

No. 71945-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JAMES KEITH RICHARDS and KIRSTEN RICHARDS,

Plaintiffs/Appellants,

vs.

QUALITY LOAN SERVICE CORPORATION OF

WASHINGTON, INC., et al,

Defendants/Respondents

RESPONDENTS AURORA LOAN SERVICES AND MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC.'S
ANSWERING BRIEF

*Adam G. Hughes, WSBA # 34438
MARSHALL & WEIBEL, P.S.
720 Olive Way, Suite 1201
Seattle, WA 98101
Telephone: (206) 622-5306, Ext. 5905
Attorneys for Respondents Aurora Loan Services, LLC,
and Mortgage Electronic Registration Systems, Inc.*

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I. INTRODUCTION

The Trial Court properly applied the facts to the law and its decision should be affirmed. The Richards' opening brief does not contain any specific assignments of error as required by RAP 10.3, but the crux of their position appears to be that Aurora Loan Services, LLC ("Aurora"), despite having possession of the Note indorsed in blank, did not have authority to initiate a nonjudicial foreclosure under Washington's Deeds of Trust Act ("DTA" or RCW 61.24 *et seq.*), and should thus be held liable to the Richards for doing so. The Richards also argue that Mortgage Electronic Registration Systems, Inc.'s ("MERS") "participation" should make MERS liable to them as well. The Richards' arguments fail for multiple reasons, including: (1) Aurora did have authority to initiate foreclosure; (2) Aurora's actions were in compliance with the DTA as interpreted by multiple state and federal courts, including this one; (3) the Richards did not rely on any action taken by MERS, and MERS' actions did not cause the Richards any harm, and (4) the Richards did not otherwise provide the trier of fact with evidence sufficient to meet the elements of their asserted claims.

The Richards defaulted under the terms of a promissory note secured by a deed of trust on their property. Aurora was the loan servicer

at the time. Following the default, Aurora took physical possession of the promissory note, endorsed in blank, and rightfully pursued foreclosure under Washington’s Deeds of Trust Act. Aurora did exactly what the Washington Supreme Court said Aurora needed to do in *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 89, 285 P.3d 34 (2012). In *Bain*, the Court held that the physical holder of the note indorsed in blank is the “beneficiary” “with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property” under the Deed of Trust Act:

A plain reading of the statute leads us to conclude that only the actual holder of the promissory note or other instrument evidencing the obligation may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property.

* * *

“Holder” with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer[.]

Bain 175 Wn.2d at 89, 104, citing RCW 62A.3-205(b), RCW 62A.1-201(20) [now 21].

Contrary to the Richards’ current arguments, there is no caveat or carve out for what capacity that person holds the note, or what third party agreements the holder of the note may have in relation to the Note. In fact, the *Bain* Court specifically found that the physical possession requirement to be the beneficiary could not be altered by the terms of such

agreements. *Bain*, 175 Wn.2d at 107-8 (“The legislature has set forth in great detail how nonjudicial foreclosures may proceed. We find no indication the legislature intended to allow the parties to vary these procedures by contract.”).

With this background, the Richards ask this Court to find that Aurora should have been found liable under the Consumer Protection Act (RCW 19.86 *et seq.* or “CPA”) because, they argue, Aurora was not actually the beneficiary of the note despite its uncontested possession thereof in compliance with the DTA as addressed in *Bain*.

Additionally, while not in their “statement of issues” section (and there being no assignments of error section), the Richards argue at the end of their opening brief that Mortgage Electronic Registration Systems, Inc. (“MERS”) should somehow also be found liable under the CPA because it “participated” in the foreclosure process despite no evidence introduced that could support a finding that the Richards were injured in any way by MERS’ actions.

Lastly, and again not in their “statement of issues” section, the Richards ask this Court to find that Aurora and MERS should be found liable for negligent and intentional misrepresentation. The Richards fail, however, to identify the “clear, cogent, and convincing” evidence submitted at trial that could have supported all nine elements of a fraud

claim or all six elements of a negligent misrepresentation claim. Rather, they set out the elements of these claims and simply conclude that they have been met by the facts. As the Trial Court rightly concluded, however, the Richards did not provide clear, cogent, and convincing evidence to support either a negligent or intentional misrepresentation claim against either Aurora or MERS and this Court should affirm that trial ruling.

