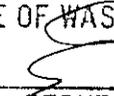


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DIVISION II

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STATE OF WASHINGTON

Appeal No. 46747-0-II
Superior Court No. 14-2-07793-4

BY  _____
DEPUTY

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

**RICHARD SORRELS, PATRICE CLINTON,
RYANSCREST TRUST**

Appellants.

v.

RICHARD JOHNSON AND SALLY JOHNSON,

Respondent.

APPELLANTS' REPLY BRIEF

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May 27, 2015

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COMES NOW the Appellants, Richard Sorrels, Patrice Clinton, and Ryanscrest Trust, by and through their attorney Martin Burns of Burns Law, PLLC, and submits their Reply Brief to the Court of Appeals as follows:

I. INTRODUCTION TO REPLY

The Response Brief dwells on many irrelevancies. The major issues before this court comes down to if the trial court erred in allowing the matter to proceed when: (1) there was an improper summons; (2) there was non-compliance with RCW 59.12.032 tied to RCW 61.24.060 as to “purchaser at the trustee sale”; (3) there was noncompliance with RCW 59.12.032 tied to RCW 61.24.060, as to the 60-day notice; and (4) when the trustee sale proceeded improperly under RCW 61.24.040.

To rebut these substantive law issues, Respondent focuses, incorrectly, on procedure. For instance, the Respondent spends a great deal of time arguing as to the 10-day stay of issuance of the writ imposed by the commissioner, but ignores that the request for the request to stay the writ once issued is entirely proper under RCW 59.12.100. Also, the Respondent ignores the fact that a 10-day stay was, as pointed out to the commissioner, essentially worthless, given the matter could not be heard on revision in such time.

Respondent then focuses on the stipulated order but ignores the authority that parties cannot stipulate to subject matter jurisdiction. The Respondent also ignores the fact that an issue of fact would have arose as

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the settlement had been breached as there was plenty of evidence thereto and the trial court impermissibly refused to try the case.

II. REPLY STATEMENT OF FACTS

The Respondent makes much ado as to the Commissioner's 10 day stay per the May 27, 2014 order. CP 162-163. At one place in the Respondent's briefing it argues the matter had to be filed and heard in such time. Resp. Brief Page 17. The actual order says "Ordered – stayed for a period of ten (10) days for defendants to seek revision." CP 162-163. The revision motion was file on June 6, 2014 within the 10 day requirement of PCLR 7(a)(12)(A). Such rule requires getting a transcript of the hearing and briefing. PCLR 7 (a)(12)(E). *The revision was timely filed on June 6 and set for hearing on the earliest compliant date, June 20, 2014, but the matter was continued by the court until June 27, 2014. CP 164, 218. Still, despite knowing the filed revision, the Respondent went and had a writ issued on June 9, 2014. CP 215. Petitioner then, pursuant to RCW 59.12.100 moved within three days of service of the writ to stay the writ and despite the mandatory language of the statute, the presiding judge refused to set a bond and refused to stay the writ. The point being, Petitioner was timely with all procedural requirements.*

The Respondent argues that the Summons "substantially complies. Resp. Brief p. 15. The Amended Summons provides:

If you want to defend yourself in this lawsuit, you must respond to the eviction complaint in writing on or before the deadline stated above. You must respond in writing even if no case number has been assigned by the court yet.

You can respond to the complaint in writing by delivering a copy of a notice of appearance or answer to the plaintiffs in person or by mailing to the address below.

TO BE RECEIVED NO LATER THAN THE DEADLINE STATED ABOVE.

CP 18-20. The consequences of not complying were also set forth:

IF YOU DO NOT RESPOND TO THE COMPLAINT IN WRITING BY THE DEADLINE STATED ABOVE YOU WILL LOOSE BY DEFAULT. THE PLAINTIFFS MAY PROCEED WITH THE LAWSUIT, EVEN IF YOU HAVE VACATED THE PROPERTY AND REMOVED YOUR BELONGINGS.

CP 18-20. As discussed in the argument section, both portions are incorrect in this context.

The Response argues the stipulated order dated July 3, 2014. Resp. Brief p. 12. The Respondent briefing ignores two important considerations raised to the trial court (1) that there is legal authority that parties cannot stipulate to jurisdiction; and (2) that facts existed to show that the Respondent's breached the order. CP 414-420. Respondent's breached the order by (1) allowing their agent to have vehicles crushed during the interim of such order wherein Petition was supposed to be allowed to remove vehicles (CP 414-420); (2) Respondent did not account for personal property removed by Respondents from the subject real property, (without execution of any writ) and (3) grant access for its

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retrieval. (CP 416). Despite the substantial evidence of such breach – including Respondent’s admission to the crushing (CP 419-420) – the trial court refused to find the breach and summarily decided the matter. CP 615-616; RP 8-15-14, p. 12.

