

Case No.: 200,719-8

SUPREME COURT OF THE STATE OF WASHINGTON

In re Sandra L. Ferguson

Attorney at Law

WSBA No. 27472

REPLACEMENT

REPLY BRIEF OF RESPONDENT FERGUSON

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STATE OF WASHINGTON
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- A. Did Ms. Ferguson knowingly violate due process by seeking “temporary injunctive relief” without notice to opposing counsel?

No. The rules allow attorneys to appear *ex parte* to ask for temporary emergency relief followed by a show cause hearing without prior notification to opposing counsel. The Bar does not dispute this in their Answering Brief and, in fact, provide copies of CR 60(e)(2) and CR 65(b) which allow it.

- B. Did Ms. Ferguson misrepresent the actions and representations of the opposing party to the Court during the course of an *ex parte* proceeding appearance?

No. The Branford’s were in possession of the Ferguson Family home without legal title. They defaulted on their contractual obligations to assume the mortgage and pay the delinquent mortgage fees as ordered by the court.

- C. Did Ms. Ferguson fail to provide the court with legal authority regarding notice requirements prior to issuance of an emergency order on contempt and restitution?

No. She sought a temporary emergency order and provided the court with a motion to set a show cause hearing consistent with CR 60(e)(2) and CR 56(b) which do not require prior notice.

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I. INTRODUCTION :

The central issue is whether or not Sandra Ferguson, a 17 year member of the Bar¹ with no prior disciplinary history, should be disciplined² for appearing on an *ex parte* calendar with an emergency motion for “temporary injunctive relief” and a motion to set a show cause hearing for a preliminary injunction without prior notification to opposing counsel.

II. REPLY TO THE BAR’S RESTATEMENT OF THE RELEVANT FACTS.

A. SUMMARY:

This case concerns efforts by attorney Sandra Ferguson to save her brother’s family home³ from foreclosure.⁴ Beginning on July 13, 2003 Andrew and Julianne Ferguson entered into a series of complex Purchase and Sale Agreements with Doug and Linda Bransford for purchase of the Nantucket Inn.⁵ The parties agreed to a 1031 Tax Deferred “Like-Kind” Exchange of properties with the Bransfords accepting the equity in the

¹ Ms. Ferguson is a single mother and solo practitioner focusing on civil rights, employment law and Indian law.

² Opening Br. Assignment of Error #3 [“The Board and the hearing officer erred when they found violations of the RPCs.”] Respondent contests the recommendation of a reprimand and suspension (Assignments of Error 4-7).

³ Andrew and Julianne Ferguson had four young children (Respondent’s nieces and nephews).

⁴ The Bar Association acknowledges the importance of preventing foreclosures by establishing a Home Foreclosure Legal Aid Project. Mr. Newman is a volunteer with that project. <http://www.mywsba.org/default.aspx?tabid=161>

⁵ Ex. 1: The Fergusons agreed to pay \$10,000 in earnest money. The agreement is unsecured.

Ferguson home as down payment for an option to purchase the Inn.⁶ The Bransfords agreed to assume the Ferguson mortgage and make all the mortgage payments.

Respondent had no involvement with these agreements.

The Bransfords never assumed the mortgage and fell behind on the mortgage payments. The Fergusons also fell behind on their lease obligations for the Inn and, after receiving a 3-Day Notice to vacate from the Bransfords' attorney [Doug Owens] on November 22⁷, did so. On December 21, 2004 the Ferguson's attorney [Stephen Schutt] had served on the Bransfords a 20-day notice to terminate tenancy.⁸ The next day (December 22) the Bransford's filed a complaint to Quiet Title⁹ and the Fergusons answered with

⁶ Ex. 2: Commercial & Investment Real Estate Purchase & Sale Agreement (January 8, 2004). These form agreements were prepared by Phil Albanese with North West Properties [Ex. 22 at 8:21-22; at 22:13-15]

⁷ Ex. 6

⁸ Ex. 7

⁹ Ex. 8 The Bransfords' complaint falsely states at 3.10

On January 8, 2004, plaintiffs contracted to purchase and defendants agreed to sell a home in Anacortes, Washington. Plaintiffs made the down payment on the property and assumed the mortgage of the defendants.

Despite repeated demands to do so, defendants have failed to give plaintiffs title to the subject property. This constitutes a material breach of the terms of sale and justifies the plaintiff's rescission of the agreement.

[Emphasis added]. This assertion was denied in their answer. Ex. 11. It is undisputed that "The Bransfords tried but failed to assume the mortgage on the home." Bar Association Answering Brief at 5 citing TR 420-21; 425.

counterclaims.¹⁰ The Fergusons also filed a complaint against the Bransfords for unlawful detainer to evict them from their home.¹¹

B. MARCH & APRIL 2005

March 8, 2005: The Fergusons received notice that their mortgage payments were past due “which puts you in default of your loan agreement.”¹²

March 17, 2005: The mortgage company (PHH) sent a “Notice of Intention to Foreclose” to the Fergusons that their home would be placed in foreclosure within 30 days (on or before April 17, 2005) unless the default was cured.¹³ The notice specified that all payments must be in the form of “certified funds only.”

March 18, 2005: Skagit County Superior Court Judge Michael E. Rickert heard the Ferguson’s Motion for Writ of Restitution.

MR. SCHUTT: Your Honor, the tenants are two months behind in payments and mortgage. In order to be entitled to their hearing within 30 days, they need to post that into the registry of the court.

MR. OWENS: We’ll make the payment, Your Honor.

THE COURT: What’s that?

MR. OWENS: We’ll make a quick payment to the mortgage company... I don’t think it is going to do much good to give it to the registry of the court.

THE COURT: Registry of the court just holds it.

MR. OWENS: I understand that, but it’s the mortgage

¹⁰ Ex. 11

¹¹ Ex. 12

¹² Ex. 14 The total amount due (with late charges) was \$2,212.76.

¹³ Ex. 15. The total amount due (with penalties) was \$2242.10. The Notice stated:
In the event you do not cure the default in full within THIRTY (30) days from the date of this letter (as provided by the terms of the mortgage), payment of the current principal balance will be accelerated and foreclosure proceedings will be initiated. Again, all remittances must be in the form of “CERTIFIED FUNDS ONLY”. Anything less than the TOTAL DUE and/or not in “CERTIFIED FUNDS”, will be refused.

company's the one that's getting itchy.

THE COURT: Okay.

MR. SCHUTT: That needs to be paid through March.

THE COURT: Great (inaudible). Okay. Check with Delilah, and tell her the low down and she'll get I set within 30.¹⁴

As a result of the hearing, Judge Rickert ordered:

Clerk shall set for expedited hearing within 30 days. Bransford shall pay the mortgage for February and March. Mortgage payments to be brought up to date w/n 10 days. Trial to be March 30, 2005 @ 1:30 P.M.¹⁵

March 28, 2005: The Bransfords dated and allegedly sent two personal checks to the mortgage company (PHH) to the default.¹⁶ The checks were in the wrong amounts and not certified as required by the mortgage company (PHH).¹⁷ They later stopped payment on those checks.¹⁸

March 30, 2005, the Bill Donovan, Collections Department Supervisor, Mortgage Service Center writes the Fergusons:

Dear Andrew,

Here is the history of your loan the last three months:

January 2005 received payment January 20, 2005

February 2005 no payment

March 2005 no payment posed as of March 30, 2005.¹⁹

¹⁴ Ex. 17 [5/18/05 TR] at 6: 10-12

¹⁵ Ex. 16 also includes the March 8 default notice from the Mortgage company (PHH) stating: "Payments for 2 months at \$962.93 per month*, beginning 02-01-05. Accumulated late charges of \$276.90. TOTAL AMOUNT DUE: \$2,212.76."

¹⁶ Ex. 19

¹⁷ Each check was for \$960 [total \$1920] when the amount due was \$2,242.10. Ex. 15

¹⁸ Appendix A: Ex. 60 at 3 (4/12/05).

¹⁹ Ex. 23. Mr. Ferguson did not receive this letter until April 4. Ex. 37 [Dec. of Andrew Ferguson] at para. 28.

On that same date, Judge Rickert heard the Ferguson's motion for writ of restitution. At the hearing, Judge Rickert repeatedly asked if the Bransfords had paid the mortgage:²⁰

PAGE 2: 18-23

THE COURT: The mortgage payments weren't made within ten days like the order says, from the 18th, which would have been by the 28th. And today is the 30th, isn't it? Yeah, by Monday.

MR. OWENS: They have to be sent away, Your Honor

THE COURT: Where are they sent to?

MR. OWENS: Los Angeles, Your Honor.

PAGE 4: 15-19:

MR. OWENS: It's our contention that we have a right to even default on the mortgage, that these people have no right to title to this property; and if we decide to let the mortgage go, we have a right to do that.²¹

PAGE 5: 83-13:

MR. SCHUTT: I'd ask that the court sign my order on writ.

MR. OWENS: Your order on what?

MR. SCHUTT: Order for the writ of restitution.

MR. OWENS: Your Honor, the money has been sent down there. If the money had been paid into the court, the money wouldn't be even on the way down there. He's not entitled to a writ of restitution. A writ of restitution is based on the assumption that he owns the property.²²

PAGE 12: 9-15:

MR. OWENS: And by the way, the payments that they call rent payments were payments made to the mortgage company (PHH) by the Bransfords. And even if the payments are behind at this time, one of the reasons is they

²⁰ Ex. 22 [3/30/05 TR of unlawful detainer hearing].