II. STATEMENT OF CASE

The claims presented at trial for adjudication were as follows:

1. Plaintiffs' claims against defendants Aurora and MERS for alleged violations of Washington's Consumer Protection Act. CP 97.
2. Plaintiffs' claims against defendants Aurora and MERS for alleged intentional and/or negligent misrepresentation. CP 97.

Based upon the evidence presented at trial, including the testimony of all witnesses and the exhibits introduced and admitted, the Trial Court made the following Findings of Fact:

On June 22, 2007, Plaintiff James K. Richards entered into an agreement with Lehman Brothers Bank, FSB ("Lehman") for a loan in the principal amount of \$1,000,000.00. (CP 98, FF 1).

The loan is memorialized by an Adjustable Rate Note dated on the same day (the “ Note”) – Trial Exhibit 1 – admitted without objection. (CP 98, FF 2, TE 1-8).

The Note is secured by a Deed of Trust encumbering that certain real property commonly known as 1808 Killarney Way, Bellevue, Washington (the “ Property”). (CP 98, FF 3).

The Deed of Trust was executed June 27, 2007, and was recorded on July 2, 2007, under King County Auditor’ s file no. 20070702000812 – Trial Exhibit 2 – admitted without objection. (CP 98, FF 4, TE 9-32).

The Deed of Trust identifies Lehman as the Lender, MERS as the Beneficiary solely in a nominee capacity for the Lender and Lender’ s successors and assigns, and Fidelity National Title Insurance Co. as the Trustee. (CP 98, FF 5, TE 9-32).

The Deed of Trust includes a provision that grants the Trustee the power of sale of the Property as follows:

This Security Instrument secures to Lender: (i) the repayment of the Loan, and... (ii) the performance of Borrower’s covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale the [Property].

(CP 98, FF 6, TE 9-32).

At the loan's origination, Plaintiff James Keith Richards agreed he would be responsible for paying property taxes directly, rather than as part of his monthly payment. (CP 98, FF 7).

Aurora Loan Services, LLC, as the Servicer, Lehman Brothers Holdings, Inc., as Seller, and Aurora Loan Services, LLC, Master Servicer entered into a Servicing Agreement related to the Structured Asset Securities Corporation Lehman XS Trust Mortgage Pass-Through Certificates, Series 2007-16N ("Securitized Trust") on or about August 1, 2007. CP 98-99. The Securitized Trust had purchased Mr. Richards' loan, represented by the Note and Deed of Trust, at sometime between loan signing and August 1, 2007. Trial Exhibit 10 – admitted over Defendants' objections. (CP 98-99, FF 8, TE 66-150).

U.S. Bank, N.A. as Custodian and U.S. Bank, N.A. as Trustee, acting on behalf of the Securitized Trust, entered into a Custodial Agreement dated as of August 1, 2007. Trial Exhibit 11 – admitted over Defendants' objections. (CP 99, FF 9, TE 151-181).

Beginning in October 2009, Plaintiff failed to make the property tax payments on the Property. (CP 99, FF 10).

Aurora paid the taxes and sought reimbursement from Plaintiff. (CP 99, FF 11).

Thereafter, Plaintiff similarly began to have trouble making regular monthly payments. (CP 99, FF 12). On or about May 12, 2010, Aurora sent Mr. Richards a Workout Agreement and asked him to execute the same. *Id.* The Workout Agreement required Mr. Richards to make six modified payments to Aurora, which he timely made. *Id.* The Workout Agreement also required Mr. Richards to provide complete financial information to enable Aurora to properly evaluate his current financial situation and his request for a loan modification or other loan workout option, which Mr. Richards failed to do. Trial Exhibit 15– admitted without objection. (*Id.*, TE 208-215, RP 259). MERS had no involvement in this process.

On November 29, 2010, Aurora received physical possession of Plaintiffs' Note, indorsed in blank, from document custodian, La Salle Bank. (CP 99, FF 13).