III. ARGUMENT

a. The underlying litigation was not resolved by a stipulation.

The Respondents argue about a stipulated order on July 3, 2015. However, what is not discussed is the terms of such order, the trial court’s summary disposition of the claims of breach of such order and the invalidity of the order in the first place.

As discussed below, there is binding Supreme Court precedent that says that a failure to properly commence the case with a proper summons is jurisdictional. While the jurisdictional authority was not contested by Respondents, the Petitioners discuss below how the Courts of Appeal are analyzing such cases more recently holding plaintiffs cannot violate notice requirements and then avail themselves of the courts jurisdiction. *Infra*. Courts have held in numerous context that parties cannot stipulate to jurisdiction. (citations omitted) Sullivan v. Purvis, 90 Wn. App. 456, 460, 966 P.2d 912, 914 (1998); (citations omitted) Magee v. Rite Aid, 167 Wn. App. 60, 75, 277 P.3d 1, 8 (2012). The Sullivan case was an unlawful detainer action where a landlord did not serve a 10-day notice to comply or vacate and the defendant, in the unlawful detainer action stipulated to a writ if he did not vacate or if further noncompliance notices were received. A court signed a stipulated order to such effect. On appeal the Court of

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Appeals, Division 3, quashed the then issued writ saying the notice was “a jurisdictional condition precedent to an unlawful detainer action for breach.” Sullivan v. Purvis, at 459. However nuanced more recent cases have been as to “jurisdictional” or the “right to invoke the jurisdiction of the court” – the point remains the same – if strict compliance with the unlawful detainer statute is missing then the court is without power to enter orders beyond dismissing the case.

Secondly, the July 3, 2014 stipulated order was appealed in the Notice of Appeal as was the Order denying the Motion to Set aside such Stipulated order. CP 626-627. The record, in addition to the jurisdictional issues, sets forth how such Respondents violated the stipulation by: (1) allowing the Respondents’ tow company to continue to take cars off site and they were crushed; (2) by failing to identify any removed personal property; and (3) by failing to authorize defendants to retrieve such property. CP 414-420. The response from the Respondent was not that they complied but that it was “an innocent mistake” and that the cars were not titled in the Petitioner’s name. CP 419-420. However, that missed the point that the stipulation did not turn on titled ownership, but on identification of removed property and authorization to retrieve it.

“A stipulation agreement signed and subscribed by the attorneys representing the parties is a contract and its construction is governed by the legal principles applicable to contracts. Riley Pleas, Inc. v. State, 88 Wash.2d 933, 937-38, 568 P.2d 780 (1977); CR 2A.” Allstot v. Edwards, 114 Wn. App. 625, 636, 60 P.3d 601, 606 (2002). “A traditional APPELLANTS’ REPLY BRIEF - 5

bilateral contract is formed by the exchange of reciprocal promises. The promise of each party is consideration supporting the promise of the other. Ebling v. Gove's Cove, Inc., 34 Wash.App. 495, 499, 663 P.2d 132 (1983).” Govier v. N. Sound Bank, 91 Wn. App. 493, 499, 957 P.2d 811, 815 (1998). “Words in a contract should be given their ordinary meaning. Corbray v. Stevenson, 98 Wash.2d 410, 415, 656 P.2d 473 (1982). Courts should not adopt a contract interpretation that renders a term ineffective or meaningless. Wagner v. Wagner, 95 Wash.2d 94, 101, 621 P.2d 1279 (1980).” Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc., 166 Wn.2d 475, 487, 209 P.3d 863, 871 (2009).

So the trial court erred summarily in allowing the Respondent to proceed and get the writ – which also was appealed. CP 616-627. Moreover, as was pointed out below to the trial court, when faced with a defective summons, the appropriate thing to do is to dismiss without prejudice: “The appropriate procedure upon proof of a critical deficiency in the summons or complaint would have been for the court to dismiss the unlawful detainer action.” First Union Mgmt., Inc. v. Slack, 36 Wash. App. 849, 853, 679 P.2d 936, 939 (1984). The only reason the Petitioners were put in the position of trying to cut whatever deal they could is because the commissioner, the presiding judge and the trial judge continuously refused to appropriately apply the law which would have been to dismiss the action at the numerous prior hearings. Accordingly, the stipulation was invalid and the Respondents breached such stipulation and cannot enforce it.

b. The summons did not comply with RCW 59.12 et. seq.