²¹ Emphasis added.

²² Emphasis added. It is undisputed that the Fergusons were the recorded legal owners of the property. Ex. 12; Ex. 37 [Andrew Ferguson Dec. Ex. A copy of recorded Statutory Warranty Deed (10/30/98)].

haven't given the coupons to make the payments. They said they had to send the payments down without coupons and the loan number on them, the check.

PAGE 16:13-18

THE COURT: Yes, keep making mortgage payments, can't waste the property, yada – yada

MR. OWENS: Al right, but if we have to keep making the mortgage payments, if we lose, they have to pay us back. There's no reason we should make mortgage payments if they are claiming title to it²³

PAGE 17: 20-24:

MR. SCHUTT: So the court's order is that the Bransfords need to keep making mortgage payments?

THE COURT: Yes. So they are suffering, too. Everybody is suffering. What are the mortgage payments?

MR. OWENS: Close to a thousand a month.

PAGE 21: 5-8

MR. OWENS: Well, the solution isn't to let them back in. They'll file bankruptcy, immediately claim that they have equity in the house, and then we are out in the cold.

MR. SCHUTT: Well, the bankruptcy court can address that. I think the court can likewise consolidate these cases for trial but put the Fergusons back in temporary possession.

MR. OWENS: IF the Fergusons go back to temporary possession, they can then claim the house as a homestead, Your Honor, and then everything ends.

THE COURT: Well, I'm just keeping the status quo. If the Fergusons were back in the house right now, I'd probably say that's – we'll just keep it that way, the Fergusons can stay in the house²⁴, but it doesn't make sense to keep swapping inns.

MR. SCHUTT: But the house is sitting empty.

²³ Emphasis added

²⁴ Emphasis added. Despite that statement, the Bransfords were the ones who retained the house.

THE COURT: No, they have their stuff in there; it sounds like they are utilizing it. Okay. Well, I'm going to deny the writ

Based on Mr. Owens' misrepresentations that the mortgage payments had been made, Judge Rickert denied the writ. He consolidated the Ferguson and Bransford cases and ordered:

Bransford shall continue to make all mortgage payments in full until further order of the court direct to the mortgage holder. Bransford shall continue in possession of the property. Court reserves issue as repayment of pmts.²⁵

April 1, 2005: Mr. Schutt, sends a copy of the Notice of Intent to Foreclose to Mr. Owens.²⁶

April 5, 2005: Mr. Owens forwards it on to the Bransfords.²⁷ Ms. Ferguson received a frantic call from her brother and begins her own legal research.²⁸

April 6, 2005: The personal checks issued by the Bransfords to the mortgage company (PHH) on March 28 were deposited.²⁹ The checks were not certified and were for the wrong amount as stated in the Notice of Intent to Foreclose.³⁰ The Bransfords later stopped payment on those checks.³¹

April 6, 2005: Ms. Ferguson substituted Mr. Schutt as counsel.³²

April 11, 2005: Julianne Ferguson called the mortgage company (PHH) once more and confirmed payments had not been made. Ms. Ferguson drove to the Skagit County Courthouse to set a hearing date for a show cause.³³ She filed:

²⁵ Ex. 20

²⁶ Ex. 24 [The Notice is dated March 17]

²⁷ Ex. 29. Note, CR 65. Ex. 69 (dated 4/5/05)

²⁸ Ex. 69 (dated 4/5/05)

²⁹ Ex. 30

³⁰ Ex. 24

³¹ Appendix A: Ex. 60 at 3 (4/12/05)

³² Ex. 32

Plaintiffs' Ex parte Motion for Temporary Injunctive Relief;
Motion for Relief from Order of Court in Unlawful Detainer
Action under CR 60(b); Motion Under sec. 7.21.030 for
Finding of Contempt and Imposition of Remedial Sanctions,
Including Costs and Attorneys' Fees; Motion to Shorten Time
for Show Cause Hearing.³⁴

The Bar does not dispute the fact that notice is neither typical nor required for a Motion to Shorten Time for Show Cause Hearing.³⁵ Ms. Ferguson's intention was to file the motions, secure an emergency temporary order and set a hearing date for the show cause. The first relief requested on page one of the motion is:

an Ex parte order for hearing on Plaintiffs' request for emergency injunctive relief (in the form of a Writ of Restitution) and for Defendants to show cause why said injunctive relief should not be made permanent.³⁶

³³ While the Respondent prepared an order to show cause for the court to set the date and time of a hearing, she did not prepare an order for a writ of restitution. However, at the hearing, the Respondent presented to Judge Rickert an Order prepared by prior counsel which the judge signed. Ex. 39 & 40.

³⁴ Ex. 33 [Emphasis added]. The footer states "Plaintiff's Motion for *Temporary Injunctive Relief*." According to Tegland, "If the moving party contemplates a request for a TRO without notice, the necessary statements and certification must be prepared in advance of the hearing so they can be presented to the court along with a request for TRO." 4 Karl B. Tegland, Washington Practice: Rules Practice, CR 65 (pages 613). This is exactly what Ms. Ferguson did. Ex. 33 (motion)

³⁵ Opening Br. at 27 – 28 [citing State v. Del Cary Smith, 17 Wash. 430, 50 P. 52 (1897)]. The Bar makes no attempt to distinguish that case or dispute the proper procedure for such motions.

³⁶ Ex. 33 (page 1) In her Declaration, Ms. Ferguson states: "I must scan this motion and send it to my clients tonight (this morning) so that they can seek the noting of a hearing later today, for the earliest possible date." Id., Ms. Ferguson Dec. at para. 5.

The motion is supported by declarations and sets forth the “irreparable injury” that will result³⁷ if the temporary motion is not granted. Ms. Ferguson’s declaration states “I have not yet had time to provide notice of this motion to Doug Owens, Defendants’ counsel, because of the exigency of the circumstances.”³⁸ She goes on to state:

I intend to take steps to ensure that Mr. Owens receives notice of the hearing as soon as possible by having my clients deliver a copy of the motion, in-person, as soon as possible.³⁹

Mr. Schutt also submitted a separate declaration in support.⁴⁰

Ms. Ferguson submitted a:

(Proposed) Order of Temporary Injunctive Relief and to Show Cause Who Preliminary Injunction Should Not Issue⁴¹

The Court granted the Writ of Restitution⁴² in “open court” but did not set a date for the show cause.

Clearly, Ms. Ferguson was seeking a temporary restraining order as a precondition to a preliminary injunction consistent with CR 65(b). The Bar’s obsession with criticizing her for not citing CR 65(b) or stating that she was

³⁷ Id., at 13

³⁸ Id., Ms. Ferguson’s Dec. at para. 4

³⁹ Id., para. 6

⁴⁰ Ex. 36 “Efforts to Give Notice or Ex Parte Motion OR of Reasons Supporting Claim Why Notice Should Not Be Required”

⁴¹ Ex. 38

⁴² Ex. 39 and 40

seeking a “Temporary *Restraining Order*” rather than “Temporary *Injunctive Relief*” is elevating form over substance, ignores Exhibit 68⁴³ and is absurd.⁴⁴

To illustrate the absurdity of the Bar’s position, it is noteworthy how the Bar mischaracterizes one of its main sources in their Answering Brief.⁴⁵

Specifically, the Bar states:

A temporary injunction is the same as a preliminary injunction, and neither is the same as a temporary restraining order. See 4 Karl B. Tegland, Washington Practice: Rules Practice, CR 65 at 612 (5th ed. 2006).

However, that section of Tegland⁴⁶ actually supports Ms. Ferguson:

Notice and procedure – Generally

CR 65 contemplates a three-step process – the TRO, the preliminary injunction, and the permanent injunction. Regrettably, other rules and statutes sometimes depart from the terminology established by CR 65. For example, CR 52 uses the term “temporary injunction,” apparently referring to what CR 65 calls a preliminary injunction. And in everyday discussion, “restraining order” is often used as a generic term to refer to TROs, preliminary injunctions, and even injunctive provisions in final decrees....⁴⁷

⁴³ Ex. 68 - 69 is Ms. Ferguson’s legal research which included Tegland on Injunctive Relief and CR 65(b). See 803 et seq.

⁴⁴ CR 65(a) and CR 65(b) both appear under the following heading: “Civil Rule 65. Injunctions.”

⁴⁵ Answering Br. at 18, fn 6

⁴⁶ Attached as Appendix B

⁴⁷ Appendix B: 4 Karl B. Tegland, Washington Practice: Rules Practice, CR 65 at 612 (5th ed. 2006).

Also on April 11: Mrs. Bransford called PPH Mortgage Services on the loan. According to the Collection/Customer Service Loan Activity Archive for that date:⁴⁸

Mrs. Bransford, a third party called on this loan. There is a lawsuit going on the property. Mrs. Bransford had been ordered to make payments, wanted to know how to get set up on plan as payments have been behind.

April 12: Skagit County Sheriff serves the Writ of Restitution on Bransfords who then stop payment on the mortgage checks.⁴⁹

April 13: Mr. Owens claims he received the order.

