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No. 69277-1

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

Elizabeth S. Wasson, *Respondent*

v.

Andrew O. Sorensen, Jacqueline L. Young,
and All Other Occupants in Possession, *Appellants*

BRIEF OF RESPONDENT

DAVID J. BRITTON, WSBA# 31748
Attorney for Respondent Elizabeth S. Wasson

BRITTON & RUSS, PLLC
535 Dock Street, Suite 108,
Tacoma, WA 98402
Tel: (253) 383-7113
Fax: (253) 572-2223
brittonlaw@comcast.net

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BRIEF STATEMENT OF THE CASE

The following facts were undisputed in the trial court proceeding. On November 28, 2011, Respondent Elizabeth S. Wasson purchased the real property commonly known as 14314 NE 72nd Street, Redmond, King County, Washington (hereinafter “the Property”) from Deutsche Bank Trust Company.¹ As part of the purchase process, Ms. Wasson ordered a title report; the title report did not reveal any clouds on the title or irregularities in the chain of title, and Ms. Wasson had no knowledge of any such irregularities.² At closing, Ms. Wasson paid a total of \$52,117.20 out of her personal funds for the Property, and took out a mortgage for the remaining \$185, 882.80 of the purchase price.³ Unfortunately, at the time of the sale to Ms. Wasson, Appellants, former owners of the Property who had lost it to foreclosure⁴, still occupied the Property and refused to vacate even after multiple requests to do so.⁵

Appellant Andrew Sorensen, the former owner of the Property, encumbered the Property with a Deed of Trust to secure a loan from

¹ Complaint, CP at 3; Declaration of Elizabeth S. Wasson (“Wasson Decl.”), CP at 50-51.

² Wasson Decl., CP 51 at 5-11.

³ *Id.*, at 12-20.

⁴ Answer, CP 13 at 17-21.

⁵ Wasson Decl., CP 52 at 10-11.

National City Mortgage on April 20, 2007.⁶ The Deed of Trust references a 30-year Note in the amount of \$477,900.00, signed by Mr. Sorenson and dated April 20, 2007.⁷ This Deed of Trust was assigned to Mortgage Electronic Registration Systems, Inc. on June 6, 2007. The June 6, 2007 Assignment included language assigning the Deed of Trust “[t]ogether with the Note or Notes therein described or referenced, [and] the money due and to become due thereon with interest;” it was publically recorded in King County on October 5, 2007 under AFN 200710005000213.⁸

On August 20, 2010, Mortgage Electronic Registration Systems, Inc. assigned the Deed of Trust, once again “[t]ogether with the Note or Notes therein described or referenced, [and] the money due and to become due thereon with interest,” to Deutsche Bank Trust Company Americas as Trustee. The August 20, 2010 Assignment was publically recorded in King County on August 31, 2010 under AFN 20100831001943.⁹

Also on August 31, Deutsche Bank Trust Company Americas appointed Northwest Trustee Services as successor trustee.¹⁰ Appellants

⁶ CP 71-87.

⁷ *Id.*, CP 72.

⁸ CP 68-70.

⁹ CP 67.

¹⁰ CP 65-66.

had defaulted on their mortgage payments,¹¹ and in their Answer “admit that they were unable to redeem the property or restrain or invalidate the nonjudicial foreclosure sale” of their property.¹² The Property was sold at Trustee’s Sale to Deutsche Bank Trust Company Americas on March 4, 2011.¹³

Ms. Wasson purchased the Property from Deutsche Bank Trust nine months later, on November 28, 2011. After finding Appellants still occupying the Property and refusing to leave, she filed a Complaint for Ejectment and Quiet Title in King County Superior Court on January 5, 2012. Ms. Wasson filed her Motion for Summary Judgment on July 3, 2012. The Motion was noted for hearing on August 3; counsel for Defendants Sorensen and Young did not respond until August 2, and when he did respond, it was not a response to Ms. Wasson’s Motion for Summary Judgment, but rather a Motion for Continuance of Hearing, for an indefinite time,¹⁴ under CR 56(f).¹⁵ At the August 3 hearing, counsel

¹¹ Trustee’s Deed, Para. 4, CP 62.

¹² Answer, CP 8 at 17-21.

