No. 94182-3
COA No. 48083-2-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL L. ROESCH,
Petitioner/Appellant,

v.

CARL and CANDY BOHM,
Respondents.

APPEAL FROM THE SUPERIOR COURT OF PIERCE COUNTY
THE HONORABLE PHILLIP K. SORENSEN, JUDGE

REPLY TO ANSWER TO PETITION FOR REVIEW

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I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

Cases

Statutes

Court Rules

Other Authorities

III. ARGUMENT

A. THE COURT OF APPEALS DECISION MERITS REVIEW UNDER RAP 13.4 (b) (4).

Respondents argue they did not litigate issues of title in the trial court.[1] To the contrary, in Paragraph 3 of Instruction 2, the trial court instructed the jury as to Respondents' claim Fred Roesch failed to transfer to Candy Bohm "*title to the subject property...*"[2] Also, in paragraph 2 of Instruction 11, the trial court instructed the jury as to Fred Roesch's obligation to "*pay off the mortgage obligations on the 14712 72nd St. E., Sumner property and provide for Michael Roesch to transfer title to this property to the Bohms...*" How is this not litigating issues of title?

Respondents struggle to evade the rule against litigating issues of title by relying on RCW 59.18.380.[3] Respondents make no attempt to reconcile RCW 59.18.380's provision for equitable defenses with the rule against litigating issues of title in unlawful detainers followed in *Federal National Mortgage Association v. Ndiaye*, 188 Wn. App. 376, 353 P. 3d 644, 648 (2015), *Puget Sound Inv. Grp. v. Bridges*, 92 Wn. App. 523, 526, 963 P. 2d 944 (1998), *Proctor v. Forsythe*, 4 Wn. App. 238, 241, 480 P. 2d 511 (1971) and *Sundholm v. Patch*, 62 Wn. 2d 244, 382 P. 2d 262 (1963).

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[1] Answer to Petition for Review p. 6.
[2] CP 970.
[3] Answer to Petition for Review p. 3.

Courts consider relevant case law in construing language of a statute. *Christensen v. Ellsworth*, 162 Wn. 2d 365, 373, 173 P. 3d 228 (2007). Thus, RCW 59.18.380 should be interpreted in light of the Washington decisions that prohibit litigating issues of title in unlawful detainer.

Respondents and the Court of Appeals failed to address the test for invoking an equitable defense in an unlawful detainer, as stated in *Josephinium Assocs. v. Kahli*, 111 Wn. App. 617, 624-25, 45 P. 3d 627 (2002): "*An equitable defense arises when "there is 'a substantive legal right, that is, a right that comes within the scope of judicial action, as distinguished from a mere moral right'" and the usual legal remedies are unavailing.*"

Respondents fail to satisfy either element of this test. As indicated by the *Federal National Mortgage Association v. Ndiaye, et al.*, line of cases, Respondents do not have a substantive legal right to raise issues of title in an unlawful detainer. Further, the availability to Respondents of remedies such as quiet title militates in this case against an equitable defense of failure to transfer title.

Respondents call attention to the fact their claims of title are now being litigated in a regular civil action in Pierce County Superior Court Cause No. 15-2-13910-5.[4] Respondents thereby conclusively demonstrate the remedy of a quiet title action has always been available to them to resolve their claims of title to Petitioner's real property. Thus, Respondents cannot satisfy the requirement of inadequacy of legal remedy, and thus are unable to assert an equitable defense against Petitioner in this case.

Respondents continue to misplace reliance upon *Snuffin v. Mayo*, 6 Wn. App. 525, 494 P. 2d 497 (1972).[5] In *Snuffin*, the appellate court concluded in light of the lessor's failure to give timely notice of termination of the agricultural tenancy in accordance with RCW 59.12.035, and the court's very limited jurisdiction in unlawful detainer actions, the case must be dismissed. 6 Wn. App. 529-30. Because the case was dismissed on jurisdictional grounds, the appellate court's discussion of constructive trusts was therefore dictum.

In any event, in *Snuffin*, the court based its discussion of constructive trusts upon the fact that issue had been raised in the trial court. 6 Wn. App. 527-28. Here, in contrast, Respondents never raised

[4] Answer to Petition for Review p. 13.
[5] Answer to Petition for Review p. 3-6.

the issue of a constructive trust in the trial court. The issue of constructive trusts therefore cannot be raised on appeal for the first time. RAP 2.5 (a); *Washburn v. Beatt Equipment Co.*, 120 Wn. 2d 246, 290, 840 P. 2d 860 (1992).

