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Division II  
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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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DAVID W. DEVIN,

Appellant,

v.

MTC FINANCIAL, INC., *et al.*,

Respondents,

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BRIEF OF RESPONDENT MTC FINANCIAL, INC., D/B/A TRUSTEE  
CORPS

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PETERSON RUSSELL KELLY PLLC  
Michael S. DeLeo  
10900 NE 4<sup>th</sup> St. Suite 1850  
Bellevue, WA 98004-8341  
Telephone: (425) 462-4700  
Email: mdeleo@prklaw.com

Attorneys for Respondent MTC Financial, Inc.,  
d/b/a Trustee Corps

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## I. INTRODUCTION

Appellant David W. Devin (“Mr. Devin”) has been representing himself in this matter since August 2017. Unfortunately for Mr. Devin, his Notice of Appeal does not properly bring up for review the final order and judgment in this case. Accordingly, the Court should dismiss Mr. Devin’s appeal pursuant to RAP 2.4(b) and (c).<sup>1</sup>

Moreover, even if the Court finds that Mr. Devin has properly sought review of the summary judgment granted in Respondent MTC Financial, Inc., d/b/a Trustee Corps’ (“MTC”) favor on January 3, 2019, the Court should affirm the trial court’s decision. There are no genuine issues of material fact, and MTC is entitled to judgment as a matter of law on the claims Mr. Devin brought against it.

## II. RESPONDENT’S RESTATEMENT OF THE CASE

### A. Pre-litigation Events.

Mr. Devin has long owned, or had an interest in, a residential real property located at 1710 Wheaton Way, Bremerton, Washington (“the Property”). CP 46 at ¶ 5. Since roughly 2009, Mr. Devin has been renting out the Property and living in Vietnam. CP 75.<sup>2</sup>

Mr. Devin admits that on or about November 4, 2005, he borrowed \$153,750 from America’s Wholesale Lender, secured by a deed of trust

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<sup>1</sup> As explained in detail below, MTC is making this request for dismissal as a motion incorporated into its Respondent’s Brief pursuant to RAP 17.4(d).

<sup>2</sup> *See also* Amended Opening Brief of Appellant (“Appellant’s Brief”), at p. 4, line 5.

(the “Deed of Trust”) against the Property. CP 46 at ¶ 6. Mr. Devin further admits that by 2007, he had defaulted on the loan secured by the Deed of Trust. CP 46, at ¶ 9.

Under the terms of the Deed of Trust, the original trustee of the Deed of Trust was Landsafe Title. CP 53.<sup>3</sup> By late 2015 or early 2016, MTC had begun acting as successor trustee under the Deed of Trust. CP 47, at ¶ 11.<sup>4</sup> In or about April or May 2016, MTC posted a Notice of Default on the Property. CP 47, at ¶ 11; CP 68-71. Mr. Devin alleges that the posting of the Notice of Default “caused Devin’s then tenant to vacate the . . . Property.” CP 47, at ¶ 11.

By May of 2016, Mr. Devin was personally aware of the Notice of Default. CP 47 at ¶ 12. Mr. Devin began corresponding with MTC by email from Vietnam, where he resides. CP 47, at ¶ 12; CP 74-81.

On or about August 16, 2016, MTC issued a Notice of Trustee’s Sale (“NOTS”) for the Property. CP 102 at ¶ 2; CP 105-108. The NOTS set a trustee’s sale of the Property for January 6, 2017. CP 105. MTC mailed the NOTS to Mr. Devin at every address for Mr. Devin set forth in a recorded instrument evidencing his interest in the Property. CP 103 at ¶

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<sup>3</sup> If the Court grants Mr. Devin’s RAP Rule 17.7 Appeal of Denial of Appellant’s Rule 10.3.8 Request of Plaintiff to File Supplemental Appendices, and allows inclusion of Mr. Devin’s proposed Appendix A (consisting of two incomplete Notices of Trustee’s Sale recorded respectively January 11, 2008 and November 12, 2008), the Court may note that by 2008, a different entity, Recontrust Company, claimed to be the trustee.

<sup>4</sup> The record on review does not establish the date MTC was appointed successor trustee under the Deed of Trust.

