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DIVISION II

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No.43811-9-II

STATE OF WASHINGTON

COURT OF APPEALS DIVISION II  
OF THE STATE OF WASHINGTON

BY   
DEPUTY

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SANDRA PEGER, an individual,

Plaintiff/Appellant,

v.

PLATT IRWIN LAW FIRM, P.S., et al,

Defendants /Respondents

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OPENING BRIEF

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## ASSIGNMENTS OF ERROR

### **The Commissioner erred by awarding CR 11 sanctions against the Stafne Law Firm.**

- 1) The Commissioner erred in finding “the complaint to have been signed without having made reasonable inquiry into the facts under the circumstances.”

## ISSUES ON APPEAL

### **Whether the Commissioner erred by awarding CR 11 sanctions against the Stafne Law Firm?**

- 1) Whether attorneys’ law firm should be sanctioned pursuant to CR 11 for not withdrawing their complaint where: The client had requested information about the ownership of her promissory note and Deed of Trust (DOT) through RESPA and TILA requests; Servicer refused to answer; and attorneys had less than one day from being notified of removal of bankruptcy protections to prepare action to restrain sale under RCW 61.24.127 and 130, or waive certain causes of action based, in part, on defendant’s failure to produce the promissory note?

## STATEMENT OF THE CASE

### **Statement of Facts**

There are four declarations relating to the sanctions issue. These include: a declaration in support of the motion for a restraining order

signed by Andrew Krawczyk, a declaration in opposition to the motion signed by Kammah Morgan, a declaration signed by the trustee, Gary Colley in support of attorney fees, and Sandra Peger's verification of the complaint.

Andrew Krawczyk, an associate attorney at the Stafne Law Firm, filed his "declaration certifying efforts to give notice and in support of Ms. Peger's motion for a temporary restraining order." CP 29-31. Krawczyk testified that he was retained by Ms. Peger on June 29, 2012, while the property was protected by a pending bankruptcy stay. CP 29, ¶ 2. On July 5, 2012, Krawczyk was advised by Peger's Bankruptcy Attorney, that the bankruptcy had been lifted and the trustee had rescheduled the foreclosure sale for July 13, 2012. CP 29 ¶ 3. On that same day (July 5, 2012) Krawczyk prepared and sent unfiled pleadings by Federal Express to Gary R. Colley, the trustee, and First Federal Savings and Loan (First Federal), the alleged beneficiary and owner of the note, in an attempt to notify them of Peger's attempt to restrain the sale pursuant to RCW 61.24.130. CP 30.

Krawczyk testified in his declaration that in preparing the pleadings for the restraining order, he relied upon his:

client's story, the letter and lack of response by defendant First Federal to debt validation and/or other written

requests for information<sup>[1]</sup>, numerous pleadings filed in other matters involving banks, both large and small<sup>[2]</sup>, involving robo signing<sup>[3]</sup> and transfers without prior notice<sup>[4]</sup>, the title records, copies of my Client's Deed of

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<sup>1</sup> The "Ninth Cause of Action: Violation of RESPA/TILA" (CP 124, ¶¶ 126-29) does apply to servicers and should not have been ignored by First Federal because Ms. Morgan viewed the letters as being based only on the Fair Debt Collection Practices Act. *Compare* Morgan declaration, CP 76, ¶ 10 with the Real Estate Settlement Procedure Act, 12 U.S.C. § 2605(e), which requires a lender/servicer to timely respond to a borrower's request for information about the loan

<sup>2</sup> As part of his information and belief, Krawczyk cites, among other things, complaints filed in over 20 cases by governmental and municipal entities related to, among other things, the securitization of home loans. *See* Complaint, CP 108-09, note 1.

<sup>3</sup> Robo signing was well a documented practice in July, 2012. *Bain Id. at 83.*

<sup>5</sup> While notifying the Trustee, Krawczyk also sent a copy of these documents to Ms. Sandra Peger, the Firm's client to verify. *Id.* Scott Stafne, another attorney at the law firm, signed the unfiled complaint later that day. RCW 61.24.130 (2) prohibits a court from restraining a Trustee's Sale unless the Trustee is given five day notice prior to the hearing date. In order to meet this deadline notice had to be provided to the trustee the day Krawczyk was advised the sale had been set. Further, if there have been misrepresentations, fraud, or irregularities in the proceedings, and if the homeowner-borrower cannot locate the party accountable and with authority to correct the irregularity, there certainly could be injury under the CPA. Footnote 18 of *Bain* comments on certain robo signing practices by Banks and MERS:

Also, while not at issue in these cases, MERS's officers often issue assignments without verifying the underlying information, which has resulted in incorrect or fraudulent transfers. *See Zacks, supra*, at 580 (citing Robo-Signing, Chain of Title, Loss Mitigation, and other issues in Mortgage Servicing Hearing Before copies of my Client's Deed of Trust and language therein<sup>5</sup>, and The Succumb, 111<sup>th</sup> Cong. 105 (2010)). Actions like these could well be the basis of a meritorious CPA claim.

