No. 323668-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

HELENE M. RAUN,

Plaintiff-Appellant,

vs.

JOHN H. CAUDILL and LUCILLE J. CAUDILL, as Trustees for the CAUDILL LIVING TRUST dated November 1, 2000; WANELL J. BARTON, as Trustee for the WANELL J. BARTON FAMILY TRUST dated May 7, 1998 and any amendments; DIRK A. CAUDILL and LAUREN C. CAUDILL, as Trustees of the CAUDILL FAMILY TRUST DATED September 11, 2002; EARL L. BOETTCHER and MARY C. BOETTCHER, as Trustees for the BOETTCHER FAMILY TRUST dated May 12, 1992; BELVA M. WILLIAMS, a single woman; LARRY LOUTHERBACK and SHANNA LOUTHERBACK, as Trustees of the LOUTHERBACK LIVING TRUST dated February 9, 2001; DALE WALKER and CAROL WALKER, husband and wife; and JOHN P. GLEESING, as Successor Trustee under the Caudill Deed of Trust, JOHN AND JANE DOES 1 THROUGH 10; JOHN DOE CORPORATIONS 1 THROUGH 10 and OTHER JOHN DOE ENTITIES 1 THROUGH 10,

Defendants-Respondents.

OPENING BRIEF OF APPELLANT HELENE M. RAUN

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A. INTRODUCTION

Appellant Helene M. Raun is an 89 year old widow. This matter involves damages suffered by Mrs. Raun from the wrongful dispossession from her home by actions taken by the named Respondents, to-wit, members of the Caudill Group[1] and John P. Gleesing.

In 2000, using their life savings, Mrs. Raun and her late husband, Chester E. Raun, purchased a bungalow at the Clare House Bungalow Homes, a residential facility marketed to seniors 55 years and older by Clare House Bungalow Homes, LLC ("Clare House"). The Resident Agreement between Mr. and Mrs. Raun and Clare House was recorded with the Spokane County Auditor's Office on December 20, 2001.

In 2004 and 2005, Clare House obtained two loans from the Caudill Group totaling $465,000.00. Commencing in 2008, the Caudill

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[1] "Caudill Group" refers collectively to Respondents John H. Caudill and Lucille J. Caudill, as Trustees for the Caudill Living Trust dated November 1, 2000, Wanell J. Barton, as Trustee for the Wanell J. Barton Family Trust dated May 7, 1998 and any amendments, Earl L. Boettcher and Mary C. Boettcher, as Trustees for the Boettcher Living Trust dated May 12, 1992, Belva M. Williams, Larry Loutherback and Shanna Loutherback, as Trustees of the Loutherback Living Trust dated February 9, 2001, and Dale Walker and Carol Walker. Named Respondents Dirk A. Caudill and Lauren C. Caudill, as Trustees of the Caudill Family Trust dated December 11, 2002, were never served and are not a party to this appeal.

Group and Mr. Gleesing commenced foreclosure proceedings on Clare House which had defaulted on the loans.

In connection with the foreclosure, Mr. Gleesing began issuing Notices of Trustee's Sale to the residents of Clare House Bungalow Homes threatening them with summary eviction on the 20th day following the Trustee's Sale pursuant to the Unlawful Detainer Act, RCW 59.12.

In issuing these notices, neither the Caudill Group nor Mr. Gleesing performed due diligence to determine the true nature of Mrs. Raun's occupancy.

Over time, as the foreclosure process continued, Mrs. Raun, in response to the stress, fear and anxiety caused by the various notices threatening eviction, vacated her bungalow on July 1, 2010.

On December 14, 2010, the United States Bankruptcy Court confirmed that Mrs. Raun had a superior right to occupancy vis-à-vis the interest held by the Caudill Group.

On September 27, 2012, Mrs. Raun initiated the present litigation by filing her Complaint. The Complaint asserted seven causes of action against the Caudill Group and Mr. Gleesing: (1) unlawful eviction; (2) violation of RCW 59.18.290; (3) continuing trespass; (4) violation of RCW 4.24.630; (5) tort of outrage; (6) negligent infliction of emotional distress; and (7) conversion.

The causes of action sought recovery in two categories of damages sustained by Mrs. Raun. The first category involves damages caused by the Caudill Group and Mr. Gleesing for wrongfully dispossessing Mrs. Raun of her residence. The second category sought damages for the emotional distress inflicted upon Mrs. Raun by the Caudill Group and Mr. Gleesing in connection with said dispossession.

On February 4, 2013, the trial court dismissed the causes of action for unlawful eviction, violation of RCW 59.18.290, continuing trespass, violation of RCW 4.24.630 and conversion on the sole basis that Mrs. Raun had abandoned her residence and thereby had no interest left to claim in her bungalow.

On February 7, 2014, the trial court dismissed the remaining two causes of action. As to the cause of action for the tort of outrage, the trial court predicated dismissal on the grounds that the "service of notice [did] not amount to intolerable and outrageous conduct." As to the claim for negligent infliction of emotional distress, the trial court dismissed the claim as to Mr. Gleesing on the finding that he had fulfilled the duties of a trustee and further, dismissed the claim as to the Caudill Group finding that, because the first notice received by Mrs. Raun was in May of 2008, the statute of limitations had run as of May 2011.

This appeal is taken from the orders of dismissal entered February 4, 2013 and February 7, 2014.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing the causes of action for unlawful eviction, violation of RCW 59.18.290, continuing trespass, violation of RCW 4.24.630 and conversion on the sole basis that Mrs. Raun had voluntarily vacated her residence and thereby had no interest left to claim in her bungalow. (CP 326-330; RP 24:4-13).

2. The trial court erred in dismissing Mrs. Raun's cause of action for the tort of outrage based upon the finding that the conduct of the Caudill Group and Mr. Gleesing in foreclosing on Clare House without having done due diligence as to the ownership interests of the residents, including Mrs. Raun, did not amount to outrageous conduct as a matter of law.

3. The trial court erred in dismissing Mrs. Raun's cause of action for negligent infliction of emotional distress as to Mr. Gleesing based upon the conclusion that Mr. Gleesing, as a matter of law, had fulfilled his duties as a trustee.

4. The trial court erred in dismissing Mrs. Raun's cause of action for negligent infliction of emotional distress as to the Caudill Group based upon the statute of limitations.

5. The trial court erred in granting Mr. Gleesing's motion for sanctions under CR 11.

C. ISSUES PRESENTED

1. Whether evidence that Mrs. Raun vacated her home under the threat of summary eviction raises a genuine issue of material fact precluding summary judgment as to causes of action for unlawful eviction, violation of RCW 59.18.290, continuing trespass, violation of RCW 4.24.630 and conversion.

2. Whether the Caudill Group and/or Mr. Gleesing, in his capacity as trustee, by failing to make a reasonable and prudent inquiry as to the terms of Mrs. Raun's occupancy at Clare House Bungalow Homes, breached their duty to avoid negligent inflection of emotional distress upon Mrs. Raun.

3. Whether Mrs. Raun was entitled to maintain her cause of action for negligent infliction of emotional distress for the period from September 27, 2009 through September 27, 2012.

D. STATEMENT OF THE CASE

The Appellant, Helene M. Raun, is 89 years old. In 2000 Mrs. Raun, then 75 years old, and her husband Chester E. Raun learned about the Clare House Bungalow Homes. Mr. and Mrs. Raun had been searching for a retirement community into which they could settle, and

after investigating Clare House Bungalow Homes, believed that they had finally found the right opportunity. (CP 206).

