in an action or suit of law or equity...."

The last day for Appellant to file and serve an action to set aside the forfeiture fell on December 11, 2012. Appellant filed his Complaint on December 7, 2012, leaving himself a window of four days to effectively serve Respondent. (CP p. 1 (#12-2-15451)). No personal service on any person of suitable age or discretion then a resident at Kevin Bremer's abode took place. *See* Appendix "A," Chart Provided by Appellant. No personal service upon Respondent took place. *See* Appendix "A." Despite knowing the Respondent's home address, the Appellant, in fact, made no attempt of service on Kevin Bremer at his Snohomish address. *See* Appendix "A," Chart Provided by Appellant. Appellant admits this in his Response to Motion to Dismiss.[1] The Declaration of Glen Walker makes the service record clear:

> After I had filed the Summons and Complaint with the Pierce County Clerk on December 7, I drove **Mr. McCullough to the Acebedo Law Office in Puyallup** so he could serve Mr. Acebedo, **as the attorney for Kevin E. Bremer**, Personal Representative of the estate of William P. Bremer. That attempt was unsuccessful.
>
> I had asked my brother, Bill Walker, to find out for me where Mr. Bremer could be found.

[1] Appellant's Motion to Dismiss provides, "Since the only way for Walker's attorney, to mail the Summons and Complaint pursuant to RCW 4.28.080(16) was to mail it to his usual mailing address or address, of which two were known, at Mr. Acebedo's address **and to his Snohomish County address**. (CP p. 65 lns 15-18 (12-2-15451-7)). (emphasis added).

> He told me when I talked with him, on December 8, that he had repeatedly tried to contact Mr. Bremer by phone and that he had only been able to speak with a woman that he thought was Mr. Bremer's wife and that he had been told by her that Mr. Bremer was out of town and not expected to return until after December 11.
>
> I delivered copies of the Summons and Complaint on Monday, December 10, to William "Bill" Farmin at AA Process Servers, who agreed to attempt service on **Mr. Acebedo....**
>
> Because my lawyer told me to that Mr. Farmin was unable to go to Snohomish, where Mr. Bremer lived and to serve anyone that he could find at his house due to another engagement, I called Renton Process Servers, while I was in Puyallup at about 4:30 pm on Monday, **December 10**, to have them serve another adult at his house. The woman I spoke to said only if I could get the papers there before closing at 5:00 p.m. **but it was impossible drive there by then**.

(CP p. 53 ln. 3 – p. 54 ln.8 (#12-2-15451-7)). (emphasis added). *See also* Appendix "A," Chart Provided by Appellant.

In this Declaration of Glen Walker, Appellant clearly states he made no attempt to serve Kevin Bremer at his home address (CP p. 52-54 (#12-2-15451-7)). Instead it shows alleged telephone calls and service attempts to the attorney Pierre Acebedo, whose firm represents the Estate of William Bremer in the Probate of the Estate. (Pierce County Superior Court cause number 12-4-01067-9). Appellant cites the Probate Notice to Creditors as the basis for attempting service upon the Probate attorney. The Declaration clearly implies **no process server** received a Summons and Complaint for service on Kevin Bremer on or before December 10, because "it was impossible to drive it there by then." (CP p. 53 ln. 3 – p. 54 ln.8 (#12-2-15451-7)).

Yet, Appellant now offers an uncited contradictory statement in Appellant's opening brief. "Walker made **some twelve different personal service attempts on Mr. Bremer**, not including the uncounted, numerous phone calls to the Bremer residence by Walker's brother, all to no avail, effectively ruling out abode service." (Appellant's opening brief p. 15 lns 13-14 and p. 16 lns 1-5). (emphasis added). This uncited and unsupported statement is made in bad faith to this Court.

Appellant failed to meet the requirements under RCW 4.28.080(15), because Appellant provided no service of the Summons and Complaint at the house of Kevin Bremer's "usual abode with some person of suitable age and discretion then resident therein." As a result, Appellant failed to meet the service requirements and the statute of limitations bars his claim. The language provided by statute is not only mandatory but jurisdictional. "Where a special statute provides a method of process, compliance therewith is jurisdictional. *Ashley v. Pierce County*, 83 Wn.2d 630, 636, 521 P.2d 711 (1974), *Sowers v. Lewis*, 49 Wn.2d 891, 307 P.2d 1064 (1957).

Appellant attempts to blame Respondents for Appellant's self created emergency in their inability to serve Kevin Bremer, but case law provides otherwise. In 1973 this Court stated: "We wish to emphasize that those who are to be served with process are under to obligation to arrange a time and place for service or to otherwise accommodate the process server." *Thayer v. Edmonds*, 8 Wn.App 36, 42, 503 P.2d 1110 (1972).

b) Substitute Service Under RCW 4.28.080(16) Not Authorized Because of Failure to Exercise Due Diligence. Appellant's Undoing Came by His Own Failure to Properly Serve

Although RCW 4.28.080(16) allows for substitute service in certain circumstances, reasonable diligence must be exercised. (CP p.1 (#12-2-15451-7)). RCW 4.28.080(16) states:

> In Lieu of service under subsection (15) of this section, where the person cannot **with reasonable diligence** be served as described, the summons may be served as provided in this subsection, and **shall be deemed complete on the tenth day after the required mailing**: By leaving a copy at his or her **usual mailing address** with a person of suitable age and discretion who is a resident, proprietor, or agent thereof and by thereafter mailing a copy by first-class mail, postage prepaid, to the person to be served at his or her usual mailing address. For purposes of this subsection "usual mailing address" does not include a United States postal service post office box or the person's place of employment.

(RCW 4.28.080(16)).

According to Appellant's own statement, he made no attempt to serve Kevin Bremer because they simply waited too long and the service process company would not have been able to deliver the documents by 5:00 pm on December 10, 2012. (CP p. 54 lns. 2-9 (#12-2-15451-7)). Because Appellant waited until four days before the deadline for service and made no attempt to serve Kevin Bremer, Appellants fail to demonstrate reasonable diligence.

c) Service on Respondent's Attorney as "Agent" Improper Under 4.28.080(16)

This Court must disallow service upon an attorney as an "agent" or "service agent" under RCW 4.28.080(16) for two reasons. First,

allowing service of "attorneys" as agents contravenes the legislative intent of RCW 61.30.140. Second, service of attorney's as agents under 4.28.080(16) contravenes case law.

The legislature purposely omitted attorneys as agents for service in lieu of the "seller" under RCW 61.30.140, regardless of titling them "agents" or "service agents." In 1988 the legislature removed "attorney" as a class of persons from the service requirements under RCW 61.30.140(2). The intent of the legislature was clear when in 1988 the Legislature rewrote subsections 1 through 3 of RCW 61.30.140 which previously read:

> (2) An action to set aside the forfeiture permitted by this section may be commenced only by a person entitled to be given the required notices under RCW 61.30.040 (1) and (2). For all persons given the required notices in accordance with this chapter, such an action shall be commenced by **filing the summons and complaint and serving the seller or the seller's agent or attorney**, if any, giving either of the required notices, not later than sixty days after the declaration of forfeiture is recorded. Concurrent with commencement of the action, the person bringing the action shall record a *lis pendens* in each county in which any part of the property is located.
>
> 1988, RCW 61.30.140 c 86, §14 (emphasis added).
>
> The same subsection now reads:
>
> (2) An action to set aside the forfeiture permitted by this section may be commenced only by a person entitled to be given the required notices under RCW 61.30.040 (1) and (2). For all persons given the required notices in accordance with this chapter, such an action shall be commenced by filing and serving the summons and complaint not later than sixty days after the declaration of forfeiture is recorded. **Service shall be made upon the seller or the seller's attorney-in-fact, if any, who signed the**

> **declaration of forfeiture.** Concurrently with commencement of the action, the person bringing the action shall record a lis pendens in each county in which any part of the property is located.
>
> RCW 61.30.140. (emphasis added).

Regardless of title, service on the Respondent's attorney in separate or underlying matter is improper under the statute because that attorney falls outside of the class of persons to which statute permits service. "Where a statute is unambiguous, the court assumes the legislature means what is says and will not engage in statutory construction past the plain meaning of the words." *Morris v. Palouse River and Coulee City Railroad, Inc.*, 149 Wn.App 366, 371, 203 P.3d 1069. (citations omitted)

Moreover, case law provides that an attorney holds no authority to accept original process for a client without obtaining special authority from the client.

> It is no part of the duty of an attorney, **nor is it within his power as an attorney, to admit service for his client of an original process** by which the court obtains jurisdiction for the first time of his person. To exercise a power and bind his client, he would require a special authority, and in the performance of the duty he would act as attorney in fact, and not as an attorney of the court.

Ashcroft v. Powers, 22 Wn. 440, 443, 61 P.161 (1900). (citation omitted). (emphasis added).

The legislature's intent clearly identifies Respondent's counsel as part of a class not intended or acceptable for service of original process under RCW 61.30.140. Appellant should have known that serving

Respondent's attorney instead of Respondent was improper, but Appellant served Respondent's attorney anyway. RCW 61.30.140.

Forcing an attorney to accept service practically requires the attorney to violate his client's rights. "....[A]n attorney may not, however, surrender a substantial right of a client without special authority granted by the client." *Russell v. Maas*, 166 Wn.App 885, 890, 272 P.3d 273 (2012) (citing *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 303, 616 P.2d 1223 (1980). The legislature never intended to create an ethical conundrum for an attorney by forcing him to choose between unethical conduct and representing his client, which is why the language in the statute is clear and the plain meaning should prevail.

d) Appellant Missed the Statute of Limitations on Mailing Under RCW 4.28.080(16).

In addition to the other errors committed by Appellant, Appellant failed to meet the statute of limitations for mailing under RCW 4.28.080(16). Specifically, if this Court allows substitute service, then statute provides service "shall be deemed complete on the tenth day after the required mailing." Appellant admits that he mailed his pleadings on December 10, 2012 (Appellant's Brief, p. 17 lns 16-17). This deems service of the pleadings complete on December 20, 2012. The Declaration of Forfeiture provided "you must file and serve a summons and complaint on the seller or the person who signed the Declaration of Forfeiture not later than December 11, 2012." (CP p. 41 (#12-2-14006-

1)). By rule, Appellant effectively served his pleadings nine days after the statute of limitations expired. Therefore, Appellant's argument fails.

Regarding proper service, Appellant attempts to interweave a variety of inapplicable statutes and case law in an attempt to lead the Court to conclude that "personal service and first class mail notice was accomplished on December 10." (Appellant's Opening Brief p. 24 lns7-8). In his effort, Appellant draws on *Collins v. Lomas & Nettleton*, 29 Wn.App 415, 418, 481, 628 P.2d 855 (1981), even though "there is no statute of limitations issue or issue of tolling the statute of limitations." (Appellant's Brief p. 24 lns. 10-11) However, *Collins*, involves matters unrelated to the Real Estate Contract Forfeiture Act. In *Collins* the court indicated that the case could be refiled despite the ninety day period for service expired.

Appellant attempts to draw the focus away from the fact that "[t]o be valid, service of process must comply with statutory requirements." *Morris v. Palouse River*, 149 Wn.App 366, 203 P.3d 1069 (2009). The court defined "substantial compliance" as "actual compliance in respect to the substance essential to every reasonable objective of statute." *Weiss v. Glemp*, 127 Wn.2d 726, 733, 903 P.2d 455 (1995). (citations omitted).

Appellant also attempts to assert that he satisfied constitutional due process. (Appellant's brief p. 23 ln16). Appellant fails to recognize that "there is a difference between constitutionally adequate service and

service required by the statute. [B]eyond due process [requirements], statutory service requirements must be complied with in order for the court to finally adjudicate the dispute between the parties." *Id.* at 733-34. Appellant failed to meet these requirements.

e) Appellant Concedes Attorney not Served as Attorney in Fact or at Law.

RCW 61.30.140 requires "[s]ervice **shall** be made upon the seller or the seller's attorney-in-fact." (emphasis added). Consequently, under the plain meaning rule, reading and interpreting statute requires service **only upon the seller or his/her attorney-in-fact.** Blacks Law Dictionary defines "Attorney-in-Fact," as follows:

> Attorney in fact. A private attorney authorized by another to act in his place and stead, either for some particular purpose, **as to do a particular act, or for the transaction of business in general, not of a legal character**. This authority is conferred by an instrument in writing, called a "letter of attorney, or more commonly a "power of attorney".
>
> BLACKS LAW DICTIONARY p. 129 (6th ed. 1990). (emphasis added).

For the purpose of service in Appellant's lawsuit to vacate the forfeiture, Respondent's attorney met no standard conferring upon him the capacity of attorney-in-fact (CP p. 41 (#12-2-14006-1)).

Appellant's concedes in his opening brief that Respondent's attorney was **not the "attorney in fact"** and **not the attorney (at law) for service** pursuant to statutory requirements.

> Mr. Acebedo, as the attorney for Personal Representative Bremer, argued that he was not the attorney in fact for Mr. Bremer, which Walker concedes is true and that service upon

him as Bremer's attorney (at law) was not effective, conceded by Walker.

(Appellant's opening brief p. 18 lns 8-12).

Therefore, Appellant waives these arguments.

2. *Lis Pendens* not Recorded Pursuant to Statute.

Pursuant to RCW 61.30.140 Appellant failed to perfect their action to vacate the forfeiture by failing to record a *lis pendens*. RCW 61.30.140(2), provides: "Concurrently with commencement of this action, the person bring the action shall record a *lis pendens* in each county in which any party of the property is located." Appellant failed to record a *lis pendens* recorded concurrently with the filing and serving of the complaint. (CP p. 1 and p. 50 (#12-2-15451-7)). Appellant filed it with the trial court, however, it remained unrecorded. *See* Appendix "B," Brief in Opposition to Defendant's Motion to Consolidate, p. 6, lns 5-7.

3. Appellant's Argument Regarding Notice is Time Barred.

a) Appellant's Argument Regarding Notice to the Trustee is Time Barred.

Appellant failed to timely file and sever the Summons and Complaint on Respondent within sixty days of the recording of the Declaration of Forfeiture. Appellant was required to both file and serve the Complaint to Vacate by December 11, 2012. RCW 61.30.140 requires execution of **personal** service. No personal service was

executed. (CP p. 52-60 (#12-2-15451-7)). Instead, as previously argued in Section IV. A. 1. a), Appellant's argument is time barred.

b) Appellant Failed to Timely Object to Lack of Notice to Trustee and Appellant Lacks Standing to File Such Objection

Appellant cannot object to notice when they failed to object to Respondent's Motion for Relief from Stay, which was granted from the Bankruptcy Court and not appealed. On June 18, 2012, a week after Respondent recorded the Notice of Forfeiture, Scott Hawton and Elizabeth Hawton petitioned for bankruptcy protection. (CP p. 3 lns. 3-6 (12-2-15451-7)).

