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# Federal Home Loan Mortgage Corporation v. Butcher Appellant's Reply Brief Dckt. 41188

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**IN THE SUPREME  
COURT OF THE STATE OF IDAHO**

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FEDERAL HOME LOAN MORTGAGE CORPORATION,

Plaintiff-Respondent,

vs.

MARGARET A. BUTCHER;

Defendant-Appellant.

DENNIS D. BUTCHER; and John Does 1-10, whose true identity is unknown, as Occupants  
of the Premises located at 10512 W. Achillea  
Street, Star, Idaho, 83669,

Defendants.

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**APPELLANT'S REPLY BRIEF**

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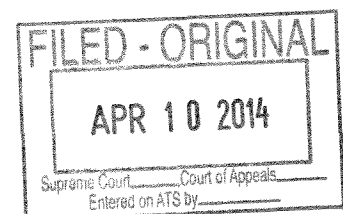
**Supreme Court Docket No. 41188-2013**

Appeal from the District Court of the Fourth Judicial District, Ada County,  
Appeal from the Honorable Christopher M. Bieter, Magistrate Judge, Judge Kathryn A. Stricklen,  
District Judge.

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**TABLE OF CONTENTS**

**TABLE OF CASES AND AUTHORITIES.....** ii

**STATEMENT OF THE CASE.....** 2

**FACTS.....** 3

**PROCEDURAL HISTORY.....** 9

**DISPUTED FACTS.....** 10

**RESPONDENT’S ISSUES AND ARGUMENT .....** 11

**ARGUMENT.....** 12

**CONCLUSION.....** 20

## TABLE OF CASES AND AUTHORITIES

### CASES:

State v. Doe, 147 Idaho 542, 544, 211 P.3d 787, 789 (Idaho.App..2009).....	1
State v. Mauro, 121 Idaho 178, 824 P.2d 109 (1991).....	1
State v. Martin, 119 Idaho 577, 808 P.2d 1322 (1991).....	1
State v. White, 97 Idaho 708, 551 P.2d 1344 (1976).....	1
State v. Grob, 107 Idaho 496, 690 P.2d 951 (Ct.App.1984).....	1
State v. Morris, 116 Idaho 834, 780 P.2d 156 (Ct.App.1989) .....	1
State v. Koch, 115 Idaho 176, 765 P.2d 687 (Ct.App.1988).....	1
Weisel v. Beaver Springs Owners Ass'n, Inc., 152 Idaho 519, 525, 272 P.3d 491, 497 (2012).....	5
Intermountain Real Properties, LLC v. Draw, LLC, 40335, 311 P.3d 734, 739 (Idaho 10-16-2013) .....	5
Federal Home Loan Mortgage Corporation v. Appel, 143 Idaho 42, 44, 137 P.3d 429, 431 (2006) .....	7, 13, 14, 15, 20
Beach Lateral Water Users Ass'n v. Harrison, 130 P.3d 1138, 1141 (Idaho 2006) .....	14, 16
Thomson v. City of Lewiston, 50 P.3d 488 (Idaho, 2002).....	14
Major v. Security Equipment Corp., #38414, _ Idaho _, at 4, (Aug. 13, 2013)....	17
Fuller v. Callister, 150 Idaho 848, 851, 252 P.3d 1266, 1269 (2011).....	17
State v. Doe, 211 P.3d 787 (Idaho. App., 2009) .....	17
Sierra Life Ins. Co. v. Granata, 586 P.2d 1068, 1069 (Idaho, 1978).....	20

### AUTHORITIES:

#### Statutes:

I.C. §§45-1509 and 45-1511.....	6
I.C. §45-1505(1) .....	8, 11, 12, 13
I.C. §§ 45-1509 and 45-1511.....	9
I.C. §45-1506(9) .....	11, 18
I.C. §§ 28-3-201, 28-3-203 and 28-3-204.....	11
I.C. §§45-1508 and 45-1510.....	18

### OTHER:

U.S.C.A. Const. Amend. 14; West's I.C.A. Const. Art. 1, § 13.	1, 17
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FEDERAL HOME LOAN MORTGAGE )  
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**APPELLANT'S  
REPLY BRIEF**

Supreme Court Docket No. 41188-2013  
Case No. CV-OC-2011-13288

## STATEMENT OF THE CASE

In this case, both lower courts created a manifest injustice<sup>1</sup> for Appellant by denying her a meaningful opportunity to be heard and causing fundamental trial court error; then Respondent also denied Appellant meaningful notice as to new facts it presented for the first time at the summary judgment hearing of November 22, 2011. Freddie Mac, in its Opening Brief, asserts Appellant, “waived her assignment of error,” “waived all of her issues on appeal” and “waived the right to review the Magistrate’s Order.” The ultimate issue Respondent raised on this appeal is waiver.

