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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

LUCIANO G. GIOVANNI, and the real parties in interest, PAUL GOOD
and DIANE GOOD, husband and wife,

Appellants,

v.

DEUTSCHE BANK TRUST COMPANY AMERICAS AS TRUSTEE
FOR RALI 2006QA11, its successors and/or assigns, THE FIRST
AMERICAN CORPORATION, d/b/a FIRST AMERICAN TITLE
INSURANCE COMPANY, a California corporation; MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC., a corporation,
UNITED PACIFIC MORTGAGE d/b/a AVENTUS, INC, a Nevada
corporation, EXECUTIVE TRUSTEE SERVICES, LLC, a Delaware
limited liability company, JOHN AND JANE DOES, 1 – 20

Respondents.

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

ASSIGNMENTS OF ERROR.....1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....1

STATEMENT OF CASE..... 2

STANDARD OF REVIEW.....16

ARGUMENT..... 18

APPELLANTS’ HAVE STANDING ON APPEAL.....18

IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO GRANT THE MOTION TO SET ASIDE COMMISSIONER BRADBURN-JOHNSON’S ORDER..... 22

IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DENY APPELLANTS’ MOTION TO VACATE COMMISSIONER VELATEGUI’S FINDINGS, CONCLUSIONS AND JUDGEMENT OF FEBRUARY 19, 2010..... 26

IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO IMPOSE SANCTIONS OF DEFENSE COUNSEL..... 32

THE FACTUAL ALLEGATIONS CONTAINED IN TRIAL COURT’S ORDER OF APRIL 15, 2010 ARE CLEARLY ERRONEOUS AND ARE NOT SUPPORTED BY THE RECORD ON REVIEW.....36

ATTORNEYS FEES ON APPEAL..... 44

CONCLUSION..... 46

DECLARATION OF SERVICE

APPENDICES

TABLE OF CASES AND AUTHORITIES

	Page
CASES	
<i>Barr v. MacGugan</i> , 119 Wn. App. 43, 78 P.3d 660 (2003)	16
<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wn.2d 210, 829 P.2d 1099 (1992)	32, 33, 34, 45
<i>Butler v. Lamont School District</i> , 49 Wn.App. 709, 745 P.2d 1308 (1987).	16
<i>Golden Eagle Distributing Corp. v. Burroughs Corp.</i> , 801 F.2d 1531, (9 th Cir. 1986).	33
<i>Grossman v. Will</i> , 10 Wn.App. 141, 152, 516 P.2d 1063 (1973).	44
<i>Haller v. Wallis</i> , 89 Wn.2d 539, 573 P.2d 1302 (1978).	22, 26
<i>IBF, LCC V Heuft</i> , 141 Wn.App. 624, 174 P.3d 95 (2007).	21
<i>In re the Marriage of Adler</i> , 131 Wn.App. 717, 129 P.3d 293 (2006).	22, 26
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997).	16
<i>Koegel v. Prudential Mut. Sav. Bank</i> , 51 Wn.App. 108, 752 P.2d 385 (1988).	19
<i>Maneuver v. Safeco Insurance</i> , 117 Wn.App. 168, 68 P.3d 1093 (2003).	32
<i>Merritt v. Graves</i> , 52 Wash. 57, 100 Pac 164 (1909).	22, 26
<i>Mosbrucker v. Greenfield Implement, Inc.</i> , 54 Wn.App. 647, 774 P.2d 1267 (1989)	22, 26
<i>Neigel v. Harrell</i> , 82 Wn. App. 782, 919 P.2d 630 (1996).	45

<u>Queen City Savings and Loan v. Mannhalt</u> , 49 Wn.App. 290, 742 P.2d 754 (1987)	19
<u>Ryan v. State</u> , 112 Wn. App. 896, 51 P.3d 175 (2002).	16
<u>State v. S.H.</u> , 102 Wn.App. 468, 8 P.3d 1058 (2000).	17, 32
<u>State ex. rel. Quick-Ruben v. Verharen</u> , 136 Wn.2d 888, 969 P.2d 64 (1998).	16
<u>Steward v. Good</u> , 51 Wn.App. 509, 515, 754 P.2d 150 (1988).	19
<u>Wilson v. Henkle</u> , 45 Wn.App. 162, 724 P.2d 1069 (1986).	32

WASHINGTON STATE STATUTES

<i>RCW 2.28</i>	32
<i>RCW 2.28.010</i>	32
<i>RCW 2.28.150</i>	32
<i>RCW 4.84.185</i>	11
<i>RCW 19.86</i>	9 18
<i>RCW 59.12</i>	18
<i>RCW 59.12.060</i>	21
<i>RCW 59.18.370</i>	1, 2, 17, 21, 24, 25, 26, 31, 40, 45
<i>RCW 61.24</i>	3, 5, 19, 20
<i>RCW 61.24.030</i>	4, 19, 20
<i>RCW 61.24.040</i>	4, 5, 20
<i>RCW 61.24.060</i>	6, 18, 20

RCW 61.24.127 9, 19

RCW 64.04.050 20

FEDERAL STATUTES AND RULES

15 USC 1962 9

FRCP 11 33

STATE COURT RULES

CR 11 11, 16, 32, 33, 34, 35, 39, 40, 44, 45

CR 12(b)(6) 12

CR 60 16, 26

CR 60(b) 11, 12, 22

RAP 10.7 36

RAP 18.1 44, 46

KING COUNTY LOCAL RULES

LGR 30 41

LR 4(g) 36

LR 7(b) 1, 8, 11, 17, 30, 31, 36, 40, 43, 45

LR 82 1, 2, 7, 8, 17, 23, 24, 25, 26, 28, 31, 40, 45

A. ASSIGNMENT OF ERROR.

1. The Seattle trial court abused its discretion in its Order of March 19, 2010 by setting aside Kent Court Commissioner Nancy Bradburn-Johnson's Order of February 19, 2010.

2. The trial court abused its discretion in its Order of March 19, 2010, by imposing sanctions of \$2,500.00 against defense counsel.

3. The trial court abused its discretion in its Order of March 23, 2010, by refusing to vacate Seattle Court Commissioner Carlos Velategui's Findings of Fact, Conclusions of Law and Judgment of February 19, 2010.

4. The trial court abused its discretion by denying Appellants' Motion for Reconsideration.

5. The trial court abused its discretion in denying Appellant's Motion for Contempt for Respondents' failure to comply with Seattle Court Commissioner Eric Watness' Order of December 16, 2009, *RCW 59.18.370*, *KCLR 7(b)* and *KCLR 82*.

6. The trial court abused its discretion by awarding additional sanctions of \$500.00 for filing an over-length brief.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is it an abuse of discretion for the trial court to set aside a Kent Court Commissioner's Order striking an unlawful detainer show cause hearing noted for Seattle, concerning real property located in Federal Way and within the Kent Assignment Area, where: (a) Respondents had previously been ordered to amend the case assignment to Kent, but failed

to do so; (b) the note for hearing set the matter for the Seattle King County Superior Court mailroom rather than any courtroom; and (c) the noting in Seattle violated *KCLR 82* and *RCW 59.18.370*?

2. Is it an abuse of discretion for a the trial court to refuse to se aside a final judgment in an unlawful detainer action noted for Seattle, concerning real estate located in Federal Way and within the Kent Assignment Area, where: (a) Respondents had previously been ordered to amend the case assignment to Kent, but failed to do so; (b) the note for hearing set the matter for the Seattle King County Superior Court mailroom rather than any courtroom; (c) Appellants were directed to the Kent courthouse by Seattle court personnel; and (d) Appellants were confused as to the proper location of the hearing due to Respondents failure to comply with applicable court rules and an outstanding order of the Court?

3. Is it an abuse of discretion for a trial court to impose monetary sanctions on counsel where the record fails to disclose any factual basis for such sanctions and the trial court fails to make an express finding that the alleged conduct was undertaken in bad faith, not well grounded in fact, warranted by existing law or for an improper purpose?

C. STATEMENT OF CASE

In October of 2006, Defendant/Appellant, LUCIANO G. GIOVANNI (hereinafter “GIOVANNI”) purchased the real property located at 27705 23rd Avenue South, Federal Way, King County,

Washington, 98003. See CP 1, CP3, CP 35 and CP 37. This purchase was funded by a loan issued by Respondent, UNITED PACIFIC MORTGAGE d/b/a AVENTUS, INC, a Nevada corporation (hereinafter "UNITED"). In connection with the making of that loan, GIOVANNI executed a Promissory Note and a Deed of Trust on October 18, 2006, with Respondents, FIDELITY NATIONAL TITLE, as trustee, and UNITED, as beneficiary. This instrument was recorded in King County under King County Auditor's Recording No. 20061020001919. CP 35-57.

On or about November 1, 2006, GIOVANNI initially leased the subject premises to PAUL GOOD and DIANE GOOD, husband and wife, (hereinafter "GOOD"). A copy of the parties' lease is Appellants' Motion to Modify Ruling of July 16, 2010 as Exhibit "B"¹.

On November 20, 2007, MERS executed, as purported beneficiary of the Deed of Trust identified above, an Appointment of Successor Trustee, nominating Respondent, THE FIRST AMERICAN CORPORATION, d/b/a FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation (hereinafter "FIRST AMERICAN"), as successor trustee. This instrument claimed that FIRST AMERICAN was "a corporation formed under *RCW 61.24*," although this statute contains no basis for such formation. This instrument was recorded

1

Please note that no discovery was conducted in the underlying action. Accordingly, documents that may be relevant to the Court's consideration of the underlying facts, including the basis for Mr. and Mrs. Good's standing herein, are provided to this Court through filings with this Court, such as the documents attached to Appellants' Motion to Modify filed on or about July 16, 2010.

November 28, 2007, in King County Auditor's Recording No. 20071128001478. CP 59.

At no time relevant to this cause of action did FIRST AMERICAN, or any other agent for the beneficiary, issue a Notice of Default to GIOVANNI or GOOD as a precondition of sale, as required under *RCW 61.24.030*. CP 27

On December 31, 2007, FIRST AMERICAN executed a Notice of Trustee's Sale on behalf of UNITED. This instrument was recorded under King County Auditor's Recording No. 20080104001349. No proof of service of this Notice of Trustee's Sale as required under *RCW 61.24.040* has ever been produced. CP 61-63

Subsequent to December 31, 2007, Respondent, EXECUTIVE TRUSTEE SERVICES, LLC, a Delaware limited liability company (hereinafter "EXECUTIVE"), conducted negotiations and discussions with GIOVANNI and his agents, "on behalf of the beneficiary/servicer GMAC Mortgage, LLC, f/k/a GMAC Mortgage," provided a payoff on request, and suspended FIRST AMERICAN's trustee sale upon tender of a partial payment of the sums due. Please see correspondence attached to Appellants' Motion to Modify Ruling of July 16, 2010 as Exhibit "E". However, on behalf of GIOVANNI, GOOD paid \$16,839.95 on the deficiency on April 3, 2008. A copy of GOOD's payment is attached Appellants' Motion to Modify Ruling of July 16, 2010 as Exhibit "F".