April 14: Bransford calls PHH

April 15: Bransford send letter to PHH⁵⁰

demanding that you accept the enclosed certified funds in the amount of \$2,242.10 ... to the above referenced account as per your letter dated March 17, 2005....

The Bransfords sent the check "Express Mail" to PHH for payment of \$2,242.18.⁵¹

April 16: Bransfords' personal checks for the incorrect amounts were received by PHH but, by that time, they stopped payment.⁵²

April 19: Owens files "Motion to Vacate Write of Restitution, Nunc Pro Tunc to Restore the Premises to the defendants, and for Attorneys Fees"⁵³ and sets it on for hearing on May 6.⁵⁴ In his brief, Mr. Owens argues that:

⁴⁸ Appendix A: Ex. 60. A careful reading of this exhibit is circumstantial evidence that Owens was served on the April 11. Furthermore, the Bar's claim that "the mortgage company (PHH)'s records reflected that payment had been made" when Ms. Ferguson called on May 6 and 11 is, according to this exhibit, false. Answering Br. at 8.

⁴⁹ Id. at page 3.

⁵⁰ Ex. 48

⁵¹ Ex. 47 and 48

⁵² Appendix A: Ex. 60

The Court, recklessly and without any legal authority,⁵⁵ signed an *ex-parte* Order for a Writ of Restitution to the premises at 1112 – 7th Street, Anacortes, Washington.⁵⁶

Included with the motion is a Declaration of Lynda Bransford dated April 19, stating:

The mortgage company, PHH, has failed to cash our checks, and when we ask them about this situation they refuse to discuss it with us and say they cannot discuss anything about this case with us.⁵⁷

Mrs. Bransford further states:

⁵³ Ex. 46. Included with the motion is a Declaration of Lynda Bransford dated April 19, stating “The mortgage company, PHH, has failed to cash our checks, and when we ask them about this situation they refuse to discuss it with us and say they cannot discuss anything about this case with us.”[Redesignated from App. E in original Reply to App. C (Ex. 70 at 4-5) in this Replacement Reply Brief]. Mrs. Bransford states “As of the 11th of April, 2005, we had made the payments called for by the Judge in his March 18, 2005 Order.” *Id.* at 5. Yet, according to PHH’s Activity Log (App. A), the Bransfords had stopped payment on 4/12/05. This is undisputed by the Bar. [See Answering Br. at 8]

⁵⁴ Ex. 49

⁵⁵ The Bransfords could have expeditiously moved to vacate the order arguing that Judge Rickert erred in consolidating a hearing on the temporary order with the preliminary injunction. See App. B (Tegland) which states:

If the TRO was entered without notice, the hearing on the preliminary injunction must be held “at the earliest possible time.” CR 65(d). A party affected by a TRO entered without notice can often hasten the first hearing by moving to dissolve or modify the TRO. See CR 65(b), last sentence.

4 Karl B. Tegland, Washington Practice: Rules Practice, CR 65 at page 614. See also Ameriquist Mortg. Co. v. State Atty. Gen. 148 Wn.App. 145, 199 P.3d 468 (Div. 2 2009) [The trial court’s consolidation of preliminary injunction hearing with a full hearing on the merits in a Public Records Action, without providing prior notice to the parties, was error.]

⁵⁶ Ex. 51 at 1:17-19

⁵⁷ App. C* (Ex. 70 at 4-5)]. [*This appendix was originally designated as “E” in the original Reply Brief and has been redesignated as App. C in this Replacement Reply Brief]

As of the 11th of April, 2005, we had made the payments called for by the Judge in his March 18, 2005 Order.⁵⁸

Yet, according to the mortgage company, the Bransfords had stopped payment on or before April 12, 2005.⁵⁹ This is undisputed by the Bar.⁶⁰

May 5: The Fergusons file bankruptcy.⁶¹ Notice of bankruptcy and stay of proceedings is filed with the Skagit County Clerk⁶² causing the court to lose jurisdiction.⁶³ The Bransfords subsequently executed a written agreement to give up any claim to the Ferguson family home.⁶⁴

III. REPLY TO THE BAR'S RESTATEMENT OF THE ISSUES:

A. Did Ms. Ferguson knowingly violate due process by seeking "temporary injunctive relief"⁶⁵ without notice to opposing counsel?⁶⁶

No. The rules⁶⁷ allow attorneys to appear *ex parte* to ask for temporary emergency relief followed by a show cause hearing without prior

⁵⁸ Id. at 5.

⁵⁹ PHH's Activity Log (App. A),

⁶⁰ See Answering Br. at 8

⁶¹ Ex. 56

⁶² Ex. 57

⁶³ Ex. 58; AFFCLR sec. 24

⁶⁴ AFFCLR 27

⁶⁵ The Bar argues that Ms. Ferguson did not cite CR 65(b) in her motion or use the magic words "Temporary *Restraining* Order." The conclude that "A temporary injunction is the same as a preliminary injunction" and, therefore, Ms. Ferguson was there for a preliminary injunction. [Answering Br. at 18 (fn. 6)]. However, the Bar's argument elevates form over substance and ignores the fact that Ms. Ferguson's motion asked to court to set a show cause hearing to determine if a preliminary injunction should issue. [Ex. 33].

⁶⁶ See AFFCLRs Count 1 [reprinted at Opening Br. pg. 11-12]

⁶⁷ Count 1 states: "By seeking an order of contempt, a Writ of Restitution and CR 60 remedies *ex parte*, Respondent knowingly violated former RPC 3.4(c) and 3.5 (b) and 8.4(d)." Id. RPC 3.4(c) (knowingly disobey an obligation under the rules of a tribunal); RPC 3.5 (b) (improper *ex parte* communication with a judge), and RPC 8.4 (d) (conduct prejudicial to the administration of justice). However, CR 60(e)(2) states: "Notice. Upon the filing of the

notification to opposing counsel. The Bar does not dispute this in their Answering Brief and, in fact, provide copies of CR 60(e)(2) and CR 65(b) which allow it.⁶⁸

B. Did Ms. Ferguson misrepresent the actions and representations of the opposing party to the Court during the course of an *ex parte* proceeding⁶⁹ appearance?

No. The Bransfords were in possession of the Ferguson Family home without legal title. They defaulted on their contractual obligations to assume the mortgage and pay the delinquent mortgage fees as ordered by the court.⁷⁰

C. Did Ms. Ferguson fail to provide the court with legal authority regarding notice requirements prior to issuance of an emergency order on contempt and restitution?

No. She sought a temporary emergency order and provided the court with a motion to set a show cause hearing consistent with CR 60(e)(2) and CR 56(b) which do not require prior notice.

IV. LEGAL STANDARDS, FACTORS & PENALTY:

A. LEGAL STANDARD:

motion and affidavit, the court shall enter an order fixing the time and place of the hearing thereof and directing all parties to the action or proceeding who may be affected thereby to appear and show cause why the relief asked for should not be granted.” [Bar Answering Br. App. A]

⁶⁸ See Respondent’s Opening Brief at 27 [citing *State v. Del Cary Smith*, 17 Wash. 430, 50 P. 52 (1897)].

⁶⁹ Note there is no transcript of the proceedings to determine what was said.

⁷⁰ The Hearings Officer concluded that Ms. Ferguson made a false representation regarding Bransford’s failure to make the mortgage payments. However, see fn. 53. Further, there is no support for the Hearing Officer’s conclusion that Respondent was aware that Judge Rickert did not review or read all of the pleadings. *Id.*, at para. 20.

To depart from Washington State Bar Association (WSBA)

Disciplinary Board's sanction recommendations in attorney disciplinary proceeding, the Supreme Court must be persuaded that the recommended sanctions are inappropriate based upon consideration of the following factors:

- (1) Purposes of attorney discipline, i.e., sanction must protect public and deter other attorneys from similar misconduct;
- (2) Proportionality of sanction to misconduct, i.e., sanction must not depart significantly from sanctions imposed in similar cases;
- (3) Effect of sanction on attorney, i.e., sanction must not be clearly excessive;
- (4) Record developed by hearing panel, i.e., sanction must be fairly supported by record and must not be based upon considerations not supported by record; and
- (5) Extent of agreement among Board members, i.e., sanction supported by unanimous recommendation will not be rejected in absence of clear reasons.⁷¹

B. FACTORS

Regarding the aggravating factors cited by the Bar (dishonest or selfish motive; refusal to acknowledge wrongful nature of conduct, substantial experience in the practice of law):

- (1) Ms. Ferguson was not dishonest nor did she have a financial motive;

⁷¹In re Disciplinary Proceeding Against McKean, 148 Wn.2d 849, 64 P.3d 1226 (2003). The higher degree of unanimity the more likely the Court will not question the Board's decision. In re Cohen, 150 Wn.2d 744, 754, 82 P.3d 224 (2004). Contrary the Bar's assertions in this case, the Board was not unanimous in its recommended sanction. Answering Br. at 4 (fn 2)

- (2) Ms. Ferguson acknowledges that her lack of experience with emergency motions; and
- (3) Although she has been in practice 17 years, she had one experience with emergency motions.⁷²

The Bar has applied the aggravating factor of dishonest or selfish motives in cases where the “lawyer intends to benefit financially or deceive the court.”⁷³ But this is not supported by the record or the findings. Where is the proof that Ferguson intended to “benefit financially or deceive the court” by speaking with a judge in the context of a motion to shorten time for a show cause? As shown above, Ms. Ferguson did not have improper *ex parte* contact with judge Rickert in open court on the *ex parte* calendar. Her actions were completely consistent with pursuit of a motion for an order to show cause for temporary emergency relief.

