

No. 67177-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DANIEL C. PETERSON and KRISTI J. PETERSON,
husband and wife,

Appellants,

v.

CITIBANK, N.A., AS TRUSTEE ON BEHALF OF HOLDERS OF
THE AMERICAN HOME MORTGAGE ASSETS TRUST 2006-4,
MORTGAGE BACKED PASS-THROUGH CERTIFICATES
SERIES 2006-4, et al.,

Respondents.

BRIEF OF RESPONDENTS

2011 DEC - 5 AM 4: 22
COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

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I. INTRODUCTION

This residential mortgage case presents the following question:

Can a borrower who undisputedly defaulted on his mortgage loan challenge a lender's standing to foreclose in both a contested bankruptcy court proceeding and in a subsequent action in superior court, including when the borrower failed to disclose any claims against the lender in the bankruptcy proceeding. The trial court properly answered "no," thus preventing the borrower from getting "two bites at the apple," from pursuing claims not disclosed in bankruptcy, and unnecessarily delaying enforcement of a deed of trust occasioned by the borrower's default.

This appeal also requires the Court to determine whether Appellants timely appealed the trial court's order granting Respondent's Motion for Judgment on the Pleadings when the notice of appeal was filed well after 30 days from entry of that order.

Appellants Daniel and Kristi Peterson ("the Petersons") filed this action after they defaulted on a \$579,975 residential mortgage secured by real property located in Sammamish, Washington. Mr. Peterson obtained the mortgage in July 2006 and by April 2009 he had defaulted on the loan. Because the Petersons had no basis for disputing their default, they instead challenged the foreclosure by contesting the validity of Citibank's

standing to foreclose, asserting that Citibank is not the proper beneficiary of the deed of trust that secured the mortgage.

Mr. Peterson also responded to the impending foreclosure by filing a bankruptcy petition. He did not disclose the existence of the claims in this lawsuit in his bankruptcy petition, nor did he file an adversary case in bankruptcy court. Instead, when the bankruptcy court ruled against him on the issue of Citibank's standing to foreclose and allowed Citibank relief from the automatic stay imposed by Mr. Peterson's bankruptcy filing, Petersons filed this lawsuit in state court, hoping for a different result.

Respondents Citibank, American Home Mortgage Servicing Inc. ("AHMSI"), and Mortgage Electronic Registration Systems ("MERS") (collectively, "Respondents") responded to this lawsuit by filing two motions to dismiss the claims brought against them.¹ First, MERS moved to dismiss the Washington Consumer Protection Act ("CPA") and breach of contract claims brought against it for failure to state a claim pursuant to CR 12(b)(6). Second, Citibank, AHMSI, and MERS moved for judgment on the pleadings pursuant to CR 12(c) and for dismissal for lack of subject

¹ The Petersons' brief frequently confuses the bases for each of the motions. *See e.g.*, Peterson's Br. at 8, 9, 13, 14. MERS' motion was a motion to dismiss for failure to state a claim pursuant to CR 12(b)(6). CP 99. The motion filed by Respondents Citibank, AHMSI, and MERS was for judgment on the pleadings pursuant to CR 12(c) and to dismiss for lack of subject matter jurisdiction pursuant to CR 12(h)(3). CP 168. The trial court entered two orders, one for each separate motion. CP 359-60; CP 361-63. Defendant Northwest Trustee Services, Inc. ("Northwest") joined in Respondents' motion, and the trial court issued a separate order dismissing Northwest. CP 272-75; CP 364-65. The Petersons did not appeal the order dismissing Northwest.

matter jurisdiction pursuant to CR 12(h)(3), seeking dismissal of all of the claims asserted against them. They argued, *inter alia*, that the Petersons were collaterally estopped from re-litigating the issue of Citibank's standing to foreclose, that Mr. Peterson lacked standing or should be judicially estopped from bringing the claims, and that the court lacked subject matter jurisdiction due to the bankruptcy court's exclusive jurisdiction over the assets in Mr. Peterson's bankruptcy estate. The trial court granted both motions in two separate orders, dismissing all claims against Respondents. For the reasons set forth below, the trial court should be affirmed.

II. STATEMENT OF THE ISSUES

The Petersons confuse the issues pertaining to the claimed assignments of error. Respondents submit the following issues for the Court's consideration:

- 1) Did the trial court properly grant MERS' motion to dismiss the Petersons' CPA claim pursuant to CR 12(b)(6) where the Petersons failed to plead facts sufficient to establish the elements of a CPA claim?
- 2) Should this Court dismiss the Petersons' appeal of the trial court's order granting Respondents' CR 12(c) motion for judgment on the pleadings because the notice of appeal was untimely?

3) If the Court decides to review the CR 12(c) order despite the Petersons' failure to file a timely notice of appeal, did the trial court properly grant Respondents' motion for judgment on the pleadings pursuant to CR 12(c) on collateral estoppel grounds because the issue of Citibank's standing to foreclose had already been determined by the bankruptcy court?

4) In the alternative, should this Court affirm the trial court's decision to grant Respondents' CR 12(c) motion for judgment on the pleadings because Mr. Peterson, as a debtor in bankruptcy, lacks standing or should be judicially estopped from pursuing these claims?

5) In the alternative, should this Court dismiss the Petersons' claims for lack of subject matter jurisdiction because the bankruptcy court has exclusive jurisdiction of their claims?

