

70503-2

ORIGINAL
70503-2

No. 70503-2-I
(Appeal of King County No. 06-2-32029-8)

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

DOUG KRUGER,
Respondent,

v.

MICHAEL MOI,
Appellant.

REPLY BRIEF OF APPELLANT

Elena Luisa Garella
Law Office of Elena Luisa Garella
3201 First Avenue South, Suite 208
Seattle, Washington 98134
(206) 675-0675
law@garella.com

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 JUL - 1 AM 10:22

TABLE OF CONTENTS

I. OBJECTIONS TO STATEMENT OF THE CASE	1
II. REPLY TO STATEMENT OF THE CASE	1
III. REPLY ARGUMENT	3
A. Kruger’s failure to provide the sworn statement is fatal to his claim that the redemption period has ended.	4
1. The cases cited by Kruger are inapplicable.	4
2. CR 11 does not supplant the verification requirement.....	8
3. Even if Kruger’s statement is considered “verified” it failed to comply with RCW 6.23.090(2).	14
B. <u>Millay v. Cam</u> does not apply because <u>Millay</u> does not involve RCW 6.23.090.	14
1. Moi was not required to redeem because Kruger did not give a sworn statement on demand per RCW 6.23.090(2).	15
2. Kruger’s argument that Moi was required to bring an accounting action after Kruger already obtained the property is barred by the invited error doctrine... ..	17
3. <u>Millay</u> does not require Moi to bring a declaratory judgment action.....	19
C. Moi complied with the notice required by RCW 6.23.080(1).	21
D. Moi exercised due diligence in his attempts to redeem the Magnolia property.	21

E. Kruger’s “public policy arguments fail to consider that he could have simply provided a sworn statement and avoided the extended redemption period.23

F. *Lis pendens*.....25

IV. CONCLUSION.....25

Note: Respondent Kruger’s Response Brief is mistakenly denominated as a “Reply.” In this Reply, Kruger’s brief is identified as the Response.

TABLE OF AUTHORITIES

CASES

<u>Boundary Dam Const. v. Lawco Contractors</u> , 9 Wn. App. 21, 510 P.2d 1176 (Div. I, 1973).....	11
<u>Christensen v. Ellsworth</u> , 162 Wn.2d 365, 173 P.3d 228 (2007)	21
<u>Columbia Cmty. Bank v. Newman Park, LLC</u> , 177 Wn.2d 566, 304 P.3d 472 (2013)	20
<u>Edwins v. Highline Sav. & Loan Assoc.</u> , 15 Wn. App. 660, 551 P.2d 135 (1976)	19
<u>Frieze v. Powell</u> , 79 Wash. 483, 140 P. 690 (1914)	4- 6
<u>Gates v. Port of Kalama</u> , 152 Wn. App. 82, 215 P.3d 983 (Div. II, 2009).....	6-7
<u>Gesa Fed. Credit Union v. Mut. Life Ins. Co.</u> , 105 Wn.2d 248, 713 P.2d 728 (1986)	17
<u>In re Pers. Restraint of Tortorelli</u> , 149 Wn.2d 82, 94, 66 P.3d 606, <i>cert. denied</i> , 540 U.S. 875 (2003)	18
<u>Johnson v. King County</u> , 148 Wn. App. 220, 198 P.3d 546 (Div. I, 2009)	11
<u>Kennedy v. Trumble</u> , 32 Wash. 614, 73 P. 698 (1903)	19
<u>Le Tastevin, Inc. v. Seattle First</u> , 95 Wn. App. 224, 974 P.2d 896 (1999)	22
<u>Levy v. State</u> , 91 Wn. App. 934, 957 P.2d 1272 (Div. II, 1998),.....	10
<u>Millay v. Cam</u> , 135 Wn.2d 193, 955 P.2d 791 (1998)	14-17, 19, 20, 23-24
<u>Putnam v. Wenatchee Valley Med Ctr.</u> , 166 Wn.2d 974, 216 P.3d 374 (2009)	7, 8
<u>Saldivar v. Momah</u> , 145 Wn. App. 365, 186 P.3d 1117 (2008).....	13

<u>Schoonover v. State</u> , 116 Wn. App. 171, 64 P.3d 677 (Div. II, 2003).....	11
<u>Scott v. Patterson</u> , 1 Wash. 487, 20 P. 593 (1889).....	21
<u>Shannon v. Dep't of Corrs.</u> , 110 Wn. App. 366, 40 P.3d 1200, (Div. II, 2002).....	10
<u>Snyder v Cox</u> , 1 Wn. App. 457, 462 P.2d 573 (Div. I, 1969)	9, 10
<u>State ex rel. Stickel v. Shattuck</u> , 95 Wash. 119, 163 P. 414 (1917)	21
<u>United Savings & Loan v. Pallas</u> , 107Wn. App. 398, 27 P.3d 629 (Div. I, 2001)	25
<u>Zesbaugh, Inc. v. General Steel Fabricating</u> , 95 Wn.2d 600, 627 P.2d 1321 (1981)	7, 9