C. HARM⁷⁴ & PENALTY:

The Bar argues that the Bransfords lost \$53,000 equity in the house and \$2,242.10 mortgage payment as “the direct result of respondent’s

⁷² Ms. Ferguson’s only experience with a TRO was a with a former client who was served with a TRO followed by a hearing. In that case, neither Ms. Ferguson or her client received prior notice of the TRO. TR 242:24-25; 243: 1-5

⁷³ In re Disciplinary Proceeding against Trejo, 163 Wn.2d 701, 185 P.3d 1160 (2008) [citing In re Disciplinary Proceeding Against Holcomb, 162 Wn.2d 563, 587, 173 P.3d 898 (2007)].

⁷⁴ Respondent contested Findings of Fact para. 27 (in regards to harm caused to the Bransfords). Opening Br. at 4

actions.”⁷⁵ Moreover, the Bar claims that the Bransfords were entitled to the \$53,000 equity in the house “under the original deal with the Fergusons.”⁷⁶

Not only is that false, it is unsupported by the findings of the hearings officer and board. The agreements cited by the Bar concern the sale of the Ferguson home to Bransford (buyers) for \$160,000 payable as follows:

\$53,000 of the purchase price TO BE GIFTED ~~in cash~~ at closing, ~~including the earnest money~~, with the balance of the purchase price paid as follow is buyers⁷⁷ assumption of any underlying note and deed of trust, or real estate contract ...⁷⁸

The agreements are confusing⁷⁹ and misleading⁸⁰ but provides for no earnest money. In addition to misstating the terms of the agreements, the Bar ignores

⁷⁵ Bar Answering Br. at 37

⁷⁶ Id.

⁷⁷ In this Agreement the Fergusons were the “Sellers” and the Bransfords the “Buyers”

⁷⁸ Ex. 4 at paragraph 1

⁷⁹ At the unlawful detainer hearing, Judge Rickert asked Mr. Owens “Who drafted this little number?” Mr. Owens responded: “A guy named Phil Albanese. Did a great job, didn’t he?” Ex. 22 at 8:20-22 [Emphasis added]

⁸⁰ The Bar cites Ex. 5 which is entitled “Statement of Exchange of Value” and states:

Sellers, Andrew Ferguson and Julianne Ferguson, Buyers Doug Bransford and Linda Bransford, and Agent, Phil Albanese agree that all equity in the property at 1112 7th St. Anacortes, WA 98221 is being exchanged as consideration for the purchase option on the property at 3402 Commercial Ave., Anacortes, WA 98221 to represent 5% of total purchase price of Real Estate and Business as stated in Purchase Sale Agreement for The Nantucket Inn or Furnishings and equipment as specified in Purchase Sale agreement for The Nantucket Inn.

Any document representing equity in 1112 7th St. property as a gift is for the purpose of satisfying mortgage company (PHH)’s requirements at the request said mortgage company (PHH) has full knowledge of all exchanges of value pertaining to this transaction.

the fact that the Bransfords breached the agreement because they never assumed the mortgage.

Moreover, Andrew Ferguson testified they were going to file bankruptcy anyway.⁸¹ Mr. Owens expressed that concern at the unlawful detainer hearing on March 30, 2005— *before Ms. Ferguson entered the case.*

MR. OWENS: Well, the solution isn't to let them back in. They'll file bankruptcy, immediately claim that they have equity in the house, and then we are out in the cold.⁸²

Her brother filed bankruptcy and the Bransfords executed a written agreement to give up any claim to the Ferguson family home.⁸³ Because the Bransfords were never the legal owners, they would not end up with the property. The property and any equity would go into the bankruptcy estate.

Again, any alleged harm could have been cured by Mr. Owens filing a timely motion to vacate. It is apparent from the sequence of events outlined above, prior notice of the hearing would not change the fact that the Bransfords were in default because — *contrary to their claims* - they had not and did not made full payment to the mortgage company as ordered by Judge Rickert. Hence, as Judge Rickert signed the *ex parte* order because the Bransfords had, in fact, not made the mortgage payments.

⁸¹ TR 614-615

⁸² Ex. 33 at 21

⁸³ AFFCLR 27

V. CONCLUSION :

Sandra Ferguson, a 17 year member of the Bar with no prior disciplinary history, should not be disciplined for appearing before a judge in open court on a motion to set a show cause hearing for temporary emergency orders. As a matter of law, her appearance before Judge Rickert on April 11, 2005, without prior notice to Doug Owens, was permissible. The charges should be dismissed.⁸⁴

Dated: July 19, 2010


Shawn Newman [WSBA 14193]
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Olympia, WA 98502
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FAX: 866.800.9941

⁸⁴ Id., Assignment of Error #5

Case No.: 200,719-8

SUPREME COURT OF THE STATE OF WASHINGTON

In re Sandra L. Ferguson

Attorney at Law

WSBA No. 27472

REPLACEMENT

REPLY BRIEF OF RESPONDENT FERGUSON

APPENDIX A

EX. 60:

PHH MORTGAGE SERVICES

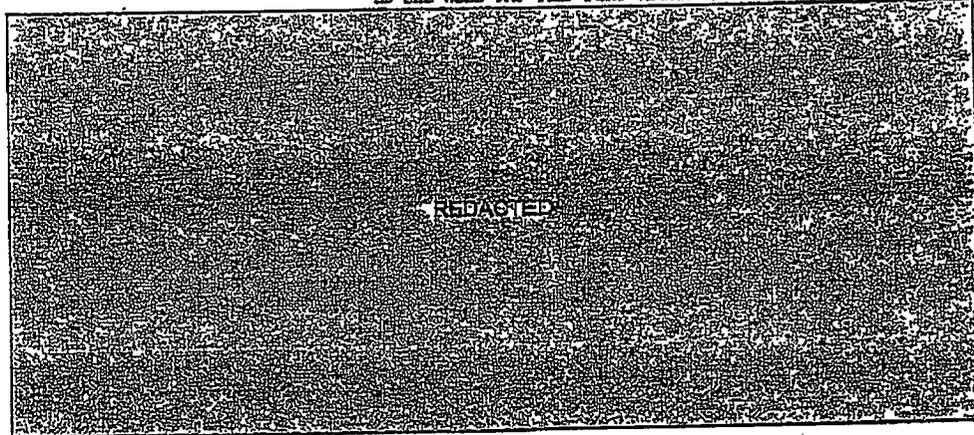
COLLECTIONS/CUSTOMER

SERVICE LOAN ACTIVITY ARCHIVE

PHH MORTGAGE SERVICES
COLLECTIONS/CUSTOMER SERVICE LOAN ACTIVITY ARCHIVE
FOR THE TIME PERIOD 01/01/04 THRU 03/31/06

0001551985

COL	03/28/05	779	S TENANTS IN COURT, NEEDS FAXED STATEMENT VERIFYING PAYMENTS MADE, FAXED TO HER SAME FROM NBR AS ABOVE, \MRS TEL OPC \FROM TO MAIL \OTHR-REASON NOT LSTD
COL	03/28/05	779	DELO STAT = REASON FOR DELO = 015
COL	03/28/05	779	MS SZ SHE WILL CALL BACK LATER TO MAKE FEB PYMT RFD TENANTS ARE NOT PAYING MARCH PYMT WILL BE MADE BRO RTLY AFTER APPROX THE 5TH OF APR
COL	03/28/05	***	KC056 HUD 55 DAY DLO LETTER SENT
COL	03/24/05	HIB	\PH RES TT MS \TENANT NOT PAYING \TENANT OCCUPIED 962.93 04-01
COL	03/24/05	HIB	UC756- MS SAYS SHE IS IN THE PROCESS OF ATTEMPTING TO GET \$ FROM TENANTS THROUGH COURT. MS SAYS IF NOT PAID BY THE 29TH, SHE WILL DO A SPDPAY. RFD SHE
COL	03/24/05	HIB	UC756- IS RENTING PROPERTY OUT AND TENANTS DID NOT PAY RENT.
COL	03/24/05	756	\TEL RES \LMTC/MACHINE \UNABL TO CNTCT MTGR
COL	03/22/05	DVX	\TEL RES \TEL DISC \UNABL TO CNTCT MTGR
COL	03/19/05	DVX	\TEL RES \TEL DISC \UNABL TO CNTCT MTGR
COL	03/17/05	***	XCL17 30 DAY NOI-VA/FHA-FRP LETTER SENT
COL	03/17/05	***	KC007 30 DAY INTNT TO F/C-VA/F LETTER SENT
COL	03/15/05	703	\MRS TEL OPC NO ARRANGEMENT MADE \TENANT OCCUPIED
COL	03/15/05	DVX	\TEL RES \TEL DISC \UNABL TO CNTCT MTGR
COL	03/12/05	DVX	\TEL RES \TEL DISC \UNABL TO CNTCT MTGR
COL	03/08/05	***	KC085 HUD Pamphlet/LN Workshop LETTER SENT
COL	03/07/05	***	NOTICE FINAL (P-182)
COL	03/01/05	HIB	\MRS TEL OPC \FROM TO MAIL \TENANT OCCUPIED 962.93 03-11
COL	03/01/05	HIB	UC775- H PYMT ON 2/20
COL	03/01/05	HIB	UC775- MS CALLED STATED PROPERTY IS TENANT OCCUPIED AND TENANTS ARE RESPONSIBLE FOR MAKING PYMT MS STAT ED SHE WILL PAY FEB PYMT AFTER 3/5 WILL PAY MARCH



