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COURT OF APPEALS  
DIVISION II

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

ROGER A. LEE & ELIZABETH LEE,  
HIS WIFE, APPELLANTS

v.

JON PARKER, TRUSTEE AND  
TIMBERLAND BANK, a corp. ,  
RESPONDENTS

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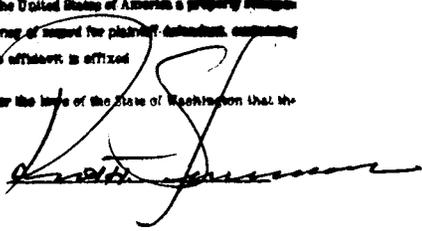
OPENING BRIEF OF APPELLANTS

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On this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the attorney of record for plaintiff defendant, containing a true copy of the document to which this affidavit is affixed.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

9-24-09



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"1. Judgment should be entered in favor of Defendants against Plaintiffs Roger A. Lee and Elizabeth Lee for attorney's fees and costs ordered plus interest from the date of each order at the rate of 12% per annum."

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#### IV. Statement of the Case

##### A. Prologue

It is common knowledge these days that massive mortgage foreclosures have produced chaos in the industry. Some of the turmoil arises from the sale by original lenders to remote purchasers of thousands of mortgages and notes in "packages." Instead of a borrower dealing with his original loan provider, during the life of his mortgages, he winds- up with a completely foreign holder of his documents. Often, the borrower is never aware that his mortgage has been transferred by sale. This case involves such a scenario.

One aspect of the "package" sale is often the original lender, after the sale, remains as "servicer" of the mortgage on behalf of the remote mortgage- purchaser or of subsequent investors of the "packages."

All of these machinations by the original lender (who is anxious to realize his profit as early as possible on the loan) has led to confusion and loss of mortgage documents in the paper transfers by sometimes numerous assignments.

When defaults occur, the "servicers" commence foreclosure, often in their own names( as in the instant case)without identifying the true owner. Few ever question the right of a "servicer" to foreclose and sell the property. Many borrowers never learn the name or see their original notes and mortgages after the initial loan. And most, never ask

for proof of the original documents and the holder of those documents, because of default.

In this case, the Lees were justifiably concerned whether a third party might have a claim against them after the foreclosure and sale of their home by the Timberland Bank, the original lender. They wanted to see the original documents and some proof of ownership. Their request was summarily refused.

B. There are no disputed issues of fact here.

In January of 2006, the Lees borrowed \$350,000 from Timberland Bank to purchase a home in Ocean Shores, Washington. They deposited approximately \$55,000 cash as a down payment. Over a period of about two years, they paid Timberland approximately \$64,800 in principal and interest. As security, the Lees executed a note and deed of trust for the balance owed. CP 105 – 107.

Timberland sold and transferred Lee's note and mortgage to Freddie Mac, a quasi-federally financed mortgage company. Freddie Mac purchased packaged mortgages and resold some of them to other investors. It is common knowledge that Freddie Mac is in federal conservatorship in another federal agency called the Federal Housing and Finance Agency. None of this is in dispute. CP 105 – 107.

The Lees had no knowledge of Timberland's sale and continued to make their monthly payments to Timberland. CP 103.

After two years, the Lees were unable financially to continue their payments. On October 15, 2008, the trustee gave them Notice of Default. The Lees were advised that failure to cure the default could lead to recordation, transmittal and publication of a Notice of Trustee's Sale. The Notice of Default was given on behalf of Timberland Bank by the trustee, Jon Parker. CP 1 – 103.

On December 4, 2008 the trustee gave the Lees Notice of Foreclosure and Notice of Trustee's Sale. Again, there was no mention of Freddie Mack as beneficiary: only Timberland was named. CP 1- 103.

The Lees responded by requesting the trustee to advise them who held their original note and assignments reflecting proof of ownership. The trustee denied the request. He referred the Lees to Freddie Mac's office located in McLean, Virginia, gave its address and phone number, and sent the Lees *copies* of their note and deed of trust. CP 109 – 112 and CP 105 – 107.

In March, 2009, the Lee's, concerned that their note and deed of trust had been sold, wondered how many *other investors* might have been involved in the sale and transfer, and whether they would be responsible to transferees other than Freddie Mac. CP 1 – 103 ; RCW 62A3.309 (b) .

