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March 8, 2016
Court of Appeals
Division I
State of Washington

NO. 74050-4-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

PAULINE LOUISE CONNER,

Plaintiff/Appellant,

v.

EVERHOME MORTGAGE COMPANY, a division of EVERBANK, REGIONAL TRUSTEE SERVICES, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a/k/a MERSCORP, FEDERAL NATIONAL MORTGAGE ASSOCIATION, LENDER PROCESSING SERVICES, DOES I-XXX, INCLUSIVE,

Defendants/Respondents.

APPELLANTS' OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

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B. The trial court erred in accepting the testimony of Bradley Lee, and Deborah Kaufman on summary judgment, in the absence of compliance with the provisions of *RCW 5.45.020* and *ER 803(a)(6)*.

C. The trial court erred in declining to consider Appellant's claims for violation of the Washington Deed of Trust Act (*RCW 61.24, et seq.*) (hereinafter "DTA"); violation of the Washington Consumer Protection Act (*RCW 19.86, et seq.*) (hereinafter "CPA") on the erroneous belief she did not plead violations of the DTA.

D. The trial court erred in ignoring the trustee's breach of its duty of good faith under *RCW 61.24.010* on the erroneous belief that Appellant failed to plead violations of the DTA.

E. The trial court erred in ignoring a facially ambiguous "Affidavit of Possession" that violated the provisions of *RCW 61.24.030(7)(a)*.

F. The trial court erred in dismissing Appellant's meritorious CPA claims on the erroneous belief she did not plead violations of the DTA.

G. The trial court erred in refusing to permit Ms. Conner additional time to obtain the testimony of a competent representative of U.S. Bank prior to summary judgment, pursuant to *CR 56(f)*.

II. STATEMENT OF THE CASE

Appellant, PAULINE LOUISE CONNER (hereinafter Ms. Conner), is the owner on title of certain real property situated in Snohomish County, State of Washington, commonly known as 21604 78th Avenue S.E., Woodinville, Washington 98072 (hereinafter the "Property").

On or about May 23, 2006, Ms. Conner executed a Promissory Note (hereinafter "Note") in favor of Irwin Mortgage Corporation (hereinafter "Irwin"), as lender and the party entitled to payments according to its terms. CP 140-142. This transaction was purportedly registered with Respondent, MORTGAGE ELECTRONIC REGISTRATION SYSTMES, INC. (hereinafter "MERS") by Irwin under MIN No. 1000139-0080839558-0. At no time relevant to this cause of action was MERS a true and lawful owner and holder of this Note.

To secure repayment of the Promissory Note, Ms. Conner, as grantor, executed a Deed of Trust dated May 23, 2006, naming Pacific Northwest Title, as the trustee, and MERS as named beneficiary, solely as a nominee for Irwin Mortgage Corporation, the Lender, and Lender's successors and assigns and encumbered the subject Property. Ms. Conner's Deed of Trust was recorded with the Snohomish County Auditor

under Recording No. 200606050432 (hereinafter the "Deed of Trust"). CP 148-164.

As of May 23, 2006, and at no time thereafter, did Ms. Conner owe any monetary or other obligation to MERS, nor has MERS ever been a holder and owner of the subject Promissory Note or other evidence of debt executed contemporaneously with the Deed of Trust as the term is defined under *RCW 61.24.005(2).*

On or about June 9, 2006, the Federal National Mortgage Association (hereinafter "Fannie Mae") purportedly purchase the Note and Deed of Trust and Respondent, EVERHOME MORTGAGE COMPANY (hereinafter "Everhome Mortgage") was allegedly retained only to service the loan. CP 924.

On August 27, 2009, Ms. Conner spoke to representatives of Everhome Mortgage who advised her to make two months of payments by August 31, 2009 to "avoid foreclosure". CP 841. On August 31, 2009, Ms. Conner's daughter-in-law called Everhome Mortgage to make payment as advised, but was told the property was already in foreclosure. CP 841.

On or about September 2, 2009, Rick Wilken, as purported Assistant Vice President of MERS, as Nominee for Irwin Mortgage Corporation, executed an Assignment of the Deed of Trust, assigning the

MERS' beneficial interest in the Deed of Trust together with the note or notes therein described to Everhome Mortgage. CP 1115-1116. At no time relevant to this cause of action did MERS ever own or hold the Note. Said Assignment was recorded under Snohomish County Auditor's Recording No. 200910200613 on October 20, 2009.

Also executed on September 2, 2009 by Rick Wilken, only this time in his capacity as "Vice President" rather than as "Assistant Vice President" for MERS, as nominee for Irwin Mortgage Corporation, was an Appointment of Successor Trustee, appointing Respondent, REGIONAL TRUSTEE SERVICES CORPORATION (hereinafter "Regional Trustee") as successor trustee. CP 668-669. Said Appointment of Successor Trustee was not recorded until October 20, 2009, under Snohomish County Auditor's Recording No. 200910200614.

On September 8, 2009, Michele de Craen, as Assistant Vice President of Everhome Mortgage, executed an Affidavit of Possession of Note. CP 757. The Affidavit alleges Everhome Mortgage to be the "owner" of the Note, rather than the "holder". Her Affidavit, however, provides that she has "either personal knowledge of the facts set forth in this Affidavit or have made appropriate inquiry of those individuals having knowledge of the facts," essentially offering hearsay to fulfill the requirements under *RCW 61.24.030(7)(a)*.

On September 18, 2009, Regional Trustee, as purported "trustee and/or agent for the Beneficiary", executed and served a Notice of Default. CP 660-663.

On October 19, 2009, Regional Trustee, as successor trustee, executed, recorded and served a Notice of Trustee's Sale, setting a sale date for January 22, 2010. CP 671-674. Said Notice of Trustee's Sale was recorded under Snohomish County Auditor's Recording No. 200910200615 on October 20, 2009. Pursuant to *RCW 61.24.010(2)*, "Only upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee." The appointment of successor trustee was not recorded until October 20, 2009, in violation of *RCW 61.24.040.*

In connection with the issuance of the Notice of Trustee's Sale, Regional Trustee prepared and executed a Notice of Foreclosure pursuant to *RCW 61.24.040* indicating delinquent payments from May 1, 2009 to October 23, 2009, a period of 6 months. CP 682-684. However, the Notice of Foreclosure lists 9 delinquent payments. Moreover, there is no accounting for the 2 payments Ms. Conner made on August 31, 2009.

