

**COURT OF APPEALS DIVISION II`
OF THE STATE OF WASHINGTON**

**Case Number 39387-5-II
DEVON MCKENNA and CYNTHIA McKENNA,
husband and wife,
Appellant's**

V.

**COMMONWEALTH UNITED MORTGAGE a division of
NATIONAL CITY BANK OF INDIANA, aka NATIONAL CITY
MORTGAGE CO., An Ohio Corporation,
doing business in the State of Washington,
Appellees,**

Appellant's Corrected BRIEF

(March 12, 2010)

Devon and Cynthia McKenna,
c/o: Post Office Box 1056,
Rainier, Washington, 98576.

FILED
COURT OF APPEALS
DIVISION II
10 MAR 12 PM 2:12
STATE OF WASHINGTON
BY
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Table of Contents

Table of Authorities	1
1) ASSIGNMENTS OF ERROR	1
Assignments of Error	1
Issues Pertaining to Assignments of Error	2
2) STATEMENT OF THE CASE	3
3) SUMMARY OF ARGUMENT	3
4) ARGUMENT	4
5) CONCLUSION	8

1 **Table of Authorities**

2 **Cases**

3

4 *Trinsey v. Pagliaro, D.C. Pa 1964, 229 F. Supp. 647*..... (CP-8, 9)

5 *Cinco Enterprises, Ins. V. Benso, Okl., 890 P 2d 866 (1944)*. (CP- 9)

6 *Government Fin. Servs. One L.P. v. Peyton Place, 62 F.3d 767, 772-73*

7 *(5th Cir. 1995)* (CP- 10)

8 *Walsh v. McCain Foods Ltd., 81 F.3d 722, 726 (7th Cir. 1996)* (CP- 10)

9 *In re Chicago, 78 F.3d at 293*..... (CP- 10)

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12 **Rules**

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14 CR 59 (a)(2)(7)(8) (9),(CP-8, 9)

15 CR60(b)(4)(5)(11),(CP-8, 9)

16 CJC 3,(CP-8, 9)

17 CR 42(a).....(CP-8, 9)

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20 **Juridical Reasoning**

21 *Actori incumbit onus probandi*. The burden of proof is on him who makes the

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23 claim.

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26 **1. ASSIGNMENTS OF ERROR**

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28 ***Assignments of Error***

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30 No. 1 The trial Court erred by failing to notify Appellants of

31 consolidation.

- 1 No. 2 The trial Court erred by failing to answer request for findings of
2 fact and conclusions of law
3 No. 3 The trial Court erred by allowing counsel to enter and argue
4 case without client present.
5 No. 4 The trial Court erred by not dismissing the Appellee's claim.
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8 ***Issues Pertaining to Assignments of Error***

- 9 No. 1 Whether enjoining the two cases without motion or notification to
10 the Appellants (Plaintiff's) Case No. 08-2-01425-5 and 08-2-02104-9
11 constitutes an error on behalf of the trial Court. (CP-8, 9)
12 No. 2 Whether the failure of the trial court to enter findings of fact
13 and conclusions of law in the Letter of Opinion and the Order
14 Denying Plaintiff's Motion For Reconsideration upon request
15 constitutes an error on behalf of the trial Court. (CP-15, 16 and
16 the Statement of Arrangements)
17 No. 3 Whether the failure of the trial court injured Appellants with its
18 arbitrary and capricious ruling denying the Appellants to
19 confront their accuser in court, with no real parties in interest
20 present. (NRP-3:8 -20)
21 No. 4 Whether the attorney can testify without their client present.
22 (CP- 9, 10)
23 No. 5 Whether the evidence on the record from the Appellee's
24 Attorney is valid on it's own merits. (CP- 9, 10)
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2. STATEMENT OF THE CASE

A Summons and Complaint against the Appellee(s), cause number 08-2-01425-5 started on 06-12-2008. (CP-8, 9) The Appellee(s) then started their own cause number, 08-2-02104-9, on 09-09-2008, that was later consolidated with case number 08-2-01425-5 without any notice to the Appellant's. (CP-8)

Janaya L. Carter, WSBA Bar #32715, and Judge Gary R Tabor in a closed door, "in chambers", decision was made without the Appellants present. (CP- 9)

A Ruling against the Appellant was entered and a Writ of Restitution was granted. A Motion For Reconsideration and Motion To Dismiss Writ of Restitution was entered against the Appellants by the trial court. (CP- 5, 6, 9)

Judge Gary R Tabor entered a Letter of Opinion, (CP- 15), and the Order Denying Plaintiff's Motion For Reconsideration, (CP- 16), without responding to the "Request for Judicial Written Findings of Fact and the Conclusions of Law" by the Appellant's on 6/19/2009.