In general, upon filing their petition for bankruptcy protection, the Hawton's contracts, unexpired leases, and breaches of contracts, fell into legal limbo, temporarily staying efforts to forfeit the Real Estate Contract. *See Truck Drivers Local Union No. 807 v. Bohack Corp.*, 541 F.2d 312, 320 (2nd Cir. 1976). As a result, as a creditor, the Estate of William Bremer became constrained by the provisions of 11 USC §362 which provides for an automatic stay of Real Estate Contracts upon the filing of a bankruptcy case.

In order to proceed with the forfeiture, on September 7, 2012, Respondent filed a Motion for Relief from Stay with the US Bankruptcy Court pursuant to 11 USC §362 (a)(1) & (d)(1). Respondent provided notice to Appellant and the Hawtons pursuant to the Real Estate Contract and court rules. Service included the addresses provided in the

Real Estate Contract. (CP p. 22 (#12-2-14006-1). Respondent provided notice to counsel for the parties as well. (CP p. 82 lns 18-19 (#12-2-14006-1). No party filed a response or objection to the Motion. (CP p. 81 lns 7-8 (#12-2-14006-1).

On October 5, 2012, US Bankruptcy Court Judge Timothy Dore granted the Motion on Relief of Stay and signed the accompanying Order thereby permitting the Estate of William Bremer to proceed with the forfeiture. (CP p. 36-37 (#12-2-14006-1).

Appellant now argues that, because the bankruptcy trustee did not receive the Declaration of Forfeiture, the entire forfeiture process must be vacated. This is incorrect. First, Appellant does not represent the Hawtons and, therefore, has no standing to address the issue. Second, even if Respondent was required to give the trustee notice, RCW 61.30.040(1) provides that the forfeiture would not be void. Rather, for a holder of a security interest given in sufficient notice, the remedy would be pursuant to RCW 61.30.80(3), which allows the court to fashion a remedy appropriate for the circumstances. *In Re Bays*, 413 B.R., 866, 881 (2009). *See* Appendix "D," *In Re Bays*. Appellant would still not be the proper party making the argument in this case and, therefore, Appellant's argument fails.

B. Trial Court Committed No Error in Granting Writ of Restitution

1. Real Estate Contract Forfeiture Act § 61.30.100 Provides for Unlawful Detainer Under RCW 59.12.

Upon perfection of the forfeiture the seller inherits the right to proceed under RCW 59.12, the Forcible Entry and Forcible and Unlawful Detainer Act. RCW 61.30.100 provides:

> (3) The seller shall be entitled to possession of the property ten days after the declaration of forfeiture is recorded or any longer period provided in the contract or any other agreement with the seller. **The seller may proceed under chapter 59.12 RCW to obtain such possession**. Any person in possession who fails to surrender possession when required shall be liable to the seller for actual damages caused by such failure and for reasonable attorney's fees and costs of the action.

Respondent elected to pursue an unlawful detainer action under RCW 59.12 because the forfeiture statute gave him that remedy where tenants refused to leave. *See* RCW 61.30.100. RCW 61.30.100(3) contains the specific provisions which entitle Respondent to exercise the restitution of the premises. *See* RCW 61.30.100.

The language clearly states, "the seller may proceed under chapter 59.12 RCW to obtain such possession." The statutory language lacks any ambiguity. RCW 61.30.100. "Where a statute is unambiguous, the court assumes the legislature means what is says and will not engage in statutory construction past the plain meaning of the words." *Morris v. Palouse River and Coulee City Railroad, Inc.*, 149 Wn.App 366, 371, 203 P.3d 1069 (2009). (citations omitted).

In this case, Appellant failed to pay on a Real Estate Contract for two years and remained on the property after the perfection of the forfeiture. (CP p. 306 (#12-2-15451-7)) Appellant now argues that Respondent held no right to remove him under the unlawful detainer act.

(Appellant's Brief p. 32-38). Appellant tried to parlay his occupancy of the premises into a tenancy right allowing him to continue to remain on the property without paying on the Real Estate Contract. (CP p. 152-156 (#12-2-14006-1)). Even after two years of no payments and over 160 days from the Notice of Forfeiture, Appellant lacked enough time to remove himself and his belongings from the premises. (CP p.2 lns. 23-25 (#12-2-14006-1)) and (CP p. 4 lns. 19-26 (#12-2-14006-1)). By attempting to convert himself into a tenant, Appellant tried to force his continued occupancy of the property and continue his business onsite without payment until such time the Respondent forcibly removed him. *See generally* (CP p. 1-52 (#12-2-14006-1)).

2. Commercial Unlawful Detainer –*Turner and Najewitz* do not Apply.

Appellant erroneously applies *Turner v. White*, 20 Wn.App 290, 579 P.2d 410 (1978) and *Najewitz v. Seattle*, 21 Wn.2d 656, 659 152 P.2d 722 (1944), in his analysis of the case at bar. However, *Turner* and *Najewitz* fail to apply because both cases pertain to properties used as a primary residence. (CP p. 79 lns. 13-16 (#12-2-14006-1)). In *Turner,* the landlord/business owner allowed the tenant to live in a trailer house he owned as part of the tenant's compensation as an employee of the landlord/business owner. (CP p. 79 lns. 23-25 (#12-2-14006-1)). *Turner,* 20 Wn.App at 291. The Court ruled that RCW 59.12 entitled the tenant to *residential* protections. *See id.* Therefore, the tenant was entitled to proper notice prior to initiating an unlawful detainer action. *See id.*

In *Najewitz v. City of Seattle* the employee used the property as his primary residence. *Najewitz,* 21 Wn App at 657. The tenant's house sat on a city owned gravel pit, but an agreement with the city allowed the employee to reside at the house as part of his contracted security duties. *See id.* The *Najewitz* decision and *Turner* decision bear factual similarities in that the property provided a primary living residence for the tenant. (CP p. 79 lns. 13-16 (#12-2-14006-1)). Both *Najewitz* and *Turner* allow tenants to reside on the premises as part of an employment package, not tenants of commercial property for operating a business. (CP p. 79 lns. 23-25 and p. 80 lns, 10-12 (#12-2-14006-1)).

Neither *Turner* or *Najewitz* apply to this case because the Respondent forfeited the Real Estate Contract on a commercial property and no parties resided on the premises. (CP p. 80 ln. 29 – p. 81 ln. 1 (#12-2-14006-1)). This distinction deserved emphasis. RCW 59.12 affords greater protections to residential property because they often provide a person's abode. No such protections apply to commercial property because of the lack of residential tenancy. (CP p. 80 ln. 27-28). Consequently, no protections should be afforded to Appellant under RCW 59.12.

C. Trial Court's Discretionary Ruling on Change of Judge.

1. Appellant's Seeks Ruling on Motion to Consolidate Before Two Different Judges.

Appellant's counsel sought a decision involving discretion from the trial court on December 21, 2012, prior to filing his Declaration of

Prejudice. (CP p. 48-49 (#12-2-15451-7)). RCW 4.12.050 allows a party to establish prejudice by motion if the party believes they

> cannot, have a fair and impartial trial before such judge: PROVIDED, That such motion and affidavit is filed and called the attention of the judge before he or shall have made any ruling whatsoever in the case, either on the motion of the party making the affidavit, or on the motion of any other party to the action...involving discretion within the meaning of the proviso...

RCW 4.12.050.

On December 13, 2012, Appellant filed a Motion to Consolidate two cases and set the matters for hearing on December 21, 2012, under Pierce County Superior Court cause numbers 11-2-13449-6 and 12-2-15451-7. (CP p. 117 (#12-2-15451-7)). The Motion to Consolidate intended to combine Appellant's lawsuit for Partition (#11-2-13449-6) with Appellant's lawsuit to Vacate Forfeiture (#12-2-15451-7). (CP p. 117 (#12-2-15451-7)).

On December 21, 2012, Judge Johnson (#11-2-13449-6) denied the Motion to Consolidate. (CP p. 154 (#12-2-15451-7)). However, also on December 21, 2012, Respondent appeared for a hearing on Motion for Attorney's Fees and Presentation of Findings of Facts and Conclusions of Law in cause Number 12-2-14006-1, presided over by the same judge sitting for the other case designated for consolidation, Judge John Hickman. (CP p. 166-178 (#12-2-14006-1)).

At oral argument before Judge Hickman, in this **completely different cause number** Appellant's counsel took the opportunity to *sua*

sponte argue his Motion to Consolidate before Judge Hickman. (CP p. 48-49 (#12-2-15451-7)).

Appellant intentionally and purposefully sought a ruling from Judge Hickman on the Motion to Consolidate using a completely different case as a platform for his arguments. (CP p. 48-49 (#12-2-15451-7)). Less than two hours after Judge Johnson ruled on the Motion to Consolidate, Appellant's counsel attempted to use Judge Hickman to trump Judge Johnson's ruling. (CP p. 48-49 (#12-2-15451-7)). By acting in bad faith and seeking from Judge Hickman a ruling to contravene Judge Johnson's, the trial court properly subsequently denied Appellant a change of judge. Judge Hickman entered Memorandum of Clerk's Papers that states, "The Court denies the motion to consolidate [sic], as Judge Johnson did on his cause number as well." (CP p. 49 (#12-2-15451)).

2. Attempt to Change Judge

On January 2, 2013, twelve days after Judge Johnson and Judge Hickman ruled on Appellant's Motion to Consolidate, Appellant filed a Motion to Change Judge, including his Declaration of Prejudice, in the case presided over by Judge Hickman (#12-2-15451-7). (CP p. 71 (#12-2-15451-7)). On January 4, 2013, Judge Hickman entered an Order of Dismissal with Prejudice, effectively denying Appellant's Motion to Change Judge (CP p. 91 (#12-2-15451-7)).

The Appellate Court normally will not vacate a verdict and grant a new trial for errors of law if the party seeking a new trial failed to object to or invited the error. *In re K. R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). Appellant's counsel clearly invited this error the decision should be affirmed.

D. Attorney Fees and Costs are Provided for Under Both Contract and Statutory Provisions. Attorney's Fees are Also Appropriate on Appeal.

A court's threshold determination as to whether there is a statutory, contractual or equitable basis for fees is a question of law to be reviewed *de novo*. *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn.App 229, 277, 215 P.3d 990 (1990). (citations omitted). The amount of the fee award is reviewed for abuse of discretion. *See id.*

1. Contractual Attorney's Fees.

In this case, the Real Estate Contract contained specific terms allowing awards for attorney's fees and costs to the prevailing party. Specifically, Article 23 of the Real Estate Contract refers as follows:

> 23. COSTS AND ATTORNEY'S FEES. If either party shall be in default under this contract, the non defaulting party shall have the right, **at the defaulting party's expense**, to retain an attorney or collection agency to make any demand, enforce any remedy, or otherwise protect or enforce its rights under this contract. The defaulting party hereby promises to pay all costs and expenses so incurred by the non defaulting party, including, without limitation, collection agency charges; **... reasonable attorney's fees and costs, and the failure of the defaulting party to promptly pay the same shall itself constitute further and additional default.**

> In the event either party hereto institutes, defends, or is involved with any action to enforce the provisions of this contract, the prevailing party in such action shall be entitled to reimbursement by the losing party for its court costs and reasonable attorneys' fees and costs, **including such costs and fees that are incurred in connection with any forfeiture,** foreclosure, public sale, action for specific performance, injunction, damages, waste, deficiency judgment, unlawful detainer, **or to contest the reasonableness of any person's costs or attorneys' fees... appeal, or other proceedings.** All reimbursement required by this paragraph shall be payable on demand....
>
> (CP p. 22 (#12-2-14006-1)). (emphasis added).

The Real Estate Contract not only clearly provides for attorney's fees to the Respondent at the trial court, but also on appeal as the prevailing party.

2. Statutory Attorney's Fees.

Because Appellant failed to vacate the premises Respondent elected to pursue an unlawful detainer action, RCW 61.30.100(3), entitles Respondent to attorney's fees. RCW 61.30 grants the seller the option to choose an unlawful detainer action under RCW 59.12 should the tenant, in this case, a holdover tenant, refuse to vacate the premises after giving notice. RCW 61.30.100(3) provides: "Any person in possession who fails to surrender possession when required shall be liable to the seller for actual damages caused by such failure and for reasonable attorneys' fees and costs of the action."

Appellant failed and refused to vacate the premises ten days after recording and posting the Declaration of Forfeiture, pursuant to RCW 61.30.100(3), requiring Respondent to file an unlawful detainer action

under RCW 59.12 in order to remove Appellant from the premises. (CP p. 1 (#12-2-14006-1)). As a result, the trial court properly awarded attorney's fees. (CP p. 275 (#12-2-14006-1)).

Also RCW 4.84.030 provides for recovery of attorney's fees to the Respondent as the prevailing party at the trial court. RCW 4.84.030 states:

> Prevailing party to recover costs. In any action In the superior court of Washington the prevailing party shall be entitled to his or her costs and disbursements; but the plaintiff shall be in no case be entitled to his or her costs taxed as attorney's fees in action within the jurisdiction of the district court when commenced in the superior court.

RCW 4.84.030.

Washington courts consistently hold that statute provides for the prevailing party's right to recover costs. *See State ex rel. Lemon v. Coffin*, 52 Wn.2d. 894, (1958), 327 P.2d 741, *opinion clarified*, 332 P.2d 1096 (1958).

As a result of Appellant's refusal to vacate the premises according the terms of the Declaration of Forfeiture, Respondent unnecessarily incurred significant attorney's fees and costs. (CP 263-275 (#12-2-14006-1)). Appellant's refusal to abide by the terms of the Declaration of Forfeiture required Respondent to file the Unlawful Detainer action, entitling Respondent to attorney's fees and costs in this action. (CP p. 1 (#12-2-14006-1)).

10. Findings of Fact and Conclusions of Law were entered supporting the attorney's fees in this case providing: "In calculating the Lodestar fee, the Court considered: (1) the time and labor required; (2) the novelty and difficulty of the

questions; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment; (5) the customary fee in the community for similar work; (6) the contingent nature of the fee; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; and (11) awards in similar cases. *Bowers v. Transamerica Title Ins. Co*, 100 Wn. 2d 581, 596 (1983).

11. The Court determined the Plaintiff seeking fees provided reasonable documentation of work performed in order to calculate the number of hours and that the rate is considered as reasonable. *Washington State Physicians Ins. Exch. & Ass'n v. Fison Corp*, 122 Wn.2d 299, 335 (1993) (citing *Bowers*, 100 Wn.2d at 597).

12. The fees and costs requested by Plaintiff's attorney and set forth above in the Court's findings are properly recoverable under §19(c) of the Real Estate Contract RCW 61.30.100(3) and as dictated under RCW 59.12.170 for twice the amount of damages.

13. Fees are awarded in the amount of $7,500.00.

(CP p. 274 ln. 16 – p. 275 ln. 10 (#12-2-14006-1)).

