

FILED
Court of Appeals
Division II
State of Washington
11/21/2018 3:06 PM

COURT OF APPEALS II No.: 51375-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

DANIEL L. ROGERS

Petitioner/Appellant

v.

QUALITY LOAN SERVICE CORPORATION
OF WASHINGTON, et al.

Respondents

ON APPEAL FROM MASON COUNTY SUPERIOR COURT

Case No. 14-2-00045-0

APPELLANT'S AMENDED OPENING BRIEF

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Hamilton A. or Madison J. (1788) "Federalist Paper No. 51" *The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments*. Retrieved on November 19, 2018 from: <https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-51>16, 29

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I. INTRODUCTION

The Washington Courts of Appeals have consistently, and without much thought, ruled that superior courts in Washington must treat *pro se* litigants as if they were attorneys. For example, in *Am. Express Centurion Bank v. Hengstler*, No. 48603-2-II, 2017 Wash. App. LEXIS 1104, at *13-14 (Ct. App. May 9, 2017) (*unpublished*) Division II Judges Lisa Worsick, Thomas Bjorgen, and Linda Lee ruled:

In federal court, *pro se* pleadings receive liberal construction. *Pouncil v. Tilton*, 704 F.3d 568 (9th Cir. 2012); *see Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972). But in Washington courts, a superior court “must hold *pro se* parties to the same standards to which it holds attorneys.” *Edwards v. Le Duc*, 157 Wn. App. 455, 460, 238 P.3d 1187 (2010).

This is a procedural rule; federal procedural rules do not control in state courts. *Adams v. LeMaster*, 223 F.3d 1177, 1182 n.4 (10th Cir. 2000). Thus, the Washington rule applies and the superior court held *Hengstler* to the proper standard.

Id. at *13-14.

In this appeal Daniel L. Rogers, who goes by the name of Sonny and will be referred to by that name herein, claims that requiring *pro se* litigants be given a fair

opportunity to present their case is a right grounded in the Constitutions of both the United States and the State of Washington.

Additionally, Sonny will establish that, for whatever reason, he was consistently provided with contradictory statements about what he owed, that he tried to obtain accurate information about his debt, and that to do so was impossible. But all the Defendants had to do to obtain a summary judgment, notwithstanding the inconsistent information provided Sonny, was to give the judge an unexplained computer print out. Sonny claims that under these circumstances there was a question of fact as to whether Defendants defaulted on the contract, as well as the amount of the default.

Sonny is not appealing his action against the Trustee or McCarthy Holthus, but maintains they are the agents of defendants JP Morgan Chase and Wells Fargo.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1

1. *Whether the superior court erred in denying Sonny's motion for indigency and/or not, appointing him counsel or affording him other accommodations under the circumstances of this case.*

ISSUES RELATED TO ASSIGNMENT OF ERROR 1.

- A. Whether the superior court erred in denying Roger's motion for indigency without notice and an opportunity to be heard.

- B. Whether the court erred in not providing Rogers counsel in this case below given the Supreme Court has found that justice is absent in Washington courts for people like Sonny who proceed *pro se* without counsel.
- C. Whether under the circumstances of this case Sonny was entitled to a determination that his pleadings were entitled to liberal construction under the United States and Washington Constitutions.
- D. Whether under the circumstances of this case Sonny was entitled to the appointment of counsel under the due process clauses of the United States and Washington Constitutions.

ASSIGNMENT OF ERROR 2

2. The trial court erred in granting summary judgment that Sonny defaulted and with regard to the amount of the default.

- E. Whether Defendants breached their contract with Sonny by providing him with contradictory statements of the amounts claimed to be owed.
- F. Whether Defendants violated Washington's Consumer Protection Act (CPA) by providing Sonny with contradictory statements of the amounts owed.
- G. Whether the superior court erred in determining as a matter of law pursuant to CR 56 the amount of the default.

III. STATEMENT OF THE CASE

Sonny went into a Chapter 13 bankruptcy which was converted into a chapter 7, which extinguished his personal obligation on the promissory note and deed of trust lien. Clerk's Papers (CP 659-660). According to the Memorandum of Judge Goodell Sonny paid Chase through the Bankruptcy Trustee, in favor of Chase and Wells Fargo, the purported trustee of a securitized trust, \$34,475.75 prior to February 2, 2011. CP 836-848. Additionally, Sonny paid Chase payments individually beyond what the Bankruptcy Trustee paid. Sonny presented evidence the payments paid during the bankruptcy proceedings totalled over \$37,000.00. These amounts were not timely credited to his account.

Although Sonny pointed this error out to Chase, it did nothing about it, so he sued Chase, Wells Fargo, and Quality Loan Service of Washington (Quality) and its owner law firm McCarthy Holthus. CP 1102-1180. Sonny sued Quality and McCarthy because Quality was attempting to non-judicially foreclose on his home on behalf of Chase and/or Wells Fargo. CP. 1102-1180.

The variations in the billings which bothered Sonny are demonstrated by the payoff statement sent by Chase to Sonny on January 20, 2010. CP 698-699. This notice

states: "As of the date of this letter, the amount required to payoff the above reference loan is \$280,296.37."

Sonny received a notice of foreclosure less than eight months later which stated: "To pay off the entire obligation secured by your Deed of Trust as of 8/16/2010 you must pay a total of \$246,906.36 in principal, 61,420.92 in interest, plus costs and advances estimated to date on the amount of \$120.60." *Id.* Thus, the amount claimed to be due had increased approximately \$20,000.00 in less than 8 months.

In opposing Defendants motions for summary judgement Sonny consistently asserted that these variations in billings, coupled with Defendant's refusal to provide him with information he could verify, should be taken into consideration by the court. CP 617, 637-646, 698-699, 701-702, 712-713, 716, 723.

The first oral argument was held regarding Defendant Quality and McCarthy-Holthus' Motion for Summary Judgment on June 1, 2015. Sonny filed his opposition papers late. Transcripts, 7-8. Sonny explained:

MR. ROGERS: As Your Honor is aware, I was served the Summary Judgment Motion and with no litigation experience whatsoever, I've been cramming night and day to respond to this in a timely fashion and comply as best I can. I have reached out to several -- two of the legal assistants (indiscernible). Due to the fact that I did have McCarthy -- not McCarthy, rather, of course -- but Stafne Trumbull as representative initially to file the initial Complaint.

