No. 323668-III
(Consolidated with No. 330257-III)

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

HELENE M. RAUN,
Plaintiff-Appellant,

v.

JOHN H. CAUDILL, and LUCILLE J. CAUDILL, as Trustees for the CAUDILL LIVING TRUST dated November 1, 2000; WANELL J. BARTON, as Trustee for the WANELL J. BARTON FAMILY TRUST dated May 7, 1998 and any amendments; DIRK A. CAUDILL and LAUREN C. CAUDILL, as Trustees of the CAUDILL FAMILY TRUST dated September 11, 2002; EARL L. BOETTCHER and MARY C. BOETTCHER, as Trustees for the BOETTCHER FAMILY TRUST dated May 12, 1992; BELVA M. WILLIAMS, a single woman; LARRY LOUTHERBACK and SHANNA LOUTHERBACK, as Trustees of the LOUTHERBACK LIVING TRUST dated February 9, 2001; DALE WALKER and CAROL WALKER, husband and wife; JOHN P. GLEESING as Successor Trustee under the Caudill Deed of Trust,

Defendants-Respondents.

BRIEF OF RESPONDENT JOHN GLEESING

Patrick W. Harwood, WSBA #30522
of Kirkpatrick & Startzel, P.S.
Attorneys for Respondent John P. Gleesing
1717 S. Rustle - Suite 102
Spokane, WA 99224
(509) 455-3647

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES, Continued

Other

I. INTRODUCTION

This matter is the second of two consolidated appeals arising from *Raun v. Caudill, et al.*, under Spokane County Superior Court cause number 12-2-03834-6. The first appeal, which has been fully briefed, regarded the trial court's orders dismissing Appellant Helene M. Raun's ("Raun") seven causes of action asserted against the Respondents. The first appeal also provided thorough briefing and argument on the trial court's oral ruling Raun's claims of outrage and negligent infliction of emotional distress ("NIED") asserted against Respondent John P. Gleesing violated CR 11.

This second appeal seeks review of the trial court's written findings of fact, conclusions of law, and order entered on the CR 11 violations as well as the order imposing CR 11 sanctions against Raun's counsel Mr. Maris Baltins and the Law Offices of Maris Baltins, P.S.

For over three years, Mr. Gleesing has been required to incur substantial costs in defending against tort claims which were not well grounded in fact or supported by existing law. The sole basis for each of these claims arise from Raun's receipt of a Notice of Trustee's Sale, and subsequent amended Notices, Mr. Gleesing was required by Washington State law to issue as a deed of trust trustee. The statutory notices followed the language and form provided by the Washington State Legislature, and

were issued as required by Washington's Deed of Trust Act ("DTA"). RCW 61.24.040(1)(f). None of the notices at issue were received by Raun directly from Mr. Gleesing or any of the named Respondents. They were received through the filter of Raun's attorney at the time or from other residents residing at the Clare House Bungalows ("Clare House").

On September 27, 2012, Raun filed her Summons and Complaint with the Spokane County Superior Court. The Complaint was dated the same day and signed by Raun's current attorney, Mr. Maris Baltins, on behalf of the Law Offices of Maris Baltins, P.S. There was not an independent certification of the Complaint by Raun herself. Mr. Gleesing was named as a Defendant as "successor trustee under the Caudill Deed of Trust." His sole involvement in the case was described as such:

> 2.10 Defendant John P. Gleesing (hereinafter "Gleesing") is a Washington attorney. Gleesing alleges to be the successor trustee under the Caudill Deed of Trust which encumbered the subject real property described herein.

The Complaint makes no allegation Mr. Gleesing: 1) violated any fiduciary duty owed under the Deed of Trust; 2) violated the DTA in issuing the statutorily required notices; 3) or that the loans secured by the Deed of Trust were not in default at the time the initial Notice of Trustee's Sale was mailed.

The underlying case and events giving rise to the filing of the Complaint for Damages was not a first notice lawsuit or a matter which consisted of undeveloped facts. The property interests of all parties involved, including Raun's, had been determined after extensive discovery and a bench trial in the U.S. Bankruptcy Court for the Eastern District of Washington. The trial occurred in January of 2011.

The Certified Verbatim Transcript of Proceedings of the trial was filed in the adversary proceeding as a matter of public record on June 2, 2011. Mr. Maris Baltins appeared as Raun's attorney of record on or about March 29, 2012, and represented Raun in her appeal from the adversary proceeding. Mr. Baltins had access to the extensive written discovery and document production leading up to the adversary trial, as well as Mr. Gleesing's trial testimony. These materials would have informed a reasonable attorney, in like circumstances, that the litigated and tried facts as to Raun's property interest in Clare House could not support legal claims for the tort of outrage and NIED.

A review of these materials would have also led a reasonable attorney, in like circumstances, to know, or reasonable should have known, Mr. Gleesing issuing a statutorily required Notice of Trustee's Sale in his capacity as the Caudill Deed of Trust Trustee was not warranted under the existing law of the State of Washington.

