

APPEAL NO. 44959-5

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

BILLIE G. ROUSE, JR, et al.,

Plaintiffs-Appellants,

v.

CITIMORTGAGE, INC. et al.,

Defendants-Appellees.

BRIEF OF DEFENDANTS-APPELLEES CITIMORTGAGE, INC. AND MERS

J. Scott Wood, WSBA# 41342
Brian B. Smith, WSBA# 45930
999 Third Avenue, Suite 3760
Seattle, Washington 98104
(206) 456-5360

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INTRODUCTION

Plaintiff's Claims Are Barred By The 2 Year Statute of Limitations

Defendants, CitiMortgage, Inc. (“Citi”) and Mortgage Electronic Registration Systems, Inc. (“MERS”), respond to Plaintiffs’ appeal brief by stating that the Pierce County Court properly granted Defendants’ motion to dismiss under Civil Rule 12. The lower court held that all three of Plaintiffs’ claims were barred by the two year statute of limitations. The Rouses admit that, by May 2010, they fell behind on their mortgage payments for their house in Spanaway. Although they quibble over the exact amount due and attendant fees and costs, they also admit that they failed to bring their mortgage current. As a result, the formal foreclosure process began with the notice of default in September 2010, when the Rouses were at least 5 payments behind. The foreclosure sale took place, as noticed, in February 2011, and Respondent Citi bought the property. The Rouses failed to take any action to enjoin the foreclosure process before the sale, nor did they take any action afterward, as the years ticked by on the calendar, even when Citi brought an eviction action in 2012.

Nevertheless, the Rouses continued to live in the home, paying nothing. It was not until March 1, 2013, that the Rouses filed their complaint initiating this lawsuit. The complaint alleged three separate causes of action: 1) A violation of the Washington Consumer Protection Act; 2) A breach of the Deed of Trust Act (versus Defendant Cal-Western only);¹ and 3) Misrepresentation. Defendants Citi and MERS filed a motion to dismiss under CR 12 that Plaintiffs’ complaint was untimely as a matter of law. The trial court agreed, dismissing the Rouses’ complaint in May 2013. The trial court did so based on the two year statute of

¹ Defendant Cal-Western filed for bankruptcy after the appeal was filed. This Court has since dismissed Cal-Western, in September 2015, extinguishing this claim.

limitations in the Deed of Trust Act under RCW 61.24.127.

This provision, RCW 61.24.127, was added when the Deed of Trust Act was amended in 2009, in order to supersede the Court of Appeals' holding in **Brown v. Household Realty Corp.**, 146 Wash.App.157, 189 P.3d 233 (2008). **Brown** held that a cause of action for damages under the Act is waived when the borrower does not seek to enjoin the foreclosure sale before it happens.

As a result of this amendment, the Deed of Trust Act allowed borrowers who failed to challenge the foreclosure sale before the sale took place, to nevertheless bring a lawsuit after the sale for damages. But the amendment sets forth an express two-year statute of limitations in order to bring such claims, and this is true for all three of Plaintiffs' claims. RCW 61.24.127 states that any claim by a borrower for "common law fraud or misrepresentation," "a violation of Title 19 RCW [the Consumer Protection Act]," or a "[f]ailure of the trustee to materially comply with the provisions of [the Deed of Trust Act]," "must be asserted or brought within two years from the date of the foreclosure sale or within the applicable statute of limitations for such claim, whichever expires earlier[.]" In short, each of the Plaintiffs' three claims is specifically included in the statute's two year deadline. Here, the foreclosure sale of the Rouses' house occurred on February 18, 2011. The two year statute of limitations on all of the Rouses' claims consequently expired on February 18, 2013. Yet Plaintiffs did not file their complaint until more than two years later, on March 1, 2013. Under the plain terms of the statute, the Rouses' claims are barred by the statute of limitations.

