

<p>SUPREME COURT, STATE OF COLORADO 101 W. Colfax Avenue, Suite 800 Denver, Colorado 80202</p>	
<p>On appeal from: Court of Appeals No. 10 CA 0256 Opinion by Judge Webb, Miller and Booras concur</p> <p>Order Denying Petition For Rehearing Announced: December 16, 2010; Judgment affirmed November 10, 2010 Not Published Pursuant to C.A.R. 35(f)</p> <p>On appeal from: Boulder District Court Judge Bailin, District Judge Case Number: 09 CV 759</p>	
<p>PETITIONER: RICK MARTIN, a Trustee for the Rick Martin Living Trust (TRUSTEE) and RICK MARTIN, an Individual (MARTIN)</p> <p>v.</p> <p>RESPONDENTS: US BANK NATIONAL ASSOCIATION (US BANK) and RICHARD G. GEBHARDT, as Boulder County Public Trustee</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorneys for Petitioner: Ralph M. (Rick) Martin, pro se P.O. Box 1839 Longmont, CO 80502 Telephone: 303-651-2177 Facsimile: 303-678-9953 Email: rmartin@patentcolorado.com</p>	<p>Case Number:</p>
<p>PETITIONER RICK MARTIN, a Trustee for the Rick Martin Living Trust (TRUSTEE) and RICK MARTIN, an Individual (MARTIN) FOR WRIT OF CERTIORI TO THE COLORADO SUPREME COURT</p>	

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<p>Attorneys for Petitioner: Ralph M. (Rick) Martin, pro se P.O. Box 1839 Longmont, CO 80502 Telephone: 303-651-2177 Facsimile: 303-678-9953 Email: rmartin@patentcolorado.com</p>	<p>Case Number:</p> <p>Division Courtroom</p>
<p>CERTIFICATE OF COMPLIANCE</p>	

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically the undersigned certifies that:

The brief complies with Rule 53 (a)
It contains 3642 words.

Respectfully Submitted *pro se* by:

Ralph M. (Rick) Martin

As trustee and individually

Petitioner, Rick Martin individually and as Trustee (Rick Martin), pro se, hereby submits the following Petition for Writ of Certiorari to the Supreme Court, seeking review of an Order of the Colorado Court of Appeals dated Nov. 10, 2010 (“the Order on Appeal”), which affirmed the judgment of the District Court granting U.S. Bank’s Motion to Dismiss, Order dated December 31, 2009.

II. ADVISORY LISTING OF ISSUES

1. Did the Colorado Court of Appeals err in ruling that Colorado’s lender fraud statute, C.R.S. 38-40-105 (1) (b), *in a case of first impression*, can be legislated out of existence by the Bench by adding a common law “reliance” element to the statute then re-writing the Complaint against the Petitioner, in violation of *Coors Brewing Co. v. Floyd*, 978 P.2d 633(Colo.1999), and then dismiss the case on the pleadings for a lack of reliance?
2. Did the Colorado Court of Appeals err in ruling that reformation of a real estate Deed of Trust by the Bench is legal in spite of :

- a) Reversing *Coors Brewing Co. v. Floyd*, 978 P.2d 633(Colo.1999) by inserting a past tense into Petitioner’s Complaint paragraph 9;
- b) Failing to conduct an evidentiary hearing to determine the state of mind of the loan officer and Petitioner at the time of the loan;
- c) Ignoring the definition of a “spurious document” per C.R.S. 38-35-201(3) and *GMAC Mortgage Corp. v. PWI Group*, 155 P.3d 556 (Colo. App. 2006);
- d) Ignoring the expiration of U.S. Bank’s statute of limitations for enforcing the Warranty of Title Clause, Complaint paragraph 23(C.R.S. 13-80-101) and Complaint Exhibit 5 Paragraph 6; and
- e) Ignoring the validity of real estate conveyances to trusts, C.R.S. 30-30-108.5?

III. GROUNDS ON WHICH JURISDICTION IS INVOKED

This Court has jurisdiction to review the orders of inferior tribunals under Art. VI § 2 of the Constitution of the State of Colorado. This Court should exercise its sound discretion to grant certiorari in this case pursuant to C.A.R 49(a) (1)

because a division of the Court of Appeals has decided a question of substance not heretofore determined by this Court in regards to C.R.S. 38-40-105 (1) (b).

Additionally this Court should exercise its sound discretion to grant certiorari in this case pursuant to C.A.R. 49 (a) (4) because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and sanctioned such procedure by a lower court as to call for the exercise of the Supreme Court's power of supervision. As this case now stands Colorado's consumer remedy against bank lender fraud has been quashed, and reliance on Colorado's real estate recording acts has been compromised.

