FILED
Court of Appeals
Division II
State of Washington
6/23/2020 8:00 AM

No. 53533-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GARY McGREAL and JESSICA McGREAL, Appellants,

v.

PEAK FORECLOSURE SERVICES, INC. (A California Corporation), SHELLPOINT PARTNERS, LLC and BYRON HARRIS, Respondents.

ANSWERING BRIEF OF RESPONDENTS

Donald G. Grant
Counsel for Respondents
Peak Foreclosure Services, Inc. and NewRez LLC fka New Penn Financial, LLC dba Shellpoint Mortgage Servicing

Donald G. Grant, WSBA#15480
Donald G. Grant, P.S.
Washougal Town Square, Suite 245
1700 Main Street
Washougal, WA 98671
TEL: (360) 694-8488
FAX: (360) 694-8688
E-MAIL: don@dongrantps.com

TABLE OF CONTENTS

TABLE OF CONTENTS 2

I. INTRODUCTION..... 8

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR 10

III. STATEMENT OF THE CASE 10

A. THE MCGREALS OBTAIN A LOAN SECURED BY A DEED OF TRUST AND DEFAULT ON THEIR LOAN OBLIGATIONS..... 10

B. RESPONDENTS INITIATED NON-JUDICIAL FORECLOSURE PROCEEDINGS BASED ON APPELLANTS' DEFAULT..... 11

C. THE MCGREALS FILE THE ORIGINAL ACTION AGAINST RESPONDENTS IN 2015 AND RESPONDENTS' PREVAIL ON SUMMARY JUDGMENT..... 13

D. THE MCGREALS FILE THE CURRENT ACTION AND THE TRIAL COURT CORRECTLY GRANTS RESPONDENTS' MOTION TO DISMISS 16

E. THE MCGREALS APPEAL BUT THEIR OPENING BRIEF IS DEVOID OF ANY ARGUMENTS PERTAINING TO RESPONDENTS' MOTION TO DISMISS..... 19

IV. STANDARD OF REVIEW 20

V. SUMMARY OF ARGUMENT 20

VI. ARGUMENT 22

A. THE OPENING BRIEF CONTAINS NUMEROUS PROCEDURAL DEFECTS DOOMING THE APPEAL..... 22

1. Appellants' Arguments Are Unsupported By Meaningful Analysis or Authority And Should Be Disregarded..... 23

2. Appellants Have Waived Their Assignment of Error and Arguments on Appeal..... 27

B. NONETHELESS, THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENTS' MOTION TO DISMISS 28

1. Res Judicata Bars The Current Action..... 29

a. The Original Action Ended In A Final Judgment On The Merits 30

b. The Current Action Involves The Same Subject Matter As The Original Action 31

c. The Current Action Complaint Contains The Same Claims As The Original Action..... 34

d. The Parties In The Two Actions Are Identical and The Quality of Persons For or Against Whom The Claim Is Made Are Identical..... 36

2. Appellants Waived Claims Challenging The Validity Of The Trustee's Sale Because They Failed To Raise These Claims Before The Sale..... 38

3. The McGreals' Remaining Claims Are Time-Barred By The Two-Year Limitations Period In RCW § 61.24.127(2) 44

VII. CONCLUSION 47

TABLE OF AUTHORITIES

Cases

Albice v. Premier Mortg. Servs. of Washington, Inc.,

174 Wash. 2d 560, 276 P.3d 1277 (2012)..... 38

Batten v. Abrams,

28 Wash. App. 737, 626 P.2d 984 (1981)..... 24

Bordeaux v. Ingersoll Rand Co.,

71 Wash. 2d 392, 429 P.2d 207 (1967)..... 29

Bruce v. Recontrust Co., N.A.,

719 F. App'x 713 (9th Cir. 2018) 45

Carlson v. Gibraltar Sav.,

50 Wash. App. 424 (1988)..... 41

Christian v. Tohmeh,

191 Wash. App. 709, 366 P.3d 16 (2015)..... 23

Cowiche Canyon Conservancy v. Bosley,

118 Wash. 2d 801, 828 P.2d 549 (1992)..... 23

Cox v. Helenius,

103 Wash. 2d 383, 388, 693 P.2d 683 (1985)..... 39

DeYoung v. Cenex Ltd.,

100 Wash. App. 885, 891–92, 1 P.3d 587 (2000)..... 29, 31

Ensley v. Pitcher,

152 Wash. App. 891, 222 P.3d 99 (2009)..... 29, 30, 34, 36

Erdmann v. Henderson,

50 Wash. 2d 296, 311 P.2d 423 (1957)..... 27

Housing Auth. of King Cty. v. Saylors,

87 Wash. 2d 732, 557 P.2d 321 (1976)..... 23

In re Marriage of Olson,

69 Wash. App. 621, 850 P.2d 527 (1993)..... 24

Jackson v. Quality Loan Serv. Corp.,

186 Wash. App. 838, 347 P.3d 487 (2015)..... 20

Jensen v. Jensen,

190 Wash. App. 1011 (2015)..... 27

Kelly–Hansen v. Kelly–Hansen,

87 Wash. App. 320, 941 P.2d 1108 (1997)..... 30

Kuhlman v. Thomas,

78 Wash. App. 115, 897 P.2d 365 (1995)..... 31

Landry v. Luscher,

95 Wash. App. 779, 976 P.2d 1274 (1999)..... 29

Loveridge v. Fred Meyer, Inc.,

125 Wash. 2d 759, 887 P.2d 898 (1995)..... 30

McAfee v. Select Portfolio Servicing, Inc.,

193 Wash. App. 220, 370 P.3d 25 (2016)..... 39

Patrick v. Wells Fargo Bank, N.A.,

196 Wash. App. 398, 385 P.3d 165 (2016)..... 45

Pederson v. Potter,

103 Wash. App. 62, 11 P.3d 833 (2000)..... 34, 36

Plein v. Lackey,

149 Wash. 2d 214, 67 P.3d 1061 (2003).....39, 40, 43-44

Rains v. State,

100 Wash. 2d 660, 674 P.2d 165 (1983)..... 37

Reid v. Countrywide Home Loans, Inc.,

No. C13-436 TSZ, 2013 WL 2099608,

(W.D. Wash. May 14, 2013)..... 46

Salmon v. Mortg. Elec. Registration Sys., Inc.,

197 Wash. App. 1067 (2017)..... 30

Smith v. King,

106 Wash. 2d 443, 722 P.2d 796 (1986)..... 27

State v. Elliott,

114 Wash. 2d 6, 785 P.2d 440 (1990)..... 23

State v. Marintorres,

93 Wash. App. 442, 969 P.2d 501 (1999)..... 24

Statutes

GR 14.1(a)..... 27, 30

RCW § 61.24.127(1)..... 44, 45

RCW § 61.24.127(2)(a) 45

RCW 61.24.040(1)(f)(IX)..... 40

RCW 61.24.127(2)(b)–(c)..... 44

RCW 61.24.130(1)..... 40

RCW 61.24.130(2)..... 40

I. INTRODUCTION

After Appellants Gary McGreal and Jessica McGreal (collectively, "Appellants" or the "McGreals") lost on summary judgment in a lawsuit they filed against Respondents[1] in 2015, the McGreals improperly commenced the instant action against Respondents based on identical theories and claims that they previously asserted in the first lawsuit.

