

NO. 39445-6-II

Pierce County Superior Court No. 08-2-11370-7

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STATE OF WASHINGTON
BY
DEPUTY

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

WILLIAM B. STANCHFIELD,

Plaintiff/Respondent,

v.

IRVING W. JONES and SHIRLEY E. JONES,
husband and wife and the marital community
of them composed,

Defendants/Appellants.

BRIEF OF APPELLANT

Thomas G. Krilich
Attorney for Appellant
Krilich, La Porte, West, &
Lockner, Inc., P.S.
524 Tacoma Ave. S.
Tacoma, WA 98402
(253) 383-4704

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
1. ASSIGNMENT OF ERROR	1
2. STATEMENT OF THE CASE	1
3. STATEMENT OF PROCEEDINGS	2
4. ISSUES PRESENTED	4
1. CAN YOU ACCELERATE THE BALANCE DUE ON A PROMISSORY NOTE THAT DOES NOT PROVIDE FOR ACCELERATION OF THE BALANCE DUE?	4
2. CAN A LENDER ASK FOR A JUDGMENT FOR AN ACCELERATED BALANCE WHEN THE PROMISSORY NOTE CONTEMPLATES RELINQUISHMENT OF THE PROPERTY TO THE LENDER IN THE EVENT OF DEFAULT INSTEAD OF ACCELERATION OF THE BALANCE DUE?	4
3. DO THE PRINTED TERMS OF A STANDARD SHORT FORM DEED OF TRUST SUPERSEDE THE TERMS OF A SPECIFICALLY DRAFTED PROMISSORY NOTE?	4
4. CAN A LENDER RECOVER THE COLLATERAL AS AGREED BY THE PARTIES, AND ALSO RECOVER A JUDGMENT FOR THE UNPAID BALANCE ON THE NOTE?	4
5. ARGUMENT	5
A. <u>Installment payments on a promissory note cannot be accelerated without a provision for it.</u>	5

TABLE OF CONTENTS (CONT.)

B.	<u>The terms of the note at issue supersede any contrary terms of the deed of trust.</u>	6
C.	<u>The note at issue provided for relinquishment of the collateral in lieu of acceleration.</u>	6
D.	<u>The lender drafted a note that gave him an accelerated right to acquire the collateral.</u>	9
E.	<u>A lender cannot have the collateral and a judgment for the unpaid debt.</u>	10
F.	<u>Foreclosure of a deed of trust non-judicially cannot result in the lender having a judgment for any portion of the unpaid balance.</u>	11
G.	<u>Foreclosure of a deed of trust as a mortgage can only be done judicially through a sheriff's sale with various protections for the debtor.</u>	11
H.	<u>The court cannot give the lender both of two inconsistent remedies.</u>	12
6.	CONCLUSION	14
	APPENDIX A-1 (Deed recorded June 3, 2009)	18
	APPENDIX A-2 (Excise Tax Affidavit)	19
	APPENDIX B (Insurance Check)	20

TABLE OF AUTHORITIES

TABLE OF CASES

Llewellyn Ironworks v. J.W. Littlefield, 74 Wash. 86,
132 Pac. 867 (1913) 5

Impoundment of Chev. Truck, 148 Wn.2d 145, at 160,
60 P.3d 53 (2002) 8

REGULATIONS

RCW 61.30.100(3) 10

RCW 61.24 11

RCW 61.24.100(8) 11

RCW 61.24.100(1) 11

RCW 61.12.060 11, 12, 13

RCW 6.21.080 13

RCW 6.23.020 13

WAC 458-61A-208(3)(a) 14

MISCELLANEOUS

18 Washington Practice, §21.29 12

1. ASSIGNMENT OF ERROR

After properly awarding the lender the collateral pursuant to the agreement of the parties, the trial court erred in also granting the lender summary judgment for the unpaid payments on the promissory note, and reasonable attorneys' fees.

2. STATEMENT OF THE CASE

Stanchfield loaned Jones money so that Jones could buy a residence. Stanchfield drafted the promissory note himself, and he also prepared the deed of trust, using a standard form deed of trust (CP 55).

The promissory note (CP 7-8) contained an unusual provision in Section 7 which read as follows:

“ACCELERATION: If Maker fails to make any payment under this Note, or if Maker defaults under Deed of Trust or any other instruments securing repayment of this Note, and such default is not cured within ninety (90) days of such default, then Holder Automatically relinquishes all rights to property as described in Exhibit A.”