After \$10,000 being paid to them, I still never had an opportunity to have these issues heard and, quite frankly, it was breaking me. So, be that as it may, we -- I approved a Motion to Stay that litigation so that we may try to do some sort of settlement with Chase and Quality on these matters. These have been ongoing for some time -- several years -- and, quite frankly, it's reckless at the very least. So, in my opinion, these matters needed to be heard. However, I didn't hear back of a settlement offer at all from Chase. Rather, they attempted to --

THE COURT: So, Mr. Rogers, I'm going to stop you there.

Transcripts, 7-8.

Sonny asked for the court to consider his response and/or to grant him a continuance so his response could be considered. *Id.* at 8-19. The court refused, explaining “[t]he Court holds *pro se* Plaintiffs to the same standard as they do to attorneys. Certainly, there are times when the Court will grant some leeway when there is a compelling reason to do so.” *Id.* at 19. The Court didn't give Sonny any leeway because his filing was “too” late; the motion to continue was not supported by an affidavit; and because of the totality of the circumstances. *Id.* at 19-20. During his oral argument the court told Sonny: “So, the Court will only consider those matters that have been presented to the Court properly for review.” Transcripts, 27. When Sonny asked if the court would accept evidence, the court responded: “No, I will only consider those matters

that have been filed with the Court properly in response to the Motion for Summary Judgment.” *Id.* at 28. Rogers responded by stating:

MR. ROGERS: So, when Quality serves documents upon me that are flagrantly wrong, flagrantly false, flagrantly inflated, but the only reason — and I’m tying this together, as you asked — the only reason that they are doing this is because they are not themselves diligently determining if they’re accurate. If they were to do their job as a non-biased Trustee, that would not be the case. A third grader could look at these documents and say what happened here?

In fact, it caused me to go into a Chapter 13 Bankruptcy to stop that. In fact, the junior lienholder had foreclosed on my home — I was no longer owner of record, and yet Quality caused documents to be presented to the Courts claiming that Washington Mutual claiming and serving me and I was no longer owner of record. My bankruptcy had discharged the debt obligation. I bought the house back from that junior lienholder several years later because he did not want to deal with any of this.

So, the entire — for all of these years — I have been begging and asking to — for someone to look at these documents. They are so flagrant that — and I know that the only reason — and I actually have put that in my brief. I’m not trying to be hard-nosed about this and it’s just a statement from myself, so I expect I could read this.

This has never been an attempt by Plaintiff to get out of a debt that may or may not be owed, but rather an effort to get to an accurate status of this account and agree to a workable solution. According to Defendants’ own documents and notices, there are an extraordinary number of inaccuracies, including the wrong party laying claim to the Plaintiff’s property that have been presented by the Defendant to the Courts and/or on the recorded public records causing untold harm to Plaintiff with clouded title issues, legal costs of defending the title to the property, and years of unwelcome stress on the Plaintiff’s family and business.

And that is what has been happening to me and our family. And all I've asked — all I've ever asked is that the non-biased Trustee that is supposed to represent myself as well as the bank look at those documents.

Id. at 28-29.

In deciding the court should rule on the motion, the court explained again: “The Court has already indicated that there are certain rules that we have to abide by in Summary Judgment Motions and that the Court does hold *pro se* litigants to the same standard as attorneys, ...” Transcript, 30. The court set the date of June 15, 2015 to announce its decision.

Before the court announced its decision on June 15, 2015 it asked whether there were any preliminary matters. *Id.* at 36. Sonny responded:

MR. ROGERS: I don't know if it's appropriate the time to bring it up or not, but it was in the initial Complaint, so I thought I'd mention it. In the fact that our place -- it's really not worth that much money because of the flood damage and so forth, but it is our home. We've been there for a very long time and we run a non-profit, River's Edge Ministry, for kids on our ranch. That's what we do there. And so, I just want to be treated fair.

MR. MCINTOSH: [The attorney for the Trustee] No, Your Honor.

In announcing its judgement the court went through the allegations of Sonny's complaint and dismissed some of the causes of action with prejudice and some without. *Id.* 37- 44. The court found that Sonny's complaint and the evidence before it, which should have included Sonny's claims regarding the variations in what he actually owed,

did not constitute an unfair and deceptive practice under the CPA and therefore dismissed that claim with prejudice. The court did not consider any other of the CPA elements. *Id.* 41-42. The Court also dismissed Sonny's claim that the attempt to non-judicially foreclose on his home violated the the Deeds of Trust Act because the sale did not occur. *Id.* at 42-43. Later in the hearing the court stated: "There is no finding with regard to F, Material Breach of Deed of Trust." The court set June 29, 2015 for the presentation of the Order. *Id.* at 48.

The hearing transcript reflected Sonny had trouble understanding what had been ruled upon at that hearing. Transcript. 49-50.

On or about August 6, 2018 Sonny filed a motion and declaration for Findings of Indigency. CP 476. On August 27, 2015 the superior court found that certain portions of the record were necessary for review and transmitted the order on to the Supreme Court for review. CP 493-493. The superior court's order does not reference any statute or court rule documenting the basis for this procedure. *Id.*

At the third hearing on August 24, 2015, Sonny indicated to the court that he had a "mini-stroke."

THE COURT: Any preliminary matters that need to be dealt with before the Motion is heard?

MR. ROGERS: Yeah. In myself, I think, it's fairly -- I think it would be important for you to know that I've had some medical issues,

stress-related from this. I had a mini-stroke the other day. So, I was trying to -- so, bear with me and I'll try to respond appropriately. But I was in the process of putting a what I thought was a fairly substantial Answer to this Summary Judgment Motion and then I had these -- these issues. I couldn't put two or three words together, so.

THE COURT: And Mr. Rogers, I noted that there was no filing in response to this matter, so.

