CASE # 43133-5-II

IN THE COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

FANNIE MAE aka FEDERAL NATIONAL MORTGAGE ASSOCIATION, Respondent,

V.

RONALD & KATHLEEN STEINMANN, Appellants.

APPELLANT'S AMENDED BRIEF

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Appellants, Ronald Steinmann and Kathleen Steinmann, purchased property in Clark County, Washington in 2001. (CP 113) They obtained a loan against the property in February of 2008 for THREE HUNDRED FIFTY THOUSAND ($350,000.00) DOLLARS, with IndyMac Bank FSB as the Lender. (CP 114) In September of 2009 with Mr. Steinmann's income being reduced, they applied for a loan modification through IndyMac Mortgage Services, a Division of One West Bank, FSB. (CP 114) They were advised that they could not be helped by IndyMac unless they were in financial trouble and that would be reflected by being "in default" on their loan payments. They stopped making payments. As they commenced their loan modification process, they received a Notice of Trustee's Sale in January of 2010 with the sale date scheduled for April 30, 2010. (CP 114)

Appellants Steinmann received a "trial modification" from IndyMac Mortgage Services, a Division of One West Bank, FSB under the Federal Program known as the Home Affordable Modification Program (HAMP) and their payments were reduced.

(CP 115) The pending Trustee's Sale was postponed at least three (3) times with the latter postponement date in August being beyond the one hundred twenty (120) days from the date of the original sale. (CP 114, 121, 122 and 123)

In September 2010, the Steinmanns received Notice that their "trial approval" under HAMP was going to be discontinued. (CP 115) They were told that the "owner" of the loan deemed them to not be eligible for HAMP because of "NPV inputs." In reviewing those inputs the Steinmanns realized the information had been erroneously inputted by employees of IndyMac Mortgage Services. (CP 116)

The Steinmanns did not receive any Notice of Discontinuance in August or September of 2010. They did receive a "Notice of Discontinuance" dated January 24, 2011 and the following day a "Notice of Default" dated January 25, 2011. (CP 114 and 115) (CP 124 and 126) Other than the Auditor's recording number, there was no identification of any "Trustee's Sale" that was being discontinued. (CP 115 and 126)

When the Steinmanns realized they were not going to be able to achieve the loan modification, Mrs. Steinmann begged the

Regional Trustees Services Corporation to postpone the sale to allow time to work out the errors contained in the loan modification application. A representative of the Regional Trustees Services Corporation (Anna Egdorf) declined to do the postponement indicating to Mrs. Steinmann "We work for the bank, IndyMac, and we have to do what they say." (CP 116 and 117)

The last letter received by Appellants was from the Trustee dated June 21, 2011 stating One West Bank has addressed all concerns and the sale would take place June 24th. (CP 152)

Without obtaining a Restraining Order to stop the sale, the sale proceeded on June 24, 2011. The net result is that Fannie Mae, Respondent herein, purchased the Steinmann property at the Foreclosure Sale. It is now believed that Fannie Mae was the "owner" or "investor" of the Steinmann loan, but that is not revealed in any of the formal documents in this Non-Judicial Deed of Trust Foreclosure process. (CP 116)

This matter comes on before the Court as the Respondent, Fannie Mae, attempts to evict the Steinmanns from their home following the Trustee's Sale through an unlawful detainer process.

The Honorable Robert Lewis entered an Order Granting Respondent's Motion for Summary Judgment indicating that he had no genuine issue of material fact why they should not take possession.

Interestingly, Plaintiff/Respondent did not contest the truth of any of the stated facts. It did attempt to keep the statement of the Trustee employee out as "hearsay." The Motion for Summary Judgment was decided based on the Trial Court's understanding of the State of the law in Washington on Deed of Trust foreclosures and the consequential unlawful detainer process.

IV.

STANDARD OF REVIEW

A. Motion for Summary Judgment. The Standard of Review for an Appellate Court reviewing Motions for Summary Judgment is stated in the case of Roger Crane & Associates v. Felice, 74 WA App 769, 875 P2d 705 (1994). Therein the Court of Appeals stated:

> "[1] Standard of Review. The Standard of Review of a Summary Judgment is well settled. We engage in the same

> inquiry as the Trial Court and review the evidence in the light most favorable to the non-moving party." [citation omitted] Roger Crane & Associates & Felice, supra page 773.

