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No. ~~70729-4-I~~

IN THE COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

Auxier Financial Group, LLC,
Appellant

v.

Joseph T. Sellars and Gregory Greene,
Respondents.

Appellant's Opening Brief

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I. INTRODUCTION

This is a case wherein the Plaintiff, Auxier Financial Group, LLC's, ("AFG") claims against Joseph T. Sellars ("Sellars") and Gregory Greene for Past Due Debt and Judicial Foreclosure of Deed of Trust on Real Property were dismissed by the Honorable Richard T. Okrent, judge of the Snohomish County Superior Court on individual summary judgment motions brought separately by each defendant, Sellars and Greene. The trial court also awarded attorney's fees and costs to defendant Sellars and reserved judgment of attorney's fees for defendant Greene. AFG seeks review of the lower court's decisions because:

- (1) disputed material issues of fact appropriate for trial were present in the evidence related to each separate motion;
- (2) the trial court failed to construe the facts and reasonable inferences from the evidence in each separate motion in favor of the non-moving party i.e., AFG; among the inferences that should have been drawn include those related to the notarized signatures and initials that appear on the Deed of Trust and Quit Claim Deed. The inference that should have been drawn is that the notary's acknowledgement is *prima facie* evidence that in fact the persons whose signatures appear actually signed the document.
- (3) Defendant Sellars was not entitled to judgment as a matter of law

because AFG reasonably relied upon his post-bankruptcy admissions in his declaration made under oath in another lawsuit and his admissions against interest in his Answer to AFG's complaint.

All of Defendants statements made under oath, admissions against interest, and contrary statements that are discussed herein were post-bankruptcy actions and are therefore properly adjudicated in State Superior Court. It was almost 2 yrs and 9 months after the August 10, 2010 discharge order that Defendant Sellars relies upon and almost 6 months after Sellers's Answer to AFG's complaint, where he admitted to his liability of the debt; as well as 1 yr and 4 months after Sellers admitted under oath to his liability of the debt in his declaration filed in a prior lawsuit that Defendant Greene's answer and declaration filed on May 6th, 2013 first raised any question as to enforceability of the Deed of Trust due to his challenge of the notarized signature represented as his.

By effect of the discovery rule, see **Alexander v. Sanford** 181 Wash.App. 135, 325 P.3d 341 (Div. 1, 2014) "The discovery rule is an exception to the normal rules governing when a cause of action accrues...Under the discovery rule, a cause of action accrues when the plaintiff knew or should have known the essential elements of the cause of action: duty, breach, causation and damages." citing **Allen v.**

State 118 Wash.2d 753, 758, 826 P.2d 200 (1992)(footnote omitted)
any and all claims AFG has related to the statements made under oath,
admissions against interest, and possible misrepresentations or
wrongdoing of Mr. Sellars related to the issues raised by Mr. Greene's
May 6th, 2013 answer and declaration are post-bankruptcy claims and
causes of action that were appropriately before the Superior Court. The
Court should have recognized that Mr. Sellars admission under oath
and pleadings occurred post-bankruptcy when evaluating the
jurisdiction of the matter.

Up to the filing of Mr. Greene's answer and declaration all parties,
including both Mr. Sellars and Mr. Greene, to this appeal had relied
upon the Deed of Trust, Quit Claim Deed and the notarized signatures
on both documents as authentic and enforceable. Mr. Sellars prior
contradictory statements under oath and admissions in the pleadings
all occurred post-bankruptcy and therefore are appropriately
adjudicated in state Superior Court.

(4) Greene was not entitled to judgment as a matter of law because: (i)
he was aware of the loan, the deed of trust, and the signatures on the
deed of trust at the time the loan was made and for more than 6 years
and 4 months (ii) he knew of the signatures on the deed of trust, he
acknowledged that he knew as an experienced real estate professional

that the signature of each co-owner was required on the deed of trust in order to secure the loan, he accepted the benefits from the loan secured by the deed of trust, relied upon the deed of trust, and assented and acquiesced to the validity of the deed of trust for a period of over 6 years thereby ratifying the deed of trust;

(5) the trial court's orders require AFG to split its unified claim of judicial foreclosure of a single deed of trust against a single parcel of real property and the co-owners of the property, Defendants Sellars and Greene;

(6) the trial court's orders have not only implicitly approved the misconduct of both Sellars and Greene, but further unjustly enriched each defendant and their attorneys by awarding attorney's fees and costs to be paid by AFG and in addition granting defendant Greene an unencumbered 50% ownership interest in the property after having received the benefit of the \$298,000 loan that paid off his prior obligations to Foundation Financial Partners, LLC, a hard money lender;

(7) there is no evidence to justify the amount of attorney's fees and costs awarded to Defendant Greene;

(8) the amount of attorney's fees and costs awarded to Defendant Sellars were not appropriate and further were not reasonable because:

(a) AFG's actions in ceasing all enforcement activity immediately upon being advised of Sellars taking the position that he was not liable for the debt which was directly contrary to his prior admissions under oath and admissions in the answer he filed to AFG's Complaint; (b) there were material facts in dispute and Defendant Sellars was not entitled to judgment as a matter of law; (c) Defendant Sellars' counsel has claimed fees that are related to Defendant Sellars's cross claim against Defendant Greene and/or Defendant Greene's counter cross-claim against Sellars; (d) Defendant Sellars' counsel has claimed court costs against AFG for the filing fee of the cross-claim against Defendant Greene; (e) Defendant Sellars's counsel has claimed fees during times which Defendant Sellars, in fact, had appeared pro-se; (f) Defendant Sellars's counsel has claimed fees for preparation for a CR11 claim against AFG's counsel which claim was denied and from which Defendant Sellars has taken no cross-appeal.

II. ASSIGNMENTS OF ERROR

1. The Court erred in the entry of its order Granting Summary Judgment to Defendant Gregory Greene, and Dismissing Gregory Greene from the Lawsuit with Prejudice dated February 3rd, 2014 (CP 58-59) with respect to only parts 2, 3, and 4 of that order. The errors in the order were (a) Granting Defendant's Motion for Summary

Judgment (b) Dismissing AFG's claims against Defendant Gregory Greene with prejudice; (c) reserving a judgment for attorney's fees to Defendant Gregory Greene from AFG dependent upon an application that can be circulated and commented upon by AFG's Counsel, for the reasons that (a) material facts were in dispute, (b) Defendant Gregory Greene was not entitled to judgment as a matter of law, and (c) the court failed to apply the standard of review under Civil Rule CR56 that all inferences based on the evidence are to be made in favor of the non-moving party, who is the AFG in this case.

2. The trial court erred in the entry of its Order on Summary Judgment of Dismissal of all monetary claims of Plaintiff against Defendant Sellars, dated February 3rd, 2014 (CP 51-57) with respect to the court's findings of fact 1, and order items 1 and 3 of that order: (a) finding that the attorney's fees which the court orders to be paid by Plaintiff are reasonable; (b) Dismissing with prejudice all monetary claims of AFG against Defendant Joseph T. Sellars; (c) entering Judgment in favor of Defendant Joseph T. Sellars against AFG for attorney's fees in the amount of \$14,633 and costs in the amount of \$240 for reasons that (a) material facts were in dispute, (b) Defendant Sellars was not entitled to judgment as a matter of law, and (c) the court failed to apply the standard of review under Civil Rule CR56 that all inferences based on

the evidence are to be made in favor of the non-moving party. In addition, the court erred in awarding the \$240 in court costs which was the court filing fee for the Cross claim against Defendant Greene, which is not a court cost claimable against Plaintiff, AFG.

3. The trial court erred in the entry of its Order Denying Motion for Reconsideration, dated March 10, 2014 (CP 18-20) with respect to the court's denying AFG's motions for reconsideration of its two orders dated February 3rd, 2014 granting the motions of the Defendants Sellars and Greene identified in Assignments of Error No. 1 and 2 above for the reasons that the court's February 3rd, 2014 orders should have been reversed under: Civil Rule CR 59 subsection (6) because they had errors in the assessment of the amount of recovery as to the attorney's fees awarded to Defendants Greene and Sellars; and subsection (7) because reasonable inferences from the evidence when construed in the favor of the non-moving party which is AFG in this case, did not justify the decisions and were contrary to law; and subsection (8) because there were errors in law that AFG's briefs and AFG's counsel objected to at the time; and subsection (9) because the order did not do substantial justice.

