

Case No: 74979-0-I

FILED
Nov 02, 2016
Court of Appeals
Division I
State of Washington

**IN COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I, AT SEATTLE**

MARK AND JULIE DAVISCOURT,

Plaintiff - Appellant,

v.

QUALITY LOAN SERVICES CORPORATION OF WASHINGTON, a
Washington corporation; SELECT PORTFOLIO SERVICING, INC.,
foreign corporation; BANK OF NEW YORK MELLON fka BANK OF
NEW YORK, a national association; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., a foreign corporation; MERSCORP
HOLDINGS, INC., a foreign corporation; ALTERNATIVE LOAN
TRUST 2005-62, MORTGAGE PASS-THROUGH CERTIFICATES
SERIES 2005-62; JOHN DOES 1-99

Defendants - Appellee.

APPELLANT’S REPLY BRIEF

Scott E. Stafne, Attorney
Church of the Gardens Advocacy Program
WSBA # 6964
239 N Olympic Avenue
Arlington, WA 98223
360.403.8700
Attorney for Mark & Julie Daviscourt

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
Introduction.....	1
I. The Trial Court Usurped Daviscourt’s Right to a Trial by Failing to Follow Routine CR 56 Fact Finding Procedure.	2
A. The Credibility of Sierra Herbert-West Was a Jury Question.	2
B. The Trial Court Failed to Weigh Evidence in Daviscourt's Favor	4
1. AWL Was Not a New York Corporation or d/b/a in 2005.....	4
2. The Trial Court Did Not Consider Daviscourt's Evidence	6
II. Issues of Fact Precluded Summary Judgment.	7
A. Negligence and Outrage.	7
B. Civil Conspiracy.....	13
C. Beneficiary Status	18
1. Whether Daviscourt's Note Satisfies the Legal Test for Being a Negotiable Instrument Is a Question of Fact for the Jury.....	18
D. Violations of the CPA	23

TABLE OF AUTHORITIES

Federal Cases

Answering Brief (,SAB) 5	8, 9
<i>Olander v. Recontrust Corp.</i> , C-11-177 MJP, 2011 WL 841313 (W.D. Wash 2011)	16
<i>See In re Mortgage Elec. Registration Sys., Inc.</i> , 754 F.3d 772 (9th Cir. 2014).....	27, 28
<i>Tourgeman v. Collins Fin. Servs., Inc.</i> , 755 F.3d 1109 (9th Cir. 2014).....	10
<i>US v. Miller</i> , C98-5022 RJB, 1999 WL 675328 (W.D. Wash. 1998)	16

State Cases

<i>Admasu v. Port of Seattle</i> , 185 Wn. App. 23, 340 P.3d 873 (2014)	23
<i>Bain v. Metro. Mortgage Grp., Inc.</i> , 175 Wn.2d 83, 285 P.3d 34 (2012)	passim
<i>Balise v. Underwood</i> , 62 Wn.2d 195, 381 P.2d 966 (1963)	7
<i>Bonneville v. Pierce County</i> , 148 Wash.App. 500, 202 P.3d 309 (2008).....	10
<i>Booker v. Everhart</i> , 294 N.C. 146, 240 S.E.2d 360 (1978).....	24, 25
<i>Brown v. Washington State Dep't of Commerce</i> , 184 Wn.2d 509, 359 P.3d 771 (2015)	29
<i>Chauncey v. Arnold</i> , 24 N.Y. 330 (1862)	16, 18
<i>Crystal Ridge Homeowners Ass'n v. City of Bothell</i> , 182 Wn.2d 665, 343 P.3d 746 (2015)	11, 23
<i>Doe v. Church of Jesus Christ of Latter Day Saints</i> , 141 Wash. App. 407 (2007)	17
<i>Edelstein v. Bank of New York Mellon</i> , 286 P.3d 249 (Nev. 2012)	28

<i>Equipto Div. Aurora Equip. Co. v. Yarmouth,</i> 134 Wn.2d 356, 950 P.2d 451 (1998)	11, 16
<i>Gen. Motors Acceptance Corp. v. Honest Air Conditioning & Heating, Inc.,</i> 933 So. 2d 34 (Fla. Dist. Ct. App. 2006).....	24
<i>Holly Hill Acres, Ltd. v. Charter Bank of Gainesville,</i> 314 So. 2d 209 (Fla. Dist. Ct. App. 1975).....	24
<i>Hopkins v. Seattle Pub. Sch. Dist. No. 1,</i> 195 Wn. App. 96, 380 P.3d 584 (2016)	12, 15
<i>Howard v. Shaw,</i> 10 Wn. 151, 38 P. 746 (1894)	21, 22
<i>In re Adoption of B.T.,</i> 150 Wn.2d 409, 78 P.3d 634 (2003)	10
<i>In Re Tortorelli,</i> 149 Wn.2d 82, 96 P. 2d (2003)	22
<i>John Davis & Co. v. Cedar Glen No. Four, Inc.,</i> 75 Wn.2d 214, 450 P.2d 166 (1969)	16
<i>Keck v. Collins,</i> 184 Wn.2d 358, 357 P.3d 1080 (2015)	5, 6, 11, 16
<i>Key Dev. Inv., LLC v. Port of Tacoma,</i> 173 Wash. App. 1, 292 P.3d 833 (2013).....	18
<i>Klem v. Washington Mut. Bank,</i> 176 Wn.2d 771, 295 P.3d 1179 (2013)	13, 21
<i>Lunsford v. Saberhagen Holdings, Inc.,</i> 166 Wn.2d 264, 208 P.3d 1092 (2009)	28
<i>Maziar v. Washington State Dep't of Corr.,</i> 183 Wn.2d 84, 349 P.3d 826 (2015)	4
<i>Orris v. Lingley,</i> 172 Wash. App. 61, 288 P.3d 1159 (2012).....	10
<i>Paradise Orchards Gen. P'ship v. Fearing,</i> 122 Wash.App. 507, 94 P.3d 372 (2004)	27
<i>Plese-Graham, LLC v. Loshbaugh,</i> 164 Wn. App. 530, 269 P.3d 1038 (2011)	16
<i>Quynn v. Bellevue Sch. Dist.,</i> 195 Wash. App. 627	12

