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## I. INTRODUCTION

The *Unpublished Opinion* below is the latest chapter in a nine-year litigation nightmare caused by the fraudulent and unethical conduct of petitioner Kruger and his attorney, Rick Wathen. The *Unpublished Opinion*—which did not address any of the issues presented in the *Petition*—is the second appellate decision in this case in which the central issue has been the misconduct of Kruger and Mr. Wathen.

Kruger and Moi entered into an agreement to subdivide a parcel residential property in Seattle, sharing equally the expenses of their venture and the obligation to repay a \$160,000 loan to purchase the property. It is undisputed that Moi fell behind in his payments. Rather than obtain a valid default judgment for the amount Moi actually owed (less than \$50,000), Kruger and Mr. Wathen obtained a fraudulent default judgment for more than \$214,000. In September 2013, the Court of Appeals vacated the fraudulent default judgment under CR 60(b)(5), and remanded the matter to the trial court to impose sanctions on Kruger and Mr. Wathen. Unfortunately, by the time the fraudulent default judgment was vacated, Kruger and Mr. Wathen already had executed upon two valuable properties owned by Moi, resulting in huge windfalls to Kruger.

The current appeal arose in June 2013, when Moi attempted to redeem one of the properties executed upon by Kruger. Moi demanded

that Kruger provide the “written and verified statement” of profits and expenses as provided by RCW 6.23.090(2). Even though Kruger and Mr. Wathen failed to provide such a statement, and thereby failed to comply with that statute, they brought a motion to compel the sheriff to deed the property to Kruger. At a hearing on the motion Mr. Wathen represented to the trial court on the record that he would give Moi five more days to redeem the property, but then he reneged on that promise and refused to allow Moi to redeem the property. The trial court inexplicably failed to enforce its order or grant reconsideration, and the property was erroneously deeded to Kruger. Moi appealed.

Although Kruger and Mr. Wathen made various erroneous arguments in an effort to retain the property and resulting windfall, the appeal focused on the reprehensible conduct of Mr. Wathen that caused the trial court error. After giving Mr. Wathen numerous opportunities to demonstrate that he had not violated his promise to the trial court, the Court of Appeals reversed and remanded to the trial court to address either (i) whether Mr. Wathen had refused to honor his representations to the trial court or (ii) whether Kruger had complied with the verification requirement in RCW 6.23.090(2). *Unpublished Opinion* at 8.

The long, sad story described in the *Petition* at 2-11 falsely portrays Kruger as a long-suffering creditor of Moi. But the *Petition*

contains too many falsehoods and irrelevant allegations to address here, and fails to even mention the fraud perpetrated by Kruger and Mr. Wathen that led to the executions on Moi's property. Remarkably, the *Petition* does not mention the unprofessional conduct of Mr. Wathen that resulted in the Court of Appeals not reaching the legal issues in this appeal.

The issues misleadingly presented in the *Petition* do not warrant this Court's review. The arguments in the *Petition* are entirely based on distorted facts presented by an attorney (Mr. Wathen) who has already committed fraud in this case, and who seeks this Court's assistance in retaining the benefits of that fraud. Kruger's assertion that the *Unpublished Opinion* "conflicts" with *Millay v. Cam*, 135 Wn.2d 193, 955 P.2d 791 (1998), is nonsense. The Court of Appeals did not cite *Millay* or even address the issue on which Kruger erroneously cites *Millay*. The *Petition* is entirely frivolous and should be denied.

## **II. RESPONSE TO STATEMENT OF FACTS**

In 1990, Moi and Kruger orally agreed to purchase real property in the Magnolia neighborhood of Seattle and divide that property into two parcels, each retaining one parcel. The parties jointly borrowed approximately \$160,000 to purchase the property. The parties agreed to share the expenses of the purchase of the property. In 2005, Moi fell behind on his half of the loan payments and other expenses.

**A. The 2006 Lawsuit and the 2011 Appeals**

Kruger sued Moi in 2006 (this case, King County No. 06-2-32029-8), obtaining a default judgment against Moi for \$44,464.91 on February 16, 2007. CP 25. On Kruger's motion, the trial court also ordered Kruger and Moi to each quitclaim one half of the Magnolia parcel to the other. CP 26-27. Moi was compelled by the trial court to transfer one half of the property (Parcel A) to Kruger in March of 2009. CP 68-69. However, Kruger never transferred Parcel B to Moi, as agreed by the parties and ordered by the court in 2007. CP 26-27.

In 2011, Moi moved for a mirror order to compel Kruger to quitclaim Moi's half of the property to Moi. The trial court denied Moi's motion, noting that "Plaintiff is prepared to convey parcel B to Defendant, as soon as he pays the money judgment owing Plaintiff." CP 275-76. Moi appealed, but the Court of Appeals affirmed on grounds that it would be inequitable to order Kruger to quitclaim Moi's property to Moi while Moi remained in breach of the agreement to pay half the expenses relating to the properties. CP 864-65. Parcel B is the subject of this Appeal.

**B. The 2009 Lawsuit, Fraudulent Default Judgment and the 2011 Appeals**

Kruger, now represented by Rick Wathen, sued Moi for a second time in 2009, obtaining a second default judgment against Moi for \$214,903.56 in May 2010. This patently fraudulent default judgment—

which was eventually vacated under CR 60(b); *see below*—included (i) the entire \$160,000 loan principal, even though half of that loan was owed by Kruger, not Moi, and Kruger had not actually paid off the loan, (ii) approximately \$30,000 in attorney fees, even though there was no legal basis for Kruger to claim such fees, (iii) and another \$61,000, for which there was no basis whatsoever. CP 859-861. Moi appeared, and brought a motion to set aside the default judgment, which the trial court erroneously denied. CP 866. In 2011, Moi appealed to the Court of Appeals in both the 2006 and 2009 cases, and those appeals were consolidated. CP 855.

**C. Executions on Moi's Properties During the Pendency of the 2011 Appeals**

Moi had two properties available that could potentially be sold to satisfy one or both judgments against him. One of these was Moi's half of the Magnolia property ("Parcel B"). The other was a commercial property in Ballard, owned by Moi and not related to the dispute. CP 197, CP 511.

During the pendency of the 2011 appeal (No. 68008-1-I) Kruger executed on both Moi's Magnolia and Ballard properties. Kruger moved the trial court to issue a writ of execution against Moi's Magnolia Parcel B. CP 277-80. Moi objected, noting *inter alia* that the execution would work an inequity on Moi. The inequity explained by Moi was as follows: Because title to Parcel B was clouded by Kruger's failure to transfer

Parcel B to Moi as ordered by the Court in 2007 (CP 26-27), the amount Parcel B would sell for at any execution sale would be a tiny fraction of its actual value. Therefore Moi would end up not only losing his Parcel B in Magnolia (and all the benefits of the parties' agreement), he would, under the fraudulent 2010 default judgment, still owe 100% of the loan and 100% of the expenses of the Magnolia property to Kruger. CP 188-93, 365-68, CP 370-403, CP 422.

Nonetheless, the trial court granted Kruger's motion, and a writ of execution was issued on March 26, 2012. CP 424-27. Kruger purchased Parcel B at the Sheriff's sale on May 25, 2012. CP 428. Kruger's bid for Parcel B was \$70,479.29, the total value of the \$44,464.91 judgment in the 2006 case, as calculated by his attorney, Rick Wathen. CP 430-31. This amount was extremely low—Parcel B had been appraised at \$375,000. CP 385-97. The fact that Kruger could buy the property for about \$70,000 reflects the encumbrance on title, as any prospective purchaser would have to negotiate with Kruger to get him to remove himself from title. CP 190.<sup>1</sup>

The effect of Kruger executing on both properties was exactly as predicted in Moi's objection to Kruger's motion for writ of execution. CP 365-368. Having paid, through the execution processes, for Kruger's

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<sup>1</sup> Kruger also purchased Moi's Ballard property at the Sheriff's sale on May 25, 2012 for \$250,000, in order to partially satisfy the fraudulent default judgment Kruger obtained in 2010 in the 2009 case. CP 511, 861.

share of the loan on Kruger' half of the Magnolia property (Parcel A), Moi's half of the loan on the Magnolia property (Parcel B), Kruger's half of the expenses on both the Magnolia parcels, Moi's half of expenses on both the Magnolia parcels, Kruger's attorneys' fees, and sixty thousand dollars in unknown claims, Moi was left with neither of his properties and still owed, jointly and severally with Kruger, the approximately \$160,000 for the Magnolia loan to the bank, as well as a claimed deficiency of about \$25,000 on the 2010 default judgment. *See* CP 859-861.

**D. The Redemption Proceedings**

On April 3, 2013, almost a year after executing on, and purchasing, Moi's Ballard and Magnolia properties, Kruger provided a "Notice of Expiration of Redemption Period" to Moi pursuant to RCW 6.23.030, advising Moi that the last day for redemption was May 25, 2013<sup>2</sup> and that the total required to redeem the Magnolia parcel was now \$84,893.46. The \$84k amount included approximately \$1700 in taxes and \$5400 in unidentified "liens or other costs." CP 489.

On May 21, 2013 Moi filed his Notice of Intent to Redeem per RCW 6.23.080(1). CP 494. On May 22, 2013 Kruger provided an "Itemized Statement for Redemption" stating that the amount Moi needed to redeem on May 28, 2013 was now \$87,032.61. CP 495-97.