¹³ Trustee’s Deed, CP 62-64.

¹⁴ “Defendants request a continuance of [the summary judgment hearing] until a reasonable time of at least four weeks after the Washington Supreme Court issues its decision on the pending consolidated [*Bain* and *Selkowitz*] cases. . .” Defendants’ Motion for Continuance, CP 162.

for Sorensen and Young requested, and obtained from the court, a week's continuance, to August 10. He failed to use the week-long extension to supplement his pleadings, which did not include any briefing in opposition to Ms. Wasson's summary judgment motion.

On August 10, 2012, the King County Superior Court, Hon. Carol Schapira, J., entered a Judgment and Order Granting Summary Judgment, Quieting Title to Real Property, and Ordering Clerk to issue Writ of Restitution.¹⁶ The Court's August 10 Order included specific Conclusions of Law that "[d]efendants have failed to produce evidence sufficient to show the existence of an issue of material fact in this case, and Plaintiff is therefore entitled to judgment in her favor as a matter of law,"¹⁷ and that "Plaintiff has presented sufficient evidence that she holds valid legal title as a bona fide purchaser" of the Property.¹⁸ Defendants' Motion for Continuance was denied. Sorensen and Young appeal from the trial court's August 10, 2012 Orders granting summary judgment in favor of Plaintiff Wasson, and denying Defendants Sorensen and Young's Motion

¹⁵ Defendants' Motion for Continuance, CP 161-167; Appellants' Designation of Clerk's Papers at 2.

¹⁶ CP 195-199.

¹⁷ CP 197 at 4-6.

¹⁸ *Id.*, at 7-12.

for Continuance. Appellants Sorensen and Young have appealed; they filed their Opening Brief on April 10, 2013.

STANDARD OF REVIEW

1. The Trial Court's Decision to Grant or Deny a CR 56(f) Motion for Continuance is Reviewed for "Abuse of Discretion."

Appellants assign error to the trial court's denial of their CR 56(f) motion for continuance. Whether or not to grant a continuance under CR 56(f) is within the discretion of the trial court, unless that discretion was manifestly abused. "abuse of discretion" is defined as "discretion exercised on untenable grounds or for untenable reasons."¹⁹ CR 56(f) is predicated on the nonmoving party's need of additional *evidence*. The trial court does not abuse its discretion by denying a CR 56(f) motion for continuance if: (1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of

¹⁹ *In re Tower*, 55 Wn. App. 697, 700, 780 P.2d 863 (1989), *rev. den.*, 114 Wn.2d 1002 (1990).

material fact.²⁰ As will be shown below, in their request for extension of time, appellants never asked the trial court for time to gather additional *evidence*, let alone explain what evidence they expected to find, or what its impact on the case might be. Appellants asked the trial court for an indefinite extension of time to await a favorable change in the law. This is not a permissible ground for a CR56(f) motion, and the trial court can hardly be said to have abused its discretion in denying it.

2. The Trial Court’s Decision to Grant or Deny a CR 56 Motion for Summary Judgment is Reviewed *de novo*, Using The Same Standard as the Trial Court.

“The standard of review on an order of summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court.”²¹ The trial court’s inquiry is based on the plain language of CR 56, and on a standard on summary judgment that has been well developed by Washington appellate courts. Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is

²⁰ *Manteufel*, 117 Wn. App. at 175; *Pelton v. Tri-State Memorial Hosp., Inc.*, 66 Wn. App. 350, 356, 831 P.2d 1147 (1992).

²¹ *Buechler v. Wenatchee Valley College*, ___ Wn. App. ___, 298 P.3d 110, 115 (2013); *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”²²

In a summary judgment motion, the initial burden is on the moving party to prove no genuine issue of material fact exists.²³ The moving party may meet this initial burden by “showing – that is, pointing out” to the court that there is an absence of evidence to support the nonmoving party’s case.²⁴ The inquiry then shifts to the party with the burden of proof at trial; if the plaintiff “fails to make a showing sufficient 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,” then the court should grant the motion for summary judgment.²⁵

In making this responsive showing, the plaintiff may not rely on the allegations made in his pleadings.²⁶ “The nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain.” Nor may Plaintiff rely on his own conclusory allegations

²² CR 56(c); *Nielson v. Spanaway General Medical Clinic*, 135 Wn. 2d 255, 261, 956 P.2d 312 (1998).

