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NO. 35939-1-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

**WILLIAM A. LOONEY  
PLAINTIFF/APPELLANT**

v.

**PIERCE COUNTY, a political subdivision of the State of  
Washington; KEN MADSEN, Pierce County Assessor-Treasurer;  
& CLIFFORD BILLINGSLEA  
DEFENDANTS/RESPONDENTS**

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Appeal from the Superior Court of Pierce County  
The Honorable Vicki Hogan

No. 06-2-04484-9

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**BRIEF OF RESPONDENT**

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DIVISION II

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court properly dismiss Plaintiff/Appellant Looney's (hereinafter "Mr. Looney") claims for relief against the Defendants/Respondents (hereinafter "Pierce County"), where they were barred by his failure to comply with RCW 84.68.080-.100?

2. Did the trial court properly conclude that Mr. Looney's complaint for damages against Pierce County and Ken Madsen, its Assessor-Treasurer, were barred by his failure to file a claim for damages, required by RCW 36.45.010, 4.96.010, and 4.96.020?

3. Did the trial court properly grant summary judgment dismissing Mr. Looney's claims, where Mr. Looney failed to allege and prove by any competent evidence that:

a. He tendered or paid to the Pierce County Assessor-Treasurer amounts required to redeem the property from tax foreclosure in person or by agent bearing notarized evidence of authority to act on his behalf, as required by RCW 84.64.060?

b. He acquired an actual, as opposed to a claimed interest in the property from heirs or devisees of the decedent owner of record, and that any interest of his grantors was of record as required by RCW 84.64.060 and RCW 84.56.310?

4. Should this Court grant Defendants/Respondents their reasonable attorney's fees and costs incurred in this appeal, because Mr. Looney's counsel failed to comply with CR 11 and RAP 18.1?

B. STATEMENT OF THE CASE

1. A Certificate of Delinquency was filed on June 3, 2005, in Cause No. 05-2-08464-8 against the property which is the subject of this action, which then appeared of record in the name of Lorraine Lane, deceased. On December 2, 2005, the day before tax sale ordered by the Court for non-payment of property taxes, payment was tendered to the Pierce County Assessor-Treasurer by a Lindsay Keeton in the name of William A. Looney, in the form of a cashier's check in an amount equal to the then due tax, penalty, interest, foreclosure costs, together with a photocopy of a quitclaim deed to the property. Ms. Lindsay provided no power of attorney or notarized authority to act on behalf of Mr. Looney. Prior to the Assessor-Treasurer's sale and deed, no one provided any other documents to the Assessor-Treasurer concerning the property, the estate, or alleged heirs of Lorraine Lane. The Assessor-Treasurer rejected the tender as not meeting the requirements of RCW 84.64.060. (CP 34-37).

2. On Monday, December 5, 2005 the Assessor-Treasurer sold the property to Clifford M. Billingslea, Defendant/Respondent, (hereinafter

“Mr. Billingslea”), the highest bidder, for the sum of \$85,000. The payment satisfied the tax, penalty, interest and foreclosure cost then due of \$4,968.09, leaving excess proceeds of the sale in the sum of \$80,031.91 payable pursuant to RCW 84.64.080 to the estate of Lorraine Lane, the person having title of record on June 3, 2006, the date on which the Certificate of Delinquency was filed. (CP 34-37).

3. On December 19, 2005 the Assessor-Treasurer recorded its Treasurer’s Deed to Clifford M. Billingslea, as provided by RCW 84.64.080. (CP 25, 34-37).

4. On January 19, 2006, William A. Looney, filed this action against Pierce County, Ken Madsen, its Assessor-Treasurer, and John Doe, the purchaser of the property at the tax sale, and deposited into the registry of the Superior Court the sum of \$5,000. Mr. Looney did not file a claim for damages pursuant to RCW 36.45.010, RCW 4.96.010, and RCW 4.96.020 with Pierce County more than 60 days prior to filing this action for damages against Pierce County and Ken Madsen, its Assessor-Treasurer. (CP 38-39). Mr. Looney made no allegation of payment or tender of payment in any amount to any Defendant/Respondent, except of the cashier’s check tendered by Lindsay Keeton. (CP 1-5).

C. ARGUMENT

**1. The trial court properly dismissed Mr. Looney's claims for relief against the Defendants/Respondents, where they were barred by his failure to comply with RCW 84.68.080-.100.**

The facts are undisputed that the William A. Looney did not allege or show that he attempted in any fashion to comply with RCW 84.68.080-.100. As a result, the trial court properly dismissed the action in its entirety.

