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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

39387-5-II  
COURT OF APPEALS, DIVISION II,  
FOR THE STATE OF WASHINGTON

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DEVON MCKENNA AND CYNTHIA MCKENNA,  
Husband and wife,

Appellants,

v.

COMMONWEALTH UNITED MORTGAGE, a division of  
NATIONAL CITY BANK OF INDIANA, aka NATIONAL CITY  
MORTGAGE CO., an Ohio Corporations, doing business in the  
State of Washington,

Respondents.

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COMMONWEALTH UNITED MORTGAGE AND NATIONAL  
CITY MORTGAGE CO.'S RESPONDENT BRIEF

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Name, Address and Telephone Number of Counsel for parties:

Respondents:  
ROUTH CRABTREE OLSEN, P.S.  
Janaya L. Carter, WSBA# 32715  
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Bellevue, WA 98006  
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## TABLE OF CONTENTS

	<u>Page(s)</u>
Table of Contents	1
Table of Authorities	2
Assignments of Error	3-4
Statement of Case	4-11
Argument	11-22
Conclusion	23

## TABLE OF AUTHORITIES

A. Cases	Page(s)
<u>State v. Peeler</u> , 7 Wash.App. 270, 274, 499 P.2d 90 (1972)	11
<u>Clay v. Portik</u> , 84 Wash.App. 553, 929 P.2d 1132 (Wash.App. Div. 2,1997).	11
<u>Dalton v. State</u> , 130 Wash.App. 653, 663, 124 P.3d 305, 310 (Wash.App. Div. 3, 2005)	19
<u>Griffin v. Draper</u> , (1982) 32 Wash.App. 611, 649 P.2d 123	16
<u>Luckett v. Boeing Co.</u> , 98 Wash.App. 307, 312, 989 P.2d 1144 (1999).	19
<u>Wilcox v. Lexington Eye Institute (2005)</u> , 130 Wash.App. 234, 122 P.3d 729, review denied 157 Wash.2d 1022, 142 P.3d 609.	14
 <b>B. Statutes</b>	
RCW 61.24.060	11, 14, 15, 16, 17, 18
RCW 59.12.030	15,18
 <b>C. Rules</b>	
Rules of Appellate Procedure, 18.14	12, 19
Superior Court Rule 59	14,15,16
Superior Court Rule 52	13, 15
Superior Court Rule 60	18
Thurston County Local Rule 59	16

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DEVON MCKENNA AND CYNTHIA  
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No. 39387-5-II

RESPONDENT'S  
BRIEF

ASSIGNMENTS OF ERROR

1. Did the Court err in not notifying Appellants of Consolidation? No, appellant was represented by Counsel at the time of consolidation and appellant's counsel entered the Order Consolidating the Cases.
2. Did the Court err by failing to enter findings of fact and conclusions of law upon denial of the Appellant's Motion for Reconsideration? No, the applicable Court Rules do not require findings of fact and conclusions of law on an Order Denying Reconsideration.

3. Did the Trial Court err by allowing Counsel to enter and argue case without client present? No, neither cases nor Court Rule require that a client must be present in order for counsel to argue a Motion.
4. Did the Court err by not dismissing the Respondent's claim? No, a Motion to Dismiss was not properly noted in the Superior Court case at any time and an Order for Partial Summary Judgment had been entered previously on the issue of whether the foreclosure sale was proper after briefing both sides and a hearing on the matter.

#### STATEMENT OF THE CASE

On or about June 28, 2005, Appellants granted a Deed of Trust to Common Wealth United Mortgage, a division of National City Bank of Indiana ("Commonwealth"), in order to secure repayment of a loan extended to the Appellants for \$172,296.00 to purchase a residential property located at 11624 Hobby Street Southeast, Yelm, WA 98597. CP 43, Exhibit 5 to Affidavit of Foreclosing Trustee. The Deed of Trust was properly recorded on June 30, 2005 in the real property records of Thurston County as Auditor's No. 3744630. CP 43, Exhibit 5 to Affidavit of Foreclosing Trustee.

In November 2007, National City Mortgage, acting as servicer for Commonwealth directed Northwest Trustee Services (“NWTS”) to initiate foreclosure on Commonwealth’s behalf. CP 32, Affidavit of Foreclosing Trustee. At the same time, Commonwealth appointed NWTS as successor trustee which was properly recorded in the real property records of Thurston County as Auditor’s File No. 3971138. CP 32, Affidavit of Foreclosing Trustee.

