No. 323668

Spokane County Cause No. 12-2-03834-6

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

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HELENE M. RAUN,
Appellant,

v.

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; JOHN P. GLEESING as Successor Trustee under the Caudill Deed of Trust,

Respondents.

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# BRIEF OF RESPONDENT JOHN P. GLEESING

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## I. INTRODUCTION

On September 27, 2012, appellant Helene M. Raun ("Raun") filed her Summons and Complaint with the Spokane County Superior Court. The Complaint asserted seven causes of action seeking damages. The causes of action included unlawful eviction, violation of RCW 59.18.290, trespass, violation of RCW 4.24.630, conversion, the tort of outrage, and negligent infliction of emotional distress. The sole basis for each of these claims is Raun's receipt of a statutorily required Notice of Trustee's Sale. The Notice was drafted by the Washington State Legislature and is codified in the Deed of Trust Act ("DTA") at RCW 61.24.040(1)(f).

When the property subject to a deed of trust foreclosure includes occupants or tenants the DTA mandates a trustee include the following language:

> X.
> NOTICE TO OCCUPANTS OR TENANTS.
>
> The purchaser at the trustee's sale is entitled to possession of the property on the 20th day following the sale, as against the grantor 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.

Raun alleges the above statutory language constituted a "threat of eviction" which deprived her of her right to possession of her home and caused

emotional distress. It is undisputed Raun was not personally served with any of the statutorily required notices identified in her Complaint. She also did not receive these notices directly from Mr. Gleesing or any other Respondent. It is further undisputed Raun has never met, spoken with, or corresponded with Mr. Gleesing.

In 2000, the Rauns purchased a bungalow at a senior residential facility owned by Clare House Bungalow Homes, LLC ("Clare House"). The rights and obligations between the Rauns and Clare House were reduced to a written contract titled "Resident Agreement." The Rauns recorded their Resident Agreement with the Spokane County Auditor's Office in 2001.

In 2004, the owner of Clare House, Mr. Harry Green, sought loans for the facilities continued operation. He utilized a loan broker by the name of Mr. Ron Webster to obtain the loans. Through Mr. Webster, Clare House obtained loans from various family trusts and other entities, which are collectively referred to as Respondents Caudill Group. The Clare House loans were secured by a Deed of Trust on Clare House property in favor of the Caudill Group. The Deed of Trust was executed by Mr. Green on behalf of Clare House on November 24, 2004.

Respondent John P. Gleesing has been a licensed Washington State attorney for over 37 years. The primary focus of his practice is real estate closings. In 2004 he was hired by the Caudill Group to act as the closing

attorney for the loans entered into between Clare House and the Caudill Group. As part of the closing transaction, Mr. Gleesing obtained a policy of title insurance from First American Title Insurance Company, dated November 24, 2004. Neither Raun's Resident Agreement, nor any other resident agreement, was identified in the title policy. Mr. Gleesing was never advised by the loan broker or Mr. Green of the existence of the Raun's Resident Agreement. Mr. Webster notified Mr. Gleesing that the Clare House occupants were "renters" and that an Assignment of Rents would be needed for the closing. Mr. Green signed the prepared Assignment of Rents on behalf of Clare House.

The Deed of Trust securing the Clare House loans appointed Mr. Gleesing as the Trustee. The Deed of Trust imposed certain obligations on Mr. Gleesing in his capacity as Trustee. The parties mutually agreed that if Clare House defaulted on its loan obligations, the "trustee shall sell the trust property, in accordance with the Deed of Trust Act in the State of Washington, at public auction to the highest bidder."

In the spring of 2008, Mr. Gleesing was contacted by a representative of the Caudill Group and notified Clare House was in default on the loans. Mr. Gleesing was instructed to commence a nonjudicial foreclosure via a Trustee's Sale as allowed by the Deed of Trust and Washington's Deed of Trust Act.

Following the directive to begin foreclosure proceedings, Mr. Gleesing contacted Allegro Escrow, which was the company holding the loan documents and administering the payments on the loans, to verify Clare House's default had not been cured. The loans continued to be in default. Mr. Gleesing purchased a Trustee's Sale Guarantee from First American Title Company prior to recording the Notice of Trustee's Sale. The Trustee's Sale Guarantee identified the Deed of Trust, Assignment of Rents, and all other documents which were recorded regarding the loans. The Trustee's Sale Guarantee did not identify the existence of Raun's recorded Resident Agreement or any other resident agreement.

Prior to recording the Notice of Trustee's Sale, Mr. Gleesing obtained an updated payoff quote from Allegro Escrow Services. The quote confirmed Clare House continued to be in default on the loans. Following the recording of the Notice of Trustee's Sale on July 15, 2008, First American Title issued an endorsement reflecting the notice and confirmed "No matters are shown by the public records which would affect the assurances" in the Trustee's Sale Guarantee. Additional Amended Trustee's Sale Guarantees and Endorsements were made by First American Title throughout the remainder of 2008 through the time the property ultimately being sold at public auction in 2011. None of these guarantees or endorsements identified the existence of a recorded resident agreement.

As required by the Washington State Deed of Trust Act ("DTA"), Mr. Gleesing mailed the Notice of Trustee's Sale and other statutorily required documents to the occupants collectively at the Clare House business address as follows:

Occupant:
4827 Palouse Highway
Spokane, WA 99223

Following the recording of the Notice of Trustee's Sale, the residents of Clare House formed Clare House Bungalows Residents Association to pool their resources. The Association hired attorney Mr. John Zeimantz to collectively represent them. Raun received all notices identified in her Complaint in the following manner: The Association's attorney, Mr. Zeimantz, e-mailed or faxed them to another member of the Association by the name of Mrs. Snyder. Mrs. Snyder in turn individually mailed the Notices to the Rauns and other residents.

In June of 2010, Raun, at the encouragement of her adult son, decided to move from her bungalow unit of Clare House. Raun's adult son had found her another home which she could afford to purchase. She was concerned about the various competing interests of the members of the Association, and she was concerned about the pending litigation and a potential eviction. Raun chose not to consult with her attorney, Mr. Zeimantz, or any member of the Association, regarding her decision to purchase a new home and move

from Clare House in June of 2010. Raun "took the chance that I was making the right decision" to move.

It is undisputed an unlawful detainer action was never commenced against Raun, or any other Clare House resident. There was no request for her to vacate her bungalow by Mr. Gleesing or any other Respondent.