²³ *Id.*; *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

²⁴ *Young*, 112 Wn.2d at 225 n.1, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986).

²⁵ *Key Pharmaceuticals*, 112 Wn.2d at 225; *Celotex*, 477 U.S. at 322.

in the form of a declaration to overcome summary judgment: "[i]n opposing summary judgment, a party may not rely merely upon allegations or self-serving statements, but must set forth *specific facts* showing that genuine issues of material fact exist." Newton Ins. Agency and Brokerage, Inc. v. Caledonian Ins. Group, Inc., 114 Wn. App. 151, 157, 52 P.3d 30 (2002) (emphasis added). In the present case, Appellant's counsel has relied exclusively upon his own declaration (which is offered as "expert" testimony, with counsel even referring to his own testimony in the third person²⁷), which deals exclusively with the procedural history and facts of *other cases*, some of which are not even from this jurisdiction.²⁸ Respondent respectfully submits that, in order to overcome summary judgment, Appellants were required to present facts from *this* case. They have failed to do so.

²⁶ Key Pharmaceuticals, 112 Wn.2d at 225.

²⁷ See, e.g., Appellants' Opening Brief at 15-16.

²⁸ Id.

A. **Appellants' Assignment of Error to the Trial Court's Denial of Their CR 56(f) Motion for Continuance Ignores The Applicable Standards for Deciding a CR 56(f) Motion, And For Reviewing the Trial Court's Decision; Appellants Have Instead Invented Their Own Standard.**

1. In Appellant's Assignment of Error No. 1, Appellants assign error to the trial court's denial of their motion for an indefinite continuance of Plaintiff's Motion for Summary Judgment pending a decision by the Washington Supreme Court in an unrelated case, involving different parties and different facts.

Appellants' First Assignment of Error reads in its entirety as follows:

*Appellant's Assignment of Error No. 1:
The Trial Court erred when it denied Defendant's Motion for continuance of Plaintiff's Motion for Summary Judgment pending the decision by the Washington Supreme Court in response to the legal questions certified from the U.S. District Court, Western District of Washington in Kristin Bain v. Metropolitan Mortgage Group, Inc., et al., Case No. 86206-1, consolidated with Kevin Selkowitz v. Litton Loan Servicing, LP, et al., Case No. 86207-9.²⁹*

Appellants identify a single Issue Related to Assignment of Error No. 1:

1. With respect to Assignment of Error No.1, did the trial court fail to adequately consider that it was probable that the pending decision by the Washington State Supreme Court in response to the legal questions certified from the U.S. District Court, Western District of Washington in Kristin Bain v. Metropolitan Mortgage Group, Inc., et al., Case No. 86206-1, consolidated with Kevin Selkowitz v. Litton Loan Servicing, LP, et al., Case No. 86207-9, would decide issues of law that would adversely affect the validity of the non-judicial foreclosure of the deed of trust on Defendants' home?³⁰

²⁹ Appellants' Opening Brief ("Appellants' Br.") at 3.

³⁰ Appellants' Br. At 4.

In other words, Appellants assign error to the trial court's denial of their motion for continuance of Plaintiffs' Motion for Summary Judgment, not because they needed more time to gather *evidence* that might create an issue of fact, but because, they alleged, "it was probable" that, at some time in the future, the Washington Supreme Court would issue a holding that would *change the law* governing nonjudicial deed of trust foreclosures, thereby rendering the March 2011 foreclosure of Defendants' home retroactively invalid.

Appellants have invented their own standard for deciding motions for continuance under CR 56(f): they argue that they are entitled to an indefinite continuance to wait for a favorable change in the law. The actual standard can be found in the plain language of CR 56(f): this seems to have escaped Appellants' notice.

2. The standard for review of a trial court's decision on a motion for continuance under CR 56(f) is manifest abuse of discretion; Appellants have not addressed the standard of review, let alone made a showing that the trial court abused its discretion.