The Lee's Complaint was filed in King County on March 31, 2009 seeking an accounting from the trustee of the holder and owner of their original note with a record of all assignments or transfers reflecting how Freddie Mac ended- up with their documents. The Lees asked the Court to void the foreclosure sale *until* the documents and proof was produced. The Complaint also sought damages against the trustee because of his failure to produce the documents and his clear *conflict of interest* in the case. CP 1 – 103.

The response was a Motion to Change Venue to Grays Harbor County on the theory that the Lees were attempting to restrain the sale and venue lay in the county where the property was located. The trial judge granted the change and assessed \$2,568 in attorney's fees against the Lees, while rejecting their theory of an personam accounting that generally could be brought in any county in which jurisdiction was obtainable over Timberland Bank. CP 1 – 103.

When the case reached Grays Harbor County, Lee moved to join *Freddie Mac* as a party and filed an Amended Complaint. CP 105 –107 and CP 109 – 112. The trustee responded by contesting the motion and sought additional attorney's fees against the Lees. The motion to add a party was denied with an additional attorney's fee and costs awarded of \$3,437.50. The order of denial was tantamount to a dismissal with prejudice of the entire case. This appeal followed. CP 131-132, CP 143 – 144, CP 145 – 147, CP 104, CP 113- 121; 148 – 154.

## V. ARGUMENT

### A. THE LEES HAVE A LEGAL RIGHT TO HAVE THE HOLDER AND OWNER OF THEIR ORIGINAL NOTE AND ASSIGNMENTS PRODUCE THOSE DOCUMENTS BEFORE FORECLOSURE AND SALE OF THEIR EQUITY

The exposure to collection of the original note and deed of trust by more than one transferee is a reasonable basis for the Lee's request for production of the original note and all assignments of their documents. Procedural due process provides a borrower with the protection of notice and an opportunity to be heard before deprivation of property occurs. The Lees sought a hearing in court on this question *prior* to foreclosure and sale. The denial of their motion to add Freddie Mac as a party violates the due process clause of the Fourteenth Amendment. Fuentes v. Shevin, 407 U.S. 67 (1972), Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). Fuentes and Sniadach require notice and opportunity to be heard at a meaningful time and in a meaningful manner when property deprivation is involved. The Lees had a substantial equity in their home to be taken. Armstrong v. Manzo, 380 U.S. 545 (1965).

An essential element of a *hearing* is one on the merits of the case when a deprivation of property is present, together with the right to present every available defense or offense. Lindsey v. Normet, 405 U.S. 56, 66 (1972).

The Lees are deprived of their property interest (1) by the taking of all of their *equity* in their home without compensation (approximately \$120,000), and (2) a substantial reduction of their ability to be able to *sell* the house after the time the trustee records the notice of sale and (3) a substantial reduction in any equity to *borrow* against at the time of the recording of the notice of sale. These kinds of deprivations are covered by the protection of the Fourteenth Amendment. Sniadach (pre-judgment attachment is a deprivation); Fuentes (temporary significant property interest); Goldberg v. Kelly, 397 U.S. 254 (1970) (temporary termination of welfare benefits). The doctrine applies to all Court and judicial hearings.

The trial Court cut- off any hearing by refusing to permit joinder of Freddie Mac, and in effect, ended any opportunity to present the merits of the case.

In this case, Timberland Bank, characterizing itself as a "servicer" for Freddie Mac, *named itself* as the foreclosing *beneficiary* in the Notices. The fact is that Timberland is *not the holder and owner* of the original note and deed of trust and has no standing to foreclose and sell the Lee's home *prior* to the production of the instruments by the true owner. Proof of a mortgage obligation is the central issue in foreclosure. RCW 61.24.100; RCW 61.24.030(6)(j); RCW 61.24.040(2).

A 2007 federal case from Ohio points up the problem. In Re Foreclosure Cases, 521 Fed Sup. 2nd 650 (S.D. Ohio 2007). The Plaintiff commenced 14 mortgage foreclosures as though it was original owner of the notes and mortgages. In fact the Plaintiff was not the owner and was unable, or could not produce the owner. The Court

observed that nothing in the title reports indicated the Plaintiff was in the chain of title at all and *held that all of the foreclosures must be restarted in the name of the owners of the obligations with proof of that ownership.* The cases were dismissed without prejudice.

