

No. 35098-0 II

**COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
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TIMOTHY KRIENKE and BROOK KRIENKE,  
Appellants,

vs.

CHASE HOME FINANCE, LLC; and NORTHWEST TRUSTEE SERVICES, INC.  
Respondents

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APPELLANTS' REVISED OPENING BRIEF  
Pierce County Cause No. 05-2-10102-0

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COMES NOW Appellants, TIMOTHY KRIENKE and BROOK KRIENKE, by and through their attorneys of record, MAHER INGELS SHAKOTKO CHRISTENSEN LLP, and Kelly DeLaat-Maher, and submits Appellant's Brief on Appeal as follows:

**I. ASSIGNMENTS OF ERROR**

A. **Assignment of Error:** The trial court erred in denying the appellant's Motion for Reconsideration by Order dated June 9, 2006. Appellant requested that the court reconsider its grant of summary judgment in favor of the Respondent Chase, which was heard by the Court on January 20, 2006, and confirmed by Order entered February 10, 2006.

B. **Issues on Appeal:** Did the Court properly conclude that there were no material issues of fact preventing summary judgment as to the claims contained in Plaintiff's Complaint for wrongful foreclosure, slander of title, damages under the Fair Credit Reporting Act, violation of the Consumer Protection Act, breach of contract, and infliction of emotional distress?

**II. STATEMENT OF THE CASE**

**A. BRIEF SUMMARY OF THE CASE**

This matter involves a dispute between residential homeowners, Appellants Krienke (hereinafter "Krienke"), and their lender/mortgage servicer, Respondent Chase Home Finance (hereinafter "Chase"), as well

as the trustee, Respondent Northwest Trustee Services. The Krienkes filed suit on July 21, 2005 against Chase after it notified the Krienkes that they were in default of their mortgage, and proceeded to institute a non-judicial foreclosure with Northwest Trustee Services acting as the Trustee. See Request for Preliminary or Permanent Injunction; Complaint for Fraud etc., CP 147-155. The institution of foreclosure proceeding followed a long history of dispute with Chase, whereby Chase contended that the Krienkes continually made late payments on the mortgage, which the Krienkes vehemently contested.

The Krienkes purchased their home in 1990. From 1990 to 1999, all mortgage payments were made and accepted without incident. Inexplicably, in 1999 and 2000, Chase began sending notices to the Krienkes that their payments were delinquent and thus incurring late charges. The Krienkes responded to the claims that the payments were made late. When their correspondence went unnoticed, they began sending all payments by certified mail, return receipt requested. The returned receipts evidenced receipt of the payment by Chase prior to its due date, although the checks were not being *cash*ed until after the due date had come and gone. A copy of the records evidencing timely payment was attached to the Declaration of Brook Krienke in Support of the Motion for Temporary Restraining Order, CP 15-146. Chase

ultimately issued a Notice of Default on March 28, 2005. Subsequently Chase set a Trustees sale for July 29, 2005. Upon filing of the action by the Krienkes prior to the sale date on July 22, 2005, the sale was discontinued, and apparently has not been reset to date.

In their Answer to the Krienke's amended Complaint, Chase alleged that the Krienkes were in default to the sum of \$6,617.45 and further denied that the Krienke's payments were timely. CP 170-175. Indeed, evidence submitted to the court in support of the initial request for a preliminary injunction demonstrated that all payments were timely made and that they should not be in default. See Declaration of Brook Krienke filed July 22, 2005, CP 15-146.