Raun's argument for liability against Mr. Gleesing on her seven causes of action can be reduced to two issues: (1) Whether Mr. Gleesing had a duty to perform an investigation as to Raun's rights of occupancy and failed to do so; and (2) whether her receipt of the Notice of Trustee's Sale and other notices required by the DTA constitute a "threat" of eviction proximately causing Raun her emotional distress. The trial court properly held Mr. Gleesing's duties were limited to those contained in the Deed of Trust and the DTA. Raun has never alleged Mr. Gleesing breached either his fiduciary duties or violated the DTA. Further, Mr. Gleesing could justifiably rely upon the title policies and Trustee Sale Guarantees in determining the necessary parties to send the statutorily required notices to. As a matter of law, Mr. Gleesing performing his duties as a trustee under the DTA can not support any of the asserted causes of action.

The trial court also properly found Raun and her counsel of record violated CR 11. Raun's claims against Mr. Gleesing were not well grounded in fact and were not supported by existing law. There was no argument to

modify or change existing law. A reasonable attorney in like circumstances would have known, or should have known, that Mr. Gleesing, in his capacity as the Deed of Trust Trustee, issuing notices as required by the DTA, could not constitute a factual or legal basis to bring the causes of action which were asserted against him. The court correctly held Raun and her counsel violated CR 11.[1]

## II. ASSIGNMENTS OF ERROR

Raun identifies the following 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 Raun had voluntarily vacated her resident and thereby had no interest left to claim in her bungalow.

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

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[1] A determination of an appropriate sanction for Raun's and her counsel's CR 11 violation is scheduled to be heard before the trial court on October 31, 2014.

3. The trial court erred in dismissing 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 Trustee.

4. The trial court erred in dismissing 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.

## III. STATEMENT OF THE CASE

Mr. Gleesing provides the following supplemental statement of the case:

Clare House is a retirement community located in Spokane County. Its property consists of six buildings containing 28 separate single-family attached residences marketed as bungalows. CP 8. Before retiring in the mid-1980s, Mrs. Raun was a licensed realtor and associate broker in the State of New Jersey. She was also a licensed realtor in the State of Washington. CP 994, 1070-1071. Mrs. Raun's husband, Chester Raun, Ph.D., had retired from being a professor and department director at Temple University. CP 994, 1066. In August of 2000, the Rauns purchased bungalow unit 2506 at Clare House. CP 9. The rights and obligations of both the Rauns and Clare

House were contained in a contract titled "Resident Agreement." CP 9, 20-32. On or about December 20, 2001, the Rauns recorded the Resident Agreement with the Spokane County Auditor's Office.

Mr. Gleesing is a Washington State attorney who has been practicing for over 37 years. CP 553. The primary focus of his practice is real estate closings. *Id.*

In 2004, Clare House's owner and manager, Mr. Harry Green, sought to obtain loans. Mr. Green utilized the services of a loan broker by the name of Ron Webster to locate an entity or individuals who would be willing to make the needed loans. CP 801-803, 991. It was Mr. Webster who brought Mr. Green, on behalf of Clare House, and the Caudill Group together. Mr. Gleesing was hired by the Caudill Group to act as their closing attorney on the loans. CP 825, 990. As the closing attorney, Mr. Gleesing did not have any input regarding the nature of the loans or the value of the property to secure the loans. CP 991, 1117. Mr. Gleesing's representation of the Caudill Group did not include a duty to perform an investigation as to the nature of the transaction between the Caudill Group, Harry Green, and Clare House. *Id.*; CP 822-823. As the loan facilitator, Mr. Webster provided the terms of the loan and other material facts to Mr. Gleesing so that he, in turn, could draft the necessary legal documents to close the transactions. CP 824, 825, 991, 1114. Mr. Webster notified Mr. Gleesing the bungalow occupants were

"renters" and an Assignment of Rents would be needed for the closing. Mr. Green signed the prepared Assignment of Rents. *Id.* At no time did Mr. Webster or Mr. Green, or any other party, advise Mr. Gleesing of the existence of Raun's recorded Resident Agreement. CP 824, 825, 991, 1116.

In preparation of the closing transaction, Mr. Gleesing purchased a policy of title insurance from First American Title Insurance Company dated November 24, 2004. CP 991, 1012-1024. The Rauns' Resident Agreement was not identified in the title policy. *Id.* The first time Mr. Gleesing was made aware of the Rauns' recorded Resident Agreement was when he was served with Rauns' Summons and Complaint in 2012. CP 992, 1116.

The loans issued by the Caudill Group to Clare House were secured by a Deed of Trust. CP 553, 558-562. Mr. Gleesing was named as the trustee of the Deed of Trust. CP 558. Clare House and the Caudill Group mutually agreed that if Clare House defaulted on its loan obligations, then

> Trustee shall sell the trust property, in accordance with the Deed of Trust Act in the State of Washington, at public auction to the highest bidder.

CP 553, 560.

In the spring of 2008, Mr. Gleesing was contacted by a member of the Caudill Group advising him Clare House had defaulted on the Promissory Note and loan obligations. Mr. Gleesing was instructed to foreclose on the Deed of Trust. CP 855, 992. Prior to beginning foreclosure proceedings as

instructed, Mr. Gleesing contacted Allegro Escrow, the company holding the loan documents and administering the payments on the loans, to verify Clare House was in default and the delinquencies had not been cured. Allegro confirmed the loans continued to be in default. CP 992, 1026, 1118. On May 23, 2008, and in compliance with the DTA, a written Notice of Default and other required notices were mailed to Clare House's business address. CP 553, 564-568.

On July 3, 2008, Mr. Gleesing purchased a Trustee's Sale Guarantee from First American Title Company prior to recording the Notice of Trustee's Sale. CP 992, 1028-1036. First American Title describes the purpose of a Trustee's Sale Guarantee ("TSG") as follows:

> The TSG assures the following crucial information necessary to execute a valid foreclosure: The current owner of record vesting, judgments, liens and encumbrances, priority of foreclosing mortgage, bankruptcy case information, property tax information, parties required by law to be notified of foreclosure, property address verification, and newspaper entities for publication.

CP 1000.

The Trustee's Sale Guarantee did not identify the Rauns' Resident Agreement, or any other resident agreement. *Id.* Prior to recording the initial Notice of Trustee's Sale as required by the DTA, Mr. Gleesing requested and obtained an updated payoff quote from Allegro Escrow Services. The quote confirmed Clare House continued to be in default on the loans. CP 993,

1038. Following recording the Notice of Trustee's Sale on July 15, 2008, First American Title issued an endorsement identifying the Notice and confirmed, "No matters are showing by the public records which would affect the assurances" in the Trustee's Sale Guarantee. CP 993, 1040-1044. First American Title issued an Amended Trustee's Sale Guarantee on October 27, 2008, as well as four separate endorsements in 2009 assuring its prior representations in the issued policies. None of these documents identified the existence of Raun's Resident Agreement or the resident agreement of any other occupant. CP 993, 1046-1064.

