FILED
Court of Appeals
Division II
State of Washington
12/11/2017 8:00 AM

No. 50523-1-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

DANIEL G. SZMANIA
Defendant/Appellant,

Vs.

WELLS FARGO BANK N.A., AS.
TRUSTEE FOR BEAR STEARNS ARM TRUST 2007-3
Plaintiff/Respondent.

ON APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR CLARK COUNTY
The Honorable Bernard F. Veljacic
No. 16-2-02606-4

APPELLANT'S OPENING BRIEF

ORAL ARGUMENTS REQUESTED

Daniel G. Szmania, Defendant/Appellant, Pro Se'.
HM1 USNR Retired, U.S. Supreme Court No. 11-6137
PO Box 757., Brush Prairie, WA 98606-0757
360-718-1402, dszmania@quixnet.net

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2) https://www.linkedin.com/pulse/evictions-federal-court-david-s-schonfeld Page 23.

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I. INTRODUCTIONN

An appeals court reviews a motion to dismiss de novo. Rodriguez v. Loudeye, 144 Wash.App. 709, 189 P. 3d 168. RAP 2.1 (a) (1) & RAP 2.2 (a) (1) is jurisdiction for this appeal. The Superior Court of Washington for Clark County (Court or Instant State Case on Appeal), made errors in its rulings on Daniel G. Szmania the Defendant/Appellant's, (Szmania) Motion to Dismiss, *See* CP 14. The Plaintiff/Respondent, Wells Fargo Bank N.A., as Trustee for Bear Stearns ARM TRUST 2007-3, (Wells) gave up State Court jurisdiction in their removal of the Primary State Case than won their argument to keep it from being Remanded back to State Court. Wells is barred by the Res Judicata doctrine and precluded from seeking jurisdiction in the State Court again per 28 U.S.C. § 1446(d) and is now outside the narrow scope of the 30 window for such a Remand found in and 28 U.S. Code § 1447 (c) which has closed in both the Primary State Case & the Instant State Case which is in this Appeal. *See* CP 18 Notice To Clerk Of Removal To Federal Court, 05/18/2017 of the instant case. The case nucleolus is an illegal foreclosure by Wells on Szmania's home that was fully paid off since November 21, 2007. **Page 1**

II. STATEMENT OF RELIEF SOUGHT

Szmania respectfully request under RAP 2.2 (a) (1), (3) and (13) that the orders and writ listed in Szmania's Notice of Appeal CP 25, all be reviewed de novo by this Court and reversed. Szmania appeals from the issuance of these 4 orders and the issuance of the Writ of Restitution. Those Orders and Writ are:

1) FINDINGS AND ORDER TO PROCEED, NOTWITHSTANDING DEFENDANT'S NOTICE TO CLERK OF REMOVAL TO FEDERAL COURT, May 26, 2017, CP 20.

2) ORDER DENYING DEFENDANT'S MOTION TO DISMISS, AND SETTING TIME FOR HEARING, May 26, 2017, CP 21.

3) ORDER FOR DEFAULT AND DEFUALT JUDMENT, May 26, 2017, CP 22.

4) ORDER TO ISSUE WRIT OF RESTITUTION WITHOUT BOND, May 26, 2017, CP 23. And WRIT OF RESTITUTION May 26, 2017.

Szmania alleges errors in the above superior court rulings and in the eviction process itself. Szmania further contends that the following defenses Pursuant to CR 12 (b) penned in Szmania's Motion to Dismiss, CP 14, pages 1 and 2, when properly examined and ruled upon, weigh in Szmania's favor.

CR 12 DEFENSES AND OBJECTIONS Those defenses are listed as:

(1) lack of jurisdiction over the subject matter;

(2) lack of jurisdiction over the person;

(3) improper venue;

(4) insufficiency of process;

(5) insufficiency of service of process; and

(6) failure to state a claim upon which relief can be granted.

And CR 12(f) Motion to Strike, CR 12 (h) (3) Lack of Jurisdiction: *"Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."* See RP Volume I, Page 9 at 1 to 11.

Wells claims are further Barred by Res Judicata. The U.S. District Court Western District of Washington At Tacoma, Case No. 3:16-CV-05644 RBL, ruled this was ***"This is not a foreclosure case."*** Dkt 64 page 2 at 14. Therefore Wells can not seek relief based upon their illegal foreclosure action in which they never got a Declaratory ruling saying they had legal standing to collect or foreclose on Szmania's home. This means Wells has NO legal standing in Szmania's home. But they proceeded anyways?

Thus Wells claims are barred from relitigating those claims under the doctrines of claim and issue preclusion.

Well's claims are also Barred for Lack of Legal Standing. Wells claims are also Barred for Lack of Authorization to Legally Represent Wells Fargo Bank N.A. *See* CP 14 page 7, 18-24 and CP 13 Ex M.

Szmania asks for a reversal of the following orders regarding: The Defendant's Motion To Dismiss, CP 14.

The Findings And Order To Proceed, CP 20.

The Order Denying Defendant's Motion To Dismiss, CP 21.

The Order For Default And Default, Judgment, CP 22 and

The Order To Issue Writ Of Restitution Without Bond, CP 23

Szmania asks for possession of the property known as: 17005 NE 164th Ave, Brush Prairie, WA 98606.

"THE COURT: I understand. You can go ahead and take that -- you have the right to appeal that and that is your right. And I know I'm subject to the authority of the Court of Appeals, and I submit to that absolutely." See RP Volume I, Page 43 at 2 to 6.

III. ASSIGNEMNT OF ERRORS

No. 1 Lack of Jurisdiction& Improper Venue

The lower court erred in not dismissing the case for lack of jurisdiction under CR 12 (b)(1),(2) and (h) (3) Lack of Jurisdiction:

> *"Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." See* CP 14*,* page 2 at 5-7. *See* RP Volume I, Page 9 at 1 to 11.

On July 20, 2016 Wells gives up Jurisdiction in the IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY, by removing Case No. 16-2-01214-4* **(Primary State Case)** to the UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT TACOMA, Case No. 3:16-CV-05644 –RBL*. **(Federal Case)** *See* CP 13 Ex H. Page 2 at 5 of NOTICE TO CLERK OF REMOVAL TO FEDERAL COURT, clearly states: *"This removal terminates this Court's jurisdiction and all proceedings in this forum pursuant to 28 U.S.C. § § 1446(d)."* Also, in the NOTICE TO PLAINTIFF OF REMOVAL TO FEDERAL COURT, Page 1 at 25 also reads:

"Pursuant to 28 U.S.C. § 1446(d), the Notice of Removal terminates this Court's jurisdiction and all proceedings in this forum." *See* CP 13 Ex H, page 13 at 25-26 and CP 14, Page 5 at 12-25.
*I ask the Court to Judicially Notice these noted cases.
See RP Volume I, Page 9 at 14 to p.11 at 5 and p. 16 at 9 to 12.

Since the Federal Case was not Remanded, Venue is also improper under CR 12 (b) (3). *See* RP Volume I, page 42 at 3-22.

28 U.S.C. § 1446(d) reads*:" **(d) NOTICE TO ADVERSE PARTIES AND STATE COURT.—***
Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State Court, ***which shall effect the removal and the State Court shall proceed no further unless and until the case is remanded."*** *(Emphases added!) See* CP 14, page 5 at 22-25.

