SUPREME COURT NO. 94580-2
COA # 34971-3-III

IN THE SUPREME COURT
STATE OF WASHINGTON

FEDERAL HOME LOAN MORTGAGE CORPORATION,

Respondent.

v.

PAMELA S. OWEN, ET AL.

Petitioner,

PETITION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER.

Pamela S. Owen, ("Petitioner") asks this court to accept review of the Court of Appeals decisions terminating review designated in Part B of this Petition.

B. COURT OF APPEALS DECISION.

Petitioner seeks reversal of the Court of Appeals Decisions filed on October 16, 2015 and May 2, 2017. A copy of each decision is in the Appendix at pages A- through .

C. ISSUES PRESENTED FOR REVIEW.

Assignments of Error.

No. 1. The Court of Appeals erred when sustaining the Superior Court's exercise of unlawful detainer subject matter and personal jurisdiction.

Issues Pertaining to Assignments of Error.

No. 1. Did the ad hoc and previously unknown unlawful detainer procedures employed by the Superior Court and affirmed by the Court of Appeals render the proceedings unfair and unconstitutional in violation of (1) Wash. Const. Art. I, §§ 2 and 3; (2) Wash. Const. Art. II, §1; (3) Wash. Const. Art. IV, § 6; (5) U.S. Const. Article VI, Clause 2 and (6) U.S. Const. Fourteenth Amendment, § 1?

No. 2. Did the filing of IRS Form 1099-A by Respondent further rendered the proceedings below unfair and unconstitutional in violation of (1) Wash. Const. Art. I, §§ 2 and 3; (2) Wash. Const. Art. II, §1; (3) Wash. Const. Art. IV, § 6; (5) U.S. Const. Article VI, Clause 2 and (6) U.S. Const. Fourteenth Amendment, § 1?

D. STATEMENT OF THE CASE.

This case arises under the Constitutions and laws of the United States and the State of Washington; from Petitioner's execution of a Deed

of Trust on November 4, 2005; and from the subsequent sale of Petitioner's loan 60 days later to Respondent on January 4, 2006.

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

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

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

On October 6, 2011, Mortgage Electronic Registration Systems, Inc. ("MERS"), acting in its unlawful capacity as "beneficiary" and "holder" of Petitioner's Deed of Trust, caused an Assignment of Deed of Trust to be recorded in the Office of the Auditor of Clark County Washington as Instrument Number 4799971 in favor of Bank of America, N.A., ("BANA"), successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP.

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

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

On October, 29, 2014, Lisa M. McMahon-Myhran, acting on behalf of BANA, filed a "Declaration Motion for Relief from Stay, Real Property located at 3912 NE 57th Avenue, Vancouver, WA" in response to Petitioner's bankruptcy petition, wherein McMahon-Myhran claimed BANA was the owner and holder of Petitioner's 2005 Note, at the same time Respondent was claiming to be the owner and holder of Petitioner's 2005 Note.

On January 16, 2015, BANA, acting through MTC, sold Petitioner's real property to Respondent, who was the highest bidder at the nonjudicial foreclosure sale.

On March 6, 2015, Respondent caused Petitioner to be served with a copy of an unlawful detainer summons and complaint, both of which had not been filed with the Superior Court. Petitioner did not respond to the unfiled summons and complaint.

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

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

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

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

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

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

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

On May 2, 2017, the Court of Appeals, Div. III, filed its Decision affirming the Superior Court's exercise of unlawful detainer subject matter and personal jurisdiction.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

I. The Ad Hoc Procedural Scheme for Unlawful Detainer Actions Concocted By the Superior Court and Affirmed By the Court of Appeals Offends State and Federal Constitutional Guarantees of Due Process.

"Facts are stubborn things; and whatever may be our wishes, our inclinations or the dictates of our passion, they cannot alter the state of facts and evidence." John Adams, Argument in Defense of the Soldiers in the Boston Massacre Trials, December 1770, available at http://www.quotationspage.com/quote/3235.html.

When the issues presented involve questions of law; mixed question of law and fact; interpretation of statutes and statutory procedural requirements; court's jurisdiction to hear a matter; and the appellate record consists entirely of written material, the proper standard of review is de novo. *Amren v. City of Kalama*, 131 Wn.2d 25, 32, 929 P.2d 389 (1997);

Hartson P'ship v. Goodwin, 99 Wn. App. 227, 231, 991 P.2d 1211 (2000); *Crosby v. Spokane County*, 137 Wn.2d 296, 301, 971 P.2d 32 (1999).

When the facts are undisputed, the reviewing court stands in the same position as the trial court and can therefore apply the de novo standard. *Peeples v. Port of Bellingham*, 93 Wash. 2d 766, 613 P.2d 1128 (1980), overruled on other grounds by *Chaplin v. Sanders*, 100 Wash. 2d 853, 861 n.2, 676 P.2d 431, 436 n.2 (1989).

The application of the civil rules to the unlawful detainer statutory requirements is a matter of statutory interpretation to be reviewed de novo. *Christensen v. Ellsworth*, 162 Wn.2d 365, 370, 173 P.3d 228 (Wash. 2007).