Subsequently, the Krienke's attorney withdrew, which was granted after motion by an order entered December 8, 2005. CP 192. On that same date, Chase brought a Motion for Summary Judgment which was heard on January 20, 2006. Chase alleged in their motion that the Krienke's causes of action for wrongful foreclosure should be dismissed since the foreclosure action was not pending. They also alleged that the Krienkes could not establish slander of title, violation of the Fair Credit Reporting Act, or the Consumer Protection Act. Finally, they alleged that breach of contract claims should be dismissed as there was no breached contractual obligation, nor was there any basis for an emotional distress

claim. At the hearing, the Court dismissed all claims against Defendants and entered summary judgment against the Krienkes by order entered on February 10, 2006. CP 221-222. Krienke moved for reconsideration, which was also denied after hearing on April 28, 2006, and confirmed by Order entered June 9, 2006. CP 241-244.

**B. CHRONOLOGY OF RELEVANT EVENTS**

The following outline is intended to serve as a guide for the court to review the relevant events in the case, with reference to their corresponding place in the record.

<b>DATE</b>	<b>EVENT</b>	<b>Exhibit No./ Declaration</b>
04/01/1990	Krienkes purchase home and obtain a loan from Chemical Mortgage Co. whom assigns the loan to Defendant Chase and Chase begins servicing the loan	Decl. of Brook Krienke, CP 15-146.
1999-2000	Defendant Chase begins sending notices to Krienkes that payments are delinquent. Krienkes dispute the notices and contend that all payments are timely and in the correct amount.	Decl. of Brook Krienke, CP 15-146.
2000	Beginning in 2000, Krienkes begin sending confirmations of payments to Defendant Chase, documenting that payments are timely.	Decl. Brook dated 7/21/05, Ex. A
03/28/05	Defendant Chase notifies Krienkes that they are in default in the amount of \$6,617.45; and a non-judicial trustee's sale is scheduled for July 29, 2005. Krienkes continually dispute they are in default.	Decl. of Brook Krienke, CP 15-146. Ex. A
07/22/05	Due to the pending trustee's sale and the	Request for

	parties' relentless dispute on the issue of whether the Krienkes are in default or have made timely payments, the Krienkes file claims against Defendant Chase and additionally seek preliminary injunction to stop foreclosure.	Preliminary or Permanent Injunction, CP 1-8; Request for Preliminary or Permanent Injunction; Amended Complaint for Fraud etc., CP 147-155
11/14/05	Krienke's prior attorney files motion to withdraw, which is granted by Order on December 8, 2005.	Motion to Withdraw, CP 162-164;.
12/06/05	Apparently seeing that Krienke's attorney is seeking withdrawal, Defendant Chase's counsel sends via U.S. mail a Note, For Motion Docket, Memorandum and Motion for Summary Judgment to Krienkes.	Motion to Dismiss or for Summary Judgment, CP 176-178; Note for Motion Docket CP 293-294..
12/08/05	Order is entered granting withdrawal of Krienke's prior attorney.	Order on Motion to Withdraw, CP 192
12/29/05	Krienkes seek continuance on Defendant's Summary Judgment.	Note and Motion for Continuance, CP 195-196
12/30/05	Krienkes again seek continuance on Defendant's summary judgment.	Note and Motion for Continuance, CP 200-201.
01/06/05	Krienkes motion for continuance is denied.	Memorandum of Journal Entry, CP 299-300.
01/19/05	Krienkes file Motion to Strike Motion for Summary Judgment, and Declarations for summary judgment hearing.	Request to Strike Motion, CP 206-208; Declaration of

		Brook Krienke CP 209-212.
01/20/05	Defendants Motion for Summary Judgment is Granted at hearing, and confirmed by Order entered February 10, 2006.	Order Granting Motion to Dismiss or for Summary judgment, CP 221-222, also see Volume 1 RP, January 20, 2006 hearing.
02/21/06	Krienkes file a Motion for Reconsideration	Motion for Reconsideration, CP 223; Declaration of Brook Krienke, CP 189-191
04/28/06	Krienke's Motion for Reconsideration denied at hearing	Vol 1 RP, April 28, 2006 hearing
06/09/06	Order entered denying Motion for Reconsideration	Order Denying Motion for Reconsideration, CP 241-244.

