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COURT OF APPEALS  
DIVISION II

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No. 42688-9-II

STATE OF WASHINGTON

BY   
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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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**JOHN P. REISINGER and BARBARA J. REISINGER,**

**Plaintiffs/Appellants,**

**v.**

**DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE  
FOR THE CERTIFICATE HOLDERS OF SOUNDVIEW HOME  
LOAN TRUST 2005-OPT3, ASSET-BACKED CERTIFICATES,  
SERIES 2005-OPT3,**

**Defendant/Respondent.**

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**On Appeal from the Superior Court of Pierce County  
Honorable Susan K. Serko  
Superior Court Docket Number 11-2-07656-9**

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**RESPONDENT'S SUPPLEMENTAL RESPONSE**

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## TABLE OF CONTENTS

|  | <b>Page</b> |
|--|-------------|
| I. SUMMARY OF RELEVANT FACTS .....   | 1           |
| II. SUPPLEMENTAL RESPONSE ARGUMENT .....   | 3           |
| A. Albice Does Not Impact the Trial Court’s<br>Conclusion that the Reisingers Waived Challenges<br>to Nonjudicial Foreclosure..... | 3           |
| 1. Any Alleged Defects in Pre-Foreclosure<br>Notices Have Been Waived .....  | 3           |
| B. The Bain Case Offers No Support to the Reisingers’<br>Dismissed Washington Consumer Protection Act<br>Claim.....                | 6           |
| C. The Reisingers’ Attack on the Trustee’s Deed is<br>Misguided .....  | 9           |
| III. CONCLUSION.....   | 13          |

## TABLE OF AUTHORITIES

|   | Page        |
|---|-------------|
| <b>CASES</b>  |             |
| <i>Albice v. Premier Mortgage Services of Washington, Inc.</i> ,<br>174 Wn.2d 560, 276 P.3d 1277 (2012).....      | 4, 5, 6, 12 |
| <i>Bain v. Metropolitan Mortg. Group, Inc.</i> ,<br>175 Wn.2d 83 (2012).....                                      | 6, 7, 8     |
| <i>Emery v. Visa Int’l Serv. Ass’n</i> ,<br>95 Cal. App. 4th 952, 116 Cal. Rpt. 2d 25 (2002).....                 | 7           |
| <i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> ,<br>105 Wn.2d 778, 719 P.2d 531 (1986)..... | 7           |
| <i>Indus. Indem. Co. v. Kallevig</i> ,<br>114 Wn.2d 907, 792 P.2d 520 (1990).....                                 | 6           |
| <i>Keierleber v. Botting</i> ,<br>77 Wn.2d 711, 466 P.2d 141 (1970).....  | 13          |
| <i>Plein v. Lackey</i> ,<br>149 Wn.2d 214, 67 P.3d 1061 (2003).....   | 3, 4, 5     |
| <i>Saterlie v. Lineberry</i> ,<br>92 Wn.App. 624, 962 P.2d 863 (1998).....  | 13          |
| <i>Schmidt v. Cornerstone Investments, Inc.</i> ,<br>115 Wn.2d 148, 795 P.2d 1143 (1990).....                     | 7           |
| <b>STATUTES</b>   |             |
| RCW 19.86.010 <i>et. seq.</i> .....   | 6           |
| Chapter 61.24 RCW .....   | 3           |
| RCW 61.24.130 .....   | 3           |
| RCW 61.24.040(1).....   | 11          |

**TABLE OF AUTHORITIES**  
**(continued)**

|                             | <b>Page</b> |
|-----------------------------|-------------|
| RCW 61.24.040(1)(a)(i)..... | 11          |
| RCW 61.24.040(6).....       | 9           |
| RCW 61.24.040(7).....       | 11          |
| RCW 61.24.050 .....         | 10          |
| RCW 61.24.050(1).....       | 11          |
| RCW 61.24.127 .....         | 3           |
| RCW 61.24.040040(7).....    | 11          |
| <br><b>RULES</b>            |             |
| RAP 10.2(d).....            | 4           |

transfer of Option One's beneficial interest in the Reisinger Deed of Trust to Respondent Deutsche Bank. CP 71. In January 2008, the Reisingers stopped making their monthly mortgage payments; a Notice of Trustee's Sale was recorded scheduling a trustee's sale for May 23, 2008. CP 75-78; 107. One day before the trustee's sale, the Reisingers filed a Chapter 13 bankruptcy petition that resulted in the cancellation of the sale. CP 88-89.

With the loan in default for nearly two years, on March 4, 2010, the bankruptcy court granted Respondent Deutsche Bank's motion for relief from stay—which the Reisingers did not oppose—allowing Deutsche Bank to proceed with foreclosure. CP 135-136. Accordingly, on April 5, 2010, the trustee recorded an Amended Notice of Trustee's Sale. CP 80-83. Following postponements that delayed the sale 116 days, the trustee completed the foreclosure sale on September 10, 2010 and recorded a trustee's deed. CP 199-200, 204; CP 3.