Respondents argue the Court of Appeals was entitled to rely upon *Snuffin's* dictum regarding equitable defenses.[6] While consideration of dictum may be appropriate in other contexts, the Court of Appeals was not in this case free to disregard controlling precedent. *1000 Virginia Ltd Partnership v. Vertecs Corp.*, 158 Wn. 2d 566, 578, 146 P. 3d 423 (2006). The Court of Appeals' therefore erred in failing to follow controlling precedent in *Federal National Mortgage Association v. Ndiaye*, *Puget Sound Inv. Grp. v. Bridges*, *Proctor v. Forsythe*, and *Sundholm v. Patch.*

Respondents' attempt to distinguish *Federal National Mortgage Association v. Ndiaye*, *Proctor v. Forsythe*, and *Sundholm v. Patch* fails.[7] In each of those decisions, the court sitting in an unlawful detainer action ruled that issues of title were not permitted to be raised in such an action.

In this case, the Court of Appeals cited with approval *Puget Sound Inv. Grp. v. Bridges* for the rule issues of title may not be raised in an unlawful detainer. 194 Wn. App. 1050 at 5 ("*Thus, the parties in an unlawful detainer action may not litigate claims to title.* (Citing *Puget*

[6] Answer to Petition for Review p. 4-5.
[7] Answer to Petition for Review p. 8-13.

Sound Inv. Grp. v. Bridges, 92 Wn. App. 526)").

Respondents' efforts to undermine these established Washington precedents create serious risks to the public, as adherence to precedent accomplishes important benefits, such as increasing predictability of the law, clarification of the law, assuring like cases are decided alike, protecting reliance interests and preventing increased costs. *See,* J.B. McInnis, M. B. Rappaport, *Reconciling Originalism and Precedent*, 103 Northwestern University Law Review 803, 834 (2009).

Here, failure to follow *Federal National Mortgage Association v. Ndiaye*, *Puget Sound Inv. Grp. v. Bridges*, *Proctor v. Forsythe*, and *Sundholm v. Patch* thwarts the benefits to be gained by adherence to those precedents. Failure to follow those precedents will lessen predictability, lessen constraints on judges to follow the law, lessen the chance that similar cases are decided alike, diminish important reliance interests, and likely increase costs and uncertainty in the law.

The record in this case vividly illustrates the high cost of failing to follow controlling precedent in *Federal National Mortgage Association v. Ndiaye*, *Puget Sound Inv. Grp. v. Bridges*, *Proctor v. Forsythe*, and *Sundholm v. Patch* in an unlawful detainer such as this case. The trial court's failure to follow those precedents caused what began as a limited summary remedy to morph into a multi-day ordeal costing tens of

thousands of dollars. Failure to follow those precedents lessened predictability of the outcome, created confusion as to the governing law, and damaged Petitioners' reliance interest in the correct application of Washington's unlawful detainer statutes.

In light of the foregoing, the Court of Appeals' decision merits review under RAP 13.4 (b) (4).

B. THE COURT OF APPEALS DECISION MERITS REVIEW UNDER RAP 13.4 (b) (1), (2).

As respondents have failed to justify the Court of Appeals' failure to follow *Federal National Mortgage Association v. Ndiaye*, *Puget Sound Inv. Grp. v. Bridges*, *Proctor v. Forsythe*, and *Sundholm v. Patch*, the Court of Appeals' decision remains in conflict with those precedents, and thus remains subject to review under RAP 13.4 (b) (1), (2).

Respondents argue the Court of Appeals did not recognize or create a post-REPSA contract for the parties.[8] As respondents fail to support their argument with a single citation to authority, it should not be considered. RAP 10.3 (a) (6); *Aiken v. Aiken*, 187 Wn. 2d 49, 380 P. 3d 680, 685 n. 3 (2017).

[8] Answer to Petition for Review p. 7-8.

Respondents provide no contrary argument to the Court of Appeals' decision that both REPSAs covering the sale of Petitioner's real property had terminated in 2010.[9] Nor do respondents explain how those terminated REPSAs can be resurrected as part of an "overall" agreement.

Nor do respondents provide any authority contrary to the rule that absent evidence of waiver or estoppel, a purchase and sale agreement where time of is of the essence becomes a nullity where timely performance is not tendered. *Nadeau v. Beers*, 73 Wn.2d 608, 610, 440 P.2d 164 (1968); *Mid-Town Partnership v. Preston*, 69 Wn. App. 233, 227, 848 P.2d 1268 (1993); *Vacova Co. v. Farrell*, 62 Wn. App. 386, 814 P.2d 255 (1991). The Court of Appeals' decision thus continues to conflict with *Nadeau v. Beers*, *Mid-Town Partnership v. Preston*, and *Vacova Co. v. Farrell*.