The record on review establishes Raun and Mr. Baltins were provided several letters from the Caudill Investors' attorney, Mr. Munding, advising the two tort claims were without merit and requested they be voluntarily dismissed. Each of these requests would have put a reasonable attorney in like circumstances on notice to re-evaluate the asserted causes of action to recertify the evidence known to date provided a factual and legal basis to continue to prosecute the claims. Each of these requests for dismissal was summarily disregarded and not responded to. Each of Mr. Munding's letters was copied to Mr. Gleesing's counsel.

Following the December 20, 2013 deposition of Raun, Mr. Gleesing's counsel joined in the chorus that the claims were baseless and requested Mr. Baltins voluntarily dismiss the claims against Mr. Gleesing to avoid a subsequent motion for fees and costs under CR 11 and RCW 4.84.185. As with Mr. Munding's numerous requests, this written notice was also disregarded and not responded to.

On April 4, 2014, the trial court confirmed the claims of outrage and NIED were not well grounded in fact, were not supported by existing law, and there had been no argument to modify existing law. On November 25, 2014, the trial court entered the orders which are now the subject of the present appeal. The trial court entered detailed findings of fact and conclusions of law outlining the specific conduct of Raun and Mr.

Baltins that violated CR 11. The trial court was requested by Mr. Gleesing's counsel to impose a sanction that included an award of all fees and costs incurred from counsel's appearance on February 22, 2013 through the hearing of April 4, 2014. It was argued the appropriate sanction would be in the amount of $41,224.00 in fees and $2,865.56 in costs for a total award of $44,089.56. The trial court declined this request. Instead, the trial court found Raun, and more specifically Mr. Baltins, was provided sufficient notice the two tort claims were without merit and should have been voluntarily dismissed as of November 7, 2013. To advance the purposes of CR 11, to educate, deter, and compensate for the frivolous filings and litigation, the trial court awarded total sanctions in the amount of $25,627.83. Substantially less than what had been requested by Mr. Gleesing.

Substantial evidence supports each of the trial court's findings of fact and conclusions of law in determining the CR 11 violations and the imposition of sanctions for attorneys' fees and costs. Raun and Mr. Baltins have failed to meet their burden to establish the trial court abused its discretion in any degree.

///

///

///

II. ISSUES PRESENTED

Raun outlines seven assignments of error and four issues presented. (App. Brief at pgs. 3-4). The two orders forming the basis of the second appeal may further be reduced to the following consideration:

1. Does the record on review support the trial court's discretionary ruling the causes of action of outrage and NIED asserted against Mr. Gleesing violated CR 11?
2. Does the record on review support the trial court's discretionary ruling in imposing a sanction in the amount of $25,627.83 to educate, deter, or compensate for the frivolous CR 11 violations?

Substantial evidence before the court answers each of the above issues in the affirmative.

III. STATEMENT OF THE CASE

Mr. Gleesing reasserts and incorporates his Statement of the Case as set forth in his initial Brief filed on October 13, 2014. (Brief of Resp. Gleesing at pp. 8-16). The following additional facts and procedural history are provided in regard to the issues specific to this second appeal.

Prior to filing the Complaint for Damages which initiated the present action, Raun and Mr. Baltins had been involved in extensive litigation on the same set of facts in an adversary proceeding in the United

States Bankruptcy Court for the Eastern District of Washington. CP 11, 13, 1437-1438, 1825. The adversary proceeding was commenced in 2009. CP 1437. A portion of the claims at issue were resolved via a December 14, 2010 Memorandum Decision on the parties competing motions for summary judgment. CP 1515-1524. The remainder of the claims were tried before the Honorable Patricia C. Williams in a bench trial held in January of 2011. CP 1561-62. Judge Williams entered her Memorandum Decision resolving all issues on March 11, 2011. CP 1526-1534.

Mr. Gleesing was called as a witness during the bench trial. His testimony under oath provided the following:

1. Mr. Gleesing represented the Caudill Investors in closing the loan transaction. It was not part of his representation to conduct any type of investigation as to the loan terms. CP 1585, 1587-88.
2. Based upon the loan broker's representation, it was Mr. Gleesing's understanding residents of Clare House were renters. CP 1589-90.
3. At no time was Mr. Gleesing made aware of the Clare House occupants' Resident Agreements. CP 1589.
4. At the time the loan transaction was closed, Mr. Gleesing obtained a title policy from First American Title Company.

The title policy referenced unrecorded leases, which was further evidence the occupants were renters. CP 1590-1593.

5. The title policy did not disclose the existence of Raun's, or any other, Resident Agreement. *(Id.)*

6. Mr. Gleesing was the named trustee under the deed of trust which secured the loans. CP 1583.

The Certified Verbatim Transcript of Proceedings was filed in the adversary proceeding as a matter of public record on June 2, 2011. CP 1560.

Mr. Baltins first met Raun in December of 2011. CP 1434. On or about March 29, 2012 Mr. Baltins formally appeared to represent Raun in her appeal of Judge Williams' decision. CP 1246. Mr. Baltins had access to the extensive discovery in the adversary proceeding as well as the pleadings and documents filed as a matter of public record. *Id.*, 1434-35.

On September 27, 2012 the Complaint for Damages was filed in the trial court asserting seven causes of action including the tort of outrage and NIED. CP 14-15. These seven causes of action were based upon the same set of facts and events that were at issue in the adversary proceeding. CP 7-13.