The record does not contain any allegation that Mr. Looney tendered or paid anything to the Pierce County Assessor-Treasurer after the sale of the property on December 5, 2005, and the issuance and recording of the Treasurer's deed to Mr. Billingslea for taxes on December 19, 2005, to meet the requirement of RCW 84.64.070 making such tender a condition precedent to commencement of any action "for the recovery of any property sold for taxes." (CP 1-5).

The record contains no allegation in Mr. Looney's Complaint to set aside the tax sale by Pierce County and its Assessor-Treasurer, and the Treasurer's deed to Mr. Billingslea, which are required by RCW 84.68.080, that

"the tax that is justly due, with penalties, interest and costs, that the taxes for that and previous years have been paid; and when the action is against the person or corporation in possession thereof that that all taxes, penalties, interest and costs paid by the purchaser at tax-sale, the

purchaser's assignees or grantees have been fully paid or tendered, and payment refused.”

As set forth in RCW 84.68.100, “the provisions of RCW 84.68.080 and 84.68.090 shall be construed as imposing additional conditions upon the complainant in actions for the recovery of property sold for taxes.” Having failed to even allege, let alone provide any evidence of compliance, the trial court properly dismissed Mr. Looney’s action to set aside the Treasurer’s deed to Mr. Billingslea and to recover the property sold to him for taxes.

Filing of a complaint to set aside a tax sale and deed without at least alleging compliance with RCW 84.68.070-.100 constituted a violation of CR 11, particularly after the applicability of those statutes were pointed out in pleadings by the Respondents. In response the Mr. Looney caused to be signed and filed new and additional pleadings pursuing his cause of action to set aside the tax sale and deed, without making any effort to meet the requirements of CR 11.

**2. The trial court properly concluded that Mr. Looney’s claims for damages against Pierce County and Ken Madsen, its Assessor-Treasurer were barred by Mr. Looney’s failure file a claim for damages more than 60 days prior to commencing an action for damages against Pierce County and Ken Madsen, required by RCW 36.45.010, 4.96.010, and 4.96.020.**

Mr. Looney neither alleged nor provided any evidence that he complied with the condition precedent to an action for damages against Pierce County and Ken Madsen, its Assessor-Treasurer. He did not allege, and the undisputed record on appeal shows that he did not file a claim for damages more than 60 days prior to commencing the case. (CP 38-39).

Under the circumstances, the trial court properly dismissed the action for damages against Pierce County and Ken Madsen. Without such allegations, the complaint and the entire subsequent proceedings violated CR 11, particularly after the Respondents pointed out the requirement for such pleadings and proof in their Answers, in their Motions for Summary Judgment, and after the trial court dismissed such claims on that basis.

**3a. The trial court properly granted summary judgment dismissing Mr. Looney's claims, where Mr. Looney failed to allege and prove by any competent evidence that he tendered or paid to the Pierce County Assessor-Treasurer amounts required to redeem the property from tax foreclosure in person or by agent bearing notarized evidence of authority to act on his behalf, as required by RCW 84.64.060.**

RCW 84.64.060 sets forth not only the persons entitled to pay property tax once tax foreclosure proceedings have been commenced, but the evidence required to be produced at the time by an agent attempting to pay on behalf of authorized persons. The section provides as follows:

Any person owning a recorded interest in lands or lots upon which judgment is prayed, as provided in this chapter, may in person or by agent pay the taxes, interest and costs due thereon to the county treasurer of the county in which the same are situated, at any time before the day of the sale; and for the amount so paid he or she shall have a lien on the property liable for taxes, interest and costs for which judgment is prayed; and the person or authority who shall collect or receive the same shall give a receipt for such payment, or issue to such person a certificate showing such payment. If paying by agent, the agent shall provide notarized documentation of the agency relationship [emphasis supplied].

The person who attempted to pay taxes upon the property the day before the sale was not Mr. Looney and supplied no “notarized documentation of the agency relationship” upon which the Treasurer was entitled to rely showing that payment was tendered on Mr. Looney’s behalf. With the lack of any evidence of compliance, and the declaration of Sandra Moore that no such evidence was supplied when payment was tendered (CP 34, line 13-14), the Trial Court could not have found that tender was properly made by Mr. Looney. This defect also warranted dismissal of the Complaint without regard to the remaining defenses.

**3b. The trial court properly granted summary judgment dismissing Mr. Looney’s claims, where Mr. Looney failed to allege and prove by any competent evidence that he acquired an actual, as opposed to a claimed interest in the property from heirs or devisees of the decedent owner of record, and that any interest of his grantors was of record, as required by RCW 84.64.060 and RCW 84.56.310.**

This is the only issue as to which Mr. Looney made any allegations or argument, let alone presented any evidence. The trial court could have granted summary judgment dismissing all of Mr. Looney's complaint before getting to this issue. Despite this, Mr. Looney only presented conclusions and arguments, and did not present evidence that his grantors had vested interests in the real property or that those interests were of record.