MR. ROGERS: Correct. I was trying to present this filing and I literally -- literally shut down. So, I think that there's -- I guess I could ask, considering much of the evidence necessary in this case is up for appeal for consideration, so that I could at least bring it to the Court. That still hasn't been heard. If we could continue this, great. And I think I'm in the process of recovering. If not --

THE COURT: How much time are you asking for, Mr. Rogers, as far as --

MR. ROGERS: Thirty days.

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THE COURT: What we're looking to right here is how much time would you need in order to respond to and that's my first question is that when do you think you'd be capable of responding?

MR. ROGERS: I would think 30 days. I'm a lot better than I was several days ago. So, I'm on the process of -- and I was -- I had a substantial portion of it done, but it wasn't completed. I do have quite a bit of information that is on the record -- it hasn't been heard. (Indiscernible) could possibly try to argue -- you know what I mean, argue orally, but --

Based on his claim of medical disability the court set over the hearing until September 16, 2015. This gave Sonny until September 2, 2015, or approximately 8 days to respond the summary judgment motion.

The actual hearing did not occur until September 28, 2015. At the hearing Sonny asked for another continuance because he had not yet recovered from his stroke sufficiently to respond to the motion.

MR. ROGERS: Yes, ma'am. Well, as I put in my Motion, the -- I had a -- Judge Goodell was -- I'm very appreciative of the time he gave me in extension because I had a physical issue -- a TIA, a little mini-stroke -- and so I wasn't, even that day, very articulate to even talk. So, he was able to do that and he granted me about a month to put it together, which I thought would be plenty of time. However, the timeliness of getting the Answer to the Summary Judgment to the opposing side and Counsel was 13 days prior to the hearing today. So, really, I didn't have a month, I had about two-and-a-half weeks or so, but that's about the entire time it took me to where I could even look at this.

Every time I tried to look at this, it completely stress-induced and I would sit and try to work on it five or ten minutes and I couldn't. I'd start to get the same pains again. So, it took about two-and-a-half weeks and then I was able to really get after it. So, for about four days pretty heavy I worked on it and finally realized I wasn't going to make it as far as the timeliness, so that's when I asked for the Motion to Continue.

And quite, you know, honestly, it's in -- in the Motion to Shorten Time, it's generalized -- it's generalized the reasons why I believe the Summary Judgment should not be dismissed. However, the specificities, the actual claims of damages -- in other words, the actual statements from Quality and from Chase, actual documentations, proof of wrongful collections -- the actual proof of all of that that I would like to have you see -- the Court see in the Motion for Continuance, that's why I'm asking for the Motion, because you won't see that.

I have it, it's about 100 and some pages that I'm working on here now, but obviously it's not done. And I'm trying to shorten it up and make it in -- in articulate order for the Court to review it methodically and make sense.

Transcripts, 66-68.

The attorney for Quality and the McCarthy Holthus law firm, Mr. McIntosh complained: “Your Honor, we’ve been down this road before with Judge Goodell and we were all on Quality’s Motion back in September in the – or I’m sorry, not September, it was August 24th. Same exact situation – ... He’s had his continuance.” *Id.* at 67. Sonny responded, making clear that his claims involved, among others, defendants illegal collection attempts against him. *Id.* at 69-70 Sonny explained: “I’m sorry you can’t have a stroke and then just have it go away. It had residual effects.” *Id.* at 70. The court responded: All right, Mr. Rogers you are repeating yourself, so I’m going to have you end.” *Id.* at 71. The court denied the motion to continue and dismissed the rest of the claims against Quality and McCarthy Holthus.

In response to the motion by Quality Sonny again argued that he had been harmed by Quality’s attempts on behalf of Chase and Wells Fargo to collect different amounts of money than was actually owed and that this had forced into bankruptcy. *Id.* at 71

Now, had I known – here’s the harm. Had I known who the true lender really was and been able to negotiate with them in good faith, we wouldn’t be here. I paid my debts. In fact, in the bankruptcy after they filed these claims, this secured party claim, I go on to prove that – which I didn’t know until later again because I had no reason to doubt their accuracy. They’re licensed professionals. I just assumed and relied upon the fact that they were legitimate parties, legitimate claims – so did the bankruptcy court.

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My debt obligation – the original debt obligation was discharged in that Chapter 7 bankruptcy in August of 2010. They started sending me foreclosure notices in June. I was still in the bankruptcy and they started sending me these foreclosure notices. So, now I'm starting to understand what's going on here and in order to stop them – and again, I still didn't know that the property was foreclosed on. I'm just assuming okay, here we go again. Again, they won't work with me because I'm not dealing with the true lender. They said no, no, no – no matter what.

* * *

So, I filed a Chapter 13, the Trustee approved it, here we go. And for 19 months, I paid almost \$2,000, a month, into the plan to not only pay my mortgage, but also to pay the arrearages. \$500, a month, went towards the arrearages. I did that for 19 months and in 19 months, they collected almost \$37,000 from me -- until I realized finally one day that I was not on the owner of record anymore. This was completely wrongful and illegal.

Transcript at 76-79.

The court, which refused to consider any of Sonny's submissions, granted Quality's motion, including dismissing Sonny's claim for what the court called "generalized equitable relief." *Id.* at 83-84.

On November 4, 2015, a panel of the Supreme Court issued an order denying Sonny's Motion for Indigency, stating only: "[t]hat the Appellants Motion for the Expenditure of Public Funds is denied." CP 553.

After defendants Quality and McCarthy Holthus were dismissed, Defendants Chase and Wells Fargo Bank brought a summary judgment motion, which was argued on September 26, 2016. Shortly before this argument Sonny had requested a disability

accommodation pursuant to CR 33, which was granted. He appeared at oral argument with his Disability Advocate, Kyle Welch.

Sonny submitted materials. It is not altogether clear, which of those documents the court reviewed. The court granted the motion for summary judgment, except with regard to the amount of the default.