On November 3, 2007, in compliance with RCW 61.24 et. Seq., a Notice of Default was forwarded to the property address, setting forth the default under the Deed of Trust by regular and certified mail. CP 32, Affidavit of Foreclosing Trustee. On November 6, 2008, the Notice of Default was posted at the property address. CP 32, Affidavit of Foreclosing Trustee.

On December 11, 2007, the Notice of Trustee’s sale was mailed to Devon J. McKenna, Cynthia H. McKenna and all occupants by regular and certified mail. CP 32, Affidavit of Foreclosing Trustee. The Notice of Trustee’s sale set the sale date for March 14, 2008, at 10:00 a.m. CP 32, Affidavit of Foreclosing Trustee. On December 11, 2007, the Notice of Trustee’s Sale was posted at the property address. CP 33, Affidavit of Foreclosing Trustee.

On March 12, 2008, Appellants filed for Bankruptcy in the Western District of Washington as case number 08-41031. On March 17, 2008, the United States Bankruptcy Court dismissed the case. CP 33, Affidavit of Foreclosing Trustee.

On April 9, 2008, the foreclosure resumed and an Amended Notice of Trustee's sale was mailed to Devon J. McKenna, Cynthia H. McKenna and all occupants by regular and certified mail. The Amended Notice of Trustee's sale set the sale date for May 23, 2008, at 10:00 a.m. CP 33, Affidavit of Foreclosing Trustee. On April 9, 2008, the Amended Notice of Trustee's Sale was posted at the property address. On April 23, 2008 and May 14, 2008, the Notice of Trustee's Sale was published in the Tenino Independent. CP 33, Affidavit of Foreclosing Trustee.

On May 23, 2008, the trustee's sale of the real property went forward and the Trustee's Deed was issued to Respondent Commonwealth on May 28, 2008, as they were the highest bidder at the foreclosure sale. CP 33, Affidavit of Foreclosing Trustee.

On May 23, 2008, the trustee's sale was held and Commonwealth acquired title to the property at the non-judicial foreclosure sale conducted pursuant to RCW 61.24.010 *et seq.* The Trustee's Deed to the property was executed and delivered to Commonwealth on May 28, 2008 and recorded in the Thurston

County real property records as Auditor's File No. 4014654 on June 3, 2008. CP 33, affidavit of Foreclosing Trustee.

On June 12, 2008, the Appellants filed a Complaint for Damages and Objecting to Sale in the Thurston County Superior Court under Case Number 08-2-01425-5 (the "Litigation Case"). CP 26-30, Complaint for Damages and Objecting to Sale. The Complaint primarily alleged problems with the foreclosure process and that the respondent had not provided that they were the Note holder. CP 26-30, Complaint for Damages and Objecting to Sale. Part of the basis for the Complaint alleging that the sale was invalid was that on May 22, 2008, one day before the foreclosure sale date, the Appellants filed an action in the United States District Court for the Western District of Washington, Tacoma Division, under Case Number C08-5330RJB, alleging violations of the Truth in Lending Act (TILA), The Real Estate Settlement Procedures Act (RESPA), The Fair Debt Collection Practice Act (FDCPA), The State Collection and Unfair Practices Act, and the Consumer Loan Act ("Federal case"). CP 27-28, Complaint for Damages and Objecting to Sale.

Following the sale, Commonwealth filed an Unlawful Detainer action on September 9, 2008 against the Appellants under

Thurston County Case Number 08-2-02104-9 (“UD case”). CP 95-99, Complaint for Unlawful Detainer.

On June 23, 2008, E. Allen Walker filed a Notice of Appearance in the UD case and a Response to Complaint for Unlawful Detainer; Counterclaim for Declaratory Relief and Other Relief on behalf of the Appellants. CR 103, Notice of Appearance. In the appellant’s Answer to the Unlawful Detainer Case, Appellants argued that the foreclosure sale was void because Appellants had filed the Federal case one day prior to the sale thereby providing actual notice to the trustee that the foreclosure was being challenged. CR 103, Notice of Appearance, CP 100-102, Memorandum in Opposition.