Clare House Bungalow Homes was developed by Clare House. Clare House Bungalow Homes consisted of 6 buildings containing 28 separate single family attached residences (bungalows). The bungalows shared amenities with a 124-unit low income apartment facility for senior citizens constructed on adjacent property, including a library, recreation center, indoor swimming pool, computer lab, and meeting room. The bungalows were marketed to senior citizens 55 years and older. (CP 206). Harry A. Green was the Manager of Clare House. (CP 791, 798-799).

Each resident owner was required to enter into a Resident Agreement with Clare House. Under the terms of the Resident Agreement, the individual agreed to pay Clare House an occupancy fee in return for which the resident owner would receive the right to possess and live in the bungalow for life or until the resident became unable to live independently or with the aid of another resident or caregiver. The Resident Agreement was terminable by the resident at any time for any reason. During the term of the Resident Agreement, the resident would be responsible only for payment of a fixed monthly common area maintenance assessment, reimbursement of a pro rata share of real property taxes and payment of utilities for the bungalow. Upon

termination of the agreement, the resident or resident's heirs would receive a percentage of the occupancy fee originally paid. (CP 206, 214-224).

In the summer of 2000, Mr. and Mrs. Raun entered into a Resident Agreement with Clare House. The Agreement became effective August 2, 2000. Pursuant to the Resident Agreement, Mr. and Mrs. Raun paid Clare House an occupancy fee of $132,500. The Resident Agreement signed by Mr. and Mrs. Raun contained the following provisions:

1. Mr. and Mrs. Raun were given exclusive occupancy rights to unit 2506.

2. The right to occupancy was non-assignable.

3. Mr. and Mrs. Raun could live in the bungalow for life or until they became unable to live independently or with the aid of another resident or caregiver.

4. Mr. and Mrs. Raun could terminate the Resident Agreement at any time.

5. Upon termination of the Resident Agreement, Mr. and Mrs. Raun would receive 80% of their occupancy fee ($106,000).

(CP 206-207, 214-224).

On December 20, 2001, Mr. and Mrs. Raun recorded their Resident Agreement with the Spokane County Auditor's Office. (CP 207, 214-224).

On or about March 20, 2002, Mr. and Mrs. Raun executed a Resident Agreement Addendum, which modified the Repurchase of Unit provisions of the Resident Agreement so that upon termination, instead of receiving 80% of the occupancy fee, Mr. and Mrs. Raun would receive the greater of "eighty-five percent (85%) of the occupancy fee paid by the immediate successor resident of the Unit ... or (b) eighty-five percent (85%) of the original Occupancy Fee paid by the Resident ...." (CP 207, 226).

On November 24, 2004, the Caudill Group loaned $400,000 to Clare House. The loan was secured by a Deed of Trust on the property which was recorded with the Spokane County Auditor's Office. On or about April 7, 2005, the Caudill Group loaned Clare House an additional $265,000. This second loan was also secured by a Deed of Trust on the property which was recorded with the Spokane County Auditor's Office. (CP 207, 228-235).

By April of 2008, Clare House had defaulted on both loans. As a result, the Caudill Group initiated foreclosure proceedings on the property. (CP 207).

On or about May 14, 2008, Mr. and Mrs. Raun received a notice signed by Mr. Gleesing, as Trustee under the Deed of Trust, giving them notice that a Trustee's Sale on the subject property would be held on November 7, 2008. In this notice, Mr. and Mrs. Raun were advised that the effect of the sale would be to deprive them of all interest in their bungalow. (CP 207, 237-240).

On October 29, 2008, Clare House filed suit in Spokane County Superior Court, *Clare House Bungalow Homes, LLC v. Caudill, et al., et ux.*, Cause No. 08-2-04898-0 ("Clare House LLC Lawsuit") to restrain the Trustee's Sale. On November 6, 2008, the Court entered an Order restraining and enjoining the Trustee's Sale until March 9, 2009. CP 207-208.

On February 3, 2009, Mr. and Mrs. Raun, as members of the Clare House Bungalow Homes Residents Association ("Clare House Residents Association"), filed a Complaint to Quiet Title, Restrain Trustee's Sale and for Other Relief in Spokane County Superior Court, *Clare House Bungalow Homes Residents Association v. Clare House Bungalow Homes, LLC, et al., et ux.*, Cause No. 09-2-00478-6 ("Clare House Residents Association litigation"). (CP 208).

On or about July 6, 2009, Mr. and Mrs. Raun received an Amended Notice of Trustee's Sale signed by Mr. Gleesing, advising them

that a Trustee's Sale would be held on August 21, 2009. In the amended notice, they were advised that after the 20th day following the Trustee's Sale, they would be subject to summary eviction under the Unlawful Detainer Act, RCW 59.12. (CP 208, 242-246).

On August 20, 2009, Clare House filed a Voluntary Petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Washington, *In Re Clare House Bungalow Homes, LLC*, No. 09-04651-PCW11 and an automatic stay was issued pursuant to 11 U.S.C. § 362. As a result of the automatic stay, the Trustee's Sale was continued to October 23, 2009. (CP 208-209, 252-253).

On October 11, 2009, Chester E. Raun passed away at the age of 86. Mr. and Mrs. Raun had been married for 63 years. (CP 209).

On October 23, 2009, Mr. Gleesing continued the Trustee's Sale to December 18, 2009. (CP 209, 255-256).

On November 18, 2009, the Clare House Residents Association lawsuit, Spokane County Superior Court Cause No. 09-2-00478, was removed to the United States Bankruptcy Court pursuant to 28 U.S.C. § 1452, where it was heard as an adversary proceeding under the Clare House bankruptcy, *Clare House Bungalow Homes Residents Association*

v. Clare House Bungalow Homes, LLC, et al, Adv. No. 09-80164-PCW11 ("Adversary Proceeding"). (CP 209).

On April 19, 2010, Mrs. Raun received a Second Amended Notice of Trustee's Sale signed by Mr. Gleesing, giving notice that a Trustee's Sale would be held on June 11, 2010. In the second amended notice, Mrs. Raun was again advised that after the 20th day following the Trustee's Sale, she would be subject to summary eviction under the Unlawful Detainer Act, RCW 59.12. (CP 209, 258-262).

On June 11, 2010, Mr. Gleesing continued the Trustee's Sale to July 16, 2010 and on July 16, 2010, continued the Trustee's Sale to October 8, 2010. (CP 209, 264-267).

On July 1, 2010, Mrs. Raun was 84 years old and alone, having lost her husband, and felt that she had no option but to move out of her bungalow. In her letter of May 27, 2010 to Mr. Green, Mrs. Raun stated that her decision was made under the stress of what seemed to be a constant stream of threats of summary eviction by the Caudill Group and the Trustee. (CP 209-210, 269).

Lawrence S. Eastburn, MD was Mrs. Raun's primary care physician from 2004 through 2012. (CP 932). Dr. Eastburn treated Mrs. Raun for diabetes and asthma. (CP 196). In conversations with Mr. and Mrs. Raun, Dr. Eastburn became aware of their situation with the Clare

House foreclosure and confirmed that the threat of losing their home and life savings understandably exerted highly unpleasant mental reactions upon them, including fright, shame, humiliation, embarrassment, anger, and worry. (CP 933-934). Dr. Eastburn confirmed that during this time, Mrs. Raun's medical records documented a worsening of her diabetes as reflected in her elevated A1C test results. (CP 934-935, 980-985). Dr. Eastburn also confirmed that the medical records also documented a worsening of Mrs. Raun's asthmatic condition over the same period. (CP 936, 986-987). Dr. Eastburn, on a more probable than not basis, based on a reasonable degree of medical certainty, was of the opinion that as a result of the threatened foreclosure and the loss of their home and life savings, Mrs. Raun suffered severe emotional distress which negatively impacted both her diabetic and asthmatic conditions. (CP 935-937).