Indeed, as in the original action, the McGreals once again alleged that Respondents purportedly failed to comply with various requirements under the Deed of Trust Act ("DTA") in connection with the non-judicial foreclosure of the underlying property at issue—the same property and same non-judicial foreclosure proceedings from the 2015 lawsuit. The trial court correctly dismissed the instant action after Respondents' moved to dismiss based on res judicata, waiver, and numerous other grounds.

Now, despite purporting to appeal the trial court's order granting Respondents' motion to dismiss, the Opening Brief fails

---

[1] Respondents are (1) Peak Foreclosure Services, Inc. (herein "Peak") and (2) NewRez LLC fka New Penn Financial, LLC dba Shellpoint Mortgage Servicing (erroneously sued as "Shellpoint Partners, LLC") (herein "Shellpoint" and, collectively with Peak, "Respondents").

to adequately address a single argument proffered by Respondents in connection with that dismissal motion—whether based on res judicata, waiver, or otherwise. Nor do the McGreals point to a single error by the trial court in granting Respondents' motion to dismiss. Instead, the McGreals confusingly and inappositely purport to argue the merits of their underlying claims, which have no relevance to the legal issues raised in Respondents' motion to dismiss and is also unsupported by the record.

Moreover, while the McGreals appear to argue that Respondents "failed completely to show there w[as] 'no genuine issue of any material facts'", this summary judgment standard likewise has no bearing on Respondents' motion. (AB 10) Respondents moved to dismiss the Complaint under CR 12(b)(6) and res judicata. They did not move for summary judgment in this case. Thus, these arguments are improper and irrelevant to the limited scope of this appeal.

Regardless, the record makes clear that res judicata bars the McGreals' improper attempt to re-litigate identical claims they previously asserted against Respondents' 2015. What is more, because the McGreals failed to properly enjoin the foreclosure in 2015, they have waived their claims and the remaining non-

waivable claims are time-barred under the DTA's two-year limitations period.

Accordingly, for these reasons and the reasons detailed below, Respondents respectfully request that this Court affirm the trial court's judgment and order dismissing the McGreals' Complaint.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Is the Complaint barred by res judicata?

2. Did Appellants waive claims by failing to enjoin the foreclosure pursuant to the procedures set forth under RCW 61.24.130?

3. Are Appellants' non-waivable claims time-barred under RCW 61.24.127(2)(a)?

III. STATEMENT OF THE CASE

A. The McGreals Obtain A Loan Secured By A Deed of Trust And Default On Their Loan Obligations

In October 2006, the McGreals obtained a loan from Countrywide Home Loans, Inc. ("Countrywide") in the amount of $720,000.00 ("Loan") to refinance real property located at 23044 Jefferson Point Road, NE Kingston, Washington 98346 (the

"Property"). (CP 4, 195-197, Ex. B) The Loan was secured by a Deed of Trust recorded against the Property. (CP 195-206, Ex. B)

In or around May 2011, the McGreals stopped making payments on the Loan. (CP 4) According to Appellants, "[a]ll of the [McGreals'] liquid assets including stocks, IRAs, and 401Ks had been liquidated and exhausted [by] this point." (CP 4) Later that year, in October 2011, Countrywide assigned its interest in the Deed of Trust to The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificateholders of the CWALT, Inc., Alternative Loan Trust 2006-40T1, Mortgage Pass-Through Certificates, Series 2006-40T1 ("BNYM"). (CP 4-5, 207-208 at Ex. C)

B. Respondents Initiated Non-Judicial Foreclosure Proceedings Based on Appellants' Default

Because the McGreals failed to cure their default, BNYM and Respondents initiated non-judicial foreclosure proceedings pursuant to the Deed of Trust. In September 2014, the McGreals received a Notice of Default reflecting a past-due balance on the Loan of $257,080.19. (CP 5-6)

Thereafter, Peak recorded a Notice of Trustee's Sale ("NOTS") on October 15, 2014 reflecting a foreclosure sale date of

February 20, 2015. (CP 8, 161-167). The NOTS unambiguously advises anyone with an objection to the impending foreclosure to "bring a lawsuit to restrain the [sale] pursuant to RCW 61.24.130" and that a "[f]ailure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's Sale." (CP 163) Appellants concede they were aware of the NOTS's issuance. (CP 8)

The McGreals have also admitted they were aware of the foreclosure proceedings initiated on the Property. For example, the McGreals claimed that Respondents failed to provide them with a Notice of Pre-Foreclosure Options ("NOPFO") required under RCW 61.24.31(5). (CP 6-7) Further, the McGreals also claimed the Property was used for agricultural purposes and, thus, that non-judicial foreclosure proceedings were improper.[2] (CP 8) Based on these alleged wrongdoings and pre-foreclosure defenses,

---

[2] The McGreals made this erroneous argument even though the Deed of Trust itself—which the McGreals executed—expressly states that the Property was not to be used for agricultural purposes. (CP 157, Ex. B) (Paragraph 25 of the McGreals' Deed of Trust states: The property is **not** used principally for agricultural purposes.") (emph. added).

the McGreals admittedly lodged a complaint with the Washington Attorney General's Office prior to foreclosure. (CP 7)

Likewise, following issuance of the Notice of Default in 2014, the McGreals admit that they notified Peak "by e-mail and by certified mail" of what they believed were errors and omissions by Respondents. (CP 8)

C. The McGreals File The Original Action Against Respondents In 2015 And Respondents Prevail on Summary Judgment

On April 16, 2015, the McGreals filed a lawsuit against Peak, Shellpoint, and BNYM ("Original Action"). (CP 214, 230) In the Original Action's operative complaint, the McGreals alleged that Peak, Shellpoint, and BNYM failed to comply with various pre-foreclosure statutory requirements under the DTA in connection with the non-judicial foreclosure proceedings. (CP 212-215) In support of these allegations, the McGreals alleged:

- "Plaintiffs purchased property in 1998 at 23044 NE Jefferson Point Road in Kingston, WA 98346 (Kitsap County)…" (CP 210)