The note also contained a provision which provided:

9. “CONFLICTING TERMS: In the event of any conflict between the terms of this Note and the terms of any Deed of Trust or other instruments securing this Note, the terms of this Note shall prevail.”

Jones suffered a minor fire at the residence on January 2, 2008, at a time when the loan was current (CP 129). Jones had fire insurance

which named Stanchfield as an additional insured. Their insurance company tendered a substantial check for restoration of the premises, which was made payable to Jones and Jones' former attorney, as well as Stanchfield. Stanchfield refused to endorse the check, thus preventing the repair of the premises (CP 57).

Jones offered to deed the property to Stanchfield in lieu of foreclosure pursuant to the terms of the note on August 27, 2008 (CP 57).

3. STATEMENT OF PROCEEDINGS

Stanchfield, through counsel, initially filed a verified complaint against Jones on August 12, 2008 which was entitled "Complaint for Breach of Promissory Note and to Vest Title in Plaintiff" (CP 3-9).

On November 7, 2008, Stanchfield, through counsel, filed an "Amended Complaint for Foreclosure of a Deed of Trust as a Mortgage" (CP 12-32). That complaint attached a copy of the promissory note and the deed of trust. That complaint prayed for a judgment for the full accelerated balance of the promissory note, including interest, and for foreclosure of the deed of trust as a mortgage (CP 15-16).

Jones, through counsel, answered the amended complaint on February 13, 2009 (CP 35-38), which answer affirmatively alleged that at the time of filing the amended complaint, there was already a pending “Verified Complaint for Breach of Promissory Note and to Vest Title in Plaintiff.” The answer also denied that attorneys’ fees were payable under the note, which superseded the deed of trust. As an affirmative defense, Jones alleged that the note drafted by Stanchfield provided as its sole remedy for breach a relinquishment of title in the collateral to Stanchfield (CP 37).

Stanchfield made a motion for summary judgment (CP 48-53) and, after argument, the court, on May 29, 2009, entered an “Order on Summary Judgment” (CP 136-139). The order required Jones to deed the real property secured by the deed of trust to Stanchfield within 10 days, and to endorse and deliver to Stanchfield the check from the insurance company in the amount of \$12,552.32 (CP 137). The order went on to award Stanchfield a principal judgment of \$39,870.93 for the then delinquent payments on the promissory note, plus attorneys’ fees of \$13,321.25. The order further allowed Stanchfield to sue Jones in the future for the remaining installment payments on the note as they became due (CP 138).

On June 18, 2009, Jones filed a timely Notice of Appeal.

Pursuant to the terms of the Order of Summary Judgment, Stanchfield recorded the deed to the real property from Jones on June 3, 2009. A copy of the recorded deed, along with its excise tax affidavit, is attached hereto as Appendix A-1 and A-2.

Jone also endorsed the insurance check in the amount of \$12,552.32, and delivered it to Stanchfield. A copy of said check is attached as Appendix B.

4. ISSUES PRESENTED

1. CAN YOU ACCELERATE THE BALANCE DUE ON A PROMISSORY NOTE THAT DOES NOT PROVIDE FOR ACCELERATION OF THE BALANCE DUE?

2. CAN A LENDER ASK FOR A JUDGMENT FOR AN ACCELERATED BALANCE WHEN THE PROMISSORY NOTE CONTEMPLATES RELINQUISHMENT OF THE PROPERTY TO THE LENDER IN THE EVENT OF DEFAULT INSTEAD OF ACCELERATION OF THE BALANCE DUE?

3. DO THE PRINTED TERMS OF A STANDARD SHORT FORM DEED OF TRUST SUPERSEDE THE TERMS OF A SPECIFICALLY DRAFTED PROMISSORY NOTE?

4. CAN A LENDER RECOVER THE COLLATERAL AS AGREED BY THE PARTIES, AND ALSO RECOVER A JUDGMENT FOR THE UNPAID BALANCE ON THE NOTE?

5. ARGUMENT

A. Installment payments on a promissory note cannot be accelerated without a provision for it.

It has long been the law in the state of Washington that you cannot accelerate the balance due on an installment note unless the note contains an acceleration provision. In **Llewellyn Ironworks v. J.W. Littlefield**, 74 Wash. 86, 132 Pac. 867 (1913), the court considered suit to recover installments not yet due at the time of commencement of the action under a promissory note that did not contain a provision for acceleration of the balance. The court, beginning at page 89, held:

“It is argued that failure to meet the payments as they became due caused the entire debt to mature and become at once payable notwithstanding the specifications as to the times of payment, but this contention cannot be sustained. There is no clause in the note providing that, in the event the payments are not made at the time specified, that the whole sum shall, or may at the election of the creditor, become due and payable, in the absence of which, delinquency as to certain payments does not mature the entire debt.”