*Bain*, at 118; *cf.*, Kate Berry, *Robo-Signing*

<sup>4</sup> Section 20 of Payer's "WASHINGTON-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT" is the paragraph upon which most securitizations are based. It states in pertinent part:

The Note or a partial interest in the Note (together with the Security Agreement) **can be sold one or more times without prior notice to the borrower.** ... (Emphasis Supplied)

It has always been the Stafne Law Firm's interpretation of this uniform provision that the term "without prior notice" indicates that some notice will be given to the borrower within a reasonable time after their Note or partial interests in the Note has/have been sold. *Id.* Where notice is contemplated, but no time is stated in the contract, the law implies a reasonable time, i.e., when a contract does not fix a time for performance, it

Trust and language therein<sup>5</sup>], and pictures of substantial development on the property. My client's story included her statements about witnesses being prepared to testify on her behalf as to statements made by Kammah Morgan<sup>6</sup>], descriptions of appraisals for more than First Federal claimed it was worth, and the fact that my client requested identification of the holder, and that she has not seen her note since execution with First Federal. The pleadings in other cases strongly suggests that such transfers are extremely common for notes and/or deeds of trusts executed between 2004 and 2008, and the effect of such transfers on an enforcement of lien is a pending question in Washington Law *I would have reason to doubt those portions of the complaint, which concern transfer or securitization, if the original note can be produced and authenticated, without suspect endorsements and/or custodial records.*

CP 30, ¶ 4 (Emphasis Supplied). Unfortunately, the trustee, Mr. Colley, did not immediately get the materials Krawczyk sent. "I received the complaint and motion when I came to the office on Sunday July 9, 2012 following a two week vacation. ..." CP 21.

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will be presumed that a reasonable time was intended. *Turner v. Gunderson*, 60 Wn. App. 696, 702-3, (1991) *Foelkner v. Perkins*, 197 Wn. 462, 85 P.2d 1095 (1938); *see also*, RCW 62A.2-309. What constitutes a reasonable time for the performance of a contract will depend upon the circumstances of each case. *Peplinski v. Campbell*, 37 Wn.2d 857, (1951); *see also*, RCW 62A.1-204. It has been the Stafne Law Firm's experience that Fannie Mae and/or Freddie Mac usually purchase loans from institutions within 60 to 90 days of the loan origination.

<sup>5</sup> The Deed of Trust instrument is identified as "WASHINGTON-*Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT*". (Emphasis Supplied) CP 129. *See also*, note 4, *Supra*, for language contemplating securitization of Peger's note.

<sup>6</sup> Kammah Morgan was identified as a defendant by Ms. Peger. Because Morgan and First Federal were defendants, the Stafne Law Firm could not simply talk to them about the loan. Contact with trustee was not immediately possible because he was out of town. CP 21.

Kammah Morgan, the Vice President and Special Assets manager for First Federal testified: “[t]he statements in that complaint have nothing to do with nature of First Federal’s loan to the plaintiff.” CP 74, ¶ 2. Morgan then indicates that the County’s web site identifies the property as open space forest land, which is a real property tax classification. *See* [dor.wa.gov/docs/pubs/prop\\_tax/openspace.pdf](http://dor.wa.gov/docs/pubs/prop_tax/openspace.pdf). This tax classification has no significance with regard to whether the property is being used as a residence.

Ms. Morgan’s testimony regarding photos of the subject property showing no improvements, CP 74-5, ¶ 3, is directly contradicted by the improvements on the photos Krawczyk was given of the property by Ms. Peger. *See* CP 30. Ms. Morgan testifies that “First Federal has remained the owner and retained possession of the original note and deed of trust” and that the “loan has never been pooled, sold, transferred, or converted in any way.” CP 75, ¶ 5. If true, this would be a *rare* portfolio loan. Dustin A. Zacks, *STANDING IN OUR OWN SUNSHINE: RECONSIDERING STANDING, TRANSPARENCY, AND ACCURACY IN FORECLOSURES*, 29 *Quinnipiac L. Review*, 737, 738 (2011). However, the Deed of Trust instrument about which Ms. Morgan testifies is identified on its face as a “WASHINGTON-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT”. CP 129.

“Fannie Mae and Freddie Mac, the two principle government sponsored entities (GSE), were traditionally the largest secondary market investors in residential mortgages.” See Thomas E. Plank, REGULATION AND REFORM OF THE MORTGAGE MARKET AND THE NATURE OF MORTGAGE LOANS: LESSONS FROM FANNIE MAE AND FREDDIE MAC, 60 S.C. L. Rev. 779, 796-804 (2009). It is difficult to understand why First Federal would have used a Fannie Mae single family residential DOT instrument form for unimproved property if the intent was not to sell the loan to Fannie Mae as such.”