Plaintiffs allege that despite the Deed of Trust Act's express deadline that any claim must be brought within two years from the "date of the foreclosure sale" under RCW 61.24.127, that this statute does not mean what it says. Instead, Plaintiffs argue that the Court should look to

another section of the act, RCW 61.24.050, regarding when a sale becomes final in relation to recording the trustee's deed. But this latter section, 61.24.050, deals with whether the recording of a deed relates back to the date of the sale – it does not define or alter when the “foreclosure sale” occurred, nor does it reference the two year limitations provision in section 127. The Washington Supreme Court has also explicitly stated, in interpreting RCW 61.24.127, that the foreclosure sale is a “single, specific event[.]” *See Frias v. Asset Foreclosure Services, Inc.*, 131 Wash.2d 412, 421, 334 P.3d 529, 533 (2014). Given the legislature's express language and the Supreme Court's interpretation, because Plaintiffs' claims were not filed within two years of the date of the foreclosure sale, they are barred.

The Dismissal of Defendant Cal-Western and Count II Deed of Trust Claim

Plaintiffs filed their appeal brief in October 2013. At the time, the case was stayed because of Cal-Western's bankruptcy. Although Plaintiffs' brief paid lip service to this fact, including a footnote that they did not intend to violate the automatic stay as to Cal-Western and acknowledging that they were precluded from seeking money from Cal-Western, the primary focus of their appeal brief was nevertheless their Deed of Trust Act claim in Count II.² Plaintiffs' complaint plainly states for Count II: “Breach of the duties under the Deed of Trust Act **as Against Defendant Cal-Western.**”³ There are no allegations against Defendants Citi or MERS in Count II, nor are either of those entities even mentioned.

As the Cal-Western bankruptcy dragged on, Plaintiffs made a motion to dismiss it from this appeal. This Court granted the motion and dismissed Cal-Western in September 2015.

² Plaintiffs' appeal brief at page 7, footnote 1 and pages 18 through 27.

³ CP at 53-54, Plaintiffs' complaint (emphasis added).

Consequently, the remaining two Defendants, Citi and MERS, assert that Count II is likewise dismissed, as well. Because Count II was only against Cal-Western, and Cal-Western is dismissed, the only remaining claims on appeal as a matter of law are Count I under the Consumer Protection Act and Count III alleging misrepresentation.

Yet even if this Court were to somehow allow Plaintiffs to proceed with their appeal as to the allegation of invalid foreclosure sale, that claim is waived as a matter of law. In the five months that passed between the September 2010 notice of demand and the February 2011 foreclosure sale, the Rouses failed to take any action to enjoin the sale. Then more than two years passed during which the Rouses did not pursue any legal action whatsoever. It was not until March 1, 2013, nearly three years after they defaulted on their mortgage, that the Rouses took any legal action by filing this lawsuit. Under the Washington Supreme Court's recent ruling in **Frizzell v. Murray**, 179 Wash.2d 301, 313 P.3d 1171 (2013), the borrower's failure to obtain an order enjoining the foreclosure sale meant that she waived her right to challenge the sale after it occurred. The Court also stated in **Albice v. Premier Mortgage Services**, 174 Wn.2d 560, 572, 276 P.3d 1277, 1283-1284 (2012), that a plaintiff's postsale challenge to a foreclosure sale must be "promptly asserted" or it is waived -- noting that the plaintiff in **Albice** "promptly brought their countersuit, showing no intention of 'sleeping on their rights.'" Here, by failing to take any action to enjoin the foreclosure sale, and then waiting more than two years after the foreclosure sale to file this lawsuit, the Rouses did sleep on their rights and failed to "promptly assert" any postsale challenge as required under the law. This Court should find that Plaintiffs have waived any claim to challenge the foreclosure sale that occurred in 2011.