3, CP 115-116.

**B. Litigation Events.**

On January 25, 2017, Mr. Devin filed the action now on appeal. CP 1. Acting through counsel, Mr. Devin filed an Amended Complaint on April 10, 2017, and four days later obtained an order restraining the sale of the Property. CP 45, 87.

Mr. Devin's counsel withdrew effective August 2017, and since that point Mr. Devin has been representing himself. CP 262-263. On or about October 6, 2017, MTC's co-defendant Bank of New York Mellon ("BONYM") moved to vacate the injunction restraining the sale. CP 264-267. MTC was not a party to BONYM's motion to vacate the injunction. *Id.* As part of his response to BONYM's motion to vacate, Mr. Devin filed a sworn statement, dated October 17, 2017. CP 268-276. By order dated October 20, 2017, the trial court denied BONYM's motion to vacate the preliminary injunction. CP 89. However, the trial court also denied Mr. Devin's request that no more hearings be held in the matter "until the Washington State Office of Financial Institutions has completed its investigation of the organization of a Trustee's Sale of the Plaintiff's real property by MTC Financials [sic] and Di-Tech." CP 90.

On October 10, 2018, BONYM filed a Motion for Summary Judgment, originally noted for December 7, 2018. CP 277-282. Mr. Devin did not file a standard response to BONYM's Motion for Summary Judgment, but instead, on November 14, 2018, filed a one-page Motion to Stay Review of Defendant's Bad Faith Motion for Summary Judgment

(“Motion to Stay”). CP 332. This Motion to Stay only applies to BONYM’s motion for summary judgment, because as of the date it was filed, only BONYM’s motion for summary judgment was before the trial court.<sup>5</sup>

The same day as he filed his Motion to Stay (November 14, 2018), Mr. Devin also filed a Motion to Compel Production of Good Faith Responses to Plaintiff’s Interrogatories. CP 91-94. The Motion to Compel was noted for November 30, 2018. CP 291. Although Mr. Devin’s Motion to Compel occasionally refers to “Defendants” (e.g. at CP 91, line 13), the Motion to Compel, like the Motion to Stay, is clearly directed only toward BONYM. *See, e.g.*, CP 93-94 (Mr. Devin’s specific objections to discovery responses prepared by BONYM) *and* CP 128-139 (Mr. Devin’s discovery requests to BONYM with answers and responses). Indeed, Mr. Devin never propounded any discovery to MTC. CP 120.

Out of an abundance of caution, MTC filed brief responses objecting to both Mr. Devin’s Motion to Compel and his Motion to Stay. CP 118-120. MTC’s responses pointed out that neither of Mr. Devin’s motions applied to MTC or to MTC’s Motion for Summary Judgment, which was filed with the trial court *after* Mr. Devin filed his motions. CP 91 (showing November 14, 2018 filing date for Mr. Devin’s Motion to Compel); CP 95 (showing November 16, 2018 filing date for MTC’s Motion for Summary Judgment); CP 118-120 (MTC’s argument that Mr.

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<sup>5</sup> *Compare* Motion to Stay (showing filing date of November 14, 2018) *with* CP 95 (showing filing date of November 16, 2018).

Devin's motions to compel and to stay did not apply to MTC).

On November 30, 2018, the trial court heard Mr. Devin's Motions to Stay and Compel. CP 151. Mr. Devin did not appear. CP 151, CP 156, at ¶¶ 3-5. The Court proceeded to deny Mr. Devin's motions, and entered orders to that effect. CP 152-155, 292-294. Mr. Devin promptly moved for reconsideration, requesting a "full hearing on my motion to stay and my motion to compel" on the grounds that his failure to appear telephonically at the November 30, 2018 hearing had been excusable. CP 156. In response, the trial court set a hearing on the motion for reconsideration for December 14, 2018. CP 163.<sup>6</sup>

In the meantime, on November 16, 2018—two days after Mr. Devin filed his Motions to Stay and Compel—MTC had filed its own Motion for Summary Judgment, which was also noted for hearing on December 14, 2018. CP 95-100, 249. Pursuant to CR 56(c), any opposition by Mr. Devin to MTC's Motion for Summary Judgment was due by Monday, December 3, 2018. Mr. Devin did not meet this deadline. Interestingly, although Mr. Devin did not meet the response deadline, he, file a "Revised Complaint" on December 7, 2018 without previously moving for leave to amend. CP 163-180.