On April 3, 2008, GIOVANNI conveyed the subject real property to GOOD by Quit Claim Deed. Said Deed was recorded October 3, 2008 under King County Auditor's Recording No. 20081003001069. A copy of this Quit Claim Deed is attached Appellants' Motion to Modify Ruling of July 16, 2010 as Exhibit "G".

On September 27, 2008, FIRST AMERICAN executed a second Notice of Trustee's Sale on behalf UNITED. This instrument was recorded under King County Auditor's Recording No. 20081003000960. . CP 65-68. The date set for sale was January 9, 2009. No proof of service of this Notice of Trustee's Sale as required under *RCW 61.24.040* has ever been produced.

On March 27, 2009, GOOD made another payment of \$1,573.92 to GMAC Mortgage, pursuant to GMAC Mortgage's representation to be the "beneficiary/servicer" of the subject obligation. See Appellants' Motion to Modify Ruling of July 16, 2010 as Exhibit "I".

On May 7, 2009, GOOD made another payment of \$1,573.92 to GMAC Mortgage.

On May 8, 2009, FIRST AMERICAN apparently conducted a Trustee's Sale, pursuant to *RCW 61.24, et seq.* CP 5-6.

On June 7, 2009, FIRST AMERICAN executed a Trustee's Deed, and conveying the subject real property to Respondent, DEUTSCHE BANK TRUST COMPANY AMERICAS AS TRUSTEE FOR RALI 2006QA11 (hereinafter "DEUTSCHE"), as "the holder of the

indebtedness secured by said Deed of Trust . . . [in] satisfaction in full of the obligation then secured by said Deed of Trust . . . ,” despite the fact that the Notices of Trustee’s Sale indicated that UNITED was the beneficiary and holder of the subject obligation in the Notices of Trustee’s Sale recorded with the King County Auditor and despite the fact that GMAC Mortgage had received funds on behalf of UNITED that would satisfy UNITED’s deficiencies. This instrument was recorded under King County Auditor’s Recording No. 20090610001889. CP 5-6. No assignment of the subject Note or Deed of Trust was ever recorded and, to this point in time, neither GIOVANNI nor GOOD had any notice or knowledge that DEUTSCHE was the alleged holder of any obligation related to the subject Deed of Trust. CP 28.

On October 6, 2009, DEUTSCHE filed an unlawful detainer action against GIOVANNI and “JOHN and JANE DOE, UNKNOWN OCCUPANTS OF THE PREMISES” under King County Superior Court Case No. 09-2-36247-5 SEA, seeking a writ or restitution based upon the provisions of *RCW 61.24.060*. CP 1-6. Although DEUTSCHE should have been aware that GOOD had an interest in the subject real property based upon the GOOD’s payment and Quit Claim Deed of April 3, 2008, the GOODS were never specifically named in the action, but referred to as “JOHN and JANE DOE, UNKNOWN OCCUPANTS OF THE PREMISES”. CP 1-6. Although at no time relevant to this cause of action, was DEUTSCHE’s Complaint amended to specifically identify

GOOD, they participated in this action on every material point personally and by and through GIOVANNI. CP 218-221.

It is significant to note that the Complaint for Unlawful Detainer was misfiled by DEUTSCHE, as a “miscellaneous civil matter” rather than an “unlawful detainer.” The case was filed with an “SEA” designation. CP 1 and CP 3. However, this matter involves real property located in Federal Way, which is south of I-90. CP 1, CP 3, CP 35 and CP 37. Accordingly, the matter should have been filed as a “KNT” case, pursuant to *KCLR 82*.

On December 16, 2009, DEUTSCHE “E-filed” a Motion for Order to Show Cause in case number 09-2-36247-5 SEA. CP 10-12. This motion was denied by Commissioner Eric Watness on December 16, 2009. Commissioner Watness’ Order denying the Motion expressly stated that “[a]mendment of the case assignment is necessary before a Show Cause Order will be issued.” CP 13. The Order further provided that a “copy of this order must be included when you resubmit this matter.” CP 13.

On January 29, 2010, DEUTSCHE “E-filed” a second Motion for Order to Show Cause in case number 09-2-36247-5 KNT. CP 14-18. There is no evidence in the record that Commissioner Watness’ Order of December 16, 2009 was included in this or any subsequent filing as ordered. CP 14-18 and CP 602-603. The Motion itself appears identical to the Motion denied by Commissioner Watness on December 16, 2009,

except that the case caption was altered to read 09-2-36247-5 KNT. Moreover, there is no evidence in the record that DEUTSCHE ever attempted to amend the case assignment, pursuant to *KCLR 82* and VRP, page 5, lines 20-25. Curiously, included with DEUTSCHE's Motion was a "Note for Commissioner's Calendar" See CP 604. This "Note" indicates a hearing date of February 19, 2010, but does not provide a location for the hearing. The "Note" itself appears to be a Pierce County pattern form. CP 606.

On February 1, 2010, Judge Mary Roberts signed an Order to Show Cause at DEUTSCHE's request demanding Defendant show cause why a writ of restitution should not be issued and setting a return date of February 19, 2010. CP 19-20. Significantly, the Order signed by Judge and crossed out the words "reviewed the files and records herein" and was apparently solely based upon DEUTSCHE's Motion, which contained an incorrect case caption and failed to include a copy of Commissioner Watness' Order of December 16, 2009, despite explicit directions to the contrary, or otherwise comply with *KCLR 7(b)(7)*. CP 19-20 and CP 569-570. Moreover, the Order to Show Cause presented to Judge Roberts by Plaintiff identifies the site of the hearing as "Room C-203" of the Seattle Courthouse, which is the King County Superior Court mail room, not the ex parte department in either the Kent or Seattle Courthouses. CP 19-20 and CP 432-433.

On or about February 18, 2010, GIOVANNI, on behalf of himself and GOOD, filed and served an Answer to Plaintiff's Complaint, alleging a counter-claim and third party action, seeking damages for wrongful foreclosure, defamation of title, violation of *RCW 19.86*, violation of *15 USC 1962*, and for quiet title. These claims, if proved at time of trial, constitute a complete defense to Plaintiff's unlawful detainer action, pursuant to *RCW 61.24.127*. CP 23-71

On February 19, 2010, GOOD and GIOVANNI appeared at the King County Courthouse, with counsel, at 8:15 a.m., to respond to the Order to Show Cause. CP 219. GIOVANNI intended to advise the Court at show cause that the real parties in interest were GOOD, but, as detailed below, he never had the opportunity to address the Court. GOOD and GIOVANNI first went to "C-203" and were advised that no hearings would be conducted at that location. CP 219 and CP 432-433. GOOD and GIOVANNI then went to the courtroom of the assigned trial judge, the Honorable Julie Spector. As Mr. and Mr. Good have testified:

3. At approximately 8:15 a.m. on February 19, 2010, we appeared at Room C-203 of the Seattle Courthouse with Mr. Luciano Giovanni, the Defendant named herein. We were advised by Court staff that no hearings would be conducted at that location. We then went to the Courtroom of Trial court, who is the judge assigned to this case. Trial court's bailiff, Christine, met us in the hallway and took us into the courtroom. We handed the bailiff the paperwork referred to above, and she confirmed the fact that "C-203" of the Seattle Courthouse is the mailroom and not a courtroom and noted the Kent designation in the case number. The bailiff then made some phone calls to determine where the hearing was to be held. After several phone calls, the bailiff directed us to the ex-

parte department of the Seattle Courthouse, located at “W-320.”

CP 219. Mr. and Mrs. Good’s testimony has been corroborated by the testimony of trial court’s bailiff, Ms. Christine Henderson. CP 519-521.

After arriving at “W- 320,” GIOVANNI and GOOD reviewed all of the dockets hung on the board located in the Seattle ex-parte department and found no reference to the subject show cause hearing. CP 220. In fact, the subject hearing had been scheduled for the Kent Courthouse. CP 668-669, specifically Subject 9 to said SCOMIS docket. GIOVANNI and GOOD then went to the clerk in the court and were advised that the matter was noted for hearing in Kent. CP 220 and CP 668-669”. The clerk contacted the clerk in the ex-parte department of the Kent Courthouse handling to advise that Defendants were in Seattle. CP 220 and CP 430-431. GIOVANNI and GOOD were advised that no one representing the DEUTSCHE had checked in, but that the matter would be held until GIOVANNI and GOOD could appear. CP 220. GIOVANNI, GOOD and counsel immediately left the Seattle Courthouse for the Kent Courthouse at approximately 9:30 a.m. CP 220. At no time prior to GIOVANNI and GOOD leaving at the direction of the clerk did a representative of DEUTSCHE appear at the Seattle Courthouse ex-parte department. CP 220.

At approximately 10:00 a.m. on February 19, 2010, GIOVANNI, GOOD and counsel, appeared before Kent Court Commissioner Nancy Bradburn-Johnson. CP 220. The Commissioner was advised of the

communication between the clerks of the Court regarding the noting of the show cause hearing, the confusion created by improper courthouse designation in the caption of DEUTSCHE's documents, and the failure of a representative of DEUTSCHE to appear at either the Seattle or Kent Courthouses at the time noted in the Show Cause Order. CP 220. At the conclusion of the hearing, the Commissioner entered an order striking the matter and awarding terms of \$750.00, pursuant to *CR 11* and *RCW 4.84.185*. CP 76 and CP 220.

On February 22, 2010, counsel for GIOVANNI and GOOD received an e-mail from DEUTSCHE'S attorney of record, Rochelle L. Stanford, advising him that DEUTSCHE had obtained a Judgment against GIOVANNI from Commissioner Carlos Velategui. CP 676. The subject Judgment appears to have been presented by Katrina E. Glogowski of the law firm Glogowski Law Firm, PLLC. – not Rochelle L. Stanford of Pite Duncan, LLP, who had brought the Motion to Show Cause. CP 73-75.

On or about March 3, 2010, counsel for DEUTSCHE filed a Motion for Reconsideration/Relief from Court Commissioner Nancy Bradburn-Johnson Order of February 19, 2010, pursuant to *CR 60(b)*. CP 96-99. The matter was inappropriately noted without oral argument before Court Commissioner Nancy Bradburn-Johnson, in violation of *KCLR 7(b)(8)*, which requires such motions be heard by the assigned judge on motion for revision. CP 93-95. Said Motion was set for March

15, 2010 before Court Commissioner Nancy Bradburn-Johnson in at the Kent Courthouse.

On or about March 9, 2010, counsel for DEUTSCHE filed a Motion to Set Aside Court Commissioner Nancy Bradburn-Johnson Order of February 19, 2010, pursuant to *CR 60(b)*, seeking the same relief as the Motion for Reconsideration/Relief of March 3, 2010. CP 112-115. This Motion was set without oral argument for March 16, 2010 before the trial judge at the Seattle, Courthouse.

On March 10, 2010, counsel for DEUTSCHE filed a Motion to Dismiss Defendant's Counterclaim against DEUTSCHE, pursuant to *CR 12(b)(6)*. CP 232-235. This Motion was set, without oral argument, for March 23, 2010.