4. The trial court erred in the entry of its two orders dated February 3rd,

2014 (CP 51-57, CP 58-59) because the issuance of those orders violated the legal doctrine related to splitting the cause of action because the effect of the trial court's orders require AFG to split its single unified claim of judicial foreclosure based on one unified set of loan documents related to one parcel of real property of which Defendants Sellars and Greene were co-owners.

III. Issues Pertaining to the Assignments of Error

1. Is Defendant Sellars estopped from claiming attorney's fees and/or discharge in a bankruptcy as an affirmative defense after: (1) Sellars filed a declaration under oath as an act that occurred post-petition and post-discharge admitting his liability for the debt which declaration was relied upon by AFG and AFG's legal counsel in the drafting and filing of AFG's complaint; (2) and where Defendant Sellars admitted liability in his answer to AFG's complaint which was a post-petition act by Defendant Sellars in response to AFG's complaint; and (3) whereas the debt may have been obtained through false statements and misrepresentation(s) that would have barred the debt from discharge under § 523(a)(2)(A) of the Bankruptcy Code had the false statements and misrepresentation(s) been discovered prior to the time of filing of the petition for bankruptcy? (Assn of Error 2, 3, 4.)

2. Should AFG's claims for monetary relief against Defendant Sellars have been dismissed with prejudice where the inferences from the evidence show the signatures and initials appearing on the Deed of Trust and Quit Claim Deed may have been the result of Mr. Sellars misrepresentations and misconduct leading to the unjust enrichment of Sellars and Greene and whereas by operation of the discovery rule these are post-bankruptcy actions and causes of action? (Assn of Error 1, 2, 3, 4)

3. Is the amount of \$14,633.50 in attorney's fees a reasonable amount to order AFG to pay when: (1) AFG ceased all actions for relief against Defendant Sellars so as to not cause any need for Sellars to incur additional attorney fees almost immediately upon being notified of Defendant Sellars taking a directly contrary position to his previous under oath statements which AFG and AFG's counsel had relied upon in the drafting of AFG's Complaint and Sellars' admissions against interest in his answer to AFG's Complaint confirming the correctness of AFG's reliance on Defendant Sellars post-bankruptcy declaration in another lawsuit; (2) \$11,566.50 of the requested attorney's fees were incurred after AFG ceased all actions against Sellars related to the monetary claims including striking AFG's pending motion for summary judgment and where Defendant Sellars' counsel did not

attend any of the depositions, scheduled by AFGs; (3) Several of the fees appearing in Defendant Sellars' counsel's affidavit are either from a period upon which Defendant Sellars was not represented by counsel but was instead appearing pro-se and/or fees that were not related to the defense of AFG's claims against Mr. Sellars' but were instead related to the filing of Sellars' cross claims against Defendant Greene and the defense of Defendant Greene's counter-cross claims against Sellars; (4) AFG could not comply with 100% of Defendant Sellars counsel's requests to dismiss ALL of AFG's claims against Defendant Sellars with prejudice, because that would have required AFG to waive its rights not only related to the requested monetary relief, but also the rights to judicially foreclose the deed of trust which would have resulted in AFG's splitting of its claims; (5) AFG after ceasing all activity related to the monetary claims then actively sought to determine the truth of the various allegations in the cross claims Sellars' had alleged against Greene and the counter cross-claims from Greene against Sellars; (6) the court, in addition, awarded \$240 in costs which were not attributable to the defense of AFG's complaint but instead was the filing fee for the cross-claim against Defendant Greene? (Assn of Error 2, 3, 4)

4. Did the trial court fail to construe the inferences from the evidence in AFG's favor, as the non-moving party, when it granted Sellars Motion for Summary Judgment even though the reasonable inferences existed which were raised by Defendant Greene's post-bankruptcy allegations that Defendant Sellars had made false statements and misrepresentations in obtaining the loan which had Defendant Sellars false statements and misrepresentations been known and raised could have barred the debt from discharge under § 523(a)(2)(A) of the Bankruptcy Code therefore under the discovery rule these were post-petition claims, and therefore Defendant Sellars was not entitled to judgment as a matter of law. (Assn of Error 2, 3, 4)

5. Did the trial court fail to construe the inferences from the evidence in AFG's favor, as the non-moving party, when it granted Greene's Motion for Summary Judgment even though Defendant Greene made the following statements under oath: (1) in Greene's declaration in a prior lawsuit he stated that he was a party to the Deed of Trust; (2) in Greene's deposition Greene stated that he: (a) was aware of the loan prior to, at or around the time of the loan origination and recording of the deed of trust; (b) had benefited from the proceeds of the loan; (c) acquiesced to the existence of the Deed of Trust for over 6 years; (d) had knowledge that as a standard practice a lender would require his

signature on the Deed of Trust? All of the above statements raise the inference that these statements were directly contrary to his declaration in support of his motion for summary judgment and also contrary to his affirmative defense that he did not sign or authorize anyone else to sign the Deed of Trust on his behalf. (Assn of Error 1, 3, 4)

6. Is Defendant Greene estopped from challenging the enforceability of the deed of trust based upon the affirmative defense that signatures appearing on the document were not made by his hand because Defendant Greene made the following statements under oath that were contrary to that affirmative defense: (1) in Greene's declaration in a prior lawsuit he stated under oath that he was a party to the Deed of Trust; (2) in Greene's deposition Greene stated that he: (a) was aware of the loan prior to, at or around the time of the loan origination and recording of the deed of trust; (b) had benefited from the proceeds of the loan; (c) acquiesced to the existence of the Deed of Trust for over 6 years; (d) had knowledge that as a standard practice a lender would require his signature on the Deed of Trust because he was a co-owner of the property? (Assn of Error 1, 3, 4)

7. Is Defendant Greene estopped from challenging the signatures appearing on the deed of trust where he has relied upon an essentially identical signature appearing on a Quit Claim Deed granting his

personal interest in the property? (Assn of Error 1, 3, 4)

8. Did the court err in issuing a conditional judgment for attorney's fees to Defendant Greene if the motion for summary judgment is reversed for any of the reasons asserted above?

9. Did the court err in issuing orders which required AFG to split its judicial foreclosure cause of action related to a single deed of trust encumbering a single parcel of real property?

IV. STATEMENT OF THE CASE

Plaintiff, Auxier Financial Group, LLC (AFG) filed and served its summons and complaint against Defendants Sellars and Greene on October 19, 2012, seeking judgment for the balance of a past due debt and to judicially foreclose a deed of trust on real property. (CP 562-608) AFG and AFG's attorney relied upon Defendant Sellars prior statements under oath filed in a declaration in a prior lawsuit in seeking its judgment for monetary relief against Defendant Sellars. (CP 327-330) That declaration was signed and filed 1 year and 4 months **after** the general order of discharge that was entered in Mr. Seller's bankruptcy. (CP 450) On December 12, 2012, Defendant Sellars filed an Answer to AFG's Complaint confirming his previous statements under oath and admitting to his liability under the debt and AFG's right to foreclose. (CP 552-553) Defendant Sellars, on that same day in that same answer, also filed a Cross