CR 56(f) provides in relevant part:

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of the party opposing the motion that he cannot, for reasons stated, present by affidavit *facts* essential to justify his opposition, the

court may . . . order a continuance *to permit affidavits to be obtained or depositions to be taken or discovery to be had* . . .³¹

(Emphasis added). In Appellants' Motion for Continuance before the trial court, they did not identify a single affidavit, deposition, or other type of discovery that they might need in order to demonstrate the existence of an issue of fact. What they wanted the trial court to wait for was not a witness, or a document to be produced: it was a Supreme Court decision that would supposedly change the law in Appellants' favor. This is not a permissible request under CR 56(f).

A trial court's denial of a CR 56(f) motion for continuance is reviewed for manifest abuse of discretion.³² Under the circumstances it can hardly be said that the trial court abused its discretion: "abuse of discretion" is defined as "discretion exercised on untenable grounds or for untenable reasons."³³ The trial court does not abuse its discretion by denying a CR 56(f) motion for continuance if: (1) the requesting party does not offer a good reason for the delay in obtaining the desired *evidence*; (2) *the requesting party does not state what evidence would be*

³¹ CR 56(f).

³² *Van Dinter v. City of Kennewick*, 64 Wn. App. 930, 936, 827 P.2d 329 (1992), aff'd, 121 Wn.2d 38, 846P.2d 522 (1993); *Manteufel v. Safeco Ins. Co.*, 117 Wn. App. 168, 175, 68 P.3d 1093 (2003).

*established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.*³⁴ (Emphasis added).

Appellants cannot establish abuse of discretion because their Motion for Continuance did not state what additional evidence would be produced if the continuance were granted. Moreover, all three prongs of the test are predicated on the moving party's desire to obtain additional *evidence*. Appellants expressed no such desire in their CR 56(f) motion, which was concerned exclusively with alleged changes in the law coming down in the near future. The trial court's denial of Appellants' CR 56(f) motion was therefore within its clear discretion, and should be affirmed on appeal.

3. There is no authority to support Appellants' theory that they are entitled to an extension of time until the law becomes more favorable to them. The trial court did not abuse its discretion in denying Appellants' CR 56(f) motion.

Appellants have not cited any legal authority to support their argument that they were entitled to an extension of the hearing date on Plaintiff's Motion for Summary Judgment because the law would

³³ *In re Tower*, 55 Wn. App. 697, 700, 780 P.2d 863 (1989), *rev. den.*, 114 Wn.2d 1002 (1990).

³⁴ *Manteufel*, 117 Wn. App. at 175; *Pelton v. Tri-State Memorial Hosp., Inc.*, 66 Wn. App. 350, 356, 831 P.2d 1147 (1992).

“probably” change soon, in a way that would be favorable to their case.

This court need not address arguments that are unsupported by citation to relevant authority.³⁵

B. Appellants’ Assignment of Error To The Trial Court’s Granting of Respondent’s Motion for Summary Judgment Is A Nearly Word-For-Word Repetition Of Their First Assignment of Error For Denial Of Appellants’ CR 56(f) Motion; Appellants Did Not Choose To Oppose Respondent’s Motion for Summary Judgment Before The Trial Court, And They Have Neglected To Do So Again On Appeal.

1. Appellant’s Assignment of Error No. 2 is not in fact a new or separate assignment of error; it is essentially a repetition of Appellant’s First Assignment of Error.

While Appellants’ Second Assignment of Error appears to differ from the First, (it purports to assign error to the trial court’s grant of summary judgment in favor of Plaintiffs, as opposed to the court’s denial of Defendants’ Motion for Continuance), the “Issue Related to Assignment of Error No.2” shows that the two assignments of error are really more or less identical. As Appellants’ counsel himself admits in the Introduction to his Opening Brief, “[e]ssentially, this appeal is from the refusal of the Trial Court on August 10, 2012 to grant Defendant’s Motion for Continuance of the hearing date on Plaintiff’s Motion for Summary

³⁵ RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828

Judgment to await the soon-to-be-issued decision of the Washington Supreme Court in the Bain/Selkowitz cases . . .”³⁶

Appellants’ Assignment of Error No.2 reads as follows:

Appellant's Assignment of Error No. 2:
The Trial Court erred when it entered the Judgment and Order Granting Summary Judgment, Quieting Title to Real Property, and Ordering Clerk to Issue Writ of Restitution.