No. 2 Insufficiency of Process & Service of Process

Insufficiency of Process CR 12 (b) (4):

The lower court erred in not dismissing the case for lack of Insufficiency of Process. The United States Court of Appeals for the Ninth Circuit Case No. 16-36055* holds Jurisdiction of the persons, parties and subject matter in this case as of December 20, 2016 and still to this day, since no final opinion, judgment, memorandum disposition or mandate has been filed in this case. *See* FRAP 41 *See* CP 13, Decl, Ex A pages 1-4, specifically 4.

*I ask the Court to Judicially Notice this case.

Insufficiency of Service of Process CR 12 (b) (5):

The lower court erred in not dismissing the case for lack of Insufficiency of Service of Process. An Order for Alternative Service was issued on 01/23/2017. That order clearly stated how service was to be carried out. Wells failed to meet those ordered instructions. *See* CP 8 pages 1-2, specifically page 2, 1-9.

No. 3 <u>Failure to State a Claim Upon Which Relief Can be Granted</u> CR 12 (b) (6):

The lower court erred in not dismissing the case for Failure to State a Claim Upon Which Relief Can be Granted. With out a proper Remand under 28 U.S.C. § 1446(d) and 28 U.S. Code § 1447 (c). Wells has no legal course of action to bring a case or claims back to the Primary State Case or its jurisdiction and venue. Their claims are further Barred by the legal doctrines of claim and issue preclusion, Res Judicata and Collateral Estoppel. As attorneys, they are fully aware they can **NOT** relitigate claims and issues they lost or didn't bring up in the Federal Case. Supplemental Jurisdiction in 28 U.S. Code § 1367 **(a)** lies in Federal Court.

No. 4 <u>The State Court Abused it's Discretion</u>

Being that the Primary State Case was removed and the Instant State Case on Appeal was also removed to Federal Court and **<u>no Remand was accomplished in either instance</u>**. **<u>The State Court had no power or jurisdiction to act!</u>** This is clearly the law in:

28 U.S.C. § 1446(d) reads*:" **(d) NOTICE TO ADVERSE PARTIES AND STATE COURT.—***

*Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State Court, **<u>which shall effect the removal and the State Court shall proceed no further unless and until the case is remanded.</u>** (Emphases added!) See* CP 14, page 5 at 22-25. *See* RP Volume I, page 42 at 3-22.

The State Court continuing and issuing orders outside of a dismissal under CR 12 (h) (3) was totally inappropriate, rogue, unethical and criminal! If a justice is NOT going to follow the law and the oath they took, than they should NOT be on the bench!

CR 12 (h) (3) Lack of Jurisdiction: *"Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."*

The Court in the Instant State Case on Appeal acknowledges seeing the Notice of Removal: *"And I have seen from both parties a notice of removal,.."* See RP Volume I, Page 25 at 15 to 16.

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERRORS

No. 1 Lack of Jurisdiction & Improper Venue

There is a very narrow legal path found in 28 U.S.C. § 1446(d) and 28 U.S. Code § 1447 (c).

28 U.S.C. § 1446(d) reads*:" **(d) NOTICE TO ADVERSE PARTIES AND STATE COURT.—***

*"Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State Court (1), **which shall effect the removal** (2) **and the State Court shall proceed no further** (3) **unless and until the case is remanded."** (4) (Emphases added!)*

(1) Filing and written notice is materially evidenced by: Ex H of CP 13 in Primary State Case and CP 18 in the Instant State Case on Appeal.

(2) Effect the removal means make it totally effective without default or error or delay.

(3) Order to the State Court to **PROCEED NO FURTHER!** There is no wiggle room in this law!

(4) Unless and until means "only if and when it happens!" Only upon a Remand may the State Court once again act. Until that time, it has **NO POWER and NO JURISDICTION! PERIOD!**

The case has NEVER been Remanded! *See* RP

Volume I, page 42 at 3-22 and page 10 at 10.

"*This case has not been remanded."*

28 U.S. Code § 1447 (c) Procedure after removal generally reads:

*"**A motion to remand the case** (1) on the basis of any defect other than lack of subject matter jurisdiction **must be made within 30 days** (2) **after the filing of the notice of removal under section 1446(a)."** (3) (Emphases added!)*

(1) Only by a motion may a party move to Remand a case. **No motion is in material evidence in either the Primary State Case, or that of the Instant State Case on Appeal showing Wells trying to Remand either case.** In fact, they fought and won the motion to Remand by Szmania. Szmania's Remand was denied in the Primary State Case! *See* CP 14, page 6, 11-15.

(2) Motion must be made within 30 days of the notice of removal.

(3) The notice of removal must be under 1446(a). Here in both the Primary State Case and that of the Instant State Case on Appeal that is the factual case. Both removals where done under 1446 (a). S*ee* Ex H of CP 13 in Primary State Case and CP 18 in the Instant State Case on Appeal.

No. 2 Insufficiency of Process & Service of Process

The Order For Alternative Service, CP 8 page 2, 1-10 gives very specific instructions for service by Wells on Szmania. These instructions were NOT followed at all! *See* CP 14 page 10 at 17 to page 13 at 23.

No. 3 <u>Failure to State a Claim Upon Which Relief Can be Granted</u>

The court did NOT state by what legal grounds Wells has made valid claims? With **<u>NO Remand of the Primary State Case or in the Instant State Case on Appeal,</u>** the court had **<u>NO Jurisdiction</u>** under 28 U.S.C. § 1446(d)! Plus Wells proved no legal standing in Szmania's home, evidenced by a Declaratory ruling! This is a major defect of many defects in the foreclosure presale sale claims in the Federal Case that warrants a postsale avoidance of the sale. Any one can do an illegal trustee sale as Wells did on 10/28/16 where they allegedly purchased Szmania's home? *See* CP 3, Ex A Page 2 at #10. Wells had plenty of time before the 11/18/16 date when the Federal Court ruled, to motion for a Declaratory ruling for standing in Szmania's home. **<u>They did NOT!</u>** Now their Barred from doing so under issue and claim preclusions. They can't have another "bite at the forbidden apple" by circumventing jurisdiction & court shopping!

No. 4 <u>The State Court Abused it's Discretion</u>

A court with **<u>NO Jurisdiction</u>** can only act in one way! That is to dismiss under CR 12 (h) (3) Lack of Jurisdiction. **Period!**

*"Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter**<u>, the court shall dismiss the action."</u>** (Emphases add!)* **Page 11**

V. STATEMENT OF THE CASE

(a) History of Primary State Case now on Appeal in the U.S Court of Appeals for the Ninth Circuit No. 16-36055.