In the Adversary Proceeding, the Clare House Residents Association filed a Motion for Summary Judgment on the issue of whether the Clare House residents, including Mrs. Raun, held rights superior to the Caudill Group. On December 14, 2010, the Bankruptcy Court issued its Order and Judgment holding, in pertinent part that the Resident Agreement created an interest in the property for each resident and that Mrs. Raun, having recorded her Resident Agreement, held a superior right to occupancy vis-à-vis the interest held by the Caudill Group under the

Deed of Trust. (CP 210, 271-280). In its Memorandum Decision, the Bankruptcy Court determined that:

> The Caudill Group obtained a title report on the property, which revealed the two recorded Resident Agreements, but the evidence at trial did not reveal that any inquiry was made regarding the existence of other Resident Agreements or even the terms of the recorded Resident Agreements. ... The evidence at trial did not reveal that any inquiry was made regarding the occupancy of the bungalows. Mr. Blanchat knew the real property constituted a retirement community which was at "full capacity." The evidence at trial did not reveal that any further inquiry was made.
>
> [The Caudill Group] had actual notice of the occupancy of the bungalows by residents. [The Caudill Group] had **a duty to make reasonable and prudent inquiry as to the terms of that occupancy** if the [Caudill Group] desired to obtain rights greater than the occupants. By failing to make any inquiry, **[the Caudill Group] is subject to the terms of the Resident Agreement to the extent the Resident Agreement grants rights in the real property**.

(CP 210, 289-290 (emphasis added)).

On April 8, 2011, the Bankruptcy Court, after trial in the Adversary Proceeding, entered an Order and Judgment holding that all Clare House residents held rights to occupancy and possession superior to those of the Caudill Group. (CP 210, 282-294).

The Bankruptcy Court's Order and Judgment was appealed to the United States District Court for the Eastern District of Washington. On September 28, 2012, the District Court issued its Order on Appeal,

affirming the Order and Judgment entered by the Bankruptcy Court. (CP 210, 296-314).

The Trustee's Sale was finally held on September 30, 2011, and the Clare House bungalows, including Mrs. Raun's, were sold to the Caudill Group. (CP 210).

Mrs. Raun's Complaint, filed on September 27, 2012, asserted the following seven causes of action against the Caudill Group and Mr. Gleesing: (1) Unlawful Eviction; (2) Violation of RCW 59.18.290; (3) Continuing Trespass; (4) Violation of RCW 4.24.630; (5) Tort of Outrage; (6) Negligent Infliction of Emotional Distress; and (7) Conversion. (CP 4-32).

The Complaint asserted that the Caudill Group, prior to initiating foreclosure proceedings on Clare House, failed to conduct a reasonable and prudent inquiry into the ownership interests of the residents of Clare House and continually threatened Mrs. Raun and the other residents of Clare House with summary eviction 20 days after completion of a Trustee's Sale. Mrs. Raun, under duress from over two years of such threats, vacated her bungalow. (CP 4-32). Mrs. Raun demanded the case be tried to a jury. (CP 387-389).

On November 14, 2012, the Caudill Group and Mr. Gleesing filed their Motion to Dismiss for Failure to State a Claim upon which Relief

may be Granted and Affirmative Defenses ("Motion to Dismiss").[2] (CP 153-156). Dismissal was sought upon three grounds: (1) the doctrine of collateral estoppel; (2) the doctrine of res judicata; and (3) failure to state a claim upon which relief may be granted under CR 12(b)(6). (CP 134-152).

The Motion to Dismiss was heard on December 21, 2012. Because both plaintiff and defendants presented matters outside the pleadings which were not excluded by the Court, the Motion to Dismiss was treated as one for summary judgment under CR 56. (CP 326-330).

After hearing arguments of counsel, the Court rendered an oral ruling finding that none of the causes of action were barred by either the doctrine of collateral estoppel or the doctrine of res judicata. (RP 22:14-23:11). The trial court then divided the causes of action into two groups. The first group, "property tort claims," included the claims for (1) Unlawful Eviction; (2) Violation of RCW 59.18.290; (3) Continuing Trespass; (4) Violation of RCW 4.24.630; and (5) Conversion (the First, Second, Third, Fourth and Seventh causes of action). The second group consisted of emotional distress torts, which included claims for: (1) Tort of

[2] At this time, Mr. Gleesing was represented by attorney John D. Munding. On February 22, 2013, attorney Patrick W. Harwood substituted in as attorney for Mr. Gleesing.

Outrage; and (2) Negligent Infliction of Emotional Distress (the Fifth and Sixth causes of action). (RP 23:17-22).

With respect to the property tort claims, the trial court reasoned that while the Bankruptcy Court and the Federal District Court had determined Mrs. Raun had a right of occupancy which was superior to that of the Caudill Group, Mrs. Raun had "made the choice to leave" her bungalow on July 1, 2010. (RP 24:4-11). Accordingly, the trial court ruled that because Mrs. Raun's "choice [affected] all of the property tort claims," dismissal solely on this basis was appropriate. (RP 24:11-13; CP 326-330).

However, the trial court ruled that the remaining claims for emotional distress and outrage would be allowed to proceed to trial. In this regard, the trial court rejected the Caudill Group's and Mr. Gleesing's contention that all they did was to send the statutory notice, noting that, as found by the Bankruptcy Court, "[t]hey really did not do due diligence before ... serving all these notices." (RP 24:23-24; CP 210, 289-299, 326-330).

The trial court's Order Granting in Part and Denying in Part Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief May be Granted and Affirmative Defenses was entered on February 4, 2013. (CP 326-330).

Around a year later as the parties were preparing for trial, on November 7, 2013, the Caudill Group and Mr. Gleesing again filed separate Motions for Summary Judgment, again seeking dismissal on similar grounds. (CP 398-401; 482-484). Both motions sought dismissal of the tort of outrage claim on the ground that the conduct of pursuing foreclosure under Chapter 61.24 could not, as a matter of law, amount to outrageous conduct. (CP 475-478, 491-494). As to the negligent infliction of emotional distress claim, while the Caudill Group contended that no duty was owed to Mrs. Raun and Mr. Gleesing contended that the only duty owed to Mrs. Raun was compliance with RCW Chapter 61.24, both contended that: (1) neither of them breached any duty owed to Mrs. Raun; and (2) there was insufficient medical evidence to support the claim. (CP 468-474, 494-501). Additionally, as to both claims, the Caudill Group asserted the statute of limitations as a partial bar to claims arising prior to September 27, 2009. (CP 478-479). Mr. Gleesing subsequently joined in this argument. (CP 737-741).

Both Motions for Summary Judgment were heard on January 10, 2014. After hearing arguments from counsel, the trial court dismissed the remaining two causes. As to the cause of action for the tort of outrage, the trial court predicated dismissal on the grounds that the "service of notice [under RCW Chapter 61.24 did] not amount to intolerable and outrageous

conduct." (RP 73:19-74-11). As to the claim for negligent infliction of emotional distress, the trial court dismissed the claim as to Mr. Gleesing on the finding that he had fulfilled the duties of a trustee. (RP 77:4-17). The trial court also dismissed the claim as to the Caudill Group, finding that, because the first notice received by Mrs. Raun was in May of 2008, the statute of limitations had run as of May 2011. (RP 77:18-81:22). The trial court's Order Granting: (1) the Caudill Investors' Motion for Summary Judgment; and (2) Defendant John P. Gleesing's Motion for Summary Judgment was entered on February 7, 2014 (CP 1218-1222).