- "Plaintiffs continued to make loan payments until May 16, 2011." (CP 210)

- "Bank of America which had acquired the assets of Countrywide Financial through merger on July 1, 2008

. . . sold the note" to BNYM. (CP 211)

- "The Plaintiffs had not received a Notice of Pre-Foreclosure Options . . . as required by RCW 61.24.031(5) nor were they contacted by phone as required by the same statute." (CP 212)

- "The Plaintiffs then received a 'Notice of Default' . . . This NOD was in specific violation of RCW 61.24.031(1)(a) . . ." (CP 213)

- "Plaintiff contacted a foreclosure consultant, Donna M. Lotiz" who then "contacted, Johnny Dahinten of Peak . . . and requested a copy of the NOPFO." (CP 213)

- Plaintiffs "file[d] a complaint with the Washington State Attorney General's office indicating the failure of Defendant's [sic] to issue a NOPFO. . . In the complaint . . . Plaintiffs had also indicated that property was used for agricultural purposes. . . . Plaintiffs notified PEAK of these errors and omissions by e-mail and by certified mail." (CP 213-214)

- "At this point . . . PEAK issued a 'Notice of Trustee Sale". (CP 214)

Based on these allegations and theories, the McGreals sought damages and injunctive relief and asserted three separate causes of action against Shellpoint, Peak, and BNYM—(1) "Failure to Follow Statutory Foreclosure Process", (2) "Failure of Trustee to Act in Good Faith", and (3) "Violations of Consumer Protection Act". (CP 216, 220, 222)

During the initial stages of the Original Action, the Property was sold at a foreclosure sale on April 25, 2015 to BDH

Holdings, Inc., an LLC owned by Respondent Byron Harris and several relatives. (CP 8) The McGreals have admitted they did not utilize the statutory procedure under RCW 61.24.130 of the DTA to enjoin the sale. (RP 36)

On December 1, 2017, Respondents filed a motion for summary judgment in the Original Action showing that there was no triable issue of material fact and that they were entitled to judgment as a matter of law. (CP 228-245) In the motion, *inter alia*, Respondents presented incontrovertible evidence that they complied with the DTA's statutory requirements, including sending the Notice of Pre-Foreclosure Options required by RCW 61.24.031. (*Id.*)

On May 25, 2018, the trial court granted summary judgment and entered judgment in favor of Respondents in the Original Action. (CP 251) Nearly one year later, the McGreals filed a Motion to Vacate summary judgment under CR 60(b)(1) and the trial court denied that motion.[3]

---

[3] The trial court's denial of the McGreals' CR 60(b)(1) motion to vacate in the Original Action is the subject of a separate but concurrently pending appeal before this Court. *See Gary McGreal et al. v. Peak Foreclosure Services et al.* pending in the Court of Appeals, Division II, of the State of Washington, Appellate Case No. 53827-0-II. This fact is subject to judicial notice under ER

D. The McGreals File The Current Action and The Trial Court Correctly Grants Respondents' Motion To Dismiss

Despite having lost on summary judgment in the Original Action, the McGreals improperly commenced this second lawsuit against Respondents and the third-party purchaser at the foreclosure sale (Byron Harris) in 2019. As in the Original Action, the operative complaint is premised on the same alleged wrongdoings by Respondents in connection with the same Property, same Deed of Trust, and same allegedly wrongful non-judicial foreclosure proceedings. In fact, many of the allegations in the Current Action complaint are a verbatim copy and paste of the allegations in the McGreals' previous complaint.

To illustrate, as in the Original Action, the McGreals once again asserted the following identical allegations in this lawsuit:

- "Plaintiffs purchased property in 1998 at 23044 NE Jefferson Point Road in Kingston, WA 98346 (Kitsap County)…" (CP 4)

201(b)(1), ER 201(f), and RAP 9.11. This fact is generally known within the territorial jurisdiction of this Court and the disposition of the CR 60(b)(1) Motion to Vacate is a proceeding "engrafted, ancillary, or supplementary to" the Current Action. *Spokane Research & Def. Fund v. City of Spokane*, 155 Wash. 2d 89, 98, 117 P.3d 1117, 1122 (2005).

- "Plaintiffs continued to make loan payments until May 16, 2011." (CP 4)

- "Bank of America which had acquired the assets of Countrywide Financial through merger on July 1, 2008 . . . sold the note" to BNYM. (CP 4)

- "The Plaintiffs had not received a Notice of Pre-Foreclosure Options . . . as required by RCW 61.24.031(5) nor were they contacted by phone as required by the same statute." (CP 6)

- "The Plaintiffs then received a 'Notice of Default' . . . This NOD was in specific violation of RCW 61.24.031(1)(a) . . ." (CP 6)
- "Plaintiff contacted a foreclosure consultant, Donna M. Lotiz" who then "contacted, Johnny Dahinten of Peak . . . and requested a copy of the NOPFO." (CP 7)

- Plaintiffs "file[d] a complaint with the Washington State Attorney General's office indicating the failure of Defendant's [sic] to issue a NOPFO. . . In the complaint . . . Plaintiffs had also indicated that property was used for agricultural purposes. . . . Plaintiffs notified PEAK of these errors and omissions by e-mail and by certified mail." (CP 7-8)

- "At this point . . . PEAK issued a 'Notice of Trustee Sale". (CP 8)

Based on these duplicative allegations and theories, the McGreals asserted five causes of action in the Current Action Complaint, including three claims from the prior lawsuit—(1) "Failure to Use Judicial Foreclosure On Identified Agricultural Property", (2) "Failure to Follow Statutory Foreclosure Process", (3) "Failure of Trustee to Act in Good Faith", (4) "Violations of

Consumer Protection Act", and (5) Theft of Second Lot. (CP 9, 11, 15, 17, 20)

On April 15, 2019, Respondents filed a Motion to Dismiss arguing that res judicata barred the action because the McGreals were attempting to re-litigate claims that the trial court already rejected on the merits in the Original Action. (CP 179-183) Further, Respondents proffered numerous other arguments in support of their Motion to Dismiss, including that the McGreals waived claims by failing to enjoin the foreclosure sale and that some of the claims were time-barred based on RCW 61.24.127. (CP 185-186)

At the hearing on June 7, 2019, the trial court correctly determined that the Complaint should be dismissed. The trial court explained that the McGreals had waived their claims and that the claims were time-barred:

> [The] statute is clear . . . there was two years to file any lawsuits. We're now almost, what, four years into that? So I think that RCW 61.24.127 acts as a bar. . . . I've got to follow the law. And so my interpretation of RCW 61.24.127 is that there is a time bar in this case.