Upon examining the “Itemized Statement,” Moi discovered that Kruger was demanding approximately \$8,000 more than the purchase price plus interest. CP 511. In light of Kruger’s failure to submit an affidavit establishing the payment of the taxes or the basis of the liens and costs pursuant to RCW 6.23.020(2), 6.23.050 and 6.23.080, Moi had no reason to trust the Kruger’s demand for \$8,000 above the purchase price plus interest. CP 503-02, 511. Therefore, on May 24, 2013, as permitted by RCW 6.23.090(2), Moi filed with the King County Sheriff a demand in writing for “a written *and verified* statement” of the amounts of rents and profits received and expenses paid and incurred on Parcel B during the redemption period. CP 498, 510-511.

In response to Moi’s demand for the written and verified statement, Kruger’s attorney sent two e-mails and an attachment to the Sheriff on the afternoon of May 28, 2013. CP 478-485, App. B. The emails and attachment do not contain a list of the expenses paid and incurred on the property during the redemption period, which was from May 25, 2012 to May 28, 2013. While there is a spreadsheet of “expenses,” **not one of those line items relates to expenses incurred after May 25, 2012.** CP 478-482; *see Unpublished Opinion* at 4.<sup>2</sup> The

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<sup>2</sup> The *Unpublished Opinion* at 4 incorrectly states that the redemption period ran from May 2013 to May 2014. That is apparently a scrivener’s error. The redemption period ran from May 2012 to May 2013. *See* CP 489.

only amounts that might (or might not) relate to expenses borne by Kruger during the redemption period are at CP 483. But this is merely a list of numbers and does not indicate either the date or nature of each alleged expense. Furthermore, the numbers add up to \$3,061.93, a number that is reflected nowhere on Kruger's "Itemized Statement for Redemption." *Compare*, CP 483 and 496.

Finally, as the Court of Appeals correctly noted, neither Kruger nor his attorney actually signed the documents. *Unpublished Opinion* at 4; Consequently, Kruger's "statement" was not *verified* or *sworn* as required by RCW 6.23.090(2), that is, it was not signed, it did not contain a recital that it is true under penalty of perjury, it did not state the place of its execution, and it was not certified under the laws of the State of Washington. CP 478-485.

Also on May 28, 2013, Kruger's lawyer, Rick Wathen, wrote to the Sheriff demanding that the Sherriff issue the deed. CP 486-7. The Sheriff must have declined to issue the deed, because on May 29, 2013, Kruger filed a *Motion for an Order ... to Transfer Deed*. CP 455-459.<sup>3</sup>

Moi opposed Kruger's *Motion*, noting, *inter alia*, that (1) Kruger's "statement" was not verified or sworn, and (2) Kruger's unverified

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<sup>3</sup> Counsel for the Sheriff appeared at the June 11, 2013 hearing but did not engage in argument. RP 8, ll. 20-22.

statement did not set forth the rents, profits and expenses as required by RCW 6.23.090(2). CP 499-509. Moi asserted that as a result of those omissions, Kruger had failed to comply with RCW 6.23.090(2), which requires the purchaser (Kruger) to provide a “written and verified statement of the amounts of rents and profits thus received and expenses paid and incurred” for the period of redemption. CP 506-508. Moi informed the trial court that therefore, pursuant to RCW 6.23.090(2), he was entitled to sixty more days to redeem, during which period he could choose to bring an action to compel an accounting, and if an action to compel an accounting was filed, the redemption period would be extended to fifteen days after final determination of that action. CP 506-508.

Coincidentally, oral argument in Moi’s first appeal (No. 68008-1-I) was held on June 11, 2013, and the hearing on Kruger’s *Motion* in superior court was later the same day. At oral argument in the Court of Appeals, the panel repeatedly pressed Mr. Wathen to explain why his client (Kruger) was entitled to the obviously inflated and fraudulent default judgment, particular why his client was entitled to a judgment for the entire \$160,000 principal of the loan which Moi did not owe and Kruger had not paid. The oral argument became an embarrassing spectacle in which Mr. Wathen repeatedly failed to answer the panel’s questions and concocted new legal theories with no basis in the record.

**Appendix A** at 8-17. The panel’s patience with Mr. Wathen soon wore out, and the court noted that it was “not able to get a straight answer” from Mr. Wathen, and that “[t]his all looks rather sharp.” *Id.* at 17. Three months later the Court of Appeals vacated the second default judgment, and remanded the matter for CR 11 sanctions because the 2010 default judgment was the product of “**fraud, misrepresentation, or misconduct.**” *See* CP 861.

Kruger’s *Motion for an Order for the Sheriff to Transfer Deed* also was heard on June 11, 2013.<sup>4</sup> At the hearing, in an attempt to escape the consequences of Kruger’s failure to provide a verified statement, Mr. Wathen stated: “If the Court grants our motion, I will waive on behalf of my client that \$10,000 [sic] that’s in dispute. Problem solved.” RP 37. Over Moi’s objection, the trial court accepted this offer. RP 39.

But Mr. Wathen’s last minute waiver of charges that Kruger was not entitled to did *not* solve the problem of Moi’s right to redeem the property. Seeking to clarify the Court’s decision, counsel for Moi queried:

MS. GARELLA: Since Mr. Wathen has so graciously offered to take off money so that we can redeem, how

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<sup>4</sup> **Note:** The June 11, 2013 hearing involved two motions by Kruger to transfer deed, one for Moi’s Magnolia property and one for Moi’s Ballard property. The Ballard property was executed on by Kruger based on the fraudulent judgment in the 2009 case. After the Court of Appeals reversed the fraudulent default judgment the trial court ordered Kruger to return the Ballard property to Moi. Moi’s appeal regarding the transfer by the Sheriff of the Ballard property was therefore dismissed. *See* Notation Ruling (3/18/14), No. 70502-4-I.

many days do we have to redeem? It seems to me that it might be appropriate to say that we get another five days because it takes that number of days after verification.... I mean, if we're going to be entitled to redeem under these new numbers, it seems to me that it's appropriate to have a few days to redeem. Otherwise, the whole waiver [of taxes and liens] issue is meaningless.

RP 41-42. In response, Mr. Wathen promised, and the trial court ordered Kruger, to permit redemption for another five days:

**MR. WATHEN: "if they come to me with a cash offer to redeem at those numbers within five days, I will represent to the Court I will make a good-faith effort to get it done. My client just wants to get paid."**

**THE COURT: Okay. What I'm going to ask is that you not put the properties up for five days -- for sale --**

**MR. WATHEN: Agreed.**

**THE COURT: -- for five days to give them an opportunity to redeem to you.**

**MR. WATHEN: On the record, I will represent to the Court and to counsel I will not list those properties for sale for five days.**

RP 42-43 (emphases added).<sup>5</sup>

**E. Mr. Wathen's and Kruger's Failure to Honor the Promise to the Court to Allow Moi to Redeem the Property.**

Following the June 11, 2013 hearing, Moi discussed the matter with hard money lenders in reliance on Mr. Wathen's promise that Moi had five more days to redeem. On Friday, June 14, 2013, Moi's attorney,

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<sup>5</sup> The resulting *Order Granting Kruger's Motion for the Sheriff to Transfer Deed* is at CP 541-42. The *Order* was later modified to add the legal description. CP 581-84.

sent an email to Kruger's attorney stating Moi's intent to redeem:

Moi will tender the redemption amount for Magnolia Parcel B and pay off the deficiency judgment on Monday.

I calculate the amounts due as \$26,386.07 for the deficiency judgment plus \$79,469.74 for the 5 day 'redemption' opportunity that you guaranteed on the record in Superior Court on Tuesday, for a total of \$105,855.81.

**IF YOU DISAGREE WITH THE NUMBERS SET FORTH, please advise me as to what you believe the correct numbers are, and how that number was calculated, as Moi must obtain a cashier's check in the proper amount...**

CP 577 (emphasis in the original).<sup>6</sup>

**Mr. Wathen immediately reneged on his promise to allow Moi to redeem, falsely stating that he had not agreed to allow Moi five more days to redeem, and intentionally causing the error from which Moi has appealed.** On Sunday, June 16, 2013, Mr. Wathen emailed Ms. Garella, indicating that Kruger simply would not allow Moi to redeem:

Ms. Garella – If you will recall correctly, I agreed not to list the property for sale for a period of 5 days. I do not recall and the court did not grant any order extending the redemption period.

CP 578. Concerned that Mr. Wathen and Kruger were violating the Court's directive to give Mr. Moi five days to redeem, Moi's attorney

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<sup>6</sup> Kruger asserts that Moi did not have the funds to redeem. *Petition* at 6-7, 10-11. That speculative assertion is rebutted by the sworn testimony in the record of Moi's attorney, CP 562. Moi never had the opportunity to prove that he could and would redeem because Mr. Wathen and his client stated that they would not accept a tender of the redemption amount. CP 579; *Unpublished Opinion* at 6-7.

emailed Mr. Wathen around 9:00 a.m. Monday, June 17th, as follows:

I see. So I should not bother to have the lender make out the check because Kruger will not transfer the property to Moi?

Let me know so I can tell the lender to not bother. Thanks.

CP 579. Mr. Wathen did not respond. At 3:39 p.m. Moi's counsel wrote:

Rick, it is almost 4 pm and you have not responded to this inquiry from 9 am this morning. Obviously I have to assume that you mean what you emailed yesterday -- that in Court you only said you would "hold" the property for five days, not that Moi could redeem it during that time. I think that it was obvious that we had 5 days to redeem.

