8-19-2011

Federal Nat. Mortg. Ass'n v. Allen Appellant's Brief Dckt. 37972

David Bruce Allen

Sandpoint, near [83864]
State of Idaho

Appearing at all times In Propria Persona

IN THE SUPREME COURT OF THE STATE OF IDAHO

Federal National Mortgage Assoc., a.k.a. FANNIE MAE, a corp. created by Congress of the United States Plaintiff/Respondent, vs. David B. Allen, an individual; and DOES I through X, unknown occupants of the property commonly knows as 1596 E. Shingle Mill Road, Sandpoint, Bonner County, Idaho. Defendants/Appellants.	Sup.Ct. No. 37972-2010 Bonner Case No. CV-2009-1865

APPEAL FROM DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER
THE HONORABLE STEVEN VERBY PRESIDING

Attorney For Appellant: Mr. David Bruce Allen
In Propria Persona

Sandpoint, near [83864]
State of Idaho

Attorney of Respondents: Mark D. Perison, Bar No. 4804
MARK D. PERISON, P.A.
314 South 9th Street, Suite 300
Boise, near [83707]
State of Idaho

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES

Constitution of the State of Idaho

Constitution of the United States of America

Idaho Rules of Civil Procedure

Idaho Appellate Rules

Idaho Code

Code of Judicial Conduct

Statement of the Case.

Mark Pierson filed a complaint on behalf of Federal National Mortgage Association on October 7th, 2009. A Bonner County Deputy Sheriff served the Complaint upon Defendant David B. Allen on October 26th, 2009. Mr. Allen filed a "Pre-Answer Motion to Dismiss; Motion for Sanctions," on the grounds of lack of subject matter jurisdiction, lack of jurisdiction over the person, and insufficiency of process. and set a hearing date for February 17th, 2010. Two and half weeks later, on December 4th, 2009, Mr. Pierson filed the applications for entry of default and default judgment on the grounds that Mr. Allen had failed to file an answer to the complaint as required by law. On December 11th, 2009, Default was ordered and judgment was entered awarding the plaintiff possession of the property at 1596 E. Shingle Mill Road, Sandpoint, Bonner County, Idaho, plus damages in the amount of $3,480.00, as well as attorney's fees and costs in the amount of $498.00. On or about 27 December 2009 Mr. Perison, realizing his and the Court's error, called Mr. Allen to work out a stipulation to set aside the "default and default judgment." On January 21st, 2010 the parties filed a stipulation to set aside "default and default judgment." Pursuant to that stipulation an "Order" setting aside "default and default judgment" was issued on January 26, 2010.

On February 17th, 2010, Mr. Allen appeared and counsel for the Plaintiff failed to appear. In fact, the hearing date somehow got undocketed without Notice to Mr. Allen. Mr. Allen spoke with Judge Verby's secretary who stated that Judge

Verby is in his office and he does not want to hear this today because he saw a Notice of Substitution in the file. Please note that Mr. Allen had not received any such notice. After much to-do Judge Verby's secretary re-scheduled to March 17th, 2010 over the objection of Mr. Allen. This proved to the instance of prejudice to Mr. Allen rights to due process.

On March 9th, 2010, Mr. O'Neill, who had no standing, filed a Notice of Intent to Take Default, without having complied with the requirements for substitution of attorneys as required under IRCP Rule 11(b). Said Notice was done prior to the hearing on the Pre-Answer Motion by Mr. Allen filed on October 26th, 2009. On March 17th, 2010, a hearing was held on Mr. Allen's Motion to Dismiss before someone other than the assigned to the case, Judge Verby. Interloper, Judge Charles Hosack denied the motion acting wholly without subject matter jurisdiction or authority from the Chief Justice of the Idaho Supreme Court and/or Administrative Judge of the District Court for the First Judicial District.

With the Motion to Dismiss still pending waiting to be heard before the assigned District Court Judge, Judge Verby as per IRCP Rule 77(b), O'Neill who himself had no standing in the case filed on April 5th, 2010 for Default and Default judgment. On April 7th, 2010 the court entered an Order for Default and a Default Judgment. Judge Verby being not present at the March 17th, 2010 hearing was not aware of the issues surrounding Mr. O'Neill, who has no standing.

On April 14th, 2010, relying on the court rules that Judge Charles Hosack was an Interloper on the case on March 17th, 2010, and that Mr. O'Neills filings

had no standing due to non-compliance with Rule 11(b) of the IRCP, Mr. Allen filed an Emergency Motion for Stay, Emergency Motion to Quash the Writ of Ejectment, Motion to Vacate Judgment and an Answer and Counterclaim, which were amended on the 20th of April, 2010.

April 21st, 2010, the hearing on the Emergency Motion for Stay, Emergency Motion to Quash the Writ of Ejectment wherein Judge Verby after questioning Mr. O'Neill got O'Neill to admit that Mr. Allen never got personally served with Notice of Sale, which was re-scheduled from March 2009, due to a Stay which was placed upon Sun Trust Mortgage who supposedly held the "note." In August of 2009 their council held a trustees sale without Notice being provided to Mr. Allen, in which Sun Trust Mortgage sold the property to Fannie Mae with the documents of sale going back to Sun Trust Mortgage. It was not known to Mr. Allen what had happened to the property at 1596 E. Shingle Mill Road, Sandpoint, Bonner County, State of Idaho until he was served with the Complaint from Fannie Mae. At the conclusion of the hearing Judge Verby took it under advisement, in which it is still under advisement to this day as no final determination was ever made. This is the next instance of prejudice to Mr. Allen.

The Motion to Vacate Judgment was noticed up for hearing to occur on the 9th day of June 2010. Judge Verby instead of complying with IRCP Rule 7(b)(3) decided the Motion without allowing the Plaintiff to respond to the Motion. On June 9th, 2010 Mr. Allen appeared for the hearing as scheduled and again his motion was undocketed without notice being provided to Mr. Allen. In addition,

there was no counsel for the Plaintiff at the hearing that date either.

Because of the May 27th, order denying Mr. Allen's Motion to Vacate Judgment which briefing period was still open - is the third time Mr., Allen was prejudiced by the court. On June 29th, 2010, Mr. O'Neill decided to respond to the Motion to Vacate Judgment which was untimely.

On July 2nd 2010, Mr. Allen again filed a second Motion to Vacate Judgment in response to the Order denying the Motion to Vacate Judgment which said decision was plagued with erroneous findings of fact and law.

On July 21st, 2010 the hearing took place and Mr. O'Neill had not responded to the Motion in writing. Judge Verby did not decide any of the issues raised within the brief, but did go into two issues. The first was the substitution issue of Mr. O'Neill reciting a new standard outside of the strict compliance standard this Court has maintained for the last 70 years. The second issue was Judge Hosack's appearance on the case being lawful; when he knew Judge Hosack did not have authority and was the final act of prejudice against Mr. Allen.

Mr. Allen filed a Notice of Appeal with this Court.