(RP 39) Consequently, on June 7, 2019, the trial court granted Respondents' Motion to Dismiss with prejudice.[4] (CP 98-99)

E. The McGreals Appeal But Their Opening Brief Is Devoid Of Any Arguments Pertaining to Respondents' Motion To Dismiss

On July 5, 2019, the McGreals filed a Notice of Appeal, which appeals the trial court's orders granting Respondents' Motion to Dismiss and Respondent Byron Harris's Motion for Summary Judgment. (CP 253-260)

In the Opening Brief, however, the McGreals make no substantive arguments in connection with Respondents' Motion to Dismiss or the trial court's rationale in deciding to grant the same. (AB 3-10) The Opening Brief only makes passing mention of the Motion to Dismiss by cursorily and erroneously claiming that the trial court "committed an abuse of discretion in entering the orders granting Defendants' Motion to Dismiss Complaint . . . when Defendants had failed their burden of truth requirements by failing to supply uncontroverted facts . . ." (AB 3, 10) Of course, this

[4] At the same time, the trial court granted Respondent Byron Harris's Motion for Summary Judgment. (CP 255-257)

incorrect "standard of review"—which is loosely (but incorrectly) based on the summary judgment standard—is irrelevant to this Court's review of Respondents' pleading stage Motion to Dismiss. The McGreals otherwise offer zero arguments in their Opening Brief to address the dismissal arguments raised by Respondents or how the trial court committed reversible error.

IV. STANDARD OF REVIEW

Motion to Dismiss. "This court reviews de novo an order granting a motion to dismiss under CR 12(b)(6)." *Jackson v. Quality Loan Serv. Corp.*, 186 Wash. App. 838, 843, 347 P.3d 487, 490 (2015). "All facts alleged in the plaintiff's complaint are presumed true." *Id.* "Dismissal under CR 12(b)(6) is appropriate in those cases where the plaintiff cannot prove any set of facts consistent with the complaint that would entitle the plaintiff to relief." *Id.*

V. SUMMARY OF ARGUMENT

This Court should affirm the trial court's order granting Respondents' Motion to Dismiss.

First, the Opening Brief is replete with procedural defects that justify affirmance of the trial court. Indeed, the Opening Brief is devoid of any comprehensible arguments to show that the trial

court erred in granting Respondents' motion. Not only have the McGreals failed to carry their burden on appeal to demonstrate that the trial court committed reversible error in its decision to dismiss the case—as evidenced by the McGreals' complete silence with respect to any dismissal arguments—but the McGreals also improperly appear to argue the purported merits of their claims, which was not at issue before the trial court. The McGreals' wholesale failure to properly address a single pertinent argument on appeal amounts to a waiver of arguments and a waiver of their sole assignment of error. This Court should affirm the trial court on this ground alone.

Second, the Current Action is barred by res judicata. The record demonstrates that the Original Action and the Current Action complaints involve the same parties, same claims, and same subject matter concerning alleged defects in Respondents' initiation of the same non-judicial foreclosure proceedings against the same Property. Moreover, the Original Action ended in a final judgment on the merits after the trial court granted summary judgment in favor of Respondents and denied the McGreals' baseless CR 60(b)(1) motion to vacate in 2019.

Third, the McGreals filed this lawsuit nearly *four years after* the trustee's sale and their claims are therefore all untimely. The McGreals should have sought an injunction pursuant to the statutory procedures set forth in RCW 61.24.130 for their judicial foreclosure and theft claims, but they did not. Thus, those claims are waived. The remaining claims could only be brought within two years of the trustee's sale, but the McGreals instead filed those claims nearly four years after the trustee's sale. The trial court's dismissal was therefore appropriate and this Court should affirm.

VI. ARGUMENT

A. The Opening Brief Contains Numerous Procedural Defects Dooming The Appeal

The McGreals' Opening Brief is replete with various arguments that lack any understandable connection to the narrow issue on appeal—whether the trial court correctly granted Respondents' Motion to Dismiss. Further, because the Opening Brief fails to address the substance of the arguments raised in connection with the Motion to Dismiss, the McGreals have also waived review of their Assignment of Error and all arguments on appeal.

1. Appellants' Arguments Are Unsupported By Meaningful Analysis or Authority And Should Be Disregarded

As an initial matter, the Court of Appeals "presumes that the court below proceeded according to law and reached a correct decision, and that the burden is upon the appellant to show error." *Housing Auth. of King Cty. v. Saylors*, 87 Wash. 2d 732, 742, 557 P.2d 321, 327 (1976).

Appellate courts are not obligated to consider arguments proffered by an appellant which are unsupported by relevant authority or meaningful analysis. *See State v. Elliott*, 114 Wash. 2d 6, 15, 785 P.2d 440, 445 (1990) (courts need "not consider claims insufficiently argued by the parties"); *Cowiche Canyon Conservancy v. Bosley*, 118 Wash. 2d 801, 809, 828 P.2d 549, 553 (1992) (declining to consider grounds argued which were "not supported by any reference to the record nor by any citation of authority"). Indeed, appellate courts "do not consider conclusory arguments" and "[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit appellate review." *Christian v. Tohmeh*, 191 Wash. App. 709, 728, 366 P.3d 16, 26 (2015) (citations omitted).

Importantly, pro se appellants are held to the same standards as attorneys. "[I]n undertaking the role of a lawyer, [an appellant] . . . assumes the duties and responsibilities and is accountable to the same standards of ethics and legal knowledge." *Batten v. Abrams*, 28 Wash. App. 737, 739 n.1, 626 P.2d 984, 986 (1981). "[T]he law does not distinguish between one who elects to conduct his or her own legal affairs and one who seeks assistance of counsel—both are subject to the same procedural and substantive laws." *In re Marriage of Olson*, 69 Wash. App. 621, 626, 850 P.2d 527, 530 (1993); *see, e.g.*, *State v. Marintorres*, 93 Wash. App. 442, 452, 969 P.2d 501, 506 (1999) (refusing to consider pro per's conclusory and unsupported claims).

Here, the McGreals fail to offer any meaningful argument or analysis showing how the trial court erred in granting Respondents' Motion to Dismiss. Below, Respondents argued not only that the Complaint in this action was barred based on res judicata, but also based on other numerous independent grounds including waiver and statute of limitations. (CP 182-185). Likewise, during the hearing on Respondents' motion, the trial court determined that the McGreals had waived their claims based on RCW 61.24.127. (RP 39)

Yet, despite this, the Opening Brief does not address—let alone mention—a single argument made in connection with the dismissal motion on appeal. Nor does the Opening Brief address the trial court's rationale in granting the Motion to Dismiss either.