On March 10, 2010, counsel for GOOD and GIOVANNI obtained the recording of the Seattle ex-parte proceedings of February 19, 2010 referred to in the Clerk's Docket for this matter. CP 684. There was no argument concerning this matter heard on the recording and the time index indicates that the matter began and ended within 35 seconds. CP 572 and CP 685.

On March 15, 2010, GIOVANNI and GOOD filed a motion seeking to vacate Commissioner Velategui's Findings of Fact and Conclusions of Law of February 19, 2010, and seeking an order of contempt against DEUTSCHE for failure to comply with Commissioner Nancy Bradburn-Johnson Order of February 19, 2010. CP 243-346. This

Motion was set with oral argument requested for March 23, 2010. None of GIOVANNI and GOOD's requests for oral argument was never considered or granted.

On or about March 19, 2010, the trial court granted DEUTSCHE's Motion to set aside Commissioner Nancy Bradburn-Johnson Order of February 19, 2010. CP 398-399. This Motion was considered by trial court without oral argument. As part of its Order, the trial court sanctioned GIOVANNI's and GOOD's counsel \$2,500.00 "for creating confusion among 2 judicial officers." The trial court did not specifically identify which judicial officers it was referring to or how or what sort of confusion had been created by counsel's alleged conduct in its Order. CP 398-399.

On March 23, 2010, the trial court entered an Order denying GOOD's and GIOVANNI's Motion for Contempt, but reserved a ruling on DEUTSCHE's Motion to Dismiss GOOD's and GIOVANNI's counter-claim, for a "separate motion." CP 405-406. Again, this Motion was considered by the trial court without oral argument.

On March 29, 2010, GOOD and GIOVANNI timely filed a Motion for Reconsideration of the trial court's Orders of March 19, 2010 and March 23, 2010. CP 411-429. A hearing on said Motion, with oral argument requested, was set for April 13, 2010. CP 409-410.

To obtain testimony to refute the trial court's finding that counsel for GOOD and GIOVANNI had created confusion among two judicial

officers and to corroborate Mr. and Mrs. Good's testimony, counsel for GIOVANNI and GOOD issued a subpoena for the trial court's bailiff's testimony. CP 434-435. The deposition of Ms. Henderson was set for April 6, 2010.

On or about April 2, 2010, a Motion to Quash counsel's Subpoena for Deposition was filed by the King County Prosecutor on behalf of Ms. Henderson. CP 444-473. Said Motion was set for hearing before the trial court, with oral argument, for April 6, 2010, on shortened time.

On April 5, 2010, the trial court recused itself from consideration of the Motion to Quash. CP 486. Consideration of the Motion to Quash was transferred to the Chief Civil Judge, the Honorable Paris Kallas.

On April 6, 2010, Judge Kallas denied the Motion to Quash. CP 488-489. At the conclusion of the hearing, Judge Kallas denied the relief requested and made the following written findings:

2. The circumstances presented herein represents on of the rare circumstances and to grant the Motion to Quash would deny to defendants their due process rights.

3. The Court acknowledges numerous irregularities in these proceedings that give rise to the need to depose a bailiff; these include (1) the improper designation of court assignment, (2) failure to abide by Commissioner Watness' Order of December 16, 2009; (3) noting a show cause hearing for the judge's mailroom, (4) seeking a motion to vacate instead of a motion of reconsideration/revision; (5) Duetsche Bank would not stipulate to errors in these proceedings and thus avoid the need for a deposition.

CP 488-489.

At the hearing, Judge Kallas was far more pointed in her evaluation of the procedural irregularities created by DEUTSCHE. VRP, page 5, line 6, through page 7, line 17; page 9, line 16, through page 10, line 19; page 11, lines 7-17 and page 15, line 17, through page 17, line 1, attached hereto as *Appendix "1"*. These findings, alone, would have been sufficient basis to support GOOD and GIOVANNI's Motion for Reconsideration, had they been considered by the trial court.

On April 12, 2010, counsel for GOOD and GIOVANNI filed a Motion and Declaration for Recusal of Assigned Judge. CP 524-564. This Motion was noted, with oral argument requested, for April 13, 2010, on shortened time. CP 522-523.

On April 15, 2010, without providing GIOVANNI, GOOD or counsel an opportunity to be heard on the issue, the trial court entered an Order Denying Defendant's Motion for Reconsideration, Motion for Contempt and Motion to Recuse. CP 706-712. The trial court's findings materially contradict those of Judge Kallas, cited above.

On May 5, 2010, GIOVANNI and GOOD timely filed the Notice of Appeal pending herein, seeking review of the trial court's Orders of March 19, 2010, March 23, 2010 and April 15, 2010, which, in material part: (1) set aside Kent Commissioner Bradburn-Johnson's Order of February 19, 2010; (2) imposed \$2,500.00 in sanctions against defense counsel; (3) denied contempt against DEUTSCHE; (4) refused to vacate the Findings of Fact, Conclusions of Law and Judgment obtained from

Seattle Commissioner Velategui on February 19, 2010 without proper notice and in the wrong administrative district against GOOD and GIOVANNI; (5) imposed \$500.00 in sanctions against defense counsel for filing an over-length brief, and (6) denied reconsideration of all these errors. CP 784-789.

D. STANDARD OF REVIEW.

The trial court decisions at issue here – vacatur under *CR 60*, and imposition of sanctions – are all reviewed for abuse of discretion. *State ex. rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 903, 969 P.2d 64 (1998) (*CR 11* sanctions); *Barr v. MacGugan*, 119 Wn. App. 43, 46, 78 P.3d 660 (Div 1 2003) (vacatur).

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997); accord, e.g., *Ryan v. State*, 112 Wn. App. 896, 899-900, 51 P.3d 175 (Div. 1 2002). “A decision based on a misapplication of law rests on untenable grounds.” *Ryan v. State, supra*, 112 Wn. App. at 900.

In determining whether the trial court abused its discretion, the trial court’s actions must be weighed on the “arbitrary, capricious or contrary to law” standard. *Butler v. Lamont School District*, 49 Wn.App.

709, 745 P.2d 1308 (1987), *State v. S.H.*, 102 Wn.App. 468, 8 P.3d 1058 (2000).

In this case, DEUTSCHE's Order to Show Cause was defective under *KCLR 7(b)* and *KCLR 82*, in direct disobedience of Commissioner Watness' Order of December 16, 2009, and failed to provide the GIOVANNI and GOOD the notice required under *RCW 59.18.370*. The Seattle court had no business hearing this matter concerning real property within the Kent Administrative area. It was the substantial procedural blunders of DEUTSCHE that created all the confusion in the first place, compounded by its failure to comply with Commissioner Watness' Order of December 16, 2009. Accordingly, setting aside the Kent Commissioner's order and refusing to set aside the Seattle Commissioner's final judgment was manifestly unreasonable, and based on untenable grounds, and it should be reversed as an abuse of discretion.

In view of DUETSCHER's procedural irregularities in obtaining Judge Robert's Order to Show Cause of February 1, 2010 and Commissioner Velategui's Findings of Fact, Conclusions of Law and Judgment of February 19, 2010, the trial court's imposition of sanctions was arbitrary and capricious and should be reversed as an abuse of discretion.

E. ARGUMENT.

1. APPELLANTS' HAVE STANDING ON APPEAL.

RCW 61.24.060 provides that following a trustee's sale, the successful bidder is entitled to possession "on the twentieth day following the sale" and has the right to "summary proceedings" to obtain possession of the property under *RCW 59.12* against "the grantor under the deed of trust and anyone having an interest junior to the deed of trust, including occupants and tenants" who were given notice.²

As the "grantor" under the Deed of Trust purportedly foreclosed by DEUTSCHE, GIOVANNI was a necessary party and a statutory party in interest in the outcome of the unlawful detainer action filed on October 6, 2009. As *RCW 61.24.060* uses the conjunctive "and", as opposed to the disjunctive "or", when referring to the parties against whom an unlawful detainer action can be prosecuted, GIOVANNI's interest in these proceedings must be assumed, by statute.

Moreover, GIOVANNI was the party named by DEUTSCHE in its Summons and Complaint as the primary party in interest, despite the fact that DEUTSCHE had actual knowledge that GIOVANNI had quit claimed his interest to GOOD prior to the trustee's sale and the filing of the

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RCW 61.24.060 then in effect provided as follows:

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 borrower and grantor under the deed of trust and anyone having an interest junior to the deed of trust, including occupants who are not tenants, who were given all of the notices to which they were entitled under this chapter. The purchaser shall also have a right to the summary proceedings to obtain possession of real property provided in chapter *59.12 RCW*.

Summons and Complaint. Please see DEUTSCHE's Response to the Court's Motion to Dismiss Appeal of June 4, 2010, page 3. Accordingly, DEUTSCHE's current position that GIOVANNI has no standing on appeal based upon the issuance of a quit claim deed to GOOD is disingenuous.

Finally, GIOVANNI retains claims against DEUTSCHE by virtue of the claims raised in the Answer to Plaintiff's Complaint file February 18, 2010 under the Deed of Trust and Lis Pendens filed therewith. CP 23-33. Since the foreclosure was completed prior to the effective date of *RCW 61.24.127*, GIOVANNI's remedies are not limited by the new provisions of that statute. The alleged fraud and failure to provide notice, together with the other violations of *RCW 61.24*, cited in GIOVANNI's and GOOD's Answer and Affirmative Defenses would vitiate the sale conducted May 8, 2009.³ CP 23-33. See *Queen City Savings and Loan v. Mannhalt*, 49 Wn.App. 290, 742 P.2d 754 (1987) and *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn.App. 108, 752 P.2d 385 (1988). Thus, GIOVANNI retains a very real interest in the subject real property and the trial court's Orders of March 23, 2010 and April 15, 2010, substantially and adversely affected this interest – particularly in view of the potential claims that could be brought against GIOVANNI by GOOD.

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DEUTSCHE's failure to provide a Notice of Default under *RCW 61.24.030* is not a mere "technical violation" of the non-judicial foreclosure statute. Failure to provide statutory notice is a defense to the waiver doctrine and permits the wronged borrower to seek vacation of the sale. See discussion in *Steward v. Good*, 51 Wn.App. 509, 515, 754 P.2d 150 (1988).

However, the real party in interest is GOOD, who accepted a Quit Claim Deed to the subject real property on April 2, 2008. Please see Appellants' Motion to Modify Ruling of July 16, 2010 as Exhibit "G". By accepting the subject quit claim deed, GOOD assumed GIOVANNI's "then existing legal and equitable rights." *RCW 64.04.050*. This arguably included GIOVANNI's rights under the duly recorded Deed of Trust and the all of the claims raised in the Answer filed herein on February 18, 2010. Accordingly, GOOD is the real party in interest in this action. However, while GOOD's interest in the subject real property was known to DEUTSCHE at all times relevant to this cause of action, by virtue of the recording of GOOD's Quit Claim Deed of April 3, 2008 and the payments made to GMAC Mortgage as "beneficiary/servicer" – DEUTSCHE's agent, GOOD never received notice of the foreclosure, in violation of *RCW 61.24.030* and *RCW 61.24.040*, until served a copy of the Summons and Complaint for Unlawful Detainer on February 4, 2010. CP 1-6, CP 21-22, CP 27; Appellants' Motion to Modify Ruling of July 16, 2010 as Exhibit "GG". Accordingly, GOOD's interest in the subject real property were never "foreclosed" and should not have been subject to the provisions of *RCW 61.24.060*, since the provisions of *RCW 61.24.040* and *RCW 61.24.060* affect only those parties "who were given all of the notices to which they were entitled under [*RCW 61.24.*]" *RCW 61.24.060*.