STATEMENT OF THE CASE

A. The Rouses' House in Spanaway

Plaintiffs' complaint alleges that they previously owned their house at 17015 21st Avenue Court East, Spanaway, WA 98031.⁴ They purchased the property in December 2001, obtaining a mortgage loan from Central Pacific Mortgage Company and secured by a Deed of Trust that was recorded in Pierce County on December 26, 2001.⁵ Under the terms of the Deed of Trust, the Rouses were the borrowers, the lender was Central Pacific and the beneficiary was Defendant MERS as nominee for the lender.⁶ The Rouses made payments on their loan over the years, and "at some point a few years ago" Defendant Citi "became the loan servicer" and the Rouses made payments to Citi.⁷ As Plaintiffs allege, Defendant MERS signed an assignment of the deed of trust to Defendant Citi, which was recorded on August 3, 2006.⁸ There is no allegation in the complaint of Defendant MERS's involvement after this 2006 assignment.

B. The Rouses' Default and The Foreclosure Sale on February 18, 2011

Plaintiffs concede in their complaint that in June 2010, "the Rouses were behind on the mortgage" and were trying to catch up.⁹ Their monthly payments in 2010 were \$1,012.14, and they were delinquent as of September 2010 in the amount of \$6,125.58.¹⁰ In early September

⁴ As this appeal involves a motion under CR 12, all of Plaintiffs' factual allegations in the complaint are taken as true.

⁵ CP at 4:5-9.

⁶ CP at 4:5-11.

⁷ CP at 5:9-15.

⁸ CP at 6:15-23.

⁹ CP at 5:17-19.

¹⁰ CP at 7:1-3.

2010, the Rouses received a notice of default from Defendant Cal-Western to this effect.¹¹ Defendant Citi appointed Cal-Western as the successor trustee in September 2010.¹²

In October 2010, Cal-Western executed a notice of trustee's sale for the Rouses' property, initiating a foreclosure sale.¹³ The foreclosure sale "went forward on February 18, 2011," the sale price was \$125,643.18, and Citi was the successful bidder.¹⁴ The Plaintiffs never filed any action seeking to enjoin the foreclosure sale, nor does Plaintiffs' complaint make reference to any such action.

Despite the foreclosure sale, the Rouses continued to live at the property. The complaint alleges that in early 2012, the Rouses received "paperwork indicating that they needed to leave the property or an eviction proceeding would be started against them."¹⁵ Plaintiffs did not file this action until March 1, 2013.

Defendants Citi and MERS filed a motion to dismiss under Rule 12, asserting that Plaintiffs' claims were barred by the two year statute of limitations. Defendant Cal-Western joined in the motion. The Pierce County Court granted the motion and entered an order to this effect on May 24, 2013.¹⁶ Plaintiffs then filed this appeal. Shortly afterwards, Defendant Cal-Western filed for bankruptcy, and this Court entered a stay of proceedings in July 2013. While the stay remained in effect, Plaintiffs filed their appeal brief in October 2013.

¹¹ CP at 6:24-25.

¹² CP at 8:14-17.

¹³ CP at 9:8-10.

¹⁴ CP at 11:11-15.

¹⁵ CP at 12:11-12.

¹⁶ CP at 178.

As Cal-Western's bankruptcy dragged on, Plaintiffs filed a motion to dismiss Cal-Western, stating that they were unlikely to recover anything from Cal-Western. This Court granted the motion, dismissing Cal-Western in September 2015.

ARGUMENT

A. The Two Year Statute Of Limitations Bars Plaintiffs' Claims

In this post-foreclosure case, the Washington Deed of Trust Act, RCW 61.24.127, provides strict time limits within which a homeowner must act, or any claims are barred. The statute provides:

“(1) The failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter may not be deemed a waiver of a claim for damages asserting:

- (a) Common law fraud or misrepresentation;
- (b) A violation of Title 19 RCW;
- (c) Failure of the trustee to materially comply with the provisions of this chapter; or
- (d) A violation of RCW 61.24.026.

(2) The nonwaived claims listed under subsection (1) of this section are subject to the following limitations:

(a) The claim must be asserted or brought within two years from the date of the foreclosure sale or within the applicable statute of limitations for such claim, whichever expires earlier;

(b) The claim may not seek any remedy at law or in equity other than monetary damages;

(c) The claim may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property.” RCW 61.24.127 (emphasis added).