In response, and without any reference to the statute, the Respondent simply says “Even though Plaintiff’s form may have been copied from RCW 59.18, all requirements of RCW 59.12.080 were complied with.” Resp. Brief, p. 15. However, Respondent does not discuss what RCW 59.12 et. seq. requires as to summons. The law is not unclear:

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.

(bolded added) RCW 59.12.080. The return date for responding is also quite clear: “On or before the day fixed for his or her appearance the defendant may appear and answer or demur.” RCW 59.12.121. The date for the Defendants’ appearance was Wednesday, May 7, 2014 (CP 16-17). The date on the summons to answer was May 3, 2014. CP 18. Nothing in the statute references “substantial compliance”. It is a plain and clear “must”. Instead of rebutting the clear authority in the opening brief the Respondent cites Truly v. Heuft, 138 Wn. App. 913, 158 P.3d 1276 (2007). However, such case says clearly that “The purpose of a summons is to give the defendant notice of the action, the time prescribed by law to

answer, and the consequences of failing to respond. *Id.* at 918. Contrary to Respondent's "substantial compliance" argument the case says: "In the context of a residential unlawful detainer action, the summons must comply with the RCW 59.18.365 to confer both personal and subject matter jurisdiction. Because the unlawful detainer action is in derogation of the common law, courts must strictly construe it in favor of the tenant." (footnotes omitted) *Id.* Now, in fairness, the *Truly* case does discuss the case of *Sprincin King St. Partners v. Sound Conditioning Club, Inc.*, 84 Wn. App. 56, 925 P.2d 217 (1996) so as to say: "Truly relies on our holding in *Sprincin King Street Partners v. Sound Conditioning Club, Inc.* that a summons in an unlawful detainer action need only substantially comply with statutory requirements, meaning it must provide notice with 'such particularity and certainty as not to deceive or mislead.'" *Truly* at 919. But the obvious point here is that there was no compliance with the statutory requirements as the very summons used deceived the Petitioner as to the return date for an answer. It violated the very purpose of the summons of properly informing a defendant of the time to answer. The *Truly* court went on to say that "**We have required strict compliance with 'time and manner' requirements, like provisions governing the number of days a tenant has to cure and answer.**" (bold added) *Id.* at 920-921. Respondents did not comply with the "time and manner" requirements at all – the dates given were in violation of the statute and were misleading.

Now, it is fair to point out that Division 1 has possibly abrogated, to some degree, some of the discussion as to if the defective summons is jurisdictional or if it just means the court has jurisdiction but is compelled to dismiss the matter. MHM & F, LLC v. Pryor, 168 Wn. App. 451, 277 P.3d 62 (2012). The undersigned could find no Division 2 cases citing MHM nor was the matter appealed to the Supreme Court. Such case stands on thin ice given in unlawful detainer actions. For instance, Division 1 had previously stated: “The statute provides a method of process, and compliance with the method is jurisdictional.” (footnote omitted) Hous. Res. Grp. v. Price, 92 Wn. App. 394, 401, 958 P.2d 327, 331 (1998) and the Supreme Court declined review 137 Wash.2d 1010 (1999). When asked about such issue the Supreme Court stated “Where a special statute provides a method of process, compliance [with that method] is jurisdictional.” Hous. Auth. of City of Everett v. Terry, 114 Wn. 2d 558, 564, 789 P.2d 745, 748 (1990). Such case in footnotes cited such long standing proposition in Sowers v. Lewis, 49 Wash.2d 891, 894, 307 P.2d 1064 (1957) *citing*, Little v. Catania, 48 Wash.2d 890, 297 P.2d 255 (1956). The courts have grappled with exactly how to phrase the issue, in one case saying: “The proper terminology is that a party who files an action after improper notice may not maintain such action or avail itself of the superior court's jurisdiction. Hous. Auth. of City of Seattle v. Bin, 163 Wn. App. 367, 374, 260 P.3d 900, 904 (2011).” Incidentally, even before the various new language courts use to discuss its “jurisdiction” or “authority”, the courts were getting to the same result that

the only permissible action was to dismiss with prejudice: “Lack of such jurisdiction ‘renders the superior court powerless to pass on the merits of the case.’ In this circumstance, dismissal without prejudice is the limit of what a court may do.” Hous. Auth. of City of Everett v. Kirby, 154 Wn. App. 842, 850, 226 P.3d 222, 226 (2010) abrogated by Hous. Auth. of City of Seattle v. Bin, 163 Wn. App. 367, 260 P.3d 900 (2011)(as related to ability to award attorney fees and the case discussed the changing perspective on jurisdiction versus the ability to invoke jurisdiction in a defective notice case).

