No. 323668-III

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

HELEN M. RAUN

Appellant.

v.

JOHN H. CAUDILL, ET AL.

Respondents

BRIEF OF RESPONDENTS

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I. INTRODUCTION

"It is like déjà vu all over again."
- Yogi Berra

The Respondents have been successfully defending litigation, including appeals, advanced by Plaintiff Raun and her counsel since as early as February 3, 2009. (CP 10-11). The present State Court proceeding, and this appeal fall on the heels of an unsuccessful appeal to the United States District Court. (CP 135-36). That appeal included the same parties, the same property, and the same counsel. Dissatisfied with the decision, Plaintiff Raun and Counsel Baltins filed the present litigation advancing meritless claims premised on an alleged wrongful eviction by the Defendants Caudill Investors.

The Caudill Investors loaned Clare House Bungalow Homes, LLC $665,000.00, these loans were secured by a Deed of Trust on the subject property. Clare House eventually defaulted on the loans, and as a result the Caudill Investors subsequently initiated non-judicial foreclosure proceedings in compliance with Washington State law, RCW 61.24 *et seq*. In further compliance with the law, the Trustee under the Deed of Trust, John P. Gleesing, issued Notices of Trustee Sale to the occupants of Clare House, including Plaintiff Raun. As

required by law, these Notices were issued to provide the occupants with an opportunity to protect any interest they held in the subject property. The Trustee's Sale was held on September 30, 2011, and the subject property, including Unit 2506, was sold to the Caudill Investors.

The Plaintiff filed her Complaint about one year later on September 27, 2012, after an unfavorable decision and appeal from the Bankruptcy Court. (CP 135-36). The Plaintiff's claims are based primarily on the theory of wrongful eviction. Since the outset of this litigation, the Plaintiff has been unable to produce any evidence supporting her claims and cannot rebut the facts presented by the Caudill Investors. The evidence shows that it was impossible for the Caudill Investors to evict the Plaintiff from Unit 2506 on July 1, 2010. The Plaintiff vacated Unit 2506, quit paying her contractual obligations, and voluntarily abandoned her premises. At all times Plaintiff Raun was represented by legal counsel. (CP 404, 447-49, 466). The Caudill Investors, were a merely a secured lender, and had no standing to enforce such rights because they were not the owners of the Clare House Bungalow Homes when Plaintiff Raun vacated

Unit 2506 on July 1, 2010, over two years before the Trustee's Sale had occurred.

The tort claims asserted against Defendants are even more preposterous, as the Defendants have had zero communications or contact with Plaintiff Raun, by her own admission. Allowing the Plaintiff's tort claims under these circumstances would open the door to any occupant of a residence that is being foreclosed on by a secured lender to pursue tort claims against that lender, as result of having received a statutorily required Notice of trustee sale. This logic defies the system that the Washington State Legislature has implemented in order to protect occupants against wrongful foreclosures. RCW 61.24 *et seq*. As a matter of law, it is clear that the Plaintiff's claims cannot stand.

In part, for the reasons stated above, the trial court dismissed the Plaintiff's real property and tort claims asserted against Defendants, and the Plaintiff now appeals the orders of dismissal. Based on the following this Court should affirm the trial courts decisions.

II. RESTATEMENT OF ISSUES

Issues relating to Appellant Raun's Assignments of Error:

1. Whether the court should affirm the summary judgment dismissing Plaintiff Raun's claims of unlawful eviction, violation of RCW 59.18.290, continuing trespass, violation of RCW 4.24.630, and conversion on the basis that Plaintiff Raun failed to state a claim on which relief could be granted, as the Plaintiff voluntarily vacated Unit 2506 prior to Defendant Caudill Investors taking ownership of the property, and therefore Plaintiff Raun had no interest left to claim in the property.

2. Whether the court should affirm the summary judgment dismissing Plaintiff Raun's tort of outrage claim against Defendant Mr. Gleesing and Defendant Caudill Investors on the basis that the Defendants were complying with the Revised Code of Washington, and that the Plaintiff's tort of outrage claim is barred by the statute of limitations.

3. Whether the court should affirm the summary judgment dismissing Plaintiff Raun's negligent infliction of emotional distress claim against Mr. Gleesing on the basis that he fulfilled his duties as

a trustee.

4. Whether the court should affirm the summary judgment dismissing Plaintiff Raun's claim of negligent infliction of emotional distress on the basis that Plaintiff's action is barred by the statute of limitations governing actions of tort, RCW 61.24 *et seq.*

5. Whether the court should affirm Mr. Gleesing's Motion for sanctions under CR 11.

6. Whether this Court should award attorneys' fees and costs under RAP 18.1.

III. RESTATEMENT OF CASE

In the 1990's, Clare House Bungalow Homes, LLC purchased real property described as 4827 S. Palouse Highway, Spokane, Washington ("subject property") including bungalow unit 2506 ("Unit 2506") (CP 7-9, 461), which was subsequently leased to Plaintiff Raun. (CP 4-19).