To illustrate, the Opening Brief's "Issues Pertaining to Assignments of Error" and "Argument" sections have nothing to do with their Assignment of Error relating to the Motion to Dismiss.[5] Instead, the McGreals identify nine alleged "issues" on appeal, which discuss various matters including whether "a trustee, beneficiary or unauthorized agent [can] issue a notice of default without satisfying the due diligence requirements of RCW 61.24.031(5)", or whether a Notice of Default's "address field" is required to contain a "current address", among others. (AB 4, 6) However, none of this is relevant to the legal issues raised in the Motion to Dismiss or decided by the trial court.

---

[5] Nor does the Assignment of Error articulate the appropriate matter for determination on appeal. Although the McGreals ask for this Court to review the trial court's order granting the Motion to Dismiss, Appellants claim that the trial court erred because Respondents "failed their burden of truth requirements by failing to supply uncontroverted facts…". (AB 3) However, the trial court did not review evidence at the pleading stage in connection with Respondents' Motion Dismiss and, thus, Appellants' framing of the issue on appeal is incorrect. (CP 99)

Similarly, the "Argument" section of the Opening Brief attempts to address the merits of the McGreals' arguments rather than addressing the sufficiency of the Current Action Complaint. For example, the Opening Brief contains disjointed citations to authority concerning a lender's obligations under the DTA when pursuing non-judicial foreclosure and a defendant's burden on summary judgment. (AB 9-10) However, Respondents Shellpoint and Peak did not move for summary judgment in the Current Action and, thus, such arguments are inapposite.[6]

Accordingly, because the Opening Brief solely contains irrelevant discussions of issues, arguments, and authority that lack a coherent relationship to the arguments raised in the trial court for Respondents' Motion to Dismiss, the Court should decline to consider the Opening Brief for this reason alone.

---

[6] In fact, the McGreals have raised nearly identical arguments in their Opening Brief for their appeal of the trial court's denial of their CR 60(b) Motion to Vacate in the Original Action. *See, supra*, fn. 3.

2. Appellants Have Waived Their Assignment of Error and Arguments on Appeal

In addition to the McGreals' failure to meet their heavy burden to demonstrate error by the trial court with relevant arguments and authority, they have also waived consideration of both their sole Assignment of Error and arguments contained in their Opening Brief.

It is well-settled that if "the assignment of error is not argued in the brief . . . [it] is waived." *Erdmann v. Henderson*, 50 Wash. 2d 296, 298, 311 P.2d 423, 424 (1957); *see, e.g., Jensen v. Jensen*, 190 Wash. App. 1011, *3 (2015) (assignment of error waived where the "notice of appeal designated the court's final decree", but the appellant "fails to assign error to, or present argument about, the court's final decree or its findings of fact and conclusions of law.")[7]*; Smith v. King*, 106 Wash. 2d 443, 451-52, 722 P.2d 796, 801 (1986) (finding an assignment of error pertaining to trial court's award of attorney fees to be waived

---

[7] Although this is an unpublished opinion, it is citable as non-binding, persuasive authority pursuant to GR 14.1(a). *See* GR 14.1(a) ("unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as non-binding authorities, if identified as such by the citing party…").

where the "assignment of error is neither stated nor argued, nor is any legal authority bearing on that issue cited.").

Here, the McGreals appealed Respondents' Motion to Dismiss. (CP 253) In their sole assignment of error, they seek this Court's review of whether "[t]he trial court erred and committed an abuse of discretion in entering the order[] granting Defendant's Motion to Dismiss Complaint . . ." (AB 3)

However, as demonstrated, the Opening Brief fails in its entirety to address Respondents' Motion to Dismiss and, instead, re-argues the same issues previously raised and rejected in connection with the summary judgment motion in the Original Action. (AB 6-10) Thus, because the McGreals have failed to support their only Assignment of Error with a single piece of relevant argument or authority, and because the McGreals appear to be attempting to raise arguments on appeal that were not at issue in connection with the Motion to Dismiss, both the Assignment of Error and arguments on appeal are waived.

B. Nonetheless, The Trial Court Did Not Err In Granting Respondents' Motion to Dismiss

Contrary to the McGreals' arguments in the Opening Brief, the only issue appropriate for appellate determination is whether

the trial court properly granted the Motion to Dismiss. Here, as Respondents demonstrate below, the Complaint failed as a matter of law on numerous independent grounds. The trial court did not err in its determination.

1. Res Judicata Bars The Current Action

The purpose of the res judicata doctrine is to "prevent relitigation of already determined causes and curtail multiplicity of actions and harassment in the courts". *Bordeaux v. Ingersoll Rand Co.*, 71 Wash. 2d 392, 395, 429 P.2d 207, 209 (1967); *see also Ensley v. Pitcher*, 152 Wash. App. 891, 898–99, 222 P.3d 99, 102 (2009) (res judicata "'puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings.'") (citation omitted). Consequently, "[f]iling two separate lawsuits based on the same event—claim splitting—is precluded in Washington." *Landry v. Luscher*, 95 Wash. App. 779, 780, 976 P.2d 1274, 1276 (1999)

Indeed, "[r]es judicata applies to matters that were actually litigated and those that 'could have been raised, and in the exercise of reasonable diligence should have been raised, in the prior proceeding.'" *DeYoung v. Cenex Ltd.*, 100 Wash. App. 885, 891–

92, 1 P.3d 587, 591 (2000) (citing *Kelly–Hansen v. Kelly–Hansen,* 87 Wash. App. 320, 328–29, 941 P.2d 1108 (1997)).

In order to prevail on res judicata, "a prior judgment must have a concurrence of identity with a subsequent action in (1) subject matter, (2) cause of action, [] (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made." *Loveridge v. Fred Meyer, Inc.*, 125 Wash. 2d 759, 763, 887 P.2d 898, 900 (1995). A lawsuit barred by res judicata serves as an appropriate basis to dismiss a lawsuit. *See, e.g., Salmon v. Mortg. Elec. Registration Sys., Inc.*, 197 Wash. App. 1067 (2017) (affirming motion to dismiss based on res judicata).[8]

As Respondents established below, each of these elements were easily met.

a. The Original Action Ended In A Final Judgment On The Merits

"The threshold requirement of res judicata is a valid and final judgment on the merits in a prior suit." *Ensley*, 152 Wash. App. at 899, 222 P.3d at 103. "A grant of summary judgment is a

[8] This case is cited as non-binding persuasive authority only pursuant to GR 14.1(a).

final judgment on the merits with the same preclusive effect as a full trial." *DeYoung*, 100 Wash. App. at 892, 1 P.3d at 591.