The Trustee's Sale set for January 22, 2010, was postponed/continued until the Property was eventually foreclosed on April

16, 2010, and the Trustee's Deed was recorded on April 29, 2010, under Snohomish County Recording No. 201004290388. CP 1127-1128.

On April 13, 2011, a Consent Order was entered into between EverBank Financial Corp., of which Everhome Mortgage is a purported subsidiary/division, and the Office of Thrift Supervision. CP 55, CP 219-239, CP 1193. Much of the conduct complained of here has apparently occurred numerous times before.

On October 20, 2011, Fannie Mae quit claimed its ownership interest in the subject property to "Everbank". Fannie Mae's Quit Claim Deed was recorded on December 13, 2011, under Snohomish County Recording No. 201112128185. CP 244-246.

On March 8, 2012, an Order Staying Proceedings was entered by the trial court, ordering Ms. Conner to make monthly payments into the Court Registry beginning April 8, 2012, and each month thereafter in the amount of $2,381.62. CP 241-242. As of July 31, 2015, the Superior Court Clerk verified that $95,286.69 has been deposited by Ms. Conner. CP 135.

On February 13, 2012, Plaintiff filed her Complaint of record herein alleging causes of action against the named Respondents. CP 1257-1269.

On May 14, 2012, Plaintiff filed her First Amended Complaint herein. CP 1192-1205.

Respondents filed their Motion for Summary Judgment on July 9, 2015, seeking dismissal as to all causes of action. CP 763-779.

On August 4, 2015, Ms. Conner moved for continuance of the hearing on summary judgment, pursuant to *CR 56(f),* seeking specific information, in the absence of an answer to Ms. Conner's Amended Complaint. CP 79-85.

On August 7, 2015, Respondents answered Ms. Conner's Amended Complaint. CP 54-62. However, this did not provide Ms. Conner sufficient time prior to hearing on summary judgment to conduct discovery.

On September 14, 2015, the trial court heard Respondent's Motion for Summary Judgement and Ms. Conner's Motion to Continue the Hearing. The trial court, *inter alia*, denied Ms. Conner's Motion to Continue the Hearing (*CR 56(f)*) and took the remaining issues under advisement. CP 16.

On September 22, 2015, the trial court entered its Memorandum Decision, granting Respondents' Motion for Summary Judgment, dismissing all of Ms. Conner's claims. CP 10-15.

On October 9, 2015, Ms. Conner timely filed her Notice of Appeal to this Court. CP 1-9

III. ARGUMENT

A. Standard of Review.

A trial court's summary dismissal of claims under *CR 56* is reviewed *de novo*, taking all inferences in the record in favor of the non-moving party. *Hayden v. Mutual of Enumclaw Insurance Co.*, 141 Wn.2d 55, 1 P.3d 1167 (2000); *Schroeder v. Excelsior Management Group, LLC*, 117 Wn.2d 94, 297 P.3d 677 (2013) (hereinafter "*Schroeder*") (citing *Dreiling v. Jain,* 151 Wn.2d 900, 93 P.3d 861 (2004); *Hauber v. Yakima County*, 147 Wn.2d 655, 56 P.3d 559 (2002); *Bavand v. OneWest Bank, FSB*, 176 Wn.App 475, 485, 309 P.3d 636 (2013) (hereinafter "*Bavand*"). Summary judgment is only appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Balise v. Underwood*, 62 Wn.2d 195, 381 P2d 966 (1963); *Schroeder*; *Herring v. Texaco, Inc.*, 161 Wn.2d 189, 165 P.3d 4 (2007); *Bavand,* at page 485.

The initial burden on summary judgment is on the moving party to prove that no material issue is genuinely in dispute. *CR 56.* Sworn statements on summary judgment must be (1) made on personal knowledge, (2) setting forth facts as would be admissible in evidence and

(3) showing affirmatively that the affiant is competent to testify to the matter stated in the sworn statement. *Snohomish County v. Rugg*, 115 Wn.App. 218, 61 P.3d 1184 (2002); *Blomster v. Nordstrom*, 103 Wn.App. 252, 11 P.3d 883 (2000); *Lilly v. Lynch,* 88 Wn.App. 306, 945 P.2d 727 (1997).

In reviewing the evidence submitted on summary judgment, facts asserted by the non-moving party and supported by affidavits or other appropriate evidentiary material must be taken as true. *State ex rel Bond v. State*, 62 Wn.2d 487, 383 P.2d 288 (1963).

Summary judgment is appropriate if reasonable persons can reach only one conclusion from all of the evidence, viewed in a light most favorable to the non-moving party. *Shows v. Pemperton*, 73 Wn.App. 107, 868 P.2d 164 (1994); *Doherty v. Munipality of Metro*, 83 Wn.App. 464, 921 P.2d 1098 (1996); *Goad v. Hambridge*, 85 Wn.App. 98, 931 P.2d 200 (1997). When there is contradictory evidence, or the moving parties' evidence is impeached, an issue of credibility is presented and the Court should not resolve issues of credibility on summary judgment, but should reserve the issue of credibility for trial. *Balise v. Underwood, supra.*

Based upon the foregoing and the documentary evidence that was before the trial court, particularly the Declarations of Brandley Lee (CP 716-719), Deborah Kaufman (CP 653-687), Brenda Lang (CP 688-699),

Glenn Perrell (CP 700-703), Wesley Werich (CP 705-706), Rita Conner (CP 840-867), Jill Smith (CP 868-872) and the Declaration of Counsel (CP 130-652),[1] there were genuine issues of material fact before the trial court inconsistent with any summary dismissal of Ms. Conner's claims.

B. The Trial Court's Reliance of Declarations of Lee and Kaufman was Misplaced.

On summary judgment, Respondents relied on the Declarations of Brandley Lee (CP 716-719) and Deborah Kaufman (CP 653-687). However, Respondents' and the trial court's reliance on these Declarations was misplaced.