The Defendants Caudill Investors loaned money to Clare House Bungalow Homes LLC ("Clare House"), which was secured by deeds of trust encumbering the real property owned by Clare House on which was located Clare House Bungalow Homes (the "subject

property"). The subject property was owned by Clare House, and the Defendant Caudill Investors were secured creditors of Clare House. (CP 10, 462).

Plaintiff Raun entered into a Resident Agreement with Clare House Bungalow Homes, LLC that had an effective date of August 2, 2000. (CP 9, 462). Later, on or about March 20, 2002, Plaintiff, together with her late husband, entered into a Resident Agreement Addendum that modified the terms and conditions of the original agreement. (CP 9-10, 462). The Caudill Investors were not a party to neither the original Resident Agreement, nor the Resident Agreement Addendum. (CP 9-10, 20-32, 462).

On or about April of 2008, Clare House defaulted on the loan obligation secured by deeds of trust. (CP 10, 462). Subsequently, on or about May of 2008, the Caudill Investors elected to commence the process of non-judicial foreclosure on its deeds of trust pursuant to its legal rights under applicable Washington statutory and common law. (CP 10, 462). The residents of the Clare House Bungalow Homes formed the Clare House Bungalow Residents Association ("CHRA"), of which Plaintiff was a member. (CP 137). On February 3, 2009,

Plaintiff, as a member of the CHRA, filed a complaint in Spokane Superior Court to quiet title, restrain trustee's sale, and for other injunctive relief. (CP 10-11, 462).

The State Court Action was removed to United States Bankruptcy Court, Eastern District of Washington where it was heard as an adversary proceeding under the main bankruptcy case of Clare House Bungalow Homes, LLC. (CP 12, 463). Plaintiff, as a member of CHRA, entered into a stipulation with the Caudill Investors and with Defendant Gleesing agreeing not to seek to restrain a trustee sale of the subject property. (CP 11, 463). By Order and Judgment of April 8, 2011, the Bankruptcy Court ruled that the interest of the Caudill Investors was subject to Plaintiff's limited property right to occupy and possess her bungalow but that the Caudill Investors continued to have all remedies available under state law with respect to enforcing their deeds of trust. (CP 210, 282-94, 463).

Notices of trustee's sale were issued by the Trustee, Defendant Gleesing, in the form prescribed by the Revised Code of Washington. (CP 465). The Notices were dated July 14, 2008, July 6, 2009, August 21, 2009, October 23, 2009, April 19, 2010, June 11, 2010, and July

16, 2010 (CP 207-09, 465-66). Plaintiff Raun voluntarily vacated Unit 2506 on July 1, 2010. (CP 12-13, 466). Plaintiff vacated and abandoned Unit 2506 as the prior Litigation was pending, over a year before Defendants Caudill Investors took ownership of the subject property. (CP 12-13, 375-76). The Plaintiff was represented by legal counsel at all material times, including July 1, 2010, and through legal counsel, litigated at length her property rights under the Resident's Agreement. (CP 404, 447-49, 466).

The trustee's sale proceeded pursuant to RCW 61.24 *et seq* and was held on September 30, 2011. (CP 14, 466). Title to the subject property was conveyed by way of Trustee's Deed dated September 30, 2011. (CP 14, 404, 452-56, 466). The trustee's sale was never sought to be set aside by the prior owner or any other party in interest. (CP 466).

The Plaintiff commenced this case on September 27, 2012, asserting the following seven causes of action: (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). This

current litigation has been presented in a manner to circumvent the binding effect of the Bankruptcy Court's prior rulings, and to have this Court revisit legal and factual issues which have already been addressed and decided.

On November 14, 2012, the Caudill Investors immediately moved to dismiss all of Plaintiff Raun's causes of action pursuant to CR 12(b)(6). (CP 134-56). Both Plaintiff and Defendants presented matters outside the pleadings which were not excluded by the Court, therefore, pursuant to CR 12(b), Defendants' Motion to Dismiss was treated as one for summary judgment under CR 56. (CP 326-30). The trial court granted relief and dismissed Plaintiff's real property causes of action: unlawful eviction, violation of RCW 59.18.290, violation of RCW 4.24.630, and conversion. (CP 326-30).

On February 4, 2013, Plaintiff Raun filed a Motion for Reconsideration of the trial court's ruling on the Motion to Dismiss (CP 331-33). The trial court denied the Motion for Reconsideration on May 21, 2013 finding:

> It is uncontested that the plaintiff vacated Unit 2506 more than one year before the defendants purchased Clare House Bungalow Homes at a trustee's sale; therefore, plaintiff cannot maintain the real property causes of action.

