

FILED
Aug 29, 2016
Court of Appeals
Division I
State of Washington

No. 74210-8-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

MICHAEL J. BEVERICK and CINDY M. BEVERICK, husband and wife,

Appellants/Plaintiffs,

v.

LANDMARK BUILDING AND DEVELOPMENT INC.; LAND TITLE
& ESCROW COMPANY; WMC MORTGAGE CORP.; AURORA
BANK FSB; U.S. BANK ASSOCIATION AS TRUSTEE for
STRUCTURED ASSET CORPORATION MORTGAGE PASS
CERTIFICATES, SERIES 2007-GEL1 Acct. No. 0122944200; BISHOP
AND LYNCH OF KING CO.; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.; and NATIONSTAR MORTGAGE,

Respondents/Defendants

REPLY TO RESPONDENTS' BRIEFS

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TABLE OF CONTENTS

PAGE

TABLE OF CASES AND AUTHORITIES.....	ii
I. INTRODUCTION.....	1
II. ARGUMENT.....	3
A. Under CR 54(b) the Decree of Foreclosure was subject to revision and did not terminate the action.....	3
B. Improper Reliance on Declarations as Substitute for Business Records.....	8
i. Declaration of A.J. Loll.....	9
ii. Declaration of Laura McCann.....	11
iii. Declaration of Adam G. Hughes.....	12
C. Promissory Note Was Not Established as Authentic by Undisputed Evidence.....	13
D. Elements of the CPA Claim.....	17
i. Unfair or Deceptive Acts.....	17
ii. Injury.....	18
iii. Causation.....	19
III. CONCLUSION	22
IV. Declaration of Service.....	25

TABLE OF CASES AND AUTHORITIES

CASES	PAGE
<i>Albice v. Premier Mortg. Services of Washington, Inc.</i> , 157 Wash.App. 912, 239 P.3d 1148, review granted 170 Wash.2d 1029, 249 P.3d 623 (2010).....	1
<i>Ayers v. Johnson & Johnson Baby Products. Co.</i> , 117 Wash.2d 747, 818 P.2d 1337 (1991).....	19
<i>Bain v. Metropolitan Mortgage Group, Inc.</i> , 175 Wn.2d 83, 285 P.3d 34 (2012).....	2, 10, 12
<i>Bank of America, N.A. v. Owens</i> , 177 Wn.App. 181, 311 P.3d 594 (2013)...	6
<i>Baughn v. Honda Motor Co.</i> , 107 Wash.2d 127, 727 P.2d 655 (1986).....	20
<i>Bavand v. OneWest Bank, FSB</i> , 176 Wn.App. 475, 309 P.3d 636 (2013)...	11
<i>Beneficial Haw., Inc. v. Casey</i> , 98 Haw. 159, 45 P.3d 359 (2002).....	6
<i>Brown v. Dept. of Commerce</i> , 184 Wn.2d 509, 359 P.3d 771 (2015).....	11
<i>Codd v. Van Der Ahe</i> , 92 Wash. 529, 159 Pac. 686 (1916).....	5, 7
<i>Fed. Sav. & Loan Ins. Corp. v. Hamilton</i> , 241 Mont. 367, 786 P.2d 1190....	7
<i>Hampton v. Gilleland</i> , 61 Wn.2d 537, 379 P.2d 194 (1963).....	14
<i>In re Meyer</i> , 506 B.R. 533 (2010).....	18
<i>In re Stanley</i> , 514 B.R. 27 (2012).....	14
<i>Ingersoll-Rand Financial Corp. v. Anderson</i> , 921 F.2d 497 (Cir. 1990).....	13
<i>Jeter v. Credit Bureau, Inc.</i> , 760 F.2d 1168, 1174).....	19
<i>Klem v. Washington Mutual Bank</i> , 176 Wn.2d 771, 295 P.3d 1179 (2012)....	1

