96430-1

Case No. 76644-9-I

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

TED A. THOMAS AND DEBRA A. THOMAS,

Appellants,

v.

SPECIALIZED LOAN SERVICING, LLC; RTS PACIFIC, INC., a Washington corporation (now in receivership); RMS MORTGAGE ASSET TRUST 2012-1, U.S. BANK as Trustee; RMS RESIDENTIAL PROPERTIES, LLC; RESIDENTIAL MORTGAGE SOLUTION, LLC; PRIME ASSET FUND, LLC,

Respondents.

AMENDED

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

Petitioners Ted and Debra Thomas are former homeowners whose non-judicial foreclosure was not initiated nor completed by the Noteholder, in contravention of the requirements of the Deed of Trust Act ("DTA") and this Court's binding decisions.

II. CIITATION TO COURT OF APPEALS DECISION

The Thomases seek review of the decision of Division I of the Court of Appeals in this case (hereinafter the "Decision"), Case No. 76644-9-I. The unpublished Opinion was filed on August 13, 2018 (See Attachment A) and a Motion for Reconsideration was denied on September 18, 2018 (Attachment B).

III. ISSUES PRESENTED FOR REVIEW

1. Does the Opinion reflect consistency with the Supreme Court's statutory interpretation of DTA requirements holding that a non-judicial foreclosure **must** be done by a noteholder instead of allowing an entity to create numerous other entities with similar sounding names and use those entity names interchangeably during the foreclosure process, irrespective of which possesses the Note.

IV. STATEMENT OF THE CASE

Procedural History

Date	Filing/Description
12/24/15	Complaint filed in Case Number 15-2-31360-6 to set aside non-judicial foreclosure sale; intentional & negligent misrepresentation; violation of Consumer Protection Act; breach of requirements of the Deed of Trust Act against Defendants Specialized Loan Servicing, LLC; RTS Pacific, Inc.; RMS Mortgage Asset Trust 2012-1; US Bank; RMS

Residential Properties, LLC; Residential Mortgage Solution, LLC; Prime Asset Fund, LLC. CP 1-20.

2/2/16 Defendants filed Answer with Affirmative Defenses. CP 1517-1530

11/28/16 Defendants filed original Motion for Summary Judgment; Declarations by Gwendolyn Wall and Jane E. Brown. CP 21-313.

1/6/17 Defendants filed another Motion for Summary Judgment; Declarations by Abe Lorber and Michael Ward. CP 588-801.

1/25/17 Thomases' filed Declarations by Ted Thomas and Melissa Huelsman. CP 840-847.

1/26/17 Thomases' filed Response to the Defendants' Motion for Summary Judgment; Amended Declarations of Ted Thomas and Melissa Huelsman. CP 848-1354.

1/31/17 Defendants' Reply in Support of Defendants' Motion for Summary Judgment filed. CP 1359-1366.

2/3/17 Order Granting Defendants' Motion for Summary Judgment entered by Judge Catherine Shaffer. CP 1367-1369.

2/13/17 Thomases' Motion for Reconsideration filed; Declaration of Melissa Huelsman. CP 1370-1461.

2/23/17 Defendants' Response to Motion for Reconsideration filed. CP 1462-1472.

2/27/17 Thomases' Reply in support of the Motion for Reconsideration; Declaration of Melissa Huelsman filed. CP 1487-1500.

3/1/17 Order Denying Plaintiff's Motion for Reconsideration entered. CP 1501-1502.

3/30/17 Thomases' filed Notice of Appeal. CP 1503-1511.

9/29/17 Thomases' Opening Brief filed, along with Motion for Wavier of Page Limitation; Declaration of Melissa Huelsman.

10/2/17 Motion granted on October 2, 2017.

10/31/17 Defendants' Answering Brief filed.

7/18/18 Oral argument at the Court of Appeals.

8/13/18 Court of Appeals, Division I, issued Opinion.

8/23/18 Defendants filed Affidavit of Nellie Q. Barnard Regarding Attorney Fees.

9/6/18 Thomases' Motion for Reconsideration filed.

9/18/18 Motion for Reconsideration denied.

10/3/18 Court of Appeals awarded attorneys' fees.

Factual History

The Thomases had owned their home located at 21025 3rd Avenue South, Des Moines, Washington 98198 ("Property") since 1989. Mr. Thomas owns a Parking/Property Management Company and Mrs. Thomas is a school teacher. In July 2007, they obtained a refinance from Imperial Lending, LLC ("Imperial"), a now defunct company. They signed a Note identifying Imperial as the Lender and a Deed of Trust ("DOT") listing Imperial as the Lender and MERS or its "successors and assigns" as the Beneficiary. CP 328-339, 622-628. The Thomases' were later notified that SLS was the servicer. In 2008, they fell behind on mortgage payments because of a significant income drop. They began communicating with SLS to see if anything could be worked out to save the house. CP 849.

On August 7, 2008 Joseph Bershas signed an Appointment of Successor Trustee as an "authorized signatory" of MERS that appointed Fidelity National Title as the new trustee, in contravention of the requirements of the DTA, as MERS was never the noteholder. RCW 61.24.010(2); 61.24.005(2). CP 1051-1054. Mr. Bershas was an SLS employee from September 2007 to November 2008 in Colorado, but it was was allegedly signed in Orange County, California on **August 7, 2008** but recorded in King County, Washington on **August 8, 2008**. The Thomases maintain that this is evidence of the Defendants falsifying documentation as to this loan dating back to 2008. CP 1045, 1051-1054.