In this immediate case, the promissory note does not provide for acceleration of the balance.

B. The terms of the note at issue supersede any contrary terms of the deed of trust.

Stanchfield then argues that one of the terms of the deed of trust executed in conjunction with the promissory note contains an acceleration provision, which would justify acceleration of the full balance of the note. While Jones does not necessarily agree with Stanchfield's contention that a term in the deed of trust can be read into the promissory note, it is especially not true in this case.

The promissory note, in section 9, very specifically states:

“CONFLICTING TERMS: In the event of any conflict between the terms of this Note and the terms of any Deed of Trust or other instruments securing this Note, the terms of this Note shall prevail.” (CP 7)

C. The note at issue provided for relinquishment of the collateral in lieu of acceleration.

The promissory note, in section 7, clearly addresses “acceleration.” Section 7 is even denominated as “Acceleration.” That paragraph goes on to say that in the event of default, the debtor is supposed to relinquish all rights to the property to the lender after 90 days (CP 7). That provision clearly confirms that the parties did not ever contemplate that there would be an acceleration of the balance of the note. There did not have to be any acceleration of the balance of

the note because the property was to be turned over to the lender (Stanchfield), rather than foreclosed judicially or non-judicially, which would open up the possibility of acquisition by a third party bidder.

The intention of Stanchfield in drafting paragraph 7 of the promissory note is made clear by two different actions of his:

1. The parties had a prior dealing where Stanchfield loaned money to Jones on other property secured by a deed of trust using a promissory note which he drafted that contains the same acceleration provision as the note which is the subject of this appeal (CP 56, 75). When there was a potential default in that other note because of a delinquent property tax payment, Stanchfield provided a written notice to Jones saying: "If the taxes are not up to date in the 90 day time frame required in paragraph 7 of the PROMISSORY NOTE, the time frame beginning January 1, 2006, I intend to take over the property." (CP 56, 77)

2. Stanchfield's original complaint in this case was entitled "Complaint for Breach of Promissory Note and to Vest Title in Plaintiff." (CP 3). Section IV of that complaint refers specifically to the relinquishment of interest in the property described in the note.

The argument cannot be made that the promissory note does not address acceleration of the balance. The note clearly intended to address the acceleration issue because section 7 is entitled “Acceleration” (CP 7). In this regard, there is clearly a conflict between what is provided for in the note, and what is provided for in the deed of trust as an option for accelerating the balance due. By the terms of section 9 of the note, this apparent conflict between the acceleration provision of the note and the acceleration provision of the deed of trust has to be resolved in favor of the provision found in the promissory note drafted by Stanchfield.

The promissory note does not provide for recovery of reasonable attorneys’ fees. It is also basic law in Washington that in the absence of either a contractual provision, a specific statutory authority, or a recognized ground in equity, there is no right to recover reasonable attorneys’ fees in any litigation, only statutory attorneys’ fees. **Impoundment of Chev. Truck**, 148 Wn.2d 145, at 160, 60 P.3d 53 (2002).

Stanchfield demanded a key to the premises, ostensibly just for the purpose of doing an inspection or appraisal. The fact is, Stanchfield then kept the key (CP 57) and then availed himself of more access on

different occasions than was necessary for an inspection or appraisal. As the testimony from the non-party witness, Connie Maglione, verifies, Stanchfield apparently even advised the Police Chief that “he had taken repossession of the premises.” (CP 87-88)

When Stanchfield filed his original complaint in this proceeding, it was for the purpose of vesting title in the property in himself, which is consistent with not only the language in the promissory note, but also consistent with the understanding of the parties as set forth in the declaration of Shirley Jones (CP 55-56).

D. The lender drafted a note that gave him an accelerated right to acquire the collateral.

The lender in this case created a promissory note that did not provide for acceleration of the balance, but did provide, in section 7, for a remedy that is very much like the forfeiture remedy in a retail installment contract. That is, section 7 of the note clearly has the borrower relinquishing all right to the secured property to the lender after 90 days notice, without any type of sale, either judicial or nonjudicial.