<i>Koegel v. Prudential Mut. Sav. Bank</i> , 51 Wn. App. 108, 752 P.2d 385 (1988).....	1
<i>Lyons v. U.S. Bank</i> , 181 Wn.2d 775, 783, 336 P.3d 1142 (2014).....	18
<i>Martin v. Abbott Laboratories</i> , 102 Wn.2d 581, 689 P.2d 368 (1984)....	20, 21
<i>Melville v. State</i> , 115 Wn.2d 34, 36, 793 P.2d 952 (1990).....	9
<i>Moritz v. Daniel N. Gordon, P.C.</i> , 895 F.Supp.2d 1097 (2012).....	18
<i>MRC Receivables Corp. v. Zion</i> , 152 Wn. App. 625, 218 P.3d 621 (2009)...	8
<i>Nelbro Packing Co. v. Baypack Fisheries, L.L.C.</i> , 101 Wn.App. 517, 6 P.3d 22 (2000).....	4, 5
<i>Nestegard v. Inv. Exch. Corp.</i> , 5 Wn.App. 618, 489 P.2d 1142 (1971).....	4, 7
<i>Panag v. Farmers Ins. Co. of Washington</i> , 166 Wn. 2d 27, 204 P.3d 885 (2009).....	19
<i>Parker v. Bodcaw Bank</i> , 161 Ark. 426, 256 S.W. 384 (1923).....	7
<i>Physicians Insurance Exchange & Association v. Fisons, Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	19, 20
<i>Podbielancik v. LPP Mortg. Ltd.</i> , 362 P.3d 1287, 191 Wn.App. 662 (2015).....	8, 9
<i>Potter v. Wilbur-Ellis Co.</i> , 62 Wn.App. 318, 814 P.2d 670 (1991).....	17
<i>Security Pacific Mortgage Corp. v. Miller</i> , 71 Haw. 65, 783 P.2d 855 (1989).....	7
<i>Schiffman v. Hanson Excavating Co.</i> , 82 Wash.2d 681, 513 P.2d 29 (1973)..	4
<i>State v. Garrett</i> , 76 Wash.App. 719; 887 P.2d 488 1995).....	8
<i>State v. Weeks</i> , 70 Wn.2d 951, 953, 425 P.2d 885 1967).....	8
<i>United States v. Varner</i> , 13 F.3d 1503 (Cir.994).....	14

Watanabe v. Webb, 320 Ark. 375, 896 S.W. 2d 597 (1995).....7

Young v. Liddington, 50 Wash.2d 78, 309 P.2d 761 (1957).....8

WASHINGTON STATE STATUTES

RCW 4.22.070(1)(a).....20

RCW 5.45.020.....8, 22

RCW 19.868

RCW 19.861

RCW 61.12.....18, 22

RCW 61.24.....1

RCW 61.24.010(4).....1

WASHINGTON COURT RULES

RAP 5.2(a).....3

RAP 18.1.....23

CR 54(b).....3, 4, 6

CR 56.....12, 22

ER 801 8002.....15

ER 1003.3.....15

OTHER AUTHORITY

Hawai'i Rules of Civil Procedure 54(b).....6

III. INTRODUCTION

Respondents' briefs rely upon demonstrably false factual assertions and seek to deny liability based upon incomplete representations of the applicable law. Through their actions, the Respondents intentionally obfuscated the responsible principal creditor for a home loan and sought to conduct a non-judicial foreclosure on the basis of fraudulent representations. This course of conduct amounts to a violation of the Washington Consumer Protection Act (*RCW 19.86, et seq.*) (hereinafter "CPA"), through both meeting the elements of a CPA claim standing alone and through violations of applicable statute.

The Deed of Trust Act (*RCW 61.24, et seq.*) (hereinafter "DTA") provides the exclusive procedures for non-judicial foreclosure and must be strictly construed in favor of the borrower. *Albice v. Premier Mortgage Services*, 174 Wn.2d 560, 276 P.3d 1277 (2012) (hereinafter "*Albice*") (citing *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 915-916, 154 P.3d 882 (2007) and *Koegel v. Prudential Mutual Savings Bank*, 51 Wn.App. 108, 111-112, 752 P.2d 385 (1988)). In order for strict compliance to occur, each step of the foreclosure process must be undertaken by the party with the statutorily prescribed authority to take each step. Additionally, trustees must adhere to a statutory duty of good faith to both parties to the secured transaction. *RCW 61.24.010(4)*.

The reasons for strict compliance were described in *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 789, 295 P.3d 1179 (2012) (hereinafter “*Klem*”):

The power to sell another person's property, often the family home itself, is a tremendous power to vest in anyone's hands. Our legislature has allowed that power to be placed in the hands of a private trustee, rather than a state officer, but common law and equity requires that trustee to be evenhanded to both sides and to strictly follow the law. *Albice*, 174 Wn.2d at 568 (citing *Udall*, 159 Wn.2d at 915-16); *Cox*, 103 Wn.2d at 389 (citing *Osborne*, *supra*). . . .

* * *

As a pragmatic matter, it is the lenders, servicers, and their affiliates who appoint trustees. Trustees have considerable financial incentive to keep those appointing them happy and very little financial incentive to show the homeowners the same solicitude. *Bain v. Metro. Mortg. Grp., Inc.* 175 Wn.2d 83, 95-97, 285 P.3d 34 (2012).