(CP 375-76). Accordingly, the Plaintiff's following two tort claims survived dismissal: (1) tort of outrage; and (2) negligent infliction of emotional distress. (CP 375-76). The basis, in part, was a declaration signed by Dr. Lawrence S. Eastburn, which later proved to be highly misleading. (CP 403, 419, 460-61).

On November 7, 2013, the Caudill Investors moved for Summary Judgment with regards to the remaining two tort claims. (CP 398-400). On November 20, 2013, Plaintiff Raun moved to Continue Hearing regarding the Summary Judgment Motions pursuant to CR 56(f) (CP 604-06) for the purpose of conducting further discovery including taking depositions at substantial time and expense. Notably, the discovery obtained was never utilized by Plaintiff Raun because the depositions did not support her claims. This Continuance, and request to conduct further discovery, appeared to be calculated, not to actually discover pertinent evidence to support Plaintiff Raun's claims, but rather, to put additional pressure on the Defendants Caudill Investors, in an attempt to force settlement.

However, the Caudill Investors did not succumb to the Plaintiff's meritless tactics, and the summary judgment motions were

heard on January 10, 2014. (CP 742-43). The trial court granted summary judgment in favor the Defendants, and dismissed Plaintiff Raun's causes of action for the tort of outrage and negligent infliction of emotional distress with prejudice. (CP 1218-22).

On March 5, 2014, the Caudill Investors moved the trial court for an order awarding costs, including attorneys' fees, pursuant to RCW 4.84.185, incurred in opposing the frivolous actions of Plaintiff Raun. (CP 1223-26). Since September 27, 2012, the Caudill Investors have been defending claims asserted against them by Plaintiff Raun. Plaintiff Raun, unhappy with the previous litigation in the United States Bankruptcy Court and United States District Court, brought meritless claims against the Defendants, as secured lenders, they were undoubtedly viewed as a deep pocket.

Plaintiff Raun now continues to pursue her frivolous claims on appeal against Defendants Caudill Investors. Plaintiff Raun filed a timely Notice of Appeal on March 7, 2014 (CP 1286-88), and subsequently filed her Appellant's Brief on September 12, 2014.

IV. ARGUMENT

A. Standard of Review and Burden of Proof

On appeal, Orders granting summary judgment are reviewed de novo, applying the same inquiry as the trial court. *Qwest Crop. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007). Summary Judgment under CR 56 shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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).

The court considers "all facts submitted and all reasonable inferences from the facts in the light most favorable to the non-moving party." *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is proper "'if reasonable persons could reach only one conclusion from all of the evidence.'" *Sjogren v. Prop's of the Pac. Nw., L.L.C.*, 118 Wn. App. 144, 148, 75 P.3d 592 (2003). The burden of showing there is no issue of material fact falls upon the party moving for summary judgment. *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997).

The appellate court may uphold a grant of summary judgment on "any theory established by the pleadings and supported by the proof, even if the trial court did not consider it." *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989), citing *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984). Here, the Court may affirm the grants of summary judgment in favor of the Caudill Investors based on any argued by the Caudill Investors below.

B. The Trial Court Did Not Err in Dismissing Appellant's Raun Causes of Action for Unlawful Eviction, Violation of RCW 59.18.290, Continuing Trespass, Violation of RCW 4.24.630 or Conversion.

On February 4, 2014 the trial court entered an 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. (CP 326-30). The trial court dismissed with prejudice Plaintiff Raun's causes of action for: unlawful eviction, violation of RCW 59.18.290, continuing trespass, violation of RCW 4.24.630, and conversion. (CP 326-30).

A complaint must be dismissed if it fails to state a claim upon which relief may be granted. CR 12(b)(6). Dismissal of a complaint is appropriate where, presuming plaintiff's allegations are true and

drawing reasonable inferences in the plaintiff's favor, "the complaint alleges no facts that would justify recovery." *Gorman v. City of Woodinville*, 175 Wn.2d 68, 71, 283 P.3d 1082 (2012).

The Plaintiff mainly premises her real property claims on the general theory of unlawful eviction by a secured lender. (CP 4-19). These real property claims are without merit because the trustee's sale of real property, which included Unit 2506, occurred more than a year after Plaintiff Raun voluntarily vacated Unit 2506, during the time that Plaintiff Raun exercised her right to occupy the subject property, and prior to purchasing the subject property, the Defendants were not owners of the subject property. (CP 9-14). Furthermore, Plaintiff Raun defaulted on her contractual obligations to owner Clare House Bungalow Homes, LLC.