As required by the DTA, Notices of Trustees' Sales and other statutorily required documents were only mailed to the occupants collectively at the Clare House business address. At no time did Mr. Gleesing individually serve the Rauns, or mail to the Rauns' individual bungalow, a Notice of Trustee's Sale or other statutorily required notices. CP 993-994.

Prior to the scheduled Trustee's Sale occurring on November 7, 2008, Clare House filed suit in Spokane County to restrain the sale. CP 554. A number of Clare House bungalow residents, which included the Rauns, formed the Clare House Bungalow Homes Residents Association ("the Association") to pool their resources and retained an attorney to collectively represent them. *Id.* The Association retained attorney John Zeimantz. *Id.*

Raun confirmed she never received the Notice of Trustee's Sale, or any other statutory notice which forms the basis of her causes of action, directly from Mr. Gleesing. Raun received all notices identified in her Complaint in the following manner: The Association's attorney e-mailed or faxed them to another member of the Association by the name of Mrs. Snyder. Mrs. Snyder, in turn, individually mailed the notices to the Rauns and other residents. CP 994, 1089-1090, 1092, 1095.

On February 3, 2009, the Association filed a quiet title action in Spokane County to determine the Association's legal rights to the property at issue. On July 6, 2009, Mr. Gleesing issued an Amended Notice of Trustee's Sale as allowed by the state court action. *Id.* On August 4, 2009, the Association, the Caudill Group, and Mr. Gleesing entered into a stipulation to allow the Trustee's Sale, which had been set for August 21, 2009, to go forward. CP 554, 994. On August 20, 2009, Clare House filed for Chapter 11 bankruptcy. As a result of the automatic bankruptcy stay, the pending Trustee's Sale was continued.

In June of 2010, Raun, at the encouragement of her adult son, decided to move from her bungalow unit at Clare House. CP 995, 1080, 1085-1086, 1092. Raun's decision to move from Clare House included her son finding her another home which she could afford to purchase; she was concerned about the various competing interests of the members of the Association; and

she was concerned about the pending litigation and a potential eviction. *Id.* She chose not to consult with her attorney, Mr. Zeimantz, or any other member of the Association, regarding her decision to purchase a new home and move from Clare House. In Raun's own words, she "took the chance that I was making the right decision" to move. CP 995, 1080.

On March 11, 2011, the Honorable Patricia C. Williams of the Bankruptcy Court of the Eastern District of Washington, entered a Memorandum Decision in the adversary proceeding which, in part, held that Raun and other bungalow residents had a superior right to occupancy. CP 289-290. Judge Williams' Memorandum Decision held, in part, as follows:

> The Caudill Group obtained a title report on the property, which revealed the two recorded Residents Agreements . . .
>
> [The Caudill Group] had actual notice of the occupancy of the bungalows by residents. [The Caudill Group] had a duty to make a 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 the rights in real property.

*Id.* Judge Williams' reliance on a title report revealing the existence of the recorded Resident Agreements was in error. No such title policy is known to exist. Throughout the pending litigation, Raun has never produced a title policy, or any other document, which would have put Mr. Gleesing on notice

of the existence of Raun's recorded Resident Agreement. RP 117:14-25, 118, 119:1-16. The loan broker, Mr. Webster, represented the occupants were "renters", hence the need for an Assignment of Rents. Mr. Green, on behalf of Clare House, executed the Assignment of Rents without objection as part of the November 24, 2004 loan closing. CP 824-825, 991, 1114.

Raun filed her Complaint on September 27, 2012. On November 14, 2012, the Caudill Group and Mr. Gleesing filed a Motion to Dismiss for Failure to State a Claim upon Which Relief May Be Granted. CP 153-156. The court entered an Order on February 4, 2013, which granted the motion in part and denied it in part. CP 326-330. The court dismissed those causes of action which the judge described as "property tort claims" which included unlawful eviction, violation of RCW 59.18.290, continuing trespass, violation of RCW 4.24.630; and conversion. The court allowed the causes of action on the tort of outrage and negligent infliction of emotional distress to go forward. *Id.*

On November 7, 2013, the Caudill Group and Mr. Gleesing filed separate motions for summary judgment on the two surviving claims. CP 398-401; 482-484. The hearing on the motions occurred on January 10, 2014. After hearing arguments of counsel, the court granted the motions. The Order granting the motions was entered on February 7, 2014. CP 1218-1222.

On March 5, 2014, the Caudill Group filed their Motion for Costs, Including 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 4.84.185. CP 1300-1301. Both motions were heard before the court 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. The court granted the motion by Mr. Gleesing finding Raun and her attorneys of record violated CR 11. RP 122:5-125:15.

## IV. ARGUMENT

Raun's stated five Assignments of Error may be further reduced to the following two issues: (1) Whether Mr. Gleesing had a duty to perform an investigation as to Raun's rights of occupancy and failed to do so; and (2) whether her receipt of the Notice of Trustee's Sale and other notices required by the DTA constitute a "threat" of eviction proximately causing Raun her emotional distress. The record on review establishes the trial court properly ruled Mr. Gleesing did not breach any duty owed as the Deed of Trust Trustee and the statutory notices at issue do not constitute a "threat" as a matter of law.

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## A. The Standard of Review on the Motion to Dismiss and Motions for Summary Judgement is *De Novo*.

A CR 12(b)(6) motion to dismiss is treated as a motion for summary judgment when "matters outside the pleadings are presented to and not excluded by the court." CR 12 (b). An order granting a motion for summary judgment is reviewed *de novo*. *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). The Appellate Court undertakes the same inquiry as the trial court, viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Id.; Thompson v. Peninsula School Dist.*, 77 Wn.App. 500, 504, 893 P.2d 760 (1995). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.;* CR 56(c).

The nonmoving party must set forth specific facts that rebut the moving party's contentions and disclose genuine issues of material fact. *Twelker v. Shannon & Wilson, Inc.*, 88 Wn.2d 473, 479, 564 P.2d 1131 (1977); CR 56(e). A nonmoving party may not rely on "conclusory allegations, speculative statements, or argumentative assertions" to prevent summary judgment as they are insufficient to raise an issue of fact. *Walker v. King County Metro*, 126 Wn.App. 904, 912, 109 P.3d 836 (2005).

## B. The Standard of Review for a CR 11 Violation is an abuse of discretion.

The standard of appellate review for a CR 11 violation is an abuse of discretion. *Biggs v. Vale*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994) citing *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338-39, 858 P.2d 1054 (1993). An abuse of discretion occurs when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons. *MacDonald v. Korum Ford*, 80 Wn.App. 877, 884, 912 P.2d 1052, 1057 (1996) (citations omitted).