Mrs. Raun filed her Notice of Appeal on March 7, 2014. The appeal seeks review of the orders of dismissal entered on February 4, 2013 and February 7, 2014 (CP 1286-1299).

On March 5, 2014, the Caudill Group filed their Motion for Costs, Including Attorney Fees, Under RCW 4.84.185. (CP 1223-1226). On March 7, 2014, Mr. Gleesing filed his Motion for Fees and Costs Re: CR 11 and RCW 4.848.185. Mrs. Raun opposed both motions, contending that neither RCW 4.84.185 nor CR 11 supported imposition of an award to either the Caudill Group or Mr. Gleesing. (CP 1405-1432). Both motions came on for hearing on April 4, 2014. (RP 84-131). At the conclusion of the hearing, the trial court denied the motions brought by the Caudill Group and Mr. Gleesing to the extent they were based upon RCW

4.84.185. (RP 125:16-128:21). However, the trial court granted the motion brought by Mr. Gleesing for sanctions under CR 11. (RP 122:5-125:15).

To date, no order has been entered on the trial court's oral ruling, precluding appeal. However, for the record, upon entry, Mrs. Raun intends to seek review of this matter upon entry of a final order.

E. ARGUMENT

1. Standard of Review.

Summary judgment under CR 56 shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); Clements v. Travelers Indem. Co., 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); Ellis v. City of Seattle, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. Wilson v. Steinback, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A material fact is one upon which the outcome of the litigation depends. Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997). The burden of showing there is no issue of material fact falls upon the party moving for summary judgment. Id.

Summary judgment is proper only if, from all the evidence, reasonable persons could reach but one conclusion. Id.; Wilson, at 437; CPL, LLC v. Conley, 110 Wn.App. 786, 790-791, 40 P.3d 679 (2002). "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 292, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). An order granting summary judgment is reviewed de novo on appeal. In its review, the appellate court "engage[s] in the same inquiry as the trial court." Wilson, 437, *citing* Highline Sch. Dist. 401 v. Port of Seattle, 87 Wn. 2d 6, 15, 548 P.2d 1085 (1976).

2. The Trial Court Erred in Dismissing Mrs. Raun's Causes of Action for Unlawful Eviction, Violation of RCW 59.18.290, Continuing Trespass, Violation of RCW 4.24.630 and Conversion Based Soley on the Determination that Mrs. Raun had Voluntarily Left Her Bungalow.

Measured against the standard for summary judgment, the trial court clearly erred in its order of February 4, 2013, dismissing Mrs. Raun's causes of action for unlawful eviction, violation of RCW 59.18.290, continuing trespass, violation of RCW 4.24.630 and conversion.

The causes of action dismissed by the trial court in its order of February 4, 2013 shared a common factual basis. Pursuant to the Resident

Agreement, Mr. and Mrs. Raun, held exclusive occupancy rights to unit 2506 for life or until they became unable to live independently or with the aid of another resident or caregiver or otherwise elected to terminate the Resident Agreement. (CP 206-207, 214-224). The Resident Agreement, recorded with the Spokane County Auditor, provided "notice to the world of" their interest in the property. The Rauns were actually residing on the premises at the time the Caudill Group issued their Notice of Trustee's Sale. (CP 207, 210, 237-240, 289),

Under these circumstances, the Caudill Group, had a duty "to make reasonable and prudent inquiry as to the terms of that occupancy." (CP 210, 289-290. As the Bankruptcy Court found, this duty was breached:

> [The Caudill Group] had actual notice of the occupancy of the bungalows by residents. [The Caudill Group] had **a duty to make reasonable and prudent inquiry as to the terms of that occupancy** if the [Caudill Group] desired to obtain rights greater than the occupants. By **failing** to make any inquiry, **[the Caudill Group] is subject to the terms of the Resident Agreement to the extent the Resident Agreement grants rights in the real property**.

(CP 210, 290 (emphasis added)). This finding of the failure by the Caudill Group and Mr. Gleesing to make reasonable and prudent inquiry as to the terms of that occupancy of the residents of Clare House is amply supported by the testimonies of Harry A. Green, and Respondents John P.

Gleesing and John H. Caudill, who testified during in the Adversary Proceeding. (CP 791).

In pertinent part, Mr. Green testified that he was first introduced to John H. Caudill in 2004 by Ron Webster, a loan broker. At the time, Mr. Green was interested in obtaining a loan for Clare House and had asked Mr. Webster to find a lender. (CP 791, 800-804). In enlisting his assistance, Mr. Green provided Mr. Webster with a package containing the following information about Clare House Bungalow Homes: (1) a cover sheet; (2) an appraisal; (3) information regarding monthly maintenance fees; (4) tax returns; and (5) a copy of a Resident Agreement to establish the structure of the business model. (CP 791, 873-876). Mr. Green indicated that he has never received a loan without putting together a loan package. (CP 791, 875). Mr. Green met with Mr. Caudill on the grounds of Clare House Bungalow Homes, gave him a tour of the premises and explained to Mr. Caudill the nature of the Residency Agreement, pursuant to which the residents of Clare House Bungalow Homes were entitled to live in their bungalows for the term of their lives or until they could no longer live there. (CP 791, 805-808). After the initial meeting, Mr. Green provided Mr. Caudill with a copy of a Resident Agreement. (CP 791, 808-809). Mr. Green understood that Mr. Caudill was the "point person" for

the Caudill investors and dealt with Mr. Caudill and Mr. Webster in obtaining the loan. (CP 791, 810-812).

Mr. Gleesing testified he first met Mr. Green at his office when Mr. Green came in to sign paperwork for the Caudill Group loan. (CP 791, 817). In terms of the Caudill Group loan transaction, Mr. Gleesing indicated that all members of the Caudill Group were his clients and that he did not represent borrowers. (CP 791, 820). Mr. Gleesing testified that the purpose of the Caudill Group was to pool their resources for the purpose of making the loan to Clare House. (CP 791, 820-821). Mr. Caudill was Mr. Gleesing's primary contact in this transaction. (CP 791, 821-822). *Mr. Gleesing indicated that he performed no investigation on behalf of the Caudill Group in connection with the loans.* (CP 791, 822-823). Mr. Gleesing, based upon representations from Mr. Webster, believed that the residents of Clare House Bungalow Homes were renters. (CP 791, 824-825). Mr. Gleesing also believed the residents of Clare House Bungalow Homes were renters based upon a reference in the title policy to unrecorded leases. (CP 791, 825-826). However, Mr. Gleesing acknowledged that the reference to "unrecorded leases" was a boilerplate provision in every preliminary commitment issued by the title company. (CP 791, 827).