As with the First Assignment of Error, Appellants identify a single Issue Related to Assignment of Error No. 2, which is very nearly identical to their Issue Related to Assignment of Error No.1. Those parts of Appellants’ Issues Related to Assignment of Error No. 2 that do not appear in their Issues Related to Assignment of Error No. 1, are stricken through below: additional language not appearing in Assignment of Error No. 1 is underlined.

2. With respect to Assignment of Error No.2, did the trial court fail to adequately consider that ~~it was probable that~~ the pending decision by the Washington State Supreme Court in response to the legal questions certified from the U.S. District Court, Western District of Washington in *Kristin Bain v. Metropolitan Mortgage Group, Inc., et al*, Case No. 86206-1, consolidated with *Kevin Selkowitz v. Litton Loan Servicing, LP, et al.*, Case No. 86207-9, probably would decide issues of law that would adversely affect the ~~validity of the non-judicial foreclosure of the deed of trust on Defendants’ home?~~ Issues in Plaintiff’s Motion for Summary Judgment and require a trial to resolve the unresolved mixed

P.2d 549 (1992).

³⁶ Appellants’ Opening Brief (“Appellants’ Br.”) at 1.

questions of law and fact issues [sic] in Plaintiff's claims for ejectment and quiet title in her complaint?³⁷

These “unresolved mixed questions of law and fact issues” mentioned here by Appellants are never actually identified on appeal, nor in their briefing before the trial court. Based on the foregoing, their existence seems to depend on a favorable *legal* outcome in the *Bain* and *Selkowitz* cases (which did not turn out as Appellants expected – see below). This Second Assignment of Error is essentially a repetition of the First.

2. To the extent Appellants are deemed to have assigned error to the trial court's ruling on the merits, the trial court issued a specific conclusion of law that the Respondent was a bona fide purchaser for value of the subject real property; this conclusion is not challenged on appeal, and therefore becomes the law of the case.

Again, Respondent believes that Appellants have not actually succeeded in assigning error to the trial court's decision to grant summary judgment in Ms. Wasson's favor, independent of any CR 56(f) considerations. However, to the extent they can be said to have done so, Appellants are precluded by the law of the case doctrine from arguing on appeal that Ms. Wasson was not a bona fide purchaser of the subject Property. The trial court's finding and conclusion on this issue therefore

³⁷ Appellants' Br. At 4.

stands; it was sufficient, by itself, to support the trial court's grant of summary judgment.

The trial court's August 10, 2012 Order Granting Summary Judgment, Quieting Title to Real Property, and Ordering Clerk to Issue Writ of Restitution contains a specific Conclusion of Law that "Plaintiff has presented sufficient evidence that she holds valid legal title as a bona fide purchaser" of the Property.³⁸ Appellants made no attempt to oppose Ms. Wasson's presentation of facts, argument and authority on summary judgment, that she was a bona fide purchaser for value. Moreover, Appellants have chosen not to oppose the trial court's conclusion of law that Ms. Wasson is a bona fide purchaser on appeal either. "Unchallenged conclusions of law become the law of the case."³⁹ Such conclusions will not be disturbed on appeal.⁴⁰

A bona fide purchaser for value is one who, without notice of another's claim of right to a property prior to her acquisition of title, has paid the seller a valuable consideration.⁴¹ A buyer of real property who

³⁸ CP 197 at 7-12.

³⁹ *State v. Moore*, 73 Wn. App. 805, 811, 871 P.2d 1086 (1994); *King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 716, 846 P.2d 550 (1993); *Detonics "45" Assocs. v. Bank of California*, 97 Wn.2d 351, 353, 644 P.2d 1170 (1982).

⁴⁰ *King Aircraft Sales*, 68 Wn. App. at 717.

⁴¹ *Steward v. Good*, 51 Wn. App. 509, 512-13, 754 P.2d 150 (1988).

has demonstrated that she is a bona fide purchaser for value is entitled to have title to the property quieted in her.⁴² This conclusion of law, unchallenged by Appellants in the proceeding below, is sufficient in and of itself to decide the case in favor of Ms. Wasson. And under the law of the case doctrine, it cannot be overturned on appeal. The trial court's decision should be affirmed.