Moreover, although GOOD's interest in the subject real property was known at the time DEUTSCHE filed its Summons and Complaint for Unlawful Detainer, GOOD was never identified as a party in interest or identified in the caption of the Complaint, in violation of *RCW 59.12.060*. CP 1-6. This could have been remedied at time of the show cause hearing on February 19, 2010, but DEUTSCHE's "numerous irregularities in these proceedings" denied GOOD an opportunity to address the issue and formally assert their personal claims. CP 488-489. However, GOOD has appeared at every material event in these proceedings and their claims have been asserted in person and through and in the name of GIOVANNI and through counsel. CP 218-221.

It would be a manifest unjust to ignore the claims of GIOVANNI and GOOD on the basis of standing, given the denial of their procedural, statutory and substantive due process rights. Their claims have been summarily dismissed by the trial court and their procedural rights violated without an opportunity to be heard. See *IBF, LCC V Heuft*, 141 Wn.App. 624, 174 P.3d 95 (2007), *RCW 59.18.370*. Here, as described more fully below, DEUTSCHE set a show cause hearing for February 19, 2010, but set it in a manner calculated to frustrate GIOVANNI's and GOOD's ability to address the Court about their claims under an unlawful detainer provision that is essentially summary in nature, provide GIOVANNI and GOOD an appearance and an opportunity to assert GOOD's interests in

the subject real property and have their claims heard. See VRP, cited below, on file herein and attached hereto as *Exhibit "1"*.

2. IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO GRANT THE MOTION TO SET ASIDE COMMISSIONER BRADBURN-JOHNSON'S ORDER.

CR 60 provides, in pertinent part, as follows:

b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

* * *

(11) Any other reason justifying relief from the operation of the judgment.

Generally, irregularities that justify vacation of a judgment or order are those where "there is a failure to adhere to some prescribed rule or mode of proceeding, such as when a procedural matter that is necessary for the orderly conduct of a trial is omitted or done in a unseasonable time or in an improper manner." *Mosbrucker v. Greenfield Implement, Inc.*, 54 Wn.App. 647,652, 774 P.2d 1267 (1989); *In re the Marriage of Adler*, 131 Wn.App. 717, 129 P.3d 293 (2006). See also *Merritt v. Graves*, 52 Wash. 57, 100 Pac 164 (1909); *Haller v. Wallis*, 89 Wn.2d 539, 573 P.2d 1302 (1978). In this case, it was clearly DEUTSCHE that failed to adhere to prescribed rules and modes of proceeding and that failure was the cause of

all the confusion that followed. Kent Commissioner Bradburn-Johnson's Order of February 19, 2010 was appropriate, in view of DEUTSHCE's procedural misbehavior.

KCLR 82 governs case assignments in King County. *KCLR 82(e)(4)(A)(iv)* provides:

Other Civil cases. For civil cases involving personal injury or property damage, the area where the injury or damage occurred; for cases involving condemnation, quiet title, foreclosure, unlawful detainer or title to real property, the area where the property is located.

As the real property in the present case is located in the Kent assignment area this case should have been properly filed there. DEUTSCHE filed the matter in Seattle which triggered all the subsequent confusion.

KCLR 82(e)(3)B designates "[a]ll of King County south of Interstate 90," aside from certain designated pockets not relevant here, as the "Kent Case Assignment Area." As already noted, the real estate in issue here is located in Federal Way, well within the Kent Case Assignment Area. CP 1, CP3, CP 35 and CP 37. The rule is very explicit that **all** proceedings need to be held in their assignment area, unless otherwise ordered:

All proceedings of any nature shall be conducted at the Court facility in the case assignment area designated on the Case Assignment Designation Form unless the Court has otherwise ordered on its own motion or upon motion of any party to the action.

KCLR 82(e)(2).

Moreover, DEUTSCHE compounded that error by acting in bad faith in subsequent filings. *KCLR 82(e)(4)(B)* provides:

Improper Designation/Lack of Designation. The designation of the improper case assignment area shall not be a basis for dismissal of any action, but may be a basis for imposition of terms. The lack of designation of case assignment area at initial case filing may be a basis for imposition of terms and will result in assignment to a case assignment area at the Court's discretion.⁴

In this case, not only had the Court not “otherwise ordered,” but on December 16, 2009, Seattle Court Commissioner Watness had expressly ordered that “[a]mendment of the case assignment [to Kent] is necessary before a Show Cause Order will be issued.” CP 13.

Under these circumstances, it was manifestly unreasonable and therefore an abuse of discretion for a Seattle-based Superior Court Judge to vacate an order of a Kent-based Commissioner, striking the improperly-noted Motion to Show Cause.

Further irregularities are apparent with respect to the noting of this show cause motion. The unlawful detainer statute provides, with respect to show cause orders:

The order shall notify the defendant that if he or she fails to appear and show cause **at the time and place specified by the order** the court may order the sheriff to restore possession of the property to the plaintiff and may grant such other relief as may be prayed for in the complaint and provided by this chapter

RCW 59.18.370 (Emphasis added)

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This violation alone is provides sufficient justification of the terms awarded Appellants by Commissioner Bradburn-Johnson on February 19, 2010.

In this matter, the Order to Show Cause prepared by DEUTSCHE's attorneys of record with a "KNT" designation in the case number, was entered February 1, 2010 and specified the time and place of Plaintiff's show cause hearing as: "Superior Court of Washington, 516 3rd Ave., Room C-203, Seattle, WA 9810402361, on February 19, 2010, at 9:00 AM." CP 19-20.

Unfortunately, there is no courtroom or hearing room located at "C-203" of the King County Courthouse in Seattle and Commissioner Velategui as never presided at that location. CP 432-433.

Moreover, there was no hearing docketed in this matter for the location and time designated in the Order. In fact, Plaintiff's Note for Commissioner's Calendar erroneously noted that matter for Kent, as is evidenced by the Note for Calendar and the copy of the docket. CP 604 and CP 668. Despite the calendaring of the matter for the Kent Courthouse, DEUTSCHE obtained their Findings, Conclusions and Judgment from Commissioner Velategui at the Seattle courthouse.

For this reason, in addition to the violation of *KCLR 82*, DEUTSCHE's Order to Show Cause was defective and failed to provide Defendants' the notice required under *RCW 59.18.370*. GIOVANNI and GOOD cannot simply be left to guess in which courtroom in a large metropolitan courthouse their property is about to be taken away. Nor can they be forced to attend court in Seattle when there is already an order of record enforcing the Kent Assignment Area designation. CP 13.

Accordingly, the trial court's Order vacating Commissioner Bradburn-Johnson's Order, striking DEUTSCHE's defected show cause, was entered in complete disregard of *KCLR 82*, prior orders in the case, *RCW 59.18.370*, and was therefore untenable and an abuse of discretion.

3. IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DENY APPELLANTS' MOTION TO VACATE COMMISSIONER VELATEGUI'S FINDINGS, CONCLUSIONS AND JUDGEMENT OF FEBRUARY 19, 2010.

Although there was no basis for the trial court to vacate Commissioner Bradburn-Johnson's Order of February 19, 2010, there was ample and considerable basis for the trial court to vacate Commissioner Velategui's Findings, Conclusions and Judgment entered the same date and it was an abuse of discretion not to do so. These were the sort of irregularities that generally justify vacation of judgments as orders. *CR 60; Mosbrucker v. Greenfield Implement, Inc., supra; In re the Marriage of Adler, supra; Merritt v. Graves, supra; Haller v. Wallis, supra.*

In the present case the procedural irregularities associated with DEUTSCHE's show cause hearing are manifest, not only to GIOVANNI and GOOD, but to another Superior Court Judge who reviewed this matter. As stated the Honorable Paris Kallas, on April 6, 2010, in connection with granting permission to depose the trial court's bailiff:

THE COURT: [M]y questions are directed first to Deutsche Bank. And I want to proceed delicately here. It's never my intent to ever point the finger or to simply point out mistakes simply for the sake of pointing out mistakes. But it seems to me that Mr. Jones on behalf of his clients is seeking to challenge the factual grounds that underlie his

motion for reconsideration, to challenge the grounds that he created judicial confusion. **And in all candor and honesty with you, Counsel, it seems to me that Deutsche Bank has created confusion from the very beginning of this case.**

It was **improperly filed as a miscellaneous civil action rather than an unlawful detainer** when it was filed with the Clerk's Office. So rather than being expedited in ex parte, it was given a case schedule and an assigned judge. That doesn't happen with unlawful detainers until ex parte certifies the matter

Then Commissioner Watness entered a notation ruling December 16, 2009, denying a motion to show cause indicating that it would not be revisited until your client moved for amendment of the case schedule because the matter was improperly designated Seattle versus Kent. **I don't see that that has ever happened. I don't see there was ever a motion to amend.** Instead several pleadings were filed with a Kent designation. Several others have been filed with a Seattle designation. So those are just two.

There are several other faulty procedural things that have happened that I seem to think appear to be directly attributable to your client's handling the procedural matters. . . .

* * *

THE COURT: . . . **The show cause was noted in Seattle with a Kent designation for the judges and the mailroom. I mean, it's so silly it's even embarrassing to say that a motion was noted for the mailroom. And then rather than seeking to either seek reconsideration from the Commissioner who issued the order or revision, your client sought to vacate a Commissioner's Order. I mean, its been frankly, Counsel, procedural irregularities at every step of the way. So to me Mr. Jones has the right to go forward.**

* * *

THE COURT: . . . **And I'd like the parties to take a minute here in court and indicate this court recognizes it's a rare circumstance under which a bailiff will be subject to a**

deposition, but that in these circumstances it's necessary because to deny that would be to deny the defendants of a fundamentally fair opportunity to correct - - or to provide a factual basis for pursuing their motion to reconsider and that **from this court's point of view there have been numerous irregularities in the proceedings on Deutsche Bank's part. And had Deutsche Bank agreed to that and agreed to set the record straight, the deposition would have been unnecessary. Absent such an agreement, it needs to go forward.**

And I can cite at least five examples of that. **Number one, simply how the case was filed in the first place; number two, a failure to have complied with Commissioner Watness' December 16th order; number three, noting a show cause for a mailroom; number four, using a Kent designation without ever formally filing a motion; and, number four (sic), seeking to vacate with Trial court a Commissioner's ruling rather than either seeking reconsideration or a motion for revision.** So we've got some significant, substantive and procedural problems with how Deutsche Bank has proceeded, but I do want that captured here. . . .

Please see VRP, page 4, line 25, through page 6, line 15; page 7, lines 7-17; page 11, lines 7-17; page 15, line 24, through page 16, line 24 and CP 488-489, attached hereto as *Exhibit "I"*. Judge Kallas' observations are amply supported by the record on review.