On August 12, 2008, Fidelity issued a Notice of Default ("NOD") which demanded an excessive monthly payment, even as the Thomases were in communication with SLS about avoiding foreclosure. On September 15, 2008 Fidelity issued a Notice of Trustee's Sale ("NOTS") setting a sale date in December 2008, recorded in King County on September 16, 2008. The NOTS indicated that MERS was the foreclosing entity ("beneficiary"), which contradicts the RMS entities' "testimony" contending that **Residential Mortgage Solution, LLC** ("**RM Solution**") has been the noteholder and loan owner **since 2007**. CP 804:23-805:2; 864-866. This sale was discontinued. CP 849. Fidelity, on behalf of MERS as the beneficiary, issued another NOTS on June 5, 2009 (CP 868-870) and March 16, 2010

(CP 872-874), both of which were discontinued. These assertions in the foreclosure documents contradict the Defendants' assertions in MSJ briefing that Residential Mortgage Properties, LLC ("**RMS Properties**") was the loan owner/noteholder dating back to 2007. CP 858-861; 864-866, CP 599-560.

The Thomases remained in communication with the servicer, SLS, about preventing a foreclosure. Nevertheless, SLS caused another foreclosure sale to be initiated by Fidelity issuing a NOTS in June 2009, which sale was ultimately discontinued. CP 849-850, 868-870. The Thomases continued to send in loan modification applications and talk to SLS employees, but didn't get anywhere. Another foreclosure was initiated by Fidelity on March 12, 2010 but it too was discontinued. CP 872-874.

On February 22, 2011, SLS employee Anthony Forsberg, as "Assistant Secretary" of "MERS as nominee for Imperial Lending, LLC" signed an Assignment of Deed of Trust purporting to transfer the beneficial interest in the Thomases' DOT to **RMS Properties**. CP 1062-1063. On February 22, 2011, Mr. Forsberg, as Assistant Vice President of SLS signed a new Appointment of Successor Trustee as an "Attorney in Fact" for **RMS Properties** appointing Regional Trustee Services ("RTS") (predecessor to RTS Pacific) as the "successor" trustee, even though the DTA only allows for appointment to be done by the "beneficiary". RCW 61.24.010(2);

61.24.005(2). CP 1065-1066.

During the litigation, Defendants produced a Limited Power of Attorney ("POA") and the Appellate Court affirmed that it was consistent with Washington law for Defendants to rely upon such a document (CP 658-659) to circumvent the requirements imposed by the Washington Legislature in RCW 61.24.010(2), even though the POA was entered into between **RMS Properties** and SLS – not between **RM Solution** (one of the alleged noteholders – CP 804:23-805:2) and SLS. CP 658-659. The POA authorized:

> . . . full power of substitution, to act in any manner necessary and proper to exercise the servicing and administrative powers set forth in the Servicing Agreement with respect to those loans transferred to Servicer pursuant to the terms of the Servicing Agreement.

CP 658-659. The POA did not provide authorization for SLS to act on behalf of **RM Solution** and any actions taken on behalf of **RMS Properties** was restricted by the terms of the Servicing Agreement, but that document was between SLS and **RM Solution** (see below). CP 1160-1223. The Servicing Agreement upon which Defendants rely makes clear that **RM Solution** is the loan owner and that any possession of loan Notes is done by the custodian and/or servicer on behalf of **RM Solution**. CP 1166; 1171; 1177 2.01(f)-(g); 1179 2.02(b)-(c); 1182 3.01(a). Thus, the POA upon which the Court of Appeals based its decision is, on its face, inconsistent with the Servicing Agreement, upon which the Court also relied, and the various and changing

positions taken by the Defendants as to the identity of the noteholder and the authority allegedly provided by the POA. Alternatively, the loan owner is **RM Solutions** and/or **RMS Properties** depending upon whatever suits the Defendants' changing purposes. The Court of Appeals could not reasonably rely upon documents containing conflicting information.

On February 16, 2011, RTS issued a NOD wherein **RMS Properties** is listed as the "beneficiary" (**not RM Solution**) and SLS is the servicer. CP 881-883. RTS then issued a NOTS also identifying **RMS Properties** as the "beneficiary" on March 21, 2011. CP 887-890. Finally, the loan was modified by SLS on behalf of an unidentified "beneficiary" before a foreclosure sale occurred on November 21, 2011 (CP 892-898), but the Thomases defaulted again because of their continued financial problems. CP 850-852. But all of these documents identify **RMS Properties** as the "beneficiary" – NOT **RM Solution**, who contended under oath that it had been the beneficiary since 2007. CP 804:23-805:2.

In spite of the assertions about **RMS Properties** made in connection with previous attempts at foreclosure, on June 14, 2012, David Sklar on behalf of MERS signed another Assignment of DOT purporting to transfer the beneficial interest in the Thomases' DOT to **RM Solution**. CP 1068-1069. The second Limited POA upon which Defendants and the Court of Appeals relied is between SLS and RMS Mortgage Asset Trust 2012-1 Asset

Backed Notes Series 2012-1 ("**RMS Trust**"). CP 674-676. It allowed only those actions permitted by the Servicing and REO Management Agreement dated July 12, 2012, but also enumerated other actions that could be taken by SLS on behalf of the **RMS Trust**, including those acts necessary to complete a foreclosure. *Id.*, Section 8. The Second POA was signed by U.S. Bank acting as the indenture trustee for the **RMS Trust**. Again, nothing in this document refers to loans owned and/or notes held by **RM Solution** nor any loans owned or notes held by **RMS Properties**. *Id.*

The Appellate Court, in its Opinion at Page 3, asserted that Mr. Ward's testimony and documents supported its decision, but the factual summary provided by that Court is contradicted by the evidentiary record, the "facts" upon which it relied are not accurate and it has refused to reconsider its position. The Court summarized Mr. Ward's testimony as:

> . . . Thomas' note had been assigned three times. . . . Imperial transferred the note to RMS in 2007. RMS assigned the note to a subsidiary, RMS Properties, in 2008. RMS Properties then transferred the note to RMS Trust in 2012.