*{Appellant is **Szmania**, Appellee is **Wells** Fargo} and {Dkt Citings are Federal District Court Case)*

1. *On June 27, 2016 **Szmania** files Case No. 16-2-01214-4 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY. See Dkt 2-2 Ex 4 pages 1-65.*

2. *On July 20, 2016 **Wells** gives up Jurisdiction in the IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY, by removing Case No. 16-2-01214-4 to the UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT TACOMA, Case No. 3:16-CV-05644 –RBL. See Dkt 1 pages 1-5, Dkt 2 pages 1-4 and Dkt 3 pages 1-3.*

3. *On July 22, 2016, Presiding Judge Stahnke cites 28 U.S.C. § 1446(d) and notes on the motion docket regarding Case No. 16-2-01214-4: **"Motion for removal to Federal Court has been filed by the defendant. (Wells Fargo). Therefore, pursuant to federal status no action will be taken by the State Court until; when or if the case is remanded"**. See Dkt 20-3 Ex C. (Emphases added!)*

4. *On 8/8/16 Dkt 23 pages 1-5, **Szmania** Motioned the Federal District Court to Remand back to the State Court.*

5. *On 8/29/16 Dkt 39 pages 1-5 **Wells** s filed their Opposition to Remand.*

6. *On 9/8/16 Dkt 49 at page 6 at 23. The U.S. District Court Denied the Motion to Remand Back to State Court saying: "The Motion to Remand [**Dkt. #23**] is **DENIED"** Thus denying the State Court Jurisdiction once again and maintaining original Jurisdiction in the U.S. District Court.*

7. *On 11/18/16 Dkt 64, in the U.S. Federal District Court Case No. 3:16-CV-05644 –RBL, the Court Rules on Appellees Motion to Dismiss, Dkt 56.*

8. *On 11/21/16, Dkt 65 Is the Entry of judgment of originating court.*

9. *On 12/01/16, Dkt 66 is the Date of service of any motion made after judgment.*

10. *On 12/19/16, Dkt 68 is the Date of entry of order deciding motion.*

11. *On 12/19/16 Dkt 67,* ***Szmania*** *files in the U.S. Federal District Court Case No. 3:16-CV-05644 -RBL, Notice of Appeal to the U.S. Court of Appeals for the Ninth Circuit. On 12/20/16 U.S. Court of Appeals for the Ninth Circuit accepts the Appeal, Case No. 16-36055. (See DktEntry 1-3 Appeal Case).* ***See*** RP Volume I, Page 11 at 6-11.

12. *On 12/22/16* ***Wells*** *Fargo Bank N.A. and Benjamin D. Petiprin files a frivolous case in the Superior Court of the State of Washington for Clark County, Case No. 16-2-02606-4.*

The 12 items noted above clearly show a <u>REMAND was NEVER accomplished!</u> Thus status as Presiding Judge Stahnke, says and Jurisdiction lay with the Federal District Court and not in the State Court! Also this shows that the Federal Court actions were initiated first with proceedings of substance on the merits and have occurred before Wells filed their frivolous Instant Case, State Action that is listed as number 12 that is on this appeal, it was filed on 12/22/16 **<u>three (3) days after</u>** the Notice of Appeal was filed on 12/19/16, Dkt 67 in Federal Case. *See* CP 18, pages1-14 specifically pages 3-4. **Page 13**

(b) History of Instant State Case that is on Appeal
{Appellant is, **Szmania** Appellee is **Wells** Fargo} and {Dkt Citings are Federal District Court Case)

1. On 12/19/16, **Szmania** files in the U.S. Federal District Court Case No. 3:16-CV-05644 -RBL, Notice of Appeal to the U.S. Court of Appeals for the Ninth Circuit, Dkt 67. On 12/20/16 U.S. Court of Appeals for the Ninth Circuit accepts the Appeal, Case No. 16-36055. Therefore the U.S. Court of Appeals for the Ninth Circuit maintains Subject Matter Jurisdiction and Supplemental Jurisdiction found in 28 U.S. Code § 1367 **(a),** on all matters and all claims and issues regarding the Szmania's home.

2. On 12/22/16 **Wells** Fargo Bank N.A. files the instant frivolous case in the Superior Court of the State of Washington for Clark County, Case No. 16-2-02606-4. **Wells also escalated and even made death threats to Szmania aiming rifles.** *See* RP Volume I, Page 7 at 20 to page 8 at 3 and page 24 at 15-17. Filed are:

CP 1 Case Information Cover Sheet

CP 2 SUMMONS FOR UNLAWFUL DETAINER

CP 3 COMPLIANT FOR UNLAWFUL DETAINER, with EXHIBIT A (TRUSTEE'S DEED)

CP 4 NOTICE TO DEPENDENTS UNDER RCW 38.42.050.

3. On 1/9/17 **Wells** files:

CP 5 DECLARATION OF NON SERVICE

CP 6 DECLARATION OF NON SERVICE

4. On 1/23/17 **Wells and** court files:

CP 7 MOTION FOR ALTERNATIVE SERVICE

CP 8 ORDER FOR ALTERNATIVE SEVICE-EXPARTE

5. On 2/2/17 **Wells** files:

CP 9 DECLARATION OF SERVICE

CP 10 DECLARATION OF SERVICE

6. On 2/7/17 **Wells** files:

CP 11 MILITARY AFFIDAVIT

7. On 2/16/17 **Szmania** files:

CP 12 CITATION (DEFENDANT'S **[Szmania]** MOTION TO DISMISS).

CP 13 DECLARARATION OF DANIEL G. SZMANIA IN SUPPORT OF MOTION TO DISMISS WITH EXHIBITS A TO J **AND** DECLARATION OF KEVIN R. WILLIAMS WITH EXHIBITS K & L **AND** EXHIBITS M TO R.

CP 14 DEFENDANT'S MOTION TO DISMISS

CP 15 PRPOPOSED ORDER TO DISMISS

8. On 4/25/17 **Wells** files:

CP 16 OPPOSITION TO DEFENDANT'S MOTION TO DISMISS WITH EXHIBITS 1-5

9. On 4/28/17 the court files:

CP 17 MOTION HEARING DOCKET

10. On 5/18/17 **Szmania** files:

CP 18 NOTICE TO CLERK OF REMOVAL TO FEDERAL COURT **AND** NOTICE OF REMOVAL TO FEDERAL COURT (Filed in the U.S. District Court Case No. 3:16-cv-05644-RBL, Document 72 Filed on 5/17/17 and in Ninth Circuit No. 16-36055, Dkt 20-1 to Dkt 20-4 and Dkt 25-1 to 25-6).

11. On 5/26/17 the court files:

CP 19 MOTION HEARING DOCKET

CP 20 FINDINGS AND ORDER TO PROCEED

CP 21 ORDER DENYING DEFENDANT'S MOTION TO DISMISS

CP 22 ORDER FOR DEFAULT AND DEFAULT JUDGMENT

CP 23 ORDER TO ISSUE WRIT OF RESTITUTION WITHOUT BOND

CP 24 WRIT OF RESTITUTION ISSUED

12. On 6/23/17 **Szmania** files:

CP 25 NOTICE OF APPEAL TO COURT OF APPEALS

CP 26 FILING FEE RECEIVED (For this Appeal)

13. On 7/3/17 the court files:

CP 27 TRANSMITTAL LETTER-COPY FILED

14. On 7/7/17 the court files:

CP 28 SHERIFF'S RETURN OF SERVICE

15. On 8/8/17 the court files:

CP 29 PERFECTION NOTICE FROM COURT OF APPEALS

It is more than apparent; that Court in the Instant State Case on Appeal did not read Szmania's Motion to Dismiss and did not due its due diligence, for it did not know the case history. *See* RP Volume I, Page 19 at 4 to page 21 at 2.

