No. 73951-4

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

WILMINGTON TRUST NATIONAL ASSOCIATION, AS SUCCESSOR TRUSTEE TO CITIBANK, N.A., AS TRUSTEE FOR THE MERRILL LYNCH MORTGAGE INVESTORS TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-HE2,

Plaintiff-Respondent,

v.

CAROL A. WERELIUS AND JAY L. WERELIUS,

Defendants-Appellants.

ANSWERING BRIEF OF RESPONDENT WILMINGTON TRUST NATIONAL ASSOCIATION, AS SUCCESSOR TRUSTEE TO CITIBANK, N.A., AS TRUSTEE FOR THE MERRILL LYNCH MORTGAGE INVESTORS TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2007-HE2

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I. INTRODUCTION

Appellants, Carol and Jay Werelius, seek to vacate a Judgment and Decree of Foreclosure based on an unsupported assertion that the trial court erred by considering the original promissory note (the "Note") during oral argument on Respondent's Motion for Summary Judgment. Yet they ignore the fact that Respondent had laid a proper foundation for the Note – as well as the evidence that the Note was in counsel's possession – through a sworn affidavit and accompanying exhibits, including a true and correct copy of the Note, served on the Wereliuses fifty-six days prior to the scheduled hearing. Even if the trial court erred in considering the original Note during oral argument (the court did not err), the error was harmless because the evidence was cumulative in nature and would not have affected the trial court's decision.

Though not identified as an assignment of error, the Wereliuses also argue on appeal that the trial court erred by failing to rule on their Motion to Dismiss though they never properly noted the motion for hearing. Also not listed as an assignment of error, but raised for the first time on appeal, the Wereliuses claim they did not receive proper notice of Respondent's Motion for Summary Judgment, though they were served with the Motion and supporting documents fifty-six days prior to the scheduled hearing. In sum, the Wereliuses ask this Court to find

procedural error where no error exists. This Court should disregard the Appellants' arguments and uphold the trial court's ruling.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court err in considering the original promissory note during oral argument on the Respondent's Motion for Summary Judgment? **No.**

2. Assuming, *arguendo*, that the trial court erred in considering the original promissory note at oral argument, was the error harmless? **Yes.**

3. Was the trial court obligated to consider the Wereliuses' Motion to Dismiss even though they failed to properly note the motion for hearing? **No.**

4. Where the Respondents filed, served, and noted their Motion for Summary Judgment fifty-six calendar days prior to the hearing, were Appellants provided proper notice of the hearing under CR 56? **Yes.**

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III. COUNTERSTATEMENT OF THE CASE

The underlying facts and procedure pertinent to this appeal are as follows:

A. The Wereliuses Obtain a Loan to Purchase Real Property.

On or around September 15, 2006, Carol A. Werelius and Jay L. Werelius obtained a loan (the "Loan") from Option One Mortgage Corporation to finance real property (the "Property"). (CP 3, ¶ 4.1; CP 156-162.) The Loan is evidenced by a promissory note ("Note") signed by the Wereliuses in favor of Option One Mortgage Corporation in the original principal amount of $498,750.00. (*Id.*) The Note was secured by a deed of trust ("Deed of Trust") on the Property. (CP 3, ¶ 4.2; CP 164-175.) On December 1, 2010, the Wereliuses executed a Loan Modification Agreement, increasing the principal balance to $617,326.86. (CP 4, ¶ 4.4; CP 183-187.)

Respondent, Wilmington Trust National Association, as Successor Trustee to Citibank, N.A., as Trustee for the Merrill Lynch Mortgage Investors Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-HE2 (the "Trust"), eventually became the beneficiary of the Note and Deed of Trust, as documented by an Assignment of Deed of Trust recorded on June 7, 2013. (CP 4, ¶ 4.7; CP 181.)

B. The Wereliuses Default on the Loan and the Trust Forecloses

The Wereliuses failed to make the monthly payment due on January 11, 2011, and failed to make any payments on the Loan thereafter. (CP 152, ¶ 11.) On February 18, 2011, the Wereliuses were provided written notice that they were in default and that, to avoid foreclosure, they should bring their payments current by March 25, 2011. (CP 152, ¶ 11; CP 189.) The Wereliuses failed to cure the default. (CP 152-153, ¶ 11.) Consequently, on July 11, 2014, the Trust filed a complaint in King County Superior Court seeking (1) to reform the Deed of Trust by correcting an error within the legal description and (2) to foreclose on the Property securing the Loan (the "Complaint"). (CP 1-11.)