The Reisingers did not file any pre-foreclosure action to enjoin or contest the foreclosure. Instead, on March 24, 2011—six months after the foreclosure—the Reisingers filed this action seeking, among other things, an order invalidating the foreclosure sale because of alleged defects in the pre-foreclosure notices they received. CP 1-7. The trial court granted Respondent Deutsche Bank's motion for summary judgment and dismissed the case. CP 267-269. This appeal followed.

## II. SUPPLEMENTAL RESPONSE ARGUMENT

### A. ***Albice* Does Not Impact the Trial Court’s Conclusion that the Reisingers Waived Challenges to Nonjudicial Foreclosure.**<sup>1</sup>

The trial court correctly dismissed the Reisingers’ post-foreclosure efforts to invalidate the foreclosure because such claims were waived pursuant to RCW 61.24.127 and *Plein v. Lackey*, 149 Wn.2d 214, 226, 67 P.3d 1061 (2003). The Washington Deed of Trust Act, Chapter 61.24 RCW (“WDTA”), explicitly **prohibits post-foreclosure challenges** that seek a “remedy at law or in equity other than monetary damages” or attempt to “affect in any way the validity or finality of the foreclosure sale.” RCW 61.24.127. This statutory prohibition is consistent with the Washington Supreme Court’s holding in *Plein*, where the court held that a party waives objections or claims related to the trustee’s sale if the party (1) received notice of the right to enjoin the sale; (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale; and (3) failed to bring an action to obtain a court order to enjoin the sale before the sale occurred. *Id.* at 227-29. Here, the trial court correctly concluded that all three *Plien* waiver elements were met.

The Reisingers now claim that the Washington Supreme Court’s decision in *Albice v. Premier Mortgage Services of Washington, Inc.*, 174

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<sup>1</sup> Under the guise of addressing the *Albice* case, the Reisingers’ Supplemental Brief reargues alleged deficiencies with the pre-foreclosure notices issued by the trustee. Suppl. Brief of App. at 4-6. Respondent addressed such arguments in its opening brief and will not repeat. Moreover, *Albice* does not change the fact that such claims relate to pre-foreclosure matters that have been waived.

Wn.2d 560, 276 P.3d 1277 (2012) supports their post-foreclosure challenges. They are wrong. First, *Albice* is not new: The parties have already briefed the case both at the trial court and with this Court. The Washington Supreme Court published the opinion on May 24, 2012. While this was after the Reisingers filed their opening brief in April 2012, it was addressed in Respondents' Brief on Appeal and the Reisingers had an opportunity to address *Albice* in their reply allowed by RAP 10.2(d) had they elected to do so. Moreover, the Supreme Court's *Albice* opinion simply affirmed Division II's decision. The Reisingers' cited extensively to Division II's *Albice* decision at the trial court and in the briefing on appeal. *See* Brief of Appellant, Revised at 5-6.

Second, as addressed in Respondent's Brief, *Albice* presented materially different facts eviscerating any relevance to this action. Most importantly, in *Albice* the plaintiffs were unaware of the defects in the foreclosure process before the sale. Not so here: the Reisingers were aware of the purported foreclosure defects they asserted in Complaint at least five months before the foreclosure sale. *See* Respondent's Brief at 15-17.

Indeed, the *Albice* decision confirmed the waiver rule announced in *Plein*, and explained why it did not apply under the facts of that case:

Further, unlike *Plein*, where the borrower had a defense almost two months prior to the sale, here, Tecca had no knowledge of their alleged breach in time to restrain the sale.

*Albice*, 2012 WL 1881022 at \*5. The facts here are like *Plein*, not *Albice*. The Reisingers had knowledge of the foreclosure defenses relating to the pre-foreclosure notices five months before the foreclosure sale when they received the Amended Notice of Trustee's Sale. CP 2-3; CP 80-83. The Reisingers took no pre-foreclosure action to enjoin the foreclosure. *Plein* bars their action.

Moreover, while the Reisingers argue that they believed the loan servicer American Home Mortgage Servicing, Inc. (AHMSI)—who is not a party to this action—would postpone the foreclosure sale because of communications about a loan modification, the trial court properly concluded that the Reisingers offered no evidence of a promise or agreement to postpone foreclosure, which would have been contrary to the written notices of foreclosure that the Reisingers received. Indeed, in their opening brief, the Reisingers concede that the loan servicer had no obligation to modify the loan. *See* Brief of Appellants at 4 (“Appellants recognize that AHMSI was under no obligation to accept appellants’ application for loan modification.”). They also acknowledge that the loan servicer never promised or agreed to delay foreclosure. *Id.* (“By postponing the actual foreclosure date on four separate occasions, AHMSI established *an unstated policy that ... AHMSI would postpone foreclosure until the adjustment procedure had run its course.*” (emphasis added)); *see also* CP 151-154, 199-200, 204 (foreclosure sale notices).