Respondent’s approach has been to claim that Appellant should be procedurally barred from presenting her claims, in essence, that Appellant should be “slam-dunked” in these court proceedings so that her defenses would be summarily denied. Rather than considering Appellant’s submissions which raised affirmative defenses, both the Magistrate and District court followed Respondent by summarily denying her a hearing while giving ‘lip service’ to the notion that her arguments were being considered.

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<sup>1</sup> In the context of the criminal law, the following cases explore the contours of fundamental trial court error that results in manifest injustice which applies by analogy to this case. *State v. Doe*, 147 Idaho 542, 544, 211 P.3d 787, 789 (Idaho.App.,2009) Procedural due process, as it is guaranteed under both federal and state constitutions, requires that a person involved in the judicial process be given meaningful notice and a meaningful opportunity to be heard. U.S.C.A. Const. Amend. 14; West’s I.C.A. Const. Art. 1, § 13. In the context of due process of law, *State v. Doe*, 123 Idaho 370, 371, 848 P.2d 428, 429 (1993) it was held that the “exception to the general rule against considering issues for first time on appeal may be made where the issue raised involves ‘fundamental error,’ which is error that so profoundly distorts the trial that it produces manifest injustice and deprives defendant of his right to due process. U.S.C.A. Const. Amend. 14. It is well established that issues not raised in the trial court cannot later be raised on appeal, *State v. Mauro*, 121 Idaho 178, 824 P.2d 109 (1991); *State v. Martin*, 119 Idaho 577, 808 P.2d 1322 (1991), unless the alleged error would constitute “fundamental error.” *State v. Mauro*, 121 Idaho 178, 824 P.2d 109 (1991); *State v. White*, 97 Idaho 708, 551 P.2d 1344 (1976); *State v. Grob*, 107 Idaho 496, 690 P.2d 951 (Ct.App.1984). Fundamental error is error “which so profoundly distorts the trial that it produces manifest injustice and deprives the accused of his fundamental right to due process.” *State v. Mauro*, 121 Idaho 178, 824 P.2d 109 (Idaho); *State v. Morris*, 116 Idaho 834, 780 P.2d 156 (Ct.App.1989); *State v. Koch*, 115 Idaho 176, 765 P.2d 687 (Ct.App.1988).

## FACTS

The manifest injustice and summary denial of Appellant's arguments without consideration started when Freddie Mac denied Appellant the opportunity, at the November 22, 2011 summary judgment hearing, of seeing and evaluating Respondent's new evidence contained in the November 18, 2011 Affidavit by Jeff Stenman (Bates #139-160). That Affidavit was filed for the first time on November 21, 2011, the day before the hearing. That new evidence was considered by the trial court three days later in granting summary judgment to Respondent without rebuttal. The Stenman Affidavit was filed the day before the summary judgment hearing (id.) with documents allegedly showing compliance with Idaho's Trust Deed Act). A copy of the Stenman Affidavit was mailed on November 21<sup>st</sup> and not received by Appellant until the day after the hearing; no copies were provided to Appellant at said hearing, so in essence, it was 'trial by ambush.'

Respondent argued, based on the Affidavit of Stenman and the "additional information supplied" that the Idaho "nonjudicial foreclosure statutes" were complied with (see Transcript of oral argument of November 22, 2011 by Mr. O'Neill, counsel for Freddie Mac, pg. 5, lns. 16-25). Yet, this statement among others, confirmed that there were genuine question of material fact that needed to be resolved, denying summary judgment.

Because the Stenman Affidavit introduced new factual information into the case without prior notice, and because Appellant's copy of Respondent's Reply and the Stenman Affidavit was mailed and was not received by her until the day after the hearing, Appellant's only opportunity to rebut the new assertions by Respondent was after the hearing. There was a fallacy in Freddie Mac's Opening Brief where it argued that Appellant should have "objected" to the

trial court's 'premature' entering of its Order Granting Summary Judgment dated November 25, 2011 (Bates #552-556). Because there is no Rule of Civil Procedure for Appellant to follow outlining how such an objection should be made and because at the summary judgment hearing Judge Bieter stated: "...I'll read everything that you've filed." (Transcript Magistrate Hearing of November 22, 2011, pg. 14, lns. 6-7.) it was reasonable for Appellant to believe that when she filed her *Motion Re: Reply Memorandum* dated December 5, 2011 (Bates #557-643) that she was objecting or seeking reconsideration and that she reasonable had a right to presume that Judge Bieter would read and consider her December 5, 2011 filing. After all, the trial judge did say he would "read everything" she filed.

Respondent in its Opening Brief repeatedly hammers on the theme that Appellant should be held to the standard of a lawyer, yet it was the lawyer, i.e., the attorney for Respondent that was not acting according to the standards of a lawyer when, at the last minute on November 21, 2011, Respondent filed the Stenman Affidavit and did not provide a copy to Appellant and did not allow Appellant the opportunity to see and rebut the same prior to the hearing; thus, the 'trial by ambush' remark above. Since Appellant's copy was in the mail while the hearing transpired Appellant was deprived of a full and fair opportunity to litigate her case.