Here, the record demonstrates that Respondents prevailed on summary judgment in the Original Action. (CP 247-248)[9] Because summary judgment qualifies as a final judgment on the merits for purposes of res judicata, the Original Action resulted in a final judgment.

b. The Current Action Involves The Same Subject Matter As The Original Action

Furthermore, the subject matter of both lawsuits is identical. In determining whether the same subject matter exists between lawsuits, the fact that the claims asserted may be different is not controlling where the factual basis underlying the claims is the same. *See, e.g.*, *Kuhlman v. Thomas*, 78 Wash. App. 115, 124, 897 P.2d 365, 369 (1995) ("find[ing] that while the claims are stated differently, both suits nevertheless involve the same subject matter. Specifically, in both suits [plaintiff] alleges a deprivation

[9] Moreover, the trial court later denied McGreals' subsequent CR 60(b)(1) motion to vacate. *See, supra*, fn. 3.

of a constitutional right and tortious harm resulting from false allegations.")

In the Original Action, the McGreals challenged Respondents' ability to foreclose on the subject Property claiming that certain statutory procedures under the DTA—in particular, the NOPFO—were not satisfied. (CP 212-215) Likewise, here, the McGreals again challenge the same exact non-judicial foreclosure proceedings initiated by Respondents, for the same Property and for the same Deed of Trust. (CP 3-9) In fact, as demonstrated above, the allegations in the Original Action Complaint and Current Action Complaint are in large part *identical*.

Again, the following set of allegations are contained in both of the McGreals' complaints:

- "Plaintiffs purchased property in 1998 at 23044 NE Jefferson Point Road in Kingston, W 98346 (Kitsap County) and a second mortgage from Novus Financial. The property was owner occupied from purchase date until after it was sold by Peak Foreclosures. Inc. in April of 2015." (CP 4, 210);

- "On October 16, 2006 Plaintiffs entered into a 30 year loan with Countrywide Home Loans, Inc. . . . Plaintiffs continued to make payments until May 16, 2011." (CP 4, 210);

- "Plaintiffs received notice of the transfer of the loan servicing to Defendant SHELLPOINT mailed Feb. 14,

2014…" (CP 5, 211);

- "On Sep. 15, 2015 Plaintiffs received a 'Notice of Default' which showed a balance due of $257,080.19…" (CP 5-6, 212);

- "The Plaintiffs had not received a Notice of Pre-Foreclosure Options ("NOPFO) (RCW 61.24.031(c) as required by RCW 61.24.031(5)…" (CP 6, 212);

- "At this point in full knowledge that they were engaged in an illegal foreclosure PEAK issued a 'Notice of Trustee Sale'". (CP 8, 214);

- "On April 24, 2014 SHELLPOINT claimed the property was sold to BDH Holdings, Inc…" (CP 8, 214); and

- Claiming that SHELLPOINT engaged in "willful misrepresentation to PEAK that the due diligence requirements of RCW 61.24.031(5) were carried out resulted in PEAK filing a NOD in overt violation of RCW 61.24.031(1)(a)." (CP 12, 216).

Stated differently, both Complaints challenge the very same non-judicial foreclosure proceedings (including issuance of the NOD and NOTS) and take issue with Respondents' compliance with various pre-foreclosure requirements under the DTA. Accordingly, because the subject matter of the two lawsuits is unambiguously the same, the same subject matter element of res judicata is satisfied.

c. The Current Action Complaint Contains The Same Claims As The Original Action

Moreover, the claims are same. "The determination whether the same causes of action are present includes consideration of (1) whether the rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the suits involved infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts." *Ensley*, 152 Wash. App. at 903, 222 P.3d at 104-05 (citing *Pederson v. Potter,* 103 Wash. App. 62, 72, 11 P.3d 833 (2000)). Importantly, "[t]hese four factors are analytical tools; it is not necessary that all four factors be present to bar the claim." *Id.*

The Original Action Complaint asserted three causes of action against Respondents: (1) "failure to follow statutory foreclosure process", (2) "failure of trustee to act in good faith", and (3) violations of the Consumer Protection Act. (CP 216, 220, 222) The same causes of action are based on overlapping allegations that appear in the Current Action Complaint: (1) "failure to follow statutory foreclosure process" (Second Cause of

Action), (2) "failure of trustee to act in good faith" (Third Cause of Action), and (3) "violations of Consumer Protection Act" (Fourth Cause of Action). (CP 11, 15, 17)

The sole difference between the two complaints is that the present complaint contains two additional claims for "failure to use judicial foreclosure on identified agricultural property" and "theft of second lot". (CP 9, 20) However, these additional causes of action nevertheless arise out of the same transactional nucleus of facts as the first lawsuit because they pertain to the same Property, same DOT, and same challenges to non-judicial foreclosure.

Importantly, the McGreals previously raised the allegations underlying these "new" claims in the predecessor case. Indeed, in both the prior and current complaints, the McGreals allege that non-judicial foreclosure was improper because the Property was allegedly used for agricultural purposes. (CP 8, 214) Further, in both cases, the McGreals identically allege that the Property description was supposedly incomplete and resulted in the improper loss of an adjacent lot on the Property. (CP 8, 18, 215). In other words, the two "new" claims asserted in the Current Action Complaint were issues already raised in the Original Action and, thus, could have been asserted before. The McGreals cannot

relitigate these two additional claims just because they have been given new titles.

Therefore, because consideration of these additional claims would impair the trial court's judgment in the Original Action, because they allege infringement of the same right to be free from an allegedly wrongful non-judicial foreclosure on the Property, and because they arise out of the same transactional nucleus of facts as the prior action, they qualify as the "same claim" for purposes of a res judicata inquiry.

Accordingly, the same claim element of res judicata is also satisfied.

d. The Parties In The Two Actions Are Identical and The Quality of Persons For or Against Whom The Claim Is Made Are Identical

The "'identity and quality of parties' requirement is better understood as a determination of who is bound by the first judgment—all parties to the litigation plus all persons in privity with such parties." *Ensley*, 152 Wash. App. at 905, 222 P.3d at 106 (citation omitted).

As to the identity element, the same parties naturally satisfy the "identity of party" element. *See, e.g., Pederson*, 103 Wash.

App. at 72, 11 P.3d at 838 (identity of party met because "[b]oth actions involve the Pedersons and the Potters. There is identity in persons and parties."). Further, where there is an identity of parties, the quality of person element is also met. *See id.* 103 Wash. App. at 73, 11 P.3d at 838 ("[b]ecause the parties are identical, the quality of the persons is also identical.") (citing *Rains v. State*, 100 Wash. 2d 660, 664, 674 P.2d 165, 169 (1983)).