(c) Other Notable Facts and Information

I ask the Court to Judicially Notice the four (4) cases listed above and that are noted here:

(1) Case No. 16-2-01214-4 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY, **(Primary State Case)**

(2) Case No. 3:16-CV-05644 –RBL.
UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT TACOMA, **(Federal Case),**

(3) Case No. 16-36055 U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, **(Ninth Circuit)**

(4) Case No. 16-2-02606-4 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY. (**Instant State Case on Appeal)**

(d) Parties and the Property is the Same in all Four Cases

Daniel G. Szmania, (Szmania) and Wells Fargo Bank N.A. as Trustee for Bear Stearns Arm Trust 2007-3, (Wells) are parties in each of the four (4) above cases. And Szmania's property commonly known as: 17005 NE 164th Ave., Brush Prairie, WA 98606 is in each of the 4 cases.

VI. SUMMARY OF ARGUMENT

Jurisdiction exclusively lies in the UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT TACOMA, Case No. 3:16-CV-05644 since July 20, 2016, when Wells removed the Primary State Case. The removal was perfected when Szmania lost his motion to Remand on 9/8/16 Dkt 49 page 6 at 23 in Federal Case. *See* CP 18 page 3, at 4-17.

Even though the Federal Case is now on appeal in the Ninth Circuit, Case No. 16-36055. Jurisdiction still sits in the Federal Courts. Appellate Jurisdiction is established in 28 U.S.C. § 1291, the Diversity Jurisdiction of 28 U.S.C. § 1332, the Supplemental Jurisdiction of 28 U.S.C. § 1367 and the Original

Jurisdiction of 28 U.S.C. § 1441 and 28 U.S.C. § 1446. *See* CP 18 page 4, at 8-25. The Federal Case properly accepted the removal and jurisdiction & Ninth Circuit has NOT mandated the case yet!

The only way to obtain State Court jurisdiction after a removal is found in 28 U.S.C. § 1446(d) and 28 U.S. Code § 1447 (c). **That is a Remand and it must happen within 30 days from Removal! Period!** Here in the Primary State Case, Szmania's motion to Remand was denied! In the Instant State Case on Appeal, Wells never motioned in the Federal Case for a Remand after Szmania enforced the prior removal by removing the Instant State Case on Appeal on 5/18/16. *See* CP 18. The fact that Wells already argued and won on the merits of Szmania's motion to Remand, ensures that their original removal documents in the Federal Case, Dkt 1, Dkt 2 & Dkt 3 and all their claims and statements for diversity jurisdiction, amount in controversy, procedural requirements, intradistrict assignment, notice and consent etc.., now can not be re litigated for they are barred by claim preclusion and res judicata. Wells failed to object and motion to Remand in the Instant State Case on Appeal and **thus waived their right to Remand under** 28 U.S. Code § 1447 (c).

The Honorable Bernard F. Veljacic clearly violated his oath and abused his discretion by deciding not to follow the law in:

13. 28 U.S.C. § 1446(d) reads:*" **(d) NOTICE TO ADVERSE PARTIES AND STATE COURT.**—Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State Court,* ***which shall effect the removal and the State Court shall proceed no further unless and until the case is remanded."*** *(Emphases added!)* *See* RP Volume I, Page 11 at 6-11.

Judge Veljacic has absolutely NO legal right to proceed after the filing of Notice To Clerk Of Removal To Federal Court, CP 18 filed on 5/18/17, which also includes on pages 6-14 a copy of the Notice of Removal to Federal Court that was also filed in the UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT TACOMA, Case No. 3:16-CV-05644 – RBL, Dkt 72 filed on 5/17/17 and in Ninth Circuit No. 16-36055, Dkt 20-1 to Dkt 20-4 and Dkt 25-1 to 25-6. (This material evidence of a proper Removal quashes Wells main argument in CP 20 pages 2 at 7 to 3 at 4). *See* RP Volume I, Page 29 at 3 to page 39 at 25. Furthermore; CR 12 (b) (1) (2) (3) (4) (5) (6) (7) provides that by motion a party asserts defenses for lack of jurisdiction etc... So Judge Veljacic is in error in CP 17 saying Szmania: *"Defendant has submitted himself to jurisdiction of Court by fling his motion"*. Since Szmania's Motion to Dismiss and the supporting

Declaration (CP 13 & CP 14) were his first pleadings, no waiver exist of the above listed defenses. *See* RP Volume I, Page 8 at 10-12 and page 26 at 18 to 22, Szmania does NOT submit to Jurisdiction of the Instant State Case on Appeal, lies with Federal.

Other issues*: "State courts do not adjudicate whether an action could be properly removed. Once a defendant has filed a notice to remove a case, jurisdiction is transferred automatically and immediately by operation of law from the state court to the federal court. Any objection to removal must be presented to the federal court. If a federal court finds that the notice of removal was in fact defective, or that the federal court does not have jurisdiction, the case is remanded to the state court."(Emphases added!)* https://en.wikipedia.org/wiki/Removal_jurisdiction

The following 4 equitable claims argued in this brief warrants a reversal of the 4 orders and the Writ of Restitution.

No. 1 Lack of Jurisdiction & Improper Venue……. 22-26

No. 2 Insufficiency of Process & Service of Process .26-27

No. 3 Failure to State a Claim Upon Which Relief Can be Granted .....……...28-30

No. 4 The State Court Abused it's Discretion … ….. 31-33

Also Res Judicata and Collateral Estoppel (claim and issue preclusion) bars Wells from litigating old or new issues that were or should have been litigated in the Federal Case that has supplemental jurisdiction, (28 U.S.C. § 1367) such as an unlawful detainer action and a writ of restitution. **Page 21**

VII. ARGUMENT

No. 1 Lack of Jurisdiction & Improper Venue

The State Court in the Instant State Case on Appeal, No. 16-2-02606-4 in this appeal **NEVER had jurisdiction** from the start of the case when Wells filed it on 12/22/16. *See* Summons CP 2 and Compliant CP 3. The reasons the State Court never had jurisdiction are as follows in the factual and supported evidence:

*{Appellant is **Szmania**, Appellee is **Wells** Fargo} and {Dkt Citings are Federal District Court Case)*

1. *On June 27, 2016 **Szmania** files Case No. 16-2-01214-4 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY. See Dkt 2-2 Ex 4 pages 1-65. ****-**See*** CP 18

2. *On July 20, 2016 **Wells** gives up Jurisdiction in the IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLARK COUNTY, by removing Case No. 16-2-01214-4 to the UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT TACOMA, Case No. 3:16-CV-05644 –RBL. See Dkt 1 pages 1-5, Dkt 2 pages 1-4 and Dkt 3 pages 1-3. ****-**See*** CP 18

Once the removal has been done, there is only one way for the State Court to regain jurisdiction and that is in a **Remand done within 30 days of said removal!**