A court's objective in construing a statute is to determine the legislature's intent. *Christensen v. Ellsworth*, 162 Wn.2d at 372-373.

"This is a special statutory proceeding, summary in its nature and in derogation of the common law." *Big Bend Land Co. v. Huston*, 98 Wash. 640, 643, 168 P. 470 (1917). The question before the Court is the legislative intent in enacting Chapters 59.12 and 61.24 RCW.

It is undisputed that Respondent filed its summons and complaint for unlawful detainer on April 2, 2015.

It is further undisputed that less than 24 hours after filing the unlawful detainer action, Respondent moved the Superior Court in an *ex parte* proceeding on April 3, 2015 for an Order of Default and an *ex parte* Writ of Restitution, which were issued by the trial court.

It is further undisputed that Petitioner was given no notice of the *ex parte* hearing and no opportunity to participate in the *ex parte* hearing.

The procedure adopted by Respondent and approved by the Superior Court and the Court of Appeals abolishes well-settled decisional law without citations or even an argument or suggestion that prior

decisions by the courts of this State be overruled, set aside or distinguished.

"A basic function of any legal system is to provide rules by which people may guide their conduct in society. To fulfill this purpose, it is essential that the law be reasonably certain, consistent and predictable. In this respect, *stare decisis* serves an important and valid function." *In re Matter of Mercer*, 108 Wash.2d 714, 720-21, 741 P.2d 559 (1987).

In Washington, the standard for overruling precedent is strict. Under the doctrine of *stare decisis*, an earlier decision must be both incorrect and harmful before it is abandoned. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wash.2d 264, 278, 208 P.3d 1092 (2009).

The constraints of *stare decisis* further prevent the law from becoming "subject to incautious action or the whims of current holders of judicial office." *Lunsford, supra*, 166 Wash.2d at 278.

"[*Stare decisis*] makes for stability and permanence...so that the decisions of the courts of last resort are held to be binding on all others. Without stare decisis, the law ceases to be a system.... Take away stare decisis, and what is left may have force, but it will not be law." *State ex rel. State Fin. Comm. v. Martin*, 62 Wash.2d 645, 665-66, 384 P.2d 833 (1963).

The Superior Court's unlawful detainer subject matter jurisdiction is of constitutional design derived from the mandate provided in Wash. Const. Art. IV, § 6. *Tacoma Rescue Mission v. Stewart*, 155 Wn. App. 250, 254 n.9, 228 P.3d 1289 (Div. Two, 2010).

The exercise of this inherent power is directly subject to the limitations imposed by Wash. Const. Art. I, §§ 2 and 3 and U.S. Const. Article VI, Clause 2 and U.S. Const. Fourteenth Amendment, § 1.

Petitioner directly challenged the Superior Court's exercise of subject matter and personal jurisdiction regarding its *ex parte* default

hearing and Respondent's issuance of IRS Form 1099-A which informed the Superior Court that both Respondent and BANA were simultaneously claiming to be the owner and holder of Petitioner's Note, thereby raising an issue involving a constitutional fact concerning strict compliance with Chapter 61.24 RCW.

Without citing any case law or other authority, the Court ruled it was permissible to hobble personal service of an unfiled summons and complaint with RCW §§ 4.28.020 and 59.18.365 and Superior Court Civil Rules, CR 3 and 55 and thereby confer unlawful detainer subject matter and personal jurisdiction on the Superior Court. Appendix (Appx) A-004.

Respondent's argument is directly rejected on the face of relevant sections of the current version of Chapter 59.12 RCW which rely upon the "filing" of the action:

(1) Under RCW § 59.12.060: "No person other than the tenant of the premises... when the complaint is filed, need be made parties defendant in any proceeding under this chapter, nor shall any proceeding abate...."

(2) RCW § 59.12.085 grants the court power to authorize an alternative means of service of the summons and complaint after both had been filed and after personal service had failed. Subdivision (3) limits the Court's jurisdiction by providing that "no money judgment may be entered against the defendant or defendants until jurisdiction over the defendant or defendants is obtained."

(3) RCW § 59.12.090 expressly rejects the notion that an unfiled summons and complaint can confer on the court unlawful detainer subject matter jurisdiction:

> "The plaintiff at the time of commencing an action of forcible entry or detainer or unlawful detainer, or at any time afterwards, may apply to the judge of the court in which the action is pending for a writ of restitution

> restoring to the plaintiff the property in the complaint described, and the judge shall order a writ of restitution to issue. The writ shall be issued by the clerk of the superior court in which the action is pending, and be returnable in twenty days after its date; but before any writ shall issue prior to judgment the plaintiff shall execute to the defendant and file in court a bond in such sum as the court or judge may order, with sufficient surety to be approved by the clerk, conditioned that the plaintiff will prosecute his or her action without delay, and will pay all costs that may be adjudged to the defendant, and all damages which he or she may sustain by reason of the writ of restitution having been issued, should the same be wrongfully sued out."