Attorney's Fees

Appellant claims Attorney Fees pursuant to I.A.R. 41(d) which states in part to wit:

> The claim for attorney fees, which at the discretion of the court may include paralegal fees shall be accompanied by an affidavit setting forth the method of computation of the attorney fees claimed.

For a great part of this case the Appellant has secured the assistance of a

paralegal to do most of his writing, research, and preparation of oral arguments before the court. Appellant asserts that should he prevail on Appeal he should be able to get attorney fees for services as provided by the paralegal.

Argument with Questions Presented

It is a well settled principal of law that the issue of standing is jurisdictional and may be raised at any time. *Tungsten Holdings, Inc., v. Drake,* 143 Idaho 69, 72, 137 P.3d 456, 459 (2006)(Because the issue of standing is jurisdictional, *Van Valkenburgh v. Citizens for Term Limits*, 135 Idaho 121, 124, 15 P.3d 1129, 1132 (2000), it may be raised at any time, *Hoppe v. McDonald*, 103 Idaho 33, 35, 644 P.2d 355, 357 (1982).) See also *Beach Lateral Water Users Association v. Harrison*, 142 Idaho 600, 603, 130 P.3d 1138, 1141 (2006).

Further this Court has stated that because standing is jurisdictional and may be raised at any time, including on appeal. *Koch v. Canyon County*, 145 Idaho 158, 162, 177 P.3d 372, 376 (2008) citing *Beach Lateral Water Users Association v. Harrison*, 142 Idaho 600, 603, 130 P.3d 1138, 1141 (2006).

It is equally well settled principal of law that "Standing is a preliminary question to be determined by this Court before reaching the merits of the case." *Trountner v. Kempthrone*, 142 Idaho 389, 391, 128 P.3d 926, 928 (2006) citing *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002); as cited in *Capstar Radio Operating Co. v. Lawrence*, 143 Idaho 704, 707, 152 P.3d 575, 578 (2007).

There are three (3) questions of standing for this Court to review for error.

1. Did Judge Hosack have standing to make determinations on this case without complying with the Idaho Rules of Court or the processes Page instituted by the Idaho Supreme Court?
2. Did Mr. O'Neill have standing to appear for the Plaintiff in this case without proper compliance with the Idaho Court Rules on substitution?
3. Does Federal National Mortgage Association have standing to bring the action without the compliance with the letter of the law under chapter 15 of Title 45 by SunTrust Mortgage?

There are two additional questions on appeal ancillary to the first three which are:

4. Did the attorneys and the court comply with the Rules on Substitution of attorneys? And
5. Was Judge Hosack's presence on the case in accordance with IRCP Rule 77(b) and the Idaho Supreme Court?
6. Did Judge Verby, the assigned judge, abuse his discretion and violate Defendant's due process and equal protection right in conjunction with the first three issues on appeal?
7. Did Appellant receive due process of law and equal protection under the law as provided for under the Nonjudicial Foreclosure Act - chapter 15 of Title 45 Idaho Code?
8. Is the Nonjudicial Foreclosure Act - chapter 15 of Title 45 Idaho Code constitutional in its application concerning in providing individuals who are being foreclosed adequate protections under the provisions of state and federal constitutions of due process and equal protection under the law?
9. Is it an abuse of discretion to avoid motions noticed up for hearing and leave them undecided?

Idaho Rules of Civil Procedure Rule 77(b) states in part to wit;

> All trials or hearings of any court held before a judge or magistrate assigned thereto, and all judgments and orders issued by such courts shall be deemed to have been done in open court regardless of the place held. *IRCP Rule 77(b)*

On November 16th the Defendant filed a Pre-Answer Motion to Dismiss which had a Notice of Hearing that this motion would be heard before the assigned Judge of Steven Verby on February 17th, 2010. See R 7 showing that Judge Verby was assigned as Judge on this case.

On February 17th, 2010 the Defendant's motion was not scheduled on the court's calendar, and Judge Verby was present in chambers. Judge Verby refused to hear the motion to dismiss that day even though the parties and the Court were properly notified of the hearing well in advance of the hearing date.

The Clerk of the Court re-scheduled the hearing to the 17th day of March, 2011 to Judge Verby without a court record by an order or some other document stating the reasons therefore. R 146. This act of not hearing the Motion as noticed up for hearing on the 17th day of February, 2010 was prejudicial to the Defendant. It was prejudicial to the Defendant as Defendant was present and ready to present the merits of the Motion that day and there was no opposition to the motion filed prior to the hearing on February 17th, 2010.[1]

That delay was a denial of due process in violation of Section 18 of Article I of the Constitution of the State of Idaho and was an abuse of discretion by the trial court in violation to Idaho Rules of Court and Code of Judicial Conduct which require mandatory compliance by the judge sitting on the bench.

On March 17th, 2010, without prior notice of change of attorneys or that the assigned judge would not be appearing, Judge Hosack appeared for Judge Verby in violation to IRCP Rule 77(b) and in absence of jurisdiction proceeded to hear the Motion to Dismiss. Judge Hosack entered an Order of decision on the Motion to Dismiss, R page 30.

On July 2, 2010, Appellant filed a second motion to vacate judgment. R

1 After the 17th day of February, 2010 on March 9th, 2010 a Memorandum in Opposition to Defendant's Motion to Dismiss and Motion for Sanctions was filed by an another attorney.

121 – 127, Brief in Support of Motion to Vacate Judgment R 128 – 159. A Reply Brief to Motion to Vacate Judgment R 160 – 164 which was filed on July 15th, 2010 and are incorporated herein by their reference. The Notice of Hearing in the Motion stated that the Motion was to be heard on July 21st, 2010, before Judge Steven Verby, the assigned Judge to the case.

The Motion to Vacate Judgment specifically challenges the sufficiency of Judge Hosack's appearance on the case at the March 17th hearing. R 130 – 133 The Appellant incorporates these arguments in this appeal.

At the hearing Judge Verby made the following findings on the issue of Lack of jurisdiction of Judge Hosack. Tr. July 21st, 2010 pages 13 and 14 to wit:

> "THE COURT: At this time I'll Turn to the issue of lack of jurisdiction of Judge Hosack.
>
> Article 5 section 12 of the Idaho Constitution authorizes service by retired judges providing that any retired District Judge may hold a district court in any county at the request of the judge of the district court thereof. I did make a request. I did request that Judge Hosack handle cases while I was outside of the county.
>
> Idaho Code section 1-2005 which governs the assignment and duties and powers of senior judges provides that a senior judge is eligible for temporary assignment by the state - - by the Supreme Court to a state court as provided by this subsection whenever the Supreme Court determines that the assignment is reasonably necessary and will promote a more efficient administration of justice. A senior judge may sit as district or magistrate judge of the district court of the county.
>
> (4) states that each senior judge assigned as provided in this section has all the judicial powers and duties while serving under the assignment of a regularly qualified judge of the court to which the senior judge is assigned.
>
> In State versus Lottridge, 29 Idaho 53, the court stated that there can be no question that a district judge from one district may preside in another district under certain circumstances. This is apparent from the reading of the Constitutional provision. The presumption is that a court of general jurisdiction has acted within

> its jurisdiction. The presumption embraces another presumption which in the absence of any affirmative showing in the record to the contrary and that is that since an appropriate invitation, in this case the law was older but it states from the judge of the district or from the governor would have conferred the requisite authority such invitation had been accepted.
>
> The court went on to state, 'We therefore hold that the judgment appealed from is not void for want of jurisdiction.'
>
> So at this point I am going to deny the motion that has been filed by Mr. Allen."

