

**No. 66721-1**

COURT OF APPEALS DIVISION 1  
OF THE STATE OF WASHINGTON

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JACK GRANT

Appellant

vs.

First Horizon Home Loans, aka FIRST HORIZON CORPORATION  
dba "First Horizon Home Loans" et al., and UNKNOWN John and  
Jane Does 1-10, XYZ Corporations 1-10, ABC Limited Liability  
Companies 1-10; and 123 Banking Associations 1-10;  
QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a  
Washington corporation;  
STEWART TITLE, dba "Stewart Title of Bellingham"; STEWART  
TITLE OF WESTERN WASHINGTON, INC. a Washington  
corporation dba "Stewart Title of Bellingham"; STEWART TITLE  
OF BELLINGHAM, INC. dba "Stewart Title of Bellingham"; and  
UNKNOWN John and Jane Does 11-20; XYZ Corporations 11-20;  
and ABC Limited Liability Companies 11-20

Respondents

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**ON APPEAL FROM WHATCOM COUNTY SUPERIOR COURT  
(Hon. Steven J. Mura - cause no. 10-2-02676-9)**

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**Brief of Appellant**

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## B. INTRODUCTION

An appeals court reviews a motion to dismiss de novo.

Rodriguez v. Loudeye, 144 Wash.App. 709, 189 P.3d 168. Grant seeks to reverse the trial court's dismissal of Grant's Complaint filed in Whatcom County Superior Court on October 25, 2010, for failure to state a claim under CR 12(b)(6) and/or 12(c). The principal basis for the Defendants' motions to dismiss Grant's Complaint and the principal reason articulated by the trial court in granting the motions was the alleged failure of Grant to bring 4 of his claims or causes of action within the applicable statute of limitation periods RP 27, lines 5-15. However, the record is not clear how the trial court analyzed and decided Grant's other claims, defenses and requests such as: i) claims for breach of contract and bad faith RP 29, lines 15-17; ii) defenses of duress, undue influence and/or civil fraud RP 42; iii) claims for substantive violations of statutes such as Consumer Protection Act RCW 19.86 (CPA) - RP 27, 29, 30, Truth in Lending Act (TILA) and Deed of Trust Act RCW 61.24 (DOTA) - RP 29, 30; and iv) request to amend Complaint (RP 37-39 and see for example, RP 32-36, 37 line 5 and RP 37 at line 4 where the trial judge says "I haven't gone in and looked at his 40 or 50 page Complaint in detail." and see possible error at RP 36 (7-13).

## **B. ASSIGNMENTS OF ERROR**

1. Did the trial court err in dismissing Grant's claims that the Respondents violated statutory requirements under DOTA relating to the foreclosure proceedings and under CPA and TILA?

a) Violation of DOTA – No Default Under the Note- First Horizon and Quality Loan Documents Fail because the Alleged Note Is Not In Default

b) Violation of DOTA – No Chain of Title to Security - Quality Loan's assertion that all parties are named properly in the foreclosure documents and that it had the authority to foreclose the property is controverted by its own evidence or lack thereof

c) Violation of DOTA - Owner Of the Note is Unknown - No evidence has been put forth by First Horizon or Quality Loan that would show how, when and from whom it acquired an interest in the alleged note or deed of trust upon which it relies to establish a debt owed and a right to foreclose.

d) Violation of DOTA – Standing - First Horizon and Quality Loan have no standing/capacity to bring CR 12(b)6 or 12(c) motions

e) Violation of DOTA - Wrongful Foreclosure

f) Violation of DOTA – Breach of Fiduciary Duties

g) Violation of DOTA – Breach of Other Duties

h) Violation of the Consumer Protection Act (CPA)

i) Violation of Truth in Lending Act (TILA)

2. Did the trial court err in dismissing Grant's defenses against the underlying alleged loan obligations, including his claims of recoupment (at law, equity and under TILA) and his right to offset loss and unliquidated damage under CR 12 against the underlying alleged loan obligations?

3. Did the trial court err in dismissing Grant's quiet title claim?
4. Did the trial court err in dismissing the following causes of action on the ground that one or more of them were barred by the statute of limitations:
  - a) Breach of Contract
  - b) Breach of Fiduciary Duty
  - c) Negligent infliction of emotional distress
  - d) Intentional interference with contractual relations
  - e) Bad Faith
  - f) Violation of Consumer Protection Act
  - g) Violation of TILA
5. Did the trial court err in dismissing Grant's causes of action for breach of contract on the ground that they were barred by the Statute of Frauds?
6. Did the trial court err in rejecting Grant's objection to Quality Loan's untimely submission of motion under CR 12(c)?
7. Did the trial court err in refusing Grant's motion for leave to amend Grant's Complaint?
8. Did the trial court err in refusing to take judicial notice (from Grant's divorce trial) that the Grant property was not converted to Community Property by either the recording of the quitclaim deed by Respondents or the refinance?

### **C. STATEMENT OF THE CASE**

Grant, an unmarried man in 1995, purchased the real property that is the subject of this appeal located at 4630 Drayton Harbor Road in Blaine, Whatcom County, WA. In 2003, Grant began an extensive remodel of his 1920s era beach cottage on the Property using construction proceeds of about \$800,000 obtained by Grant as his separate property from Horizon Bank. The sole purpose of the proposed First Horizon loan was to refinance the construction loan at a fixed rate (no new funds) CP 253. There was never any request or agreement on Grant's part to add his spouse to the title or the loan. This is not a subprime mortgage or "underwater mortgage" situation.

In 1996, Grant married Lisa Alvaro. They divorced in 2009. The divorce judge confirmed the Property remained the separate property of Grant; it never became community property (following Estate of Borghi v. Gilroy, 141 Wash.App 294, 169 P.3d 847 (2007), affirmed 167 Wash.2d 480, 219 P.3d 932 (2010)).

On July 15, 2010, Quality Loan, purporting to act as "agent" for the Bank of New York Mellon and many others ("BONY", as a new and previously undisclosed "owner/beneficiary" of the foreclosure documents), commenced a non-judicial foreclosure of

the Property by preparing a Notice of Default (CP293) based on a deed of trust dated December 1, 2004 recorded in the name of "First Horizon Corporation" as "Lender" with Mortgage Electronic Registration Systems, Inc. (MERS) named as the "nominee for Lender" and "the beneficiary under this Security Instrument" CP 291. At the time of the Notice of Default, BONY had no interest in the deed of trust. On July 20, 2010, five (5) days after the Notice of Default was issued, MERS purported to transfer to BONY the deed of trust and the note CP 232-236, 300.

Quality Loan suggests it was appointed as trustee under the deed of trust (successor to Stewart Title) by an appointment of trustee recorded September 10, 2010 - CP 236-238, 302. Stewart Title never resigned as trustee under RCW 61.24.010 (2).

Grant sued "First Horizon Corporation" dba "First Horizon Home Loans", the "lender" exactly as set forth in the alleged note and deed of trust prepared by the lender CP 220. "Stewart Title" was escrow agent for Grant, the lender's title insurer and was the original trustee named under the deed of trust.

Grant has defenses against the true owner of the alleged note (duress, undue influence, fraud – see RCW 62A.3-305) and challenges the alleged underlying loan and the security. Stewart

Title, acting alone or in concert with First Horizon, wrongfully interfered with title to Grant's Property. At loan closing, among other last minute demands, they demanded that Grant sign a quit claim deed in favor of Grant and his then spouse (QCD) however, also agreed the QCD would remain in the escrow file CP 228-230. Yet, they recorded it anyway, contrary to Grant's instructions and without his knowledge. In 2007, when Grant tried to refinance the Property and ready it for sale, he discovered that the QCD had been recorded. However, by that time, Grant's marriage had been irretrievably broken, but because of the recording of the QCD, he could no longer independently deal with his separate Property. His former spouse had become an uncooperative "partner". As a result, Grant had to watch as the real estate market collapsed and the value of his Property plummeted.