In the absence of such statutory compliance the attempted non-judicial foreclosure may not only be invalid but may additionally violate the CPA. *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 115-120, 285 P.3d 34 (2012) (hereinafter “*Bain*”).

Here, Respondents,¹ WMC MORTGAGE CORP. (hereinafter “WMC”), AURORA BANK, FSB (hereinafter “Aurora”), U.S. BANK NATIONAL ASSOCIATION, as Trustee (hereinafter “US Bank”), BISHOP

¹ These Respondents shall hereinafter be referred to as “Respondents Aurora Bank, *et al.*” in circumstances where their Answering Brief is referenced.

AND LYNCH OF KING CO. (hereinafter “Bishop Lynch”), MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (hereinafter “MERS”), and NATIONSTAR MORTGAGE, LLC (hereinafter “Nationstar”) argue that this Court should condone deviations from statutory requirements to validate the non-judicial foreclosure and condone the use of incompetent testimony offered at summary judgment to facilitate judicial foreclosure. This Court should repudiate their arguments, and reinforce the long-established principals underlying statutory interpretation and the requirements of evidence.

IV. ARGUMENT

E. **Under *CR 54(b)* the Decree of Foreclosure was subject to revision and did not terminate the action**

Respondents, Aurora Bank, *et al.* contend that the Decree of Foreclosure represented a final and appealable judgment which made Appellant’s subsequent Notice of Appeal untimely under *RAP 5.2(a)*. Answering Brief of Respondents Aurora Bank, *et al.*, page 11. Nowhere in the argument do these Respondents identify, discuss or properly apply the requisites contained within *CR 54(b)* and instead seek to invoke the finality of judgment without meeting the legal requirements for finality as required by Washington law.

It is well established in Washington that in cases involving multiple parties or multiple claims dismissal of merely a subset of the claims will not

amount to an appealable termination of those claims, absent compliance with the three-part procedure proscribed under *CR 54(b)*. These elements are: (1) an express determination in the judgment that there is no just reason for delay; (2) written findings supporting this determination; and (3) an express direction for entry of judgment. *CR 54(b)*; *Nelbro Packing Co. v. Baypack Fisheries, L.L.C.*, 101 Wn.App. 517, 6 P.3d 22 (2000) (hereinafter “*Nelbro*”). Absent each of these elements

...any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

CR 54(b).

In appellate cases where a court fails to comply with the requisites of *CR 54(b)* the remedy is dismissal of the appeal pending compliance. *Schiffman v. Hanson Excavating Co.*, 82 Wash.2d 681, 687, 513 P.2d 29 (1973) (hereinafter “*Schiffman*”).

The cases cited by Respondents for their position are inapposite or inapplicable to the facts of this case. *Nestegard v. Inv. Exch. Corp.*, 5 Wn.App. 618, 489 P.2d 1142 (1971) (hereinafter “*Nestegard*”) involved a single claim of contract that was subject to a Summary Judgment order then a subsequent ruling that the appellate court called an “affirmance” of the prior ruling. *Nestegard*, at pg. 625. *Nestegard* is irrelevant because it did not

involve multiple claims with multiple parties, making Respondents' reliance completely misplaced.

Likewise, in *Codd v. Van Der Ahe*, 92 Wash. 529, 159 Pac. 686 (1916) (hereinafter "*Codd*") there was only a single claim before the trial court, foreclosure on a promissory note. Although there were multiple defendants involved in that case, once again the issue centered on orders and rulings directly related to that judgment which resolved all claims, which the appellate court characterized as a final judgment rather than distinct claims against additional parties.

Crucially, there are several factors that a trial court is required to weigh that must form the basis of the written findings required by the rule. These factors are: (1) The relationship between the adjudicated and the unadjudicated claims, (2) whether questions which would be reviewed on appeal are still before the trial court for determination in the unadjudicated portion of the case, (3) whether it is likely that the need for review may be mooted by future developments in the trial court, (4) whether an immediate appeal will delay the trial of the unadjudicated matters without gaining any offsetting advantage in terms of the simplification and facilitation of that trial, and (5) the practical effects of allowing an immediate appeal. *Nelbro Packing Co.*, 101 Wn.App. 517, 525, 6 P.3d 22, at 27 (citing *Schiffman* and dismissing appeal based upon written findings that did not adequately address all the factors).