First, DEUTSCHE misfiled the case and then compounded that error by leading GIOVANNI and GOOD to believe that a hearing would occur in Kent while DEUTSCHE instead appeared *ex parte* in Seattle. VRP, cited above and CP 488-489. See also *KCLR 82*, cited above.

Despite DEUTSCHE's erroneous filing of documents, the GIOVANNI and GOOD appeared at the designated location in the Order to Show Cause, then appeared at the next logical place: the Kent *ex parte*

department. CP 219. After consultation with the *ex parte* court staff regarding the hearing, GIOVANNI and GOOD were informed that the hearing should occur in Kent, travelled to Kent, appeared *ex parte* in Kent and at no point were ever actually informed that any hearing would or was occurring at *ex parte* in Seattle. CP 218-221; CP 430-431; CP 432-433; and CP 519-521.

It is difficult to imagine a more irregular process by which to obtain a judgment than serving a Calendar Note drafted from a form provided by a sister county, using two case assignment designations interchangeably, sending the adverse party to a mailroom, and then obtaining a judgment based upon default without physical appearance or argument before the court where it was noted in the SCOMIS court records. GIOVANNI and GOOD took every conceivable action to appear for the hearing. This is the conclusion Judge Kallas came to at hearing on April 6, 2010. VRP, quoted above, and CP 488-489. The trial court's Order of March 23, 2010, refusing to vacate Commissioner Velategui's Findings of Fact, Conclusions of Law and Judgment of February 19, 2010, based upon this very flawed show cause process was manifestly unreasonable, based on untenable grounds and should be reversed as an abuse of discretion. Commissioner Velategui has no discretion to issue final orders on a Kent matter involving Federal Way real property, especially after another Commissioner has specifically ordered that no

further show cause orders will issue until the administrative assignment has been amended and corrected to Kent. CP 13.

Moreover, in obtaining the second Order to Show Cause, and therefore the Judgment itself, DEUTSCHE engaged in knowing violation of a court order and misrepresentation by failing to provide a copy of Commissioner Watness' Order of December 16, 2009 with its second motion. CP 13 and CP 14-18. Resubmitting exactly the same motion both violated Commissioner Watness' December 16, 2009 order and violated *LCLR 7(b)(7)*, which provides as follows:

Reopening Motions. No party shall remake the same motion to a different judge without showing by affidavit what motion was previously made, when and to which judge, what the order or decision was, and any new facts or other circumstances that would justify seeking a different ruling from another judge.

There were no circumstances stated that would justify seeking a different ruling from another judge or court commissioner. CR 14-18. In addition, Commissioner Watness' December 16, 2009 Order contained a concurrent instruction to include a copy with any subsequent motion, which Respondents also failed to follow. CP 13. DEUTSHCE presented an additional declaration with the second motion, but failed to note the prior motion or the resulting decision. CP 14-18. Further, DEUTSHCE failed to address the court's directive concerning the case assignment which directly led to the confusion in this case. See CP 14-18.

While *KCLR 82(e)(6)* provides that *ex parte* proceedings may be heard outside the case assignment area, it is only for instances in which

review of the case file is not required. Clearly, a final order in a case is not such a matter. DEUTSHCE recognized this when it put the words “reviewed the files and records herein” in its proposed Order to Show Cause, which Seattle Judge Roberts struck out. CP 19-20. Here, a review of the case file would have revealed that the GIOVANNI’s and GOOD’s Answer and Counterclaim had been filed on February 18, 2010. Additionally, a review would have informed the Court concerning DEUTSHCE’s misconduct in obtaining the second Order to Show Cause, DEUTSHCE’s failure to follow the specific injunctions contained in Commissioner Watness’ Order of December 16, 2009, and the numerous other irregularities in DEUTSHCE’s’ filings.

Based upon the foregoing, DEUTSHCE’s Order to Show Cause of February 1, 2010, was defective under *KCLR 7(b)* and *KCLR 82*, in direct disobedience of Commissioner Watness’ Order of December 16, 2009 and failed to provide GIOVANNI and GOOD the notice required under *RCW 59.18.370*. Accordingly, the trial court’s refusal to vacate Commissioner Velategui’s Findings, Conclusions and Judgment, which were entered on the basis of this defective notice, was manifestly unreasonable, based on untenable grounds and should be reversed as an abuse of discretion.

4. IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO IMPOSE SANCTIONS OF DEFENSE COUNSEL

Trial courts have broad inherent authority to assess litigation expenses against attorneys for litigation conduct undertaken in bad faith. *RCW 2.28.010, RCW 2.28.150, CR 11*, and *Wilson v. Henkle*, 45 Wn.App. 162, 724 P.2d 1069 (1986), *State v. S.H.*, 102 Wn.App. 468, 8 P.3d 1058 (2000), *Maneuver v. Safeco Insurance*, 117 Wn.App. 168, 68 P.3d 1093 (2003).

Applying the foregoing to the facts of the present controversy, there is no factual basis for the trial court's imposition of sanctions against defense counsel, either under the trial court's inherent authority under *RCW 2.28* or *CR 11*.

While there is little case law construing the provisions of *RCW 2.28*, it is clear that any imposition of sanctions based upon *RCW 2.28* requires a finding of bad faith. *Wilson v. Henkle, supra., State v. S.H. supra.* Findings of "inappropriate" or "improper" conduct are sufficient. *Wilson v. Henkle, supra., at page 175.* No such finding was made by Trial court in her Order of March 19, 2010, her Order of March 23, 2010 or her Order of April 15, 2010.

Turning to *CR 11*, in *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (1992), the Washington Supreme Court stated that "[t]he purpose behind *CR 11* is to deter *baseless* filings and to curb abuses of the judicial system." *Id.* at 219 (emphasis in original). The rule is most

decidedly not intended to chill the zealous advocacy so essential to the functioning of the adversary system. *Id.* (“Our interpretation of *CR 11* . . . requires consideration of both *CR 11*’s purpose of deterring baseless claims as well as the potential chilling effect *CR 11* may have on those seeking to advance meritorious claims”); accord, e.g., *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1537-38 (9th Cir. 1986); Fed. R. Civ. P. 11, *Advisory Committee Note*, 97 F.R.D. 165, 199 (1983). In *Bryant*, the Supreme Court established a two-step framework for analysis of whether sanctions are appropriate under the “not well grounded” type of *CR 11* charge. The first step requires a determination of whether the charged arguments are “baseless”:

Complaints [or arguments] which are “grounded in fact” and “warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law” are not “baseless” claims, and are therefore not the proper subject of *CR 11* sanctions. The purpose behind the rule is to deter baseless filings, not filings which may have merit. The Court of Appeals therefore correctly determined that a complaint [or argument] must lack a factual or legal basis before it can become the proper subject of *CR 11* sanctions.

Bryant v. Joseph Tree, *supra*, 119 Wn.2d at 219-20.

Even without getting into analysis of the substantial speculation which the trial court deemed to be “facts” underlying its denial of reconsideration – all based on a disputed cold record, rather than evidentiary hearing – it is apparent on the face of this record that the argument to Kent Commissioner Nancy Bradburn-Johnson that DEUTSCHE’s Show Cause Order of February 1, 2010, was defective and

should be quashed was **not baseless**. Due to the substantial procedural irregularities detailed above, there were (and are) plenty of good faith arguments, warranted by the existing facts shown in this record, and by existing law, to contend that DEUTSCHE's Show Cause Order should be vacated. Therefore, there was no *CR 11* violation in seeking or obtaining the order vacating the Show Cause from Kent Commissioner Bradburn-Johnson.

Even if the charged argument is “baseless” (which is emphatically denied), *CR 11* sanctions are not warranted without completing the second step of the analysis, which is to determine whether the attorney failed to conduct a “*reasonable inquiry* into the factual and legal basis of the claim.” *Bryant v. Joseph Tree, supra*, 119 Wn.2d at 220 (emphasis in original). The standard for determining whether an attorney made a reasonable inquiry prior to signing a pleading [or making an argument] is one of objective reasonableness at the time of the signing under all the circumstances. *Id.* at page 220. In this case, the record on review shows that counsel for GOVIANNI and GOOD knew the caption showed the case to be a “KNT” matter, but that it was noted in Seattle for the mailroom. CP 19-20. After inquiring into the location of the hearing, counsel and his clients were directed to Kent by the clerk in the Seattle *ex parte* department. CP 220 and CP 430-431. Counsel knew that this matter concerned Federal Way property, and the procedural confusion was caused by DEUTSCHE'S highly irregular manner of proceeding, and

violation of Commission Watness' Order of December 16, 2009. CP 568-582. Under these circumstances, after reasonable inquiry, it was objectively reasonable for counsel to present arguments to a Commissioner in Kent. Therefore, there is no basis for sanctions under *CR 11*.

In neither her Order of March 19, 2010 or April 15, 2010, does the trial court indicate the statutory or court rule basis for her sanctions against Appellants' attorney of record. Rather, the trial court only refers to alleged misconduct, based largely on speculation.

In her Order of March 19, 2010, Trial court states that "Richard L. Jones is sanctioned \$2,500 for creating confusion among 2 judicial officers." The trial court does not identify the judicial officers it is referring to; and, second, the trial court does not indicate how counsel created the confusion. In any event, given the foregoing discussion, it is clear that it was not counsel for GIVONNI and GOOD who created confusion in this matter, it was DEUTSCHE and its attorneys of record. As observed by Judge Kallas who reviewed this matter on April 6, 2010, "it seems to me that Deutsche Bank [not counsel for Appellants] has created confusion from the very beginning of this case." VRP , page 5, lines 11-13. There is not one shred of evidence in this record on review to support Trial court's allegations or the purported basis for the sanctions against counsel.

In its Order of April 15, 2010, the trial court states that “an additional sanction of \$500 will be imposed on Mr. Jones’ because he filed a over length brief in violation of *LCLR 7(b)(5)(vi)*.” *LCLR 7(b)(5)(vi)* provides as follows:

Page Limits. The initial motion and opposing memorandum shall not exceed 12 pages without authority of the court; reply memoranda shall not exceed five pages without the authority of the court.

However, unlike other provisions of the King County Local Rules, such as *LCLR 4(g)*, or *RAP 10.7*, *LCLR 7(b)* makes no provision for an award of terms or sanctions for violation of the rule.

In sum, the trial court’s imposition of sanctions against defense counsel was manifestly unreasonable, arbitrary and capricious, based on untenable grounds and should be reversed as an abuse of discretion

5. THE FACTUAL ALLEGATIONS CONTAINED IN TRIAL COURT’S ORDER OF APRIL 15, 2010 ARE CLEARLY ERRONEOUS AND ARE NOT SUPPORTED BY THE RECORD ON REVIEW.

Not one of the factual allegations contained in the trial court’s Order of April 15, 2010, cited above as assignments of error, are supported by the record on review and are clearly erroneous. Each is addressed in order.