The court's Memorandum Opinion Re: Defendants' Motion for Summary Judgment, CP 836-848, states in this regard:

There is a genuine issue of material fact with regard to the total amount due and owing under the Deed of Trust/ As indicated earlier, an opinion of Eva L. Grageda was provided by the Defendants in support of the total amount that they claim is owing. However, the basis for the opinion is lacking. This information is necessary to determine the appropriate application of payments made after April 30, 2007. While it is clear that plaintiff is in default for failure to maintain the monthly payments required by the Deed of Trust, the total amount amount of debt is disputed by Plaintiffs and the Defendants have failed to provide adequate support for their calculations. In addition the Defendants have not addressed the right of redemption, if any, that the Plaintiff may have with regard to a foreclosure sale or what costs it believes are recoverable in this action.

Id. at 847.

Thereafter, Defendants submitted a group of computer print outs, which Sonny could not understand. CP 1516- 1571 and 1674-1720. Sonny continued to dispute the amount owed, but the court granted summary judgment as to the amount of the debt as well.

IV. ARGUMENT

A. Under the Circumstances of this Case Sonny Should Not Have Been Held to the Same Standards as an Attorney.

Standard of Review. Constitutional issues are questions of law that appellate Courts review *de novo*. *Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wash. 2d 342, 350, 340 P.3d 849, 853 (2015).

1. *Justice Is Absent In Washington Courts for Pro Se litigants*

On March 29, 2017 Chief Justice Mary Fairhurst on behalf on the nine member Washington State Supreme Court and as co-chair of the Washington State Board for Judicial Administration, wrote Washington's Senators and Representatives of the United States House of Representatives, requesting they protect funding for the Legal Services Corporation (LSC). In support of that request, Fairhurst declared: "The first purpose of our federal constitution is 'to establish justice.'" A copy of this letter is available at the Supreme Court's website and is accessible here:

<https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Documents/WACongressionalDelegationReLegalServicesCorporation.pdf>. Sonny asks this court judicially notice this letter pursuant to ER 201 as it is capable of reasonable dispute.

The Chief Justice again makes the same point, *i.e.* that justice is the first purpose of the Federal Constitution, when she states as part of its conclusion:

Alexander Hamilton advised that “the first duty of society is justice.” LSC funds ensure that justice is available for the homeless veteran denied VA benefits, for the victim of domestic violence need shelter and legal protection for herself and her children, for the disabled senior being denied necessary home health care services, for vulnerable people who fall victim to predatory consumer scams, and for so many others for whom the law offers protection but who lack a legal voice to enforce the same. *In a society committed to fairness and the just rule of law, all must have access to and the ability to enforce rights within the civil justice system.*

Id. (emphasis supplied)

The Chief Justice is correct in stating that this nation’s founders intended the Federal Constitution, if followed, would provide justice for the people as part of the social compact between the people and representative government. In Federalist Paper No. 51¹ either Alexander Hamilton or James Madison (historians are not sure which) wrote:

Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful.

¹ This document can be accessed at <https://www.congress.gov/resources/display/content/The+Federalist+Papers>.

The “justice principles” referenced by Justice Fairhurst in her letter and the Federalist Papers which were incorporated into our Constitution by its framers were heavily influenced by political writings, including Jean Jacques Rousseau's *Social Contract*². Kelly, Martin. "Constitutional Convention." ThoughtCo, June. 14, 2018, [thoughtco.com/constitutional-convention-105426](https://www.thoughtco.com/constitutional-convention-105426).

In his first book *The Social Contract or Principles of Political Right* Rousseau explains:

that, instead of destroying natural inequality, the fundamental [social] compact substitutes, for such physical inequality as nature may have set up between men, an equality that is moral and legitimate, and that men who may be unequal in strength or intelligence, become every one equal by convention and legal right.

According to Rousseau the social compact theory of government cannot work when the equality among persons is skewed.

“[u]nder bad governments, this equality [among persons] is only ... illusory: it serves only to keep the pauper in his poverty and the rich man in the position he has usurped.”

Rousseau contemplated the social compact of government “is advantageous to men only when all have something and none too much.”

² The term "social contract" refers to the idea that the state exists only to serve the will of the people, who are the source of all political power enjoyed by the state. The people can choose to give or withhold this power. The idea of the social contract is one of the foundations of the American political system. Kelly, Martin. "The Social Contract." ThoughtCo, Aug. 9, 2018, [thoughtco.com/social-contract-in-politics-105424](https://www.thoughtco.com/social-contract-in-politics-105424).

Shortly after the turn of the century and before the Great Recession, in November 2001 the Washington State Supreme Court established a Task Force on Civil Equal Justice Funding. As part of its charge, the Task Force was directed to conduct a study of the civil legal needs of Washington's low-income and vulnerable populations. The task force studied the issue for approximately two years. Then in September 2003 the study, which was titled "The Washington State Civil Needs Study" (hereafter referred to as the 2003 Study) was published by the Washington Supreme Court. A copy of that study can be accessed here:

<https://www.courts.wa.gov/newsinfo/content/taskforce/civillegalneeds.pdf>.

The task force members included: Supreme Court Justice Charles W. Johnson; Division I Court of Appeals Judge Mary Kay Becker; Supreme Court Justice Tom Chambers; Division I Court of Appeals Judge Marlin Appelwick; King County Superior Court Judge Philip Hubbard; King County District Court Judge Janet Garrow; Chief Administrative Law Judge Judge Art Wang; Jennifer Joly from the Office of the Governor; Washington State Senator Adam Kline; Washington State Senator Stephen L. Johnson; Washington State Senate Representative Patricia Lantz; King County Councilmember Dow Constantine; United States Attorney for the Western District of Washington John McKay; King County Prosecuting Attorney Norm Maleng; Rick Coplen from Administrative Office of the Courts; Governor of the Washington State Bar

Association Board of Governors William D. Hyslop; Michele E. Jones of Columbia Legal Services; private attorney Victor Lara; business person Janice S. Mathison; and United States Bankruptcy Trustee Diane Tebelius.

The “Foreword” to the Study provides:

The findings are very troubling and have significant implications for our state’s justice system. Many thousands of our state’s most vulnerable residents have serious legal problems and cannot get any help in resolving them. Many don’t even realize their situations have a legal dimension. Others don’t know where to seek help or are too overwhelmed to try. Meanwhile they are systematically denied the ability to assert and enforce fundamental legal rights, and forced to live with the consequences.