EXHIBIT

60

PHH MORTGAGE SERVICES
COLLECTIONS/CUSTOMER SERVICE LOAN ACTIVITY ARCHIVE
FOR THE TIME PERIOD 01/01/04 THRU 03/31/05

0001551985

DATE	TIME	AGENT	STATUS	DESCRIPTION
04/22/05	141	XP001		192 - Payoff Statement Page 1 (#1)
04/22/05	141	XP002		081 - Payoff Statement Page 2
04/22/05	141	XP003		048 - FHA Prepayment Letter
04/22/05	141	XP995		038 - Additional Payoff Comments
04/20/05	CPI	XC007		108 - 30 DAY INTNT TO F/C-VAR050419
04/20/05	CPI	XCL17		086 - 30 DAY NOI-VA/FHA-PRP R050419
04/19/05	508			KRISTINA LAREEE... NEED TO KNOW HOW MUCH INFO WE CAN RELEASE TO THE BRANFORDS...
04/19/05	508			INVOLVED THE PROPERTY SOMEHOW... THE BRANFORD HAVE BEEN ORDERED BY THE COURT TO MAKE PMTS... SPOKE WITH DAWN BRADBERT... SHE ADVISES I SEND THIS INFO TO \CORRES REC\
04/19/05	508			INFORMATION REC'D FROM DOUGLAS AND LYNDA BRANFORD. LETTER STATES THERE WAS SOME SORT OF BUSINESS TR ANS BETWEEN THEM AND THE H/O THAT FAILED... TRANS XCL17 30 DAY NOI-VA/FHA-PRP LETTER SENT XC007 30 DAY INTNT TO F/C-VAR/F LETTER SENT CR22908 \$960.00 POSTED TO 04-06-05 RETURNED TO PAY EMNT STOPPED
04/19/05	***			
04/19/05	***			
04/18/05	289			SFC - COUPON BOOK REQUEST
04/18/05	RFW	CLOSED		007 - Stop plcd on pymt R050412
04/13/05	CPI	CC004		007 - Stop plcd on pymt R050412
04/13/05	CPI	CC004		PAYMENT STOPPED
04/12/05	***			H/O WANTS TO KNOW THEIR PAYMENT
04/11/05	282	CPAMT		ADV H.O NOW MIC SHE WOULD HAVE TO PAY TO HAVE HER ACCT CORRECT
04/11/05	282	CSCHNG		CHANGE TO ACCOUNT (TELE, ADDR, ETC...)
04/11/05	247	CC001		UPDATED FHS
04/06/05	767			TRANSFERRED CALL TO COLLECTIONS
04/06/05	767			MRS. BRANFORD, A THIRD PARTY CALLED ON THIS LOAN. THERE IS A LAWSUIT GOING ON THE PROPERTY. MRS BRAS FORD HAD BEEN ORDERED TO MAKE PAYMENTS, WANTED TO KNOW HOW TO GET NET UP ON PLAN AS PAYMENTS HAVE B EN BEHIND
04/06/05	507			\MRS TEL OPC NO ARRANGMENT MADE \WOULD NOT DISCUSS MS WANTED INFO ON THE ACCT.
04/06/05	507			\MR HES TT MR NO ARRANGMENT MADE \WOULD NOT DISCUSS THE TENANTS ARE TO BE PAYING--HE IS FILING AN INQUIRY TODAY--ONCE HE FINDS OUT WHO IS TO MAKE THE P YMT HE WILL TAKE CARE OF IT
04/04/05	MTL	VERAND		PLEASE VERIFY ADDRESS. POSSIBLE INCORRECT INFO
04/01/05	718			TT CH WANTS ANOTHER FAX WED MORN
03/31/05	788			DELO STAT = REASON FOR DELQ = 018
03/31/05	799			\MRS TEL OPC NO ARRANGMENT MADE \OTHR-REASR NOT LISTD
03/31/05	703			MS ASKED NEEDS LETTER = NO PAYMENT RCVD* FAXD AGAIN.
03/31/05	703			\MRS TEL OPC \TENANT NOT PAYING \TENANT OCCUPIED
03/30/05	728			\MRS TEL OPC NO ARRANGMENT MADE \OTHR-REASR NOT LISTD
03/30/05	728			DELO STAT = REASON FOR DELQ = 018
03/30/05	703			MS CL TO REQ IF THE FAX INFO BE REPAKED TO HER/MS B D SHE WAS HAVING PROBLMS W/HER FAX MACHINS EARLIER/F ORWARD REQ TO BILL WHO WAS FAXING THE INFO TO MS
03/30/05	703			AD BILL OF REQUEST AND HE WILL TAKE CARE OF IT.
03/30/05	703			\MRS TEL OPC \FROM TO MAIL \TENANT OCCUPIED
03/30/05	703			MS ASKED IF ANY PAYMENT RECEIVED, AD ME NOT, MS AD HA

0001551985

COL	04/26/05	BIB	NO A: NO A PRINCIPAL RESIDENCE? R: YES A: YES
COL	04/26/05	BIB	UC779- A: YES
COL	04/26/05	BIB	UC779- A: YES
COL	04/26/05	BIB	UC779- C: HOW MANY MONTHS IS THE LOAN DELINQUENT? R
COL	04/26/05	BIB	: SHOULD BE BETWEEN 3, 12 A: 2
COL	04/26/05	BIB	UC779- C: DOES THE BORROWER OCCUPY THE PROPERTY AS
COL	04/26/05	BIB	UC779- C: HOW MANY MONTHS IS THE LOAN DELINQUENT? R
COL	04/26/05	BIB	A PRINCIPAL RESIDENCE? R: YES A: YES
COL	04/26/05	BIB	: SHOULD BE ATLEAST 3 A: 2
COL	04/26/05	BIB	UC779- C: DO THE ARREARS EXCEED 12 MONTHS PAY? R:
COL	04/26/05	BIB	UC779- C: DO YOU OR YOUR SPOUSE INTEND TO KEEP THE
COL	04/26/05	BIB	NO A: NO
COL	04/26/05	BIB	PROPERTY? R: YES A: YES
COL	04/26/05	BIB	UC779- A: YES
COL	04/26/05	BIB	UC779- C: IF YOU HAVE NOT RECEIVED HOUSING COUNSELING,
COL	04/26/05	BIB	YOU SHOULD CALL 1-800-569-4287 OR THE TOLL FREE
COL	04/26/05	BIB	TDD NUMBER 1-800-877-8339 FOR ASSISTANCE R: YES
COL	04/26/05	BIB	UC779- C: IS INCOME SUFFICIENT TO MAINTAIN REPAYMENT
COL	04/26/05	BIB	UC779- C: HOW MANY MONTHS IS THE LOAN DELINQUENT? R
COL	04/26/05	BIB	T OF DEBT? R: YES A: YES
COL	04/26/05	BIB	: SHOULD BE BETWEEN 3, 12 A: 2
COL	04/26/05	BIB	UC779- C: DO YOU OR YOUR SPOUSE INTEND TO KEEP THE
COL	04/26/05	BIB	PROPERTY? R: YES A: YES
COL	04/26/05	BIB	UC779- A: YES
COL	04/26/05	BIB	UC779- C: DOES THE BORROWER OCCUPY THE PROPERTY AS
COL	04/26/05	BIB	A PRINCIPAL RESIDENCE? R: YES A: YES
COL	04/26/05	BIB	UC779- C: IF YOU HAVE NOT RECEIVED HOUSING COUNSELING,
COL	04/26/05	BIB	YOU SHOULD CALL 1-800-569-4287 OR THE TOLL FREE
COL	04/26/05	BIB	TDD NUMBER 1-800-877-8339 FOR ASSISTANCE R: YES
COL	04/26/05	BIB	UC779- C: DO YOU OR YOUR SPOUSE INTEND TO KEEP THE
COL	04/26/05	BIB	PROPERTY? R: YES A: YES
COL	04/26/05	BIB	UC779- C: IS PRE-CONDITION FOR REPAYMENT PLAN SUCCESSFULLY
COL	04/26/05	BIB	R: YES A: YES
COL	04/26/05	BIB	UC779- C: IF YOU HAVE NOT RECEIVED HOUSING COUNSELING,
COL	04/26/05	BIB	YOU SHOULD CALL 1-800-569-4287 OR THE TOLL FREE
COL	04/26/05	BIB	TDD NUMBER 1-800-877-8339 FOR ASSISTANCE R: YES
COL	04/26/05	BIB	UC779- FINANCIAL INFORMATION AS ON 04/26/2005: MONTHLY
COL	04/26/05	BIB	INCOME = \$6,300.00 MONTHLY EXPENSES = \$5,089.36
COL	04/26/05	BIB	(INCLUDES MORTGAGE)
COL	04/26/05	BIB	UC779- UC779
COL	04/26/05	BIB	UC779- Q: IS FORECLOSURE ON HOLD? A: NOT APPLICABLE
COL	04/26/05	BIB	UC779- Q: IS THE DURATION OF THE AGREEMENT MORE THAN
COL	04/26/05	BIB	THREE (3) MONTHS? A: YES
COL	04/26/05	BIB	UC779- Q: NON OWNER OCCUPANCY STATUS MUST HAVE BEEN
COL	04/26/05	BIB	RELATED TO THE CAUSE OF DEFAULT. A: YES
COL	04/26/05	BIB	UC779- Q: THREE MONTHS AVERAGE MONTHLY SURPLUS INCOME
COL	04/26/05	BIB	PERCENTAGE A: 23.79
COL	04/26/05	BIB	UC779- Q: WHAT IS FRONT-END RATIO? A: 1.3
COL	04/26/05	BIB	UC779- Q: HOW MANY MONTHS IS THE LOAN DELINQUENT? R
COL	04/26/05	BIB	: 2
COL	04/26/05	BIB	UC779- Q: DO THE ARREARS EXCEED 12 MONTHS PAY? R:
COL	04/26/05	BIB	NO
COL	04/26/05	BIB	UC779- Q: CALL TO CONFIRM STATUS BEFORE SENDING MONEY