This is the law in 28 U.S.C. § 1446(d) ***(d) NOTICE TO ADVERSE PARTIES AND STATE COURT.—"and the State Court shall proceed no further unless and until the case is remanded."*** **And** 28 U.S. Code § 1447 (c) ***Procedure after removal generally reads: "must be made within 30 days.*** **Page 22**

*"**A Federal Removal divests the State Court jurisdiction** and places it in the hand of the Federal District Court judge. Removal is merely exercising ones legal rights to the fullest extent possible under the law." (Emphases added!)*
https://www.linkedin.com/pulse/evictions-federal-court-david-s-schonfeld

"Hence, after removal, the jurisdiction of the state court absolutely ceases and the state court has a duty not to proceed any further in the case. Any subsequent proceedings in state court on the case are void ab initio." *Maseda v. Honda Motor Co., Ltd., 861 F.2d 1248, 1254–55 (11th Cir. 1988) (internal citation omitted); see DB50 2007-1 Tr. v. Dixon, 723 S.E.2d 495, 496 (Ga. Ct. App. 2012) ("'**[A]ny proceedings in a state court after removal of a case to federal court are null and void and must be vacated.**'" (citation omitted)). (Emphases added!)*

https://www.mcglinchey.com/files/uploads/Real_Property_Newsletters/2016/01/Case-Wargo-v-Wells-Fargo.pdf Page 4.

When the presiding judge for the Superior Court for Clark Country Washington follows the law that speaks volumes!

3. *On July 22, 2016, Presiding Judge Stahnke cites 28 U.S.C. § 1446(d) and notes on the motion docket regarding Case No. 16-2-01214-4: **"Motion for removal to Federal Court has been filed by the defendant. (Wells Fargo). Therefore, pursuant to federal status no action will be taken by the State Court until; when or if the case is remanded"**. See Dkt 20-3 Ex C. (Emphases added!)*****-**See*** CP 18

4. *On 8/8/16 Dkt 23 pages 1-5, **Szmania** Motioned the Federal District Court to Remand back to the State Court. ****-**See*** CP 18

5. *On 8/29/16 Dkt 39 pages 1-5 **Wells** s filed their Opposition to Remand. ****-**See*** CP 18

6. *On 9/8/16 Dkt 49 at page 6 at 23. The U.S. District Court Denied the Motion to Remand Back to State Court saying: "The Motion to Remand [**Dkt. #23**] is **DENIED"** Thus denying the State Court Jurisdiction once again and maintaining original and subject matter Jurisdiction in the U.S. District Court. ****-**See*** CP 18

Since no Remand is contained in the record on appeal, subject matter jurisdiction was never restored to the Instant State Case on Appeal and no Venue exists with no jurisdiction! This is well-settled law!

7. *On 12/19/16 Dkt 67, Appellant/ **Szmania** files in the U.S. Federal District Court Case No. 3:16-CV-05644 -RBL, Notice of Appeal to the U.S. Court of Appeals for the Ninth Circuit. On 12/20/16 U.S. Court of Appeals for the Ninth Circuit accepts the Appeal, Case No. 16-36055. ****-**See*** CP 18

8. *On 12/22/16 Appellees /, **Wells** Fargo Bank N.A. and Benjamin D. Petiprin files a frivolous case in the Superior Court of the State of Washington for Clark County, Case No. 16-2-02606-4. ****-**See*** CP 18 Notice To Clerk Of Removal To Federal Court, 05/18/2017, Pages 3-4.

9. *On 5/18/17**Szmania files in the Instant State Case on Appeal,** Case No. 16-2-02606-4. Notice To Clerk Of Removal To Federal Court **AND** NOTICE OF REMOVAL TO FEDERAL COURT (Filed in the U.S. District Court Case No. 3:16-cv-05644-RBL, Document 72 Filed on 5/17/17 See* **CP 18** and in Ninth Circuit No. 16-36055, Dkt 20-1 to Dkt 20-4 and Dkt 25-1 to 25-6).

Wells never motioned for a Remand in Case No. 16-2-02606-4 which is the Instant State Case on Appeal. Wells failure to object and motion to Remand is a **waiver to their right to remand now under** 28 U.S. Code § 1447 (c). **Page 24**

"when an application to remove a cause (removable) is made in proper form, and no objection is made . . . ***'it is the duty of the State court to "proceed no further in the cause."'"*** *Virginia v. Rives, 100 U.S. 313 (1879) (Emphases added!)*

"no court—state or federal—is free to revisit as a matter of res judicata". *See generally Farm Credit Bank of St. Paul v. Ziebarth, 485 N.W.2d 788, 791 (N.D. 1992). (Emphases added!)*

"the filing of a removal petition terminates the state court's jurisdiction until the case is remanded, even in a case improperly removed." *Lowe v. Jacobs, 243 F.2d 432, 433 (5th Cir.), cert. denied, 355 U.S. 842, 78 S.Ct. 65, 2 L.Ed. 52 (1957). (Emphases added!)*

"BILBREY, J., concurring. I agree with Judge Benton's thorough legal analysis that as 28 U.S.C. § 1446 is currently written, ***a state court lacks subject matter jurisdiction after a notice of removal is filed, even if the removal is improper.*** *See Maseda v. Honda Motor Co., Ltd., 861 F.2d 1248 (11th Cir. 1988)."* https://www.mcglinchey.com/files/uploads/Real_Property_Newsletters/2016/01/Case-Wargo-v-Wells-Fargo.pdf Page 20. *(Emphases added!)*

'If one court acquires jurisdiction over property first, no other court may take jurisdiction for common sense reasons." *Sexton v. NDEX West, et al., U.S. Court of Appeals for the Ninth Circuit, Case No. 11-17432, D.C. No. 3:ll-cv-00440-LRH-VPC (2013) (Emphases added!)*

Once the Court in the Instant State Case on Appeal read Szmania's Motion to dismiss filed on 2/16/17, which challenged jurisdiction. The Court should have dismissed the case! *See* CP 14.

"Once jurisdiction is challenged, the court cannot proceed when it clearly appears that the court lacks jurisdiction, the court has no authority to reach merits, but, rather, should dismiss the action. *" Melo v. US. 505 F2d 1026. (Emphases added!)*

In the Melo court, we see the same standard of law upheld as CR 12 (h) (3) Lack of Jurisdiction, prescribes:

*"Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter**, the court shall dismiss the action."** (Emphases added!)*

"The law provides that once State and Federal Jurisdiction has been challenged, it must be proven." *Main v. Thiboutot, 100 S. Ct. 2502 (1980). (Emphases added!)*

No. 2 Insufficiency of Process & Service of Process

Wells states: *"this Court has jurisdiction"* (Complaint CP 3, page 2 at line 12) when they know the U.S. Court of Appeals for the Ninth Circuit Case No. 16-36055 as of 12/20/16, has jurisdiction. *See* CP 13 Ex A. This claim makes their pleadings insufficiency of process! See CP 14 Page 16, 4-8.