E. A lender cannot have the collateral and a judgment for the unpaid debt.

Under Washington's Real Estate Contract Forfeiture Act, specifically RCW 61.30.100(3):

The seller shall be entitled to possession of the property 10 days after the declaration of forfeiture is recorded....and
(4)...the seller shall have no claim against and the purchaser shall not be liable to the seller for any portion of the purchase price paid, or for any other breach of the purchaser's obligations under the contract, except for damages caused by waste to the property to the extent such waste results in the fair market value of the property on the date of the declaration of forfeiture is recorded being less than the unpaid monetary obligations under the contract and all liens or contracts having priority over the seller's interest in the property."

If by drawing the promissory note with a real estate contract forfeiture-like provision has rendered the transaction between the parties the equivalent of a real estate contract, then Stanchfield would be entitled to possession of the property and Jones would have no further interest therein. Stanchfield would be allowed to keep all of the monies paid, but would have no claim against Jones for any of the unpaid portion of the obligation.

Stanchfield did have Jones execute a statutory form deed of trust as collateral for the note. That arrangement made sure that Jones could not dispose of the property prior to the time that it might be

relinquished to Stanchfield pursuant to the terms of paragraph 7 of the note.

F. Foreclosure of a deed of trust non-judicially cannot result in the lender having a judgment for any portion of the unpaid balance.

Under Washington's deed of trust statute (RCW 61.24), the beneficiary under a deed of trust can either foreclose the said deed of trust nonjudicially by means of a trustee's sale; or judicially as in the nature of a mortgage. RCW 61.24.100(8).

If this particular deed of trust had been foreclosed nonjudicially, then there would have been a trustee's sale at which Stanchfield could have acquired the property, but in no way could he have had any kind of a judgment against Jones for any unpaid portion of the debt. RCW 61.24.100(1).

G. Foreclosure of a deed of trust as a mortgage can only be done judicially through a sheriff's sale with various protections for the debtor.

If the deed of trust in this case were treated as a mortgage, then it could only be foreclosed by a judicial sale. RCW 61.12.060.

The holder of a deed of trust, if he elects to treat it as a mortgage, cannot acquire title to the property, except by being the successful bidder at a sheriff's sale. If there was a proper acceleration clause, he could have gotten judgment for the unpaid balance of the note, but he would have to credit whatever was paid at the sheriff's sale, and the sale would have been subject to the debtor's equity of redemption, as well as the debtor's right to ask the court to fix an "upset price." RCW 61.12.060. In this case, the lender provided for an expedited method of obtaining title to the collateral. He can't have the collateral and all of the purchase price as well.

H. The court cannot give the lender both of two inconsistent remedies.

It is respectfully submitted that a court cannot grant Stanchfield two inconsistent remedies, those two remedies being: a) possession and title to the collateral; and b) a judgment for the balance of the debt.

"It is a principle of remedial law that a party may not have two different remedies that are "inconsistent" with each other. Remedies are "inconsistent" when they would allow a double recovery for the same cause of action. We assume that the plaintiff has a cause of action upon which he might obtain more than one remedy, and we say, "you may have either one, but not both; you must elect between them."

18 Washington Practice, §21.29 at page 502.

Nowhere in the law is a party, as either a lender or a seller, entitled to recover both the collateral and a judgment for any unpaid portion of the purchase price or loan.

Stanchfield's drafting of the unusual language in paragraph 7 of the promissory note was done deliberately to give him an advantage in the foreclosure process. Had he inserted a standard provision for the acceleration of the balance instead of the provision for relinquishment of the property, then, upon a default, he would have had to elect between foreclosing the deed of trust nonjudicially or as a mortgage. Either way, he would have had to relinquish it to face a public sale. If he foreclosed the deed of trust nonjudicially, then there would be a trustee's sale at which anyone could bid. If he elected to treat the deed of trust as a mortgage and foreclose it judicially, then, at the sheriff's sale, anyone could have bid on the property, and there could have been a minimum or upset price set by the court, RCW 61.12.060, and there would have been a year-long redemption period. RCW 6.21.080, 6.23.020.

Stanchfield sought to accelerate the process so that in the event of default uncured after 90 days, he would acquire the property by having Jones relinquish it without having to face the risk of losing the

property to someone else at a public sale, or having to worry about a redemption, or an upset price

Jones understood the language of paragraph 7 in exactly the same way. They understood that in the event of default, Stanchfield's only remedy was to take the property back, and that they were obligated to give it back to him (CP 55). Mrs. Jones even testified that:

"We never would have borrowed the \$250,000 if Stanchfield had the option to sue us for the balance of the note because we did not want to risk losing our commercial property where my husband has his auto repair shop and I have my beauty shop business." (CP 56).