The trial court finds in its Order of April 15, 2010, that Court Commissioner Nancy Bradburn-Johnson’s Order of February 19, 2010 was based upon GIOVANNI’s and GOOD’s “inaccurate representations to the Court.” As noted extensively above, each and every fact upon which

Commissioner Bradburn-Johnson's Order was based has been substantiated by this record on review. The trial court refused to provide GIOVANNI or GOOD a hearing on oral argument, so it had no knowledge of what counsel for GIOVANNI and GOOD represented or didn't represent to Commissioner Bradburn-Johnson on February 19, 2010.⁵ See CP 218-231. The trial court merely speculates as to what counsel for GIOVANNI and GOOD represented to Commissioner Bradburn-Johnson.

The trial court finds in its Order of April 15, 2010, that DEUTSCHE properly noted a show cause hearing for the King County Courthouse. This is patently false as a casual review of the Court record would disclose. CP 10-20 CP 488-489 and CP 668.

The trial court finds in its Order of April 15, 2010, that "Plaintiff's counsel appeared in the King County Courthouse in Seattle as designated by the Note for Show Cause and the Order for Show Cause" which was "confirmed by the by the court's posted calendar." While it is true that DEUTSCHE's counsel appeared in the King County Courthouse on February 19, 2010, they did not appear at the judge's mailroom and the

5

It should be noted that at every hearing noted before the trial court after February 19, 2010, counsel for GIOVANNI and GOOD requested oral argument to address the issues and any concerns the trial court might have concerning the facts and procedural history of the case. Clearly, there appeared to be misunderstanding, given the record on review and the trial court's written additions to the Order of March 19, 2010. However, on each occasion, the trial court denied counsel's request for an appearance and oral argument. It is for GIOVANNI's and GOOD's belief that had the trial court granted them oral argument and an opportunity to be heard, much of the confusion that has led to this appeal could have been avoided.

suggestion that this was confirmed at that site is false and is specifically rebutted by the fact that the subject hearing was scheduled by the Court for the Kent Courthouse. CP 668, specifically Subject 9 to said SCOMIS docket. CP 218-231.

The trial court finds in its Order of April 15, 2010, that “Mr. Unchur, the Ex Parte Clerk did not advise defense counsel and the Goods to go to the Maleng Regional Justice Center” or that the “Goods never appeared at the Maleng Regional Justice Center before Commissioner Bradburn-Johnson.” This allegation is specifically and unequivocally rebutted by the testimony of Mr. Unchur, who states in his Declaration of March 29, 2010:

On February 19, 2010, I was assigned to Courtroom 2 of the Ex Parte Department of the King County Superior Court, Seattle Courthouse. At approximately 9:15 a.m., Mr. Richard Llewelyn Jones, an attorney with whom I am acquainted, approached me to inquire where a particular show cause hearing was scheduled. Mr. Jones handed me what appeared to be an Order to Show Cause with a Kent designation in the caption. I checked the SCOMIS records and advised Mr. Jones the hearing would be held at the Kent Courthouse. I immediately called the Clerk at the Kent Courthouse and spoke to the Clerk assigned to the Ex Parte Department handling unlawful detainer actions on that date and advised her that Mr. Jones and his clients were at the Seattle Courthouse and would be immediately traveling down to the Kent Courthouse to make their appearance. The Clerk I spoke to assured me that the matter would be footed to permit Mr. Jones and his clients time to travel from Seattle to Kent. At that point, Mr. Jones rushed out of the courtroom.

(Emphasis added) CP 43-431. See also CP 218-231.

The trial court finds in its Order of April 15, 2010, that “no answer or counterclaim had been confirmed by the court.” This is patently false, as the record on review discloses. Appellants’ Answer and Affirmative Defenses was filed on February 18, 2010. CP 23-71 and CP 668.

The trial court finds in its Order of April 15, 2010, that GIOVANNI’s and GOOD’s counsel of record “misrepresented” the problems associated with the “KNT” versus “SEA” designations on DEUTSCHE’s pleadings. There is nothing in the record on review to support this allegation, which is specifically refuted in Judge Kallas’ discussion of the same events, cited above. VRP, page 5, line 20, through page 6, line 4. See also CP 218-231.

The trial court finds in its Order of April 15, 2010, that “without legal or factual basis and with no notice to anyone, defense counsel somehow asked Commissioner Bradburn-Johnson to strike Plaintiff’s Show Cause hearing and award sanctions against the Plaintiff.” There is nothing in the record on review to support this allegation. CP 218-231. DEUTSCHE’s procedural errors were certainly of a magnitude to justify sanctions under *CR 11*, in view of the record before this Court. Moreover, the trial court refused to provide GIOVANNI and GOOD a hearing on oral argument, so the trial court merely speculates as to what counsel for GIOVANNI and GOOD asked or didn’t ask of Commissioner Bradburn-Johnson. CP 218-231.

The trial court finds in its Order of April 15, 2010, that “because of defense counsel’s inaccurate representations to the Court, Commissioner Bradburn-Johnson struck Plaintiff’s Show Cause hearing and sanctioned Plaintiff \$750,00 in error.” As observed by Judge Kallas, “it seems to me that Deutsche Bank has created confusion from the very beginning of this case.” VRP, page 5, lines 11-13 and CP 488-489. There was nothing erroneous in the award of terms by Commissioner Bradburn-Johnson pursuant to *CR 11*: they were justified under the circumstances.⁶

The trial court finds in its Order of April 15, 2010, that “defense counsel’s failure to be candid with Commissioner Bradburn-Johnson at the Maleng Justice Center in Kent created the confusion” that resulted in the

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CR 11 provides in part:

The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

In the case before the court, Respondents have acted in flagrant violation of Commissioner Watness’ Order of December 16, 2009 and multiple local civil rules of procedure. DEUTSCHE misfiled the case under *LCLR 82*. DEUTSCHE had actual knowledge of the December 16 order and simply ignored it, which is tantamount to contempt. DEUTSCHE used a Calendar Note from Pierce County to improperly provide notice of a matter in King County and directed GIOVANNI and GOOD to appear at a mailroom for argument in violation of *RCW 59.18.370*. DEUTSCHE failed to disclose to the Court Commissioner Watness’ Order of December 16, 2009, denying the prior Motion to Show Cause, in violation of *KCLR 7(b)(7)*. DEUTSCHE obtained a judgment *ex parte* while knowingly depriving the court of the opportunity to review the case file and discover the misconduct set forth above. Clearly, the sanctions awarded by Commissioner Bradburn-Johnson were warranted.

entry of “conflicting and contradicting orders.” This is rebutted by the litany of procedural irregularities cited above and Judge Kallas’ observations of the same facts of this matter. VRP, page 4, line 25, through page 6, line 15; page 7, lines 7-17; page 11, lines 7-17; page 15, line 24, through page 16, line 24, cited above, CP 218-231 and CP 488-489. Moreover, the trial court refused to provide GIOVANNI and GOOD a hearing on oral argument, so the trial court merely speculates as to what counsel for GIOVANNI and GOOD told or failed to tell Commissioner Bradburn-Johnson.

The trial court finds in its Order of April 15, 2010, that “defense counsel also failed to acknowledge” his e-filing of his Answer to Commissioner Bradburn-Johnson or otherwise had knowledge that the ECF system for the entire King County Superior Court was not operating. This is patently absurd. First there is nothing in the record to indicate that counsel for GIOVANNI and GOOD or anyone other than court staff was aware that the ECF system was down on February 19, 2010. In fact, the system appeared to be working for at least one court staff member on February 19, 2010. CP 704-705. As to the issue of e-filing, all pleadings filed after July 1, 2009 in King County Superior Court must be “e-filed”, in accordance with *KCLGR 30*.

The trial court finds in its Order of April 15, 2010, that “but for defense counsel’s actions” Commissioner Bradburn-Johnson would not have entered her Order of February 19, 2010. This is rebutted again by the

litany of procedural irregularities cited above and Judge Kallas' observations of the facts of this matter. VRP, page 4, line 25, through page 6, line 15; page 7, lines 7-17; page 11, lines 7-17; page 15, line 24, through page 16, line 24, cited above and CP 488-489. As observed by Judge Kallas, "it seems to me that Deutsche Bank [not counsel for Appellants] has created confusion from the very beginning of this case." VRP, page 5, lines 11-13.

The trial court finds in its Order of April 15, 2010, that the "hearing at the Maleng Regional Justice Center was never noted there." This is simply not supported by the record. CP 10-20, CP 430-431 and CP 688.

The trial court finds in its Order of April 15, 2010, that counsel for GIOVANNI and GOOD made the decision to go to the Maleng Regional Justice Center. This statement is somewhat disingenuous in view of the reasonable inferences that a reasonably prudent attorney practicing in the courts of King County would draw from the irregularities created by DEUTSCHE and its attorneys, noted above. VRP, page 4, line 25, through page 6, line 15; page 7, lines 7-17; page 11, lines 7-17; page 15, line 24, through page 16, line 24, cited above and CP 488-489. With the hearing noted for the Kent Courthouse on SCOMIS and the "**KNT**" designation in the caption of Judge Robert's Order to Show Cause, a hearing at the Maleng Regional Justice Center could be reasonably

assumed. CP 10-20 and CP 688, specifically Subject 9 to said SCOMIS docket.

The trial court finds in its Order of April 15, 2010, that “defense counsel did not present to Commissioner Bradburn-Johnson the Note for Motion to Show Cause” and “failed to indicate that both the Order and Note for Show Cause always indicated *ex parte* in the King County Courthouse in Seattle.” Since the trial court refused to provide GIOVANNI and GOOD a hearing on oral argument, it merely speculates as to what counsel for GIOVANNI and GOOD shared or failed to share with Commissioner Bradburn-Johnson. However, Commissioner Bradburn-Johnson had the entire electronic docket available to her for review on February 19, 2010, and, had she consulted the electronic docket, Commissioner Bradburn-Johnson would have discovered that the hearing had been noted for Kent, not Seattle. CP 668, specifically Subject 9 to said SCOMIS docket.

Finally, the trial court finds in its Order of April 15, 2010, that GIOVANNI and GOOD failed to comply with *KCLR 7(b)(4)*. The trial court does not indicate or explain how GIOVANNI or GOOD violated *KCLR 7(b)(4)*, which requires electronic filing of the documents and six days notice of all motions. GIOVANNI’s and GOOD’s Motion for Order of Contempt and to Vacate Judgment was filed with the Court on March 15, 2010. CP 243-346. The Motion was noted for March 23, 2010, and

served the same on Respondents with more than six days notice.⁷ CP 380-381. Moreover, under Washington law, claims of invalid service, if that is what the trial court was referring to in her Order of April 15, 2010, are waived if the interested party voluntarily appears to defend itself against the motion, which was the case in this matter. See CP 388-397; Grossman v. Will, 10 Wn.App. 141, 152, 516 P.2d 1063 (1973). DEUTCHE, in fact, filed a timely response to GIOVANNI's and GOOD's Motion, which was considered, without oral argument. CP 400-404.

In sum, not one of the factual allegations set forth in the trial court's Order of April 15, 2010 can be sustained on the basis of the record before the Court. As such, the trial court's Order of April 15, 2010, was clearly erroneous and its denial of GIOVANNI's and GOOD's Motion for Contempt and to Vacate Judgment and Motion for Reconsideration constituted an abuse of discretion.