From that point until the Note was transferred to Nationstar Mortgage in June 2012, the Note remained in Aurora's possession in Aurora's Scottsbluff, Nebraska vault as evidenced by Aurora's "Collateral Log" – Trial Exhibit 8 – admitted without objection. (CP 100, FF 14, TE 63).

At no point between November 29, 2010, and June 25, 2012, did the Note leave Aurora's possession. (CP 100, FF 15). Plaintiff did not dispute this fact and provided no evidence to the contrary. *Id.*

On December 3, 2010, Aurora executed a declaration, indicating that Aurora was the actual holder of the original Note, and that it had not been assigned or transferred. Trial Exhibit 3 – admitted without objection. (CP 100, FF 16, TE 33).

Mr. Richards completed making the payments required under the Workout Agreement in December 2010, but had never provided the financial information required to be provided despite multiple follow up requests by Aurora. (CP 100, FF 17). Thereafter, despite having failed to provide the financial information required to be considered for a permanent loan modification, Mr. Richards began making requests again to obtain a forbearance agreement with Aurora. *Id.*

On or around January 12, 2011, an authorized officer of MERS executed an Assignment, whereby MERS's nominee interest in the Deed of Trust was assigned out of MERS to Aurora. Trial Exhibit 5 – admitted without objection. (CP 100, FF 18, TE 54-55, RP 104-106).¹ This was the only action taken by MERS.

¹ Plaintiffs' assertions on pages 11-12 of their opening brief that Jan Walsh falsely asserted that she was a vice president of MERS and that Ms. Walsh had no relationship with MERS are not only unsupported by the record, but the only evidence provided to the Trial Court contradicts this assertion. (FF 18, RP 104-106)

The Assignment from MERS to Aurora was publicly recorded on January 18, 2011, under King County Auditor's No. 20110118002163. Trial Exhibit 5 – admitted without objection. (CP 100, FF 19).

On or around February 5, 2011, Aurora appointed Quality Loan Services, Inc. ("QLS") as the Successor Trustee to Plaintiff's Deed of Trust. Trial Exhibit 6 – admitted without objection. (CP 101, FF 20, TE 56-57).

The Appointment of Successor Trustee was recorded on February 9, 2011, under King County Auditor's No. 20110209002079. Trial Exhibit 6 – admitted without objection. (CP 101, FF 21, TE 56-57).

After attempts to work out a loan modification or foreclosure avoidance agreement were unsuccessful, and as a result of Mr. Richards' default on the loan, on or around March 14, 2011, the Trustee executed a Notice of Trustee's Sale, scheduling a Trustee's Sale date of June 17, 2011. (CP 101, FF 22).

Aurora provided QLS with a Beneficiary Declaration wherein it declared under penalty of perjury that it was the "actual holder" of Mr. Richards' Promissory Note. Trial Exhibit 3 – admitted without objection. (CP 101, FF 23, TE 33).

QLS issued a Notice of Default to Mr. Richards on or about February 10, 2011, wherein it asserted that Aurora was the "current owner/beneficiary

of the Note secured by the Deed of Trust.” Trial Exhibit 4 – admitted without objection. (CP 101, FF 24, TE 34-53).

QLS issued a Notice of Trustee’s Sale and Notice of Foreclosure document on March 14, 2011, wherein it referenced the foreclosure being brought on behalf of Aurora. (CP 101, FF 25).

The Notice of Trustee’s Sale was recorded under King County Auditor’s No. 20110316000655. Trial Exhibit 7 – admitted without objection. (CP 101, FF 26, TE 58-62).

The MERS Servicer Report obtained by Mr. Richards’ attorney prior to filing the lawsuit on June 3, 2011, stated that the securitized trust was the investor for Mr. Richards’ Note and that Aurora was the loan servicer. Trial Exhibit 12 – admitted over Defendants’ objection. (CP 102, FF 27, TE 182).

Plaintiffs filed this lawsuit and obtained an order restraining the sale on the Property in June 2011. (CP 102, FF 28).

In July 2012, servicing of Mr. Richards’ loan and the physical possession of Mr. Richards’ Note and Deed of Trust were transferred by Aurora to Nationstar Mortgage, LLC. (CP 102, FF 29).