The aforementioned section makes clear that nothing filed, is nothing "pending." Thus, an unfiled Summons and Complaint does not and cannot create the "pendency of the action" in a court of competent jurisdiction for purposes of the court's ex parte exercise of subject matter and personal jurisdiction to support the issuance of unlawful detainer default orders and judgment contemplated by Wash. Const. Art. IV, § 6 and the Legislature when enacting Chapter 59.12 RCW.

U.S. Const. Article VI, Clause 2, ("Supremacy Clause"), provides:

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

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

The full significance of the Supremacy Clause, as applied to legislation, was further developed in the opinions of *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819) and *Gibbons v. Ogden*, 22 U.S.

(9 Wheat.) 1 (1824), where the nullity of an act, inconsistent with the constitution, is produced by the declaration that the constitution is the supreme law of the land.

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

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

For more than a century the central meaning of procedural due process has been that parties whose rights are to be affected are entitled to be heard at a meaningful time and in a meaningful manner. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 68 U.S. 223, 233 (1 Wall.) 223, 233 (1864); *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case" (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

Missing from the Superior Court's ad hoc procedures is the familiar procedural due process inspection instructed by *Mathews v. Eldridge*, 424 U. S. 319 (1976). Under the *Mathews* balancing test, a court evaluates (A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake. *Mathews v. Eldridge*, 424 U. S., at 335.

All three considerations weigh decisively against the Superior Court's ad hoc scheme. Petitioner has a strong and obvious interest in retaining title to her real property and remaining in possession thereof.

As the issuance of IRS Form 1099-A makes clear, both BANA and Respondent are claiming to be the owner and holder of Petitioner's Note.

Because of the existence these competing claims, the risk of erroneous deprivation could not be higher. Moreover, Washington has no interest in summarily stripping Petitioner of her property rights in favor of entities who may have zero claim of right.

That the Superior Court's ad hoc unlawful detainer scheme fails constitutional due process was aptly stated by this Court in *Klem v. Wash. Mut. Bank,* 176 Wn.2d 771, 295 P.3d 1179 (2013):

> "While the legislature has established a mechanism for nonjudicial sales, neither due process nor equity will countenance a system that permits the theft of a person's property by a lender or its beneficiary under the guise of a statutory nonjudicial foreclosure. *Klem v. Wash. Mut. Bank,* 176 Wn.2d at 790.

Indeed, a long line of cases, from *Big Bend Land Co. v. Huston,* 98 Wash. 640, 168 P. 470 (1917) to *Christensen v. Ellsworth,* 162 Wn.2d 365, 173 P.3d 228 (2007), cast considerable legal and constitutional doubt upon the argument that RCW §§ 4.28.020 and 59.18.365 and the civil rules, CR 3 and 55 may be hobbled like a horse to commence an action for unlawful detainer and thereby confer jurisdiction on the Superior Court.

Tegland, in his Washington Practice Series, explains that CR 3 does not mandate that the defendant take any action whatsoever when served with a summons that has not been filed:

> "§ 7:3 Service without filing
>
> As mentioned in § 7:1, an action may be commenced, at least *tentatively*, by serving the defendant with a summons and complaint.... Even if the defendant does not demand that the plaintiff file the action (the more typical situation), the plaintiff must file it within 90 days, or the action is treated as if it was never commenced for purposes of the statute of limitations.... 14 Karl B. Tegland, Washington Practice Series: Civil Procedure §§ 7:1-7:3 at 213-215 (2009); *See also:* 3A Karl B. Tegland, Washington Practice Series: Rules Practice, at 39 (2013).

As to whether the Superior Court ever acquired jurisdiction of Respondent's complaint for unlawful detainer and whether the Court of Appeal and this Court has power to affirm, this Court's earlier holding in *Fortier v. Fortier*, 23 Wn.2d 748, 749-750, 162 P.2d 438 (1945) is dispositive:

> "The statement is found in many cases that, where the trial court has no jurisdiction of the subject matter, the appellate court can have none. This statement is accurate in the sense that, while this court has jurisdiction, procedurally, to entertain an appeal, it has no greater jurisdiction of the subject matter or the merits than had the trial court. If it were not so, then there would be no remedy for the pretended judgments of the lower courts in those cases in which affirmative judgment was rendered without jurisdiction. The duty of this court, upon reversing on such a case, would be to render such a judgment as the trial court should have rendered it, which would be one dismissing the case." See also: *In re Jullin*, 23 Wn.2d 1, 16, 158 P.2d 319, 160 P.2d 1023 (1945), citing *In re Elvigen's Estate*, 191 Wn. 614, 622-623, 71 P.2d 672 (1937) (Exercise of power without authority "is a nullity.").

The Court of Appeals, Div III, noted in its Decision at page 4 that:

> "Ms. Owen also filed a separate lawsuit in federal court against the Clark County sheriff, Freddie Mac, Freddie Mac's attorneys, and Trustee Corps. See Owen v. Atkins, No. CIS-5375-BHS (W.D. Wash. 2015). She asserted claims under the Washington Consumer Protection Act (CPA), chapter 19.86 RCW, and claims under 42 U.S.C. § 1983for violation of her federal rights. The federal court dismissed Ms. Owen's claims."