Regardless of how this court wishes to phrase it, the end result should have been dismissal when the matter was promptly and properly raised to the trial court. As the Supreme Court has said: “Thus, any noncompliance with the statutory method of process precludes the superior court from exercising subject matter jurisdiction over the unlawful detainer proceeding.” Christensen v. Ellsworth, 162 Wn. 2d 365, 372, 173 P.3d 228, 231 (2007). The ironic part of it is that the trial court – in a decision not appealed by the Respondent – held in a written order that the summons was improper. CP 347-348. RP 6/27/14, p. 29 (“Thank you. I do find that the summons was defective and it is jurisdictional.”) Under any analysis, be it jurisdiction or “may not maintain such action” the court should have then and there dismissed the action without prejudice. It was error to not do so. It was error to attempt to allow the summons to be remedied and it was further error to allow the writ to be issued when, even then, the summons was not corrected.

c. **The 10-day stay for revision was irrelevant as to the right to quash a writ.**

The Respondent goes on at length as to the fact that the commissioner gave a 10-day stay of the writ. Such argument miss the point. The 10-day stay was pretty much worthless as the undersigned noted to the commissioner that what was needed was that the order be stayed until the motion for revision was heard provided it was filed in 10 days. CP 210. The Commissioner refused saying that undersigned could seek extensions from other departments: "So we'll – I'll give you a stay for 10 days to file a revision and seek further stays from the department." CP 211. At the same time, nothing in the commissioner's order attempted (or could) restrict the Petitioners' other statutory rights. RCW 59.12.100 allows that a writ will not be executed until three days after service and that:

... the defendant, or person in possession of the premises within three days after the service of the writ of restitution may execute to the plaintiff a bond to be filed with and approved by the clerk of the court in such sum as may be fixed by the judge, with sufficient surety to be approved by the clerk of said court, conditioned that he or she will pay to the plaintiff such sum as the plaintiff may recover for the use and occupation of the said premises, or any rent found due, together with all damages the plaintiff may sustain by reason of the defendant occupying or keeping possession of said premises, and also all the costs of the action.

The defendant utilized RCW 59.12.100 by seeking the stay which went before the presiding judge (as the department was in recess – the same reason the revision motion was continued). CP 218-220. The presiding

judge after lecturing the undersigned as to the judge's past experience with Richard Sorrels and brushing off an allegation that the court had prejudged the matter then denied the motion for stay. RP 6/18/14, p. 8-9, 25-26. CP 236-237. The Court refused to set a bond explicitly saying it was "in part because I do have some history with Mr. Sorrels." RP 6/8/14, p. 25-26. This statutory process is entirely independent of the commissioner-made ability to seek a further stay. The statute is not vague. The defendant has the right to so seek a stay of a writ and the post a bond – which amount was to be set by the judge. The obvious need for the stay was to maintain the status quo until the timely filed revision motion could be heard. The flat refusal to set a bond within the confines of the statute was error as the right to stay the writ is nondiscretionary subject a reasonable bond set by the court "for the use and occupation of the said premises, or any rent found due, together with all damages the plaintiff may sustain." So, while this is a bit beside the point given the posture of the case now, Petitioner did timely file the motion for revision. Petitioner did timely seek to stay the writ. It was the court that erred in not giving the Petitioner the protection of the statute – subject to a setting a reasonable bond. The failure to do so was error. It is also demonstrative of the presiding judge's bias against Mr. Sorrels.

Respondents try to argue that somehow by not seeking a stay under the commissioner's order that it was a waiver of the right to seek revision. However, such proposition is not support by legal authority and is contrary to the plain language of the statutes, court rules and case law. The right to

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revision is not something that can be conferred or restricted by a court commissioner – as that would defeat the very purpose of reviewing a commissioner’s ruling. Revision is a matter of right.¹ Such revision motion is a de novo review wherein deference is not required to be given to the underlying decision. Williams v. Williams, 156 Wn. App. 22, 27, 232 P.3d 573, 575 (2010); In re Marriage of Dodd, 120 Wn. App. 638, 644, 86 P.3d 801, 804 (2004). So while Respondent is correct in saying that the commissioner’s ruling is not automatically stayed by the filing of the motion for revision (which is why the undersigned asked for the stay until the revision motion was heard), the failure to stay the order does not lessen the ability to have the order revised. Nothing in the Pierce County Local Rules say one must stay a commissioner’s order in conjunction with filing a motion for revision. So while the stay ran out on the 11th day, it did not precluding seeking to stay the writ or to seek further stays. The Respondent’s assertion that the commissioner’s ruling became the final order of the court ignores the fact that the demand for revision was made within 10 days as required under RCW 2.24.050. The Respondent plays semantics with the notion of the writ being issued “forthwith” but stayed