III. STATEMENT OF THE CASE

A. Mr. Peterson Obtains a Mortgage.

Appellants Dan and Kristi Peterson are husband and wife who owned property located at 20425 Northeast 37th Way, Sammamish, Washington (the "Property"). CP 2. The Property is not the Petersons' primary residence. CP 198 (identifying addresses other than the Property address as Mr. Petersons' street and mailing addresses). On July 13, 2006, Daniel Peterson obtained a \$579,975 mortgage from American Brokers

Conduit (“ABC”) by executing a Promissory Note in favor of the lender (the “Note”). CP 88. As security for the Note, Mr. Peterson executed a Deed of Trust, which identified ABC as the “Lender” and MERS as the beneficiary “acting solely as a nominee for Lender and Lender’s successors and assigns.” CP 40-54. Mr. Peterson’s mortgage was later sold to American Home Mortgage Assets Trust 2006-4 (“Securitized Trust”). CP 4. Citibank is the trustee for the Securitized Trust. CP 4-5.

On or about April 1, 2009, the Petersons stopped making their mortgage payments. CP 8. On or about December 18, 2009, Northwest, as the agent of Citibank, transmitted a Notice of Default to the Petersons notifying them that they had an outstanding past-due balance of over \$40,000. CP 60-64. The Notice of Default identified Citibank as the beneficiary of the Deed of Trust and AHMSI as the loan servicer. CP 61-62.

On February 1, 2010, an Assignment of Deed of Trust was recorded with the Official Recorder of King County. CP 56. This Assignment recorded MERS’ assignment of all beneficial interests in the Deed of Trust to Citibank as the trustee for the Securitized Trust. CP 56. Citibank executed an Appointment of Successor Trustee naming Northwest as Successor Trustee, which was recorded on the same day as the Assignment. CP 58.

On May 11, 2010, a Notice of Trustee's Sale identifying the date of sale as August 13, 2010, was filed with the Official Recorder of King County. CP 66-69. By this point, the amount past due on the loan had grown to approximately \$68,000. CP 67.

B. Mr. Peterson Files for Bankruptcy.

On August 5, 2010, Mr. Peterson filed a Chapter 11 Voluntary Petition with the U.S. Bankruptcy Court, Western District of Washington, which automatically stayed the pending foreclosure. CP 186; CP 198-236. On his Schedule D-Creditors Holding Secured Claims, Mr. Peterson listed AHMSI as a Creditor holding a \$702,678 claim secured by the Property. CP 215-16. Mr. Peterson also filed a "Schedule B-Personal Property" that required him to disclose all of his personal property assets. CP 211-13. He was required to disclose "[o]ther contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims." CP 212. He checked "NONE" for this category of assets. CP 212.

On September 14, 2010, Citibank, through its servicing agent AHMSI, filed a Motion for Relief from Stay in the bankruptcy proceeding, in which Citibank requested an order allowing the foreclosure to proceed. CP 237-42. The Motion asserted that Mr. Peterson was in default on the

loan in the amount of over \$73,000 and that Citibank had standing to foreclose as the holder of the Note. CP 238-39.

Mr. Peterson opposed Citibank's Motion, arguing that Citibank "is not a real party in interest and does not have standing to seek relief from stay." CP 243; *see also* CP 249-53. On November 3, 2010, the bankruptcy court granted Citibank's Motion and entered an Order Granting Relief from Stay. CP 269-71. The Order states:

[T]he automatic stay is terminated as to Citibank . . . through its servicing agent American Home Mortgage Servicing, Inc., its successors and assigns, so that it may pursue its state remedies to enforce its security interest in the Property and/or as to enforcement of the deed of trust that is the subject of [Citibank's] motion.

CP 270.

C. The Petersons File this Lawsuit in State Court.

Less than a month after the bankruptcy court's Order finding that Citibank had standing to pursue foreclosure, on December 1, 2010, the Petersons filed this lawsuit against Citibank, Northwest, AHMSI, MERS, and others in King County Superior Court. CP 1-15. The Petersons also filed a Motion and Memorandum for Temporary Restraining Order ("Motion for TRO") seeking to prevent Citibank and AHMSI from completing the scheduled December 10, 2010 trustee's sale. CP 75-86. Neither the Complaint nor the Petersons' Motion for TRO mentioned the

bankruptcy proceedings or the bankruptcy court's order. *See* CP 1-15; CP 75-86.

On February 4, 2011, MERS filed a Motion to Dismiss the two claims brought against it, which were for breach of contract and violation of the CPA, pursuant to CR 12(b)(6). CP 98-106. Citibank, AHMSI, and Northwest answered the Complaint. CP 107-20; CP 121-30. Upon learning of the bankruptcy proceeding, the three answering defendants then moved for judgment on the pleadings pursuant to CR 12(c) and to dismiss for lack of jurisdiction pursuant to CR 12(h)(3). CP 167-81. They argued that (1) the Petersons were collaterally estopped from re-litigating the issue of whether Citibank had standing to foreclose due to the bankruptcy court's decision on that issue, (2) Mr. Peterson is judicially estopped from bringing his claims because he failed to disclose them as an asset in the bankruptcy proceedings and lacks standing to pursue his claims because his claims are assets of his bankruptcy estate, and (3) the superior court lacked subject matter jurisdiction over the Petersons' claims because the bankruptcy court had exclusive jurisdiction over the property included in the Mr. Peterson's bankruptcy estate. CP 167-81.

On April 22, 2011, the trial court granted MERS' Motion to Dismiss pursuant to CR 12(b)(6) and Respondents' Motion for Judgment on the Pleadings pursuant to CR 12(c). CP 359-63. On May 19, 2011, the

Petersons timely appealed the order dismissing the claims against MERS. CP 366-70. On June 15, 2011, more than thirty days after the trial court entered the two orders, the Petersons filed an amended notice of appeal seeking review not only of the order on MERS' Motion to Dismiss but also of the order on Respondents' Motion for Judgment on the Pleadings. CP 371-78.