Op. 3. The first Assignment was from MERS to **RMS Properties** (CP 1062-1063) and the second Assignment was from MERS to **RM Solution** (CP 1068-1069).[1] On **July 5, 2013** Barry Coon, AVP at SLS, signed a third

[1] As this Court is aware, Assignments have no meaning under the law in Washington. They are not required by the DTA and this Court has made clear in *Bain* that what matters is possession of the Note in order to meet the definition of "beneficiary". RCW 61.24.005(2).

Assignment on behalf of SLS as "Attorney-in-Fact" for **RMS Properties** (CP 1074-1075) to transfer it to **RMS Trust**. There is no assignment or other record of the transfer of the beneficial interest in the Thomas' DOT from **RM Solution** to **RMS Properties**. *Id.* The second and third Assignments contradict each other, and all of them were allegedly done by MERS. *Id.*

Mr. Ward asserted at Paragraph 6 that SLS obtained possession of the Note but does not identify the date of this alleged acquisition nor is there any documentation of the same. CP 615. The Servicing Agreement upon which the Defendants and the Court of Appeals relied makes clear that **if** the servicer obtains possession of the original Note, it is holding the Note for the Owner, **RM Solution**. CP 1171 ("Owner"), 1177-1178(f)-(g); 1183(c); 1185(4.03). Further, the Addendums to the Servicing Agreement were entered into between SLS and **RM Solution** – not any other entity. CP 1216-1223. Similarly, the Custodial Agreement confirms that Wachovia Bank, N.A. is the custodian. CP 1225-1257. These facts contradict explicitly the conclusions by the Court of Appeals, and the facts do not support the Defendants' position as to conformity with the DTA requirements.

The Indenture, dated **July 12, 2012** (CP 1259-1327) indicates that **RMS Trust** is the Issuer and U.S. Bank is the Indenture Trustee, and that **RMS Trust** transfers its beneficial interest in certain Notes to U.S. Bank as the trustee. *Id.* Most of the document deals with the relationship between

investors and the trustee, and payment distributions. There is not one word in the Indenture which indicates that the Thomases' loan is included in the deal but more importantly, this does not constitute evidence in any way that U.S. Bank **ever** had possession of the Thomas' original "wet ink" note, let alone that it was in the possession of U.S. Bank **since 2004**, as Defendants asserted in discovery responses. CP 1105.[2] The Thomas' did not enter into their loan until 2007, something the appellate court clearly did not consider.

Mr. Ward, at Paragraph 8, asserted that SLS serviced the loan on behalf of **RM Solutions**[3], **RMS Properties** and **RMS Trust**, but there is no documentation of the alleged transfer or sale of the Note to any of these various entities and any such transfers or sales are not consistent with the Servicing Agreement, which requires documentation of the same. At Paragraph 11, he testified that "RMS Properties, **through SLS**, was the holder of the Note at the time the Appointment was executed." CP 615- 616. (emphasis added). This expressly contradicts the assertions in discovery responses that **RM Solution** has been the noteholder since 2007 and it

[2] Discovery responses assert that the Note "has always been maintained by U.S. Bank at a storage facility in Chicago, Il." and references November 23, 2004 Custodial Agreement. The Thomas' loan was not made until **2007**. Since the "original custodian" was Wachovia per Servicing Agreement dated 2004, U.S. Bank could not have had possession of the Note for the years the loan did not exist (2004-2007). There is no evidence whatsoever that U.S. Bank became the Custodian under the Servicing Agreement wherein Residential Mortgage Solution, LLC is the presumed Owner. CP 1105.

[3] This is NOT the name of the entity that allegedly owned the Note and is a Defendant in this case. That entity is Residential Mortgage Solution, LLC.

contradicts the Servicing Agreement, as noted above. CP 1105.

Mr. Ward also testified at Paragraph 9 that the "ownership" of the Thomas' loan "transferred" to **RMS Properties** in **2008** when it went into default so that in the event of foreclosure, "title to the property would vest in **RMS Properties**". CP 616. But again, there is no documentation of any such sale or transfer provided by the Defendants inn discovery responses or to the Court. This is yet another example of significant inconsistencies in the Defendants' assertions which the appellate court has ignored entirely.

At Paragraph 13, Mr. Ward testified that the **RMS Trust** acquired ownership of the Thomas' loan in **2012,** but again, no documentation of such transfer is provided. None. CP 616. Defendants' discovery responses included this "explanation" of the relationship between the RMS entities:

> From time to time, Loans owned by RM Solution go into default. If foreclosure is necessary, it is RM Solution's standard practice is for title to the secured properties to vest in a separate entity, RMS Properties. RMS Properties is a wholly-owned subsidiary of RM Solution.

CP 1085. Again, no documentation of this alleged transfer was produced. *Id.*

On **February 26, 2013,** Hunter Robinson, VP Default Administration of SLS, signed a new Declaration of Ownership under penalty of perjury on behalf of SLS, "authorized servicing agent" for **RMS Trust**, asserting that it by SLS "as Attorney-in-Fact is the actual holder" of the Note. The Thomases maintained that this assertion was not based upon

personal knowledge of the signer but more importantly, was not signed by the actual "noteholder". Thus, it was not compliant with RCW 61.24.030(7)(a) and the same was true as regards another Declaration signed on **August 21, 2013**, allegedly based upon "personal knowledge" and signed under penalty of perjury. CP 1046, 1071, 1074-1075. In discovery responses, SLS and RMS Defendants all asserted that there is no one at any of those entities with any personal knowledge about the Thomases' loan. CP 1084-1086, 1103-1105. Further, LPS communications between SLS and Regional made clear that Regional created the new "Affidavit of Note" and sent it to SLS, so that it said what Regional wanted it to say. CP 1126-1129.