Each declarant claims to have "personally reviewed" the business records maintained by their respective employers and has "personal knowledge" of the facts they related to the trial court. However, neither of the declarants demonstrated sufficient personal and testimonial knowledge of the facts offered the trial court beyond conclusory statements and statements based exclusively on hearsay. *ER 801, ER 802, CR 56(e).*

The business records offered on summary judgment must be identified by an employee of the company who created the document, a records custodian or the person who supervised the documents' creation to

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[1] It is significant to note that the Court's Memorandum Decision (CP 10-15) failed to list any of Ms. Conner's sworn statements, including the Declarations of Rita Conner (CP 840-867), Jill Smith (CP 868-872) and the Declaration of Counsel (CP 130-652) which were before the Court on summary judgment, in violation of *CR 56(h).*

be admissible. *State v. Meyer,* 27 Wn.2d 759, 226 P.2d 204 (1951); *Fies v. Story*, 21 Wn.App. 413, 585 P.2d 190 (1978) (overruled on different grounds *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984)); *State v. Alexander*, 64 Wn.App. 147, 822 P.2d 1250 (1992). The "business record" exception to the hearsay rule does not extend to records and information compiled and received from third parties. *State v. Weeks,* 70 Wn.2d 951, 425 P.2d 885 (1967). See generally, Tegland, *Washington Practice: Evidence* § 803.39 (5th Ed. 2007).

Moreover, conclusory statements or "mere averment" that the affiant has personal knowledge are insufficient to support a motion for summary judgment. *CR 56(e); Blomster* at page 260; Editorial Commentary to *CR 56* (citing *Antonio v. Barnes*, 464 F2d 584, 585 (4th Cir. 1972)). Indeed, the contents of a business record cannot be established by a witness' oral testimony, the actual document must be offered. *ER 803(a)(6) and (7); ER 1002; State v. Fricks*, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979) ("In this case the State failed to produce the document or to make any showing of its unavailability. Under these circumstances the testimony of a manager as to its contents was not an acceptable method of proof.")

With these requirements in mind, Ms. Kaufman's and Mr. Lee's specific factual allegations must be critically considered.

Ms. Kaufman and Mr. Lee each indicate they reviewed documents, but fail to identify the specific documents they reviewed, ambiguously referring to the records as "compilations" "business records", etc. of their respective firms. However, these "business records" necessarily include records and information complied by third parties (hearsay). Under Washington law, such third-party information and records must be separately authenticated by the third party who compiled the records to meet the business records exception to the hearsay rule and meet the requirement that such testimony must be based on personal knowledge from the third party's records custodian that satisfies each of the elements of *RCW 5.45.020*. *State v. Weeks*, *supra;* (affirming trial court's decision that out-of-state hospital record proffered by physician was inadmissible hearsay and business records exception to hearsay rule was not established because "[t]here was no evidence by the custodian of records of the Arkansas hospital or by any other qualified person that the document in question was a business record"); *MRC Receivables Corp. v. Zion*, 152 Wn. App. 625, 631 & n. 9, 218 P.3d 621 (2009) (reversing summary judgment entered in favor of debt collector, and identifying as one of the issues for determination on remand whether "Sharp's affidavit [submitted by debt collector in support of summary judgment] presented only inadmissible hearsay" and met business records exception to hearsay rule,

given the "lack of an explanation for how Sharp's status as a Midland employee provide[d] her with personal knowledge of her assertions regarding MRC, Zion's account with Providian, and how MRC came to own it"). Absent a proper foundation, the testimony of Ms. Kaufman (a representative of Regional Trustee) and Mr. Lee (a representative of EverBank) should have been stricken and disregarded by the trial court on summary judgment.

Specifically, in Ms. Kaufman's Declaration, states that "Regional's involvement began . . . when it received a referral for foreclosure from Everbank," referring to an Exhibit "A". CP 654. However, the subject referral came from a company called "LPS", a third party – not EverBank. In fact, the alleged referral indicates that LPS made the referral on behalf of Everhome Mortgage – not EverBank. CP 658. There is no indication that Regional Trustee investigated or verified the information it received from LPS, as required under *RCW 61.24.010, Lyons v. U.S. Bank,* 181 Wn.2d 775, 336 P.3d 1142 (2014) (hereinafter "*Lyons*") and *Trujillo v. NWTS*, 183 Wn.2d 820, 355 P.3d 1100 (2015) (hereinafter "*Trujillo II*"). The referral (Exhibit "A") does not indicate where LPS got its information, the claim that Ms. Conner was in default or who may have made such a claim, or otherwise provide a justification or authority for initiating a non-judicial foreclosure (hearsay). Whatever information LPS

had, it would certainly not have been a "business record" of Regional Trustee. Moreover, as LPS has never been identified as an owner, holder, servicer or investor in the loan at any time relevant to this cause of action, LPS' information would necessarily have come from some other undisclosed third party (hearsay). The source of Regional Trustee's referral and the quality of the information it relied upon should have been material to the trial court on summary judgment to establish Regional Trustee's authority to initiate a non-judicial foreclosure and Regional Trustee's compliance with its duties under the DTA – without this referral, Regional Trustee would never have had colorable authority to initiate a foreclosure of Ms. Conner's home in the first instance.

Furthermore, Ms. Kaufman indicates that Regional Trustee relied on an Affidavit of Possession to initiate the subject foreclosure, but fails to provide a copy of the affidavit it relied upon. It is a requisite to a trustee's issuance of a notice of sale that the trustee have in its possession a "declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note." *RCW 61.24.030(7)(a); Lyons* and *Trujillo II.* Apparently this affidavit was not part of Regional Trustee's business records, as would be statutorily required, and the information Ms. Kaufman relied upon to make her Declaration came from another unidentified source (hearsay). This

information is material because without providing the trial court the Affidavit actually relied upon, the trial court could not verify compliance with *RCW 61.24.030(7)(a); Lyons* and *Trujillo II*. Although a copy of an affidavit of possession is attached to the Declaration of Brandley Lee at CP 757, there was no evidence before the trial court that the Affidavit of Possession attached to Mr. Lee's Declaration was identical to the document Ms. Kaufman referred to in her Declaration and the same document relied upon by Regional Trustee to initiate and prosecute the non-judicial foreclosure of Ms. Conner's home, pursuant to *RCW 61.24.030(7)(a)*.