In this case, the McGreals' Complaint names "Peak Foreclosure Services, Inc." and "Shellpoint Partners" as defendants. (CP 3) Similarly, in the prior lawsuit, the McGreals named "Peak Foreclosure Services, Inc." and "New Penn Financial LLC DBA Shellpoint Mortgage Servicing" as defendants. (CP 2019). Although the McGreals confusingly chose to name different Shellpoint entities in an apparent (but feeble) attempt to avoid the application of res judicata's identity of party element, the entity is one and the same.[10] (CP 178, 228) In fact, the McGreals

[10] Indeed, Shellpoint has appeared as "NewRez LLC fka New Penn Financial, LLC dba Shellpoint Mortgage Servicing (erroneously sued as 'Shellpoint Partners, LLC')" in this lawsuit. (CP 179) In the prior lawsuit, Shellpoint also appeared as "New Penn Financial, LLC dba Shellpoint Mortgage Servicing". (CP 228)

concede in both complaints that the applicable Shellpoint entity is the entity that acquired "Resurgent Mortgage Servicing, Inc". (CP 5, 211) Consequently, Respondents easily demonstrated below that both the identity and quality of persons elements are met.

Accordingly, each element of res judicata is satisfied and the complaint is therefore barred. The McGreals cannot relitigate their failed claims which were already raised and rejected by the trial court on summary judgment in the Original Action.

2. Appellants Waived Claims Challenging The Validity Of The Trustee's Sale Because They Failed To Raise These Claims Before The Sale

The DTA "creates a three-party transaction, in which a borrower conveys the mortgaged property to a trustee, who holds the property in trust for the lender as security for the borrower's loan." *McAfee v. Select Portfolio Servicing, Inc.*, 193 Wash. App. 220, 227, 370 P.3d 25, 29 (2016) (citations omitted). "If a borrower defaults, a lender may nonjudicially foreclose by a trustee's sale." *Id.* The DTA was created to "further[] three goals: (1) an efficient and inexpensive foreclosure process, (2) adequate opportunity for interested parties to prevent wrongful foreclosure, and (3) stability of land titles." *Id.* (citing *Albice v. Premier Mortg.*

Servs. of Washington, Inc., 174 Wash. 2d 560, 567, 276 P.3d 1277, 1281 (2012)).

To further these goals, the DTA establishes a "specific procedure for stopping a trustee's sale" as set forth in RCW 61.24.130. *Plein v. Lackey*, 149 Wash. 2d 214, 225, 67 P.3d 1061, 1066 (2003). "RCW 61.24.130 sets forth the *only* means by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure." *Cox v. Helenius*, 103 Wash. 2d 383, 388, 693 P.2d 683, 686 (1985) (emphasis added).

By failing to utilize these statutory procedures, the DTA makes clear that borrowers can waive future claims to invalidate a trustee's sale. As the Washington Supreme Court has explained:

> Under RCW 61.24.040, and the form it mandates for a notice of trustee's sale, recipients are advised that
>
> [a]nyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a *waiver* of any proper grounds for invalidating the Trustee's sale.

Plein, 149 Wash. 2d at 226, 67 P.3d at 1066 (2003) (citing RCW 61.24.040(1)(f)(IX)) (emphasis added). For example, in order to receive a restraining order or injunction against the lender, borrowers must "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." RCW 61.24.130(1). Further, the borrowers must give "five days notice to the trustee of the time when, place where, and the judge before whom the application for the restraining order or injunctions to be made." RCW 61.24.130(2).

However, if a borrower fails to enjoin the foreclosure sale, the borrower can waive any claims related to the underlying obligation and the trustee's sale. Indeed, in the context of post-foreclosure sale challenges, Washington courts have determined that a waiver "occurs where 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." *Plein*, 149 Wash. 2d at 227, 67 P.3d at 1067. In fact, even where borrowers may have legitimate grounds to restrain a sale, borrowers waive their

claims by failing to take action before the trustee's sale. *See Carlson v. Gibraltar Sav.*, 50 Wash. App. 424, 430-32 (1988).

Here, the McGreals received notice of their right to enjoin the trustee's sale through the Notice of Trustee's Sale. (CP 161-167) The Notice of Trustee's Sale specifically cited RCW 61.24.130 and advised the McGreals that they were entitled to "bring a lawsuit to restrain the [sale] *pursuant to RCW 61.24.130*". (CP 163) (emphasis added). Further, the NOTS advised the McGreals that "[f]ailure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the sale." (CP 163)

Moreover, the McGreals have explicitly conceded that they were aware of the foreclosure sale and also believed they had defenses to foreclosure. In the Complaint, the McGreals admit to having knowledge that the Notice of Trustee's Sale was recorded. (CP 8, 14)

Likewise, the McGreals admit being aware of the impending foreclosure sale and also believed the statutory pre-foreclosure procedures had not be followed. Specifically, in both complaints, they allege that prior to the sale they contacted "Donna M. Loitz of American Financial Solutions" to request a copy of the NOPFO because they thought Respondents failed to comply with

the NOPFO requirement. (CP 7, 213-214) They also allege that they lodged a complaint with the "Washington State Attorney General's office indicating the failure of Defendant's [sic] to issue a NOPFO." (CP 7, 213-214) They even sent correspondence to Peak "of these errors and omissions by e-mail and by certified mail." (CP 8) In fact, during the hearing on Respondents' Motion to Dismiss, Mr. McGreal confirms these efforts:

> I did use other things to try to stop [foreclosure]. And those included notifying people that the notice of preforeclosure options hadn't been sent out notifying the Attorney General that we haven't received this. . . . I went to a foreclosure consultant that the state provides.

(RP 36).

Stated differently, the McGreals had actual knowledge that the Property would be sold at a foreclosure sale and believed they had defenses to the same. Yet, despite having actual knowledge, the McGreals failed follow the appropriate statutory procedures to enjoin that sale prior to the foreclosure in 2015. (CP 8, 35-36)

On appeal, the McGreals do not address these arguments. Instead, in once sentence, they cursorily argue they "believed the lawsuit and injunction they filed should stop the proceedings"—

with no explanation of what lawsuit or injunction they are referring to. (AB 9-10) To the extent they are referring to the Original Action, the McGreals did not obtain a TRO to enjoin the sale of the Property or otherwise follow the statutory procedures delineated under RCW 61.24.130, as conceded during the hearing on Respondents' Motion to Dismiss. (CP 36)

Merely bringing an action that seeks a permanent injunction is not enough to bar waiver from applying to subsequent lawsuits. To illustrate, in *Plein*, the Washington Supreme Court clarified that "[a]lthough [the borrower's] complaint sought a permanent injunction and disputed whether there was a default (by alleging the debt had been extinguished), he never sought a preliminary injunction or any order that would have halted the sale, and accordingly did not comply with other requirements such as providing the trustee with five days' notice of any attempt to seek such an order." *Plein*, 149 Wash. 2d at 226, 67 P.3d at 1066. Consequently, the Supreme Court held that "by failing to obtain a preliminary injunction or other restraining order restraining the trustee's sale, as contemplated by RCW 61.24.130, [the borrower] waived any objections to the foreclosure proceedings." *Id.* at 149 Wash. 2d at 229, 67 P.3d at 1068 (2003).