The Appellate Court's Opinion relied upon Defendants' discovery responses that asserted the Thomas' "wet ink" Note was held by U.S. Bank as a custodian per the Custodial Agreement. Op. 5. Yet, a review of the evidence makes clear that there is not one single document which supports Mr. Ward's assertion. No documentation was provided to the trial court and none was produced in discovery. CP 933-934.

As the Thomases have argued to Appellate Court, the Defendants' testimony and documents contradict themselves and are inconsistent. It is disappointing that the Appellate Court's Opinion is founded upon "facts" which are untrue and which have led it to a decision which is not supported by the record nor the requirements of the DTA. Yet these "facts" are at the

heart of the Thomas' arguments about why summary judgment should not have been granted. The Court focuses on when the Thomases sent out discovery, but that has no relevance to the legal issues. It was timely sent and the Defendants responded, albeit in contravention of the requirements of the Civil Rules. The Thomases relied upon those discovery responses and the contradictions therein with the evidence presented to the trial court to make clear that there were genuine issues of material fact which precluded summary judgment. Nevertheless, the Court of Appeals' Opinion essentially holds that it was the Thomases' obligation to disprove the unsupported testimony of an employee of Defendant SLS in order to prevail, even though documentary evidence contradicted his assertions. That is not the standard for summary judgment. CR 56.

The Washington DTA is not predicated upon the notion that a loan servicer who is not the noteholder has authority to act to foreclose without judicial oversight. RCW 61.24.005(2). It is predicated upon a **requirement** that the actions be performed and authorized by the **beneficiary** and in this case, there is no credible evidence about the identity of the beneficiary and noteholder who had the authority to act under Washington law. *Id.*

On **October 24, 2013**, Regional served another NOD on the Thomases, which demanded payments on behalf of **RMS Trust**. When the Thomases could not cure the arrears, on **December 4, 2013**, Regional issued

a new NOTS in the name of **RMS Trust** setting a new sale date. CP 851-852, 905-911, 914-918. The Thomases continued to communicate with SLS about a loan modification and what was needed to obtain one, but the foreclosure sale date was looming and scheduled to take place on **April 11, 2014**. To stop the foreclosure, the Thomases filed a Chapter 7 bankruptcy that morning and the foreclosure was continued. It was converted to a Chapter 13 but on July 16, 2014 it was dismissed. *Id.* The foreclosure sale had been continued to **July 25, 2014** so once the stay was lifted, the foreclosure could take place on July 25th. *Id.*

The Thomases retained what they thought was a California law firm to help them that turned out to be a scam. They were also directly communicating with SLS about the loan modification and responding to SLS' requests. CP 852-853. On **July 16, 2014**, the Thomases submitted a new modification package, as requested by SLS. On **July 21, 2014**, Mr. Thomas spoke with Veronica at SLS who confirmed that she had his package and that it had been moved out of the Bankruptcy Department and back to the Loss Mitigation Dept., and the sale would be continued. CP 852. Mr. Thomas also called Regional to talk about the sale and was assured it had been continued to **September 19, 2014**. CP 852-853. He reviewed Regional's webpage and did not see his property listed, so he believed the sale was continued, just as it had been all of the other times before. *Id.*

Defendants have asserted that these calls did not occur, but without any evidence from a someone with personal knowledge that can contradict Mr. Thomas' testimony under oath. CP 618, 853. There was no testimony at all from Regional. Thus, his testimony is entirely uncontroverted. *Id.*

When Mr. Thomas called SLS back after July 25th to find out about the status of the loan modification review, he did not receive any meaningful information until he found that the sale had occurred, which shocked him. CP 853. Further evidence of SLS' inconsistencies is a letter dated **July 22, 2014** (received after the foreclosure sale) advising the Thomases that their loan was past due and instructing them to contact SLS about their options to avoid foreclosure. CP 920-921. The Thomases maintained throughout the litigation that they would have taken action as they had done previously to prevent the sale if they had not been told it was not happening. *Id.*

Regional recorded a Trustee's Deed on **August 18, 2014** indicating the Thomases' home was sold to **RMS Trust**, "not in its individual capacity, but solely as Owner Trustee". **RMS Trust** is identified as the "GRANTEE" and Paragraph 5 reads that "**RMS Trust**" provided written instruction to Regional "directing said Trustee to sell the described property in accordance with the law and the terms of said Deed of Trust." CP 1047, 1122-1124. In discovery responses, the Defendants denied the existence of communications from **RMS Trust** or anyone else about the loan and confirmed that SLS

handled all communications. CP 1083-1100. Thus, the available evidence makes clear that SLS made all decisions regarding the loan without any guidance or control over its actions by the RMS entities even though there are notations in SLS' records about the alleged need to communicate with the "investor" about loan modification parameters. *Id.* Since RMS' discovery responses make clear that none of the RMS entities was exercising any control over its purported "agent" and in fact, knew absolutely nothing about the Thomases' loan (or any other loans in the trust apparently). Therefore, none of them could ever meet the definition of a principal which has exercised control over an "agent" under Washington law. Of course, this would only matter if, in fact, **RMS Trust** was ever the noteholder. There is no credible evidence that **RMS Trust** has ever been the noteholder.

After July 25, 2014, the Thomases were served with an eviction case by another entity, which caused additional confusion. CP 853-854 In **October 2014**, they were served with an unfiled Eviction Complaint identifying **RMS Trust** as the plaintiff. They retained an attorney to appear in that case but were later advised that the case was not being pursued. *Id.* CP 854; 923-928. The Thomases later learned that their home had been sold to a third party, after they had already initiated this litigation. CP 1086; 1131-1136. Before initiating this litigation, the Thomases' paid Ms. Huelsman to investigate their legal issues and determine their available courses of action.