3. The Supreme Court has decided the *Bain v. Metropolitan Mortgage Group* Case that appellants asked the trial court to wait for the Washington Supreme Court to decide: *Bain does not change the law in Appellants' favor, though appellants' counsel has misrepresented to this Court that it does.*

As Appellants' counsel points out in his brief, the Washington Supreme Court has now decided *Bain* and *Selkowitz*, and has published a holding consolidating the two cases. The Supreme Court's opinion in *Bain v. Metropolitan Mortgage Group, Inc.*⁴³ is essentially the only legal authority cited by Appellants' counsel on appeal.⁴⁴ Appellants' counsel

⁴² *Id.*, at 514.

⁴³ *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012).

⁴⁴ The remainder of the cases cited by Appellants' counsel are either out-of-state holdings cited by counsel as part of his own "expert" testimony regarding MERS, or are contained as authority for a "boilerplate" recital of the standard on summary judgment. Appellants' Br. At 18. *Albice v. Premier Mortgage Services of Washington, Inc.*, 174 Wn.2d 560, 573, 276 P.3d 1277 (2012) (Appellant's Br. At 34) is cited for the proposition that the recitals in a Trustee's Deed must contain recitals of fact showing that the legal requirements of the Deed of Trust Act, Ch. 61.24 RCW were complied with, as opposed to conclusory assertions that "all legal requirements were complied with." Appellants

has even provided a copy of the full holding in Bain as an Appendix to his Opening Brief. Roughly 13 pages of his 36-page brief are given over to in-depth discussion of the Bain and Selkowitz cases, their factual and procedural history, including pages 26 through 31 of his brief, in which he reproduces several pages of the Bain holding verbatim. Clearly he has read the holding and knows what it says.

This makes counsel's blatant misrepresentation of the Bain holding all the more disturbing. Counsel repeatedly misrepresents to this court that in Bain, the Washington Supreme Court

held, as a matter of law, that Mortgage Electronic Registration Systems, Inc. (MERS) is not a lawful beneficiary under the Washington State Deed of Trust Act definition of beneficiary, in section RCW 61.24.050(2), because Mortgage Electronic Registration Systems, Inc. (MERS) never holds the note or other evidence of the debt obligation in which MERS is named beneficiary of the deed of trust. See *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 91, 94-98, 98-110, 110-114, 285 P.3d 34 (2012);⁴⁵

...

In [*Bain*] the court held as a matter of law that Mortgage Electronic Registration Systems, Inc. (MERS) is not a lawful beneficiary under the Washington Deed of Trust Act;⁴⁶

...

here assert that the recitals in Deutsche Bank's Trustees' Deed are inadequate. This is false: the Trustees deed clearly recites the facts of compliance. See Trustee's Deed, CP 62-63, Recitals 1-8. In any event, Appellants failed to raise this argument on summary judgment.

⁴⁵ Appellant's Br. at 2.

⁴⁶ Appellant's Br. at 17.

In *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d at 89, 91, 98-110, 110-114, the Supreme Court clearly holds that MERS is an unlawful beneficiary under the Washington State Deed of Trust Act.⁴⁷

What the Supreme Court *actually* held in *Bain* is quite a bit different:

The primary issue is whether MERS is a lawful beneficiary with the power to appoint trustees within the deed of trust act *if it does not hold the promissory notes secured by the deeds of trust*.⁴⁸ A plain reading of the statute leads us to conclude that only the actual holder of the promissory note or other instrument evidencing the obligation may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property. Simply put, *if MERS does not hold the note*, it is not a lawful beneficiary. [Emphasis added].⁴⁹

Next, *we are asked to determine the "legal effect" of MERS not being a lawful beneficiary. Unfortunately, we are unable to do so* based upon the record and argument before us.⁵⁰ [Emphasis added].

...
[N]othing herein should be interpreted as preventing the parties to proceed with judicial foreclosures.⁵¹ [Emphasis added].

The holding in *Bain* does not apply to cases where MERS *does* hold the note. Counsel conveniently omits this part of the holding from his analysis.⁵² Moreover, the Court *expressly states* that its holding *does not have any effect on foreclosures*. The *Bain* holding therefore cannot be used to invalidate the March 4, 2011 deed-of-trust foreclosure by which

⁴⁷ *Id.*, at 32.