With regards to the due process issue here on appeal, the Federal District Court, in granting Sheriff Atkins' cross-motion for summary judgment, justified its avoidance of constitutional questions by ruling that:

> "In this case, Owen fails to show that any conduct deprived her of a right secured by federal law. While due process generally requires notice before deprivation of property, Owen was not deprived of her property rights based on the

> ex parte unlawful detainer action because Freddie Mac cancelled the forceful eviction. Therefore, Owen has not only failed to establish that she is entitled to summary judgment but also has failed to show that questions of material fact exist to overcome Atkins's motion for summary judgment." CP at 19, line 16.

The Federal District Court's dismissal finding no constitutional violations because Petitioner remained in possession of her home is contrary to the decisions of the Superior Court and Court of Appeals declaring Respondent is entitled to evict Petitioner and take possession.

On May 12, 2016, Petitioner perfected a timely appeal with the United States Court of Appeals for the Ninth Circuit, Cause No. 16-35398.

II. Respondent's Issuance of IRS Form 1099-A Effectively Deprived the Superior Court of Unlawful Detainer Subject Matter Jurisdiction.

In *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 89-108 (2012), the Court rejected outright MERS's fallacious use of the principle that it could be the statutory beneficiary under RCW 61.24.005(2) because it is named the "beneficiary" of the deed of trust. "Simply put, if MERS does not hold the note, it is not a lawful beneficiary." *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83 at 89.

In this appeal, Respondent seeks a ruling that will affirm the Superior Court's *ex parte* exercise of unlawful detainer subject matter and personal jurisdiction without requiring any compliance with constitutional due process.

By issuing IRS Form 1099-A pursuant to federal law, 26 U.S.C. § 6050J, Respondent is also claiming to be the lawful beneficiary, owner or holder of Petitioner's Note which is contrary to claims by BANA and MERS's claim to be "beneficiary."

When enacting 26 U.S.C. § 6050J(a), Congress used the conjunction "and" to create the test for the information return to be made to the Treasury Secretary relating to any foreclosure:

> "(a) In general
> Any person who, in connection with a trade or business conducted by such person, lends money secured by property and who—
>
> (1) in full or partial satisfaction of any indebtedness, acquires an interest in any property which is security for such indebtedness, or
>
> (2) has reason to know that the property in which such person has a security interest has been abandoned...."

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

Respondent's claim to have been a "lender" raises additional legal issues. In *Brown v. The Department of Commerce*, 184 Wn.2d 509; 359 P.3d 771 (2015), this Court developed the understanding that:

> "Freddie Mac does not lend to homebuyers. Instead, Freddie Mac purchases mortgage notes from the initial lenders. Often, Freddie Mac pools hundreds of these mortgage notes into a trust, and the trustee issues and sells securities to investors in various tranches of seniority.... Freddie Mac guarantees the borrowers' monthly payments on the underlying notes. If a borrower stops paying, Freddie Mac will step in and pay the investors. Freddie Mac does all of this to further its congressionally mandated mission to "provide ongoing assistance to the secondary market for residential mortgages" to thereby "promote access to mortgage credit throughout the Nation" and expand homeownership. 12 U.S.C. § 1716(3), (4)."

Thus, IRS Form 1099-A effectively defeats Respondent's entitlement to the benefits of Chapters 59.12 and 61.24 RCW. Where, as here, the issue of title predominate the issue of possession, a putative owner claiming unlawful detainer must first establish superior title to a person who holds a statutory warranty deed through an action in ejectment or quiet title before the remedy of unlawful detainer may be pursued. *Puget Sound Inv. Group, Inc. v. Bridges*, 92 Wn. App. 523, 963 P.2d 944 (Div. One, 1998).

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

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

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

Petitioner had valid color of title and held superior title through her possession of a statutory warranty deed. Respondent's lack of belief that it had "color of title" through the Trustee's Deed Upon Sale became apparent when issuing IRS Form 1099-A.

Under Washington case law, one cannot possess color of title if it knows that the title is invalid. Here, MERS, Inc. was not a lawful "beneficiary" with power and authority to assign Petitioner's Note and Deed of Trust to BANA. No rights were acquired by BANA from the Assignment. And during the period leading up to the nonjudicial foreclosure sale, both BANA and Respondent were simultaneously claiming to be the owner or holder of Petitioner's Note.

Finally, in the Courts below, Respondent submitted no evidence that a lawful agency relationship existed between itself and MERS, BANA or MTC. In this light, the facts demonstrate that the Superior Court was deprived of unlawful detainer subject matter jurisdiction and personal jurisdiction over Petitioner.

F. CONCLUSION.

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

Under the Supremacy and Due Process Clauses and Chapters 59.12 and 61.24 RCW and the facts, the Superior Court was profligate in its exercise of unlawful detainer subject matter and as such, could never acquire personal jurisdiction over Petitioner consistent with constitutional due process. On the facts and evidence, the Superior Court's orders and judgments were improvidently issued and granted.