## C. The Trial Court Properly Ruled Raun's Seven Causes of Action Must be Dismissed as a Matter of Law as Mr. Gleesing only had a duty to Comply with the Obligations Set Forth in the Deed of Trust and the Deed of Trust Act.

Raun erroneously argues Mr. Gleesing had a duty to conduct some form of investigation to determine the existence of Raun's occupancy rights, or the existence of her Resident Agreement, prior to issuing the Notice of Trustee's Sale. App. Brief, at pp. 25-26. Raun fails to provide any factual basis or on point legal authority to support her argument. She also fails to articulate what additional investigation or inquiry Mr. Gleesing should have made. Any duty owed by Mr. Gleesing in his capacity as trustee is limited exclusively to the instructions in the Deed of Trust and the DTA.

### 1. The Trustee in a Nonjudicial Foreclosure Only Owes an Occupant or Tenant a Duty to Comply with the DTA.

A deed of trust is a form of a three-party mortgage, involving not only a lender and a borrower, but also a third party called a trustee. *Vawter v. Quality Loan Service Corp. of Wash.*, 707 F.Supp.2d 1115, 1121 (W.D. Wa 2010). When enacting the DTA, the Washington Legislature sought to promote the following three primary goals:

(1) That the nonjudicial foreclosure process should be efficient and inexpensive;

(2) That the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure; and

(3) That the process should promote stability of land titles.

*Id.* (citations omitted).

Once a default on a secured obligation occurs, and the beneficiary notifies the trustee of the default, then the trustee must initiate the nonjudicial foreclosure process by giving written notice of default to the borrower and grantor. RCW 61.24.030(8). A notice of default issued by the trustee must contain specific language which provides notice not only to the grantor of the deed of trust, but also to any occupants or tenants who may be residing on the property subject to the deed of trust. RCW 61.24.040.

Upon receipt of the statutory notice of trustee's sale, the DTA permits the borrower or grantor, as well as occupants or tenants, to restrain a trustee's

sale by court action "on any proper legal or equitable ground." RCW 61.24.130(1).

The trustee does not have a duty to advise either the grantor or purchasers of a sale as to their legal duties or about the condition of title. *McPherson v. Purdue*, 21 Wn.App. 450, 585 P.2d 830 (1978) (trustee has no duty to purchaser to disclose condition of title). The trustee's primary duty is to conduct the trustee's sale according to the DTA. Even if nonprejudicial lapses occur in the statutory procedures, such lapses will not make the sale automatically voidable. *Koegel v. Prudential Mut. Savings Bank*, 51 Wn.App. 108, 752 P.2d 385 (1988).

In the case at bar, Raun does not make <u>any</u> allegation that Mr. Gleesing violated the DTA. The very fact Raun received the statutory notices is clear and convincing proof Mr. Gleesing was compliant with the DTA and those duties imposed upon him by the Deed of Trust.

**2. <u>Raun Provides No Legal Authority To Support the Allegation Mr. Gleesing Owed Her a Duty to Investigate her Occupancy Rights</u>.**

It is undisputed Harry Green and Clare House had defaulted on the loans secured by the Deed of Trust at issue. CP 992, 1026, 1118. It is also undisputed Mr. Gleesing, as the trustee, was instructed to commence the foreclosure action by the Deed of Trust beneficiaries. CP 855, 992. Once a default on a secured obligation occurs, and the beneficiary notifies the trustee

of the default, the trustee must initiate the nonjudicial foreclosure process by giving written Notice of Default to the borrower and grantor. RCW 61.24.030(8). The statutorily required Notice of Trustee's Sale must contain specific language which provides notice not only to the grantor of the deed of trust, but also to any occupants or tenants who may be residing on the property subject to the deed of trust. RCW 61.24.040; 61.24.060.

Raun quotes from a 1908 case and a 1928 case as her sole legal support that Mr. Gleesing had a duty to inquire as to Raun's property rights. App. Brief at 26, citing *Peterson v. Weist*, 48 Wash. 339, 341, 93 P. 519 (1908); *Oliver v. McEachran*, 149 Wash. 433, 439; 271 P. 93 (1928). The quoted cases are not applicable to the facts at bar. Both the *Peterson* and *Oliver* cases specifically limit their respective decisions to "the purchaser" of real property having a duty to investigate title. A "purchaser" at a trustee's sale who fails to investigate title does so at their own risk. See *McPherson*, 21 Wn.App. at 453, 585 P.2d at 831 (1978). The holdings of these two cases are consistent with *McPherson* which held a trustee at a trustee's sale has no duty to advise a purchaser of the condition of title. *Id.*

In the case at bar, there is no allegation Mr. Gleesing violated the DTA. There is no allegation Mr. Gleesing breached his fiduciary duties as trustee. It is undisputed the Notices received by Plaintiff were mandated by the DTA and contained specific language required by the State Legislature.

Most importantly, it is undisputed Harry Green and Clare House were in default as to the loans secured by the Deed of Trust to the Clare House property. All notices issued by Mr. Gleesing as trustee were legally and lawfully sent.

### 3. Mr. Gleesing Reasonably Relied Upon the Policies of Title Insurance and Representations of the Loan Broker in Determining Encumbrances as to the Clare House Property.

Even if the court were to find some duty of investigation was required by Mr. Gleesing, reasonable minds cannot differ that he could not do more than what he had done to identify potentially interested parties and encumbrances to the property at issue.

At the time the initial loans and Deed of Trust were closed by Mr. Gleesing, he reasonably relied on the loan broker, Ron Webster, that the occupants were "renters." CP 824, 825, 991, 1114. Mr. Webster directed an Assignment of Rents to be drafted. The Assignment of Rents was agreed to and signed by Mr. Green on behalf of Clare House. *Id.* At the time the loans were closed, a policy of title insurance was issued by First American Title Insurance Company on November 24, 2004. The purpose of obtaining a policy of title insurance is to determine potential interested parties and/or encumbrances to the property at issue. The policy did not identify the Raun's

recorded Resident Agreement or the existence of any other resident agreement. CP 1012-1024.

In May of 2008, when Mr. Gleesing was directed to commence a foreclosure action he contacted Allegro Escrow to confirm the loans were in fact in default. Allegro confirmed the loans were in default. CP 1026.