IV. SUMMARY OF ARGUMENT

The trial court properly dismissed the two claims brought against MERS for failure to state a claim pursuant to CR 12(b)(6). Even when construed in the light most favorable to the Petersons, the Complaint fails to allege sufficient facts to support the elements of a CPA claim as it does not identify an unfair or deceptive act by MERS or any resulting injury to the Petersons. The only actions that MERS took in regard to Mr. Peterson's loan were in accordance with the authority granted to it in the Deed of Trust, and MERS had no involvement in the foreclosure against the Petersons' Property. The trial court properly granted MERS' motion to dismiss for failure to state a claim.

Although the Petersons timely appealed the order dismissing the claims against MERS, they did not timely seek review of the order granting Respondents' CR 12(c) motion for judgment on the pleadings. *See* RAP 5.2(a) (notice of appeal must be filed within 30 days after entry

of the decision that the filing party wants reviewed). The Petersons did not seek review of the CR 12(c) order until June 15, almost two months after the entry of the two orders on April 22. Because the Petersons' notice of appeal as to the CR 12(c) order was untimely, this Court should not review it.

If the Court decides to review the CR 12(c) order, despite the Petersons' untimely notice of appeal, the order should be affirmed. The trial court properly dismissed all of the claims brought against Citibank, AHMSI, and MERS pursuant to CR 12(c). All of the Petersons' claims rest on the premise that Citibank is not authorized to foreclose on their Property because it lacks standing to enforce the Deed of Trust. Citibank's standing to foreclose was squarely before the bankruptcy court on Citibank's Motion for Relief from Stay. The Petersons had the opportunity to present – and did present – their arguments on this subject to the bankruptcy court in their briefing. They chose not to appeal the bankruptcy court's decision, and should not now be permitted to re-litigate the issue in a new forum. The trial court agreed, finding that the Petersons were collaterally estopped from re-litigating Citibank's standing, and dismissing all of their claims against Citibank, AHMSI, and MERS. RP 71. That decision should be affirmed.

In the alternative, there are additional bases other than collateral estoppel for affirming the trial court's decision to grant Respondents' CR 12(c) motion. First, Mr. Peterson, as a debtor in bankruptcy, lacks standing to pursue claims that existed at the time that he filed his bankruptcy petition because the claims belong to the bankruptcy estate and Mr. Peterson failed to disclose them as an asset in his bankruptcy petition. Second, because the property is part of the bankruptcy estate, the bankruptcy court has exclusion jurisdiction over such claims and the superior court therefore lacks subject matter jurisdiction. Thus, even if this Court determines that the Petersons' claims are not barred by collateral estoppel as the trial court found, the trial court's dismissal of all of the claims asserted against Respondents should be affirmed for these independent reasons.

V. ARGUMENT

A. Standard of Review

CR 12(b)(6) motions to dismiss for failure to state a claim and CR 12(c) motions for judgment on the pleadings raise identical issues and are both subject to de novo review on appeal. *Gaspar v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 634, 128 P.3d 627 (2006); *Suleiman v. Lasher*, 48 Wn. App. 373, 376, 739 P.2d 712 (1987). Dismissal is appropriate if it appears beyond doubt that the plaintiff cannot prove any

facts that would allow recovery. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). The court is to accept the allegations in the complaint as true and may consider hypothetical facts outside the record. *Id.*

B. The Trial Court Properly Granted MERS' Motion to Dismiss the Petersons' Consumer Protection Act Claim.

The Petersons alleged two causes of action against MERS: (1) breach of contract and (2) a violation of the Washington Consumer Protection Act, RCW 19.86.010, *et seq.* ("CPA"). The Petersons have conceded that the trial court properly dismissed the breach of contract claim. Petersons' Br. at 14 n.9. The trial court's dismissal of the CPA claim against MERS was also proper and should be affirmed.

The CPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. In order to prove a CPA claim, a private plaintiff must satisfy all of the following required elements: (1) the defendant engaged in an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) that impacts the public interest, (4) that injured plaintiff's business or property, and (5) which injury is causally related to the unfair or deceptive act. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37,

204 P.3d 885 (2009); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

Because the Petersons failed to plead facts sufficient to establish any of the required elements, the trial court properly dismissed their CPA claim against MERS for failure to state a claim. The only allegations in the Complaint directed against MERS are: (1) that the Deed of Trust named MERS as the beneficiary and (2) MERS later executed an Assignment of Deed of Trust in favor of Citibank. *See* CP 6. Because these facts are facially insufficient to establish the required elements of a CPA claim, the trial court's dismissal of the Petersons' CPA claim against MERS for failure to state a claim should be affirmed.

First, the Petersons failed to allege an unfair or deceptive act. Although the CPA does not define unfair or deceptive act, Washington courts have interpreted the term to mean an act or practice that "misleads or misrepresents something of material importance," *Holiday Resort Cmty. Ass'n v. Echo Lake Assocs.*, 134 Wn. App. 210, 226, 135 P.3d 499 (2006), or is "immoral, unethical, oppressive, or unscrupulous." *Blake v. Fed. Way Cycle Ctr.*, 40 Wn. App. 302, 311, 698 P.2d 578 (1985) (internal citations omitted).