John Caudill testified that he met Mr. Green through Mr. Webster. (CP 791, 831). Mr. Webster advised Mr. Caudill of an opportunity to make a commercial loan to Clare House, referencing the 28 bungalows. (CP 791, 833-834). According to Mr. Caudill, Mr. Webster told him that the units were rentals. (CP 791, 835). Mr. Caudill received further information regarding the living arrangement of the residents from Mr. Green. (CP 791, 835). Mr. Caudill subsequently met with Mr. Green at Clare House Bungalow Homes. (CP 791, 836). During this meeting, Mr. Green described the characteristics of the property and took Mr. Caudill inside one of the bungalows. (CP 791, 836-837). Mr. Green also described the bungalows as residences for seniors to live in. (CP 791, 837). Mr. Caudill denied that Mr. Green advised him about a Resident Agreement or the terms and conditions of the living arrangements of the residents of the bungalows. (CP 791, 837-838). Mr. Caudill acted as the point man for the Caudill Group in the Clare House loan. (CP 791, 842). Mr. Caudill advised the other members of the Caudill Group about the loan opportunity and the bungalows on the property. (CP 791, 842-843). Mr. Caudill denied requesting or receiving any documents from Mr. Green. (CP 791, 843-845). Mr. Caudill knew the bungalows were occupied. (CP 791, 846). Mr. Caudill denied that Mr. Green advised him of the plan for the operation of Clare House Bungalow Homes, nor did

Mr. Caudill request such information. (CP 791, 846-847). Mr. Caudill never made any inquiry as to the revenue generated by Clare House Bungalow Homes, valuation of the bungalows or rent rolls. (CP 791, 847-849). Mr. Caudill testified that he visited the Clare House Bungalow Homes property approximately three times before the loan closed. (CP 791, 849-853). Mr. Caudill agreed that all members of the Caudill Group had the opportunity to visit Clare House Bungalow Homes and no requested documents were denied to him or, to his knowledge, any member of the Caudill Group. (CP 791, 853-854). Mr. Caudill never spoke to any of the residents of Clare House Bungalow Homes. (CP 791, 856). Mr. Caudill never reviewed any financial information pertaining to Clare House Bungalow Homes. (CP 791, 857-858). At the time the Caudill Group made the loan to Clare House, Mr. Caudill understood that Clare House Bungalow Homes was an elderly community. (CP 791, 862). When the loan went into default, Mr. Caudill directed Mr. Gleesing to foreclose. (CP 791, 855-56).

Both the Caudill Group and Mr. Gleesing had knowledge, prior to initiating foreclosure, of the residents living in the Clare House bungalows, yet chose to do nothing to determine the rights of the residents. Under Washington law, the facts known to the Caudill Group

and Mr. Gleesing were sufficient to trigger a duty to inquire as to the property rights of the residents living in the Clare House bungalows:

> It is a well-settled rule that where a purchaser has knowledge or information of facts which are sufficient to put an ordinarily prudent man upon inquiry, and the inquiry, if followed with reasonable diligence, would lead to the discovery of defects in the title or of equitable rights of others affecting the property in question, the purchaser will be held chargeable with knowledge thereof and will not be heard to say that he did not actually know of them. In other words, knowledge of facts sufficient to excite inquiry is constructive notice of all that the inquiry would have disclosed.

Peterson v. Weist, 48 Wash. 339, 341, 93 P. 519 (1908) (citation omitted); Casa del Rey v. Hart, 110 Wn.2d 65, 750, P.2d 261 (1988).

This duty of inquiry applies even to situations where the record shows title to be in the name of someone else. As the Washington Supreme Court stated:

> But it seems to us that the law is well established that, where a party is in possession of land, even where the public records show the title to be in someone else, the purchaser cannot rely entirely upon the record testimony, but he must take notice also of the rights of those who are in possession.

Oliver v. McEachran, 149 Wash. 433, 439, 271 P. 93 (1928).

It is submitted that if the Caudill Group or Mr. Gleesing had made an inquiry with reasonable diligence in 2004, they would have conducted a grantor search at the Spokane County Auditor's Office and discovered the

Resident Agreement signed by Mr. and Mrs. Raun, recorded in 2001. Further inquiry would have disclosed to the Caudill Group and Mr. Gleesing all facts regarding Mr. and Mrs. Raun's occupancy rights to their bungalow and that they would, in fact, not be subject to eviction or lose their interest in their bungalow upon completion of a Trustee's Sale.

Notwithstanding their blatant failure to inquire, Mr. Gleesing, at the direction of Mr. Caudill, sent Notices of Trustee's Sale to the residents of Clare House. In the Notice of Trustee's Sale dated July 14, 2008, Mr. and Mrs. Raun were advised:

> The effect of the sale will be to **deprive** [Clare House] and **all those who hold by, through or under [it] of all their interest in the above-described property**.

(CR 207, 237-240 (emphasis added)).

In the Amended Notice of Trustee's Sale dated July 6, 2009, Mr. and Mrs. Raun were further advised:

> The purchaser at the trustee's sale is entitled to possession of the property on the 20th day following the sale, as against [Clare House] under the deed of trust (the owner) and anyone having an interest junior to the deed of trust, including occupants and tenants. **After the 20th day following the sale the purchaser has the right to evict occupants and tenants by summary proceedings under the unlawful detainer act, chapter 59.12 RCW**.

(CP 208, 242-246).

The Second Amended Notice of Trustee's Sale dated April 19, 2010, contained an identical threat of summary eviction. (CP 209-258-262).

Although the summary eviction notice in these Notices of Trustee's Sale follows the form prescribed by RCW 61.24.040, in this instance, because the Caudill Group breached its duty to conduct a reasonable and prudent inquiry into the occupancy rights of Mr. and Mrs. Raun, that notice amounted to nothing more than a continuing threat which was ultimately found by the Bankruptcy Court to be without basis. (CP 210, 271-280, 282-290).

The threats of summary eviction made to the elderly residents of Clare Bungalow Homes had their effect. Mrs. Raun herself suffered significant stress and anxiety as she worried about losing her home, enduring two years of threats of summary eviction, during which time she also saw her husband pass away. (CP 209-210, 933-937, 980-987).

Under these circumstances, Mrs. Raun did not simply vacate and abandon her unit. She was coerced by the Caudill Group to do so. The real reason Mrs. Raun vacated Clare House Bungalow Homes is poignantly expressed in her letter to Harry A. Green dated May 27, 2010, wherein she stated:

To Clare House Bungalow Homes –

Dear Harry –

This is a most difficult letter to write. The threats to make us vacate our home, that I and Chet thought would be our final home, in 20 days after the auction on June 11th was kind of the final blow after the 2 years of Law Suits.

I have made plans to be out of 2506 before July 1st. Have paid $89 more than I should have on Aprils Property Taxes – I'm paying Junes full price so I hope you consider I'm paid in full.

I'm sorry I have to leave, my hopes are for your future is for the best.

Sincerely,
s/ Helene M. Raun

Again:

I'm leaving; will be out before July 1, 2010[.] Hoping the contract we signed 85% as soon as the place is sold to the next resident or which ever is higher –

Thank you for your Best Wishes

(CP 209-210, 269).

This evidence not only constituted grounds for the causes of action dismissed by the trial court on February 4, 2013, they more importantly established genuine issues of material fact which precluded summary judgment. Their applicability to each cause of action is discussed below.

a. Unlawful Eviction. Mrs. Raun's cause of action for unlawful eviction is predicated upon a violation of her rights to her

bungalow under the Resident Agreement. The evidence presented to the trial court unquestionably supported the proposition that as a direct result of the failure to make a reasonable and prudent inquiry into her occupancy at Clare House Bungalow Homes, Mrs. Raun was coerced to leave and was therefore wrongfully dispossessed of her home.

b. Violation of RCW 59.18.290. Mrs. Raun's cause of action for violation of RCW 59.18.290 alleged that the actions of the Caudill Group and Mr. Gleesing unlawfully removed and excluded her from her bungalow within the meaning of RCW 59.18.290. In this regard, the evidence clearly established that Mrs. Raun did not voluntarily vacate her residence, but did so only on threats of summary eviction which were later found to be without merit. (CP 209-210, 269, 271-280, 282-294, 296-314).