0001951985

REDACTED

COL	04/29/05	BDY	SPAY XNET \$980.43 (\$962.93+\$17.50 SPAY FEE) PAYMENT MADE 4/29/2005 12:02:00 PM CONF#3000204 ACCT:1006 BANK:NEEDHEX ISLAND BANK \\MR TEL OFC \\SPEED PAY \\REPAYMENT PLAN DELO STAT = 12 REASON FOR DELO = MR CALLED IN VIA SPAY FOR ADEL REPAY PLAN.
COL	04/29/05	787	UC779- C: HOW MANY MONTHS IS THE LOAN DELINQUENT? R : SHOULD BE ATLEAST 2 A: 2
COL	04/29/05	787	UC779- A: YES
COL	04/29/05	787	UC779- C: DOES THE BORROWER OCCUPY THE PROPERTY AS A PRINCIPAL RESIDENCE? R: YES A: YES
COL	04/26/05	BIB	UC779- C: IS INCOME SUFFICIENT TO MAINTAIN REPAYMEN T OF DEBT? R: YES A: YES
COL	04/26/05	BIB	UC779- C: HOW MANY MONTHS IS THE LOAN DELINQUENT? R : SHOULD BE BETWEEN 4, 12 A: 2
COL	04/26/05	BIB	UC779- A: YES
COL	04/26/05	BIB	UC779- C: DO YOU OR YOUR SPOUSE INTEND TO KEEP THE PROPERTY? R: YES A: YES
COL	04/26/05	BIB	UC779- C: DO YOU OR YOUR SPOUSE INTEND TO KEEP THE PROPERTY? R: YES A: YES
COL	04/26/05	BIB	UC779- C: IF YOU HAVE NOT RECEIVED HOUSING COUNSEL ING, YOU SHOULD CALL 1-800-569-4287 OR THE TOLL FREE TDD NUMBER 1-800-877-8339 FOR ASSISTANCE R: YES
COL	04/26/05	BIB	UC779- C: AT LEAST 12 MONTHS HAVE ELAPSED SINCE THE ORIGINATION DATE OF THE LOAN OR THE ORIGINATOR DA TE IS NOT AVAILABLE? R: YES A: YES
COL	04/26/05	BIB	UC779- C: DOES THE BORROWER OCCUPY THE PROPERTY AS A PRINCIPAL RESIDENCE? R: YES A: YES
COL	04/26/05	BIB	UC779- A: YES
COL	04/26/05	BIB	UC779- C: DO THE ARREARS EXCEED 12 MONTHS FIFTY R: UC779- C: IF YOU HAVE NOT RECEIVED HOUSING COUNSEL ING A: NO
COL	04/26/05	BIB	NO, YOU SHOULD CALL 1-800-569-4287 OR THE TOLL FREE TDD NUMBER 1-800-877-8339 FOR ASSISTANCE R: YES
COL	04/26/05	BIB	UC779- C: DOES THE BORROWER OCCUPY THE PROPERTY AS A PRINCIPAL RESIDENCE? R: YES A: YES
COL	04/26/05	BIB	UC779- C: DO THE ARREARS EXCEED 12 MONTHS FIFTY R: UC779- C: THREE MONTHS AVERAGE MONTHLY SURPLUS INCO ME A: NO
COL	04/26/05	BIB	ME PERCENTAGE R: SHOULD BE BETWEEN 0, 9999 A: 23.7 9
COL	04/26/05	BIB	UC779- C: HOW MANY MONTHS IS THE LOAN DELINQUENT? R : SHOULD BE BETWEEN 3, 12 A: 2
COL	04/26/05	BIB	UC779- C: IF YOU HAVE NOT RECEIVED HOUSING COUNSEL ING
COL	04/26/05	BIB	UC779- C: IF YOU HAVE NOT RECEIVED HOUSING COUNSEL ING, YOU SHOULD CALL 1-800-569-4287 OR THE TOLL FREE TDD NUMBER 1-800-877-8339 FOR ASSISTANCE R: YES
COL	04/26/05	BIB	NO, YOU SHOULD CALL 1-800-569-4287 OR THE TOLL FREE TDD NUMBER 1-800-877-8339 FOR ASSISTANCE R: YES
COL	04/26/05	BIB	UC779- C: DO THE ARREARS EXCEED 12 MONTHS FIFTY R: UC779- C: DOES THE BORROWER OCCUPY THE PROPERTY AS

Item	Cims Key	Serial	Account	C	Amount	Prod Cod
20050406	05040628001714613	0000000000	[REDACTED]	002908	\$960.00	PHLTCORPX

R. Douglas Bransford
 or Lynda Bransford
 Po Box 1732
 Anacortes, WA 98221

Date: 3-28-05

Pay to the Order of: PHH

\$ 960.00

Nine hundred sixty 00/100 Dollars

Bank of America

Valued Client Since 2000

For: 000165.1995

Lynda Bransford

TO CASH 943363447

943363447

2800171461

APR 06 2005

FOR DEPOSIT ONLY

R. Douglas Brantford
or Lynch Brantford 360-
P.O. Box 1728 799-2011
Anacortes, WA 98221

2907

1 3-28-05

Pay to the order of P.H.H.

\$ 960.00

Five hundred ninety six and 00/100

Bank of America



U.S. Department of Treasury

Valued Client Since 2000

Account # 10011111111111111111
UCC# ~~XXXXXXXXXXXX~~ Ferguson, Andrew

James Brantford

15555555555555555555

FOR DEPOSIT ONLY
APR 06 2005
CASH DEPOSIT ONLY

28801719

7878 7878
78787878

43 027 9484

Case No.: 200,719-8

SUPREME COURT OF THE STATE OF WASHINGTON

In re Sandra L. Ferguson

Attorney at Law

WSBA No. 27472

REPLACEMENT

REPLY BRIEF OF RESPONDENT FERGUSON

APPENDIX B

4 Karl B. Tegland

Washington Practice: Rules Practice

CR 65 (pages 612 et seq.) [5th ed. 2006 and 2009 Supp.]

WASHINGTON PRACTICE
SERIES™

Volume 4

RULES PRACTICE

FIFTH EDITION

By

KARL B. TEGLAND
of the Washington Bar

PART IV.
RULES FOR SUPERIOR COURT
(CR 38-END)

THOMSON
—★—
WEST

Mat #40469463

23, below.

7. Commencement of action, coordination with other documents filed

A TRO cannot be entered until an action is formally commenced. Under CR 3, an action can be commenced by either service or filing, but since a TRO is usually requested very early in the proceeding, commencement in this context is usually accomplished by filing. Technically, CR 3 requires that an action be commenced by filing a complaint or petition, setting forth all relief sought by the plaintiff or petitioner. However, clients often need immediate protection before a comprehensive complaint or petition can be drafted, and as a practical matter, most courts are willing to entertain a motion for a TRO even if the motion is the first document filed in the proceeding.

A TRO may be entered and served before service of the summons and complaint, since the action is commenced by filing. *State v. Nicoll*, 40 Wash. 517, 82 P. 895 (1905).

Of course, if the motion for the TRO is the only document initially filed, the plaintiff will need to follow up with a complaint or petition, setting forth the relief ultimately sought in the case. The complaint or petition must be filed and served, together with a summons, in order to complete the formal commencement of the action.

8. Notice and procedure—Generally

CR 65 contemplates a three-step process—the TRO, the preliminary injunction, and the permanent injunction. Regrettably, other rules and statutes sometimes depart from the terminology established by CR 65. For example, CR 52 uses the term “temporary injunction,” apparently referring to what CR 65 calls a preliminary injunction. And in everyday discussion, “restraining order” is often used as a generic term to refer to TROs, preliminary injunctions, and even injunctive provisions in final decrees. For the sake of clarity and consistency, the discussion here uses only the terms established by CR 65.

9. Notice and procedure—Temporary restraining order (tro)

The plaintiff may first seek a TRO, ordering the defendant to immediately refrain from harming the plaintiff. Ordinarily, the purpose of a TRO is to preserve the status quo until the court can hear an application for a preliminary injunction. *State ex rel. Pay Less Drug Stores v. Sutton*, 2 Wn.2d 523, 98 P.2d 680 (1940) (but court leaves the door open to other applications).