COURT RULES

CR 6	21
CR 11	8, 9- 12
CR 60	fn. 3
CR 81	9, 10, 21
RAP 9.11	1
RAP 10.3	1
RAP 12.8.....	fn. 9

STATUTES

RCW 4.28.320	25
(Former) RCW 4.96.020	7

RCW 6.23.020	23
RCW 6.23.040	15, fn. 6, 23
RCW 6.23.050	15, 23
RCW 6.23.080	21, 22
RCW 6.23.090	<i>in passim</i>
RCW 6.27.210	fn. 5
(Former) RCW 7.32.250	9, fn. 5, 10
RCW 7.70.150	7
RCW 9A.72.085.....	11
(Former) Rem. & Bal. § 303	5, 6, fn. 3

SECONDARY SOURCES

<u>Black's Law Dictionary</u> , Rev'd Fourth Ed. (1968).....	11
--	----

I. OBJECTIONS TO STATEMENT OF THE CASE

“Appendix A” of Kruger’s Response should be stricken as an improper attempt to supplement the record on review. RAP 9.11. The fact that Kruger violates the Rules of Appellate Procedure in order to supplement the record with irrelevant information is a tacit admission that his arguments have no merit. Moi also objects to the argumentative statements throughout Kruger’s Statement of the Case. RAP 10.3(a)(5).¹

II. REPLY TO STATEMENT OF THE CASE

Kruger now claims that he paid \$13,341.74 in property taxes on the property without citation to the record. Resp., p. 5. In the trial court, Kruger claimed he paid only \$1,773.54 for real property taxes. CP 496.

Kruger’s statement, at Resp. p. 6, that “Moi demanded an accounting for the rents and profits” is misleading. In fact, Moi’s demand tracked the language in RCW 6.23.090(2). Moi sought verification of “the amounts of rents and profits thus received **and expenses paid and incurred.**” CP 498. Neither Kruger nor his attorney ever provided the Sheriff with a statement (verified or not) of the “expenses paid and incurred” on the property during the redemption period. In his Statement of the Case, Kruger does not contend otherwise.

¹ Such arguments include, but are not limited to, the flat claim that “there was a one year redemption period,” p. 4; the assertion that Moi’s notice of intent to redeem “was not timely,” p. 5; “ that an accounting was mandatory in order to extend the period of redemption....” p. 8, etc..

Kruger claims that “Moi agreed that the ‘sum required’ to redeem was at least \$78,936.80.” Resp. pp. 6-7, 10. There is no citation to the record, for the very reason that Moi never agreed to any such thing. Moi’s position consistently has been that he was not required to redeem at any amount because Kruger failed to provide the verified statement of rents, profits and expenses. CP 499-509, 531-32; RP 31-33, 34-40.

Kruger asserts that the Order at CP 834-35 allowed Moi five more days to redeem. Resp., p. 10. That Order says nothing of the sort. Rather, the trial court’s order was oral: Kruger was directed to “**not put the properties up for five days--for sale--for five days to give them an opportunity to redeem to you.**” RP 42.

Citing to CP 572, Kruger argues that Moi placed conditions on redemption, and demanded that Kruger deliver the property “unencumbered.” Resp., pp. 10-11. The word “unencumbered” at CP 572 references only the payoff of the underlying amount of the loan against the Magnolia property and has nothing to do with other judgments against Moi. In any event, Kruger conveniently “forgets” that on June 14, 2013, Moi offered an unconditional tender of the redemption amount (CP 577) and Kruger simply refused it: “**I do not recall and the court did not grant any order extending the redemption period.**” CP 578.

At pages 11-12 of his Response, Kruger inserts irrelevant and prejudicial allegations regarding Moi's criminal history and other matters, purportedly to support the speculative assertion that Moi did not have a lender willing to loan him the redemption amount. In fact, Moi did have a hard money lender willing to loan him the money. CP 562, ¶ 6.

III. REPLY ARGUMENT

Redemption, RCW Ch. 6.23, is a special proceeding prescribing the rules whereby a judgment debtor may recover his property and whereby a creditor may keep the property following execution. One of its rules, RCW 6.23.090, allows a person entitled to redeem to demand a sworn statement of rents, profits and expenses incurred on the property during the redemption period. If the person in possession provides the sworn statement, redemption is not allowed unless the person entitled to redeem pays according to the sworn statement. If the person in possession refuses or fails to give the sworn statement, the person entitled to redeem may bring an accounting action within 60 days and the redemption period is held open until 15 days after the conclusion of the action.

The statutory procedures are precise because redemption is intended to work with a minimum of judicial oversight. The sheriff either receives a demand for a verified statement from the person entitled to redeem, or he does not. The sheriff either receives a verified (sworn)

statement from the person in possession, or he does not. The consequences flow from each of the parties' actions.

In this case, the person in possession, Respondent Kruger, failed to provide a verified statement upon Appellant Moi's demand. Then Kruger appeared in court and forced the issue. Kruger convinced the trial court to disregard straightforward statutory language intended to hold the person in possession's feet to the fire by compelling him to support his claims of the amount required to redeem under penalty of perjury. Kruger caused the premature termination of Moi's period to redeem. The case is not moot. This court should restore Moi's substantial right to an extended period of redemption and the opportunity to bring an accounting action.