A Motion for Summary Judgment is to allow the Trial Court to determine whether or not there is any genuine issue of material fact pursuant to Civil Rule 56. There are many cases outlining criteria for granting or denying such a motion. The case of Balise v. Underwood, 62 WA 2d 195, 381 P2d 966 (1963) outlines it succinctly.

> "(1) the object and function of the summary judgment procedure is to avoid a useless trial; however, a trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact. [citation omitted]
>
> . . .
>
> (3) A material fact is one upon which the outcome of the litigation depends. [citations omitted]
>
> (4) In ruling on a motion for summary judgment, the court's function is to determine whether a genuine issue of material fact exists,

> not to resolve any existing factual issue. [citation omitted]
>
> . . .
>
> . . .
>
> (7) In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences therefrom most favorably to the nonmoving party and, when so considered, if reasonable men might reach different conclusions the motion should be denied." Balise v. Underwood, supra page 199.

In Wood v. Seattle, 57 WA 2d 469, 358 P2d 141 (1960), the Court ruled as follows:

> "In ruling on a Motion for summary judgment, the Court must consider the material evidence and all reasonable inferences therefrom most favorably to the non-movant party and, when so considered, if reasonable men might reach different conclusions, the motion should be denied because a genuine issue as to a material fact is presented. Brannon v. Harmon, 56 Wn. 2d 826, 355 P.2d 792 (1960). Considering Appellants evidence most favorably to him (for the purposes of this motion), we find that it presented a genuine issue of fact

> relative to his contributory negligence, and that the court erred in granting the motion for summary judgment." Wood v. Seattle, supra page 473.

Likewise, is Saluteen-Maschersky v. Countrywide Funding Corporation, 105 Wn. App. 486, 22 P.3d 804 (2001):

> ". . . A Trial Court's Order granting Summary Judgment is reviewed de novo on the record before the Trial Court at the time of the Order [citation omitted] Summary Judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. [Citation omitted] All facts and reasonable inferences from them are to be considered in the light most favorable to the nonmoving party. [Citation omitted] The Motion should be granted if, from all the evidence, reasonable persons could reach but one conclusion. [Citation omitted] Saluteen-Maschersky v. Countrywide Funding Corporation, supra page 850 and 851.

Stated another way in Ward v. Coldwell Banker 74 Wn. App. 157, 872 P.2d 69 (1994), the Court held:

> ". . . if reasonable minds could draw different conclusions from undisputed facts, or if all the facts necessary to determine the issues are not present, summary judgment is improper."

B. Standard for Unlawful Detainer. There are three (3) cases for the Court to consider in the context of Appellants' situation. Appellants are before the Court having failed to seek a pre-Trustee's Sale Injunction, having suffered the completion of a Trustee's Foreclosure Sale, and Respondents sought relief as the part of the Unlawful Detainer action allowed by RCW 61.24.060. That shifts the cause of action to RCW 59.12.030. In Mundan v. Hazelrigg, 105 WN. 2d 39, 711 P.2d 295 (1985). The Washington State Supreme Court held as follows:

> "...
>
> In order to protect the summary nature of the unlawful detainer proceedings, other claims, including counterclaims, are generally not allowed. "It has long been settled that counterclaims may not asserted in an unlawful detainer action." [Citations omitted]
>
> An exception to the general rule is made when the counterclaim, affirmative equitable defense, or setoff is "based on facts which excuse a tenant's breach." [Citation omitted]
>
> ...
>
> We create today not another exception, but a rule which is collateral to the

> general rule: Where the right to possession ceases to be an issue at any time between the commencement of an Unlawful Detainer Action and trial of that action, proceedings may be converted to an ordinary civil suit for damages, and the parties may then properly assert any cross claims, counterclaims, and affirmative defenses." Mundan v. Hazelrigg, supra pages 45 and 46.