On July 3, 2012, Aurora executed an Assignment of Deed of Trust assigning the interest in Mr. Richards’ Deed of Trust to Nationstar Mortgage, LLC. Trial Exhibit 9 – admitted without objection. (CP 102, FF 30, TE 64-65).

Mr. Richards and his wife sold their Residence in December 2013, paying the balance of the loan in full to Nationstar. The Note has been paid in full and satisfied, and the Deed of Trust reconveyed. (CP 102, FF 31).

III. ARGUMENT

A. Standard of Review.

“The trial court's decision following a bench trial is reviewed to determine whether the findings are supported by substantial evidence and whether those findings support the conclusions of law.” *In re Marriage of Akon*, 160 Wn. App. 48, 57, 248 P.3d 94 (2011) (citing *Dorsey v. King County*, 51 Wn. App. 664, 668–669, 754 P.2d 1255, review denied, 111 Wn.2d 1022 (1988)). The Court of Appeals does not hear or weigh evidence, find facts, or substitute its opinions for those of the trier of fact. *Quinn v. Cherry Lane Auto Plaze, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009). “Substantial evidence” is simply the quantum of evidence sufficient to persuade a rational, fair-minded person the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

“In determining the sufficiency of evidence, an appellate court need only consider evidence favorable to the prevailing party.” *In re Marriage of Akon*, 160 Wn. App. at 57 (citing *Bland v. Mentor*, 63 Wn.2d 150, 155, 385 P.2d 727 (1963)).

The substantial evidence standard will vary depending upon the quantum of proof required for the point at issue. Evidence that is substantial enough to support a preponderance of evidence burden may not support a clear, cogent and convincing evidence burden. When a challenged finding of fact is required to be proved at trial by clear cogent and convincing evidence, the Court of Appeals must incorporate that standard of proof in conducting a substantial evidence review. When such a finding is appealed, the question to be resolved is not merely whether there is substantial evidence to support it but whether there is substantial evidence in light of the “highly probable” test. *In re Welfare of Seago*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973).

In evaluating the persuasiveness of the evidence and the credibility of witnesses, appellate courts are required to defer to the trier of fact. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994). Credibility determinations are solely for the trier of fact and cannot be reviewed on appeal. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). Unchallenged findings of fact are treated as verities on appeal. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004); RAP 10.3(g).²

² Note that Plaintiffs have not challenged any particular finding of fact and thus the Trial Court’s Findings of Fact must be treated as verities on appeal.

Questions of law are reviewed *de novo*. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 879–880, 73 P.3d 369 (2003). A trial court’s decision must be affirmed on appeal if it is sustainable on any theory within the pleadings and proof. *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984); *Gross v. City of Lynnwood*, 90 Wn.2d 395, 401, 583 P.2d 1197 (1978).

B. The Lower Court correctly found that Plaintiffs’ CPA Claims Failed as a Matter of Law

To establish a Consumer Protection Act (“CPA”) claim, the Plaintiffs have the burden to show (1) an unfair act or deceptive act or practice, (2) occurring in trade, (3) affecting the public interest, (4) injury, and (5) a causal link between the act and resulting injury. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 784, 719 P.2d 531 (1986). If any of the elements is not established, a Consumer Protection Act claim cannot stand. *See Robinson v. Avis Rent A Car Sys., Inc.*, 106 Wn. App. 104, 114, 22 P.3d 818 (2001).

1. Plaintiffs CPA Claim Against Aurora Fails

Plaintiffs’ Consumer Protection Act claim against Aurora rests entirely on their erroneous argument that Aurora was not authorized to initiate foreclosure under the Deed of Trust Act. Plaintiffs argue that, despite its possession of the Note, Aurora was only a custodian and not a

beneficiary or “owner” as referenced in the language of the DTA and RCW 61.24.030(7)(a) specifically. This argument, however, was thoroughly analyzed and directly rejected in *Trujillo v. Northwest Trustee Services, Inc.*, 181 Wn. App. 484, 493-510, 326 P.3d 768 (2014)(rejecting argument that beneficiary must also prove that it is the “owner” in order to foreclose in analyzing RCW 61.24.030(7)(a)).