While Appellant indiscriminately alleges Respondent's attorney's fees exceed the norm, he fails to recognize not only the appropriateness of the fees but that they come by his own actions. (Appellant's Brief p. 43 lns. 5-12). Appellant failed to adhere to the Real Estate Contract, to remove himself from the premises, and continues to file meritless suits against Respondent for actions, including this appeal. This pattern of conduct by Appellant and Appellant's counsel explains the continually increasing litigation costs.

Respondent's counsel took the necessary steps to protect Respondent from Appellant and all parties who, without just cause, continues to unnecessarily increase the costs of litigation.

E. Verities: Unchallenged Findings and New Arguments.

Appellant failed to object to the Findings of Fact and Conclusions of Law. Unchallenged Findings of Fact are verities on appeal. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). The Findings of Fact and Conclusions of Law should be affirmed.

Appellant failed to object to receiving notice at the address in the Real Estate Contract and did not provide a new address as it states in § 24 provides of the Real Estate Contract, which states, "Either party may change such address for notice..." (CP p.22 (#12-2-14006-1)). Therefore, Appellant cannot bring this issue now.

A party seeking review before the Court of Appeals must timely preserve the issue for appeal. An appellate court may refuse to review any claim of error, which was not raised at the trial court level. RAP 2.5(A); *Postema v. Postema Enterprises, Inc.*, 118 Wn.App 185, 193, 72 P.3d 1122 (2003).

Further, case law prohibits Appellant from presenting any new arguments not raised at the trial court level. Appellant must waive any new arguments. "We generally will not review an issue, theory or argument not presented at the trial court level. The purpose of this rule is to afford the trial court an opportunity to correct errors, thereby

avoiding unnecessary appeals and retrials." *Demelash v. Ross Stores*, Inc., 105 Wn.App 508, 527, 20 P.3d 447 (2001). "An appellate court may refuse to review any claim of error which was not raised in the trial court." *State v. Morgensen*, 148 Wn.App 81, 91 197 P.3d 715 (2008).

The Appellate Court defers to the trial of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. *Boeing Co. v. Heidy*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002). And, an appellate court may not substitute its evaluation of the evidence for that made by the trier of fact. *Goodman v. Boeing Co.*, 75 Wn.App 60, 82-83, 877 P.2d 703 (1994). "The substantial evidence standard is deferential and requires the appellate court to view all evidence and inference in the light most favorable to the prevailing party." *Lewis v. Dep't of Licensing*, 157 Wn.2d 446, 468, 139 P.3d 1078 (2006).

F. Appellant's Inadequately Cited and Referenced Brief.

Appellant's opening brief fails to reference relevant parts of the record and provides inadequately citations in support of its legal arguments. Where an appellant provides no meaningful legal analysis and cites no authority to support his arguments, the appellate court may decline to review it. *See Norcon Builders, LLC v. GMP Homes VG*, 161 Wn.App 474, 486, 254 P.3d 835 (2011) (declining to consider an inadequately briefed argument). *See also* RAP 10.3(a)(6) (requiring argument in support of the issues presented for review, together with

citations to legal authority and references to relevant parts of the record). This carries great gravity where a party fails to cite references to the record and constructs fabrications to attempt meet statutory requirements upon review.

In one clear instance, Appellant's makes the uncited statement that "Between December 7 and December 10, 2012, Walker made **some twelve different personal service attempts on Mr. Bremer**, not including the uncounted, numerous phone calls to the Bremer residence by Walker's brother, all to no avail...." (Appellant's Brief p. 15-16). Respondents provide a copy of Appellant's chart as Appendix A that diagrams the service efforts on Mr. Bremer from the lower court, **showing no service attempts on Mr. Bremer**, as well the declarations of Appellants indicating this same information. *See* Appendix "A," Chart Provided by Appellant.

In many instances, the cases cited by Appellant either support Respondent or simply fail to apply to the point at issue. The fact that Appellant brought two appeals, consolidated them before this Court, and then failed to point to the record in reference, requires more work for both the Appellate Court and Respondent's counsel because the statement used cannot be relied upon as accurate.

VI. CONCLUSION

Appellant cannot appeal to a higher Court to right errors of his own doing. First, Appellant was properly evicted from the commercial

property because there was no lease agreement between the parties and he refused to vacate the premises within ten days of the declaration of forfeiture. (VR 3 lns. 12-14 November 30, 2012) and (CP p. 4 lns. 19-26 (#12-2-14006-1)). Second, Appellant failed to timely serve his action to set aside the real estate forfeiture within the sixty day time period specifically stated under RCW 61.30.140 and file a *lis pendens.*

As the prevailing party, however, Mr. Bremer was certainly entitled to recover his attorney's fees and costs under the Real Estate Contract, the forfeiture statute, and the unlawful detainer statute. When presented by motion, Appellant had the opportunity to argue the appropriateness of the amount of fees requested by Mr. Bremer, which were substantial.

As a result in this series and patterns of errors, this Court must affirm the lower Court's decision and grant attorney's fees to Respondent based on the Real Estate Contract.

RESPECTFULLY SUBMITTED THIS 25th DAY OF September, 2013.

ACEBEDO & JOHNSON, LLC.

/s/ Pierre E. ACebedo
Pierre E. Acebedo, WSBA #30011
Attorney for Respondent, Estate of William Bremer

COURT OF APPEALS NO. 44350-3-II

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

GLENN L. WALKER AN INDIVIDUAL,	**COURT OF APPEALS NO. 44350-3-II**
Appellant,	
v.	
ESTATE OF WILLIAM P. BREMER,	**RETURN OF SERVICE**
Respondent.	

SERVICE DOCUMENTS: RESPONDENT'S BRIEF; SETTLEMENT DESIGNATION OF CLERK'S PAPERS.

Received by Eclipse Process Service on the 25th day of Sept. 2013 to be served on Charles Cruikshank

I, Darrin Sanford do hereby affirm that on the 25th day of September, 2013 at 5:03 PM at his place of business located at 108 S. Washington St. #306 Seattle WA 98104.

I Personally delivered at the time and place set forth above, a true and correct copy of the **RESPONDENT'S BRIEF; SETTLEMENT DESIGNATION OF CLERK'S PAPERS** leaving same with Charles Cruikshank.

I Declare under penalty of perjury under the laws of the State of Washington: That I am now and at all times herein mentioned a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action and competent to be a witness herein.

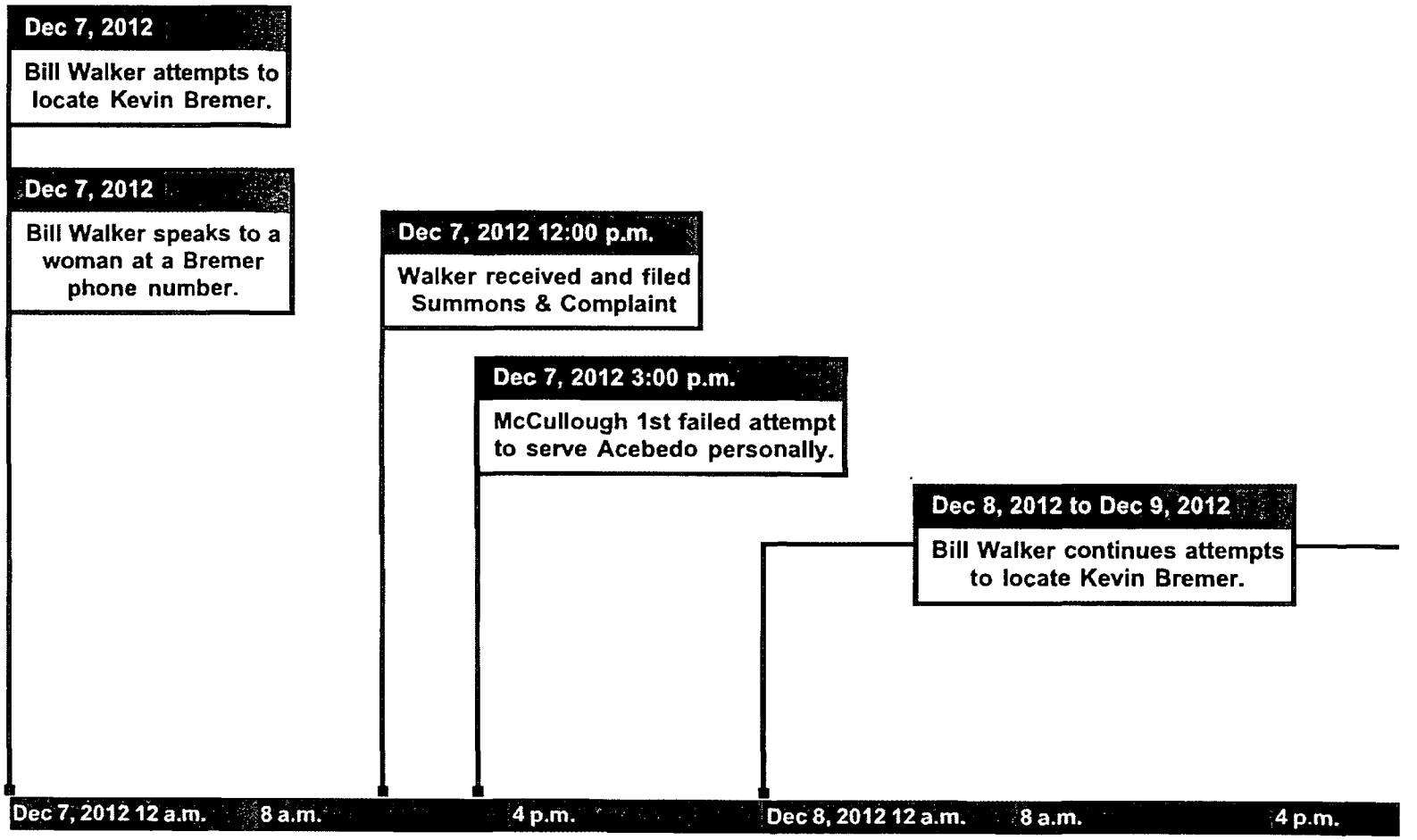
Darrin Sanford # King 1015853

VII. APPENDIX

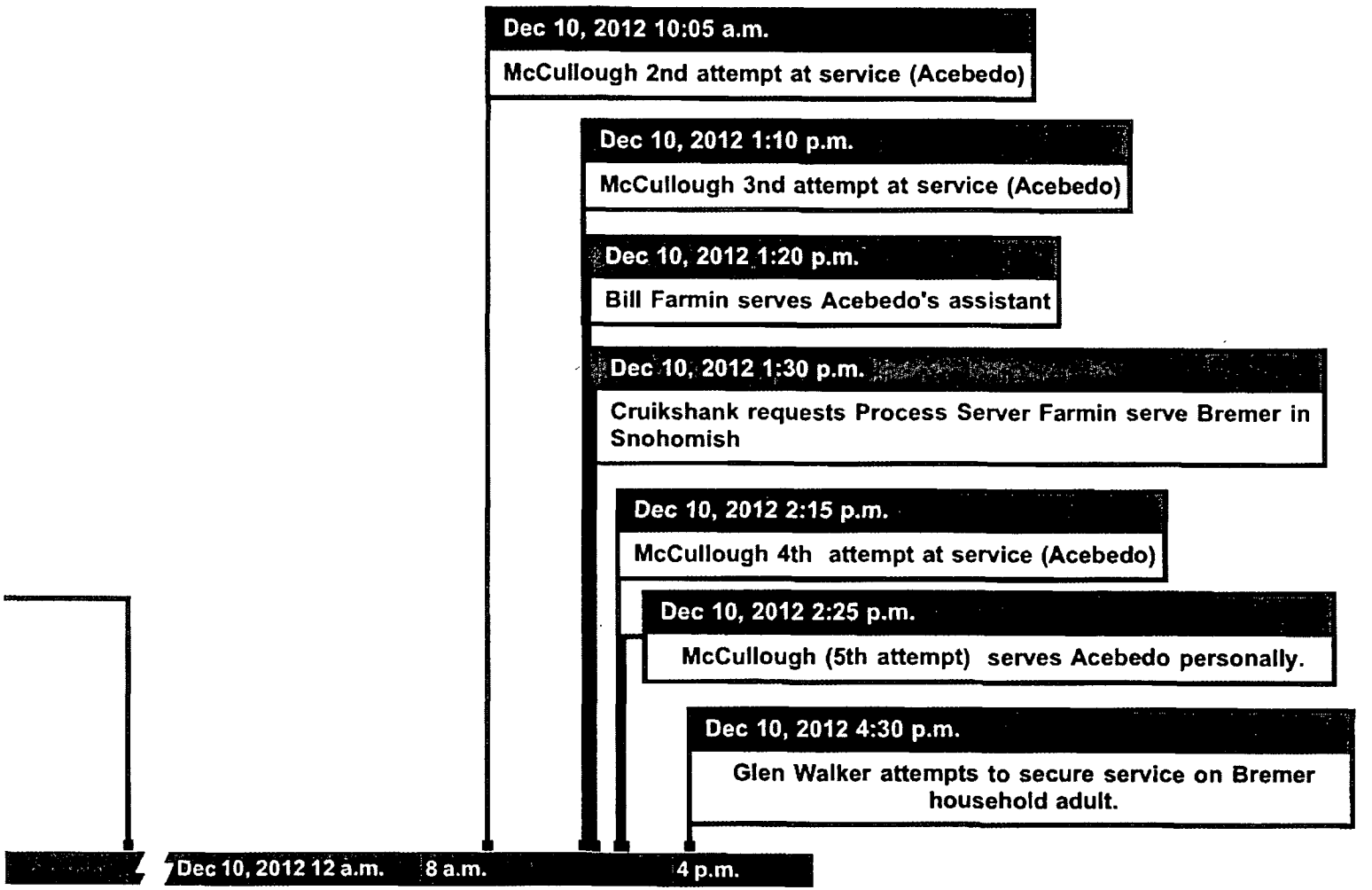
APPENDIX "A"

Exhibit 1
Page 1

Service
S/C for R



Events
escission



JUDGE JOHN R. HICKMAN

PIERCE COUNTY WASHINGTON SUPERIOR COURT

GLEN L. WALKER Plaintiff, v. KEVIN E. BREMER, Personal Representative of the estate of William P. Bremer Defendant	NO. 12-2-15451-7 DECLARATION OF GLEN L.WALKER

I make this declaration under penalty of perjury according to the laws of the state of Washington. I am competent to be testifying as I am over the age of majority and I am otherwise competent to make this declaration.

1. My name is Glen L. Walker. I am the Plaintiff.

2. I received the unfiled Summons and Complaint in this case from my attorney at or about 1:30 pm on December 7th, 2012.

3. I had been instructed that if I wanted to manage serving these, I could not serve them myself, but must have someone who was not a relative do it by handing the Summons and Complaint to the proper person and that had to be done no later than midnight on December 10, 2012.

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4. I hired Jeremi McCullough, who had worked for me before and who I knew was reliable to conduct service of the Summons and Complaint in Puyallup.