Tr. of the July 21st, 2010 hearing, pages 13 and 14.

Judge Hosack appeared on the case without having a valid assignment from the Administrative District Court Judge – Judge Mitchell, as ordered by this Court on December 15, 2009 by Chief Justice Eismann. See Affidavit of Stay in Support of Motion For Stay, Exhibit – Order from Idaho Supreme Court In Re: Assignment of; Senior Judge Charles W. Hosack and is incorporated herein by its reference. Judge Hosack also violated the Code of judicial Conduct by presiding over a case he was not assigned to pursuant to Canon 3B(1) which states to wit:

"B. Adjudicative Responsibilities.

> (1) A judge shall hear and decide matters assigned to the judge except those in which an appropriate disqualification is required by these Canons." Code of Judicial Conduct

Judge Verby stated on the record as transcribed herein that Judge Hosack was properly clothed with authority, when Judge Verby knew that he was not pursuant to Idaho Code 1-2005(3). This section states to wit:

> (3) The assignment of a senior judge shall be made by an order which shall designate the court or duties to which the judge is assigned and the duration of the assignment. Promptly after assignment of a senior judge under this section, the Supreme Court shall cause a certified copy of the order to be sent to the senior

judge and another certified copy to the court to which the judge is assigned. Idaho Code Section 1-2005

It was a fact at the time when Judge Verby announced his decision that Judge Hosack was not clothed with authority due to the fact that the Chief Justice of this Court through the Administrative Judge of the First Judicial District had not issued the required Order of Assignment giving Judge Hosack authority to preside over the above entitled case.

Further said lack of authority was known by Judge Verby from the onset due to the requirement pursuant to I.C. § 1-2005(3) that a copy of the Order be sent to the Clerk of the Court to eventually be placed within the case file as stated by Administrative Judge of the First Judicial District – Judge Mitchell stated in his response to the Appellant's Public Record Request. See Affidavit of Stay in Support of Motion For Stay, Exhibit – Request for Public Records requesting the Order from Idaho Supreme Court In Re: Assignment of; Senior Judge Charles W. Hosack and is incorporated herein by its reference. The bottom line is – no Order exists which allowed Judge Hosack to preside over the above entitled case.

However, the extent of the deceit goes further than just the lack of the Order and lying about it in open court. Judge Verby's deliberate mis-stating the law of Idaho Code § 1-2005 and Article V, Section 12 of the Constitution of the State of Idaho which continues to state to wit: "**or of the chief justice, and when any such request is made or approved by the chief justice it shall be his duty to do so**;" making it look like because he was out of the county was justification for not following the process mandated by law, in which he had no business to be outside

of the county to begin with without an Order by this Court.

Judge Verby showed his disrespect for his immediate supervisors - the Idaho Supreme Court Justices and his Employer, The People of this State, which I am a member of pursuant to Section 2 of Article I of the Constitution for the State of Idaho. Also he showed his bias and prejudice against the Appellant in violation of Sixth Amendment of the Bill of Rights in not having a impartial judge as is also required by Order of the Idaho Supreme Court of June 15th, 2006 – In Re: Policy Regarding Fairness and Equality In the Courts and is incorporated herein by its reference.

Additionally, this Court has recently stated in regards to both Article V, Section 12 of the Constitution of the State of Idaho and Idaho Code § 1-2005 the following quote from *State v. Pratt*, 128 Idaho 207, 912 P.2d 94 (1996) to wit:

> "**A retired district judge may hold a district court position upon request and order of the chief justice.**" *State v. Pratt*, 128 Idaho 207, 912 P.2d 94 (1996).

It should also be noted that this case is cited in the annotations of Article V, Section 12 of the Constitution of the State of Idaho and Idaho Code § 1-2005 of the Idaho Code. So Judge Verby should have had personal knowledge of what he was mis-stating to interfere with the administration of justice and circumvent the mandates of the law of this State and his superiors.

Again the bottom line is that the ruling made by Judge Hosack on the Motion to Dismiss is void ab initio for lack of standing of no authority to preside on over the above entitled case. Judge Verby allowing Judge Hosack to interfere

with his case assigned to him and his failure to correct the situation was an abuse of discretion where no discretion existed as required by law.

Therefore, the Motion to Dismiss is an undecided issue, in which the Plaintiff could have never received a default judgment. Therefore said ruling on the Motion to Dismiss and the Judgment of default constitutes fundamental error as it is prejudicial to the Appellant in violation of his due process rights including but not limited to Section 13 and 18 of Article I of the Constitution of the State of Idaho, the 6th and 14th Amendment of the Bill of Rights of the Constitution of the United states of America of as it took his property without due process of law.

Appellant also asserts that the decision of either Judge Hosack or Judge Verby to allow Judge Hosack to preside over the case was not a discretionary act as stated herein. As such, Judge Hosack was not clothed with authority to preside over this case and Judge Verby failed to correct this error brought to his attention of Judge Hosack's lack of standing to be on the case, who is also subject to Code of Judicial Conduct.

Substitution Issue of Attorneys:

While the judges aforementioned indiscretions of Idaho Supreme Court mandates and decisions was compounded by another deliberate lack of standing and due process being implemented by a lack of compliance with procedural rules concerning change of attorneys.

The initial complaint was filed on October 7th, 2009, by Mark D. Perison. See R. pages 7 – 12. In the complaint it alleges throughout the complaint that the

Plaintiff complied with the mandates of chapter 15 of Title 45. Appellant on November 9th, 2009 filed a Motion to Dismiss based upon partially on the lack of standing of Plaintiff due to the non-compliance with chapter 15 of Title 45. See R 13 – 20. Before the Motion being heard a default judgment and judgment was entered on December 11, 2009. See R. 21 – 25. On January 26th, 2010 the default judgment and judgment was set aside. See R. 26 – 27. Prior to all this, Appellant sent a letter, R 71 - 75 and had phone conversations with Mr. Perison. Being that his "client" failed to disclose the truth about the real facts of this case surrounding the fraudulent loan and the subsequent acts and actions of theft to make the Appellant and his family homeless under color of law.

Based upon the September letter and the conversations with Mr. Pierson, Mr. Pierson had full knowledge that he had no standing to bring the suit forward and agreed to vacate the default judgment and judgment to avoid liabilities accruing on his person. Additionally, On March 2nd, 2010 he sent a letter to Appellant with an unsigned Notice of Substitution. See R. 108 – 111. Please Take Judicial Notice of R. 110 and 111 of the fact that Mr. O'Niell's signature is not on the Notice of Substitution.

