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On appeal from Mason County No. 14-2-00045-0

**IN THE COURT OF APPEALS FOR THE STATE OF
WASHINGTON DIVISION II**

DANIEL L. ROGERS, an individual,

Appellant,

v.

**QUALITY LOAN SERVICING CORPORATION
OF WASHINGTON et al.,**

Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The attorneys for J.P. Morgan Chase Bank (“Chase”) and Wells Fargo Bank N.A. (“Wells Fargo”) (hereinafter collectively referred to as “Banks”) do not address Daniel Roger’s (Sonny’s) constitutional arguments that justice was absent in these court proceedings. They argue they need not do so because Sonny never made these arguments to the trial court. But as will be demonstrated this is untrue.

The record reflects Sonny raised the unfairness of these judicial proceedings before the trial court every chance he could.

Moreover, even if Sonny, acting *pro se* following a stroke, did not state this argument in precisely the way the Banks now demand, the unfairness of proceedings where justice is absent, constitutes structural error which can be raised on appeal in the first instance under controlling decisions of the United States Supreme Court.

The Banks’ second argument, *i.e.* that Sonny never argued there was a material dispute about the amount of the default, is belied by the fact the superior court initially found there were material factual issues which precluded a motion for summary judgment. Indeed, the same factual dispute about what was paid and credited existed when the superior

court later resolved it by usurping the role of a fact finder in deciding whether the monies paid through the bankruptcy court were actually credited.

II. REPLY TO COUNTER-STATEMENT OF THE CASE

The Banks argue Sonny's "case statement is disjointed and contains irrelevant tangents." Sonny disagrees. His Opening Brief (OB) contains those arguments he is advancing herein. The Banks don't get to write Sonny's briefs.

Sonny agrees he borrowed money from Washington Mutual Bank (WAMU) evidenced by a promissory Note. Further, that the Deed of Trust named WAMU as its beneficiary. Sonny asserts WAMU sold the note and deed of trust to Freddie Mac. Clerk's Papers (CP) 915-931.

Rogers admits he defaulted on the loan, but the record also establishes he nonetheless made substantial payments on the amount due, which were not promptly credited to his balance. CP 211-214, 269-288; CP 544-546, 596-600, 601-603, 604-607. Indeed, the Banks' Answering Brief admits they did not timely report these payments as they admit these payments were "*ultimately* credited to his loan." Answering Brief, p. 3.

Sonny objects to the Banks attempts to prove facts regarding Chase purportedly becoming WAMU's successor and acting for Wells Fargo as the Note Holder in this case by citation to other cases, which have not

been shown to include the same evidence as was introduced in this case. AB, pp. 3-4. Such a procedure is particularly unfair when used against a *pro se* litigant who does not necessarily have access to evidence upon which such court decisions are based.

Chase and Wells Fargo concede that Sonny, to whom they had provided inconsistent billings regarding the loan, appropriately brought this case in Mason County Superior Court under the Chapter 61.12 RCW because they “failed to follow the DTA requirements and because the property was used for agricultural purposes.” AB, pp. 4-5. As a result, the Banks claim they properly brought a counterclaim against Sonny seeking a judicial foreclosure. AB p. 5.

Sonny’s and the Banks’ Opening and Answering Briefs provide different accounts of the summary judgment process. *Compare* OB, pp. 8–9 & 13–14, with AB, pp. 5–6. Sonny disputes that the evidence he provided in opposition to the Banks’ motions for summary judgement regarding the amount of the default was not considered by the Court.

Sonny maintains his evidence was considered and weighed by the trial court against the computer printouts by Chase - a task which a jury or fact finder should have performed after a trial!

III. REPLY ARGUMENTS

A. Sonny Objected to the Trial Court that Judicial Proceedings Without Counsel Were Unfair

Sonny's Opening Brief (OB) demonstrated he argued before the trial court that he was not being treated fairly because he could not afford an attorney and sustained a stroke in the course of representing himself. *See* OB 5–14. *See* also CP pp. 495–498 (Motion for Extension of time to Respond to Summary Judgement because of Sonny's stroke); 499–513 (Another request for extension of time because of stroke); 549 (Order granting motion provided "Plaintiff's moving papers are served on Defendant no later than 10 a.m." the next day.