The following study documents these findings. The resulting story presents tremendous challenges for those of us who serve as stewards of our state’s justice system and to all who believe in our democracy’s promise of “liberty and justice for all.” We commend the study and look forward to working to develop the necessary strategic responses.

Id. at 5.

The Introduction to the 2003 Study identifies its key findings to include:

- More than three-quarters of all low-income households in Washington state experience at least one civil (not criminal) legal problem each year. In the aggregate, low-income people experience more than one million important civil legal problems annually.
- Low-income people face more than 85 percent of their legal problems without help from an attorney. Attorney assistance is most successfully secured in family-related matters, but even here only 30 percent of legal problems reported are addressed with the assistance of an attorney. Removing family-related problems, low-income people receive help from an attorney with respect to less than 10 percent of all civil legal problems.

- Women and children have more legal problems than the general population, especially on matters relating to family law and domestic violence. Specific types of legal problems are experienced by certain minorities, the disabled and members of other demographic cluster groups at a significantly higher than average rate.
- Legal problems experienced by low-income people are more likely to relate to family safety (including domestic violence), economic security, housing and other basic needs than those experienced by people with higher incomes.
- A significant percentage of legal problems experienced by low-income people are perceived to include a wrongful discrimination component.
- Legal problems do not differ significantly regionally or between those who live in close proximity to urban centers and those who do not.
- While the legal problems of urban and rural low-income residents are similar, residents of rural areas have less knowledge of available legal resources, and have less access to and success in using technology based legal services.
- Nearly half of all low-income people with a legal problem did not seek legal assistance because they did not know that there were laws to protect them or that relief could be obtained from the justice system. Others did not know where to turn, were fearful, believed they could not afford legal help, or had language barriers.
- Nine out of 10 low-income people who do not get legal assistance receive no help at all and end up living with the consequences of the problem. Of the 10 percent who try to get help elsewhere, most turn to organizations that cannot provide legal advice or assistance.
- Though widely divergent by region and demographic cluster group, nearly half of low-income households have access to and the capacity to

use the Internet. However, those with access to technology often do not know how it can help them address their legal needs.

- *Low-income people who get legal assistance experience better outcomes and have greater respect for the justice system than those who do not.*

Id. at 8-9. (emphasis supplied)

The next part of the 2003 Study further elaborates on its key findings. For purposes of this appeal, Key Finding IV is the most relevant. “Most legal problems experienced by low income people affect their basic human needs, such as housing, family security and security, and public safety.” *Id.* at 33-36. The chart on page 34 Figure 11 “Prevalence of legal Problem by Problem Area” states at the bottom of the illustration: “*If a low income household has a problem, it most likely involves housing, family, or consumer matters.*” This case involves a consumer matter³, i.e. abusive debt collection practices, designed to take Sonny’s house away. *Id.*

³ With regard to consumer matters the study explains:

Abusive collection practices account for a third of consumer-related issues, and issues relating to insurance account for nearly a quarter. Of households experiencing at least one legal problem, 27 percent (approx. 89,000) experience a problem in the consumer area.

Both Sonny’s defense and counter claims against defendants asserted abusive collection practices.

In analyzing Key Factor IX, the 2003 Study states: “Nearly half of all low-income people with a legal problem did not seek legal assistance because they did not know that there were laws to protect them or that relief could be obtained from the justice system.” *Id.* at 9. Sonny did seek legal help by way of a motion for indigency, CP 482-483, which a panel of the Supreme Court denied without ever affording Sonny an opportunity to participate in the process. CP 552-553

Findings X of the 2003 Study also is important with regards to this Appeal as it concludes:

Nine out of 10 low-income people who do not get attorney assistance receive no help at all. The vast majority end up living with the consequences of the problem. Of the 10 percent who try to get legal help elsewhere, most turn to organizations that cannot provide legal advice or assistance.

Id. at 50.

Between 2000 and 2013 the number and percentage of Washington residents living in poverty increased dramatically. In 2013 Washington ranked among the top three states with the fastest growing poverty rate. *See* See 2015 Civil Legal Needs Study Update (hereafter referred to as 2015 Update), which can be accessed at:

http://ocla.wa.gov/wp-content/uploads/2015/10/CivilLegalNeedsStudy_October2015_V2_1_Final10_14_15.pdf, p. 21.

In the summer of 2012 the Washington State Office of Civil Legal Aid, in Consultation with the Washington Supreme Court's Access to Justice Board convened 16 Washington community leaders who were asked whether the 2003 Study needed to be updated. 2015 Update, 19. That group of community leaders determined that an update of the 2003 Study was necessary to ensure effective and relevant understandings of the civil legal problems experienced by low-income Washingtonians.

The community leaders recommended that any such update be designed to:

Understand the nature, gravity and consequences of legal problems that low-income people face in Washington State. • Identify new civil legal problems that have emerged since the 2003 study. • Assess the impact those problems have on low-income individuals and families. *Id.* at 19.

Further, the group recommended that a blue ribbon panel led by a Justice of the Washington State Supreme Court guide the effort. Acting upon that recommendation, the Washington State Supreme Court established a 12-member Civil Legal Needs Study Update Committee. Supreme Court Justice Charles K. Wiggins was appointed to lead it.

Other members of the group, included: Justice Steven González, Washington State Supreme Court, representing the Washington Supreme Court Access to Justice Board; Robert Ferguson, Washington State Attorney General; Hon. Lorraine Lee, Chief Administrative Law Judge, Washington State Office of Administrative Hearings; Hon. Lesley Allan, Chelan County Superior Court; Elizabeth Thomas, K&L Gates,

representing the Legal Foundation of Washington; David Keenan, Orrick, Herrington & Sutcliffe, representing the Washington Supreme Court Minority and Justice Commission; Ruth Gordon, Jefferson County Clerk, representing the Washington Supreme Court Gender and Justice Commission; Hon. Anita Dupris, Chief Judge, Colville Tribal Court of Appeals; Ninfa Quiróz, representing Sea Mar Community Health Centers; Sally Pritchard, representing United Way of Spokane County; Virla Spencer, representing the Center for Justice in Spokane; and James A. Bamberger, Director, Washington State Office of Civil Legal Aid, Project Coordinator.