5. After I had filed the Summons and Complaint with the Pierce County Clerk on December 7, I drove Mr. McCullough to the Acebedo law office in Puyallup so he could serve Mr. Acebedo, as the attorney for Kevin E. Bremer, Personal Representative of the estate of William P. Bremer. That attempt was unsuccessful.

6. My attorney had earlier told me to also have the Summons and Complaint served on Mr. Kevin Bremer and on Mr. Acebedo.

7. I had asked my brother, Bill Walker, to find out for me where Mr. Bremer could be found.

8. He told me when I talked with him, on December 8, that he had repeatedly tried to contact Mr. Bremer by phone and that he had only been able to speak with a woman that he thought was Mr. Bremer's wife and that he had been told by her that Mr. Bremer was out of town and not expected to return until after December 11.

9. I was able to locate two process servers in north Pierce County general area, Renton Process Servers and AA Process Servers in Puyallup.

10. I delivered copies of the Summons and Complaint on Monday, December 10, to William "Bill" Farmin at AA Process Servers, who agreed to attempt service on Mr. Acebedo.

11. He reported only being able to serve his assistant, who was ". . . evasive as to when or if Mr. Acebedo or his associate would be in the office today," (December 10, 2012). (See Exhibit A).

12. Mr. McCullough then bluffed his way into Mr. Acebdeo's office (See Exhibit B), and

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managed to personally serve him.

13. Because my lawyer told me that Mr. Farmin was unable to go to Snohomish, where Mr. Bremer lived and to serve anyone that he could find at his house due to another engagement, I called Renton Process Servers, while I was in Puyallup at about 4:30 pm on Monday, December 10, to have them serve another adult at his house. The woman I spoke to said only of I could get the papers there before closing at 5:00 p.m. but it was impossible drive there by then.

This declaration signed at Kent, Washington on the __day of December 2012.

Glen L. Walker

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following and below named parties and/or attorneys by placing such in the U S Mail, 1st class postage affixed thereto on the date herein signed below.

_____ Date:

Mr. Pierre E. Acebedo
1011 East Main–#456
Puyallup, WA 98372
Attorney for Kevin E. Bremer, Personal Representative of the estate of William P. Bremer

Charles M. Cruikshank III
108 So. Washington St. #306
Seattle, Washington 98104
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EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

GLEN L. WALKER Plaintiff, **v.**	**CASE NO. 12-2-15451-7**
KEVIN BREMER, as Personal Representative of the Estate of William P. Bremer, deceased. Defendant (s).	**DECLARATION OF SERVICE**

This declaration is made by: **William J. Farmin,** Pierce County Registered Process Server, Registration #9912, of: **AA PROCESS SERVERS** located at: 4227 So. Meridian #C516, Puyallup, WA 98373 (253) 845-9729. I am above the age of 18, not a party to the below action and competent to be a witness.

I DECLARE that on **December 10, 2012** at **1:20p.m.** at the address of **1011 East Main, Suite 456** in the city of **Puyallup** in the county of **Pierce,** State of Washington. I duly served the below described documents upon: **PIERRE E. ACEBEDO, Attorney at Law** by then and there, at his business address and usual place of employment by personally delivering one (1) true and correct copies, thereof and leaving the same with: **SEAN JONES, Assistant to Pierre E. Acebedo, Attorney** being a person of suitable age, discretion and employee therein. Upon Attempts to serve Mr. Acebedo personally, assistant was evasive as to when or if Mr. Acebedo Or his associate would be in the office today. The following described documents were then Served upon Sean Jones (his assistant): **Summons, Complaint to Vacate and Order Assigning Case to Judicial Department**

I declare under penalty of perjury under the laws of state of the Washington that the foregoing is true and correct.

Signed at: PUYALLUP, WASHINGTON on
AA PROCESS SERVERS
4227 So Meridian #C-516
Puyallup, WA. 98373

December 10, 2012

SIGNATURE **Pierce County**
William J. Farmin, Registration#9912

JUDGE JOHN R. HICKMAN

EXHIBIT B

PIERCE COUNTY WASHINGTON SUPERIOR COURT

GLEN L. WALKER Plaintiff, v. KEVIN E. BREMER, Personal Representative of the estate of William P. Bremer Defendant	NO. 12-2-15451-7 PROOF OF SERVICE [SUMMONS, COMPLAINT AND CASE ASSIGNMENT ORDER]

My name is Jeremi McCullough. I am over the age of majority and fully competent as to all matters to which I testify herein.

1. On December 10, 2012, at approximately 2:25 p.m., I entered the office of Peter Acebedo at the Acebedo & Johnson law office, 1011 East Main, #456, Puyallup, WA 98372.
2. When I arrived, I told Mr. Jones that I had returned to deliver some documents to Mr. Acebedo. I had been in this office three times before in attempts to serve him. On all occasions, his assistant, Mr. Shawn Jones, received me when I walked into the office.
3. After multiple attempts to see Mr. Acebedo, and being told by Mr. Jones that he had "No idea when he will be in the office," I left the building and called

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Mr. Acebedo's cell phone, and confirmed his presence in the office, despite the fact that Mr. Jones had immediately before told me that Mr. Acebedo was not in his office, and wouldn't be in for a couple hours at least.

4. I then returned to the office after deciding that I had more than enough dealings with Mr. Jones and promptly told him "I'm here to see Mr. Acebedo and I'm in a hurry," as I started to walk down the hallway towards an open door.

5. Mr. Jones stopped me and called Mr. Acebedo, who came identified himself and I handed him the Summons, Complaint and Case Assignment Order for Glen L. Walker v. Kevin E. Bremer, Personal Representative of the estate of William P. Bremer, which was filed on December 7, 2012, after I confirmed his identity by his acknowledgment.

6. He took the documents and after I told him he was served, I turned and left the office.

7. I had been unable to find out where Mr. Acebedo lives in order to serve him at his residence.

8. I had attempted to serve Mr. Acebedo at his office three times before this fourth and successful attempt.

9. The first was on Friday, December 7, in the afternoon at about 3:00 when I went to Mr. Acebedo's office and his assistant, Mr. Jones, told me that Mr. Acebedo would not be in that day.

10. In my second unsuccessful attempt, I returned on Monday, December 10, shortly after 10:00 a.m. and again asked his assistant to allow me to speak to Mr. Acebedo. I told him that I had papers for him. He asked me to leave them with him.

11. Just as with the earlier failed attempts, I told him that it was not good enough for me simply to leave the documents, but that I had to hand them to Mr. Acebedo personally.

12. He asked me who I was bringing documents from and I told him Mr. Cruikshank and he had instructed me to only deliver the documents personally to Mr. Acebedo.

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13. Mr. Jones then asked me for my phone number and I gave him Mr. Cruikshank's phone number.

14. At the Monday 10:00 attempt, Mr. Jones said that Mr. Acebedo would be in "sometime this afternoon" and that he had "no idea" of what time he would arrive and that "there was no way to contact him."

15. Shortly after 1:00 p.m. that Monday afternoon, I went back and Mr. Jones was on the phone but when he was free, he told me when I asked that Mr. Acebedo was out and he did not know when he would be in.

16. After this third failed attempt at service and because it was apparent that Mr. Jones was being evasive and not telling me the full story, I contacted Mr. Cruikshank and asked him for Mr. Acebedo's cell phone number.

17. At 2:25 p.m, Monday, December 10th, when I returned, I was frustrated, particularly after Mr. Jones told me again that Mr. Acebedo was out of the office and he did not know when he would be in.

18. I then proceeded as I described earlier with the call to his cell phone. I feel quite certain that if I had not obtained Mr. Acebedo's cell phone number, I never would have been able to serve him personally.

I am not a party to the above law suit. I am a resident of King County, Washington. I signed this declaration at Sumner, Washington on this 11th day of December 2012 under penalty of perjury under the laws of the State of Washington.

JEREMI McCULLOUGH

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following and below named parties and/or attorneys by placing such in the U S Mail, 1st class postage affixed thereto on the date herein signed below.

Dec 11, 2012 Date:

Mr. Pierre E. Acebedo
1011 East Main–#456
Puyallup, WA 98372 –Attorney for Kevin E. Bremer

Charles M. Cruikshank III
108 So. Washington St. #306
Seattle, Washington 98104
206 624-6761 WSB #6682

APPENDIX "B"

Honorable Judge John Hickman
Department 22
Honorable Judge Garold Johnson
Department 10
Motion: To Consolidate
Date: December 21, 2012
Time: 9:00 AM

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

GLEN L. WALKER Plaintiff, v. **SCOTT W. HAWTON & ELIZABETH HAWTON**, husband and wife; **WILLIAM BREMER** Defendants **GLEN L. WALKER** Plaintiff, v. **KEVIN BREMER**, Personal Representative of the **WILLIAM P. BREMER ESTATE** Defendant	**NO. 11-2-13449-6** **NO. 12-2-15451-7** **BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO CONSOLIDATE**

COMES NOW Defendant, Kevin Bremer, Personal Representative of the Estate of William Bremer, by and through its attorney, **ACEBEDO & JOHNSON, LLC.**, and Pierre E.

ACEBEDO & JOHNSON, LLC
1011 EAST MAIN STE 456
PUYALLUP, WA 98372
TELEPHONE: (253) 445-4936

Acebedo, and presents this Brief in Opposition of Defendant's Motion to Consolidate cases pursuant to CR 42(a) and asks this Court to deny the same, as follows:

I. STATEMENT OF FACTS

A. Original Case – *Walker v. Hawton, et al.* Cause Number 11-2-13449-6.

On or about September 9, 2011, Plaintiff, Glen Walker, filed a lawsuit in Pierce County Superior Court, cause number 11-2-13449-6, seeking damages from Defendants Scott Hawton and Elizabeth Hawton and to partition real property located at 15532 East Main Street, Sumner, Pierce County, Washington. *See generally* Complaint. The case also listed Mr. William P. Bremer, now deceased, as a Defendant but only because of his role as the seller named in the Real Estate Contract executed between Scott and Elizabeth Hawton and Glen Walker on October 23, 2009. *See generally* Complaint.

Plaintiff Walker's main allegations in the Complaint stems from alleged financial improprieties of Mr. Scott Hawton, which occurred during operating the business he co-owned with Plaintiff Walker. The business name was Sumner Transmission and Auto Repair, LLC., also known as "STAR, LLC." While the Complaint listed no specific "causes of action" the following facts were alleged against Scott Hawton.

> 14. ...Defendant Scott Hawton has failed to file and withhold and pay over to the IRS the withholding, FICA, social security and other payments required to be paid upon the earnings of STAR LLC.
>
> 15. Defendant Scott Hawton has failed to maintain complete and accurate records of the income and expense of the business of STAR LLC.
>
> 16. ...Scott Hawton has converted to his own use and benefit funds and assets of STAR LLC.

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17. Defendant Scott Hawton has failed and fused to pay the other creditors of STAR LLC, including Plaintiff Walker, for improvements made to the property before beginning of the business, some of which were at Walker's separate expense.

18. Defendant Scott Hawton has neglected, breached and failed to honor and perform his fiduciary duties to Plaintiff Walker, owned to him as a member of STAR LLC.

19. Defendant Scott Hawton has issued hundred of checks from the accounts of the LLC, when insufficient funds were in the accounts, causing significant, unnecessary expense to the LLC.

20. Defendant Scott Hawton has dishonored the requests of Plaintiff Walker for reimbursement of expenses paid by Walker on behalf of the LLC.

Complaint for Damages and Petition for Partition of Real Property (Cause # 11-2-13449-6). Plaintiff Walker also sought to partition the real property under the deceased Defendant Bremer, who sold the property to the partners of STAR, LLC.

After a year and a half of litigation, Plaintiff Walker's Motion for Consolidation now "requests dismissal of William P. Bremer, deceased, from the above titled case in the consolidation order." *Motion for Order Consolidating Cases*, p. 1. Plaintiff further adds "Walker no longer seeks partition of the property that he and the Hawtons were buying from William P. Bremer...." *Motion to Consolidate*, ¶ 10. Dismissal of Defendant Bremer and the partition action has been long sought, and is welcome by Defendant Estate of William Bremer.

B. <u>Forfeiture Action</u>

Plaintiff Walker and the Hawtons made no payments on the Real Estate Contract in excess of two years, since December 2009. *See* Declaration of Pierre Acebedo, Exhibit "A," Notice of Intent to Forfeit, incorporated herein by this reference. Further, Plaintiff Walker and the Hawtons

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failed to pay property taxes and make other payments as required by the Real Estate Contract. Consequently, in May 2012, the now-deceased Defendant Bremer initiated the forfeiture process. *See* Declaration of Pierre Acebedo, Exhibit "A." A Notice of Intent to Forfeit was recorded on June 11, 2012, and mailed pursuant to statute to all parties, including Plaintiff Walker. No purchaser attempted to cure within the ninety days as provided by RCW 61.30, *et seq.*

C. Mr. Bremer's Death, Hawton Bankruptcy, Relief from Stay, & Refusal to Dismiss Mr. Bremer.

About two weeks following the recording of the Notice of Intent to Forfeit Defendant Mr. William Bremer died, on June 25, 2012. Then, on July 18, 2012, co-Defendants in the originating case, Scott and Elizabeth Hawton, filed for bankruptcy. This action effectively stayed all claims Plaintiff Walker alleged against Defendant Scott Hawton, pending bankruptcy. *See* Declaration of Pierre Acebedo, ¶ 3.

In order to proceed with the forfeiture, the Estate of William Bremer filed a Motion for Relief from Stay from the Western Washington Bankruptcy Court in cause number 12-17455-TWD. *See* Declaration of Pierre Acebedo, ¶ 4. No objections to the Motion for Relief from Stay were filed by any party, including Plaintiff Walker. Judge Timothy Dore of the US Bankruptcy Court granted the Order for Relief from Stay on October 5, 2012. *See* Declaration of Pierre Acebedo, ¶ 4.

D. Declaration of Forfeiture & Refusal to Vacate.

On October 11, 2012, the Estate of William Bremer recorded a Declaration of Forfeiture effectively terminating all parties' rights to title and interest on the property, including Plaintiff Walker. *See* Declaration of Pierre Acebedo, ¶ 5. All parties were provided notice pursuant to statute. According to the Declaration of Forfeiture, Plaintiff Walker had ten (10) days to vacate

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the property or risk eviction under the unlawful detainer statute, RCW 59.12, *et seq.* Plaintiff Walker refused to vacate the premises within the time allotted. *See* Declaration of Pierre Acebedo, ¶ 6.

E. Unlawful Detainer & Motion for Revision

Pursuant to the Real Estate Contract Forfeiture Statute, RCW 61.30.100, the Estate of William Bremer proceeded under the Unlawful Detainer Statute, RCW 59.12, to obtain possession of the real property. A hearing on a Motion to Show Cause and Motion for Writ of Restitution on November 9, 2012, resulted in the issuance of a Writ of Restitution to forcibly evict Plaintiff Walker from the Bremer property. *See* Unlawful Detainer, cause number 12-2-14006-1.