Mr. Gleesing was named as a defendant in his capacity as "successor trustee under the Caudill Deed of Trust." His sole involvement in the case was described as such:

> 2.10 Defendant John P. Gleesing (hereinafter "Gleesing") is a Washington attorney. Gleesing alleges to be the successor trustee under the Caudill Deed of Trust which encumbered the subject real property described herein.

CP 6.

The Complaint makes no allegation Mr. Gleesing: 1) violated any fiduciary duty owed under the Deed of Trust; 2) violated the DTA in issuing the statutorily required notices; 3) or that the loans secured by the Deed of Trust were not in default at the time the initial Notice of Trustee's Sale was mailed. CP 4-19. The Complaint is dated the same day of its filing and signed by Mr. Baltins on behalf of the Law Offices of Maris Baltins, P.S. CP 19.

On November 14, 2012, the Caudill Investors and Mr. Gleesing, through their attorney of record, Mr. Munding, filed a Motion to Dismiss for failure to State a Claim upon Which Relief May be Granted. CP 153-156. The trial court entered an order dismissing what were referred to as "property tort claims". CP 326-330. In opposing the motion, Raun submitted the Declaration of Lawrence S. Eastburn, MD, her family physician, friend, and pastor. CP 195, 498. The trial court reviewed the

Motion to Dismiss as one for summary judgment under CR 56. CR 12(b). In providing Raun, as the non-moving party, all reasonable inferences in her favor, the trial court took Dr. Eastburn's declaration at face value and determined there were issues of fact which precluded dismissal of the torts of outrage and NIED at that time. RP 150:13-25, 151-154. The trial court allowed for addition discovery on the surviving tort claims. *Id.*

Mr. Gleesing's current counsel substituted as his attorney on February 22, 2013. CP 352. At that time, Raun's motion for reconsideration of the trial court's order was pending. CP 1826. The motion to reconsider was denied on May 21, 2013. CP 375. Following the Order, the parties exchanged written discovery on the tort of outrage and NIED. CP 1826. In the summer of 2013, Raun unilaterally set the video perpetuation deposition of Dr. Eastburn despite not providing his complete file and before the opportunity to conduct a discovery deposition as allowed by the civil rules. CP 1839. This tactic lead to unnecessary motion practice before a resolution was reached to allow the discovery deposition of Dr. Eastburn to be taken on August 6, 2013. CP 498, 1839. Dr. Eastburn's deposition testimony contradicted numerous of the statements made in his Declaration filed in opposition to the Motion to Dismiss. CP 498-501. Based upon Dr. Eastburn's deposition testimony,

the Respondents began preparing their respective motions for summary judgments.

On November 7, 2013, the Caudill Investors and Mr. Gleesing filed separate motions for summary judgment on the remaining claims. CP 398-401, 482-484. Prior to this date Raun had not requested to take any depositions other than the previous effort to perpetuate Dr. Eastburn's testimony. After the motions were filed, Raun sought to take the deposition of Mr. Gleesing as well as the other named defendants. CP 1827.

On November 20, 2013, Raun moved for an order shortening time to hear her motion to continue the hearing on the motions for summary judgment to allow for numerous depositions to occur. *Id.* The trial court granted the motion to continue on November 22, 2013. CP 1828.

Raun noted and took the following depositions:

A. John H. Caudill, December 12, 2013 (in Peoria, AZ);

B. John P. Gleesing, December 17, 2013;

C. Dale Walker, December 18, 2013;

D. Larry Loutherback, December 18, 2013;

E. Wanell J. Barton, December 19, 2013 (telephonic).

CP 1828.

Raun chose not to submit the transcripts of the deposition testimony of any of the Caudill Investors in opposition to the pending Motions for Summary Judgment. Instead, the Verbatim Transcript of Proceedings of the January 24, 2011 adversary bench trial was filed. *(Id.)*

The deposition of Raun was taken on December 20, 2013. At that time, she confirmed she had never met Mr. Gleesing or any other of the named Respondents. *Id.* Raun also testified she never received the statutory Notice of Trustee's Sale, which formed the basis of the outrage and NIED claims, directly from Mr. Gleesing or any other named Respondent. CP 1828-1829. At the conclusion of Raun's deposition, counsel for the Respondents were handed Notices of Deposition for additional Caudill Investors which were being unilaterally set in violation of the Civil Rules and the Court's existing Case Scheduling Order. CP 1829. Also on December 20, 2013, Mr. Gleesing's counsel mailed and emailed a letter to Mr. Baltins outlining Raun's deposition testimony occurring earlier that day and advising there was not a factual or legal basis to support the causes of action of outrage or NIED against Mr. Gleesing. Raun and Mr. Baltins were requested to dismiss their action to avoid a motion for fees and costs under CR 11 and/or RCW 4.84.185. CP 1397-1398.