MERS did not make any misrepresentations in regard to Mr. Peterson's loan, much less engage in any "immoral, unethical, oppressive,

or unscrupulous” conduct. Rather, MERS did exactly what it was authorized to do under the Deed of Trust, which is a contract that Mr. Peterson signed.² The Deed of Trust specified, and Mr. Peterson agreed, that MERS was the beneficiary “acting solely as nominee for Lender and Lender’s successors and assigns.” CP 41. That is precisely what MERS did – MERS acted as the nominal beneficiary until it assigned the beneficial interest to Citibank. The Petersons have failed to articulate anything that renders those actions an unfair or deceptive act under the CPA. This is particularly the case because Mr. Peterson was a signatory to the Deed of Trust, agreeing to the terms thereof.

Nor have the Petersons suffered any injury as a result of MERS’ conduct. To state a claim for violation of the CPA, the plaintiff must allege that he or she has suffered an injury and there must be a causal link between that injury and the defendant’s allegedly unfair or deceptive practice. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 84, 170 P.3d 10 (2007) (plaintiff must establish that “but for the defendant’s unfair or deceptive practice, the plaintiff would not have suffered an injury.”).

² Mr. Peterson executed the Deed of Trust, and is presumed to have read and understood its contents, including that MERS was to be the nominal beneficiary. *See Nat’l Bank of Wash. v. Equity Inv.*, 81 Wn.2d 886, 912, 506 P.2d 20 (1973) (“It is a general rule that a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents.”); *Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 381, 745 P.2d 37 (1987) (same).

The Petersons assert in their brief that they have been injured by MERS' conduct because they expended resources responding to an unlawful foreclosure and the title to their property was clouded as a result of the foreclosure proceedings. Petersons' Br. at 16. This argument ignores three critical points: (1) MERS did not foreclose on the Property, (2) there is no dispute that the Petersons defaulted on the loan, which in turn led to foreclosure proceedings, and (3) there has never been any question that a foreclosure proceeding would have been initiated against the Property by someone; rather, the only question was who had a right to foreclose.

First, it is important to remember what MERS did *not* do. MERS did not foreclose on the Petersons' property, nor was it involved in any way with the foreclosure proceedings. MERS did not cause the Petersons to default on their loan. MERS did not charge the Petersons any fees. MERS did not do anything other than what it was authorized to do under the terms of the Deed of Trust. MERS' only role was to serve as the nominal beneficiary during the period of time *prior* to when Citibank sought to foreclose on the mortgage as a result of the Petersons' failure to pay, and to execute an assignment in favor of Citibank, again *prior* to the foreclosure. Thus, even if the Petersons could establish that they have been injured by the foreclosure (although there is no dispute that the

foreclosure was the result of their failure to make their loan payments), they cannot prove that their injury was caused by MERS' conduct.

Nor is there any dispute here that the Petersons defaulted on their loan. Whether or not MERS is authorized to act as a nominal beneficiary and whether or not MERS' assignment to Citibank was proper, the Petersons' property would still have been foreclosed upon by someone. Thus, even if there was some injury to the Petersons as a result of the foreclosure, the Petersons cannot establish a CPA claim because they cannot show that the injury would not have occurred but for MERS' actions.

The trial court properly granted MERS' CR 12(b)(6) motion to dismiss for failure to state a claim because the Petersons have not alleged facts sufficient to establish the elements of a CPA claim against MERS. The trial court's order dismissing the claims against MERS should be affirmed.

C. The Petersons Did Not Timely Seek Review of the Order on Respondents' CR 12(c) Motion.

Both the order granting MERS' CR 12(b)(6) motion and the order granting Respondents' CR 12(c) motion were signed by the judge and filed with the court on April 22, 2011. CP 359-60; CP 361-63. These two orders along with the order dismissing Northwest, which was also entered

on April 22, disposed of all parties and claims in the lawsuit. Although the Petersons filed a timely Notice of Appeal as to the order on MERS' motion, their Amended Notice of Appeal seeking review of the order on Respondents' CR 12(c) motion was not filed until June 15, 2011, well after the 30-day deadline set forth in RAP 5.2(a). *See* CP 366-70; CP 371-78. Respondents hereby move to dismiss review of the order on Respondents' CR 12(c) motion pursuant to RAP 18.9(c).

The Rules of Appellate Procedure specifically state that extensions to the deadline for filing a notice of appeal should rarely be granted. RAP 18.8(b) provides:

The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section.

Thus, the deadline for filing a notice of appeal is strictly construed and will rarely be extended. *See Beckman v. State Dep't of Social & Health Servs.*, 102 Wn. App. 687, 693, 11 P.3d 313 (2000) ("In contrast to the liberal application we generally give the Rules of Appellate Procedure (RAP), RAP 18.8 expressly requires a narrow application."); *Shumway v.*

Payne, 136 Wn.2d 383, 395, 964 P.2d 349 (1998) (noting that the standard for extending the time for filing a notice of appeal is “rarely satisfied.”).

There are no “extraordinary circumstances” here. The Petersons simply neglected to seek review of the order on Respondents’ CR 12(c) motion within the time permitted under the rules and then filed a belated amended notice, without even requesting leave from this Court to do so. Extension of the deadline is not justified under these circumstances. *See Beckman*, 102 Wn. App. at 695 (refusing to accept untimely notice of appeal from a \$17.76 million judgment, stating “negligence or the lack of ‘reasonable diligence,’ does not amount to ‘extraordinary circumstances’”); *Reichelt v. Raymark Indus., Inc.*, 52 Wn. App. 763, 765, 764 P.2d 653 (1988) (defining “extraordinary circumstances” as “circumstances wherein the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party’s control.”).