Anyway, no lender is willing to cut a cashier's check without written verification that Kruger will allow Moi to "redeem" at the "discount" rate you offered at last Tuesday's court hearing. At this point, in fact, the two lenders I have been dealing with are so turned off by these shenanigans that I am not sure they are worth approaching again even if you agree to accept the 105k . . .

CP 580. Mr. Wathen did not respond to this last email. CP 563. On June 19, 2013, Moi filed a motion for reconsideration and sanctions. CP 543-556. The court denied the motion without explanation. CP 838.

#### **F. Court of Appeals**

Moi appealed to the Court of Appeals, asking that court to reverse the trial court's order to transfer the deed to the Sheriff, CP 541-42; CP 581-84, and to remand to allow Moi sixty days to redeem or to bring an action for accounting, and for sanctions. At oral argument Mr. Wathen attempted to argue that Moi had failed to redeem in contravention of

*Millay v. Cam*, 135 Wn.2d 193. **Appendix B** at 7. The panel focused on Mr. Wathen's refusal to allow Moi to redeem as he had promised:

JUDGE DWYER: ...In this litigation, there is a prior Court of Appeals opinion that calls into question your professionalism.

**Again, now we have a circumstance where your professionalism has been called into question because the inference from the allegations are that you misled Judge Craighead or that you did not live up to the promise that you made to Judge Craighead. So in fairness to you, I'm asking you not to talk about cases, but to point me to things in the record that show that this attack upon your professionalism is not well taken. I would want that opportunity, were I you.**

**Appendix B** at 9. Mr. Wathen repeatedly failed to answer the panel's questions and made factual claims with no basis in the record. *Id.* at 9-12.

On February 2, 2015 the Court of Appeals issued the *Unpublished Opinion* from which Kruger seeks review. The court focused on Mr. Wathen's misconduct, quoting Mr. Wathen's email on Sunday, June 16, 2013 (CP 578) in which Mr. Wathen denied that he had made any agreement to allow Moi to redeem:

[Mr. Wathen's] response clearly suggests Wathen's intent not to honor the five-day redemption period ordered by the court in reliance on his previous in-court representations.

*Unpublished Opinion* at 6. The court held that the trial court never actually ruled on the issue, raised by Moi, of whether Kruger failed to provide a verified statement as required by RCW 6.23.090(2). *Id.* at 8.

The court remanded the case to the trial court to address either (i) “whether Wathen refused to honor his representations to the court, entitling relief to Moi,” or (ii) the question of statutory verification. The court did not address any of the issues raised in the Petition and did not even cite the *Millay* case upon which Kruger now erroneously relies.

### III. ARGUMENT

A. **The *Unpublished Opinion* in this case does not warrant review under RAP 13.4(b)(1) or (4).**

The Court of Appeals did not address any of the issues presented in the *Petition*, remanding to the trial court only the issues of whether (i) Kruger failed to provide the “written and verified statement” required by RCW 6.23.090(2) or (ii) violated his promise to allow Moi to redeem. Kruger’s *Petition* misleadingly drifts far afield of the actual issues, not even acknowledging that Kruger’s violation of RCW 6.23.090(2) is an issue in this case. The statute provides, in relevant part:

(2) If a redemptioner or other person entitled to redeem, before the expiration of the time allowed for such redemption, files with the sheriff a **demand in writing for a written and verified statement of the amounts of rents and profits thus received and expenses paid and incurred**, the period for redemption is extended five days after such a **sworn statement** is given by the person receiving such rents and profits, or by his or her agent, to the person making the demand, or to the sheriff.... **If such person shall, for a period of ten days after such demand has been given to the sheriff, fail or refuse to give such statement, the redemptioner ...** or other person entitled

to redeem who made the demand **may bring an action within sixty days after making such demand**, but not later, in any court of competent jurisdiction, to compel an accounting and disclosure of such rents, profits and expenses, **and until fifteen days from and after the final determination of such action the right of redemption is extended** to such redemptioner or other person entitled to redeem who made the demand... (Emphasis added).

RCW 6.23.090(2). This statute unambiguously requires a “**verified**” or “sworn” statement, which Kruger failed to provide.

Kruger’s *Petition* avoids even using the words “verified” or “verification,” and twice mischaracterizes the statute as extending the redemption period only where there is a “complete failure to provide an accounting of rents and profits.” *Petition* at 13. Kruger also repeatedly omits the statutory phrase “**expenses paid**” in order to misleadingly imply that because Kruger had no “rents and profits,” his duty to provide the statement was accomplished. *Petition* at 4, 5, 13, 18. But Kruger claimed substantial *expenses*, and his statement was not only *not verified*, it did not account for any expenses. *Unpublished Opinion* at 3-4; CP 478-483.

The *Petition* erroneously assumes that Moi was required to pay the amount claimed by Kruger despite Kruger’s violation of RCW 6.23.090(2). But Kruger’s failure to comply with the statute relieved Moi of any immediate obligation to pay the requested amount. Moi should have been given sixty (60) more days to redeem or bring an action for an

accounting. But Kruger persuaded the trial court to ignore the verification requirement, and the court erroneously give Moi only five (5) more days before transferring the property to Kruger, causing this appeal.

Kruger's failure to provide a verified statement easily distinguishes this case from *Millay*, in which RCW 6.23.090(2) was not even at issue. In *Millay*, the prospective redemptioner failed to pay the sum required for redemption under RCW 6.23.040, -.080, and sought a declaratory judgment to determine the redemption amount. This Court held that the declaratory judgment action did not toll the redemption period, and rejected Millay's request to adopt a procedure "allowing a prospective redemptioner to obtain a judicial determination of the sum required before paying any money to redeem." *Millay*, 135 Wn.2d at 203, 206.

This case is the mirror image of *Millay*. Under the fourth sentence of RCW 6.23.090(2), Moi was *not* obligated to pay the sum demanded by Kruger unless Kruger provided the required "sworn statement." Having failed to comply with the verification requirement, Kruger invited the trial court to err by ignoring the requirement that Moi be given at least sixty (60) more days to redeem. Far from supporting Kruger's argument, *Millay* shows that the trial court improperly modified the redemption statute at Kruger's behest, and erroneously deprived Moi of his statutory right to redeem. Even that error would have been harmless if Mr. Wathen

had not reneged on his promise to allow Moi to redeem within five days.

Kruger also argues that Moi failed to seek an accounting under RCW 6.23.090(2) within sixty (60) days. *Petition* at 7, 13-14. This argument is barred by the doctrine of invited error. See *In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606 (2003). Kruger convinced the trial court to ignore his violation of RCW 6.23.090(2) and deed him the property, which caused the trial court error and forced Moi to appeal. CP 457-459. Kruger's argument suggests that Moi should have proceeded as if the trial court had actually denied Kruger's motion and the property had not already been erroneously transferred to Kruger.

Kruger's assertion that the *Unpublished Opinion* "conflicts" with *Millay v. Cam* for purposes of RAP 13.4(b)(1) is nonsense. Similarly, Kruger's RAP 13.4(b)(4) argument regarding "public policy" in favor of the "finality of litigation and executions upon valid judgments" is laughable in light of the undisputed fact that Kruger and Mr. Wathen created this mess by committing *fraud*. The *Petition* should be denied.

**B. If the Court grants review then the Court must address (i) Kruger's violation of the verification requirement in RCW 6.23.090(2) and (ii) Moi's request for sanctions against Kruger and Mr. Wathen.**

Moi has not sought review in this Court because the unethical shenanigans of Mr. Wathen, and the trial court errors that Mr. Wathen

intentionally caused, do not warrant review under RAP 13.4(b). However, pursuant to RAP 13.7(b), the Court must address issues raised by Moi that would support the decision to reverse and remand this case. The trial court erred by failing to hold that Kruger violated the verification requirement. After Mr. Wathen violated his promise to allow Moi to redeem, Moi moved for reconsideration and sanctions. CP 543-556. The trial court again erred by failing to reconsider its decision after Moi submitted un rebutted evidence that Kruger failed to allow Moi to redeem as Mr. Wathen had promised. CP 838. Moi raised both issues on appeal, *App. Br.* 17-37, but the Court of Appeals did not address either issue.

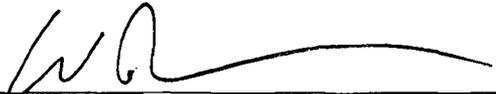
If review is accepted, the Court should reach the verification issue, reverse the trial court and hold that (i) Kruger violated RCW 6.23.090(2), (ii) the deed to Kruger was erroneously issued and must be vacated, (iii) Moi must be permitted to redeem the property, and (iv) sanctions, including attorney fees for this appeal, must be imposed for Kruger's frivolous arguments and factual misrepresentations, and Mr. Wathen's willful violation of his promise to the trial court to allow Moi to redeem. *See App. Br.* at 35-37.

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RESPECTFULLY SUBMITTED this 7th day of April, 2015.

By:

  
William John Crittenden, WSBA No. 22033

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**Certificate of Service**

I, the undersigned, certify that on the 7th day of April, 2015, I caused a true and correct copy of this pleading to be served, by the method(s) indicated below, to the following person(s):

By email (PDF) to:  
[rwathen@cwllaw.com](mailto:rwathen@cwllaw.com)

By First Class mail To:

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#### **IV. APPENDICES**

**Appendix A**

Transcript of Oral Argument (No. 68008-1-I)  
on June 11, 2013.