Fannie Mae and Freddie Mac often purchase such loans and then securitize them. Freddie Mac’s website describes how these GSE’s work:

Every day, Freddie Mac provides a continuous flow of funds to mortgage lenders. We do so not by making individual mortgage loans to consumers; instead, we support the U.S. home mortgage market by providing money directly to lenders, ensuring that the system is liquid, stable and affordable. To fulfill this vital mission, Freddie Mac buys residential mortgages and mortgage-related securities and guarantees mortgages made by lenders. We issue debt securities to the global capital markets to fund the purchase of mortgages and mortgage-related securities we hold as an investor. We also create and sell mortgage-related securities to the capital markets, providing a guarantee to investors on those securities.

Freddie Mac pools the mortgages it purchases from lenders across the country and packages them into securities that can be sold to investors. These investors include the lenders themselves, pension funds, insurance companies, securities dealers, commercial and central banks, and others. Freddie

Mac also is one of the largest investors in mortgage-related securities, purchasing and holding in portfolio a portion of our own securities and those issued by others.

[http://www.freddiemac.com/corporate/company\\_profile/our\\_business/securities.html](http://www.freddiemac.com/corporate/company_profile/our_business/securities.html). Both Fannie Mae and Freddie Mac have had rules requiring original lender/servicers, like First Federal, to hold onto notes purchased by them - i.e. not deliver the promissory notes to Fannie or Freddie, which in turn are the entities actually paying the banks for single family home loans. See "Welcome to Freddie and Fannie's Mortgage Shell Game", which was published on Mandelman Matters at <http://mandelman.ml-implode.com/2011/12/guest-post-welcome-to-freddie-and-fannies-mortgage-shell-game-by-shawn-t-newman-j-d/>.

The Stafne Law Firm would also ask this Court take judicial notice that several of its members, and other attorneys in other law firms, filed an amicus brief in *Bain* at 83, 285 P.3d 34 (2012) on behalf of homeowners before this hearing related to Ms. Peger's motion for a restraining order was held. The brief raised, among others, issues regarding the securitization of mortgages, and the fact that these issues have not yet been resolved by any Washington State court precedent. In this regard, the Amicus Brief states in pertinent part with regard to securitization:

Allowing MERS' intrusion into the Bain's DOT for purposes of exercising considerable power for purposes of securitizing individual promissory notes of Washington

homeowners violates all of the policies which underlie the WDTA. See *Supra*, note 6.

“At ... [MERS] core, it is a system designed by the banks' lawyers to grow the securitization industry. In this it has been remarkably successful. ***Securitization has replaced financial institutions in funding home mortgage loans, with over eighty percent of all such loans originated in 2006*** ... having been securitized. A closer look at the larger securitization process reveals a system apparently intended to raise a virtually impenetrable smokescreen to the detriment of homeowners and the communities where they live.”

Slicing and dicing a home mortgage transaction as was done here profoundly alters the economic incentives of the banking industry in the home mortgage market. Banks necessarily focus on the immediate cash return from securitizing their home mortgage loans, rather than relying upon them as long term investments. Their agents, the loan servicers, have little, if any, incentive to "work out" a troubled home mortgage loan and every incentive to realize an immediate return from foreclosure sales. Moreover, one who holds bare legal title, without more, has no incentive whatever to maintain the home it owns. *Id.*

[\*\*\*]

What the process of securitization, and the market for loan servicing that has developed to support it, highlights is that loan servicers, despite their duty to act for the benefit of investors, are in fact "principal-less agents." Levitin & Twomey, *Supra*, at 81. Their incentives in managing individual loans do not mirror the interests of investors or trustees acting on behalf of investors, much less homeowners.

Yet, investors are without the information or capacity to track servicers' handling of mortgage loans in default. *Id.* at 58, 81; Thompson, *Supra*, at 8. While the typical pooling and servicing agreement charges the trustee with protecting the interests of the investors, the trustee's duties involve reporting, not analyzing, data received from the loan

servicer. *MBIA Ins. Corp. v. Royal Indem. Co.*, 321 F.Appx. 146, 150 (3d Cir. 2009). The trustee is further disincentive from scrutinizing the performance of the loan servicer because, should such scrutiny reveal real shortcomings, the trustee would have to assume the unwelcome role of servicer. Levitin & Twomey, *Supra*, at 58-62, 82. The mortgage homeowner, the party to the mortgage transaction most affected by loan servicing practices that favor foreclosure over modification, is often unaware that his loan has been securitized and that the servicing rights have been transferred to a servicer with whom he has no direct contractual relationship, *Id.* at 83. By the time of default, the homeowner is in no position to negotiate a price that accounts for the servicing risk inherent in his decision to take out a mortgage loan months or years earlier. *Id.* at 84. Loan servicers are thus virtually unchecked in their drive to bolster their own bottom line, with foreclosure overwhelmingly the best economic decision.