CP 854-855. The Thomases incurred time and expenses related to their repeated efforts to get reviewed for a second loan modification and stop the pending nonjudicial foreclosure sale, including time off of work, parking, gas, etc. They had to pay an attorney to investigate their claims, defend against eviction proceedings and they lost their home and the equity therein, as well as the stress involved with it all, which supported their injury and damages claims under the CPA. *Id.*

V. STANDARD ON REVIEW

The Thomases maintain that the Appellate Court's Opinion is in conflict with this Court's binding decisions and the applicable statutes. RAP 13.4(b). RCW 61.24., *et seq.*

VI. ARGUMENT

A. Division I's Decision is not supported by Washington case law.

1. Standard on Review at the Court of Appeals.

The Court of Appeals engaged in an analysis under Civil Rule 56 as to whether the trial court properly granted summary judgment.

B. Genuine issues of material fact remain and the case must be remanded to the trial court.

A motion for summary judgment is to be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); *Jackowski v. Borchelt*, 174 Wn.2d 720, 729, 278 P.3d 1100 (2012). When determining whether an issue of material fact exists on summary judgment, a court must construe all facts and inferences in favor of the nonmoving party. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008); *McNabb v. Dep't of Corrs.*, 163 Wn.2d 393, 397, 180 P.3d 1257 (2008). A "material fact" for summary judgment purposes is one upon which all or part of the outcome of the litigation depends. *Hill v. Cox*, 110 Wn.App. 394, 41 P.3d 495 (Div. III 2002), *review denied* 147 Wn.2d 1024, 60 P.3d 92. Summary judgment is proper if reasonable minds could reach only one conclusion from the evidence presented. *Cano-Garcia v. King County*, 168 Wn.App. 223, 277 P.3d 34 (Div. II 2012), *review denied* 175 Wn.2d 1010, 287 P.3d 594. Washington courts are "reluctant to grant summary judgment when 'material facts are particularly within the knowledge of the moving party.'" *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn.App. 649, 661-62, 240 P.3d 162 (Div. II 2010).

As the Court of Appeals held in *Podbielancik v. LPP Holdings, Inc.*, 191 Wn.App. 662 (2015),

> On summary judgment, the moving party bears the initial burden of showing that there is no genuine issue of material fact. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770

> P.2d 182 (1989). The nonmoving party then has the burden to rebut the moving party's contentions. Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). If the nonmoving party fails to " 'establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' " the court should grant summary judgment. Young, 112 Wn.2d at 225 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). In reviewing a grant of summary judgment, any matters argued below but not raised on appeal are deemed abandoned. GMAC v. Everett Chevrolet, Inc., 179 Wn.App. 126, 134, 317 P.3d 1074 review denied, 181 Wn.2d 1008, 335 P.3d 941 (2014) (citing Coggle v. Snow, 56 Wn.App. 499, 512, 784 P.2d 554 (1990)).

Podbielancik at 666. This Court has made clear that the DTA **requires** that a non-judicial foreclosure may only be initiated by the "beneficiary", defined as the noteholder. *Bain v. Metropolitan Mortg. Grp., Inc.*, 175 Wn.2d 83, 93, 285 P.3d 34 (2012); RCW 61.24.005(2). The *Bain* decision does not support the Court of Appeals' Opinion, which holds that conflicting statements about noteholder status, unsupported by documentation, complies with the DTA and that any supposedly related entity without noteholder status may foreclose non-judicially.

The Thomas' have demonstrated that the Defendants' version of the "facts" is inconsistent and that the Ward Declaration is unsupported by corroborating documents. The Appellate Court's summary of the facts is inaccurate and yet, it is the summary upon which it rendered its decision. The Thomas' demonstrated these inconsistencies to both courts, and the

sleight of hand in which Defendants engaged to mislead the Appellate Court and the trial court about those facts given the use of "RMS" in the various business entities. However, that is irrelevant under Washington law given the conflicting information about the identity of the noteholder.

The Washington DTA **requires** that the foreclosure be initiated by the **beneficiary** (noteholder) (RCW 61.24.005(2)) and there is no documentary evidence at all to support the unsubstantiated and contradictory claims made by Mr. Ward hat SLS had possession of the Note at some unidentified date (CP 615-616), as compared to the answer to **all** of the Defendants' discovery responses, which was that the Note was held in a vault by U.S. Bank since 2004, even though the loan was not made until 2007. Further, there is no documentation of U.S. Bank's possession of the Note nor is there any documentation of the sale or transfer of the Note between the various RMS entities. Summary judgment should not have been granted in this case as there are numerous genuine issues of material fact at issue, and they should be afforded an opportunity to try this case.

VII. CONCLUSION

The Thomases respectfully requests that the Supreme Court accept review so that it can clarify the parameters of the DTA and make certain that participants in the non-judicial foreclosure process understand its requirements. The Court of Appeals' Opinion is contrary to this Court's

holdings and will harm other members of the public if it is permitted to stand as authority in Washington.

Respectfully submitted this 8th day of November, 2018.

LAW OFFICES OF MELISSA A. HUELSMAN, P.S.

/s/ Melissa A. Huelsman
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CERTIFICATE OF SERVICE

I, Tony Dondero, declare under penalty of perjury as follows:

1. I am over the age of eighteen years, a citizen of the United States and state of Washington, not a party herein, and am competent to testify to the facts set forth in this Declaration.