**Appendix B**

Transcript of Oral Argument (No. 70503-2-I)  
on January 14, 2015.

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION ONE

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DOUGLAS KRUGER,	)	
	)	
Respondent/Cross-Appellant,	)	No. 68008-1-I
	)	Consolidated with
v.	)	No. 68009-9-I
	)	
MICHAEL MOI,	)	
	)	
Appellant/Cross-Respondent.	)	
	)	

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HEARING

June 11, 2013

Judge Michael S. Spearman, Judge Marlin J. Appelwick

and Judge J. Robert Leach Presiding

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Transcribed by: Shanna Barr, CETD  
 Reed Jackson Watkins  
 206.624.3005

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On Behalf of Respondent/Cross-Appellant:

RICK J. WATHEN  
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On Behalf of Appellant/Cross-Respondent:

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June 11, 2013

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PANEL: Before I start the clock, Mr. Crittenden --

MR. CRITTENDEN: Yes.

PANEL: -- was there an order authorizing an overlength  
reply brief?

MR. CRITTENDEN: This was a cross-appeal, Your Honor. And  
in fact, we at one point moved to dismiss the cross-appeal,  
but that was denied.

PANEL: Thank you. How much time would you like to  
respond?

MR. CRITTENDEN: I'd like to save five minutes for  
rebuttal.

PANEL: All right. Proceed.

MR. CRITTENDEN: May it please the court, my name is  
William John Crittenden, representing Michael Moi.

This case involves a challenge to a default judgment that  
awarded vastly inflated amounts of money, amounts that were  
wildly in excess of what was actually owed, and which was  
obtained by significant misconduct of the respondent's  
attorney.

The case arises out of a fairly simple agreement between  
two people to buy a piece of property, subdivide it, and end  
up owning each a parcel that they could then develop. The

1 relationship fell apart. My client admits that he fell  
2 behind in some of his payments, and in February of 2007 a  
3 default judgment for about \$44,000 was entered against him.  
4 We don't challenge that default judgment at all.

5 In 2009, represented by now a new attorney, Mr. Wathen, an  
6 identical lawsuit was filed, another default judgment of  
7 about \$79,000 was obtained in February 2010. Now, that  
8 judgment included about \$30,000 in attorneys' fees that were  
9 mislabeled as "damages" in an almost-impossible-to-read  
10 spreadsheet that would have required reading glasses to  
11 determine that that's what those damages were.

12 Now, in April 2010, when my client found out about this  
13 second lawsuit and second default judgment, he called an  
14 attorney, Michael Malnati, and talked to him and met with  
15 him. Mr. Malnati called Mr. Wathen and spoke to him and  
16 emailed him as well. Shortly after that conversation  
17 occurred, Mr. Wathen went back down to ex parte to obtain  
18 what he calls an amended default judgment.

19 PANEL: Who was Mr. Malnati representing when your client  
20 met with him?

21 MR. CRITTENDEN: He was clearly representing Mr. Moi. The  
22 trial court simply either didn't look at or didn't  
23 understand the documentary evidence. The declaration is  
24 clear, the invoice shows that Moi was the client, that  
25 Kruger was the matter. The email does not say that

1 Mr. Malnati was calling on behalf of a lender client. It  
2 says that he was referred -- Mr. Moi was referred to him by  
3 a lender client. But that's not even -- that's only one of  
4 three reasons why the default judgment should be reversed.

5 The default judgment, among other problems, added the  
6 entire \$160,000 principal of the loan to the judgment that  
7 was obtained just ten weeks earlier, and we have asked the  
8 respondent over and over and over again to explain under  
9 what possible legal theory could my client have become  
10 liable for the entire unpaid principal of the loan and what  
11 happened between February 2010 and May 2010 that caused that  
12 to occur. Well, there is no legal theory under which he's  
13 liable for the whole mortgage, and nothing happened except  
14 he got a phone call from Mr. Malnati.

15 PANEL: But we see this frequently that there are  
16 allegations of fact in the complaint which when there's a  
17 default are deemed admitted, and those facts provide a basis  
18 for an award that might not have been available had the  
19 other party contested those facts.

20 MR. CRITTENDEN: Your Honor, that's true, but the case law  
21 also clearly says that a party has the right to expect that  
22 a default judgment will not be significantly different or  
23 greater in amount than what is pled. Now, we have --

24 PANEL: The complaint in this case sought to recover the  
25 one-half that Mr. Moi owed on all the --

1 MR. CRITTENDEN: No, it did not. It claimed that  
2 Mr. Kruger had been damaged by Mr. Moi's failure to keep up  
3 with the payments as they became due.

4 PANEL: Did it describe the agreement in any way that  
5 would fairly be characterized as an equal division of  
6 obligation?

7 MR. CRITTENDEN: I believe that is in the supporting  
8 declaration, Your Honor, that --

9 PANEL: I'm only asking about the complaint right now,  
10 because I think that's what we look to to determine the  
11 scope of damages.

12 MR. CRITTENDEN: That may be so. Counsel is handing me --  
13 the complaint did not allege that he owed the principal at  
14 all. And I don't have the clerk's papers in front of me,  
15 but I will get that on reply.

16 The problem here is finally in his response brief Kruger  
17 tries to explain why he suddenly added \$160,000 to a default  
18 judgment shortly after he got off the phone with  
19 Mr. Malnati. That theory is: Well, Moi wasn't paying,  
20 therefore I was liable for the whole thing. But that is not  
21 true. First of all, the bank -- the loan was not due. And  
22 even if you accept the bizarre proposition that you can  
23 claim that you are damaged because someone hasn't been  
24 paying the payments and therefore they should pay -- owe you  
25 a judgment for the entire amount, Mr. Wathen added the

1           \$80,000 that was owed by Kruger. It's undisputed that the  
2           agreement was to -- that each of them was to pay half. Now,  
3           he has never even tried -- I defy you -- search the clerk's  
4           papers, search the briefs. He has never told any court  
5           under what plausible legal theory did my client suddenly  
6           become liable for \$80,000 that Mr. Kruger hadn't paid and  
7           that was, in fact, owed by Mr. Kruger to the bank.

8           Now, there's -- you can read the complaint all day long  
9           and you can talk about default judgments and people should  
10          respond to service of process and things like that, but at  
11          the end of the day, where did Mr. Wathen get off asking for  
12          \$80,000 that my client didn't owe and that his client had  
13          not paid? And I'll be waiting for my answer as I prepare  
14          for reply.

15          MR. WATHEN: Good morning. May it please the court, I'm  
16          Rick Wathen here on behalf of Douglas Kruger, the respondent  
17          in this particular matter.

18          I think one of the issues that been overlooked in much of  
19          the briefings so far is the standard of review, and the  
20          standard of review for this court is an abuse of discretion.  
21          That means that this court must conclude that the trial  
22          court on the various rulings that were made, as well as  
23          perhaps the bankruptcy court as well, lacked any reasonable  
24          justification that would have allowed the decision which  
25          were made -- the decisions which were made in this

1 particular case, and I would assert to this court that that  
2 standard has not been met. The trial court acted within its  
3 discretion.

4 PANEL: What was the evidence of a signed written  
5 agreement which authorized the payment of attorneys' fees  
6 which appears in the trial court record that would allow a  
7 trial court on default to award the fees that you have  
8 claimed?

9 MR. WATHEN: Your Honor, the written agreement didn't  
10 arise until the bankruptcy matter when Mr. Moi for the first  
11 time ever challenged that there was no such agreement.

12 PANEL: But, Counsel, you signed pleadings stating that  
13 attorneys' fees were due under contract, and there appears  
14 to be no credible evidence in the record that there existed  
15 such a written agreement, and that's troublesome to this  
16 court.

17 MR. WATHEN: Your Honor, I think we've articulated several  
18 reasons why we would be entitled to attorneys' fees. One is  
19 recalcitrance and (inaudible) of the defendant --

20 PANEL: You're not answering the question. The question  
21 is what evidence is of the contract, not what alternate  
22 grounds for recovery.

23 MR. WATHEN: Your Honor, I don't believe I signed a  
24 pleading indicating that there were grounds under a  
25 contract. I believe I stated there were provisions under

1 the agreement. And when the issue of the written contract  
2 came up is when we researched and found the original  
3 attorney --

4 PANEL: Provisions under what agreement?

5 MR. WATHEN: There was an agreement between the parties  
6 that was reached back in the early '90s to purchase --

7 PANEL: Right.

8 MR. WATHEN: -- the particular property.

9 PANEL: And that agreement included attorneys' fees?

10 MR. WATHEN: Yes, Your Honor. In --

11 PANEL: And where's your evidence for that?

12 MR. WATHEN: It's been submitted and it's part of the  
13 clerk's papers, and I've cited the court to the specific  
14 provision. The parties retained an attorney very early on  
15 to draft a joint venture agreement, and the evidence that  
16 was --

17 PANEL: Was that agreement ever signed?

18 MR. WATHEN: Yes. Well, the evidence before the court was  
19 that my client signed that --

20 PANEL: Right.

21 MR. WATHEN: -- agreement and provided that agreement to  
22 Mr. Moi --

23 PANEL: Right.

24 MR. WATHEN: -- for his signature. And --

25 PANEL: The law requires evidence that the party to be

1 charged signed.