In response to the Complaint, the Wereliuses filed a Verified Motion to Dismiss Complaint ("Motion to Dismiss") on August 29, 2014. (CP 76.) The Motion to Dismiss essentially made three arguments. First, the Wereliuses argued that the Note was non-negotiable, and could not have been transferred by mere endorsement. (*Id.*) Second, they argued that the "note and mortgage were bifurcated the moment the mortgage was recorded as it names Mortgage Electronic Registration Systems, Inc., as nominee." (*Id.*) Lastly, the Wereliuses claimed the Note did not exist, as it had either been "lost, stolen, mutilated, destroyed or spent or exchanged

for other value or consideration." (*Id.*) The Wereliuses also stated that they had "destroyed or disposed of the note." (CP 76-77.) Though the Wereliuses filed the Motion to Dismiss, they did not note the matter for a hearing in 2014. Consequently, the matter was not considered by the Court.

On October 30, 2014, the Trust filed a Motion for Order of Default against the Wereliuses and other remaining defendants[1], noting the hearing for November 10, 2014. (CP 84-85; CP 108-109.) The Wereliuses filed a Motion for Enlargement of Time, requesting additional time to "evaluate this claim, retain legal representation, continue their attempt to work out a Loan Modification...and file an appropriate response, or counterclaim." (CP 110-111.) In addition, the Wereliuses filed a Motion to Set Aside Entry of Default. (CP 116.) On November 10, 2014, the trial court granted an Order of Default against all remaining parties except the Wereliuses.[2]

The Trust, through counsel, later confirmed that the Wereliuses were being considered for a loan modification and, in fact, were offered a loan modification. (CP 199, ¶ 6.) However, the Wereliuses did not accept

[1] In addition to the Wereliuses, the Complaint identified the Internal Revenue Service and All Persons or Parties Unknown Claiming any Right, Title, Lien, or Interest in the Property Described in the Complaint, as defendants in this action. (CP 1).

[2] Though the Wereliuses did not file an Answer in this action, the record reflects that the lower court deemed their Motion to Dismiss to be an Answer and accordingly denied the Trust's Motion for Default as to the Wereliuses only. (CP 199, ¶ 4).

the loan modification and, in June 2015, the Trust chose to move forward with litigation by filing and serving a Motion for Summary Judgment. (CP 198-200.)

C. The Trust Presents Evidence in Support of a Motion for Summary Judgment

On June 10, 2015, the Trust filed a Motion for Summary Judgment ("MSJ"). (CP 285, 291-298.) The motion was supported by the sworn affidavit of Andres Fernandez, the Contract Management Coordinator of Ocwen Loan Servicing, LLC, the loan servicer for the Trust ("Fernandez Affidavit"). (CP 299-302.) In the affidavit, Mr. Fernandez testified that he is "familiar with the business records maintained by [the servicer] and [the Trust] for the purpose of servicing mortgage loans, including records maintained by any sub-servicer and/or prior servicers of the loan at issue." (CP 300, ¶ 2.) He further testified that he "personally reviewed the business records related to [the Wereliuses'] loan prior to executing the affidavit," including review of the Note and Deed of Trust. (CP 300, ¶ 3.) Mr. Fernandez identified a copy of the Note, attached to the Affidavit as Exhibit A. (CP 300, ¶ 5; CP 304-311.) The Note had been duly endorsed, and delivered to the Trust. (CP 300, ¶ 5; CP 311.) Consequently, the Fernandez Affidavit established that the Trust was the "holder" of the Note pursuant to RCW 62A. 1-201(b)(21)(A).

In addition to the Fernandez Affidavit, the Trust's counsel, Tiffany Owens, filed a declaration in support of the MSJ ("Owens Declaration") stating that the Trust had forwarded to counsel its original collateral file, and that the original Note would be available for the trial court's inspection at the hearing on the MSJ. (CP 290, ¶¶ 2, 3.)

The Wereliuses opposed the MSJ on several grounds. They argued that the motion was untimely due to the fact that the Court had never ruled on the Werelius' Motion to Dismiss (which had never been noted for hearing). (CP 261.) They also challenged the admissibility and relevance of the Fernandez Affidavit and Owens Declaration (CP 262.), but provided no authority or other explanation for why the submissions were improper.