Under Paragraph (1) of this statutory section, the Rouses' failure to file an action to enjoin the foreclosure sale does not automatically prohibit them from later bringing a claim for damages. However, Paragraph (2) states expressly that any such post-sale claims “must be asserted or brought within two years from the date of the foreclosure sale[.]”

As the Rouses concede in their complaint, the foreclosure sale for their property took place on February 18, 2011. The two-year limitations period on their claims consequently

expired on February 18, 2013. Yet it was not until the next month, after the limitations period expired, that the Rouses filed their complaint, which they did on March 1, 2013.

The Rouses have alleged three claims in their complaint, all of which are barred by the two-year statute of limitations. Count I is against all three Defendants, including Citi, Cal-Western and MERS, and it alleges violations of Washington's Consumer Protection Act, RCW 19.86 et seq. Count II, alleging breach of duty under the Deed of Trust Act, is solely against Cal-Western as the foreclosing trustee. Because Cal-Western has been dismissed, Count II should be considered dismissed, as well. The third count, alleging misrepresentation, is against all Defendants. The express terms of the statutory limitations period, *supra*, bars claims for misrepresentation and violations of Title 19 [the Consumer Protection Act]. Consequently, the Rouses' claims here are barred by the two-year limitations period as a matter of law.

The Plaintiffs have attempted to dodge this unalterable result by making misleading and irrelevant allegations, such as “the foreclosure was allegedly completed on March 9, 2011.”¹⁷ Or that the trustee's deed is dated February 21, 2011, and it was apparently not notarized until March 1, 2011.¹⁸ But Plaintiffs concede that this March 9 date is the date the trustee's deed was recorded;¹⁹ **the actual foreclosure sale occurred a few weeks earlier on February 18, 2011.**²⁰ Plaintiffs acknowledge the plain language of the limitations provision by stating in their complaint that “the Rouses maintain that they are entitled to seek to recover title to their home,

¹⁷ CP at 1:22-24.

¹⁸ CP at 11:17-18.

¹⁹ CP at 1:22-24.

²⁰ CP at 11:12-15.

in spite of the restrictions articulated in RCW 61.24.127.” (Emphasis added).²¹

Yet merely wishing for something won't make it come true. It is a fundamental tenet of Washington law that a court will enforce the “plain meaning” of a statute. As Division 2 recently stated: “When a statute's plain meaning is clear, our inquiry ends without resort to other methods of statutory construction.” **Crystal Mountain, Inc. v. State Dept. of Revenue**, 173 Wash.App. 925, 937, 295 P.3d 1216 (2013). The Court has also noted the maxim that: “We avoid construing a statute in a manner that results in ‘unlikely, absurd, or strained consequences.’” **Mason v. Georgia-Pacific Corp.**, 166 Wash.App. 859, 870, 271 P.3d 381 (2012). In a recent foreclosure case, the Washington Supreme Court stated: “In matters of statutory construction, we are tasked with discerning what the law is, not what it should be.” **Frias v. Asset Foreclosure Services, Inc.**, 131 Wash.2d 412, 421, 334 P.3d 529, 533 (2014).

Here, the statute expressly provides in plain, unambiguous terms that the claim “must be asserted or brought within two years from the date of the foreclosure sale[.]” The Legislature could have chosen another point in time, such as the date when the trustee’s deed was recorded, which the Rouses advocate, but it did not. The Legislature chose the date of the foreclosure sale, which sensibly fits within the overall statute’s framework providing guidance to borrowers who have failed to enjoin “a foreclosure sale under this chapter[.]” Using a different date than the “foreclosure sale” would lead to an “absurd” and untenable result that would directly conflict with the statute’s express reference to the “date of the foreclosure sale.”