This appeal follows the denial of the Motion to Reconsider and Motion to Dismiss Writ of Restitution, Plaintiffs' Pursuant to CR 59 (a)(2)(7)(8) (9), CR60(b)(4)(5)(11), CJC 3, and CR 42(a).and Motion for Order to Show Cause.

The Appellant asked to confront the true party in interest/ Appellee, Janaya L. Carter acted in her own behalf for an Appellee that never appeared or was ever revealed. (CP- 9, 10)

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3. SUMMARY OF ARGUMENT

The crux of the matters at issue in this case is whether the two Case's, No. 08-2-01425-5 and 08-2-02104-9 were consolidated properly and adequately

1 without any notice to the Appellant. (CP- 9)

2 Whether it was appropriate for Judge Gary R Tabor to enter a Letter of
3 Opinion, (CP- 15), and the Order Denying Plaintiff's Motion For Reconsideration,
4 (CP- 16), without responding to the "Request for Judicial Written Findings of
5 Fact and the Conclusions of Law" by the Appellant's on 6/19/2009 and no reply
6 has been entered to date. (Statement of Arrangements)

7
8 Whether it was appropriate for the trial court not to allow the Appellant
9 to confront their accuser. (NRP-3:8 -20)

10
11 Whether it was appropriate for the trial court to allow only third party
12 debt collectors to enter evidence into the record, whether the evidence from a
13 third party debt collector was valid on it's own merits. (NRP-3:8 -20)

14 15 **4. ARGUMENT**

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17 The crux of the matters this court is asked to resolve revolves around four
18 issues: **1)** Whether two actions can be consolidated with bias and prejudice
19 against someone without counsel. (CP- 9)

20
21 **2)** Whether it be appropriate for a Chief Judge to not respond to a timely
22 request for Judicial Written Findings of Fact and the Conclusions of Law to a
23 Letter of Opinion and the Order Denying Plaintiff's Motion For Reconsideration
24 was entered by that same Chief Judge only days before. (CP- 15, 16)

25
26 **3)** Whether it was appropriate for the trial court not to allow the Appellant
27 to confront their accuser. (CP- 9, 10)

28
29 **4)** Whether it was appropriate for the trial court to allow only third party
30 debt collectors to enter evidence into the record, whether the evidence from a
31 third party debt collector was valid on it's own merits. (CP- 9, 10) (NRP-3:8 -20)

1 Appellant's moves this court for a reconsideration to consolidate Case
2 No. 08-2-01425-5 and 08-2-02104-9 into one case. There was no motion or
3 hearing on the matter of consolidation and no notice was given to the Appellant
4 under CR 42. (CP- 9)

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6 Under CJC 3 the judge must be impartial to all parties. It was an error in
7 an act of bias and prejudice against the Appellant. The appearance of fairness
8 has therefore been lost as a result of a single act of prejudice, in bad faith,
9 against the Appellant by the judge in error. Judge Tabor acted as if he did not
10 understand and relied upon Lynch for guidance throughout the hearing. (NRP-
11 3-12) (CP- 9)

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13 Furthermore, the title of Case No. 08-2-01425-5 was changed without
14 motion or notification to the Plaintiff changing/altering the Plaintiff/Defendant
15 without a motion or proper notification.
16

17 On 6/19/2009 a "Request for Judicial Written Findings of Fact and the
18 Conclusions of Law" was made. (CP- 15)

19
20 Judge Gary R Tabor entered a Letter of Opinion and the Order Denying
21 Plaintiff's Motion For Reconsideration without responding to the "Request for
22 Judicial Written Findings of Fact and the Conclusions of Law" by the Appellant's
23 on 6/19/2009 and no reply has be entered to date. (Statement of Arrangements).
24

25 Judge Gary R Tabor appeared almost senile at times, not seeming to
26 know who the Defendant or the Plaintiff was, and at times appeared quite lost
27 and glossed over, for instance the issue of whether the Appellant could stay in
28 the home if the payments were still being made or not. Judge Gary R Tabor also
29 made claim to having issued an order on January 22, 2009 when there is no entry
30 on the record in either cause of such a document. Judge Gary R Tabor seemed to
31

1 be prejudice in favor of the Appellee(s)'s Attorney's. (NRP - 6:8-17 & 9:12-14)

2 Judge Gary R Tabor, with prejudice, meet in a close door sessions with the
3 Appellee(s)'s attorney without notice to the Appellant, once again removing any
4 appearance of impartiality.