Respondent notes in its Opening Brief that Appellant did not file her initial Response (Bates #162-551) to Freddie Mac's original Motion for Summary Judgment until November 22, 2011, which is true, however, there is a significant difference. Appellant had an extension to late file her initial Response on November 15, 2011 and in fact, counsel for Respondent acknowledged that Appellant served the same (Bates #162-551) on counsel by hand delivery on November 15, 2011, giving Respondent's counsel over a week to consider the same unlike being blind sighted by the Stenman Affidavit, which Respondent argued was conclusive as to



foreclosure compliance, making it a material fact in the case that was disputed. Thus, Appellant had no meaningful opportunity to be heard at the November 22, 2011 hearing.

As Respondent well knows, Appellant attempted in good faith to file her Response to the Motion for Summary Judgment because counsel reported to the trial judge at the November 22, 2011 hearing that a member of counsel's staff was in the Clerk's Office when an anomaly occurred. Appellant attempted to file her Response (Bates #162-551) with the Clerk of the District Court of Ada County on November 15, 2011, per the court-granted extension. However, because the Clerk refused to allow Appellant to file her Response on November 15, 2011 (a due process violation created by the Clerk) and would only allow her to file a pre-printed, three page form entitled "Answer" (Bates # 130-132) which she had to fill out at the counter and would not allow her to file any of the supporting attachments tendered that day. Thus, she could only reference her supporting information as "Please See Attachment," repeatedly in the form provided. It was not until November 22, 2011, at the hearing, that she was permitted to 'bench-file' her Response with attachments.

Rather than waiving her right, Appellant made reasonable efforts to preserve her rights which were not considered by either the Magistrate or District courts. Thus, the doctrine of "waiver" would have no application as Appellant was deprived of due process.

With regard to the doctrine of waiver, the Idaho Supreme Court has judicially "relaxed" the waiver doctrine to achieve a just result in other situations. *Weisel v. Beaver Springs Owners Ass'n, Inc.*, 152 Idaho 519, 525, 272 P.3d 491, 497 (2012); and see *Intermountain Real*

I.C. §45-1505(1) because there was no assignment of trust deed recorded in the mortgage records of Ada County, Idaho.

Freddie Mac simply asserted itself as a “pretender-lender” at the foreclosure sale of May 16, 2011 and Northwest Trustee Services, Inc. (the Trustee, a wholly owned company by the law firm of Routh, Crabtree and Olsen, personally profiting from foreclosures such as this one foisted upon Ms. McCluskey in this case even though she claims she was not in default of payment) ignored the Idaho statutes that allowed only the “holder” of the trust-deed-note to purchase the property by credit bid and erroneously issued the Trustee’s Deed (Bates #000010).

Ms. McCluskey alleged numerous genuine issues of material fact in the Magistrate’s Court, contrary to the assertions in the Trustee’s Deed (Bates #000010): 1) First she showed that she had not been in default of payment on her mortgage because she was in compliance with the loan modifications and had always paid Wells Fargo as agreed even under the HAMP program which she proved was supervised by Respondent, by which Freddie Mac was on notice that she was not in default and thus not subject to foreclosure; 2) she showed there was a genuine issue of material fact that the Notice of the May 16, 2011 foreclosure sale was defective because it her residence was not posted with the notice of sale as required by I.C. §45-1506 4) she showed that Freddie Mac by credit bid (as admitted at Bates #117, paragraph C 1, of its summary judgment brief) was the purported “purchaser” that unlawfully purchased defendant’s home without the proper authority as the holder of the deed-of-trust note; 5) Freddie Mac was not a *bona fide* purchaser for value because it was on notice that of the above defects due to its supervisory role of Wells Fargo Bank under HAMP and as such was not entitled to the shelter protection of I.C. §§ 45-1509 and 45-1511; and 6) she showed by her Affidavit (Bates #934) that there had been no recording of an Assignment her Deed of Trust to Freddie Mac, proving the negative and showing

address. (District Court's decision May 23, 2013 Bates # 983-993, at pg. 987 "It would be very difficult for the Court to attempt to review such a lengthy document and engage in issue spotting and the Court does not believe that it has an obligation to do so.") The issue was whether there was a genuine issue of material fact, all of which Judge Sticklen missed, including the lack of jurisdiction issue, because she did not want to do her job.

As of the date of this writing, Appellant's home is still vacant, with the constant potential of vandalism, while she languishes without a dwelling and is desperately seeking a reversal of this unjust judicial nightmare. There is absolutely no rational reason that Appellant had to be thrust out of her home immediately before Christmas 2013 when the most dire consequence to Freddie Mac or to Wells Fargo was that the payment of the remaining small balance on the note would be delayed by a few months while this matter was sorted out by the Idaho Supreme Court; all the while Appellant had been faithfully paying a bond of \$500.00 set by Judge Sticklen to prevent Freddie Mac from suffering damages. In other words, Freddie Mac turned this performing loan into a complete loss by the Supreme Court's denial of continued bond on appeal.