Turning to Mr. Lee's Declaration, he makes the statement that "[i]n June 2006, IMC" (Irwin) sold the loan to Fannie Mae and indorsed the Note in blank", but also testifies that "[e]ffective January 2007, loan servicing transferred to EverBank". CP 717. But, how does he know? His company was not involved in the purported transaction. Mr. Lee does not testify that he has ever seen the original Note, so he cannot testify that he has personal knowledge of whether EverBank actually holds and possesses the Note or whether there is an endorsement on the Note or not. Since EverBank did not come into possession of the Note until 2007, EverBank would necessarily have to rely on the business records of Irwin and Fannie Mae (hearsay) to establish the sale of the loan and transfer,

evidence that was not offered the trial court. The MERS records offered by Mr. Lee, dated March 5, 2013 (hearsay), do not confirm a sale to Fannie Mae, rather a transfer of "beneficial rights" to Fannie Mae, as an "investor" is referenced. CP 743-744. These issues are material because nowhere in his Declaration does Mr. Lee ever state that he has seen the original Note and can verify, based on that personal inspection, that EverBank or Everhome Mortgage actually holds and has possession of the original Note, with endorsement affixed, or not. Certainly, the original Note was never produced at hearing on summary judgment. Rather, Mr. Lee relies entirely on the business records of Irwin, MERS and Fannie Mae and "data compilations, electronically imaged documents, and others" (hearsay). CP 717.

Moreover, neither Ms. Kaufman nor Mr. Lee provide the Court facts that would establish (1) how the documents they refer to are maintained, whether in hard copy or electronic; (2) if the records are maintained by electronic means, whether the computer document retrieval equipment used is standard; (3) the original source of the materials maintained; (4) the identity of person who compiled the information contained in the files or computer printouts; (5) when, aside from the conclusory statements that they were made "at or near the time of the happening or event", the records or the entries were made and (6) and how

the employer of each declarant relies on these records. See *RCW 5.45.020*; *State v. Smith*, 16 Wn.App. 425, 558 P.2d 265 (1976) and *State v Kane*, 23 Wn.App. 107, 594 P.2d 1357 (1979). Without this information, there is no assurance that the information offered by these declarants is reliable absent verification by the entity that provided the information as to the means by which the information was created and maintained. See *State v. Mason*, 31 Wn.App. 680, 644 P.2d 710 (1982). There were simply no facts offered the trial court that would justify the trial court's reliance on the information provided by these declarants.

The sort of careless and conclusory testimony by mortgage lenders and loan servicers has been roundly criticized by other trial courts in Washington. In *McDonald v. OneWest*, 929 F. Supp. 2d 1079 (2013) (hereinafter "*McDonald*"), Judge Robert Lasnik was offered testimony by Mr. Boyle and other representatives of loan servicers on summary judgment like that offered by Mr. Meyers, Mr. Blake and Ms. Campbell here. In *McDonald,* Judge Lasnik observed:

> The testimony of Mr. Boyle and Mr. Corcoran confirmed what this Court has long suspected: defendants have not taken their obligations as litigants in federal court seriously enough. *Rather than obtain declarations from individuals with personal knowledge of the facts asserted or locate the source documents underlying its computer records, defendants chose to offer up what can only be described as a "Rule 30(b)(6) declarant" who regurgitated information provided by other sources.* Rule 30(b)(6) is a rule that applies to depositions in which an opposing party is given the

> opportunity to question a corporate entity and bind it for purposes of the litigation. *A declaration, on the other hand, is not offered as the testimony of the corporation, but rather reflects – or is supposed to reflect – the personal knowledge of the declarant.*
>
> Not surprisingly given the fact that his counsel apparently did not understand the difference between a declaration based on personal knowledge and a Rule 30(b)(6) deposition, Mr. Boyle's declarations consist of sweeping statements, a few of which may be within his ken and admissible, but most of which are assuredly hearsay. When he was asked to sign a declaration in this case, he thought he was responding on behalf of OneWest and therefore felt justified in questioning co-workers, running computer searches, and reviewing other sources before reporting their statements as his own. Nothing in his declarations would alert the reader to the fact that Mr. Boyle was simply repeating what he had heard or read from undisclosed and untested sources. When his statements turned out to be untrue, Mr. Boyle conveniently blames inaccuracies in the underlying documentation, computer input errors, or faulty reporting. Had defendants made the effort to produce admissible evidence in the first place, these errors may have been uncovered and avoided before they could taint the discovery process in this case.

McDonald, 929 F. Supp. at 1090-1091. (Emphasis added). The same criticisms can be lodged against the testimony of Mr. Lee, Ms. Kaufman and Mr. Werich in all forms offered to this Court.

Absent a proper foundation, the testimony of Mr. Lee and Ms. Kaufman constituted rank hearsay that should not have been considered or given any weight by the trial court on summary judgment. CR 56(e), *ER 803(a)(6)* and *RCW 5.45.020.*

C. The Trial Court Erroneously Declined to Address Ms. Conner's DTA Claims.

In its Memorandum Decision of September 22, 2015, the trial court asserted that Ms. Conner "did not plead a violation of the DTA" and declined to provide Ms. Conner "some of the relief for which she has prayed." CP 8. This was patently erroneous. Ms. Conner specifically set out claims against Respondents for several violations of the DTA. CP 1200-1204. Even though there was a sale of the subject property (CP 185-186), Ms. Conner's claims were asserted two months before the second anniversary of the sale and would have been preserved under *RCW 61.24.127.* CP 1269.

RCW 61.24.127 provides, in pertinent part, as follows:

> (1) The failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter may not be deemed a waiver of a claim for damages asserting:
>
> (a) Common law fraud or misrepresentation;
> (b) A violation of Title 19 RCW;
> (c) Failure of the trustee to materially comply with the provisions of this chapter; or
> (d) A violation of RCW 61.24.026
>
> (2) The non-waived claims listed under subsection (1) of this section are subject to the following limitations:
>
> (a) The claim must be asserted or brought within two years from the date of the foreclosure sale or within the applicable statute of limitations for such claim, whichever expires earlier;
> (b) The claim may not seek any remedy at law or in equity other than monetary damages;

(c) The claim may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property;

(d) A borrower or grantor who files such a claim is prohibited from recording a lis pendens or any other document purporting to create a similar effect, related to the real property foreclosed upon;

(e) The claim may not operate in any way to encumber or cloud the title to the property that was subject to the foreclosure sale, except to the extent that a judgment on the claim in favor of the borrower or grantor may, consistent with RCW 4.56.190, become a judgment lien on real property then owned by the judgment debtor; and

(f) The relief that may be granted for judgment upon the claim is limited to actual damages. However, if the borrower or grantor brings in the same civil action a claim for violation of chapter 19.86 RCW, arising out of the same alleged facts, relief under chapter 19.86 RCW is limited to actual damages, treble damages as provided for in RCW 19.86.090, and the costs of suit, including a reasonable attorney's fee

(3) This section applies only to foreclosures of owner-occupied residential real property. (Emphasis added).