<i>Spokane Research & Def. Fund v. City of Spokane</i> , 155 Wn.2d 89, 117 P.3d 1117 (2005)	10
<i>State v Sanders</i> , 86 Wash. App. 466, 937 P. 2d 193 (1997)	22
<i>State v. Hampton</i> , 143 Wn. 2d 789	21, 22
<i>Sterling Bus. Forms, Inc. v. Thorpe</i> , 82 Wn. App. 446, 918 P.2d 531 (1996)	21
<i>Swank v. Valley Christian Sch.</i> , 194 Wn. App. 67, 374 P.3d 245 (2016)	13
<i>Vallandigham v. Clover Park Sch. Dist. No. 400</i> , 154 Wn.2d 16, 109 P.3d 805 (2005)	7
<i>Washburn v. City of Federal Way</i> , 178 Wn. 2d 732, 310 P.3d 1275 (2013)	11
<i>Wm. Dickson Co. v. Pierce Cty.</i> , 128 Wash. App. 488, 116 P.3d 409 (2005)	27

State Statutes

RCW 19.80.001	9
RCW 40.16.030	12, 22
RCW 5.40.050	12
RCW 61.130	14
RCW 61.24.011	15
RCW 61.24.030(7).....	30
RCW 61.24.030(8).....	14
RCW 61.24.090	14
RCW 61.240.030(6).....	14
RCW 9.38.020	12
Wash. Const. art. I, § 21.....	13

State Rules

CR 56	5, 29
ER 201	10
RAP 2.5.....	23

Other Authorities

Article 3 of the Uniform Commercial Code	24
Restatement (Second) of Torts § 302(b).....	15

Introduction

Defendants Answering Briefs urge this Court to resolve factual issues as matters of law. This violates Washington law. “[A]ny party ... [has] the right to have a jury determine most matters of fact.” *See Maziar v. Washington State Dep't of Corr.*, 183 Wn.2d 84, 85–86, 349 P.3d 826, 827 (2015).

The first section of this reply will focus on the evidence before the trial court. It will document how the superior court’s failure to follow traditional fact finding procedures, *e.g.* reserving witness credibility issues for trial and construing evidence in favor of the non-moving parties, usurped Mark and Julie Davis’ (collectively Davis’ or Mark and Julie) right to have fact finding performed at a trial. *Keck v. Collins*, 184 Wn.2d 358, 369, 357 P.3d 1080, 1085 (2015)(CR 56 should not be used to deny people their right to trial.)

The second section will discuss and demonstrate how the facts in evidence precluded the Court from granting a judgment as a matter of law on each of the following causes of action: negligence, outrage, civil conspiracy, and violations of the Consumer Protection Act (CPA).

I. The Trial Court Usurped Daviscourt’s Right to a Trial by Failing to Follow Routine CR 56 Fact Finding Procedure.

Defendants submitted only four declarations as evidence (three from attorneys) in support of the motions for summary judgment being appealed here. These included the Declarations of: Sierra Herbert-West’s (Herbert-West), CP 10-57 (claiming that QLS Seattle office has been accessible to the public since February, 2014 and that QLS records indicated Mark never attempted to access that office); attorney Joe McIntosh, CP 58-66 (testifying signatures on copies of the note and deed of trust were signed by Mark and Julie); and attorney John Glowney, (testifying that he will bring copies of the original note and deed of trust to the summary judgment hearing) CP 656-682; (submitting recorded documents evidencing Daviscourt's previous mortgage was paid off). CP 611-616. These declarations are hereafter referred to collectively as “Defendants’ Declarations”.

A. The Credibility of Sierra Herbert-West Was a Jury Question.

Only Herbert-West testified Seattle QLS’ office was always open and accessible to Daviscourt, whom she infers made no attempt to contact the trustee. CP 11, ¶ 7. Mark and Julie disputed this testimony and Herbert-West’s overall credibility as a witness. CP 324:19-327:2; *see also* CP 178-9, ¶¶ 5-10; CP 254-258, ¶¶ 38-51. QLS’ Answering Brief (QAB) acknowledges the “he said-she said” nature of this dispute when it argues

Daviscourt's Declarations are “exaggerated and self-serving”. QAB at 6. Nonetheless, QLS emphasizes its reliance on Herbert-West’s version of the facts to make its case when it argues: “Quality’s employee testified from personal knowledge that the office existed and she and others were working in it.” QAB at 6. QLS then asserts Daviscourt did not submit sufficient evidence to call Herbert-West’s credibility into question. *Id.*

In fact, Daviscourt presented abundant evidence into the record challenging Herbert-West’s credibility, including several certified declarations directly impeaching Herbert-West’s testimony that the QLS Seattle office was accessible during the relevant time period. These declarations included testimony by Jan Simmons, CP 443 – 449; Deputy Atty. Gen. Benjamin J. Roesch,¹ CP 454 – 470; Robert E. Ordal, CP 471 – 478; Melissa Colletto CP 479-481; and A.G. paralegal Lesli Ashley, CP 482 – 484.