Claim against Defendant Greene claiming he was equally liable for the past due debt. (CP 553-554) On April 18, 2013, AFG filed its Motion for Summary Judgment supported by the Declaration of Joshua Auxier, Managing Member of Plaintiff, Auxier Financial Group, LLC. (CP 659-740) On May 6th, 2012 Defendant Greene filed his Answer & Affirmative Defenses to AFG 's Complaint (CP 548-551), Answer to Sellars' Cross-Claims and a Counter Cross-Claim (CP 532-547), and a Response to AFG's Motion for Summary Judgment. (CP 648-652) On May 15th, 2012 upon AFG's counsel being notified of Sellars intent to take a position directly contrary to his prior under oath declaration and the admissions against interest in Sellars's answer filed on December 12, 2012 AFG's counsel re-note the hearing for AFG 's motion for summary judgment from May 17, 2012, to June 7th, 2012 (CP 385). On May 16th, 2012 a Limited Notice of Appearance (CP 645-646) was filed by Sellars' counsel and AFG's counsel received a letter demanding AFG's Summary Judgment hearing set for May 17, 2012 be stricken and requesting AFG's counsel to prepare a stipulated order of dismissal, including all cross claims by both Defendants against each other. (CP 397) Neither AFG nor AFG 's counsel possessed any authority to agree to an order dismissing claims other than AFG's, nor could AFG dismiss **all** of its claims against Sellars without splitting its unified claim of judicial foreclosure against the

two co-owner defendants of the property. On May 22, 2013 AFG 's counsel, received a 2nd letter demanding AFG 's Summary Judgment hearing now scheduled for June 7, 2013 be stricken and AFG 's stipulation to an *“agreed order of dismissal with prejudice of all claims of all parties against defendant Sellars.”* (CP 350-353) Again, neither AFG nor AFG 's counsel possessed any authority to agree to an order dismissing Defendant Greene's counter-cross claims against Sellars, or dismiss **all** of its claims against Sellars with prejudice without splitting its unified claim of judicial foreclosure against the two co-owner defendants of the property.

On May 30, 2012, AFG 's counsel struck the hearing on AFG 's Motion for Summary Judgment (See Dkt notation on May 17, 2013) altogether, so as to avoid the necessity for Defendant Sellars to incur additional attorney's fees and to allow AFG additional time to obtain information related to the allegations of Sellars against Greene and the allegations of Greene against Sellars.

On October 17, 2013 Defendant Greene filed his Motion for Summary Judgment disputing the Deed of Trust's compliance with the Statute of Frauds (even though the Deed of Trust contains a clear and accurate legal description of the property) claiming that Defendant Greene did not sign the document. (CP 525-529) AFG filed an Initial Response to Greene's Summary Judgment along with its Motion for Continuance on

November 4, 2013. (CP 503-509). This initial response was support by both the Declaration of Joshua Auxier (CP 472-483) and the Declaration of Edward L. Mueller (CP 492-502)

On October 31, 2013 AFG's counsel took the deposition of Defendant Greene. (CP 105-236) On November 20, 2013 the trial court continued Defendant Greene's MSJ to February 3rd, 2014. (CP 469-471) On December 18, 2013 Defendant Sellars filed his Motion for Summary Judgment claiming a contrary position to his prior declaration under oath that had been relied upon by AFG and AFG's counsel in drafting its complaint. Mr. Sellars position in his Motion for Summary Judgment was also directly contrary to the admissions against interest pled in his answer to AFG's complaint. Instead in his motion he asserted that he was not liable for the debt. (CP 463-468)

On January 15, 2014 AFG took the deposition of Brandon Shimizu. (CP 250-269)

On January 16, 2014 AFG took the depositions of Jacqueline Kimzey (CP 285-304) and Cathy Haage. (CP 306-323)

On January 24, 2014 AFG filed its combined response to both Defendants Motions for Summary Judgment (CP 375-388) and supported its response with the individual declarations of Edward Mueller in support of AFG's response to (1) Gregory Greene's Motion for Summary

Judgment (CP 60-323); and (2) Joseph T. Sellars Motion for Summary Judgment (CP 324-374).

The trial court heard oral arguments on February 3, 2014 and issued its orders Granting both Defendant Sellars' and Greene's Motions for Summary Judgment dismissing all claims against Defendant Greene with prejudice and awarding attorney's fees and costs in an amount to be determined after submission of an application by Greene's counsel and response by AFG's counsel (CP 58-59) and dismissing all monetary claims against Defendant Sellars with prejudice and awarding attorney fees in the amount of \$14,633 plus \$240 in costs. (CP 51-57)

On February 13, 2014 AFG filed its Motions for Reconsideration of the Order Granting Summary Judgment to Defendant Sellars (CP 21-26) and the Order Granting Summary Judgment to Defendant Greene. (CP 46-50) and supported the motions with the declaration of Ed Mueller. Both Defendant Sellars and Greene filed Memorandums in opposition to AFG's Motion for Reconsideration. (CP 37-45 & CP 27-32).

On March 10, 2014 the trial court issued its Order denying AFG's Motions for Reconsideration of each of its February 3rd, 2014 Orders (a) granting Sellars' Motion for Summary Judgment; and (b) granting Greene's Motion for Summary Judgment. (CP 18-20). AFG filed its Notice of Appeal on April 9, 2014. (CP 1-17).

V. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Summary judgment is only proper when there is NO genuine issue of material fact. The moving party is not entitled to judgment as a matter of law if a reasonable person could differ on a conclusion. CR 56(c), Scott v. Pac. W. Mtn. Resort, 119 Wn. 2d 484, 502, 834 P.2d (1992). Affidavits submitted in support of, or in response to a motion for summary judgment must set forth such facts as would be admissible in evidence, must be made on personal knowledge, and must affirmatively show that the affiant is competent to testify as to his or her averments. CR 56(e); Grimwood v. University of Puget Sound, Inc., 110 Wash.2d 355, 753 P.2d 517 (1988) If the nonmoving party demonstrates that an issue of material fact exists which establishes a genuine issue for trial, then summary judgment must be denied. See CR56(e) and, e.g. Young v. Key Pharm, Inc. 112 Wn.2d 216, 770 P.2d.(1989). All facts and reasonable inferences from the evidence must be construed in favor of the nonmoving party. Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 349, 588 P.2d 1346 (1979).

VI. ARGUMENT

A. **Defendant Greene Assented To and Ratified the Enforceability of the Deed of Trust Based on the Inferences From the Evidence Before the Court.**

In AFG's combined response ("AFG's Resp to MSJs") (CP 375-

388) to the Motions for Summary by Defendant Gregory Greene (“Greene’s MSJ”) (CP 525-529) and Defendant Joseph Sellars (“Sellars’ MSJ”) (CP 463-468) AFG presented to the trial court that as a product of its extensive discovery that *prima facie* evidence existed showing that Mr. Greene personally appeared before two separate notary publics, both of which, personally knew both Mr. Greene and Mr. Sellars; and that the notary acknowledgments (CP 91-92 – Deed of Trust acknowledgement by Cathy Haage; CP 243 – Quit Claim Deed acknowledgement by Brandon Shimizu) stated that Mr. Greene acknowledged before each notary that he signed the documents as his free and voluntary act and deed, for the uses and purposes therein mentioned. See Declaration of Edward L. Mueller in Support of Plaintiff’s Response to Defendant Gregory Greene’s Motion for Summary Judgment (“Dec. of EM Opposing Greene’s MSJ”) (CP 60-323), Ex. EM-12 – the Deposition Transcript of Cathy J. Haage relating to the Deed of Trust (CP 304-323) and Ex. EM-6, the Deposition Transcript of Brandon Shimizu relating to the Quit Claim Deed (CP 248-258) @ Pg. 9 In 10 – Pg. 11 In 4 (CP 256). Further, Ms. Jacqueline Kimzey, stated in her deposition, as the owner of Community Escrow (the escrow company that closed the loan transaction) that she had looked at the Deed of Trust that appeared to be signed by Mr. Sellars and Mr. Greene and she believed that Mr. Sellars and Mr. Greene each personally signed the Deed of Trust

that was part of the closing file which had been the subject of the subpoena duces tecum issued to her company in preparation for her deposition (See CP 270-277, Ex. 7 & 8 attached to Dec. of EM Opposing Greene's MSJ). When AFG's counsel asked her why she believed both Mr. Greene and Mr. Sellars had signed the deed of trust she stated "Because it was their file and they were our clients and Cathy notarized it when they came in to signed it."

Ms. Kimzey was then asked the following additional questions to which she answered as follows:

Q. "Are you familiar with the procedures that a notary public normally follows in acknowledging real estate transaction documents?"