*Culhane v. Aurora Loan Services of Nebraska*, U.S. Dist. LEXIS 136112, note 15 (D. MASS. 2011).

----- Footnotes -----  
n7 Judge Young ultimately concludes in *Culhane* foreclosure was proper where the service of an agent of the note holder started foreclosure without holding the note. Judge Young notes in his opinion that a state judge may have reached a different result because of the differences in the judicial duty imposed on a state judge than a federal judge interpreting state law under the federal court's diversity jurisdiction. The reason Homeowners cite Judge Young's factual findings about how MERS and the securitization process works is to help this Court evaluate whether MERS' functioning is consistent with the policies of the WDTA.

*Bain v. Metro Mortg. Grp.*, 2011 WA. S. Ct. Briefs 517238, 13-16

(Wash. Feb. 24, 2012) (Emphasis Supplied]

In *Bain* the Supreme Court recognizes the problems mortgage securitizations, especially those accomplished through MERS, pose for borrowers. In this regard, the Court stated:

Many loans have been pooled into securitization trusts where they, hopefully, produce income for investors. *See, e.g., Pub. Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co.*, 277 F.R.D. 97, 102-03 (S.D. N.Y. 2011) (discussing process of pooling mortgages into asset backed securities). MERS has helped overcome what had come to be seen as a drawback of the traditional mortgage financing model: lack of liquidity. MERS has facilitated securitization of mortgages bringing more money into the home mortgage market. With the assistance of MERS, large numbers of mortgages may be pooled together as a single asset to serve as security for creative financial instruments tailored to different investors. Some investors may buy the right to interest payments only, others principal only; different investors may want to buy interest in the pool for different durations. *Mortg. Elec. Registration Sys., Inc. v. Azize*, 965 So.2d 151, 154 n.3 (Fla. Dist. Ct. App. 2007); Dustin A. Zacks, *Standing in Our Own Sunshine: Reconsidering Standing, Transparency, and Accuracy in Foreclosures*, 29 QUINNIPIAC L. REV. 551, 570-71 (2011); Chana Joffe-Walt & David Kestenbaum, *Before Toxie Was Toxic*, NAT'L PUB. RADIO (Sept. 17, 2010, 12:00 A.M.) (discussing formation of mortgage backed securities). In response to the changes in the industries, some states have explicitly authorized lenders' nominees to act on lenders' behalf. *See, e.g., Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W.2d 487, 491 (Minn. 2009) (noting MINN. STAT. § 507.413 is "frequently called 'the MERS statute'"). As of now, our state has not.

[\*\*\*]

Critics of the MERS system point out that after bundling many loans together, it is difficult, if not impossible, to identify the current holder of any particular loan, or to negotiate with that holder. While not before us, we note that this is the nub of this and similar litigation and has

caused great concern about possible errors in foreclosures, misrepresentation, and fraud. Under the MERS system, questions of authority and accountability arise, and determining who has authority to negotiate loan modifications and who is accountable for misrepresentation and fraud becomes extraordinarily difficult.<sup>7</sup> The MERS system may be inconsistent with our second objective when interpreting the deed of trust act: that “the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure.” *Cox v. Helenius* 103 Wn.2d 387 (citing *Peoples Nat'l Bank v. Ostrander*, 6 Wn. App. 28).

*Bain* at 96-98 impact on the meaning of the DTA and the application of Washington system of precedent are their subject of a petition for several issues are currently pending before the Supreme Court pursuant to a borrower's petition for discretionary review in *Grant v. First Horizon*, Washington Supreme Court No. 88039-5.

Law firms representing homeowners, including the Stafne Law Firm, have filed an amicus brief in that case urging the Supreme Court to consider whether Courts of Appeal must follow RAP 13(d) in this developing area of the law.

These Homeowner Attorneys argue that Washington common law is unclear because of the Court of Appeals failure to publish decisions construing the DTA. Since January 1, 2004 through November 11, 2012, the versus law database shows there have been only ten cases decided by

state courts citing to RCW 61.24.030. Six of those are unpublished Court of Appeal decisions. Two are published Washington Supreme Court decisions and two are published Court of Appeals decisions. On the other hand federal district courts have produced 35 precedential opinions during this same time period. Our common law interpreting Washington statutes is being flooded with federal precedent which, in the past, has failed to even consider the language of our DTA. *Bain*, at 109

Currently Washington attorneys are prohibited from citing over 60% of Washington Courts' appellate decisions to Washington Courts, even though federal courts are apparently required to consider unpublished decisions of the Court of Appeals as a part of Washington's common law<sup>7</sup>.