Despite clearly articulating various meritorious claims under the DTA, the trial court summarily dismssied Ms. Conner's claims, erroneously believing they had not been plead. On summary judgment, the non-moving parties' allegations must been presumed to be true, but this requires the trial court to be cognizant of the claims in the first place. On this basis alone, the trial court's decision should be reversed and this matter remanded for further hearing.

D. Trustee's Breach of its Duty of Good Faith.

The misconduct outlined in Ms. Conner's Amended Complaint

(CP 1192-1204) demonstrates a callous disregard by Regional Trustee for its duty of good faith. *RCW 61.24.010; Klem v. Washington Mutual Bank,* 176 Wn.2d 771, 790, 295 P.3d 1179 (2012) (hereinafter "*Klem*"); *Lyons.*

Under current Washington law, private trustees, such as Regional Trustee, are obligated by statute, common law and equity to act evenhanded to both sides and to strictly follow the provisions of the DTA. See *RCW 61.24.010; Cox v Helenius,* 103 Wn.2d 383, 388, 693 P.2d 683 (1985)*; Albice v. Premier Mortgages Services of Washington, Inc.*, 174 Wn.2d 560, 790, 276 P.3d 1277 (2012) (hereinafter "*Albice*") ("An independent trustee who owes a duty to act in good faith to exercise a fiduciary duty to act impartially to fairly respect the interest of both the lender and debtor is a minimum to satisfy the statute, the constitution and equity. . ."); *Lyons,* at page 787.

Notwithstanding serious doubts that any named Respondent had standing as an actual holder of the subject obligation to initiate a non-judicial foreclosure against Ms. Conner and the lawfulness of MERS' appointment of Regional Trustee as successor trustee, Regional Trustee engaged in an unethical process of unreasonably relying upon documents provided by third parties, without verification or inquiry, it knew or should have known to be false and misleading. *Lyons*. As noted above, Regional Trustee relied exclusively on the referral from LPS and made no inquiry to

verify the information it received to initiate a foreclosure. CP 654.

By failing to verify any of the records it was provided by LPS to initiate a non-judicial foreclosure (CP 654); relying on an Assignment of Deed of Trust executed by an ineligible beneficiary without verifying MERS' authority (CP 1115-1116); relying on an Appointment of Successor Trustee prepared by the trustee itself without verification of the underlying facts and presumably based on the Assignment of Deed of Trust executed by an ineligible beneficiary (CP 1119-1120); relying on an Affidavit of Possession that was facial ambiguous and based on hearsay (CP 757) and otherwise failing to verify who held the obligation, Regional Trustee breached its duty of good faith by attempting to prosecute a non-judicial foreclosure on Respondents' behalf without strictly complying with all requisites of sale. *RCW 61.24.010(4).* As noted by the Washington Supreme Court in *Lyons*, at page 787:

> A foreclosing trustee must "adequately inform" itself regarding the purported beneficiary's right to foreclose, including, at a minimum, a "cursory investigation" to adhere to its duty of good faith. *Walker*, 176 Wn.App. at 309-10. A trustee does not need to summarily accept a borrower's side of the story or instantly submit to a borrower's demands. But a trustee must treat both sides equally and investigate possible issues using its independent judgment to adhere to its duty of good faith. See *eg., Cox v Helenius,* 103 Wn.2d 383, 388, 693 P.2d 683 (1985). A trustee's failure to act impartially between note holders and mortgagees, in violation of the DTA, can support a claim for damages under the CPA. *Klem,* 176 Wn.2d at 792.
>
> Specifically, under *RCW 61.24.030(7)(a)* a trustee must ensure that

the beneficiary is the holder of any promissory note or other obligation secured by the deed of trust before a notice of trustee's sale is recorded, transmitted, or served. *RCW 61.24.030(7)(a), RCW 61.24.030(8)(l)* and *RCW 61.24.040(2). Lyons,* pages 786 and 789; *Trujillo II; Walker v. Quality Loan Service Corp.*, 176 Wn.App. 294, 319, 308 P.3d 716 (2013) (hereinafter "*Walker*").

With regard to Regional Trustee's compliance with its duty to investigate and verify, it is important to reiterate that during this period of time, Regional Trustee had no procedures in place to verify any of the information it received from its "clients", such as LPS and Everhome Mortgage. See testimony of Deborah Kaufman (CP 593-594, 596, 607, 611-612, 614-615) and Melissa Hjorten (CP 445, 449, 451-452, 453-454, 455-459, 479-480, 482, 488, 491-492, 499-501, 508, 510, 512, 563, 568-569). Clearly, Regional Trustee blindly accepted whatever information was provided by LPS and it's "clients" and failed to engage in the sort of investigation necessary to verify the information it relied upon to initiate non-judicial foreclosures and its duties of good faith described in *Lyons.*

On the basis of the record before the trial court, LPS and Everhome Mortgage called the shots and assumed the authority to start and stop the foreclosure efforts. This was authority not shared with Ms. Conner. As the party in control of the process, Everhome Mortgage

should be as liable for the violations of the DTA as Regional Trustee by application of the doctrine *respondeat superior*. See *Bain v. Metropolitan Mortgage Group*, 175 Wn.2d 83, 285 P.3d 34 (2012) (hereinafter "*Bain*"), *Walker* and *Klem*. See also *Nelson v. Elmview Group Home,* 131 Wn.2d 39, 929 P.2d 420 (1958). Moreover, Everhome Mortgage and Regional Trustee should be held jointly responsible for Ms. Conner's claims under theories of civil conspiracy and joint venture liability subsumed in her claim of joint and several liabilities based upon these facts. See *Gilbrook v. City of Westminster*, 117 F.3d 839, 856 (9th Cir. 1999), *Sterling Business Forms, Inc. v. Thorpe*, 82 Wn.App. 446, 918 P.2d 531 (1996), *Refrigeration Engineering Co. v. McKay*, 4 Wn.App. 963, 486 P.2d 304, 311 (1971) and *Knisely v. Burke Concrete Accessories, Inc.*, 2 Wn.App. 533, 468 P.2d 717, 720-21 (1970). The undisputed fact is that LPS, presumably at the request of Everhome Mortgage, referred this matter to Regional Trustee for foreclosure and controlled the process to the extent that it could start and stop the process and if that referral was wrongful and Everhome Mortgage failed to stop the process, Everhome Mortgage shares in the responsibility of that misconduct along with Regional Trustee and the trial court should have so found.