A. "Yes."

Q. "Do you have a set of procedures which you normally require in your business for a notary to follow?"

A. "Yes."

Q. "Could you briefly describe those for me?"

A. "We obtain their driver's license and then take a copy of that, and... well, they're signing the documents, we get their license and they sign they documents; that's our requirements."¹

See Dec. of EM Opposing Greene's MSJ, Ex. EM-11 the Deposition Transcript of Jacqueline Kimzey (CP 283-304) Pg. 9 Ln 5 -16

¹ Referring to Cathy J. Haage, the notary who signed the notary acknowledgment on the Deed of Trust.

(CP 292). This procedure appears to have been followed as a copy of both Mr. Greene's and Mr. Sellars's Washington Drivers Licenses which were current and valid at the time of signing were produced as a part of the closing file produced by Ms. Kimzey at her deposition, true and correct copies of which are attached to the Dec. of EM Opposing Greene's MSJ, Ex. 9 (CP 257-259).

Due to the extended period of time, almost 7 years since the signings occurred, neither Mr. Shimizu (See Dec. of EM in Sppt Opposing Greene's MSJ, Ex. EM-6 Deposition Transcript of Brandon Shimizu @ Pg. 7 Ln 17-19) (CP 254) nor Ms. Haage (See Dec. of EM Opposing Greene's MSJ, Ex. EM-12 Deposition Transcript of Cathy Haage Pg. 8 Ln. 1-24) (CP 312) referring to the signature lines and notary block on Pg 14 of the Deed of Trust, (CP 93), specifically recalled the event of notarizing either the Quit Claim Deed and/or the Deed of Trust, but neither had any reason to believe they did not properly perform their notary obligations in acknowledging the signatures of both Mr. Greene and Mr. Sellars on the respective documents.

Under Washington Law, notaries "*determine and certify,*" based upon "*personal knowledge or satisfactory evidence,*" that the person making an acknowledgement or verification upon oath or affirmation "*is the person whose true signature is on the document.*" RCW 42.44.080(1)

and (2). A notary is determined to have such “*satisfactory evidence*” of identification if the person is either personally known to the notary, as is the case here, identified upon oath or affirmation of a credible witness personally known to the notary, or “*identified on the basis of identification documents*” RCW 42.44.080(8), which is also the case here in relation to the Deed of Trust. The notary’s affirmation of personal knowledge or proof of identity of the person signing the document establishes “*prima facie evidence of the facts recited therein.*” RCW 64.08.050. The facts recited are that “On this day [February 23rd, 2007] personally appeared before me [Cathy J. Haage] Joseph T. Sellars and Greg Greene to me known to be the individual(s) described in and who executed the within and foregoing instrument, and acknowledged that he/she/they (they is circled) signed the same as his/her/their (their is circled) free and voluntary act and deed, for the uses and purposes therein mentioned” (CP 91-92. While Mr. Greene’s statements in his declaration in support of his Motion for Summary Judgment (CP 510-524) states that he believes the signatures on the Deed of Trust and Quit Claim Deed are not his. However ultimately that is irrelevant because. Greene ratified the enforceability of the deed of trust through his knowledge of the loan prior to and at the time of its closing and his acceptance of the benefits therefrom “A party ratifies an otherwise voidable contract if, after discovering facts that warrant

rescission, she remains silent or continues to accept the contract's benefits. A ratifying party must have acted voluntarily and with full knowledge of the facts.” **Snohomish County v. Hawkins** 121 Wash.App. 505, 89 P.3d 713 (Div.1 2004) at 715-716 this is shown in Mr. Greene’s testimony in his Deposition (CP 105-165) where there is no doubt that Mr. Greene (a) was aware of the transaction prior to its closing, See Dec. of EM Opposing Greene’s MSJ, Ex. EM-3 the Deposition of Gregory Greene Pg. 19 (CP 124); Pg. 32 ln 18-21 (CP 137); Pg. 41 ln 10 – Pg 42 ln 12 (CP 146-7); (b) knew he was liable for the loan to Foundation Financial Partners, LLC that was paid off by the loan that is one of the subjects of this lawsuit and therefore both Mr. Sellars and Mr. Greene were equally benefited by the transaction, See Dec. of EM Opposing Greene’s MSJ, Ex. EM-3 the Deposition of Gregory Greene Pg. 15 ln 12-13 (CP 120); Pg. 18 (CP 123); Pg. 21 ln 5-11 (CP 126); Pg. 27 ln 22-25 (CP 131); Pg. 41 ln 10 – Pg. 42 ln 12 (CP 146-7); (c) was aware of the typical requirements related to a loan transaction that is secured by real property because Mr. Greene is a sophisticated business man and licensed real estate broker with education and experience in real estate related transactions See Dec. of EM Opposing Greene’s MSJ, Ex. EM-3 the Deposition of Gregory Greene Pg. 4 ln 19 – Pg. 5 ln 24 (CP 109-110); Pg. 9 ln 11-13 (CP 114). With all of the inconsistent statements made under oath by Mr. Greene, Mr.

Greene's statements and declarations do not support the existence of clear and convincing evidence necessary to rebut the statutory presumption favoring the documents' authenticity. See *Whalen v. Lanier*, 29 Wn.2d 299, 308, 186 P.2d 919 (1947) (“*The statutory presumption which attaches to a properly accomplished notarial or other certificate of acknowledgment can be overcome only by evidence that is clear and convincing.*”)

The evidence presented by AFG and called to the attention of the trial court was out of the mouth of Defendant Greene while he was under oath and should have been considered by the trial court to, at least, present a material questions of fact as to whether Mr. Greene had signed the Deed of Trust and/or ratified and assented to the Deed of Trust either of which would bind Mr. Greene to the terms and security interest of the Deed of Trust. Mr. Greene should have therefore been estopped from challenging the enforceability of the Deed of Trust no matter the ultimate outcome of the disputed fact as to whether he or an agent he authorized did or did not sign the Deed of Trust. **Restatement (Second) of Contracts** sec. 139 (1981) permits a party to enforce a promise that fails to satisfy the statute of frauds on a theory of promissory estoppel. Therefore AFG asserts that the information submitted to the trial court described above shows that the court erred in issuing the order granting Greene's MSJ.

B. General Estoppel - Defendant Greene is Estopped From Denying the Enforceability Against Him Because of His Assenting to and Ratification of the Deed of Trust for Over 6 years.

The elements of equitable estoppel are: (1) admission, statement, or act inconsistent with claim afterward asserted, (2) action by another in reasonable reliance upon that act, statement or admission, and (3) injury which would result to relying party if first party was allowed to contradict or repudiate prior act, statement or admission. **Colonial Imports, Inc. v. Carlton Northwest, Inc.**, 853 P.2d 913 Wash.,1993 As just discussed above in Item A Mr. Greene has testified that he (1) was aware of the loan prior to, at or around the time of closing, and for the now 7 years thereafter (2) knew of the purpose of the loan and benefited from the \$295,172.80 payoff of the Foundation Financial Partners, LLC hard money loan for which he was equally liable together with Mr. Sellars; (3) has not at any time prior to the filing of Mr. Greene's answer to AFG's complaint disputed the enforceability of the Deed of Trust or otherwise challenged the signatures appearing thereon that read "Greg Greene"; (4) is an experienced and knowledgeable real estate professional who is aware of the typical requirements of lenders that all parties with ownership interests in a parcel of real property must sign a deed of trust that secures a loan. Mr. Greene's own testimony in his deposition shows that he should

be estopped from challenging AFG's enforcement of the Deed of Trust that Mr. Greene has assented to, ratified and continued to accept the benefits of for over 6 years. It is, also, undeniable and undisputed that the originating lender, Washington Mutual Bank, FA relied upon the Deed of Trust when it fully performed its obligations by funding the loan which paid of the Foundation Financial loan, and then Chase Bank relied upon the Deed of Trust when it did not challenge the dischargability of the debt during Mr. Sellars's bankruptcy proceedings, and Auxier Financial Group, LLC (AFG) has also relied upon the Deed of Trust, to allow Mr. Greene to contradict and repudiate his prior actions and statements clearly has and will continue to cause injury to AFG. The above facts, at a minimum, create disputed material facts and inferences that when construed in the favor of AFG, as the non-moving party, are appropriate for trial and precluded summary judgment in Mr. Greene's favor.