2. That on Thursday, November 8, 2018, I caused the foregoing document attached to this Certificate of Service plus any supporting documents, declarations and exhibits to be served upon the following individuals via the methods outlined below:

Nellie Q. Barnard, WSBA #50587 David Elkanich, WSBA#35956 Holland & Knight LLP 2300 U.S. Bancorp Tower 111 S.W. Fifth Ave. Portland, OR 97204 Phone: 503-517-2928 Email: David.Elkanich@hklaw.com Nellie.Barnard@hklaw.com	□ Legal Messenger ☒ Electronic Mail □ Federal Express

I certify under penalty of perjury under the laws of the State of Washington that the foregoing statement is both true and correct.

Dated this Thursday, November 8, 2018, at Seattle, Washington.

Tony Dondero, Paralegal

ATTACHMENT A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

TED A. THOMAS and DEBRA A. THOMAS, Appellants, v. SPECIALIZED LOAN SERVICING, LLC; RTS PACIFIC, INC., a Washington Corporation (now in receivership); RMS MORTGAGE ASSET TRUST 2012-1, U.S. BANK as Trustee; RMS RESIDENTIAL PROPERTIES, LLC; RESIDENTIAL MORTGAGE SOLUTION, LLC; PRIME ASSET FUND, LLC, Respondents.	No. 76644-9-I DIVISION ONE UNPUBLISHED OPINION FILED: August 13, 2018

ANDRUS, J. — Ted and Debra Thomas (Thomas) appeal the summary judgment dismissal of their claim to set aside a trustee's sale as well as their claims for intentional and negligent misrepresentation and violations of the Consumer Protection Act (CPA). We affirm.

FACTS

Thomas defaulted on his mortgage and his home was sold at a foreclosure sale in July 2014. In December 2015, Thomas filed the complaint,

naming as defendants three related entities and alleged noteholders: Residential Mortgage Solutions (RMS), RMS Residential Properties, and RMS Mortgage Asset Trust (collectively RMS Entities). Thomas also named the loan servicer, Specialized Loan Servicing (SLS).[1]

Thomas's complaint asked the court to set aside the trustee's sale based on alleged violations of the deeds of trust act (DTA), chapter 61.24 RCW. Thomas alleged that his note had been improperly assigned and it was unclear if the purported beneficiary was the actual noteholder. He also asserted that beneficiary declarations and appointments of successor trustees associated with the foreclosure were invalid. Thomas further claimed that the beneficiary and servicer committed intentional and negligent misrepresentation and violated the Consumer Protection Act (CPA), chapter 19.86 RCW.

After filing the complaint in December 2015, Thomas did not conduct any discovery for nearly a year. On November 28, 2016, the RMS Entities and SLS jointly noted a hearing on a motion for summary judgment and set argument on the motion for February 3, 2017. The following week, on December 6, 2017, Thomas propounded his first discovery requests. The RMS Entities and SLS filed their motion for summary judgment with supporting documentation on January 6, 2017. They answered Thomas's discovery requests on January 9 and January 13, 2017.[2]

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[1] Thomas also named the trustee, Regional Trustee Services (in receivership), and a third party, Prime Asset Fund, in the complaint. These parties have apparently not participated in the action. Thomas appears to concede that he never served Prime Asset Fund.

[2] Thomas granted the defendants' request for a one-week extension to respond to his discovery requests.

In support of their motion for summary judgment, Michael Ward, an SLS vice president, testified by declaration that Thomas's note had been assigned three times. The original lender, Imperial Lending, LLC, transferred the note to RMS in 2007. RMS assigned the note to a subsidiary, RMS Properties, in 2008. RMS Properties then transferred the note to RMS Trust in 2012. SLS serviced the loan throughout its life and held limited powers of attorney to act for RMS Properties and RMS Trust. Ward explained that SLS, as agent for the noteholder, appointed the trustee who obtained a beneficiary declaration before recording a notice of sale. The RMS Entities and SLS submitted numerous supporting documents, including a copy of the note, which was endorsed in blank, copies of the deed of trust, power of attorney agreements, the beneficiary declarations, a 2011 appointment of successor trustee, and the servicing records.

At the hearing on the summary judgment motion, the RMS Entities and SLS relied on this record to argue that Thomas failed to establish a question of material fact as to any of his claims. Thomas asserted that the RMS Entities and SLS provided insufficient and contradictory responses to discovery and their documentation was not credible. The trial court granted summary judgment to the RMS Entities and SLS and denied Thomas's motion for reconsideration. Thomas appeals.

ANALYSIS

We review an order on summary judgment de novo, viewing the evidence in the light most favorable to the non-moving party. Jackowski v. Borchelt, 174 Wn.2d 720, 729, 278 P.3d 1100 (2012). In a summary judgment motion, the moving party bears the initial burden of showing that there is no genuine issue of material fact. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party meets this initial showing, the burden shifts to the nonmoving party to produce specific facts showing that there is a genuine issue for trial. Id. at 225-26. Summary judgment is only appropriate 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).

Thomas asserts several theories to argue that the trial court erred in dismissing his claims. As to his DTA claim, his primary argument appears to be that the RMS Entities and SLS provided insufficient documentation to establish that the RMS Entities actually held the note.[3]

Under the DTA, the beneficiary is the entity that holds the note. RCW 61.24.005(2); see also Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 89, 285 P.3d 34 (2012). Before conducting a foreclosure sale, a trustee must have proof that the beneficiary actually holds the note on which the trustee is foreclosing. Bain, 175 Wn.2d at 102. "A declaration by the beneficiary made under the

[3] Thomas alleges that the RMS Entities and SLS have not been truthful about the loan and have falsified documents since the loan's inception. He claims that SLS and the trustee demanded excessive monthly payments, MERS (Mortgage Electronic Registration Systems) improperly appointed a successor trustee and assigned the note, and SLS made the process of

penalty of perjury stating that the beneficiary is the actual holder of the promissory note. . . shall be sufficient proof."[4] Former RCW 61.24.030(7)(a) (2009).