The Treasurer was required to accept attempted payments of property tax after commencement of foreclosure only from persons having an actual, as opposed to a claimed recorded interest in the property. Though RCW 84.56.310 has long permitted payment of taxes by mere claimants to an interest in real property before commencement of foreclosure, the legislature clearly imposed a different result after filing of a certificate of delinquency. By c. 23, s. 4, Washington Laws of 2003, the legislature amended RCW 84.64.060 to provide that payment after commencement of foreclosure be made only by a person with a recorded interest.

Sec. 4. RCW 84.64.060 and 2002 c 168 s 9 are each amended to read as follows:  
Any person owning [D] an [D] [A] A RECORDED [A] interest in lands or lots upon which judgment is prayed, as provided in this chapter, may in person or by agent pay the

taxes, interest and costs due thereon to the county treasurer of the county in which the same are situated, at any time before the day of the sale; and for the amount so paid he or she shall have a lien on the property liable for taxes, interest and costs for which judgment is prayed; and the person or authority who shall collect or receive the same shall give a receipt for such payment, or issue to such person a certificate showing such payment. If paying by agent, the agent shall provide notarized documentation of the agency relationship.

The change by the legislature made payment after commencement of foreclosure much more limited than payment before foreclosure under RCW 84.56.310, which then permitted payment by “Any person being the owner or having an interest in an estate or claim to real property in which taxes shall have been unpaid may pay the same and satisfy the lien at any time before execution of a deed to said real property [emphasis supplied].” Having used the words “or claim” in RCW 84.56.310 and omitted it in RCW 84.64.060, it is clear that the legislature knew the difference and intended a different eligibility requirement for payments made after foreclosure. After 2003, the trial court could not properly have interpreted RCW 84.64.060 to consider Mr. Looney’s contention that his grantors claim of interest alone required acceptance of payment, without a showing by clear, cogent and convincing evidence that the interest of his grantors was both actual and recorded.

In 2005 the legislature further emphasized the distinction between payments before and after commencement of foreclosure when it amended RCW 84.56.310 by c. 502, s. 8, Washington Laws of 2005 to read as follows:

Sec. 8 RCW 84.56.310 and 1961 c 15 s 84.56.310 are each amended to read as follows:  
Any person being the owner or having an interest in an estate or claim to real property against which taxes [D> shall have been unpaid <D] [A> HAVE NOT BEEN PAID <A] may pay the same and satisfy the lien at any time before [D> execution of a deed to said <D] [A> THE FILING OF A CERTIFICATE OF DELINQUENCY AGAINST THE <A] real property. The person or authority who shall collect or receive the same shall give a certificate that such taxes have been so paid to the person or persons entitled to demand such certificate. [A> AFTER THE FILING OF A CERTIFICATE OF DELINQUENCY, THE REDEMPTION RIGHTS SHALL BE CONTROLLED BY RCW 84.64.060. <A]

After the 2003 and 2005 amendments, no contention could remain viable that payment could be made after filing a certificate of delinquency without complying with RCW 84.60.060 requiring that to pay, the payer must demonstrate both an actual and a recorded interest in the real property subject to foreclosure sale.

Mr. Looney presented no evidence on which the trial court could have relied that his grantors had any actual interest in the property, or that their interest was of record. First, he presented no competent evidence that

his grantors were heirs of Lorraine Lane, though he asserted that they were in his declaration of November 16, 2005, where he stated that:

“3. I began some additional research to determine if Ms Lorraine Lane had any heirs. Lorraine Lane was survived by four daughters; Lee Ann Lane, Shelley R. Cummings, Sheryl Lynn Garrett and Sandra Lee Teeter.” (CP 48, lines 7-9).

His declaration was at most hearsay, failing to show any personal or direct knowledge of the statements asserted, and it was not competent to establish that his grantors were children, let alone heirs of Lorraine Lane. Second, Mr. Looney presented no competent evidence upon which the trial court could have relied that Lorraine Lane died intestate, allowing the property to pass to heirs, instead of to devisees.

Appellant Looney acknowledges in his Opening Brief at page 9 that there was no probate of the estate of Lorraine Lane prior to the tax foreclosure sale, from which the trial court in this case could have determined whether the property had vested at the date of death in devisees or heirs, and the identity of those vested heirs or devisees.