Shortly thereafter, Plaintiff Walker filed a Motion for Revision challenging the validity of the Unlawful Detainer action and the Writ of Restitution. *See generally* Motion for Revision. Plaintiff Walker argued that the Estate of Mr. Bremer failed to meet several statutory requirements under RCW 59.12 as a "tenant at will" and that it failed to properly notify the Hawton Bankruptcy trustee of the perfected forfeiture action. Mr. Walker's Motion for Revision was denied. *See generally* Order dated November 30, 2012.

F. *Glen Walker v. Estate of William P. Bremer*, Cause Number 12-2-15451-7, Improper Service, Absent *Lis Pendens* & Pending Motion to Dismiss.

After denial of all attempts to regain possession of the property pursuant to the forfeiture action, Plaintiff Walker now files a Complaint to Vacate the Forfeiture under RCW 61.30.140, initiating the present action before the Court. Included in the Complaint, Plaintiff seeks rescission and damages. The Plaintiff's Complaint further alleges that the Real Estate Contract was void *ab initio* due to alleged non-disclosure of environmental hazards purportedly present on the property.

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However, the statutory requirements under the forfeiture act require service of the Complaint and Summons on Kevin Bremer, the Personal Representative of the Estate of William P. Bremer within sixty (60) days after the recording of the Declaration of Forfeiture. Plaintiff Walker failed to comply with this service requirement. In addition, Plaintiff never recorded a *lis pendens* in Pierce County concurrently upon filing the above complaint as required under RCW 61.30.140 (2). Presently, Defendant Estate of William Bremer awaits hearing on its Motion to Dismiss set for January 4, 2013.

II. EVIDENCE RELIED UPON

The files and records herein. Declaration of Pierre E. Acebedo

III. STATEMENT OF ISSUES

Whether the Court should deny Plaintiff's Motion to Consolidate under CR 42(a) based on the fact that the Real Estate Contract Forfeiture Act is a statutorily driven mechanism providing a means for a seller to terminate a contract without being involved in lengthy litigation?

Whether the Court should deny Plaintiff's Motion to Consolidate lawsuits because they are based on two unrelated issues of fact and law and causing unnecessary harm and delay to Estate of William Bremer?

IV. ARGUMENT

A. ADDING TEDIOUS AND PROTRACTED LITIGATION CONTRAVENES THE PURPOSE OF RCW 61.30.

The purpose of the Real Estate Forfeiture Act is to terminate the real estate contract and end the rights and the duties pertaining to the parties within a set period once a breach of a contract has occurred, as defined under RCW 61.30. *See generally* 18 WAPRAC § 21.38 18 WILLIAM B. STOEBUCK, WASHINGTON PRACTICE: REAL ESTATE: TRANSACTIONS

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§ 21.38, at 515(2012). In essence, the statute provides a means for sellers to redress the non payment of purchasers or regain possession of their property in a timely manner without the expense of a lengthy litigation.

Only two narrow grounds exist for a proceeding to set aside or vacate a forfeiture action under RCW 61.30.140 (4). The statute is intentionally narrow in scope. Attempting to insert any issues outside the purview of RCW 61.30.140 (2) are wholly inappropriate and serve only to confuse and delay. RCW 61.30.140(4) provides as follows:

> The forfeiture shall **not be set aside unless** (a) the rights of the bona fide purchasers and bona fide encumbrances for value of the property would not be thereby be adversely affected **and** (b) the person bringing the action establishes that the seller was not entitled to forfeit the contract at the time the seller purported to do so or that the seller did not materially comply with the requirements of this chapter.

(emphasis added). This specific, detailed language deserves narrow application to the case. Allowing litigation of any type to be added with the limited statutory provision is contrary to the purpose of the statute itself.

To consolidate the case with any other case contradicts the content and spirit of the statute and dilutes the Real Estate Contract Forfeiture Act for those with legitimate need to exercise their right to reclaim their property. Consolidation in this instance results in lengthy, tedious, and unnecessarily expensive litigation. This simply contravenes the intent of the statute.

B. <u>CR 42(A) IS INAPPROPRIATE IN THIS CASE. THERE EXIST NO COMMON QUESTIONS OF LAW OR FACT AND CONSOLIDATING CASES PRODUCES UNNECESSAY COSTS AND DELAY.</u>

The purpose of CR 42 is to give the Court broad authority and sole discretion to manage the scope of litigation in the interest of economy and in the interest of justice. It provides the

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Court the ability to manage complex multiparty and multi-claim litigation. As such, motions to consolidate are ruled on a case-by-case basis by requiring the Court to balance competing interests by focusing on the facts and not the law. "Consolidation of claims for trial is matter within discretion of trial court, and will not be disturbed except for clear abuse of that discretion." *Hawley v. Mellem*, (1965) 66 Wash.2d 765, 405 P.2d 243.

Here, the Motion to Consolidate serves no economic interest and the claims involve no "common questions of law or fact." Contrary to Plaintiff's claims, the two suits arise from a distinct and unrelated nucleus of facts. Plaintiff Walker started the first case to redress the alleged fiduciary impropriety of Scott Hawton. Plaintiff Walker started the second case to redress the forfeiture of a Real Estate Contract between him and Defendant Bremer.

Because no common question of law or fact exists in these cases, the result of any consolidation would only further damage Defendant Bremer. Defendant Bremer already suffered with no payments for over two and a half years. Consolidating cases only heaps upon him more suffering, more unnecessary costs, and more delay. Civil Rule 42(a) governs consolidations and provides as follows:

> When actions involving a **common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions**; it may order all the actions consolidated; **and it may make such orders concerning proceedings therein** as may tend to avoid unnecessary costs or delay.

One case is a corporate dispute regarding alleged financial improprieties while the other is specifically pertaining to setting aside forfeiture under a Real Estate Contract, RCW 61.30.140(4).

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1. No Common Question of Fact or Law.

a) *Walker v. Bremer* – Cause Number 12-2-15451-7 Based Solely Upon a Real Estate Forfeiture Action.

Walker v. Bremer asks the legal question of whether an alleged non-disclosure of an environmental issue, even while signing with full knowledge of those issues, warrants vacating a forfeiture action and rescission of the Real Estate Contract. The limited scope of review by the court remains under RCW 61.30.140(4). If Plaintiff Walker establishes that "the seller was not entitled to forfeit the contract at the time the seller purported to do so or the seller did not materially comply with the requirements" of RCW 61.30, then the action for the forfeiture will be set aside. Plaintiff Walker could then proceed with his underlying claims. The statute is specific and restrictive.

b) *Walker v. Hawton, et. al.* – Cause #11-2-13449-6 Regards a Corporate Dispute for Financial Improprieties.

Walker v. Hawton, et al. asks the legal question of whether Mr. Hawton breached fiduciary and/or contractual duties related to his ownership and management of STAR, LLC. Defendant Bremer played no role in STAR, LLC. Defendant Bremer's involvement in the case is only peripheral. Many times, Defendant Bremer sought dismissal from this case, as finally provided by Plaintiff Walker's Motion to Consolidate. Defendant Bremer faced no allegations as to any involvement in the operation of STAR, LLC.

Nothing in *Walker v. Hawton, et. al.* pertains to the action to set aside the forfeiture under RCW 61.30.140 in *Walker v. Bremer*. Plaintiff Walker attempts to create the illusion of similar facts by asserting that the conduct of business by STAR, LLC. took place on the property at issue

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in the Real Estate Contract. However, the business practices of STAR, LLC. play no role in the action to set aside the forfeiture.

These facts and legal questions in the two cases are wholly unrelated and, accordingly, make consolidation is improper.

2. Consolidation Causes Unnecessary Costs and Undue Burden.

In this instance, consolidating cases fails to improve judicial economy. Consolidation serves only to obfuscate the issues and unnecessarily protract the litigation. Defendant Bremer's perfected forfeiture in no way prejudices Plaintiff's rights to bring separate and distinct cases before this Court. Further, the issues involved in Plaintiff's separate cases remain wholly unrelated. Consolidation of these two unrelated cases results unnecessary costs and undue burdens to the already burdened Estate of William Bremer, who has not been paid on this Real Estate Contract in over two and a half years. After being dismissed from the second case, Defendant would be burdened with additional legal fees and costs for its counsel's involvement in matters outside the scope RCW 61.30.140(4). Accordingly, Defendant's Motion to Consolidate must be denied.

C. PLAINTIFF MAY SEEK REMOVAL OF THIS CASE FROM JUDGE HICKMAN.

Seeking a new judge to review his pleadings in these matters explains another possible motive behind Plaintiff's Motion to Consolidate. Judge Hickman reviewed the forfeiture matter and heard the subsequent unlawful detainer matter. Judge Hickman also ruled on the underlying Motion for Revision brought by Plaintiff. He ruled in favor of Defendant, denying relief to Plaintiff Walker. Plaintiff Walker's Motion to Consolidate attempts to secure a new review of the case to possibly secure a more favorable outcome.

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TELEPHONE: (253) 445-4936

D. THE COURT CAN REQUIRE ALL PAYMENTS SPECIFIED IN THE NOTICE OF INTENT TO FORFEIT SHALL BE PAID TO THE CLERK OF THE COURT AS A CONDITION TO MAINTAINING THE ACTION.

Plaintiff's insistence on maintaining this action after multiple and consistent denials for relief warrant a tangible warning from the Court. Defendant Bremer's financial losses from Plaintiff's failure to pay on the Real Estate Contract combined with the added costs of subsequent action and litigation to remove Plaintiff from the property created a total expense of approximately $250,000.00. Consequently, because Plaintiff defiantly persists in these actions, Defendant Bremer asks this Court to require Plaintiff to provide funds commensurate with Defendant Bremer's losses.

Pursuant to RCW 61.30.140, the Court can require that Plaintiff Walker deliver "all payments specified in the notice of intent shall be paid to the clerk of the court as a condition to maintaining an action to set aside the forfeiture." Accordingly, Defendant Bremer recommends allowing Plaintiff Walker twenty (20) days to deliver said money, totaling $201,926.79. Absent the delivery of said funds, cause number 12-2-15451-7 should be dismissed. The inequities of the parties simply can no longer be ignored.

E. ATTORNEY'S FEES

Pursuant to the Real Estate Contract, Defendant Bremer seeks attorney's fees for having to defend this matter. The Real Estate Contract between the Plaintiff and Defendant allows for attorney's fees. Specifically Article 23 of the Real Estate Contract, states in pertinent part:

> 23. COSTS AND ATTORNEY'S FEES. If either party shall be in default under this contract, the non defaulting party shall have the right, at the defaulting party's expense, to retain an attorney or collection agency to make any demand, enforce any remedy, or otherwise protect or enforce its rights under this contract. The defaulting party hereby promises to pay all costs

ACEBEDO & JOHNSON, LLC
1011 EAST MAIN STE 456
PUYALLUP, WA 98372
TELEPHONE: (253) 445-4936

> and expenses so incurred by the non defaulting party, including, without limitation, collection agency charges; ... reasonable attorney's fees and costs, and the failure of the defaulting party to promptly pay the same shall itself constitute further and additional default. ...

See Declaration of Pierre E. Acebedo Exhibit "A," Real Estate Contract, incorporated herein by this reference.

V. CONCLUSION

Defendant's Motion to Consolidate is improper because it fails to provide common points of fact and common points of law between the two cases. It also offers no economy, judicial or otherwise, and unduly burdens the Court and the Defendant with unnecessary expense. Consequently, Plaintiff's Motion to Consolidate must be denied. A proposed Order with attorney's fees and costs is provided.

DATED this 19 day of December, 2012.

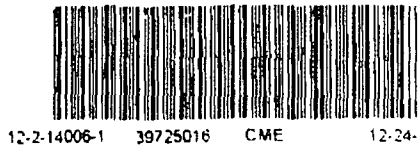
ACEBEDO & JOHNSON, LLC.

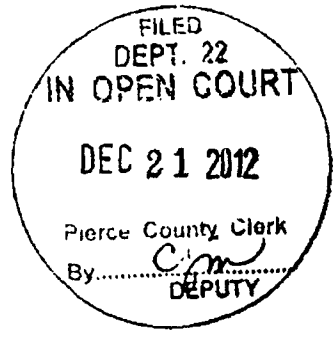
PIERRE E. ACEBEDO, WSBA#30011
Attorney for Defendant

ACEBEDO & JOHNSON, LLC
1011 EAST MAIN STE 456
PUYALLUP, WA 98372
TELEPHONE: (253) 445-4936

APPENDIX "C"

21613 12/24/2012 189954





IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

WILLIAM BREMER

Plaintiff(s)

vs.

GLEN WALKER

Defendant(s)

Cause Number: 12-2-14006-1

MEMORANDUM OF JOURNAL ENTRY

Judge/Commissioner: John R Hickman
Court Reporter: Emily Dirton
Judicial Assistant/Clerk: Connie Mangus

BREMER, WILLIAM	PIERRE E ACEBEDO	Attorney for Plaintiff/Petitioner
WALKER, GLEN	Charles Malcolm Cruikshank III	Attorney for Defendant

Proceeding Set: Motion
Proceeding Outcome: Motion Held
Resolution:

Outcome Date: 12/21/2012 11:16

Clerk's Scomis Code:MTHRG
Proceeding Outcome code: **MTHRG**
Resolution Outcome code:
Amended Resolution code:

IN THE SUPERIOR COURT, PIERCE COUNTY, WASHINGTON

WILLIAM BREMER

vs.

GLEN WALKER

Cause Number: 12-2-14006-1
MEMORANDUM OF JOURNAL ENTRY

Judge/Commissioner:
John R Hickman

MINUTES OF PROCEEDING

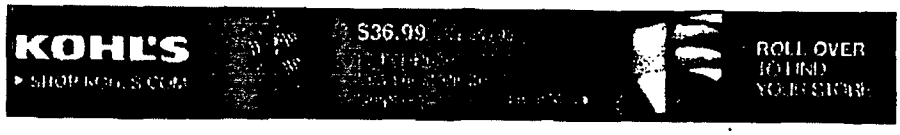
Judicial Assistant/Clerk: Connie Mangus
Court Reporter: Emily Dirton
Start Date/Time: 12/21/12 10:57 AM

December 21, 2012 10:57 AM Present for these three motions are Attorney Pierre Acebedo, on behalf of the Plaintiff, and Attorney Charles Cruikshank, on behalf of the Defendant.

10:58 AM Attorney Acebedo argues the attorney's fees motion.
11:05 AM Attorney Cruikshank responds.
11:11 AM The Court gives its ruling as to the F of F and C of L and attorney's fees. Order to be prepared.

End Date/Time: 12/21/12 11:16 AM

APPENDIX "D"



IN RE BAYS

413 B.R. 866 (2009)

In re David Wallace BAYS, Debtor.

Linda Bays; Kelly Case, Plaintiffs,

v.

David Bays; Doug Lambarth and Jane Doe Lambarth; Joe Esposito and Jane Doe Esposito; Gary Stenzel and Jane Doe Stenzel; Paul Bastine and Jane Doe Bastine; Joe Wittstock and Jane Doe Wittstock; David Hardy and Jane Doe Hardy; Spokane County Superior Court, Defendants.