In support of their opposition, the Wereliuses submitted an Affidavit from Carol Werelius, which asserted that various "exhibits attached to the pleading do not contain my signature and they are not exhibits I have ever signed." (CP 265.) Ms. Werelius further claimed, "[a]fter careful review of these exhibits, it appears to me that at least the note was substantially altered by more than one individual at different times since the origin date appearing on its face." (*Id.*) She reiterated her objection to jurisdiction, arguing that the "defendants' motion to dismiss is still pending and the plaintiff has failed to object or file any response." (CP 265-266.)

Jay Werelius also executed an affidavit on June 16, 2015, claiming that he had never signed the Note or Deed of Trust, and had never agreed to their terms. (CP 267.) The Wereliuses inexplicably made these claims though they had previously acknowledged seeking a loan modification. (CP 110, ¶ 1.)

On June 18, 2015, the Trust filed and served its MSJ, noting the matter for oral argument on August 13, 2015 –fifty-six days later. (CP 285, 287-288.) On August 10, 2015, the Wereliuses finally noted their Motion to Dismiss for a hearing on the same date as the MSJ. (CP 343.)

D. The Court Grants the Trust's Motion for Summary Judgment and Defendants Appeal

On August 13, 2015, the trial court heard oral argument on the Trust's MSJ. (CP 345.) During the course of the hearing, the Trust's counsel presented the original Note for the court's consideration. (RP 3:1-6.) The court reviewed the original Note and commented that a copy of the Note had previously been provided as plaintiff's Exhibit A. (RP 5:8-12.)

The Wereliuses argued that the MSJ was premature because the court had not ruled on their Motion to Dismiss. (RP 7:12-14, 8:11-13.) They further argued that it was improper to consider the original Note at the hearing, stating, "for the moving party to bring it forward today, it

should not be included in this hearing."[3] (RP 9:7-9.) The trial court informed the Wereliuses that the Motion to Dismiss had not been properly noted for hearing, but that the court would consider it as a response to the Trust's MSJ. (RP 8:5-8.)

At the conclusion of oral argument, the trial court granted the Trust's MSJ and denied the Wereliuses' Motion to Dismiss. (CP 345, 499.) On August 25, 2015 – twelve days after the trial court's ruling – the Wereliuses filed a Motion to Set Aside or Vacate Summary Judgment. (CP 406.) On October 12, 2015, the trial court entered a Judgment and Decree of Foreclosure in favor of the Trust. (CP 484-488.) The Wereliuses filed a Notice of Appeal on October 26, 2015. (CP 496.)

IV. STANDARD OF REVIEW

This Court reviews a trial court's order de novo, engaging in the same inquiry as the trial court. *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 787, 108 P.3d 1220 (2005). A motion for summary judgment will be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Scott v. Pac. W. Mt. Resort*, 119 Wn.2d 484, 502-503, 834

[3] The Wereliuses also raised an argument regarding assignment of the Deed of Trust to the Trust. The Court considered this argument and held in favor of the Trust on this matter. (RP 9:11-23, 10:23-25, 11:1-7.) Regardless, the issue is not addressed in the Wereliuses' appeal.

P.2d 6 (1992). "A material fact is one that affects the outcome of the litigation." *Owen*, 153 Wn.2d at 789.

The moving party bears the burden of demonstrating the absence of any genuine issue of material fact. *Knox v. Microsoft Corp.*, 92 Wn. App. 204, 207, 962 P.2d 839 (1998). Once the moving party produces evidence showing the absence of disputed material facts, the burden shifts to the nonmoving party to produce evidence setting forth facts showing a genuine issue for trial. CR 56(e). The nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value." *Discover Bank v. Bridges*, 154 Wn. App. 722, 727, 226 P.3d 191 (2010)(citing *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)).

This Court may affirm a summary judgment order on any ground supported by the record. *Blue Diamond Grp., Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 453, 266 P.3d 881 (2011).

V. ARGUMENT

The Wereliuses identify two assignments of error on appeal. (Opening Br. at 6.) However, both assignments address the same argument: that presentation of the original Note during the August 13, 2015, hearing was improper because it constituted new evidence not

previously disclosed. (*Id.*) This argument fails for a number of reasons. First, the original Note was not new evidence: a true and correct copy of the Note had been provided well in advance of the hearing, and a foundation was properly provided through sworn affidavit. Second, even if, for the sake of argument, the trial court erred in considering the original Note during oral argument, the error was harmless because the evidence was cumulative in nature and would not have affected the trial court's ruling.