On December 14, 2018, the trial court heard argument on the following motions: (1) Mr. Devin's Motion to Reconsider (asking for a re-

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<sup>6</sup> As explained below, the trial court ultimately granted this motion for reconsideration, heard additional argument, and then once again denied Mr. Devin's Motions to Compel and Stay. *See* CP 249-251.

hearing of Mr. Devin's Motions to Stay and to Compel), (2) Mr. Devin's Motion to Stay, (3) Mr. Devin's Motion to Compel, (4) BONYM's Motion for Summary Judgment, and (5) MTC's Motion for Summary Judgment. CP 163, 183, and 249. The trial court first granted Mr. Devin's Motion for Reconsideration, allowing additional argument on the Motions to Stay and Compel, but it then denied those motions. CP 183, 251. The trial court also struck Mr. Devin's "Revised Complaint." CP 183. It took both BONYM's and MTC's motions for summary judgment under advisement, stating that it would issue its decision on those motions in writing. CP 183.

Mr. Devin moved for reconsideration a second time on December 19, 2019. CP 184-187. This second motion for reconsideration asked the trial judge "to reconsider her decisions made on December 14, 2018." CP 184. As Mr. Devin's subsequent argument made clear, the decisions which he sought to have reconsidered were the trial court's decisions to: (1) deny his Motion to Compel; (2) deny his Motion to Stay; and (3) strike his Revised Complaint. CP 184-185. MTC is not mentioned at all in Mr. Devin's second motion for reconsideration. CP 184-187. Mr. Devin also filed a Motion for the Court to Approve Plaintiff's Attached Revised Complaint. CP 188-193. However, the trial court docket reflects that Mr. Devin did not note the Motion for Court to Approve Plaintiff's Attached Revised Complaint on the court's motion calendar.

The trial court denied Mr. Devin's second motion for reconsideration by order dated December 20, 2018. CP 235. On Monday,

December 31, Mr. Devin filed his third motion for reconsideration, in which he asked the trial court to reconsider its December 20, 2018 order denying his second motion for reconsideration. CP 237-243. According to Mr. Devin, the relief he sought in the third motion was “simply . . . to compel [counsel for BONYM] to provide the court with the vital information that [it] need[s] to decide this case in a fair and just manner.” CP 242, lines 9-11. Mr. Devin’s third motion for reconsideration does not mention MTC at all. CP. 237-43.<sup>7</sup> The trial court denied Mr. Devin’s third motion for reconsideration on January 3, 2019. CP 253.

Separately on January 3, 2019 the trial court also issued two “omnibus” orders, one prepared by MTC and the other by BONYM, respectively granting each of the pending motions for summary judgment. CP 249-252, 326-328.

Mr. Devin filed his Notice of Appeal on February 1, 2019. CP 254. The Notice of Appeal states that Mr. Devin seeks “review by Washington State Appellate Court Division II, District 2 of the ORDER entered on January 3, 2019 *denying his Motion for Rule 59 Relief in this matter.*” CP 254 (emphasis added). The Notice of Appeal also states that “[a] copy of the decision is attached to this notice” (CP 254), and the only Order attached is the Order on Reconsideration dated January 3, 2019. CP 257. The Notice of Appeal makes no reference to either Omnibus Order granting the motions for summary judgment brought by MTC and

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<sup>7</sup> It does briefly mention MTC’s counsel. CP 242, lines 7-8.

BONYM. CP 254-257.

### **III. ARGUMENT**

#### **A. Summary of the argument.**

Mr. Devin's appeal against MTC is fatally flawed as a matter of both procedure and substance.

Procedurally, Mr. Devin's Notice of Appeal fails to seek review of the judgment entered in favor of MTC. Indeed, his Notice of Appeal does not seek review of either of the final judgments entered in this matter. Mr. Devin's appeal should be dismissed for these reasons alone.