IRCP Rule 11(b)(1) – (4) governs changes of attorneys. Rule 11(b)(1). Change of attorneys – which states to wit:

> The attorney of record of a party to an action may be changed or a new attorney substituted by **notice to the court and to all parties signed by both the withdrawing attorney and the new attorney** without first obtaining leave of the court. If a new attorney appears in an action, the action shall proceed in all respects as though the new attorney of record had initially appeared for such party, unless

> the court finds good cause for delay of the proceedings. I.R.C.P. Rule 11(b)(1) [Emphasis Added]

Looking at the Notice of Substitution in R. 110 and 111, both attorneys did not sign the Notice. Whether or not the court record shows something other than what the Appellant received is irrelevant. Notice must be provided to all parties signed by both the withdrawing attorney and the new attorney. This simply was not done.

Each hearing the Appellant objected to Mr. O'Neill's appearance in the above entitled case. See Tr. March 17th, 2010, pages 3 - lines 21 – 25 page 4 - line 1, and page 4 - lines 20 – 25, page 5 - lines 1 – 19, page 6- lines 4 – 22, page 7 - lines 23 – 25 and page 8 - lines 1 – 23, page 9 - lines 1 – 25 and page 10 - lines 1 – 13; Tr. April 21st, 2010, page 6 - lines 22 – 25 and page 7 - lines 1 – 5; page 7 - lines 11 – 19; page 8 - lines 4 – 15; Tr. July 21st, 2010, page 3 - lines 19 – 25 and page 4 - lines 1 – 17.

At the July 21st, 2010 hearing Judge Verby addressed two issues of many issues raised in several Motions to Vacate Judgment. The Second issue was Judge Hosack being on the case which Appellant has already discussed. The First issue is the substitution of attorneys. Judge Verby made the following findings on page pages 11 and 12 of the Tr. July 21st, 2010, to wit:

> THE COURT: I am going to address the two new issues that have been raised. One is the lack of standing of plaintiff's counsel Mr. O'Neill due to improper substitution. And when I say new, I relate to additional information that has been presented.
>
> The omission of the withdrawing counsel Mark Pierson's signature on the Notice of Substitution of counsel is not necessarily grounds for nullification of present counsel Mr. O'Neill's action in this case because Mr. Allen has failed to show that he was misled or otherwise prejudiced by the substitution.

> Idaho Rules of Civil Procedure 11(b)(1) which does govern a change of substitution of attorneys provides that all parties must - - excuse me, the substitution must be signed by both the withdrawing attorney and the new attorney without first obtaining leave of the court. Courts in other jurisdictions have held that an irregularity in substitution does not oust jurisdiction or require validation of the substituting attorney's actions where no prejudice has been shown by the opposing party.
>
> For example, in California Appellate Court Baker versus Box 226 Cal Appeals 3d 1303 stated "Where the actual authority of the new or different attorney appears, courts regularly excuse the absence of record of a formal substitution and validate the attorney's acts, particularly where the adverse party has not been misled or otherwise prejudiced."
>
> In a New York State appellate case, Divalackwa (phonetic spelling) versus Bloomberg L.P., 895 New York 2d 347, a New York Appeals Division, First Department 2010 case, the holding was made that plaintiff's mistake of not filing the consent to change form is under the circumstances a mere formality and Quincy has shown no prejudice by the plaintiff's noncompliance with the applicable rule.
>
> In Black versus Ameritel Inns, 139 Idaho 511, 2003 Idaho Supreme Court case, although not dealing directly on point with this issue, the Court did interpret Rule 11 and stated that Rule 11 is not intended to be a stumbling block to the pursuit of justice. The primary goal in the application of Rule 11 is to deter pleading and motion abuses.
>
> In these circumstances, there has not been a showing that there has been prejudice by the substitution so it is the Court's ruling that the substitution, although not completely in compliance - - " Tr. July 21st, 2010 pages 11 and 12

First Judge Verby admitted that counsel did not comply with IRCP Rule 11(b)(1). Next there was no consideration given to the fact that Appellant objected to each of Mr. O'Neill's appearances and that Mr. O'Neill could have rectified the situation by complying with IRCP Rule 11(b)(1) by providing a Notice of Substitution with signatures of the withdrawing party and the new attorney. Why Mr. O'Neill chose not to do so is a question for him to answer, but the Appellant

will not speculate.

But what is well settled is the law and this Court and Court of Appeals of the State of Idaho has stated multiple times in *Rodell v. Nelson*, 113 Idaho 945, 750 P.2d 966 (Ct.App. 1988) holding that "Strict compliance with this rule is reasonable and necessary in light of the rule's extraordinary impact." And again in *Reinwald v. Eveland*, 119 Idaho 111, 803 P.2d 1017 (Ct.App. 1991) holding that "Strict compliance, and not substantial compliance, is required when the rule is applicable." And by this Court in the case of *Wright v. Wright*, 130 Idaho 918, 950 P.2d 1257 (1998) in which this Court held, "There must be strict compliance with this rule to obtain a valid judgment. Judgments obtained without such compliance are void."

Judge Verby in error introduced new standards not known to the current standard of strict compliance in violation of the Code of Judicial Conduct, Canon 2 A which states to wit: "Judges should respect and comply with the law and should conduct themselves at all times in a manner that does not detract from public confidence in the integrity and impartiality of the judiciary." "Law" denotes court rules as well as statutes, constitutional provisions and decisional law. Code of Judicial Conduct.

The case of *Berg v. Kendall*, 147 Idaho 571, 212 P.3d 1001 (2009), wherein recently this Court again upheld the strict compliance standard holding that, "Strict compliance with the rule is required to obtain a valid judgment. However, where a party fails to demonstrate prejudice stemming from alleged inadequate

notice of a hearing on his attorney's motion to withdraw, the district court did not abuse its discretion in denying a Rule 60(b)(1) motion for relief."

The facts in Berg are different from the facts in this case. Berg's attorney for a minor child failed to properly give notice to Berg's father pursuant to IRCP Rule 11(b)(3), and later the mother filed a motion to vacate the dismissal, which was subsequently appealed. In this case it was opposing counsel who failed to give proper notice to Appellant pursuant to IRCP Rule 11(b)(1). Further, in this matter there was no hearing on the issue, which is required under IRCP Rule 11(b)(2), which in itself was prejudicial to the Appellant. This prejudice was known to Judge Verby in the record due to Judge Verby's direct interference with Appellant's due process rights of having the plaintiff show good cause for the change and the delay which resulted in the disposition of the Motion to Dismiss which was noticed up for hearing on February 17th, 2010. Judge Verby decided NOT to hear the Motion to Dismiss on the docket due to supposed change of attorneys.