Though not raised as assignments of error in their Opening Brief, the Wereliuses also argue that the Trust's MSJ was improper because the trial court had not yet ruled on their Motion to Dismiss, and that the Trust did not provide proper notice of the MSJ hearing. (*Id.* at 11, 14.) These arguments have no merit as the Trust's notice of the MSJ hearing was appropriate; and conversely, the Wereliuses never provided timely notice of a hearing on their Motion to Dismiss.

A. Consideration of the Original Note at Oral Argument was Proper because the Trust had Previously Disclosed a True and Correct Copy through Sworn Affidavit.

The Trust submitted a true and correct copy of the Note as an exhibit to the Fernandez Affidavit disclosed in conjunction with the Trust's MSJ. Because the Fernandez Affidavit and accompanying exhibits comply with CR 56(e) and Washington's business records statute, RCW

5.45.020, the trial court acted well within its discretion in considering the Note in evidence. Accordingly, the Wereliuses' assertion – that the original Note constitutes admission of new evidence – is faulty as the original Note was simply demonstrative of admissible evidence already submitted in support of the MSJ.

Statements within affidavits, based on review of business records, satisfy the requirements for CR 56(e) if they satisfy Washington's business records statute, RCW 5.45.020. *See Barkley v. Greenpoint Mortgage Funding, Inc.*, 190 Wn. App. 58, 67, 358 P.3d 1204 (2015). The business records statute is satisfied –

> if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020.

Washington courts have upheld declarations submitted in support of summary judgment where the documents comply with Washington's business records statute. For example, in *Barkley*, the plaintiff objected to declarations of bank and trustee officers submitted in support of the defendant's motion for summary judgment. 190 Wn. App. at 66. The appellate court held that the trial court properly considered the

declarations and attached business records because they complied with RCW 5.45.020. Specifically, the officers "had declared under penalty of perjury that (1) they were officers of [their respective companies], (2) they had personal knowledge of their company's practice of maintaining business records, (3) they had personal knowledge of their own review of records related to [the plaintiff's] note and deed of trust; and (4) the attached records were true and correct copies of documents made in the ordinary course of business at or near the time of the transaction." *Id.* at 67.

In the present case, the trial court could properly rely upon the Fernandez Affidavit and accompanying exhibits based on the same standards outlined in *Barkley*. Specifically, Mr. Fernandez testified that he was the Contract Management Coordinator of the Trust's loan servicer and had personal knowledge of the loan servicer's and the Trust's practice of maintaining records. (CP 150, ¶ 1; CP 151, ¶ 2.) Further, Mr. Fernandez testified that he had personally reviewed the records related to the Wereliuses' loan, and identified a true and correct copy of the Note. (CP 151, ¶¶ 3-5, Exhibit A.) Accordingly, the Fernandez Affidavit complies with RCW 5.45.020, and the trial court appropriately considered the Affidavit and accompanying exhibits, including the Note.

To the extent the Wereliuses may claim that the original Note tendered at oral argument and the true and correct copy previously provided by affidavit are somehow substantively different, the Wereliuses provided no evidence to the trial court to support this notion. It is well established in Washington that parties opposing summary judgment may not rely on speculation or argumentative assumptions. See, *Doty-Fielding v. Town of South Prairie*, 143 Wn. App. 559, 566, 178 P.3d 1054 (2008); see also, *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). As such, this Court should uphold the trial court's ruling and deny the Wereliuses' claims on appeal.

B. Even if Consideration of the Original Note Amounted to Error (it did not), the Error was Harmless.

Even assuming *arguendo* that the trial court erred in considering the original Note during oral argument, the error was harmless because the evidence was cumulative in nature and would not have affected the court's ruling. The Trust timely submitted a true and correct copy of the Note as an exhibit to the Fernandez Affidavit in support of the MSJ, and the Wereliuses provided no objection with adequate specificity to dispute these documents. Consequently, even if the trial court refused to consider the original Note at the hearing, the Trust's MSJ would have prevailed.