Tellingly, the Richards make no attempt to argue that their position is consistent with *Trujillo*, but simply reject *Trujillo* as alleged bad law for allegedly contradicting *Bain supra*. Notably, the argument they make to attempt to support this position, actually shows just the opposite. That is, the Richards’ actually quote from *Bain* that “[i]f the original lender [has] sold the loan, that purchaser would need to establish ownership of the loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions.” 175 Wn. 2d at 111 (emphasis added).

This holding in *Bain* is consistent with the long standing common law on the issue recognized in *Trujillo*:

The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument. See RCW 62.01.051. It is not necessary for the holder to first establish that he has some beneficial interest in the proceeds.

John Davis & Co. v. Cedar Glen No. Four, Inc., 75 Wn.2d 214, 222-23, 450 P.2d 166 (1969).

Further, with regard to the Richards' argument that Aurora's possession of the Note did not make it the "beneficiary" because Aurora was only holding the Note in a "custodial capacity," the Washington Supreme Court has made it clear that the physical holder of the note indorsed in blank is the "beneficiary" as defined under the Deed of Trust Act regardless of third party agreements:

A plain reading of the statute leads us to conclude that only the actual holder of the promissory note or other instrument evidencing the obligation may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property.

* * *

The legislature has set forth in great detail how nonjudicial foreclosures may proceed. We find no indication the legislature intended to allow the parties to vary these procedures by contract.

* * *

"Holder" with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer[.]

Bain 175 Wn. 2d at 89, 104, 107-8 (emphasis added), citing RCW 62A.3-205(b), RCW 62A.1-201(20) [now 21].

Multiple other Courts have also found that the key to being able to foreclose is being the "beneficiary," which is defined under RCW 61.24.005(2) "holder of the instrument," not a separately defined "owner."

See Rouse v. Wells Fargo, No. 3:13-cv-05706-RBL, ECF No. 25 (W.D. Wash. Oct. 2, 2013); *Corales v. Flagstar Bank, FSB*, 822 F. Supp. 2d 1102, 1107 (W.D. Wash. 2011); *Zalac v. CTX Mortg. Corp.*, 2013 WL 1990728, * 3 (W.D. Wash. 2013).³ Indeed, power to act under the DTA is pinned to the “beneficiary,” not the undefined “owner.”⁴

In light of all these provisions, it would make no sense for the Legislature to create a scenario in which the “beneficiary,” despite being the “holder” of the promissory note and entitled to enforce it, nevertheless was not the proper person to initiate nonjudicial foreclosure. *Trujillo*, 181 Wn. App. at 510. If the Legislature intended to prevent the holder entitled to enforce the note from proceeding with nonjudicial foreclosure it would have said so explicitly. *Id.* The most obvious way to do so would be to amend the definition of “beneficiary,” but the Legislature chose not to do so in 2009 when it enacted RCW 61.24.030(7)(a), and it has not done so in response to the multiple decisions cited *supra* or this Court’s decision in *Trujillo*.⁵

³ Not a single published or unpublished decision has gone along with Plaintiffs’ current argument.

⁴ It is the “beneficiary” that may appoint a successor trustee. RCW 61.24.010(2). The “beneficiary” must declare a default. RCW 61.2.030(8)(c). The “beneficiary” must exercise due diligence to contact the borrower. RCW 61.24.031(5). The “beneficiary” must produce certain documents and attend mediation if requested. RCW 61.24.163(5). The trustee owes a duty of good faith to the “beneficiary.” RCW 61.24.010(4).

⁵ By contrast, when the Legislature disagrees with the Court of Appeals’ ruling, it tends to move quickly to clarify the language, as it did in 2013 with SB 5541 to clarify the

Lastly, no evidence or testimony provided to the Trial Court showed any indication that Aurora was not attempting to comply with the requirements of the DTA. Acts performed in good faith under an arguable interpretation of existing law do not constitute unfair or deceptive conduct in violation of the consumer protection act. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 155, 930 P.2d 288, 299 (1997). Here, given that multiple courts have agreed with Aurora's interpretation of the DTA that possession of the Note endorsed in blank authorized it to proceed with foreclosure, including this Court in *Trujillo*, Aurora's interpretation is better than just arguable, it is eminently reasonable. As such, even if this Court somehow agrees with Plaintiffs' proposed reading of the DTA, Plaintiffs' CPA claim fails for this reason alone.