Mr. Gleesing then issued the Notice of Default and other statutorily required notices pursuant to his duty as the trustee and per the DTA. Prior to recording the Notice of Trustee's Sale as required by the DTA, Mr. Gleesing contacted Allegro Escrow a second time to confirm Clare House had not cured the default on the loans. CP 993, 1038. Allegro Escrow confirmed the loans continued to be in default pursuant to a July 11, 2008, payoff quote provided to Mr. Gleesing. *Id.*

Prior to recording the Notice of Trustee's Sale, Mr. Gleesing obtained a Trustee's Sale Guarantee Policy from First American Title Insurance Company dated July 3, 2008. CP 1028-1036. First American Title describes the purpose of a Trustee's Sale Guarantee ("TSG") as follows:

> The TSG assures the following crucial information necessary to execute a valid foreclosure: The current owner of record vesting, judgments, **liens and encumbrances**, priority of foreclosing mortgage, bankruptcy case information, property tax information, **parties required by law to be notified of foreclosure**, property address verification, and newspaper entities for publication.

CP 1063, Emphasis added.

The TSG did not identify the existence of Raun's Resident Agreement, or any other resident agreement. CP 1028-1036.

An Amended Trustee's Sale Guarantee was issued on October 27, 2008. Again, a recorded Resident Agreement was not identified. CP 1046-1055. First American Title issued subsequent assurances to Mr. Gleesing throughout the year of 2009. CP 1056-1061. At no time did Raun's recorded Resident Agreement, or any other resident agreement, appear in the reports.

Raun's argument Mr. Gleesing had a duty of inquiry or investigation almost exclusively relies upon Judge Williams' March 11, 2011, Memorandum Decision. App. Brief at 21, 25-26. Judge Williams found the "Caudill Group obtained a title report on the property, which revealed the two recorded Resident Agreements...." App. Brief at p. 13; CP 289. It is unknown what title report, or other evidence, Judge Williams is referring to. More importantly, Raun does not provide such a report to support her claims. As set forth in the 2004 Policy of Title Insurance, the 2008 Trustee's Sale Guarantee and subsequent Endorsements, the existence of Plaintiff's recorded Resident Agreement was never disclosed to Mr. Gleesing.

The evidence is clear Mr. Gleesing acted reasonably in determining interested parties and encumbrances to the Clare House property. At no time was Mr. Gleesing provided actual or constructive notice that Raun was anything other than a renter at Clare House. Raun has provided no

explanation as to what additional "investigation" Mr. Gleesing should have conducted. More importantly, Raun has failed to provide any legal authority Mr. Gleesing owed an individual duty to her or acted in any manner inconsistent with the DTA.

**D. The Trial Court Properly Ruled the DTA Statutory Notices at Issue Cannot Constitute a "Threat" of Eviction as a Matter of Law.**

Raun alleges she was forced to move from her Clare House bungalow due to constant "threats" of eviction. App. Brief at p. 28. These alleged "threats" are solely derived from the statutory language required to be included in the Notices of Trustee's Sales and subsequent Amended Notices by the DTA. RCW 61.24.040; RCW 61.24.060. The specific language at issue is as follows:

> X.
> NOTICE TO OCCUPANTS OR TENANTS.
>
> The purchaser at the trustee's sale is entitled to possession of the property on the 20th day following the sale, as against the grantor 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.

RCW 61.24.040(1)(f).

Plaintiff's allegation the above language constituted a "threat" is a gross misinterpretation of the statutory language. As appropriately titled by the

State Legislature, the above clause was a "Notice," not a threat. The Notice advises any occupant or tenant that a purchaser at the trustee's sale has the **option** to evict occupants and tenants under the State's Unlawful Detainer Act. It should also be noted that a purchaser at a trustee's sale only has a right to pursue eviction against "anyone having an interest junior to the deed of trust." Judge Williams found Raun's right to occupancy was superior to the interests of the Caudill Group. CP 290.

The Rauns were not unsophisticated individuals. Mrs. Raun was a licensed realtor and associate broker in the State of New Jersey. She was also a licensed realtor in the State of Washington prior to her retirement. By her own account, she oversaw the development and sale of over 200 homes and condominiums. CP 1071 at 10:1-8. Chester Raun, Ph.D., was a retired University professor. Most importantly, Raun testified all of the statutory notices identified in her Complaint were received through the filter of her and the Association's attorney, Mr. Zeimantz. Raun relied upon the advice of her attorney to allow her to "feel a little bit more secure than we would have if we hadn't had any representation." CP 1078 at 39:25, 40:1-3. The statutory notices issued by Mr. Gleesing, and received by Raun from her own attorney and through another Association member, did no more and no less than provide her due process and the opportunity to have her interest determined by the court. Notice and the opportunity to be heard is the purpose of the

DTA's requirement in providing "notice" to occupants and tenants of a pending foreclosure. It is unknown how the statutory language can be misconstrued as a "threat" of eviction directed against her.

It is undisputed Raun was not evicted. There is no evidence any Clare House occupant was evicted as a specific result of the Trustee's Sale.

### 1. Receipt of Notice of Trustee's Sale Does Not Constitute the Basis for an Unlawful Eviction and/or Violation of RCW 59.18.290 as a Matter of Law.

It is undisputed Mr. Gleesing never instituted an unlawful detainer action as allowed under RCW 59.12. The statutory notice Raun alleges constitutes her "threat" of eviction was nothing more than notice. The Notice to Occupants or Tenants begins with "**The purchaser at the trustee's sale is entitled to possession of the property on the 20th day following the sale**...." It is unfathomable how Raun, as a licensed realtor in the State of Washington, can misconstrue the Notice as a threat. Ironically, Raun, through her attorney, Mr. Zeimantz, in August of 2009, stipulated to allow the Trustee's Sale to go forward. In June of 2010, Raun sent a letter to Harry Green of Clare House, informing him that pursuant to the pending litigation she has voluntarily decided to move out. There was never a request for her to vacate her bungalow.

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### 2. The Issuance of a Notice of Trustee's Sale Cannot Support Claims of Continuing Trespass or Violation of RCW 4.24.630 as a Matter of Law.

Raun correctly identifies the four elements that constitute the tort of trespass. (App. Brief at 31). Other than issuing the statutory Notice of Trustee's Sale as required by the DTA, there was no other act taken by Mr. Gleesing. None of the elements of trespass are supported by the evidence or the law in this case. The Notice of Trustee's Sale specifically references a potential of an unlawful detainer action being filed after a subsequent event occurs, namely the purchaser at the trustee's sale decides to institute that right on the 21st day after the purchase. A foreclosure sale did not occur until September 30, 2011. CP 554. Raun, for a variety of reasons, chose to vacate her bungalow as of July 1, 2010. It is assumed she left with all of her personal possessions. The issuance of a statutory Notice of Trustee's Sale cannot be the foundation for the tort of trespass.

### 3. The Issuance of a Notice of Trustee's Sale Does Not Violate RCW 4.24.630 as a Matter of Law.

The assertion of a violation of RCW 4.24.630 is frivolous. It is not supported by any reasonable interpretation of the facts of this case or the law of the State of Washington. As set forth in the Appellate Brief, a violation of the statute requires that a person intentionally or unreasonably

> ... 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, and is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury.