This Court should grant this Petition for writ of Certiorari because, as set forth more fully in Section V below, 200,000 Coloradans have lost their homes to foreclosure, and the first borrower to plead C.R.S. 38-40-105 (1) (b) has been denied the right to a jury trial.

Both lower Courts have found a fatal pleadings defect in the following words:

The Complain in paragraphs 7, 10, 37-42, pleads lender fraud per C.R.S. 38-40-105 (1) (b) with specificity as follows:

U.S. Bank by means of a fraudulent "drive by" appraisal of 340

Cottonwood Court created an illusory security interest by designating

the fair market value of 340 Cottonwood Court at \$620,000.00 in March 2005. Thus U.S. Bank perpetrated a predatory home equity loan for \$250,000 by falsifying the value of 340 Cottonwood Court in March 2005. U.S. Bank made a misrepresentation of material fact of the value of 340 Cottonwood Court to entice Plaintiffs, (a putative borrower) to enter into a second mortgage in violation of C.R.S. 38-40-105 (1) (b), et seq. U.S. Bank blatantly created an illusory security interest **USING THEIR OWN APPRAISER** to create at least a 33% over-valuation of 340 Cottonwood Ct., forming an unconscionable loan.

The lower Court's Order Re-motion to Dismiss dated December 31, 2009 never addressed C.R.S. 38-40-105 (1) (b). Instead the lower court created its own cause of action in common law fraud. Then it held Plaintiff had no detrimental reliance based on a false reading of the Complaint.

Oddly the lower Court read paragraph 9 of the Complaint in the past tense rather than as it is written in the present tense:

Never ever have comparable houses sold for \$620,000.00 wherein a fair appraisal in March 2005 would have yielded a value of \$425,000.00 or less.

The lower Court injected a past tense spin to this paragraph and held, “His complaint is full of references to his own disbelief that his property was worth as much as the bank indicated that it was.” This injection of the past tense spin violates *Coors Brewing Co. v. Floyd*, 978 P.2d 633(Colo.1999).

The Court of Appeals affirmed a dismissal of a common law fraud claim that was never pled! Then the Court of Appeals erased the above noted words, “***using their own appraiser***” and held that Martin should have discovered before filing the case that a third party appraiser was used. Then Martin should have added the words , “U.S. Bank should have known the appraisal was false.” This obvious bias favoring U.S. Bank’s position makes a mockery of the Colorado Justice System.

IV. STATEMENT OF THE CASE

This case arises from a dispute between Petitioner plaintiff, Rick Martin, and defendant, U.S. Bank National Association, over a deed of trust (DOT) on Martin’s residence (the property) that secured a home equity loan. The trial court reformed the DOT at the bank’s request after the three year statute of limitations had run to enforce the Warranty Clause, and dismissed Martin’s claims.

In 2002, Martin deeded the property to the Rick Martin Living Trust (the Trust), a Colorado revocable trust. Martin is the sole settler, trustee, and beneficiary of the Trust. U.S. Bank does not dispute that the deed to the Trust was in the chain of title when it made the loan in 2005.

In 2005, Martin took out the home equity loan for \$250,000 and signed a package of U.S. Bank documents. In a DOT and a contemporaneous borrower agreement, both of which he signed as “Rick Martin,” Martin affirmed that as Grantor he is or will be lawfully seized of the estate. See Complaint Exhibit 5 Paragraph 6 attached hereto. When Martin defaulted on the loan, U.S. Bank petitioned under C.R.C.P. 120 for an order of sale, which was entered on July 21, 2009 (the foreclosure case). Martin filed this action on July 29, 2009.

Martin asserted four causes of action: violation of § 38-35-109, C.R.S. 2010 (spurious lien claim); quiet title (wild deed claim); negligence; and lender fraud under §38-40-105, C.R.S. 2010. Central to Martin’s claims are his assertions that U.S. Bank made a misrepresentation of the material fact of the value of his house to entice him to enter into a second mortgage. Martin also asserted that the DOT was invalid because he did not sign it as a trustee of the Trust, and the three year statute of limitations had run to cure the Warranty of title, Paragraph 6 of Exhibit 5 herein.

The trial court granted U.S. Bank's request to reform the DOT to read "Rick Martin, personally, and as agent for the Rick Martin Living Trust." The court then dismissed the remaining four claims on the bank's motion to dismiss with prejudice, but it held the case open for further proceedings on the bank's claim for sanctions and attorney fees. Martin filed a C.R.C.P. 97 motion to reconsider. When both motions were denied, he appealed.