C. **Defendant Greene is Estopped From Challenging Whether he is Bound by the Signature on the Deed of Trust Because (1) He Ratified the Deed of Trust as Explained under Heading A above, and (2) His Reliance upon an Essentially Identical Signature on the Quit Claim Deed that was Essential to His Undivided Individual Ownership Interest In The Property that is Subject to the Deed of Trust.**

From the date the Deed of Trust was recorded, February 27, 2007, Mr. Greene had constructive notice of his signature on the Deed of Trust and did not challenge it until May 6, 2013, in response to AFG's

Complaint; at which point the challenge was initiated because Mr. Greene's attorney brought to his attention the difference in appearance of Mr. Greene's signature on the Deed of Trust and Mr. Greene's signature on other documents. Mr. Greene has now declared under oath that he did not sign the Deed of Trust, See Dec. of EM Opposing Greene's MSJ, Ex. EM-3 the Deposition of Gregory Greene Pg. 43-44 (CP 148-9) however the essentially identical signature appears on a Quit Claim Deed that was recorded, February 21, 2007 (CP 76) of which Mr. Greene had constructive notice because that Quit Claim Deed conveyed respectively to Mr. Greene and Mr. Sellars their undivided individual interest in the real property that was made the subject of the Deed of Trust. In order for Mr. Greene to have had an undivided individual interest in the property that Quit Claim Deed was an essential conveyance because prior to that time the property that became subject to the Deed of Trust had been owned by and LLC of which Mr. Sellars and Mr. Greene were the sole members. That real property was subject to a loan by a hard money lender named Foundation Financial Partners, LLC (CP 181-216) which loan had become due and was to be paid by the new loan (CP 234) for which this Deed of Trust was to provide the security. The deed of trust that secured the hard money that was to be paid had been signed by Greg Greene as a managing member of the LLC (CP 214).

Mr. Greene has now declared under oath that he did not sign the Deed of Trust and further in his deposition he has stated he never relied upon the Quit Claim Deed that evidenced his individual interest in the Property, See Dec. of EM Opposing Greene's MSJ, Ex. EM-3 the Deposition of Gregory Greene Pg. 15 Ln 15 – Pg. 17 Ln 22 (CP 120-122); Pg. 57-58 (CP 162-163). Whether or not Mr. Greene admits or denies that he relies upon the Quit Claim Deed is ultimately not relevant, because the fact that the original lender on the Note and Deed of Trust, Washington Mutual Bank, FA relied upon the Quit Claim Deed in the making of the loan and that AFG is the successor in interest to the Lender, is the Owner and Note Holder, and the current Beneficiary of the Deed of Trust, AFG is likewise entitled to rely upon the Quit Claim Deed and has done so. Further, whereas Mr. Greene has never challenged the validity of the Quit Claim Deed until he was asked about it in his Deposition the Quit Claim Deed is also relevant as it shows that Mr. Greene has known of and accepted the benefits from the Quit Claim Deed (his personal interest in the property) and the resulting Loan, evidenced by the Deed of Trust, for over 6 years 2 months (the \$295,172.80 payoff of the Foundation Financial Partners, LLC hard money loan).

For the additional reasons explained under this heading AFG asserts that not only is Mr. Greene estopped from challenging the enforceability

of the Deed of Trust because of the reasons stated in Section A and B above, but Mr. Greene is also estopped from challenging the signatures on the Deed of Trust because they are essentially identical to the signatures that appear the Quit Claim Deed which is the only evidence of his personal interest in the property, and that has relied upon by multiple parties including Washington Mutual Bank, FA at the time of the closing of the loan and AFG at multiple times thereafter. Mr. Greene has as discussed above benefited from both the Quit Claim Deed and the Deed of Trust and to allow Mr. Greene to now contradict his reliance upon the essentially identical signatures injures AFG. As a result AFG alleges that the trial court committed error when it granted summary judgment to Mr. Greene, because the above facts, at a minimum, create disputed material facts and inferences that when construed in the favor of AFG, as the non-moving party, are appropriate for trial and precluded summary judgment in Mr. Greene's favor.

For the additional reasons explained under this heading AFG asserts that the trial court committed error when it granted summary judgment to Mr. Greene that he was not liable on the Deed of Trust.

D. The Court Erred in Granting the Conditional Judgment for Attorney's Fees to Defendant Greene if the Summary Judgment Should Not Have Been Granted For Any of the Reasons Asserted Above.

In the Order Granting Defendants [Greene's] Motion for Summary Judgment, and Granting Plaintiff's Motion to Accept Late Filing (CP 58-59) in page 2, "*that a judgment for attorney's fees is reserved to Plaintiff \$10, 598.00. Reserved until an application can be circulated and commented upon by Plaintiff's counsel*"

In so far as Plaintiff's Counsel recalls Defendant Greene's Motion for Summary Judgment Defendant Greene asked for "*For an award of Defendant Greene's reasonable Attorney's fees for defense of these claims in the amount of \$3773.00 pursuant to equity and reciprocity where Plaintiff has continued to press the attorney's fee provision of the DoT which my client did not sign.*"(CP 529)

That request was unsupported by any written statement by Defendant Greene's counsel at that time or since.

The request in the amount \$10,598.00 included in the proposed order submitted to the trial court on February 3, 2012 had not been submitted previously and, again, was not supported by any written statement by Defendant's legal counsel.

It is the AFG's position on this Appeal that the order granting summary judgment to Defendant Greene is reversible error and that no attorney's fees should have been awarded to him. Therefore, we ask that

the entry in the order reserving to Defendant Greene an award of attorney's fees in the amount of \$10,598.00 be reversed.

E. The Court Erred When It Denied the Motions For Reconsideration Because There Existed adequate Grounds under Civil Rule 59 to Reverse the Order Granting Summary Judgment That Were Entered on Behalf of Each Defendant.

AFG filed separate motions for reconsideration with respect to each of the orders granting summary judgment to Defendant Greene and to Defendant Sellars. See Plaintiff's Motion for Reconsideration of Court's Order Entered February 3, 2014 Granting Summary Judgment to Defendant Gregory Greene, and Dismissing Gregory Greene from the Lawsuit with Prejudice. (CP 46-50) See Plaintiff's Motion for Reconsideration of Court's Order entered February 3, 2014 Granting Summary Judgment to Defendant Joseph Sellars, and Dismissing Joseph Sellars from the Lawsuit with Prejudice (CP 21-26). The motions for reconsideration were submitted without oral argument and were denied by the trial court using a modified proposed order submitted by legal counsel for Defendant Sellars which was modified by the court to include denial of motion for reconsideration documents provided by Mr. Greene.

AFG respectfully submitted that the trial court erred when it denied each of the separate motions for reconsideration.

F. The Trial Court Failed To Interpret The Inferences From The Evidence In Plaintiff's Favor, As The Non-Moving Party, When

It Granted Sellars's Motion For Summary Judgment

1. His Binding Admissions Against Interest (Declaration & Answer)

There are undisputed facts that exist showing that Mr. Sellars has either: (1) not disputed nor provided any defense to; or (2) further confirmed in his Declaration in Support of his Motion for Summary Judgment: (a) first, Mr. Sellars is in default of his obligation under the Note and the Deed of Trust; (b) second, AFG is the Owner and Note Holder of both the original signatory promissory note and the Deed of Trust and is therefore the Beneficiary of the Deed of Trust, as that term is defined in RCW 61.24.005(2); these facts are confirmed by Mr. Sellars in his Declaration, at ¶ 3 (CP 329); and (c) third, AFG has the legal right to enforce its legal and equitable interests and rights under the Deed of Trust via judicial foreclosure as stated in AFG's complaint ¶4.1 & ¶4.2 (CP 568). Defendant Sellars has made no showing to the contrary in his support of his Motion for Summary Judgment.