Sonny's Motion and Declaration for Finding of Indigency requests, among other things, the appointment of counsel. CP 476. When prompted by the court form to explain why he believed he had a constitutional right to review at public expense Sonny explained in part:

Plaintiff is in a financial hardship/poverty situation and no long has the resources to afford "learned counsel" so as to have his constitutional "day in court" to be able to defend and/or assert his right of a level playing field. This Motion for Appeal [actually for discretionary review which was denied] would not have been necessary, nor should it be at plaintiff's expense, had he simply been granted leniency as *a pro se litigant*, and *not* be held to the same standards as "learned counsel" in order to have adequate time to prepare proper pleadings and responses and be able to present critical evidences for the court to "see" the true merits of the case. ...

CP 487.

Sonny's declaration of indigency was signed July 31, 2015 - just a few months before the 2015 Washington State Civil Needs Study Update confirmed that "Justice is absent for low-income Washingtonians who frequently experience serious civil legal problems." 2015 Civil Legal Needs Study Update (Update), p. 3. As the Court will recall from Sonny's Opening Brief (OB) this report updated Washington's 2003 Civil Legal Needs Study (Study).

Sonny moved to be declared indigent. CP 476-480. The trial court found Sonny indigent, but did not appoint counsel for him. CP 482-483. The trial judge referred her order of indigency to the Washington Supreme Court on September 2, 2015. CP 484-CP 494. On November 4, 2015 a panel of the Supreme Court reversed the trial court's order of indigency, denying any expenditure of public funds. CP 552-3. This Order does not set forth any reason supporting the Supreme Court's Order. Apparently the Panel denied the appointment of counsel because Washington Court Rules only provide for such an appointment in civil contempt cases; notwithstanding applicable United States Supreme Court precedent requires appointment of counsel where due process requires it. CP 83-4. *See also* RAP 15(2)(b)(1)-(f) and RAP 15(d). *See infra*.

B. Requiring Indigents to Litigate in Courts where "Justice is Absent" Because They Cannot Afford a Lawyer Constitutes Structural Error Which Cannot Be Waived

Sonny asserted in his opening brief that forcing him to adjudicate his civil case in a Washington state court *where justice is absent* because of his inability to afford an attorney is unfair. *See e.g.* OB, pp. 1–35. As will be demonstrated this is the type of structural constitutional error which cannot be waived because it challenges the fundamental fairness of these proceedings and the effects of that unfairness are uncertain.

In *Weaver v. Massachusetts*, ___ U.S. ___, 137 S. Ct. 1899 (2017) defense counsel neither objected to the closure of the jury selection process at trial, or on direct review of that action, but raised it in a collateral action. The Supreme Court observed that had this challenge been brought by way of a direct appeal, the defendant would have been entitled to an automatic reversal under the “structural error” doctrine.

Weaver explains the purpose of the “structural error” doctrine, which involves a type of error the Supreme Court has determined should not be deemed harmless and waived if not made in trial court:

The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. Thus, the defining feature of a structural error is that it “affect[s] the framework within which the trial proceeds,” rather than being “simply an error in the trial process itself.”

Weaver, 137 S. Ct. at 1907.

The precise reasons why different errors are considered structural vary. *Id.* at 1908. In *Weaver* the Court identified three types structural errors. *Id.* The first type of error the Court discussed was error which is not designed to protect the defendant, but instead protects some other interest. The example the Court gives of this type of structural error is a defendant's right to conduct his own defense, which, when exercised "usually increases the likelihood of a trial outcome unfavorable to the defendant." *Id.*

The second type of errors the Court noted had been deemed "structural" are those in which the effects of the error are too difficult to measure. The example the Court gives of this type of error is, when a defendant is denied the right to select his or her own attorney because the precise effect of that violation cannot be ascertained.

The third type of errors *Weaver* identifies as structural are errors that always results in fundamental unfairness. The Supreme Court gives two examples of "fundamental unfairness" structural errors:

For example, if an indigent defendant is denied an attorney or if the judge fails to give a reasonable-doubt instruction, the resulting trial is always a fundamentally unfair one. *See Gideon v. Wainwright*, 372 U. S. 335, 343-345, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (right to an attorney); *Sullivan v. Louisiana*, 508 U. S. 275, 279, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)(right to a reasonable-doubt instruction).

In *Gideon* the question was whether *Betts v. Brady*, 316 U.S. 455, 62 S. Ct. 1252 (1942) should be overruled. *Betts* had held the Fourteenth Amendment did not require that a defendant be appointed counsel at a trial for every criminal defense. The *Betts* Court explained its rationale:

[I]n the great majority of the States, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. *On the contrary, the matter has generally been deemed one of legislative policy.* In the light of this evidence, we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the States, whatever may be their own views, to furnish counsel in every such case. *Every court has power, if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness.*

Betts v. Brady, Id. 316 U.S. at 471-72. (Emphasis supplied)

The Supreme Court reversed *Betts* in *Gideon*. In doing so the *Gideon* majority stated:

We accept *Betts v. Brady's* assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights.