It makes no difference that the Petersons filed a timely notice as to one of the two orders. They should not be permitted to bootstrap an appeal of Respondents’ CR 12(c) motion into their timely appeal of MERS’ CR 12(b)(6) motion. Although RAP 5.3(h) allows a notice of appeal to be amended upon the motion of a party or the court’s own initiative to include “additional parts of a decision in order to do justice,”

it is inapplicable here. First, the Petersons' untimely amended notice sought review of a completely separate order, not "additional parts" of the same decision for which they timely sought review. *See* RAP 2.1(a) ("The term 'decision' refers to rulings, orders, and judgments . . ."). Second, the Petersons did not move to amend their notice; rather, they simply filed their amended notice of appeal without requesting leave to do so.

The Petersons should not be permitted to evade the strict deadline for filing an appeal set forth in RAP 5.2(a) and 18.8(b), and this Court should decline to review the trial court's order on Respondents' CR 12(c) motion.

D. The Trial Court Properly Granted Respondents' CR 12(c) Motion.

If this Court decides to consider the Petersons' appeal of the trial court's order granting Respondents' CR 12(c) motion, despite its untimeliness, the order should be affirmed. The trial court properly held that the Petersons are collaterally estopped from re-litigating the issue of Citibank's standing to foreclosure on their property—an issue previously decided by the United States Bankruptcy Court. Because Citibank's standing is the underlying premise for all of the Petersons' claims, the trial court properly dismissed all of the Petersons' claims against Respondents. In the alternative, dismissal was also proper because (1) Mr. Peterson, as a

debtor in bankruptcy, lacks standing or should be judicially estopped from pursuing the claims, and (2) the bankruptcy court has exclusive jurisdiction over the claims.

1. The Petersons are collaterally estopped from challenging Citibank's standing to foreclose.

In their Complaint, the Petersons assert claims for Defect of Trustee's Sale, Defective Initiation of Foreclosure, Quiet Title, Slander of Title, Breach of Contract, and violation of the CPA against Citibank and claims for Slander of Title and violation of the CPA against AHMSI. CP 1-15. All of the Petersons' claims are premised on the allegation that Citibank lacks standing to foreclose because it has no beneficial interest in the Note or Deed of Trust.

Collateral estoppel prevents a party from re-litigating an issue that has previously been decided where the party had the "full and fair opportunity" to present his or her case. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 561, 852 P.2d 295 (1993). The purpose of the doctrine is to "promote the policy of ending disputes, to promote judicial economy and to prevent harassment of and inconvenience to litigants." *Id.* Because the bankruptcy court was required to decide, and did decide, that Citibank had standing to foreclose, the trial court correctly held that the Petersons are

collaterally estopped from re-litigating that issue in state court and that all of the Petersons' claims should be dismissed.

a. Standing was a threshold issue that had to be decided by the bankruptcy court prior to ruling on the Motion for Relief from Stay.

Standing is a threshold issue that must be resolved by the bankruptcy court whenever the court decides a motion for relief from stay. *See In re Jacobson*, 402 B.R. 359 (Bankr. W.D. Wash. 2009) (denying motion for relief from stay because the moving party lacked standing). In *Jacobson*, U.S. Bankruptcy Judge Brandt held that before determining whether relief from stay should be granted, the court must first determine whether the motion is brought by “a real party in interest,” and whether the moving party has constitutional and prudential standing. *Id.* at 366-67. “Generally, a party without the legal right under applicable substantive law to enforce the obligation at issue, or pursuing an interest outside those protected by the law invoked or abstract questions more appropriately addressed legislatively, lacks prudential standing.” *Id.* at 367. Applying this principle, the court held that the moving party as the servicer of the loan did not have standing and therefore denied the motion without reaching the merits. *Id.* at 370.

To reach this decision, the court analyzed Washington law regarding standing to foreclose on a deed of trust and noted that only the

holder of the obligation secured by the deed of trust (here, the Note) is entitled to foreclose. *Id.* at 365-66 (“The real party in interest in relief from stay is whoever is entitled to enforce the obligation sought to be enforced.”). Accordingly, before determining whether to grant a motion for relief from stay, the bankruptcy court must conclusively decide whether the moving party has a beneficial interest in the note or can enforce the note in its own right. *Id.*

Here, the bankruptcy court decided Citibank’s Motion for Relief from Stay in Citibank’s favor. That decision required the bankruptcy court to conclusively determine, as a preliminary matter, whether Citibank had a beneficial interest in the Note and thus standing to foreclose. Mr. Peterson had the opportunity to present his arguments against Citibank’s standing in opposition to the Motion, and he devoted several pages of his brief to that topic. CP at 249-53. He also had the right to appeal the order if he was dissatisfied with the outcome, as orders on requests for relief from a stay are final, appealable orders. *See Packerland Packing Co., Inc. v. Griffith Brokerage Co. (In re Kemble)*, 776 F.2d 802, 805 (9th Cir. 1985) (appeal lies to circuit court from order granting relief from an automatic stay); *Crocker Nat’l Bank v. Am. Mariner Indus. Inc. (In re Am. Mariner Indus. Inc.)*, 734 F.2d 426, 429 (9th Cir. 1984). But he does not have the right to re-litigate the matter in another court.