Based on the above outline, it is evident that the Krienkes were unrepresented for a large part of their case. Notably, they were unrepresented by counsel at the critical time of the summary judgment hearing, despite have requested a continuance of the hearing to find counsel. Indeed, at the January 6th hearing on the continuance, counsel for Chase agreed that a short continuance could be had of the summary judgment motion to allow the Krienkes to obtain counsel. Vol 2 RP, January 6, 2006 hearing 6:22-25; 7:1-2. At Summary Judgment, Ms. Krienke was not given an opportunity to argue her case, despite having

filed voluminous records at the onset of the case supporting her claims. See Declaration of Brook Krienke in Support of Motion for Temporary Restraining Order, CP 15-146. Ms. Krienke's Motion for Reconsideration was also summarily dismissed, leading to this appeal.

### **III. ARGUMENT**

#### **A. STANDARD OF REVIEW**

This appeal deals with the court's denial of a Motion for Reconsideration of an Order granting Chase's Motion for Summary Judgment. As such, the court should apply the same standard of review that it does for a review of a decision on summary judgment. On review of an order for summary judgment, the court perform the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wash.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wash.2d 715, 722, 853 P.2d 1373 (1993)). As specifically stated in *Kruse v. Hemp*, in reviewing a summary judgment order, an appellate court evaluates the matter de novo, performing the same inquiry as the trial court. *Kruse*, at 722.

##### **i. The Krienke's Motion for Reconsideration Should Have Been Granted**

The Krienkes contend that the summary judgment should not have been granted in Chase's favor, and their motion for reconsideration was

appropriate. They were not able to properly defend the motion for summary judgment due to their inability to find an attorney in such a short period between their attorney's withdrawal and the motion, and were further not able to properly prepare and argue the motion for reconsideration. Additionally, multiple issues of material fact were evident in reviewing the earlier Declaration of Brook Krienke that had been filed in support of the Krienke's Motion for a Temporary Restraining Order. CP 15-146. Civil Rule 59 provides for the reconsideration of orders and/or judgments made by the court under certain circumstances.

That rule provides in pertinent part as follows:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;

...

(4) Newly discovered evidence, material for the party making the application. . .

...

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, *or that it is contrary to law*;

...

(9) That substantial justice has not been done.

CR 59(a). Arguably, there was an irregularity in the proceedings due to the absence of counsel for the Krienkes. Further, the evidence filed with

the court presented enough material issues of fact sufficient to prevent summary judgment on all the issues at such an early juncture in the case. This conclusion is compounded by the fact that the parties had not engaged in any discovery or had opportunity to fully explore the claims and defenses raised by each of the parties.

**ii. Summary Judgment in Favor of Chase and Northwest Trustee was Not Proper**

As the court knows, summary judgment is governed by the Civil Rules of Procedure, Rule 56(c). That rule provides as follows:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In this case, summary judgment was not appropriate. Summary judgment, pursuant to CR 56 (c), is proper if the pleadings, affidavits and depositions before the trial court establish that there is no genuine issue of material fact. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (quoting *Dickenson v. Edwards*, 105 Wn.2d 457, 461, 716 P.2d 814 (1986); and *Wilson v. Steinbach*, 98 Wn2d 434, 437, 656 P.2d 1030 (1982)). A material fact is one on which the outcome of the litigation depends. *Braegelmann v. Snohomish County*, 53 Wn.App. 381, 383, 766 P.2d 1137, *review denied*, 112 Wn.2d 1020 (1989). In a summary

judgment motion, the moving party must first show absence of issue of material fact, with burden then shifting to nonmoving party to set forth specific facts showing genuine issue for trial. *Iwai v. State*, 129 Wn.2d 84, 915 P.2d 1089 (1996).

If the moving party is a defendant who meets the initial burden of showing the absence of an issue of material fact:

. . .then the inquiry shifts to the party with the burden of proof at trial, the Plaintiff. If, at this point, the plaintiff ‘fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial’, then the trial court should grant the motion.

*Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). Furthermore, the defendant cannot avoid summary judgment by merely denying the allegations.

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

CR 56(e) (*emphasis added*).

Here, Ms. Krienke’s Declaration contained multiple issues certainly showing there was an ongoing dispute with Chase. CP 15-146.

For example, she submitted an extensive Exhibit outlining payments accepted by Chase, but not credited until after the due date. She further outlined that improper information regarding her credit was reported to the credit reporting agencies, thereby damaging her credit score. Chase's statement that the foreclosure sale had been discontinued was not adequate to defeat the obviously ongoing dispute, which continues to this day. The Krienke's claims should not have been dismissed. Indeed, Chase's act in discontinuance of the sale without filing of a bond or an order for injunctive relief filed raises the question of the propriety of Chase's proceedings.

**B. THE KRIENKE'S CLAIMS FOR WRONGFUL FORECLOSURE SHOULD NOT HAVE BEEN DISMISSED.**

In their Motion for Summary Judgment, Chase argued that the Krienke's claims for wrongful foreclosure must fail since they had called off the trustee's sale after the action was filed, and therefore the cause of action was moot. This argument is without merit – namely because the only reason the sale was called off was because of the suit filed by the Krienkes to halt the sale. It goes without saying that Chase undoubtedly feels that they are still owed the monies they claimed in the foreclosure action, and once this appeal is resolved, will once again commence foreclosure for recovery of the monies allegedly owed by sale of the

Krienke's home. Further, issues remain as to whether the Krienkes suffered any damage due to the wrongful institution of the foreclosure process. Simply halting the sale will not have resolved those issues.

Courts have determined that the purpose of the Deed of Trust Act is threefold. First, the statutory non-judicial foreclosure process should remain efficient and inexpensive. *Udall v. T.D. Escrow Services, Inc.*, 132 Wash.App. 290, 296, 130 P.3d 908 (2006). Second, it should provide an adequate opportunity for interested parties to prevent *wrongful foreclosure*. *Id.* Third, it should promote the stability of land titles. *Id.*

Here, the institution of the foreclosure was wrongful, which caused the Krienkes damages. Chase's assertion that a party can only make a claim for wrongful foreclosure after a sale has been accomplished is erroneous. This position is strengthened by the Deed of Trust Act provisions providing a grantor an avenue to seek an injunction to halt a sale they feel is wrongful. The act includes a specific procedure for stopping a trustee's sale so that an action contesting default can take place. RCW 61.24.130(1) provides in pertinent part that "[n]othing contained in this chapter shall prejudice the right of the borrower, grantor, any guarantor, or any person who has an interest in, lien, or claim of lien against the property or some part thereof, to restrain, on any proper ground, a trustee's sale." The statute does not require immediate

dismissal of a suit once the action has been halted due to compliance with the procedures outlined therein.

The causes of action contained in the Krienke's pleadings are proper grounds to enjoin the sale. The Krienke's should have been afforded an opportunity to explore how the institution of wrongful foreclosure proceedings damaged them, regardless of whether the actual sale had been called off in accordance with RCW 61.24. Halting the sale pursuant to the provisions of RCW 61.24 does not negate the cause of action. Further, sufficient evidence was contained in the Declaration of Brook Krienke which should have defeated the motion for Summary Judgment. See CP 15-146.

**C. THE KRIENKE'S CLAIMS FOR SLANDER OF TITLE SHOULD NOT HAVE BEEN DISMISSED**

The court summarily dismissed the Krienke's claims for slander of title. The Krienke's action for slander of title should not have been dismissed because the Declaration of Brook Krienke contained materials issues of fact as to each of the Krienke's claims, including slander of title.

In *Rorvig v. Douglas*, 123 Wn.2d 854, 859, 873 P.2d 492 (1994), the Court defined slander of title as follows:

Slander of title is defined as: (1) false words; (2) maliciously published; (3) with reference to some pending sale or purchase of property; (4) which go to defeat plaintiff's title; and (5) result in plaintiff's pecuniary loss.