Gideon, supra, 372 U.S. at 342. So both *Betts* and *Gideon* are grounded in the premise that a provision of the Bill of Rights which is fundamental to a

fair trial is made obligatory upon the State courts by the Fourteenth Amendment. *Gideon* simply reversed *Betts* holding that the Sixth Amendment *is not* one of the Bill of Rights made applicable to the States.

As explained in Sonny's Opening Brief *Turner v. Rogers*, 564 U.S. 431, 131 S. Ct. 2507 (2011) acknowledges that due process requires counsel be appointed in civil cases under some circumstances. OB 33.

In *Turner* the issue in the United States Supreme Court, which was not raised in the trial court, was whether the Due Process clause granted an indigent defendant the right to state-appointed counsel at a civil contempt proceeding, which might lead to his incarceration. In analyzing this issue the United States Supreme Court observed: “[t]his Court has decided only a handful of cases that ... directly concern a right to counsel in civil matters. And the application of those decisions is not clear.” *Id.* 564 U.S. at 442.

After analyzing its civil case precedents the majority observed:

We believe those statements are best read as pointing out that the Court previously had found a right to counsel “*only*” in cases involving incarceration, not that the right to counsel exists in all such cases.

The Court next turned to considering what specific dictates of due process were necessary for fundamental fairness by examining those “distinct factors” set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct.

893 (1976). *Turner*, 564 U.S. at 444. The factors the Court found relevant for determining the fundamental fairness due process required in civil proceedings included: (1) the nature of “the private interest that will be affected,” (2) the comparative “risk” of an “erroneous deprivation” of that interest with and without “additional or substitute procedural safeguards,” and (3) the nature and magnitude of any countervailing interest in not providing “additional or substitute procedural requirement[s].”

The *Turner* Court cited *Lassiter v. Department of Social Servs. of Durham Cty.*, 452 U.S. 18, at 25-27, 101 S. Ct. 2153 (1981) as applying the applicable *Mathews v. Eldridge* due process framework in a civil case. *Turner*, at 564 U.S. at 445. *Lassiter* was also a case where the petitioner asserted no right to appointed counsel based on indigency in the trial court, but only on appeal. *Lassiter*, 452 U.S. at 22.

In *Lassiter* a mother’s parental rights were terminated. On appeal the mother contended the due process clause required the State trial court should appoint counsel for her because she was indigent. The Supreme Court observed there was a presumption against the right to appointed counsel when no potential deprivation of liberty existed. In analyzing the *Mathew v. Eldridge* factors, however, the Court found that a parent’s interest could overcome the presumption against the right to appointed

counsel under the Due Process clause in appropriate cases. *Lassiter*, supra, 428 U.S. at 24-27.

In balancing the three factors set forth above, *i.e.* 1) the nature of the private interest; 2) the State's interests; and 3) the risk of an erroneous deprivation of a right, the Supreme Court noted in *Lassiter* that the nature of the private right being protected was "[a] parent's interest in the *accuracy and justice of the decision* to terminate his or her parental status." *Id.* at 27. (Emphasis Supplied)

The Supreme Court stated with regards to the government's interests: "Since the State has an urgent interest in the welfare of the child, it shares the parents interests in an *accurate and just decision.*" *Id.* (Emphasis Supplied) Although, the Supreme Court observed the State also wants to avoid paying costs for indigent litigants', it stated this interest "is hardly significant enough to overcome private interests as important as those here", *i.e.* the *accurateness and justice* of the State court's decision.

Finally, the Supreme Court considered the risk the parent would be erroneously deprived of her child because the parent is not represented by counsel. The Court first observed in this regard that North Carolina sought to ensure an accurate decision by establishing numerous procedures to insure accurate and just State court decisions. *Lassiter*, supra, 428 U.S. at 28-29. After considering all of the circumstances in the case the Supreme

Court held Lassiter had failed to rebut the presumption against appointment of counsel given North Carolina's alternative provisions and the specific facts of that case. *Id.* at 32-3.

In its concluding paragraph the Supreme Court observed:

In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair. A wise public policy, however, may require higher standards be adopted than those minimally tolerable under the Constitution. ... The Court's opinion today in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise.