In *Grant, Supra*, Homeowners' attorneys argue:

Homeowner's Attorneys are concerned that *Bain* is not properly being applied as precedent by Washington Courts and Federal District Courts located in Washington. *See e.g. Burkart v. Mortgage Elec. Registration Sys.*, 2012 U.S. Dist. Lexis 1404794 (W.D. Wash. September 28, 2012). *See also Brodie v Northwest Trustee Servs.*, 2012 U.S. Dist. LEXIS 139451 (E.D. Wash. Sept. 27, 2012).<sup>8</sup>.

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<sup>7</sup> Compare *State v. Fitzpatrick*, 5 Wn. App. 661, 668, 491 P.2d 262 (1971) (We therefore hold that unpublished opinions of the Court of Appeals ... do not become a part of the common law of the State of Washington.) with *Nunez v. City of San Diego*, 114 F.3d 935, 942 n. 4 (9th Cir. 1997) (court is "not precluded from considering unpublished state court opinions") *See also McSherry v. Block*, 880 F.2d 1049, 1054, n. 2 ("We find therefore that we may not summarily disregard the Appellate Department's construction of section 653g merely on the basis that its construction was rendered in an unpublished opinion.")

<sup>8</sup> *Bain* finds federal courts rejection of a "show me the note" defense unhelpful where judge did not meaningfully consider the specific language of the DTA. *See Bain*, at 109, which rejects *St. John v. NW. Tr. Sevrns., Inc.*, No.C11-5382BHS, 2011 WL 4543658,

## Proceedings Below

At the hearing on Peger's motion to show cause Peger's Attorney requested to see the note. The trustee indicated that he had the note, but did not bring it to court. CP 25. The Commissioner did not require production of the note and appears to have sanctioned the Stafne Law Firm for refusing to withdraw its securitization causes of action based on Morgan's contested declaration.

## ARGUMENT

### Standard of Review

An award of judicial sanctions is reviewed for abuse of discretion. *Washington State Physicians Inns. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). This is true whether judicial sanctions are imposed under CR 11<sup>9</sup> or RCW 4.84.185<sup>10</sup> or the inherent

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2011 U.S. Dist. Lexis 111690(W.D. Wash. Sept. 29, 2011, Dismissal Order) (unpublished) "show me the note" analysis. Nonetheless, another federal court in *Brodie v. Northwest Trustee Servs*, 2012 U.S. Dist. LEXIS 139451 (E.D. Wash. Sept. 27, 2012) relies on "show me the note" defense after Bain rejected that analysis in dismissing claims by borrower that s/he was entitled to disclosure of note owner under RCW 61.24.030 (7)(a) and (8)(I). The *Brodie* decision directly contradicts the Court of Appeals unpublished decision in *Grant*, supra.

<sup>9</sup> *Skimming v. Boxer*, 119 Wn.App.748, 754, 82 P.3d 707 (2004) (citing *Biggs v. Vail*, 124 Wn.2d 193, 197, 876.P.2d 448 (1994) (*Biggs II*)).

<sup>10</sup> See *Biggs v. Vail*, 119 Wn. 2d 129, 134-37 (reviewing and interpreting the legislative history of Washington Revised Code, section 4.84.185 (1991)). It designed the statute to discourage frivolous lawsuits and to compensate victims forced to litigate meritless cases. *Biggs*, 119 Wn.2d at 137. The action must be frivolous in its entirety for the statute to apply. *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 903-04, 969 P.2d 64 (1998).

power of the court<sup>11</sup> A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.* at 339.

## CR 11

This appeal involves only a violation of CR 11. On the order prepared by the trustee on behalf of all defendants the Commissioner handwrites in the lower right hand corner:

It is further ordered that Defendants shall have judgment for reasonable attorney fees and expenses against plaintiff and Stafne Law Firm for the violation of CR 11.

CR 11 requires attorneys to date and sign all pleadings, motions, and legal memoranda. CR 11(a). The rule 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) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

CR 11(a). If a filing is signed in violation of the rule, the court

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<sup>11</sup> *State v. Gassman*, 175 Wn.2d 208, 210, 283 P.3d 1113 (2012); *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 266-67, 961 P.2d 343 (1998)

“may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.” CR 11(a).

CR 11(a) An award of fees under CR 11 may be made against an attorney or party for filing pleadings that are not grounded in fact or warranted by law or are filed in bad faith for an improper purpose. *Loc Thien Truong v. Allstate Prop. & Cas. Ins. Co.*, 151 Wn. App. 195, 207, 211 P.3d 430 (2009); *Skimming v. Boxer*, 119 Wn.App.748, 754, 82 P.3d 707 (2004). The trial court must make an adequate record articulating the grounds supporting its decision. *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 157 P.3d 431, 415,435, (2007). It is not clear from the Commissioner’s Order why he found no reasonable inquiry had been made before filing the emergency action to save Peger’s property. CP 8-9.

