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Court of Appeals  
Division II  
State of Washington  
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No. 51368-4

COURT OF APPEALS  
DIVISION II OF THE STATE OF WASHINGTON

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ESTATE OF STEPHEN SPRING,

Appellant,

v.

OUR COMMUNITY CREDIT UNION

Respondent.

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**BRIEF OF RESPONDENT**

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## **I. INTRODUCTION**

Respondent, Our Community Credit Union (“OCCU”), requests that this Court affirm the Trial Court’s Order Granting OCCU’s Motion for Summary Judgment, dated November 6, 2017. Petitioner, Stephen J. Spring (“Spring”) failed to meet his burden to demonstrate to the Superior Court that there was a genuine dispute as to any issue of material fact such that summary judgment should not be granted. Spring’s case failed as a matter of law, and the Order granting its Motion for Summary Judgment was appropriate.

Furthermore, OCCU moves this Court to dismiss this appeal pursuant to RAP 18.9(c)(2) for being frivolous.

## **II. STATEMENT OF THE ISSUES**

1. Whether Appellant has provided the Court of Appeals with a record devoid of evidence to support Appellant’s Appeal?
2. Whether a genuine issue of material fact existed to defeat OCCU’s Motion for Summary Judgment.
3. Whether the Court of Appeals should Dismiss this Appeal as frivolous pursuant to Rule 18.9.

### III. STATEMENT OF THE CASE

This case stems from the payment default by the borrowers on a Promissory Note secured by non-residential real property. Stephen S. Spring and Shirley Spring (“Borrowers”) executed a Promissory Note (“Note”) in the amount of \$100,000.00, payable to OCCU. CP 25. As security for the Note, Borrowers executed a Deed of Trust (the “Deed of Trust”) against real property commonly known as 11 S.E. Channel Point Road, Shelton, Washington 98584 (“Subject Property”). CP 29.

Borrower Stephen S. Spring passed away on November 8, 2011. CP 1. Shortly thereafter, Shirley Spring ceased making payments on the Note. CP 6, 102. OCCU provided Shirley Spring written notice of the default. CP 102. The default on the Note went uncured.

OCCU caused a non-judicial foreclosure to be commenced on the Deed of Trust. On March 10, 2015, OCCU appointed Northwest Trustee Services (“NWTS”) as Successor Trustee under the Deed of Trust with all of the powers of the original trustee. CP 38. On May 7, 2015, NWTS sent a statutory Notice of Default via first-class mail and also certified mail, with a return receipt requested, to *inter alia*, Shirley Spring, the Estate of Stephen

S. Spring, and the Heirs and Devisees of the Estate of Stephen S. Spring. CP 155. The Notice of Default adhered to RCW 61.24.030(8). CP 155.

At the time these Notices were given, no probate for Stephen S. Spring had not been opened. CP 1. It was not until August 18, 2016, almost five (5) years after Stephen S. Spring passed, that Petitioner Spring, filed a Petition for Adjudication of Intestacy and Heirship and Issuance of Letters of Administration for his deceased father. CP 140. In the attached Inventory, Spring listed the Subject Property, which had been sold at the Trustee's Sale the previous year, as the only asset of the Estate. CP 143.

On or about June 16, 2015, OCCU and NWTS recorded a Notice of Trustee's Sale with the Mason County Auditor. CP 41. The Notice of Trustee's Sale was delivered in the manner required by RCW 61.24.040, consistent with the form in the statute. CP 41, 155. The Notice of Trustee's Sale set the date of the sale for October 16, 2015. CP 41.

Pursuant to RCW 61.24.030, the Notice of Trustee's sale provided instructions for anyone wishing to bring a lawsuit to restrain the sale. CP 41. The Notice also provide that "failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale." CP 41. The Notice was sent to twelve different addresses, including to the

“Heirs and Devisees of the Estate of Stephen S. Spring, deceased.” CP 155. Shirley A Spring, the remaining borrower on the Note, was also this Notice. CP 155.

On October 9, 2015, Spring filed a Complaint to Restrain the Sale of the Property (“First Complaint”). CP 105. In his First Complaint, Spring alleged that he had invested money in improving the Subject Property and would suffer great financial loss if the Property was sold. CP 106

The Court held a hearing for the Motion to restrain the trustee’s sale. CP 115. At the hearing, the Court found Stephen A. Spring lacked standing to bring the claim (he was neither a borrower or able to represent the Estate of Stephen S. Spring as he did not hold letters testamentary); had failed to demonstrate a likelihood of success on the merits of any claim related to the trustee’s foreclosure sale of the Property, and denied the injunction. CP 118. No appeal of this decision was sought.