Mr. Sellars's binding statements (CP 330) and admission in his answer (CP 552) to AFG's complaint ¶ 2.1 are admissions against interest that he was still liable for the loan and on the hook for the loan. "A statement against interest is one which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, that a

reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. ER 804(b)(3);”

Burnside v. Burnside, 106 Wash.App. 1033 (Div. 1, 2001.) Whereas, AFG and AFG’s attorney relied upon those statements that were made in Defendant Sellars declaration under oath filed in a previous lawsuit (CP 330) and AFG’s reliance upon Mr Sellars previous statements has injured AFG. Like Mr. Greene, Mr. Sellars contradictory statements and admissions against interest should cause Mr. Sellars to be estopped from taking the contradictory position in his Motion for Summary Judgment.

Colonial, *supra*; see also **Board of Regents of University of Washington v. City of Seattle**, 741 P.2d 11 Wash., 1987; Mr. Sellars previous declaration was also a post-bankruptcy action as it was signed by Mr. Sellars on December 7, 2011 (CP 331), 1 year and 4 months **after** the, August 10, 2010, general order of discharge that was entered in Mr. Seller’s bankruptcy. (CP 450) On December 12, 2012, Defendant Sellars’s answer to AFG’s Complaint (CP 552) was filed as a post-bankruptcy action. AFG further asserts that Mr Sellars’s admissions against interest in his answer is binding upon Mr. Sellars “answer contained a declaration by the defendants against interest, the answer would be admissible in evidence. **Keller v. Morton**, 63 Misc. Rep. 340, 117 N. Y. S. 200; **Smith v. Smith**, 136 Ga. 197, 71 S. E. 158.

“The general rule is that statements of fact in a party's pleadings may be used against him as evidence of those facts. Such pleading is competent and may be introduced in evidence, as was done in the case at bar, for the reason that such statement is an admission against interest.” **Smith v. Saulsberry** 157 Wash. 270, 288 P. 927, (1930)

Mr. Sellars’ claimed to be acting pro-se during the time his answer was drafted and filed, however it is clear from the record that Mr. Minor had fully evaluated Plaintiff’s Complaint and drafted and filed Mr. Sellars’s Answer (See Item G – Attorney’s Fee descriptions below) that stated “The following paragraphs are admitted: 1.1, 1.3, 1.4, **2.1**, 2.2, 2.3 and 4.1.” (emphasis added). AFG’s Complaint ¶2.1 read

“2.1 Original Promissory Note; Status as of December 2011,

The original Promissory Note signed by Joseph T. Sellars as maker is dated February 22, 2007, payable to the order of the original Lender, Washington Mutual Bank FA. The principal amount of the Promissory Note is \$298,000.00. The Promissory Note provided for an adjustable interest rate as stated in its provisions. The original Promissory Note also contains provisions on page 4, ¶ 7 (B) and (C) that provides in relevant part as follows:

(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default;

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder

may require me to pay immediately the full amount of Principal which has not been paid and all interest that I owe on that amount. That date must be at least 10 days after the date on which the notice is delivered to me or mailed to me

The original Promissory Note signed by Joseph T. Sellars was endorsed in blank by Washington Mutual Bank, FA. Washington Mutual Bank FA was seized and closed by the FDIC on September 8, 2008, and the assets thereof were immediately sold and the right to possession and the possession of the assets of Washington Mutual Bank FA, including, but not limited to the Promissory Note signed by Joseph T. Sellars described above, was transferred to JPMorgan Chase Bank, NA, (hereinafter Chase Bank.) Joseph T. Sellars has admitted making monthly payments as provided in the Promissory Note initially to Washington Mutual Saving Bank, and later to Chase Bank, until he defaulted. Attached hereto is a copy of the original Promissory note, marked Exhibit A, and incorporated herein by reference as if fully set forth here. This is an identical copy of the original Promissory Note that, as of December 2011, Joseph T. Sellars identified as “a true and correct copy of the Promissory Note.” As of December 2011, Joseph T. Sellars also admitted that “I am still liable for the debt owing under the loan,” and that “I am still on the hook for the loan.” As of December 2011, when Joseph T. Sellars made his admissions stated above, Chase Bank was the holder at that time of the original Promissory Note signed by Joseph T. Sellars, endorsed in blank pursuant to applicable law.”

Sellars admission to this paragraph confirmed his previous statements under oath as to his liability under the debt, again, and Plaintiff’s right to foreclose. (CP 552-553) Defendant Sellars, on that same day in that same answer, also filed a Cross Claim against Defendant Greene claiming that Defendant Greene was equally liable for the past due debt. (CP 553-554)

Those statements are admissions against interest that were each made at a time and in a manner that were totally unrelated to Defendant Sellars prior bankruptcy and are in fact post-bankruptcy and post-discharge actions by Defendant Sellars. Those admissions were relied upon by Auxier Financial Group, LLC (AFG) in its Complaint and its proposed original motion for summary judgment filed on April 18, 2013. (CP 659-710). AFG alleges that Defendant Sellars should be estopped from taking a contrary position to his prior declarations under oath and admissions against interest in his Answer to AFG's Complaint in his Motion from Summary Judgment. AFG alleges that the trial court erred when it ruled in favor of Defendant Sellars based on Sellars's counsel's argument that the trial court did not have jurisdiction over these post-bankruptcy statements and admissions that argument is incorrect "state courts and bankruptcy courts have concurrent jurisdiction over all proceedings arising under Title XI or in or related to cases under Title XI." 28 U.S.C.A. § 1334(b). "Bankruptcy courts do not have exclusive jurisdiction...forum shopping by debtor after discharge...is not type of offensive conduct which discharge injunction was designed to protect. Bankr.Code, 11 U.S.C.A. § 362." **In re Watson**, 192 B.R. 739, 9th Cir.BAP (Cal.),1996)

2. **The Inferences Drawn from the Escrow File Which**

**Contained the Driver's Licenses of Both Greene & Sellars
and the Notary Acknowledgment of Both Defendants'
Signatures Create Inferences Favorable to Plaintiff's Right
to Enforce the Deed of Trust.**

The reasonable inferences to be drawn from the prima facie evidence which is composed of copies of the current, at the time, drivers licenses of Mr. Sellars and Mr. Greene coupled with the notary acknowledgment by Cathy Haage that each had personally signed the Deed of Trust justifies the inference that both Defendants were present at the time and appeared before Cathy Haage who acknowledged that they had each signed the Deed of Trust. The notary's affirmation of personal knowledge or proof of identity of the person signing the document establishes "*prima facie evidence of the facts recited therein.*" RCW 64.08.050. The facts recited are:

"On this day [February 23rd, 2007] personally appeared before me [Cathy J. Haage] Joseph T. Sellars and Greg Greene to me known to be the individual(s) described in and who executed the within and foregoing instrument, and acknowledged that he/she/they [they is circled] signed the same as his/her/their [there is circled] free and voluntary act and deed, for the uses and purposes therein mentioned" (CP 92.

The declaration of Gregory Greene dated October, 28 2011 (CP 70-72) filed in a previous lawsuit, contains statements that are consistent with the prima facie evidence and the inferences to be drawn from Mr. Greene's statement, under oath

“On or about February 23, 2007, Mr. Sellars borrowed \$298,000 from Washington Mutual Bank, FA (“WaMu”) (the “Loan”), and secured the Loan with the Main Property via a Deed of trust, to which I was a party. The Deed of trust securing the Loan was recorded in Snohomish County under auditor number 200702270788. A true and correct copy of that Deed of Trust is attached hereto as Exhibit B” (See CP 71 ¶3, CP 77-103).

The *prima facie* evidence and Mr. Greene’s statements, under oath, thus support AFG’s claim that Gregory Greene either appeared or has approved and ratified the Deed of Trust in this case.