E. Unfounded Reliance on Affidavit of Possession.

RCW 61.24.030(7)(a) provides as follows:

> That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection. (Emphasis added).

Under *Lyons* and *Trujillo II,* a trustee fulfills its duty of good faith and complies with *RCW 61.24.030(7)(a)* only when it has in its possession an unambiguous sworn statement that the beneficiary is the holder of the obligation. The Affidavit of Possession, that served as a substitute for a beneficiary declaration under *RCW 61.24.030(7)(a)*, failed to comply with the statutory requirements.

An affidavit is a written declaration of facts, voluntarily made and confirmed by the oath of the party making it. *Clay v. Portik,* 84 Wn.App. 553, 929 P.2d 1132 (1979). By an "oath", a declarant attests and affirms the truth of his or her statement. *RCW 9A.72.010(2); Black's Law Dictionary* 1120 (4th ed. Rev. 1978). To "swear" is to "put on oath" and declare the truth of a statement offered under oath. *Black's Law Dictionary* 1617 (4th ed. Rev. 1978). Indeed, false statements contained in either an affidavit or declaration would subject the declarant to prosecution for perjury. *RCW 9A.72, et seq.* See *GR 13* and *RCW 9A.72.085.* Moreover, it is axiomatic that in addition to being true, sworn

statements issued to fulfill statutory obligations such as *RCW 61.24.030(7)(a)* must also comply with the Rules of Evidence. *Kaye v. Department of Licensing*, 34 Wn.App. 132, 359 P.2d 548 (1983); *In re the Marriage of Morrison*, 26 Wn.App. 571, 613 P.2d 557 (1980) (hearsay evidence in sworn statements in inadmissible and may not be considered by the court).

Accordingly, a beneficiary declaration that is ambiguous or contains hearsay cannot fulfill the requirements of *RCW 61.24.030(7)(a)* and cannot be relied upon by a foreclosing trustee unless the trustee has investigated and confirmed that the beneficiary/declarant is, in fact, the holder of the obligation prior to issuing its notice of sale. *Lyons* and *Trujillo II.*

Here, the subject Affidavit of Possession (CP 757), signed under oath by Michele de Craen, provides as follows:

> The undersigned, having been duly sworn, deposes and says the following:
>
> * * *
>
> In my capacity as Assistant Vice President of Everhome Mortgage Company I have either personal knowledge of the facts set forth in this Affidavit **or** have made appropriate inquiry of those individuals having knowledge of the facts set forth in this Affidavit. (Emphasis added) CP 757.

Well, which is it? Is the Affidavit of Possession based on personal knowledge, as it would need to be under the authority cited above and *CR 56(e),* or is it based upon hearsay, inadmissible under *ER 802*? If the statements are based on hearsay, there was no evidence before the trial court to indicate who may have been consulted or the basis of their information or knowledge and no way for the trial court to evaluate the credibility of the information offered.

To the extent it is impossible to determine the source of Ms. Craen's information, the Affidavit of Possession is ambiguous on its face and could not reasonably be relied upon Regional Trustee to establish Everhome Mortgage to be the holder of the obligation or otherwise to comply with its duties under *RCW 61.24.030(7)(a).* See *Lyons* and *Trujillo II.* To the extent Regional Trustee failed to investigate and verify the information contained in the Affidavit of Possession to determine who actually held the subject Note, Regional Trustee violated the DTA and its duty of good faith. *Lyons* and *Trujillo II.* This was one of the many violations of the DTA that the trial court ignored, erroneously believing it had not been plead. CP 8. The remedy for this error is reversal and remand to the trial court for further hearing.

F. Claims for violation of the CPA.

While damages for pre-sale violations of the DTA are not

recoverable, a CPA claim may be maintained regardless of the status of the property. *Frias v. Asset Foreclosure Services, Inc.,* 181 Wn.2d 412, 417, 334 P.3d 529 (2014); *Lyons,* at page 784.

The elements of a claim under the CPA include the following: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation. *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wn.2d 778, 719 P.2d 531 (1986), *Frias, Lyons, Walker* and *Bavand.* The CPA should be "liberally construed that its beneficial purposes may be served." *RCW 19.86.920; Short v. Demopolis,* 103 Wn.2d 52, 691 P.2d 163 (1984). In *Lyons,* the court held that when a CPA claim is predicated on an alleged violation of the DTA, a question of fact is automatically created if the issue is disputed. *Lyons*, at pages 786-787. Here, each element of the CPA claim are in dispute.

i. Unfair and Deceptive Acts.

As noted in *Bain,* the unfair and deceptive act or practice element can be presumed based upon MERS' business model and the manner in which it has been used.[2] *Bain* at pages 115-117; *Klem,* at pages 784-788;

[2] This is in accord with other case law in Washington. An unfair or deceptive act can include misrepresentations of facts related to the legal status of a debt. *Panag v. Farmers Ins. Co. Of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009) (hereinafter "*Panag*") (deceptive methods used by a collection agency to recover money on behalf of an insurance company). See also *Klem.*

Walker, at pages 318-319 and *Bavand,* at pages 504-506. The acts need not be made with an intent to deceive, merely that the acts in question have the capacity to deceive a substantial portion of the public. *Panag.* Indeed, the improper assignment of the obligation by MERS and appointment of Regional Trustee based upon that assignment, among other violations of the DTA alleged herein, constitute unfair and deceptive acts or practices. *Walker*, at pages 319-320, and *Bavand*, at page 505.