Due process and CR 65 both encourage (but do not absolutely require) the moving party to notify the adverse party of the time and place where the TRO will be requested. CR 65 states that a temporary restraining order may be entered without notice only

if it is shown by sworn affidavit that the moving party's injury will result before the court can hear the motion, and after plaintiff has been made to give notice of the request for a TRO. In such a case, certification must be made, and the motion can be presented to the court without notice.

It is at least arguable that a TRO is more rigorous than CR 65 requires. In a divided vote, that the court should require notice only in the most extreme case. *Inc. v. McNamara*, 8

Written notice is required, but oral notice is better. The rule is codified by CR 65(b). (*Teamsters*, 415 U.S. 449, 454 (1973)). The notice requirement is void. See *Esmieu v. Esmieu*, 206 (1977).

The request for a TRO is made by the moving party at the time of the hearing on facts justifying injunctive relief. If the penalty of perjury is required, it meets the requirement of CR 65(b). The court will not hear the motion unless the court has the authority to grant it.

Argument on the merits is left to the discretion of the court. The court may require the posting of security before the TRO is granted.

A TRO entered without notice is voidable at the date fixed by the court. The date may be set by the court for good cause shown.

10. Notice and procedure—Preliminary injunction

As mentioned, a TRO is a preliminary injunction in effect, an extension of the TRO until a preliminary injunction can be held. *Blakiston v. Blakiston*, 435, 23 P.2d 397 (1934). The purpose of a preliminary injunction is to preserve the status quo until the court can hear the motion. *State ex rel. Pay Less Drug Stores v. Sutton*, 2 Wn.2d 523, 98 P.2d 680 (1940). The conditions that will be

Comparison with other

until an action is formally commenced by either a writ or a complaint. Usually requested very early in the case, a TRO in this context is usually accompanied by a motion. CR 3 requires that an action be commenced by filing a petition, setting forth all the facts and circumstances. However, clients often file a comprehensive complaint or petition, and most courts will grant a TRO even if the motion is not filed.

Written notice is preferred before service of the summons. Oral notice is better than no notice at all and is expressly authorized by CR 65(b). *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974). If the notice requirements are not met, the order may be declared void. See *Esmieu v. Schrag*, 88 Wn.2d 490, 497, 563 P.2d 203, 206 (1977).

The TRO is the only document to follow up with a complaint. The TRO is ultimately sought in the case. It is filed and served, together with the formal commencement of the action.

Terminology

The process—the TRO, the preliminary injunction. Regrettably, the court from the terminology. In everyday discussion, “restraining order” is used to refer to TROs, preliminary injunctions. In final court decisions, the discussion is usually by CR 65.

Temporary restraining order

Ordering the defendant to do or refrain from doing the plaintiff. Ordinarily, the status quo until the court can hear the case. *State ex rel. Pay Less Drug Stores v. Sutton*, 2 Wn.2d 523, 98 P.2d 680 (1940) (but see applications).

Emergency (but do not absolutely require the adverse party of the time requested. CR 65 states that a TRO entered without notice only

if it is shown by sworn statement that immediate and irreparable injury will result before the adverse party can be heard in opposition, and after plaintiff's counsel certifies the efforts that have been made to give notice. If the moving party contemplates a request for a TRO without notice, the necessary statements and certification must be prepared in advance of the hearing, so they can be presented to the court along with the request for the TRO.

It is at least arguable that the due process clause is even more rigorous than CR 65. The Court of Appeals has stated, by a divided vote, that temporary restraining orders may be entered without notice only upon a clear showing of critical and immediate need for the protection of person or property. *Corning & Sons, Inc. v. McNamara*, 8 Wn.App. 441, 506 P.2d 1328 (1973).

Written notice is preferable because it creates a record, but oral notice is better than no notice at all and is expressly authorized by CR 65(b). *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974). If the notice requirements are not met, the order may be declared void. See *Esmieu v. Schrag*, 88 Wn.2d 490, 497, 563 P.2d 203, 206 (1977).

The request for a TRO should be supported by affidavits from the moving party and other appropriate persons, setting forth facts justifying injunctive relief. An unsworn declaration under penalty of perjury may be substituted for an affidavit, so long as it meets the requirements of CR 13. The adverse party is entitled to present opposing affidavits or declarations. CR 43(e). Ordinarily the court will not hear live testimony, though CR 43(e) does give the court the authority to do so.

Argument on the motion may be conducted by telephone in the discretion of the court. CR 7(b)(5). The court may require the posting of security before granting a TRO (see § 73.8, below).

A TRO entered without notice must, by its terms, expire on a date fixed by the court, not to exceed 14 days from the date of entry. The date may be extended by the court during that time, for good cause shown. CR 65(b).

10. Notice and procedure—Preliminary injunction

As mentioned, a TRO is effective for 14 days (subject to extension for good cause shown), after which the plaintiff may seek a preliminary injunction. CR 65(b). The preliminary injunction is, in effect, an extension of the TRO and serves to prevent harm to the plaintiff until a full hearing on the merits of the complaint can be held. *Blakiston v. Osgood Panel & Veneer Co.*, 173 Wash. 435, 23 P.2d 397 (1933). Again, the purpose of a preliminary injunction is to preserve the status quo. *State ex rel. Pay Less Drug Stores v. Sutton*, 2 Wn.2d 523, 98 P.2d 680 (1940). The conditions that will be preserved are the last, actual, peaceable,

non-contested conditions which preceded the pending controversy. *General Telephone Company of the Northwest, Inc. v. Washington Utilities and Transportation Commission*, 104 Wn.2d 460, 706 P.2d 625 (1985).

Advance notice must be given to the adverse party before requesting a preliminary injunction. CR 65(a)(1). As a practical matter, the hearing on a preliminary injunction is usually scheduled when (and if) the court grants the TRO. Local procedures vary, but it is common practice when obtaining a TRO to also have the court sign an order to show cause, directing the adverse party to appear at a specified time and place for a hearing on whether the TRO should be converted to a preliminary injunction, pending the final outcome in the case. The order to show cause is then served on the adverse party, together with the TRO.

If the TRO was entered without notice, the hearing on the preliminary injunction must be held "at the earliest possible time." CR 65(d). A party affected by a TRO entered without notice can often hasten the first hearing by moving to dissolve or modify the TRO. See CR 65(b), last sentence.

The notice of intent to seek a preliminary injunction must include a designation of the kinds of evidence that will be considered at the hearing (normally affidavits or declarations) and must be accompanied by any affidavits or declarations that the moving party intends to present. CR 43(e). If either party intends to present live testimony, he or she must obtain permission from the court in advance, and must serve notice of such permission on the adverse party at least 3 days before the hearing. CR 43(e).

If issues of fact inhere in the underlying cause of action, courts, in ruling on a preliminary injunction, will ordinarily not decide the ultimate rights in the lawsuit, but will engage in the more limited exercise of determining the likelihood that the moving party will prevail on the merits. *Tyler Pipe Industries, Inc. v. State, Department of Revenue*, 96 Wn.2d 785, 638 P.2d 1213 (1982). If, on the other hand, the facts are not in dispute, the trial court must, from the nature of the circumstances, reach the ultimate issues of law that comprise the underlying cause of action. *Rabon v. City of Seattle*, 84 Wn.App. 296, 932 P.2d 646 (1996), reversed on different point 135 Wn.2d 278, 957 P.2d 621 (1998).

The trial court has broad discretion in granting or denying a preliminary injunction. However, when the trial court decides a pure issue of law in the course of ruling on a motion for a preliminary injunction, an appellate court will review the trial court's decision on that issue just as it would review any other trial court decision on an issue of law. See, e.g., *Rabon v. City of Seat-*

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11. Notice of

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05).

8. PROVISIONAL AND FINAL REMEDIES (CR 64-71)

CR 65. INJUNCTIONS

AUTHOR'S COMMENTS

10. Notice and procedure—Preliminary injunction

Add after fifth paragraph of Author's Comment:

A preliminary injunction serves the same general purpose as a temporary restraining order to preserve the status quo until the trial court can conduct a full hearing on the merits, with "status quo ante" meaning the last actual, peaceable, noncontested condition which preceded the pending controversy. At a preliminary injunction hearing, plaintiff need not prove, and trial court does not reach or resolve, merits of issues underlying requirements for permanent injunctive relief. Instead, the trial court considers only likelihood that plaintiff will ultimately prevail at a trial on merits by showing (1) that he has a clear legal or equitable right, (2) that he reasonably fears will be invaded by defendant's actions, and (3) defendant's actions will result in substantial harm. *Ameriqurest Mortg. Co. v. State Atty. Gen.*, 148 Wash. App. 145, 199 P.3d 468 (Div. 2 2009).

Washington Decisions

5. Preliminary injunction, procedure

If the court intends to consolidate a hearing on a preliminary injunction with the trial on the merits (i.e., if the court intends to reach a final decision on the merits at the hearing on the preliminary injunction), the court must give the parties advance notice of its intent to do so. In the absence of notice, it is error for the court reach a final decision on the merits at a hear-

ing on a preliminary injunction. *Ameriqurest Mortg. Co. v. State Atty. Gen.*, 148 Wash. App. 145, 199 P.3d 468 (Div. 2 2009).