In addition, the declaration of Gregory Greene dated May 6th, 2013 filed in this lawsuit in which for the first time he asserted that he had not signed the Deed of Trust and was not bound by it simply serves to dispute the *prima facie* evidence provided and submitted by AFG. AFG asserts that Mr. Greene’s declaration in support of his Motion for Summary Judgment is not clear and convincing evidence adequate to overcome the statutory presumption that exists from the *prima facie* evidence. **Whalen, supra** The net result of Defendant Greene’s disputing the *prima facie* evidence submitted by AFG is that Defendant Greene has simply created a disputed question of material fact as to whether Mr. Greene was the signer and/or authorized an agent to sign on his behalf and is therefore bound by the Deed of Trust by having approved, assented to, and ratified the Deed of Trust. The fact that he has attempted to deny the enforceability of the

Deed of Trust against him after having received the benefit of it for well over 6 years speaks for itself.

G. The Award of Attorney's Fees To Defendant Sellars Was Unreasonable Given The Support For The Award Does Not Meet The Requirement To Separate The Attorney's Fees Chargeable To AFG From Legal Work Related to Co-Defendant Greene.

The trial court's award of attorney fees against AFG was not reasonable because there never has been any "refusal" of AFG or AFG's attorney, as claimed by Mr. Sellars' attorney, to dismiss the claims against Mr. Sellars for a deficiency. In fact, AFG and AFG's counsel took immediate action by first re-noting the hearing for AFG's pending Motion for Summary Judgment originally set for May 17, 2013 for two-weeks to June 7, 2013, so that the current evidence could be evaluated in support of AFG's Motion for Summary Judgment. After which, the hearing was then altogether canceled, because both AFG and AFG's attorney recognized that there was the need for considerable additional investigation and discovery to be done before taking any decisive action regarding the nature and scope of the claims against Mr. Sellars. Since that date AFG has been attempting to ascertain the truth of the circumstances surrounding both Mr. Sellars and Mr. Greene's cross-claims against one another as well as Mr. Greene's allegations that "*co-defendant Joseph T. Sellars, conspired with Ms. Cathy J. Haage to forge under notary Defendant*

[Greene]'s signature and initials in all relevant places on the Deed of Trust.” See Mr. Greene’s Answer and Affirmative Defenses to Plaintiff Pg. 2 ¶3 lns 4-6 Affirmative Defenses – Pg. 2 ln 22- Pg. 3 Ln 2. (CP 548-551);

Since ceasing all motions for judgment against Mr. Sellars upon the notification from Mr. Sellars’ attorney that Mr. Sellars was taking a directly contrary position to his previous declaration under oath and Answer to AFG’s complaint that Mr Sellars was not liable for the debt.

Mr. Seller’s attorney has at all times ignored the admission against interest made in Mr. Sellars’s answer, even though, Mr. Minor claimed the following Attorney’s Fees totaling \$1,108 for: (a) On 12/07/2012 “Telephone call with Kara re: answer to complaint,...”; (CP 430, Dec. of Deane W. Minor in Sppt of Motion to Dismiss with Terms and Attorney’s Fees (“Dec of Minor”), Ex. C, Pg. 1); (b) On 12/10/2012 “Review Auxier complaint; conference with Joe; second conference with Joe; draft answer, affirmative defense, and cross claim; draft requests for production of documents from Greene” (CP 430, Dec. of Minor, Ex. C, Pg. 1) ; (c) On 12/11/2012 “Work on revisions to and finalize Deane’s draft of Defendant Sellar’s Answer and First Request for Production to Plaintiff and First Request to Production for Greene; complete check for filing fee; scan and save all documents to computer file; meet with client to sign documents.”

(CP 430, Dec. of Minor, Ex. C, Pg. 1) (d) On 12/12/2012 “Prepare fax cover sheet memo to attorney Mueller and fax him; Defendant Sellars’ Answer, First requests for Production of Documents to Plaintiff and First Requests for Production of Documents to Greene, phone calls with Mueller’s office and Mueller. (CP 430, Dec. of, Ex. C, Pg. 1)

AFG asserts that the above charges as well as any additional attorney’s fees related to the prosecution and/or defense of the cross-claim against Defendant Greene and/or counter cross-claim from Defendant Greene against Defendant Sellars are inappropriate. See C-C Bottlers, Ltd. v. J.M. Leasing, Inc. 78 Wash.App. 384, 896 P.2d 1309 Wash.App. Div. 3, 1995 (holding that attorney’s fees for work related to counter claim not appropriately awarded); see also Pearson v. Schubach 52 Wash.App. 716, 763 P.2d 834 Wash.App., 1988 holding that “(4) failure to distinguish between attorney fees incurred as result of contract action... was erroneous as provision in lease for award of attorney fees only applied to contract action; (5) attorney fees could not be awarded under frivolous action or defense statute and rule to prevailing party in pretrial summary judgment dismissal; and (6) award of attorney fees incurred on appeal was not warranted where issues were debatable.”

As discussed above, Mr. Sellers’s Answer contained admissions against interest that appears to have been made during a time while Mr.

Sellars was receiving legal advice from Mr. Minor. These post-bankruptcy admissions against interest by Mr. Sellars that he owed the debt are binding. As discussed above AFG did not taken any further action against to obtain judgment against Mr. Sellars, but instead vigorously took actions and completed discovery² including the taking of three depositions of non-party witnesses and the taking of the deposition of Defendant Greene seeking to uncover the truth and facts regarding: (1) the circumstances surrounding the signing of the notarized signatures that read “Greg Greene” that appear on the Quit Claim Deed recorded, presented and caused to be recorded by Mr. Sellars in order to establish both his own and Mr. Greene’s individual ownership of the Property, a publicly recorded document that was then reasonably relied upon by the Lender in the decision to make the Loan; (2) the circumstances surrounding the signing of the notarized signatures that read “Greg Greene” that that appear on the Deed of Trust that are essentially identical to the signature that reads “Greg Greene” on the Quit Claim Deed; (3) the truthfulness of Mr. Greene’s allegations “...*that Mr Sellars conspired with Cathy J. Haage, to forge [Mr. Greene’s] signature on the Deed of Trust...for the sole purpose of securing proceeds...[from the Loan].*”; and (4) the extent

² See the Declaration of Joshua Auxier (CP 472-483) and Declaration of Edward L. Mueller (CP 492-502) in Support of Plaintiff’s Partial Response to Defendant Greene’s Motion for Summary Judgment

of Mr. Greene's knowledge of and involvement with the making of, closing, and use of proceeds from the Loan.

Although Mr. Sellers Attorney was given notice of each of those depositions he declined to attend any of them, but advised AFG's counsel that he had advised Mr. Sellars that Mr. Sellars could attend the depositions without Mr. Minor if Mr. Sellars wished to do so. Neither Mr. Minor as counsel for Mr. Sellars, nor Mr. Sellars attended any of those depositions. For the reasons stated throughout the trial court record and this brief AFG asserts the granting of Mr. Sellers's Motion for Summary Judgment was reversible error and on that basis the award of Attorney's Fees should also be reversed. In addition, an award of attorney's fees during the time that Mr. Sellars claimed he was appearing pro-se, or those related to cross-claims and counter cross-claims are also not appropriate through May 16, 2013 are not appropriately charged against Plaintiff.

H. The Award of \$240 for the Filing of Sellars's Cross Claim Against Defendant Greene Is Not Properly Chargeable to Plaintiff.

The trial court erred in awarding court costs in the amount of \$240 claimed by Defendant Sellars against AFG because that cost was Defendant Sellars expense in filing a cross claim against his co-defendant Greene and had nothing to do with the AFG. Mr Sellars did not have to pay any court costs related to his defense(s) or admissions against interest

in his answer. Therefore the court's entry of that part of the order for an award to Defendant Sellars is clearly an indisputable error of law and should be reversed. See C-C Bottlers, Ltd., supra.