The issue decided in Citibank's Motion for Relief from Stay is the same issue that forms the basis for all of the Petersons' claims: does Citibank have standing to foreclose on the Property? All of the Petersons' claims are premised on the allegation that the foreclosure proceeding is invalid because Citibank has no beneficial interest in the Note or Deed of Trust, and therefore is not the proper party to foreclose on the Property. For example, in their Complaint, the Petersons assert that the Note was not properly endorsed, which precludes Citibank from having standing to foreclose as the beneficiary of the Deed of Trust. CP 6 at ¶ 30. The Petersons also assert that the recorded Assignment of Deed of Trust is invalid and therefore Citibank has no beneficial interest, CP 6-9 at ¶¶ 33, 35-38, 54-58, and that the Petersons are entitled to an order eliminating any interest claimed by Citibank in the Property because Citibank is not the beneficiary under the Deed of Trust, CP 9-11 at ¶¶ 61, 67-69, 75, 77, 79(g)-(h). The Petersons have not asserted any defenses to the foreclosure other than those based on Citibank's lack of standing to pursue foreclosure against the Property. Thus, if Citibank has standing, which it does as determined by the bankruptcy court, all of the Petersons' allegations must fail, and they have no basis for challenging the foreclosure.

b. Standing is a distinct inquiry from determining whether the moving party has a colorable claim.

The Petersons assert that the only thing the bankruptcy court had to decide on the Motion for Relief from Stay was whether Citibank had a “colorable claim” to pursue foreclosure. Petersons’ Br. at 20. Because that decision is not a full adjudication on the merits, they argue, it cannot form the basis for collaterally estopping them from pursuing their claims in this litigation.

But this argument confuses the inquiry that the bankruptcy court is required to engage in when deciding a motion for relief from stay. In *Jacobson*, the court clearly held that *before addressing* whether the moving party has a “colorable claim,” the court must first decide whether the moving party has standing to pursue the claim. 402 B.R. at 366. Standing is the initial inquiry that must be made before proceeding to the second step of determining whether the moving party has a colorable claim. Thus, while the adjudication of a motion for relief from stay may not be a full adjudication of the merits of the claim itself, it does not follow that Citibank’s standing to pursue the claim was not fully litigated.

Because that issue – Citibank’s standing to foreclose – was fully litigated in bankruptcy court and is the same issue that forms the basis for

each and every one of the Petersons' claims in this litigation, the trial court properly granted Respondents' motion for judgment on the pleadings.

c. The elements of collateral estoppel are met.

The Petersons also argue that the trial court erred because the elements of collateral estoppel are not met here. Petersons' Br. at 23. To establish collateral estoppel, a party must demonstrate the following four elements: (1) an identical issue, (2) a prior adjudication that ended in a final judgment on the merits, (3) the party to be estopped was a party to or in privity with a party to the prior adjudication, and (4) the application of the doctrine will not result in injustice. *Hanson*, 121 Wn.2d at 562. Because all four elements are met here, the Petersons' argument lacks merit.

First, as discussed above, there is an identical issue in both this lawsuit and Mr. Peterson's bankruptcy proceeding – Citibank's standing to foreclose. Under *Jacobson*, in order to rule on Citibank's Motion for Relief from Stay, the bankruptcy court necessarily had to determine whether Citibank had a beneficial interest in the Note with standing to foreclose. And that issue is the same issue that forms the basis for the Petersons' claims in this lawsuit. Therefore, the first element of collateral estoppel is met.

Second, the bankruptcy court's decision that Citibank has standing to foreclose is a final judgment on the merits. The Petersons attempt to re-characterize the issue, arguing that the bankruptcy court did not make a final judgment on the claims the Petersons attempt to bring in this lawsuit. *See* Peterson's Br. at 24. But that is not the relevant inquiry. There is no dispute that the bankruptcy court did not fully adjudicate the merits of the claims the Petersons attempted to bring here as those claims were not before the bankruptcy court. What the bankruptcy court did decide conclusively and on the merits was the question of Citibank's standing to foreclose. Because Citibank's alleged lack of standing forms the basis for all of the Petersons' claims in this lawsuit, the Petersons' claims cannot survive.

The third element of collateral estoppel is indisputably met, and the Petersons make no argument to the contrary in their brief. Mr. Peterson is the debtor in bankruptcy and was therefore a party to the bankruptcy court's adjudication of Citibank's Motion for Relief from Stay. Ms. Peterson is alleged to be his wife, and is therefore in privity with him. *See* CP at 2.

Fourth, the application of collateral estoppel will not result in injustice; to the contrary, it will prevent inconsistent decisions between the U.S. Bankruptcy Court and the state court. In the bankruptcy matter, Mr.

Peterson had a full and fair opportunity to contest Citibank's standing to foreclose in response to the Motion for Relief from Stay. His attorneys fully briefed the issue, devoting several pages of their response to this topic. *See* CP 249-53. If Mr. Peterson was unhappy with the result, he could have appealed the bankruptcy court's order. But he is not permitted to re-argue the issue in state court, hoping for a different result. No injustice will result from denying him a second bite at the apple.

Thus, the elements of collateral estoppel are met here. The trial court properly held that because the bankruptcy court determined that Citibank had standing to foreclose, Respondents are entitled to judgment on the pleadings on all of the Petersons' claims.

2. In the alternative, as a debtor in bankruptcy, Mr. Peterson did not have the right to pursue the claims in this lawsuit.

In the alternative, an independent reason for dismissing the Petersons' claims is that they are an asset of the bankruptcy estate, and only the bankruptcy trustee, and not Mr. Peterson, has standing to pursue them.³ In addition, Mr. Peterson should be judicially estopped from pursuing his claims because he failed to disclose them in the bankruptcy action.

³ This Court may affirm the trial court's dismissal of the claims against Respondents on any basis supported by the record. *See State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004) ("This court may affirm a lower court's ruling on any grounds adequately supported in the record.").

a. Mr. Peterson lacked standing to pursue this action because it belongs to the bankruptcy estate.