There then followed Cox v. Helenius, 103 Wn. 2d 383, 363 P.2d 683 (1985), which arose directly out of a Deed of Trust foreclosure. There the Court held:

> "Even if the statutory requisites to foreclosure had been satisfied and the Coxes had failed to properly restrain the sale, this trustee's actions, along with the grossly inadequate purchase price, would result in a void sale." See Lovejoy v. Americus, 111 Wash. 571, 574, 191 P. 790 (1920) and Miebach v. Colasurdo, 102 Wn. 2d 170, 685 P.2d 1074 (1984).

This has led to the conclusion that if the sale is "void," then that results in an ability to set aside the sale. This is affirmed in Savings Bank v. Julius Mink, 49 Wn. App 204, 741 P.2d 1043 (1987), wherein the Court of Appeals held:

> "In Cox, the Court recognizes two (2) bases for post-sale relief: defects in the foreclosure process itself, i.e., failing to observe the statutory prescriptions, and

> the existence of an actual conflict of interest on the part of the trustee arising out of the performance by the Trustee by the dual role of Trustee under RCW 61.24 and the attorney for the beneficiary of the deed."

The nub of this standard is that if there is no question as to the right of possession, Respondents prevails. However, if there are facts showing the sale was invalid or void, then Respondents has no right of possession.

V.

ARGUMENT

A. The Trial Court erred by failing to find a genuine issue of material fact concerning the Trustee's breach of its duty and the Trustee's actual conflict of interest.

1. A Deed of Trust Trustee has a high degree of duty to both Grantor and Beneficiary and should not work for just one.

It is established in Cox v. Helenius, supra that the only way for Appellants Steinmann to avoid the consequences of the Unlawful Detainer Action following a Trustee's Sale is to have a "void sale."

That will occur if there is some procedural defect or some other egregious matter results in the sale being void. That said, Cox goes on to say that because the Deed of Trust foreclosure is conducted without review by a court of law, the fiduciary duty imposed upon the Trustee is exceedingly high. The Trustee is a fiduciary to both the grantor and beneficiary and must act impartially between them. And quoting from McHugh v. Church, an Alaska case found at 583 P2d, 218, the Cox Court held:

> "Nonetheless, the Trustee must 'take reasonable and appropriate steps to avoid sacrifice of the debtor's property and his interest,' " McHugh v. Church, 583 P2d at 214 and Cox v. Helenius, supra page 389.

The Cox principle was reiterated in Meyers Way v. University Savings Bank, 80 Wn. App. 655, 910 P.2d 1308, (1996). In this case the attorney was serving as Trustee for the bank and was arguably an "employee" of the bank by virtue of having an Indemnity Agreement wherein the bank indemnified the attorney. The Indemnity Agreement did not include any provisions requiring Jones to adopt the bank's position without regard to rights of the borrowers.

> ". . . If the agreement in question had contained such provisions, we would, of course, agree with the appellant's

> position. But this agreement merely required the bank to indemnify the Trustee from any claims arising from his services, including any claims asserted by the grantor that the Trustee had breached his fiduciary duty to them." Meyers Way v. University Savings Bank, supra page 667.

The inference there is that the borrower's position was that if the Trustee adopted the bank's position without regard to the rights of the borrowers that would be a conflict of interest on its face.

Turning to the facts as submitted by Appellants Steinmann, the Trustee in question, Regional Trustees Services Corporation allowed its employee to state "we work for the bank, IndyMac and we have to do what they say."(CP 117) Clearly if it's the understanding of the employees of the Trustee that they must do the bank's bidding, then they apparently do the bank's bidding without regard to the rights of the borrowers (Steinmanns). The Steinmanns were trying to buy a little more time before the foreclosure sale so that they could get IndyMac to understand that the NPV facts that had been inserted into the computer were wrong and resulted in IndyMac or Fannie Mae not wanting to grant them the HAMP loan. The Trustee's letter is dated June 21, 2011, three days before the sale. It states essentially that it

must do the bank's bidding. With mail service, Appellants would have only one or two days to start a lawsuit to restrain the sale. Not practical. The Trustee could postpone the sale in its discretion for any cause the Trustee deems advantageous under RCW 61.24.040(6).

2. Did the legislature violate the separation of powers doctrine by reducing the Trustee's duty from a "fiduciary duty" to a "duty of good faith"?