Respectfully submitted,
Dated: May 31, 2017

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SUPREME COURT NO. _____

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APPENDIX TO PETITION FOR DISCRETIONARY REVIEW

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FEDERAL HOME LOAN MORTGAGE CORPORATION,

Respondent,

v.

PAMELA S. OWEN AND JOHN/JANE DOE OWEN, WIFE AND HUSBAND; AND JOHN AND JANE DOE, UNKOWN OCCUPANTS OF THE PREMISES,

Appellants.

No. 47566-9-II

RULING GRANTING MOTION ON THE MERITS TO AFFIRM

Pamela Owen appeals from the trial court's April 3, 2015 Order of Default, Judgment for Writ of Restitution Only, and Writ of Restitution, and its May 1, 2015 Order denying her motion to vacate judgment and stay enforcement of that writ. The Respondent Federal Home Loan Mortgage Corporation (Freddie Mac) filed a motion on the merits to affirm the trial court's orders under RAP 18.14(e)(1). Concluding that Owen's appeal is clearly without merit, this court grants the motion on the merits and affirms the trial court's orders.

On March 6, 2015, a process server served Owen with a Summons and Complaint for Unlawful Detainer issued by Freddie Mac. The Summons informed Owen that the

deadline for her response to the Complaint was March 30, 2015. The Summons also informed Owen that she could demand that Freddie Mac file the Complaint with the trial court. Owen did neither. On April 2, 2015, Freddie Mac filed the Summons and Complaint with the trial court. On April 3, 2015, it obtained the following orders ex parte: Order of Default, Judgment for Writ of Restitution Only and Writ of Restitution. On April 13, 2015, Owen filed a motion to vacate judgment and stay enforcement of the judgment and the writ of restitution, asserting her failure to respond was the result of deficiencies in the Summons and Complaint. After a hearing, the trial court denied her motion.

Owen argues that the trial court lacked jurisdiction to enter the April 3 orders because Freddie Mac did not file the Summons and Complaint for Unlawful Detainer with the trial court before serving them on her. She relies on *Big Bend Land Co. v. Huston*, 98 Wash. 640, 642-43, 168 P. 470 (1917),[1] which states that in an unlawful detainer action filed by Big Bend Land Company:

> In the summons served upon the defendants, the nature of the action is not stated, the relief demanded is not mentioned, and no return day is designated. This is a special statutory proceeding; summary in its nature, and in derogation of the common law. It is an elementary rule of universal application in actions of this character that the statute conferring jurisdiction must be strictly pursued, and if the method of procedure prescribed by it is not strictly observed, jurisdiction will fail to attach and the proceeding will be a nullity. *Smith v. Seattle Camp, No. 69, W.O.W.*, 57 Wash. 556, 107 Pac. 372 [(1910)]. The original summons is in neither strict nor substantial compliance with [Rem. Code. § 818] and is clearly void.

[1] The other cases upon which Owen relies cite *Big Bend*. *See Hatfield v. Greco*, 87 Wn.2d 780, 782, 557 P.2d 340 (1976) (challenge to qualification of candidate for elected office); *Signal Oil Co. v. Sterbick*, 40 Wn.2d 599, 602-03, 245 P.2d 217 (1952) (unlawful detainer); *Lee v. Weerda*. 124 Wash. 168, 172, 213 P. 919 (1923) (unlawful detainer) *State ex rel. Seaborn Shipyards Co. v. Superior Court of Pierce County*, 102 Wash. 215, 216, 172 P. 826 (1918) (unlawful detainer).

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Owen contends that *Big Bend* requires that in order for the trial court to have jurisdiction, the unlawful detainer complaint must be filed before it is served. But *Big Bend* did not base its ruling on the sequence of filing and service. It concluded that the trial court lacked jurisdiction because the form of the summons did not comply with the statutory requirements.

Owen next argues that *Signal Oil Co. v. Sterbick*, 40 Wn.2d 599, 602-03, 245 P.2d 217 (1952), requires that an unlawful detainer complaint be filed before it is served in order to commence the action. But while Signal Oil filed its unlawful detainer complaint before serving it on Sterbick, the court again did not base its ruling on the sequence of filing and service. It concluded that Signal Oil had waived its claim that Sterbick had breached the lease, so it could not bring an action for unlawful detainer.

Finally, Owen argues that the trial court failed to strictly construe the requirements for an unlawful detainer proceeding. RCW 59.12.070 provides:

> The plaintiff in his or her complaint, which shall be in writing, must set forth the facts on which he or she seeks to recover, and describe the premises with reasonable certainty, and may set forth therein any circumstances of fraud, force or violence, which may have accompanied the forcible entry or forcible or unlawful detainer, and claim damages therefor, or compensation for the occupation of the premises, or both; in case the unlawful detainer charged be after default in the payment of rent, the complaint must state the amount of such rent. A summons must be issued as in other cases, returnable at a day designated therein, which shall not be less than seven nor more than thirty days from the date of service, except in cases where the publication of summons is necessary, in which case the court or judge thereof may order that the summons be made returnable at such time as may be deemed proper, and the summons shall specify the return day so fixed.