Id. at 33-34. (Emphasis Supplied)

Turner and Lassiter support Sonny's claim he was entitled to appointment of legal counsel to contest the inaccurate debt collection activities of Chase and Wells Fargo, which sought to take his home. This is because judicial proceedings to take people's homes from them are fundamentally unfair when they occur in courts where *justice is absent*.

The effect of taking Sonny's home will be to deprive him of the shelter which humans have used for centuries to sustain their lives¹. Sonny

¹ See e.g., US House Resolution 328, September 29, 2010 ("Whereas the mortality rate among homeless populations has been shown to be almost four times that of the general population"), which was last accessed February 14, 2019 at <https://www.govinfo.gov/content/pkg/BILLS-111hconres325ih/pdf/BILLS-111hconres325ih.pdf>; Project Homeless, "Once again, homeless deaths in King County appear to break record" as reported by Seattle Times on January 9, 2019, which was last accessed on February 14,

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Cf. “Description of Homeless Deaths Investigated by the King County Medical Examiner Office (MEO), 2012-2017,” which was last accessed on February 14, 2019 at https://www.kingcounty.gov/depts/health/locations/homeless-health/healthcare-for-the-homeless/~/_/media/depts/health/homeless-health/healthcare-for-the-homeless/documents/medical-examiner-analysis-homeless-deaths.ashx;

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O’Connell, JJ, “*Premature Mortality in Homeless Populations: A Review of the Literature*” National Health Care for the Homeless Council (2005).

maintains his loss of shelter, and likely his loss of life as a result thereof, is sufficient to satisfy *Lassiter's* due process presumption. However, even if this is not the case, Sonny asserts the absence of justice in Washington civil judicial proceedings because of the lack of counsel, without any mitigating procedures, makes such representation required by the Due Process Clause of the Fourteenth Amendment, notwithstanding the presumption.

As previously discussed, the first *Mathews v. Eldridge* test is the private nature of the interests which will be affected. Here, Sonny's interests in obtaining justice in proceedings intended to take his family's home and put them on the streets where they are three times more likely to die than other persons is substantial. *Lassiter, supra*. Sonny contends this litigation seeking to take his home has the same, if not more, constitutional importance as the termination of parental rights. *See* U.S. Const. Fourth Amendment; *Minnesota v. Carter*, 525 U.S. 83, 99, 119 S. Ct. 469, 478-79 (1998)(Kennedy J. concurring) (discussing constitutional tradition related to homes.)

The Banks, as litigants generally, also have an interest in ensuring Washington courts are fair and afford justice to all. However, defendant Banks more narrow interests as wealthy entities which often engage in unlawful debt collection practices and can always afford attorneys is to

prevent persons like Sonny from obtaining counsel because they are better able to take homes and collect monies from people under these circumstances.

The interests of the State in insuring its judicial proceedings are fair and promote justice, not court proceedings in which justice is absent, are also substantial. They outweigh the minimal cost of providing counsel for Sonny because protecting individual rights, including property rights, is the first duty of Washington's government under the social compact set forth in Wash. Const. Art. I, § 1. *See also Lassiter*, supra, 428 U.S. at 24-27.

The comparative "risk" of an "erroneous deprivation" of justice in civil judicial proceedings with and without "additional or substitute procedural safeguards" is profound because the Washington Supreme Court has documented that justice is absent for indigent people trapped in civil litigation without attorneys. Yet, the Supreme Court's own Update documents Washington has not developed any alternative procedural safeguards to achieve justice without providing attorneys. Apparently the Court's ill-founded belief that it need not afford justice in civil cases is based on the assumption States need only provide fundamental fairness in criminal or civil contempt cases. But this misreads both the United States and Washington's Constitutions. *Compare Turner*, supra; *Lassiter*, supra.

with Update, at p. 3 (“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.”) This statement from the Update is not true.

Structural error under the United States Constitution no longer applies to just criminal cases. *Turner*, supra; *Lassiter*, supra. See also *Wellness Int'l Network, Ltd. v. Sharif*, __U.S.__135 S. Ct. 1932 (2015).

Finally, with regard to the last *Mathews* factor, *i.e.* the nature and magnitude of any countervailing interest in not providing “additional or substitute procedural requirements” to endow Washington's courts with justice, there are none. Washington courts provide no additional or substitute procedures to provide justice when plaintiffs are forced to proceed in them without attorneys. Indeed, as mentioned in Roger’s opening brief Washington courts of appeal make this problem worse by requiring unrepresented parties to have the knowledge and competence of attorneys. OB, pp. 1–2; 15–36.