2 MR. WATHEN: Yes, Your Honor. And I think there's -- and  
3 our argument to the trial court was that Mr. Moi accepted  
4 the benefits of that contract throughout the agreement by  
5 accepting the benefits of the agreement to purchase the  
6 property, and as such, he would be bound by the  
7 responsibilities of that contract as well.

8 PANEL: Why wouldn't your client be bound by going forward  
9 without a signed agreement?

10 MR. WATHEN: I'm sorry, Your Honor?

11 PANEL: Why wouldn't your client be bound by the fact that  
12 there was not a signed agreement, which would trigger common  
13 law and joint venture?

14 MR. WATHEN: Your Honor, I believe that my client was  
15 bound by the agreement, and my client did live up to that  
16 agreement, because my client did make the payments and my  
17 client continues to make those payments solely on his own  
18 behalf, even as of today's date. For the last decade, he  
19 has had no assistance from Mr. Moi meeting the financial  
20 obligations that this particular joint venture undertook.

21 But to answer your question more fully, Your Honor, when  
22 the issue came up that Mr. Moi originally denied there being  
23 any agreement and we presented the evidence from former  
24 counsel -- this goes back 15 years -- who drafted the  
25 agreement and follow-up letters talking about the agreement,

1           it was Mr. Moi's original position that it was Mr. Kruger  
2           who had refused to sign the agreement based upon some  
3           allegations that Mr. Kruger's ex-wife was claiming an  
4           interest. We presented clear and unequivocal evidence that  
5           Mr. Kruger's wife had, in fact, relinquished any right or  
6           claim to this long before the purchase of the property  
7           occurred.

8           So the evidence before the trial court on these motions to  
9           set aside the default is that there was a contract. The  
10          evidence was before the court that my client claimed he did  
11          sign the contract, that he was led to believe by Mr. Moi  
12          that Mr. Moi would provide him with a copy of that signed  
13          contract, and that he did so for several years, and that my  
14          client fully abided by his obligations under that contract.

15          PANEL: Under what --

16          PANEL: So what --

17          PANEL: -- theory why your client gets to recover the full  
18          amount of the bank debt from Mr. Moi's (inaudible)?

19          MR. WATHEN: Yes, Your Honor. As the court asked in the  
20          opening arguments, is "What about the complaint," the  
21          complaint requested broad-ranging damages at that point in  
22          time because there were continual breaches. If we go back  
23          to the 2006 lawsuit, the 2006 lawsuit asked for a sum  
24          specific and specific performance requiring transfer of  
25          those properties. Mr. Moi breached those obligations as

1 well and refused to transfer the property for several years.  
2 It actually took motion practice to have the Superior Court  
3 appoint Judge Steven Scott to act on the behalf of Mr. Moi  
4 to actually transfer that property, which didn't occur for  
5 some four years after. During the entire pendency of this,  
6 my client could not sell his portion of the property. He  
7 was forced to incur all the interest, tax --

8 PANEL: Is there a declaration that explains that that's  
9 where the other \$80,000 comes from? That it's lost  
10 opportunity, costs, and other expenses incurred because of  
11 Mr. Moi's breach?

12 MR. WATHEN: No, Your Honor. Because in the  
13 circumstance --

14 PANEL: Then what is the theory where a joint venturer is  
15 liable for the full debt of the joint venture?

16 MR. WATHEN: Your Honor, I think those are issues that  
17 would be fleshed out in the event the matter were -- have  
18 proceeded to trial.

19 PANEL: Not fleshing them out. What evidence did you  
20 present in support of default that would entitle the court  
21 to award your client that recovery?

22 MR. WATHEN: My client submitted his declaration  
23 indicating that he is now fully responsible for that  
24 \$160,000 --

25 PANEL: He was already responsible for half, so that

1 doesn't explain the other half.

2 MR. WATHEN: Actually, Your Honor, not to disagree, but  
3 that's not entirely correct. My client was the cosignator  
4 on that particular note, so he --

5 PANEL: So joint and several liability as to the bank.  
6 But as for a contribution claim from the other joint  
7 venturer, it would be limited to 50 percent unless there was  
8 some contrary agreement. The law presumes that they're  
9 equal joint venturers unless there's some contrary  
10 agreement. What evidence did you present in support of your  
11 default judgment to support something different than what  
12 the law presumes?

13 MR. WATHEN: The evidence that was submitted was the  
14 declaration of Doug Kruger indicating that he had now become  
15 fully responsible for that obligation and would be  
16 responsible for that obligation moving forward.

17 PANEL: And since he was already responsible for half of  
18 it, that doesn't explain why Mr. Moi should pay him the full  
19 amount.

20 MR. WATHEN: Your Honor, in -- and I would agree that  
21 under normal circumstances that's something that would have  
22 been presented if Mr. Moi had appeared and defended this  
23 particular action. But in a default situation --

24 PANEL: If he's not there, do you get to ask for more than  
25 you're legally entitled to recover?

1 MR. WATHEN: I think you get to ask for what you requested  
2 in the complaint, and we requested all damages --

3 PANEL: Even if there's no legal entitlement to it?

4 MR. WATHEN: Your Honor, I would disagree that there's no  
5 legal -- that there is not a legal --

6 PANEL: Okay. Well, I've asked you to explain for me, and  
7 so far I've not had any success, to give me the legal theory  
8 for Mr. Moi's responsibility for a hundred percent of the  
9 bank debt rather than 50 percent.

10 MR. WATHEN: Yes.

11 PANEL: I would invite you to give me a legal theory that  
12 entitles your client to that.

13 MR. WATHEN: Yes. He was entitled to lost opportunity  
14 cost. He was forced to pay ongoing taxes.

15 PANEL: Did you present evidence of lost opportunity  
16 damages?

17 MR. WATHEN: Not in his declaration, no.

18 PANEL: And how does that --

19 MR. WATHEN: It wasn't requested in the --

20 PANEL: -- equal a sum certain?

21 MR. WATHEN: I don't understand what -- the question.

22 PANEL: In order to get the damages you requested without  
23 some sort of evidentiary hearing, the damages had to be for  
24 a sum certain.

25 MR. WATHEN: He --

1           PANEL: What you're asking now is essentially  
2 consequential damages for lost opportunities, and how is  
3 that a sum certain?

4           MR. WATHEN: Your Honor, we presented the evidence to the  
5 court showing the entire obligation owing under the bank  
6 note and all expenses incurred by my client in the form of  
7 this spreadsheet. And I would assert it was legible. It  
8 was legible to the court that reviewed it.

9           PANEL: And then you sought recovery for the entire amount  
10 shown on the spreadsheet plus \$30,000 in attorneys' fees?

11          MR. WATHEN: Correct, Your Honor. And they were  
12 delineated as attorneys' fees on the spreadsheet.

13          PANEL: Okay. What you're --

14          PANEL: But what I'm asking you, sir, is how is that a sum  
15 certain that is determined by looking at the face of the  
16 complaint?

17          MR. WATHEN: Your Honor, there wasn't a specific amount  
18 pled in the complaint --

19          PANEL: That is correct.

20          MR. WATHEN: -- and there was a -- and a claim for all  
21 damages. At the time, the trial court did not request any  
22 additional information and did not ask for further  
23 clarification at that point in time. In a default hearing,  
24 this is unlike a reasonableness hearing where on typical  
25 practices a party doesn't have to go through the entire

1 process --

2 PANEL: But the court does have to make a finding that the  
3 damages set forth in the complaint are determined -- are  
4 determinable in a reasonable and easily ascertainable  
5 fashion to be a sum certain amount.

6 MR. WATHEN: Yes, Your Honor, and by putting forth that he  
7 was responsible for that entire \$160,000 obligation, what's  
8 being lost here is my client has also represented throughout  
9 the course of this process that as part of his collection  
10 activities he will satisfy the full \$160,000 obligation plus  
11 all of the ongoing expenses.

12 PANEL: Well, he won't satisfy it. He's asking Mr. Moi to  
13 satisfy it is what he's asking for.

14 MR. WATHEN: And that would be part of the agreement, and  
15 no one has contested that that is part of the agreement.

16 PANEL: And part of the agreement was that he pay the  
17 entire -- that Mr. Moi pay the entire \$160,000?

18 MR. WATHEN: Your Honor, those would be part of the  
19 ongoing damages that my client has sustained and continue s  
20 to sustain as of today's date.

21 PANEL: Did the trial court enter findings in connection  
22 with the default judgment?

23 MR. WATHEN: No, Your Honor, the trial court did not.

24 PANEL: CR 55(b)(2) says that when the amount is uncertain  
25 findings of fact and conclusions of law are required.

1 MR. WATHEN: Your Honor, I think we are in a very vastly  
2 different situation where we're at today given the  
3 procedural history that has occurred.

4 PANEL: I'll tell you what's really troubling to us is we  
5 don't seem to be able to get a straight answer from you  
6 about how this number was arrived at other than what it  
7 appears to be, which is your client got the full amount of  
8 the debt. We don't have the procedures which were followed.  
9 And the description of the contract, frankly, is troubling.  
10 This all looks rather sharp.