A. KRUGER'S FAILURE TO PROVIDE THE SWORN STATEMENT IS FATAL TO HIS CLAIM THAT THE REDEMPTION PERIOD HAS ENDED.

An attorney's signature on pleadings is not the functional or legal equivalent of a "verification" as required by RCW 6.23.090(2). Even if Kruger's attorney's signature is "verification," the materials submitted by his attorney failed to set forth the "expenses paid and incurred" during the redemption period. Therefore, the statute's requirements were still unmet.

1. The cases cited by Kruger are inapplicable.

Kruger relies heavily on Frieze v. Powell, 79 Wash. 483; 140 P. 690 (1914). In that case, defendant Powell owed a judgment to plaintiff

Frieze. Defendant worked for garnishee defendant, an Illinois company. Plaintiff served a writ of garnishment on the garnishee's Seattle office. Garnishee failed to answer. Plaintiff obtained an order of default against the garnishee for the full amount of the judgment against defendant. A few days later, garnishee filed a petition to set aside the default judgment. Id., at 485. The garnishee's petition was verified only by an attorney for the garnishee. Ultimately, the trial court vacated the default judgment against garnishee and permitted garnishee to file an answer.

On appeal, plaintiff urged that the court did not have jurisdiction to consider the petition because it was only signed by the garnishee's attorney. Plaintiff relied on Rem. & Bal. § 303, which permitted the court to relieve a party from a judgment upon an affidavit showing good cause. Frieze, 79 Wash at 490. The opinion rejected plaintiff's position:

There is nothing in the record, however, indicating that this particular matter was called to the attention of the trial court, and in any event, since the verification states that no officer of the corporation was, at the time, within King County, we think the petition was sufficient to confer jurisdiction upon the court.² Id. at 490.

Kruger contends that Frieze supports his claim that an attorney's

² Plaintiff also asserted that the trial court should have stricken garnishee's answer because it was not signed by an officer of the garnishee. Frieze, 79 Wash at 487, 495. The court rejected this argument because the record did not reflect that the argument had been made to the trial court and because the garnishee's secretary did in fact sign under oath that he had "read the answer, knows its contents, and believes the same to be true." Frieze, 79 Wash at 494.

signature is the equivalent of verification because the garnishment statutes addressed in Frieze “required a verification from the claimant.” Resp., p. 23. But Kruger is incorrect. Rem. & Bal. § 303 was not a garnishment statute.³ Rather, Frieze holds that “a motion signed by an attorney is sufficient to **invoke the jurisdiction of the court**, and that an affidavit of merits made by the defendant in person is **not a jurisdictional element**.” Id. at 490, *emph. added*. The court declined to permit a “mere technicality” to bar the opportunity to present a defense.

Frieze does not apply. The jurisdiction of the trial court to consider Kruger’s Motion to Transfer Deed is not at issue. The actual issue (whether or not the redemption period was extended because Kruger failed to supply a sworn statement) was brought to the attention of the trial court. The language quoted by Kruger from Frieze, directing trial courts to avoid the imposition of “mere technicalities” to deprive litigants of “substantial rights,” does not apply. Moi had a substantial right to a sworn statement from Kruger and, when that statement was not provided, Moi had the further substantial right to an additional period to redeem.

The other cases cited by Kruger are also inapposite. In Gates v.

³ Rem. & Bal. § 303, the precursor to CR 60, stated: “The court may, in furtherance of justice... amend any pleadings or proceedings ... and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars....”

Port of Kalama, 152 Wn. App. 82, 215 P.3d 983 (Div. II, 2009), the Port moved for summary judgment because the plaintiff's administrative claim had not been verified. Id. at 88. Affirming, the Court of Appeals noted that former RCW 4.96.020(3) stated that "the claim *may* be verified." Verification was permissive, not mandatory. Id. at 90. Therefore the attorney's signature on the claim was good enough.

Zesbaugh, Inc. v. General Steel Fabricating, 95 Wn. 2d 600, 627 P.2d 1321 (1981) is similar. The trial court dismissed a complaint in intervention of a garnishment proceeding because the intervenor had not verified the complaint. Id. at 600. The Supreme Court reversed because the garnishment statutes (formerly RCW Ch. 7.33) include no requirement that intervenors provide verification. Id. at 603-4. Zesbaugh notes that "although the technical requirements of the garnishment statutes cannot be ignored, [cit. omit'd], the complaint in intervention is not one of the pleadings required by the statute." Id. at 604. Like Kalama, Zesbaugh does not hold that a statutory obligation to provide verification is satisfied by an attorney's signature.

Finally, Putnam v. Wenatchee Valley Med Ctr., 166 Wn.2d 974, 216 P.3d 374 (2009) holds that RCW 7.70.150's requirement that a "certificate of merit" be filed with a medical malpractice action "fundamentally conflicts with the civil rules regarding notice pleading—

one of the primary components of our justice system.” 166 Wn.2d at 984. Kruger entirely fails to explain how Putnam, which considers an access to courts issue of constitutional dimension, applies to RCW 6.23.090(2).