Against all Respondents, Grant claims bad faith, negligent infliction of emotional distress, interference with contractual relations, negligence and violation of statutory requirements. Against Stewart Title, Grant also claims breach of contract (potentially civil fraud) and breach of fiduciary duties as escrow agent and under the DOTA (prior to legislative change to the DOTA in 2008). Against First Horizon, Grant asserts defenses of

recoupment, duress, undue influence and claims breach of contract (potentially civil fraud).

Grant has proposed to set off his loss and unliquidated damages (to be proven at trial) against amounts alleged by First Horizon to be owing CP 226, 248 (CR 13; Warren v. Kuney 115 Wash.2d 211, 796 P.2d 1263 (1990)).

There has been a short time since the Complaint was filed (October 25, 2010), but relatively many court proceedings:

On November 5, 2010, on Grant's motion, the trial court entered a restraining order stopping the foreclosure CP 188. On January 14, 2011, First Horizon and Stewart Title argued a motion under CR 12(b)(6) (joined in by Quality Loan but who untimely filed its motion under CR 12(c)). The trial court dismissed Grant's Complaint with prejudice and without leave to amend and dissolved the restraining order effective March 7, 2011 "unless the Restraining Order is extended by the Court of Appeals" CP 32, RP 27-31. The trial judge erred in accepting Respondents' false suggestions that December 1, 2004 was the accrual date for **all** claims in Grant's case RP 38, line 8.

A motion to settle the terms of the January 14, 2011 Order was set for February 4, 2011. On short leave, Grant brought

motions on the same day for leave to amend the Complaint CP 38-81, RP 37-39) and Reconsideration of the trial court's dismissal Order. The trial court refused to hear Grant's motions RP 32, 37.

On March 3, 2011, (on Grant's February 26, 2011 emergency motion to the Court of Appeals), under RAP 8.3, this Court ordered a stay of foreclosure pending a supersedeas hearing in the trial court by March 25, 2011, to determine the amount of equity in Grant's property and whether that equity was sufficient to secure defendant losses if they were successful on appeal.

At the supersedeas hearing on March 25, 2011, the trial court refused to consider Grant's appraisal material after Lane Powell objected that it was untimely filed – one day late (RP 43, 51) and determined the amount of the supersedeas bond based on an estimate of value generated by “Zillow” (a computer website that uses no appraisal data specific to the site) RP 44. The trial court also refused Grant's motion to continue the hearing (so Grant's appraisal evidence could be considered) because the trial court felt bound to make its decision by the March 25, 2011 deadline RP 51.

On April 12, 2011 (on Grant's March 29, 2011 emergency motion to the Court of Appeals), under RAP 18.8, and 8.1(b)(2) and (4), this Court authorized Grant's property to stand as alternate

security for the stay without further bond pending appeal and stayed the trial court ruling allowing the foreclosure.

**E. ARGUMENT**

**E1 Standards on appeal - Requirements of pleading**

Washington courts apply a "notice pleading" standard (Hofto v. Blumer (1968) 74 Wash. 2d 321, 444 P.2d 657) to avoid technical dismissals of legitimate claims, even observing that under CR 8, "there is no necessity for stating the facts constituting a cause of action so long as there is a short and plain statement of the claim showing that the pleader is entitled to relief and there is a demand for such relief (Sherwood v. Moxee School District # 90 – (1961) 58 Wn. 2d 351). In Sherwood, the Washington Supreme Court also held "all that is required in a complaint is a generalized statement of the facts from which the defendant may form a responsive pleading" Id at 360.

The Court of Appeals applies the same standard as the trial court: nonmoving party's evidence, together with all reasonable inferences that may be drawn from it, must be accepted as true Tyner v. State (Child Protective services) 92 Wn.App.504, 963 P.2d 215 (1998). Grant's Complaint is 31 pages and includes detailed facts (CP 238-247) as well as clear statements of the

claims (CP 238 -247) and demands for relief (CP 247-250). There are 58 pages of Exhibits. The Complaint satisfies the pleading requirements and factually supports Grant's claims and causes of action. Grant will amend his Complaint, if necessary once discovery is completed, to allege any special CR 9 pleading requirements for fraud/fraudulent concealment by the parties August v. U.S. Bancorp, 146 Wash.App 328, 190 P3.d 86 (2008).

Under CR 12 (b)(6), a motion to dismiss for failure to state a claim may be made before answering. That was the case here although Quality Loan did file an (essentially unresponsive) Answer CP 168. Dismissal is warranted only if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove any set of facts which would justify recovery Rodriguez v. Loudeye. The appellate court will consider even hypothetical facts that might give plaintiff a cause of action (Bravo v. Dolsen Companies, 125 Wn.2d 745, 888 P.2d 147 (1995)).

When a motion to dismiss pursuant to CR 12 (b)6 or (c) is treated as one for summary judgment, the burden is on the movant to show nonexistence of any issue of material fact by competent evidence (Bly v. Pilchuck Tribe No. 42 (1971) 5 Wash App. 606, 489 P.2d 937). Respondents did not satisfy this burden.

**E2 Grant's Claims for Breach of Statutory Requirements Should Not be Dismissed – see CP 221-246**

a) Violation of DOTA – No Default in the Note First Horizon and Quality Loan Documents Fail because the Alleged Note Is Not In Default

The existence of a default is a prerequisite to starting a non-judicial foreclosure proceeding. RCW 61.24.030(3). According to First Horizon's declaration from Edward Hyne dated March 16, 2011 (CP 5), the alleged promissory note is now owned by BONY and the owner of the note considers payments under the note upon which the foreclosure is based to be current. If the underlying note is not in default, there is no right to foreclose. Grant submits that the entire foreclosure proceedings should be declared void ab initio.

b) Violation of DOTA – No Chain of Title to Security Quality Loan's assertion that all parties are named properly in the foreclosure documents and that it had the authority to foreclose the Property is controverted by its own evidence or lack thereof

First Horizon's and Quality Loan's foreclosure proceedings should be declared void ab initio because there is no valid chain of title that supports the parties' authority to foreclose CP 232-241.

At Exhibit K of the Complaint (CP 222, 293), Quality Loan purporting to act as agent for the BONY, signed a Notice of Default on July 15, 2010. In that same Exhibit K, last page "First Horizon Home Loans" is called the "beneficiary" of the note CP 299. Under

DOTA, it is the “beneficiary” who must file the Notice of Default. It is an issue of material fact whether Lane Powell’s client (First Tennessee Bank National Association) or BONY (or someone else) owns the trade name “First Horizon Home Loans”. At Exhibit L of the Complaint (CP 300), MERS purports to assign to BONY its beneficial interest in and to the deed of trust “together with a promissory note secured by said deed of trust”. It is an issue of material fact whether MERS ever had an interest in the note. Accordingly, when the Notice of Default was signed by Quality Loan, BONY had no interest in either the note or deed of trust and therefore, no authority to initiate a foreclosure or to so authorize Quality Loan. The terms of Quality Loan’s “agency” are issues of material fact.

The foreclosure documents are not only invalid because the Assignment of Deed of Trust was post-dated, but they were also unauthorized and fraudulent. The reasoning in U.S. Bank National Association v. Antonio Ibanez, 458 Mass. 637 -2011, 941 N.E. 2d 40 (2011) is applicable. In that case decided January 7, 2011, foreclosure proceedings under a mortgage predated the transfer of the security interest to the foreclosing lender. The Supreme Judicial Court of Massachusetts held the foreclosure sales were

invalid because the foreclosing lenders failed to show it was the mortgage holder at the time of foreclosure and because the lenders did not supply sufficient evidence of authority to foreclose. The reasoning applies equally to a deed of trust and to an earlier proceeding under the DOTA. It follows that the entire foreclosure proceeding in the instant case is based upon false, if not fraudulent, documents. For the foregoing reasons, all acts undertaken by Quality Loan incident to the foreclosure proceedings are void.

c) Violation of DOTA - Owner Of The Note is Unknown - No evidence has been put forth by First Horizon or Quality Loan that would show how, when and from whom it acquired an interest in the alleged note upon which it relies to establish a debt owed and a right to foreclose. See CP 221-223

Grant has defenses and recoupments against the real owner(s) of the alleged note and security Olsen v. Pesarik, 118 Wash.App. 688, 77 P.3d 385 (2003). There are seven (7) possible owner groups (RP 16-17, CP 160); the identity of the owner/beneficiary or the alleged note is an issue of material fact. If "First Horizon Corporation" can establish entitlement to a debt, that entity is still subject to Grant's defenses.