11 MR. WATHEN: Your Honor, if I may respond?

12 PANEL: Sure.

13 MR. WATHEN: Your Honor, we fleshed these issues out at  
14 length in the bankruptcy matter, and I was given the  
15 opportunity to present the court with the full written  
16 contract and present to the court as part of the clerk's  
17 papers the full written contract.

18 We are here on a CR 60(b) motion. We waited -- or Mr. Moi  
19 waited a full 16 months before bringing this particular  
20 motion before this court. On the eve of summary judgment in  
21 the bankruptcy matter which would have resolved all of these  
22 issues, Mr. Moi voluntarily dismissed his bankruptcy action.  
23 And I would assert that the issue of sharp practice here has  
24 to do more with the person trying to get out of their  
25 obligations completely as opposed to Mr. Kruger simply

1 getting out of this obligation that he's been burdened with  
2 for the last ten years solely on his own.

3 Thank you.

4 MR. CRITTENDEN: I'd like to respond to a couple of the  
5 points that the panel raised. More importantly than the  
6 fact that there is only --

7 PANEL: When you do that, why don't you also respond to  
8 why didn't your client wait too long?

9 MR. CRITTENDEN: My client was -- as soon as he found out  
10 about the February default judgment, which took him a month  
11 or two -- I don't remember the exact information, but it's  
12 in the record -- he contacted Mr. Malnati. That's what you  
13 do. You talk to a lawyer. Mr. Malnati immediately  
14 contacted Mr. Wathen. And in fact, as luck would have it,  
15 two days after Mr. Wathen snuck down to ex parte to get  
16 another \$160,000 without notice to anybody, Mr. Malnati had  
17 reviewed the documents and put together a proposal about how  
18 to resolve all this case, and when he found out that -- what  
19 Mr. Wathen had done, he said, "I'm sorry, but with this kind  
20 of judgment, we're going to bankruptcy court." And he  
21 immediately referred him to Mr. Stern, and he immediately  
22 went to bankruptcy.

23 PANEL: Why didn't he do a motion to set aside the  
24 judgment?

25 MR. CRITTENDEN: For whatever reason, the bankruptcy

1 attorney, Mr. Stern, felt that this needed to be in  
2 bankruptcy. Now, the bankruptcy court has jurisdiction over  
3 the bankruptcy, and there's no authority that's been cited  
4 for the proposition that you can second-guess my client's  
5 decision to go bankrupt.

6 PANEL: How long before the bankruptcy was dismissed was  
7 it before Mr. Moi moved to set aside the judgment?

8 MR. CRITTENDEN: Mr. Moi actually attempted to move to set  
9 aside the default judgment before the bankruptcy was  
10 dismissed --

11 PANEL: After the bankruptcy was dismissed, how much  
12 time --

13 MR. CRITTENDEN: I believe it was about a month,  
14 Your Honor. I don't know the exact date. It's in the  
15 record, okay. But it's a period of time that no case holds  
16 that where your adverse party knows within days, if not --  
17 or maybe weeks that you are going to challenge a judgment,  
18 and then you end up in bankruptcy under the bankruptcy stay  
19 that somehow you're not being diligent. There's no  
20 authority for the proposition that being in bankruptcy and  
21 governed by the automatic stay is a lack of diligence,  
22 because it's ludicrous. The purpose of bankruptcy is to  
23 stop everything that happens in the state court so that the  
24 bankruptcy court can look at Mr. Moi's estate.

25 PANEL: (Inaudible) question.

1 MR. CRITTENDEN: Sure.

2 PANEL: If we grant the relief you're requesting, what is  
3 the impact of that upon the two sales the sheriff conducted?

4 MR. CRITTENDEN: We are going to have to figure that out  
5 in the trial court, Your Honor. There's been multiple writs  
6 of attachment --

7 PANEL: You're not asking us to sort that out or --

8 MR. CRITTENDEN: No. Actually, I think it would probably  
9 require an assignment to an actual judge down in Superior  
10 Court and quite a lot of paperwork to sort this all out  
11 because, frankly, the reason my client is in bankruptcy and  
12 the reason he's been financially ruined is because of the  
13 incredible efforts Mr. Wathen has gone to to take his  
14 property. He's sold the property. We redeemed it. He sold  
15 it again. He -- and this brings me to another very  
16 important point. The order obtained in 2007 required  
17 Mr. Kruger to convey his half of the property --

18 PANEL: But it had conditions on it which weren't met.

19 MR. CRITTENDEN: It had no conditions on it at all,  
20 Your Honor. It said, "Convey the property." "You shall."  
21 In fact, my client was found in contempt because he just  
22 didn't show up and they had to appoint Judge -- I believe it  
23 was Steven Scott. I may be wrong about that.

24 PANEL: Before you arrived today, I asked another attorney  
25 about case law that holds that a party in breach of a

1 contract cannot insist upon performance by the other party.  
2 Why wouldn't that rule apply to your client with respect to  
3 the conveyance of the one parcel?

4 MR. CRITTENDEN: We're not arguing -- we didn't ask for  
5 that order, Your Honor. First of all, if my client is going  
6 to be held --

7 PANEL: But you're here, though, complaining about that,  
8 and I'm asking --

9 MR. CRITTENDEN: Yes. Because --

10 PANEL: -- why you get to complain when the rule of law is  
11 that if you're in breach you can't insist on performance by  
12 the other party?

13 MR. CRITTENDEN: We are not asking the court to enforce  
14 the contract. We're asking the court to enforce a court  
15 order that was obtained by the adverse party. The adverse  
16 party represented to the court that it was fair and  
17 equitable and necessary to execute an order that would  
18 subdivide the property and convey the parcels, and then once  
19 the ink was dry on that order and once my client had been  
20 found in contempt and once a judge had been appointed to  
21 convey the property on his behalf, Mr. Kruger just decides  
22 he doesn't want to.

23 Now, I would like a sports car, but I don't have one. He  
24 would like a security interest, but he doesn't have one.  
25 The contract does not give him the right to hold on to the

1 property so that my client will go into bankruptcy and be  
2 foreclosed upon. The court order did not give him that  
3 right. He simply says, "I'll pay him his -- I'll give it  
4 back as soon as you pay me." That's called hostage taking.  
5 That's not a legal theory.

6 PANEL: Aren't we in the posture that the default itself  
7 stands, and the only thing that this court can do is set  
8 aside the damages?

9 MR. CRITTENDEN: That's fine. We have never argued that  
10 my client was not in default. In fact, we couldn't -- my  
11 brief could not be more clear. We admit he was in default.  
12 He was having personal and financial problems. He did not  
13 respond and he was in default. But the case law is very  
14 clear that a person in default has the right to expect that  
15 a lawyer licensed to practice law will comply with  
16 RPC 3.3(f) and follow the procedure and scrupulously and  
17 ethically document what their client is actually entitled to  
18 and not sneak down to ex parte after a conversation with  
19 Michael Malnati and add \$160,000 to the judgment.

20 Now, I -- what happened in this case is exactly what  
21 Judge Trickey alluded to. This was a matter of -- this is  
22 ex parte. It's not what about what we're legally entitled  
23 to. It's about what we can get away with. I don't make  
24 that accusation lightly, but the record bears it out.

25 PANEL: Thank you, Counsel. The court will be in recess.

1 THE CLERK: All rise.

2 (Conclusion of hearing)

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C E R T I F I C A T E

STATE OF WASHINGTON )  
 ) ss  
COUNTY OF KING )

I, the undersigned, under my commission as a Notary Public in and for the State of Washington, do hereby certify that the foregoing recorded statements, hearings and/or interviews were transcribed under my direction as a transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 17th day of March, 2014.

Shanna Barr



NOTARY PUBLIC in and for the State of Washington, residing at Redmond. My commission expires 6-23-15.

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION ONE

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MICHAEL MOI,	)	
	)	
Appellant,	)	No. 70503-2-I
	)	
v.	)	
	)	
DOUG KRUGER,	)	
	)	
Respondent.	)	
	)	

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ORAL ARGUMENT

January 14, 2015

Judge James Verella, Judge Linda Lau  
and Judge Stephen J. Dwyer Presiding

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Transcribed by: Marjorie Jackson, CETD  
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Court-Approved Transcription  
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A P P E A R A N C E S

On Behalf of Respondent:

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On Behalf of Appellant:

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January 14, 2015

MS. GARELLA: Good morning, Your Honor. Elena Garella for Appellant Michael Moi, and I'd like to reserve five minutes for rebuttal.

As you probably know, this is our second trip up here to the Court of Appeals on a joint venture that's gone very, very wrong. On the first trip up here, this court vacated a default judgment obtained by Respondent Kruger that was found to have been procured through misconduct and fraud.

In this, the second case, we're dealing with another default judgment and it was a default judgment that was executed upon while Mr. Moi was in the process of the first appeal. While this court was reviewing that other default judgment that was vacated due to fraud, Mr. Kruger executed both on the fraudulent default judgment and on the non-fraudulent default judgment and secured the only two pieces of property that Mr. Moi had from which he could potentially pay a legitimate judgment.

A few days before the redemption period ended, Mr. Moi handed to the sheriff a statement in writing in which he demanded a written and verified statement of the amounts of rents and profits received, and expenses paid and incurred.

Now, the statute 6.23.090(2) is quite clear. Mr. Kruger

1 had ten days to come up with a sworn statement of the  
2 expenses he had on the property during the redemption  
3 period.