Wells got an EXPARTE ORDER FOR ALTERNATIVE SERVICE CP 8 on January 23, 2017 for alternative service on Szmania. This Order clearly states on page 2 at 1-7:

*"IT IS HEREBY ORDERED that the Summons and Complaint issued by the Clerk of this Court in this action, **be served by posting a copy thereof in a conspicuous place on the subject Property located at 17005 NE 164th Ave, Brush Prairie, WA 98606,** and a copy of the complaint and summons **be forthwith mailed to said Defendant DANIEL G. SZMANIA** and All Occupants of the Premises, **by certified mail, return receipt requested, postage prepaid** to Defendants at their last known address of: 17005 NE 164th Ave, Brush Prairie, WA 98606." (Emphases added!)*

14. By Mr. Brian Anders posting the Summons and Complaint on the Hawk Meadows Home Owners Association gate that has its own address of: 17010 NE 167TH AVENUE, BRUSH PRAIRIE, WA 98606. (*See* Ex N of Delc, CP 13) and *See* DECLARATOIN OF SERVICE CP 9 and CP 10. (Also *See* DECLARATION OF KEVIN R. WILLIAMS and Ex K and Ex L. *See* Ex N, Ex O, Ex P, EX Q and Ex R all of Delc, CP 13). This is clearly **NOT in compliance** with the EXPARTE ORDER FOR ALTERNATIVE SERVICE CP 8! Furthermore, **NO** U.S. Mailings either regular or Certified Return Receipt were ever received by the Szmania regarding this matter! If there was, there would be the Certified Return Receipt as an Exhibit by Wells in this matter. There is none! Therefore process of service on Szmania is insufficient & procedural requirements of RCW 59.12 are in noncompliance.

See CP 14 Pages 16, 9-24 and Page 17, 1-4. *See* RP Volume I, Page 11 at 12 to page 12 at 6.

> *"**A judgment rendered by a court without personal jurisdiction over the defendant is void. It is a nullity**. [**A judgment shown to be void for lack of personal service on the defendant is a nullity.**] "Sramek v. Sramek, 17 Kan. App. 2d 573, 576-77, 840 P.2d 553 (1992), rev. denied 252 Kan. 1093 (1993). (Emphases added!)*

> *"Court must prove on the record, all jurisdiction facts related to the jurisdiction asserted." Latana v. Hopper, 102 F. 2d 188; Chicago v. New York, 37 F Supp. 150* **Page 27**

No. 3 <u>Failure to State a Claim Upon Which Relief Can be Granted</u>

Well's claims are further Barred by doctrines of Res Judicata & Collateral Estoppel (claim and issue preclusion). The U.S. District Court Western District of Washington At Tacoma, Case No. 3:16-CV-05644-RBL, ruled on 11/18/16: ***"This is not a foreclosure case."*** Dkt 64 page 2 at 14. Therefore Plaintiff can not seek relief based upon their illegal foreclosure action in which they **never got a Declaratory ruling saying they had legal standing** to collect or foreclose on Szmania's home. *See* CP 3. Plaintiff's Complaint does not meet the *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)* standard.

But the 4 prongs for Res Judicata apply here. To determine whether res judicata applies, Washington courts apply a four-part test. *Karlberg, 280 P.3d at 1130.* In all instances, res judicata applies only if there is a final judgment on the merits. *Id.* (citing *Pederson v. Potter, 103 Wn. App. 62, 11 P.3d 833, 835 (2000).)* Assuming there is, that judgment will have preclusive effect only if there is identity between the prior judgment and the subsequent

action with respect to (1) persons and parties; (2) causes of action; (3) subject matter; and (4) the quality of persons for or against whom the claim was made. *Id.* Plead on page 18 (d), the parties, cause of action, subject matter and the quality of persons claims were made against, all meet the above standards. Res Judicata occurs when a prior judgment has a concurrence of identity in four respects with a subsequent action. In short; Well's claims in the Instant State Case on Appeal are Barred by Res Judicata.

"no court—state or federal—is free to revisit as a matter of res judicata". *See generally Farm Credit Bank of St. Paul v. Ziebarth, 485 N.W.2d 788, 791 (N.D. 1992). (Emphases added!)*

Where it is clear amendment would be futile, the court may dismiss the Complaint without leave to amend. *See Havas v. Thorton, 609 F.2d 372 (9th Cir. 1979).* Here, Wells has failed to plead a plausible claim for relief despite being attorneys and trained to do so. Combined with the preclusive effect of the prior rulings entered against them, no further amendment could survive a motion to dismiss. Thus, dismissal with prejudice is appropriate. Issues of the Loan have already been litigated and res judicata precludes Wells from another bite at the forbidden apple. As such, dismissal with prejudice is appropriate. **Page 29**

Well's claims are Barred for Lack of Legal Standing. **Wells has NO LEGAL STANDING in Defendant's home!** As the Defendant penned in the Facts Section, Wells lacks Legal Standing an materially evidenced in: *See* Ex B, Ex C, Ex D, Ex E, Ex F, Ex G, and **Ex J (JP Morgan, owner of Bears Stearns says Szmania's loan is NOT in it's trust!)** of Decl. Daniel G. Szmania, re: Motion to Dismiss. *See* CP 13.

Well's claims are barred for Lack of Authorization to Legally Represent Wells Fargo Bank N.A. Mr. Benjamin David Petiprin is **NOT** an attorney for Wells Fargo Bank N.A. as materially evidenced in the attorney list for Wells in the Ninth Circuit. *See* Ex M of Decl. Daniel G. Szmania, re: Motion to Dismiss CP 13. (*See* CP 14 Pages 17 at 7 to 18 at 13).

> *"Defense of lack of jurisdiction over the subject matter may be raised at any time, even on appeal." Hill Top Developers v. Holiday Pines Service Corp., 478 So. 2d. 368 (Fla 2nd DCA 1985)*

Dismissals based on res judicata have been affirmed where the defense was raised by way of a 12(b)(6) motion. *See, e.g., Begala v. PNC Bank,* 214 F.3d 776 (6th Cir.2000) (affirming 12(b)(6) dismissal on basis of res judicata); *Kane v. Magna Mixer Co.,* 71 F.3d 555(6th Cir.1995) (same). **Page 30**

No. 4 <u>The State Court Abused its Discretion</u>

Once again; the Court of The Honorable Bernard F. Veljacic in the Instant State Case on Appeal was derelict in its procedures and it was negligent in its acting with total lack of Jurisdiction to reach any merits or make any rulings once it read Szmania's Notice To Clerk Of Removal To Federal Court, *See* CP 18 which was filed on 5/18/17. But the rogue and unlawful court ruled anyways **<u>in nullity</u>** the following orders **<u>8 days latter</u>**:

1) FINDINGS AND ORDER TO PROCEED, NOTWITHSTANDING DEFENDANT'S NOTICE TO CLERK OF REMOVAL TO FEDERAL COURT, May 26, 2017, CP 20.

2) ORDER DENYING DEFENDANT'S MOTION TO DISMISS, AND SETTING TIME FOR HEARING, May 26, 2017, CP 21. *"THE COURT: I'm just ruling on the motion to dismiss at this point.* ***<u>I don't think it's lawfully based.</u>*** *I'm denying the motion to dismiss." See* RP Volume I, Page 19 at 4-7. *(Emphases add!)*

3) ORDER FOR DEFAULT AND DEFUALT JUDMENT, May 26, 2017, CP 22.

4) ORDER TO ISSUE WRIT OF RESTITUTION WITHOUT BOND, May 26, 2017, CP 23. And WRIT OF RESTITUTION May 26, 2017.