This Court has previously stated that “strict compliance” with the rule is required, including the written findings underlying the decision. *Bank of America, N.A. v. Owens*, 177 Wn.App. 181, at 192, 311 P.3d 594 (2013). The judgment asserted to be final and appealable here clearly does not meet the basic requirements set forth in the prior decisions of this Court.

Respondents’ resort to out of state case law is also entirely unpersuasive for its failure to address the important differences between the various statutory and court rule requirements among the different states. Respondents call the *Beneficial Haw., Inc. v. Casey*, 98 Haw. 159, 45 P.3d 359 (2002) (hereinafter “*Beneficial*”) decision “the most persuasive” among the cases cited and as such it demonstrates the shortcomings of the argument.

First, as the Supreme Court of Hawai’i noted “[t]he foreclosure decree was certified for appeal pursuant to Hawai’i Rules of Civil Procedure (HRCP) Rule 54(b).” *Beneficial*, at pg. 162. This marks the determinative difference with the present case, as the May 21, 2015 Order failed to comply with written findings as required under *CR 54(b)*. Unlike Washington’s *CR 54(b)*, the rule in Hawai’i does not require specific written findings to support the determination and direction for entry of final judgment. Compare Washington *CR 54(b)* to HRCP *Rule 54(b)*.

Second, even if the plain language of the respective rules was not determinative, there was a string of prior cases in Hawai’i that established that the bifurcated nature of foreclosure (issuance of the decree followed by

ancillary proceedings addressing details of the decree) did not alter the finality of the earlier judgment for decree of foreclosure. Similarly, in the case of *Watanabe v. Webb*, 320 Ark. 375, 896 S.W. 2d 597 (1995), that court was able to rely on Supreme Court cases as far back as 1923 for the proposition regarding finality. See *Parker v. Bodcaw Bank*, 161 Ark. 426, 256 S.W. 384 (1923). As Respondents note, Washington courts have not held that a decree of foreclosure is a final and appealable order. Brief of Respondents Aurora Bank, et al, at page 13.

Finally, as in *Nestegard* and *Codd*, the claim before the Hawai'i court was singular in nature. It was a foreclosure, and though it did involve multiple parties, it did not involve additional claims (or parties being both Plaintiff and Cross-Defendant or Defendant and Cross-Plaintiff) distinct from the suit on the obligation to collect a debt. A similar analysis applies to *Fed. Sav. & Loan Ins. Corp. v. Hamilton*, 241 Mont. 367, 786 P.2d 1190, as well as the additional Hawai'i case of *Security Pacific Mortgage Corp. v. Miller*, 71 Haw. 65, 783 P.2d 855 (1989).

Respondents fail to identify a case involving multiple distinct claims where a decree of foreclosure was found to be a final order when any claims were still subject to trial. For all of the reasons cited above, Appellants' appeal was timely under the laws of Washington.

F. Improper Reliance on Declarations as Substitute for Business Records

The purpose of *RCW 5.45.020* is to avoid the necessity of calling numerous witnesses, each having a part in the creation of the record based upon the presumption that the person charged with making or maintaining custody of the record will accurately testify as to its contents. *Young v. Liddington*, 50 Wash.2d 78, 309 P.2d 761 (1957); *State v. Garrett*, 76 Wash.App. 719; 887 P.2d 488 (1995). However, actually producing the record is required for a trial court to properly consider such evidence. *Podbielancik v. LPP Mortg. Ltd.*, 362 P.3d 1287, 191 Wn.App. 662 (2015) (hereinafter “*Podbielancik*”).

In *MRC Receivables Corp. v. Zion*, 152 Wn. App. 625, 218 P.3d 621 (2009) this Court stated:

Here, MRC provided no direct or even indirect proof of any written assignment by Providian. We therefore need not resolve the parties' other numerous points of contention about whether Sharp's affidavit presented only inadmissible hearsay and speculation. Even if MRC had established beyond question that Zion had a delinquent account with Providian for the claimed amount, without proving a written assignment, MRC still failed to meet its burden of establishing that it was entitled to judgment as a matter of law. We must accordingly reverse the order on summary judgment and remand for further proceedings.

Id., at pgs. 630-631; See also *State v. Weeks*, 70 Wn.2d 951, 953, 425 P.2d 885 (1967) (affirming trial court's decision that out-of-state hospital record proffered by physician was inadmissible hearsay and failed to meet the business records exception to hearsay rule because “[t]here was no evidence

by the custodian of records of the Arkansas hospital or by any other qualified person that the document in question was a business record.”).