When Freddie Mac filed the ejectment action in the magistrate's department of the Ada County District Court claiming that it had "purchased" Appellant's property by credit bid (Bates #000007, #000010 and #000117), she did not "waive" her claim to assert that Freddie Mac had no right to assert a credit bid at the foreclosure sale of May 16, 2011 and thus had no valid claim of ownership in the ejectment Complaint. In fact, Appellant asserted that because of a defective trustee's sale, Freddie Mac (which was not a the holder of the deed-of-trust note or a lender under *Federal Home Loan Mortgage Corporation v. Appel*, 143 Idaho 42, 44, 137 P.3d 429, 431 (2006)) could not qualify as a statutory "purchaser" of the property under I.C. §45-1506(9)

because of two defects: first, it was not the “holder” of the note, there being no valid indorsement thereon (Bates #96 and 97); and second, the foreclosure sale was held in violation of I.C. §45-1505(1) because there was no assignment of trust deed recorded in the mortgage records of Ada County, Idaho. Freddie Mac claims there is an indorsement “in blank” on the Note, however, it is obvious that both indorsements pay to the order of Wells Fargo, and if one is to be considered an indorsement “in blank,” then it presents a disputed issue of fact which must be resolved at an evidentiary hearing; not by summary judgment.

The fact show that Freddie Mac simply asserted itself as a “pretender-lender” at the foreclosure sale of May 16, 2011, having no authority to purchase by credit bid and Northwest Trustee Services, Inc. (the Trustee, a wholly owned company by the law firm of Routh, Crabtree and Olsen, personally profiting from foreclosures such as this one foist upon Appellant in this case even though she claims she was not in default of payment, another material issue of fact) ignored the Idaho statutes that allowed only the “holder” of the trust-deed-note to purchase the property by credit bid and erroneously issued the Trustee’s Deed (Bates #000010).

Appellant alleged numerous genuine issues of material fact that challenged the truth of the allegations in the Trustee’s Deed (Bates #000010): 1) First she showed that she had not been in default of payment on her mortgage because she was in compliance with the loan modifications and had always paid Wells Fargo as agreed even under the HAMP program which she proved was supervised by Respondent, by which Freddie Mac was on notice that she was not in default and thus not subject to foreclosure; 2) she showed there was a genuine issue of material fact that the Notice of the May 16, 2011 foreclosure sale was defective because it her residence was not posted with the notice of sale as required by I.C. §45-1506 4) she showed that Freddie Mac by credit bid (as admitted at Bates #117, paragraph C 1, of its summary judgment

brief) was the purported “purchaser” that unlawfully purchased defendant’s home without the proper authority as the holder of the deed-of-trust note; 5) Freddie Mac was not a *bona fide* purchaser for value because it was on notice that of the above defects due to its supervisory role of Wells Fargo Bank under HAMP and as such was not entitled to the shelter protection of I.C. §§ 45-1509 and 45-1511; and 6) she showed by her Affidavit (Bates #776-826 and 934) that there had been no recording of an Assignment her Deed of Trust to Freddie Mac, proving the negative and showing all documents that had been recorded concerning her property, yet, not one of them was an Assignment of Deed of Trust.

Freddie Mac has not shown that it has a recorded interest in the property before the foreclosure sale and the Trustee’s Deed being void, it cannot demonstrate it has sustained an injury in fact.

### **PROCEDURAL HISTORY**

After the wrongful foreclosure sale of May 16, 2011, Appellant was sued by Freddie Mac for ejectment from her property in the magistrates department of the Ada County District Court. The case was assigned to Magistrate Judge Beiter. A Motion for Summary Judgment was filed by Respondent and Appellant’s time to respond was extended to November 15, 2011. The clerk of the court took it upon herself to deny Appellant the right to file her Response (which was hand delivered to counsel for Freddie Mac on that day). After being denied the right to file her Response, Appellant came to the November 22, 2011 hearing on Summary Judgment without any notice that Freddie Mac had filed the Affidavit of Jeff Stenman asserting new facts that it would rely upon at the hearing that day; which facts were disputed. Because new matters were asserted in the Reply, and the court was aware but Appellant was not aware the new Affidavits

had been filed, the Court should have granted a continuance *sua sponte*. Instead, it assured Appellant that it would consider all information filed by her. However, contrary to that promise, the Magistrate entered Summary Judgment against Appellant on November 25, 2011 without allowing Appellant the opportunity to respond to the new information.

On November 23, 2011 Appellant received the Stenman Affidavit with new facts filed on November 21, 2011. Acting on the promise from Judge Bieter that he would consider the information filed by her, she, prepared her Response to said Reply rebutting the Affidavit on December 5, 2011; none of which was considered by Judge Bieter because he rendered his decision on November 25, 2011.