And RCW 59.12.080 provides:

> The summons must state the names of the parties to the proceeding, the court in which the same is brought, the nature of the action, in concise

> terms, and the relief sought, and also the return day; and must notify the defendant to appear and answer within the time designated or that the relief sought will be taken against him or her. The summons must be directed to the defendant, and in case of summons by publication, be served at least five days before the return day designated therein. The summons must be served and returned in the same manner as summons in other actions is served and returned.

Neither statute requires that the unlawful detainer complaint be filed before the summons and complaint are served. They prescribe the content of the summons and complaint for unlawful detainer. Owen contends that the use of the word "brought" in RCW 59.12.080 is in the past tense and therefore indicates that the complaint must have already been filed in the trial court when the summons is issued. But RCW 59.12.080 uses the term "is brought," which is not the past tense and does not support Owen's reading.

RCW 59.12.180 provides that in unlawful detainer proceedings, the laws with reference to practice in civil actions apply "except so far as they are inconsistent with the provisions of" chapter 59.12 RCW. CR 3 and RCW 59.18.365 permit a summons and complaint for unlawful detainer to be served on the occupant of the property before it is filed with the trial court. They are not inconsistent with the provisions of chapter 59.12 RCW. Owen did not respond to the Summons and Complaint within the 20 days prescribed in the Summons. Nor did she demand that Freddie Mac file its complaint with the trial court. Having not responded within 20 days, Owen was in default under CR 55. The trial court had jurisdiction to enter the ex parte Order of Default, Judgment for Writ of Restitution Only and Writ of Restitution. And Owen does not show that the trial court erred in denying her motion to vacate and stay those orders.

An appeal is clearly without merit when the issues on review are clearly controlled by settled law. RAP 18.14(e)(1)(a). Because Owen does not show that the trial court lacked jurisdiction to enter its orders, her appeal is clearly without merit. Accordingly, it is hereby

ORDERED that Freddie Mac's motion on the merits to affirm is granted and the trial court's April 3, 2015 and May 1, 2015 orders are affirmed.

DATED this 16th day of October, 2015.

Eric B. Schmidt
Court Commissioner

cc: Pamela S. Owen, Pro Se
John A. McIntosh
Hon. Robert A. Lewis

A-005

FILED
MAY 2, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

FEDERAL HOME LOAN MORTGAGE CORPORATION, Respondent, v. PAMELA S. OWEN AND JOHN/JANE DOE OWEN, WIFE AND HUSBAND; JOHN AND JANE DOE, UNKNOWN OCCUPANTS OF THE PREMISES, Appellants.	)	No. 34971-3-III UNPUBLISHED OPINION

LAWRENCE-BERREY, J. — In this unlawful detainer action, Pamela Owen appeals from the trial court's order reissuing a writ of restitution. The writ directed the sheriff to deliver possession of the subject property to its owner, the Federal Home Loan Mortgage Corporation (Freddie Mac). Ms. Owen argues a tax document she received, Internal Revenue Service (IRS) Form 1099-A, demonstrates the underlying foreclosure sale was unlawful. Because unlawful detainer proceedings do not provide a forum for litigating issues not directly related to the right of possession between the parties, we disagree with Ms. Owen and affirm the trial court's order reissuing the writ.

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FACTS

In November 2005, Ms. Owen bought the subject property located in Vancouver, Washington. The deed of trust and promissory note were both granted in favor of Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary and nominee for the lender.[1] In 2011, MERS assigned the deed of trust and note to Bank of America, N.A., who later appointed Trustee Corps as successor trustee.

Ms. Owen defaulted on her loan. In 2014, Bank of America asked Trustee Corps to sell the property to satisfy Ms. Owen's outstanding obligation. Trustee Corps served and recorded a notice of trustee's sale. The notice advised that anyone who objected to the sale could sue to restrain the sale, and that failing to do so could result in waiver of any grounds for invalidating the sale. On January 16, 2015, Trustee Corps held a nonjudicial foreclosure sale and sold the subject property to Freddie Mac, the highest bidder. Trustee Corps then conveyed the deed of trust to Freddie Mac.

Ms. Owen did not leave the property. On March 6, 2015, Freddie Mac served Ms. Owen with a summons and complaint for unlawful detainer alleging that Ms. Owen was wrongfully occupying the subject property. On April 2, 2015, Freddie Mac filed the

[1] The record contains the deed of trust, but not the note. The recitals in the trustee's deed indicate the note was executed in favor of MERS.

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summons and complaint with the trial court, along with a copy of the recorded trustee's deed upon sale. On April 3, the trial court entered a default judgment in favor of Freddie Mac, finding that Freddie Mac had properly served Ms. Owen, and that since being served, Ms. Owen failed to file or serve any response.