¹ “All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court. Any party in interest may have such revision upon demand made by written motion, filed with the clerk of the superior court, within ten days after the entry of any order or judgment of the court commissioner. Such revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner, and unless a demand for revision is made within ten days from the entry of the order or judgment of the court commissioner, the orders and judgments shall be and become the orders and judgments of the superior court, and appellate review thereof may be sought in the same fashion as review of like orders and judgments entered by the judge.” RCW 2.24.050

for 10 days but that ignores two things. First, the reality of the situation is that the writ was not issued “forthwith” – it was issued on June 9, 2014 and served on June 10, 2014. CP 215, 617. Second, the time to stay a writ is three days from service of the writ per RCW 59.12.100. So on all procedural matters, the Respondents acted timely. The only thing Respondents did not do was seek to stay the order issuing the writ – choosing rather to seek to stay the writ. How this could be construed as a waiver, as argued on page 19 of Respondent’s Brief, is unclear. Waiver is the “intentional and voluntary relinquishment of a known right...waiver will not be inferred from doubtful or ambiguous factors.” (citations omitted) Jones v. Best, 134 Wn.2d 232, 241, 950 P.2d 1, 6 (1998), as corrected (Feb. 20, 1998). Throughout, Respondent has been arguing that the issuance of the writ was improper on multiple grounds...positions that have not changed. In filing the motion for revision, nothing ever was mentioned that any claims or defenses were being discarded. In filing for the motion to stay the writ, reference was made to the revision motion. The two were obviously tied together and the intention was clear: The writ should await the outcome of the revision motion which was setting forth all of the various arguments that this court is now addressing. Nothing was waived.

Respondents claim at page 19 of the Response Brief that in “defendant’s failure to comply with the Court’s Order, the defendants waived any opportunity to object and seek revision of the Commissioner’s May 27th Order”. How so? What part of the order did the defendants

[petitioners herein] waive? The order did not compel the seeking of a stay. Besides issuing the writ and not setting a bond, the only thing the Commissioner's order said was "Ordered – Stayed for a period of ten (10) days for Defendants to seek revision." CP 162-163. Defendants sought revision in such 10 days. (CP 165) There was not "failure to comply". There was no waiver.

d. Petitioners have not waived issues related to the improper trustee sale.

In citing to cases wherein owners sought to set aside a trustee sale after the fact, the Respondent makes a leap in logic to say that tenants and occupants have waived the right to challenge an eviction following an improper trustee sale. Not a single one of Respondents' cases are unlawful detainer cases. While Respondents ask the court to take matters "to their logical end" – imagine the illogical end that Respondents' position is: If the trustee sale is fundamentally defective and unfair as Petitioner alleges, the Respondents' position would be that it does not matter. Therefore, the illogical end would be for a foreclosing party to be as defective and unfair as possible because if an owner is misled enough to not object (or not given notice in the first place), so what? The trustee's deed is final no matter what. Obviously that can't be the law. So instead of looking what the law actually is – the Respondent makes logic (or illogic) arguments and cites to non-eviction cases.

The statute, again, is not unclear. "An unlawful detainer action, commenced as a result of a trustee's sale under chapter 61.24 RCW, must

comply with the requirements of RCW 61.24.040 and 61.24.060.” RCW 59.12.032. Note that it does not say every little element of RCW 61.24 must be complied with. Rather, the legislature struck a balance to say what portions of a deed of trust foreclosure must be complied with. The undersigned is not going to list out the lengthy RCW 61.24.040 statute or all of the RCW 61.24.060 (Bold added) but the relevant portion of RCW 61.24.060 provides:

(2) If the trustee elected to foreclose the interest of any occupant or tenant, the purchaser of tenant-occupied property at the trustee's sale **shall provide** written notice to the occupants and tenants at the property purchased in substantially the following form:

“NOTICE: The property located at was purchased at a trustee's sale by on(date).

1. If you are the previous owner or an occupant who is not a tenant of the property that was purchased, pursuant to RCW 61.24.060, the purchaser at the trustee's sale is entitled to possession of the property on(date), which is the twentieth day following the sale.