Under *Podbielancik* and prior cases, it is clear that the business records exception does not permit declarations offering testimony regarding the contents of documents that are not themselves in the record. *Melville v. State*, 115 Wn.2d 34, 36, 793 P.2d 952 (1990) (disallowing affidavit asserting facts learned from documents outside of the record). Notably, the document in question in *Podbielancik*, and at issue in this case, is the assignment of a debt instrument.

i. Declaration of A.J. Loll

A.J. Loll’s Declaration (CP 50-116) was based on unsupported conclusory statements that the trial court improperly relied upon.

First, Loll makes statements regarding the execution of the Note and Deed of Trust that are beyond the scope of any knowledge potentially derived from Nationstar, which was not a party to the original transaction. CP 52, ¶ 3, 4. While the Deed of Trust was publicly recorded, the validity of the Note is subject to dispute. CP 795.

Second, Loll’s assertion regarding the current purported owner of the obligation (US Bank) is unsupported by any documentary evidence. CP 53, ¶ 5. It was the unknown ownership of the loan that caused Appellants’ confusion and led to their investigation of various companies based on the unlawful attempts to foreclose. Even to this date, after years of litigation,

there is no documentary proof that US Bank is acting on behalf of the actual owner or holder of the subject loan or any evidence demonstrating a chain of ownership of the loan.

Likewise, in the next paragraph of the declaration Loll claims that WMC endorsed the original Note in blank, once again with no basis in fact for this claim, then proceeds to assert a legal conclusion regarding the status of Nationstar as holder that is one of the central disputes of the case and also has no sound factual support. CP 53, ¶ 6. The remainder of the declaration is irrelevant to the issues of this appeal.

The issue of the chain of ownership is critical where there is a dispute regarding the authenticity of the Note and the legitimacy of the holder seeking to begin a foreclosure. As the Court stated in *Bain*:

If the original lender had sold the loan, that purchaser would need to establish ownership of that loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions. Having MERS convey its "interests" would not accomplish this.

Bain, at pg. 111. This issue was discussed in more depth in Appellants' Opening Brief and is germane to other issues herein (elements of the CPA), but it is important to understand that the Respondents have failed to provide any evidence of the "chain of transactions" that the Washington Supreme Court stated are necessary, where holder status is not established.

Since the trial court's Order Granting Summary Judgment failed to provide detailed findings, the extent to which it relied upon these illusory

“facts,” hearsay and speculations contained in Loll’s Declaration is unknown. The only statement the trial court made was that “Nationstar Mortgage LLC is entitled to judgment and decree of foreclosure as a matter of law.” CP 1291. Although on *de novo* review such a conclusion is not binding upon this Court, it is impossible to divine how the trial court came to this conclusion, absent the adoption of hearsay, conclusory and incompetent testimony and speculation, when Respondents failed to produce any documentary evidence to support it. See *Brown v. Dept. of Commerce*, 184 Wn.2d 509, 359 P.3d 771 (2015) (hereinafter “*Brown*”) and *Bavand v. OneWest Bank, FSB*, 176 Wn.App. 475, 309 P.3d 636 (2013) (hereinafter “*Bavand*”).

ii Declaration of Laura McCann

The Declaration of Laura McCann contains additional conclusory statements without documentary evidence. CP 678-690. Ms. McCann claims with precision the dates during which Aurora was servicer of the loan, but provides no records to support these assertions. CP 679, ¶ 2. Again, as in Loll’s declaration, McCann makes claims regarding the origination of documents that Aurora would have no basis to have information concerning. CP 680, ¶ 7. However, because the Appellants’ dispute the authenticity of the Note containing the indorsement used to justify this foreclosure, based upon the personal inspection of the Note by Mr. Beverick, and Aurora’s failure to provide any information concerning its provenance, McCann’s declaration

fails to resolve one of the most important factual issues of the case: the authenticity of the Note and its endorsement.

iii Declaration of Adam G. Hughes

Respondents concede that the Declaration of Adam G. Hughes concerning the location of the Note, and presumably the legitimacy of the indorsement as well, was not relevant to the trial court's decision. Respondents' Aurora Bank, *et al* Answering Brief at page 22. Given this concession, it is not relevant to issues of this appeal.

It must be emphasized again that Respondents failed to offer any documentary evidence relevant to the central factual disputes of the case. Even if all of the above stated testimony were to be allowed, there remains a dispute concerning the authenticity of the Note such that the trial court's Order Granting Summary Judgment was entered in the face of genuine issues of disputed fact and must be reversed.

Under *CR 56*, it remains Respondents' burden to establish their right to foreclose. Respondents have not demonstrated this on the basis of the sworn testimony presented to the trial court, in view of Appellants' outstanding allegations regarding the authenticity of the Note and endorsement and the absence of documentary evidence regarding the indorsement or chain of ownership as required by *Bain*.