2. CR 11 does not supplant the verification requirement.

The claim that an attorney’s CR 11 signature equates to a client’s verification cannot be true, or attorneys could sign declarations for their clients in all manner of proceedings. The law frequently requires sworn statements by persons with actual knowledge and a direct stake in the proceedings. RCW 6.23.090(2) is one such instance.

RCW 6.23.090(2) states that the person in possession [Kruger], or his agent⁴, is to file a “written and verified statement of the amounts of rents and profits... and expenses...” upon demand. If such person [Kruger] “fails or refuses to give such statement” then the person entitled to redeem [Moi] “may bring an action within sixty days after making such demand” and the right of redemption is extended “until fifteen days from and after the final determination of such action.” The statute is clear: The person receiving the rents and profits must provide the “sworn statement” to avoid extension of the redemption period.

⁴ There is no evidence in the record that Mr. Wathen or Ms. Sagara, or any other attorney for Kruger, had personal knowledge of the income and expenses incurred on the Magnolia property during the redemption period. Ms. Sagara merely swore that the spreadsheets submitted were true and correct **copies**. CP 465-466. She did not attest to the veracity of the **contents** of those spreadsheets.

Under CR 81, the Civil Rules do not apply to special proceedings:

(a) To What Proceedings Applicable. **Except where inconsistent with rules or statutes applicable to special proceedings, these [Civil] rules shall govern all civil proceedings.** Where statutes relating to special proceedings provide for procedure under former statutes applicable to civil actions, the procedure shall be governed by these rules.

(b) Conflicting Statutes and Rules. **Subject to the provisions of section (a) of this rule, these rules supersede** all procedural statutes and other rules that may be in conflict. [Emph. added]

Garnishment is a special proceeding, Zesbaugh, 95 Wn. 2d at 904.

Therefore CR 11 does not supplant RCW 6.23.090(2)'s verification requirement.

Kruger ignores the applicable case law. In Snyder v Cox, 1 Wn. App. 457, 462 P.2d 573 (Div. I, 1969), plaintiff Snyder secured a writ of garnishment against garnishee defendant National Union Fire Ins. Co.. National answered, denying possession of any assets due to the Coxes. Snyder noted the case for trial without filing the controverting affidavit required by RCW 7.32.250.⁵ Instead, "Snyder's *attorney* signed and filed an affidavit on October 31, 1967, 13 1/2 months after National had filed

⁵ The current version of RCW 7.32.250 is RCW 6.27.210, which has been amended. In relevant part, RCW 6.27.210 now states: "If the garnishee files an answer, either the plaintiff or the defendant, if not satisfied with the answer of the garnishee, may controvert... by filing an affidavit in writing signed by the controverting party **or attorney** or agent, stating that the affiant has good reason to believe and does believe that the answer of the garnishee is incorrect..." [emph. added]. **The legislature clearly is capable of designating that an attorney may execute a document when it actually wants to do that.**

its answer.” Id. at 458. National moved to dismiss. Snyder pressed the same argument as Kruger does; to wit, that his attorney’s signature fulfilled the affidavit requirement. The court rejected the argument:

[Snyder] contends, however, his attorney's affidavit was sufficient because CR 11 has abolished the requirement of personal verification. CR 81(a) leads us to a contrary conclusion. CR 11 is not applicable. **The failure to comply with RCW 7.32.250 was fatal to Snyder's cause.**

Id. at 460, *emph. added.* Snyder notes that under the garnishment statutes:

a plaintiff is furnished a valuable remedy provided he complies with certain mandatory procedures. Inasmuch as compliance with the procedures has been declared mandatory, it is logical to conclude the legislature intended that a defendant's remedy for plaintiff's noncompliance have an equally imperative result.

Id. at 461. The same applies to the instant case. Plaintiff Kruger had a valuable remedy—cutting off Moi’s redemption period—provided he supplied a statement under oath of the rents, profits and expenses upon Moi’s demand. His failure to do so is fatal to his cause. As in Snyder, this court must conclude that Moi’s “remedy for plaintiff’s noncompliance [has] an equally imperative result.” Id. at 461.

Similarly, in Levy v. State, 91 Wn. App. 934, 943, 957 P.2d 1272 (Div. II, 1998), the court rejected a purported “verification” by an attorney who “neither swore to the contents of the claim under penalty of perjury, nor signed or acknowledged the claim before a notary public.” Shannon v. Dep't of Corrs., 110 Wn. App. 366, 40 P.3d 1200, (Div. II, 2002) also

affirmed dismissal where plaintiff's attorney had signed a tort claim where the statute required the plaintiff to verify. *See, also, Boundary Dam Const. v. Lawco Contractors*, 9 Wn. App. 21, 30, 510 P.2d 1176 (Div. I, 1973); *Schoonover v. State*, 116 Wn. App. 171, 178-79, 64 P.3d 677 (Div. II, 2003); *Johnson v. King County*, 148 Wn. App. 220, 226-227, 198 P.3d 546 (Div. I, 2009).