The excise tax affidavit (Appendix A-2) that was filed with the deed in lieu of foreclosure recited that it was exempt from excise tax because of WAC 458-61A-208(3)(a). That section clearly states:

"The real estate excise tax does not apply to the following transfers where no additional consideration passes:

(a) A transfer by deed in lieu of foreclosure to satisfy a mortgage or deed of trust."

5. CONCLUSION

Stanchfield loaned money to Jones under the terms of a promissory note he drew which evidenced a somewhat unusual arrangement. That unusual arrangement was that in the event of default lasting more than 90 days, the lender's only remedy was to acquire the

property from the borrower who was obligated to relinquish all interest in the collateral. That is not an option available to a lender under the terms of a typical promissory note and a standard deed of trust, which could be foreclosed judicially or non-judicially. In the event of either a judicial or non-judicial foreclosure, the property would go up for a public sale, at which other people could bid, and at which the borrower might have a chance of receiving something for the borrower's equity in the property.

The deal negotiated by the lender (Stanchfield), as evidenced by the promissory note which he drafted, was that instead of the property going up for a public sale at which the borrower might recover something, the borrower was going to forfeit his interest back to the lender. That is a somewhat unusual situation, but it is one that the parties negotiated and memorialized in their written agreement (the promissory note).

Stanchfield did not reserve an option to accelerate the balance and sue for a money judgment. He in fact replaced that typical option by inserting paragraph 7 in the promissory note which provided for a different form of acceleration, which would give him a more immediate

remedy in the form of a right to acquire the property without a judicial or non-judicial foreclosure.

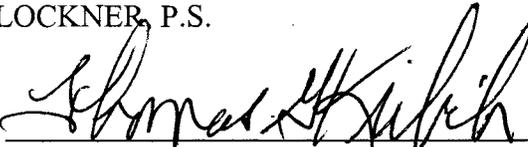
The promissory note did not contain a provision for attorneys' fees.

By actually taking title to the property back as a result of recording the deed in lieu of foreclosure, Stanchfield has elected a remedy, that is, the remedy of acquiring the collateral. He can't also have a judgment for any unpaid portion of the promissory note. That would amount to the lender "having his cake and eating it, too."

That portion of the "Order on Summary Judgment" awarding Stanchfield the property and the insurance check should be affirmed, and those portions awarding him monetary judgments should be reversed and deleted from the said summary judgment.

Respectfully submitted this 3rd day of August, 2009.

KRILICH, LA PORTE, WEST
& LOCKNER, P.S.

By 
Thomas G. Krilich, WSBA #2973
Attorney for Appellant

CERTIFICATE OF SERVICE

I, DAWNE SHOTSMAN, hereby certify under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

On August 3rd, 2009, I delivered a true and accurate copy of the foregoing Brief of Appellant, via first class mail, to:

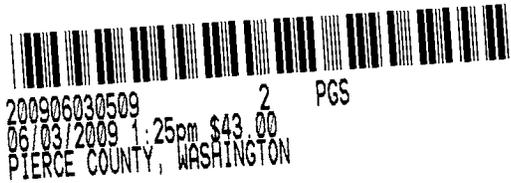
William B. Stanchfield
5610 N 44th Street
Tacoma WA 98407-2825

DATED: August 3rd, 2009, at Tacoma, Washington.

Dawne Shotsman
Dawne Shotsman

2009 AUG 3 11:38:57
STATE OF WASHINGTON
DEPT. OF APPELLATE
COURTS
BY *[Signature]*

APPENDIX A-1



After Recording Return to:
Thomas G. Krilich
Krilich La Porte West & Lockner
524 Tacoma Avenue South
Tacoma WA 98402

QUIT CLAIM DEED IN LIEU OF FORECLOSURE

Auditor's Reference Number: 200707170487

Grantor: JONES, IRVING W; JONES, SHIRLEY E.

Grantee: STANCHFIELD, WILLIAM B.

Legal Description: Lots 5-8, Argyle Addition to Tacoma, W.T.