The Notices of Trustee Sale were issued by John P. Gleesing, the Trustee under the Deed of Trust at the direction of the Caudill Group. (CP 207-209, 237-240, 242-246, 258-262). Mr. Gleesing was appointed Trustee by Clare House, the owner of the property and the powers wielded by him were powers granted to him by Clare House. (CP 207, 228-235). The term "Landlord" as used in RCW 59.18.290, includes "any person designated as **representative of the owner**, ... including, **an agent**. RCW 59.18.030(9) (emphasis added). Accordingly, the Notices of Trustee Sale,

including the notice of summary eviction are in fact, acts directly attributable to the "landlord." Further, the notices of summary eviction were the direct result of the failure to conduct a reasonable and prudent inquiry into the occupancy rights held by Mrs. Raun. These acts directly caused Mrs. Raun to vacate her bungalow. (CP 209-210, 269, 289-290).

c. Continuing Trespass.

The tort of trespass occurs if a person engages in actions which have "(1) invaded the plaintiff's interest in the exclusive possession of his property, (2) been committed intentionally, (3) been done with the knowledge and reasonable foreseeability that the act would disturb the plaintiff's possession, and (4) caused actual and substantial damages ...." Bradley v. Am. Smelting & Ref. Co., 104 Wn.2d 677, 992-993, 709 P.2d 782 (1985). "Liability for trespass exists ... where there is an intentional or negligent intrusion ... on the part of the defendant." Hughes v. King County, 47 Wn.App. 776, 780, 714 P.2d 316 (1986). In the context of a continuing trespass, the tortious event "happens every day the trespass continues." Woldson v. Woodhead, 159 Wn.2d 215, 149 P.2d 361 (2006).

On December 14, 2010, Mrs. Raun was found to have a right to occupancy and possession of her bungalow which was superior to the rights of the Caudill Group under the Deed of Trust. (CP 210, 289-290). By virtue of the threat of summary eviction notices contained in the

Notices of Trustee Sale, the Caudill Group and Mr. Gleesing interfered with Mrs. Raun's right to occupancy and possession of her bungalow by coercing her to vacate her home. (CP 207-209, 237-240, 242-246, 258-262, 269). The owner of Mrs. Raun's bungalow is now the Caudill Group. (CP 210).

d. Violation of RCW 4.24.630.

Statutory trespass is defined by RCW 4.24.630 as follows:

> Every person who goes onto the land of another and ... wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.

RCW 4.24.630(1).

In her Complaint for Damages, Mrs. Raun alleged that the Caudill Group wrongfully caused her to vacate her bungalow through threats of summary eviction. The actions of the Caudill Group and Mr. Gleesing were wrongful in that they breached their duty to conduct a reasonable and

prudent inquiry into Mrs. Raun's right to possess and occupy her home. (CP 209-210, 269, 289-290).

e. Conversion.

"Conversion is the unjustified, willful interference with a chattel which deprives a person entitled to the property of possession." Meyers Way Dev. Ltd. P'ship v. Univ. Sav. Bank, 80 Wn.App. 655, 674-75, 910 P.2d 1308 (1996). Mrs. Raun's Complaint for Damages asserted that the Caudill Group committed an unjustified, willful interference with Mrs. Raun's interest in her bungalow and deprived her of her right to occupancy and possession. (CP 4-32).

Mrs. Raun's interest in her bungalow was personal property, or a chattel. That interest arose from the Resident Agreement signed by Mr. and Mrs. Raun in 2000. (CP 206, 214-224). While the nature of the interest created by the Resident Agreement is one in real property, it is in fact analogous to a leasehold interest. In the State of Washington, the general rule is that "leasehold interests are tangible personal property." In re Estate of Barclay, 1 Wn.2d 82, 95 P.2d 393 (1939) (leasehold interests are chattel real).

Again, the damage sustained by Mrs. Raun (i.e., the loss of her home), was due to the failure of the Caudill Group and Mr. Gleesing to fulfill

their duty to conduct a reasonable and prudent inquiry into Mrs. Raun's right to possess and occupy her home. (CP 209-210, 269, 289-290).

f. Whether Mrs. Raun Abandoned Her Home Presents a Genuine Issue of Material Fact Precluding Summary Judgment.

As noted above, the trial court, in dismissing Mrs. Raun's "property tort claims," reasoned that although Mrs. Raun had a right of occupancy which was superior to that of the Caudill Group, Mrs. Raun had "made the choice to leave" her bungalow on July 1, 2010. (RP 24:4-11). The trial court found that because Mrs. Raun's "choice [affected] all of the property tort claims," dismissal solely on this basis was appropriate. (RP 24:11-13; CP 326-330). The Court's oral ruling clearly indicated that dismissal of the five "property tort claims" was predicated on a determination that Mrs. Raun abandoned her bungalow.

In the context of summary judgment, this finding was improper as the question of whether Mrs. Raun abandoned her bungalow or was coerced into doing so presented a genuine issue of material fact as to the five "property tort claims."

"Abandonment involves a **voluntary** leaving of property with no intention to return and claim or possess it." Koenig v. Hansen, 39 Wn.2d 506, 512, 236 P.2d 771 (1851) (emphasis added). Legal abandonment contemplates both an act or omission and an intent to abandon. Moore v.

Northwest Fabricators, Inc., 51 Wn.2d 26, 27, 314 P.2d 941 (1957). Furthermore, abandonment must be proved by "clear, unequivocal and decisive evidence." Tuschoff v. Westover, 65 Wn.2d 69, 73, 395 P.2d 630 (1964); *see also* Olin v. Goehler, 39 Wn.App. 688, 693, 694 P.2d 1129 (1985) (there must be clear, unequivocal and decisive evidence of an intent to abandon).

That the trial court's dismissal was based on an improper determination of a genuine issue of material fact was highlighted during the hearing held April 4, 2014. During that hearing, the trial court revisited the issue of Mrs. Raun's vacating her bungalow and stated the following:

> However, **one of the major issues in this case** that was ruled on in summary judgment and that is **highly disputed, is** whether or not Ms. Raun voluntarily left the property or whether she abandoned the property or **whether she was forced to leave the property. That issue has some relevance in terms of the overall allegations that were being made.** Certainly I will grant that **it did not have any merit** with regard to, my view, under certain real property statutes because of her status. I do not want to go into all those decisions again. **But in alleging the claim of negligent infliction of emotional distress, plaintiff is making the argument that she did not leave voluntarily. Obviously it is debatable about whether or not she did, but I would characterize the argument as frivolous.**

(RP 126:23-127:13).

These statements establish without question that the dismissal of the five "property tort claims" was solely based upon the trial court's determination of a genuine issue of material fact which was "highly disputed."

Furthermore, the trial court missed the overall relevance of the abandonment issue in general. Mrs. Raun's injuries stem from the fact that she was wrongfully dispossessed of her bungalow by the actions of the Caudill Group and Mr. Gleesing. The trial court's reasoning appeared to consider the issue in terms of standing to prosecute these claims. In other words, whether or not Mrs. Raun had been forced out of her home, she was no longer residing there and had no right to seek relief.

This is not only illogical, but a usurpation of the role of trier of fact of the grossest kind. If Mrs. Raun had not been coerced to leave her bungalow, she would not now be prosecuting her property tort claims against the Caudill Group and Mr. Gleesing.

Whether or not the trial court felt that Mrs. Raun's claim that she was coerced to leave her bungalow "did not have any merit" or was "frivolous," despite evidence to the contrary, including a contemporaneous written statement authored by Mrs. Raun, the determination was not one for the trial court to make before listening to all the evidence. A genuine

issue of material fact was presented and the determination was one which could only be made by a jury.