His only argument that the four women he named were heirs of Lorraine Lane was:

“However, these heirs were not strangers to the property. In fact Pierce County attempted to find at least two of the heirs to serve them regarding the foreclosure. Pierce County was made aware of these heirs by the Department

of Social and Health Services (CP 96-97). The daughters of Lorraine Lane were not strangers to the property” (Appellant’s Opening Brief, page 9).

The declaration of Sandra Moore dated December 4, 2006 to which he refers (CP 96-97) states just the opposite, and recites that the County did not know the identities or addresses of any heirs of Lorraine Lane, and that the County was only informed by DSHS “that Shelly Garrett and Lee Anne Lane were related to Lorraine Lane and might know someone who would claim an interest in the property, but they had no address for them except the property” (CP 96, lines 8-10). No other competent evidence in the record showed that the ladies named by Mr. Looney were children or heirs of Lorraine Lane, if they were, let alone that the property vested in them instead of in devisees of the decedent.

The Respondents have not argued that title did not vest as of the date of death of the decedent in the heirs or devisees, nor did the trial court so find. Instead the Respondents argue and the trial court found that though title vested in the heirs or devisees of the decedent at the date of death of the decedent, their identity has not been determined by probate or otherwise found by the trial court. Though Respondents contend that under RCW 11.04.250 probate is required to determine based upon competent evidence the identity of the heirs or devisees in which title

vested as of the date of death of the decedent, neither this Court nor the trial court need to adopt that position to sustain the summary judgment of dismissal against Mr. Looney. Based upon the lack of any evidence of record which could arguably show that the decedent died intestate, and the lack of any competent evidence showing the identity of heirs of the intestate decedent, the trial court could not have found that title to the property vested in Mr. Looney's grantors, even if it did not require those facts to have been determined by intestate or testate probate proceedings.

Even if Mr. Looney could show from the evidence of record below that his grantors were heirs of the decedent Lorraine Lane, the title holder of record of the property, and that title to the property vested in them as of her death, the trial court could not have denied summary judgment of dismissal of the case. Even if they were shown below to have been vested with title to the property, title was not "of record" when they quitclaimed their interest to Mr. Looney, as required by RCW 84.64.060. Mr. Looney cited neither statutes nor case law showing that he met the standard of RCW 84.64.060 requiring that to redeem the property from tax foreclosure after the filing of a Certificate of Delinquency, the payer must have an actual interest in the property, not just a claim of interest, and that such interest owned by the payer was recorded. Accordingly, dismissal of Mr.

Looney's claims by the trial court was properly entered, and the appeal should be dismissed.

**4. This Court should grant Defendants/Respondents their reasonable attorney's fees and costs incurred in this appeal, because Mr. Looney's counsel failed to comply with CR 11 and RAP 18.1.**

In the case below and in the Appellant's Notice of Appeal and Opening Brief, the requirements of CR 11 were not even arguably met. Neither the Notice of Appeal nor the Opening Brief recites required allegations in the complaint before bringing the action. Neither was arguable compliance with the statutes, or excuse from the compliance with following statutes shown:

1. RCW 84.68.070-.100. Neither below nor in pleadings signed in this appeal did Mr. Looney allege or recite any evidence that he met the statutory prerequisites to an action to set aside a tax sale and deed.
2. RCW 36.45.010, 4.96.010, and 4.96.020. Neither below nor in pleadings signed in this appeal did Mr. Looney allege or recite any evidence that he filed a claim for damages with Pierce County more than sixty days prior to commencing the action for damages against Pierce County.
3. RCW 84.64.060.

a. Neither below nor in pleadings signed in this appeal did Mr. Looney allege or recite any competent evidence that “notarized documentation of the agency relationship” was provided by the person he alleges paid taxes on his behalf.

b. Neither below nor in pleadings signed in this appeal did Mr. Looney recite any competent evidence that the grantors from whom he claims to have acquired an interest in the property were children, heirs of the decedent, or that the decedent died intestate.

c. Neither below nor in pleadings signed in this appeal did Mr. Looney allege or recite any evidence that the claimed interest of his grantors in the property was recorded.

CR 11 certification requirements and sanctions apply to proceedings in appellate courts. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (1992); *Pillsbury v. Dept. of Labor & Industries*, 69 Wn.App. 828, 851 P.2d 698 (1993).

CR 11(a) 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; . . . [emphasis supplied].”