G. Promissory Note Was Not Established as Authentic by Undisputed Evidence.

In its ruling on Respondents' Motion for Partial Reconsideration on November 14, 2013, the trial court specifically held that issues of material fact remained as to the authenticity of the indorsement on the Note (and thereby the propriety of any and all actions by any party claiming to act under a UCC holder theory). CP 1285. The additional issues of material fact in that ruling essentially derive from the authenticity of the indorsement, except that of the authenticity of the Deed of Trust. *Id.*

As noted by Respondents this Note was produced at two summary judgment hearings (the earlier of which led to a finding that there was a material fact as to the authenticity of the Note). Respondents' Aurora Bank, *et al* Answering Brief at page 1. Respondents make various attempts to establish the authenticity of this document without resort to any supporting documentary evidence in the record.

Nationstar claims to hold the Note based upon the indorsement. *Id.*, at 27. Rather than prove the indorsement valid, instead the Respondents attempt to assert that Appellants did not specifically deny the validity of the instrument and relied instead upon a general denial in answer to the cross-complaint. *Id.*, at 28. However, this assertion is misleading, and legally false. A specific denial of authenticity arises when the party files pleadings alleging that a document is not authentic. *Ingersoll-Rand Financial Corp. v. Anderson*,

921 F.2d 497 (Cir. 1990) (pleadings included answer and affidavit filed in response to summary judgment containing denials that shifted the burden of authenticity); *See also United States v. Varner*, 13 F.3d 1503 (Cir. 1994) (even general denial of the allegations contained in Complaint sufficient to place the authenticity of the instrument at issue for trial despite admission into evidence.) In the unreported case of *Paatalo v. JPMorgan Chase Bank, N.A.* and *In re Miller*, 310 B.R. 185 (2004), the courts found that there was no timely denials of authenticity in contrast to the specific denials in pleadings filed by Appellants. CP 1342-1358; 1463-1464.

Likewise, in *Hampton v. Gilleland*, 61 Wn.2d 537, 379 P.2d 194 (1963) (hereinafter “*Hampton*”) and *In re Stanley*, 514 B.R. 27 (2012) (hereinafter “*In re Stanley*”) there was no record before the courts of such a specific denial or an allegation by the party disputing the validity of an original following an inspection. *Hampton*, at pg. 544 (“If the record is silent, as it is here, concerning the making and delivery of a deed...”); *In re Stanley*, at pg. 40. (“Indeed, without ever inspecting the Note, Stanley objected to the endorsement as a rogue or fugitive allonge.”). Here, the record was not silent and Mr. Beverick did inspect the Note and found it to be counterfeit.

In addition to the specific grounds upon which Mr. Beverick disputed the authenticity of the Note produced by Nationstar there were other anomalies with copies produced during the course of this dispute. CP 795. In

particular it is noteworthy that Aurora produced a copy of the Note without the indorsement well after the time it should have been present on the document and presumably after it received the Note from WMC. CP 840; CP 824.

Aurora, and Nationstar, seek to legitimize all their actions based on attaining the status of holder. Although the Appellants still dispute this conclusion on other grounds, as set forth in their Opening Brief, it remains a genuine factual dispute as to whether the indorsement was in fact applied by an entity other than WMC well after the purported transfer date, which would invalidate the transfer and establishment of status as holder for either entity. In fact, despite actively participating in the litigation, WMC never offered any evidence establishing that the original Note was properly endorsed. In its responsive brief, WMC relies upon the Declaration of Laura McCann, VP at Aurora, for its contention that the indorsement and the Note it is affixed to are authentic. Respondent WMC Mortgage Corp.'s Brief, page 4. This is simply nonsensical and fails to meet the evidentiary burden on the moving party at Summary Judgment.

Copies may in certain circumstances be allowed despite the requirements of best evidence, however, because the authenticity of the original is at issue all the additional copies likewise fall short under evidentiary rules. *ER 1003.3*. However, here Appellants' claim is that the instrument purported relied upon by Respondents to foreclose is not original

and may be counterfeit is based on Mr. Beverick's inspection of the Note, comparing it both to his own memory of the signing, as well as duplicate documents that remained in his possession. CP 795.