It is telling that there has been no attempt by Respondents to offer proof of successorship or chain of title. The evidence shows there was a failure to convey authority under both the alleged note

and deed of trust to BONY from MERS (or First Horizon Corporation or possibly some other party). Accordingly, the foreclosure proceedings should be declared void ab initio. On this issue of owner identification, the trial judge said at RP 18:

”Here's my problem with that. I don't know where I stand. I don't know what the legal effect of my problem is here. It may be just an intellectual problem I have with it.”

Grant did not get the name of the lender wrong – the alleged documents clearly state “First Horizon Corporation” CP 291. Hypothetically, the lender used an incorrect name on the documents to further a pattern of deception. Or, human mistake may be the reason why wrong names were used. A scrivener's error, failing to properly name a party to the transaction, is on its own a material term. Such mistakes can be corrected by the original parties either by agreement or through appropriate court proceedings, both of which require basic evidentiary proof of the mistake and the pursuit of specific procedural requirements to correct. First Horizon has made no attempt to seek rectification in the instant case.

The following additional facts must be carefully considered by this Court:

1 The whereabouts of the original promissory note is

unknown. No one has offered it for inspection. There are reports that promissory notes were destroyed by the Wall Street securitization firms - deemed "unnecessary".

2 No assignments of the note or allonges have been produced so there is no evidence whatsoever of assignment of the note from the original lender "First Horizon Corporation".

3. The note and security cannot be held by different owners. If they are, the security is void. A security interest cannot exist, much less be transferred, independent from the obligation that it secures In re Leisure Time Sports, Inc. 194 B.R. 859 (1996). There can be no assignment of security interest independent of assignment of the obligation that it secures – a purported assignment of a mortgage without an assignment of the debt which it secured is a legal nullity Kelley v. Upshaw, 39 Cal.2d 179, 193, 246 P.2d 23, 30 (1952). An assignment of the security must follow the note; not the reverse. Here, MERS purported to assign the note in the document purporting to assign the deed of trust CP 300. That is not an effective assignment of the note when it is not known who owns the note. The identity of the true owner of the note is an issue of material fact. "This is not a mere technical legal requirement: to allow the assignee of a security interest to enforce

a security agreement would expose the obligor to a double liability, since a holder in due course of the promissory note clearly is entitled to recover from the obligor” In re Leisure Time Sports, Inc., at 861.

4. MERS never had any beneficial or other interest in the alleged note so the Assignment of Deed of Trust (CP 300) conveyed no interest in the note from MERS to BONY pursuant to basic contract law and the statute of frauds. The proposition that the Assignment of Deed of Trust transferred the note from MERS to BONY is without merit. There is no proof of offer and acceptance, no proof of consideration paid, no proof of delivery of the instruments and no competent attestation from the Respondents, leaving a document that purports to "speak for itself", but is mute on the subject. It is difficult to view the creation of this assignment of deed of trust, and the aggregate of this transaction, as anything other than an intentional fraud.

5. Securitization documents typically prohibit the transfer of mortgage rights from the originating lender directly to the trustee of a securitization trust; an issue of material fact here because no securitization documents have been proffered by the Respondents.

As a result of the foregoing, the note and related security should be declared void.

d) Violation of DOTA – No Standing - First Horizon and Quality Loan can not bring motions under CR 12(b)(6) or (c)

Standing (capacity) is a question of law that an appeals court reviews de novo. Generally, the doctrine of standing prohibits a litigant from asserting another's legal right West v. Thurston County, 144 Wn.App. 573, 183 P.3d 346, 349 (2008), Miller v. U.S. Bank, 72 Wn.App 416, 424, 865 P2.d 536 (1994).

"First Horizon Home Loans" is no more than a "division" or a "trade name" RP 3. The identity of the owner of that trade name is an issue of material fact RP 14-15. A trade name may not be sued and disclosure of the trade name alone presents a barrier to Grant discovering actual identity of the creditor Lawrence v. Franklin 468 F.Supp 499 (1978).

"First Horizon Corporation", the "lender" in the alleged note and deed of trust, recently changing its name to "United Country Real Estate, Inc." is a Missouri corporation formed March 6, 1990, previously licensed as a foreign corporation in various states, including Washington, Kansas, Tennessee and Texas CP 134. Grant submits that "First Horizon Home Loans Corporation" was an

unrelated and entirely different corporation formed in Kansas on May 31, 1978 CP 143. According to documents filed with the Kansas Secretary of State on or about May 24, 2007, that corporation merged with "First Tennessee Bank National Association" but not with "First Horizon Corporation" RP 13-15. Lane, Powell asserts that its clients "are successors by merger" in this case, without ever offering any evidence to back up that statement RP 11 at line 7. Whether First Tennessee Bank National Association is a necessary and proper party to this lawsuit is an issue of material fact. Lane Powell has made no attempt to demonstrate and presumably can not prove that his clients have a relationship to Grant or to the entity and alleged lender "First Horizon Corporation". It follows that Lane Powell and its clients had no standing to bring a motion to dismiss in the instant case.

Quality Loan's authority as trustee and its own standing to bring a motion to dismiss is an issue of material fact; it is not inherent but rather, both are strictly derivative of the lender "First Horizon Corporation" or its true successors. A security follows the note, not the reverse In re Leisure Time Sports, Inc. If First Horizon's chain of title to the note is not proven, Quality Loan can prove no authority and therefore has no standing to bring

proceedings under the deed of trust. Similarly, if the chain of title to the deed of trust is not proven, the deed of trust is void.

e) Violation of DOTA - Wrongful Foreclosure

Grant submits the foreclosure practices of First Horizon and Quality Loan do not conform to Washington law because they evolved from the fatally flawed business practices adopted by the securitization industry. Attorneys General from all 50 states are investigating illegal foreclosure practice following last years "robo-signing" scandal. Exhibit 1 attached hereto is an excerpt from an Amicus Curiae brief dated October 1, 2010 filed by Marie McDonnell, CFE, Mortgage Fraud and Forensic Analyst, Certified Fraud Analyst in the Ibanez case. Ms. McDonnell graphically describes how the securitization industry created these problems with their flawed securitization documentation - problems that are present in the instant case - and how the securitization industry is scrambling to unravel their mess. See generally – Complaint CP 221-241.

In Cox v. Helenius, 103 Wash. 2d 383, 693 P. 2d 683 (1985), the Supreme Court affirmed the 3 goals of the Deed of Trust Act: 1) the non-judicial foreclosure process should remain efficient and inexpensive; 2) the process should provide an

adequate opportunity for interested parties to prevent wrongful foreclosure; and 3) the process should promote the stability of land titles (emphasis added). Courts have recognized that the unsupervised deed of trust foreclosure procedure can be the subject of abuse by a rapacious lender - "In addition, because non-judicial foreclosures lack the oversight inherent in judicial foreclosures, we strictly apply and interpret the Act in the borrower's favor" (Albice v. Premier Mortgage Services of WA, Inc., 239 P.3d 148 (2011) at page 1152, citing CHD, Inc. v. Boyles, 138 Wash.App. 131, 137, 157 P.3d 415 (2007)).

"We are required, when possible, to give effect to every word, clause and sentence of a statute" Cox v. Helenius, at 387.

In Vawter v. Quality Loan Service Corporation of Washington, 707 F.Supp.2d 1115 at 1124, the federal district court also acknowledged the dangers of the unsupervised process, stating that it is "mindful that lenders must strictly comply with the DOTA because the non-judicial foreclosure process removes many protections borrowers and grantors have under a mortgage".

Nowhere in the DOTA is there a preference or priority given by the legislators for any one of the objectives over the other two. However it appears some courts have given preference to DOTA

goal #1, arguably at the expense of the other two goals.