Even if Mr. Devin's Notice of Appeal can be construed as properly raising the final judgment entered in favor of MTC, the trial court did not err in granting that judgment. Mr. Devin failed to file any opposition to MTC's motion for summary judgment in the trial court. Moreover, Mr. Devin's Opening Brief fails to assign any error to, or make any argument about, the trial court's dismissal of the breach of contract claim against MTC. Finally, Mr. Devin failed to offer the trial court any evidence supporting the injury and causation elements of a CPA claim against MTC.

For all of these reasons, this Court should affirm the trial court's grant of summary judgment to MTC.

**B. This Court should dismiss Mr. Devin’s appeal, because his Notice of Appeal fails to bring up the final judgment for review.**

A party may include in a brief “a motion which, if granted, would preclude hearing the case on the merits.”<sup>8</sup> Accordingly, MTC moves this Court to dismiss Mr. Devin’s appeal, for the reason that his Notice of Appeal fails to properly bring up the final judgment in this matter, and that the time to appeal from the final judgment has passed.

Mr. Devin’s Notice of Appeal states that he seeks “review . . . of the ORDER entered on January 3, 2019 *denying his Motion for Rule 59 Relief in this matter.*” CP 254 (italicized emphasis added). Crucially, the “Motion for Rule 59 Relief” Mr. Devin refers to was not a motion for relief from the final judgment entered in this case. CP 237-243, 329-331. Rather, it was a motion for relief from the trial court’s decision to refuse reconsideration of its prior orders denying his motions to stay, to compel, and to amend. CP 237-243, 184-187, 235. Mr. Devin never moved for reconsideration of the final judgment.

The scope of this Court’s review of a trial court’s decisions is governed by RAP 2.4. The pertinent parts of that rule state as follows:

**(a) Generally.** The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal or, subject to RAP 2.3(e), in the notice for discretionary review, and other decisions in the case as provided in sections (b), (c), (d), and (e).

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<sup>8</sup> RAP 17.4(d).

**(b) Order or Ruling Not Designated in Notice.** The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.

....

**(c) Final Judgment Not Designated in Notice.** Except as provided in rule 2.4(b), the appellate court will review a final judgment not designated in the notice only if the notice designates an order deciding a timely motion based on (1) CR 50(a) (judgment as a matter of law), (2) CR 52(b) (amendment of findings), (3) CR 59 (reconsideration, new trial, and amendment of judgments), (4) CrR 7.4 (arrest of judgment), or (5) CrR 7.5 (new trial).

Here, the final judgment is not designated in the Notice of Appeal. CP 254-257. Accordingly, review cannot be based directly on RAP 2.4(a), and could only be proper under RAP 2.4(b) or RAP 2.4(c).<sup>9</sup> However, neither RAP 2.4(b) nor RAP 2.4(c) supports review in this case.

RAP 2.4(b) does not support review here because the final judgment entered on January 3, 2019 cannot plausibly be held to have “prejudicially affect[ed]” the Order on Reconsideration entered that same day.<sup>10</sup> The Order on Reconsideration was exclusively focused on Mr. Devin’s previously denied motions to stay, compel, and to amend. CP 257. Even under the State Supreme Court’s “exceedingly liberal approach” to the scope of review, there is no plausible argument that the order Mr. Devin appeals from—denial of reconsideration of a prior order on

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<sup>9</sup> See RAP 2.4(a). Neither RAP 2.4(d) nor 2.4(e) applies to this case.

<sup>10</sup> See RAP 2.4(b).

reconsideration refusing revision of the trial court’s adverse decisions on Mr. Devin’s motions to stay, compel, and amend—“would not have happened but for” the final judgment.<sup>11</sup>

RAP 2.4(c) also does not support review, because it is clearly not a reasonable reading of this rule to hold that *any* motion for reconsideration—regardless of the order for which reconsideration is sought—brings up for review a final judgment not designated in the Notice of Appeal. Instead, “RAP 2.4(c) provides for review of a final judgment not designated in the notice of appeal *where the appeal is taken from an order deciding a timely post-trial motion to amend the judgment pursuant to CR 59.*”<sup>12</sup> Here, Mr. Devin has not taken an appeal from any motion to amend the judgment, but instead has only attempted to appeal from an order on reconsideration regarding the trial court’s prior denial of his motions to compel, stay, and amend.