As the holder of the Note and the beneficiary of the Deed of Trust, Aurora was entitled to initiate foreclosure and to appoint a successor trustee. (FF 13-15); RCW 61.24.005(2), 61.24.010(2). Thus, as a matter of law, Plaintiff cannot show Aurora engaged in an unfair or deceptive act or practice as required for a Consumer Protection Act claim.

Plaintiffs also cannot meet the injury element of a CPA claim because

language of RCW 6.23.010 following this Court's decision in *Summerhill Village Homeowners Ass'n v. Roughley*, 166 Wn. App. 625, 270 P.3d 639, 289 P.3d 645 (2012). SB 5541 (2013).

Plaintiffs failed to establish that they were injured by any alleged conduct on the part of Aurora. The Property was not foreclosed, and Plaintiffs sold the property themselves in December 2013. (FF 31). In the meantime, Plaintiffs made no payments to Aurora or Nationstar for over three years. While it is true that the missed payments were recouped when the Richards sold the Property and paid off the Note, it is also true that the Richards' breach of the terms of the Note allowed them to use those obligated funds in other ways that provided them with substantially more benefit than any alleged injury caused by Aurora.

Additionally, the purposes of the Deed of Trust Act have been frustrated by Plaintiffs' actions in this case, as the process has not been efficient or inexpensive, there is no evidence of a wrongful foreclosure that should have been prevented, and Plaintiffs used this action to delay foreclosure in order to sell the Property at a substantial profit to themselves rather than paying their mortgage or rightfully opposing a fully warranted foreclosure.⁶ Plaintiffs have not been injured here and thus they cannot support a CPA claim for this reason as well.

⁶ "Washington's deed of trust act should be construed to further three basic objectives. First, the nonjudicial foreclosure process should remain efficient and inexpensive. Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, the process should promote the stability of land titles." *Bain*, 175 Wn.2d at 94 (internal citations/quotations omitted).

Plaintiffs also cannot establish the fifth element of a CPA claim: a causal link between Aurora's actions and an alleged injury. To establish a Consumer Protection Act violation, a plaintiff must show a causal link between the plaintiff's injury and the alleged unfair or deceptive act. *See Leingang*, 131 Wn.2d at 149. The causal link element may be established by proof that the plaintiff relied upon the deceptive or unfair acts of the defendant. *See Robinson v. Avis Rent A Car Sys., Inc.*, 106 Wn. App. 104, 119, 22 P.3d 818 (2001).

As set forth above, there were no unfair or deceptive acts committed by Aurora, and Plaintiffs have suffered no damages. Specifically, Plaintiffs complain that Aurora misrepresented itself as the holder of the Note. This was not a misrepresentation, thus no damages could result from that correct representation. (FF 13-15). Further, the cost of instituting a CPA action does not, itself, constitute injury under the CPA. *See Demopolis v. Galvin*, 57 Wn. App. 47, 786 P.2d 804 (1990) (cost of instituting a CPA action to challenge the underlying loan agreement could not, itself, constitute injury); *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 564, 825 P.2d 714 (1992)(a consumer's "mere involvement in having to defend against [Sign-O-Lite Signs] collection action and having to prosecute a CPA counterclaim is insufficient to show injury to her business or property"). Plaintiffs' CPA claim against Aurora fails as a matter of law.

2. *Plaintiffs Cannot Support a CPA Claim Against MERS Because Plaintiffs Were Not Damaged or Misled by MERS*

Plaintiffs' CPA claim against MERS is based upon their contention that MERS falsely claimed that it owns a beneficial interest in the Deed of Trust. At the outset, the Washington Supreme Court has stated that such an assertion by MERS is not a per se violation of the CPA. *Bain*, 175 Wn.2d at 117. Thus, Plaintiffs must prove all elements of a CPA claim in order to prevail. Here they cannot do so.