The Defendants were a secured lender with a lien on the subject property, and pursuant to Washington law, the Defendants exercised their right to commence a non-judicial foreclosure on the subject property, and notice of the trustee sale was done in accordance with a duty imposed under Washington law. (CP 10, 145). Furthermore, the Plaintiff agreed by Stipulation to permit the trustee sale to occur by

agreeing not take any action to attempt to restrain it. (CP 11, 145).

Taking the facts in the Plaintiff's Complaint as true, and drawing all reasonable inferences in Plaintiff's favor, the trial court's grant of summary judgment regarding the Plaintiff's real property claims should be upheld.

1. Unlawful Eviction. Washington courts have recognized the tort of wrongful eviction. *See, e.g., Iverson v. Marine Bancorporation*, 86 Wn.2d 562, 546 P.2d 454 (1976). This action is consistent with Washington's disfavor of self-help eviction, as the proper method to accomplish an eviction is by unlawful detainer. *Gray v. Pierce Cnty. Hous. Auth.*, 123 Wn. App. 744, 747, 97 P.3d 26 (2004).

Appellant Raun claims that she was unlawfully evicted because her right to her bungalow was violated under the Resident Agreement. (CP 14; Appellant's Opening Brief 30). No eviction occurred and could not have occurred whether unlawful, lawful, or otherwise. Plaintiff simply moved out of her bungalow on July 1, 2010, more than one year *prior* to the date of the Trustee's sale of the subject property. (CP 12-13, 145). The Caudill Investors could not

have commenced an unlawful detainer action against Plaintiff as Plaintiff had long since abandoned and vacated Unit 2506. (CP 145). Failure to allege any facts supporting the occurrence of an actual eviction of Plaintiff by Defendant is not surprising because at all times prior to the date on which Plaintiff vacated Unit 2506, Clare House was the owner of Unit 2506, not the Defendants Caudill Investors. (CP 7-14, 146). While the Defendants Caudill Investors ultimately became owners of Clare House Bungalow Homes, they did not obtain such ownership interest until after the Trustee's sale, which occurred more than a year after Plaintiff had vacated and abandoned the subject property. (CP 13-14, 146).

Plaintiff continues to argue that she was under threat of summary eviction. (*See* Appellant's Opening Brief 30). However, even presuming Plaintiff received notices that a Trustee's sale was to occur of the subject property, the Washington State Legislature requires such notice to be given to occupants of property that will be the subject of a trustee's sale. (RCW 61.24.040; CP 146). Regardless of whether the notice appeared threatening to Plaintiff Raun, an affirmative duty existed to provide her with notice of the Trustee's

sale because she was an occupant of the Unit. (CP 146).

Plaintiff Raun has failed to plead any facts amounting to an eviction of Plaintiff by Defendants. The trial court did not err in dismissing the Plaintiff's unlawful eviction claim, and its order should upheld.

2. Violation – RCW 59.18.290

RCW § 59.18.290 provides that "[i]t shall be unlawful for the landlord to remove or exclude from the premises the tenant thereof except under a court order so authorizing."

Plaintiff asserts the same argument for this cause of action as she did for unlawful eviction (CP 15), and the Plaintiff's claim must fail for the same reasons. Plaintiff was neither "removed" nor "excluded from Unit 2506. (CP 147). Defendants had no occasion to remove or exclude the Plaintiff because the Plaintiff simply vacated and abandoned Unit 2506. (CP 12-13, 147). Furthermore, the Defendants had no authority to remove or exclude the Plaintiff because under the Resident Agreement Plaintiff had a right to occupy Unit 2506, and Clare House was the owner of Clare House Bungalow Homes, including Unit 2506, and not the Defendants. (CP 7-14, 56-

58, 174).

The Caudill Investors did not become owners of the Clare House Bungalow Homes until more than a year after Plaintiff had vacated and abandoned Unit 2506. (CP 14, 147). Therefore, Defendants Caudill Investors could not have taken any steps to remove or exclude Plaintiff from Unit 2506 until it became owners of Clare House Bungalow Homes. (CP 147).

Plaintiff Raun claims that because the Notices of Trustee Sale were issued by John P. Gleesing, at the direction of the Caudill Investors, and that the act of issuing the Notices of Trustee Sale is directly attributable to the "landlord," as used in RCW 59.18.290. (CP 207-209, 237-240, 242-246, 258-262). Defendants were not the Plaintiff's landlord. Just as a home mortgage lender would not have standing to commence an eviction proceeding under a rental agreement between the owner and tenant to which contract the lender was not in privity, neither would the Defendants Caudill Investors. (CP 319-20).