Prior to Mr. Gleesing's counsel sending a letter demanding Raun and Mr. Baltins to dismiss the frivolous claims, they were both on notice the claims of outrage and NIED were without merit. CP 1245-1247, 1251-1257. Specifically, Mr. Munding, who previously represented Mr. Gleesing, sent letters dated November 7, 2013; November 18, 2013; December 5, 2013; and December 23, 2013, each requesting Raun and Mr. Baltins to voluntarily dismiss the two tort claims. Each of these letters either inferred or directly stated the tort claims were without merit. *Id.* Each of these letters was also copied to Mr. Gleesing's counsel, Mr. Harwood. (*Id.*) Raun and Mr. Baltins refused to dismiss the actions either in response to Mr. Munding's letters or Mr. Harwood's letters.

Hearing on the Motions for Summary Judgment was held on January 10, 2014. The order granting the motions was entered on February 7, 2014. CP 1218-1222. On March 5, 2014, Caudill Investors filed their Motion for Costs and Fees Under RCW 4.84.185. CP 1223-1226. On March 7, 2014, Mr. Gleesing filed his Motion for Fees and Costs Re: CR 11 and RCW 4.84.185. CP 1300-1301. In response to the Motions, the Declaration of Maris Baltins was filed on March 28, 2014. Mr. Baltins' Declaration and its attached exhibits totaled 307 pages. CP 1433-1740. The vast majority, if not all, of these voluminous materials

constituted documents from the bankruptcy adversary proceeding. (*Id.*) CP 1535-1538.

On April 4, 2014, the trial court made an oral ruling denying sanctions under RCW 4.84.185 but granted Mr. Gleesing's Motion for a Determination that CR 11 had been violated. RP 84:131; 125:16-128:21).

On November 25, 2014, the trial court held a presentment hearing as well as a hearing on Mr. Gleesing's motion for a determination of an appropriate sanction for the CR 11 violations. RP 132-158. The trial court entered an order which set forth 23 separate findings of fact and three conclusions of law to support the finding that the claims of outrage and NIED against Mr. Gleesing were not grounded in fact, warranted by existing law, and there was no argument for a modification of existing law. CP 2037-2043.

Also on November 25, 2014, the trial court entered its order imposing CR 11 sanctions. CP 2046-2049. Because the pleading which violated CR 11 was the Complaint itself, Mr. Gleesing sought an award of fees and costs from the date of his current counsel of record's appearance on the case on February 22, 2013, through the hearing for a determination of CR 11 violation. The trial court found Mr. Gleesing's attorney of record's billed hourly rates reasonable, and the itemized attorney fees and paralegal fees in the total amount of $41,224.00, and costs in the amount

of $2,865.86 were reasonably and necessarily incurred in defending against the causes of action of outrage and NIED. CP 2048. Mr. Gleesing's counsel's billed hourly rates and the amount of fees incurred in defense of the action were not disputed by Raun or Mr. Baltins. RP 136:1-25, 137:125.

The trial court also found Mr. Baltins received adequate notice of an intent to seek attorneys' fees and costs and/or that the asserted claims of outrage and NIED were not well grounded in fact or supported by existing law by at least November 7, 2013. CP 2041, 2048. To satisfy the purposes of CR 11 to educate, deter, and compensate for the frivolous filings in litigation, an award of fees and costs in the total amount of $25,627.83 was entered against Maris Baltins, Esq., and the Law Offices of Maris Baltins, P.S., jointly and severally, for violations of CR 11. CP 2048-2049.

IV. ARGUMENT

Raun spends a considerable amount of her Opening Brief echoing the same arguments set forth in the first appeal. The issues of whether Mr. Gleesing conducted a reasonable investigation, whether obtaining title insurance and a Trustee's Sale guarantee was a reasonable inquiry as to interests in the Clare House property, and the effect of Judge Williams' erroneous finding a title policy noted Resident Agreements have been fully

briefed before the Court in the first appeal. (Brief of Rsp. Gleesing at 18-32, 38-40).

A. The Standard of Review for a CR 11 Violation and Sanction is an Abuse of Discretion.

The standard of appellate review for a CR 11 violation is an abuse of discretion. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994) citing *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338-39, 858 P.2d 1054 (1993). An abuse of discretion occurs when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons. *MacDonald v. Korum Ford*, 80 Wn.App. 877, 884, 912 P.2d 1052, 1057 (1996) (citations omitted). An abuse of discretion can only be found when no reasonable person would take the view that the trial court has adopted. *Bldg. Indus. Ass'n. of Washington v. McCarthy*, 152 Wn.App. 720, 745, 218 P.3d 196, 208 (2009), citing *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

B. The Trial Court's Order Denying Fees and Costs Under RCW 4.84.185 is Not Before This Court.

Raun curiously opens her argument with a discussion on the trial court finding there was not a violation under RCW 4.84.185. (App. Brief at p. 25). The trial court's order denying fees and costs under RCW 4.84.185 has not been appealed and is therefore not a proper issue before this Court. Raun further mischaracterizes the trial court's oral ruling. Upon conclusion

of oral argument by all counsel of record, the trial court first ruled from the bench the causes of action of outrage and NIED asserted against Mr. Gleesing violated CR 11. Specifically, the court stated:

> First I want to address Mr. Gleesing's argument.
>
> I will grant the motion for CR 11 sanctions with regard to Mr. Gleesing. Mr. Gleesing's role in this case was, in fact, limited. He was the trustee under the deed of trust. He had certain obligations as a trustee does. Those obligations arise from two sources; the statute and the contents of the deed of trust. That was where his duties lie. It is important in this case that there was no allegation of breach of duty on the part of Mr. Gleesing. He performed his duties as were required of him during the process of the foreclosure of the deed of trust.
>
> ***
>
> Mr. Gleesing acted in compliance with the deed of trust law and acted in compliance with the deed of trust document.... Those notices are required by law. In fact, if Mr. Gleesing did not give those notices, he would be breaching his duty under the statute.