Plaintiffs failed to put forth any evidence that they were damaged by MERS's statement that it was a beneficiary under the Deed of Trust as the Deed of Trust also makes clear that MERS was acting only as the nominee (agent) for the Lender and its successors and assigns. (TE 10). The Assignment of Deed of Trust provides explicitly that MERS assigned the deed of trust "as nominee for Lehman Brothers Bank, FSB, a Federal Savings Bank its successors and assigns[,]" not on its own behalf. (TE 54). As the holder of the Note indorsed in blank, Aurora was Lehman Brothers Bank's successor beneficiary of the Deed of Trust as a matter of law as provided by RCW 62A.3-301, 62A.1-201(b)(5), and 62A.3-205(b). The Assignment of Deed of Trust provided public notice that MERS no longer had any interest in the Deed of Trust, and that Aurora was the current beneficiary. This information was accurate. The Assignment is

not even required under the Deed of Trust Act, and is itself ineffective to confer beneficiary status, as that is exclusively reserved for the holder of the Note as is discussed in *Bain*. Regardless, Plaintiffs did not put forth any evidence that they detrimentally relied on MERS's assignment, or that the assignment had any effect on them whatsoever. Accordingly, Plaintiffs did not show and could not have shown that they were damaged by any action or representation by MERS.

Plaintiffs opening brief argues that they were "misled" by MERS' representations. However, MERS had already been removed as beneficiary of record in King County before foreclosure was initiated. *Compare* TE 54-55 (Assignment of Deed of Trust from MERS to Aurora recorded January 16, 2011) with TE 34-53 (Notice of Default mailed February 11, 2011) and TE 58-62 (Notice of Trustee's Sale recorded March 16, 2011). Mr. Richards testified at trial, when asked about the damages he was alleging, that the damages all arose after the Notice of Trustee's Sale was recorded:

- Q.** Just confirming that the injury you're alleging here all arise out of this foreclosure process and this lawsuit. There's not separate damages.
- A.** It was the schedule to go to sale that started all of this.
- Q.** The what?
- A.** It was our house going to the foreclosure sale that started all of this, yes.

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The foreclosure proceedings which form the basis of this lawsuit were instituted after MERS had no further role with respect to Plaintiffs' Deed of Trust. Plaintiffs provided no evidence at trial that they relied upon MERS's actions. MERS did not cause Plaintiffs to default. Plaintiffs failed to show that they were damaged by MERS and did not put forth any evidence to show any connection between MERS and any alleged damages. MERS's role in this matter had no effect on Plaintiffs whatsoever. Accordingly, Plaintiffs' CPA claim against MERS failed as a matter of law and was properly dismissed at trial.

C. The Trial Court correctly found that Plaintiffs' Misrepresentation Claims Failed as a Matter of Law

Plaintiffs also pursued both intentional misrepresentation (fraud) and negligent misrepresentation claim against Aurora and MERS at trial. Each of these claims required all elements thereof to be plead with particularity and to be proven by clear cogent and convincing evidence. See e.g. *Baddely v. Seek*, 138 Wn. App. 333, 338 (2007), *Sigman v. Stevens-Norton, Inc.* 70 Wn.2d 915, 920 (1967); *Stiley v. Block*, 130 Wn.2d 486 (1996). Plaintiffs failed on both fronts.

1. Plaintiffs' Fraud Claim Fails

To prevail on their fraud claim, Plaintiffs must plead and prove all nine elements:

The nine fraud elements are: (1) a representation of an existing fact; (2) the fact is material; (3) the fact is false; (4) the defendant knew the fact was false or was ignorant of its truth; (5) the defendant intended the plaintiff to act on the fact; (6) the plaintiff did not know the fact was false; (7) the plaintiff relied on the truth of the fact; (8) the plaintiff had a right to rely on it; and (9) the plaintiff had damages.

Baddely, 138 Wn. App. at 338-39.

Plaintiffs did not plead these elements as required (*see* CP 18-19), nor did they put forth evidence sufficient to support a finding of each of these elements at trial. (CP 105). On appeal, Plaintiffs have again failed to identify how the evidence put forth at trial could support a fraud claim, let alone a finding of error when the Trial Court heard all evidence and dismissed the fraud claim. *In re Marriage of Akon*, 160 Wn. App. at 57 (“In determining the sufficiency of evidence, an appellate court need only consider evidence favorable to the prevailing party”), *Bland*, 63 Wn.2d at 155. Plaintiffs certainly do not come close to citing evidence sufficient to meet the “highly probable” standard required on appeal. *In re Welfare of Sego*, 82 Wn.2d at 739.