This is further supported by the Washington Supreme Court’s recent decision in **Frias v. Asset Foreclosure Services, Inc.**, 131 Wash.2d 412, 421, 334 P.3d 529, 533 (2014). The Court

²¹ CP at 13:7-9.

analyzed RCW 61.24.127, including the legislative history, in holding that a claimant is barred from bringing a claim for damages under the Deed of Trust Act in the absence of a completed foreclosure sale. The Court stated:

“Notably, all of these limitations [in Section 127] refer to ‘the’ foreclosure sale. The use of a definite article ‘the’ – as opposed to an indefinite article ‘a’ – is indicative of the legislature’s intent to specify or particularize the word that follows. . . . Plainly, the specific foreclosure sale referred to in RCW 61.24.127(2) is the foreclosure sale the borrower or grantor did not bring a civil action to enjoin. While foreclosure generally is a process rather than an event, **‘the foreclosure sale’ is a single, specific event**, and the limitations in RCW 61.24.127(2) all speak of that foreclosure sale in the past tense, clearly contemplating it already happened.” 181 Wash.2d at 427, 334 P.3d at 536 (emphasis added).

The Court’s finding has direct application to this Rouse case. Here, the foreclosure was a single, specific event that occurred on February 18, 2011. Fixing that date as a bright line rule makes perfect sense for setting a 2 year limitations period from that event. The statute’s explicit language that the claim “must be asserted or brought within two years from the date of the foreclosure sale” means just that – the claim must be brought within two years of when that single, specific act occurred. Here, because the foreclosure sale occurred on February 18, 2011, the deadline for Plaintiffs’ claims for misrepresentation and violation of the Consumer Protection Act was February 18, 2013.

Plaintiffs’ only argument is that, despite the express language in RCW 61.24.127, the Court should look to another section of the act, 61.24.050, regarding when a sale becomes final in relation to recording the trustee’s deed. But this latter section, .050, deals with whether the recording of a deed relates back to the date of the sale – it does not define or alter when the “foreclosure sale” occurred, nor does it reference the two year limitations provision in section 127.

In addition, Defendants submit that this two-year limitations provision, by setting forth a

well-defined date relating to foreclosure sales, furthers the goals of the Deed of Trust Act, which are:

“The purposes of the DTA are well-established: ‘First, the nonjudicial foreclosure process should remain efficient and inexpensive. Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosures. Third, the process should promote the stability of land titles.’” **Frias**, 181 Wash.2d at 428, 334 P.2d at 537.

The legislature has spoken in clear and unmistakable terms in RCW 61.24.127 – failure to bring a claim within two years “of the foreclosure sale” bars any further challenge to the foreclosure sale. Here, because the Rouses brought their claims against Citi and MERS after the two-year limitations period expired, their claims are barred as a matter of law.

B. Plaintiffs Have Waived Any Claim That The Foreclosure Was Invalid

Although the lower court based its ruling dismissing the case on the fact that Plaintiffs’ claims are barred by the statute of limitations, nearly the entire focus of Plaintiffs’ brief is on a completely different issue -- that the foreclosure sale was “invalid.” Although Plaintiffs’ complaint contains allegations about this, there is no separate cause of action alleging invalid foreclosure sale. There were three causes of action in the complaint. Count II has effectively been dismissed because it was only against Cal-Western, and this Court has granted Plaintiffs’ motion and dismissed Cal-Western. The remaining claims, Count I for Consumer Protection and Count III alleging misrepresentation, are not a proper mechanism for challenging a foreclosure sale. Rather, Plaintiffs’ remedy was to take action prior to the foreclosure to enjoin the sale under RCW 61.24.130, which the Plaintiffs never did.