### **The Commissioner’s Order**

The Commissioner’s Order states that Peger’s pleadings were not verified. *Id.* This is incorrect. CP. 25<sup>12</sup>; 32<sup>13</sup> (Peger’s verification). The Commissioner goes on to state that no declaration was submitted in support of Peger’s motion. CP 8. But this statement is also not correct.

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<sup>12</sup> The Court minutes state: “Mr. Krawzyck hands forward verification & presents argument.” CP 25.

<sup>13</sup> Peger’s verification.

CP 29-32<sup>14</sup>. The The Commissioner then and determines (solely by relying on Kammah Morgan’s declaration, while and ignoring Krawczyk’s declaration and the language in the DOT identifying it as Fannie Mae single family Uniform Instrument) that the property is not owner occupied. Finally, the Commissioner finds Ms. Peger, has no equity in her property.

### **The Language of the Order:**

What do these last two items have to do with CR 11 sanctions? The DTA either applies to “open space forest land” tax designated property or it does not. If the DTA does not apply because trees are “crops” then the nonjudicial foreclosure the Commissioner authorized and the trustee performed violated RCW 61.24.030 (2)<sup>15</sup>. Just because the judge found the land was unimproved forest land provides no basis whatsoever for sanctioning the Stafne Law Firm.

Similarly, what does Ms. Peger being “underwater” have to do with sanctioning her attorneys? Most people who are foreclosed upon

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<sup>14</sup> Declaration of Andrew Krawzyck certifying efforts to give notice and in support of motion.

<sup>15</sup> RCW 61.24.030(2) provides:

(2) That the deed of trust contains a statement that the real property conveyed is not used principally for agricultural purposes; provided, if the statement is false on the date the deed of trust was granted or amended to include that statement, and false on the date of the trustee's sale, then the deed of trust must be foreclosed judicially. Real property is used for agricultural purposes if it is used in an operation that produces *crops*, livestock, or aquatic goods; (Emphasis provided)

have little or no equity in their homes. Should foreclosure defense attorneys get sanctioned because their clients do not have any money?

The specific language of the Order documenting the basis for the imposition of sanctions under CR 11 is:

“the court not having been provided with a verified complaint, declaration or affidavit in support of the motion, ***the complaint having been signed by counsel without having made reasonable inquiry under the circumstances,*** the court determining the property subject to foreclosure is not owner occupied residential property and that the property has no equity value as of the date of this hearing, the court not being able to find that plaintiff has suffered any irreparable injury, loss, or damage if the trustee’s sale is allowed to take place on July 13, 2012 ...”

CP 8-9 (Emphasis Added). As this Court can see, the Commissioner’s apparent basis for imposing sanctions was because the complaint was signed by counsel without a reasonable inquiry. Under Washington law a trial court must make “an adequate record so the appellate court can review a fee award” and “must enter findings of fact and conclusions of law to support an attorney fee award.” *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 415, 157 P.3d 431 (2007) (citing *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998)). Here, it is not apparent on the face of the order what the Commissioner believed was not adequately investigated and why this was sufficient to impose

sanctions for all of Mr. Colley's trustee fees, when the Stafne Law Firm had agreed to withdraw all such claims if the note was produced.

### **The Evidence before the Court**

As is set forth in the Statement of Facts there were three declarations before the Commissioner on July 12, 2012. These included the conflicting testimony contained in the declarations of Krawczyk (CP 29-31) and Morgan (CP 74-86), as well as Ms. Peger's certification of the complaint (CP 32). Peger's DOT instrument, which is attached to the verified complaint, indicates on its face that it is a "WASHINGTON-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT". CP 129. Thus, the agreement First Federal had Ms. Peger sign tends to disprove Morgan's testimony that the property was unimproved.

Krawczyk's declaration also indicates a willingness to withdraw the securitizations claims if First Federal would present the note as evidence. In this regard, Krawczyk states in his declaration:

"I would have reason to doubt those portions of the complaint, which concern transfers or securitizations, if the original note can be produced and authenticated, without suspect endorsements and/or custodial records."

CP 30:1-19. The minutes before the Commissioner reflect Krawczyk's interest in seeing the note; but the Commissioner's lack of interest therein:

Mr. Krawczyk hands forward verification & presents argument regarding their motion Court gets clarification.

Plaintiff attorney answers. Mr. Colley presents argument. Mr. Keawczyk has rebuttal & requests to see the bank note. Mr. Colley has it, but not in court. Mr. Krawczyk argues further. Court denies the motion for a restraining order.