Under these circumstances Herbert-West’s credibility as a witness was a factual issue which needed to be resolved by the jury at a trial. *See Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963).

¹ Exhibit 3 to Deputy AG Roesch’s declaration is a letter informing QLS (at numerous locations) that the State will be moving for a temporary restraining order pursuant to the Consumer Protection Act because its failure to have an office “*accessible to borrowers*” at 108 1st Avenue, Seattle from “*at least February 14 – 18, 2014*” constituted an unfair and deceptive practice. CP 468-469.

B. The Trial Court Failed to Weigh Evidence in Daviscourt's Favor

Another basic tenet of summary judgment jurisprudence is courts must weigh all the evidence and inferences therefrom in favor of the non-moving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). The trial court appears to have not considered any of the evidence supporting Daviscourt's version of the facts.

1. AWL Was Not a New York Corporation or d/b/a in 2005

Daviscourt presented abundant evidence² and argument³ that America's Wholesale Lender (AWL), a New York corporation, did not exist in 2005. Defendants did not dispute AWL was not a New York corporation in 2005. Defendants only argued AWL was a trade name for Countrywide. QAB 1; Select Portfolio Servicing (SPS) Defendants⁴ Answering Brief (SAB) 5. Defendants offered no evidence by way of

² See factual evidence referred to at OB 38 referring to the affidavit of Marie McDonnell (CP 70-77), the declarations of Scott Stafne (including certified information from the New York Secretary of State) (CP 196, 223-224), declaration of Josh Auxier (CP 376-386) including a response to Public Disclosure Request that AWL has never held a license with the Washington Department of Financial Institutions.

³ See Daviscourts' Opening Brief (OB) 8 and 38-41.

⁴ The term SPS Defendants refers to defendants Select Portfolio Servicing, Inc., Mortgage Electronic Registrations Systems, Inc., MERSCORP Holdings, Inc., and Bank of New York Mellon F/K/A Bank of New York, Individually and as Trustee for the Alternative Loan Trust 2005-62, Mortgage Pass Through Certificates Series 2005-62. All of these defendants are represented by one law firm, which claims these entities are all agents of one another, and has submitted a single Answering Brief on their behalf.

declaration or otherwise (*i.e.*, requesting judicial notice) that AWL was a trade name. *See* Defendants' Declarations.

SPS Defendants argued DAVIS court "plainly knew" in 2008 when they sued Countrywide that Countrywide was actually AWL. SAB at 5. But Mark and Julie directly contradict this. Mark testified that he did not know Countrywide and AWL were the same entity. CP 258, ¶¶ 53- 54. Mark also testified that when he learned Countrywide's purported successors and QLS were using a false name to take his family's home, he had a debilitating psychological episode which proximately caused damages. *Id.* Mark's testimony is corroborated by his wife, CP 179, ¶ 10, and was never rebutted by defendants. *See* Defendants' Declarations.

Notwithstanding that the defendants submitted no evidence whatsoever that AWL was a trade name of Countrywide, the superior court erroneously resolved this factual issue in the defendants' favor⁵ in

⁵ Defendants present no evidence AWL is a trade name or d/b/a. *See* Defendants Declarations. Defendants' argument AWL was a trade name for Countrywide in 2005 consists only of citations to one brief and 3 unpublished federal cases decided well after 2005 which did not involve the issue of whether AWL, a New York corporation, was a trade name for Countrywide *in Washington State in 2005*. SAB 6 & n. 11.. If defendants had wanted to prove AWL was a legitimate trade name in Washington they should have offered evidence to prove this. *See* Ch 19.80 RCW; Washington's Trade Name statute. Its purposes include (1) requiring each person who is conducting business in Washington under a trade name to disclose the true and real name of that person; and (2) establishing a registry of trade names, which can be used as proof of trade name status. RCW 19.80.001.

Defendants' argument that "everybody uses trade names and every American knows this" is not evidence. It is an erroneous legal conclusion. The truth is federal law does not encourage the use of trade names where they are likely to cause confusion and are not

violation of longstanding summary judgment rules which require controverted evidence be considered in favor of non-moving parties.⁶

2. The Trial Court Did Not Consider Daviscourt's Evidence

Neither QLS nor the SPS Defendants objected to any of the evidence offered by Daviscourt, including Marie McDonnell's Declaration and attached exhibits. Nor did defendants offer any argument or rebuttal evidence contradicting any evidence presented by Daviscourt except for the incredulous testimony of Herbert-West, which is discussed *supra*.

“If a party fails to object or bring a motion to strike deficiencies in affidavits or other documents in support of a motion for summary judgment,” the party fails to preserve any such deficiencies. *Orris v. Lingley*, 172 Wash. App. 61, 67–68, 288 P.3d 1159, 1163 (2012); *Bonneville v. Pierce County*, 148 Wash.App. 500, 509, 202 P.3d 309 (2008). *Cf. Crystal Ridge Homeowners Ass'n v. City of Bothell*, 182 Wn.2d 665, 678–79, 343 P.3d 746, 753–54 (2015).

utilized in good faith. *Tourgeman v. Collins Fin. Servs., Inc.*, 755 F.3d 1109, 1121–25 (9th Cir. 2014).