The Washington Supreme Court’s recent opinion in **Frizzell v. Murray**, 179 Wash.2d 301, 313 P.3d 1171 (2013), is right on point. There, the plaintiff-borrower defaulted on her \$100,000 loan that was secured by a deed of trust on her home. The defendants initiated the

foreclosure process. Prior to the foreclosure sale, the plaintiff even brought a lawsuit against the defendants alleging fraud and violation of the Consumer Protection Act, as well as a separate motion to enjoin the trustee sale. One day before the sale, the judge granted plaintiff's motion, but conditioned the injunction on her paying \$25,000 by the next day, for a bond and to bring the loan current. The plaintiff failed to do so, though, and the foreclosure sale took place.

The trial court granted summary judgment to the defendants as to all claims based on plaintiff's failure to obtain pre-sale injunctive relief, but the Court of Appeals reversed. On appeal to the Supreme Court, however, that Court held that the plaintiff "waived her right to contest the nonjudicial foreclosure sale." 179 Wash.2d at 307, 313 P.3d at 1174.

The Court looked with favor to its earlier decision in **Plein v. Lackey**, 149 Wash.2d 214, 67 P.3d 1061 (2003), where the Court held that failure to obtain a preliminary injunction or restraining order barring a nonjudicial foreclosure sale waived defenses to the sale. The Court stated:

"We stated [in **Plein**] that under the waiver provision set forth in RCW 61.24.040 (1)(f)(IX), a waiver of a postsale contest occurs when 'a 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 enjoining the sale.'" 179 Wash.2d at 306-307, 313 P.3d at 1174.

The Rouses' case meets all these factors, so this Court should hold that they have waived any challenge to the foreclosure sale. The Rouses received the notices of default and the foreclosure sale, which gave them notice of the right to enjoin the sale, and they had knowledge of the alleged violations. Yet they failed to bring any action to enjoin the sale.

In **Frizzell**, although the Court noted that the plaintiff even filed a lawsuit before the foreclosure sale to obtain a court order to enjoin it, the "order was conditioned on a payment to the court that she failed to make." 179 Wash.2d at 307. Although plaintiff argued that she did not

have sufficient funds to meet the order's requirements, the Court rejected this, noting that the plaintiff did not seek reconsideration or appeal the order. The Court stated: "But consciously choosing not to pursue all remedies is not an excuse, and posting security is a clear statutory requirement." *Id.* The Court emphasized the importance of obtaining an order enjoining the sale in order to meet the statutory requirements, or else such claims are waived. The Court stated:

"However, RCW 61.24.130(1) provides that "[t]he court shall require as a condition of granting the restraining order of injunction that the applicant pay to the clerk of the court the sums that would be due on the obligation secured by the deed of trust if the deed of trust was not being foreclosed. . . . The statute is clear that the order is conditional upon payment, which [plaintiff] failed to make. [Plaintiff] received notice and had the opportunity to prevent foreclosure, but through her actions she failed to meet the clear statutory requirements under RCW 61.24.130 and did not actually obtain an order enjoining the sale. To allow the borrower to ignore the conditions for an injunction would render aspects of the waiver provision and injunction statute meaningless. 179 Wash.2d at 308, 313 P.3d at 1174-1175.

Finally, to the extent that the plaintiff in **Frizzell** attempted to rely on the Court's decision in **Albice v. Premier Mortgage Services of Washington, Inc.**, 174 Wash.2d 560, 276 P.3d 1277 (2012), the **Frizzell** Court rejected this argument. In **Albice**, the Court held that there was no waiver, but there the borrowers did not know of the alleged breach in time to restrain the sale (unlike in **Plein**), the borrowers had no grounds to challenge the underlying debt because they had entered into a forbearance agreement, and because the sale took place outside the statutory time period. The Court noted that in **Albice** that: "There was no indication that the parties were 'sleeping on their rights.'" 179 Wash.2d at 309, 313 P.3d at 1175. Rather, the plaintiffs "promptly" asserted their counterclaim. *Id.*