F. ATTORNEYS FEES ON APPEAL

GIOVANNI and GOOD respectfully request an award of taxable costs and reasonable attorney's fees on appeal, pursuant to *RAP 18.1*.

First, GIOVANNI and GOOD are entitled to attorney's fees pursuant to the terms of the parties' Deed of Trust. CP 48.

Second, GIOVANNI and GOOD are entitled to "reasonable expenses" and "a reasonable attorney fee," pursuant to *CR 11*, as awarded

⁷

The pleadings were served on Mr. Jesse Baker, in Bellevue, Washington, the attorney for Respondents who appeared before Judge Kallas on April 6, 2010.

by Commissioner Bradburn-Johnson on February 19, 2010. CP 76. Under *CR 11*, attorneys must meet certain standards when filing pleadings, motions, and legal memoranda in Superior Court. The rule imposes upon attorneys the responsibility to insure that assertions made and positions taken in litigation are done so in good faith and not for an improper purpose. It is intended to deter baseless filings and to curb abuses of the judicial system. See, e.g., *Neigel v. Harrell*, 82 Wn. App. 782, 919 P.2d 630 (1996). Further, the rule was designed to reduce “delaying tactics, procedural harassment, and mounting legal costs.” *Bryant v. Joseph Tree, Inc.*, *supra*.

In the present case, DEUTSCHE acted in flagrant violation of both a prior Court order and multiple local civil rules of procedure, as noted at length above. These include total disregard of Commissioner Watness’ Order of December 16, 2009, violation of *RCW 59.18.370*, *KCLR 7(b)*, and *KCLR 82*. See also VRP, cited above. DEUTSCHE obtained a judgment *ex parte* with knowledge that it had deprived the court of the opportunity to review the case file and discover the misconduct set forth above and depriving GIOVANNI and GOOD due process. All of these actions of DEUTSCHE and its attorneys has resulted in baseless filings and/or has done nothing more than harass the Appellants and needlessly delayed the judicial process. Please see VRP.

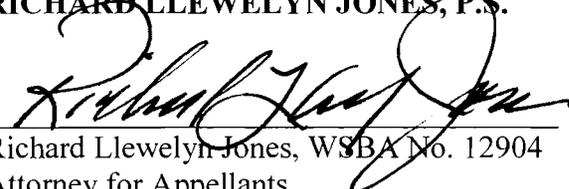
G. CONCLUSION

On the basis of the foregoing, GIOVANNI and GOOD respectfully request the Court reverse the trial court's Orders of March 19, 2010, March 23, 2010 and April 15, 2010, affirm Commissioner Bradburn-Johnson's Order of February 19, 2010, vacate Commissioner Velategui's Findings, Conclusions and Judgment, together with any Writ of Restitution that issued on the basis thereof, and remand this matter back to the trial court for consideration of DEUTSCHE's unlawful detainer action, on the merits. Justice demands no less.

Furthermore, GIOVANNI and GOOD respectfully request an award of their costs and reasonable attorney's fees incurred on appeal, pursuant to *RAP 18.1*

RESPECTFULLY SUBMITTED this 15th day of February, 2010

RICHARD LLEWELYN JONES, P.S.


Richard Llewelyn Jones, WSBA No. 12904
Attorney for Appellants.

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

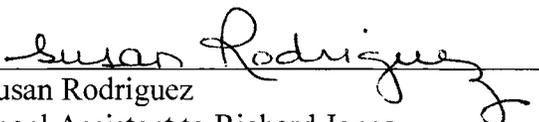
That on February 14, 2011, I arranged for service of the foregoing Brief of Appellants on the following parties:

Office of the Clerk	<input type="checkbox"/>	Facsimile
Court of Appeals, Division I	<input checked="" type="checkbox"/>	Messenger
One Union Square	<input type="checkbox"/>	U.S. Mail
600 University St.	<input type="checkbox"/>	Overnight Mail
Seattle, WA 98101-4170		

Rochelle L. Stanford	<input checked="" type="checkbox"/>	Facsimile
Attorney at Law	<input type="checkbox"/>	Messenger
4375 Jutland Dr., Suite 200	<input checked="" type="checkbox"/>	U.S. Mail
San Diego, CA 92117-3600	<input type="checkbox"/>	Overnight Mail

Jesse Baker	<input checked="" type="checkbox"/>	Facsimile
Attorney at Law	<input type="checkbox"/>	Messenger
14510 N.E., 20 th St., Suite 203	<input checked="" type="checkbox"/>	U.S. Mail
Bellevue, WA 98007-3747	<input type="checkbox"/>	Overnight Mail

DATED this 14th day of February, 2011


Susan Rodriguez
Legal Assistant to Richard Jones

FILED
COURT OF APPEALS DIVISION I
SEATTLE, WA
2011 FEB 14 PM 1:55

APPENDIX “1”

I N D E X

WITNESSES: DIRECT CROSS REDIRECT RECROSS

(None Offered)

* * *

EXHIBITS FOR IDENTIFICATION MARKED RECEIVED

(None Offered)

* * *

PROCEEDINGS PAGE

Motion to Quash Denied14

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P R O C E E D I N G S

APRIL 6, 2010

1
2
3
4 THE COURT: Good morning. We are here in
5 09-2-36247-5. It's a little bit of an unusual
6 procedural history. Let me explain why we're here
7 before this court. I'll have you introduce yourselves
8 and then I have an idea of how I'd like to go forward
9 this morning.

10 This is a case in which Judge Spector is the
11 assigned judge. We'll talk about how that happened.
12 There is a motion for a deposition that's been noted, a
13 motion to quash that's been filed by the King County
14 Prosecutor's Office on behalf of Judge Spector's
15 bailiff. Judge Spector recused on that motion. I
16 granted a motion to shorten time and the motion is here
17 because it's otherwise unassigned and chief civil hears
18 otherwise unassigned motions. That's why we're here.

19 I'm going to have you introduce yourselves and then
20 I'll tell you how I'd like to proceed and I'll tell you
21 what I've read and what's before me. So I'll have you
22 introduce yourselves so then we'll go forward.

23 MS. LAMOTHE: My name is Oma Lamothe and I'm here
24 representing Christine Henderson --

25 THE COURT: Thank you.

1 MS. LAMOTHE: -- from the Prosecutor's Office.

2 MR. BAKER: I'm Jesse Baker; I'm representing
3 Deutsche Bank.

4 THE COURT: Thank you.

5 MR. JONES: Richard Jones appearing in response on
6 behalf of defendant Giovanni.

7 THE COURT: And would you clarify the defendants in
8 the caption are Giovanni. It now appears that -- who
9 are the names of the parties that filed the dec --

10 MR. JONES: Mr. and Mrs. Good --

11 THE COURT: Good, okay.

12 MR. JONES: -- filed a declaration.

13 THE COURT: Are they now the named defendants?

14 MR. JONES: They are the current owners of the
15 property by a deed that was filed --

16 THE COURT: Is it simply best referred to them as
17 defendants then?

18 MR. JONES: It might be appropriate, your Honor.

19 THE COURT: All right.

20 MR. JONES: Sure.

21 THE COURT: We're here on the motion to quash the
22 deposition of the bailiff. I recognize that it's King
23 County's motion.

24 MS. LAMOTHE: Yes.

25 THE COURT: I recognize that Mr. Jones is bringing

1 it on behalf of his clients to address factual grounds
2 for the motion to reconsider, but my questions are
3 directed first to Deutsche Bank. And I want to proceed
4 delicately here. It's never my intent to ever point
5 the finger or to simply point out mistakes simply for
6 the sake of pointing out mistakes. But it seems to me
7 that Mr. Jones on behalf of his clients is seeking to
8 challenge the factual grounds that underlie his motion
9 for reconsideration, to challenge the grounds that he
10 created judicial confusion. And in all candor and
11 honesty with you, Counsel, it seems to me that Deutsche
12 Bank has created confusion from the very beginning of
13 this case.

14 It was improperly filed as a miscellaneous civil
15 action rather than an unlawful detainer when it was
16 filed with the Clerk's Office. So rather than being
17 expedited in ex parte, it was given a case schedule and
18 an assigned judge. That doesn't happen with unlawful
19 detainers until ex parte certifies the matter.

20 Then Commissioner Watness entered a notation ruling
21 December 16, 2009 denying a motion for show cause
22 indicating that it would not be revisited until your
23 client moved for amendment of the case schedule because
24 the matter was improperly designated Seattle versus
25 Kent. I don't see that that has ever happened. I

1 don't see there was ever a motion to amend. Instead
2 several pleadings were filed with a Kent designation.
3 Several others have been filed with a Seattle
4 designation. So those are just two.

5 There are several other faulty procedural things
6 that have happened that I seem to think appear to be
7 directly attributable to your client's handling the
8 procedural matters. So I guess my question to you is
9 with that in the record, is your client prepared to
10 acknowledge to Judge Spector that there are certain
11 procedural mistakes that have happened and to
12 acknowledge those to Judge Spector so that it in
13 essence becomes an uncontested motion or does Mr. Jones
14 need to go forward and still fight for his right to
15 correct the record and establish the facts?

16 MR. BAKER: First of all, your Honor, I have to
17 admit that, you know, the first time I handled this
18 case was last night and I'm appearing for Deutsche Bank
19 on the motion to quash the subpoena.

20 THE COURT: Understood, but you're here --

21 MR. BAKER: I don't have a full procedural
22 understanding of -- I mean, I don't have a full
23 understanding of what's happened from the beginning of
24 this case.

25 I have been informed that there was an improper

1 designation on one of the documents filed, at least
2 listing Kent instead of Seattle. I've also been
3 informed that there was -- there was an amendment to be
4 filed and our firm was informed that it wasn't needed
5 to be filed. Beyond that, I don't know. I don't have
6 information on what else has taken place.

7 THE COURT: Well, it was then filed. The show cause
8 was noted in Seattle with a Kent designation for the
9 judges and the mailroom. I mean, it's so silly it's
10 even embarrassing to say that a motion was noted for
11 the mailroom. And then rather than seeking to either
12 seek reconsideration from the Commissioner who issued
13 the order or revision, your client then sought to
14 vacate a Commissioner's order. I mean, it's been
15 frankly, Counsel, procedural irregularities at every
16 step of the way. So to me Mr. Jones has the right to
17 go forward.

18 These are very unusual circumstances. I can't think
19 of a circumstance in which we would allow a bailiff of
20 a judge to be subject to a deposition, but frankly
21 these are the circumstances and which I'm prepared to
22 allow it unless your client is willing to come forward
23 and say we've made mistakes, we've created confusion,
24 let's get back to the merits of this unlawful detainer
25 and stop this sideshow. But unless your client is

1 willing to agree to that, I'm granting the request and
2 allowing Mr. Jones to go forward. So I don't know if
3 you need to take some time and talk with your client ...

4 MR. BAKER: Yeah, I'd like to do that, your Honor.

5 THE COURT: Do you want to take a minute now?

6 MR. BAKER: Sure.

7 MR. JONES: I have, based upon the court's
8 observations middle ground.

9 THE COURT: We need you at the microphone.

10 MR. JONES: Ah, yes, I forgot. Elvis is not in the
11 house.

12 Your Honor, first of all, I want to acknowledge the
13 fact that Mr. Baker has come in here today. There's an
14 attorney with a Washington Bar license down in San
15 Diego who was trying to operate this basically by wire.