Now it should be noted that the State Legislature has changed the statute regarding the duty of the Trustee. In 2008 RCW 61.24.010 was changed to add the following subsections:

> "3) the Trustee or Successor Trustee shall have no fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the Deed of Trust.
>
> 4) the Trustee or Successor Trustee has a duty of good faith to the borrower, beneficiary and grantor."

Appellants submit that the Legislature does not have the power to modify the findings of the court in Cox, supra and Meyers Way, supra by having a lesser standard than that of fiduciary duty.

The Cox Court was emphatic in its assertion that the Trustee has an "exceedingly high" standard. The Meyers Way court described how a Trustee would be under "heightened judicial scrutiny."

For the legislature to modify the case law and reduce the heightened scrutiny set by the Courts is a violation of the Separation of Power doctrine. Prior to 2008, there was no express statutory duty attributed to a Trustee. The Courts of Washington have ruled about the high standard of duty. In Marine Power and Equipment Co. v. The Human Rights Commission Hearing Tribunal, 39 Wn. App. 609, 694 P.2d 697 (1985), the Court held:

> "The legislature may not, under the guise of clarification, overrule by legislative enactment a prior authoritative Supreme Court opinion construing a statute."

3. If the Trustee believes that it "works for the bank," is that an actual conflict of interest?

There is a question of fact which arises to be a genuine issue of material fact as to whether or not the trustee in question had an actual conflict of interest. This should not have been resolved under the Motion for Summary Judgment. Either there were insufficient

facts to determine the issues or reasonable minds could have drawn different conclusions.

This is emphasized in Savings Bank of Puget Sound v. Julius Mink, supra, wherein the Court used the Cox decision quoted above and stated that an actual conflict of interest by the Trustee would result in post-sale relief.

By refusing to postpone the sale and stating One West Bank had met Appellants' concerns, Regional Trustees Services Corporation was not exercising the heightened degree of fiduciary duty expressed in these cases.

B. The Trial Court erred by failing to find a genuine issue of material fact concerning the breach of the covenant of good faith and fair dealing in the dual tracking of loan modification and foreclosure.

4. Does the dual tracking, processing a loan modification while also processing foreclosure, violate the covenant of good faith and fair dealing.

Appellants now turn to the issue of dual tracking. This is the process in which the lender/bank encourages the borrower to refinance their loan to what may be more favorable terms and at the same time commences a foreclosure proceeding. Generally speaking, believing that they are in good hands with their banker/lender, the borrowers ignore the Deed of Trust foreclosure proceeding, thinking that the lender will approve the refinance. This is exactly what happened to Appellants Steinmann. They were first approved by the lender IndyMac Mortgage Services, a division of One West Bank FSB, to a trial process for a HAMP loan modification (CP115) and after seven (7) months were discontinued. In the meantime, a Deed of Trust Foreclosure had been started, postponed three (3) times and then just disappeared. (CP 114, 121, 122 and 123) The Appellants were told in September 2010 that their ratings under the HAMP process called "NPV" did not allow them to qualify. (CP 115) In a review of the numbers submitted by the IndyMac Mortgage Services personnel, the Appellants Steinmann realized that the numbers were erroneous and not the numbers that they had actually submitted in February of 2010. (CP 116) After Appellants waited months and asked repeatedly, instead of correcting the numbers, now IndyMac

Mortgage Services states that "the owner of the loan" would not approve the loan modification because the NPV numbers still didn't allow HAMP, but the numbers used were the same as the earlier NPV and were still wrong (March 11, 2011). (CP 139) Then IndyMac Mortgage Services stated (March 29, 2011) that Appellants didn't qualify for HAMP because they had not completed their "trial modification" which IndyMac itself had terminated. (CP 142) Later, one month before the Trustee's Sale (May 25, 2011), IndyMac Mortgage Services took the position that Appellants no longer qualified because there was an "imminent foreclosure sale." (CP 144) At that time it appeared on one hand that IndyMac Mortgage Services controlled the HAMP process, but there was an unnamed "owner" of the loan that refused to delay the foreclosure sale to allow Appellants to straighten out the IndyMac mistakes. (May 16, 2011) (CP 145) The Court must recall that IndyMac Mortgage Services is a loan servicer. It is not the owner of the loan. It is a division of One West Bank, FSB according to all of the foregoing letters. If One West Bank is the "owner" then it knows of the alleged erroneous NPV numbers. If, as believed, Fannie Mae, Respondent herein, is the "owner" then certainly it can be expected that the loan servicer would have passed

through to the "owner" all of the issues attributed to the NPV by the Steinmanns as well as the termination of the trial modification and they would have been involved in the "imminent foreclosure sale." The loan servicer, IndyMac, and Fannie Mae, the "owner" had to be working together.