⁶ SPS citations of briefs and cases at SAP 6, n. 11 are not evidence of anything. In fact, these cases cannot even be judicially noticed as an adjudicative fact pursuant to ER 201. *See Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 97–98, 117 P.3d 1117, 1122 (2005) (“we cannot, while deciding one case, take judicial notice of records of other independent and separate judicial proceedings even though they are between the same parties.” (quoting *In re Adoption of B.T.*, 150 Wn.2d 409, 415, 78 P.3d 634 (2003) (citations omitted))).

Since there was unrebutted evidence in the record, to which defendants never objected, the trial court erred by not construing it in favor of Mark and Julie. *Keck v. Collins*, 184 Wn.2d at 369. *See also Egipto Div. Aurora Equip. Co. v. Yarmouth*, 134 Wn.2d 356, 371–72, 950 P.2d 451, 458–59 (1998).⁷

II. Issues of Fact Precluded Summary Judgment.

A. Negligence and Outrage.

Mark and Julie asserted common law negligence and outrage causes of action against the defendants based on violations of well-established tort duties. *See* OB 20-27. Defendants did not challenge the applicability of these tort duties in their Answering Briefs. The negligence cause of action was based on the “ordinary care standard” and the Restatement (Second) of Torts principles set forth in *Washburn v. City of Federal Way*, 178 Wn. 2d 732, 757, 310 P.3d 1275 (2013).⁸ *See* OB 21-25. Their “outrage” cause of action was based on longstanding Washington case law making persons in defendants’ position liable for

⁷ *Yarmouth* is a good example of how fact finding procedures in Washington should work. *Yarmouth* claimed he was unaware that his corporation had been administratively dissolved and the Supreme Court noted defendants did not dispute this. *Id.*, 134 Wn.2d at 359. Because *Yarmouth* was the non-moving party and the trial court was required to view all the evidence and inferences therefrom in his favor, the Supreme Court reversed the summary judgment against him and remanded for further fact finding regarding this issue.

⁸ This Court discussed both the ordinary care and special relationship standards recently in *Hopkins v. Seattle Pub. Sch. Dist. No. 1*, 195 Wn. App. 96, 380 P.3d 584 (2016).

outrageous conduct proximately causing psychological injury to Mark. *See* OB 25-28.

SPS arguments challenging Daviscourt's private right of action under RCW 40.16.030 and RCW 9.38.020 (SAB 10-14) are inapposite because Daviscourt never brought such an action; preferring to assert tort claims which impose broader duties on defendants. *See Quynn v. Bellevue Sch. Dist.*, 195 Wash. App. 627, __P2d__ (2016).

Under negligence law “[a] breach of a duty imposed by statute[s] like RCW 40.16.030, 9.38.020, 61.24.010 (2)&(4), 030(6) & 7, 040(1)(a) and (f)] ...may be considered by the trier of fact as evidence of negligence.” RCW 5.40.050. Because RCW 5.40.050 allows a trier of fact to consider the breach of a statutory duty as evidence of negligence, Daviscourt may bootstrap their contentions that QLS and the SPS Defendants violated these statutes into their assertions of negligence. *Swank v. Valley Christian Sch.*, 194 Wn. App. 67, 82, 374 P.3d 245, 253 (2016), *review granted*, 380 P.3d 498 (2016).

That evidence which Mark and Julie relied upon, none of which was objected to by any defendant, is referenced at OB 4-15 and relied upon here to demonstrate the existence of factual issues which the trial court should have referred to a jury to resolve pursuant Wash. Const. art. I,

§ 21. *See e.g. Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 780–81, 295 P.3d 1179, 1184 (2013).⁹

QLS has presented no evidence it attempted to meet the standard of care of a reasonably prudent person charged with its responsibilities. Indeed, QLS appears to argue that it owes borrowers involved in non-judicial foreclosure of homes in Washington no right of access to the trustee at all. *See* QAB 6-7, where QLS argues: “The reason for requiring a local trustee office is to accommodate service of process, not for borrowers such as Daviscourt to show up and confront employees”. Although QLS suggests there are “proper channels for accessing trustee”, OB 6, it never provides any *evidence* such channels exist. Under the evidence before the Court presented by Daviscourt, see OB 3-19, it should be up to a jury to determine whether the level of access provided Mark and Julie breached the ordinary standard of care.¹⁰

⁹ The heart of Daviscourt's negligence case is similar to that which QLS lost in *Klem*. There the plaintiffs argued that QLS failure to grant borrower's request to delay the sale pursuant to its policy of refusing to do so unless its beneficiary-clients agreed constituted negligence. QLS presented as evidence *in Klem* only legal conclusions by one of its employees that: “My job was to process the foreclosure ... according to the state statutes.” In *Klem*, QLS also argued the law did not require it to be impartial between the parties.

Here, the evidence establishes that QLS described its job to SPS Defendants as preparing those documents “needed for us to advance the non-judicial foreclosure that we are processing for you.” CP 234. Marie McDonnell testified that several of those documents contained false statements which were utilized to facilitate the initiation of non-judicial foreclosure proceedings against Daviscourt. CP 70-77.