Therefore, as in *Plein*, Appellants have waived their claims pertaining to judicial foreclosure and other claim for alleged "theft" of the second lot, which both seek to challenge the validity of the trustee's sale.

3. The McGreals' Remaining Claims Are Time-Barred By The Two-Year Limitations Period In RCW § 61.24.127(2)

Even though borrowers can waive their claims which seek to challenge the validity of a trustee's sale, the waiver is inapplicable to a *narrow* set of claims that seek to recover monetary damages. Specifically, the DTA allows borrowers to assert four categories claims for post-sale damages that "may not be deemed a waiver", including claims under the CPA and based on a "[f]ailure of the trustee to materially comply with the provisions of this chapter". RCW § 61.24.127(1). These non-waivable claims can only seek monetary relief, and cannot "affect in any way the validity or finality of the foreclosure sale . . . ." RCW 61.24.127(2)(b)–(c).

Notably, "[t]he legislature's decision to limit the statute's safe harbor to four types of damage claims [under RCW 61.24.127(1)] shows that the legislature did not intend to protect

other claims from waiver if the requirements of notice, knowledge of a defense, and failure to enjoin the sale are satisfied." *Patrick v. Wells Fargo Bank, N.A.*, 196 Wash. App. 398, 407, 385 P.3d 165, 170 (2016).

However, these non-waivable claims are subject to a statute of limitations. Under RCW § 61.24.127(1), a borrower must assert or bring the claims "*within **two years** from the date of the foreclosure sale* or within the applicable statute of limitations for such claim, whichever expires earlier". RCW § 61.24.127(2)(a) (emphasis added).

Failure to timely bring the claims within this two-year post-foreclosure period renders the claims time-barred. *See, e.g., Bruce v. Recontrust Co., N.A.*, 719 F. App'x 713, 714–15 (9th Cir. 2018) (affirming dismissal of complaint by the district court, stating: "Bruces' claims for fraud and for violations of the Consumer Protection Act and Deeds of Trust Act must be brought within two years of the date of the foreclosure, or within the applicable statute of limitations, whichever is earlier. . . . The Bruces point to no claim for which the statute of limitation is less than two years. Because the Bruces did not bring their claims until approximately four years after the date of foreclosure, the Bruces'

remaining claims are time-barred."); *Reid v. Countrywide Home Loans, Inc.*, No. C13-436 TSZ, 2013 WL 2099608, at *3 (W.D. Wash. May 14, 2013) (granting motion to dismiss without leave and "hold[ing] that Plaintiffs' claims for misrepresentation and violations of the CPA are time-barred pursuant to RCW § 61.24.127(2) because the claims were not brought within two years from the date of the foreclosure sale.").

The McGreals concede that the sale of the Property took place on or about "April 24, 2015". (CP 8) The Trustee's Deed demonstrates the same. (CP 170) Thus, under the two-year limitations period, the McGreals had until April 24, 2017 to bring any non-waivable monetary claims against Respondents related to the trustee's sale. They failed to do so. Instead, they waited until March 2019 to file this lawsuit—and only after having lost on summary judgment in the Original Action they previously filed concerning the same claims. (CP 3, 247-248) In other words, they waited for nearly *four years* to file the Complaint at issue in this action, clearly outside of the two-year period. The McGreals have at no point identified any other statute of limitations that would change this analysis.

Notably, the Opening Brief is glaringly silent on this critical argument that the non-waivable claims are time-barred.

Accordingly, the trial court correctly determined that the McGreals' claims are time-barred based on RCW § 61.24.127(2)—*i.e.*, failure to follow failure to follow statutory foreclosure process (Second Cause of Action), failure of trustee to act in good faith under RCW 61.24.10(4) (Third Cause of Action), and for alleged CPA violations (Fourth Cause of Action).

VII. CONCLUSION

This Court should affirm the trial court's judgment. Not only does the Opening Brief's host of procedural deficiencies demonstrate Appellants' failure to meet their burden on appeal and amount to a waiver their appellate arguments, but the record also demonstrates that the trial court did not err in dismissing the Complaint on independent grounds. The Complaint is barred by res judicata, waiver, and also based on the two-year statute of limitations for non-waivable claims.

Accordingly, Respondents respectfully request that this Court affirm.

/ / /

/ / /

DATED: June 22, 2020.

/s/ Donald G. Grant

DONALD G. GRANT, WSBA#15480
Counsel for Respondents

Donald G. Grant, P.S.
Washougal Town Square, Suite 245
1700 Main Street
Washougal, WA 98671
TEL: (360) 694-8488
FAX: (360) 694-8688
E-MAIL: don@dongrantps.com

CERTIFICATE OF SERVICE

I certify that I served the foregoing Brief of Respondents on the following on June 22, 2020:

Gary L. McGreal
Jessica McGreal
24800 Chris Lane
Kingston, WA 98346
E-MAIL : mcgreal@aol.com
Appellants Pro Se

David A. Weibel
Templeton Horton Weibel & Broughton, PLLC
3212 NW Byron St., Ste 101
Silverdale, WA 98383-9154
E-MAIL: dweibel@kitsaplawgroup.com
Counsel for Respondent, Byron Harris

_x_ by directly e-mailing a true copy thereof to his or her e-mail address listed above.

_x_ by mailing a true copy of the pleading to the parties at their addresses listed above.

DONALD G. GRANT, P.S.

/s/ Donald G. Grant
DONALD G. GRANT, WSBA#15480
Counsel for Respondents

DONALD G GRANT, PS

June 22, 2020 - 6:18 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	53533-5
Appellate Court Case Title:	Gary L. McGreal, et al., Apps v. Peak Foreclosure Service, Inc., et al., Resps
Superior Court Case Number:	19-2-00808-5

The following documents have been uploaded:

- 535335_Briefs_20200622181554D2149234_2248.pdf
  This File Contains:
  Briefs - Respondents
  The Original File Name was 2020-06-22 Brief of Respondents.pdf

A copy of the uploaded files will be sent to:

- dweibel@kitsaplawgroup.com
- mcgreal@aol.com
- tracey@kitsaplawgroup.com

Comments:

Sender Name: DONALD GRANT - Email: DON@DONGRANTPS.COM
Address:
1700 MAIN ST STE 245
WASHOUGAL, WA, 98671-4129
Phone: 360-694-8488

Note: The Filing Id is 20200622181554D2149234