2. If you are a tenant or subtenant in possession of the property that was purchased, pursuant to RCW 61.24.146, the purchaser at the trustee's sale may either give you a new rental agreement **OR give you a written notice to vacate the property in sixty days or more before the end of the monthly rental period.”**

(3) The notice required in subsection (2) of this section **must be given to the property's occupants and tenants by both first-class mail and either certified or registered mail, return receipt requested.**

However, the record is devoid of a 60 day notice to Richard Sorrels or to the Trust. The record is devoid of any such mailing. Richard Sorrels testified he never got such notice. CP 225. The tenant might not have standing to do a presale challenge to the foreclosure under

RCW 61.24.130 as it does not list “tenant” or in the list of people who have standing. An argument could be made that they could challenge as “any person who has an interest”. RCW 61.24.130(1). A quick search of such statute’s annotation for “tenant” or “lessee” cases turned up no cases and the issue is not dispositive to this appeal. The point is that the one place that it is clear that a tenant has a right to challenge is at the eviction stage if the 60 day notice is not given. Richard Sorrels unambiguously testified to being a tenant/occupant of the property. CP 225. Sorrel’s status as a tenant/occupant was never contested.

The whole citation to RCW 61.24.127 is a complete red herring and a distraction. That statute does not apply to tenants or occupants. The first line of the statute says, “The failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter may not be deemed a waiver of a claim for damages asserting ... [numerous claims listed thereafter]. RCW 61.24.127. The terms “tenant”, “occupant” or “lessee” are not mentioned in RCW 61.24.127. While it may be an issue for Patrice Clinton to deal with down the road, it is not a bar for a tenant or occupant from arguing that they did not get the statutorily required notice which is a condition precedent to evicting such person.

So the question before this court pertaining to the tenant is not if an owner can make a post-sale challenge to the trustee sale – it is if a tenant or occupant who was not served a 60-day notice as required by RCW 61.24.060 can raise such defect to challenge an unlawful detainer. The answer has to be that a tenant or occupant can make the challenge or

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it renders meaningless both the requirement to give such notice under RCW 61.24.060(2) as well as the requirement to properly comply with said statute under RCW 59.12.032. It is a basic notion of statutory construction that “[courts] do not interpret a statute in a manner that renders a provision meaningless or creates an absurd or strained result.” Pierce Cnty. v. State, 144 Wn. App. 783, 852, 185 P.3d 594, 630 (2008), as amended on denial of reconsideration (July 15, 2008). RCW 59.12.032 is one sentence and absolutely clear (bold added): “An unlawful detainer action, commenced as a result of a trustee's sale under chapter 61.24 RCW, **must** comply with the requirements of RCW 61.24.040 and 61.24.060.” The court is well aware that when the legislature uses the word “must” it creates a mandatory duty. In re Det. of A.S., 138 Wn. 2d 898, 927, 982 P.2d 1156, 1171 (1999). RCW 61.24.060(2) is also very clear saying the 60-day notice “shall” be provided. The Respondent tries to deflect by citing to non-eviction cases, by not citing to these statutes and by making arguments to the wisdom of applying the statutes as written. Challenging the wisdom of the statute is discussed in the next section. Respondents have shown no compliance with RCW 61.24.060. They should not be able to evict under RCW 59.12.032. Requiring a foreclosing party to give required notice to a tenant prior to invoking a post-sale unlawful detainer action will no more do violence to the statutory scheme for expediency as requiring landlords to give 3-day notices to pay or vacate to defaulting renters.

It is noteworthy that while Respondents argue that Patrice Clinton cannot exercise post-sale challenges, they do not contest: (1) that the foreclosing entity had received its assignment of the deed of trust from an Ameriquest which had stipulated in prior proceedings to having no interest in the subject property; (2) that Patrice Clinton received none of the RCW 61.24.040 required notices (CP 222); and (3) that the servicer, Ocwen, misled Patrice Clinton by telling her the trustee sale was cancelled and by giving her a letter with a repayment date after the supposedly cancelled trustee sale. CP 47-48, 222-223. Misleading an owner in foreclosure can invalidate a trustee sale. “Because the act dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures, lenders must strictly comply with the statutes and courts must strictly construe the statutes in the borrower's favor. *Udall v. T.D. Escrow Servs., Inc.*, 159 Wash.2d 903, 915–16, 154 P.3d 882 (2007); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wash.App. 108, 111–12, 752 P.2d 385 (1988). The procedural requirements for conducting a trustee sale are extensively spelled out in RCW 61.24.030 and RCW 61.24.040. Procedural irregularities, such as those divesting a trustee of its statutory authority to sell the property, can invalidate the sale. *Udall*, 159 Wash.2d at 911, 154 P.3d 882.” *Albice v. Premier Mortgage Servs. of Washington, Inc.*, 174 Wn. 2d 560, 567, 276 P.3d 1277, 1281 (2012). Further *Albice* refused to find a waiver of the right to challenge the sale when the trustee led the owner to believe the “sale might not even proceed.” *Id.* at 571. This is very similar to the present case based on the undisputed testimony