¹⁰ A jury may not agree that only providing a place for service of process is adequate access to a trustee given its preparation of documents filed in the public records in order to facilitate non-foreclosure of borrowers' homes. Certainly, the Washington

Given the undisputed evidence established it was or should have been foreseeable to QLS and SPS Defendants, as a result of receiving Mark's medical records, that he was peculiarly susceptible to severe emotional stress from their actions, see OB 26-27 referencing CP 180-194; 251:1-16, it should be up to a jury to determine whether these defendants acts and omissions were negligent under the Restatement (Second) of Torts § 302(b) and/or constituted the tort of outrage under the facts of this case. *See Hopkins v. Seattle Pub. Sch. Dist. No. 1*, 195 Wash. App. 96, 380 P.3d 584 (2016). These acts and omissions include without limitation QLS and SPS Defendants attempting to foreclose on a deed of trust in the name of an entity which does not exist in violation of state and federal law, *see* note 5, *supra*, as well as sending Daviscourt four notices threatening a sale would occur after they had cancelled it. *See* OB 3-19 for a more detailed statement of facts.

SPS Defendants' response to Daviscourt's negligence cause of action invites this Court to repeat the trial court's error in deciding issues of fact as matters of law. SPS Defendants argue Daviscourt's theories of

Attorney General did not buy this interpretation of RCW 61.24.030(8) when it sued QLS for violating this statute during the same time period. *See* CP 469, which states:

“We take the physical presence requirement of RCW 61.240.030(6) [sic], as well is the need for Bowers to be able to locate, confirm, and access trustees physical locations, very seriously. These requirements provide critical protection for Borrowers (or junior lien holders) who seek to stop a trustee sale by serving a motion to restrain the sale under RCW 61.130 or cure the default pursuant to RCW 61.24.090.”

negligence liability should fail because they “are based upon the Davis courts’ erroneous premises that AWL is a non-existent corporation, that false documents were recorded, etc. [sic]” SAB 22. But the flip side of this argument is that if a jury (after weighing the evidence) determines that “AWL, a New York corporation” was not a person within the meaning of RCW 61.24.011 then defendants would be negligent for attempting to foreclose upon a void deed of trust¹¹ and liable for all those damages proximately caused thereby.

Additionally, SPS Defendants’ argument that there is no evidence that publicly recorded documents contain false statements (SAB 22) is untrue. Marie MacDonnell, a well-known forensic land records expert, testified that defendants publicly recorded several documents containing false statements. CP 67-176. This evidence when interpreted in the light most favorable to Davis court establishes issues of fact both with regard to (1) whether these documents contain false statements; and (2) whether

¹¹ Washington law squarely holds AWL, as a non-existent New York corporation, is not an “person” under the DTA which can foreclose on a deed of trust in Washington as a matter of law. *Bain v. Metro. Mortgage Grp., Inc.*, (quoting *Chauncey v. Arnold*, 24 N.Y. 330, 335 (1862)); *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 216–20, 450 P.2d 166, 168–70 (1969); *Olander v. Recontrust Corp.*, C-11-177 MJP, 2011 WL 841313 at 3-5 (W.D. Wash 2011); *US v. Miller*, C98-5022 RJB, 1999 WL 675328 at 3 (W.D. Wash. 1998); see also unrebutted argument at OB 38-42. To the extent, AWL claims that it was appropriate for it to do business in Washington notwithstanding the above authority, Mark and Julie assert AWL must present facts justifying their actions, i.e. naming a non-existent corporation as the grantee of the deed of trust. See OB 41-42; cf. *Equipto Div. Aurora Equip. Co. v. Yarmouth*, 134 Wn.2d 356, 371–72, 950 P.2d 451, 458–59 (1998); *Plese-Graham, LLC v. Loshbaugh*, 164 Wn. App. 530, 542–47, 269 P.3d 1038, 1046–48 (2011).

they were negligent when they relied on and/or publicly recorded such documents. *See Keck*, 184 Wn.2d at 369.

No defendant has put forth any evidence rebutting Daviscourt's evidence substantiating that he meets the criteria for requiring his outrage claim be tried to a jury. *Compare OB 26* citing *Doe v. Church of Jesus Christ of Latter Day Saints*, 141 Wash. App. 407, 429-30 (2007) with Defendants' Declarations. Instead of submitting evidence defendants pompously told the trial court, and now this court, that "using a d/b/a is a long standing, common, and well recognized business practice" cannot be considered outrageous as a matter of law. SAB 19-20. But defendants never presented the superior court with evidence AWL is a tradename or Countrywide took steps to make it one in Washington. *See supra*, note 5.

The evidence viewed in the light most favorable to plaintiffs establishes Mark was a 9-11 survivor suffering from debilitating psychological maladies which could be easily exacerbated by unlawful, unfair, negligent, and/or outrageous conduct. CP 180-194 (Dr. Hunsberger Declaration). Further, that defendants knew Mark was an eggshell plaintiff who likely would incur psychological maladies if treated outrageously. CP 251; 254.

So what did defendants do when they learned they could so easily cause Mark harm? Defendants cancelled the sale without telling

Daviscourt on March 6, 2012, CP 11 & 56, and then sent them four letters claiming the sale was still on at the end of March (CP 257-28, 318-9), even though defendants knew this was not true and would likely cause Mark severe emotional consequences. Defendants also sought to foreclose on a deed, which they should have known was void and no more subject to foreclosure than a blank piece of paper. *See* OB 38-42; *see also* *Bain v. Metro. Mortgage Grp., Inc.*, 175 Wn.2d 83, 112, 285 P.3d 34, 48 (2012) (quoting *Chauncey v. Arnold*, 24 N.Y. 330, 335 (1862)). Defendants also recorded documents containing false statements in the public land records and utilized a disputed “Beneficiary Declaration” in order to initiate the non-judicial foreclosure. CP 70-78. Other courts have found less egregious facts sufficient to create jury issue with regards to whether trustees or servicers have committed the tort of outrage. OB 27-8.