Appellants submit that the conduct of IndyMac and/or Fannie Mae, Respondent herein, violated the covenant of good faith and fair dealing which is found in every contractual relationship.

The requirement of contractual fair dealing finds its basis in RCW 62A.1-203 wherein it is stated:

> "Obligation of good faith. Every contract or duty within this Title imposes an obligation of good faith in its performance or enforcement."

The case of Liebergesell v. Evans 93 Wn. 2d 881, 631 P.2d 1170 (1980) discusses this statute and indicates that the Courts of the State of Washington have emphasized good faith dealings under the performance of contracts, citing Peter Pan Seafoods, Inc. v. Olympic Foundry Co., 17 Wn App. 761, 770, 565 P.2d 819 (1977) and other such cases. A foot note in Liebergesell points out that the principle of

good faith goes back to the time of the Romans. Liebergesell, supra page 893 n.1.

The Court of Appeals case Badgett v. Security State Bank, 56 Wn. App. 872, 786 P2d 302 (1990) uses this case to overturn a Trial Court's Order of Summary Judgment for a couple that were attempting to refinance their dairy herd loan and were foiled by relationships within the bank. Unfortunately this case was overturned by the Supreme Court in Badgett v. Security State Bank, 116 Wn. 2d 563, 807 P.2d 356 (1991). The Supreme Court case stated that the duty to cooperate, i.e., to express the covenant of good faith and fair dealing exists only in relation to performance of the specific contract term. It held:

> "As a matter of law, there cannot be a breach of the duty if good faith when a party simple stands on its rights to require performance of a contract according to its terms." [Citations omitted]

Appellants submit that the Supreme Court case of Badgett is distinguishable from Appellants' matter. If enforcement of the Promissory Note and Deed of Trust were the only question, then there is no question that there is no violation of a covenant of good

faith and fair dealing merely to enforce the defaulted note. However, once the putative lender, IndyMac Mortgage Services, starts down the path of loan modification and goes to the extent of having them make application through a federal stimulus provision, then there is a good faith requirement that they complete the application properly. In a loan modification, there is a "new" arrangement between what was believed to be the lender and the borrower. During this process both sides must act in good faith toward the other.

5. Does the failure to disclose the decision –making owner of the loan violate the covenant of good faith and fair dealing.

The procedure or lack thereof followed by IndyMac Mortgage Services and/or perhaps Respondent Fannie Mae doesn't pass the smell test. IndyMac Mortgage Services is apparently processing the loan modification. There is an undisclosed "owner" who has denied the loan modification and/or a postponement of the Trustee's Sale presumably based on information erroneously fed to it by IndyMac. By making a finding that there is no genuine issue of material fact the Trial court has precluded Appellants Steinmann from presenting its full case to determine how all of these erroneous matters were

interrelated which results in the Appellants Steinmann losing their home.

Anticipating that Respondents will respond by indicating that the Steinmanns should have brought an action to enjoin the sale, Appellants point out that their last notice that they would not postpone the sale was received not earlier than June 22, 2010, a mere two (2) days before the sale was scheduled to occur. As a practical matter, there was not sufficient time to bring a lawsuit seeking a temporary injunction.

6. Does the failure to correct misinformation in the loan modification interfere with the modification process and breach the covenant to cooperate in good faith?

Stated another way in Ward v. Coldwell Banker, there is a principle of law that states:

> "All contracts included implied condition that a party will not interfere with another party's performance, but will cooperate in good faith. Lonsdale v. Chesterfield, 99 Wn. 2d 353, 357, 662 P.2d 385 (1983), Jones and Associates v. Eastside Properties, Inc., 41 Wn. App. 462, 471, 704 P.2d 681 (1985)."

Ward v. Coldwell Banker, 74 Wn. App. 157, 872 P.2d 69, page 168 (1994).