The Foreclosure Cases track what has occurred in the Lee case. Timberland is the named owner beneficiary and Freddie Mac is not named. Timberland is not the real party in interest and should be ordered to commence the foreclosure and sale again in the name of the owner, with proof of ownership of the original documents. RCW 62A. 3-308 of the Uniform Commercial Code sets down what an *enforcer* of an obligation must show:

- (1) (that) it is the holder of the original note by transfer,
- (2) it has possession of the obligation;
- (3) it can show title to the note runs to it;
- (4) if an agent seeks to enforce the obligation it must show its principal is the owner and holder of the note.

However, if a person not in possession of an instrument is not entitled to enforce it because the instrument is lost, stolen or destroyed, that person (Timberland Bank) must show under RCW 62A. 3 – 309:

- ...(a) (the) person not in possession of an instrument is entitled to enforce the instrument *if ...* (ii) the loss of possession was not the result of a transfer by the person...(Emphasis added).

Here, Timberland and the trustee not only were not in possession of Lee's instruments, Timberland had transferred them. The originals have never been produced and more than likely, are lost or destroyed.

The Uniform Commercial Code seeks to protect people like the Lees from being forced to pay twice or more by reason of a claim by an unknown separate transferee and sale of the same obligation. RCW 62.A. 3 – 309:

- (b) A person seeking to enforce an instrument under subsection
- (a) (a lost, destroyed or stolen instrument) must prove the terms of the instrument and the person's right to enforce the instrument ... the Court may not enter a judgment in favor of the person seeking enforcement *unless* it finds that the person required to pay the instrument is *adequately protected* against loss that might occur by reason of a claim by another person to enforce the instrument. (Emphasis added).

Deeds of trust are subject to our mortgage laws. RCW 19.144.005. When foreclosure notices and sale are instituted by an assignee or “servicer”, the Notices must reflect title in the *true holder* of the original note and deed of trust. Martin v. Frank, 259 Ill. App. 417 (true owner of the note and mortgage must be disclosed in foreclosure); Iland Pond Nat. Bank v. Lacroix, 158, 684, 104 Vt. 282.

B. FREDDIE MAC IS A NECESSARY AND  
PROPER PARTY TO THIS ACTION

Our joinder rules under CR 19 & CR 20 provide for joinder of persons needed for a just adjudication. In Onvick v. Fox, 65 WA 71 828 P2d 12 (1992), the Court observed that the failure of the trial court to enter findings concerning the refusal to allow joinder was an abuse of discretion. The trial court must, in a two part inquiry, first determine adjudication. If the person is needed, then whether that person's absence would prevent

the court from affording complete relief to the existing parties or whether his absence would impair that person's interest or subject an existing party to inconsistent or multiple liability. It is *mandatory* to allow joinder when a complete determination of the case cannot be made without the presence of another party. Lindberg v. Kitsap County, 33 W2d 729, 948 P2d 805 (1997).

In this case, Freddie Mac is allegedly the owner and holder of Lee's original note and assignments, but not the disclosed owner in the foreclosure. Freddie Mac is the real party in interest and should be joined as a party. Denial is an abuse of discretion.

C. IT IS AN ABUSE OF DISCRETION TO ALLOW  
ATTORNEY'S FEES WHEN THE LEE'S NOTE AND DEED OF TRUST  
THAT IS EXTINGUISHED BY FORECLOSURE AND SALE

In Washington, attorney's fees are allowed based upon a statute, contract or other rate equitable grounds. City of Seattle v. McReady, 131 W2d 266, 931 P2d 156 (1997).

In the Grays Harbor trial court, the court awarded the trustee attorney's fees based upon Lee's note and deed of trust even though they had been merged in a foreclosure and sale of the property, and as a matter of law, *extinguished*. CP 104.

When a *mortgagee* acquires the *entire interest* in the obligation and the lien of the mortgage, the debt is discharged as a matter of law by payment or accord, extinguishing both the debt and the lien. This rule is founded on the premise that the intention, actual

or presumed, is to merge both estates. Connecticut Ins. Co. v. Demmick, 105 W265, 177 P2d 676 (1919); Van Woerden v. Union Imp. Co., 156 W 555, 287 P2d 870 (1930); Hilmes v. Moon, 168 W 222, 11 P2d 253 (1932), 93 ALR 1; 46 ALR 322 & 95 ALR 89; Osborne on Mortgages, Sec. 274.