Finally, Respondents argue that through his failure to answer the Requests for Admission, Appellants should be held to admit them. Respondents Aurora Bank, *et al* Answering Brief at page 29-30. However, the Respondents fail to note that the Motion for Extension of Time was never ruled upon. CP 1125-1145. Additionally, the trial court considered two declarations by Michael Beverick under the Summary Judgment pertaining to Nationstar's Decree of Foreclosure. CP 1290, ¶ 6 (CP 795), 7 (CP 803). While Appellants would dispute the trial court properly considered Mr. Beverick's testimony and resulting evidentiary burden, absent a ruling on the extension and given that the trial court allowed Mr. Beverick's testimony disputing the authenticity of the Note, it is apparent that Appellants had no reason to lodge an appeal on this issue. There appears no adverse ruling on the issue in the record and instead it appears the trial court considered evidence from both sides on the issue (although failing to analyze the facts in the light most favorable to the non-moving party).

Given Appellants' specific, factual denial of the authenticity of the Note produced in court, combined with the irregularities in the copies produced during the dispute, there remains a material issue of fact as to

authority to begin the non-judicial foreclosure and standing to bring the judicial foreclosure action.

H. Elements of the CPA Claim.

All Respondents focus their arguments on the first (unfair or deceptive act or practice), fourth (injury) and fifth (causation) elements of Appellant's CPA claims.

i. Unfair or Deceptive Act or Practice.

Implicit in the definition of "deceptive" under the CPA is the understanding that the practice misleads or misrepresents something of material importance. *Potter v. Wilbur-Ellis Co.*, 62 Wn.App. 318, 814 P.2d 670 (1991) (failure to reveal a material fact may be classified an unfair or deceptive act due to its inherent capacity to deceive).

Here, Respondents' misrepresentation is twofold. First, through the use of MERS, Respondents obfuscated as to the identity of the holder and the chain of title to the Note (and hence to authority under the Deed of Trust to conduct a foreclosure). Second, through the use of dubious copies of the Note, which may be counterfeit, with a disputed indorsement, Respondents seek to claim the title of holder to validate their misconduct.

As noted in Appellants' Opening Brief the use of MERS, various violations of the DTA, and the activities of servicers attempting to foreclose absent lawful authority all meet the element of an unfair or deceptive act.

Brief of Appellant, at pages 20-25, 33-34, which is incorporated herein by this reference.

ii. Injury

As noted in Appellants' Opening Brief, injury and damages were disputed issues of fact. Appellants contend that but for Respondents' manifest violations of the DTA and *RCW 61.12, et seq.* they would have suffered no injury or damages. See Appellant's Opening Brief.

Here, Respondents concede that Appellants incurred expenses to investigate and consult with counsel to dispel uncertainty regarding the ownership of the loan. CP 794-851. Such damages were recently found to be compensable under Washington law. See *Lyons v. U.S. Bank*, 181 Wn.2d 775, 783, 336 P.3d 1142 (2014) (hereinafter "*Lyons*") and *In re Meyer*, 506 B.R. 533 (2010) (hereinafter "*In re Meyer*"). Courts have even previously held that the costs of postage do create an issue of fact as to injury. *Moritz v. Daniel N. Gordon, P.C.*, 895 F.Supp.2d 1097 (2012) (improper to grant summary judgment on the basis of alleged illegal collection activities where plaintiff had alleged \$7.75 in postage costs related to activities). Here, Mr. Beverick offered a certified postage receipt for \$5.59 in addition to numerous other correspondence and evidence of investigation in the record. CP 817.

Moreover, Appellants allege costs associated with sending requests for information to the servicers. CP 805, CP 814-815, CP 816-817, CP 820-

821. In response, they received material that most ordinary citizens would classify as “legal doublespeak” meant to further confuse them rather than enlighten and required them to seek legal counsel to make sense of what they received. CP 808, CP 810-813, CP 818-819, CP 822-823. WMC’s original designation of MERS is what caused this chain of events, as Appellants were left in ignorance about the true owner and holder of the obligation, as a direct and proximate result of the use of MERS² by WMC, and forced to inquire of various opaque entities that refused to provide useful information.

Finally, under *Panag v. Farmers Ins. Co. Of Washington*, 166 Wn.2d 27, 63, 204 P.3d 885 (2009) the hiring of an attorney to prevent improper foreclosure proceedings qualifies as injury under the CPA (“...a plaintiff may recover the cost of hiring an attorney if he or she did so as a result of a collection notice that misleadingly threatens legal action.”) (citing *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1174)). If investigatory expenses are recoverable, it stands to reason that all other expenses incurred, aside from those directly involved in bringing the CPA claim itself, must also qualify as damages.

iii. Causation

With regard to the causation element of the CPA, the plaintiff must establish damages and a causal link between the deceptive act and the injury suffered. *Physicians Insurance Exchange & Association v. Fisons, Corp.*,

² In both the Deed of Trust and the Assignment of Deed of Trust.