After having answered, and after several months of discovery, U.S. Bank moved to dismiss with prejudice or in the alternative for judgment on the pleadings and for sanctions. Both the bank and Martin presented documents outside of the pleadings in briefing the motion. The trial court did not exclude these documents. The Court of Appeals treated the dismissal as a summary judgment per C.R.C.P. 12(c); *Yadon v. Lowry*, 126 P.3d 332, 335-36 (Colo. App. 2005).

The appellate review of summary judgment was made de novo per *West Elk Ranch, L.L.C. v. United States*, 65 P.3d 479, 481 (Colo. 2002).

The Court of Appeals found no disputed issue of material fact and affirmed the trial court's dismissal.

V. ARGUMENT

A. Lender Fraud Under § 38-40-105

In its motion to dismiss, U.S. Bank argued that Martin did not plead his lender fraud claim with the specificity required for fraud claims under C.R.C.P. 9(b). Neither Court addressed this issue of first impression. The trial court dismissed the claim for failure sufficiently to plead the elements of common law fraud, especially justifiable reliance. Common law fraud was never pled! The Court of Appeals upheld the dismissal, but on slightly different grounds. *See Negron v. Golder*, 111 P.3d 538, 542 (Colo. App. 2004).

Section 38-40-105 (1) (b)

[Making] a false promise or misrepresentation or conceal[ing] an essential or material fact to entice either a borrower or a creditor to enter into a mortgage agreement when, under the terms and circumstances of the transaction, he or she knew or reasonably should have known of such falsity, misrepresentation, or concealment.

Martin argues that the statute does not involve reliance, but entails: (1) a misrepresentation by a mortgage originator, (2) that entices a borrower to borrow, (3) made with actual or constructive knowledge of its falsity.

The complaint alleged that U.S. Bank's appraisal was fraudulently inflated, thereby enticing Martin to borrow the money. However, the Court of Appeals further violated Coors Id. by putting a burden on Martin that Martin should have known a third party appraiser and not a U.S. Bank appraiser did the fraudulent drive-by appraisal. Martin did not allege that the bank knew or should have known the appraisal was too high. Thus, his Complaint was fatally flawed, and Martin's right to a jury trial extinguished relying on, *Hill v. Behrmann*, 911 P.2d 679, 681 (Colo. App. 1995) (dismissal for failure to state a claim appropriate "only if ... plaintiff would not be entitled to any relief under the facts pleaded"), *aff'd sub nom. Left Hand Ditch Co. v. Hill*, 933 P.2d 1 (Colo. 1997). The Court of Appeals held the Complaint was deficient on its face.

The real error made by the Court of Appeals was a failure to read the Complaint as noted above:

U.S. Bank by means of fraudulent "drive-by" appraisal of 340 Cottonwood Court created and illusory security interest by designating the fair market value 340 Cottonwood Court at

\$620,000.00 in March 2005. Thus, U.S. Bank perpetrated a predatory home equity loan for \$250,000 by falsifying the value of 340 Cottonwood Court in March 2005. U.S. Bank made a misrepresentation of the material fact of the value of 340 Cottonwood Court to entice Plaintiffs, (a putative borrower) to enter into a second mortgage in violation of C.R.S. 38-40-105 (1) (b), et seq. U.S. Bank blatantly created an illusory security interest *using their own appraiser* to create at least a 33% over-valuation of 340 Cottonwood Ct., forming a unconscionable loan.

Martin called U.S. Bank a crook in so many words. The Complaint alleges that U.S. Bank intentionally falsified the appraisal value of 340 Cottonwood Court “to entice Plaintiffs to enter into a second mortgage” *using their own appraiser* to create at least a 33 percent over valuation of 340 Cottonwood Court. Will Colorado’s Supreme Court buckle to U.S. Bank’s money and require lender fraud victims to hire private investigators to ascertain bank lender procedures before filing a lender fraud lawsuit? In fact only in Discovery in this case did Martin get a copy of the written eleven page appraisal which showed a third party wrote it!

It is legal prostitution to say the Complaint “failed to allege that U.S. Bank knew or should have known the appraisal was too high.” Reading the Complaint in

favor of Plaintiff, U.S. Bank's own appraiser intentionally committed fraud by inflating an appraisal by at least 33%. Both Courts granted summary judgment to U.S. Bank's scapegoat defense of "it wasn't my appraiser and he hath wronged us too!"