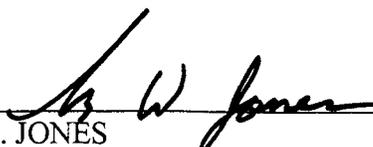
Additional legal description on page ____

Assessor's Parcel No.: 2225000080

THE GRANTOR, IRVING W. JONES and SHIRLEY E. JONES, husband and wife, for and in consideration of in lieu of foreclosure (WAC 458-61A-208(3)(a), convey and quit claim to **WILLIAM B. STANCHFIELD**, the following described real estate situated in the County of Pierce, State of Washington, together with all after acquired title of the Grantor therein.

Lots 5 to 8, inclusive Block 2, Argyle Addition to Tacoma, W.T., according to plat thereof recorded in Volume 2 of Plats, page 153, in Pierce County, Washington.

DATED MAY 14, 2009



IRVING W. JONES



SHIRLEY E. JONES

06/03/2009 1:21pm RCAROVA
EXCISE COLLECTED: \$0.00
JAN SHABRO, AUDITOR
PIERCE COUNTY, WA
4213325 1 PG
PRO.FEE:\$5.00
STATE FEE:\$5.00

APPENDIX A-2



REAL ESTATE EXCISE TAX AFFIDAVIT

This form is your receipt when stamped by cashier.

PLEASE TYPE OR PRINT

CHAPTER 82.45 RCW - CHAPTER 458-61A WAC

THIS AFFIDAVIT WILL NOT BE ACCEPTED UNLESS ALL AREAS ON ALL PAGES ARE FULLY COMPLETED

(See back of last page for instructions)

Check box if partial sale of property

If multiple owners, list percentage of ownership next to name.

Form sections 1 and 2: Seller/Grantor and Buyer/Grantee information including names, addresses, and phone numbers.

Form sections 3 and 4: Property tax correspondence and street address information.

Form section 5: Land Use Code selection and exemption questions.

Form section 6: Forest land or current use designation questions.

Form section 7: Continuation notice and signature lines.

Form section 8: Compliance notice and signature lines.

Form sections 7 and 8: Personal property inclusion and tax calculation table.

Form sections 9 and 10: Exemption details and document information.

Form sections 11 and 12: Tax calculation table with fields for Gross Selling Price, Excise Tax, and Total Due.

Form sections 13 and 14: Signature and date lines for Grantor and Grantee.

For reference only, not for re-sale.

Form sections 15 and 16: Perjury statement and signature lines.

Perjury: Perjury is a class C felony which is punishable by imprisonment in the state correctional institution for a maximum term of not more than five years, or by a fine in an amount fixed by the court...

Form sections 17 and 18: Barcode, payment information, and official stamps.

APPENDIX B

Check Number: 3351043152
Date: 04/24/2008

PAY NON-NEGOTIABLE NON-NEGOTIABLE NON-NEGOTIABLE NON-NEGOTIABLE \$12,542.35
NON-NEGOTIABLE NON-NEGOTIABLE NON-NEGOTIABLE NON-NEGOTIABLE

To C/O: Levandowski & Wayne Jones &
the Shirley Jones & William Stanchfield
order 730 Fawcett Ave
of Tacoma, Wa, 98402

Claimant/Patient: Wayne I Jones And Shirley Jones
Insured: Wayne I Jones And Shirley Jones
Date of Loss: 01/02/2008
Claim Number: 1011371708-1
Check Number: 3351043152
Payment Under Insured's: Building
Correspondence Reference: H1\$4LD5M
Reference Number:

COPY RECEIVED
APR 28 2008
LEVANDOWSKI & ASSOCIATES

RE-ISSUE OF ACV BLG REPAIRS

73-0282 3-03 120001



FARMERS

62-20/311

Mid-century Insurance Company
2500 South Fifth Avenue
POCATELLO, ID 83204

Claim #: 1011371708-1
SALN: 4H027195

Check No. 3351043152
Date: 04/24/2008

PAY Twelve Thousand Five Hundred Forty Two Dollars And Thirty
Five Cents

\$12,542.35

NOT GOOD AFTER SIX MONTHS

To C/O: Levandowski & Wayne Jones &
the Shirley Jones & William Stanchfield
order 730 Fawcett Ave
of Tacoma, Wa, 98402

Citicorp Delaware, A Subsidiary of Citicorp One Penn's Way, New Castle, DE 19720

THE ORIGINAL DOCUMENT HAS A REFLECTIVE WATERMARK ON THE BACK.

HOLD AT AN ANGLE TO VIEW WHEN CHECKING THE ENDORSEMENT.

⑈ 3351043152 ⑈ 1031100209⑈

3872469⑈