RCW 4.24.630; Appellate Brief at 32.

Raun appears to completely ignore the clear language of the statute and its application to the facts of this case. There is no allegation Mr. Gleesing entered upon the land much less wrongfully caused waste or injury to the land itself, Raun's personal property, or the improvements thereon. It is an undisputed fact that Raun vacated her bungalow by July 1, 2010. Had she waited for the Adversary Proceeding to be concluded, she would have enjoyed her continued right of occupancy.

**4. <u>The Act of a Trustee Mailing a Statutorily Required Notice Cannot Be Construed as Outrageous Conduct as a Matter of Law</u>.**

A plaintiff asserting a claim for outrage bears the burden of proving the following elements by a preponderance of the evidence: "(1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress." *Rice v. Janovich*, 109 Wn.2d 48, 61, 742 P .2d 1230 (1987).

The first element requires proof the conduct was "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." *Robel v. Roundup Corp.*, 148 Wn.2d 35, 51, 59 P.3d 611, 619

(2002), quoting *Dicomes v. State*, 113 Wn.2d 612, 782 P.2d 1002, 112 (1989). The second element requires Plaintiff prove the emotional distress complained of was inflicted intentionally or recklessly. Negligence, bad faith or malice is not enough to prove an outrage claim. *Dicomes,* 113 Wn.2d 612, 782 P.2d 1002 (1989); *Grimsby v. Samson*, 85 Wn.2d 52, 530 P.2d 291 (1975); Restatement (Second) of Torts § 46, comment d.

The trial court acts as a gatekeeper to prevent unsupported outrage claims from being presented to the finder of fact. *Robel,* 148 Wn.2d at 51, 59 P.3d at 619 (2002). The court is required to make an initial determination as to whether the alleged conduct may reasonably be regarded as "so extreme and outrageous" as to warrant a factual determination by the jury. *Strong v. Terrell*, 147 Wn. App. 376, 385, 195 P.3d 977, 982 ( 2008), rev. den'd, 165 Wn.2d 1051, 208 P.3d 555 (2009) (trial court properly dismissed outrage claim where plaintiff failed to show that defendant's conduct exceeded all bounds of decency); *Jackson v. Peoples Fed. Credit Union*, 25 Wn. App. 81, 84, 604 P.2d 1025 (1979) (citing Restatement (Second) of Torts § 46, cmt. h). Summary judgment is proper if the court determines no reasonable person would regard the conduct in question as extreme and outrageous. *Strong*, 147 Wn.App. at 385-387; *Keates v. City of Vancouver*, 73 Wn. App. 257, 263-64, 869 P.2d 88.

Washington courts have declined to sustain outrage claims against defendants for lawfully exercising legal rights to collect debts. *Jackson*, 25 Wn. App. at 85-87, 604 P.2d at 1028. The *Jackson* court held "[O]ne is not liable for knowingly causing emotional distress where all he does is to insist on his legal rights in a permissible way." *Jackson*, 25 Wn. App. at 88, 604 P.2d at 1030 (citing Restatement (Second) of Torts, § 46, comment g).

In the case at bar, Raun's only allegation of emotional distress against Mr. Gleesing arises from receiving statutory notices he was mandated to provide per the Washington State Deed of Trust Act ("DTA"). It is undisputed Mr. Gleesing was acting in the course and scope of his duties as trustee in mailing the statutory notices referenced in Raun's Complaint. Issuing DTA notices which were written and mandated by the State Legislature simply does not "*go beyond all possible bounds of decency*" and cannot be regarded as "*atrocious and utterly intolerable in a civilized community.*" *Dicomes*, 113 Wn.2d at 130, 782 P.2d at 1012-13. Raun cannot meet her burden as to the first element of an outrage claim.

Raun also cannot satisfy the second element of outrage. There is **no** evidence Mr. Gleesing sought to intentionally or recklessly cause emotional distress to Raun. *Id.* Raun cannot satisfy the third element of outrage. She has not produced evidence she suffered "**severe** emotional distress" as a

direct and proximate cause of receiving the statutory notices. *Rice*, 109 Wn.2d at 61-62, 742 P.2d at 1238 (emphasis added.)

Summary judgment is appropriate where the plaintiff fails to establish any element essential to her cause of action. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Such failure renders all other facts immaterial. *Id.* The trial court properly dismissed the claim as a matter of law.

### 5. Mr. Gleesing Mailing Statutory Notices to Raun Cannot Sustain a Claim for Negligent Infliction of Emotional Distress as a Matter of Law.

A claim for NIED requires the plaintiff prove negligence by establishing duty, breach of the duty, proximate cause, and damages. *Hunsley v. Girard*, 87 Wn.2d 424, 434, 553 P.2d 1096 (1976). The cause of action is limited as "[m]ental distress is a fact of life." *Id.* at 435. The plaintiff carries the additional burden of proving objective symptomology. The "emotional distress must be susceptible to medical diagnosis and proved through medical evidence." *Strong v. Terrell*, 147 Wn. App. 376, 388, 195 P.3d 977, 983 (2008), quoting *Hegel v. McMahon*, 136 Wn.2d 122, 135, 960 P.2d 424 (1998). A plaintiff is not entitled to damages if the parties relationship was primarily economic. *See Id.*, citing *Gagliardi v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 446, 815 P.2d 1362 (1991); *Hunsley v. Giard*, 87 Wn.2d 424, 436–37, 553 P.2d 1096 (1976). The court may grant

summary judgment on issues of fact if, in viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact as to an element of the nonmoving party's claim and the moving party is entitled to a judgment as a matter of law. *Reid v. Pierce Cnty.*, 136 Wn.2d 195, 204, 961 P.2d 333, 338 (1998); CR 56(c).

The trial court properly found that Mr. Gleesing fulfilled his duties as a trustee in issuing the Notices mandated by the DTA. RP 77:4-17. Mr. Gleesing could reasonably rely upon the title company correctly identifying all interested parties requiring notice under the DTA. *Id.* Mr. Gleesing acted reasonably in all aspects in his capacity as trustee. *Id.*

**E. The Trial Court Correctly Concluded that the Three-Year Statute of Limitations for the Tort of Outrage and Negligent Infliction of Emotional Distress Had Expired Prior to Filing Her Complaint.**

Raun's Complaint was filed on September 27, 2012. Raun agrees Washington's three-year statute of limitation applies to her claims of outrage and NIED.

A tort or other personal injury action accrues at the time the tortious act or omission occurs. *White v. John-Manville Corp.*, 103 Wn.2d 344, 348, 693 P.2d 687 (1985). A cause of action also accrues when the injured party has a right to seek relief from a court. *Sabey v. Howard Johnson & Co.*, 101

Wn. App. 575, 593, 5 P.3d 730 (2000). Raun does not provide a viable argument that a discovery rule exception applies in this case.