On October 3, 2008, a Show Cause hearing was held by the Court in the UD case. Respondent and the appellant were both represented by counsel and present in Court. Based upon the Court’s decision on October 3, 2008 at the Show Cause hearing, on October 17, 2008, the UD Court entered an Order Consolidating the UD Case and the Litigation Case and providing for payments by the Appellant into the Court registry on a monthly basis upon presentation of the appellant’s counsel at the time. CR 80-81, Order from Hearing.

Although the Order was marked Clerk's Action Required, action to actually consolidate the case was not taken at that time by the Court. In other words, even though the Court had ordered consolidation, the dockets for the two cases at that time did not reflect the consolidation until a later date. CR 80-81, Order from Hearing, CR 104-105.

On October 3, 2008, Respondents moved for Summary Judgment in the Litigation Case. CP 69-79, Motion for Summary Judgment. On November 7, 2008, at hearing on the Motion for Summary Judgment, during which the Appellants were represented by counsel, the Court awarded partial Summary Judgment to the Respondents, finding that "Summary Judgment is granted to the defendant as the foreclosure being proper" and "Defendant may move forward with Show Cause hearing set on December 5, 2008". CP 82-83, Order Granting Summary Judgment.

On April 15, 2009, acting in accordance with the previous Order Consolidating the two Cases, counsel for the Respondent filed a Motion for Order to Show Cause (CP 84-91) and Motion to Issuance of a Writ of Restitution. CP 84-91, Motion for Order to Show Cause, CP 92-94, Motion for Writ of Restitution. Counsel's papers referenced both Case Numbers as the cases were not showing being consolidated on the Court dockets and it was

unclear as to which case should be treated as the lead case. The case caption used in counsel's pleadings was that as listed in the UD case. CP 84, Motion for Order to Show Cause, CP 92, Motion for Writ of Restitution.

On May 8, 2009, the Order issuing the Writ of Restitution was entered by the Court at the Show Cause hearing. CP 3-4, Order Issuing Writ of Restitution.

On or about May 18, 2009, the appellant filed his Motion for Reconsideration. CP 7-11, Motion for Reconsideration and Motion to Dismiss Writ of Restitution. At the Court's own initiative, Judge Tabor, on May 28, 2009 issued a letter denying the Reconsideration and striking the hearing for May 29, 2009. CP15, Letter Opinion. On May 29, 2009, Judge Tabor executed the Order Denying Reconsideration. CP 16, Order Denying Reconsideration. Counsel was not a party to that decision and was unaware until counsel appeared for hearing on March 29, 2009 in Thurston County that the matter had been struck.

Based upon the finding of the Court on November 8, 2008 that the foreclosure sale was proper, the Court has no basis for denying the owner of the property, Commonwealth, possession. Pursuant to RCW 61.24.060, Commonwealth is entitled to possession. It was based upon a finding a proper foreclosure sale

that the Court issued the Writ of Restitution in this Case and reconsideration was properly denied.

ARGUMENT

THERE WAS NO ERROR IN CONSOLIDATING THE CASES  
AND APPELLANT WAS PROPERLY NOTIFIED THROUGH  
HIS COUNSEL

An attorney appearing on behalf of her client is her client's representative and is presumed to speak and act on her behalf. State v. Peeler, 7 Wash.App. 270, 274, 499 P.2d 90 (1972) (counsel's signature on statement consenting to separation of jury without client's signature is binding). An attorney's procedural acts accomplished in the regular conduct of her client's case are considered those of her client and are binding on her client. Clay v. Portik, 84 Wash.App. 553, 929 P.2d 1132 (Wash.App. Div. 2,1997).

The Order consolidating the case was entered in October 2008 after a Show Cause hearing on the eviction at which both sides were present. At the time, Mr. McKenna was represented by counsel who represented the Order Consolidating the cases to the Court. Mr. McKenna was bound by his attorneys' actions and it was his attorneys' obligation to notify Mr. McKenna of the consolidation. The Order Consolidating the Cases was not properly

objected to or properly appealed in a timely manner. Mr. McKenna should be bound by the Order.