SPS Defendants’ final argument, that the “economic loss” rule bars liability for outrage (SAB 20-21), is not tenable because that doctrine has been abrogated. *See Key Dev. Inv., LLC v. Port of Tacoma*, 173 Wash. App. 1, 292 P.3d 833 (2013).

B. Civil Conspiracy

Daviscourt presented clear, cogent, and convincing evidence substantiating QLS and SPS Defendants conspired together to create and

record documents in the public land records containing false statements in order to non-judicially foreclose on a void deed of trust. OB 28-34.

Here, the evidence shows every defendant in this case participated in a conspiracy to record public documents which contained false statements. [*citing* CP 234 & 353-355.]

In this case publicly recorded documents which contain false fact statements include 1. deed of trust (states MERS as nominee of AWL, a New York corporation which does not exist is the beneficiary... CP 200& 202: 70-78.; 2. The Assignment of Deed of Trust (falsely states MERS is assigning its interest in the note and deed of trust to BNYM as trustee) CP 72, 231; 3. Appointment of Successor Trustee (falsely states BNYM is the present beneficiary of the deed of trust) CP 72, 236; 4. the Notice of Trustee Sale (falsely states that property to be sold is to secure an obligation in favor of MERS, as beneficiary, to BNYM [BONY] as trustee. See also CP 49-55, 73 ¶ 29

OB 29-30.

Apparently expecting this Court to protect trustees at the price of sacrificing the rights of ordinary Washingtonians to a jury trial, QLS does not present any evidence or even much of an argument in response to Davis court's evidence. *Compare* QAB 10 (“The Davis courts’ other claims for relief (e.g. civil conspiracy ...) are meritless arguments”) and Defendants’ Declarations *with* OB 8-15 (setting forth the following evidence tending to prove QLS conspired with SPS Defendants to record documents containing false statements in order facilitate the nonjudicial

foreclosure of Daviscourt's home: CP 36-41, 71-77, 200, 202, 226-229, 234, 236-237, 239-242, and 244).

QLS refusal to offer any evidence rebutting this carefully identified conspiracy is particularly troubling because QLS' own records tend to prove the conspiracy existed. *See* OB 13 which reproduces a letter from QLS to SPS (CP 234) which begins:

Enclosed is a draft of the Appointment of Successor Trustee. This document is needed for us to advance the non-judicial foreclosure we are processing for you.

SPS Defendants, like QLS, offer no evidence, that the above evidence, when viewed in favor of Daviscourt, did not prove a conspiracy to file documents containing false statements in public land records to facilitate a nonjudicial foreclosure. SAB 21-22. Their only argument was:

Daviscourts defaulted in payment ... and BONY as trustee sought to non-judicially foreclose on its collateral. There is no civil conspiracy when a party acts to enforce its contractual and statutory remedies.

Id. But SPS is wrong. Defendants do not get to foreclose on a void deed of trust, even if a debt under the note is in default. *See* OB 38-42; *see also Bain*, 175 Wn.2d at 112; and note 11, *supra*. And defendants don't get to conspire to steal Daviscourt's house under the guise of the Deeds of Trust Act. *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 790, n. 10, 295 P.3d 1179 (2013);CP 234.

Here, Mark and Julie have presented evidence which, when viewed in their favor, created a jury question with regard to whether there was “an agreement by two or more persons to accomplish some purpose, not in itself unlawful, but by unlawful means.” *Sterling Bus. Forms, Inc. v. Thorpe*, 82 Wn. App. 446, 451–54, 918 P.2d 531, 533–35 (1996).

The next argument SPS advances against the conspiracy alleged by Mark and Julie is not made in the conspiracy section of its brief (SAB 21-22). Rather, it is made in responding to the “private right of action” cause of action, which Mark and Julie never advanced. SPS Defendants argue that conspiring together to create and/or record in the public record documents containing false statements is not unlawful. SAB 14-17. But the cases defendants cite for this proposition, *Howard v. Shaw*, 10 Wn. 151, 155, 38 P. 746 (1894) and *State v. Hampton*, 143 Wn. 2d 789 P.3d 1035 (2001) actually hold that in order to record documents you must be *required or permitted to do so*. See *Hampton*, 143 Wn.2d at 796–98 (analyzing *Howard*). Defendants argument they are not required, coupled with the absence of citation of authority *permitting* them, to publicly record assignments containing false statements exposes defendants to the alternate, separate, charge of forgery under RCW 40.16.030. See OB 31 (citing *In Re Tortorelli*, 149 Wn.2d 82, 96 P. 2d 606 (2003); *State v Sanders*, 86 Wash. App. 466, 937 P. 2d 193, 195 (1997)).

In *Tortorelli*, the defendant was found to have committed the crime of forgery by not having *permission* to record the documents he did. The Court held recording documents without permission to do so was all the materiality needed to sustain a conviction. *Tortorelli*, 149 Wash. App. at 97. In *Sanders*, the issue was “whether a violation of RCW 40.16.030 requires the State to prove that a forged document offered for filing in a public office was “materially false.” *Id.* at 468-469. Division II held “[u]nambiguous statutory language is not subject to judicial interpretation” and “[t]he statute does not require that the forged document be “materially false.” *Id.* at 470.