Bankruptcy No. 01-05127-JAR7. Adversary No. A03-00237-JAR.

United States Bankruptcy Court, E.D. Washington.

February 9, 2009.

Patrick W. Harwood, Kirkpatrick & Stenzel PS, Christopher J. Kerley, James B. King, Evans Craven & Lackie, P.S., Joseph A. Esposito, Esposito George & Campbell, Gary R. Stenzel, Stenzel Law Office, James H. Kaufman, Spokane Cty. Prosecuting Atty. Office, Spokane, WA, Douglas D. Lambarth, Lambarth Law Office, Newport, WA, for Defendants.

DECISION RE: QUIET TITLE

JOHN A. ROSSMEISSL, Bankruptcy Judge.

THIS MATTER comes before the court upon motions for summary judgment on the issue of quiet title in real property located in Stevens County, Washington.

This adversary proceeding originated as a lawsuit in Stevens County Superior Court. It was removed to bankruptcy court by the then trustee of David Bays' bankruptcy estate, Joseph Esposito. The

[413 B.R. 869]

removed adversary proceeding included multiple causes of action against multiple defendants. During the litigation of this matter, this court has disposed of multiple causes of action and dismissed many of the parties to the adversary proceeding. The plaintiffs remaining are Linda Bays and her son, Kelly Case. The defendants remaining are Tony Grabicki, successor trustee of the bankruptcy estate of David Bays and David Bays. The last remaining cause of action is for quiet title in some Kettle Falls real estate. Linda Bays and Kelly Case seek a determination that their interest in the real estate is not encumbered by a Real Estate Contract awarded to David Bays in the Bays dissolution in which trustee Grabicki claims David's interest. Trustee Grabicki's predecessor-in-interest, Joseph Esposito, had proceeded to forfeit that contract. Linda Bays and Kelly Case ask this court to declare that forfeiture void and quiet title in them free of the claims of the bankruptcy trustee and David Bays. This is the final issue left unresolved in this adversary proceeding.

The record in the case is extensive. The court has in discussing the facts and procedure made numerous references to documents filed with the court in the parties' various cases. A Reference Code is attached as an appendix to this decision as an aid to find the referenced documents in court files.

The court will commence its decision on the matters with a chronological review of the *facts and relevant pleadings.*

FACTS

1. By a contract dated October 5, 1987, William and Karen Ferguson sold Terrance and Anita Symonds real estate located in Stevens County and known as 1698 Nichols Road, Kettle Falls, Washington (referred to herein as "the Ferguson Contract"). The real estate sold consists of two parcels designated A and B, respectively (referred to herein collectively as "the Kettle Falls property"). [AP # 600, Ex. A, pg. 17]. Parcel A is approximately 13 acres with a shed. Parcel B is approximately one acre with a house and improvements. [DB # 61, pg. 8, ¶ 29].

2. The plaintiffs Linda Bays and her then husband Eric Svare, acquired the vendee's interest in the Ferguson Contract from the Symonds in 1987. [AP # 686-1, pg. 4; Dep., pg. 7, lns. 1-10; Dep., pg. 8, lns. 10-21]. Ms. Bays divorced Eric Svare and Linda Bays received the Kettle Falls property in the divorce as her separate property. [AP # 686-1, pg. 4; Dep., pg. 9, lns. 4-7; AP # 686-1, pg. 5; Dep., pg. 10, lns. 6-1]. Eric Svare quit claimed this property to Linda on November 27, 1989. [DB # 61, pg. 8, ¶ 30].

3. Linda J. Svare, as seller, entered into a Real Estate Contract with the Linjericks Society, "an unincorporated Religious Family of God" dated January 12, 1995 and recorded January 13, 1995. The subject of this contract was Parcel A of the Kettle Falls property. [AP # 600, pg. 9, ¶ 4].

4. Linda Svare, as grantor, executed a Deed of Trust dated September 14, 1995, in the amount of $18,000 in which the Linjericks Society, a corporation, was the beneficiary, and recorded the same day under Stevens County auditor No. 9509089. The Deed of Trust encumbered Parcel B of the Kettle Falls property. [AP # 382, pgs. 42-45].

5. The minutes of a special meeting the Linjericks Society called on January 29, 1996, *reflect that the Society had no way of collecting on its Deed of Trust without forfeiture and* forfeiture was authorized on the 1698 Nichols Road property. The minutes of the meeting were signed by "Kelly Case, Secretary of Linjericks Society" and dated February 2, 1996. [AP #382, pg. 4].

[413 B.R. 870]

6. On February 2, 1996, Linda Svare executed a Quit Claim Deed "in consideration of in lieu of foreclosure/forfeiture of Deed of Trust, Stevens County # 9509089" to the "Linjericks Society and the Overseer of the Linjericks Society (a corporation sole)." This Quit Claim Deed related to Parcel B of the Kettle Falls property. [AP # 382, pg. 6].

7. Linda Svare met David Bays in July of 1997. [AP # 686-1, pg. 14; Dep., pg. 49, lns. 3 -6]. It is Linda Bays' position, that shortly after meeting David Bays that they entered into a contract whereby Linda agreed to clean out David's home in Ione, Washington, and in return David would pay off the approximately $52,000.00 balance of the Ferguson Contract. [AP # 686-1, pg. 14; Dep., pg. 47, lns. 8 thru Dep., pg. 48, ln. 13; AP # 686-1, pg. 15; Dep., pg. 50, lns. 12-23; AP #739-1, pg. 5, ¶ 3.1].

8. Linda Svare and David Bays married on March 23, 1998 during the course of the clean up of the Ione home. [AP # 686-1, pg. 5; Dep., pg. 13, lns. 19-21].

9. The work on cleaning up the Ione residence continued until completion. The clean up was completed by May 17, 1999, at which time Linda Bays paid off the Ferguson Contract. The money used for this pay off was received from David Bays. She received a receipt for the sum of $52,406.81. [AP # 382, pg. 18].

10. On May 18, 1999, the escrow officer sent a letter to the Fergusons and Linda E. Erickson indicating that the contract has been paid in full and that the original statutory deed was being sent to the Stevens County Auditor for recording. [AP #382, pg. 21]. A payment history was included with this letter which indicated that the account balance was paid to Fergusons on May 17, 1999. [AP # 382, pg. 22].

11. It is Linda Bays' position that after the Ferguson Contract was paid off, Linda discovered that John Troberg would attempt to enforce a judgment lien against the property. To protect her interest in the property, she stopped the recording of the deed to her from Fergusons. Instead Linda Bays asserts she and David Bays agreed that David Bays would be transferred the vendor's interest in the Ferguson Contract to protect the property from the Troberg lien. Linda Bays further alleges that no payments were due or expected from her by David Bays. [AP# 739-1, pgs. 4-5; AP # 686-1, pg. 16, Dep. pg. 54, lns. 18 thru Dep., pg. 56, ln. 25].

12. By letter dated June 9, 1999, the Fergusons were sent a "Deed and Seller's Assignment of Real Estate Contract" and a "Hold Harmless and Indemnification Agreement" executed by David Bays. [AP # 382, pgs. 23-27]. The "Deed and Seller's *Assignment of Real Estate Contract" was signed by the Fergusons and recorded with the* Stevens County Auditor on June 18,1999. [AP # 382, pgs. 28-31].

13. Linda Bays and David Bays lived together as husband and wife until October of 1999. [AP # 686-1, pg. 19; Dep., pg. 68, ln. 24 thru Dep., pg. 69, ln. 20].

1 2 3 4 5 ...
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14. David Bays executed and delivered a Statutory Warranty Deed to Linda Bays on October 13, 2000. [LB # 57, pg. 36-38; AP # 686-1, pg. 17; Dep., pg. 59, ln. 16 to Dep., pg. 61, ln. 4; AP # 600, pg. 15, ¶ 25]. This deed relates to both Parcels A and B of the Kettle Falls property and recites "For and in consideration of non-assignable life estate on basement apartment at 1698 Nichols Road and $1.00." [LB # 57, pgs. 36-38; AP # 600, pg. 15].

15. Linda Bays and Kelly Case entered into a "Loan Contract" dated November 27, 2000. [AP #686-3, pgs. 2-3; AP # 686-1, pg. 20; Dep., pg. 72, ln. 5 to Dep., pg. 73, ln. 24; AP # 686-2, pg. 7; Dep., pg. 21, ln. 22 to AP # 686-2, pg. 8; Dep., pg.

[413 B.R. 871]

22, lns. 1-9; AP # 686-2, pg. 8; Dep., pg. 25, ln. 18 to ln. 25]. As part of this contract, Linda Bays executed and delivered a Quit Claim Deed to Kelly Case dated November 27, 2000 relating to Parcel B of the Kettle Falls property. [AP # 686-4, pg. 2]. Under the terms of this contract, Kelly Case was to loan money to Linda Bays, which loan was secured by the real estate described in the Quit Claim Deed. [AP# 686-1 pg. 20; Dep., pg. 72, ln. 24 to Dep., pg. 73, ln. 18; AP # 686-1, pg. 21; Dep., pg. 77, ln. 17 to AP # 686-1, pg. 22; Dep., pg. 78, ln. 24].

16. David Bays filed a petition for dissolution of his marriage to Linda Bays in April of 2001. [AP # 503, pg. 2, ¶ 3].

17. On June 20, 2001, David Bays filed this bankruptcy case. [DB # 1]. Joseph Esposito was appointed trustee of David Bays' chapter 7 bankruptcy estate

18. On August 7, 2001, Kelly Case recorded the Quit Claim Deed referred to in ¶ 15 above. [AP # 686-1, pg. 22; Dep., pg. 78, lns. 20-22; AP # 600, pg. 14, ¶ 22].

19. On October 1, 2002, Linda Bays filed a document in her dissolution case with the Pend Oreille County Superior Court entitled "Responsive Declaretion of Linda Bays," which provided in part:

> Prior to our marriage I entered into a contract with David to do work for him in exchange for him paying off my mortgage. David has admitted this by affidavit. It took me 2 years to complete the work, and as promised, David gave me the money to pay off the mortgage. [AP # 385, pg. 31].
>
> . . .
>
> David agreed to act as my trustee by taking the place of the seller, Bill Ferguson, in order to protect me from Attorney Troberg. At first Bill Ferguson was reluctant to do this since he had already been paid. Bill then made David signed a "Hold Harmless" agreement so Attorney Troberg would not sue him (Bill). It was always understood that the home was my separate property. David even asked Attorney Monasmith to draft the paperwork showing the home was my separate property with nothing owing on it, in order to protect me from David's own children. [AP # 385, pg. 32]
>
> . . .
>
> The house belonged to me, and I did not even suspect that David would claim an interest in it. [AP # 385, pgs. 32-33].
>
> . . .
>
> When David made my home an issue in the divorce, Mr. Monasmith told me to subpoena him to court. He will testify why David took the sellers position after giving me the money to pay off my home, and that David's position always was that "this home was my separate property," not his. Contrary to the claim that David now makes, many people have knowledge by David's own admission, that he only held the mortgage as trustee to protect me from John Troberg. [AP # 385, pg. 33].

20. The Bays dissolution case went to trial on October 7, 2002, without Linda Bays or anyone representing her interests in attendance. [AP #503, pg. 10, ¶ 53]. David Bays testified at the trial that it was his understanding when he paid the almost $53,000 on the Ferguson Contract that he was to have a half interest in that property right away. [AP # 697, pg. 31].

21. Judge Bastine in his oral opinion delivered at the close of the trial said:

> She does not make any reference to any other property items except for a claim indicated as "work performed by wife" in the amount of $75,000 which should be considered in the distribution.
>
> [413 B.R. 872]
>
> There is no evidence with regard to that. There is nothing to support that. And indeed, I don't even know by what theory that would come into play here in any event. [AP # 466, pg. 23]

22. David Bays' dissolution attorney Douglas Lambarth, forwarded proposed Findings of Fact and Conclusions of Law and Decree of Dissolution to Trustee Joe Esposito by letter dated October 11, 2002. [AP # 503, pgs. 10-11, ¶ 55].

23. On October 11, 2002, Linda Bays had the Statutory Warranty Deed from David Bays to her (¶ 14 above) recorded with Stevens County Auditor. [LB # 57, pgs. 36-38; AP # 600, pg. 15, ¶ 25]. Linda Bays recorded this deed after the dissolution trial had been completed and she was aware of the proposed findings of fact. [AP # 686-1, pg. 17; Dep., pg. 60, lns. 9 to 21].

24. The dissolution court entered the final Findings of Fact, Conclusions of Law and Decree of Dissolution on October 31, 2002. [DB # 61 & 62]. The decree dealt with the various transfers relating to the Kettle Falls property as follows:

(5) The real estate contract dated 01/12/95 between Linda J Svare, as seller, and Linjericks Society, an unincorporated Religious Family of God, a pseudonym for Linda Bays, as purchaser, is set aside and is declared null and void and of no effect. The Stevens County Auditor filing nos. of this contract are Vol 186, page 0973 through 0976 and was recorded on January 13, 1995, document # 9500414.

(6) The Deed of Trust dated September 14, 1995, between Linda Svare, as grantor and borrower, and Linjericks Society, a pseudonym for Linda Bays, as beneficiary, is set aside and is declared null and void and of no effect. The Stevens County Auditor's filing nos. of this deed of trust are Vol. 192, pages 3234 through 3237 and was recorded on September 14, 1995, document # 9509089.

(7) The Quit Claim Deed with David Bays, as grantor, and Linda Bays and Linjericks Society, a pseudonym for Linda Bays, as grantees, is set aside and is declared null and void and of no effect. The Stevens County Auditor's filing nos. are Vol. 240, pages 0284 through 288, document # 1999-0010689.

(8) The Quit Claim Deed dated November 27, 2000, with Linda Bays as grantor, Kelly Case, as grantee, is set aside and declared to be null and void and of no effect. The Stevens County Auditor's filing nos. of the quit claim deed are Vol. 261, pages 3185 through 3787 and was recorded on August 7, 2001, document # 2001-0007745.

(9) The Statutory Warranty Deed dated October 13, 2000, with David Bays, as grantor, and Linda Bays, as grantee, involving both Parcels A and B, and not filed of record, is set aside and is declared null and of no effect.

(10) The real estate contract dated October 5, 1987, between Fergusons, as sellers, and Symonds, as purchasers, filed in the Stevens County Auditor's office on October 8, 1987, at Vol. 118, pages 1904 through 1913 is reinstated and declared to be fully enforceable

(11) The deed and seller's assignment of real estate contract dated June 15, 1999, whereby David W. Bays acquired the Fergusons' vendor's interest in the original real estate contract between Fergusons, as sellers, and Symonds, as purchasers, filed in the Stevens County Auditor's office on June 18, 1999, file # 1999-0107377, and located in Vol. 237, pages 0998 through 1001, is reinstated and declared to be fully enforceable, and is a first lien on the real property described therein in the amount of

[413 B.R. 873]

$89,038.36, including interest as of October 30, 2002

[DB # 62, pgs. 7-8].