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of Patrice Clinton and the Owen letter. Accordingly, the Respondents underlying presumption of the right to possession is very much in dispute and is subject to trial.

e. **RCW 61.24.060 by its clear terms only applies to the “purchase at the trustee’s sale”.**

Please note that nowhere in the Respondents’ pleadings do they claim RCW 61.24.060 is unclear. Respondents also do not contest that they are not “purchasers at the trustee sale”. Rather, the Respondents discuss how the statute “was designed by the legislature to avoid cost” (Resp. Brief p. 24) and how “it makes absolutely no sense to limit the proceedings allowed by RCW 61.24 to only the purchaser’s at a trustee sale.”. (Resp. Brief p. 25).

So we have an unambiguous statute that says exactly what Petitioners say it says. This court should not entertain the invitation to second guess the legislature or rewrite the statute by judicial fiat. The wisdom of a statute that does not violate the constitution “is not the concern of the courts.” I.N.S. v. Chadha, 462 U.S. 919, 944, 103 S. Ct. 2764, 2780, 77 L. Ed. 2d 317 (1983). *See also*, Schrom v. Bd. For Volunteer Fire Fighters, 153 Wn.2d 19, 37, 100 P.3d 814, 823 (2004). If the language of a statute is clear and unambiguous there is no proper place for construction. (citations omitted) Auto. Drivers & Demonstrators Union Local No. 882 v. Dep’t of Ret. Sys., 92 Wn.2d 415, 425, 598 P.2d 379, 384 (1979). Respondent essentially wants to add the words “and successors and assigns” after “purchaser at the trustee sale” in RCW

61.24.060. The Supreme Court has prohibited this: “It is not a judicial function to add words to a statute even if it appears the omission was a legislative oversight.” (Citations omitted) Id. The Respondents’ standing is destroyed by the clear language of the statute. While Respondents make arguments as to why the statute should not be so construed, it is not hard to imagine issues arising if the line is not drawn as the legislature did. Issues of parties taking assignments of the purchaser’s interest with full knowledge of a leasehold interest could complicate matters bringing bona fide purchaser issues into play. If an assignee accepted rent or acquiesced in possession – that too could raise issues. The legislature drew the line with the “purchaser at the trustee sale”. Not only is a court prohibited to second guess the wisdom of the legislature drawing such line – one doubts this court wants to get into the business of passing on the collective wisdom (or lack thereof) of the 98 legislators, 49 senators and one governor who may act out of wisdom, pressure, political expediency or any number of reasons, if any. The Respondents do not dispute the clarity of the statute and do not contest the clear law regarding that courts are to enforce clear, constitutional statutes as written.

So, given that Washington law does not help the Respondents, they turn to California law and cite to Evans v. Superior Court, 67 Cal. App. 3d 162, 136 Cal. Rptr. 596 (Ct. App. 1977). The problem with applying Evans is that it was interpreting a different statute that is not written like the Washington Statute. In such case Bank of America foreclosed and took title and later sold to the petitioner who brought unlawful detainer

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actions which were thrown out as the actions were “not truly for unlawful detainer.” Id., at 165. A writ of mandamus was brought against the superior court to vacate such order and proceed with the eviction. The issue was similar as to the standing of a subsequent purchaser – but such court looked at the relevant California statute which reads

In any of the following cases, a person who holds over and continues in possession of a manufactured home, mobilehome, floating home, or real property after a three-day written notice to quit the property has been served upon the person, or if there is a subtenant in actual occupation of the premises, also upon such subtenant, as prescribed in Section 1162, may be removed therefrom as prescribed in this chapter:

(3) Where the property has been sold in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust executed by such person, or a person under whom such person claims, and the title under the sale has been duly perfected.

Cal. Civ. Proc. Code § 1161a (West). The California statutory scheme adds to list of who may be evicted. This is unlike the Washington statute of creating an additional party that may file an eviction. The Evans court was not faced with the clear language of “purchaser at the trustee sale” or terms to that effect. The California case notes that what has to be proven under its scheme is that the sale was (1) completed in accordance with its nonjudicial foreclosure act and (2) title under such sale was duly perfected. Id. at 169. Given that the statute did not say who could bring the eviction, the court said that so long as a subsequent purchases can prove statutory compliance, perfection of title and their later acquisition of

title, that allowing the action does not destroy the summary nature of the proceeding. Id. But as can be easily seen...the Washington statute is painfully clear on who can invoke the unlawful detainer statute. The California statute is not.