Further prejudice can be shown in the record where Judge Verby allowed another Judge to interlope on his case without any apparent authority who had no obligation to uphold the law and rights of the Appellant. These were the first three (3) prejudices which were known by Judge Verby at the time of his decision and would not let the Appellant respond to his newly discovered standard in derogation to this Court's mandated law of strict compliance which has been in existence of over ten (10) years.

Judge Verby introduced a clearly erroneous standard by shifting the burden

of proof of plaintiff demonstrating strict compliance of IRCP Rule 11(b) to having the Appellant prove prejudice without giving him the opportunity to do so. Judge Verby does not cite any Idaho cases on point to substantiate his findings, but cite cases from outside the jurisdiction of the State of Idaho which are not applicable to State of Idaho case rulings (law) or the rules of court (law) all of which is another prejudice to the Appellant.

It is also worthy to note that the issue of substitution was not a matter of discretion pursuant to IRCP Rule 1(c) which states in part, "No district court or magistrates division of the state shall make rules of procedure except as expressly authorized by these rules."

Another showing of prejudice was Judge Verby's failure to uphold the decisions of this Court on the doctrine of Strict Compliance with Rule 11 and issue a decision in favor of the Appellant as was required to be in conformity with the law and as is required under Article I, Section 18, entitled, "Justice to be freely and speedily administered." which states to wit:

> "Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property or character, and right and justice shall be administered without sale, denial, delay, or prejudice."

The ultimate showing of prejudice was when Judge Verby failed to vacate the entry of default judgment and judgment, R 32 – 35, handed to Mr. O'Neill when Mr. O"Neill lacks standing to be on the case. See Brief on Second Motion to Vacate Judgment pages 5 – 9 as R. 132 – 136 and are incorporated herein by its reference. Decisions to allow Mr. O'Neill, who had no standing, to be on the case,

due to lack of compliance with IRCP Rule 11(b) was an abuse of discretion, in opposition to Rules of court and case dicta, in which this Court should reverse.

Does Federal National Mortgage Association have standing?

This issue of Fannie Mae's lack of standing was brought each time Appellant went before the Court without determination of the subject matter after Appellant's presentation. See Tr. March 17th, 2010, page 26 – lines 7 – 25, page 27 – lines 1 – 8 and 17 – 25, page 28 – lines 1 – 4; Tr. April 21st, 2010 pages 8-11, 14 – 24; Tr. July 21st, 2010, pages 6 – 10. In order for this Court to fully understand the issue on appeal, Appellant requests the Court to TAKE JUDICIAL NOTICE of the Answer and Counterclaim in record as R. 49 – 81, which details and demonstrates the non-compliance with chapter 15 of title 45 Idaho code.

The door was opened by the Plaintiff's complaint to challenge the sufficiency of the non-judicial foreclosure processes used to secure the property from Appellant as alleged in the complaint in paragraphs 5, 6, and 7. See R. pages 7 – 12.

Judge Hosack not having any standing to preside over the case, made no legitimate opinions which had any legal effect, except to deprive Appellant of a fair and impartial hearing, in violation of the 1st, 6th and 14th Amendments of the Bill of Rights to the Constitution of the United States of America and Sections 13 and 18 of Article I of the Constitution of the State of Idaho.

Second, constitutionality of the Non-judicial Foreclosure Act codified in Idaho Code as Chapter 15 of Title 45 was brought into question before the court

on July 21st, 2010 which was never determined. Tr. July 21st, 2010, page 4 – lines 4 – 22 which the Appellant stated to wit:

All right. First, in order for Fannie Mae to be the plaintiff, the transaction which led up to this obtaining an interest had to be lawful and legal. As a matter of standing concerning how Fannie Mae was supposedly deeded Appellant's property is alleged in the complaint to be through the Nonjudicial Foreclosure Act of chapter 15 of Title 45, Idaho Code. At the March 17th, 2010 hearing before Judge Hosack, who had no authority to be presiding anyway, Appellant brought the issue forward as the transcript shows on page 17 – lines 10 – 25 and again pages 26, 27, and 28 – lines 1 – 4 all explaining the lack of compliance with the Nonjudicial Foreclosure Act.

Due to Judge Hosack not being clothed with authority to preside on the bench, he was not under any obligation to consider the merits of the jurisdictional challenge to plaintiff's complaint which failed to recite a jurisdictional clause for bringing forth the action, other than clauses VI and VII within the complaint itself. R. pages 7-12 at 9. Judge Hosack failed to act in accordance with the law to the prejudice of the Appellant. That failure consisted of not deciding a standing issue which can be brought at any time, with or without notice to the other side. See the cases on standing as stated on page 5 herein.

At the April 21st hearing the issue of standing came forward again by the Appellant. In the Appellant's Answer and Counterclaim, R. pages 49 – 81 and First Motion to Vacate Judgment, R. 46 - 48 and Brief in Support of Motion, R. 36 – 45,

and are incorporated herein by its reference, it was fully demonstrated that the Plaintiff had no standing for noncompliance with chapter 15 of Title 45 Idaho Code – Nonjudicial Forclosure Act. See R. pages 49 – 81 at 52 – 54 with attached Exhibits. Appellant asserted at the hearing of April 21st, 2010, before the assigned judge – Judge Verby, that there was no service on the Appellant of the Notice of Sale for August of 2010. Tr. April 21st, 2010, pages 8 – lines 16 – 25, 9, 10 – lines 1 -21, 11 – lines 4 – 9.

Based on the foregoing, Judge Verby explored the claims of the Appellant. Tr. April 21st, 2010, pages 17 – 22. In the direct questioning of Judge Verby about whether or not the Appellant received actual notice of the second sale date Mr. O'Neill stated, "Your Honor, if I might. I need to go back. He doesn't Have to have actual knowledge of that exact sale." This statement is contrary to Idaho Code § 45-1506A.

Judge Verby also questioned Mr. O'Neill about the lack of proper posting with the proposed sale. In conclusion Judge Verby stated, "So if the - - if the Notice of Publication lists the wrong property and the Affidavit of Posting posted the wrong property, is it possible that Mr. Allen may have a legitimate position? Idaho Code § 45-1506A which states to wit:

> 45-1506A.Rescheduled sale -- Original sale barred by stay -- Notice of rescheduled sale. (1) In the event a sale cannot be held at the time scheduled by reason of automatic stay provisions of the U.S. bankruptcy code (11 U.S.C. 362), or a stay order issued by any court of competent jurisdiction, then the sale may be rescheduled and conducted following expiration or termination of the effect of the stay in the manner provided in this section.
> **(2) Notice of the rescheduled sale shall be given at least thirty**

(30) days before the day of the rescheduled sale by registered or certified mail to the last known address of all persons who were entitled to notice by mail of the original sale and to any person who shall have recorded a request for notice of sale at least forty-five (45) days prior to the rescheduled sale date in the form and manner required by section 45-1511, Idaho Code, provided that recording the request prior to notice of default is, for the purposes of this section only, waived.
(3) Notice of the rescheduled sale shall be published in the newspaper of original publication once a week for three (3) successive weeks, making three (3) publishings in all, with the last publication to be at least ten (10) days prior to the day of sale.
(4) The trustee shall make an affidavit stating that he or she has complied with subsections (2) and (3) of this section. The trustee shall make the above affidavit available for inspection at the time of the rescheduled sale together with any affidavit of mailing and posting, when required, which was not of record as required by subsection (7) of section 45-1506, Idaho Code, when the stay became effective. The affidavit or affidavits shall be attached to or incorporated in the trustee's deed. [Emphasis Added] I.C. § 45-1506A

What Mr. O'Neill's stance was, if he had standing to bring forth any arguments in the first place, was his reliance on the first date for trustee sale, which he admitted was stayed by the bankruptcy court and that they continued to use the same affidavit of service and notice documents for the second date which were as equally defective in the first date set for trustee's sale. Tr. April 21st, 2010, pages 17 – 23.