If anything, Defendant Citi and MERS argument is far stronger than the defendants' position in **Frizzell**. In **Frizzell**, the borrower at least took action, filing a lawsuit and a motion to enjoin the foreclosure sale. She failed to obtain an injunction because she said she could not

afford to pay the amounts the court required. Here, in sharp contrast, the Rouses failed to take any action whatsoever to stop the foreclosure sale. The Rouses were fully informed of the foreclosure process here, including the foreclosure sale, yet they did nothing. Nor did they take any action even after the foreclosure sale. Rather, it was not until over two years later, in March 2013, that the Rouses filed this lawsuit, with their strained interpretation of when the “date of the foreclosure sale” is. Moreover, even when they filed this lawsuit, the Rouses did not bring a motion for injunctive relief. Unlike the plaintiffs in **Albice**, who “promptly” asserted their postsale challenge, the Rouses were sleeping on whatever rights they may have had.

The recent decision from Division 3 in **Merry v. Northwest Trustee Services, Inc.**, 188 Wash. App. 174, 352 P.3d 830 (2015), is instructive. There, the junior deed of trust holder, Merry, filed a lawsuit before the foreclosure sale to declare the deed of trust void and unenforceable. The Court noted that Merry’s complaint had “a number of technical violations of the DTA in the form of actions by entities who had been improperly designated or appointed or otherwise lacked authority.” 188 Wash.App. at 180, 352 P.3d at 832. Although Merry filed his lawsuit, the Court noted that he “did not attempt to enjoin the trustee’s sale of the property.” 188 Wash.App. at 180, 352 P.3d at 833. The foreclosure sale occurred in January 2014. The defendants, the lender and trustee, filed a motion to dismiss under Rule 12, which the trial court granted. Interestingly, the plaintiff in Merry made the identical allegations that the Rouses have made here, such as: “Northwest Trustee was not trustee at the time it issued the notice of default; and that Nationstar [the lender] lacked standing to enforce the note, initiate nonjudicial foreclosure, or appoint a substitute trustee[.]” 188 Wash.App. at 180, 352 P.3d at 833. The Court of Appeals framed the issue: “[W]hether, even if Mr. Merry is right about ineffective assignments and appointments, the trial court properly applied waiver because he failed to pursue

a presale injunction authorized by RCW 61.24.130 and failed to allege any basis on which waiver would not apply.” 188 Wash.App. at 182, 352 P.3d at 833.

The Court in **Merry** conducted an exhaustive review of the recent case law, and after doing so held that the trial court appropriately applied waiver, barring plaintiff’s claims. The Court’s analysis regarding waiver and the statute at issue in this Rouse case, RCW 61.24.127, is particularly instructive:

The legislative preference for presale remedies is even more clear following the legislature’s enactment in 2009 of a provision explicitly identifying claims for damages arising out of foreclosures of owner-occupied residential real property that are not waived by a failure to enjoin a foreclosure sale. [Citing RCW 61.24.127]. The legislature’s primary purpose in enacting the new provision was to supersede the holding in **Brown v. Household Realty Corp.**, 146 Wash.App. 157, 189 P.3d 233 (2008), which held that an action seeking damages for wrongful foreclosure is waived if the borrower does not seek to enjoin the foreclosure sale. **Frias**, 181 Wash.2d at 425, 334 P.3d 529.

Among the postsale claims for damages that the 2009 act recognizes is a borrower’s or grantor’s claim for damages ‘asserting . . . [f]ailure of the trustee to materially comply with the provisions of this chapter.’ But the nonwaived claim is subject to the limitation (among others) that the claim may not seek any remedy other than monetary damages. RCW 61.24.127(2). Notably, while the legislature explicitly recognized that a grantor’s or borrower’s claim for *damages* for a material violation of the DTA could survive completion of the foreclosure sale, it did not explicitly recognize a grantor’s or borrower’s claim to set aside the sale for a material DTA violation as surviving the sale. Not only that, but it showed a general disapproval for the latter type of legal challenge by providing that a grantor or borrower hoping to recover postsale damages may not include any claim that would affect the validity or finality of the sale or operate to encumber or cloud title to the property.