The trial court found that Freddie Mac owned the subject property due to its successful bid at the trustee's sale, and was therefore entitled to immediate possession. The trial court also found that Ms. Owen refused to surrender possession of the property. The trial court ordered the clerk to issue a writ of restitution directing the sheriff to evict Ms. Owen and restore possession to Freddie Mac.

Several weeks later, Ms. Owen moved to quash the service of the unlawful detainer summons, vacate the court's order finding unlawful detainer, and stay the writ of restitution. *See* Ruling Granting Motion on the Merits to Affirm, *Fed. Home Loan Mortg. Corp. v. Owen*, No. 47566-9-II, at 2 (Oct. 16, 2015). She asserted her failure to respond was the result of deficiencies in the summons and complaint. *Id.* After a hearing, the trial court denied her motions. *Id.*

Ms. Owen appealed to the Court of Appeals. She argued the trial court lacked jurisdiction to enter the April 3, 2015 orders because Freddie Mac did not file the summons and complaint for unlawful detainer with the trial court before serving them on

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her. *Id.* Freddie Mac moved under RAP 18.14(e)(1) to affirm the trial court's orders. *Id.* at 1. A Court of Appeals commissioner concluded Ms. Owen's appeal was clearly without merit and affirmed the trial court's orders granting default judgment and issuing the writ. *Id.* at 5.

Ms. Owen also filed a separate lawsuit in federal court against the Clark County sheriff, Freddie Mac, Freddie Mac's attorneys, and Trustee Corps. *See Owen v. Atkins*, No. C15-5375-BHS (W.D. Wash. 2015). She asserted claims under the Washington Consumer Protection Act (CPA), chapter 19.86 RCW, and claims under 42 U.S.C. § 1983 for violation of her federal rights. The federal court dismissed Ms. Owen's claims.

Around this time, Bank of America sent Ms. Owen a copy of IRS Form 1099-A, relating to acquisition or abandonment of secured property. Ms. Owen filed the IRS Form 1099-A in federal court, arguing it supported her CPA and § 1983 claims. The federal court characterized Ms. Owen's motion as "essentially a motion for reconsideration," noted it had already dismissed her conspiracy claims with prejudice, and denied Ms. Owen's motion. Clerk's Papers (CP) at 61.

Following the mandate from the Washington State Court of Appeals, Freddie Mac moved the state trial court for an order reissuing the writ of restitution, given that the prior writ had expired. Ms. Owen then moved to vacate the trial court's original default

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judgment and dismiss Freddie Mac's original complaint for unlawful detainer. She argued the IRS Form 1099-A demonstrated that MERS, Bank of America, and Trustee Corps illegally foreclosed on her mortgage.

Freddie Mac responded, arguing that the federal court had already rejected Ms. Owen's claim that the IRS Form 1099-A demonstrated an unlawful conspiracy to foreclose on her home. Thus, Freddie Mac argued collateral estoppel barred her from re-litigating the issue in her motion to vacate. Freddie Mac also argued Ms. Owen could not challenge the underlying foreclosure sale in an unlawful detainer action.

The trial court entered an order reissuing the writ of restitution. Ms. Owen timely appealed the trial court's order reissuing the writ.

ANALYSIS

Ms. Owen argues the trial court lacked authority to reissue the writ of restitution because IRS Form 1099-A demonstrates the foreclosure sale was unlawful. She contends the form proves "MERS was an unlawful 'beneficiary' " under the original deed of trust, and thus could not assign the deed of trust to Bank of America. Br. of Appellant at 4. She argues that because of this, Bank of America had no authority to foreclose on her

property.[2]

The purchaser at a deed of trust foreclosure sale may bring an unlawful detainer action to evict the previous owner of the home, provided the sale complied with the statutory foreclosure rules. *See* RCW 59.12.032. The purchaser is entitled to possession of the property on the 20th day following the sale, provided that the borrower and occupant received notice of the sale. *See* RCW 61.24.060(1).

Unlawful detainer is a summary proceeding for obtaining possession of real property. *Fed. Nat'l Mortg. Ass'n v. Ndiaye*, 188 Wn. App. 376, 382, 353 P.3d 644 (2015). It is a narrow action limited to the question of possession and related issues. *Id.* It does not provide a forum to litigate claims to title. *Id.* To protect the proceeding's summary nature, "other claims, including counterclaims, are generally not allowed," except for those that excuse the tenant's failure to pay rent. *Heaverlo v. Keico Indus., Inc.*, 80 Wn. App. 724, 728, 911 P.2d 406 (1996); *see Ndiaye*, 188 Wn. App. at 382.

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[2] Ms. Owen vaguely raises numerous other assignments of error. She alleges that Freddie Mac, rather than Trustee Corps, was responsible for ensuring the trustee's sale complied with statutory requirements. She also alleges that Freddie Mac's complaint for unlawful detainer was facially deficient, that the trustee's sale failed to comply with statutory requirements under RCW 61.24.030(7), (9), that the federal court order estopped the trial court from issuing the writ, and that Freddie Mac was not entitled to pursue an unlawful detainer action because she had color of title. Ms. Owen raises all of these contentions for the first time on appeal, many of them for the first time in her reply brief. Accordingly, this court declines to address them. *See* RAP 2.5(a); RAP 10.3(c).