Courts without justice are by their very nature *fundamentally unfair* and due process requires procedures be established to make them fundamentally fair.

Accordingly, inherently unjust proceedings which result from an absence of counsel during judicial proceedings constitutes a type of

structural error which, unless it can be rectified, violates the Due Process Clause and cannot be waived.

C. This Court Should Hear Sonny's Claim of Constitutional Error Pursuant to RAP 2.5

RAP 2.5(a)(3) also requires this Court to review Sonny's constitutional challenge. This provision states in pertinent part:

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: ... (3) manifest error affecting a constitutional right. ...

Before Washington appellate courts review the merits of unpreserved error under RAP 2.5(a)(3) they ask two questions:

“(1) Has the party claiming error shown the error is truly of a constitutional magnitude, and if so, (2) has the party demonstrated that the error is manifest?” *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253, (2015) *citing State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.2d 756 (2009).

“These gatekeeping questions open meritorious constitutional claims to review without treating RAP 2.5(a)(3) as a method to secure a new trial every time any error is overlooked.” *Id. citing State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).

In *Lamar* the Washington Supreme Court explained that for an error to qualify as a claim of manifest error affecting a constitutional right

a party must identify the constitutional error and show that it exactly affected his or her rights at trial. *Id.* 180 Wn.2d at 583. Further, the Court held that where the error is not structural defendants must make a plausible showing the error resulted in actual prejudice. *Id.*

Sonny meets these criteria. Here, Sonny was a 56-year-old man, who had the constitutional right not to have his home taken from him through a judicial process in which justice was absent because he did not have an attorney. Sonny's inability to obtain justice without an attorney was manifest throughout the trial court proceedings. *See* OB 4–36. Indeed, Sonny plausibly contends having to navigate the judicial proceedings against attorneys for the Banks and the DTA trustee without a lawyer caused him to have a “stroke”. OB 9–12. And the evidence shows that when he asked for a 30-day extension to respond to Defendant's motion for summary judgment he was only given 8 days. OB, p. 10. So according to the Banks he got his evidence in late. Chase and Wells Fargo now argue this precluded the trial court from reviewing his evidence showing inaccurate billings in response to their motions for summary judgment. Answering Brief, AB pp. 6 . (This contention by the banks will be addressed *infra*.)

Furthermore, with regard to prejudice Supreme Court cases discussed earlier indicate prejudice is presumed where indigent and

disabled litigants are denied attorneys to litigate cases where they are entitled to them.

D. This Court Should Hear Sonny's Claim Justice is Absent in Washington Courts Pursuant RAP 2.5(a) or RAP 1.2(a)

RAP 2.5(a) states in pertinent part:

(a) Errors Raised for First Time on Review. The appellate court *may* refuse to review any claim of error which was not raised in the trial court...(Emphasis Supplied).

RAP 1.2(a) provides:

(a) Interpretation. These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b).

In *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015) the Supreme Court affirmed the Court of Appeals denial of review of an appellate challenge to a trial court's imposition of Legal Financial Obligations (LFO) without engaging in those statutory inquiries required because this argument was not raised in the trial court. Nonetheless, the Supreme Court decided that it also had its own discretion under RAP 2.5(a) to determine whether it wanted to review this unreserved error and determined that it did want to undertake such a review. So it did.

Justice Fairhurst and Justice Stephens concurred in the result only because they disagreed with how the majority applied RAP 2.5(a).

While the majority does not indicate which of the three exceptions it is applying to reach the merits, it is likely attempting to use RAP 2.5(a)(3), “manifest error affecting a constitutional right.” However, the majority fails to apply the three part test from *State v. O’Hara*, ..., that established what an appellate what an appellant must demonstrate for an appellate court to reach an unpreserved error under RAP 2.5(a)(3).

Id. 182 Wn.2d at 840 (Fairhurst J. concurring)

Justices Fairhurst and Stephens indicated they “would hold this error can be reached by applying RAP 1.2(a), which states the rules ‘ will be liberally interpreted to promote justice and facilitate the decision of cases on the merits.” *Id.* 182 Wn.2d at 841.

In conclusion, with regard to the Banks arguments that Sonny’s due process arguments have been waived Sonny replies 1) he did raise the unfairness of the proceedings in the trial court, but even if he had not done so this Court should still review this error on appeal because 2) it constituted structural error under the United States Constitution; 3) it is mandated to do so under RAP 2.3(c); and it has discretion to do so under RAP 2(a) and/or RAP 1.2.