Trial court's consolidation of preliminary injunction hearing with a full hearing on the merits in Public Records Act action, without providing prior notice to parties, was error. *Ameriqurest Mortg. Co. v. State Atty. Gen.*, 148 Wash. App. 145, 199 P.3d 468 (Div. 2 2009).

CR 66. RECEIVERSHIP PROCEEDINGS

[Deleted effective September 1, 2006.]

CR 66 was rescinded in 2006, due to the enactment of comprehensive, new receivership statutes in 2004. The 2004 statutes covered the points formerly covered in CR 66, making the rule unnecessary.

Case No.: 200,719-8

SUPREME COURT OF THE STATE OF WASHINGTON

In re Sandra L. Ferguson

Attorney at Law

WSBA No. 27472

REPLACEMENT

REPLY BRIEF OF RESPONDENT FERGUSON

APPENDIX C¹

EX. 70: DECLARATION OF LYNDA BRANSFORD

IN SUPPORT OF MOTION TO VACATE

WRIT OF RESTITUTION, NUNC PRO TUNC,

TO RESTORE THE PREMISES TO DEFENDANTS,

AND FOR ATTORNEYS FEES.

¹ This was designated as Appendix E in the original Reply Brief

1
2 As of that date, the complaint in cause no. 04-2-02124-6, filed December 22, 2004, had not
3 been answered by the defendants. The Court was informed that my attorney, Doug Owens, would
4 make efforts to get an answer to the complaint and get the matter set for trial. As of that date also,
5 the Court was informed that checks had been sent to PHH, the mortgage company, on the 28th of
6 March, 2005.

7 As of April 15, 2005 a check was sent to PHH in the amount of \$2,242.10, the amount they
8 claim for default. PHH will still not discuss anything having to do with these payments with me or
9 my husband, Douglas Bransford. I am told that on or about the 6th day of April, 2005, Sandra
10 Ferguson signed a Substitution of Counsel with Steve Schutt in cause no. 05-2-00250-9. Further, I
11 am informed that on the 11th day of April, 2005, Sandra Ferguson went to Mount Vernon,
12 Washington and presented a Motion for Temporary Injunctive Relief and Attorney's Fees and a
13 Motion entitled

14 "Plaintiff's ex-parte Motion for Temporary Injunctive Relief; Motion for Relief from Order
15 of Court in Unlawful Detainer Action under CR 60(b); Motion under Sec. 721.030 for
16 Finding of Contempt and Imposition of Remedial Sanctions, including Costs and Attorney's
17 Fees; Motion to Shorten Time for Show Cause Hearing."

18 This motion, together with attached exhibits and proposed Orders consisted of approximately
19 eighty-three (83) pages of text. This motion was presented on the ex-parte calendar on April 11,
20 2005, with no prior notice to my attorney, Doug Owens. When the matter was finally delivered to
21 my attorney, it was delivered on the 13th of April, 2005, after the Judge had signed, on April 11,
22 2005, on the ex-parte calendar, a Writ of Restitution.

23 I have read some of the declaration of Andrew Ferguson and note inaccuracies and untruths,
24 which I will point out to the Court in a terse manner, as I do not have the time to go through it in
25 great detail. Andrew Ferguson informs the Court in his declaration (para. 3) that they (he and his
26 wife) have held the Statutory Warranty Deed on the subject property in their names, but he fails to

27 Declaration of Lynda Bransford
28 Page -2-

Doug Owens
Attorney at Law
911 Sixth Street
Anacortes, WA 98221
(360) 293-9502

1 tell the Court that they had signed over to my husband and I all of their equity in the property
2 sometime before this lawsuit began.

3 In para. 4, Andrew Ferguson fails to note that although they agreed to gift their equity in the
4 property, they also took personal property out of the Nantucket Inn when they leased the Inn, sold
5 the property to third parties, and their claim to the personal property and title to it would have to
6 flow from their agreement to give us the equity in the property at 1112 7th Street.

7
8 Concerning para. 5 of Mr. Ferguson's declaration, there is never an agreement that the
9 necessary condition of our (Bransfords) receiving the equity in the property was that we assume the
10 mortgage within thirty days. There is never a necessary condition for this equity.

11
12 Further, in para. 6 it is stated that we (Bransfords) were unable to obtain financing. The
13 reason we were unable to obtain financing is that we could not show a record of payment from the
14 Fergusons for their lease of the Nantucket Inn. A record of payments from the Fergusons was never
15 forthcoming, as they were continually behind on the rent.

16 We had a purchaser for the 7th Street house who would have cashed out the equity position,
17 but the house would not qualify for a loan at that time, due to structural problems, which the
18 Fergusons refused to fix.

19
20 Something not stated to the Court is that the Fergusons came and took over the Nantucket
21 Inn, which was a business valued at over One Million Dollars, and the 7th Street house was supposed
22 to be part of what would be called an earnest money or downpayment, if they went through with the
23 business. Instead, the Fergusons sacked the business, destroyed whole portions of it, failed to pay the
24 rent, and finally, after a three-day Notice to Vacate, left the premises in a filthy, disheveled
25 condition, the cost of which to restore to its prior condition is staggering.

26
27 Declaration of Lynda Bransford
28 Page -3-

Doug Owens
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1 As to para. 10 of Andrew Ferguson's declaration, there was never an agreement that we, the
2 Bransfords, would stay on at the 7th Street property on a month to month tenancy.

3 I also state that we have held the premises under a claim of equitable title since the
4 Ferguson's moved into the Nantucket Inn. There are not "squatters", there has never been an
5 "abandonment of the property".
6

7 Andrew Ferguson claims that they contacted their mortgage holder by telephone and learned
8 that still no payments had been received. As of this date, the mortgage company has still not cashed
9 the checks, to the best of my knowledge. My husband and I have sent to the mortgage company the
10 attached correspondence (Exhibit A), and it is our feeling that the mortgage company is holding this
11 matter up, probably at the request of the Fergusons.

12 I would point out that in matters of title of property, the fact that Mr. Ferguson has four
13 minor children, ages 5 to 14 years, is irrelevant. He pledged the property at 1112 7th Street to my
14 husband and myself, moved into the Nantucket Inn and commenced to run our business totally into
15 the ground.
16

17 My husband and I are retired and we have equities on our side, but neither the fact that we are
18 retired nor the fact that they have children has anything to do with this claim. Whether we reside at
19 the subject property or not is irrelevant. I point out to the Court that the house, which is the subject
20 matter of this litigation, was a rental house, not the residence of the Fergusons at the time they
21 entered into the contract to lease/ option to purchase the Nantucket Inn. We claim the premises
22 through the contract signed by the Fergusons giving us their equity in the property.

23 I also state that we have never failed to comply with the Court orders. The mortgage
24 company, PHH, has failed to cash our checks, and when we ask them about this situation they refuse
25

26
27
28 Declaration of Lynda Bransford
Page -4-

Doug Owens
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1 to discuss it with us and say they cannot discuss anything about this case with us.

2
3 In para. 36, Andrew Ferguson arrogantly states "even if we prevail in the separate action
4 being brought against us by the Bransfords, they will not have the financial ability to pay damages
5 that we will incur if our house is foreclosed on." As a matter of fact, the Fergusons owe us, the
6 Bransfords, a considerable amount of money and we feel, although we cannot prove it, that the
7 mortgage company's unwillingness to cooperate with us on making payments is something that was
8 caused by the Fergusons and not us.

9 As of the 11th of April, 2005, we had made the payments called for by the Judge in his March ✓
10 18, 2005 Order.

11
12 As of April 11, 2005 our procedural rights were violated by the fact that the Judge allowed
13 eighty-three pages of motions, exhibits and declarations to be considered without giving us notice
14 pursuant to the rules of civil procedure and allowing us to respond to this motion.

15 I ask that the Court set aside the Writ of Restitution, nunc pro tunc, award attorney's fees for
16 having to deal with this outrageous violation of our procedural rights, and order the immediate
17 evacuation of the premises by the Fergusons.

18

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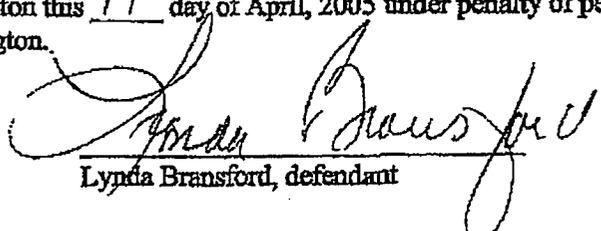
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Signed at Anacortes, Washington this 19th day of April, 2005 under penalty of perjury
under the laws of the state of Washington.

22

23

24


Lynda Bransford, defendant

25

26

27

28

Declaration of Lynda Bransford
Page -5-

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Chandler, Desiree R.

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Following up on Desiree's call, I filed a replacement reply brief today but did not black out the personal information on the last two pages of Ex. A [Checks from Bransfords]. That information had not been redacted in the original reply but should be redacted. Hence, per Desiree's inquiry, please redact the personal information on those two pages. My apologies.

Shawn Timothy Newman

Shawn Timothy Newman

Attorney at Law, Inc. | 2507 Crestline Dr., N.W.

Olympia, WA 98502 | Ph: 360.866.2322 | Fax: 866.800.9941

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