Ward testified that RMS acquired the loan from the original lender in 2007. The note was subsequently transferred to RMS Properties and later to RMS Trust. Ward declared that, as servicer for the RMS Entities, SLS received the "wet ink" note from them. In response to an interrogatory seeking information on the whereabouts of the original note, the RMS Entities stated that the original note was in possession of U.S. Bank per a custodial agreement with that entity.

Documents in the record support Ward's testimony. The note was indorsed in blank by Imperial Lending, making it payable to the bearer. See RCW 62A.1-201(21)(a); RCW 62A.3-205(b). A sworn declaration executed February 11, 2011, identifies RMS Properties as the holder of the note. A declaration executed on August 21, 2013, identifies RMS Trust as the noteholder on that date. A custodial agreement between RMS and Wachovia Bank, predecessor in interest to U.S. Bank, authorizes the bank to hold physical possession of RMS's residential mortgage loans. Thomas points to nothing in the record that contradicts this evidence and thus fails to raise a question of material fact on this point.

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applying for a loan modification unnecessarily difficult. Thomas presents no legal argument as to these allegations, as required by RAP 10.3(a)(6). We decline to consider them.

[4] The legislature made minor changes to RCW 61.24.030(7) in 2018. See LAWS OF 2018, ch. 306, § 1. The amendment is not at issue here.

Thomas also challenges the validity of the beneficiary declarations and appointment of successor trustee. RMS Properties appointed a successor trustee and executed a beneficiary declaration in February 2011. These documents were signed by an SLS employee as attorney in fact for RMS Properties. In August 2013, RMS Trust executed a new beneficiary declaration. This document was also signed by an SLS employee.

Thomas asserts that the 2011 appointment of successor trustee and the 2011 and 2013 beneficiary declarations are invalid because they were signed by an SLS employee rather than an employee of any RMS Entity. The argument fails because SLS was acting as an agent of RMS Properties and RMS Trust when its employees executed these documents, permissible actions under the DTA.

An agent may act on behalf of a noteholder. Bain, 175 Wn.2d at 106. "[A]n agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control." Id. (internal quotation marks omitted) (quoting Moss v. Vadman, 77 Wn.2d 396, 402-03, 463 P.2d 159 (1970)).

Here, it is undisputed on this record that RMS Properties appointed SLS to act as its attorney in fact in March 2009 and RMS Trust did the same in July 2012. The principal-agent relationship was memorialized in written contracts granting SLS limited power of attorney to act for the RMS Entities in foreclosure matters. The 2009 limited power of attorney authorized SLS to act as attorney in

fact "in any manner necessary and proper to exercise the servicing and administrative powers set forth in the Servicing Agreement." The servicing agreement authorized SLS to institute foreclosure proceedings, and to execute instruments on behalf of the owner to settle mortgage loans. The 2012 limited power of attorney authorized SLS to prepare all documents necessary under state law to complete a nonjudicial foreclosure. The written power of attorney agreements are clear manifestations of the RMS Entities' consent that SLS would act on their behalf in executing all required documentation to complete nonjudicial foreclosure sales.

The RMS Entities produced prima facie evidence that they held the note at the relevant times and SLS, as their agent, executed foreclosure documents on their behalf. Because Thomas failed to rebut this evidence, he did not establish a question of material fact as to the identity of the noteholder or the validity of the challenged documents. The trial court did not err in dismissing Thomas's claim to set aside the trustee's sale.[5]

Thomas also challenges the dismissal of his claim for negligent and intentional misrepresentation. He argues that the RMS Entities and SLS misrepresented the identity of the noteholder, the existence of SLS's agency relationship, and their authority to foreclose. But Thomas's failure to establish any DTA violation is fatal to this claim.

[5] Because of our resolution of this issue, we do not reach the parties' further arguments that Thomas's DTA claim was barred by waiver or was properly dismissed for failure to join the current property owner as an indispensable party.

Thomas next alleges that SLS misrepresented the date the foreclosure sale would occur.[6] The foreclosure sale was initially set for April 11, 2014. Thomas filed for bankruptcy and, as a result, the sale was continued to July 25, 2014. When Thomas's bankruptcy petition was dismissed on July 16, he submitted a new application for a loan modification to SLS. Thomas asserts that he called SLS on July 21 to check on the status of his application. According to Thomas, a representative told him SLS had received his application and had continued the foreclosure sale to September 19. SLS disputes that it told Thomas the sale had been continued. Assuming the alleged misrepresentation occurred, SLS argues that Thomas fails to show reliance.

To establish a claim for negligent or intentional misrepresentation, the plaintiff must show, among other elements, that the defendant made a false representation and, because the plaintiff reasonably relied on the false information, the plaintiff suffered damages. See Lawyers Title Ins. Corp. v. Baik, 147 Wn.2d 536, 545, 55 P.3d 619 (2002) (negligent misrepresentation); Carlile v. Harbour Homes, Inc., 147 Wn. App. 193, 204-05, 194 P.3d 280 (2008) (intentional misrepresentation). Thomas contends that because he relied on SLS's alleged statement that the sale had been continued until September, he took no action to restrain the sale in July. Thomas provides no specifics as to

[6] Thomas also asserts that SLS and the RMS Entities engaged in a pattern of misrepresentation dating back to 2008. He does not expressly rely on these older events as a basis for his misrepresentation claim or make any argument as to the timeliness of such a claim. An action for misrepresentation must be brought within three years of discovery of the misrepresentation. Davidheiser v. Pierce County, 92 Wn. App. 146, 156 n.5, 960 P.2d 998 (1998) (citing RCW 4.16.080(4)). We decline to consider alleged misrepresentations that occurred more than three years before Thomas filed his complaint.

what action he would have taken had he been aware of the July sale date and he points to no evidence that he made efforts to restrain the sale in September. Nor did Thomas bring a prompt post-sale challenge; although the sale took place in July 2014, Thomas did not commence this action until December 2015. Because Thomas fails to show how he relied on any alleged misrepresentation relating to the date of the foreclosure sale, the trial court did not err in dismissing his claim for misrepresentation.