Furthermore, issuing a statutory notice of a trustee sale does not amount to an action equal to eviction as a matter of law,

particularly where, as here, Plaintiff agreed by Stipulation to permit commencement of such sale by agreeing to take no action to attempt to impede it. (CP 11, 57, 85-86, 147). Issuing the Notices of Trustee's sale to occupants was required by the Revised Code of Washington and conforming thereto is neither unlawful eviction nor a violation of RCW 59.18.290 (CP 147-148), and therefore the Plaintiff's claims must fail as a matter of law.

3. Continuing Trespass

A continuing trespass is "[a]n unprivileged *remaining on land* in another's possession" that causes "actual and substantial damage to a plaintiff's property." *Bradley v. Am. Smelting & Refining Co.*, 104 Wn.2d 677, 693, 709 P.2d 782 (1985) (emphasis added). The trespass continues until the intrusion abates. *Id.*

Plaintiff Raun claims that her right to occupy and possess Unit 2506 was interfered with because the Notices of Trustee's Sale coerced her into vacating the Unit. (CP 207-209, 237-240, 242-246, 258-262, 269). Plaintiff has not set forth any allegations that Defendants Caudill Investors have at any time entered and remained on the property possessed by the Plaintiff, nor can any reasonable

inference be drawn from the allegations made by the Plaintiff. (CP 148). Rather, the Plaintiff claims she was subject to an "unlawful removal or exclusion" from Unit 2506. (CP 15. 148). However, removal or exclusion, without a physical invasion and remaining on the real property, does not constitute continuing trespass as a matter of law. (CP 148).

4. Violation – RCW 4.24.630

RCW 4.24.630 provides as follows:

> (1) Every person who goes onto the land of another and . . . wrongfully injures personal property or improvements to real estate on the land, is liable . . . .

The Plaintiff alleges that she was caused to vacate Unit 2506 through threats of summary eviction, however the Complaint fails to set forth any allegations that Defendants have *gone onto the land of the Plaintiff* nor can any reasonable inferences be drawn there from (CP 4-19, 149), and therefore, the Plaintiff's claim must fail as a matter of law.

5. Conversion

"The tort of conversion is 'the act of willfully interfering with any *chattel*, without lawful justification, whereby any person entitled

thereto is deprived of the possession of it.'" *Kruger v. Horton*, 106 Wn.2d 738, 743,725 P.2d 417 (1986) (quoting *Judkins v. Sadler-Mac Neil*, 61 Wn.2d 1, 3, 376 P.2d 837 (1962) (emphasis added)). The Plaintiff must also prove a right to possession of the property converted. *Kruger*, 106 Wn.2d at 743,725 P.2d 417.

The Plaintiff alleges that her interest in Unit 2506 was personal property, or a chattel, and that interest arose from the Resident Agreement. (CP 18, 206, 214-224). Interference with one's right to occupy real property, without more, is not conversion as a matter of law. (CP 152). Plaintiff has failed to allege that the Defendants have interfered with any personal property to which the Plaintiff is entitled, and therefore this court should uphold the trial court's order dismissing the Plaintiff's claim.

6. Plaintiff Raun has Presented No Issue of Material Fact, Therefore Summary Judgment Appropriate.

Plaintiff's "property tort claims" were all predicated on the Plaintiff's assertion that because Defendants Caudill Investors directed Mr. Gleesing to issue the Notices of Trustee Sale that she was put under threat of summary eviction. (CP 4-19). These claims are without merit because: (1) Plaintiff vacated and abandoned Unit 2506

more than a year prior to Defendants Caudill Investors purchasing Clare House Bungalow Homes at the Trustee Sale; (2) prior to purchasing Clare House Bungalow Homes and during the time that Plaintiff exercised the right to occupy Unit 2506, Defendants simply did not own the subject property; (3) Plaintiff agreed by Stipulation to permit the trustee sale to occur by agreeing not to take any action to attempt to restrain it; and (4) any notice of trustee sale receive by Plaintiff from Defendant Mr. Gleesing was done in accordance with a duty under Washington law. (CP 144-145). Taking all the facts in the Complaint as true, and drawing all reasonable inferences in favor of the Plaintiff, the Plaintiff's claims must fail as a matter of law.

The trial court stated that the issue of whether Ms. Raun voluntarily left the property, whether she abandoned the property, or whether she was forced to leave the property did not have any merit with regard to the real property statutes. (RP 126:23-127:13). Even if this issue had some merit, it is not relevant as against the Defendants Caudill Investors for the above stated reasons, primarily because the Caudill Investors were not the owners of the subject property at the time Plaintiff Raun vacated the subject property. (CP 209-210). It is

clear that this issue is not material as it pertains to the Defendants, and therefore the trial court did not err in dismissing the Plaintiff's property tort claims, and summary judgment is appropriate.