The *Bain* court specifically held that a homeowner might have a CPA claim against MERS if MERS acts as an ineligible beneficiary. *Bain* at pages 115-120. MERS' undisputed execution of its Assignment of Note and Deed of Trust (CP 1115-1116) as an ineligible beneficiary constituted an unfair and deceptive act in that it prepared, executed and filed for record a document that it had no authority or right to prepare, execute or file. *Bain.* Certainly, the source of MERS apparent authority was not addressed by Respondents on summary judgment, if it existed at all. The existence and scope of MERS' authority was a genuine issue of material fact in dispute on summary judgment ignored by the trial court. But for this Assignment, Respondents could not have initiated and prosecuted a non-judicial foreclosure of Ms. Conner's home.

The *Lyons* court held that a trustee's failure to act impartially, in violation of its fiduciary duty of good faith under *RCW 61.24.010(4)* as

Regional Trustee did here, is actionable under the CPA as an unfair and deceptive act or practice. *Lyons,* at page 788-789. Specifically, Regional Trustee's failure to verify the information contained in the facially ambiguous Affidavit of Possession to determine the identity of the "holder's" or "beneficiary's" right to foreclose constitutes an unfair and deceptive act and practice. See *Lyons,* at page 786-787. Here, notwithstanding serious doubts regarding whether any named Respondents had standing as actual holder of the subject obligation to initiate a non-judicial foreclosure against Ms. Conner, and the lawfulness of Everhome Mortgage Company's appointment of Regional Trustee as successor trustee, Regional Trustee engaged in an unethical process of unreasonably relying upon documents it knew or should have known to be false, deceptive and misleading. By failing to verify any of the records it was provided by Respondents to initiate a non-judicial foreclosure; relying on an Assignment of Deed of Trust executed by an ineligible "beneficiary" (CP 1115-1116); relying on an Appointment of Successor Trustee executed by an entity that was merely a servicer without verifying its authority and otherwise failing to verify the ownership of the obligation (CP 1119-1120); and issuing its Notice of Default (CP 1088-1091) misrepresenting the ownership of Ms. Conner's Note and Deed of Trust, Regional Trustee breached the "fiduciary duty of good faith" by

attempting to prosecute a non-judicial foreclosure on Ms. Conner's home without strictly complying with all requisites of sale. This misconduct constitutes unfair and deceptive acts and practices. *Lyons,* at page 786-787. The extent of Regional Trustee failure to act in good faith was a material issue of fact in dispute on summary judgment.

ii. Affecting the public interest.

As noted in *Panag,* "the business of debt collection affects the public interest." *Panag,* at page 54. Therefore, there is no dispute that Respondents' misconduct affect the public interest. Moreover, the conduct complained of here has occurred on numerous occasions before. CP 188-239.

iii. Damages and Causation.

As noted in *Frias,* at page 417, since "the CPA addresses 'injuries' rather than 'damages,' quantifiable monetary loss is not required" in a CPA claim for violation of the DTA, citing *Panag*, at page 58. *Frias,* at page 431. Comparing a DTA claim to an unlawful debt collection action, the *Frias* court noted: "[a] CPA plaintiff can establish injury based on unlawful debt collection practices even where there is no dispute as to the validity of the underlying debt. [citing *Panag* at 55-56, & n. 13.] Where a business demands payment not lawfully due, the consumer can claim injury for expenses he or she incurred in responding, even if the consumer

did not remit the payment demanded. . . . The injury element can be met even where the injury alleged is both minimal and temporary." *Frias,* at page 431. Accordingly, Ms. Conner established a claim for injury and damage for Respondents' violations of the DTA, even without challenging the underlying debt. Such claims could include threatened loss of title, impact on credit and legal fees. *Frias,* at page 432.

Respondents argued on summary judgment that Ms. Conner has either not been damaged, since she has enjoyed the subject property without making payment,[3] or is otherwise responsible for her own injuries and damages and was not entitled to relief from the trial court. However, as noted in *Panag*, pages 55-56: "a person's blameworthiness . . . is not relevant in deciding whether a collection practice is unfair or deceptive: the focus is on the conduct of the collection agency, not the alleged debtor." See also *Frias.* Accordingly, the fact that Ms. Conner may have missed payments should not diminish or prejudice her claims under the CPA.

In addition to her claims for declaratory relief, injunctive relief and damages, Respondents deceived and prevented Ms. Conner from meaningfully pursuing her options under the federal Home Affordable

[3] This argument ignores the fact that Ms. Connor has made substantial payment (approximately $93,286.69 as of July 31, 2015) into the Court Registry. CP 135.

Modification Program (HAMP) or the FFA (*RCW 61.24.163*). Specifically, Defendants violated *RCW 61.24.030(8)(l)* by failing to provide contact information for Fannie Mae in the Notice of Default. (CP 172-178). Accordingly, Ms. Conner had no meaningful way of contacting the purported owner of her obligation. Had she been given the proper contact information, Ms. Conner could have pursued Fannie Mae sponsored programs that might have provided them a modification of her loan. Fannie Mae borrowers are eligible to a modification of the loan when: "(1) you are ineligible to refinance; (2) you are facing a long-term hardship; (3) you are behind on your mortgage payments or likely to fall behind soon; (4) your loan was originated on or before January 1, 2009 (i.e., the date you closed your loan)' and (5) your loan is owned by Fannie Mae or Freddie Mac – or is serviced by a participating mortgage company."[4]

Unfortunately, Ms. Conner did not become aware of Fannie Mae's involvement until well after she was allegedly thousands of dollars in arrears, making any modification at that time problematic. Respondents all participated in concealing Fannie Mae's involvement in Ms. Conner's loan and colluded in leading Ms. Conner to believe she did not have options under the federal programs, when, in fact, the opposite was true.

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[4] http://www.knowyouroptions.com/modify/home-affordable-modification-program

As a direct and proximate result of Respondents' misconduct, Ms. Conner totaled her injuries and damages as of June 27, 2014 at approximately $15,350.00. CP 365-366. Her injuries and damages have increased since that time, but Ms. Conner's testimony was certainly specific enough for summary judgment purposes under *Frias, Lyons* and *Panag*, where it is the existence of a material issue of fact in dispute that is germane.