It is critical to note that Appellant did not waive any of the arguments as suggested by Freddie Mac, rather she raised genuine issues of material facts at the District Court level based on her presentments to the Magistrate's Court. Further, Appellant a non-lawyer is being required to adhere to the standards of a lawyer, when the attorney for Freddie Mac cannot adhere to the standards of a lawyer. By the untimely filing of its Affidavits with new factual material contained therein on November 21, 2011, it was given a free pass for its late filing by the magistrate while Ms. Appellant was denied fundamental due process and notice of new factual material to be considered at summary judgment; meanwhile, she has been deprived her of her home without due process of law because of fundamental trial court error.

### **DISPUTED FACTS**

At Magistrates Court disputed facts were raised, which also were raised on appeal before the district court judge, but neither judge recognized the issues. The Magistrate said he would consider the information filed by Appellant, but did not, and the District Court Judge refused to

address issues raised by Appellant. The following issues were raised by Appellant and need to be resolved at an evidentiary hearing by the trial court:

- 1) Was Freddie Mac a “purchaser” of Appellant’s property at the foreclosure sale within the meaning of I.C. §45-1506(9)?
- 2) Was Appellant’s Promissory Note (Justice Jones: Trust Deed Note) indorsed in a manner that vested ownership in Freddie Mac prior to the foreclosure sale per Idaho’s UCC §§ 28-3-201, 28-3-203 and 28-3-204?
- 3) Was Freddie Mac in compliance with I.C. §45-1505(1) by recording, in the real estate mortgage records of Ada County, Idaho, an assignment of Ms. McCloskey’s Deed of Trust?
- 4) Was Freddie Mac estopped from asserting the status of a *bona fide* purchaser for value without notice when it was the agency charged with supervising Wells Fargo with regard to Appellant’s loan modification?

#### **RESPONDENT’S ISSUES AND ARGUMENT**

- 1) Whether Appellant has waived the right to appeal the magistrate court’s grant of summary judgment in favor of Respondent, where she substantially complied with the Idaho Appellate Rules.

**Summary of Argument No. 1: Appellant Submitted a Notice of Appeal of the Magistrate’s summary judgment decision to the District Court. She briefed the same and demonstrated that she had raised sufficient questions of fact, as set forth above to warrant reversal of summary judgment. Attorneys for Respondent violated their obligation to serve Appellant with its Reply Memorandum and Affidavits containing new evidence and both the Magistrate and the District Court overlooked material procedural denials of due process to Appellant, however, the District Court refused to review the record and held Appellant to a standard of performance that she refused to apply to Respondents’ attorney, which is a violation of the 14<sup>th</sup> Amendment of the equal protection clause of the US Constitution and Article 13 of the Idaho Constitution.**

- 2) Whether Appellant has waived all of her issues presented on appeal, while she raised those issues below, where both the Magistrate and the District Court denied her due process by refusing to consider them.

**Summary of Argument No. 2: Appellant did not “waive” her issues because she presented over 800 pages of material in defense of her position that Freddie Mac was not a lawful purchaser of her residence at an trustee’s sale that denied her due process of law.**

- 3) Whether there was substantial and competent evidence to support the magistrate court’s findings of fact and summary judgment when Appellant raised the standing of Respondent to assert its claim for possession of Appellant’s residence which affected the jurisdiction over its claim to restitution of Appellant’s home, presenting a genuine issue of material fact showing that Respondent was not the holder of the deed of trust note and thus had no right to make a claim for ejectment.

**Summary of Argument No. 3: Because a question of material fact was raised by Appellant at the trial court level, an evidentiary hearing should have taken place to resolve whether Freddie Mac was the holder of the deed of trust note.**

**ARGUMENT**

In the event that the Supreme Court finds that Appellant did not waive her all of her issues, and in fact raised some issues that require an evidentiary hearing, then Respondent has, by failing to argue against the matters asserted in Appellants Opening Brief, conceded them and the case must be reversed and remanded through the District Court with instructions to send the case back to the Magistrate for a hearing on the issues raised therein.

The Trial Court erred in awarding possession of the Subject Property by summary judgment to Freddie Mac when there was a genuine issue of disputed fact whether Freddie Mac had complied with I.C. § 45-1505(1) requiring the recording of all Assignments of the Trust Deed in the mortgage records of the county where the property is located prior to foreclosure and since there was no recorded assignment from Wells Fargo to Freddie Mac, therefore the property sale and the Trustee’s Deed are void *ab initio*, because it was a law violation for Freddie Mac to purchase the Subject Property by credit bid without having complied with said statute.

By looking at the actual substantive law and facts of what occurred during Appellant’s foreclosure, Respondents realize that an objective court will discover the mistakes,



misrepresentations, and fraud that occurred, and invalidate the illegal foreclosure. Therefore, as has been the case for the entire duration of this foreclosure, Respondent once again attempts to distract and mask any substantive issues from the court, and to hastily jam yet another wrongful foreclosure through the court system.