Because Mr. Devin’s Notice of Appeal does not properly seek review of the final judgment entered in this matter on January 3, 2019, and because the time to seek such review has passed, the Court should dismiss Mr. Devin’s appeal with prejudice.<sup>13</sup>

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<sup>11</sup> 15A Wash. Prac., Handbook Civil Procedure § 86.2 (2018-2019 ed.) (citing to *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 146 Wn.2d 370, 46 P.3d 789 (2002)).

<sup>12</sup> *Structurals Nw., Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 714, 658 P.2d 679, 681 (1983) (emphasis added).

<sup>13</sup> See RAP 5.2(a) (setting deadline for filing notice of appeal of 30 days after entry of judgment).

**C. Even if Mr. Devin has properly sought review, this Court should affirm the trial court’s grant of summary judgment to MTC.**

For the reasons stated above, this Court should dismiss Mr. Devin’s appeal without reaching the merits. However, even if this Court allows Mr. Devin’s appeal to proceed, it should affirm the trial court’s grant of summary judgment to MTC.

1. The standard of review on summary judgment.

This Court “review[s] a summary judgment order *de novo*, engaging in the same inquiry as the trial court.”<sup>14</sup> Summary judgment is proper if the records on file with the trial court show “there is no genuine issue as to any material fact” and “the moving party is entitled to a judgment as a matter of law.”<sup>15</sup> Like the trial court, this Court construes all evidence and reasonable inferences in the light most favorable to the nonmoving party.<sup>16</sup> However, conclusory statements, argumentative assertions and allegations of unanswered questions will not defeat a properly supported motion for summary judgment.<sup>17</sup>

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<sup>14</sup> *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976).

<sup>15</sup> CR 56(c).

<sup>16</sup> *Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140, 142, 500 P.2d 88 (1972); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

<sup>17</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

2. Mr. Devin failed to establish any genuine issue of material fact regarding his breach of contract claim against MTC, and has waived this claim on appeal.

Mr. Devin’s Amended Complaint alleges that “Defendants . . . breached contractual obligations, causing Plaintiff damage.” CP 48, at ¶ 22. MTC moved for summary judgment against this claim, pointing out that for Mr. Devin to prevail on breach of contract claim against MTC, he would have to show: (1) the existence of a contract imposing a specific duty on MTC; (2) the duty is breached; and (3) the breach proximately caused damage.<sup>18</sup>

Mr. Devin made no effort in any of his submissions to the trial court to establish any of these elements. Moreover, Mr. Devin’s Amended Opening Brief on appeal is completely devoid of any assignment of error or argument regarding his breach of contract claim as to MTC. Because Mr. Devin failed to show the existence of any material question of fact regarding his claim for breach of contract against MTC, and because he has effectively abandoned this claim on appeal, this Court should affirm the dismissal of Mr. Devin’s breach of contract claim against MTC.<sup>19</sup>

3. Any claim by Mr. Devin under the Deed of Trust Act fails as a matter of law.

Mr. Devin’s Amended Opening Brief is not a model of clarity.

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<sup>18</sup> See, e.g., *Nw. Indep. Forest Mfrs. v. Dep’t of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6, 9 (1995). See also CP 98.

<sup>19</sup> See, e.g., *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 846, 347 P.3d 487, 491 (2015) (holding that an appellant’s “failure to assign error to and argue against the [trial] court’s decision . . . waives any argument as to those claims”).

Yet, part of its argument can be read as asserting that MTC should be held directly liable for violating the Deed of Trust Act (“DTA”), Chapter 61.24 RCW.<sup>20</sup> It is undisputed, however, that the Property has not been sold at a trustee’s sale. CP 48, ¶ 16; CP 87-90. Well-established Washington law provides that “the DTA does not create an independent cause of action for monetary damages based on alleged violations of its provisions where no foreclosure sale has been completed.”<sup>21</sup> Consequently, any claim by Mr. Devin directly under the DTA fails as a matter of law.