4 JUDGE LAU: Ms. Garella --

5 MS. GARELLA: Yes.

6 JUDGE LAU: -- May I -- the trial court never reached the  
7 question of whether there was the proper verification in  
8 court. And so the question really seems to be, at the end  
9 of the colloquy over the verification issue, do you agree  
10 the trial court never ruled on whether there was a valid  
11 verification or not? And what appears to have happened is  
12 some agreement.

13 MS. GARELLA: No, I do not agree. There was no  
14 agreement. The trial -- Mr. Wathen offered during the oral  
15 argument --

16 JUDGE LAU: You're saying there was no agreement?

17 MS. GARELLA: I never -- Mr. Moi and myself, counsel, we  
18 never agreed to the decision that the trial court made,  
19 which was to allow us five more days to redeem from  
20 Mr. Kruger. That was something clearly offered by  
21 Mr. Wathen. He said: If they come to me with a cash offer,  
22 I will make a good faith effort to get it done.

23 And then the trial court said: Give them five days to  
24 redeem from you.

25 But if you read that transcript, there was absolutely no

1 agreement on my behalf for my client that the redemption  
2 period was not extended. Throughout that long colloquy, I  
3 repeated over and over again: They have not appeared before  
4 you with a verified sworn statement of rents and expenses.

5 The Court simply said -- what the Court said is,  
6 "Ms. Garella, if you want it verified, that seems like  
7 ridiculous construction." There's a note in there, but I  
8 certainly did not agree to that.

9 The fact is, is that I came in objecting because  
10 Mr. Kruger had not provided a sworn statement. Not only  
11 that, the statement he provided, which is at CP 479 to 485,  
12 it's a long list of expenses. Not one of these expenses  
13 occurred during the redemption period. Not one.

14 JUDGE DWYER: Have you cross-appealed? If you're in  
15 front of the court saying this verification was  
16 inadequate --

17 MS. GARELLA: Yeah.

18 JUDGE DWYER: -- it seems like the Court's choices were  
19 to say: I agree with you, it's inadequate, you're entitled  
20 to this bump period, for which you can start an accounting.

21 MS. GARELLA: Yeah.

22 JUDGE DWYER: Or to say, I disagree with you, the  
23 redemption period has run, sheriff's deed should issue,  
24 no --

25 MS. GARELLA: That's what the trial court did. So I'm

1 the appellant. Mr. Moi is the appellant.

2 JUDGE VERELLEN: What order are you appealing from?

3 MS. GARELLA: We're appealing from the June 11, 2013  
4 order which ordered the sheriff to transfer the property by  
5 sheriff's deed to Mr. Kruger.

6 JUDGE LAU: But the record shows that the -- what part of  
7 this record shows the Court ruled on the merits of your  
8 verification motion? You didn't --

9 MS. GARELLA: Okay. First of all, there's the report of  
10 the proceedings.

11 JUDGE LAU: I have it.

12 MS. GARELLA: And there are my motions, my objections.  
13 Mr. Kruger made a motion to the court to order the sheriff  
14 to transfer the property to Mr. Kruger. We objected on the  
15 basis that there was no verification. The trial court  
16 overruled and granted his order, so I'm kind of puzzled as  
17 to how you're saying -- I mean, she didn't make a separate  
18 finding of fact, if that's what you're looking for, to say  
19 that the verification was inaccurate, but the entire dispute  
20 was before the trial court.

21 JUDGE LAU: Thank you.

22 MR. WATHEN: Good morning, Your Honors, may it please the  
23 Court, my name is Rick Wathen. I'm representing Doug  
24 Kruger. I want to take a quick moment to address the  
25 comments made concerning the prior appeal. The prior appeal

1 did deal with the 2006 matter that we are here for today.

2 I will also make note that Counsel's comments about the  
3 misconduct in the 2009 matter are, one, not relevant to this  
4 decision; two, we are now 16 months post-decision and still  
5 no motion has been brought to address the allegations of  
6 misconduct, a full 16 months and no action taken on that  
7 issue.

8 The reasons that we're here for today, Your Honor, we  
9 have set forth in the briefing and I believe they are  
10 controlled strictly by the statute and the Supreme Court's  
11 decision in Millay vs. Cam.

12 JUDGE DWYER: Well, there was a matter before Judge  
13 Craighead. You said, "If they come to me with a cash offer  
14 to redeem at those numbers within five days, I will  
15 represent to the Court I will make a good faith effort to  
16 get it done. My client just wants to get paid."

17 Judge Craighead said, "Okay. What I'm going to ask is  
18 that you not put the properties up for five days for sale."

19 You said, "Agreed."

20 Judge Craighead said, "For five days to give them an  
21 opportunity to redeem to you."

22 You said, on the record, "I will represent to the Court  
23 and to counsel I will not list those properties for sale for  
24 five days."

25 Judge Craighead said, "Okay." And then she concludes the

1 proceeding.

2 So did you, in fact, give them an opportunity to redeem  
3 to you within five days?

4 MR. WATHEN: Absolutely, Your Honor.

5 JUDGE DWYER: And how did that manifest itself in the  
6 record that we can see?

7 MR. WATHEN: Your Honor, I think it is the absence of an  
8 attempt to redeem. And under the Millay decision, that  
9 means you have got to pay the money. And keep in mind --

10 JUDGE DWYER: Well, there's evidence in the record that  
11 you indicated that you weren't going to allow them to redeem  
12 and that the only assertion that you had made to Judge  
13 Craighead is that you would just simply wait for five days  
14 in order to put the matter for sale, but that you weren't  
15 going to allow the other party to redeem.

16 MR. WATHEN: Your Honor, if you look at the statutes,  
17 redemption is --

18 JUDGE DWYER: I'm not talking about the statute right  
19 now. I'm talking about the evidence in the record, and you  
20 made a factual assertion to me, so I'm trying to get you to  
21 point me to the evidence in the record that contradicts,  
22 overcomes -- whatever term, whatever verb you want to use --  
23 that evidence that you did not, in fact, live up to the  
24 agreement that you made with Judge Craighead in open court.

25 MR. WATHEN: As I will point to the Court to the Millay

1 decision, it talks about redemption as being --

2 JUDGE DWYER: I'm really not interested in that, okay?

3 Let's put this --

4 MR. WATHEN: I will --

5 JUDGE DWYER: Let's put this -- let's get right down to  
6 it, okay? In this litigation, there is a prior Court of  
7 Appeals opinion that calls into question your  
8 professionalism.

9 Again, now we have a circumstance where your  
10 professionalism has been called into question because the  
11 inference from the allegations are that you misled Judge  
12 Craighead or that you did not live up to the promise that  
13 you made to Judge Craighead. So in fairness to you, I'm  
14 asking you not to talk about cases, but to point me to  
15 things in the record that show that this attack upon your  
16 professionalism is not well taken. I would want that  
17 opportunity, were I you.

18 MR. WATHEN: Your Honor, and I'm trying to answer your  
19 question. You're asking me to prove a negative proposition.  
20 To redeem, you have to pay the money. No attempt was ever  
21 made to pay the money.

22 JUDGE DWYER: The allegation was that the contact was  
23 made with you and you indicated that that would be futile,  
24 that you weren't going to allow that to happen.

25 MR. WATHEN: That is not what is in the record, Your

1 Honor. What is in the record is exactly what is in my email  
2 on that Sunday afternoon, saying: I agreed to not sell the  
3 property for five days. And that's exactly what my  
4 agreement was.

5 Redemption, in my mind, according to my understanding of  
6 the exact case law that I talked about -- and I don't want  
7 to go down that path because I understand that's not what  
8 the Court is asking -- but the redemption requires payment  
9 of the money. And that's what I believe has to happen here.  
10 You have to pay the money.

11 JUDGE DWYER: Okay. I understand that position. I want  
12 to give you another chance to tell me, to tell me where in  
13 the record I'm going to find something that shows that when  
14 Judge Craighead said for five days to give them an  
15 opportunity to redeem to you, and then they make the claim  
16 that you communicated to them that you would not be  
17 conveying that opportunity, and what the countervailing  
18 evidence from your side is that rebuts their assertion.

19 We all know that the money wasn't paid. For goodness  
20 sakes, if the money had been paid we wouldn't be here, so we  
21 all get that. But I really am trying to give you a chance  
22 to tell me: Where's the evidence that says that the other  
23 side is wrong, that I, as an attorney, entered into an  
24 arrangement with the judge and I honored it. I really want  
25 to tell the other judges where that is.

1 MR. WATHEN: I don't know how else I can answer that  
2 other than to say, in my mind, redemption means paying the  
3 money, and I did not refuse to accept the money. I made  
4 that very clear at the trial court level. I accepted the  
5 number that Mr. Moi put in his declaration as being the  
6 amount due and owing. I agreed to the judge and represented  
7 to the judge: Pay it in five days and we'll take it and be  
8 done with this.

9 There was nothing brought before Judge Craighead accusing  
10 me of not agreeing to that record. You have the subsequent  
11 motion practice before the court, again, where Mr. Moi  
12 simply did not have the money and did not make any attempt  
13 whatsoever to pay that money.

14 JUDGE VERELLEN: Then why in your email of June 16th did  
15 you say "There's no order extending the redemption period"?

16 MR. WATHEN: Your Honor, because we're talking about  
17 beyond that five-day time frame. We're talking beyond what  
18 the Court had already agreed to and what I had agreed to on  
19 the record.