RP 122:1-15; 123:1-18.

Only after providing detailed reasoning and the basis for finding a CR 11 violation did the trial court address the issue of RCW 4.84.185. RP 122-125.

Raun further fails to realize the elements of a CR 11 violation and sanction are very different than the jurisprudence developed for sanctions under RCW 4.84.185. (App. Brief at p. 26). A lawsuit is only frivolous under RCW 4.84.185 when the asserted causes of action "cannot be

supported by any rational argument on a law or fact." *Skimming v. Boxer*, 119 Wn.App. 748, 756, 82 P.3d 707, 712 (2004). Further, the lawsuit must be frivolous in its entirety. If any of the asserted claims are not frivolous, the action is not frivolous. (*Id.*, citing *Biggs*, 119 Wn.2d 136-37, 830 P.2d 350; *Forster v. Pierce Cty.*, 99 Wn.App. 168, 183-84, 991 P.2d 687 (2000). Fees under RCW 4.84.185 should not be substituted for more appropriate pre-trial motions or CR 11 sanctions. (*Id.*)

Further, Raun provides no authority to support the contention that because the trial court found a mere scintilla of evidence not to grant sanctions under RCW 4.84.185, somehow a finding of a CR 11 violation is not appropriate. (App. Brief at p. 26). The trial court clearly articulated its reasoning and findings to support the decision as to why taking a declaration of Raun's physician, Dr. Eastburn, at face value on a motion to dismiss does not equate to a finding the claims are valid after additional discovery is allowed to be conducted. RP 150:13-25 - 153.

The trial court correctly exercised its discretion in applying the correct legal principles applicable to CR 11 and the distinct elements developed under RCW 4.84.185. RP 122-125. Neither Mr. Gleesing nor the Caudill Investors have appealed the trial court's order denying fees and costs under RCW 4.84.185. The issue is moot.

C. **The Trial Court Did Not Abuse its Discretion in Determining the Claims of Outrage and NIED Were Not Well Grounded in Fact or Warranted by Existing Law in Violation of CR 11.**

The determination of whether a violation of CR 11 has occurred is a matter within the sound discretion of the trial court. *Madden v. Foley*, 83 Wn.App. 385, 389, 922 P.2d 1364 (1996). CR 11 is violated when claims or defenses are not well grounded in fact or warranted by existing law, or a good faith argument for the extension, modification, or reversal of existing law. The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992). Sanctions for a baseless filing are appropriate when the court finds that the party and/or attorney who signed and filed the pleading failed to conduct a reasonable inquiry into the factual and legal basis for the claims. *Madden*, 83 Wn.App. at 389

In considering whether a violation of CR 11 has occurred, the court applies an objective standard. *Skimming v. Boxer*, 119 Wn.App. 748, 711, 82 P.3d 707 (2004). The question the court is to ask is "whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified." *Id., citing Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992).

In the case at bar, Raun has failed to provide any justification or "plausible view of the law" that Mr. Gleesing's compliance with the

Washington State Deed of Trust Act can sustain her asserted causes of action of outrage and NIED.

The record on review provides substantial evidence to support the court's finding the claims were not well grounded in fact or warranted by existing law. CP 2039-2042; RP 122-125:1-15. Raun failed to provide the trial court any legal authority that a trustee of a deed of trust issuing a statutorily required notice of trustee's sales could form the basis of even a *prima facie* case as to the elements of outrage or NIED. Raun has failed to provide this Court any legal authority which supports the proposition Washington law recognizes a cognizable claim of outrage and NIED under the facts of this case. (App. Brief at pgs. 28-30).

Instead, Raun cites essentially three cases that, by their very block-cited quotes, only apply to "a purchaser's " duty to inquire as to the condition of title. (*Id.* at pgs. 29-30; citing *Peterson v. Weist*, 48 Wash. 339, 341, 93 P. 519 (1908); *Casa del Rey v. Hart*, 110 Wn.2d 65, 750 P.2d 261 (1988); *Oliver v. McEachran*, 149 Wash. 439, 271 P. 93 (1928). These cases, and more specifically the quoted language in Appellant's Brief, are distinguishable from the facts at issue and not applicable.

Raun and her counsel had access to, and knew, Mr. Gleesing was acting solely as the Deed of Trust Trustee. CP 1592-1593. Mr. Gleesing had no interest in the property. (*Id.*) In fact, the Deed of Trust at issue

specifically precludes Mr. Gleesing as the Trustee from bidding at a trustee's sale. The Deed of Trust provides as follows:

> 4. Upon default by Grantor ... in such event and upon written request of Beneficiary, a trustee shall sell the trust property, according to the Deed of Trust Act of the State of Washington, at public auction to the highest bidder. Any person except trustee may bid at trustee's sale.