It is undisputed that the “stability of land titles” (DOTA goal #3) is being jeopardized by flawed foreclosure practice. In Washington, Chicago Title Insurance Company has refused to insure title in trustee sale cases if there is secondary financing; or substantial owner equity; or a dispute by the owner as to the foreclosure process itself being fraudulent or otherwise illegal. All 3 issues are involved in the instant case.

In Vawter, Quality Loan (a Respondent here and a party in that case), argued that there is no cause of action called “wrongful foreclosure” (those exact words are used in DOTA goal #2), arguing further that the claim should be called “wrongful initiation of foreclosure” or “attempted wrongful foreclosure” and that such a claim would fail in any event unless a foreclosure sale takes place RP 30. Here, the trial judge dismissed without discussion Grant’s “violation of statute requirements” claim that Quality Loan renamed “wrongful initiation of foreclosure” (RP 30). According to Quality Loan, “wrongful foreclosure” is only wrongful (and can only arise) after a trustee sale. That suggestion is without merit. There is no reason to test for wrongful foreclosure only after sale. A violation of the statute is wrongful at any stage of the foreclosure.

The federal judge in Vawter was interpreting a state statute (DOTA) and he supported his conclusion with an unreported Washington case (Krienke v. Chase HomeFinance, LLC 2007 WL 2713737 (Wash.App. Div 2) and a federal district court case (Pfau v. Washington Mutual, Inc. 2009 WL 484448 - not reported in F.Supp.2d). The Washington Supreme Court has held that Washington courts are not bound by such cases (see for example, In re Elliott, 74 Wash2.d 600 (1968), 446 P2.d 347 (1968)). In any event, Vawter and its supporting cases can be distinguished from the instant case because those cases did not have the substantive and procedural defects present in this case. Here, among other things: the note is current (so there is no right to foreclose); the identity of the true owner of the alleged debt or security is unknown and unproven; there is no evidence that the original of the alleged note can be produced or that it is owned by the same party that owns the deed of trust; the trustee has not been properly appointed or authorized; and one or more of the lender or foreclosing groups has no standing to file its motion to dismiss.

Whether a trustee sale is discontinued or not, a homeowner can suffer loss from a wrongful foreclosure. For example, a foreclosure action quickly gets the property onto “foreclosure lists”

that are available to every Realtor and bargain hunter. The Supreme Court of the United States has recognized that “property sold within the time and manner strictures of state-prescribed foreclosure is simply worth less than property sold without such restrictions” (BFP v. Resolution Trust Corporation, 114 S.Ct., 511 U.S. 531 (1994), 1757, 128 L.Ed.2d 556 – emphasis added - affirmed in Albice v. Premier Mortgage Services of WA, Inc. 239 P.3d 148 (2010) at 1158, FN 13). Experts estimate 30% of the value of the property is lost through foreclosure sales (CP 231); that loss starts with the threat of foreclosure and recording on title of a Notice of Sale. This is a serious problem long before a sale is concluded.

Grant asks this Court to distinguish Vawter and cases that generated or follow them and to take this opportunity to clarify Washington law on wrongful foreclosure.

Grant respectfully submits that the trial judge erred in accepting a suggestion that the sole remedy of an owner facing foreclosure is “a restraining order under RCW 61.24.130” (RP 28, line 6-18). That remedy favors the first goal of the DOTA – i.e.: keeping the process inexpensive for the lenders and mortgage servicers, while offering only “lip service” to the other two goals of

the DOTA. It follows that if a foreclosing lender ignores or violates the goals or provisions of the DOTA, the Courts have authority to step in to prevent and/or remedy wrongful foreclosure (DOTA goal #2). Washington cases have supported the goals of the DOTA expressed in Cox v. Helenius. On at least three (3) recent occasions, this Court has itself offered remedies additional to RCW 61.24.130 to owners facing wrongful foreclosure. First, in Olsen, this Court clarified that the DOTA permits a borrower to file an action to "assert an offset of the debt that is the basis of the non-judicial proceeding" and (at 694) "that a timely action filed in Superior Court was the only proper means by which the Olsen's could assert any defenses to the non-judicial foreclosure". Second, a trustee sale was overturned when a trustee violated its duties (there, sacrificing the homeowner's equity) Albice v. Premier Mortgage Services of WA, Inc. 239 P.3d 148 (2010). Third, in the instant case, this Court accepted Grant's argument that the supersedeas provisions of RAP 8.1, 8.3 and 18.8 permit the Court to allow real estate to stand as security without further bond pending appeal. At page 2 of the March 3, 2011 notation ruling, Commissioner Verellen states:

"First Horizon argues that RCW 61.24.130 compels that any

order restraining a non-judicial foreclosure must require the debtor to make the monthly mortgage payments. But nothing in the non-judicial deed of trust foreclosure statutes, including RCW 61.24.130, excludes appellate review of such a trial court decision and such an appeal is subject to the supersedeas provisions of RAP 8.1 (b) and (c). Appellate review without a right or opportunity to supersede the non-judicial foreclosure would almost always be meaningless. That is, without a chance to stay the pending foreclosure, the owner is left with no meaningful relief on appeal."

That decision gave Grant an opportunity to avoid a foreclosure "fire-sale", potentially minimizing the sacrifice of Grant's equity in the Property (see Albice v. Premier Mortgage Services).

It is possible that lenders and mortgage servicers have prepared and used false documents knowing there was no or little court supervision – using cases like Vawter as their cover to assert that a homeowner only has a right to seek an injunction under DOTA in a non-judicial foreclosure. Many homeowners will not have the resources to dispute or fight the lenders - resulting in no consequence for bad behavior and providing no disincentive.

Grant asks this Court to recognize the cause of action of wrongful foreclosure and an owner's right to damages against lenders and mortgage servicers who prepare illegal or fraudulent documents (as in the instant case).

Grant can show "prejudice" Amresco Independence Funding, Inc. v. SPS Props LLC, 129 Wn.App. 532, 119 P.3d 884, 886-87 (2005). Grant's Property is for sale and Quality Loan's actions have resulted in it going on the "foreclosure list", drawing out the bargain hunters and prompting Grant's Realtor to suggest a "significant price reduction" CP 271-273. Judicial notice has been taken by the Supreme Court of the United States that foreclosed properties are "simply worth less". BFP v. Resolution Trust Corporation, and see Albice. Grant has incurred costs in this case and has lost equity/property value from the threatened foreclosure sale and from the interference with his title CP 229-231, 246-247. The full extent of Grant's losses in property value will be known after completion of a sale. Grant has suffered physical and emotional harm, emotional distress and continues to suffer lost opportunity in not being able to replace his home and its financing.

f) Violation of DOTA – Breach of Fiduciary Duties CP 242

Breach of fiduciary duty imposes liability in tort. Whether a legal duty exists is a question of law Miller v. U.S. Bank of Washington, NA, 72 Wn.App. 416, 865 P.2d 536 (1994). Until 06-12-08 when SB 5378 (2007-08) amended RCW 61.24.010(3). At all material times, Stewart Title owed fiduciary duties to Grant as

escrow holder and trustee under the alleged deed of trust (see Cox v. Helenius).

A “quasi-fiduciary” relationship may exist where the lender has superior knowledge and information, the borrower lacks such knowledge (or business experience), borrower relies on the lender's advice, and the lender knew the borrower was relying on the advice Miller v. U.S. Bank - referring to Tokarz v. Frontier Federal Savings and Loan Ass'n, 33 Wash.App 456 at 460, 656 P.2d 1089 (1983). First Horizon owed quasi-fiduciary duties to Grant at all material times. First Horizon knew that Grant was relying on the conditions of delivery of the QCD and it is an issue of material fact whether First Horizon intended all along to record it immediately but without telling Grant.

At RP 29, Mr. Hinton, attorney for Stewart Title, referred to a fiduciary obligation that he believed Grant had withdrawn CP 156. The Judge said at RP 30 “you’re entitled to judgment on those” - presumably meaning dismissal of Grant’s claim for breach of fiduciary duty against Stewart Title. However, Grant hereby corrects his statement (at CP 156) and reaffirms the allegations that at all material times, Stewart Title owed fiduciary duties to Grant, it breached those duties and caused harm to Grant.