C. The Trial Court Did Not Err in Dismissing Appellant's Raun Cause of Action for the Tort of Outrage

On February 7, 2014 the trial court entered an Order Granting: (1) the Caudill Investors' Motion for Summary Judgment; and (2) Defendant John P. Gleesing's Motion for Summary Judgment. (CP 1218-22). The court ordered, that pursuant to CR 56, the Caudill Investors and Defendant Gleesing established that they were entitled to a judgment as a matter of law with respect to Plaintiff Raun's cause of action for the tort of outrage. (CP 1221).

In order to prove the intentional tort of outrage, the Plaintiff must satisfy 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. Boker*, 149 Wn.2d 192, 198-99, 66 P.3d 630 (2003). A court must determine whether reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability. *Strong v. Terrell*, 147 Wn. App. 376, 385, 195 P.3d 977 (2008). Plaintiff must prove each

element for the tort of outrage for each Caudill Investor.

Under the tort of outrage conduct must be "so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975). Outrageous character does not include "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id.*, at 59.

The Plaintiff alleges that the Defendants failed to perform due diligence and make any reasonable inquiry as to the occupancy rights of the residents at Clare House Bungalow Homes prior to initiating foreclosure procedures, and that this failure resulted in serving Notices of Trustee Sale to the residents of Clare House Bungalow Homes, including Ms. Raun. (CP 17; Appellant's Opening Brief 38-39). The Plaintiff further claims that the service of the Notices of Trustee Sale involved a misuse of the legal process, and therefore amounted to extreme and outrageous conduct. (CP 17; Appellant's Opening Brief 38-39).

Plaintiff Raun's tort claims were based, in part, on the

conclusory statements made in the Declaration of Lawrence S. Eastburn, M.D. (CP 322-23, 460). After Dr. Eastburn provided his deposition testimony, the foundation for the previous conclusory statements contained in his declaration were de-bunked, if not completely undermined. (CP 403, 406-25, 460). Dr. Eastburn revealed that most of his conclusions were asserted not as a medical professional but as a Plaintiff's close personal friend. (403, 406-425, 460-61). When questioned about his prior testimony, Dr. Eastburn testified:

> Q: You next say, "I spoke to them about their situation and attempted to alleviate their concerns." Again, this was as a friend and not their physician, correct?
> A: Correct
> Q: Are you making an observation as a friend or a physician?
> A: Friend specifically

(CP 403, 419, 460-61). This material statement was omitted from Dr. Eastburn's Declaration and from Plaintiff's Response to Motion to Dismiss. (CP 167-204, 461). Dr. Eastburn's prior declaration testimony where he opined that Plaintiff's "fear and uncertainty . . . were negatively impacting [her] general well-being" was based on observations as a friend, and not as a medical professional. (CP 419,

467). His observations of Plaintiff's worries and anxieties were not based on any medical diagnosis or treatment. (CP 418, 467).

Dr. Eastburn was a former client of Plaintiff's present counsel, and Plaintiff would visit Dr. Eastburn's office not as a patient, but as a close acquaintance, in fact, Dr. Eastburn thought of Plaintiff as his mother. (CP 409, 416, 466-67). Dr. Eastburn did not provide any medical treatment to Plaintiff during 2008 and 2009 for Plaintiff's purported apprehension or concern allegedly related to Clare House. (CP 417, 467). Conclusions within Dr. Eastburn's Declaration material to Plaintiff's claims were asserted not as a medical professional, but as a Plaintiff's close personal friend. (CP 415, 419, 468).

Nothing about the Caudill Investors actions amounts to extreme and outrageous conduct. The Caudill Investors held a commercial promissory note secured by a deed of trust encumbering real property. (CP 10, 476). The Caudill Investors elected to foreclose on the subject property. (CP 10, 476). The Trustee then caused Ms. Raun to receive statutory notice, thereby allowing her adequate opportunity to protect her asserted property interest. (CP 10, 476). All

of the Defendants actions, including issuing the Notice of Trustee Sale is required by Washington's non-judicial foreclosure statutes. RCW 61.24 *et seq*.

Plaintiff's claim that serving her with Notice of Trustee Sale, pursuant to RCW 61.24 *et seq*, amounts to the intentional tort of outrage is unquestionably without merit and is clearly frivolous. (CP 477). The only intentional act that the Caudill Investors made was to initiate a non-judicial foreclosure on a deed of trust in the manner prescribed by the Washington Revised Code. (CP 477). The trial court stated service of notice does not amount to intolerable and outrageous conduct. (RP 73:19-74:11).