*Id.* The element of malice is met when the slanderous statement is not made in good faith or is not prompted by a reasonable belief in its veracity. *Brown v. Safeway Stores, Inc.*, 94 Wash.2d 359, 375, 617 P.2d 704 (1980).

The Krienkes allege that they were not in default, which they had laboriously detailed to Chase on more than one occasion, and which was further detailed in the Declaration of Brook Krienke filed at the inception of the action. CP 15-146. As such, material issues of fact existed as to whether recording of the Notice of Trustee's Sale alleging mortgage delinquency was a false statement, thereby satisfying the first element required for slander of title. *Rorvig* at 859. There is also a material issue of fact as to whether publication of the Notice of Trustee's Sale by recordation and publication in a legal periodical was malicious publication as required by the second element of slander of title. *Id.* If Chase and their trustee had reason to know that the information was erroneous, then publication thereof was not in good faith. Because a Notice of Trustee's Sale and subsequent foreclosure seeks to defeat a borrower's title, there are material issues of fact as to whether or not the fourth element of slander of title was met, requiring that the false statements seek to defeat a plaintiff's title. *Id.* Finally, the fifth element requires that a person suffer

pecuniary loss. *Id.* Material issues of fact were presented by the damage to the Krienke's credit, as well as the potential loss of their property and any consequential damages arising by the foreclosure action.

The only real issue is whether the Krienkes could allege sufficient facts to meet the third element requiring reference to a pending sale or purchase. *Id.* Chase argues that there was no pending sale for the property at the time the Notice of Default was filed. The fact of the matter is that the Krienke's would essentially have great difficulty in finding a bona fide purchaser at an appropriate price once the foreclosure process had begun. Indeed, they would be prevented from even refinancing their property due to the damage to their credit scores. Whether or not there was or could have been a pending sale is an issue of fact that was not before the court. The summary dismissal of the claim was simply in error.

**D. THE KRIENKE'S CLAIMS UNDER THE FAIR CREDIT REPORTING ACT SHOULD NOT HAVE BEEN DISMISSED**

Similarly, the trial court should not have summarily dismissed the Krienke's claims under the Fair Credit Reporting Act ("FCRA"). In her declaration, Brook Krienke alleges that Chase transmitted information relating to their alleged default to credit reporting agencies, which caused their credit to be greatly impaired. CP 15-146. Indeed, their credit still

remains impaired. This material issue of fact should have been sufficient to overcome Chase's Motion for Summary Judgment on that issue.

15 U.S.C. §1681(o) provides for civil liability for negligent noncompliance. It provides as follows:

**(a) In general**

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

- (1) any actual damages sustained by the consumer as a result of the failure; and
- (2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

**(b) Attorney's fees**

On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.

In their Complaint, the Krienke's also requested damages under 15 U.S.C. §1681(n)(a)(2), which provides damages for willful noncompliance. It provides in pertinent part as follows:

**(a) In general**

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

- (1)

- (A) any actual damages sustained by the consumer as a result of the failure or damages of not less than \$100 and not more than \$1,000; or
- (B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or \$1,000, whichever is greater;
- (2) such amount of punitive damages as the court may allow; and
- (3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

The Respondent alleged at Summary Judgment that the cause of action should be dismissed since the Krienkes did not lodge a complaint in regard to inaccurate information with their credit reporting agency. The Statute provides that a consumer reporting agency reinvestigate the accuracy of the information or delete it, and within a certain time period, notify the persons who furnished the information of the dispute.

Although the Krienkes did complain to Chase, they also provided evidence through their Declaration that their credit had been harmed by Chase's provision of erroneous information to the consumer reporting agency. Although a consumer reporting agency has a requirement to comply with the requirements of the Fair Credit Reporting Act, so to does the provider of such information carry a requirement that the information provided to the agency be truthful. In this case, there can be no doubt that

there is a long history of dispute – evidence of which was provided to the court in Ms. Krienke’s Declaration. Her claims should not have been so swiftly dismissed.