The above abuse of power by the The Honorable Bernard F. Veljacic is **NOT a matter of judicial discretion!** It is in clear violation of the well settled law in 28 U.S.C. § 1446(d) it reads:

*" **(d) NOTICE TO ADVERSE PARTIES AND STATE COURT:** Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State Court,* ***which shall effect the removal and the State Court shall proceed no further unless and until the case is remanded."*** *(Emphases added!)*

Also in regards to 28 U.S.C.A. § 1446(d):

"After a notice of removal is filed in federal court, notice thereof is given to adverse parties, and a copy of the notice of removal is filed in state court, removal is effected and "the State court shall proceed no further unless and until the case is remanded." 28 U.S.C.A. § 1446(d) (West 2015). As a court of the United States, we must, under the Supremacy Clause, give force to the express language of 28 U.S.C.A. § 1446 (West 2015). ***We hold the final judgment entered by the court below after removal of the case to federal court (and prior to remand) is void because the circuit court no longer had jurisdiction."***

https://www.mcglinchey.com/files/uploads/Real_Property_Newsletters/2016/01/Case-Wargo-v-Wells-Fargo.pdf Page 19.

"Hence, after removal, the jurisdiction of the state court absolutely ceases and the state court has a duty not to proceed any further in the case. Any subsequent proceedings in state court on the case are void ab initio." *Maseda v. Honda Motor Co., Ltd., 861 F.2d 1248, 1254–55 (11th Cir. 1988) (internal citation omitted); see DB50 2007-1 Tr. v. Dixon, 723 S.E.2d 495, 496 (Ga. Ct. App. 2012)*

The above noted 4 orders are void that were entered after the Removal was done not once, but twice!

"There is no discretion to ignore lack of jurisdiction! " *Joyce v. U.S. 474 2D 215.*

42 U.S.C. § 1983 ***Civil action for deprivation of rights****: provides that any person, acting under the color of state law, that subjects or causes to be subjected any citizen of the United States or other person within its jurisdiction to the deprivation of any rights, privileges, or immunities under the Constitution,* ***shall be liable to the injured party in an action at law, suit in equity, or other proper proceeding for redress.***

This law makes Mr. Bernard F. Veljacic personally and equally liable and responsible to Szmania for his judicial misconduct and forcing Szmania and his family and roommates out of the home located at 17005 NE 164th Ave., Brush Prairie, WA 98606.

See CP 19, Page 2 ***"MR. SZMANIA ARGUES AGAINST-ARGUES THIS COURT DOES NOT HAVE JURISDICITON!"*** *(Emphases added!)*

See RP Volume I, Page 8 at 10-12 and page 26 at 18 to 22, Szmania does NOT submit to Jurisdiction of the Instant State Case on Appeal.

See RP Volume I, Page35 at 11 to page 36 at 2. **The Court in the Instant State Case on Appeal acknowledges that is sees the Removal filed in the U.S District Court.**

Even though the Court in the Instant State Case on Appeal was out right lied to by Wells when asked if this case was in Federal Court, the Court still had a Judicial duty to Szmania to do it's own due diligence and findings of fact. *See* RP Volume I, Page 12 at 22-25. *"THE COURT: Thank you, sir, for your argument. Mr. Read, is there -- is this a case up in federal court? MR. READ: Your Honor, this case is not."*

VIII. CONCLUSION

The well settled law of **Lack of Jurisdiction after Removal** found in 28 U.S.C. § 1446(d) that terminates the Jurisdiction in the State Court of the Instant Case on Appeal and further bars Wells from bringing the unlawful detainer action in said court .

"A court cannot confer jurisdiction where none existed and cannot make a void proceeding valid. It is clear and well established law that a void order can be challenged in any court". *OLD WAYNE MUT. L. ASSOC. v. McDONOUGH, 204 U. S. 8, 27 S. Ct. 236 (1907). (Emphases added!)*

Also, being that Jurisdiction is still in the Jurisdiction of the Federal Case, on appeal in the Ninth Circuit, also further employs the doctrines of claim and issue preclusion, Res Judicata and Collateral Estoppel.

"[w]hen an appeal is pending, a party is precluded by res judicata from starting a new action ... in hopes of obtaining a contrary result while the appeal is pending." *Spokane Cnty. v. Miotke, 158 Wn. App. 62, 67, 240 P .3d 811 (20 1 0) (internal quotation marks omitted).*

The Court in the Instant State Case on Appeal asked if estoppel applied: *THE COURT*: *"Has title been called into question in that action? Is there some sort of estoppel effect because of that action? "* *See* RP Volume I, Page 13 at 23 to 25. Wells mislead and lied to the Court, *See* RP Volume I, Page 14 at 1 to page 15 at 22. Szmania correctly answered: *See* RP Volume I, Page 15 at 23 to page 18 at 13. **Page 34**

Wells Insufficiency of Process lacking in Jurisdiction and in their failures in Service of Process on Szmania further makes this instant case ripe for overturning of the 4 orders and the writ of restitution and restoring possession of the property to Szmania.

Wells **Failure to State a Claim Upon Which Relief Can be Granted** adds to the weight of case tremendously in favor of Szmania.

> *"In an unlawful detainer action, plaintiff bears the burden to prove, **by a preponderance of the evidence, the right to possession of the premises.**" Duprey v. Donahoe, 52 Wn.2d 129, 135, 323 P.2d 903 (1958). (Emphases added!)*

The only evidence before this court Wells has offered is in their Compliant CP 3, Ex A, which is their illegal, fraudulent and non compliant in 61.24 RCW, Deeds of Trust Act. What is lacking in evidence before this Court is a **Declaratory Ruling** giving Wells Legal Standing to collect and or foreclose on Szmania' home. Standing and many more claims in equity were made presale. There is **NO** affidavit of the foreclosing trustee, as evidence of a properly conducted sale or the Federal Case order saying: ***"This is not a foreclosure case."*** Dkt 64 page 2 at 14. This ruling alone is

why Wells "Court Shopped" and moved to get possession of Szmania's home in the State Court and is trying to pull a fast one on every one! Also lacking is any order adjudicating and or a mandate in the appeal in the Ninth Circuit, which solidifies Jurisdiction, is still in the hands of the Federal Courts. However, Szmania submitted a "***preponderance of the evidence"*** (Decl. CP 13) that **proves Wells has NO LEGAL STANDING his home**:

Ex B is the Deed, Ex C shows full pay off by Szmania 11/ 21/ 2007, Recording No. 4397625, Ex D shows Bear Stearns Arm Trust 2007-3 is delisted, Ex E Wells illegal assignment with fake address as evidence in Ex F, Ex G shows an illegal trustee not in Washington State & noncompliant in RCW 61.24.030(6), Ex J- JP Morgan Chase owner of Bear Stearns Trusts states:" Szmania's loan is NOT in their trust"! Page 7. See **RP Volume I, Page 8 at 12-25.**

Wells failed to object and motion to Remand in the Instant State Case on Appeal and **thus waived their right to Remand under** 28 U.S. Code § 1447 (c), **after Szmania Removed the State Case on 05/18/2017., *See*. CP 18** Wells waived any challenge of the Removal by failing to file a motion to Remand within 30 days per 28 U.S. Code § 1447 (c).