THE TRIAL COURT PROPERLY DENIED THE MOTION FOR RECONSIDERATION AND THERE WAS NO ERROR BY THE COURT IN FAILING TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THE ORDER DENYING RECONSIDERATION

*A. Denial of the Motion for Reconsideration was appropriate.*

On or about May 15, 2009, the appellant filed his Motion for Reconsideration. The appellant alleged and requested the following in his Motion for Reconsideration:

1. That the Court should Reconsider the Order consolidating the cases;
2. That the Case Caption was changed without notice to the appellant;
3. That the Prevailing party was involved in misconduct that result in the consolidation and title change;
4. To dismiss the Writ of Restitution Issue by Judge Tabor on May 11, 2009, order entered May 8, 2009;
5. That Summary judgment was granted improperly;
6. That respondent's counsel's statements are not evidence;
7. That the Appellants were not provided with Due Process;
8. That Judge Tabor rushed to judgment in granting the Order Issuing the Writ on May 8, 2009.

CR 59 provides the basis for reconsideration, grounds for reconsideration and the timing required for filing a Motion for

Reconsideration. CR 59(b) provides that a motion for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. Superior Court Civil Rules, CR 59.

Under CR 59(a), the motion for reconsideration may be granted for various causes which materially affect the substantial rights of such parties, such as, 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; misconduct of prevailing party or jury; or newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial. Although there are other provisions, the appellant did not raise them as causes for the reconsideration in this case.

Superior Court Civil Rules, CR 59.

At the time of the appellant's Motion for Reconsideration, the time to reconsider the Order Consolidating the Actions (Issues 1-3) had passed as had the time to reconsider the Order Granting Summary Judgment (Issue 5) so those issues were properly denied reconsideration solely on a failure to raise them in a timely manner. The Order Consolidating the Cases had been entered seven months earlier and the Order for Summary Judgment had

been entered six months earlier. They could not be reconsidered under CR 59.

The only Order that the Court could consider in the Motion to Reconsider would be the Order Issuing the Writ of Restitution. The Respondent does not argue that Mr. McKenna did not file a timely Motion to Reconsider the Order Issuing the Writ of Restitution but rather that there was not a sufficient basis for the Motion for Reconsideration.

The basis for issuing Order for the Writ of Restitution was that the Court had already ruled that the foreclosure sale held by the respondent on its Deed of Trust was proper. Under the provisions of RCW 61.24.060, the purchaser at the trustee's sale is entitled to possession on the 20<sup>th</sup> day. Based upon the Court's finding that the foreclosure sale was proper, Commonwealth was entitled to restitution of the premises and Mr. McKenna was free to continue his lawsuit for damages as to any other issues although it should be noted that Mr. McKenna has done nothing in the two years that his case has been pending as far as conducting discovery or moving the case along.

Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of

discretion, which occurs when its decision is based on untenable grounds or reasons. Wilcox v. Lexington Eye Institute (2005), 130 Wash.App. 234, 122 P.3d 729, review denied 157 Wash.2d 1022, 142 P.3d 609.

There was no error by the Court in issuing the Writ of Restitution. Mr. McKenna's Complaint alleged various wrongdoings as far as the trustee's foreclosure notices. In answer, the Respondent and the foreclosing trustee provided evidence that it had complied with the provisions of RCW 61.24 et. seq. Based upon the evidence presented, the Court found for the Respondent as to the propriety of its sale.

Because the provisions of RCW 61.24.060(1) state that the purchaser at the trustee's sale shall be entitled to possession of the property on the twentieth day following the sale, as against the borrower and grantor under the deed of trust and when the Trial Court has found that a proper foreclosure sale has occurred, the provisions make clear that the purchaser is entitled to possession and that the purchaser shall also have a right to the summary proceedings to obtain possession of real property provided in chapter 59.12 RCW. The Order Issuing the Writ of Restitution was proper and reconsideration was properly denied.

***B. Findings of Fact and Conclusions of Law were unnecessary.***

Civil Rule 52 governs those situations when findings of fact and conclusions of law are necessary.

Pursuant to CR 52(5), findings of fact and conclusions of law are not necessary in the following two situations:

(A) Stipulation. Where all parties stipulate in writing that there will be no appeal.

(B) Decision on Motions. On decisions of motions under rules 12 or 56 or any other motion, except as provided in rules 41(b)(3) and 55(b)(2). Superior Court Civil Rules, CR 52.

Mr. McKenna filed a Motion for Reconsideration, occurring and authorized by CR 59. The Court rules do not contemplate that it is necessary for the Court to enter Findings of Fact and Conclusions of law in this scenario.