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Here, it is undisputed that Freddie Mac purchased the property at the January 16, 2015 trustee's sale. The trustee's deed, recorded in Clark County on January 22, 2015, conveyed title in the property to Freddie Mac. *See* RCW 61.24.050(1). It is likewise undisputed that over 20 days passed before Freddie Mac served and filed its summons and complaint for unlawful detainer. Nothing in the record suggests that Freddie Mac failed to comply with any of chapter 59.12 RCW's procedures, or that the trial court improperly resolved the question of possession.

A. IRS FORM 1099-A

Ms. Owen argues, as she did below, that IRS Form 1099-A demonstrates the foreclosure sale was unlawful. Even assuming Ms. Owen could challenge the underlying foreclosure in this unlawful detainer action (which she cannot), she fails to explain how this form has any bearing on foreclosure proceedings under the deeds of trust act, chapter 61.24 RCW. Under federal income tax laws, a commercial lender must provide the borrower with this form when it acquires an interest in secured property to satisfy a debt, or when it knows its property has been abandoned. *See* 26 U.S.C. § 6050J(a). The IRS requires the lender to do this so the borrower can calculate the gain or loss on the property's disposition and report it on his or her tax return. *See* Topic 432 - Form 1099-A, Internal Revenue Service, (updated Apr. 25, 2017),

https://www.irs.gov/taxtopics/tc432.html. Contrary to Ms. Owen's assertion, IRS Form 1099-A is not evidence that Bank of America wrongfully foreclosed on her property.

B. CHAIN OF TITLE

Ms. Owen also argues Bank of America could not foreclose on her property because MERS was improperly listed as the beneficiary on the original deed of trust.

When facing nonjudicial foreclosure, a borrower can sue to restrain the trustee's sale "on any proper legal or equitable ground." RCW 61.24.130(1). Failure to do so can waive valid defenses. RCW 61.24.040(1)(f)(IX). Waiver applies when the borrower (1) had notice of the right to restrain the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring a lawsuit to enjoin the sale. *Ndiaye*, 188 Wn. App. at 382.

In *Ndiaye*, the borrower never sued to restrain the trustee's sale and later defended the unlawful detainer action on the ground that MERS was an improper beneficiary under the deed of trust and, therefore, MERS lacked power to convey any interest in the original deed of trust. *Id.* at 383. Citing *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012), the *Ndiaye* court acknowledged the borrower could be correct that MERS was an improper beneficiary. *Ndiaye*, 188 Wn. App. at 383. Nevertheless, the court held that the borrower waived this claim as a matter of law. *Id.* The court

reasoned that the deed of trust listed MERS as its original beneficiary long before the trustee's sale. *Id.* at 383-84. The court concluded the borrower had constructive notice, before the foreclosure sale, that MERS was an improper beneficiary and that the chain of title could be defective. *Id.* at 384.

Likewise, here, the notice of trustee's sale advised Ms. Owen that she could sue to restrain the sale, and that failing to do so could result in waiver. Ms. Owen also had constructive notice of this defense prior to the sale—she signed the deed of trust in 2005, which listed MERS as the beneficiary. Our Supreme Court also issued the *Bain* decision years before the trustee's sale, so Ms. Owen had ample notice that this was a potential defense. Lastly, nothing in the record indicates Ms. Owen ever sued to restrain the trustee's sale. Again assuming Ms. Owen could challenge the underlying foreclosure in this case, Ms. Owen waived her chain of title defense to the foreclosure sale.

Ms. Owen's appeal challenges the merits of the underlying foreclosure and trustee's sale. Because chapter 59.12 RCW unlawful detainer proceedings do not provide a forum for litigating issues not directly related to the right of possession between the parties, we conclude the trial court did not err when it reissued the writ of restitution.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Fearing, C.J.

Pennell, J.

A-015

IN THE SUPREME COURT

STATE OF WASHINGTON

)	Supreme Court No.:_____
FEDERAL HOME LOAN MORTGAGE)	
CORPORATION,)	Court of Appeals No. 34971-3-III
Respondent.)	
vs.)	
PAMELA S. OWEN, et al.,)	PROOF OF SERVICE
Petitioner.)	
)	

EMANUEL MCCRAY DECLARES AS FOLLOWS:

1. I am over the age of 18, am not a party to the within action, and make this declaration based upon personal knowledge and belief.

2. On May 31, 2017, I served copies of **APPELLANT'S PETITION FOR DISCRETIONARY REVIEW** and **APPELLANT'S APPENDIX TO PETITION FOR DISCRETIONARY REVIEW** by placing the same in the U.S. Mail in a sealed envelope with postage fully prepaid, for delivery to:

Joseph H. Marshall
RCO Legal, P.S.
13555 SE 36th Street, Suite 200
Bellevue, WA 98006

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

DATED this 31st day of May 2017 at Vancouver, Washington.

Emanuel McCray

PAMELA OWEN - FILING PRO SE

June 01, 2017 - 3:46 PM

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