CP 1474, emphasis added.

Raun next outlines the trustee of the deed of trust's obligations under the DTA. (App. Brief at p. 33). The argument is superfluous and not applicable because there was never any allegation Mr. Gleesing breached a fiduciary duty as the trustee or violated the DTA.

Raun and Mr. Baltins knew, or reasonably should have known, the litigated facts and events leading up to this matter could not support the legal requirements of the tort of outrage or NIED.

Substantial evidence supports each of the trial court's findings of fact and conclusions of law for the claims of outrage and NIED asserted against Mr. Gleesing in his capacity as the Deed of Trust trustee were not well grounded in fact or warranted by existing law, and there has been no viable argument to modify existing law. CP 2039-2042.

///

///

///

D. The Trial Court Did Not Abuse its Discretion in Finding Mr. Baltins Failed to Conduct a Reasonable Inquiry into the Factual or Legal Basis for the Claims of Outrage and NIED

CR 11 requires attorneys to "stop, think and investigate more carefully before serving and filing papers." *Bryant* at 119 Wn.2d at 219, 829 P.2d at 1104. It is not enough that an attorney believes the asserted civil claims are meritorious. *Harrington v. Pailthorp*, 67 Wn.App. 901, 911, 841 P.2d 1258 (1992), *review denied* 121 Wn.2d 1018, 854 P.2d 41 (1993). As reasoned by the Court of Appeals:

> Starting a lawsuit is no trifling thing. By the simple act of signing a pleading, an attorney sets in motion a chain of events that surely will hurt someone. Because of CR 11, that someone may be the attorney.

Cascade Brigade v. Economic Devel. Bd. for Tacoma-Pierce Cty., 61 Wn.App. 615, 617, 811 P.2d 697 (1991).

An attorney is under a continuing duty to review and re-examine asserted causes of action under the required elements as the facts of the case are developed. TEGLUND, WASHINGTON PRACTICE SERIES, RULES PRACTICE, 5th Ed. Vol. 3A at p. 234 (2006). If, through the discovery process, an attorney becomes aware of information that would lead a reasonable attorney to conclude that a previously asserted claim is not supported by facts or law, the attorney is obligated to re-evaluate an earlier CR 11 certification and take action. *Id.*, citing *MacDonald v. Korum*

Ford, 80 Wn.App. 877, 912 P.2d 1052 (1996)(lack of factual basis became apparent at plaintiff's deposition).

A filing becomes baseless if (a) it is no longer well grounded in fact, or (b) it is not warranted by existing law, or (c) there is a good faith argument for the alteration of existing law. *Madden*, 83 Wn.App. at 390, 922 P.2d 1364.

It is not enough that an attorney or party believes that asserted civil claims are meritorious. *Harrington v. Pailthorp*, 67 Wn.App. 901, 911, 841 P.2d 1258 (1992), *rev. den'd* 121 Wn.2d 1018, 854 P.2d 41 (1993).

Additionally, the law of performing an investigation does not merely constitute "any inquiry" but a reasonable inquiry. *Miller v. Badgley*, 51 Wn.App. 285, 301, 753 P.2d 530 (1988). Whether or not a reasonable inquiry has been made depends on the circumstances of a particular case. (*Id.*) The factors a trial court may consider in this regard include the time that was available to the attorney who certifies the pleading per CR 11, the extent of the attorney's reliance upon the client for factual support, whether the signing attorney accepted the case from another member of the bar or forwarding attorney, the complexity of the factual and legal issues, and the need for discovery to develop factual circumstances under a claim. (*Id.*, 51 Wn.App. at 301-302, 753 P.2d at 539 (citations omitted).

In the case at bar, Mr. Baltins had access to the extensive discovery, arguments in support of dispositive motions, and the verbatim transcript of proceedings of the adversary bench trial. CP 1433-1740. Approximately 300 pages of documents from the adversary proceeding were filed as exhibits to Mr. Baltins' March 28, 2014 Declaration. (*Id.*)

None of the adversary materials provide a factual basis or a reference to existing Washington State law which would support claims of outrage and NIED from a deed of trust trustee that breaches no fiduciary duty and merely issues statutorily required notices. RP 122-125. In applying as to whether Mr. Baltins had made a reasonable inquiry, the trial court correctly concluded he had not. (*Id.*) *Madden*, 83 Wn.App. at 390, 922 P.2d 1364.