**E. THE KRIENKE’S CLAIMS UNDER THE CONSUMER PROTECTION ACT SHOULD NOT HAVE BEEN DISMISSED**

In its Motion for Summary Judgment, Chased argued that the Krienke’s claims under the Consumer Protection Act (“CPA”) should be dismissed since there “was no foreclosure” and therefore they could not establish damage to their business or property. CP 176-188. Once again, the Krienke’s presented material issues of fact sufficient to overcome the Defendant’s Motion, and it should not have been dismissed.

RCW 19.86.020 provides that unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful. Similarly, RCW 19.86.090 provides for damages for violation of RCW 19.86.020. It provides as follows:

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in the superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee, and the court may in its discretion, increase the award of damages to an

amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed ten thousand dollars: PROVIDED FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed the amount specified in RCW 3.66.020. For the purpose of this section "person" shall include the counties, municipalities, and all political subdivisions of this state.

RCW 18.86.090.

To support a claim under the CPA, a plaintiff must present evidence of (1) an unfair or deceptive act (2) committed in trade or commerce (3) that impacts the public interest and (4) injures the plaintiff's business or property, as well as (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

Here, the Krienke's have alleged facts which meet all of the elements under the CPA. They have met the first requirement with their contention and abundant exhibits demonstrating that Chase has unfairly and erroneously begun foreclosure proceedings under the assumption that their mortgage payments were delinquent when in fact they were not. Their second element is met in that Chase is in the business of servicing

mortgages, an activity conducted in trade or commerce. Certainly, the public is impacted by a mortgage servicer's institution of an unjustified foreclosure, when the consumer has produced evidence to the contrary, thus meeting the third element. They further meet the fourth element in that a successful foreclosure results in the damage and actual *loss* of their property. Finally, the fifth element requiring causation is amply met. But for the wrongful insistence that the Krienkes were delinquent with their mortgage, their property and their credit would not have been placed in jeopardy.

As such, sufficient evidence existed to defeat the Defendant's motion for Summary Judgment on the issue of the CPA. The court erred in dismissing those claims.

**F. THE KRIENKE'S CLAIMS FOR BREACH OF CONTRACT SHOULD NOT HAVE BEEN DISMISSED**

Chase argued before the trial court that the Krienke's claims for breach of contract should be dismissed since Krienke failed to identify a contractual provision that was allegedly breached. Despite the extensive Declaration of Brook Krienke, CP 15-146, the trial court agreed and dismissed the claims. The court's action in doing so were in error.

There can be no doubt whatsoever that a contract existed between the parties, in the form of a Promissory Note and Deed of Trust securing

the note. As with any Promissory Note and Deed of Trust, the Krienkes were expected to make payments in a certain amount by a stated time. Impliedly, the mortgage servicer was to accept the payment by that date, and credit it to the client's account. Chase failed to do so. Attached to Ms. Krienke's Declaration were several years of payment history showing certified mail receipts of payments made by the appropriate date, although the checks were not cashed until after the due date. Despite the Krienke's compliance with the terms of the agreement, Chase failed to abide by its requirement of *accepting timely payments made* in the appropriate amount. Their failure is a breach.

“[T]he essence of a contract is that it binds the parties who enter into it and, when made, obligates them to perform it, and any failure of any of them to perform constitutes in law, a breach of contract.” *Carboneau v. Peterson*, 1 Wn.2d 347, 374, 95 P.2d 1043 (1939). Thus, a breach can be defined as the failure without legal excuse to perform any promise making up a contract and may be inferred from the refusal of a party to recognize the existence of a contract, or when, in anticipation of the time for performance, one definitely and specifically refuses to do something which he is obligated to do.