Injury to a person's business or property is broadly construed and in some instances, where "no monetary damages need be proven, and that non-quantifiable injuries, such as loss of goodwill would suffice for this element of the *Hangman Ridge* test." *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987); *Klem. Lyons,* at page 9, ftn 4. The expenditure of out-of-pocket expenses for postage, parking, and consulting an attorney are sufficient proof of an injury under *Hangman Ridge, supra. Panag,* at pages 59-65. Thus, "investigation expenses and other costs" establish injury and are compensable under a CPA claim. *Panag* at page 62. Other injuries may include injury to financial reputation or professional goodwill. *Physicians Insurance Exchange & Association v. Fisons, Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993), citing to *Nordstrom, Inc, v. Tampourlos*, 107 Wn.2d 735, 733 P.2d 208 (1987), *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 792 P.2d 142

(1990), and *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 554 P.2d 1041 (1976) (holding that injury to one's credit reputation constitutes injury).

Here, Ms. Conner had to repeatedly take time off from work at a loss of wages and incurred travel expenses to consult with an attorney to dispel uncertainty regarding the ownership of her Note, prepare and incur the expense of obtaining an Audit to address Respondents' misconduct. Such damages have been found to be compensable under Washington law. CP 248-399. See *Lyons* and *In re Meyer,* 506 B.R. 533 (2014).

All of the injuries and damages alleged by Ms. Conner were the direct and proximate cause of Respondents' misconduct, including Regional Trustee, Everhome Mortgage and MERS, and viewing the evidence in a light most favorable to the non-moving party, all five elements for a private cause of action under the CPA were met.

Unfortunately, the trial court did not reach Ms. Conner's CPA claims under *Frias, Lyons* and *Trujillo II,* because it mistakenly believed Ms. Conner had not plead claims under the DTA. CP 8. This error can only be remedied by reversal and remand.

G. Ms. Conner's Request for Relief under *CR 56(f)*.

In view of Ms. Kaufman's and Mr. Lee's incompetent testimony and Respondents failure to answer her Amended Complaint, Ms. Conner

requested relief under *CR 56(f)*. CP 79-85. The relief requested was denied by the trial court.

As noted above, there were numerous material issues of fact raised by the testimony offered by Respondents on summary judgment that could not be adequately addressed without additional discovery. To address the outstanding issues, Ms. Conner, through counsel, requested the following:

> To address the outstanding issues of fact regarding who the true and lawful owner and actual holder of the subject obligation might be and who may have directed the foreclosure of the above-named Defendants, Plaintiff requests a continuance of the hearing on summary judgment to conduct additional discovery, to include interrogatories, requests for production and *CR 30(b)(6)* depositions to address, without limitation, the following:
>
> A. The identity of each and every owner of the Note and Deed of Trust from signing until the present. With regard to each owner identified:
>
> a. The date such party acquired ownership of the Note and Deed of Trust.
>
> b. The amount of consideration paid for the Note and Deed of Trust by each owner so identified.
>
> c. The form of the consideration paid.
>
> d. The date upon which the consideration was paid.
>
> e. The source of funds paid for ownership of the subject Note and Deed of Trust.
>
> f. The identity of each and every agent retained by each owner identified and the terms of said agency relationship.
>
> B. Production of any and all document(s) related to the

purchase and sale and/or assignment and/or transfer of the subject Note and Deed of Trust by each of the owners identified above, including, without limitation, evidence of the date, form and source of funds used to purchase the subject Note and Deed of Trust by each owner identified.

C. The identity of each and every holder or party in possession of the Note from signing until the present. With regard to each such holder identified:

a. The first date the Note was held or possessed.

b. The date of signing of any contracts related to the holding or possession of the Note.

c. The identity of each and every agent retained as custodian or other entity possessing the Note and Deed of Trust by each holder identified and the terms of said relationship.

D. Production of any and all document(s) identified above in response to the foregoing information regarding holders, including, without limitation, evidence of the date, form and terms of any agency or custodial relationship.

E. Production of Plaintiff's original note, bearing endorsements, deed of trust and their chain of custody since it was executed. CP 84-85.

These were all reasonable areas of inquiry in view of the issues on summary judgment.

The Rules of Civil Procedure are to be liberally construed in order that full discovery proceedings will be afforded in all instances where factual inquiries are in order. *Barnum v. State*, 72 Wash. 2d 928, 435 P.2d 678 (1967). The scope of discovery under the Rules of Civil Procedure is broad and is subject to narrow exceptions. *Hertog v. City of Seattle*, 88

Wn.App. 41, 943 P.2d 1153 (1997). "Good cause" for discovery is present if the information sought is material to the party's trial preparation. The justification for specific discovery requests is ordinarily satisfied by a factual allegation showing that the requested information is necessary to establishment of the party's claim or that denial of the information would work a hardship or injustice on the party. *Id.* The limitations on discovery presented by recognized privileges or defined in the discovery rules remain narrow because the right to discovery under the Washington Constitution is tied to the fundamental right of access to the courts. *Lowy v. PeaceHealth*, 174 Wash. 2d 769, 280 P.3d 1078 (2012).

The trial court's refusal to provide Ms. Conner additional time to conduct discovery on the areas of inquiry outlined in her Motion for Continuance (CP 79-85) pursuant to *CR 56(f),* particularly in view of Respondents failure to answer her Amended Complaint until a month before the hearing on summary judgment (CP 62), constituted manifest error for which reversal is the remedy.

IV. CONCLUSION

The trial court's summary judgment was entered despite the existence of disputes regarding issues of fact. The trial court ignored the incompetency of Respondents' witnesses, who clearly had no personal and testimonial knowledge of the matters they were testifying to, in violation

of *RCW 5.45.020* and *CR 56(e),* and contained inadmissible evidence which could have been challenged through discovery, had it been allowed under *CR 56(f).* The trial court ignored Ms. Conner's DTA and CPA claims, erroneously believing they had not been plead (CP 8) and excused Respondents from their responsibility to clearly establish their factual and legal entitlement to summary judgment and to foreclose on the Ms. Conner's home. Reversal is the remedy.

Moreover, Ms. Conner should be awarded taxable costs and attorney's fees on appeal, pursuant to *RAP 18.1,* based on the terms of the subject Deed of Trust. CP 161.

REPECTFULLY SUBMITTED this 4th day of March, 2016.

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CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury under the laws of the State of Washington that on March 4th, 2016, I caused to be served a true and correct copy of the foregoing Opening Brief on the following party(ies) and in the manner(s) indicated:

Wesley Werich, WSBA No. 38428	____	Facsimile
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SIGNED this 4th day of March, 2016, at Bellevue, Washington.

Dan L. Williams
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