E. The Trial Court Did Not Abuse its Discretion in Finding Notice the Tort Claims Were Without Merit Had Been Provided as Early as November 7, 2013

Washington's version of CR 11 does not specifically require formal notice of an intent to file a motion for sanctions as does the Safe Harbor provision contained in the Federal Civil Rule 11. In the federal rule, a party who intends to seek fees and costs under CR 11 must provide at least 21 days' notice to give the offending party a safe harbor to either dismiss or revise the claims at issue. FRCP 11. Washington's CR 11 does not contain such a requirement. However, Washington courts have held

general notice should be provided to the opposing party or attorney to allow for mitigation of the CR 11 abuses from continuing. *MacDonald*, 80 Wn.App. at 892, 912 P.2d at 1061, citing *Biggs,* 124 Wn.2d at 198 n.2, 876 P.2d 448. The *MacDonald* court held "an attorney should informally notify the offending party by telephone call or letter before filing, preparing, and serving a CR 11 motion." (*Id.*) Although this informal notice does not replace a formal CR 11 motion, the trial court should consider evidence of its presence or absence when devising an appropriate sanction. (*Id.*)

Mr. Baltins argues CR 11 sanctions may implicate due process per *Bryant*. (App. Brief at 38). The *Bryant* court cited to federal CR 11 Advisory Committee Note stating a due process requirement is a consideration. *Bryant*, 119 Wn.2d 224, 829 P.2d at 1107. However, a closer reading of the case indicates the party at issue's first notice of an intent to seek CR 11 sanctions was contained in an Appellant's Reply Brief. (*Id.*) The court held this notation was sufficient to satisfy due process as the opposing party had the opportunity of notice prior to oral argument to address the request for CR 11 sanctions. (*Id.*)

The policies underlying CR 11 are best served where the rule is interpreted broadly so a court can fashion a penalty that deters litigation

abuse most efficiently and effectively. *Madden*, 83 Wn.App. at 392, 922 P.2d at 1368, citing *Biggs*, 124 Wn.2d at 198.

Here, the trial court correctly ruled prior notices given by the Caudill Investors' counsel, Mr. Munding, satisfied the general notice requirement that sanctions are contemplated. RP 154:4-25, 155, 1-25, 156:1-6. The court also considered testimony of Mr. Munding which provided as follows:

> On several occasions, I personally requested that the present litigation be dismissed in conversations with Mrs. Raun's counsel, Mr. Baltins. My request focused on the prior final decisions and lack of merit surrounding his client's claims. These requests were met with vehement rejection.

CP 1246.

Mr. Baltins received notice early and often that the claims of outrage and NIED were not supported by the asserted facts or by existing Washington State law. CP 1246-1247, 1251-1257. The warnings were ignored, and the requests for dismissal were refused. The general notice requirement has been satisfied. *Biggs*, 124 Wn.2d at 199, 876 P.2d at 452 (citations omitted).

F. <u>The Record on Review Provides Substantial Evidence the Trial Court Did Not Abuse its Discretion in Imposing CR 11 Sanctions in the Amount of $25,627.83</u>.

The trial court properly exercised its broad discretion in fashioning a sanction appropriate to the CR 11 violation committed by Mr. Baltins. It is undisputed the offending pleading found in violation of CR 11 was the Complaint filed on September 27, 2012. Mr. Gleesing's current counsel of record did not substitute as his attorney until February 20, 2013.

The purpose behind CR 11 is to deter baseless filings to curb abuses of the judicial system. If CR 11 is violated, a court may impose sanctions against the offending attorney, a party, or both. CR 11(a); *Madden v. Foley*, 83 Wn.App. 385, 922 P.2d 1364 (1996). An appropriate sanction may include an order to pay a party's reasonable expenses and attorney fees. CR 11(a). While CR 11 is not meant to act as a fee shifting mechanism, the trial court has broad discretion to tailor an appropriate sanction and to determine whom the sanction should be imposed against. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 225, 829 P.2d 1099 (1992); *MacDonald v. Korum Ford*, 80 Wn.App. 877, 891, 912 P.2d 1052 (1996). The sanction should be limited to those fees reasonably expended in responding to the sanctionable filings. *Biggs v. Vail*, 124 Wn.2d 193, 201, 876 P.2d 448 (1994).

The Lodestar method has been the default principle used by Washington courts in calculating reasonable fees and costs as a sanction. *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998) (impliedly

overruled on other grounds by *Matsyuk v. State Farm*, 173 Wn.2d 643, 272 P.3d 802 (2012)). In the case at bar, Mr. Baltins has not argued Mr. Gleesing's counsel of record's rates were not reasonable or the amount of time expended on the case was unreasonable. (App. Brief at pgs. 36-41; RP 136:3-25, 137:1-17). Instead, Mr. Baltins argues the trial court abused its discretion in awarding the fees and costs it incurred from the date a letter dated November 7, 2012, issued by Respondent Caudill Investors' counsel, Mr. John Munding, requesting Raun to voluntarily dismiss her claims of outrage and NIED rather than a letter issued by Mr. Gleesing's counsel on December 20, 2014. (*Id.*)

For Mr. Baltins to argue the "imposition of any sanctions under CR 11 is unwarranted" not only shows a lack of accountability for filing frivolous claims, but it exposes an unapologetic attitude of entitlement to continue similar conduct in the future. (App. Brief at pgs. 36-37). Only a substantial sanction of fees and costs would serve as a determent against future bad conduct and compensate Mr. Gleesing for the fees and costs incurred in his defense.