When it recorded the QCD on December 6, 2004 without Grant's instructions or knowledge and in breach of the conditions of delivery and terms of escrow, Stewart Title, in violation of contract and its fiduciary duties, and First Horizon, in violation of contract and its quasi-fiduciary duties breached duties owed to Grant, caused interference to Grant's title in breach of such duties, and the breach is the direct cause of Grant's losses resulting from his inability to sell or otherwise independently deal with his separate property. Stewart Title and First Horizon are liable to reimburse Grant for his entire lost property value.

g) Violation of DOTA – Breach of Other Duties CP 230-243

All parties owed Grant the duty of good faith implied as part of Washington's general contract law. Grant has not asked the parties to accept new obligations which represent material change in the terms of contract Miller v US Bank.

On 06-12-08, the legislature amended RCW 61.24.010(3) to provide that a trustee under a deed of trust would not owe a fiduciary duty to any party, but nonetheless the trustee would still be required to "act impartially between the borrower, grantor and beneficiary." (see SB 5378 (2007-08)). Recognizing that a duty to act impartially does not necessarily require a party to act in good

faith, the legislature again clarified the duty in 2009 and specifically provided that the trustee owed a duty of good faith to both the bank and borrower (effective 07-26-09, Senate Bill 5810).

In addition to the fiduciary duties owed by Stewart Title and the fiduciary or quasi- fiduciary duties owed by First Horizon, both Stewart Title and Quality Loan as trustees under the deed of trust have breached the duties of impartiality and good faith owed (and continue to owe) to Grant under the DOTA.

“Although a trustee of a deed of trust is not required to obtain the best possible price for the trust property.... nonetheless, the trustee must take reasonable and appropriate steps to avoid sacrifice of the debtor’s property and his interests.” (see Cox v. Helenius, at 687, affirmed in 2010 by this Court , Division 2 in Albice v. Premier Mortgage) RP 8-9. Neither Quality Loan nor Stewart Title as trustee obtained an appraisal of the Property. If Quality Loan was “effectively“ appointed successor trustee on 09-09-2010 (RCW 61.24.101), it has disregarded the evidence of equity offered by Grant - all to his detriment (see for example, Exhibit H to the Complaint CP 284). The trial judge erred in his analysis of these duties RP 9-10. On the other hand, as the trial judge mused (see RP 8, line 18), if Quality Loan is not properly

appointed as trustee, it owes no duties to Grant but, in such event, the foreclosure proceedings are void.

h) Violation of CPA CP 241, 245

Lane Powell told the trial court there was no evidence whatsoever to plead a CPA claim or other statutory claim RP12. Grant was not given an opportunity to speak on this topic at the trial court RP 27 (line 16), 30 (line 11).

To prevail on a private Consumer Protection Act RCW 19.86.090 claim, a private plaintiff must show:(1) an unfair or deceptive act or practice; (2) that occurs in trade or commerce; (3) a public interest; (4) injury to the plaintiff in his or her business or property; and (5) a causal link between the unfair or deceptive act and the injury suffered Indoor Billboard v. Integra Telecom 162 Wash.2d 59, 170 P.3d 10.

1 Whether a given practice is "unfair or deceptive" is a question for the finder of fact. To be "deceptive", the act or practice must be one that "misleads or misrepresent something of material importance" (Nguyen v. Doak Homes Inc. 140 Wn.App 726, 167 P.3d 1162, 1166 (2007). Quality Loan falsified a document (the Notice of Default) and failed to prove or even investigate the basic questions, including: i) the identity of the beneficiary; ii) the chain of

title to the debt and security; iii) the proof of debt; iv) even whether the underlying indebtedness was in default. Instead, Quality Loan represents that all parties are properly named in the foreclosure documents - their own documents refute this CP 293-307. This is deception.

In this case, without any discovery having been conducted, it is already undisputed that the Notice of Default was signed when Quality Loan had no authority to do so and the alleged note is current. That distinguishes this case from cases like Vawter, Krienke (where the court found no evidence to invalidate the foreclosure either procedurally or substantively).

2. The broad CPA definition of an act occurring in the course of trade or commerce includes "the sale of assets or services, and any commerce directly or indirectly affecting the people of Washington" RCW 19.86.010(2) and this element is satisfied in the instant case.

3 Showing that the unfair or deceptive act "impacts the public interest" is a question of fact. Attorneys General in all 50 states are investigating circumstances similar to the conduct complained about here because the conduct is harmful or potentially harmful to the public. In the instant case, Quality Loan has been unapologetic to Grant (an attorney who, in theory, has some ability to defend

himself) in making its false assertions about the basic questions. It is easy to imagine the damage that lenders like First Horizon and foreclosure mills like Quality Loan can do to people who don't have the ability or resources to dispute or fight back. A review of the many court cases in which Quality Loan is a party in Washington State suggests that this is no aberration or one-time event for Quality Loan. Quality Loan's conduct and practice is likely to be repeated in the future and accordingly, has the capacity to deceive a substantial portion of the public.

4, 5 The injury requirement is met upon proof that the party's "property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal Mason v. Mortgage Am., Inc. 114 Wn.2d 842, 854; 792 P.2d 142 (1990) see also Tallmadge v Aurora Chrysler-Plymouth Inc. 25 Wn.App. 90, 605 P.2d. 1275 (1979). Grant can show that he has incurred fees and costs, suffered loss property value as well as income, resulting from this unlawful foreclosure proceeding.

On April 14, 2011, the Washington legislature signed into law the Foreclosure Fairness Act. Lawmakers acknowledged an urgent need to further regulate lenders and mortgage servicers and they even declared an "emergency". Grant submits the new

mediation mechanism and other procedural amendments of the Foreclosure Fairness Act requiring the delivery of documents (new S, 7(8)) and the addition of specific new violations of the Consumer Protection Act (see S.14) were intended by the legislature to be retroactive and accordingly, they are applicable in the instant case. They are remedial, applicable to practice, procedure or remedies and do not affect a substantive or vested right. Johnston v. Beneficial Management Corp. of America, 85 Wash.2d 637 (1975).

Section 14(2) of the Foreclosure Fairness Act amends DOTA S. 61.24.135 and specifies additional per se violations of the Consumer Protection Act, RCW 19.86, including the failure of the lender to act in good faith as required by new section 7 (8). A violation of that duty includes failure to provide documentation to the borrower and mediator such as (iii) proof that the entity claiming to be the beneficiary is the owner of the note (emphasis added). Quality Loan, the purported trustee under the deed of trust herein, has not complied with the duty of good faith owed to Grant. One consequence is that Quality Loan is not entitled to rely on the beneficiary's declaration (CP 80) which provides false or misleading information about the identity of the beneficiary/owner of the note.

i) Violation of TILA CP 241, 245

The *Truth in Lending Act*, 15 U.S.C. s.1635(b) (**TILA**) and its regulations (12 CFR 226 et.seq.) have for years provided that a violation of the lender's obligations to disclose the "cost of borrowing" gives rise to a borrower's right of rescission. On certain loans in foreclosure, the consumer's right to rescind can be extended for a period greater than 3 years when a consumer files bankruptcy and the consumer used that as a defense to a foreclosure action. Additional regulations were implemented in 2009 under TILA Section 131(g), 12 CFR 226.39 - CP 102-104. Now, purchasers or assignees of loans must provide disclosures in writing within 30 days of any **transfer**. Failure to disclose transfers can result in the security interest and promissory note becoming automatically void by operation of law (see Reg. Z s. 226.15(d)(1), 226.23(d)(1) and revised 226.39. These new regulations provide for new violations – additional to the "cost of borrowing" violations. These new non-disclosure violations also affect and bind the deed of trust trustee (Quality Loan and/or Stewart Title) because it is a trustee who must sign and record the full reconveyance after an owner elects rescission. Documents filed by Quality Loan prove TILA violations by First Horizon for failure to disclose to Grant some

of its transfers (see for example, Complaint sections 4.33 to 4.55 - CP 295 and 234-238). This evidence supports Grant's claims for quiet title. If Grant's quiet title claim was dismissed by the trial judge, Grant submits that dismissal should be reversed because Grant can rescind the transaction under TILA and needs a Washington court mechanism to clear title.