Raun asserts all claims for outrage or NIED arise solely from the receipt of the statutory notices required by the DTA. The first notice was claimed to be received on May 14, 2008. (CP 10 at ¶ 3.17). An Amended Notice was received by Plaintiff from Mrs. Snyder and their attorney on or about July 6, 2009. (CP 11 at ¶ 3.21). Significant events occurred between the receipt of these two notices which included Clare House's suit to restrain the sale and the Association's suit to Quiet Title.

Raun's argument she somehow did not discover the causes of action, or her claimed distress, until 2011 is nonsensical. The argument also contradicts the testimony of her physician, friend, and pastor, Dr. Eastburn. The doctor claims he treated Raun for various ailments caused by receipt of the statutory notices beginning in 2008. CP 197 at ¶ 11.

All factual allegations and claims of outrage or emotional distress occurring prior to September 27, 2009, are barred by the three-year statute of limitations. RCW 4.16.080(2); *Cox v. Oasis Physical Therapy*, 153 Wn.App. 176, 192, 222 P.3d 119 (2009). Raun chose to abandon her bungalow as of July 1, 2009.

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## F. The Trial Court Did Not Abuse its Discretion in Determining Raun and her Counsel Violated CR 11.

Civil Rule 11 provides in pertinent part:

> Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed .... The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading . . . and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law[.] . . . If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, . . . , including a reasonable attorney fee.

CR 11(a).

CR 11 permits reasonable attorney fees and costs to be awarded when pleadings are filed for an improper purpose or for pleadings that are not grounded in fact or warranted by law. *Wood v. Battleground School District*, 107 Wn.App. 550, 574, 27 P.3d 1208 (2001). In considering whether a violation of CR 11 has occurred, the court applies an objective standard. *Skimming v. Boxer*, 119 Wn.App. 748, 711, 82 P.3d 707 (2004). The question the court is to ask is "whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally

justified." *Id., citing Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 220, 829 P.2d 1099 (1992). A pleading is to be considered frivolous if it is not well grounded in fact, or not warranted by existing law or a good faith argument for altering existing law. *Skimming*, 119 Wn.App. 754, *citing Blair v. GIM Corp.*, 88 Wn.App. 475, 482-83, 945 P.2d 1149 (1997). Sanctions for a baseless filing are appropriate when the court finds that the party and/or attorney who signed and filed the pleading failed to conduct a reasonable inquiry into the factual and legal basis for the claims. *Bryant*, 119 Wn.2d 220, 829 P.2d 1099.

In the present case, Raun's *Complaint* was signed in violation of CR 11 because the pleading was not well grounded in fact, was not supported by existing law, and there has been no argument to alter existing law. Raun and her counsel are in the best position to determine whether the known facts are supported by existing law. When assessing the facts and the law in this case it is clear that had a reasonable inquiry been made, the claims against Mr. Gleesing would not have been filed.

The rights to title and occupancy were heavily litigated in State and Federal Court by Raun, the Association, Clare House, and Harry Green prior to Raun filing her Complaint on September 27, 2012.

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### 1. The Certified Verbatim Transcript from the Adversary Proceeding Would Place a Reasonable Attorney on Notice Raun's Causes of Action Could Not be Factually or Legally Supported Against Mr. Gleesing.

Raun argues in her brief that her counsel contacted and "interviewed pertinent individuals and reviewed an extensive amount of documentation, including pleadings filed in State Court and Bankruptcy Court." (App. Brief at p. 47). The record on review clearly indicates had Raun and/or her counsel conducted a reasonable investigation, Mr. Gleesing would not have been sued in his capacity as Trustee of the Deed of Trust.

The January 24, 2011, testimony of John Gleesing in the Adversary Proceeding includes the following facts:

1. Mr. Gleesing represented the Caudill Investors in closing the loan transaction. It was not part of Mr. Gleesing's representation to conduct any type of investigation as to the loan terms. (CP 822, 823).
2. The loan terms, as well as escrow instructions, were provided to Mr. Gleesing by the loan broker, Mr. Ron Webster. (CP 825).
3. Based upon Mr. Webster's representation, it was Mr. Gleesing's understanding residents of Clare House bungalows were renters. (CP 824-826).

4. At no time was Mr. Gleesing made aware of the existence of a Clare House Resident Agreement. *Id.*

5. At the time the loan transaction was closed, Mr. Gleesing obtained a title policy from First American Title Company. The title policy referenced unrecorded leases, which was further evidence the occupants were renters. (CP 825-828).

6. The title policy did not disclose the existence of Raun's or any other, Resident Agreement. (CP 826-829).

Mr. Gleesing's testimony placed Raun and Raun's counsel on notice that not only was Mr. Gleesing unaware of the Residents Agreement, but he made a diligent inquiry as to interested parties and encumbrances to the property in purchasing the title policy. Mr. Gleesing's sworn testimony could not support any of the elements of Raun's seven causes of action.

**2. Raun and Raun's Counsel Improperly Relied Upon Judge Williams' Memorandum Decision.**

Raun argues her Complaint is supported by Judge Williams' March 11, 2011, Memorandum Decision. Specifically that "the Caudill Group obtained a title report on the property, which revealed two recorded Resident Agreements...." Judge Williams' finding in this regard was incorrect. None of the title policies or trustee guarantees identify a recorded Resident Agreement.

If such a title policy did exist, a reasonable attorney under similar circumstances would have obtained a copy of the title report to verify the Judge's finding prior to filing suit a year and a half later, on September 27, 2012. Despite Plaintiff's counsel's pre-suit investigation, the inability to obtain a copy of the title report, allegedly admitted into evidence in the adversary proceeding, which referenced the two Resident Agreements should have placed him on notice of Judge Williams' error. (See App. Brief at p. 47). No such title report has ever been produced.

If, through the discovery process, an attorney becomes aware of information that would lead a reasonable attorney to conclude that a previously asserted claim is not supported by facts or law, the attorney is obligated to re-evaluate an earlier CR 11 certification and take action. *Id.*, citing *MacDonald v. Korum Ford*, 80 Wn.App. 877, 912 P.2d 1052 (1996)(lack of factual basis became apparent at plaintiff's deposition).

A filing becomes baseless if (a) it is no longer well grounded in fact, or (b) it is not warranted by existing law, or (c) there is a good faith argument for the alteration of existing law. *Madden*, 83 Wn.App. at 390, 922 P.2d 1364.