The findings of the 2015 Update Study confirmed “a significant and persistent Justice Gap in Washington, where low income Washingtonians continue to face their problems without necessary legal help.” *Id.* at 15. Further, that low-income people “experience the greatest number of problems in the areas of health care, consumer/finance and employment” *Id.* at 16.

Significantly, the 2015 Update confirmed that “even limited legal assistance helps people solve problems.” *Id.*

As the 2003 Study found, and results from the 2014 survey confirm, those who get legal help – even limited legal advice or assistance – are able to solve their problems. Nearly two-thirds (61%) of those who sought and received some level of legal assistance were able to solve some portion of their legal problem. Of these, nearly 30% were able to resolve their problems completely. *Id.* at 16

In his introduction to the 2015 Update Justice Wiggins writes:

The findings are sobering. Low-income Washingtonians routinely face multiple civil legal problems that significantly affect their everyday lives. These problems are experienced to greater degrees by low-income persons of color, victims of domestic violence or sexual assault, persons with disabilities and youth. The compound effect of these problems on individuals and families today is even more acute than it was a decade ago, with the average number of civil legal problems per low-income household having nearly tripled since 2003.

At the same time, and despite much work over the last decade, our state's civil justice system does not serve Washington's poorest residents the way that it should. Most low-income people do not get the help they need to solve their legal problems, and significant majorities of low-income people do not believe they or others like them will receive fair treatment by our civil justice system.

This Report challenges us to do better:

- It challenges us to ensure that low-income residents understand their legal rights and know where to look for legal help when they need it.
- It challenges us to squarely address not only the scope of problems presented, but the systems that result in disparate experiences depending on one's race, ethnicity, victim status or other identifying characteristics.
- ***It challenges us to be aware of the costs and consequences of administering a system of justice that denies large segments of the population the ability to assert and effectively defend core legal rights.***

Ultimately, it challenges us to work all the harder to secure the investments needed to deliver on the promise embedded in our

constitutional history and our nation's creed – that liberty and justice be made available “to all.”

Id. at 2. (emphasis supplied)

The first sentence of the Executive Summary of the 2015 Update is instructive on the constitutional issues Sonny Rogers raises before this Court. That sentence states and his experience with the Mason County Superior Court demonstrates: “***Justice is absent for 70% of the state’s low income Washingtonians who frequently experience serious legal problems.***” *Id.* at 3. Sonny is one of these people.

But four paragraphs later, the Executive Summary concludes that people for whom justice is absent have no right under the federal or state constitutions to justice:

While the U.S. Constitution guarantees all people, regardless of their ability to pay, the right to legal representation in a criminal trial, it does not extend that right to people who have civil legal problems. That leaves a majority of low-income individuals and families in Washington to face and resolve their problems alone – without the help of a lawyer, ***no matter how complex or life-changing a problem may be.*** ...

Indeed, the Justice Gap⁴ in Washington is real and it is growing. This calls out for a thoughtful, significant and coordinated response.

Id.

⁴ The “Justice Gap” refers to the difference between the number of problems experienced by low-income Washingtonians for which they need legal help and the actual level of legal help that they receive to address such problems.

Sonny Rogers asserts the above statement of law in the Executive Summary of the 2015 Update does not and cannot not apply to persons *for whom the likelihood of obtaining justice in the Courts of Washington is absent.*

2. *The Separation of Powers and Federalism Protect Rogers from Having to Appear in Courts Where Justice Will be Absent For Them.*

The United States Constitution was designed: to "establish Justice, insure domestic Tranquility . . . and secure the Blessings of Liberty to ourselves and our Posterity." *Bell v. Maryland*, 378 U.S. 226, 346 (1964).

In *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388-90 (1798) the question before the Supreme Court was whether after a case had been decided by an inferior state court in favor of one litigant the state legislature could vacate the decision and provide for a new hearing with a right of appeal. In his decision for the United States Supreme Court Justice Chase observed:

Whether the Legislature of any of the States can revise and correct by law, a decision of any of its Courts of Justice, although not prohibited by the Constitution of the State, is a question of very great importance, and not necessary NOW to be determined. I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without controul; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State. The people of the United States erected their Constitutions, or forms of government, *to establish justice*, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative

power will limit the exercise of it. *This fundamental principle flows from the very nature of our free Republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republicans governments, which will determine and over-rule an apparant and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded.* A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; *a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B.*

Id. at 387-89. (emphasis supplied)

Sonny asserts that the action of Supreme Court denying him an order of indigency without affording him notice or hearing violated the fundamental right to justice described above by Justice Chase and the social compact between the Washington government and the people. Further, that it exposed him to the exercise of arbitrary power by the superior court, under circumstances where the Supreme Court knew, or should have known, that there would be no likelihood of justice.

Sonny also asserts the superior court's exercise of arbitrary authority precluding him from obtaining information about the amount of the alleged default and simply

accepting defendants computerised print outs of the debt as conclusive evidence of what was owed violated his rights under the compact to protect his property.

“[I]f there is a principle in our Constitution . . . more sacred than another,” James Madison said on the floor of the First Congress, “it is that which separates the Legislative, Executive, and Judicial powers.” 1 *Annals of Cong.* 581 (1789). By diffusing federal powers among three different branches, and by protecting each branch against incursions from the others, the Framers devised a structure of government that promotes both liberty and accountability. See *Bond v. United States*, 564 U.S. 211 (2011); *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 497-501 (2010); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

Bond, is not really a separation of powers case, but it explains how the federal structure of our government is intended to protect people's liberties and properties from the exercise of arbitrary power by both federal and state governments. In that case a woman who was charged with a federal crime, asserted as a defense that the national government had no authority under the federal structure of our government to enact the federal statute which she was alleged to have violated. The Third Circuit held that because a State was not a party to the federal criminal proceeding *Bond* had no standing

to challenge the statute as an infringement upon the powers reserved to the States. The Supreme Court reversed because the function of the federal structure of our government is to protect individual personal liberties. *Id.* at 220. Justice Kennedy, writing for a unanimous Supreme Court explained:

Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. True, of course, these objects cannot be vindicated by the Judiciary in the absence of a proper case or controversy; but the individual liberty secured by federalism is not simply derivative of the rights of the States. Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. *See ibid.* ***By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake. ... An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. ...***

Id. at 220-222. (Emphasis supplied)

Justice Kennedy goes on in *Bond* to explain how violations of the separation of powers structure of our government works the same way and demonstrates the irony in

this dynamic by pointing out that often governmental actors cannot obtain any judicial relief, while individuals, like these plaintiffs, can.