5 Judge Gary R Tabor, WSBA #8225, William Thomas McPhee, David
6 Hunter of Montlaw, have errored by allowing the Defendant to proceed without
7 properly setting the record for a summary judgment.

8 Judge Gary R Tabor, WSBA #8225, rushed to judgment, in the hearing of
9 May 8th 2009, cutting off any appearance of fairness, through the Attorney's
10 misrepresentation and constructive fraud, with knowledge and forethought
11 mislead the Court to obtain a summary judgment while at all times knowing a
12 full disclosure of the request for accounting evidence existed which for the sake
13 of justice required issue at trial. (CP- 10)

14 Judge Gary R Tabor, denied the Appellant the right to confront one's
15 accuser. A constitutional right given to everyone who claim's that right. Judge
16 Gary R Tabor has given an oath to uphold all constitutional rights to all. Refusing
17 that right is in direct violation to the constitution. (CP- 9, 10)

18 Appellant has challenged the trial court jurisdiction to be able to confront
19 the accuser, Appellee, and not to move forward without the Appellee present.
20 (CP- 9, 10)

21 And finally it was inappropriate for the trial court to allow a third party
22 debt collector(s) to enter evidence into the record on it's own merits and against
23 public policy. (CP- 9, 10) (NRP-3:8 -20)

24 The Appellant's were not allowed the right to confront their accuser in
25 court and no real parties in interest were ever present in the trial court hearings,

1 in spite of the objections by the Appellant. (CP- 9, 10) (NRP-3:8 -20)

2 Where there are no depositions, admissions, answers to interrogatories,
3 or affidavits, the Appellee's motion for summary judgment by providing the
4 court with information in the form of false and misleading information should
5 not be considered. The Appellee' falsely represented the facts in collusion with
6 Janaya L. Carter, WSBA Bar #32715, attorney representing the Defendant. (CP-
7 10)
8

9 N. Joseph Lynch, WSBA #7481, Janaya L. Carter, WSBA Bar #32715,
10 statements' in Cause Numbers 08-2-01425-5 and 08-2-02104-9 are not evidence,
11 as statements of counsel in their briefs or arguments are not sufficient for
12 purposes of granting an Adversary Proceeding in the form of a motion to
13 dismiss or for summary judgment. *Trinsey v. Pagliaro, D.C. Pa 1964, 229 F. Supp.*
14 *647*. Unsupported contentions of material fact are not sufficient on motion for
15 dismissal, but rather, material facts must be supported by affidavits and other
16 testimony and documents that would be admissible in evidence at trial. *Cinco*
17 *Enterprises, Ins. V. Benso, Okl., 890 P 2d 866 (1944)*. (CP- 9, 10)
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21 Therefore there is no evidence on the record from the Appellee. The only
22 evidence in the trial court cause numbers 08-2-01425-5 and 08-2-02104-9 is from
23 the Appellant. (CP- 9, 10)
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25 A party is entitled to relief from judgment if the adverse party engaged
26 in fraud, misrepresentation, or other misconduct and if the judgment was
27 unfairly obtained. Washington Court Rule of Civil Procedure 60(b); The lack of
28 due process renders this court's judgment decision void. Due process was
29 denied when the Appellant's were denied the right to plead their case and for
30 willful misleading of Material Facts. [Unconscionable contract (Non-Disclosure
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1 of Material Facts [terms and conditions]] see *Government Fin. Servs. One L.P. v.*
2 *Peyton Place*, 62 F.3d 767, 772-73 (5th Cir. 1995). The Appellant's are entitled to
3 relief from judgment because clear and convincing evidence exists that
4 misconduct prevented the Appellant's from fully and fairly presenting their case
5 on the merits. See *Walsh v. McCain Foods Ltd.*, 81 F.3d 722, 726 (7th Cir. 1996).
6 (CP- 10)
7

8 Judge Gary R Tabor, WSBA #8225, knowingly and voluntarily waived the
9 appellant's due process right to plead the case and for willful misleading of
10 Material Facts. A summary judgment was premature when title is at issue. For
11 these reasons, and in the interest of justice and fairness, the appellant's asks the
12 appeals court to strike all evidence of the Appellee. (CP- 10)
13
14

15 5. CONCLUSION

16
17 Because there is no evidence entered into this case by the Appellee, and
18 because the Appellee has willfully mislead this court, the Appellant's move this
19 court for a dismissal of all claims of and by the Appellee.
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21

22 Respectfully resubmitted on March 12th 2010.
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1 Cynthia McKenna

2 Cynthia McKenna, Sui Juris
3 authorized representative
4 c/o: Post Office Box 1056,
5 Rainier, Washington, 98576.

Devon McKenna

Devon McKenna, Sui Juris
authorized representative
c/o: Post Office Box 1056,
Rainier, Washington, 98576.