The Reisingers' post-foreclosure efforts to invalidate the foreclosure are waived. *Albice* offers no assistance to their barred claims.

**B. The *Bain* Case Offers No Support to the Reisingers' Dismissed Washington Consumer Protection Act Claim.**

The Reisingers Supplemental Brief makes no meaningful attempt to argue that the decision in *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83 (2012) resuscitates their WCPA claim. As stated in Respondent's Brief and consistent with the trial court's determination, the Reisingers' WCPA claim failed because, *inter alia*, (1) the claim is directed at non-party AHMSI (the loan servicer) and they offered no evidence of any unfair or deceptive act or practice committed by Respondent Deutsche Bank; (2) the public impact element was not met because the claims concerned a private contract involving unique loan matters; and (3) there was no evidence of causation, e.g., evidence that the Reisingers would not have lost their home (injury) **but for** Deutsche Bank's allegedly unfair or deceptive act. See *Indus. Indem. Co. v. Kallevig*, 114 Wn.2d 907, 920-21, 792 P.2d 520 (1990) (construing RCW 19.86.010 *et. seq.* and citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986)).

Further, to the extent the Reisingers' WCPA claim is based on the activities of the loan servicer AHMSI, Respondent Deutsche Bank cannot be held vicariously liable under the WCPA. See, e.g., *Schmidt v.*

*Cornerstone Investments, Inc.*, 115 Wn.2d 148, 165, 795 P.2d 1143 (1990) (refusing to apply vicarious liability theory in WCPA claim); *see also Emery v. Visa Int'l Serv. Ass'n*, 95 Cal. App. 4th 952, 960, 116 Cal. Rpt. 2d 25 (2002) (holding that vicarious liability does not apply under California's unfair and deceptive practices act).

*Bain* does not alter the analysis or conclusion. In *Bain*, the Washington Supreme Court held that Mortgage Electronic Registration Systems (MERS) does not meet the definition of "beneficiary" under the Washington Deed of Trust Act (WDTA) when MERS does not hold the promissory note. *Bain*, 175 Wn.2d at 120. In that context, the *Bain* also held that characterizing MERS as the beneficiary has the capacity to deceive, thus presumptively meeting the first element of a WCPA claim. *Id.* at 117. At the same time, *Bain* emphasized that a plaintiff asserting a WCPA claim concerning foreclosure must prove the remaining elements of the cause of action, including public impact, injury and causation.

Here, the trial court correctly analyzed the elements of the WCPA claim and concluded that the Reisingers had not met their burden. While the Reisingers have superficially alleged injury through the loss of their property, they failed to offer evidence showing that **but for** the alleged actions of Respondent Deutsche Bank, they would not have suffered the same loss of foreclosure. Further, the Reisingers have not explained how

the foreclosure was caused by Respondent Deutsche Bank, rather than being caused by their failure to pay their loan since 2008.

Finally, unlike the hypothetical scenarios set forth in *Bain* that could prove injury and causation under the WCPA, such as when the homeowners need to deal directly with the note holder to resolve loan matters but do not know the note holder's identity, here the Reisingers knew that Respondent Deutsche Bank was the beneficiary and holder of the note as a result of the bankruptcy proceedings in which Deutsche Bank obtained relief from stay; from the original 2008 Notice of Foreclosure in which Deutsche Bank is identified as the beneficiary; and in the 2010 Amended Notice of Foreclosure again identifying Deutsche Bank as the beneficiary. Unlike the situations set forth in *Bain* in which the homeowner is in the dark about who owns their loan because of MERS's involvement, the Reisingers had that information for at least three years before the foreclosure.

**C. The Reisingers' Attack on the Trustee's Deed is Misguided.**

The Reisingers use the supplemental brief opportunity to reargue that the September 2010 Trustee's Deed recorded after the foreclosure sale is invalid because it recites the original Notice of Trustee's sale issued in February 2008 rather than the Amended Notice of Trustee's Sale. *See* Supplemental Brief of Appellants at 2. Even though they admit an **Amended** Notice of Trustee's Sale was recorded and served on them 116 days before the sale, they argue that the sale violates RCW 61.24.040(6)'s 120 day limitation on trustee sale continuances. Given their other

Further, the recitation of the original Notice of Trustee's Sale rather than the Amended Notice of Trustee's sale does not render the Trustee's Deed *per se* invalid for two reasons. First, because the trustee complied with the WDTA foreclosure process, the Reisingers interest in the real property was extinguished upon the sale and thus they lack standing to challenge whether the trustee's deed properly transferred title to the purchaser. Under RCW 61.24.050, the delivery of the trustee's deed to the purchaser following the trustee's sale terminated the Reisingers ability to challenge the sale because they lost all interest in the property:

Upon physical delivery of the trustee's deed to the purchaser...the trustee's deed shall convey all of the right, title and interest in the real and personal property sold at the trustee's sale which the grantor had or had power to convey at the time of the execution of the deed of trust... . [I]f the trustee accepts a bid, then the trustee's sale is final as of the date and time of such acceptance if the trustee's deed is recorded within fifteen days thereafter. After a trustee's sale, no person shall have any right, by stature or otherwise, to redeem the property sold at the trustee's sale.