Substantial evidence supports the trial court's discretionary ruling to impose a sanction in the total amount of $25,627.83. It is ironic Mr. Baltins seeks to avoid sanctions being calculated from November 2013, when a flurry of activity occurred upon the filing of the Respondent's

Motion for Summary Judgment. It is also ironic December 2013 was one of the most time-intensive, and therefore expensive, periods of the case due to numerous depositions demanded by Mr. Baltins. CP 1874-1880. The trial court correctly considered the entire record on review in imposing an appropriate sanction.

H. Mr. Gleesing Requests this Court to Award Appellate Attorneys' Fees and Costs Pursuant to RAP 18.9.

RAP 18.9(a) authorizes this court to award compensatory damages, which includes attorneys' fees and costs, when a party files a frivolous appeal. RAP 18.9(a); *West v. Thurston Cty.*, 169 Wn.App. 862, 867-8, 282 P.3d 1150, 1153 (2012) citing *Kearney v. Kearney*, 95 Wn.App. 405, 417, 974 P.2d 872, review denied, 138 Wn.2d 1022, 989 P.2d 1137 (1999). An appeal is to be found frivolous if there are "no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there is no reasonable possibility of success." *West, supra*, citing *In Re Recall Charges Against Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003).

For the same reasoning why the trial court's finding of a CR 11 violation should be sustained on appeal, Mr. Gleesing also requests this Court make a determination based upon the record on review that reasonable minds cannot differ that Raun's appeal is so devoid of merit

that there is no reasonable possibility of reversal. *Stiles v. Kearney*, 168 Wn.App. 250, 267-268, 277 P.3d 9, 17 (2012) citing *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691, 732 Pacific 10, 510 (1987).

Raun does not provide this court any recognizable legal theory where Mr. Gleesing as a deed of trust trustee can be found liable for the asserted seven causes of action for merely issuing a statutorily mandated Notice of Trustee's Sale pursuant to the DTA. Raun also fails to make any argument Mr. Gleesing violated a fiduciary duty owed under the Deed of Trust at issue, or violated the DTA. Raun's knowledge of Mr. Gleesing's sworn testimony taken during the trial at the Adversary Proceeding put her and her counsel on notice that he was unaware of Raun's recorded Resident Agreement. Raun and Raun's counsel further had direct knowledge that Mr. Gleesing had purchased title insurance which failed to disclose the existence of Raun's recorded Resident Agreement. Raun had nearly a year and a half to conduct a reasonable investigation from the filing of Judge Williams' Memorandum Decision on the Adversary Proceeding up to filing her Complaint on September 27, 2012. Despite an alleged investigation occurring, Raun obviously did not find, or perhaps even pursue, the alleged title report referenced in Judge Williams' opinion. No such title report is known to exist.

A careful review of the record on appeal establishes reasonable minds cannot differ that Raun's appeal against Mr. Gleesing is so lacking in merit that there is no possibility of reversal. *Mahoney*, 107 Wn.2d at 691, 732 P.2d at 516-17. Further evidenced the appeal is frivolous is Raun's failure to provide this court any on-point legal authority that supports her argument, or that existing law should be changed.

Mr. Gleesing respectfully requests this court find Ms. Raun's appeal is frivolous and order an award of appellate attorneys' fees and costs pursuant to RAP 18.9(a).

V. CONCLUSION

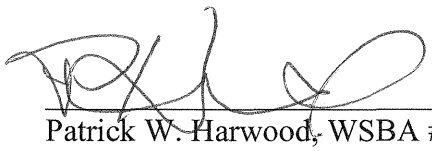
Following heavily litigated matters in State and Federal Court, Raun filed her Complaint against Mr. Gleesing on September 27, 2012. Raun asserts seven causes of action against Mr. Gleesing in his capacity as a deed of trust trustee. Each of these causes of action is based solely upon her receipt of a statutorily required Notice of Trustee's Sale. The torts of outrage and NIED were not grounded in fact, warranted by Washington law, nor was an argument to modify current law.

Raun's argument on appeal presents no debatable issue on which reasonable minds can differ and is so lacking in merit that there is no possibility of obtaining a reversal to the trial court's decisions. Mr. Gleesing is entitled to an award of appellate's attorneys' fees and costs.

Mr. Gleesing respectfully requests the court affirm the trial court's discretionary rulings in finding CR 11 violations and imposing the appropriate sanction of $25,627.83.

Respectfully submitted this 2nd day of October, 2015.

KIRKPATRICK & STARTZEL, P.S.



Patrick W. Harwood, WSBA #30522
Attorneys for Defendant/Respondent
John Gleesing

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October, 2015, I caused to be served a true and correct copy of the Brief of Respondent John P. Gleesing to the following attorneys of record as follows:

Attorney for Plaintiffs

Maris Baltins
Law Offices of Maris Baltins, P.S.
7 S. Howard, Suite 220
Spokane, WA 99201

Fax: 444-3335

☒ Hand Delivery
☐ U.S. Mail
☐ Federal Express
☐ Fax Transmission
☐ Email:

John D. Munding
Crumb & Munding, P.S.
1610 W. Riverside Avenue
Spokane, WA 99201

Fax: 624-6155

☒ Hand Delivery
☐ U.S. Mail
☐ Federal Express
☐ Fax Transmission
☐ Email:

Jan Kirtell

Of Kirkpatrick & Startzel, P.S.