A pleading like the Notice of Appeal and Appellant's Opening Brief, which recites no facts, and no law regarding statutory requirements which are prerequisites to this action, cannot have been based upon "knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) [that] 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 establishment of new law." The pleadings in this case simply recite that the actions of the trial court were erroneous, without mentioning facts or law on the subjects mentioned above. The pleadings talk about facts they would like the Court to consider on the issue they framed, without even acknowledging the Respondent's Motion, Declarations, and pleadings below which show that compliance with the requirements of the statutes listed above had not been alleged by the Mr. Looney or supported by competent evidence in the record below. Since compliance with none of these laws was recited or even attempted to be excused below or here, neither could the pleadings have constituted a "good faith argument for the extension, modification, or reversal of existing law or the establishment of new law." Under the circumstances Mr. Looney's pleadings in this case were wrongfully signed in violation of the certificate required by CR 11, and the appeal should be

dismissed as frivolous, and sanctions, including all of the reasonable costs and attorney's fees incurred by the Respondents in defending on this appeal should be granted to the Respondents.

Mr. Looney's argument regarding frivolous appeals and RCW 4.84.185 and the cases he cited demonstrate that the entire action and the appeal are frivolous. In this case Mr. Looney brought an action to set aside the tax sale and deed to Mr. Billingslea, and an action for damages against Pierce County and Ken Madsen, its Assessor-Treasurer, for actions taken in that capacity.

He did not include allegations required by RCW 84.68.070-.100, nor proof that he had complied with those prerequisites to jurisdiction by the Superior Court. He did not argue that he was not required to comply, that compliance was waived, or that the statutes were invalid for any reason, let alone a good faith application of existing law, modification or reversal of existing law, or creation of new law. He simply ignored the law, its requirements, and the allegation of Respondents that failure to allege and demonstrate compliance with the statutory requirements demanded dismissal. As he argues, citing both RCW 4.84.185 and *Smith v. Okanogan County*, 100 Wn.App. 7, 24, 994 P.2d 857 (2000), an action is frivolous only if it cannot be supported by any rational argument on the

law or facts. It does not matter how arguable an individual subsidiary argument may be, if no argument and no evidence are presented regarding the prerequisites to bringing an action like RCW 84.68.070-.100. Arguing against dismissal on that basis was frivolous.

Similarly, it cannot be other than frivolous to bring an action for damages based upon even an arguable tort, without first showing compliance with the statutory predicate for its consideration by a court - filing a claim for damages against the County in the required manner at least sixty days before commencing the action. Where Mr. Looney neither filed the required claim more than sixty days before commencing this action, the trial court would have been without jurisdiction to hear even an admitted liability for damages. Again Mr. Looney did not plead or prove compliance with the statutory predicate for suits against the County, and he did not even make a good faith argument under CR 11 that compliance was or should be excused. Using the test espoused by Mr. Looney, his action for damages against Pierce County and Ken Madsen were also frivolous and warranted sanctions under RCW 4.84.185.

Though not a prerequisite to jurisdiction, Mr. Looney's failure to plead and present any evidence that payment tendered by Ms. Keaton was not statutorily required to be accompanied by "notarized evidence of [an]

agency relationship” to pay for Mr. Looney to enable him to sue under RCW 84.64.060 was also frivolous under even Mr. Looney’s standard. Again, failure to plead, failure to introduce any competent evidence, and failure to make an argument meeting the requirements of CR 11 was frivolous.

Because Mr. Looney’s claims in the trial court were rejected for his complete failure to either allege or present any competent evidence of compliance with statutory prerequisites, and because his Notice of Appeal and Opening Brief were filed without any showing of compliance with CR 11, Pierce County and Ken Madsen, its Assessor-Treasurer, request an award of fees and costs on appeal. In the event this request is granted, they ask for permission to submit a cost and fee bill pursuant to RAP 18.1(d).

D. CONCLUSION

Pierce County and its Assessor-Treasurer Ken Madsen respectfully join in the Brief of Respondent Billingslea, request that the appeal be dismissed as frivolous, and request that the Court grant sanctions against

the Appellant Looney and/or his attorney for violation of CR 11 and for a  
frivolous appeal as prayed above.

Respectfully submitted this 2nd day of May, 2008.

GERALD A. HORNE  
Prosecuting Attorney

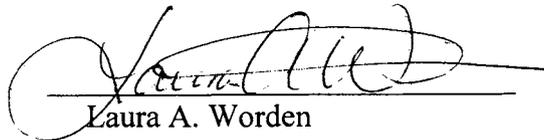
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**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 2nd day of May, 2008, she placed with ABC Legal Messengers, Inc. an original of Brief of Respondent for filing with the Court of Appeals, Division II, and true and correct copies of the same for delivery to the following parties and their counsel of record:

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DATED this 2nd day of May, 2008, at Tacoma, Washington.

  
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Laura A. Worden

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