122 Wn.2d 299, at 314, 858 P.2d 1054 (1993). However, proximate causation is typically a question of fact for the jury. *Ayers v. Johnson & Johnson Baby Products. Co.*, 117 Wash.2d 747, 753-56, 818 P.2d 1337 (1991); *Baughn v. Honda Motor Co.*, 107 Wash.2d 127, 142, 727 P.2d 655 (1986); *Fisons*, 122 Wash.2d at 314, 858 P.2d 1054.

WMC claims that because Appellants had no direct communication with WMC, that means there was no deceptive act and no causal link to Appellants' damages. WMC's Brief, at pages 12, 26. However, WMC's argument completely ignores the fact it initially designated MERS as beneficiary, an "ineligible entity", and that the Assignment of Deed of Trust recorded by MERS in the name of WMC gave rise to the specific mechanisms of liability (wrongful foreclosure), including agency liability. *RCW 4.22.070(1)(a)* provides that "A party shall be responsible for the fault of another person... when a person was acting as an agent or servant of the party." Appellants will not belabor the issue since the plain language of the Assignment of Deed of Trust demonstrates that MERS was acting as an agent/servant of WMC, in concert with the servicers of the loan and the other named Respondents.

Additionally, the denial of causation by WMC is advanced without acknowledgement of the doctrines of alternative liability or concerted action. *Martin v. Abbott Laboratories*, 102 Wn.2d 581, 689 P.2d 368 (1984) (hereinafter "*Martin*") (discussing and comparing the two doctrines).

Alternative liability lies where the conduct of two or more actors is tortious, and the defendant's actions preclude the plaintiff from identifying which of them caused the injury, and the responsible party is among the defendants. *Martin*, at pgs. 591-595. In this case the tortious actions are the misrepresentation of the owner or holder of the loan obligation (via the utilization of a counterfeit Note and fraudulent indorsement purported to be on the Note in addition to the recorded documents) and the initiation of a wrongful foreclosure (undertaken via the Notice of Default) in violation of the DTA and CPA.

Concerted action derives from vicarious liability and requires any one of three alternative factual patterns to establish liability. A defendant is liable if it (1) does a tortious act in concert with the other or pursuant to a common design with him; or (2) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself; or (3) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person. *Martin*, at pgs. at 596, (quoting Restatement (Second) of Torts § 876(a)-(c), at 315 (1977)). Appellant argues that the present case would fall within the first alternative, as the designation of MERS as beneficiary and its use to conceal or misrepresent the identity of the true and lawful owner and/or holder of the obligation, which is part of a broad pattern within the current mortgage

lending industry. Under any of these alternatives the linkage of WMC to the wrongful conduct of the other Respondents is sufficient that the trial court's grant of Summary Judgment is subject to reversal.

V. CONCLUSION

As noted in Appellants' Opening Brief, defending first a non-judicial foreclosure and then a judicial foreclosure is the ultimate peril against which no homeowner should have to contend.

The testimony of A.J. Loll, Adam Hughes and Laura McCann upon which the trial court relied on summary judgment was incompetent, within the terms of *CR 56(e)*, *ER 801*, *ER 802* and *RCW 5.45.020*.

Respondents non-judicial foreclosure activities violated numerous provisions of the DTA and Nationstar had no standing to initiate judicial foreclosure proceedings given the fact that under no set of facts could it comply with the terms of *RCW 61.12.040* as servicer for U.S. Bank in view of concerning regarding the authenticity of the Note and endorsement relied upon to conduct a foreclosure. Indeed, Appellants have consistently argued that the Note Respondents claim to be the original appears to be counterfeit creates material issues of fact in dispute as to whether Respondents had any authority and/or standing to initiate non-judicial for judicial foreclosure proceedings against them. CP 795. Indeed, until the original Note is found and presented to the Court and its possessor is identified, no foreclosure proceedings are warranted.

In view of the trial court's manifest error on summary judgment, reversal is the remedy.

Finally, Appellants reiterate their request for an award of taxable costs, expenses and reasonable attorney's fees on appeal, pursuant to *RAP 18.1*, based on the terms of the subject Note and Deed of Trust.

REPECTFULLY SUBMITTED this 29th day of August, 2016.

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VI. CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury under the laws of the State of Washington that on August 29th, 2016, I caused to be served a true and correct copy of the foregoing Reply Brief of Appellants on the following party(ies) and in the manner(s) indicated:

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