The trial court's dismissal of the five "property tort claims" in its order of February 4, 2013 should accordingly be reversed.

3. The Trial Court Erred in Dismissing Mrs. Raun's Cause of Action for the Tort of Outrage.

"The tort of outrage requires the proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress." Kloepfel v. Bokor, 149 Wn.2d 192, 195, 66 P.3d 630 (2003); Grimsby v. Samson, 85 Wn.2d 52, 59-60, 530 P.2d 291 (1975). The determination whether conduct is sufficiently outrageous ordinarily rests with the jury. Chambers-Castanes v. King County, 100 Wn.2d 275, 289, 289, 669 P.2d 451 (1983). However, the trial court must initially determine if reasonable minds could differ on whether the conduct is sufficiently extreme and outrageous so as to warrant a factual determination by the jury. Robel v. Roundup Corp., 148 Wn.2d 35, 51, 59 P.3d 611 (2002).

In dismissing Mrs. Raun's cause of action based upon the Tort of Outrage, the trial court assumed a "gatekeeper" role articulated in Rodel and effectively held that the conduct of the Caudill Group and Mr.

Gleesing was not sufficiently extreme and outrageous so as to warrant a factual determination by the jury:

> With regard to the outrage claim itself, my view is that reading all of the material that I have read, that all other things being equal, this case would never get to a jury on outrage. Outrage is a form of conduct that has been described in the cases as atrocious. Most of the outrage cases, one of them that is quoted frequently is my case, the *Clopfell* (sic) case, the 350 phone calls that this man made to this woman. That is behavior that just is not tolerable. It is not because somebody is interpreting a statute or somebody did not look at a residence agreement. This is intolerable behavior. We do not even get there in this case. Whatever other theories there might be out there, outrage is not a matter to go to the jury, this is not that kind of case. I will dismiss an outrage claim on its merits that service of notice does not amount to intolerable and outrageous conduct.

(RP 73:19-74:11).

With all due respect, Mrs. Raun disagrees with the conclusion of the trial court. Simply stated, the conduct underlying Mrs. Raun's cause of action for the tort of outrage involves significantly much more than "somebody is interpreting a statute or somebody did not look at a residence agreement." It is also more than a mere allegation that "service of notice" constitutes "intolerable and outrageous conduct."

Rather, the evidence presented, taken in the light most favorable to Mrs. Raun, establishes that the Caudill Group and Mr. Gleesing failed to perform due diligence or make any reasonable or prudent inquiry as to the occupancy rights of the residents at Clare House Bungalow Homes prior

to initiation of foreclosure proceedings. This failure resulted in the service of various Notices of Trustee's Sale upon the residents including Mrs. Raun. Both the Caudill Group and Mr. Gleesing knew that Clare House Bungalow Homes was an elderly residential community. At the time foreclosure began Mrs. Raun was 84 years old and understood from these notices that she and her husband were being threatened with summary eviction under the Unlawful Detainer Act (RCW Chapter 59.12) and in jeopardy of losing the home into which they had invested their life savings. After enduring two years of such threats, the stress, fear, anxiety and frustration caused Mrs. Raun to vacate her bungalow under duress. The value of that bungalow resulted in a direct benefit of over $100,000.00 to the Caudill Group.

It is respectfully submitted that these facts could reasonably be viewed by a trier of fact to be much more extreme and outrageous than an ex-boyfriend stalking and harassing his alleged ex-girlfriend with 350 telephone calls. *See* Kloepfel, id. Indeed, a trier of fact could reasonably find the evidence presented, involving the misuse of the legal process against an elderly woman resulting in divesting her of her home, to be nothing less than atrocious and despicable and sufficient to establish the tort of outrage.

At any rate, viewing the evidence in the light most favorable to Mrs. Raun, the trial court's dismissal of Mrs. Raun's cause of action for the tort of outrage should be reversed.

4. The Trial Court Erred in Dismissing Mrs. Raun's Cause of Action for Negligent Infliction of Emotional Distress.

Washington first recognized the tort of negligent infliction of emotional distress in Hunsley v. Giard, 87 Wn.2d 424, 553 P.2d 1096 (1976) (a defendant has a duty to avoid the negligent inflection of mental distress). Negligent infliction of emotional distress requires proof of (1) duty, (2) breach of duty, (3) proximate cause; and (4) injury. Id., at 435-436; Kloepfel, at 199.

It is submitted that the evidence presented was sufficient to establish each of these four elements.

Pursuant to the Resident Agreement signed by Mr. and Mrs. Raun, they held exclusive occupancy rights to unit 2506 for life or until they became unable to live independently or with the aid of another resident or caregiver or otherwise elected to terminate the Resident Agreement. (206, 214-224). Both the Caudill Group and Mr. Gleesing were bound to respect those rights and their interference with those rights breached their duty to avoid negligent inflection of mental distress upon Mrs. Raun. Both the Caudill Group and Mr. Gleesing had a duty to make reasonable

and prudent inquiry as to the terms of the occupancy of the residents if they wanted to obtain rights greater than the residents before giving notice to them.

Both the Caudill Group and Mr. Gleesing breached their duty. Mr. and Mrs. Raun recorded their Resident Agreement with the Spokane County Auditor on December 20, 2001. (CP 207, 214-224). The effect of recording their Resident Agreement was to give constructive notice of their rights of occupancy to the public and more specifically, to the Caudill Group and Mr. Gleesing before the loans to Clare House were made in 2004 and 2005. RCW 65.08.070; Ellingsen v. Franklin County, 117 Wn.2d 24, 27, 30, 810 P.2d 910 (1991). Because no reasonable and prudent inquiry was made as to the occupancy rights of the residents of Clare House Bungalow Homes, Notices of Trustee's Sale were issued, threatening the residents, including Mrs. Raun with summary eviction 20 days after the Trustee's Sale was accomplished.

That the threats of eviction proximately caused emotional distress to Mrs. Raun cannot be denied. Mrs. Raun herself suffered significant stress and anxiety as she worried about losing her home, enduring two years of threats of eviction, during which time she also saw her husband pass away. The worsening of Mrs. Raun's health was directly attributable to the foreclosure action. (CP 209-210, 934-936, 980-987).

Separate and distinct grounds were cited by the trial court in dismissing Mrs. Raun's cause of action for negligent infliction of emotional distress against the Caudill Group and Mr. Gleesing. For the reasons set forth below, the trial court erred as to each and should be reversed.

a. The Trial Court Erred in Dismissing Mrs. Raun's Cause of Action for Negligent Infliction of Emotional Distress Against Mr. Gleesing.

In dismissing the cause of action for negligent infliction of emotional distress against Mr. Gleesing, the trial court, contrary to its earlier finding that "[t]hey really did not do due diligence before ... serving all these notices" found that "based upon the information that he had at that time, he acted appropriately." (RP 24:23-24, 75:10-12).