16 THE COURT: And it's a confusing area of practice,
17 I'll acknowledge that. Yet we need to clear this up.

18 MR. JONES: Having said that, I don't know what this
19 court's authority would be, but I would -- I am very
20 concerned, operating as a pro tem myself, having the
21 lower bench being manipulated for whatever reason. I
22 took this step with a great deal of trepidation.

23 The bailiff had communications with my clients, but
24 if -- I would be willing to reserve the deposition
25 because what I am essentially doing here is perfecting

1 my record on appeal. Without the bailiff's testimony,
2 my client's statements are simply out there.

3 THE COURT: I agree.

4 MR. JONES: I am worried, however, to set precedent.
5 The court I think has acknowledged the fact that this
6 is an unusual situation unlikely to reoccur, but I am
7 willing to consider if this court is willing to hold
8 this matter for purposes of reconsideration, which is
9 unusual, or in the alternative a Rule 59 motion as
10 opposed to a reconsideration.

11 THE COURT: Reconsideration of what?

12 MR. JONES: Of the two underlying orders.

13 THE COURT: I don't have that authority.

14 MR. JONES: I didn't think so, but I wanted to at
15 least explore that.

16 THE COURT: And that's why to me if Deutsche Bank is
17 prepared to in essence correct the record before Judge
18 Spector and take responsibility for the mistakes
19 Deutsche Bank has made and perhaps -- I mean, I'm not
20 your settlement judge, I'm here to rule on a motion to
21 quash, but I can't also help but notice how we've
22 gotten to where we've gotten. And if Deutsche Bank is
23 willing to take responsibility and correct the record
24 in front of Judge Spector and acknowledge the mistakes
25 Deutsche Bank has made, primarily failing to comply

1 with Commissioner Watness' ruling in the first place,
2 had that order been complied with we would never have
3 had the confusion of two separate courthouses and the
4 show cause being noted the way it was noted.

5 Commissioner Watness said: Don't renote this without
6 seeking to change the case designation. That never
7 happened. We've got noncompliance with a court order
8 right there.

9 So I think if Deutsche Bank kind of steps up to the
10 plate and does a mea culpa, in essence, we can get back
11 to the merits and get this case on track. I can't
12 force that. I don't have jurisdiction. I'm not going
13 to be the judge ruling on the motion, pending motion to
14 reconsider before Judge Spector, that's not
15 appropriate, but I have no problem either saying I'm
16 reserving on this, that Mr. Jones is willing at this
17 point to either reschedule the deposition based on
18 Deutsche Bank's response or that I'll grant it unless
19 the parties enter into some type of stipulation.

20 MR. JONES: Could we take a brief recess, your Honor?

21 THE COURT: Sure. Court recess. Please don't
22 leave. Please let us know that we're either coming
23 back on the record with an agreement or that we're
24 taking some kind of action.

25 MR. JONES: Absolutely.

1 THE COURT: All right. Thank you.

2 MR. JONES: Thank you very much, your Honor.

3 THE CLERK: Court is in recess.

4 (RECESS.)

5 THE COURT: We've taken a break. Have a seat,
6 please. Where are we, Counsel?

7 MR. BAKER: Your Honor, my clients are not willing
8 to enter into any stipulation. We're simply here to
9 assist Ms. Lamothe with her motion to quash the
10 subpoena.

11 Our position is that the Giovannis have no standing
12 to defend the unlawful detainer action. They
13 quitclaimed the property to the Goods in 2008. The
14 Goods did not file an answer or enter an appearance and
15 so that's the extent of our role here today.

16 THE COURT: I couldn't disagree more, but that's the
17 position you're taking.

18 This is the State's motion, did you want to be
19 heard?

20 MS. LAMOTHE: Yes, I do have a brief argument.

21 I think one of the most important things about this
22 deposition is that it's not legal. And where it's as
23 questionable as this is in the judicial process, that
24 the court needs to look for or the party needs to look
25 for alternative methods of getting the information.

1 Since the motion for reconsideration has been filed,
2 the information in Ms. Henderson's deposition could
3 only be used in a reply brief which would address some
4 concerns that the plaintiffs had as to whether the
5 Goods visited Judge Spector's courtroom before they
6 went to ex parte.

7 I don't see that the visit to Judge Spector's
8 courtroom is at issue or in contention by Deutsche Bank
9 or any other persons in the matter, and so I think that
10 it is unnecessary and that the Goods' statement that
11 they visited that is not contended as incorrect by
12 anyone that I can tell and I think that a better way to
13 address this is that it's unnecessary and that the
14 statement that the Goods visited and talked to Judge
15 Spector's bailiff should stand and that that's all that
16 would be necessary.

17 THE COURT: What about the representations, though,
18 made by Deutsche Bank? I'm just looking at one
19 example, and believe me I have a richness of examples
20 here from which I could pull --

21 MS. LAMOTHE: Yes.

22 THE COURT: -- but I'm looking at the motion to set
23 aside the order, Page 2, and there Deutsche Bank
24 indicates that the defendant's implication that
25 plaintiff had not appeared at the King County

1 Courthouse led to the finding of the Regional --
2 Maeling Regional Justice Center Commissioner that
3 plaintiff's counsel did not appear in either Seattle or
4 Kent. Accordingly, the Commissioner entered an order
5 striking.

6 Deutsche Bank then goes on to say that the irregular
7 unnoted proceeding at the Maeling Regional Justice
8 Center without notice to plaintiff while plaintiff's
9 matter came on for regular hearing at King County, I
10 mean, at some point -- and then they say here plaintiff
11 -- on Page 3 -- never had any reason to believe that
12 any hearing in this matter would be held at the Maeling
13 Regional Justice Center when they had been ordered by
14 Commissioner to change the case schedule designation is
15 unbelievable. And I tend to agree that Ms. Henderson's
16 testimony seems somewhat tangential --

17 MS. LAMOTHE: Very narrow, yes.

18 THE COURT: -- and yet there are factual
19 representations made in here I'm not sure how else the
20 defendants are entitled to challenge them. I couldn't
21 agree more that this is unusual, very irregular to
22 order or allow a deposition, but the very notion of due
23 process and fundamental fairness I think is at stake
24 here and it would be profoundly unfair to deprive the
25 defendants of an opportunity to factually correct the

1 record.

2 MS. LAMOTHE: I don't think that in all cases that a
3 bailiff cannot be called as a witness and that there
4 are certain circumstances where what the bailiff has
5 seen or done can be brought [INAUDIBLE], so.

6 THE COURT: I appreciate your candor very much.

7 Mr. Jones, I'm prepared at this point to deny the
8 motion to quash. I'm not sure what else we can do
9 given Deutsche Bank's position.

10 MR. JONES: I will deal with Deutsche Bank, but I've
11 spoken with counsel. I believe your bailiff has spoken
12 to Ms. Henderson. I'm concerned about the deposition
13 during the court hours to disrupt Judge Spector's
14 courtroom. I've spoken with counsel and she has
15 gratefully and cordially agreed to conduct the
16 deposition after court hours, say, at, say, 5:30 or
17 6:00 p.m. at my office.

18 THE COURT: And I can't imagine it's going to be
19 long.

20 MR. JONES: No, ma'am. Your Honor, it won't be long
21 at all. I will arrange for a court reporter. I would
22 like to schedule it if that can be made a part of your
23 order to have it tomorrow evening at my office at
24 6:00 p.m.

25 THE COURT: Well, what I'd rather do, given your

1 appreciative flexibilities, I'd rather -- and I'm
2 looking for the order that was submitted by the
3 prosecutor.

4 MR. JONES: Oh.

5 THE COURT: I'd rather tailor the order and indicate
6 that the motion to quash is denied with the
7 understanding it will be rescheduled at a mutually
8 convenient time outside court hours. So how about if
9 we do that. Let me hand that back to you.

10 MS. LAMOTHE: Okay.

11 MR. JONES: The court rule requires me to give a
12 certain amount of time --

13 THE COURT: Well, you've given plenty of time --

14 MR. JONES: Okay.

15 THE COURT: -- so it's simply being rescheduled.

16 MS. LAMOTHE: Yeah.

17 THE COURT: I don't think we need to comply with
18 that as long as the State agrees. The other thing I
19 want to do, however, is -- and I'm not prepared to
20 enter findings, but I'm going to hand a blank order to
21 the parties and have you indicate that the court --
22 we'll issue two orders. One is simply the more formal
23 order on the motion to quash and the other will be more
24 in the nature of findings. And I'd like the parties to
25 take a minute here in court and indicate this court

1 recognizes it's a rare circumstance under which a
2 bailiff will be subject to a deposition, but that in
3 these circumstances it's necessary because to deny that
4 would be to deny the defendants of a fundamentally fair
5 opportunity to correct -- or to provide a factual basis
6 for pursuing their motion to reconsider and that from
7 this court's point of view there have been numerous
8 irregularities in the proceedings on Deutsche Bank's
9 part. And had Deutsche Bank agreed to that and agreed
10 to set the record straight, the deposition would have
11 been unnecessary. Absent such an agreement, it needs
12 to go forward.

13 And I can cite at least five examples of that.
14 Number one, simply how the case was filed in the first
15 place; number two, a failure to have complied with
16 Commissioner Watness' December 16th order; number
17 three, noting a show cause for a mailroom; number four,
18 using a Kent designation without ever formally filing a
19 motion; and, number four (sic), seeking to vacate with
20 Judge Spector a Commissioner's ruling rather than
21 either seeking reconsideration or a motion for
22 revision. So we've got some significant, substantive
23 and procedural problems with how Deutsche Bank has
24 proceeded, but I do want that captured here. So you've
25 got a little bit of work ahead of you. Let me hand you

1 a blank order here.

2 MR. BAKER: Thank you very much, your Honor.

3 THE COURT: And if you want to let me know when
4 you're ready, we'll come back and I'll review the
5 proposed orders.

6 MR. JONES: Thank you.

7 THE COURT: Thank you.

8 THE CLERK: Court's in recess.

9 (RECESS.)

10 THE COURT: Have a seat, please.

11 Counsel, I've reviewed the proposed order and it
12 accurately captures the court's ruling. I've signed
13 it. Did we have a need for the other order as well,
14 or does this capture it all?

15 MS. LAMOTHE: I think that that's --

16 MR. JONES: I think that does --

17 THE COURT: I do, too. Here's the original for
18 Madam Clerk, and we've made copies for each of you.
19 And we will send a copy of this order to Judge
20 Spector's court and her bailiff so that they understand
21 what we've done here. And then I'm assuming, Ms.
22 Lamothe, that you will contact the bailiff personally
23 and discuss scheduling issues with her.

24 MS. LAMOTHE: Yes, your Honor.

25 MR. JONES: I've assured her that I will work with

1 the court's calendar [INAUDIBLE].

2 THE COURT: We appreciate that. Thank you.

3 MR. JONES: Thank you very much, your Honor.

4 THE COURT: Uh-huh.

5 (PROCEEDINGS CONCLUDED.)

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