RCW 61.24.050(1).

Similarly, because the Reisingers received a notice of foreclosure that complied with the WDTA (RCW 61.24.040(1)(a)(i)), they lack any standing or authority to challenge the sale. Under RCW 61.24.040(7), only persons who **do not receive** the pre-foreclosure notices required by RCW 61.24.040(1) reserve an interest in the real property after the foreclosure:

...if the trustee fails to give the required notice to such person [as required by RCW 61.24.040(1)]...the lien or interest of such

omitted person shall not be affected by the sale and such omitted person shall be treated as if such person was the holder of the same lien or interest and was omitted as a party defendant in a judicial foreclosure proceeding;

RCW 61.24.040(7). The Reisingers are not an “omitted person” because they received a timely notice of foreclosure per RCW 61.24.040(1)(a)(i). CP 80-83. Accordingly, they lack standing to pursue post-foreclosure remedies regarding real property in which they have no interest.

Second, while including the Amended Notice of Trustee’s Sale date would have resulted in “*prima facie* evidence of such compliance [with the WDTA] and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value,” RCW 61.24.040(7), it does not result in an invalid trustee’s deed if in fact the sale complied with the WDTA’s procedural requirements. This proposition—that the substance of what actually occurred should rule over form—was made clear in *Albice*, where the court did not rely on the recitals in the trustee’s deed to decide if the foreclosure sale complied with the WDTA, but instead looked at the facts:

Therefore, strictly applying the statute as required, we agree with the Court of Appeals and hold that under RCW 61.24.040(6), a trustee is not authorized, at least not without reissuing the statutory notices, to conduct a sale after 120 days from the original sale date, and such a sale is invalid.

Here, Premier issued the notice of trustee’s sale listing the sale date as September 8, 2006. Premier held the actual sale on February 16, 2007, 161 days from the original sale date in violation of the statute and

divesting its statutory authority to sell. The sale was invalid.

*Albice*, 174 Wn.2d at 568.

*Albice* clarifies that to determine if a foreclosure sale complies with the WDTA procedural requirements, the court must make a factual inquiry “to ensure trustees strictly comply with the requirements of the act,” rather than superficially reviewing the notices and forms. *Id.* at 571, 573 (“Whether Dickinson was a BFP is a factual and legal inquiry.”) In *Albice*, that inquiry resulted in a finding that the trustee conducted the sale after 120 days from the original sale date, thus invalidating the sale. Here, the same inquiry caused the trial court to determine that the foreclosure sale occurred 116 days after the original sale date included in the Amended Notice of Trustee’s Sale. Accordingly, the sale complied with the WDTA’s procedural requirements.

Finally, to the extent the Trustee's Deed reference to the April 2008 Notice of Trustee’s Sale has any bearing on the validity of the trustee’s sale, it is clearly a scrivener’s error that may be corrected by a minor reformation of the trustee’s deed. *See, e.g., Keierleber v. Botting*, 77 Wn.2d 711, 466 P.2d 141 (1970) (after noting that “law and justice go hand in hand and should never really part company” court holds that deed should be reformed to correct mistake in property description); *Saterlie v. Lineberry*, 92 Wn.App. 624, 628, 962 P.2d 863 (1998) (holding the deed could be reformed because of scrivener’s error relating to property description). The remedy sought by the Reisingers—to invalidate the trustee’s deed that was

caused by their failure to pay their mortgage—is not an equitable remedy the Court should entertain.

### III. CONCLUSION

The trial court's order granting Deutsche Bank's Motion for Summary Judgment should be affirmed. The "new" cases identified in the Reisingers' supplemental briefing do not advance their positions. This wrongful foreclosure case that has dragged on for over four years since the Reisingers first defaulted on the loan should be finally put to rest.

DATED: November 16, 2012

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**CERTIFICATE OF SERVICE**

On November 16, 2012, I caused by be served a true and correct copy of the foregoing AMENDED BRIEF OF RESPONDENT, by email and U.S. Mail upon the following:

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

SIGNED this 16<sup>th</sup> day of November, 2012, at Seattle, Washington.



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Frederick B. Rivera