"[W]aiver is an equitable doctrine, and 'we apply waiver only where it is equitable under the circumstances and where it serves the goals of the act."' Klem v. Wash. Mut. Bank. 17 6 W n.2d 771, 783 n. 7, 295 P.3d 1179, 1185 (2013) (quoting Albice v. Premier Mortg. Servs. of Wash., Inc., 174 Wn.2d 560, 569, 276 P.3d 1277 (2012)).

The State Court Abused it's Discretion by not dismissing Wells Complaint CP 3 and claims upon reading Szmania's Motion to Dismiss, CP 14 on 02/16/2017. Also **when Szmania Removed the State Case on 05/18/2017, CP 18.** It further abused its power and discretion when it entered the four (4) orders noted below and the Writ of Restitution without any Jusrisdiction. **Settled law dictates that the four (4) orders and the writ are all nullity.**

*"**A universal principle as old as the law is that a proceedings of a court without jurisdiction are a nullity and its judgment therein without effect either on person or property**." Norwood v. Renfield, 34 C 329; Ex parte Giambonini, 49 P. 732. (Emphases added!)*

"Jurisdiction is fundamental and a judgment rendered by a court that does not have jurisdiction to hear is void ab initio." *In Re Application of Wyatt, 300 P. 132; Re Cavitt, 118 P2d 846. (Emphases added!)*

"The burden shifts to the court to prove jurisdiction." *Rosemond v. Lambert, 469 F2d 416. (Emphases added!)*

"Jurisdiction can be challenged at any time." and "Jurisdiction, once challenged, cannot be assumed and must be decided." Basso v. Utah Power & Light Co., 495 F 2d 906, 910.

"Once challenged, jurisdiction cannot be assumed, it must be proved to exist." Stuck v. Medical Examiners, 94 Ca 2d 751. 211 P2d 389.

See RP Volume I, Page 8 at 10-12 & and page 26 at 18 to 22. Szmania declares he is NOT submitting to the Jurisdiction of the Instant State Case on Appeal. **Page 37**

"A court has no jurisdiction to determine its own jurisdiction, for a basic issue in any case before a tribunal is its power to act, and a court must have the authority to decide that question in the first instance." *Rescue Army v. Municipal Court of Los Angeles, 171 P2d 8; 331 US 549, 91 L. ed. 1666, 67 S.Ct. 1409. (Emphases added!)*

"Thus, where a judicial tribunal has no jurisdiction of the subject matter on which it assumes to act, its proceedings are absolutely void in the fullest sense of the term." *Dillon v. Dillon, 187 P 27. (Emphases added!)*

"A departure by a court from those recognized and established requirements of law, however close apparent adherence to mere form in method of procedure, which has the effect of depriving one of a constitutional right, is an excess of jurisdiction." Wuest v. Wuest, 127 P2d 934, 937.

"Where a court failed to observe safeguards, it amounts to denial of due process of law, court is deprived of juris." Merritt v. Hunter, C.A. Kansas 170 F2d 739.

Szmania asks the Court in the Instant State Case on Appeal, what authority it had to override 28 USC 1446 subsection (d)?

***'MR. SZMANIA**: I just want to clarify, because 28 USC 1446 subsection (d) clearly says that once a notice is filed with the clerk of the court, which shall affect the removal, and the state court shall proceed no further unless and until the case is remanded. In my humble opinion, from my view, you're proceeding in the case by entering an order. So do you have an authority that overrides 28 USC 1446 subsection (d)? **THE COURT**: I haven't heard a question so I'm not going to respond. And moreover, I'm typically not the one to respond to questions." See* RP Volume I, Page 28 at 14 to 24.**The case has NEVER been Remanded thus Jurisdiction is in the Federal Court!** *See* RP Volume I, page 10 at 10. "*This case has not been remanded."*

For the foregoing reasons, **Szmania respectfully request a reversal of the following four (4) orders and writ regarding:**

The Defendant's Motion To Dismiss, CP 14.

The Findings And Order To Proceed, CP 20.

The Order Denying Defendant's Motion To Dismiss, CP 21.

The Order For Default And Default, Judgment, CP 22 and

The Order To Issue Writ Of Restitution Without Bond, CP 23

Szmania also asks for possession of the property known as: 17005 NE 164th Ave, Brush Prairie, WA 98606. (Which sits vacant since we've been illegally forced out of our paid off home!)

Szmania also asked under RAP 18.1 that no attorney fees or cost be awarded to Wells. That cost, fees and time of value be awarded Szmania for prosecution of this appeal payable by Wells.

Szmania is also available for oral arguments and request oral arguments.

Respectfully submitted;

s/ Daniel G. Szmania

Daniel G. Szmania, Defendant/Appellant, Pro Se', December 11, 2017
HM1 USNR Retired, U.S. Supreme Court No. 11-6137
PO Box 757., Brush Prairie, WA 98606-0757
360-718-1402, dszmania@quixnet.net

CERTIFICATE OF SERVICE

Case No. 50523-1-II

Pursuant to RCW 9.A.72.085, the undersigned certifies under penalty of perjury under the laws of the United States and the State of Washington, that on the 11th day of December, 2017, I served via: (Indicated by and X) to the following persons, a true and correct copy of the Foregoing:
_X__ by CM/ECF
_XX__by First Class Mail

1) DEFENDANT'S/ APPELLANT'S OPENING BRIEF

TO PLAINTIFF/RESPONDENT:
1) Wells Fargo Bank, N.A., AS TRUSTEE FOR BEAR STEARNS ARM TRUST 2007-3. C/o Zieve, Brodnax & Steele, LLP, Leslie Marie Klott
30 Corporate Park, Suite 450, Irvin, CA 92606-3401
714-848-7920 Ext. 363 klott@zbslaw.com **CM/ECF & First Class Mail**

2) Wells Fargo Bank, N.A., AS TRUSTEE FOR BEAR STEARNS ARM TRUST 2007-3. C/o Dale W. Read, JR
211 East McLoughlin Blvd, Vancouver, WA 98663-3368
360-696-5976 **Not on CM/ECF by First Class Mail Only.**

I certify under penalty of perjury under the laws of the United States and the laws of the State of Washington that the foregoing is true and correct. **AND** Per GR 30 ELECTRONIC FILING AND SERVICE: (d) (2) (B) and (C) (ii): I ensure these electronic documents has the digital signature of the signer, myself; s/ Daniel G. Szmania.

Dated this 11th day of December, 2017, at Brush Prairie, Washington.

s/ Daniel G. Szmania
Presented: Daniel G. Szmania, Defendant/Appellant, Pro Se'.
HM1 USNR Retired, U.S. Supreme Court No. 11-6137.
PO Box 757, Brush Prairie, WA 98606-0757
360-718-1402, Email: dszmania@quixnet.net

DANIEL SZMANIA - FILING PRO SE

December 11, 2017 - 12:06 AM

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Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	50523-1
Appellate Court Case Title:	Wells Fargo Bank, Respondent v. Daniel G. Szmania, Appellant
Superior Court Case Number:	16-2-02606-4

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