The Respondents ask this court to adopt such “reasoning” of the California court. Resp. Brief p. 25. However, the term “reasoning” is simply asking this court to substitute the wisdom of the Second District of Division 5 of the California Court of Appeals over the wisdom of the Washington State legislature. This is improper. The citations to Peoples Nat. Bank of Wash. v. Ostrander, 6 Wn. App. 28, 491 P.2d 1058 (1971) and Sav. Bank of Puget Sound v. Mink, 49 Wn. App. 204, 741 P.2d 1043 (1987) seem to be added only to provide the appearance of Washington authority. Such cases are unlawful detainer cases brought by the foreclosing beneficiary and not some subsequent purchasers.²

f. Issues of a 1997 injunction or junk vehicles is irrelevant as to a Respondents’ duties under RCW 59.12 or RCW 59.18.

Presumably the Respondents’ argument related to the junk vehicles and an injunction is somehow related to the failure of the Respondents to store the vehicles as they argue in a conclusory fashion: “Clearly the

² What is notable is that, to harking back to a prior argument, Mink at 206 says: “RCW 61.24.060 provides in part: ‘The purchaser at the trustee’s sale shall be entitled to possession of the property on the twentieth day following the sale, as against the grantor under the deed of trust ... and shall have a right to the summary proceedings to obtain possession of real property provided in chapter 59.12 RCW.’ Under RCW 59.12, the unlawful detainer statute, notice to quit the premises, where required, is a jurisdictional prerequisite.”

plaintiffs had every right to tow the junk vehicles from their property and obviously the defendants had knowledge of the identity and ultimate location of the same junk vehicles.” Resp. Brief p. 31. This is allegedly an unlawful detainer action. The status of vehicles or issues of prior injunctions seem beyond the purview of the limited jurisdiction afforded a court in such actions. Citing to a code enforcement officer, Mark Lupino³, the Respondents talk of nuisances. All of this is irrelevant. What is relevant is that all that the Petitioners requested is that the court make clear that the Petitioners have retained whatever rights they have for damages for the Respondents failing to store the Petitioners’ personal property. The Respondents do not contest that they served the statutorily required notice wherein a party being evicted can request their items be stored for 45 days. RCW 59.18.312. The Respondents do not deny that they timely received a request for storage. CP 315, 617. The Respondents do not deny the writ was served under RCW 59.12.100. The Respondents do not refute the, again, clear statute that under such scenario “...the landlord must store the tenant’s property....” RCW 59.18.312(5). The statute does not make exclusion from storage based upon conclusory statements by Mark Lupino or however many times the Respondents want to call such items junk. Such characterizations also do not justify entering

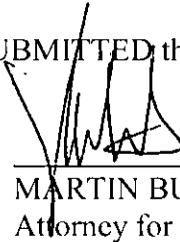
³ As an aside, the Pierce County Hearing Examiner dismissed Pierce County enforcement action against Mr. Sorrels on an unrelated property brought by Mark Lupino just last month which was not appealed. Administrative Appeal AA10-14. The point being, the court should follow statute and binding precedent – not what Mr. Lupino may say.

and removing any property prior to execution of the writ. Moreover, given the confused nature of what happened below, the Petitioners simply want it clear that damages related to such statutory violation have not been decided and hence they are not precluded in pursuing such damages.

IV. CONCLUSION

Over and over the Petitioners have pointed out the clear and unambiguous law to the courts only to have the courts use derogatory names in characterizing the property, to discuss past negative history with one of the petitioners and to note the improper summons but then not do what the law requires. Over and over the Petitioners simply asked the courts to follow the law. The trial court should be reversed and the case remanded with instructions to vacate the offending orders, quash the illegal writs, and dismiss the action.

RESPECTFULLY SUBMITTED this 27 day of May, 2015.



MARTIN BURNS, WSBA No. 23412
Attorney for Appellants

CERTIFICATE OF SERVICE

I certify that on the 27th day of May, 2015, I caused a true and correct copy of this Statement of Arrangements to be served on the following via U.S. Mail and email to:

Attorney for Plaintiffs:

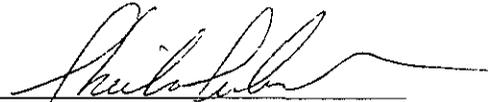
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Counsel for Respondent

DATED this 27th day of May, 2015, at Tacoma, Washington.

BURNS LAW, PLLC

By 
Sheila Gerlach
Paralegal

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