The recognition of an injured person's standing to object to a violation of a constitutional principle that allocates power within government is illustrated, in an analogous context, by cases in which individuals sustain discrete, justiciable injury from actions that transgress separation-of-powers limitations. Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well. In the precedents of this Court, the claims of individuals--not of Government departments--have been the principal source of judicial decisions concerning separation of powers and checks and balances. ... [citing *INS v. Chadha*, 462 U.S. 919 (1983); Compare *Clinton v. City of New York*, 524 U.S. 417, 433-436, (1998) (injured parties have standing to challenge Presidential line-item veto), with *Raines v. Byrd*, 521 U.S. 811, 829-830, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997) (Congress Members do not); see also, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579; *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).] ***If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object.*** (Emphasis Supplied]

Id. at 222-3.

Here, Sonny argues that exposing him to a legal system in which *justice is absent* simply because he is poor violates those liberty and property interests the federalism structure of the United States and Washington Constitution were intended to secure.

Additionally, Sonny argues that exposing him to courts in which *justice is absent* violates the separation of powers provisions of Washington's constitution. Washington's Supreme Court has traditionally treated Washington's separation of powers doctrine as if it were the same as that of the federal constitution. *See e.g. Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wash. 2d 494, 506, 198 P.3d 1021, 1026 (2009). Here, Sonny maintains that being forced to litigate in courts where justice is absent without an attorney violates the separation of powers doctrine of the Washington Constitution.

3. Requiring Sonny to Litigate in the Superior Court Without an Attorney or other Legal Help Violated Federal and State Due Process of Law.

“There is a presumption that civil litigants do not have a right to appointed counsel unless their physical liberty is at risk.” *In re Marriage of King*, 162 Wn.2d 378, 395, 174 P.3d 659 (2007) This presumption is overcome only when the *Mathews v. Eldridge* balancing factors weigh heavily enough against that presumption. 424 U.S. 319 (1976). Those factors are “[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *King*, 162 Wn.2d at 395 (alteration in original) (quoting

Mathews, 424 U.S. at 335). See also *Turner v Rogers*, 564 U.S. 431, 432 (2011) (“[T]he average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, *wherein the prosecution is presented by experienced and learned counsel.*” In *Turner* the court chose not to address “what due process requires in an unusually complex case where a defendant ‘can fairly be represented only by a trained advocate.’” *Turner*, 564 U.S. 449. See also *State v. Stone*, 165 Wash. App. 796, 812-15, 268 P.3d 226, 234-35 (2012) which followed *Turner*.

Application of the *Matthew v. Eldridge* standards to this case required that Sonny be given an attorney to access the courts because 1.) the loss of his home, *i.e.* place of shelter, is a basic human right which is protected by the social compact between the people and their government, *i.e.* constitution; 2.) the risk of loss of his home in courts where justice is absent is extreme, *ie.* possible death; 3.) the court itself has indicated that access to counsel is the primary way to protect litigants from being subjected to an otherwise unjust system; and 4.) the government assumed the costs of process by enacting a law in which it substantially controls the contract provisions in deeds of trust.

4. Sonny was Entitled to Counsel or other Legal Accomodation Under Wa. Const. Art. 1, Sec. 10.

In *O'Connor v. Matzdorff*, 76 Wash. 2d 589, 590, 458 P.2d 154, 154-55 (1969) Glennie O'Connor, through her attorney, tendered a complaint for replevin and damages

in the total amount of \$ 215.50 to the Honorable George H. Mullins, Judge of the Yakima Justice Court, and to his clerk, for filing. She did not tender any money for fees, and instead tendered her motion and affidavit for leave to proceed in forma pauperis. Judge Mullins and his clerk refused to accept the complaint and to issue a notice of suit to the named defendants on the sole ground that she had not paid the filing fee of \$ 3.50. O'Connor sought a writ of mandamus to let her bring her action.

After reviewing authorities the court observed:

We think the authorities cited in the annotation sufficiently establish that courts have found within their powers an inherent power to waive the prepayment of court fees, where a suitor or defendant has shown that he is impoverished, regardless of statutory authority. *We are also convinced that such a power is in harmony with the court's duty to see that justice is done in the cases which come before it*, which fall within its jurisdiction. *In re Bruen*, 102 Wash. 472, 476, 172 P. 1152 (1918), states:

The inherent power of the court is the power to protect itself; *the power to administer justice whether any previous form of remedy had been granted or not*; the power to promulgate rules for its practice, and the power to provide process where none exists. It is true that the judicial power of this court was created by the constitution, but upon coming into being under the constitution, this court came into being with inherent powers.

O'Connor v. Matzdorff, 76 Wash. 2d at 590. (emphasis supplied)

In *Ashley v. Superior Court of Pierce*, 82 Wash. 2d 188, 509 P.2d 751 (1973) the Supreme Court held that because state courts provided the only means of obtaining divorce, courts were required to allow indigent litigants seeking divorce to proceed without costs upon a showing of indigency. Sonny maintains that this same reasoning applies to actions brought under the Deeds of Trust Act, Ch. 61.24 RCW, because this legislation which makes access to the courts the only way to save his home from persons, like defendants, who would otherwise just take it. See *Kennebec, Inc. v. Bank of the West*, 88 Wn.2d 718, 565 P.2d 812 (1977). Thus, the State has made the courts the only way people can protect their property based on deeds of trust, but the terms of those contracts are constantly changing as the result of legislative amendments to Chapter 61.24 RCW.