Since defendants provide no argument they had permission to record assignments, they were precluded from recording any assignments containing false statements by RCW 40.16.030 even if they were not material. *Howard v. Shaw* and *State v. Hampton, supra*. Their motive for violating this law by recording assignments containing false statements (either lawfully or without permission) and the impact these recordings had on the integrity of Washington’s land records are factual issues a jury should resolve¹² in the context of all of Davis court's causes of action. For

¹² Defendant's' other arguments relating to the three elements needed for proving an instrument was false for purposes of establishing a violation of RCW 40.16.30, see SAB 14-15, were never raised below and therefore cannot be raised here. RAP 2.5; *see also Crystal Ridge Homeowners Ass'n v. City of Bothell*, 182 Wn.2d 665, 678–79, 343 P.3d 746, 753–54 (2015); *Admasu v. Port of Seattle*, 185 Wn. App. 23, 40, 340 P.3d 873, 881–82 (2014), *review denied*, 183 Wn.2d 1009, 352 P.3d 187 (2015).

certainly a jury could find the filing of documents containing intentionally false statements by these defendants also constitutes negligent and/or outrageous behavior. *See supra*.

C. Beneficiary Status

Defendants only argument to the trial court and this court, is to insist that the legal conclusion the deed follows the note, validates non-judicial foreclosure in every conceivable factual scenario, including those involving fraud and/or a void deed. *See* Defendants Declarations; QAB 3; SAB 8-10, 15-17 and n. 24. According to defendants, it does not matter how BONY got the note and/or that defendants created documents containing false statements which were recorded in Washington's land records to make it look like BONY acquired the note and deed of trust from AWL and MERS. *Id.* But, by law, it does matter.

2. Whether Daviscourt's Note Satisfies the Legal Test for Being a Negotiable Instrument Is a Question of Fact for the Jury.

Daviscourt argued that it was a question for the jury whether the documents in evidence, *i.e.* the Adjustable Rate Note (CP 660-663), Prepayment Penalty Addendum (CP 664-665), the Deed of Trust (CP 667-77), and Adjustable Rate Rider (CP 678-683), constituted a negotiable instrument for a fixed amount. OB 35-38. SPS Defendants response never references any of this evidence. Nonetheless, it appears that all the parties

agree that the factual issue relating to negotiability is “whether the note’s holder could determine her or his rights, duties, and obligations with respect to the payment on the notes without having to examine any other documents?” See OB 14-15, 35-38; SAB 27-28.¹³ Here, it is up to the jury (perhaps with the help of expert witnesses) to determine whether the total amount and the fixed amount owed can be determined from the four corners of the note.

Evidence a jury might consider in this regard includes the note, which identifies the principal amount as \$875,000 (CP 660); the February 13, 2014, Notice of Trustee Sale which identifies the principal amount as being \$959,058.01 (CP 50); and, the debt validation notice, dated September 12, 2013 which states the total amount owed is \$1,261,071.42. (CP 42).

Simply perusing the note indicates its loan amount is different than the loan amount claimed to be owed under the deed of trust. For example, paragraph 11 of the note (CP 663) incorporates additional charges which

¹³ Defendants agree that this is the standard in Washington which should be utilized for determining whether a document is negotiable under Article 3 of the Uniform Commercial Code. See SAB 27; *HSBC USA, National Association v. Buset*. (April 27, 2016) (attached) (trial court finding of fact at ¶¶ 50-81 that provisions in uniform deed of trust involved prevented note holder from ascertaining the actual amount owed pursuant to the note); *Gen. Motors Acceptance Corp. v. Honest Air Conditioning & Heating, Inc.*, 933 So. 2d 34, 36–37 (Fla. Dist. Ct. App. 2006); *Holly Hill Acres, Ltd. v. Charter Bank of Gainesville*, 314 So. 2d 209, 211–12 (Fla. Dist. Ct. App. 1975); *Booker v. Everhart*, 294 N.C. 146, 150–53, 240 S.E.2d 360, 362–64 (1978).

are not a part of the loan amount for the note, which is for principal and interest. (CP 660, ¶1). Paragraph H of the deed of trust (CP 668) defines the term “loan” to include not only the note’s principal and interest but also “all sums due under this Security Interest, plus interest.” *Id.* Similarly, paragraph 3 of the deed of trust (CP 670) provides for the payment of taxes and interest on the property. These payments are also not described in the Note, which as stated before, requires only payment of principal and interest. A jury could find these substantive variations in the amount of the loan amount between the note and security instrument makes the amount of Davis courts’ actual obligation under the note and security instrument unknowable without reference to both. Further, if this is the case then a jury would need to determine whether the amounts owed pursuant to the security agreement are necessary to protect the collateral.

If a jury, applying the Uniform Commercial Code determines that the notes’ holder cannot determine its rights under the note (which is a question of fact) then the note would not be negotiable, *see* note 13, and the deed would not follow it. However, even if the note is negotiable and the deed followed it, this would not make a void deed enforceable under the DTA. *See* note 11, *supra*, and OB 38-42.

Davis court also argued the deed of trust was void because it did not name a person as a the beneficiary and therefore no beneficiary status

could be transferred to MERS or BNYM. *See* OB 38-42. Defendants offered no rebuttal evidence or argument. *See also* note 11.

Defendants' legal mantra "the deed follows the note" is a jury issue even if one assumes the note is a negotiable instrument because there remains a factual question whether the MERS process in this case intentionally split the deed from the note. In *Bain*, MERS claimed it was the "holder" of the deed of trust. *Bain*, 175 Wn.2d at 101("MERS contends that it is a proper beneficiary because, in its view, it is "indisputably the 'holder' of the Deed of Trust.") (citing to MERS response brief at 22.). The language of MERS boilerplate deed of trust actually states MERS is the legal owner of the deed security instrument. CP 669 ("Borrower understands and agrees MERS holds only legal title to the interests granted by Borrower in this security agreement".) MERS also claims a beneficial interest in the deed which it suggests gives it an interest in the note, which it claims it can and actually did convey. CP 231.