In its first issue presented on appeal Appellant raised a dispute as to a material fact that Freddie Mac's claim of possession fails as a matter of law because it did not comply with I.C. §45-1505(1) by recording an Assignment of the Trust Deed prior to the foreclosure sale. Freddie Mac admitted that it purchased the property via credit bid at the foreclosure sale. (Bates #117) Pursuant to this Court's holding in *Federal Home Loan Mortgage Corporation v. Appel* 143 Idaho 42, 44 137 P.3d 429,431 (2006), only the current note holder has the right to purchase the property by a credit bid, and all other purchasers must pay cash.

Since Freddie Mac did not pay cash, but submitted a credit bid when it was shown by Appellant that it was neither the current Note holder nor beneficiary on the Trust Deed, the foreclosure sale was not valid and was void. Since the foreclosure sale was not valid, the Trustee's Deed is not valid, and must be set aside. Therefore, Freddie Mac had no right to possession of the Subject Property, and the Trial Court erred when it granted the Motion for Summary Judgment awarding it a Writ of Ejectment. This issue was raised by Appellant, before the Trial Court in McCluskey's reply memo at Bates # 559, 562, and 565 filed in response to the late filed Reply Memorandum filed by Respondent that raised new facts, however it was not considered in the court's ruling, and has been repeatedly ignored by Respondent. In fact, Respondent freely admits that this issue was raised and argued by Ms. McCuskey in its Reply Memorandum. (Bates # 137 Paragraph 4). How can it now argue that the issue was never raised? As such, Appellant has raised an issue of material fact and thus, entry of Summary

Judgment was not proper and she also raised the same issue before the District Court on appeal and it was ignored by Judge Sticklen.

Furthermore, since Freddie Mac was neither the current note holder, nor the beneficiary on the Trust Deed, it was not entitled to place a credit bid at a foreclosure sale. *See Appel at 44*. As a result, Freddie Mac never had standing to bring an action for ejectment. The Note presented by the Plaintiff in the present case, was originally made Payable to Home Federal Bank, but contains two specific indorsements, both of which call for payment to the “order of Wells Fargo Bank, NA” and does not contain an indorsement “in blank” as falsely argued by Freddie Mac. As such the then current note holder was “Wells Fargo Bank, N.A.” not Freddie Mac. Only Well Fargo N.A. (“Wells Fargo”) was the current Note holder with standing to bring the action.

Respondent argues that this issue was not raised and cannot be raised at this point, but as has been shown above the issue was raised by Ms. McCuskey, and simply ignored.

Even if the court find that the issue was not raised, in Idaho the issue of standing is jurisdictional and may be raised at any time. *Beach Lateral Water Users Ass’n v. Harrison*, 130 P.3d 1138, 1141 (Idaho 2006). Therefore at any time in the proceeding, if standing is raised, Respondent must show that it is the correct party with standing to bring the action for ejectment, which is an undertaking that it has not, and cannot do.

In order to demonstrate proper standing, Respondent must show that it suffered an injury in fact. *Thomson v. City of Lewiston*, 50 P.3d 488 (Idaho, 2002). How can Freddie Mac have suffered an injury in fact when Wells Fargo is the only party that was the proper note holder and proper party to issue a credit bid, and then pursue an action for ejectment? Freddie Mac was simply a nonparty to this proceeding, and as a result, the sale and action for ejectment should be void.

On the question of whether Appellant, in the Magistrate's Court, raised a dispute as to a material fact that Freddie Mac's was not the holder of the Note at the time of the foreclosure sale, she made a showing that Respondent was not entitled to purchase the Subject Property by credit bid. The Trial Court erred in awarding possession of the Subject Property to Freddie Mac by summary judgment because there was a genuine issue of material fact as to whether Freddie Mac was the holder of the Note, when there was no specific indorsement from Wells Fargo and there was no indorsement on the Note 'in blank;' therefore, Wells Fargo (and not Freddie Mac) was the only party with authority to offer a credit bid at the foreclosure sale and receive a Trustee's Deed.

Appellant raised the issue of ownership of the Note in the Magistrate Court, which was amplified by the fact that Freddie Mac filed a copy of the Note with two indorsements on it, both of which showed that the Note had been specifically indorsed to Wells Fargo (R. Bates #s 96 and 97); however, the Magistrate failed to properly consider the affidavits, pleadings and arguments presented, and erroneously awarded Summary Judgment in favor of Freddie Mac in spite of the fact that, at a minimum, there was a question as to a genuine issue of material fact as to which party was the holder of the Note at the time of the Trustee's foreclosure sale.