The requirements of rescheduling a trustee's sale from the termination of a automatic stay of Appellant's property, failed to comply with the standards in subsections 2, 3, 4 of I.C. § 45-1506A for any alleged second date set for trustee's sale, not to mention that there was non-compliance with I.C. 45-1506 subsections 5, 6, 7, and 10 either on the staid first date for trustee's sale.

What all this comes down to is that the Appellant did not receive ANY due process and equal protection rights whatsoever under the Nonjudicial Foreclosure Act – chapter 15 of Title 45 Idaho Code.

The Appellant brought to the attention of Judge Verby the case *Federal Home Loan Mortgage Corporation, Fannie Mae, v. Gary R. and Linda L. Apel, Idaho Supreme Court Docket No. 31760, 2006 Opinion No. 61.* See R. pages 62 – 70 as Exhibit B to the Answer and Counterclaim. Looking at the Apel decision on page 67 of the Clerk's transcript clearly shows that strict compliance with the notice provisions are required under I.C. 45-1506 and I.C. 45-1506A were not complied with. *Security Pacific Finance Corp. v. Bishop*, 109 Idaho 25, 28, 704 P.2d 357, 360 (1985)(quoting *Patton v. First Federal Savings & Loan Ass'n of Phoenix*, 578 P.2d 152, 156 (Ariz. 1978).

Having not complied with the strict requirements of I.C. 45-1506 and I.C. 45-1506A as demonstrated by Judge Verby's questioning of Mr. O'Neill and the Exhibits cited in plaintiff's complaint showed a lack of standing of the Plaintiff in which Plaintiff could not have received title to the property because SunTrust Mortgage could never have had title to the property because Panhandle State Bank, the originator of the "loan" sold the promissory note prior to selling the "loan" to SunTrust Mortgage. So, there is no proper chain of title in existence to the Plaintiff. There is also the fact that MERS had no interest to transfer.

Judge Verby having personal knowledge of the fact that Appellant never received Notice of Sale or had been served with anything to indicate that Appellant

had actual knowledge of the second trustee's sale date, which was proof that the Plaintiff had no standing in the case, was fundamental error by the court to first protect the Appellant's property rights and second failed to even enter into the record a determination on the issue raised and proved by Judge Verby himself.

It is also worth mentioning that the Motions noticed up for hearing on April, 21st, 2010 was for an Emergency Motion to Quash the Writ of Ejectment and Emergency Motion for Stay, with the Motion to Vacate Judgment scheduled for hearing on June 9th, 2010. See Notice of Hearing contained in aforementioned Motions R. page 84, 86, and 47 respectfully. See also Tr. April 21st, 2010, page 3 – lines 1 – 2. Arguments on the two Emergency motions for Stay and Quash the Writ of Ejectment were presented fully to the court. On page 29 -lines 18 – 20 of the April 21st transcript of the hearing Judge Verby concluded the hearing by taking the matters under advisement.

Also having the Brief to the Motion to Vacate judgment which also included the Answer and Counterclaim prior to the hearing of April 21st, 2010 gave Judge Verby additional evidences and personal knowledge of the violations of Nonjudicial Foreclosure Act – Chapter 15 of Title 45, Idaho Code. The Apel decision included also gave Judge Verby knowledge of the fact that Strict Compliance to the Nonjudicial Foreclosure Act was required in order to satisfy due process mandates. To date no determinations were made on these two issues brought timely by the Appellant to the detriment and prejudice of Appellant's rights in the property under litigation.

In addition, since Mr. O'Neill was appearing telephonically the court was obligated to send to me minutes to be prepared, filed and served upon all parties pursuant to IRCP Rule 7(b)(4). This did not happen until much later down the road without request by the Appellant. Whether the Appellant suffered prejudice from the lack of not having the minutes is undetermined by the Appellant as there were other more prejudicial issues going on due to lack of determinations being made by the court.

However, due to Judge Hosack's unauthorized interference in the case the Appellant had no choice but to also file a Motion to Vacate Judgment and an Answer and Counterclaim on Plaintiff's claims even though the Plaintiff lacked standing to bring the suit. See R. pages 49 – 81.

In the Answer and Counterclaim Appellant raised multiple affirmative defenses and claims multiple issues of fraud and fraud upon the court. In the April 21st hearing Appellant also raised multiple issues of fraud upon the court, which were left unanswered by Mr. O'Neill and the court. The issue of standing of Judge Hosack and whether his determination made on the Motion to Dismiss is a core issue to this Appeal. Just as important is whether Mr. O'Neill has standing on the case even though there exists a lack of strict compliance with Rule 11(b) of the IRCP, which would preclude Mr. O'Neill the ability to submit anything into the court record let alone file for default judgment.

As far as the Appellant is concerned they have no standing not just because they failed to comply with the Nonjudicial Foreclosure Act, but also because they

had other remedies which had to be acted on before an action to take Appellant's property matured. Appellant paid mortgage insurance in the event that Appellant defaulted on the "loan." Did the Plaintiff file a claim to the insurance company to get the alleged monies due them? I doubt it. But they were required to. That's a contractual lack of standing to sue or is the insurance payments the Appellant paid just another fraud committed against the Appellant.

First Motion to Vacate

Appellant incorporates all proceeding paragraphs prior to the Motion to vacate Judgment. The Motion to vacate Judgment was filed in accordance with IRCP Rule 7(b)(3)(C) and a brief was filed at the same time the motion was filed on April 14th, 2010. See Tr. pages 46 – 48 and 36 – 45, respectfully. This motion had a hearing date of June 9th, 2010. See Notice of Hearing as contained in the Motion to Vacate Judgment. Tr. pages 46 – 48. The Notice of Hearing is required under IRCP Rule 7(b)(1) and 7(b)(3)(A) so that it can be determined the timeliness of briefing with the time periods required to file responses and reply briefing pursuant to IRCP Rule 7(b)(3)(E).