LCR 59(a) (1) (A), provides the procedure under which a party can file a Motion for Reconsideration under Thurston County local rules. That rule specifically provides that each judge reserves the right to strike the hearing and decide the motion without oral argument, which is what Judge Tabor did in this case. LCR 59(a)(3) further provides that motions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a

showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence. Thurston County Superior Court LCR 59

LCR (b) then goes on to discuss deadline for Motions for Revision of Court Commissioners' Orders and provides that findings of fact and conclusions of law shall be entered *before* the hearing on the motion for revision. Perhaps this is why the appellant believes that findings of fact and conclusions of law are necessary in this case. However, based upon the provided law, they are not required. Thurston County Superior Court LCR 59.

There is no legal basis under which the Trial Court would be required to enter findings of fact and conclusions of law.

THE TRIAL COURT DID NOT ERR BY ALLOWING  
COUNSEL TO ENTER AND ARGUE CASE WITHOUT  
CLIENT PRESENT

The Respondent, in previously presenting its Motion for Summary Judgment, accompanied that Motion with an Affidavit of the Foreclosing Trustee, setting out its compliance with the Deed of Trust Statute, RCW 61.24, during its foreclosure. Mr. McKenna's Complaint had previously listed the following captions: Objection to Foreclosure Sale, Cause of Action: Defamation of Title, Cause of Action: Declaratory Relief, Breach of Fiduciary Duty. Each of these contained allegations as to the

underlying foreclosure process. As a result, the respondent requested and provided a sworn statement of its foreclosing trustee in support of its Motion for Summary Judgment, which lead to a finding that the foreclosure sale was proper.

On that basis alone, the Respondent moved to a Show Cause hearing for Issuance of a Writ of Restitution. The foreclosure sale had already been found proper. Pursuant to RCW 61.24.060, the Respondent was entitled to a writ. There is nowhere that counsel can locate in the statutes or case law that provide that a lawyer can only engage in oral argument with his/her client present. In fact, lawyers provide oral argument based upon Motion without their client present regularly.

THE COURT DID NOT ERR BY FAILING TO DISMISS THE RESPONDENT'S CLAIM

A Motion to Dismiss was not properly noted in the Superior Court case at any time and has to this day not been heard by the Court because Mr. McKenna continues to file Motions before Judge McPhee and he has declined to consider the Motion. The reason for that denial is that there is an Order in the case that any further proceedings must be heard by Judge Tabor as he was the Judge that granted summary judgment. The Court cannot possibly have erred in not dismissing a claim when a Motion to Dismiss was never before it. At the time of the Show Cause, the

Order for Partial Summary Judgment had been entered previously on the issue of whether the foreclosure sale was proper.

Further, at no time has Mr. McKenna raised an issue which would void the Order for Summary Judgment under CR 60(b), nor has that matter even been heard. As recently as May 7, 2010, Mr. McKenna was noting a Notice to Vacate Void Judgment and Dismiss Invalid Trustee's Sale. The Court has never ruled on that Motion because Mr. McKenna has failed repeatedly to file it correctly. Even if Mr. McKenna had successfully filed his Motion to Vacate the Order for Summary Judgment, it is not sufficient to be successful to vacate the Order.

Under CR 60(b), motions must be brought under its provisions within "a reasonable time." The facts and circumstances of the particular case are considered in determining whether a movant has filed its CR 60(b) request within a reasonable time. Lockett v. Boeing Co., 98 Wash.App. 307, 312, 989 P.2d 1144 (1999). The critical period is the period between when the moving party became aware of the reason to vacate the judgment and when the moving party filed its motion. *Id.* In determining whether the motion is timely, the court considers whether the delay has prejudiced the nonmoving party and whether the moving party has

a good reason for failing to act sooner. *Id* Dalton v. State, 130 Wash.App. 653, 663, 124 P.3d 305, 310 (Wash.App. Div. 3, 2005).