The Note presented by the Plaintiff in the present case, was originally made Payable to Home Federal Bank, but contains two specific indorsements both of which call for payment to the "order of Wells Fargo Bank, NA" and neither contains an indorsement "in blank." As such the then current note holder was "Wells Fargo Bank, N.A." not Freddie Mac. As the current Note holder, creditor and named beneficiary on the Assignment of Trust Deed, only Wells Fargo was entitled to issue a credit bid at auction by a non-judicial foreclosure sale. See *Appel* at 431. All other parties, if purchasing the property at the foreclosure sale, are required to pay cash. I.C.

§ 45-1508, and see *Appel*, supra. As a result, Freddie Mac did not have legal standing to place a credit bid and it was improper (breach of fiduciary duty, to both lender and the borrower) for the trustee to accept a credit bid from Freddie Mac which was not the holder of the trust deed note and to issue the Trustee's Deed to Freddie Mac; which invalidated the sale.

In her response to Motion for Summary Judgment, Appellant raised and argued the issue of ownership of the Promissory Note. (Bates #'s 166). Respondent has never provided a response to this issue, instead it always claimed erroneously that the issue was never raised. In fact, the Responded has never provided a copy of the Note showing it was indorsed in blank in any proceeding and never rebutted Appellant's contention, creating an issue of material fact. The lower courts relied upon the misrepresentations by Freddie Mac that it owned the note (filed in Affidavit form, when Bates # 96 and 97 proved otherwise), and never granted any weight to this issue raised by Appellant.

Once again, as shown above, Wells Fargo is the only party with standing, as the holder of the Note by specific indorsement, to issue a credit bid, and proceed with foreclosure. Freddie Mac is a non party without standing, and has never been required to demonstrate that it had standing in this case. Again, the action for ejectment and foreclosure sale by Freddie Mac is void.

As previously explained, the issue of standing is jurisdictional and may be raised at any time. *Beach Lateral Water Users Ass'n v. Harrison*, 130 P.3d 1138 (Idaho 2006). Thus Freddie must demonstrate how it has standing to pursue this action, a task it cannot accomplish.

On the issue of whether Appellant had a right to due process of law prior to being deprived of her property by foreclosure sale was violated by the trial court when it denied her a full and fair opportunity to litigate her claims and defenses to the summary judgment which were

aimed at raising disputed issues of material fact. The Trial Court Did Not Provide Appellant either a full and fair opportunity to litigate her claims and defenses because all disputed facts and inferences should have been taken in the light most favorable to Appellant.

When considering summary judgment, Idaho requires that disputed facts should be construed in favor of the non-moving party, and all reasonable inferences should have been drawn in her favor. *Major v. Security Equipment Corp.*, #38414, \_ Idaho \_, at 4, (Aug. 13, 2013); *Fuller v. Callister*, 150 Idaho 848, 851, 252 P.3d 1266, 1269 (2011); (quoting *Castorena v. Gen. Elec.*, 149 Idaho 609, 613, 238 P.3d 209, 213 (2010)). Had the Magistrate considered all reasonable inferences favorably to Appellant and construed the disputed facts in favor of Appellant, then summary judgment could not have been entered granting Plaintiff possession of the Subject Property. Respondent filed a Reply Memorandum in Support of Motion for Summary Judgment on November 21, 2011 with new factual information in Affidavits and documents. This was the day before the November 22nd hearing. Appellant was not served with this Memorandum before she appeared at the hearing on November 22, she had no knowledge that the Respondent's Reply Memorandum had been filed and did not get a copy of it until the next day. She was blindsided with no time to prepare for oral argument, or any time to prepare any written response. The court erroneously accepted the Respondent's Nov. 21<sup>st</sup> Reply Memorandum in full support of the improper November 25<sup>th</sup> ruling without a meaningful opportunity to rebut the new facts. Appellant was never afforded the opportunity to review or respond and present her counter factual information and arguments. Procedural due process is guaranteed under both federal and state constitutions. *USCA Const. Amend. 14; West's I.C.A. Const. Art.1§ 13*. Due process requires that a person involved in the judicial process is given meaningful notice and a fair and meaningful opportunity to respond. *State v. Doe*, 211 P.3d 787

(Idaho. App., 2009). Appellant was never given an opportunity to review or respond or be heard as to Freddie Mac's Reply Memorandum, as the Judge issue his ruling on November 25<sup>th</sup>, only three days after the hearing.

Freddie Mac demands that, even though Appellant was a *pro se* litigant, she must be held to the precise standard of an attorney. On the other hand, Respondent did not serve Appellant with its November 21, 2011 Motion, and the trial court never allowed her a fair opportunity to respond, both of which would not have been allowed if Appellant was represented by counsel. Furthermore, Respondent now asks this court to turn a blind eye to the violations of due process.

The due process rights of Appellant were violated by the Magistrate who stated at the hearing of November 22, 2011 that he would review all of the evidence submitted by the Appellant, however, the Magistrate cut off Appellant as she was making her argument with the promise to review what she submitted and then failed to review any of the evidence submitted by her. (Bates citation needed). The Magistrate entered his ruling granting summary judgment on November 25, 2011 before Appellant had the opportunity to submit her response to the evidence submitted by Freddie Mac on November 21, 2011.