6 **NOTARIAL**

7 As a Notary Public in witness whereof, /s/ David J Amundsen attests to the
8 following:

9 **State of Washington**)
10 **County of Thurston**) : ss **ATTESTATION**

11 In Witness whereof, I affirm and set my hand and seal on March, 12th in the
12 year of our Lord two thousand and ten, A. D., before me,
13 David J Amundsen, the undersigned Notary Public in and for the State of
14 Washington, appeared Devon McKenna and Cynthia McKenna, personally
15 known to me or proved to me on the basis of satisfactory evidence, to be the
16 one whose autograph appears in the within instrument and acknowledged to me
17 that he/she executed it.

[Signature]

18 Notary Public-Washington
19 My commission expires: 10.19.13
20 Address: 1109 Yelm Ave
Yelm, WA 98598



21
22 cc: COMMONWEALTH UNITED MORTGAGE a division of NATIONAL CITY BANK OF
23 INDIANA, aka NATIONAL CITY MORTGAGE CO., An Ohio Corporation, doing business in the
24 State of Washington, c/o: Janaya L. Carter, WSBA Bar #32715, ROUTH CRABTREE OLSEN, P.S.
25 3535 Factoria Blvd. S.E. Ste 200, Bellevue, Washington 98006. Telephone (425) 458-2121, Facsimile
26 (425) 458-2131, and Cassandra Kennan, WSBA #22845, and Nigel P. Avilez, WSBA #36699, Davis
Wright Tremaine LLP, 1201 Third Ave. Ste 2200, Seattle, Washington, 98101. Telephone (206) 622-
3150, Facsimile (206) 757-7700.

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BY [Signature]
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March 12, 2010

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DIVISION II

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STATE OF WASHINGTON

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

**DEVON MCKENNA and CYNTHIA
McKENNA, husband and wife,
Appellant(s),
vs.
COMMONWEALTH UNITED
MORTGAGE a division of NATIONAL
CITY BANK OF INDIANA, aka
NATIONAL CITY MORTGAGE CO.,
An Ohio Corporation, doing business in
the State of Washington,
Appellee(s).**

**COURT OF APPEALS DIVISION II
Case No. 39387-5-II**

PROOF OF SERVICE

Comes now, Devon McKenna, authorized representative, by special restricted appearance, hereby gives notice:

Attached Document: PROOF OF SERVICE on Janaya L. Carter, WSBA Bar #32715, ROUTH CRABTREE OLSEN, P.S. 3535 Factoria Blvd. S.E. Ste 200, Bellevue, Washington 98006. Telephone (425) 458-2121, Facsimile (425) 458-2131 and Cassandra Kennan, WSBA #22845, Nigel P. Avilez, WSBA #36699, Davis Wright Tremaine LLP, 1201 Third Ave. Ste 2200, Seattle, Washington, 98101. Telephone (206) 622-3150, Facsimile (206) 757-7700.

Respectfully submitted March 12th, 2010.



Devon McKenna, authorized representative, Seal

1 Actual christian lawful man, injured party,
2 Inhabitant resting on the soil of Washington,
3 Sui Juris.
4

5 **Affidavit of Proof of Service By Devon McKenna**

6 I, Affiant Devon McKenna, is competent to testify and is over the age of majority, and
7 states that the facts contained herein are true and correct, to the best of Affiant's first hand
8 knowledge under penalties of perjury.

9 This is the Affidavit of Proof of Service of Devon McKenna that I, the affiant, served by
10 first class mail 1 copy of the documents listed below on Janaya L. Carter, WSBA Bar
11 #32715, ROUTH CRABTREE OLSEN, P.S. 3535 Factoria Blvd. S.E. Ste 200, Bellevue,
12 Washington 98006. Telephone (425) 458-2121, Facsimile (425) 458-2131 and Cassandra
13 Kennan, WSBA #22845, and Nigel P. Avilez, WSBA #36699, Davis Wright Tremaine LLP,
14 1201 Third Ave. Ste 2200, Seattle, Washington, 98101. Telephone (206) 622-3150,
15 Facsimile (206) 757-7700.

16 A courtesy copy of:

- 17 1. Appellant's Corrected Brief (March 12, 2010).

18 The above Documents were served by first class mail on the above parties, on or about
19 March 12th, 2010, by affiant, Devon McKenna.

20 **FURTHER AFFIANT SAYS NAUGHT**

21
22 
23 _____
24 Devon McKenna, authorized representative,
25 Actual christian lawful man, injured party,
26 Inhabitant resting on the soil of Washington,
Sui Juris.