4. Mr. Devin’s CPA claim against MTC also fails as a matter of law.

Even where there is no completed foreclosure sale, “it is possible for a plaintiff to suffer injury to business or property caused by alleged DTA violations that could be compensable under the CPA.”<sup>22</sup> Nonetheless, when advancing a CPA claim based on an alleged violation of the DTA, a plaintiff must still establish all of the required elements of a CPA claim.<sup>23</sup> Those elements are: “(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; [and] (5) causation.”<sup>24</sup> Failure to establish any one of these elements is fatal and necessitates dismissal.<sup>25</sup>

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<sup>20</sup> See Amended Opening Brief, at p. 18.

<sup>21</sup> *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 417, 334 P.3d 529, 531 (2014).

<sup>22</sup> *Frias*, 181 Wn.2d at 430.

<sup>23</sup> *Id.* at 432.

<sup>24</sup> *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531, 533 (1986).

<sup>25</sup> See, e.g., *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 298, 38 P.3d 1024, 1027 (2002).

Mr. Devin's Amended Complaint does not clearly specify the actions that allegedly support a CPA claim against MTC. CP 49, at ¶ 23. The gravamen of this claim, however, appears to be that MTC failed to serve the Notice of Trustee's Sale and the Notice of Foreclosure on Mr. Devin at his address in Vietnam. CP 48 at ¶¶ 15-17; CP 147 at lines 11-14. Crucially, Mr. Devin acknowledges that he had promptly learned of the posting of the Notice of Default on the Property, and that he did not provide MTC with his Vietnam address until *after* he had been informed of the Notice of Default. CP 75 (Email dated May 16, 2016); CP 47, at ¶ 12. Moreover, it was the proper posting of the Notice of Default on the Property—and not anything to do with the later issuance of the Notice of Sale—that “caused Devin’s then tenant to vacate the Subject Property.” CP 47, at ¶ 11. Finally, it is undisputed that the Property was never sold. CP 48, ¶ 16; CP 87-90.

Given these undisputed facts—and given the absence of any other relevant evidence in the record—Mr. Devin cannot show that MTC's alleged failure to serve him with the Notice of Sale and Notice of Foreclosure at his address in Vietnam caused him any injury. It was the prior posting on the Notice of Default at the Property that allegedly caused Mr. Devin's tenant to move out. Mr. Devin completely fails to allege, let alone provide evidence for, any injury to him caused by MTC's alleged failure to mail the Notice of Sale and the Notice of Foreclosure to his Vietnam address. CP 47 at ¶ 11 to CP 48 at ¶ 18, CP 147-148. Thus, if the alleged “unfair or deceptive” act claimed by Mr. Devin is the improper

service of the Notice of Sale and Notice of Foreclosure, his CPA claim fails because he has no evidence of any injury caused by that purported omission.

Nor can Mr. Devin rescue his claim by arguing that the “unfair or deceptive” act was the posting of the Notice of Default on the Property. Posting a notice of default on a property subject to non-judicial foreclosure is specifically authorized by RCW 61.24.030(8).<sup>26</sup>

Finally, Mr. Devin has no evidence—and no plausible argument—that MTC violated any duty which it was required to perform before posting the Notice of Default. Although a successor trustee owes a borrower a statutory duty of good faith under RCW 61.24.010(4), there is no authority supporting Mr. Devin’s implicit claim that the trustee has a duty to investigate whether a debt secured by a deed of trust has been time-barred (or forgiven) prior to sending a notice of default.<sup>27</sup> There is clearly no express statutory duty to this effect.<sup>28</sup> Moreover, the three goals of the DTA are: “(1) that the nonjudicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested

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<sup>26</sup> RCW 61.24.030(8) states in pertinent part that “at least thirty days before notice of sale shall be recorded . . . the beneficiary or trustee **shall cause to be posted in a conspicuous place on the premises, a copy of the notice [of default]**, or personally served on the borrower and grantor” (emphasis added).

<sup>27</sup> Compare Opening Brief of Appellant, at pp. 9-10.