An evidentiary error without prejudice is not a basis for reversal. *Brown v. Spokane County Fire Protection Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983) (citing *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). "Error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial." *Brown*, 100 Wn.2d at 196 (citing, *James S. Black & Co. v. P & R Co.*, 12 Wn. App. 533, 537, 530 P.2d 722 (1975)).

Thus, Washington courts have found that the admission of inadmissible evidence is harmless error where the evidence is cumulative of other, substantively similar, admissible evidence. For example, in *Brown*, the petitioner argued that portions of an audio recording presented at trial should have been excluded as hearsay. 100 Wn.2d at 195. The Washington Supreme Court held that, though the testimony was admitted in error, it was harmless because the recording was cumulative in nature and was consistent with non-hearsay testimony presented at trial. *Id.* at 196.

In this case, as in *Brown*, even if presentation of the original note at oral argument amounted to inadmissible evidence, it was cumulative in nature because a true and correct copy of the Note had been provided by

sworn affidavit in compliance with CR 56(e) and Washington's business records statute.[4]

Even so, if the Wereliuses claim that the Fernandez Affidavit and accompanying exhibits are also inadmissible, they did not preserve this issue for appeal because they did not raise it with adequate specificity before the trial court. Evidentiary objections must be timely and specific. ER 103; *DeHaven v. Grant*, 42 Wn. App. 666, 669, 713 P.2d 149 (1986). Failure to raise an objection at the trial court precludes a party raising the issue on appeal. *DeHaven*, 42 Wn. App. at 669 (citing *Symes v. Teagle*, 67 Wn.2d 867, 873, 410 P.2d 594 (1966); *State ex rel. Partlow v. Law*, 39 Wn. App. 173, 178, 692 P.2d 863 (1984)). Even if objection is made, "a party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial." *DeHaven*, 42 Wn. App. at 669 (citing *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985); *State v. Boast*, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976)).

One may argue that the Wereliuses preserved their objection by stating, within their "Opposition to Untimely Motion for Summary Judgment," that "Plaintiff has filed no affidavit containing relevant or

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[4] *See also Deutsche Bank Nat. Trust Co. v. Slotke*, 192 Wn. App. 166, 173, 367 P.3d 600 (2016) (Ruling that the "holder" of the delinquent note is entitled to judicially foreclose upon the mortgage). The *Slotke* court also noted that the bank presented the original note at the hearing on summary judgment and that "[t]his was sufficient to prove the bank's status as holder of [the defendant's] delinquent note." *Id.* at 175.

admissible facts by a competent fact witness in support of the untimely motion. (CP 262.) But the Wereliuses provided no authority or explanation for the challenge whatsoever. Nor did they raise objection to the Fernandez Affidavit and accompanying exhibits at oral argument or in a subsequent "Motion to Set Aside or Vacate Summary Judgment."[5] (CP 406.) In sum, to the extent the Wereliuses claim objection to the Fernandez Affidavit and accompanying exhibits – including the Note – the Wereliuses did not provided adequate specificity that would enable the trial court to fairly evaluate the objection. Accordingly, even assuming the trial court erred in considering the original Note, the error was harmless because it was cumulative of previously admitted evidence, and this Court should uphold the trial court's ruling.

C. The Court Had No Obligation To Consider The Wereliuses' Motion To Dismiss And The Trust Was Not Required to Respond.

Though not presented as an assignment of error, the Wereliuses also assert on appeal that the trial court erred by considering the Trust's MSJ before considering the Wereliuses' Motion to Dismiss. (Opening Br.

[5] The Wereliuses also submitted affidavits asserting that the Trust's exhibits appear altered, and that they had never signed the documents. (CP 265, 267.) The Wereliuses made this claim though they previously acknowledged attempting to seek a loan modification. (CP 110, ¶ 1.) Regardless, the trial court rightly disregarded the claims as the Wereliuses provided no evidence to support them and did not make the same assertions at oral argument. *See, Doty-Fielding v. Town of South Prairie*, 143 Wn. App. 559, 566, 178 P.3d 1054 ("A party opposing a motion for summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value.").

at 8, 11.) However, the trial court was not required to consider the Wereliuses' Motion to Dismiss, and the Trust had no obligation to respond, because the Wereliuses failed to properly note the motion for hearing. The Washington Civil Rules require that all motions (unless raised during a hearing or at trial) must be in writing, must state the grounds for relief with particularity, and must set forth the relief or orders sought. CR 7(b)(1). This requirement is fulfilled if "the motion is stated in a written notice of the hearing of the motion." *Id.* Upon filing the motion with the court, the clerk "may refuse to accept for filing any paper presented for that purpose because it is not presented in proper form as required by these rules or any local rules of practice." CR 5(e). King County Local Civil Rules require that a moving party "shall serve and file all motion documents no later than six court days before the date the party wishes the motion to be considered." KCLCR 7(b)(4)(A). Opposing documents are then due no later than 12:00 noon, two court days before the scheduled hearing. KCLCR 7(b)(4)(D).