No evidence has been presented indicating that the Defendants intended to cause Ms. Raun emotional distress by complying with the requirements of the Washington statutes. In fact, the opposite is true, the Defendants comported with Washington law in order to allow Ms. Raun, as an occupant of the Clare House Bungalow Homes, an opportunity to protect any interest she had, and prevent any wrongful foreclosures on the subject property. (CP 476-77). Ms. Raun took advantage of this opportunity and responded to the Notice and sought

quite title, restrain trustee's sale, and other relief in Spokane County Superior Court. (CP 10-11, 1127, 1147-48, 1185-86). Ms. Raun also admitted "that there was no action that could have been taken by any one of the defendants on a personal level that could have possibly caused emotional distress." (CP 1176, 1130-31).

Equating such notice with a claim of outrage has absolutely no merit, and allowing this claim to go forward would turn the law on its head, and open the door for future claims of the tort of outrage to be brought by any occupant of foreclosed property, who has received notice of such foreclosure and trustee sale. As a matter of law, statutory notice cannot create a basis for asserting tort claims against a secured lender.

Furthermore, Plaintiff Raun's tort of outrage claim is barred by the three year statute of limitations. (CP 1127). The Plaintiff's Complaint was filed on September 27, 2012. (CP 4). As such, any factual circumstance giving rise to the Plaintiff's tort of outrage claim that occurred prior to September 27, 2009 are barred from being asserted as a basis for such tort claims. (CP 1127). Plaintiff Raun admits that her tort claims are based on incidents that occurred prior

to September 27, 2009, specifically her receipt of the Notices of Trustee's Sale. (CP 207-08, 1127-29).

Not only are Plaintiff's claims unsupported by any medical evidence, they are unsupportable as a matter of law. Defectively, Plaintiff's claims rise and fall entirely on statutory notice of an anticipated non-judicial foreclosure sale that was served by the Trustee on Plaintiff Raun. For the reasons stated above, the trial court did not err in dismissing the Appellant's cause of action for the tort of outrage.

D. The Trial Court Did Not Err in Dismissing Appellant Raun's Cause of Action for Negligent Infliction of Emotional Distress

On February 7, 2014, the trial court granted the Caudill Investors' and Defendant Gleesing's Motions for Summary Judgment, ordering that the Caudill Investors established that they were entitled to judgment as a matter of law with respect to Plaintiff Raun's cause of action for negligent infliction of emotional distress. (CP 1218-22).

A plaintiff asserting a claim of negligent infliction of emotional distress must demonstrate the following elements of a negligence

claim: "duty, breach, proximate cause, and damage or injury," and additionally must demonstrate that the emotional distress is "manifested by objective symptomology." *Hunsley v. Giard*, 87 Wn.2d 424, 433, 436, 553 P.2d 1096 (1976). The emotional distress must also be "susceptible to medical diagnosis and proved through medical evidence." *Hegel v. McMahon*, 136 Wn.2d 122, 135, 960 P.2d 424 (1998). In order to survive summary judgment on her claim of negligent infliction of emotional distress, Plaintiff Raun is required to show that the Defendants' conduct was unreasonably dangerous. *See Snyder v. Med. Serv. Corp.*, 145 Wn.2d 233, 35 P.3d 1158 (2001). (CP 1132).

The Washington Supreme Court has outlined the limitations for the scope of one's duty as follows:

> [N]egligence necessarily involves a foreseeable risk, a threatened danger of injury, and conduct unreasonable in proportion to the danger. If the defendant could not reasonably foresee any injury as the result of his act, or if his conduct was reasonable in the light of what he could anticipate, there is no negligence and no liability.

Hunsley, 87 Wn.2d at 435. (CP 469-70). While all persons are under a general tort duty to not negligently cause emotional distress to others, the scope of this duty is limited.

The Caudill Investors exercised valid contractual rights pursuant to a deed of trust and consistent with strict statutory requirements governing non-judicial foreclosure. RCW 61.24 *et seq.* (CP 470). It is unforeseeable as a matter of law that a beneficiary under a deed of trust would cause emotional distress to an occupant of property that is subject to a deed of trust merely by a trustee sending notice of a pending foreclosure sale. (CP 470). The Caudill Investors were merely enforcing their state law contract remedies pursuant to a deed of trust and in accordance with RCW 61.24 *et seq.* (CP 10, 207, 470). None of the Caudill Investors were parties to the Resident Agreement that the Plaintiff had entered into with Clare House Bungalow Homes, LLC, nor did any of the Caudill Investors have any kind of business relationship, personal relationship, or contact with Plaintiff. (CP 9, 20-32, 270).

The Caudill Investors had no relationship or contact with the Plaintiff that would give rise to a "duty." (CP 469). No duty could be breached and, as such, no damages could follow. (CP 469). Assuming a duty existed, Plaintiff cannot provide any evidence to support any relationship between the Notices of Trustee Sale and non-existent

medical evidence of physical manifestations of emotional distress. (CP 469). Furthermore, Plaintiff Raun admitted that she had absolutely no contact or communication with, or even had knowledge of, any of the Caudill Investors. (CP 1132-33, 1184).