The Trustee’s Sale was held on October 16, 2015. CP 1, 47. The Trustee’s Deed was issued to OCCU and signed by Deidre Piggott, Assistant Vice President of NWTs. CP 47. The Trustee’s Deed was recorded on November 2, 2015 with the Mason County Auditor’s Office. CP 47.

On February 1, 2016, the Trial Court granted a CR 12(c) Motion to Dismiss the First Complaint. CP 121.

On February 22, 2017, Petitioner filed its Complaint against OCCU and NWTS for “Wrongful Sale” (“Second Complaint”) alleging that the foreclosure was improper. CP 1. In the Second Complaint, Petitioner alleged OCCU should have been aware that Stephen S. Spring was deceased and known that the estate had no legal representative at the time it gave notice and therefore OCCU had breached its requirement to notify the borrower under RCW 61.24.031. CP 2. The Second Complaint sought over Four Hundred Thousand dollars (\$400,000.00) in damages. CP 2.

On August 28, 2017, the Court dismissed Spring’s claims against NWTS for failure to state a claim on which relief could be granted, pursuant to CR 12(b)(6). CP 11.

On November 1, 2017, OCCU filed a Motion for Summary Judgment. CP 6. Shortly thereafter, OCCU filed a Corrected Motion for Summary Judgment, the purpose of which was to correct some handwritten edits that were inadvertently left on OCCU’s Motion document when it was filed. CP 71.

Spring filed a wholly inadequate Response to OCCU's Motion for Summary Judgment (which contained, in pertinent part, four conclusory sentences) and failed to timely submit to the Trial Court any admissible evidence in opposition to prevent summary judgment. Spring did file a Declaration, that was purportedly made by Spring, but it was filed late, was riddled with inadmissible hearsay, and was not signed by the Declarant and for those reasons was struck by the Trial Court. Spring did not appeal this decision.

The Trial Court granted OCCU's Motion for Summary Judgment on November 6, 2017, and the case was dismissed with prejudice. CP 69.

On December 6, 2017, Spring timely appealed the Order granting Summary Judgment.

#### **IV. SUMMARY OF THE ARGUMENT**

A. Spring has failed to supply this Court with a Record that supports his Appeal because Spring's Designation of Clerk's Papers does not include any document filed by Spring in the case below other than his Complaint.

B. Summary Judgment was Properly Granted because Spring failed to submit admissible evidence to the Trial Court to defeat Summary Judgment.

C. The Court of Appeals should grant OCCU's motion to Dismiss Spring's Appeal as frivolous because it is completely without merit and has been pursued for improper purposes.

## V. LAW AND ARGUMENT

**A. Spring has failed to supply this Court with a Record that supports this Appeal.**

Spring has failed to supply this Court with a record that supports his Appeal. Spring's Designation of Clerk's Papers does not include *any document* filed by Spring in the case below other than Spring's Complaint. There is *literally nothing* from the record of the proceedings below properly before the Court to support Petitioner's Appeal. This violates RAP 9.12 and demonstrates, once again, that Spring is pursuing this case for improper purposes and is indifferent to the resulting waste of judicial resources not to mention the expense incurred by OCCU.

**B. Summary Judgment was Properly Granted.**

Notwithstanding the inadequacy of the record, the Trial Court properly granted summary judgment to OCCU because OCCU supported its motion for summary judgment with a declaration as required and Spring failed to provide *any evidence* to demonstrate was an issue of material fact that would prevent summary judgment.

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of a pleading, but a response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Wash. Super. Ct. Civ. R. 56.

In the instant case, OCCU moved for summary judgment and supported its motion with the Declaration of its Accounts Control Officer, Carl Anderson. In particular, with this Declaration OCCU demonstrated that NWTs had given all required notices, to all required parties pursuant to RCW 61.24 *et seq.*

A party opposing summary judgment may not rely on “mere allegations or denials” set forth in the pleadings, but rather “must set forth specific facts showing that there is a genuine issue for trial.” CR 56(e). *Tiffany Family Tr. Corp. v. City of Kent*, 155 Wash. 2d 225, 230, 119 P.3d

325, 328–29 (2005). A “material fact” is a fact upon which the litigation depends, in whole or in part. *Barrie v. Hosts of Am., Inc.*, 94 Wash.2d 640, 643, 618 P.2d 96 (1980). *Young v. Key Pharm., Inc.*, 112 Wash. 2d 216, 234, 770 P.2d 182, 192 (1989).