Mr. Peterson lacked standing to pursue the claims asserted in this litigation because they were part of his bankruptcy estate.

The commencement of a bankruptcy creates a bankruptcy estate, which encompasses “the debtor’s legal and equitable interests in property ‘as of the commencement of the case.’” *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 100-01, 138 P.3d 1103 (2006). In his or her bankruptcy petition, the debtor must list “all legal or equitable interests . . . in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). This includes all causes of action in which the debtor has an interest, including unliquidated claims and causes of action where the likelihood of success is uncertain. *Bartley-Williams*, 134 Wn. App. at 98; *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 230, 108 P.3d 147 (2005) (citing 2 William Miller, *Collier Bankruptcy Manual* ¶ 521.05[3][a] (Lawrence B. King ed. 2002)); *Linklater v. Johnson*, 53 Wn. App. 567, 569, 768 P.2d 1020 (1989).

Once part of the bankruptcy estate, the debtor’s interest in the property is represented by the bankruptcy trustee. *Turner v. Cook*, 362 F.3d 1219, 1225-26 (9th Cir. 2004) (“When [plaintiff] declared bankruptcy, all the ‘legal or equitable interests’ he had in his property

became the property of the bankruptcy estate and are represented by the bankruptcy trustee.”); *Linklater*, 53 Wn. App. at 569-70. Property of the bankruptcy estate, including causes of action, that is not abandoned or administered during the bankruptcy remains property of the estate even after the estate closes. *Bartley-Williams*, 134 Wn. App. at 101. It is therefore the trustee, and not the debtor, who is the real party in interest with standing to pursue such causes of action. *Id.*

Linklater is instructive. In that case, the plaintiff did not disclose any causes of action related to his pre-bankruptcy home purchase. 53 Wn. App. at 570. After he was discharged in bankruptcy, the plaintiff brought claims for violation of the CPA, misrepresentation, and fraudulent concealment arising from the purchase of the home. *Id.* at 568. The court held that the debtor lacked standing to pursue such claims and that the only person who could bring the action was the bankruptcy trustee. *Id.* at 569. “[A] discharged debtor lacks legal capacity to subsequently assert title to and pursue an unscheduled claim” *Id.* at 570.

Like the plaintiff in *Linklater*, the Petersons’ claims accrued prior to Mr. Peterson’s bankruptcy filing as Citibank and Northwest commenced foreclosure proceedings prior to the bankruptcy filing. Northwest sent the Petersons the Notice of Default naming Citibank as the beneficiary on December 18, 2009, and transmitted the Notice of Trustee’s

Sale on May 7, 2010. CP 60-64, 66-69. It was not until nearly three months later that Mr. Peterson filed his bankruptcy petition. CP 186. In his petition, Mr. Peterson did not disclose any of the claims brought by the Petersons in this litigation, although he knew that foreclosure proceedings had been commenced and a date had been set for the trustee's sale. *See* CP 212 (Mr. Peterson checked "None" for "[o]ther contingent and unliquidated claims of every nature."). As in *Linklater*, the bankruptcy trustee, not the Petersons, was the only one with standing to pursue the claims asserted.

b. Mr. Peterson is judicially estopped from bringing this action because he failed to identify it as an asset.

As discussed above, Mr. Peterson failed to list the claims he has asserted in this lawsuit as assets in his bankruptcy proceeding. Even if he had standing to bring these claims, which he does not, he should be judicially estopped from doing so.

"Judicial estoppel is an equitable doctrine. It precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking an inconsistent position in another court." *McFarling v. Evaneski*, 141 Wn. App. 400, 403, 171 P.3d 497 (2007). Judicial estoppel has been applied where a debtor in bankruptcy fails to list a claim as an asset in the bankruptcy proceeding and then later pursues the claim

outside of bankruptcy. *See id.* (debtor was judicially estopped from bringing personal injury claim because he failed to disclose it in his bankruptcy petition); *Bartley-Williams*, 134 Wn. App. at 102 (affirming application of judicial estoppel against debtors who failed to disclose malpractice lawsuit as an asset in their bankruptcy proceedings). When determining whether to dismiss a claim based on judicial estoppel, courts consider three “core factors”: (1) whether a party’s later position is clearly inconsistent with its earlier position, (2) whether judicial acceptance of the inconsistent position would create the perception that either the first or second court was misled, and (3) whether the party asserting the inconsistent position would gain an unfair advantage if not estopped. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007). The court may also consider other factors, as these three are not an “exhaustive formula.” *Id.*

Here, the filing of this lawsuit is inconsistent with Mr. Peterson’s representation in his bankruptcy petition that there were no such claims. *See Bartley-Williams*, 134 Wn. App. at 98-99 (“A litigant takes inconsistent positions by failing to disclose a pre-petition claim during bankruptcy proceedings and later attempting to pursue that claim.”) (citing *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784 (9th Cir. 2001)). There is no dispute that Mr. Peterson failed to list the claims as an

asset in his bankruptcy petition or to otherwise bring the claims to the attention of the bankruptcy court.⁴ Nor is there any dispute that the claim accrued before he filed his bankruptcy petition. Mr. Peterson should not be permitted to mislead his creditors, the bankruptcy court, and the trustee by conveniently failing to list these claims as assets in his bankruptcy proceeding only to assert them later in superior court.