Finally, the Plaintiff's claim of negligent infliction of emotional distress is also barred by the three year statute of limitations, based on the same reasoning above.

For the reasons stated above, the trial court did not err in dismissing Appellant Raun's cause of action for negligent infliction of emotional distress.

E. The Trial Court Did Not Err in Awarding CR 11 Sanctions Against Appellant Raun

On April 4, 2014, the trial court heard both the Caudill Investors and John P. Gleesing's Motions for Costs, Including Attorneys' Fees, Under RCW 4.84.185. (CP 1399-1401). The trial court denied both motions to the extent they were based on RCW 4.84.185; however, the trial court granted the motion brought by Mr. Gleesing for sanctions under CR 11. (RP 122:5-125:15). A presentment hearing for an Order Granting Defendant Gleesing's Motion for CR 11 violations is currently set for October 31, 2014 at

1:30 p.m. before Honorable Kathleen M. O'Connor, Spokane Superior Court.

RCW 4.84.185 provides an independent basis for a court's award of attorneys' fees to a prevailing party. *White Coral Corp. v. Geyser Giant Clam Farms, LLC*, 145 Wn. App. 862, 189 P.3d 205 (2008). The trial court had discretion under RCW 4.84.185 both to impose sanctions for frivolous litigation and to determine the amount of reasonable attorneys' fees. *Highland School Dist. No. 203 v. Racy*, 149 Wn. App. 307, 317, 202 P.3d 1024 (2009). This statute "was enacted to discourage abuse of the legal system by providing for an award of expenses and legal fees to any party forced to defend itself against meritless claims asserted for harassment, delay, nuisance, or spite." *Suarez v. Newquist*, 70 Wn. App. 827, 832, 855 P.2d 1200 (1993). The purpose of the statute is to "compensate the targets of such lawsuits for fees and expenses incurred in fighting meritless cases." *Biggs v. Vail I*, 119 Wn.2d 129, 137, 830 P.2d 350 (1992).

F. The Court of Appeals Should Award Respondents Attorneys' Fees and Costs Pursuant to RAP 18.1.

RAP 18.1 only requires that the request for attorney fees be made in the brief or motion on the merits and, if the Court states in its

opinion that fees should be awarded, an affidavit of fees and expenses must be filed no later 10 days prior to the date the case is set for oral argument. RAP 18.1(b) and (c).

RAP 18.7 requires that each paper filed in appellate court be dated and signed as required by CR 11. This provision has been held to incorporate the remedies for violations of CR 11 into the appellate rules. *Bryant v. Joseph* Tree, 119 Wn.2d 210, 829 P.2d 1099 (1992). CR 11 allows for sanctions in three situations: (1) the assertion of a factually frivolous claim or defense, (2) the assertion of a legally frivolous claim or defense, and (3) the assertion of a claim or defense for purposes of harassment of delay. RAP 18.9 provides this Court with the authority to sanction the assertion of a frivolous claim or defense and with the authority to sanction the use of the appellate rules or procedures for harassment or delay. There have been several cases imposing sanctions on appeal for violations of CR 11. *See e.g. Bryant*, 57 Wn. App. 107, 786 P. 2d 829, aff'd, 119 Wn.2d 210, 829 P.2d 1099 (1992) (imposing sanctions of attorney fees for filing in the appellate court a groundless motion to disqualify opposing counsel); *In re Lasky*, 54 Wn App. 841, 776 P.2d 695 (1989); *Lee v. The Columbian*,

Inc., 64 Wn. App. 535, 826 P.2d 217 (1992).

The foregoing discussion has established that Plaintiff Raun has continued to abuse the legal system by bringing countless factually and legally frivolous claims. Plaintiff Raun's claims were partially based on the misleading declaration of Dr. Eastburn. In addition, the Plaintiff has used the procedural process, without justification, to delay litigation in an attempt to force settlement. Based on the foregoing information, the Respondents respectfully request that this Court award Respondents attorneys' fees and costs pursuant to RAP 18.1.

V. CONCLUSION

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

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

2. Affirming 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.

3. Awarding Respondents attorney fees and costs pursuant to RAP 18.1.

DATED this 13th day of October, 2014.

CRUMB & MUNDING, P.S.

JOHN D. MUNDING, WSBA #21734
Attorney for Respondents

CERTIFICATE OF SERVICE

I, Amanda C. Scholes, hereby certify under penalty of perjury under 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 13th day of October, 2014, I caused to be served a true and correct copy of the foregoing document by causing the same to be hand delivered upon the following parties:

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Paul W. Harwood
Kirkpatrick & Startzel, P.S.
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DATED this 13th day of October, 2014.

AMANDA C. SCHOLES