It is not enough that an attorney or party believes that asserted civil claims are meritorious. *Harrington v. Pailthorp*, 67 Wn.App. 901, 911, 841 P.2d 1258 (1992), *rev. den'd* 121 Wn.2d 1018, 854 P.2d 41 (1993). Claims

must be warranted by existing law. CR 11. A complaint becomes legally frivolous if it cannot be based on a plausible view of the law. *Madden*, 83 Wn.App. at 391, 922 P.2d 1364.

Raun has failed to provide any justification or "plausible view of the law" that Mr. Gleesing's compliance with the Washington State Deed of Trust Act can sustain her asserted causes of action.

A reasonable inquiry into existing law would have caused a reasonable attorney in like circumstances to determine her claims could not be legally justified. *Harrington*, 87 Wn.App. at 911-912.

Raun and her counsel were repeatedly requested to voluntarily dismiss her causes of action by both the Caudill Group and Mr. Gleesing's counsel. (CP 1242, 1251-1257, 1397-1398). Raun's failure to accept the invitation constitutes a willingness to continue to litigate the frivolous causes of action.

The trial court properly exercised its discretion in finding that Raun's claims against Mr. Gleesing were not well grounded in fact, not supported by existing law, and that there was no argument for a change to existing law. RP 122-125. The trial court's ruling in finding a violation of CR 11 was not manifestly unreasonable or based upon untenable grounds or reasons. *Id.*, *MacDonald*, 80 Wn.App. AT 884, 912 P.2D at 1057.

## G. Mr. Gleesing Requests this Court to Award Appellate Attorneys' Fees and Costs Pursuant to RAP 18.9.

RAP 18.9(a) authorizes this court to award compensatory damages, which includes attorneys' fees and costs, when a party files a frivolous appeal. RAP 18.9(a); *West v. Thurston Cty.*, 169 Wn.App. 862, 867-8, 282 P.3d 1150, 1153 (2012) citing *Kearney v. Kearney*, 95 Wn.App. 405, 417, 974 P.2d 872, review denied, 138 Wn.2d 1022, 989 P.2d 1137 (1999). An appeal is to be found frivolous if there are "no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there is no reasonable possibility of success." *West, supra*, citing *In Re Recall Charges Against Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003).

For the same reasoning why the trial court's finding of a CR 11 violation should be sustained on appeal, Mr. Gleesing also requests this Court make a determination based upon the record on review that reasonable minds cannot differ that Raun's appeal is so devoid of merit that there is no reasonable possibility of reversal. *Stiles v. Kearney*, 168 Wn.App. 250, 267-268, 277 P.3d 9, 17 (2012) citing *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691, 732 Pacific 10, 510 (1987).

Raun does not provide this court any recognizable legal theory where Mr. Gleesing as a deed of trust trustee can be found liable for the asserted seven causes of action for merely issuing a statutorily mandated Notice of

Trustee's Sale pursuant to the DTA. Raun also fails to make any argument Mr. Gleesing violated a fiduciary duty owed under the Deed of Trust at issue, or violated the DTA. Raun's knowledge of Mr. Gleesing's sworn testimony taken during the trial at the Adversary Proceeding put her and her counsel on notice that he was unaware of Raun's recorded Resident Agreement. Raun and Raun's counsel further had direct knowledge that Mr. Gleesing had purchased title insurance which failed to disclose the existence of Raun's recorded Resident Agreement. Raun had nearly a year and a half to conduct a reasonable investigation from the filing of Judge Williams' Memorandum Decision on the Adversary Proceeding up to filing her Complaint on September 27, 2012. Despite an alleged investigation occurring, Raun obviously did not find, or perhaps even pursue, the alleged title report referenced in Judge Williams' opinion. No such title report is known to exist.

A careful review of the record on appeal establishes reasonable minds cannot differ that Raun's appeal against Mr. Gleesing is so lacking in merit that there is no possibility of reversal. *Mahoney*, 107 Wn.2d at 691, 732 P.2d at 516-17. Further evidenced the appeal is frivolous is Raun's failure to provide this court any on-point legal authority that supports her argument, or that existing law should be changed.

Mr. Gleesing respectfully requests this court find Ms. Raun's appeal is frivolous and order an award of appellate attorneys' fees and costs pursuant to RAP 18.9(a).

## V. CONCLUSION

Following heavily litigated matters in State and Federal Court, Raun filed her Complaint against Mr. Gleesing on September 27, 2012. Raun asserts seven causes of action against Mr. Gleesing in his capacity as a deed of trust trustee. Each of these causes of action is based solely upon her receipt of a statutorily required Notice of Trustee's Sale. Raun alleges Mr. Gleesing should have made a reasonable investigation or inquiry as to her specific property rights. Raun had direct knowledge of Mr. Gleesing being told that the occupants of Clare House were renters. Raun had direct knowledge Mr. Gleesing obtained title policies which did not reveal the existence of her recorded Residents Agreement. Raun fails to articulate to this court what additional investigation or inquiry Mr. Gleesing had a duty to perform. Raun's argument in this regard is not supported by the record on review or Washington law.

Raun also fails to provide this court any reasonable argument her receipt of the Notice of Trustee's Sale could constitute a "threat" of eviction when lawfully issued by a Deed of Trust Trustee per the DTA. No reasonable

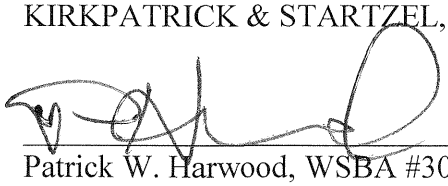
construction of the record on review or any of the case law provided by Raun can support her allegation in this regard.

Raun's argument on appeal presents no debatable issue on which reasonable minds can differ and is so lacking in merit that there is no possibility of obtaining a reversal to the trial court's decisions. Mr. Gleesing is entitled to an award of appellate's attorneys' fees and costs.

Mr. Gleesing respectfully requests that this court sustain the trial court's findings that Raun's seven causes of action asserted against Mr. Gleesing must be dismissed as a matter of law. Mr. Gleesing further requests a finding that the trial court did not abuse its discretion in finding Raun and her counsel violated CR 11.

**Respectfully submitted** this 13th day of October, 2014.

KIRKPATRICK & STARTZEL, P.S.



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## CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October, 2014, I caused to be served a true and correct copy of the Brief of Respondent John P. Gleesing to the following attorneys of record as follows:

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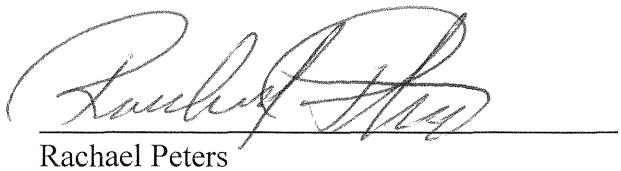

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