The Court of Appeals makes further error by holding that Plaintiff failed to ask for leave to amend the complaint. The lower Court did not even address C.R.S. 38-40-105 (1) (b). Instead the trial court manufactured its own common law fraud cause of action. It is further legal prostitution to deny Martin a jury trial because to this day no precedent exists dictating how to plead C.R.S. 38-40-105 (1) (b).

Does Colorado's District Court, the Court of Appeals and now the Colorado's Supreme Court want to wield the power to strike down a Congressional Statute created to offer relief from banker fraud? Since when does a District Court have the power to create its own common law fraud cause of action in place of the statutory cause of action pled, C.R.S. 38- 40-105 (1) (b)?

U.S. Bank's oral argument stated, "Some Colorado statutes have no recourse in the Courts, and this should be one of them." The Court of Appeals has buckled to U.S. Bank's request to quash a lender fraud statute.

The lower Court erased a Congressionally created lender fraud statute. The Court of Appeals affirmed the erasure 'with prejudice' adding a few completely

erroneous twists to the law. The biggest twist is holding that a consumer victim of fraud must know the inner workings of a bank's loan process, then perfectly draft a Complaint in a case of first impression of a lender fraud statute, or lose his right to a jury trial along with his house.

B. Reformation

Martin contends disputed factual issues should have prevented the trial court from reforming the DOT on motion.

“Reformation is an appropriate remedy when the evidence clearly and unequivocally shows that an instrument does not express true intent or agreement of the parties.” *Poly Trucking, Inc. v. Concentra Health Services, Inc.*, 93 P.3d 561, 563 (Colo. App. 2004). The two primary grounds for reformation are mutual mistake or unilateral mistake by one party coupled with inequitable conduct by the other party, *see Boyles Bros Drilling Co. v. Orion Industries, Ltd.*, 761 P.2d 278, 281 (Colo. App. 1988). A party who recognizes a mistake in a contract, but nevertheless executes it instead of pointing out the mistake, commits inequitable conduct, which can be treated by a court as equivalent to mutual mistake. *See Sumerel v. Goodyear Tire & Rubber Co.*, 232 P.3d 128, 135 (Colo. App. 2009). Martin's Complaint alleging inequitable conduct by U.S. Bank was ignored.

What both Courts ignored was Martin's Complaint paragraphs 14, 16, 17, 18, 19, 20, 21, 22, 23, 25, 31, 34, 35, 41, 43, 44 and 45.

The Complaint supplies adequate disputed facts to deny any proper summary judgment. Martin pled that it was the LOAN OFFICER at U.S. Bank that intentionally (per Para. 31 "purposefully, needlessly and/or recklessly") created the loan documents IN ERROR and coupled this act with a verbal promise, "U.S. Bank will never foreclose on your second" – Complaint paragraph 14! (In fact the loan officer made a quick commission then quit the bank as gathered in discovery herein).

Here the borrower agreement and the DOT mistakenly list Martin, not the Trust, as the owner of the property. Martin does not dispute that he signed these documents, which state that he "will be lawfully seized of the estate" at an unspecified future date. See Exhibit 5 Paragraph 6 herein. The Complaint clearly states that U.S. Bank intentionally prepared them, in error. Both Courts denied Martin a right to a jury to decide the state of mind of both signatories. Both Courts waived the statute of limitations of three years to cure/enforce a warranty clause. Because reformation involves intent, it should not be granted on summary judgment. Martin had no duty to file an affidavit setting forth his intent because

Martin alleged U.S. Bank purposefully, needlessly or recklessly prepared their own loan documents.

Martin's assertion that a bank officer told him signing the home equity agreement was merely a formality, and U.S. Bank would never foreclose on the loan might not render the oral promise enforceable per section 38-10-124, C.R.S. 2010. However, that oral promise creates a factual dispute, ignored by both Courts, as to the loan officer's state of mind. Was America's subsequent housing bust fueled by a flood of such acts by loan officers? See Exhibit H herein, wherein so many scholars answer YES to this question.

Colorado case law and statute have held that when a deed is patently invalid and contains an illusory grant, it constitutes a spurious document pursuant to C.R.S. § 38-35-201(3). *See GMAC Mortgage Corp. v. PWI Group*, 155 P.3d 556 (Colo. App. 2006).

C.R.S. § 38-35-201(3) defines "spurious document" as "any document that is forged or groundless, contains any material misstatement or false claim, or is otherwise patently invalid." Under the definition of "spurious document," the following documents are spurious documents:

1. Forged documents;
2. Groundless documents;

3. Documents that contain material misstatements;
4. Documents that contain false claims; **OR**
5. Documents that are patently invalid.