Whether or not Mr. Gleesing "fulfilled his duties as trustee" because he "got two title policies" and "could reasonably rely upon a company" is beside the point. (RP 75: 12-13, 77:5, 11-12). Mr. Gleesing as trustee is responsible for his actions and the actions of those he hires, such as a title company. This is especially true where, as admitted by Mr. Gleesing, he performed no investigation on behalf of the Caudill Group in connection with the loans. (CP 791, 822-823). In order to avoid liability, Mr. Gleesing instead seeks to hide under cover of blind adherence to the Deeds of Trust Act, RCW Chapter 61.64, even acknowledging that he

would have handled things differently had he known about Mrs. Raun's occupancy:

> Q. Okay. And I'm not following you there. What title policy told you to send it to the occupants?
>
> A. Trustee sale title policy.
>
> * * *
>
> Q. Tell me about that title policy. When did you obtain that?
>
> A. I obtained it prior to sending out the notice of trustee sale.
>
> Q. Who is that with?
>
> A. First American Title Company.
>
> Q. And that policy protects who against what?
>
> A. It protects the trustee.
>
> Q. Against mistakes?
>
> A. Against whatever the title company doesn't put in the title policy.
>
> Q. Was the residents' agreements in this transaction identified in the title policy?
>
> A. No.
>
> * * *
>
> Q. (By Mr. Baltins) Had the residents' agreement been properly identified, would you have taken a different kind of action?
>
> * * *
>
> A. Yes.

(CP 791, 922).

This situation occurred due solely to the fact that Mr. Gleesing, along with the members of the Caudill Group, in fact failed to conduct a reasonable and prudent inquiry into the occupancy rights of Mrs. Raun.

Under the facts of this case, whether Mr. Gleesing fulfilled his duty as a trustee or failed to conduct a reasonable and prudent inquiry is a question of fact. It is not one for the trial court to determine at this stage and the dismissal of Mrs. Raun's cause of action for negligent infliction of emotional distress against Mr. Gleesing should be dismissed.

b. The Trial Court Erred in Dismissing Mrs. Raun's Cause of Action for Negligent Infliction of Emotional Distress Against the Caudill Group.

The trial court's dismissal of Mrs. Raun's cause of action for negligent infliction of emotional distress against the Caudill Group should also be reversed. In dismissing this claim against the Caudill Group, the Court held the claim barred under the applicable statute of limitations. While Mrs. Raun's cause of action for intentional infliction of emotional distress is governed by a three year statute of limitations, **no party** contended that a complete dismissal was the remedy. (CP 478-479, 997-998).

"[A] cause of action accrues until an injured party knows, or in the exercise of due diligence should have discovered, the factual bases of the causes of action." Doe v. Finch, 113 Wn.2d 96, 101, 942 P.2d 359 (1997).

In applying the statute of limitations, the trial court relied on Cox v. Oasis Physical Therapy, PLLC, 153 Wn.App. 176, 222 P.3d 119 (2009).

In its oral ruling the trial court reasoned, based upon Cox, that since the Notices of Trustee's Sale were issued commencing in May of 2008, the statute of limitations began running from that date and accordingly, Mrs. Raun should have filed her complaint no later than May of 2011. (RP 80:12-81:22).

In Cox, the plaintiff appealed the dismissal of a suit brought against her former employer. The complaint alleged several causes of action stemming from her employment, including negligent infliction of emotional distress and outrage and intentional infliction of emotional distress. Cox, at 181. The plaintiff was employed by the defendant during the period from February 2004 through May 2005. Id. at 183, 191. The complaint was filed on December 6, 2007. **In reversing the trial court, which had dismissed all claims, the Court of Appeals held that the claims for negligent infliction of emotional distress and outrage and intentional infliction of emotional distress, subject to a three year statute of limitations, could proceed as to claims which occurred between December 6, 2004 and December 6, 2007.** Id., at 192, 193.

The actions of the Caudill Group and Mr. Gleesing were continuing, as was the conduct in Cox. The trial court in this matter

committed the same error as the trial court in Cox. Pursuant to Cox, the trial court should have used the date Mrs. Raun filed her Complaint for Damages (September 27, 2012) and carried back three years to December 27, 2009 to determine the period during which time Mrs. Raun's claim for negligent infliction of emotion distress could be brought. Instead, the trial court did the direct opposite, targeting the earliest date of the Notices of Trustee's Sale and moving forward (i.e., from May 2008 to May 2011).

Accordingly, the trial court erred in completely dismissing Mrs. Raun's cause of action for negligent infliction of emotional distress against the Caudill Group. At the very least, this claim should be allowed to proceed within the period from September 27, 2009 to December 27, 2012. The trial court's dismissal of Mrs. Raun's cause of action for negligent infliction of emotional distress against the Caudill Group should be reversed.

5. The Trial Court Erred in Awarding CR 11 Sanctions Against Mrs. Raun.

As noted above, on April 4, 2014, the trial court granted Mr. Gleesing's Motion for Fees and Costs Re: CR 11 and RCW 4.848.185.

Although no written order has been entered, it appears that the trial court apparently found CR 11 sanctions appropriate on the basis that Mrs. Raun's complaint was not warranted by existing law or a good faith

argument for the extension, modification, or reversal of existing law or the establishment of new law. (RP 122:5-125:15).

Mrs. Raun disagrees.

In this regard, plaintiff's counsel, prior to filing the Complaint, contacted and interviewed pertinent individuals and reviewed an extensive amount of documentation, including pleadings filed in State Court and Bankruptcy Court. (CP 1433-1740). The evidence presented in this matter clearly established the Mr. Gleesing failed to perform due diligence or otherwise make a reasonable and prudent inquiry into Mrs. Raun's occupancy at Clare House Bungalow Homes before initiating the foreclosure process. This failure directly injured Mrs. Raun.

There are no grounds to justify imposition of CR 11 sanctions.

F. CONCLUSION

Accordingly, based upon the foregoing, it is respectfully requested that this Court enter an Order:

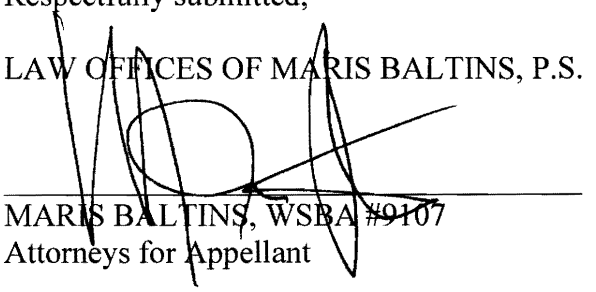
1. Reversing the trial court's Order Granting in Part and Denying in Part Defendants' Motion to Dismiss for Failure to State a Claim Upon Which Relief May be Granted and Affirmative Defenses, entered on February 4, 2013.

2. Reversing the trial court's Order Granting: (1) the Caudill Investors' Motion for Summary Judgment; and (2) Defendant John P. Gleesing's Motion for Summary Judgment, entered on February 7, 2014.

DATED this 12th day of September, 2014.

Respectfully submitted,

LAW OFFICES OF MARIS BALTINS, P.S.



MARIS BALTINS, WSBA #9107
Attorneys for Appellant

CERTIFICATE OF SERVICE

Seth Thompson hereby declares under penalties of perjury of the laws of the State of Washington that:

1. I am and at all times hereinafter mentioned was a citizen of the United States and a resident of the State of Washington, over the age of 18 years and not a party to this action.

2. On the 12th day of September, 2014, I caused to be served a true and correct copy of the foregoing document, by the method indicated below, upon the following parties:

Paul L. Kirkpatrick Patrick W. Harwood Kirkpatrick & Startzel, P.S. 1717 S. Rustle, Suite 102 Spokane, WA 99224	[ ] First Class Mail, Postage Prepaid [ ] Federal Express [x] Hand Delivery [ ] Facsimile Transmission:
John D. Munding Crumb & Munding, P.S. 1610 W. Riverside Ave. Spokane, WA. 99201	[ ] First Class Mail, Postage Prepaid [ ] Federal Express [x] Hand Delivery [ ] Facsimile Transmission:

DATED this 12th day of September, 2014.

Seth Thompson