Next, Thomas challenges the dismissal of his CPA claim. To establish a claim under the CPA, a plaintiff must show five elements: (1) an unfair or deceptive act or practice (2) that occurs in trade or commerce, (3) a public interest impact, (4) an injury to plaintiff in his or her business or property, and (5) causation. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531, 533 (1986). Thomas alleges that the respondents engaged in unfair or deceptive practices by executing the beneficiary declarations and appointment of successor trustee through an attorney-in-fact and failing to prove that the RMS Entities actually held the note. But, as discussed above, Thomas fails to raise a material question of fact as to these points.

Thomas also asserts that the respondents engaged in an unfair or deceptive practice by misrepresenting the date of the foreclosure sale. A misrepresentation of fact may be an unfair or deceptive practice for purposes of a CPA claim. Indoor Billboard/Wash., Inc., v. Integra Telecom of Wash., Inc., 162

Wn.2d 59, 83, 170 P.3d 10 (2007). The plaintiff must show that but for the misrepresentation, the plaintiff's injury would not have occurred. Id.

Here, even if, as Thomas asserts, SLS misrepresented the date of the foreclosure sale, Thomas fails to show a causal link between the misrepresentation and his injury. Thomas alleges two injuries: the loss of his home and the attorney fees he has incurred to bring the present action. But Thomas does not contest that he defaulted on the loan payments and did not cure the default. The trial court correctly concluded that Thomas's default, and not any misrepresentation as to the sale date, was the "but for" cause of the loss of Thomas's home.

Nor do Thomas's attorney fees support his CPA claim. Attorney fees necessary to investigate a deceptive business practice may constitute injury within the meaning of the CPA. Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 62, 204 P.3d 885 (2009). Here, however, Thomas has not established a question of material fact as to any unfair or deceptive practice that required investigation. Attorney fees divorced from a deceptive business practices do not constitute injury under the CPA. See id. at 62-63.

We hold that Thomas has not established an issue of material fact as to any of his claims. The trial court did not err in dismissing Thomas's claim under the DTA, his claims for intentional and negligent misrepresentation, and his CPA claim.

Thomas contends the trial court erred in denying his motion for reconsideration. He argues that SLS and the RMS Entities provided late and

incomplete responses to discovery, thereby preventing him from establishing his claim. We review the denial of a motion for reconsideration for abuse of discretion. West v. Dep't of Licensing, 182 Wn. App. 500, 516, 331 P.3d 72 (2014). The trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. Id. A decision is manifestly unreasonable if it is outside the range of acceptable choices. Id.

Thomas raised the lack of adequate discovery responses during the summary judgment hearing, and the trial court rejected it. The court stated that the case had been pending for over a year and nothing prevented Thomas from conducting further discovery. The court noted that Thomas had not filed a motion to compel or a motion to continue the summary judgment hearing. And Thomas provided only speculation that further discovery would uncover a genuine question of material fact. In his motion for reconsideration, Thomas reasserted his argument concerning late and incomplete discovery responses and asked the court for leave to file a motion to compel. The court denied the motion without comment.

In this case, the trial court's decision was not manifestly unreasonable. As the trial court stated, nothing prevented Thomas from timely conducting further discovery, moving to compel, or moving to continue the hearing on summary judgment.

The respondents request attorney fees on appeal based on the attorney fee provision in the deed of trust. Attorney fees may be awarded where authorized by statute or contract. Aiken v. Aiken, 187 Wn.2d 491, 506, 387 P.3d

680 (2017). In this case, the deed provides that the lender is entitled to recover reasonable attorney fees "in any action or proceeding to construe or enforce any term" of the deed. The present appeal is an action to enforce the deed, as it stems from Thomas's complaint that the respondents had no authority to foreclose against him. See Podbielancik v. LPP Mortg. Ltd., 191 Wn. App. 662, 673, 362 P.3d 1287 (2015). We grant attorney fees to the respondents based on the deed.

Affirmed.

Andrus, J.

WE CONCUR:

Leach, J.

Schindler, J.

ATTACHMENT B

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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September 18, 2018

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CASE #: 76644-9-I
Ted A. Thomas and Debra A. Thomas, Appellants v. Specialized Loan Servicing, LLC., Respondents

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

jh

Enclosure
c: The Hon. Catherine Shaffer

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TED A. THOMAS and DEBRA A. THOMAS, Appellants, v. SPECIALIZED LOAN SERVICING, LLC; RTS PACIFIC, INC., a Washington Corporation (now in receivership); RMS MORTGAGE ASSET TRUST 2012-1, U.S. BANK as Trustee; RMS RESIDENTIAL PROPERTIES, LLC; RESIDENTIAL MORTGAGE SOLUTION, LLC; PRIME ASSET FUND, LLC, Respondents.	)	No. 76644-9-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellants Ted and Debra Thomas have filed a motion for reconsideration of the opinion filed on August 13, 2018. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Andrus, J.

LAW OFFICES OF MELISSA HUELSMAN

November 08, 2018 - 4:35 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	76644-9
Appellate Court Case Title:	Ted A. Thomas and Debra A. Thomas, Appellants v. Specialized Loan Servicing, LLC., Respondents
Superior Court Case Number:	15-2-31360-6

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