Consequently, if a party files a motion without noting it for hearing, the deadline for opposing papers never comes due, nor does the Court have any obligation to consider the motion. Here, the Wereliuses filed their Verified Motion to Dismiss on August 29, 2014, but failed to properly note the matter for hearing. In fact, the Wereliuses did not issue

a notice of hearing until August 10, 2015, only three days before the date they wished their motion to be heard (August 13, 2015, the same date as Plaintiff's noted hearing on its MSJ). Because the motion was never properly noted for hearing, the trial court had no obligation to consider it, and the Trust had no obligation to respond. Nevertheless, the matter is moot, as the record reflects that the trial court considered the arguments raised in the Motion to Dismiss. The trial court specifically stated during oral argument that it would treat the Motion to Dismiss as an opposition to the Trust's Motion, and provided the Wereliuses ample opportunity to address the substance of the Motion to Dismiss. (RP 8:23-25, 9:1.)

D. The Trust Properly Served and Noted its MSJ for Hearing.

Also not raised as an assignment of error, but addressed in their Opening Brief, the Wereliuses argue that the "appellee's notice of hearing on its motion for summary judgment fails to comply with the notice requirements set forth in Rule 56 and unfairly denies the appellants an opportunity to respond timely as set forth in the rules." (Opening Br. at 14.) But the Wereliuses provide no argument to support this claim.

CR 56 provides that a moving party must file and serve the "motion and any supporting affidavits, memoranda of law, or other documentation" no later than 28 calendar days before the hearing. CR

56(c). The record reflects that the Trust filed and served its MSJ and accompanying affidavit, declaration, and exhibits, on June 18, 2015 – fifty-six calendar days before the hearing. (CP 287-288.) Regardless, the Wereliuses did not raise this claim in the trial court, and this Court should disregard the claim and uphold the trial court's ruling.

VI. ENTITLEMENT TO ATTORNEY FEES

The Trust respectfully requests an award of costs and attorneys' fees as the prevailing party pursuant to RAP 14. The Trust also requests an award of its reasonable attorney fees on appeal pursuant to RCW 4.84.330 and RAP 18.1. It is undisputed that the deed of trust and note provide for an award of attorney fees to the prevailing party who is required to litigate to enforce or interpret the provisions of the contract. Although the Wereliuses' claims for relief cannot be construed as litigation to enforce the provisions of the contract (as their claims do not rely on any contractual provisions), the Trust's prosecution of the case in the trial court, and response to this appeal has been necessary to enforce its right to foreclose under the deed of trust. Attorney fees are therefore appropriately awarded to the Trust pursuant to RCW 4.84.330. *Deere Credit, Inc. v. Cervantes Nurseries, LLC*, 172 Wn. App. 1, 8, 288 P.3d 409 (2012) (awarding attorney fees to prevailing party on appeal where contract allowed fees); *IBF, LLC v. Heuft*, 141 Wn. App. 624, 639, 174

P.3d 95 (2007) ("[a] contractual provision for an award of attorney fees at trial supports an award of attorney fees on appeal.")

VII. CONCLUSION

For the reasons set forth above, the Trust requests that the Court affirm the trial court's rulings and uphold entry of the trial court's Judgment and Decree of Foreclosure.

DATED this 10th day of August, 2016

HOUSER & ALLISON, APC

By _____

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CERTIFICATE OF SERVICE

I the undersigned declare as follow: I am over the age of 18 years and am not a party to this action. I certify that on the 16th day of August, 2016, I caused a true and correct copy of this ANSWERING BRIEF OF RESPONDENT to be served on the following via UPS Overnight:

Carol A. Werelius
Jay L Werelius
14340 93rd Avenue N.E.
Kirkland, WA 98034

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

Dated: August 16, 2016

HOUSER & ALLISON, APC

By */s/ Shawn K. Williams*
Shawn K. Williams