As to the issue of whether Freddie Mac was entitled to claim the status of a *bona fide* purchaser for value under the shelter rules of I.C. §§45-1508 and 45-1510 when it was the successor lender that offered a credit bid at the May 16, 2011 Trustee's Sale and whether such assertion was in violation of I.C. §45-1506(9). Freddie Mac was not entitled to claim the statutory shelter offered by I.C. §§45-1508 and 45-1510 because it was on either actual notice of Appellant's loan modification compliance or it was on inquiry notice because of its supervisory role over Wells Fargo in the HAMP program.

Freddie Mac was not entitled to enter a credit bid in the foreclosure due to the fact that Wells Fargo was the lender of record. In order to cover this fact, Freddie Mac attempted to claim status as a bona fide purchaser for value (“BPV”) after the foreclosure sale. (Citation needed).

Pursuant to the Assignment of Trust Deed, the Note indorsement, as well as all of the purported foreclosure documents, only Wells Fargo is the proper note holder and entity entitled to foreclose on the property and enter a credit bid under I.C. §45-1506. The statutory shelters offered by I.C. §§45-1508 and 45-1510 only apply to a bona fide purchaser for value. Freddie Mac did not tender any cash payment at the foreclosure sale therefore if a credit bid took place, only Wells Fargo as the proper note holder, could tender such credit bid. The Trustee’s Deed incorrectly identified Freddie Mac as the grantee following the foreclosure sale instead of Wells Fargo.

Freddie Mac cannot be a bona fide purchaser for value as it has never provided any evidence that it tendered payment for the property. Freddie Mac is not entitled to claim the statutory shelter offered to a BPV because it was on either actual notice of Appellant’s loan modification as the holder of the note, or it was on inquiry notice because of its supervisory role over Wells Fargo in the HAMP program. (Bates # 186-187).

As to the issue of whether there was a question of fact presented to the Magistrate as to whether Freddie Mac had a valid interest in the Subject Property as a result of the foreclosure sale when it violated its own rules and regulations against Dual-Tracking by participating in foreclosure on the Subject Property. Freddie Mac was in charge of enforcing its own rules that prohibited Dual Tracking, or prevented a bank, such as Wells Fargo from conducting a loan modification and at the same time pursuing foreclosure. Because of this rule violation by Wells Fargo and the knowledge that Freddie Mac had or is imputed, Freddie Mac was estopped from

purchasing at foreclosure sale the Subject Property which was promoting a violation of its own rules.

As to the issue whether the Magistrate lacked jurisdiction over this case because Freddie Mac was not the lawful owner of a right of possession of the Subject Property. Because Freddie Mac had no legal authority to purchase by credit bid, it did not own a right to possess the Subject Property and had no right to bring this action for ejectment. Therefore, there was no jurisdiction in the trial court to grant summary judgment of possession to Freddie Mac.

Due to the fact that Freddie Mac did not have the legal authority to purchase by credit bid, and therefore did not have a right to bring this action for ejectment, the trial court did not have jurisdiction to grant the summary judgment of possession for Freddie Mac. Respondent argues that Appellant did not raise this issue properly, and therefore it cannot be raised at this time and has been waived.

Respondent is mistaken; the Defense of lack of jurisdiction is never waived. *Sierra Life Ins. Co. v. Granata*, 586 P.2d 1068, 1069 (Idaho, 1978). Jurisdiction can be raised at any time during the proceeding. *Id.* The Magistrate was not the proper court to grant Freddie Mac right to possession of the property, as Freddie Mac has no valid right of possession or title to the property, and could not bring the action.

#### CONCLUSION


Furthermore, as has been previously argued, Freddie Mac did not have standing to bring an action for ejectment as it had no right to purchase by credit bid, and therefore no right to possession. By its own admission, the foreclosure auction resulted in a credit bid, but only the current note holder is entitled to issue a credit bid. *Appel* at 431 Wells Fargo by specific endorsement was the note holder, not Freddie Mac, and therefore it never had standing to bring



an action for ejectment. The defense of lack of standing is jurisdictional in nature and can be raised at any time. *Harrison* at 1141. As a result of its lack of standing, Freddie Mac did not have standing to bring the actions, and the Magistrate did not have jurisdiction to grant summary judgment in favor of Freddie Mac.

Respectfully submitted this 9<sup>th</sup> day of April, 2014.


**LAW OFFICE OF WESLEY W. HOYT**

  
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Wesley W. Hoyt, ISB # 4590

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 9<sup>th</sup> day of April 2014, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Derrick J. O'Neill, and Lewis N. Stoddard ROUTH CRABTREE OLSEN, P.S. 300 Main Street, Suite #150 Boise, Idaho 83701	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Fax: 208-854-3998 <input type="checkbox"/> Email: <input type="checkbox"/> To Tray
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