These cases underscore that certification under CR 11 simply is not the functional or legal equivalent of verification. CR 11 itself clearly distinguishes between the two processes, stating that "[p]etitions for dissolution of marriage, separation, declarations concerning the validity of a marriage, custody ...shall be **verified**" and, elsewhere, "[t]he signature of a party or of an attorney constitutes a **certificate**" that the information is factual "to the best of that party's or attorney's knowledge, information and belief..." [emph. added].

"Verification," when prescribed by a statute, "ordinarily imports a verity attested by the sanctity of oath." *Black's Law Dictionary*, Rev'd 4th Ed. (1968). Where a law requires verification, the affiant must declare that **statement is true** under penalty of perjury. RCW 9A.72.085. On the other hand, "certification" under CR 11 is simply a personal affirmation of **belief** in the truthfulness of what is stated in the document, and need not, for that reason, be based upon personal knowledge. Thus verification is

distinguishable from a mere signature—even if that signature is deemed by CR 11 to qualify for the enhanced status of a "certification." Case in point: Kruger's attorney only certified that the spreadsheets provided to the court were true and correct **copies** of the originals provided to the Sheriff. She did not swear under oath that the **contents** were true. CP 465.

It can be predicted that, at oral argument, Kruger's counsel will howl about the imposition of a "mere technicality" upon his client. **But this is no mere technicality.** The evident purpose of setting up a procedure to demand verification of the redemption amount is to ensure a modicum of restraint by the person in possession. If the person in possession wishes to claim extra costs and expenses, he must swear to the validity of those amounts. Otherwise, he could simply inflate the numbers, discouraging—or even preventing—an entitled person from redeeming, without facing the prospect of an indictment for perjury. RCW 6.23.090(2) forces people in Kruger's position to either respond to the demand for a verified statement under penalty of perjury or submit to an accounting action and the extended redemption period.

An attorney's memorandum, signed pursuant to CR 11, does not fulfill RCW 6.23.090's statutory purpose because CR 11 is only intended to ensure that the "attorney has read the pleading... and that to the best of the... attorney's knowledge, information and belief, formed after an

inquiry reasonable under the circumstances... it is well grounded in fact.” Because an attorney is entitled to rely on his client, “the trial court cannot reasonably sanction him solely for failing to accurately assess his client's ultimate credibility.” Saldivar v. Momah, 145 Wn. App. 365, 405, 186 P.3d 1117 (2008). Supplying a pleading signed by an attorney, rather than a sworn statement, opens up a dodgy end-run around the discipline imposed by RCW 6.23.090(2).

Kruger had the power in his hands to end Moi’s redemption period. He could have simply given the sworn statement. Moi then would have had only five more days to redeem. Astonishingly, even after Moi pointed this out in the trial court, CP 499-508, Kruger still did not provide the sworn statement (and has not done so to date). The fair inference is that the amounts he claimed above the purchase amount and interest were wholly (or in part) not amounts that he was willing to risk perjury charges to assert. Kruger elected to not provide a sworn statement, and he may not hide behind his attorney’s pleadings to avoid the consequences.

3. **Even if Kruger’s statement is considered “verified” it failed to comply with RCW 6.23.090(2).**

RCW 6.23.090 not only requires a sworn statement, it requires that the statement demonstrates the amounts of rents and profits thus received and expenses paid and incurred with respect to the subject property during

the redemption period. At a minimum, therefore, Kruger's verified statement should have set forth the dates of payment and the nature of the "liens or other costs paid by the purchaser during the redemption period" of \$6,037.78 and the \$1,986.98 in taxes claimed by Kruger in his "Itemized Statement." CP 496.

However, Kruger's response to Moi's RCW 6.23.090(2) demand does not contain any of the required information. The "accounting" offered by Kruger consisted of a spreadsheet of expenses (CP 478-482) and a list of numbers (CP 483). None of the expenses listed on the spreadsheet were costs incurred on the Magnolia property during the redemption period. The final page is simply a series of unidentified numbers. The "accounting" is unintelligible. During the 6/11/13 hearing, even Mr. Wathen himself could not explain the data to the confused judge on the bench. RP 29-39

B. MILLAY V. CAM DOES NOT APPLY BECAUSE MILLAY DOES NOT INVOLVE RCW 6.23.090.

Throughout his Response, Kruger relies on Millay v. Cam, 135 Wn.2d 193, 955 P.2d 791 (1998) to argue that Moi was required to redeem within a year, Resp., pp. 12-14 and 19-22; required to bring an accounting action, Resp., pp. 8, 14; and should have filed a declaratory judgment action. Resp., pp. 17-18. Kruger's reliance on Millay is misplaced for the

reason that the redemptioner in Millay, unlike Moi, never made a demand for a verified statement pursuant to RCW 6.23.090(2).