When Freddie Mac acquired *both* the debt and the lien of the mortgage both were extinguished and merged into the fee. There is no redemption under the Deed of Trust Act or excess judgment. The trial court had no note or deed of trust to award fees and costs and the order is reversible error. CP 145 – 147.

D. THE TRUSTEE BREACHED HIS FIDUCIARY DUTY TO THE LEES BY REFUSING THEIR REQUEST, FAILING TO RESIGN OR HAND HIS ROLE OFF AND CONTINUE LEE'S CASE FOR HEARING

A trustee under a deed of trust is under an exceedingly high fiduciary duty. Cox v. Helenius, 103 W2nd, 383, 389, 693 P2d 683 (1985). The trustee was acting for *both* the Lees and Timberland Bank. The trustee refused the Lee's request to produce the original note and deed of trust for examination before he proceeded with the foreclosure and sale of the Lee's home. He has never produced the original documents and repeatedly has sought to *punish* the Lees for requesting those documents. This conflicts directly with the trustee's duties of *good faith* to Lees. CP 1-103.

The trustee has also fought all attempts of the Lees to ascertain the true owner of their instruments. The conflict of interest was plain from the date of the request in March

of 2009. And yet, the trustee, while serving on the Board of Directors of the Timberland Bank (the allegation has never been denied), refused to *resign* as trustee or to recruit *another trustee* to avoid the conflict. CP 1 – 103.

But the trustee's conflict of interest is most serious when *the* trustee, in the face of the action by the Lees to obtain a hearing, refused to *continue the sale* of the home temporarily CP 1-103

In Helenuis, supra, a home owner sought damages against a trustee under a deed of trust for breach of his fiduciary obligations to the homeowner. The trustee was aware of the owner's action to prevent the foreclosure, but went ahead and sold the property at an inadequate price. The Court voided the sale and found that the trustee had clearly breached his fiduciary duties to the grantor owner. The Court recognized that the Deed of Trust Act was passed to provide an efficient and inexpensive method and process of foreclosure and for protection against wrongful foreclosure. The Court then observed that while a trustee is not required to protect the owner's interest, he is a fiduciary for *both* the mortgagee and mortgagor and must act *impartially* between them. The trustee's sale of the property *in light of his knowledge of the facts* was a conflict and produced damages to the grantor to whom he owed a high fiduciary duty.

The Helenuis Court held that when an actual conflict arises, a trustee must transfer his role to another person. Meyers Way v. University Sav., 80 WA 655 (1996)

(adopted the Helenuis rule of transfer to another person when the trustee has a role conflict).

The Lees contested the sale by the trustee by filing this action. RCW 61.24.040 (2). The trustee ignored the suit as in Helenuis, and failed and refused to transfer his obviously conflicted role to another or, continue the sale. He and Timberland are liable in damages for the trustee's breach to the Lee's, the cost to them of bringing this lawsuit and their emotional distress in so doing.

#### E. Conclusions

1. The request of the Lees for production of their original documents and assignments was reasonable in light of the deprivation of their home equity and exposure to third party claimants on their debt.

2. The refusal, and in effect, a dismissal of Lee's action is a constitutional denial of due process protection of notice and a hearing prior to deprivation of their home equity.

3. The Lee's obligation on the debt and the deed of trust was extinguished upon the purchase of their home by Freddie Mac and no contract exists upon which to assess attorney's fees and costs against them.

4. Freddie Mac foreclosed and purchased the Lee's home and is a proper party in this action in order to discover the true owner of their obligation.

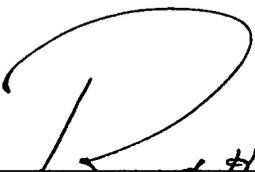
5. The trustee breached his high fiduciary duties to the Lees when he refused to produce their original documents, failed to foreclose in the name of the alleged holders and owners of those instruments, and failed to resign or continue the Lee's case before selling their home equity.

6. This case should be reversed and the Lee's case remanded with instructions to allow joinder of Freddie Mac and a full hearing on all issues.

7. Because of the obvious bias of the trial judge, a new judge should be assigned to this case so that the Lees may have a fair and equitable hearing.

DATED this 24<sup>th</sup> day of September, 2009.

Respectfully submitted,

  
\_\_\_\_\_  
Robert H. Stevenson, WBA 519  
Attorney for the Appellants