<sup>28</sup> See, e.g., RCW 61.24.030. See also *McAfee v. Select Portfolio Servicing, Inc.*, 193 Wn. App. 220, 228, 370 P.3d 25, 30 (2016) (noting that “[t]he DTA describes the steps a trustee must take to start a nonjudicial foreclosure”).

parties having an adequate opportunity to prevent wrongful foreclosure; and (3) that the process should promote stability of land titles.”<sup>29</sup> The first of these goals would be adversely impacted by imposing on the trustee the duty to investigate possible time bars before initiating a foreclosure, and neither of the other two goals would be served by such a duty. In particular, the DTA already “includes a specific procedure for stopping a trustee's sale so that an action contesting default can take place.”<sup>30</sup> Here, Mr. Devin was able to utilize that procedure, raise the statute of limitations issue as an affirmative defense, and procure an injunction restraining the sale. CP 48, ¶ 12; CP 87-88.<sup>31</sup>

For all of these reasons, Mr. Devin’s CPA claim against MTC fails as a matter of law. Understood as a claim based on MTC’s alleged failure to serve the Notice of Trustee’s Sale on Mr. Devin at his address in Vietnam, the claim fails because Mr. Devin can show no injury caused by this omission. Understood as a claim based on the posting of the Notice of Default, or on some alleged violation of a duty before MTC posted the Notice of Default, the claim fails because Mr. Devin can show no violation of the DTA, nor any other unfair or deceptive act or practice by

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<sup>29</sup> *Plein v. Lackey*, 149 Wn.2d 214, 225, 67 P.3d 1061, 1065 (2003), as amended on denial of reconsideration (June 6, 2003).

<sup>30</sup> *Id.*

<sup>31</sup> As an affirmative defense, the statute of limitations must be proved by the party asserting it. *See, e.g.*, CR 8(c); and *Henderson v. Pennwalt Corp.*, 41 Wn. App. 547, 555, 704 P.2d 1256, 1262 (1985) (noting that “[t]he statute of limitations is an affirmative defense and its elements must be proved by the party asserting it”).

MTC at or before posting the notice. Accordingly, this Court should affirm the trial court's dismissal of Mr. Devin's CPA claim against MTC.

#### IV. CONCLUSION

Because Mr. Devin's Notice of Appeal fails to bring up the final judgment for review, this Court should dismiss this matter with prejudice. Even if this Court allows Mr. Devin's appeal to proceed, Mr. Devin's claims against MTC all fail as a matter of law. Mr. Devin has waived his breach of contract claim, any DTA claim is barred as a matter of law, and Mr. Devin cannot establish the necessary elements of a CPA claim against MTC. Accordingly, this Court should affirm the trial court's grant of summary judgment to MTC.

DATED this 12<sup>th</sup> day of September, 2019.

PETERSON RUSSELL KELLY PLLC

By: s/Michael S. DeLeo

Michael S. DeLeo, WSBA # 22037

Peterson Russell Kelly PLLC

10900 NE 4<sup>th</sup> St., Suite 1850

Bellevue, WA 98004-8341

Telephone: (425) 462-4700

Fax: (425) 451-0714

Email: mdeleo@prklaw.com

Attorneys for Respondent MTC  
Financial, Inc., d/b/a Trustee Corps

**CERTIFICATE OF SERVICE**

I hereby certify, under penalty of perjury under the laws of the State of Washington, that on September 12, 2019, I caused to be served a true and correct copy of the foregoing **BRIEF OF RESPONDENT MTC FINANCIAL, INC., D/B/A TRUSTEE CORPS** in the manner noted below, to the following parties:

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Email:		
david_devin11676@yahoo.com		

William G. Fig	<input type="checkbox"/>	Via Facsimile
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1000 SW Broadway, Suite 1400	<input type="checkbox"/>	Via Messenger
Portland, OR 97205	<input checked="" type="checkbox"/>	Via Electronic Transmission
Email: wfig@sussmanshank.com		

DATED: September 12, 2019, at Bellevue, Washington.

By: s/ Rachel White  
Rachel R. White, Paralegal  
Peterson Russell Kelly PLLC  
10900 NE 4<sup>th</sup> St., Suite 1850  
Bellevue, WA 98004-8341  
Telephone: (425) 462-4700  
Fax: (425) 451-0714  
Email: rwhite@prklaw.com

**PETERSON RUSSELL KELLY PLLC**

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