In Millay, the prospective successive redemptioner (Millay) gave notice to the sheriff of his intent to redeem eight days prior to the end of the 60-day redemption period, pursuant to RCW 6.23.040. The redemptioner in possession, Cam, provided a payoff statement pursuant to RCW 6.23.050. Believing the amount was exaggerated, Millay filed a declaratory judgment action rather than paying Cam's price. 135 Wn.2d at 198. Millay holds that redemptioners usually must pay at least "the last previous judgment plus interest and any recorded taxes or assessments paid by the redemptioner in possession" in order to redeem. Id., at 200.

1. **Moi was not required to redeem because Kruger did not give a sworn statement on demand per RCW 6.23.090(2).**

Like Mr. Millay, Moi was suspicious of the unsubstantiated costs claimed in Kruger's Itemized Statement. CP 511. But unlike Mr. Millay, Moi followed the alternative procedure available under RCW 6.23.090(2) by filing a demand "for a written and verified statement of the amounts of rents and profits thus received and expenses paid and incurred" on the property during the redemption period.⁶ CP 498. Under RCW 6.23.090(2), "[i]f a sworn statement is given" the person entitled to redeem [Moi]

⁶ Millay itself contrasts the difference in procedure and remedy between 6.23.090 and RCW 6.23.040. 135 Wn.2d at 202.

must “first redeem in accordance with such sworn statement.” **But Kruger did not give a sworn statement.** Therefore the trial court erred when it failed to recognize that RCW 6.23.090(2) extended Moi’s period to redeem.

RCW 6.23.090(2) provides that when a sworn statement is given, the person seeking to redeem must redeem first. The redemption period is not extended, but the person redeeming may bring an action for an accounting within 30 days. In contrast, when the sworn statement is not given, the person seeking to redeem need not redeem first, and the redemption period is extended for at least sixty days or until 15 days following the determination of an accounting action, whichever is later.⁷

RCW 6.23.090(2) reveals a difference in legislative intent where a person in possession either complies or fails to comply with a demand for a sworn statement. “It is well settled that where the Legislature uses certain language in one instance but different, dissimilar language in another, a difference in legislative intent is presumed.” Millay, 135 Wn.2d at 202. **Because Kruger failed to give the sworn statement, Moi had no obligation to first redeem.**

⁷ Kruger claims that “[t]he maximum timeframe the period of redemption may be extended is one year, plus ten days, if demand is made plus an additional sixty days, for a total of one year and seventy days.” Response, p. 14. This is simply untrue. The maximum timeframe is 15 days after final determination of an accounting action where the person in possession fails to provide a verified statement upon demand. RCW 6.23.090(2).

If Millay stands for anything, it is for the strict reading of the plain language of the redemption statutes, which the Millay court undertook. Under RCW 6.23.090(2), after Kruger failed to give the demanded sworn statement, Moi had 60 days to bring an accounting action, during which the redemption period was extended. Moi was not required to first tender payment of any redemption amount.

2. **Kruger’s argument that Moi was required to bring an accounting action after Kruger already obtained the property is barred by the invited error doctrine.**

Kruger claims that Moi was required to file an accounting action within 30 days, or by July 5, 2013, in order to preserve his redemption rights. Resp., p. 14. However, on May 29, 2013, Kruger demanded that the trial court immediately transfer the property to Kruger. Kruger advised the trial court that “the redemption period has expired.” CP 455-59; RP 4, ll. 7-8; 19-24.

The right of redemption is purely a creature of statute. Gesa Fed. Credit Union v. Mut. Life Ins. Co., 105 Wn.2d 248, 252, 713 P.2d 728, (1986). There is no case or statute permitting redemption after the Sheriff has deeded property in fee. CP 586. Consistent with the trial court’s order, the Sheriff’s Return on Real Property states that “the redemption

period in the above-mentioned case [06-2-32029-8] has expired.⁸ CP 585. The trial court extinguished Moi's right to redeem when it ordered the Sheriff to immediately transfer the property to Kruger. CP 541-42.

Recall that it was **Kruger** who marched into the trial court to demand an order transferring the property into his name, urging the court to adopt his position that the redemption period had expired. CP 455-459. And yet he now claims that Moi should have proceeded as if the trial court had denied Kruger's own motion. But the issues already had been resolved against Moi. Kruger cites no authority for the proposition that an accounting action would revive Moi's redemption rights after the trial court already had decided that Moi could no longer redeem and after Kruger obtained an order giving him the property.

Kruger's claim that Moi should have brought an accounting action is barred under the doctrine of invited error. "The invited error doctrine prohibits a party from setting up an error in the trial court then complaining of it on appeal." In re Pers. Restraint of Tortorelli, 149 Wn.2d 82, 94, 66 P.3d 606, *cert. den'd*, 540 U.S. 875 (2003). Kruger should not be heard to complain that Moi did not bring an accounting action when Kruger himself caused the court transfer the property to him

⁸ Indeed, Kruger was able to simply ignore Moi's attempts to redeem on June 14 and 17 because Kruger had convinced the trial court to have the deed delivered into his hands—well before the period for an accounting allowed under 6.23.090(2) had elapsed. CP 577-79.

and terminate the redemption period.