Plaintiffs’ fraud argument on appeal addresses only the first four elements by arguing that Aurora was never the “beneficiary” as defined by Washington law, and thus its representations to the contrary were intentionally false. The evidence at trial and the multiple court decisions

cited above, however, show just the opposite. Aurora was the “beneficiary” as defined by Washington law (*see e.g. Bain, Trujillo supra*), and even if it is somehow now determined otherwise, Aurora cannot be characterized as making intentionally false representations as to its status as the “beneficiary” when its actions were entirely consistent with multiple courts’ review of the issue. And even if this Court were to somehow find that Aurora made an intentionally false representation, Plaintiffs have failed to identify what “clear, cogent, and convincing,” evidence they put forth at trial that would require the trial court to have found that they met all nine elements of a fraud claim. Plaintiffs’ fraud claim against Aurora was properly dismissed.

With regard to MERS, the Trial Court found that “Plaintiffs failed to show an injury caused by MERS or a causal link between any act of MERS resulting in injury to the Plaintiffs.” (CP 104, CL 7). Further, the Trial Court found that Plaintiffs had otherwise failed to put forth clear cogent and convincing evidence of each of the elements of fraud. (CP 105, CL 10). Plaintiffs never attempted at trial, nor have they attempted in this appeal to identify how they met each of the elements of a fraud claim against MERS, because they were not injured by MERS, and they never relied on anything that MERS did or said to their detriment. The Trial

Court's dismissal of Plaintiffs' fraud claim against MERS should be affirmed.

2. *Plaintiffs' Negligent Misrepresentation Claim Also Fails.*

The elements of negligent misrepresentation are as follows:

(1) the defendant supplied false information; (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in business transactions; (3) the defendant was negligent in obtaining or communicating false information; (4) the plaintiff relied on the false information supplied by the defendant; (5) the plaintiff's reliance on the false information supplied by the defendant was justified (that is, that reliance was reasonable under the surrounding circumstances); and (6) the false information was the proximate cause of damages to the plaintiff.

Lawyers Title Ins. Corp. v. Baik, 147 Wn.2d 536, 545 (2002) (internal citation omitted). Again, all elements must be proven by clear and convincing evidence. *Id.*

Plaintiffs did not plead these elements as required (*see* CP 18-19), nor did they put forth evidence sufficient to support a finding of negligent misrepresentation at trial against Aurora or MERS, or that they relied upon any statement by Aurora or MERS to their detriment. (CP 105, CL 12). For the same reasons that Plaintiffs' fraud claim failed, Plaintiffs' negligent misrepresentation claim fails. Aurora cannot be considered negligent when it acted consistent with the reasoning set forth in *Bain* and *Trujillo*, and Plaintiffs failed to identify any way upon which they relied

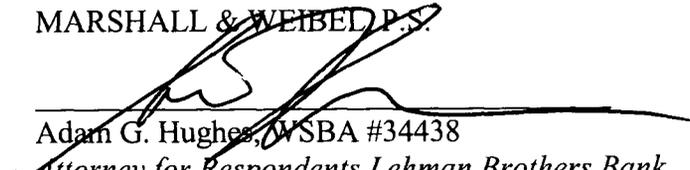
on information provided by Aurora or MERS to their detriment. The Trial Court properly dismissed Plaintiffs' negligent misrepresentation claims against Aurora and MERS and its decision should be affirmed.

IV. CONCLUSION

For the foregoing reasons, the Trial Court correctly found that Plaintiffs failed to put forth evidence sufficient to prove their asserted CPA and misrepresentation claims against Aurora and MERS. Aurora and MERS thus respectfully request that this Court affirm the Trial Court's defense verdict.

Respectfully submitted this 12th day of June, 2015.

MARSHALL & WEIBEL P.S.



Adam G. Hughes, WSBA #34438
*Attorney for Respondents Lehman Brothers Bank,
FSB, Aurora Loan Services, LLC, and Mortgage
Electronic Registration Systems, Inc.*