Bullock v. Superior Court for King Cty., 84 Wn. 2d 101, 104, 524 P.2d 385, 387 (1974) followed *O'Connor* and *Ashley*, holding: “Full access to the courts in a divorce action is a fundamental right. *Boddie v. Connecticut*, 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971); *Ashley v. Superior Court*, 82 Wn.2d 188, 509 P.2d 751 (1973); *aff'd on rehearing*, 83 Wn.2d 630, 521 P.2d 711 (1974).”

Although these cases involve due process issues which are hereby incorporated as part of that argument above, the Supreme Court referred to and discussed them in resolving access to justice issues pursuant to Wash. Const. Art. 1, § 10 in *In re Marriage*

of King, 162 Wash. 2d 378, 174 P.3d 659 (2007). In *King* the court held that no right to counsel was implicated for the King's dissolution proceedings. However, it distinguished other cases where it had afforded litigants with access to counsel at state expense. *See In re Welfare of Luscier*, 84 Wn.2d 135, 524 P.2d 906 (1974)(termination of parental rights) and *In re Welfare of Myricks*, 85 Wn.2d 252, 533 P.2d 841 (1975)(state instituted dependency proceedings). Sonny's case is more like *Luscier* and *Myricks* because Sonny's very life is at stake as a result of these judicial proceedings and this court has conceded that justice is absent in the courts of this state unless persons like Sonny have attorneys.

If Washington's court system only provides justice for the rich, there should be another system of justice for the poor *to deliver on the promise embedded in our constitutional history and our nation's creed – that liberty and justice be made available “to all.”*

B. Defendants were not entitled to summary judgment as to the default or its amount because of the existence of material facts which precluded it.

Standard of Review. “The standard of review for an order granting summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.” *Washington Fed. v. Harvey*, 182 Wn.2d 335, 339-40, 340 P.3d 846 (2015) (quoting *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002)).

In *Bank of N.Y. v. Barbanti*, No. 31034-5-III, 2013 Wash. App. LEXIS 2817 (Ct. App. Dec. 12, 2013) *rev denied Bank of N.Y. v. Barbanti*, 180 Wash. 2d 1012, 325 P.3d 913 (2014)(**unpublished**) the issue before the court was the amount of debtors default.

There, the court held:

III. Summary Judgment on Amount in Default

We agree with appellants that a genuine issue of material fact exists regarding the amount of Barbanti's default. BONY's evidence suggested "Barbanti failed to make at least 72 principal payments of \$1,351.65 during the six years following March 8, 2003," which totals \$97,318.80 without interest. CP at 315. Appellants' evidence suggested the deed of trust's unpaid balance was "\$125,011.72" as of July 9, 2012 or perhaps "\$119,499.53" as of April 8, 2009, "together with interest from March 1, 2003 at \$21.33 per diem." CP at 207, 309.

The trial court's order on summary judgment does not identify any amount in default. Establishment of this amount, *by further summary judgment proceedings or trial, if needed, is essential.*

BONY chose to foreclose the real estate contract as a mortgage. Where a seller chooses to judicially foreclose a real estate contract as a mortgage, all laws and procedures governing judicial foreclosures of mortgages apply. RCW 61.30.020(1); 18 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Transactions* § 21.40, at 518 (2d ed. 2004). The procedures include a sale to satisfy amounts owed and the opportunity of the debtor to pay amounts owed before the sale. RCW 61.12.060, .090, .130. The sale cannot occur and appellants' rights are thwarted without the establishment of the amount owed.

Id. at *8-12. (Emphasis added)

The Defendant/Appellee sent out monthly notices stating the amount due. The Deed of Trust required payments be paid when due. Sonny asserts that sending borrowers contradictory statements regarding the amount due constitutes a default of the promissory note and the deed of trust.

The fact that the Note Holder or its agents had previously sent out contradictory bills and had not provided any testimony explaining how the \$30 plus thousand payments in the bankruptcy were handled creates an issue of fact *per se* and one regarding the total amount owed. It also involves question with regard to credibility of creditors. These issues of fact should not have been resolved against Sonny.

Our system of justice contemplates credibility and other factual issues should be resolved at trial after the fact finder has an opportunity to observe their testimony and conflicting evidence. *See Maziar v. Washington State Dep't of Corr.*, 183 Wn.2d 84, 85–86, 349 P.3d 826, 827 (2015) (“[A]ny party ... [has] the right to have a jury determine most matters of fact.”); *see also Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963)(Credibility of witnesses testifying differently about a disputed issue is question of fact be resolved by the jury at a trial).

The trial court clearly erred when it held that a servicer sending out contradictory payment information is not an unfair trade or deceptive practice in a trade or business.

Indeed, it is difficult to think of any which would be more frustrating to the public at large during these times, especially in Washington and California. Further, the superior court erred in resolving the amount of the default.

CONCLUSION

This case should be reversed and remanded back to the trial court with instructions to afford such accommodations as will provide him justice under the circumstances of his case. Further, the case should be remanded to resolve all those issues related to the contradictory billings and other questions of fact.

/s/ Scott Stafne
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239 N. Olympic Ave
Arlington, WA 98223
360-403-8700

CERTIFICATE OF SERVICE

I, LeeAnn Halpin, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

1. I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

2. That on the 21th day of November 2018, I caused to be served by electronic service a true and correct copy of APPELLANT'S AMENDED OPENING BRIEF by causing it to be delivered by notification through the Washington State Court of Appeals appellant e-filing system upon all relevant parties

DATED this 21st day of November, 2018 at Arlington, Washington.

BY: 

LeeAnn Halpin, Paralegal

STAFNE LAW

Advocacy & Consulting

STAFNE LAW ADVOCACY & CONSULTING

November 21, 2018 - 3:06 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51375-7
Appellate Court Case Title: Daniel Rogers, Appellant v. Quality Loan Service Corporation, Respondent
Superior Court Case Number: 14-2-00045-0

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