**The Stafne Law Firm should not have been sanctioned.**

It is the position of the Stafne Law Firm that it should not be sanctioned for insisting that the note upon which a non-judicial foreclosure is based be presented as evidence before withdrawing Peger's securitization and transfer claims, which were required to be promptly prepared because of the waiver provisions of the DTA. *See* RCW 61.24.127, 130; *see also, Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061 (2003); *Amresco Independence Funding, Inc. v. SPS Properties, LLC*, 119 P.3d 884, 129 Wn. App. 532 (2005).

As is well known and documented in the above Statement of Facts it is very rare for a lender to hold a portfolio loan. As the likelihood of a note being securitized is greater than 50%<sup>16</sup> it was appropriate for the Stafne Law Firm to assume on a more likely than not basis under the

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<sup>16</sup> In *Culhane, Supra*, the Court estimated that approximately 80% of loans are securitized. Our own Supreme Court noted that MERS securitized loans alone account for 50% of mortgages. MERS contends that plaintiffs cannot show a public interest impact because, it contends, each plaintiff is challenging "MERS's role as the beneficiary under Plaintiff's Deed of Trust in the context of the foreclosure proceedings on Plaintiff's property." Resp. Br. of MERS at 40 (Selkowitz) (emphasis omitted). But there is considerable evidence that MERS is involved with an enormous number of mortgages in the country (and our state), perhaps as many as half nationwide. John R. Hooge & Laurie Williams, *Mortgage Electronic Registration Systems, Inc.: A Survey of Cases Discussing MERS' Authority to Act*, NORTON BANKR. L. ADVISORY No. 8, at 21 (Aug. 2010).

circumstances presented that the loan had been financed by Fannie Mae and securitized in the absence of production of the note.

The Court of Appeals has held the best evidence rule applies to judicial foreclosures. Therefore, it allowed a copy of the note to suffice as evidence for the note under the best evidence rule. *Braut v. Tarabochia*, 104 Wn. App. 728, 17 P.3d 1248 (2001). But here the Commissioner held that the note could be enforced by way of a nonjudicial foreclosure of real property without any evidence of the note itself. This does not make sense and is not consistent with the Supreme Court's construction of the DTA in *Bain*.

Critically under our statutory [DTA] system, a trustee is not merely an agent **for the lender or the lender's successors. Trustees have obligations to all of** the parties to the deed, including the homeowner. ... Among other things, "the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust" and shall provide the homeowner with "the name and address of the owner of any promissory notes or other obligations secured by the deed of trust" before foreclosing on an owner-occupied home. RCW 61.24.030(7)(a), (8)(l).

*Bain*, at 93-4; *also Bain*, at \*98, at note 7, (where this Court distinguishes between note owner's interests and servicer's interests and suggests how this may create communications problems where the borrower does not have access to the true note owner, i.e. stakeholder.); *Bain*, at \*103 (The

legislature was attempting to create a framework where the stakeholders could negotiate a deal in the face of changing conditions.)

The DTA is not about only providing a quick and efficient way for note owners to take peoples' homes. It is just as much about creating a framework for negotiation between stakeholders, who both have something to give and lose. If there is no way for actual stakeholders to communicate and negotiate, then the DTA cannot be utilized and a judicial foreclosure must be commenced. *See* Const. Art. 4 § 6. (“... The Superior Court shall have original jurisdiction in all cases at law which involve the title or possession of real property;...”); *See also, State v. Posey*, 174 Wn.2d 131, 135-141, 272 P.3d 840 (2012); *ZDI Gaming, Inc. v. Wash. State Gambling Comm’n*, 173 Wn.2d 608, 616-18, 268 P.3d 929 (2012) (for an analysis of the Supreme Court’s evolving analysis of Superior Courts’ subject matter jurisdiction over enumerated grants of original jurisdiction.)

The purpose of CR 11 is to deter baseless filings and curb abuses of the judicial system. *Skimming v. Boxer*, 119 Wn. App. 748, 754, 82 P.3d 707 (2004) (citing *Biggs v. Vail*, 124 Wn.2d 193, 197, 876.P.2d 448 1994) (*Biggs II*). A perceived violation of CR 11 must be brought to the offending party's attention as soon as possible; without such notice, CR 11

sanctions are unwarranted. *Biggs II*, 124 Wn.2d 198 (citing *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 224, 829 P.2d 1099 (1992)).

In this case defendants could have avoided the securitization challenges by merely providing the note or providing a response to Peger's RESPA request early on. But the choice given Peger's counsel by defendants was to simply stand down and allow the nonjudicial foreclosure to proceed. Under the Rules of Professional Conduct Stafne Law Firm had a duty to Peger to timely file the motion for the restraining order as its attorneys had sufficient facts to make a claim that the note had been securitized. RPC 1.3 and 3.1.