Mr. McKenna's sole claim for why the Order for Summary Judgment should not have been granted and the trustee's sale found to be proper was that he now claims that he did not notarize the attached Deed of Trust and that "Janaya L. Carter, WSBA#32715, has been caught in multiple acts of bad faith, willfully misleading and deceiving the Court and the Plaintiff". The appellant in that motion then claims that the Order for Summary Judgment should be vacated because:

1. Carter had knowledge of the "altered" Deed of Trust as evidenced by its mailing to the appellant on April 14, 2009 (five months after summary judgment);
2. That Carter started a separate case (a related Unlawful Detainer) to circumvent his case;
3. That Carter attempted to rush to judgment in Cause Number 08-2-02104-9;
4. That Carter stated in her reply of June 8, 2009 that "Commonwealth will be continued to be delayed and Mr. McKenna will continue to file baseless pleadings in an effort to stay in the

property unless something is done (seven months after the Order for Summary Judgment);

5. That the respondents failed to comply with public policy by allowing the entering of evidence into the record and testifying in court without the defendant present;
6. That Carter cited to “No. 08-2-01425-5 consolidated with 08-2-02104-9” instead of “08-2-02104-9 consolidated with No. 08-2-01425-5”;
7. That Carter stated “the plaintiff again asks for the same relief despite the fact that the same matter and the same issues were before the Court on May 29, 2009” (in the Motion for Reconsideration, which was denied);
8. That Carter stated that Judge Tabor was the assigned judge in the case when he was not;
9. That Carter referred to the May 29, 2009 Order as a lockout (again six months after the Summary Judgment Order);
10. That Carter spent considerable time and effort to convince the sheriff to violated a valid stay issue

on May 18, 2009 (again six months after the Summary Judgment Order;

11. That Carter stated “Commonwealth has now learned that another Commissioner has stayed the writ of restitution”;
12. That Carter stated “The McKenna’s have set a Motion to Dismiss for September 25, 2009 alleging that the trustee sale held by Commonwealth is invalid. This issue was decided months ago!”;
13. That Carter referred to McKenna’s attempts to find justice as baseless pleadings;
14. That Carter under LCR 5(b) (2) failed to serve the reply in a timely manner (no indication of which reply McKenna refers to).

Assuming that Mr. McKenna here now alleges that the Trial Court erred in not dismissing the Order for Summary Judgment and the Respondent’s case, this is not an issue that can be raised in the Appeal. It has not even been decided on by the Trial Court and thus is not a final order or judgment that can form the basis for the Appeal. The Court has not ruled on his Motion and Mr. McKenna appealed the Motion Denying Reconsideration.

The issue of dismissal is not ripe and an order has not been entered for that issue.

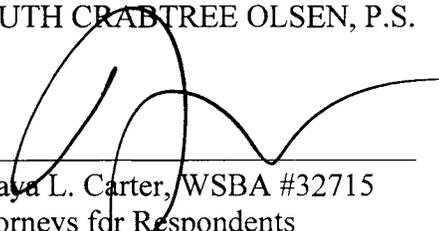
CONCLUSION

The trial court acted properly in denying the Motion for Reconsideration because the appellant was beyond the time to attack the validity of the foreclosure sale and upon that basis, the respondent was entitled to a Writ of Restitution.

The Court should uphold the trial court order denying the Motion for Reconsideration and send the case back to the State Court for Reissuance of the Writ of Restitution.

DATED this 13 day of May, 2010.

ROUTH CRABTREE OLSEN, P.S.



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DECLARATION OF SERVICE

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Name, Address and Telephone Number of Counsel for parties:

Respondents:  
ROUTH CRABTREE OLSEN, P.S.  
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 ORIGINAL

The undersigned makes the following declaration:

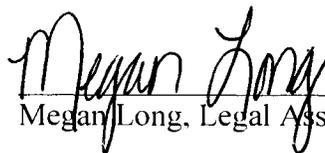
1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.
2. That on May 14, 2010, I caused a copy of **Respondent Commonwealth United Mortgage and National City Mortgage Co.'s Respondent Brief** to be served to the following in the manner noted below:

Devon McKenna	<input type="checkbox"/>	US Mail, Postage Prepaid
Cynthia McKenna	<input type="checkbox"/>	Hand Delivery
11624 Hobby St. SE	<input checked="" type="checkbox"/>	Overnight Mail
Yelm, WA 98597	<input type="checkbox"/>	Facsimile

*Pro Se* Appellants/Plaintiffs

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 14<sup>th</sup> day of May, 2010.

  
Megan Long, Legal Assistant