I. The Court Erred In Issuing Orders Which Required Plaintiff To Split Its Judicial Foreclosure Cause Of Action.

The Trial Court erred when it entered the Orders by which it granted the separate Motions for Summary Judgment to Defendant Sellars (CP 463-468) and Defendant Greene (CP 525-529); and denied AFG's Motions for Reconsideration with respect to each Order (CP 46-50, CP 21-16) for the additional reason that the combined effect of those Orders was to cause AFG to split its unified judicial foreclosure action even though the foreclosure was based on a single set of loan documents comprised of (1) one promissory note, (2) payment of which was secured by one deed of trust, (3) that encumbered one parcel of real property, (4) that was co-owned by Defendants Sellars and Greene as tenants-in-common, (5) who each owned an undivided 50% of the encumbered real property.

The combined effect of the Orders, if AFG accepted them without an appeal, was that AFG would be prevented from judicially foreclosing against the undivided 50% interest of Defendant Greene while at the same time AFG was authorized to judicially foreclose against the undivided 50% interest of Defendant Sellars. If AFG proceeded to foreclose against

the undivided 50 % interest of Defendant Sellars then all the rights to foreclose inherent in the deed of trust as a real property mortgage would merge into the foreclosure judgment at the time of entry of the judgment, and any possible appeal of the Order Granting Summary Judgment to Defendant Greene would be lost for two reasons; (1) the unified right to foreclose judicially based on the deed of trust as a mortgage will have merged into the judgment granting foreclosure against Defendant Sellars's 50% interest in the real property and (2) after completing the judicial foreclosure against the interest of Defendant Sellars, the time to file a notice of appeal as stated in RAP 5 (a) or (e) will have expired with respect to the Order Granting Defendant's [Greene's] Motion for Summary Judgment.

Therefore, AFG had no practical choice but to appeal the trial court's orders so as to avoid the loss of the right to foreclose on an undivided 50% interest in the real property.

AFG filed and served its Notice of Appeal on April 9, 2014. On May 14, 2014, the Court of Appeals filed its Motion to Determine Appealability and Whether Review Should be accepted by the Court which motion contained a notice addressed to counsel for AFG and each counsel for the Defendants Greene and Sellars. The Notice set a hearing date of June 20, 2014, on the Court's motion and set a due date for

Responses to the court's motion on the Monday prior to the hearing date. Appellant's (AFG's) responsive documents³ were dated June 16, 2014, with an attached certificate of service of the documents on counsel for each Respondent (Defendants Sellars and Greene) by mail, also dated June 16, 2014. Those documents were faxed to the Court on June 16, 2014, after 5:00 pm closing time, probably shortly before 7:00 pm, with the request that the documents be filed in the Court's file on this appeal. The Court of Appeals docket sheet shows that Appellant's (AFG's) response documents were filed in the court file on this appeal the next day, June 17, 2014.

AFG's/Appellant's counsel attended the Court hearing on June 20, 2014. Neither counsel for Defendant/Respondent Sellars nor counsel for Defendant/Respondent Greene appeared at the hearing. Counsel for Plaintiff /Appellant AFG simply submitted his client's written response to the Court's motion without oral argument in support of the written response. On June 24, 2014, the following notation ruling by Commissioner Mary Neel of the Court was entered:

³ See documents entitled (1) "Response of Plaintiff/Appellant to Court's Motion to Determine Appealability and Whether Review Should be Accepted by the Court" and (2) "Declaration of Josh Auxier.re Unification of Claims Against Defendants Sellars and Greene in response to this Court's "Motion to Determine Appealability and Whether Review Should be Accepted by the Court .: :

“Based on appellant’s response to the court’s motion to determine appealability and absent any response from respondent, review will go forward as an appeal under RAP 2.2(a)”

On July 2, 2014, counsel for Respondent Greene wrote a letter to the Court Administrator/Clerk objecting that Appellant’s counsel had not provided him with copies of Appellant’s response to the Court’s Motion to determine appealability. On July 7, 2014, Commissioner Neel entered a new notation ruling that provided in relevant part the following ruling

....

Nevertheless, because it appears that respondents may not have received service of Auxier’s answer prior to my ruling, I will give them an opportunity to address the question of appealability.

Any answer addressing appealability is due by 2014. Any reply is due by August 6, 2014. I will consider the issue of appealability without oral argument and issue a new ruling.

On August 15, 2014, the following notation ruling by Commissioner Mary Neel of the court was entered:

Respondents have not addressed the issue of appealability despite opportunities to do so. Review will go forward.

It thus appears that the issue of appealability of the three orders attached to Appellants Notice of Appeal has been determined, and the Orders are appealable.

However, in support of AFG’s claim that the Orders are appealable

within the meaning of RAP 2.2(a)(3) AFG cited the following legal authority in its Response of Plaintiff/Appellant (AFG) to Court's Motion to Determine Appealability, etc. at p. 4, lines 2-8. We repeat the same case citations with essentially the same information to be sure that the Court understands Plaintiff/Appellant (AFG)'s position that the combined effect of the three orders that required AFG to give up its right to claim foreclosure of the undivided 50% interest of Defendant Gregory Greene in order to be able to proceed with foreclosure of the undivided 50% interest of Defendant Joseph T. Sellars was reversible error because it required AFG to split its unified foreclosure claim.

That legal authority is:

Beginning with the case of *Sprague v. Adams*, 139 Wash 510, 515, 247 Pac. 960 (1926), the law has been settled in this state that a plaintiff cannot split his/her/its cause of action when the claim arises out of the same fact pattern of events and involves the same persons who are in some kind of privity. See *Large v. Shively*, 194 Wash.608, 627-28, 82 P.2d.793, (1938); *Landry v. Luscher*, 95 Wn.App.779, 782, 976 P.2d 1274 (Div. III, 1999). Also see *Kelly-Hansen v. Kelly-Hansen*, 87 Wn.App.320, 327-330, 941 P.2d 1108 (Div. II, 1997); and *Kuhlman v. Thomas*, 78 Wn.App. 115, 120, 897 P.2d 365 (Div. I, 1995).

Plaintiff/Appellant AFG respectfully submits that the trial court

erred when it entered orders the combined effect of which was that Plaintiff AFG would have been required to give up its right to foreclose against the undivided 50% interest of Defendant Greene in order to proceed to foreclose against the undivided 50% interest of Defendant Sellars.

VII. CONCLUSION.

Appellant, AFG has presented a clear summary of its case on this appeal in its Introduction as pp. 1-5 above. The Statement of the Case at pp. 13-17 above lays out AFG's efforts to tie all relevant events and evidence to the pertinent parts of the Clerk's Papers. The Standard of Review for Summary Judgment is addressed at pp. 18. The essential part of that Standard of Review is that the Court is to draw all inferences from the evidence in favor of the nonmoving party, which is Appellant Auxier Financial Group, LLC. The Argument, pp. 18-49 lays out AFG's arguments under 9 separate headings each of which addresses at least one issue in this appeal.

AFG believes the trial court erred repeatedly, as explained in the Argument by failing to follow the Standard of Review for Summary Judgment. In addition, AFG has presented in detail above the basis for AFG's claim that each Defendant is estopped from taking positions at the hearing(s) for Summary Judgment contrary to their statements, made

under oath, and in Defendant Sellars case admissions against interest in his Answer to AFG's complaint in this case, taken prior to their respective motions for summary judgment.

For each and all of those reasons Appellant Auxier Financial Group, LLC asks that the trial court's Orders granting Summary Judgment to each Defendant, and the Order Denying Reconsideration discussed above be reversed and the matter remanded to the trial court for further proceedings consistent with this court's decision.

Respectfully submitted this 24th day of November, 2014,

A handwritten signature in cursive script that reads "Edward L. Mueller".

Edward L. Mueller, WSBA # 264
Attorney for Appellant Auxier
Financial Group, LLC

Certificate of Service.

I certify that in November 24, 2014 I caused to be mailed by first class mail with postage prepaid, to the following named legal counsel for the respective respondents a copy of Appellant's Opening Brief to which this certificate is attached:

Counsel for Respondent Gregory Greene
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I also certify that on the same date stated above, I e-mailed a copy of the brief to the respective Counsel for Respondent at the e-mail address shown below each name.

Dated November 24, 2014.


Edward L. Mueller