Because CR 11 sanctions may have a chilling effect, a trial court should impose them "only when it is patently clear that a claim has absolutely no chance of success." *In re Cooke*, 93 Wn. App. 526, 529, 969 P.2d 127 (1990).

Under *Bain*, Peger is entitled to access to and disclosure of Fannie Mae as the note owner (if Fannie Mae is actually is the note owner). RCW 61.24.030(7)(a), (8)(1); *Cf. Stubbs v. Bank of Am.*, 844 F. Supp.2d 1267, 1272-73 (Where Fannie Mae was not disclosed as the secured creditor in nonjudicial foreclosure notice, disclosure of Bank of America

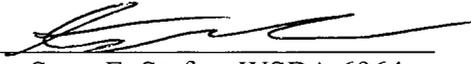
as note owner violated Georgia's deed of trust act and constituted a wrongful disclosure).<sup>17</sup>

In Washington it is a reasonable interpretation of the law that a borrower is entitled to have his note produced as evidence before he is foreclosed upon by a judicial substituted at a private sale.

### CONCLUSION

The Commissioner erred in awarding sanctions under the circumstances of this case.

RESPECTFULLY SUBMITTED this 13th day of December, 2012. By:

  
for Scott E. Stafne, WSBA 6964  
Attorney for Petitioner and WSDA 42982, *Andrew S. Kowalski*

Jocelynn R. Fallgatter, WSBA 44587  
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<sup>17</sup> Washington's DTA is much like Georgia's statute as both stress disclosure of ownership for purposes of stakeholders determining among themselves whether a foreclosure can be avoided. Whether a foreclosure is valid under the DTA where a GSE, such a Freddie or Fannie, has not been identified as the note owner may be an open question under Washington law. At least, Judge Pechman has scheduled oral argument on November 30, 2012 with regard to this specific and other related issues in *Mickelson v. Chase Home Fin. LLC*, United States District Court for the Western District of Washington Cause No. 2:11-cv-01445.

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IN THE WASHINGTON STATE COURT OF APPEALS  
DIVISION TWO

SANDRA PEGER, an individual,  
  
Plaintiff,  
  
v.  
  
PLATT IRWIN LAW FIRM, P.S., et al  
an individual,  
  
Defendants.

NO. 43811-9-II  
  
DECLARATION OF SERVICE

I, Jocelynn Fallgatter, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge.

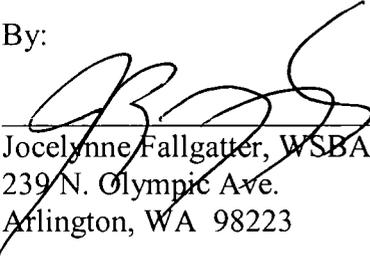
1. I am over the age of eighteen and competent to testify.
2. At all times hereinafter mentioned I am a citizen of the United States of America, a resident of the State of Washington, not a party to the above-entitled action, and competent to be a witness herein.
3. I further state that on the 26th day of November, 2012, I served a copy of the following documents on Plaintiff's attorneys: Defendant's Opening Brief by depositing into the U.S. Mail, first class, postage prepaid, a copy of that document addressed to the following individual:

Gary Richard Colley  
Platt Irwin Law Firm  
403 S. Peabody St.  
Port Angeles, WA 98362

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DATED this 13<sup>TH</sup> day of DECEMBER, 2012 at ARLINGTON in  
SLOTTOMISH COUNTY, Washington

By:

  
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Jocelyne Fallgatter, WSBA #44587  
239 N. Olympic Ave.  
Arlington, WA 98223

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STATE OF WASHINGTON  
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DEPUTY

IN THE WASHINGTON STATE COURT OF APPEALS  
DIVISION TWO

SANDRA PEGER, an individual,

NO. 43811-9-II

Plaintiff,

AFFIDIVIAT OF SERVICE

v.

PLATT IRWIN LAW FIRM, P.S., et al  
an individual,

Defendants.

I, Lili Cervantes-Patel, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge.

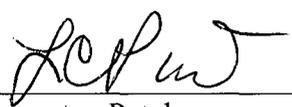
1. I am over the age of eighteen and competent to testify.
2. That on 13<sup>th</sup> of December, 2012, I served a copy of the corrected OPENING BRIEF, and DECLARATION OF SERVICE of Jocelyne Fallgatter by depositing into the U.S. Mail, first class, postage prepaid, a copy of said document addressed to the following individual:

Gary Richard Colley  
Platt Irwin Law Firm  
403 S. Peabody St.  
Port Angeles, WA 98362

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DATED this 13<sup>th</sup> day of December, 2012 at Arlington, Washington.

By:



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Lili Cervantes-Patel  
Stafne Law Firm  
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Arlington, WA 98223