By this definition, Chase failed without legal excuse to perform their part of the bargain –crediting the payments upon the date of their

receipt rather than the date that Chase got around to cashing the check. Simply put, the Krienke's performance should not be measured by the date Chase decides to perform their end of the bargain – something over which the Krienkes had not control. The court's summary judgment on this issue should be reversed and remanded for trial.

**G. THE KRIENKE'S CLAIMS FOR EMOTIONAL DISTRESS SHOULD NOT BE DISMISSED**

Chase argued before the trial court that the Krienkes failed to establish a statutory or common law basis for emotional distress damages, and thus their claims should be dismissed. The Court agreed, despite the ample evidence contained in Ms. Krienke's Declaration. The court was in error, and the Krienke's should be allowed to pursue their claims.

Washington law does not support claims for emotional distress damages in breach of contract claims. See *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 448, 815 P.2d 1362 (1991); *Lord v. Northern Automotive Corp.*, 75 Wn.App. 589, 596, 881 P.2d 256 (1994) overruled on unrelated grounds, *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 898 P.2d 284 (1995). However, Washington will support a claim for emotion distress in light of a party's bad faith. In *Werlinger v. Clarendon Nat. Ins. Co.*, 129 Wash.App. 804, 120 P.3d 593 (2005), the appellate court recognized that “[b]ecause bad faith is a tort, a plaintiff

may seek emotional damages.” Here, the Krienke’s have alleged that Chase has acted in bad faith, and therefore they should have been allowed to explore their claims against Chase on that basis.

Further, Washington case law supports a claim for outrage in a situation where credit has erroneously been damaged. In *Rice v. Janovich*, 109 Wash.2d 48, 61, 742 P.2d 1230 (1987), the court outlined the elements of the tort of outrage as follows:

The elements of the tort of outrage are “(1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress.”

*Id.* Whether certain conduct is sufficiently outrageous is generally a question for the trier of fact. *Jackson v. Peoples Federal Credit Union*, 25 Wash.App. 81, 84, 604 P.2d 1025 (1979). In this case, Chase has failed to demonstrate that the Krienkes can prove no set of fact consistent with their claims for emotional distress and outrage due to the consistent reporting of bad credit to the appropriate agencies. The case should be remanded to allow them opportunity to explore their claims.

#### **H. THE KRIENKES ARE ENTITLED TO THEIR ATTORNEYS FEES ON APPEAL**

Several of the Krienke’s claims contain a basis for attorney’s fees, including violation of the Consumer Protection Act, and violation of the Fair Credit Reporting Act. Furthermore, fees are appropriate under RCW

4.84.330 pursuant to a contract provision in the Deed of Trust to a prevailing party in a dispute. The Krienke's action should not have been dismissed. Pursuant to RAP 18.1, they request fees incurred on review, and remand back to the Superior Court for trial.

#### **IV. CONCLUSION**

Summary Judgment was not appropriate. The action should be remanded to the court for trial on the merits. Ms. Krienke's Declaration, submitted at the inception of the action, contained ample evidence sufficient to present material issues of fact preventing summary judgment. The court should have considered that Declaration, especially in light of the Krienke's weakened position without counsel. Furthermore, Chase's overriding reasoning that the Krienke's action must fail solely because they discontinued the sale is without merit. The statute is designed to seek an injunction to prevent a foreclosure wrongfully commenced, which the Krienke's did when they filed their action. Despite Chase's assertion that the foreclosure was stopped shortly after the filing of the action, the situation remains largely unresolved, and Chase still stands with their beliefs that monies are delinquent and owed. The matter should be resolved at trial.

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RESPECTFULLY SUBMITTED this 19 day of January, 2007.

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**CERTIFICATION OF SERVICE**

Under penalty of perjury of the laws of the State of Washington, I hereby certify that I served the above Appellant's Revised Opening Brief to counsel of record as follows:

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