In *GMAC Mortgage*, a division of the Court of Appeals held that when a deed is patently invalid and contains an illusory grant, it constitutes a spurious document pursuant to C.R.S. § 38-35-201(3), *GMAC*, 155 P.3d at 558. A void deed (not signed by the Rick Martin Living Trust) fits squarely within the definition of “spurious document” since it is “groundless, contains a material misstatement or false claim, or is otherwise patently invalid.” *Id.*

Colorado’s statute of limitations should have forbidden reformation, *see Rossi v. Osage Highland Development, L.L.C.*, 219P.3d 319 (Colo. App. Div. 5 2009).

CONCLUSION

Summary judgment for reformation violated the fundamental tenant of mandating that disputed facts go to a jury. Martin alleged inequitable conduct by U.S. Bank’s loan officer. But both Courts simply ignored the Complaint and acted as a servant to U.S. Bank’s biddings. Both Courts have also extinguished the right

to convey property to a Trust per C.R.S. 30-30-108.5. Both Courts have waived the statute of limitations for a rich bank.

In summary the Court of Appeals affirmed a summary judgment on a common law fraud claim that did not exist in the Complaint. The Court of Appeals then threw the C.R.S. 38-40-105 into the common law fraud summary judgment bucket based on allegedly defective pleadings. These allegedly defective pleadings hold that a Complaint can be ignored once again, and a consumer fraud victim in Colorado must divine the inner workings of a (crook) bank, then plead accordingly, thus anticipating U.S. Bank's scapegoat defense of "it wasn't me, the devil made me do it."

In summary, U.S. Bank was on notice that it was accused of violating C.R.S. 38-40-105 (1) (b). The Complaint stated U.S. Bank knowingly falsified an appraisal by at least 33%, to solicit a second mortgage, thereby violating 38-40-105 (1) (b). The Complaint stated U.S. Bank did a fraudulent "drive by" appraisal. Will this Supreme Court succumb to U.S. Bank's well financed effort to kill C.R.S. 38-40-105 (1) (b)?

Appellant is a borrower allegedly victimized by bank fraud. This borrower is the first to exercise C.R.S. 38-40-105 (1) (b). After two years of litigation both

lower Courts have raised procedural barriers to refuse the borrower's day in court by re-writing and/or ignoring the words in the Complaint.

As a secondary issue the trial Court affirmed the waiver of the statute of limitations to enforce U.S. Bank's Warranty Clause, as noted in the Complaint paragraph 23. The loan documents called for the borrower in the future to get the power to convey title (Complaint Exhibit 5 Paragraph 6). The three year statute of limitations passed. Yet both lower Courts affirmed a reformation of (stipulated) incorrect title documents violating another statute (C.R.S. 13-80-101) in favor of U.S. Bank. All this ignoring Martin's Complaint allegations that any inequitable conduct done was done by U.S. Bank.

When corporate greed rules, then all factual disputes are held in favor of corporate greed. No juries for consumer fraud victims in Colorado? Is Colorado going to advertise ***"banker fraud welcome in Colorado"***? ***Colorado's Courts will quash the lender fraud statute and waive any statute of limitations so you bankers can cover-up your sloppy foreclosure documents and continue defrauding borrowers.*** Or is this Supreme Court going to allow one borrower, an alleged victim of banker fraud to get his day in court?

Petitioner Martin once again reminds the Colorado Justice system that the voting foreclosure victims were given a sword to wield against entrenched

corporate greed. See Exhibit H attached hereto in its entirety (formerly Plaintiff's Reply to U.S. Bank's Motion to Dismiss, Filing I.D. 28361212). Clearly no legislation that attempted to regulate big banks prevented the housing bust.

Will Colorado's Supreme Court legislate from the Bench the destruction of Colorado's legislatively created lender fraud statute?

Or will this Supreme Court allow one tiny consumer fraud victim to wield a sword against U.S. Bank's entrenched corporate greed?

I certify the word count is 3642.

Respectfully Submitted *pro se* by:

Ralph M. (Rick) Martin

As trustee and individually

EXHIBIT LIST – APPENDIX

A – Order Denying Petition For Rehearing

B – JUDGMENT AFFIRMED Nov. 10, 2010

C – 38-40-105

5 – Deed Of Trust

H – Widespread Appraisal Fraud Threatens America’s Homeowners

I – 38-30-108.5

J - 13-80-101

K – 38-35-201

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served this 12th day of January 2011 via first class mail addressed to the following:

Tanya E. Milligan, Esq.
MESSNER & REEVES, LLC
1430 Wynkoop Street, Suite 300
Denver, Colorado 80202

Rick Martin