With the hearing date being set for the 9th day of June, 2010, Plaintiff had up to June 2nd to file a response to the Motion. However, Judge Verby entered his decision on May 27th, 2010 – 6 days prior to Plaintiff's time to file their response. Appellant asserts that because of what occurred on April 21st, 2010 hearing, Judge Verby knew that Mr. O'Neill had no standing to respond to the Motion to Vacate Judgment and also it was known to him that Plaintiff had no standing to bring forth

the action filed. In any event, due process was not satisfied as to the mandates of IRCP Rule 7(B)(3).

In the case of *Parkside Schools, Inc., v. Bronco Elite Arts & Athletics*, 145 Idaho 176, 177 P.3d 390 (2008) this Court explained the requirements under IRCP Rule 7(b)(3)(A) & (C). Three days after Parkside's motion to dismiss was served, the court granted the motion via an order apparently prepared by Parkside. In doing so, the district court exceeded its authority. IRCP Rule 7(b)(3)(D) which provides that "If the moving party does not request oral argument upon the motion, and does not file a brief within fourteen (14) days, the court may deny such motion without notice if the court deems the motion has no merit." The rule provides authority to deny a motion under specified circumstances. It does not give the court authority to grant a motion, nor does it excuse compliance with IRCP Rule 7(b)(3)(A) & (C). Thus, the district court acted in excess of its authority in granting the motion. We therefore vacate the order. *Parkside* supra.

This case applies to this case in that the court knew a brief had been filed and oral argument was not being requested and that a hearing date was definitely set for June 9th, 2010. The district court order R. pages 87 – 94 does not find that the Appellant's Motion to Vacate Judgment had no merit and therefore the district court's order was issued in excess of its authority and in derogation with the IRCP Rule 1(c) which specifies that no judge can make any rules of procedure except as expressly authorized by these rules. It was not a matter of discretion to comply with IRCP Rule 7(b)(3) in its entirety. Further, because the IRCP Rules are adopted

by Court Order from this Court it was also an act of Contempt. Further, Appellant objected to the court's premature order by filing a reply brief on June 4th, 2010, R. pages 95 – 99 and Affidavit R. pages 99 – 100.

In the Motion itself Appellant cited that "Judgments by default are not *favored* and, generally, the Court is to grant relief from default order to reach a judgment on the merits. *Johnson v. Pioneer Title Co., of Ada County*, 104 Idaho 727, 732, 662 P.2d 1171, 1176 (Ct.App. 1983). Because judgments of default are not favored, a trial court should grant relief in doubtful cases in order to decide the case on the merits. *Garren v. Saccomanno*, 86 Idaho 268, 385 P.2d 396 (1963).

By this point there was:

1) a judge who interfered with another judges case and acting without any authority by Court Order from the Chief Justice or the Administrative Judge. Judge Hosack was informed by this Court of the conditions for him to preside over any case and knew before he presided over this case, that he had no authority. That such action(s) by Judge Hosack was void ab initio, leaving Appellant's motion to dismiss undecided in conformity with case decision. *Meyers v. Hansen*, Docket No. 35534, November 2009 (Idaho)(However a judgment is also void if the – court's action amounts to plain usurpation of power constituting a violation of due process. *Dept. of Health and Welfare v. Housel*, 140 Idaho 96, 100, 90 P.3d 321, 325 (2004). A reasonable prudent person would not be expected to be held to a ruling in which the one sitting on the bench lacked subject matter jurisdiction and who had no authority to preside on;

2) An attorney not properly substituted in derogation with strict compliance requirements of IRCP Rule 11(b) and case decisions from this Court. A reasonable prudent person would not be expected to be held to counsel who was not properly substituted in conformity with the court rule and decisional law and in which case law expressly stated that the Appellant had no duty or obligation to perform on filings done by counsel not properly substituted;

3) Docketed issues presented to the court on April 21st, 2010, which was left undecided. Even though there was substantial evidence of noncompliance with Nonjudicial Foreclosure Act – chapter 15 of Title 45, Idaho Code. A reasonable prudent person would not be expected to be held to a nonjudicial foresclosure sale when he did not receive service of Notice of pending sale in conformity with chapter 15 of Title 45 Idaho Code.

and,

4) Judge Verby who had in his possession:

a) the *Apel* case stated that that statute required strict compliance to satisfy due process;

b) the documents showing noncompliance,

c) statements from O'Neill that admitted non-compliance; and

d) Judge Verby himself coming to the conclusion that Appellant had meritorious issues concerning the non compliance with Nonjudicial Foreclosure Act – chapter 15 of Title 45, Idaho Code. **And the record so shows.** A reasonable prudent person would expect a constitutional court to be in session which has a

judge properly authorized to preside over a case. Would expect the court not to lie to him on the record with full knowledge. Would expect to have his remedies granted to him without prejudice, delay, etc., pursuant to Section 18 of Article 1 of the Constitution of the State of Idaho. None happened. Why?

None of these deficiencies as the record shows and by law were acts and actions of discretion. By their acts and actions they were done in abuse of discretion by emanating decisions which were erroneous from the facts presented, especially at the April 21st, 2010 hearing when O'Neill admitted that Appellant did not have actual notice by service in conformity with the Nonjudicial Foreclosure Act - chapter 15 of Title 45 Idaho Code, all being in derogation to the Code of Judicial Conduct, court rules, case law, State and National Constitutions, etc., and the standard of the criteria used by reviewing courts on a motion under IRCP Rule 60(b)(1) as cited in *Shelton v. Diamond Int'l Corp.*, 108 Idaho 935, 703 P.2d 699 (1985).

In accordance with *Johnson* and *Garren* decisional law and as demonstrated by and through substantial evidence from Appellant not receiving constitutional due process or equal protection pursuant to statute, rule, case decision, etc., in this case this is a doubtful case which entitled Appellant to have the default vacated and decided on its merits in conformity with decisional law of *Johnson* and *Garren, supra.* See also *Baldwin v. Baldwin*, 114 Idaho 525, 757 P.2d 1244 (Ct.App. 1988).

It is also worthy to note that Mr. O'Neill filed an Objection to the Motion to

Vacate Judgment on June 29th, 2010, some 27 days late from the hearing date of June 9th, 2010 in conjunction with the requirements of IRCP Rule 7(b)(3)(E). See R. pages 118 – 120.

The reason(s) for denying the Motion to Vacate was in error. Primarily, alleging that in order to place facts before the court in a Motion to Vacate requires an affidavit. That since there was no facts properly placed by affidavit Appellant had a lack of proof to substantiate excusable neglect, fraud, and fraud upon the court asserted in the Motion to Vacate Judgment.

Second Motion to Vacate Judgment

Appellant filed another Motion to Vacate Judgment on July 2nd, 2010. See R. 121 – 127; Brief in Support of Motion, R. pages 159; Reply Brief, R. pages 160 -164 all addressing the reasoning for the denial of the first Motion to Vacate Judgment. Appellant re-asserts his briefings in both motions to vacate judgment and are incorporated herein by its reference. With all the issues he raised in the Order denying the First Motion to Vacate Judgment, which was clearly set out in the second brief challenging the ruling, none of the issues raised in the second Motion to Vacate Judgment was ever decided by Judge Verby. He threw his hands in the air and vacated the bench without so much as to comment.