⁴⁸ In the nonjudicial foreclosures that gave rise to the *Bain* and *Selkowitz* cases, "the assignments of the promissory notes were not publically recorded." *Bain*, 175 Wm.2d at 90. In this case, both of the note assignments were publically recorded. *See supra* at 7.

⁴⁹ *Bain*, 175 Wn.2d at 89.

⁵⁰ *Id.*

⁵¹ *Id.*, at 109.

Appellants lost their title to the Property, and there is no basis for Appellants' argument that the chain of title for the Property has been broken and Ms. Wasson does not actually have a valid title.

Based on his false assertions that the Bain holding states categorically that "MERS is an unlawful beneficiary under the Washington Deed of Trust Act," and that "MERS can never be a real beneficiary of a deed of trust,"⁵³ counsel attempts to convince the court that all of the documents in Ms. Wasson's chain of title to the Property, beginning with the 2007 Assignment of Deed of Trust to MERS, are invalid, meaning she does not have title to the property.⁵⁴

Beyond the fact that Appellants' counsel ignores the established fact that Ms. Wasson is a bona fide purchaser, his theory is necessarily based on his misrepresentation of the Bain holding. The actual holding does not support his argument at all. Once again, settled law – the very settled law Appellant's counsel has cited in support of his own case – controls the case, and mandates an affirmation by this court of the trial court's decision.

⁵³ Appellant's Br. at 32.

MOTION FOR ATTORNEY’S FEES UNDER RAP 18.9
FOR FILING A FRIVOLOUS APPEAL

RAP 18.9 provides for an award of attorney's fees to a prevailing respondent in a frivolous appeal. An appeal is frivolous when there are no issues upon which reasonable minds could differ, and when the appeal is so devoid of merit that there was no reasonable possibility of a reversal.”⁵⁵ In the present appeal, Appellants’ counsel has ignored applicable law in some cases, misrepresented it in others; has assigned error to the trial court’s grant of summary judgment in Ms. Wasson’s favor, after declining to oppose the summary judgment motion in the trial court; and has failed to address an unchallenged conclusion of law. The one thing he has not done is identify a single issue for appeal that is actually supported by the facts in the record or by relevant legal authority. His appeal is utterly without merit. An award of attorney’s fees in an amount to be supported by affidavit is therefore appropriate.

⁵⁴ *Id.*

⁵⁵ *Van Dinter*, 64 Wn. App. at 930.

CONCLUSION

For the reasons set forth above, Respondent Elizabeth S. Wasson prays this Court to AFFIRM the trial court's August 10, 2012 Judgment and Order Granting Motion for Summary Judgment, Quieting Title, and Ordering the Clerk to Issue Writ of Restitution, and DISMISS Sorensen and Young's appeal.

Finally, Respondent Wasson renews her request that this Court consider and grant her Motion on the Merits, filed on April 12, 2013, as provided by RAP 18.14 and the Court's own General Order of September 14, 2012, on largely the same grounds as set forth above.

RESPECTFULLY SUBMITTED This **8th** day of **May, 2013**.

BRITTON & RUSS, PLLC

by:



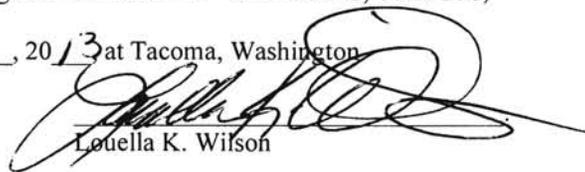
DAVID J. BRITTON, WSBA# 31748

Attorney for Respondent Elizabeth S. Wasson

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington, that on this day I Personally served upon _____, Deposited in the mails of the United States, first class, postage prepaid Sent by Certified United States Mail, return receipt requested return receipt not requested Sent via legal messenger service Sent via commercial parcel service, the original of a true and correct copy of this document to **Edward L. Mueller and Mueller & Associates, Inc., P.S.**, at the following address: **2320 130th Avenue NE, Suite 210, Bellevue, WA 98005.**

SIGNED this 8th day of May, 2013 at Tacoma, Washington



Louella K. Wilson