3. In the alternative, this case should be dismissed because the trial court lacked subject matter jurisdiction.

The trial court also properly dismissed the Petersons' claims pursuant to CR 12(h)(3) because the U.S. District Court had exclusive jurisdiction over the claims. "The district court in which the bankruptcy case is commenced obtains exclusive *in rem* jurisdiction over all of the property in the estate." *Hong Kong & Shanghai Banking Corp. v. Simon (In re Simon)*, 153 F.3d 991, 996 (9th Cir. 1998). Because the causes of action asserted by the Petersons were assets of the bankruptcy estate, as discussed above, Washington state courts lack subject matter jurisdiction.

Bankruptcy jurisdiction is *in rem*, and accordingly, the bankruptcy court has jurisdiction to decide all claims regarding the property that is part of the bankruptcy estate. *In re Simon*, 153 F.3d at 996; *see also*

⁴ Although the Petersons contended in their briefing to the trial court that Mr. Peterson was "in the process of amending his bankruptcy schedules and expects to list the claims filed in this matter," CP 283, he did not do so and his bankruptcy proceeding has now been dismissed.

Reusser v. Wachovia Bank, N.A., 525 F.3d 855, 861 (9th Cir. 2008) (“The purpose of bankruptcy courts’ ‘comprehensive jurisdiction’ is to enable them to ‘deal efficiently and expeditiously with all matters connected with the bankruptcy estate.’”) (quoting *Celotex Corp. v. Edwards*, 514 U.S. 300, 308, 115 S. Ct. 1493, 131 L. Ed. 2d 403 (1995)). Because causes of action are property of the bankruptcy estate as discussed above, this Court lacks subject matter jurisdiction.

In addition, the Federal Rules of Bankruptcy require a debtor to bring a dispute regarding the validity of a lien or to recover money or property as an adversary case in bankruptcy court:

An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:

(1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002;

(2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d)[.]

Fed. R. Bankr. P. Rule 7001. Here, because they assert claims for damages and dispute the validity of Citibank’s lien, the Petersons were required to bring their claims as an adversary proceeding in bankruptcy court.

E. The Petersons Are Not Entitled to an Award of Attorneys' Fees on Appeal.

Attorneys' fees may only be awarded on appeal if properly requested by the party seeking such fees. RAP 18.1(b) states: "The party must devote a section of its opening brief to the request for the fees or expenses." The Petersons have not done so here, and are therefore not entitled to an award of fees, regardless of whether there is a contractual, statutory or equitable basis for such an award.

Our Supreme Court has held that the requirement of devoting a section of the opening brief to a request for fees is "mandatory." *See Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998). In *Tony Maroni's*, the party seeking fees included a request for fees in the last line of a supplemental brief, but did not include a separate section devoted to this topic in its opening brief. *Id.* The Court denied the request for fees, stating:

The rule requires more than a bald request for attorney fees on appeal. Argument and citation to authority are required under the rule to advise us of the appropriate grounds for an award of attorney fees as costs. As *Wilson* fails to fulfill these requirements, attorney fees on appeal are denied.

Id. (citations omitted).

As in *Tony Maroni's*, the only request for an award of fees that appears in the Peterson's brief is the last line, which simply states: "Costs

on appeal should be awarded to the Petersons.” Petersons’ Br. at 28. The Petersons have not “devote[d] a section of [their] opening brief” to their request for an award of attorneys’ fees, nor have they included any argument or citation to authority to support their request. Rather, their request for fees is precisely the sort of “bald request” that the Court in *Tony Maroni’s* found insufficient under the court rules. Nor can the Petersons remedy this omission by including a section in their reply brief regarding their request for fees, as RAP 18.1(b) clearly specifies that such requests must be included in the requesting party’s “opening brief.” This Court should therefore deny the request.

F. Citibank Is Entitled to Its Attorneys’ Fees on Appeal.

Citibank is entitled to recover its attorneys’ fees under the Deed of Trust, which provides: “Lender shall be entitled to recover its reasonable attorneys’ fees and costs in any action or proceeding to construe or enforce any term of this Security Instrument,” including fees incurred in any bankruptcy proceeding or on appeal. CP 53. Since the beneficial interest in the Deed of Trust was assigned to Citibank, Citibank stands in the shoes of the lender, ABC, and is entitled to recover its fees. Furthermore, RCW 4.84.330 provides that in actions on contracts or leases “where such contract or lease specifically provides that attorneys’ fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be

awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.” *See also Yuan v. Chow*, 96 Wn. App. 909, 917-18, 982 P.2d 647 (1999) (purported borrower could recover attorneys’ fees as prevailing party under the terms of the note and pursuant to RCW 4.84.330 although he did not sign the promissory note). Thus, even though Citibank is not the “lender” identified in the Deed of Trust, Citibank is entitled to recover its fees as a prevailing party.

VI. CONCLUSION

The trial court’s orders granting MERS’ CR 12(b)(6) Motion to Dismiss and Respondents’ CR 12(c) Motion for Judgment on the Pleadings and dismissing all of the Petersons’ claims should be affirmed. Citibank should be awarded its attorneys’ fees on appeal as a prevailing party.

DATED: December 5, 2011

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DECLARATION OF SERVICE

On this day set forth below, I served via legal messenger, a true and accurate copy of the Brief of Respondents in Court of Appeals Cause No. 67177-4-I to the following parties:

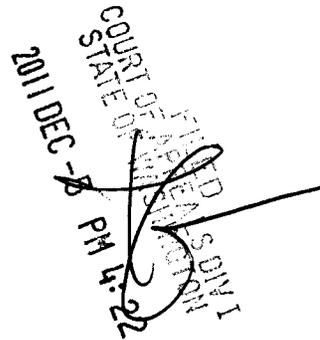
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DIVISION I

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

DATED this 5th day December, 2011.


Cindy Anderson
Legal Secretary