## **E2. Dismissal of Grant's Defenses and Rights of Recoupment Should be Reversed CP 226, 241-242**

Under RCW 62A.3-305:

"(a) Except as stated in subsection (b), the right to enforce the obligation of a party to pay an instrument is subject to the following:

(1) a defense of the obligor based on.....(ii) duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor, (iii) fraud that induced the obligor to sign the instrument with neither knowledge or reasonable opportunity to learn of its character or its essential terms...:

(3) a claim in recoupment of the obligor against the original payee of the instrument if the claim arose from the transaction that gave rise to the instrument; but the claim of the obligor may be asserted against a transferee of the instrument only to reduce the amount owing on the instrument at the time the action is brought.

(b) the right of a holder in due course to enforce the obligation of the party to pay the instrument is subject to defenses of the obligor stated in subsection (a)(1), but is not subject to defenses of the obligor stated in subsection (a)(2) or claims in recoupment stated in subsection (a)(3) against a person other than the holder."

Grant has a right to know the identity of the alleged creditor.

The trial court's dismissal decision eliminates Grant's ability to:

a) determine the true owner and the amount, if any, they are entitled to be paid for discharge;

b) present his recoupment defenses and remedy of rescission under TILA;

c) set off his loss and unliquidated damages (to be proven at trial) against amounts alleged by First Horizon to be owing (CP 248) pursuant to CR 13. (and see Warren v. Kuney 115 Wash.2d 211, 796 P.2d 1263 (1990));

d) determine whether Lane Powell's clients and others are necessary and proper defendants in this matter; and

e) present his affirmative defenses under UCC.

Hypothetically, First Horizon by itself or in conjunction with Stewart Title intended to record the QCD at loan closing. If so, their deliberate concealment is at best a breach of the escrow conditions relating to the delivery of the QCD (the discovery of it by Grant was not until late October, 2007) and more than likely, it was fraudulent.

It is an issue of material fact whether the alleged loan and security documents are void because of fraud, undue influence and/or fraud on the part of First Horizon and Stewart Title. If Grant's UCC defenses of duress and undue influence have been

dismissed, that dismissal should be reversed. The evidence of duress and undue influence supports Grant's claims for quiet title.

The trial judge erroneously described the test of duress as someone having "a gun to your head" and "if they threaten to kill you" RP 24, lines 8 and 11. However, under the Restatement (First) of Contracts S. 492 (1932), "duress" means:

"(a) a wrongful act of one person that compels a manifestation of apparent assent by another to the transaction without his volition, or

(b) any wrongful threat of one person by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement."

The test of what act or threat produces the required degree of fear is not objective, it is subjective. All attendant circumstances must be considered, here, the circumstances leading up to the loan closing.

#### **E4 Dismissal of Grant's Claims for Quiet Title Should be Reversed See CP 226, 241**

Grant's request to quiet his title, arising out of his affirmative UCC defenses and right of rescission under TILA, are demonstrated in the previous discussions regarding duress, undue influence fraud and fraudulent concealment of and by First Horizon and Stewart Title. The loan documents should be declared void

ab initio and the security documents released from title to the Property.

#### **E5 Dismissal of claims based on Statute of Limitations should be reversed**

The principal basis for the Defendants' motions to dismiss Grant's Complaint and the principal reason articulated by the trial court in granting the motions was the alleged failure of Grant to bring four of his claims or causes of action within the applicable statute of limitation periods; the claims specifically mentioned by the trial court were "emotional distress", "intentional interference", "negligence" and "CPA". At RP 20, trial judge says:

"You are arguing the merits of it. But the statute of limitations, what they're claimed entitled to dismissal is -- let's assume that you're correct in all this but the statute of limitations issue is what they're raising. "

The trial judge erred in accepting Respondents' false suggestions that December 1, 2004 was the accrual date for **all** claims in Grant's case RP 11, 38, line 8.

#### Statute of Limitations is Inapplicable to Some Claims and all Defenses in the Complaint

Grant's recoupment defense, his defenses under the Uniform Commercial Code and the recoupment defense under the Truth in Lending Act are not subject to time limitations and cannot

be defeated on those grounds. “Statutes of limitation never run against defenses arising out of the transaction sued upon and “recoupment or offset is one of the defenses that is not barred by the statute of limitations” Olsen v. Pesarik, 118 Wash.App. 688-692, 77 P.3d 385 (2003); and see Dove v. McCormick, 698 So.2d 585 (1997).

#### Statute of Limitations analysis of other claims

Early in their submissions, Respondents’ bundled up a category of claims and called them “Loan Closing Claims” – claims they argued arose at the loan closing on December 1, 2004. However, as their arguments progressed, Respondents allowed the trial court to understand that the statute of limitations arguments applied without justification to all claims in the Complaint, no matter when they arose (see for example RP 11, 13, 38). If December 1, 2004 is a correct date (see the four dismissed claims/causes of action specified by the trial judge at RP 26), those claims would be time barred under the 3 year limitation unless a “discovery rule” (such as the exception for fraud (RCW 4.16.080(4)), an “equitable tolling rule” or the “continuing tort rule” applied. However, here the parties disagree as to the date that the causes of action accrued. There are genuine issues of material fact relevant to the discovery

rules for commencement of limitation periods August v. U.S. Bancorp. For those claims that were dismissed as being barred by a limitation period, discovery rules, the continuing tort doctrine and the doctrine of equitable tolling are in place to prevent such outcomes.

Equitable tolling is allowed when justice requires. The predicates for equitable tolling are bad faith, deception or false assurances by the defendant and the exercise of diligence by the plaintiff Millay v. Cam 135 Wash.2d. 193, 955 P.2d 791. In correspondence, on business cards and even in their documentation, First Horizon and Stewart Title fail to use their corporate name consistently or at all, hiding their true identities and entity form. All Respondents appear to have engaged in deliberate and/or fraudulent concealment of the identities of the parties and this underpins the chain of title issues. As well, First Horizon and/or Stewart Title deliberately, negligently or fraudulently concealed the unauthorized recording of the QCD.

Stewart Title's violation of its duty as a fiduciary usually carries a three-year limitation period, but since Stewart Title fraudulently concealed the recording of the QCD while a fiduciary (between 2004 -2008), it tolled the statute of limitation August v.

U.S. Bancorp.

In summary, equitable tolling should be applied to all these causes of action and the dismissal of those claims should be reversed.

Additionally, it is an issue of material fact whether the tort claims are continuing torts. "When a tort involves continuing injury, the cause of action accrues and the limitation period begins to run at the time the tortious conduct ceases " Since usually no single incident in a continuous chain of tortious activity can "realistically be identified as the cause of significant harm" it seems proper to regard the cumulative effect of the conduct as actionable (see Page v. United States (1984) 729 F.2d 818 (quoting Donaldson V. O'Connor 493 F.2d 507 (5th Cir. 1974) vacated on other grounds) and Fowkes v. Pennsylvania R.R. 264 F.2d 397). Where injury is caused by an ongoing tort, the statutory limitations may not begin to run even when the tort is complete. The statute of limitations may be tolled until the tortious conduct ceases on the theory that one should not be allowed to acquire a right to continue the tortious conduct Hill v. Transportation (1995) 76 Wn. App 631.

Each of Grant's claims of bad faith, negligent infliction of emotional distress, interference with contractual relations,

negligence and violation of statutory requirements: i) involve currently active causes of action; ii) are covered by a discovery rule; or iii) are continuing torts.

**a) Breach of Contract CP 242-243** The recording by the Respondents Stewart Title and/or First Horizon of the QCD without Grant's consent or knowledge is at best, a breach of an express agreement with Grant to maintain that document on the escrow file (complaint filed within 6 years), and at worst, the commission of civil fraud (3 year limitation period but tolled until discovery on October 29, 2007) or a breach of fiduciary duty (3 year limitation period but equitably tolled because of Stewart Title's positive duty to disclose coupled with fraudulent concealment). Stewart Title had possession of the QCD and accordingly must have actively participated in the fraud, breach of escrow, breach of fiduciary duties or breach of conditions of delivery of the QCD.