E. The Submission of Inaccurate Billings to Sonny was Unfair and Deceptive as a Matter of Law

The Banks, their DTA Trustee, and Sonny all produced evidence regarding the Banks billings and credits. *See e.g.* CP 554–556 (Banks Requests for Judicial Notice of Bankruptcy Court exhibits); CP 596–600,

(Exhibit 3 - September 4, 2004 Plan calling for payments of \$1900.00 per month); CP 604–607 (Exhibit 5 - Bankruptcy Trustee’s Report dated February 2, 2011 shows Sonny through the Bankruptcy Trustee paid Banks \$32,475.74.); CP 1516–1543 (WAMU’s transaction history); CP 1544–1571 (Chase detailed transaction history). CP 1–2 (Declaration of Sierra West, Trustee Sales Officer for DTA Trustee; CP 39–54 (Exhibit E - November 19, Notice of Default showing \$85,199.25 owing, but not crediting the \$32,475.74 Sonny paid through bankruptcy, CP 43, and Notice of Debt Validation claiming Sonny owed \$359,967.11 as of November 9, 2012 even though his original loan was for only \$240,000. (CP 47.); CP 211–214 (Sonny’s declaration filed with the court on June 13, 2015); CP 268–288 (Exhibit B - Inaccurate Billing Amounts from Banks and their agents).

This evidence shows what the Banks admit - only “ultimately”, after they had instituted non-judicial foreclosure on Sonny without crediting him at least \$30,000.00, did the Banks try to get their billings right. AB, 3. And Sonny does not accept for purposes of this appeal that the Banks have got their billings right now. *See infra*.

However, because the Banks admit they submitted inaccurate statements to Sonny prior to this lawsuit, AB 3, Sonny’s position is Chase and Wells Fargo acted unfairly and deceptively by sending him inaccurate

and confusing bills which only “ultimately” reflected a purportedly accurate amount after he was forced to bring a judicial action (in a Court where justice is absent without an attorney) against them.

Sonny asserts the submission of inaccurate, conflicting bills constitutes deceptive and unfair practices actionable under the Consumer Protection Act, Chapter 19.86 RCW, as a matter of law because such practice has the capacity to deceive substantial portions of the public. *Klem v. Washington Mutual*, 176 Wn.2d 771, 782, 295 P. 3d 1179 (2013). *See also* RCW 6.86.093(a), (b) and (c).

The Banks did cause Sonny injuries by insisting he pay more than he owed because this required him to file bankruptcy. Furthermore, non-judicially foreclosing on him for vastly more than he owed caused him to have to bring suit in a court where justice was absent for him.

F. The Superior Court Erred in Weighing Facts When Resolving A Material Factual Dispute Pursuant to CR 56

The evidence described on page 21 hereof demonstrates the Banks attempted to non-judicially foreclose on Sonny to obtain an inflated debt. Further, the Banks concession that it was only as part of the second attempt for summary judgement they “ultimately” got the amount right strains credulity. Even now, none of the evidence appears to support the

Banks assertion they credited the \$32,000+ in payments from the Bankruptcy to Sonny's account.

The evidence supporting this fact theory comes straight from the Banks. *See* p. 21, *supra*. Of course, Sonny's declaration filed with the court on June 13, 2015 supports this analysis with its exhibits demonstrating the Banks inconsistent mailings to him.

Under these circumstances the trial court's determination of the amount of the default was not a legal one, but a factual one. A factual one in which the judge clearly weighed the evidence that a fact finder should have considered after a trial, *See e.g.* RT 238:18–18:240:13, along with the Bank's conduct in not accurately accounting for the payments Sonny made. *See* CR 56. *See also* *Keck v Collins*, 184 Wn.2d 358, 357 P. 3d 1080 (2015). *Cf.* RCW 4.40.060.

In *Keck v. Collins*, *supra.*, the Washington Supreme Court cautioned this State's trial courts: "The purpose of summary judgement is not to cut litigants off from their right of trial by jury if *they really have evidence which they will offer on a trial*, it is carefully to test this out, in advance of trial *by inquiring and determining whether such evidence exists.*" *Id.* 184 Wn.2d at 369.

Here, a question of material fact exists under the circumstances of this case with regard to whether the Banks record keeping is sufficiently accurate for a fact finder to believe it.

IV. CONCLUSION

The decision of the trial court should be reversed, and this case should be remanded for trial for the reasons stated herein.

DATED this 14th day of February 2019, at Arlington, Washington.

Respectfully submitted,

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