Kruger's argument is simply a legally unsupported excuse to claim that Moi's appeal is "moot." This Court should restore the *status quo ante* by reversing the trial court's erroneous ruling and allowing Moi to redeem the property.⁹ See, e.g., Kennedy v. Trumble, 32 Wash. 614, 618, 73 P. 698 (1903) and Edwins v. Highline Sav. & Loan Assoc., 15 Wn. App. 660, 662, 551 P.2d 135 (1976). Both Kennedy and Edwins remanded for an accounting action and redemption following successful appeals based upon the respondents' failures to provide a verified statement. Tellingly, Kruger **never addresses** Kennedy and Edwins in his Response, even though the cases were addressed in Appellant's Brief at pp. 23-25.

3. Millay does not require Moi to bring a declaratory judgment action.

Kruger asserts that Millay allows a single "exception to the redemption timelines," allowing a "perspective [sic] redemptioner" to toll the redemption action by filing a declaratory judgment action. Kruger claims that because Moi did not file a declaratory judgment action, Moi's right to redeem was not "tolled." Resp., pp. 17-18.

In Millay, the matter was remanded for a determination of whether the exception applied because Cam had submitted "a grossly exaggerated

⁹ Kruger is not a *bona fide* purchaser so there is no impediment to restoring Moi's right to redeem. RAP 12.8.

or fraudulent statement of the sum required” under facts imparting a “strong aura of fraudulent manipulation.” Millay, 135 Wn.2d at 206-07. While Kruger and his counsel have engaged in fraudulent practices elsewhere in this litigation, CP 861, Moi has not alleged outright fraud with respect to this issue. Rather, Moi was entitled to the additional period to redeem because Kruger did not submit a verified statement per RCW 6.23.090(2). The argument that Moi should have brought a declaratory action is another red herring.

Kruger’s statement, Resp., p. 18, that Moi “failed to seek any equitable relief” is false. The record discloses that after Kruger refused to allow Moi to redeem within the five days ordered by the court on June 11, 2013, Moi moved for reconsideration because, *inter alia*, “substantial justice has not been done.” CP 543-556. “The goal of equity is to do substantial justice.” Columbia Cmty. Bank v. Newman Park, LLC, 177 Wn.2d 566, 569, 304 P.3d 472 (2013). Moi has sought equitable relief throughout these proceedings. CP 188-93, 365-68, CP 422.

At this point it must be recalled that **Moi’s difficulty in paying for the redemption was caused by Kruger’s wrongful acts.** At the time of the redemption hearing, Moi was still subject to the fraudulent default judgment of \$214,903.56 Kruger obtained in 2010. CP 849-67. Kruger enforced his fraudulent judgment by executing on the only other property

Moi had (the Ballard property) which could have provided a source of funds to Moi to redeem the Magnolia property. CP 199, 365-368, 511. Now that Moi has received the Ballard property back (*see*, Div. I, 70502-4-I), Moi is ready, willing and able to redeem his Magnolia property when this Court restores his statutory right to do so.

C. MOI COMPLIED WITH THE NOTICE REQUIRED BY RCW 6.23.080(1).

Kruger argues that Moi failed to give five days' notice of his intent to redeem as required by RCW 6.23.080(1). Resp., pp. 15-17. Moi's notice was given seven days before May 28, 2013. It was timely because CR 6 does not apply to substantive law provisions set forth in a special proceedings statute. CR 81; Christensen v. Ellsworth, 162 Wn.2d 365, 374, 173 P.3d 228 (2007). Furthermore, when a person entitled to redeem fails to give timely notice, the redemption right is not defeated if the purchaser had actual notice and the sheriff did not object. Scott v. Patterson, 1 Wash. 487, 20 P. 593 (1889); State ex rel. Stickel v. Shattuck, 95 Wash. 119, 163 P. 414(1917). Kruger had actual notice and the King County Sheriff did not object.

D. MOI EXERCISED DUE DILIGENCE IN HIS ATTEMPT TO REDEEM FROM KRUGER.

Throughout his Response, Kruger attacks Moi's good faith attempt to tender in the five days allowed by the trial court. Kruger characterizes

Moi's attempt to redeem as "conditional" and therefore ineffective. Resp., pp. 18-19. However, Moi's final attempt to redeem on June 14, 2013, was unconditional. CP 577. Kruger simply refused to allow redemption: "**I do not recall and the court did not grant any order extending the redemption period.**" CP 578. Kruger's argument that Moi's offer was "conditional" is based on diverting this court's attention to an earlier e-mail exchange between the parties' attorneys. Resp., pp. 10-11.

Citing RCW 6.23.080 and Le Tastevin, Inc. v. Seattle First, 95 Wn. App. 224, 974 P.2d 896 (1999), Kruger's next gambit is to assert that Moi should have tendered to the Sheriff. Resp., p. 26. But Kruger had already persuaded the trial court to have the deed immediately transferred to him. CP 541-42. The Sheriff no longer had the property to transfer to Moi. See, above, § III.B.2.