The *Bain* Court, citing the Restatement (Third) of Property (Mortgages) § 5.4(c) (1997), recognized that a deed can be split from the note if the parties intend this result. *Bain*, 175 Wn.2d at 112–13. A jury could find the intent of the deed of trust in this case was to split the deed (owned by MERS) from the note (owned by lender). Parties intentions with regard to a contract are questions of fact for a jury to resolve. *Wm.*

Dickson Co. v. Pierce Cty., 128 Wash. App. 488, 493, 116 P.3d 409, 413 (2005) (citing *Paradise Orchards Gen. P'ship v. Fearing*, 122 Wash.App. 507, 517, 94 P.3d 372 (2004)).

The Ninth Circuit has acknowledged that MERS system can separate the deed from the note. See *In re Mortgage Elec. Registration Sys., Inc.*, 754 F.3d 772, 784 (9th Cir. 2014). The Ninth Circuit held a split occurred in a note and deed which were part of a loan made in Nevada, but concluded the two were reunited for purposes of allowing a foreclosure by MERS transferring its interest in the deed of trust to the successor Note holder. *Id.* at 787. The Ninth Circuit relied on *Edelstein v. Bank of New York Mellon*, 286 P.3d 249 (Nev. 2012) as authority MERS could execute valid assignments of the deed to a successor beneficiary in Nevada.

Washington, of course, does not allow MERS (as a nominee which never held the note) to execute assignments reuniting the deed with the note. *Bain*, 175 Wn.2d at 110. Even after the Supreme Court's decision in *Bain* in 2012 these *defendants* continued to record documents in Washington's land records containing false statements about MERS transferring its interests in the Note. CP 72-77. MERS argues that publicly recording documents containing false statements regarding its ownership of the deed should not impose retroactive criminal liability, see SAB 18-19, are not applicable to civil tort liability. See *Lunsford v.*

Saberhagen Holdings, Inc., 166 Wn.2d 264, 285, 208 P.3d 1092, 1103 (2009)(discussing Supreme Court’s decisions creating civil liability apply retroactively.)

Here, a factual question exists as to whether MERS and the original lender intended to split the deed from the note and, if so, whether the deed and note were ever reunited for purposes of pursuing a nonjudicial foreclosure under the DTA. *Bain*, 175 Wn.2d at 111; ns. 15 and 18.

3. QLS and the SPS Defendants Have Not Submitted Any Evidence BNYM Is Not “A Person Holding [The Note] as Security for a Different Obligation.

If the jury determines the MERS system intentionally split the deed from the note (as the Ninth Circuit indicated would be possible to find) then it is an issue of fact as to whether MERS or any of its successors, including BNYM, were excluded from beneficiary status. Under CR 56 SPS Defendants were required to negate this possibility through evidence. But they never offered any. *See* Defendants’ Declarations.

D. Violations of the CPA

The legal standards related to the CPA are well established and accurately reflected in the opening brief (OB 42-49) filed by Mark and Julie. Accordingly, Davis court stand on their opening brief with regard to virtually all the issues raised by the QAB and SAB.

The only point Daviscourt wants to further clarify here is that defendants were not entitled to rely on the beneficiary declaration in this case because it was disputed. *See Brown v. Washington State Dep't of Commerce*, 184 Wn.2d 509, 542, n. 18, 359 P.3d 771, 787 (2015) which suggests a trustee can only rely on a beneficiary declaration alone as its basis for initiating a non-judicial foreclosure pursuant to RCW 61.24.030(7) when that declaration is not contested. Here the evidence established the defendants knew the declaration was disputed. *See McIntosh's Declaration* that the note and deed of trust were signed by Daviscourt (CP 58-67) with the rebuttal evidence submitted by Mark (250, 291-296) and Julie. CP 177-178. See also McDonnell's opinion testimony that BNYM was not the beneficiary. CP 71-77. Because there is evidence the beneficiary declaration was contradicted and unbelievable, it is a question of fact whether QLS violated the DTA and CPA in relying upon it.

III. CONCLUSION

The decision of the trial court should be reversed and this case remanded back to the superior court for trial of those factual issues which are required to be decided by a jury.

/s Scott E. Stafne

Scott E. Stafne

CHURCH OF THE GARDENS ADVOCACY PROGRAM

WSBA # 6964

239 N Olympic Avenue

360.403.8700

Attorney for Mark & Julie Daviscourt

CERTIFICATE OF SERVICE

I certify that I electronically filed the forgoing document using the Washington Court' Electronic Filing for the Court of Appeals. Any party not so registered with the system will be served in accordance with Washington State Court Rules.

Vanessa Soriano Power
Stoel Rives LLP
Vanessa.power@stoel.com

Robert William McDonald
Quality Loan Service Corp. of Washington
rmcdonald@qualityloan.com

Joseph Ward McIntosh
McCarthy & Holthus, LLP
jmcintosh@mccarthyholthus.com

John Eugene Glowney
Stoel Rives LLP
John.glowney@stoel.com

Date: November 2, 2016

/s Pam Miller
Pam Miller, Paralegal/Advocate
Church of the Gardens Advocacy Program