25. Linda Bays timely appealed the decision of the dissolution court.

26. A Litigation or Trustee's Sale Guarantee from Ticor Title Insurance dated February 5, 2003 was obtained by Mr. Esposito's office on the Kettle Falls property. [AP # 600, pgs. 2, 7-17]. This action was taken in connection with initiation of contract forfeiture proceedings.

27. A "Notice of Intent to Forfeit" dated July 11, 2003 was recorded with the Stevens County Auditor on July 14, 2003. [AP # 502, pgs. 10-15]. The declared intent was to forfeit the Ferguson Contract in which Joseph Esposito, David Bays' bankruptcy trustee, held the vendor's interest. Copies of this "Notice of Intent to Forfeit" were mailed on July 11, 2003 to a number of parties, including Linda Bays, Kelly Case and the Linjericks Society at the following addresses:

Linda J. Erickson a/k/a Svare a/k/a Bays
1698 Nichols Road
Kettle Falls, WA 99141

Linda J. Erickson a/k/a Svare a/k/a Bays
PO Box 301
Kettle Falls, WA 99141

Kelly Case
PO Box 301
Kettle Falls, WA 99141

Linjericks Society a/k/a The Overseer of the
Linjericks Society c/o Linda J. Erickson a/k/a
Svare a/k/a Bays
1698 Nichols Road
Kettle Falls, WA 99141

Linjericks Society a/k/a The Overseer of the
Linjericks Society c/o Linda J. Erickson a/k/a Svare
a/k/a Bays
PO Box 301
Kettle Falls, WA 99141

[AP # 502, pgs. 9 & 16].

28. On September 26, 2003, Bank of America issued a cashier's check purchased by Linda Bays payable to Kelly Case in the sum of $2,400.00. The face of the check bore the handwritten words "contract dated November 2000 paid in full + extra money ..." [AP #696-1, pg. 4]. Kelly Case, after obtaining legal advice, cashed the check and took the money. [AP #686-2, pg. 9; Dep., pg. 28, ln. 9 thru Dep., pg. 30, ln. 1].

29. Linda Bays and the Overseer of the Linjericks Society filed a "Complaint for Damages and for Injunctive Relief dated October 15, 2003 with the Stevens County Superior Court under docket No. 03-2-00528-1. [AP # 1, pgs. 7-26]. The complaint included this language "THIS COMPLAINT is made pursuant to RCW 61.30.110, ..." among other

terms. [AP # 1, pg. 7]. The statutory provisions referenced deal with enjoining forfeitures. This lawsuit was removed to bankruptcy court on October 17, 2003, and is this adversary proceeding. [AP # 1, pgs. 1-3].

30. On October 21, 2003, Joseph Esposito, bankruptcy trustee of David Bays, signed a "Declaration of Forfeiture" which declared the Ferguson Contract forfeited. This "Declaration of Forfeiture" was filed with the Stevens County Auditor on October 22, 2003. [AP #502, pgs. 21-25]. Copies of this "Declaration of Forfeiture" were mailed on October 22, 2003, to a number of parties, including Linda Bays, Kelly Case and the Linjericks Society at the following addresses:

Linda J. Erickson a/k/a Svare a/k/a Bays
1698 Nichols Road
Kettle Falls, WA 99141

Linda J. Erickson a/k/a Svare a/k/a Bays
PO Box 301
Kettle Falls, WA 99141

Kelly Case
PO Box 301
Kettle Falls, WA 99141

Linjericks Society a/k/a The Overseer of the
Linjericks Society c/o Linda J. Erickson a/k/a
Svare a/k/a Bays
1698 Nichols Road
Kettle Falls, WA 99141

Linjericks Society a/k/a The Overseer of the
Linjericks Society c/o Linda J. Erickson a/k/a Svare
a/k/a Bays
PO Box 301
Kettle Falls, WA 99141

[413 B.R. 874]

31. Linda Bays and the Overseer of the Linjericks Society, a corporation sole, plaintiff, filed a "Complaint To Set Aside Forfeiture and for Damages" signed December 16, 2003 and filed with the Superior Court of Stevens County on December 19, 2003 [AP # 739-3, pgs. 2-23; AP # 739-6, pg. 2]. David Bays, Douglas Lambarth, John Troberg and John and Jane Does were named as defendants in that case. The first paragraph of this complaint provides in part as follows:

> THIS COMPLAINT is made pursuant to RCW 61.30.140(4)(5), and based upon the fact that the plaintiff, Linda Bays, did pay off the real estate contract that was forfeited. Therefore, the defendants or their agents were not entitled to forfeiture....

The statutory provisions referenced deal with setting aside a forfeiture. Joseph Esposito, David Bays' bankruptcy trustee, was not specifically named as a defendant in the original complaint nor does it appear that he was ever served with a summons and complaint in that case. [AP # 738, pg. 2].

32. During the course of this litigation, Joseph Esposito passed away and Tony Grabicki was appointed successor trustee on July 15, 2008. [DB # 108]. Mr. Grabicki is currently serving as trustee for the estate of David Bays.

33. On December 10, 2008, Linda Bays filed an Amended Complaint in Stevens County Superior Court Cause No. 2003-200-6333, the lawsuit referred to in FACTS ¶ 31 above. This Amended Complaint adds Kelly Case as a party plaintiff and Joseph Esposito, his spouse and the Dave Bays bankruptcy estate as party defendants. Among the relief sought in this Amended Complaint, the plaintiffs seek to have the forfeiture set aside and title quieted in the plaintiffs. [AP II:# 4, pgs. 11-25]. On December 15, 2008, Linda Bays filed a Notice of removal of this Stevens County case with this court. This removed action was assigned this court's adversary docket No. 08-80140. [AP II # 1].

DISCUSSION

I. *LINDA BAYS VS. TRUSTEE AND DAVID BAYS*

A. *The Parties' Contentions*

The remaining issue before the court is whether Linda Bays retains any interest in the Kettle Falls property.

The trustee bases his position on the decree in the dissolution case which awards the sellers interest in the reinstated Ferguson Contract to the debtor, David Bays, and upon the trustee's actions to forfeit Linda Bays' purchaser's interest in that contract.

Linda Bays' contention is that there was nothing due on the Ferguson Contract, that the money provided to her by David Bays to pay off the Ferguson Contract was money due and payable to her for the clean up of David's lone residence, the issue of payment was never decided by the dissolution court, the final decree in that case is not controlling in this case on these matters, and in any event, the trustee's attempt at forfeiting the contract was

unsuccessful because of failure to adequately comply with the requirements of Washington's Real Estate Contract Forfeiture Act.

B. *The Preclusive Effect of the Dissolution Decree*

The parties disagree on the application of claim/issue preclusion doctrines to the dissolution court's Findings of Fact, Conclusions of Law, and Decree. The Trustee/David Bays seek to apply the Findings, Conclusions and Decree strictly by their terms. Linda Bays argues that the dissolution judgment should not be given binding effect against her in this action. The court will examine the legal requirements

[413 B.R. 875]

for application of the doctrines of claim preclusion (res judicata) and issue preclusion (collateral estoppel). The court has found Professor Trautman's article "Claim and Issue Preclusion in Civil Litigation in Washington," 60 Wash. Law Review 805 (1985) of great assistance in its analysis.

1. *Claim Preclusion (Res Judicata)*

The Washington Supreme Court has identified a number of conditions necessary for application of issue preclusion (res judicata).

> Res judicata occurs when a prior judgment has a concurrence of identity in four respects with a subsequent action. There must be identity of (1) subject matter; (2) cause of action, (3) persons and parties; and (4) the quality of persons for or against whom the claim is made. *Seattle-First Nat'l Bank v. Kawachi*,91 Wn.2d 223, 588 P.2d 725 (1978).

Rains v. State of Washington, et al., 100 Wn.2d 660, 663, 674 P.2d 165, 168 (1983).

To assist courts in deciding whether the same cause of action is involved, the *Rains* decision, *ibid.*, at 100 Wash.2d at 664, 674 P.2d at 168 referenced the following quote from *Abramson v. University of Haw aii*,594 F.2d 202, 206 (9th Cir.1979):

> (1) [W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

2. *Issue Preclusion (Collateral Estoppel)*

The *Rains* court articulated the difference between the two concepts as follows:

> The doctrine of collateral estoppel differs from res judicata in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted

Seattle-First Nat'l Bank v. Kawachi,91 Wn.2d 223, 225-26, 588 P.2d 725 (1978). The Court of Appeals in *Seattle-First Nat'l Bank v. Cannon*,26 Wn.App. 922, 927, 615 P.2d 1316 (1980) (quoting *Lucas v. Velikanje*,2 Wn.App. 888, 894, 471 P.2d 103 (1970)) stated:

> Affirmative answers must be given to the following questions before collateral estoppel is applicable:
>
> (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

Rains v. State of Washington, et al., 100 Wash.2d at 665, 674 P.2d at 169.

The burden of persuasion on the application of either claim preclusion or issue preclusion doctrines is on the party that advocates the preclusive effect of the prior judgment. In this case that burden is on the trustee.

3. *Application of Preclusion Principles*

Linda Bays claims that she was not present at the dissolution trial because of illness. She had sought to have the trial continued, but was unsuccessful. The trial was conducted in her absence. The result was unfavorable to her. The court determined

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that David Bays had loaned Linda the $52,406.81 which paid off the balance on the Ferguson Contract. It also ruled that David's loan was secured by transfer to David of the seller's interest in the Real Estate Contract by the Fergusons. A subsequent deed by David to Linda in satisfaction of the contract was set aside and the Real Estate Contract was reinstated in David, with the balance owing on the contract of $69,038.36, including interest. Linda Bays challenged the dissolution court's Findings, Conclusions and Decree by post-trial motions, and when those motions were denied, by appeal. The trial court's decisions were affirmed on appeal.

Linda argues that the Ferguson Contract was paid off and therefore could not be forfeited. The trustee argues that Ms. Bays is precluded from taking that position by the dissolution decree. Linda Bays challenges the preclusive effect of the dissolution decree on jurisdictional grounds, that the trial was improperly conducted in her absence, and on the grounds that the question of pay off of the contract was not decided by the dissolution court.

a. *Jurisdiction of the Trial Judge*

Linda Bays contends that Judge Bastine, a Spokane County Superior Court Judge, was improperly assigned to hear the Pend Oreille County dissolution case and therefore had no jurisdiction to decide the case. This challenge to Judge Bastine's authority to hear the case was raised by Ms. Bays at the Court of Appeals. She lost on that issue and the Washington State Supreme Court denied her request for review of that decision. Ms. Bays cannot challenge that decision in this court. She is barred by both claim preclusion and issue preclusion.

b. *Denial of Trial Continuance*

The issue of whether the dissolution court erred when it denied Linda Bays' request for a continuance based on her ill health, was also a subject of her appeal. The Court of Appeals considered her argument and decided that the trial judge was within his reasonable discretion when he denied Ms. Bays' motion for a continuance. *In re Marriage of Bays*, 131 Wn.App. 1032, 2006 WL 281143 (2006). Ms. Bays is bound by the decision of the Court of Appeals on the issue of the propriety of the denial of the continuance. Ms. Bays cannot challenge that decision in this court. She is barred by both claim preclusion and issue preclusion.

c. *Was the Ferguson Contract Paid Off?*

The dissolution court found that the balance owed by Linda Bays on the Ferguson Contract was $69,038.36 plus interest from October 30, 2002.

Linda Bays disputes that finding in this court. It is her contention that the Ferguson Contract was paid in full. She contends that the money that she received from David Bays to pay off the Ferguson Contract was received in full payment and satisfaction of the money David Bays owed her for cleaning up his lone residence. She explains the assignment to David of the vendor's interest in that contract, as a device used to protect the Kettle Falls property from judgment creditor John Troberg.

The record reflects that Linda Bays filed a document with the dissolution court just prior to the trial which articulates her position that the money received from David Bays which was used to pay off the Ferguson Contract was money David owed to her for cleaning up his lone residence. FACTS ¶ 19. It is unclear whether Judge Bastine ever saw this pleading. If he did, his statement in his oral opinion at the conclusion of the dissolution trial is puzzling. FACTS ¶ 21. Ms. Bays' sworn statement filed with the dissolution court

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on October 1, 2002, six days before the trial, arguably explains Ms. Bays' reference to work performed by her and how it would be applicable to the issues in the dissolution.

Likewise, David Bays' testimony at the dissolution trial, at least in the portion provided in the record before this court, suggests he understood he was getting a half-interest in the Kettle Falls property when he advanced the pay off funds. FACTS ¶ 20. This is at variance with the final decree, which reinstates the Ferguson Contract and grants David Bays a vendor's interest in same, and treats the money advance as a loan. Perhaps that inconsistency was explained in the balance of the dissolution trial record, but that has not been provided to this court.

Ms. Bays filed post-trial motions challenging the court's Findings, Conclusions and Decree. It is unclear what, if any, reference is made in those motions to her argument that the Ferguson Contract was paid off with money David owed her. That argument does not appear in Ms. Bays' appellant's brief filed with the Court of Appeals, nor is there mention of that argument in the Court of Appeal's decision affirming the rulings of the dissolution court. [AP # 137, pgs. 3-43; *In re Bays*, 131 Wn.App. 1032, 2006 WL 281143 (2006)]. It is uncertain from the record before us that she ever pursued this argument before the dissolution court beyond the October 1, 2002, pleadings or on appeal. One thing is certain however, she raised the issue prior to the dissolution trial.

The failure to pursue an issue raised, or which could have been raised, before the trial court and not pursued in the appeal of the trial court's decision is waived. Claim preclusion bars not only what was raised, but what could have been raised.

> The general doctrine is that the plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

Seyward v. Thayer, 9 Wn. 22 at 24, 36 P. 966 (1894). This is true even if the matter was decided by default rather than actually litigated. *Baskin v. Livers*, 181 Wn. 370, 43 P.2d 42 (1935). In the words of Professor Trautman:

> Claim preclusion, or res judicata, precludes the relitigation of the same claim or cause of action. Unlike issue preclusion, which applies only to issues actually litigated, claim preclusion applies to what might, or should, have been litigated as well as to what was actually litigated, if all part of the same claim or cause of action.

60 Wash.L.Rev. at 813-14.

Here the parties' claims to the Kettle Falls property was actually litigated by the dissolution court, although in the absence of Ms. Bays. David Bays' claim to the Kettle Falls property was determined by the dissolution court, and that court's judgment was affirmed on appeal. The action by the trustee to forfeit the contract is essentially enforcement of the

dissolution decree. Ms. Bays is precluded by the doctrine of claim preclusion from arguing there was nothing owed on the contract.

Even if the principle of claim preclusion was not applicable to these facts, the principle of issue preclusion would apply. The issue in the dissolution case, the status of Linda and David Bays' interest in the Kettle Falls property, is identical with the issue in this court.