Even after **Albice** and **Schroeder**, Washington law continues to support the application of waiver to individuals like Mr. Merry who, with full knowledge of a material violation of the DTA, fail to restrain a sale – as long as courts heed **Albice**’s admonition that ‘we apply waiver only where it is equitable under the circumstances and where it serves the goals of the act.’ **Albice**, 174 Wash.2d at 570, 276 P.3d 1277.” **Merry**, 188 Wash.App. at 194-195, 352 P.3d at 839-840 (Emphasis in original).

This analysis from the **Merry** Court is directly applicable to the case at bar. Here, the Rouses have likewise included a laundry list of what the Merry Court referred to as “formal,

technical, nonprejudicial violations of the DTA with no suggestion that they could not have been corrected if timely raised.”188 Wash.App. at 197, 352 P.3d at 841. For example, the Rouses claimed in their complaint that the delinquency amounts listed in the notice of default in September 2010 and the notice of trustee’s sale in October 2010 were inaccurate.²² The Rouses state that the delinquency in the notice of trustee sale was \$12,011.89, but they allege that had missed “at most” 5 payments of \$1,012.14 each.²³ They also allege that Cal-Western was not properly appointed trustee, and that Citi was not properly the beneficiary, just as the plaintiff alleged in **Merry**.²⁴ Yet the bottom line, as in **Merry**, is that the Rouses had notice of all these alleged DTA violations well before the foreclosure sale took place on February 18, 2011. The Rouses, however, did not file an action or seek to enjoin the foreclosure sale from occurring. On this record, this Court should likewise rule that the Rouses have waived any claim that the foreclosure sale was invalid.

²² CP at 7:2 and 10:8.

²³ CP at 10:8-12.

²⁴ CP at 7:9-16 and 9:3.

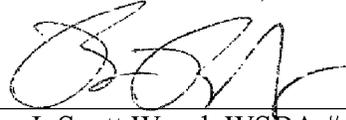
CONCLUSION

This Court should affirm the Pierce County Court's ruling granting Defendants' motion to dismiss under CR 12, ruling that Plaintiffs' claims are barred by the statute of limitations.

DATED January 26, 2016

FOLEY & MANSFIELD, P.L.L.P.

BY:



J. Scott Wood, WSBA #41342
swood@foleymansfield.com
Brian B. Smith, WSBA #45930
bsmith@foleymansfield.com
Attorneys for Defendants Citi & MERS

FOLEY AND MANSFIELD PLLP

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Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellants'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Wendy L Cruz - Email: wcruz@foleymansfield.com

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tclark@foleymansfield.com

bsmith@foleymansfield.com

APPEAL NO. 44959-5

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

BILLIE G. ROUSE, JR, et al.,

Plaintiffs-Appellants,

v.

CITIMORTGAGE, et al.,

Defendants-Appellees.

DECLARATION OF SERVICE

J. Scott Wood, WSBA# 41342
Brian B. Smith, WSBA# 45930
800 Fifth Avenue, Suite 3850
Seattle, Washington 98104
(206) 456-5360

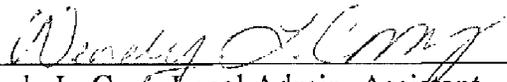
On behalf of Citi & MERS. I hereby certify under penalty of perjury under the laws of the State of Washington that on the date stated below, I served the following documents as follows: 1) Appel Brief of Citimortgage and MERS2)

[This] Declaration of Service to:

LAW OFFICES OF MELISSA A. HUELSMAN, P.S.
Melissa A. Huelsman, WSBA 30935
Attorney for Plaintiffs
705 Second Avenue, Suite 601
Seattle, WA 98104
Mhuelsman@predatorylendinglaw.com

DATED this 26th day of January 2016.

FOLEY AND MANSFIELD PLLP


Wendy L. Cruz, Legal Admin. Assistant

FOLEY AND MANSFIELD PLLP

January 26, 2016 - 1:42 PM

Transmittal Letter

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Case Name:

Court of Appeals Case Number: 44959-5

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