The contract claims against the Defendants First Horizon and Stewart Title are not barred whether they are analyzed according to the 3 year or 6 year limitations based on hypotheticals. If the agreement to not record the QCD:

i) is part of the written agreement (conditions of delivery or escrow conditions) the contract claim is not barred against either

First Horizon or Stewart Title by the 6 year rule.

ii) is partly written and partly oral, the 3 year rule applies to the oral portion and if necessary, parol evidence will show the conditions of delivery and other oral and written acknowledgments by the lender's representative. In any event, the 3 year limitation is tolled by the discovery rule exception for fraud (RCW 4.16.080(4)). Grant did not discover the QCD was recorded until October 29, 2007 - RP 33-34.

These issues all involve issues of material fact. The Complaint was filed October 25, 2010, so Grant's contract claims are not barred by the Statute of Limitations under any scenario.

**b) Breach of Fiduciary Duties see CP 242** Stewart Title was a fiduciary either as the escrow holder or as the trustee under the deed of trust (while fiduciary rules applied until 2008) and even had a duty to disclose. However, Stewart Title denies there was any fiduciary duty RP 13, line 15 or any other duties owed to Grant. The hypothetical here is that Stewart Title fraudulently concealed the recording of the QCD while a fiduciary. As a result, the 3 year statute of limitation was tolled and the claim is valid August v. U.S. Bancorp.

**c) Negligent Infliction of Emotional Distress** The heading of section 9.2 of the Complaint (CP 243-244) uses the word “Intentional” where it should have read “Negligent”. The text of the Complaint alleges that each of First Horizon and Stewart Title “negligently and/or intentionally inflicted emotional distress on the Plaintiff...” CP 243. However, the name given to cause of action doesn’t matter Adams v. King County 164 Wash.2d 640, 192 P.3d 891. If the facts necessary to prove “outrage” as a matter of law are not included in the Complaint, the Complaint can be amended, but Grant is not required to prove “extreme and outrageous” conduct for negligent infliction of emotion distress. The essential elements of negligent infliction of emotion distress are: i) the existence of a duty owed to the party; ii) a breach thereof; iii) resulting injury; and iv) proximate cause Potter v. Wilbur-Ellis Co. 62 Wn.App. 318 , 323,814 P.2d 670 (1991). These have been discussed earlier in this brief and in the Complaint. The proof of Grant’s damages will be corroborated by medical evidence at trial. This is a continuing tort.

**d) Intentional interference with Contractual Relations CP 244** The elements are: i) existence of a contract or relationship; ii) defendant’s knowledge of the contract or relationship; iii) intentional

interference; iv) the absence of justification; and v) damages resulting from the conduct. These have been discussed earlier in this brief and in the Complaint. Where a discovery rule is applied, a cause of action does not accrue until the plaintiff discovers, or in the reasonable exercise of diligence should discover, evidence of all elements of the cause of action First Maryland Leasecorp v. Rothstein, 72 Wn.App. 278, at 284-85, 864 P.2d 17 (1993).

**e) Bad Faith see CP 243** In addition to the fiduciary duties imposed upon Stewart Title and the statutory duties of good faith imposed upon Stewart Title, Quality Loan and First Horizon under the DOTA there is in every contract an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so each could obtain the full benefit of performance Badgett v. Security State Bank 116 Wash.2d 563, 569, 807 P.2d 356 (1991). All these duties have been denied by Quality Loan (for example see RP 13) and by Stewart Title (for example see RP 29). However, the conduct that violates these duties was described in the earlier discussions in this brief and in the Complaint (CP 227-229, 232-238, 243. In the case of Quality Loan and First Horizon, the breached duties are within the 3 year limitation period.

f) **Consumer Protection Act see 241, 245** The violations under the DOTA by First Horizon and Quality Loan and the CPA claims against Quality Loan arose from the foreclosure proceedings of 2010 - those claims were filed within the three-year limitations.

g) **TILA see CP 241, 245** Grant's recoupment defense under the Truth in Lending Act is not subject to time limitations and cannot be defeated on those grounds Dove v. McCormick, 698 So.2d 585 (1997). The principle of equitable tolling does apply to TILA's 3 year rescission right. The rescission right remains available to Grant since certain violations for failure to disclose transfers of ownership of the loan have just been discovered, and for others that are unknown, despite due diligence, Grant could not have reasonably discovered the facts of the TILA violations that were concealed by First Horizon (and actively continue to be concealed).

**E6 Dismissal of contract claims, if based on Statute of Frauds, should be reversed**

First Horizon argued the contract claims fail under Washington's Statutes of Frauds. However, the purpose of the statute of frauds is to prevent fraud, not to perpetrate fraud; thus courts are empowered to disregard the statute when necessary to prevent gross fraud from being practiced Powers v. Hastings 20

Wash.App. 837, 582 P.2d 897 (1978). The doctrine of equitable estoppel by reason of part performance is invoked to guard against utilization of the Statute of Frauds as a means of defrauding innocent parties who have been induced or permitted to change their position in reliance upon oral agreement within its operation Mobley v. Harkins 14 Wash.2d 276, 128 P.2d 289 (1942). Courts will not allow First Horizon to perpetrate its own fraud under such statutes. It is an issue of material fact which of the many documents fall within and which one are outside the definition of "Credit Agreement" under RCW 19.36.100 and comprise the "lender's commitment". In any event, Stewart Title is not afforded protection under RCW 19.36.110 because it is not a "lender".

**E7 Quality Loan untimely filed its CR 12 (c) motion**

Under WCCR 77.2(c) and CR 56, 28 days notice is required for a CR 12(c) motion (treated as a summary judgment motion). Quality Loan gave Grant only 17 days notice so that motion was untimely filed. The trial court ignored Grant's objection CP 161. That motion and all consideration of it should be struck.

**E8 Leave to Amend Complaint should have been given**

An appeal court reviews a trial court's ruling on a CR 15 motion for manifest abuse of discretion. Herron v. Tribune Pub. Co.,

108 Wn.2d 162, 165, 736 P.2d 249 (1987). A trial court abuses its discretion when its decision is based upon untenable grounds or for untenable reasons. On February 4, 2011, the trial court denied Grant's request to amend the Complaint pursuant to CR 15 to add parties and to include fraud and fraudulent concealment CP 38-81. This was based on Lane Powell's opposition: i) because its clients would be prejudiced by the "delay" (note that only three (3) months had passed since Grant filed the Complaint); ii) that it was "unfair" to add their clients as necessary parties; and iii) that Grant should not have an opportunity to investigate the chain of title issues. Each of these positions was without merit and the trial court abused its discretion in denying Grant's motion to amend. There are issues of material fact as demonstrated above and in particular, that are relevant to the discovery rules for commencement of limitation periods August v. U.S. Bancorp. After discovery, Grant should have an opportunity to amend the Complaint to add necessary parties and include fraud and fraudulent concealment.