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There was a final judgment on the merits in the dissolution case and that judgment was affirmed on appeal.

David Bays' successor bankruptcy trustee is in privity with David Bays in this dispute. 11 U.S.C. § 541(a)(1). In fact, Joseph Esposito offered suggestions as to the form of the dissolution court's Findings, Conclusion and Decree.

Application of the doctrine of issue preclusion will not work an injustice on Linda Bays. It appears that she did raise the issue of payment for clean up of David's lone residence as explanation for David's advance of funds to pay off the Ferguson Contract prior to the trial of the dissolution. If the dissolution court ignored her position, the issue was for her to raise in her post-trial motions and appeal. The bankruptcy court had granted stay relief so that the dissolution litigation could proceed and determine Linda and David's rights in the contested property, including the Kettle Falls residence. (DB #51). The dissolution court did that, and its decision has been upheld on appeal. This court is under an obligation to afford the state court judgment full faith and credit. 28 U.S.C. § 1738. Affording issue preclusion effect to the judgment of the dissolution court, is consistent with the law of the State of Washington and with recent authority in the Ninth Circuit. *In re Lopez*,367 B.R. 99 (9th Cir. BAP 2007).

Linda Bays is precluded from challenging the determination of the dissolution court that she owed David Bays $69,038.36 on the Ferguson Contract as of October 30, 2002, by application of both the doctrines of claim preclusion and issue preclusion.

C. *Compliance with Real Estate Contract Forfeiture Statute*

Joseph Esposito, as trustee of the bankruptcy estate of David Bays, acted to enforce the Bays' dissolution decree by undertaking actions to forfeit Linda Bays' interest in the Ferguson Contract. He was acting as the seller under the contract. R.C.W. 61.30.010(9).

Linda Bays contends that Joseph Esposito did not comply with the terms of the Real Estate Contract Forfeiture Statute (R.C.W. 61.30.010-61.30.911) Therefore, she argues the contract as not forfeited.

The record reflects that after the Bays' dissolution decree had been entered, the trustee Joseph Esposito instituted contract forfeiture proceedings. In these proceedings, the trustee sought to forfeit Linda Bays' vendee's interest in the Ferguson Contract, which the dissolution decree had reinstated and awarded to David Bays. On July 11, 2003, the trustee filed a "Notice of Intent to Forfeit" with Stevens County and mailed copies of this notice to Linda Bays, Kelly Case and the Linjericks Society, among others. FACTS ¶ 27. This notice advises that the Ferguson Contract payments are in default and that if these defaults are not cured by October 20, 2003, the contract will be forfeited. [AP # 502, pgs. 12-13]. On October 15, 2003, "Linda Bays and the Overseer of the Linjericks Society Plaintiffs," filed a complaint with the Stevens County Superior Court seeking, among other things, an injunction against forfeiture of the Ferguson Contract pursuant to R.C.W. 61.30.110. [AP # 1, pg. 7] Joseph Esposito, trustee of David Bays' bankruptcy estate, one of the defendants, removed the matter to this court where it became this adversary proceeding. [AP # 1, pgs. 1-3].

On October 22, 2003, trustee Esposito filed a "Declaration of Forfeiture" with the Stevens County Auditor and mailed copies of the Declaration to Linda Bays, Kelly Case, and the Linjericks Society, among others. FACTS ¶ 30. This Declaration advised that interested parties have until December 28, 2003, to commence an action

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to set aside the forfeiture. [AP # 502, pgs. 22-23].

On December 19, 2003, "Linda Bays and THE OVERSEER OF THE LINJERICKS SOCIETY, A CORPORATION SOLE, plaintiffs" filed a "COMPLAINT TO SET ASIDE FORFEITURE AND FOR DAMAGES" in Stevens County Superior Court. [AP #793-3, pgs. 2-23]. As grounds for setting aside the forfeiture, Linda Bays asserts that she had paid off the contract. The complaint names neither Joseph Esposito nor the bankruptcy estate of David Bays as defendants nor were they served with process. FACTS ¶ 31.

On December 10, 2008, Linda Bays filed an "Amended Complaint to Set Aside Forfeiture, for Fraud, for Due Process Violations, for Equal Protection Violations, for First Amended Violation and for Damages" in Stevens County Superior Court, Cause No. 2003-200-6333. [AP II #4, pgs. 11-25]. This Amended Complaint adds Kelly Case as a plaintiff and, among others, Joseph Esposito, personally and as trustee of David Bays' bankruptcy estate, defendants. This Amended Complaint was filed in the Linda Bays' December 19, 2003, action to set aside the forfeiture. On December 15, 2008, Linda Bays removed Stevens County case No. 2003-200-6333 to this court. [AP II # 1].

Based on the above-mentioned litany of events, Linda Bays argues that the trustee was unsuccessful in his attempt to forfeit the Ferguson Contract.

Linda Bays does not challenge that the required Notice of Intent and Declaration of Forfeiture were appropriately filed with the Stevens County Auditor and served on her by mail.

She initiated a lawsuit on October 15, 2003, in Stevens County to enjoin the trustee from filing a Declaration of Forfeiture. This lawsuit was filed prior to October 20, 2003, the date set in the Notice of Intent and thus timely under the statute. R.C.W. 61.30.110(2). However, Linda Bays never obtained a restraining order to prevent the filing of the Declaration of Forfeiture. "... [T]he commencement of the action shall not of itself extend the time for cure." R.C.W. 61.30.110(2). Therefore, the trustee was not prohibited from filing the Declaration of Forfeiture on October 22, 2003.

Upon the filing of the Declaration of Forfeiture, a new time line becomes applicable. Parties seeking to set aside the forfeiture must both file a complaint to set aside the forfeiture and serve it within sixty days of the time the Notice of Forfeiture was recorded. R.C.W. 61.30.140(2). The Declaration of Forfeiture filed by the trustee on October 22, 2003, and mailed to Linda Bays sets the time in which the suit to set aside the forfeiture must be brought as December 29, 2003. Linda Bays met that time line by filing her complaint to set aside the forfeiture with the Stevens County Superior Court on December 19, 2003. The record before this case does not reflect whether service of the required summons and complaint on the defendants named in that complaint was made within the time line as outlined in the statute. R.C.W. 16.30.140(2). The record does reveal, however, that Joseph Esposito, trustee of the David Bays' bankruptcy estate, was neither named as a party defendant nor served within the statutory time line. FACTS ¶ 31. Since the trustee was the one who initiated the forfeiture of the contract and filed the Declaration of Forfeiture, the bankruptcy estate would be the beneficiary of the forfeiture. The trustee was an absolute necessary party to a suit to set aside the forfeiture. Ms. Bays has tendered no explanation which would excuse these omissions on her part. The amending of the complaint nearly five years later to add the trustee as a party

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defendant does not solve the problem. Ms. Bays did not timely seek to set aside the forfeiture as to the trustee and is barred from doing so now.

Ms. Bays' next challenge to the forfeiture process turns on an unresolved question of fact, whether the trustee gave appropriate notice of the intended forfeiture to Kelly Case. Kelly Case alleges that the address the forfeiture notices were sent to was not his address, that he did not reside there at the time the notices were given and, therefore, the forfeiture process fails as to him. If Mr. Case prevailed on the issue of improper notice, his interest was not forfeited. The seller would then be required to proceed under the terms of R.C.W. 61.30.080(3) to seek a court order to allow forfeiture and would be required to join and serve all the other parties which were given the required notices. It appears that process allows the trial court some discretion in fashioning appropriate relief to fit the circumstances.

Ms. Bays argues that if Kelly Case was not properly given notice then the forfeiture is void as to her. The statute specifically requires that notice be given to "the last holder of record of a purchaser's interest." Failure to comply with this provision renders the forfeiture void. R.C.W. 61.30.040(1). Assuming that Kelly Case did not receive appropriate notice in the forfeiture proceeding and he held a purchaser's interest in the Kettle Falls property, then the trustee's attempts to forfeit would be for naught.

The Quit Claim Deed by which Kelly Case obtained an interest in the Kettle Falls property was given as security for a loan of money. FACTS ¶ 15. The definition of this term "purchaser" in the forfeiture statute provides, "However, 'purchaser' does not include an assignee or any other person whose only interest or claim is in the nature of a lien or other security interest." R.C.W. 61.30.010(7). By definition, Kelly Case did not hold a "purchaser interest" in the Kettle Falls property. Therefore, the failure to give him appropriate notice of the forfeiture would not "void" the forfeiture pursuant to the terms of R.C.W. 61.30.040(1). Rather for a holder of a security interest given insufficient notice, the remedy would be pursuant to R.C.W. 61.30.080(3), which allows the court to fashion a remedy appropriate for the circumstances. In such a court action, all parties entitled to the required notice must be joined as parties. Although the court may decide to set aside the forfeiture in that proceeding, R.C.W. 61.30.080(3) does not have the mandatory language of R.C.W. 61.30.040(1), which requires voiding the forfeiture if a purchaser is not properly noticed.

Thus, even if Kelly Case was not given the required notices, that fact in itself would not render the entire contract forfeiture procedure void and reinstate Linda Bays' interest. Rather, it would depend on what remedy, if any, was available to Kelly Case.

II. *KELLY CASE VS. TRUSTEE AND DAVID BAYS*

The court now turns to the question of what interest, if any, Kelly Case has in the Kettle Falls property.

Kelly Case and Linda Bays entered into a "Loan Contract" dated November 27, 2000, whereby Kelly Case agreed to loan money to Linda Bays. Linda Bays agreed to give Kelly Case a Quit Claim Deed as security for repayment on her Kettle Falls residence. [AP # 686-3, pgs. 2-3]. On the same date, Linda Bays executed a "Quit-Claim Deed" to Kelly Case.

[AP 688-4, pg. 2]. FACTS ¶ 15. Kelly Case recorded this "Quit-Claim Deed" on August 7, 2001. FACTS ¶ 18. On July 11, 2003, Joseph Esposito, then trustee of David Bays' bankruptcy estate, had a "Notice

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of Intent to Forfeit" mailed to Kelly Case and addressed to "Kelly Case, P.O. Box 301, Kettle Falls, WA 99141." FACTS ¶ 27. Kelly Case disputes that was his correct address at the time. On September 26, 2003, Linda Bays obtained a cashier's check in the sum of $2,400.00 payable to Kelly Case. [AP # 688-5, pg. 2]. This cashier's check bore the handwritten words "contract dated November 2000 paid in full + extra money...." Kelly Case, after first obtaining legal ad vice, cashed this check and took the money FACTS ¶ 28. At the time Kelly Case took the money tendered by Linda Bays, he understood it was being tendered to him in complete satisfaction of all obligations owed by Linda Bays on the contract. [AP #688-2, pg. 9; Dep., pg. 28, ln. 9 thru Dep., pg. 30, ln. 1]. By accepting that money under those terms, Linda Bays' obligation to Kelly Case on the Loan Contract secured by the Quit-Claim Deed was paid in full. Upon acceptance of that money, there was no debt secured by the Quit-Claim Deed/Mortgage. With no debt to secure, there was no longer a mortgage.

If Kelly Case received the Notice of Intent to Forfeit and the Declaration of Forfeiture, this fact would explain why he didn't seek to join his mother's lawsuit to enjoin the forfeiture or in her lawsuit to set aside the forfeiture. If he was properly noticed, this failure would bar his attempts to challenge the forfeiture at a later time. Being added by amendment as a plaintiff to the injunction suit and in the suit to set aside the forfeiture would be time barred pursuant to the terms of the statute. R.C.W. 61.30.110; R.C.W. 61.30.140.

Even if the court was to conclude that the notices sent to Kelly Case were defective pursuant to the statute, he would have no remedy under R.C.W. 61.30.080(3). His mortgage on the property having been paid off prior to the Declaration of Forfeiture, he would have no standing to challenge the forfeiture.

Whether Kelly Case received appropriate notice of the foreclosure proceedings or not, he is barred from challenging this forfeiture.

III. CONCLUSION

A. *As to Linda Bays*

Linda Bays seeks in her complaint to quiet title in the Kettle Falls property and to clear that property of the claims of the David Bays' bankruptcy estate and David Bays. To do this, she must challenge the Findings of Fact, Conclusions of Law and Decree entered in the Bays' dissolution and affirmed on appeal by arguing that the Ferguson Contract had been paid in full and that nothing was owed on it to David Bays. Linda Bays is precluded from making that argument by both the doctrine of claim preclusion (res judicata) and issue preclusion (collateral estoppel).

Ms. Bays also challenges the trustee's forfeiture of her interest in the Ferguson Contract. The essence of that challenge is her claim that nothing was owed on the contract, which argument is precluded as a result of the dissolution decree. However, she also asserts a number of other procedural challenges to the forfeiture. She sought to enjoin the forfeiture, but she did not obtain an injunction before the Declaration of Forfeiture was filed. She also sought to set aside the forfeiture, but failed to name or serve the forfeiting trustee in the time frame required by the forfeiture statute. She is therefore barred from challenging the forfeiture in her own capacity.

Linda Bays also seeks to set aside the forfeiture on the grounds that Kelly Case was not properly noticed in the forfeiture proceeding and therefore the whole process is void. Even if Kelly Case was not

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properly noticed, a fact that the trustee disputes, that would not in itself void the forfeiture of Linda Bays' interest in the contract. Rather, the matter would come before the court for fashioning of an appropriate remedy under the circumstances. Although Linda Bays would be entitled to being joined in that proceeding, she would still be precluded from asserting in her own behalf that there was nothing owing on the contract.

B. *As to Kelly Case*

The evidence reflects that Kelly Case's interest in the Kettle Falls property was based on a Quit Claim Deed given to him by his mother Linda Bays as security for a loan. The evidence also reflects that Linda Bays tendered payment in full satisfaction of that loan and that Kelly Case accepted that payment. As a result, nothing was owed to Kelly Case on the obligation secured by the Quit Claim Deed. He therefore had no personal interest in the Kettle Falls property and therefore was not entitled to notice in the forfeiture proceeding and has no standing to challenge the forfeiture, whether he received appropriate notice or not.

C. *Judgment Should Be Entered*

A judgment should be entered quieting title in the Kettle Falls property in Tony Grabicki, trustee of David Bays' bankruptcy estate, and confirming that the interests of Linda Bays and Kelly Case in that property have been forfeited.

The court having herewith resolved these claims and issues, and they being the only matters remaining unresolved in this adversary proceeding, the judgment entered in this case shall be the final judgment in this adversary proceeding.

APPENDIX

REFERENCE CODE

[AP # ___]	Adversary Proceeding No. 03-00237- Docket No.
[AP II # ___]	Adversary Proceeding No. 08-80140, Docket No.
[DB # ___]	David Bays Bankruptcy Case, No. 01-05127, Docket No.
[LB # ___]	Linda Bays Bankruptcy Case, No. 02-07687, Docket No.
FACTS ¶ ___	The indicated paragraph in the FACTS section of this decision