Spring did not timely submit any admissible evidence to the Trial Court to oppose OCCU’s Motion for Summary Judgment. Spring effectively stood on his pleadings. After hearing argument, the trial correctly granted summary judgment to OCCU.

Notwithstanding Spring’s failure to provide evidence opposing summary judgment, OCCU also demonstrated that summary judgment was appropriate because Spring’s legal argument that the foreclosure was “wrongful” failed as a matter of law.

Spring’s argument was based on the notion NWTS had failed to notify the legal representative of deceased borrower Stephen S. Spring prior to the foreclosure. OCCU demonstrated that argument was fallacious. Spring did not petition for letters testamentary for Stephen S. Spring until August 16, 2016, which was more than a year *after* the foreclosure had taken place. NWTS could not provide notice to an entity that did not yet exist, and the law did not require it to do so.

In fact, OCCU demonstrated that it had provided all required notices to every party entitled to receive them pursuant to RCW 61.24, including borrower Shirley Spring. Further, despite the fact that it was not expressly required as a matter of law, OCCU provided notice to Spring and Spring received notice as demonstrated by the fact that Spring filed the First Complaint seeking to enjoin the foreclosure.

OCCU made other legal arguments as well. OCCU argued that the issues presented by Spring were *res judicata* because they had been decided by the Order Dismissing the Plaintiff's First Complaint for failure to state a claim. OCCU also argued that Spring lacked standing to sue OCCU because he was not a borrower on the Note, and by the time Spring opened the Estate of Stephen A. Spring and became the Personal Representative of the Estate, the foreclosure had been long since completed.

In summary, Spring provided no admissible evidence in opposition to summary judgment. OCCU contends this was because none existed. Regardless, OCCU demonstrated that Spring's claim for wrongful foreclosure was factually and legally baseless, and accordingly, entry of summary judgment was appropriate.

**C. The Court of Appeals should grant OCCU's motion to Dismiss Spring's Appeal as frivolous.**

OCCU moves the Court for an order dismissing Petitioner Spring's Appeal as frivolous pursuant to RAP 18.9(c)(2). Spring's appeal is frivolous because of the inadequacy of the record Spring put forward on appeal, the defects in Spring's opening brief, and most importantly, because this Appeal is has no substantive merit.

Spring brought nothing forward before the Trial Court to withstand summary judgment. OCCU demonstrated to the Trial Court that Spring's Second Complaint was fatally flawed, both factually and legally, and the Trial Court properly granted Summary Judgment. Unrepentant, Spring brought this Appeal. Spring then filed an opening brief that did not comply with the Rules of Appellate Procedure and supplied nothing to this Court to support Spring's contention that summary judgment was not properly granted beyond the bare allegations in his Complaint.

This Appeal is Spring's third bite at the apple. The First Complaint, which was dismissed under CR 12(c), was arguably frivolous. The Second Complaint, which was dismissed as to NWTs under CR 12(c), and on Summary Judgment against OCCU after Spring failed to come forward with

any evidence, was also arguably frivolous. It is abundantly clear that this Appeal is so devoid of legal merit that it has no reasonable chance of success. The only reasonable conclusion is that this Appeal was filed in an attempt to coerce OCCU in to proposing some sort of settlement or accommodation to Spring.

“[A]n appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.” *Tiffany Family Tr. Corp. V. City of Kent*, 155 Wash. 2d 225, 241, 119 p.3d 325, 334 (2005). There are no debatable issues in this Appeal. This Court should not waste any more judicial resources on this case, or allow Spring to continue to waste OCCU’s resources. This Court should dismiss this Appeal as frivolous and obviate the need for further briefing or oral argument.

## **VII. CONCLUSION**

The trial Court correctly granted summary judgment to OCCU. This is a frivolous appeal of a meritless Complaint, neither of which have been pursued with competence, diligence and good faith. The Court of Appeals should dismiss Spring’s Appeal and, at long last, put this matter to rest.

RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of May 2018.

BEAN, GENTRY, WHEELER & PETERNELL, PLLC



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**DECLARATION OF SERVICE**

I hereby certify that I caused to be served a true and correct copy of the foregoing document on all parties or their counsel of record on the date below as follows:

Appellant:

Nathan Dysart  
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- US Mail Postage Prepaid
- Electronic mail: [nathandysart@yahoo.com](mailto:nathandysart@yahoo.com)
- Hand delivered

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

DATED this <sup>20th</sup> day of May 2018, at Olympia, Washington.

  
Kelley Strickland

**BEAN GENTRY WHEELER & PETERNELL**

**May 29, 2018 - 4:37 PM**

**Transmittal Information**

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