By continuing to provide erroneous information to the "owner" and to correctly and in good faith process the loan modification, the Appellants ability to perform was interfered with. It was suggested to the Trial Court that the Respondent Fannie Mae was a participant in this interference for reasons that could not be developed under the restrictions of a Motion for Summary Judgment, but because those were material facts raised before the Trial Court, then the Trial Court should have denied Respondent's Motion for Summary Judgment and allowed the facts to be developed and determined by the trier of fact as to whether or not the interference by Respondents or their agents were such that the possession of the Appellants' property following the Trustee's Sale should not be allowed.

This "dual tracking" process deprives Appellants of an ability to deal directly with the true owner of their loan. This failure is a failure to follow the prescriptions of the non-judicial trustee's sale.

C. The Trial Court erred in failing to find genuine issues of material fact as to who the actual holder/owner of the Appellants'

Note and Deed of Trust, therefore which entity is actually entitled to complete the foreclosure.

7. Does the failure by the Trustee to require the beneficiary to affirm it is the holder of the Promissory Note result in a procedural omission which voids the foreclosure sale?

Since it has been established that the Trustee's Sale may be void if there is a defect in the foreclosure process, or a failure to observe the statutory prescriptions, Appellants now turn to failure of either the Respondent or the Trustee to produce the original Promissory Note and Deed of Trust. In its' rebuttal to Appellants' resistance to its' Motion for Summary Judgment, Respondent's counsel calls this a "show me the note" argument. She then cites cases which apparently deny the ability of the beneficiary to obtain presentment all of which are unreported cases.

However, because of the apparent lack of appropriate processes throughout the United States, Washington State Legislature did make a requirement that found its way to RCW 61.24.130. The legislation was engrossed Senate Bill 5810 adopted in 2009 which

added the following provision to the requisites to Trustee's sale section:

> "(7)(a) that, for residential real property, before the Notice of Trustee's Sale is recorded, transmitted, or served, the Trustee shall have proof that the beneficiary is the owner of any Promissory Note or other obligation secured by the Deed of Trust. A Declaration by the beneficiary and made under the penalty of perjury stating that the beneficiary is the actual holder of the Promissory Note or other obligation secured by the Deed of Trust shall be sufficient proof as required under this subsection.
>
> (b) Unless the Trustee has violated his or her duty under RCW 61.24.010(4), the Trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection."

There is nothing in the record produced by Respondent that indicate that the Trustee, Regional Trustees Services Corporation, ever received such a declaration under penalty of perjury. There is no reference to such a document and none was ever produced. There is no question from the record that Appellants made evident their concern to IndyMac Mortgage Services and to Regional Trustees Services Corporation. (CP 146 and 148) These requests fell on deaf ears. IndyMac admitted it does not have the original documents. (CP

149 and 151) The Trustee apparently violated its duty to assure that the appropriate beneficiary owned the Note and supporting Deed of Trust. While the "owner" is referred to in several items of correspondence from IndyMac Mortgage Services, there was never an identification of who the "owner" actual was at any given time. (CP 142, 144, 144 and 145) Yet the "Notice of Trustee's Sale" identifies One West Bank, FSB, as the holder of the "beneficial interest" in February 2011. (CP 129)

8. Does RCW 62A.3-301 et seq. require a beneficiary to prove to the Grantor/Borrower that it is a holder of the Promissory Note that is being enforce through foreclosure of a Deed of Trust?

Beyond that requirement, which Respondents' counsel acknowledged in her Memorandum of Authorities, (CP 167), the failure to comply with RCW 62A.3-301 et seq. could leave the Respondent the inability to enforce the collection of or foreclosure of the basic promissory note. A promissory note is a negotiable instrument and the enforcement of those instruments are dispositive under RCW 62A.3-301 et seq. The Deed of Trust that secures a

Promissory Note is merely a security instrument, which would be one methodology for enforcement of the terms of the Promissory Note.