**E8 Judicial notice of the divorce holdings should have been granted**

Judge Snyder in the Plaintiff's Divorce (Whatcom County Superior Court # 08-3-0024977) found that Grant's Property

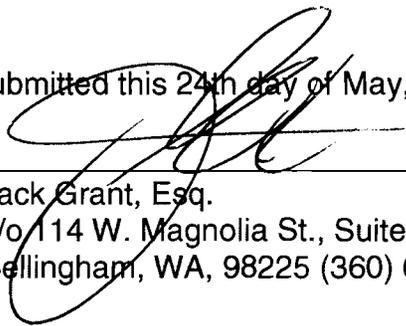
remained his separate property despite the recording of the QCD or the First Horizon loan documents, following Estate of Borghi v. Gilroy, 141 Wash.App 294, 169 P.3d 847 (2007), affirmed 167 Wash.2d 480, 219 P.3d 932 (2010). When Grant asked the trial court to take judicial notice of the findings, the trial judge disputed whether the divorce judge had made that characterization of separate property RP 22, 23. Grant asks this Court to direct the trial court to take judicial notice of the following portion of the findings of fact that describes the separate property characterization and reflects to some extent the undue influence by First Horizon and Stewart Title and duress at the time the loan documents were presented:

“The property at 4630 Drayton Harbor Rd., Blaine, WA should be characterized as the separate property of the husband, Jack Grant, and awarded to him. It was purchased by Mr. Grant in 1995 and refinanced shortly before the marriage. The property was refinanced again in 2003 as a construction loan. Mrs. Grant acknowledged that Mr. Grant’s community income was pledged to the 2003 loan. In December 2004, Mrs. Grant was placed on title to accommodate First Horizon Home Loans. She was not on the initial loan application, and there is no evidence that a gift was intended. The parties signed for an additional loan secured by the property in December 2007, the proceeds of which are the separate property of Mr. Grant....Mrs. Grant should clear title to this property by a quit claim deed to Mr. Grant” (emphasis added).

**F RELIEF REQUESTED** For the reasons stated above, Grant respectfully requests that this Court:

- 1) declare the foreclosure proceedings void ab initio;
  - 2) declare the note and deed of trust void ab initio;
  - 3) reverse the order dismissing the Complaint and enter an order remanding this case for proceedings consistent with that opinion;
  - 4) declare that Lane Powell has no standing to bring its motion or further proceedings unless it can prove successorship as asserted;
  - 5) reverse the trial court's denial of Grant's request to amend his Complaint to add parties and include fraud and fraudulent concealment;
  - 6) direct the trial court to take judicial notice of the separate property findings of fact from the Divorce proceedings; and
  - 7) award Grant attorneys fees and costs on appeal (RAP 18.1).
- Applicable law authorizing an award of fees is found in our RCW 11.96A.150(1), which provides, in pertinent part: "Either the Superior Court or the court on appeal may, in its discretion, order costs, including reasonable attorneys fees to be awarded to any party: (a) from any party in the proceedings."

Respectfully submitted this 24th day of May, 2011



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Jack Grant, Esq.  
c/o 114 W. Magnolia St., Suite #436  
Bellingham, WA, 98225 (360) 671-1116

## EXHIBIT 1

Excerpt from an Amicus Curiae brief on fraud in the securitization industry dated October 1, 2010 filed by Marie McDonnell, CFE, Mortgage Fraud and Forensic Analyst, Certified Fraud Analyst in the case. U.S. Bank National Association v. Antonio Ibanez, 458 Mass. 637 -, 941 N.E. 2d 40 (2011):

(see **page 12** of the Marie McDonnell brief)

The banking industry and the attorneys who developed the securitization model intentionally created a dynamic system that was designed for high-speed, electronic transfers where efficiencies of scale were more important than compliance with State real property laws governing the orderly and authorized transfer of real estate interests at the time such transactions took place. Compromises like this were made in order to facilitate the unfathomable amount of money to be made in the process of pooling individual mortgage transactions for the securitization mill. As with the predatory mortgage lending scheme test marketed by the Dime Savings Bank of New York in the late 1980s through the mid-1990s, a business decision was made at the highest executive levels of the organization to deal with these "technicalities" later.

As a result, required "interim" assignments transferring real property interests -notably the borrower's deed of trust-properly executed by a person or persons duly authorized to do so was simply not handled at the time the transfer actually occurred. As mortgage default rates began to soar, the "assignment problem" became urgent and extreme and mortgage servicing companies, who control the foreclosure process, attempted to correct the problem retroactively by backdating the conveyancing documents because they securitizers had not done so at the time of the transfer(s).

Unfortunately, the practice of creating retroactive assignments of real estate interests clearly promote fraud, waste and abuse and virtually eliminates transparency in the process of buying and selling residential mortgages. As a result of the system set up by the banks, their servicing companies are feverishly, almost desperately creating tens of thousands of improper assignments of Deeds of Trusts, affidavits, powers of attorney, etc., which largely appear to be fraudulently created in order to process the millions upon millions of foreclosure cases now in the pipeline.

**At page 15** - The mortgage industry and the foreclosure conveyancing bar are well aware that consumers who have been ravaged by predatory lending and wrongful foreclosure schemes do not have the emotional, psychological or monetary wherewithal to challenge the likes of the appellants (U.S. Bank and Wells Fargo Bank).

The sad fact is that the wrongdoers have gotten away with the most enormous transfer of wealth in human history representing trillions upon trillions of dollars and they have yet to be held accountable.

....the mainstream media in the United States is just beginning to break news exposing what consumers, advocates and foreclosure defense attorneys have been saying for several years, namely that the parties who securitized loans on a massive scale negligently or intentionally skipped critical steps in the process necessary to document the legal transfer of ownership in, and possession, of the promissory notes and mortgages (deeds of trust) that were allegedly bundled into "pools", transformed into securities and sold to the global capital markets as a AAA rated investments.

In an attempt to fix these problems..... the public land records are increasingly being populated with fraudulent documents purporting to transfer mortgage (deed of trust) rights from the originating lender directly to the trustee of a securitization trust (an act typically prohibited by the securitization documents themselves) when neither party has the legal authority to issue or accept such a transfer. Moreover, foreclosure documents are being recorded by entities and persons who have no legal authority to do so, creating



clouds on title that can only be corrected by costly litigation such as the instant litigation.

When these bogus documents are presented to the courts in support of a complaint or other document to foreclose a mortgage (deed of trust), judges automatically afford them deference and without question assume, like most people, that they are valid, particularly when such documents are being presented by an officer of the court (for example, an attorney for foreclosing lender). Many judges, unaware of the underlying potential for fraud, become unwitting participants in the wrongful foreclosure of the borrower's real property. "

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**COURT OF APPEALS – DIVISION ONE**

**JACK GRANT**

**Plaintiff**

**CASE NO. 66721-1**

vs.

**FIRST HORIZON HOME LOANS**, aka First Horizon Corporation dba "First Horizon Home Loans"

And UNKNOWN John and Jane Does 1-10, XYZ Corporations 1-10, ABC Limited Liability Companies 1-10; and 123 Banking Associations 1-10

**QUALITY LOAN SERVICE CORPORATION OF WASHINGTON**, a Washington corporation

**DECLARATION OF MAILING**

**STEWART TITLE**, dba "Stewart Title Of Bellingham"

**STEWART TITLE OF WESTERN WASHINGTON, INC.** a Washington corporation dba "Stewart Title Of Bellingham"

**STEWART TITLE OF BELLINGHAM, INC.** a Washington corporation dba "Stewart Title Of Bellingham"

And UNKNOWN John and Jane Does 11-20; XYZ Corporations 11-20; and ABC Limited Liability Companies 11-20;

**Defendants**

1 I, JULIE AKRE, declare under penalty of perjury under the laws of the state of  
2 Washington that I am now and at all times herein mentioned was, a citizen of the United  
3 States, a resident of the state of Washington and over the age of eighteen years.

4 On May 24, 2011, I caused to be mailed by *regular U.S. Mail, postage prepaid*, a  
5 copy of the following to the following persons:

- 6
- 7 1. Brief of Appellant Jack Grant; and
- 8 2. This Declaration of Mailing.
- 9

10 **Service upon:**

11 Lane Powell, P.C.  
12 Attn: Ronald Beard/Andrew Yates  
13 1420 Fifth Ave. Suite 4100  
14 Seattle, WA 98101-2338

Hinton Law Office, PLLC  
Attn: Patrick L. Hinton  
P.O. Box 10933  
600 Ericksen Avenue, Suite 395  
Bainbridge Island, WA 98110

15 McCarthy & Holthus, LLP  
16 Attn: Albert Lin/Mary Stearns  
17 19735 10<sup>th</sup> Avenue NE  
18 Suite N-200  
19 Poulsbo, WA 98370

20 I hereby declare under penalty of perjury that the foregoing is true and correct.

21 Executed at Bellingham, Washington this 24th day of May, 2011

22   
23 \_\_\_\_\_  
24 Julie Akre