The two issues he did address at the July 21st, 2010 hearing was Substitution and How Judge Hosack had supposed authority to preside on this case, which has been fully debunked. In other words Judge Verby lied on the record in open court. He knew he was lying because there was no Order placed in

the case file showing that Judge Hosack had permission from the Chief Justice of the Supreme Court or from the Administrative Judge of the First Judicial District as per the Order from the Chief Justice himself.

One issue raised and not decided was the Appellant challenged the process under the Nonjudicial Foreclosure Act - chapter 15 of Title 45 Idaho Code to be unconstitutional on the grounds for violating the due process clauses of the Constitution of the State of Idaho - sections 1, 13, 18 of Article 1 and the Constitution of the United States of America in the 1st, 6th, and 14th amendments - in that legal rights to property are subjected to being taken without the person affected thereby by the foreclosure has no ability to challenge or defend his property rights before his property rights are affected due to the lack of the statute providing a mechanism for the individual who is about to be foreclosed to secure minimal requirements of due process of notice of hearing and the right to be heard.

The Idaho Supreme Court stated in a recent decision to wit, "Procedural due process requires that there must be some process to ensure that the individual is not arbitrarily deprived of his rights in violation of the state and federal constitutions." *Cowan v. Board of Comm'rs*, 143 Idaho 501, 510, 148 P.3d 1247, 1256 (2006); "An individual must be provided with notice and an opportunity to be heard." *Spencer v. Kootenai County*, 145 Idaho 448, 454, 180 P.3d 487, 493 (2008); Due process is not a rigid concept. Instead, the protections and safeguards necessary vary according to the situation. *Aberdeen-Springfield Canal Co. v. Piper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999). cited from *Meyers v. Hansen*,

Docket No. 35534, November 2009 (Idaho).

Because there is a lack of due process complying with minimal standards as set forth in the *Meyers v. Hansen*, Docket No. 35534, November 2009 (Idaho) decision, the Court has an extra duty bestowed upon it, to ensure that statutory process was strictly complied with under Nonjudicial Foreclosure Act - chapter 15 of Title 45 Idaho Code. There was not compliance with the Nonjudicial Foreclosure Act - chapter 15 of Title 45 Idaho Code in this case. Even Judge Verby himself acknowledged the possibility of noncompliance with Nonjudicial Foreclosure Act - chapter 15 of Title 45 Idaho Code though he failed to act.

As such, the Appellant believes that since there are not adequate safeguards in place to ensure the constitutional protection of life, liberty, property and pursuit of happiness as stated in Section 1 of Article of the Constitution of the State of Idaho. At the July 21st hearing Appellant raised the question of constitutionality of Nonjudicial Foreclosure Act - chapter 15 of Title 45 Idaho Code. See Tr. July 21st hearing - page 6 - lines 4 - 22.

In error., Judge Verby left this question of constitutionality undetermined and Appellant asserts that this Court must decide and declare the statute unconstitutional upon its face as has many other states which have similar statutes which have recently come under scrutiny.

Another issue not really germaine to the subject matter was Judge Verby raising the issue that Appellant failed to show proof of his disability even though at each hearing Appellant noticed the court of his disabilities. Tr. March 17th, 2010,

page 4 - lines 4 - 10 and 15 - 18, page 8 lines 24 and 25. Tr. April 21st, 2010, page 4 - lines 18 - 25, page 5 - lines 1 - 12, page 10 24 and 25 and page 11 lines 1 - 3 and 12 - 25 and page 12 - lines 1 - 7; page 26 - lines 1 - 4; page 29 - lines 12 - 17. Tr. July 21st, 2010, page 4 - lines 1 - 3. Besides all the times he mentioned his disabilities and medical problems, Appellant also had his prescription pill bottles on the table in full view of the bench. Also, on July 2nd Appellant provided in an affidavit letters from the VA and Dr Haugen emphasizing that Appellant was disabled and on morphine for pain. R. pages 114 and 115, in an effort to have Judge Verby change his erroneous conclusions of fact in his determination to deny the First Motion to Vacate Judgment. Did Judge Verby take any action to correct this inaccuracy of fact? - NO!

Another issue not really germane to the subject matter was Judge Verby's pronouncement of a new system of motion practice for a Motion to Vacate judgment requiring affidavits to show fact, when in IRCP Rule 11(a)(1) it states as clear as day to wit, "Except as otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. Rule 60(b) does not mandate that the motion must have an affidavit as other rules do. This issue was briefed out in the Second Motion to Vacate Judgment, R. pages 128 - 159 at 136 - 141 and is incorporated herein by its reference. Did Judge Verby take any action to correct this inaccuracy of fact? - NO!

Every issue determined by Judge Verby was met with opposition supported by fact and law - all being documented. Did Judge Verby take any action to correct

this inaccuracy of fact? - NO!

Conclusion

Removing all the technicalities of presentation before this Honorable Court, the pure facts in this case are that Judge Hosack had no standing to preside on this case. Because he did not, the Motion to Dismiss remains undetermined.

Mr. O'Neill's failure to comply with the Rules on Substitution, now he will undoubtedly use as an excuse for not providing Notice to Appellant that the Court did. Therefore the Appellant did. Appellant objecting to Mr. O'Neills appearance at every stage should be sufficient proof of fact the Appellant did not receive service. Mr. O'Neill could have corrected the deficiency by just serving the Appellant with proper Notice signed by both attorneys. He did not. However, if this Court alters its long standing standard of strict compliance to something else, would be prejudicial and detrimental to the Appellant in the loss of his home without any concrete procedural due process whatsoever.

Coupled with all the various skull drudgery by the lower court, the Appellant deserves the benefit of doubt and vacate the entry of default and default judgment and allow the parties to prove their individual claims on the merits as dictated by public policy of this State. The Appellant so prays.

Dated this 2nd day of August, 2011.

David Bruce Allen, In propria Persona

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of August, 2011, I caused 2 each true and correct copies of this APPEAL BRIEF to be mailed, Postage prepaid to:

Mark D. Perison, Bar No. 4804
MARK D. PERISON, P.A.
314 S. 9th Street, Suite 300
Post Office Box 6575
Boise, near [83707]
State of Idaho

2 Courtesy Copies to:
Derrick J. O'Neill
Routh Crabtree Olsen PS
300 Main Street, Suite 150
Boise, [near 83702]
State of Idaho.

I also HEREBY CERTIFY that on the 2nd day of August, 2011, I caused the original and 6 each true and correct copies bound, and 1 true and correct copy not bound and not stapled, of this APPEAL BRIEF to be mailed, Postage prepaid to:

CLERK OF THE COURTS
SUPREME COURT
COURT OF APPEALS
P.O. BOX 83720
Boise, State of Idaho
Near [83720-0101]

Dated this 15th day of August 2011.

By: 
David Bruce Allen, In propria Persona