Respondents provide no authority contrary to *Wagner v. Wagner*, 95 Wn. 2d 94, 104, 621 P. 2d 1279 (1980) or *Dragt v. Dragt/DeTray*, 139 Wn. App. 560, 573, 161 P. 3d 463, *review denied*, 163 Wash.2d 1042, 187 P.3d 269 (2008). It may therefore be assumed no such authority exists. *DeHeer v. Seattle Post Intelligencer*, 60 Wn. 2d 122, 126, 372 P. 2d 193 (1962).

[9] Unpublished Opinion at 14; App. 1.

C. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S AWARD OF ATTORNEY FEES TO RESPONDENTS AND IN AWARDING ATTORNEY FEES ON APPEAL TO RESPONDENTS.

Because the Court of Appeals' decision conflicts with controlling precedent barring consideration of issues of title in unlawful detainer actions and because respondents fail the test for recognizing an equitable defense in this case. respondents therefore have not prevailed for purposes of an award of attorney fees. Petitioners incorporate here the arguments and authorities in paragraphs I A and B, above.

The arguments and authorities in paragraphs I A and B above also compel rejection of respondents' argument petitioner's petition for review is frivolous.[10] Contrary to respondents' argument, this petition is well supported by controlling precedent and by respondents' inability to satisfy the necessary elements for an equitable defense.

D. PETITIONER REQUESTS AN AWARD OF ATTORNEY FEES IF THE COURT GRANTS REVIEW.

If he prevails, Petitioner requests an award of attorney fees incurred on appeal, pursuant to paragraph 11 of the lease[11], RAP 18.1 and RCW 4.84.330. Paragraph 11 applies here, even if the lease has expired. *Marsh &McLennan Bldg., Inc. v. Clapp*, 96 Wn. App. 636, 644, 980 P. 3d 311 (1999). An award of attorney fees is mandatory. *Singleton v. Frost*,

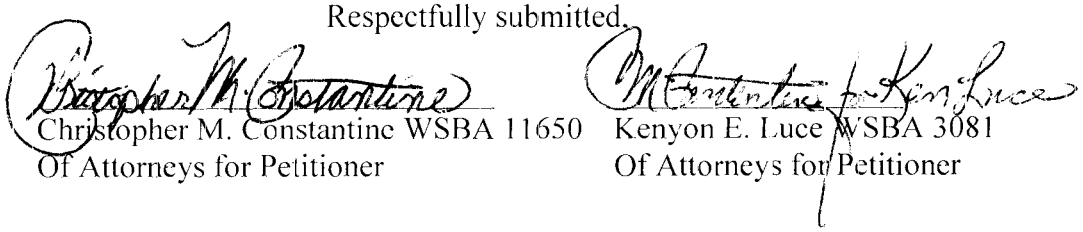
[10] Answer to Petition for Review p.
[11] EX 9.

108 Wn. 2d 723, 727-28, 742 P. 2d 1224 (1987); *Hawkins v. Diel*, 166 Wn. App. 1, 10, 269 P. 3d 1049 (2011). If the Court remands this case, Petitioner requests the Court pursuant to RAP 18.1 (i) to direct that the amount of fees and expenses be determined by the trial court after remand.

IV. CONCLUSION.

If the Petition for Review is granted, the Court should reverse the decision of the Court of Appeals and the trial court's order on jury verdict, verdict, judgment and other orders, and remand the case for trial.

Respectfully submitted,



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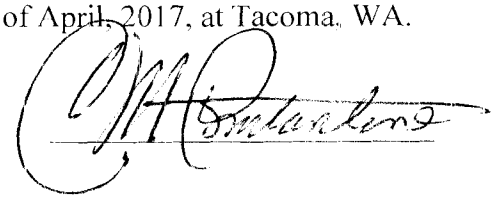
V. CERTIFICATE OF SERVICE

The undersigned hereby declares that on April 7, 2017, the undersigned served upon Respondents, Carl Bohm and Candy Bohm the REPLY TO ANSWER TO PETITION FOR REVIEW, addressed to the following:

Klaus O. Snyder
Snyder Law Firm
16719-110th Ave Ste C
Puyallup, WA 98374-9156

Dated this 7th day of April, 2017, at Tacoma, WA.



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