Since there was never any effort by the Respondent or IndyMac Mortgage Services or any of the related agencies to prove to either the Trustee or the Appellants that they were actually the holders of the real Promissory Note, then there should not have been an Order Granting Respondent's Motion for Summary Judgment because there is a material issue of fact. Did the Respondent or the foreclosing entity really have the Promissory Note in question? Was it a holder? Since that answer has never been satisfied either by RCW 61.24.030(7), or by the demand under RCW 62A.3-301 et seq., then there were clearly issues of fact that were unresolved. If the foreclosing entity was not the holder of the Promissory Note, then it had no right to complete the Trustee's Sale and the sale is void. Therefore, the Trial Court erred in granting Respondents' Motion for Summary Judgment on this issue.

VI.

CONCLUSION

A standard of review for a Motion for Summary Judgment is that if reasonable minds could draw different conclusions from

undisputed facts, or if all the facts necessary to determine the issues are not present, then the grant of Summary Judgment would be improper. While the standard in Unlawful Detainer matters arising out of the Deed of Trust foreclosure, is to determine who is entitled to possession, the case law is clear that if there is a failure to observe the statutory prescriptions of the Deed of Trust foreclosure or if there is an actual conflict of interest on the part of the Trustee, then the sale is void and the purchaser at the Trustee's Sale is not entitled to possession.

Appellants submit that in each of the three (3) arguments or assignments of error the Appellants brought forth sufficient facts to raise a question under those principles which should have resulted in the Trial Court denying Respondent's Motion for Summary Judgment.

The Trustee clearly has an actual conflict of interest by indicating that they "work for the bank and must do what the bank says." In fact, three (3) days before the Trustee's Sale, the Trustee once again refused to postpone the sale saying that "the bank" says it has answered all your questions. There was no independent review

of the matter by the Trustee. The Trustee could have postponed the sale for any cause which it deemed appropriate.

The convoluted process that was carried on between the alleged holder of the loan, IndyMac Mortgage Services, a Division of One West Bank, FSB, and Respondent Fannie Mae begs credulity. IndyMac processes the loan modification on faulty facts and refuses to correct the facts despite information received from a CPA and Appellants themselves. They it says the Appellants have failed to complete their trial period, which IndyMac itself had terminated. Later it says there is an imminent foreclosure and therefore, the "owner" won't postpone the Trustee's Sale. So who is really in control of this loan? That is the mystifying question. That is why the Trial Court should have indicated that there was insufficient facts to merit approval of the Motion for Summary Judgment, because there was an appearance that somebody in the lending side of things failed to observe the statutory prescriptions, in addition to the Trustee having an actual conflict of interest.

And that, lastly, is also the conclusion when the Trial Court failed to find issues of fact concerning who actually owned the

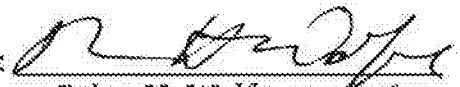
Promissory Note and the Deed of Trust. The Trial Court bought into Respondent's use of unpublished opinions, wherein it stated that it was opposed to a "show me the note" defense. The truth is no one really could state who the beneficial owner of the Note and Deed of Trust was. It started out being the One West Bank in the Notice of Trustee's Sale, but may have really been Fannie Mae, Respondent herein, who ends up being the owner. All borrowers, including Appellants, have a right to know who is behind the foreclosure which leads to the "sacrifice of debtor's property and his interest."

The Court of Appeals should find that there were certain issues which should have been resolved by a trier of fact and not on Summary Judgment. If any one of the foregoing arguments is sustained for Appellants then the sale must be set aside and Respondents denied possession of the property. Since the Trial Court entered an Order

Granting Summary Judgment, this matter should be remanded to allow the taking of evidence by a trier of fact.

Dated this 10th day of August, 2012

BRIAN H. WOLFE, P.C.

By: 
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IN THE COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

FANNIE MAE A/K/A FEDERAL NATIONAL MORTGAGE ASSOCIATION, its successors and/or assigns, Respondents, vs. RONALD D. STEINMANN, KATHLEEN STEINMANN, Appellants.	Court of Appeals No. 43133-5-II CERTIFICATE OF MAILING

I hereby certify that I have mailed **(by regular mail)** Appellants **Amended** Brief on the following attorney on the date noted below, by mailing to said persons a true copy thereof, certified by me as such, contained in a sealed envelope, addressed to said persons last known addresses as indicated, and deposited in

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DATED this 10 day of August, 2012.

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