20 JUDGE VERELLEN: When did the five days run?

21 MR. WATHEN: I believe it would have been the following  
22 Monday, if you apply CR --

23 JUDGE VERELLEN: So they're saying: Tell us what we need  
24 to pay you. And on Sunday the 16th you say: Nobody ever  
25 extended the redemption period.

1           What inference can there possibly be except you're  
2           saying, you can't redeem?

3           MR. WATHEN: Your Honor, I think that is way beyond the  
4           record and I think this issue was brought before Judge  
5           Craighead, and if she -- if there was a problem with that,  
6           it should have been brought as a motion before Judge  
7           Craighead seeking to have me bound by this representation  
8           that is now being impugned.

9           And I want to step back --

10          JUDGE LAU: Mr. Wathen, she contacted you the day before  
11          and said: Tell me -- I want to tender. The title of the  
12          email is "Tender of Redemption Amount for Magnolia." She  
13          had five days. She knew; you knew it. The sheriff attorney  
14          was sitting there and said: What do I do with this deed?

15          The Court said, hang onto it for five days. It's very  
16          clear. Everybody agreed she gets five days. She contacted  
17          you and said: Here's the amount I think that's owed. You  
18          graciously waived the dispute over the costs and expenses,  
19          but I want to make sure, we're prepared write you a check to  
20          your law firm, deliver it, just confirm to me the amount.

21          And you write back what Judge Verellen just said you  
22          said.

23          MR. WATHEN: Your Honor --

24          JUDGE LAU: You struck a deal that the Court relied on,  
25          and that's why she didn't rule on the verification issue

1 because you said you were going to give her five days, and  
2 she tried.

3 MR. WATHEN: Your Honor, we did provide the number. It  
4 was agreed upon in the hearing in front of Judge Craighead.

5 JUDGE LAU: No. She needed the number at the point of  
6 the redemption. She needed to confirm it because she  
7 disputed your numbers.

8 MR. WATHEN: Your Honor, if you look at the record, I  
9 agreed to the numbers set forth in Mr. Moi's declaration.

10 JUDGE LAU: Then why didn't you let her give you the  
11 check?

12 MR. WATHEN: There was no check, and I didn't refuse a  
13 check. And there's nothing before this court showing that I  
14 refused tender of any check. And as the record is now  
15 clear, there never was any money. So I think what's  
16 happening is that's being taken out of context.

17 I agreed to waive the disputed portion of the fees and  
18 agreed with the Court that I would not sell the property for  
19 five days in anticipation of redemption. Redemption, in my  
20 mind, reading the statute and the case law, means payment of  
21 that money. The money was never paid. There was never an  
22 offer of tender. And the courts have already addressed this  
23 issue about futility of tender because it gives the option  
24 at any point in time to deposit the money with the sheriff,  
25 take me out of the equation, or go back to Judge Craighead

1 and say: He didn't live up to his obligation.

2 None of that occurred. Not one single one of those steps  
3 occurred. They knew the amount because we had agreed upon  
4 the amount in the transcript with Judge Craighead and at  
5 that hearing. That amount was never tendered.

6 And now we have Counsel saying -- and I appreciate the  
7 Court's comments about, was there an agreement here.  
8 Counsel is denying that there was an agreement, so I'm  
9 unclear, has --

10 JUDGE DWYER: She's denying that there was an agreement  
11 between her client and you. We're talking about the  
12 agreement between you and Judge Craighead.

13 MR. WATHEN: And I would say that if there --

14 JUDGE DWYER: That's the situation. The agreement that  
15 the Court sees is an agreement between you and Judge  
16 Craighead for her to forebear from ruling on the merits of  
17 the motion for the five-day period that you said you would  
18 give to redeem. That's what we're talking about.

19 MR. WATHEN: Okay.

20 JUDGE DWYER: That's just a difference in terminology.

21 MR. WATHEN: Okay. I understand now, Your Honor. And  
22 here would be my thought on that: There was subsequent  
23 motion practice before Judge Craighead, the very judge that  
24 I had this agreement between. And there was nothing from  
25 Judge Craighead saying I misled her, I confused her, I

1 didn't live up to my end of the bargain, despite the fact  
2 that these same arguments were made before Judge Craighead  
3 subsequent to this motion.

4 If there were arguments or confusion or anything, they  
5 should have been brought to Judge Craighead's attention and  
6 have Judge Craighead rule as to whether or not she and I did  
7 not have an understanding about my agreement with her and  
8 whether or not that was contingent upon her not ruling on  
9 other matters.

10 In conclusion, the amount was known to Plaintiff, the sum  
11 require -- or, excuse me, to Mr. Moi was known. We agreed  
12 upon his number. The amount was never tendered and it was  
13 never paid. We would ask the Court to put an end to this  
14 nine-year-long litigation.

15 I will make one comment in the Millay decision. The  
16 Court cautioned about allowing matters to proceed, and that  
17 was seven years. This has now been going on for nine years  
18 and my client still remains unpaid. Thank you.

19 MS. GARELLA: Your Honor, of course we did, in fact, go  
20 back before Judge Craighead with the record that's before  
21 you now. And you have tapped into the source of so much  
22 frustration, because after scrambling to get a hard-money  
23 lender in line and asking for numbers, Mr. Wathen simply  
24 responded to me by saying, "I do not recall and the Court  
25 did not grant any order extending the redemption period."

1           Whereas in court, obviously he had been ordered to do one  
2           thing and he also said he would make a good faith effort.  
3           And there was no good faith effort here, and I made multiple  
4           emails trying to resolve these issues, and there was simply  
5           no response. They didn't want to give up a piece of  
6           property that's worth about \$375,000 in exchange for a  
7           redemption amount that was about \$75,000.

8           Mr. Wathen says that first the Court issued -- the first  
9           Court of Appeals opinion that you decided a year, what, a  
10          year ago isn't relevant. It's strictly relevant. It ties  
11          into an entire long-term scheme and plan to remove my  
12          client's properties from him in exchange for judgments that  
13          are worth far less than what Mr. Wathen and Mr. Kruger claim  
14          they were.

15          The real reason that my client couldn't redeem just by  
16          paying it out of his own pocket is because Mr. Wathen and  
17          Mr. Kruger had executed on the only other real property that  
18          my client had that was available to pay this redemption  
19          amount. They executed on that with the 2010 fraudulent  
20          judgment, so that Ballard property wasn't there as a  
21          resource to pay the redemption amount. That's why he was  
22          going to hard-money lenders.

23          And then when we got the Ballard property back after this  
24          court decided the first issue, what did my client do? The  
25          first thing he did is he sold Ballard and he has tendered

1 the \$80,000 that is owed to Mr. Kruger on the 2007 judgment  
2 to the registry of the court. It is waiting for him. He  
3 can get it any time he actually wants to be paid what is due  
4 him.

5 The point of redemption statutes is, one, to ensure that  
6 creditors are paid their just due, not more than their just  
7 due. We have --

8 JUDGE DWYER: What can we read into Judge Craighead's  
9 denial of you motion for reconsideration? Is that a  
10 determination that you have got to technically have more  
11 than you had here on the tender redemption, or is it -- the  
12 number was adequate or just, what? She let --

13 MS. GARELLA: It was --

14 JUDGE DWYER: (Inaudible) off the hook.

15 MS. GARELLA: It's very difficult for me to read anything  
16 into it because it was simply denied without an explanation.

17 JUDGE DWYER: And without oral argument.

18 MS. GARELLA: And without oral argument. I think what  
19 happened is that, if you read the entire report of the  
20 proceedings, it's clear that she is frustrated by the amount  
21 of litigation that's going on between these two, as are we  
22 all, and she just wanted it to end somewhere. In fact, I  
23 think she makes that comment in the report of proceedings at  
24 some point, "It's got to end sometime."

25 But the fact is, is that the report of the proceedings is

1 very clear about Mr. Wathen's promise, about why the Court  
2 allowed the sheriff to transfer the deed, because I was  
3 going to have -- my client was going to have five more days  
4 to redeem from him. Not five more days to redeem from the  
5 sheriff; five more days to deal with him and redeem from  
6 him.

7 So to me the denial of the reconsideration, it simply has  
8 to be reversed. And the fact is, is we should be restored  
9 to the position that we were in when she ordered the sheriff  
10 to transfer those deeds to Mr. Kruger. There never was a  
11 written verification. It was not sworn. CR 11 signatures  
12 by attorneys are not the equivalent to verification.

13 And on top of that, there was a contempt of court or at  
14 least a CR 11 violation by Mr. Wathen and his client in  
15 simply refusing to allow us to tender the amount that was  
16 due. This has been a deeply frustrating and disappointing  
17 case, and I ask that you reverse.

18 JUDGE DWYER: Thank you.

19 MS. GARELLA: Thank you.

20 (Proceeding is adjourned.)

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**OFFICE RECEPTIONIST, CLERK**

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**To:** William John Crittenden  
**Cc:** 'Rick J Wathen'; 'Elena Garella'  
**Subject:** RE: Kruger v. Moi, No. 91516-4

Received 4-8-2015

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**To:** OFFICE RECEPTIONIST, CLERK  
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**Subject:** Kruger v. Moi, No. 91516-4

Dear Clerk-

Enclosed please find respondent Moi's Answer to Petition for Review.

Hard copies will also be mailed to the Court and to counsel for petitioner.

Thank you.

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Attorney at Law  
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