Consistent with Kruger's receipt of the deed, the trial court ordered Kruger to "not put the properties up for five days--for sale--...for five days to give them an opportunity **to redeem to you.**" RP 42. Moi, therefore, was compelled to deal with Kruger. Kruger simply refused to cooperate, CP 578, notwithstanding his attorney's promise to the court that "if they come to me with a cash offer to redeem at those numbers within five days, I will represent to the Court **I will make a good-faith effort to get it done.**" RP 42, ll. 20-22. RCW 6.23.080 and Le Tastevin do not apply

under the extraordinary circumstances here, in which the Sheriff no longer was involved.

Kruger also alleges that Moi failed to exercise “due diligence” because Moi did not pay the purchase price, interest, and property taxes. The argument is grounded in RCW 6.23.020(2), 040(3) and.050. Resp., pp. 19–22. However, as argued by Kruger in the trial court, the statute at issue here is RCW 6.23.090(2). CP 523-24. Unlike RCW 6.23.020(2), 040(3) and.050, RCW 6.23.090(2) “requires the redemptioner in possession to provide a verified statement of the amounts” upon request. Millay, 135 Wn.2d at 202. **RCW 6.93.090 provides additional and independent recourse for a person entitled to redeem.** The person in possession who fails to give a verified statement does so at his peril.

E. KRUGER’S “PUBLIC POLICY” ARGUMENTS FAIL TO CONSIDER THAT HE COULD HAVE SIMPLY PROVIDED A SWORN STATEMENT AND AVOIDED THE EXTENDED REDEMPTION PERIOD.

In the last few pages of his Response, Kruger coughs up a couple of incoherent public policy arguments in support of his view that he should be allowed to **both** not respond to the demand for the verified statement **and** cut-off the redemption period.

Revisiting Millay, Kruger contends that permitting Moi to obtain financing after the one year period violates the policy against encouraging unqualified applicants to file suit to hold the redemption period open.

Resp., p. 28, Millay, 135 Wn.2d at 199. This argument again sidesteps the gravamen of Moi's appeal, which is that the trial court erred by abridging the redemption period. RCW 6.23.090(2) does not require a judgment debtor to "prove up" his ability to redeem when the person in possession refuses to supply a verified statement.

In any event, dismissal of Moi's appeal would thwart the policy underlying RCW 6.23.090(2), which is to ensure that persons in possession do not exaggerate the expenses claimed in order to discourage redemption. RCW 6.23.090(2) required Kruger to either provide a sworn statement or submit to an accounting action and the extended redemption period that accompanies such an action.

Kruger's final salvo, at pages 28-30, should simply be disregarded as wholly inconsistent with the plain language of RCW 6.23.090. Kruger complains that "[i]t would be bad policy to permit a redemptioner to delay matters with an accounting action on rents and profits, without the redemptioner paying the undisputed 'sum required.'" Resp., p.30. But Kruger could have easily avoided any delay (and this appeal) by simply filing a sworn statement setting forth the rents, profits and expenses incurred during the redemption period. The law provided him with his own remedy; he simply refused to take it. It is bad policy to permit a person in possession to ignore the mandates of the redemption statutes.

F. LIS PENDENS.

The *lis pendens* placed on the Magnolia property by Kruger was entirely appropriate under RCW 4.28.320 and United Savings & Loan v. Pallas, 107Wn. App. 398, 405, 27 P.3d 629 (Div. I, 2001). See, CP 892-904. Kruger did not appeal the denial of his motion to remove the *lis pendens*. CP 905-06. Therefore, even were Kruger to prevail in this appeal, he cannot seek relief from this court.

IV. CONCLUSION

Moi's primary argument is that Kruger did not provide a "verified statement" per RCW 6.23.090(2), thus triggering an extension of the redemption period. Moi demanded the sworn statement. Kruger did not provide it. This Appeal addresses the trial court's failure to extend the redemption period as required under RCW 6.23.090(2).

This court should reverse, restore Moi's statutory redemption period, and direct the trial court to sanction Kruger for the refusal to allow Moi to redeem during the five day period allowed by the trial court.

RESPECTFULLY SUBMITTED this 30 day of June, 2014.

By: Elena Garella
Elena Luisa Garella, WSBA No. 23577
Attorney for Appellant Michael Moi

LAW OFFICE OF ELENA LUISA GARELLA
3201 First Avenue South, Suite 208

Seattle, Washington 98134, (206) 675-0675
law@garella.com

Certificate of Service

I, the undersigned, certify that on the 30 day of June, 2014, I caused a true and correct copy of this pleading to be served, by the method(s) indicated below, to the following person(s):

By U.S. First Class mail, pre-paid, and e-mail to:

Rick J. Wathen
Cole | Wathen | Leid | Hall, P.C.
303 Battery St
Seattle, WA 98121-1419
Attorney for Respondent Doug Kruger

By e-mail to:

Nancy Balin
Office of Pros Atty
516 3rd Ave Rm W400
Seattle, WA 98104-2388
Attorney for King County Sheriff

Elena Garella
Elena Luisa Garella, WSBA No. 23577

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 JUL -1 AM 10:22