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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY *Cm*
DEPUTY

No. 431335-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Respondent,

v.

KATHLEEN AND RONALD STEINMANN,

Appellants.

BRIEF OF RESPONDENT

Tracy J. Frazier, WSBA #43986
Rochelle L. Stanford, WSBA #38690
PITE DUNCAN, LLP
621 SW Morrison St., Suite 425
Portland, OR 97205
503-222-2026
Attorneys for Respondent Federal National
Mortgage Association

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INTRODUCTION

This is an appeal of a post-foreclosure eviction matter. After defaulting on their residential loan, Appellants Kathleen and Ronald Steinmanns' ("the Steinmanns") home was sold to Respondent Federal National Mortgage Association ("Fannie Mae") at a trustee's sale. Washington law provides that Fannie Mae as the purchaser was entitled to possession of the property twenty (20) days after the trustee's sale. When the Steinmanns refused to vacate the premises Fannie Mae initiated this unlawful detainer action to have the Steinmanns evicted. The trial court granted Fannie Mae's motion for summary judgment and subsequently issued an order for a writ of restitution. The Steinmanns then filed this appeal. The foundation of the Steinmann's appeal is that the trial court failed to find a genuine issue of material fact regarding the propriety of the trustee's sale. Their brief is largely comprised of issues that were not raised before the trial court and are not preserved for appeal.

RESTATEMENT OF THE ISSUES

1. Whether the Steinmanns waived their right to contest the foreclosure sale by failing to enjoin the sale under RCW 61.24.130?
2. Whether the trial court properly found that Fannie Mae was entitled to possession of the property at issue?

3. Whether Fannie Mae is entitled to attorney's fees and costs?

RESTATEMENT OF THE CASE

In 2008, the Steinmanns borrowed money from IndyMac Bank, F.S.B. ("IndyMac"), secured by a deed of trust on their property in Clark County, Washington. Clerk's Papers ("CP") at 65. After the Steinmanns defaulted on the loan obligation, IndyMac began the process of nonjudicially foreclosing its interest in the property. The Steinmanns were notified of their default and of the trustee's sale, including their right to enjoin the sale for any reason. CP at 114, 135. Specifically, they were provided with a notice of sale that stated "Anyone 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 same 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." CP at 135. They also were informed that their right to occupy the property would terminate on the 20th day following the sale. CP at 135.

After defaulting on their loan, the Steinmanns assert they applied for a loan modification with IndyMac. CP at 114. The trustee's sale was postponed multiple times in order to allow for a trial

modification. CP at 123-125. In September 2010, the Steinmanns' modification application was denied and they were informed of this by mail. CP at 115, 138. As the postponements had caused the sale date to be extended beyond 120 days from the original notice of sale, the trustee issued a notice of discontinuance and then a new notice of default. CP at 125, 127.

The new notice of trustee's sale was recorded on February 25, 2011, with the Clark County Auditor, and duly served and published. CP at 127-29. The Steinmanns did not sue to restrain the foreclosure sale and did not make payments to reinstate their loan. App. Am. Br. at 5; CP at 117. Instead, they allege that they continued to seek a loan modification and contacted the trustee directly to request that the trustee postpone the sale. CP at 116. On June 24, 2011, Fannie Mae purchased the property at the trustee's sale. CP at 86. The trustee's deed upon sale ("TDUS") was recorded July 12, 2011. CP at 86. At the time of sale, the Steinmanns owed more than \$30,000 on their mortgage obligation. CP at 128.

When the Steinmanns failed to vacate after the sale, Fannie Mae issued a notice to vacate. CP at 8-12. Fannie Mae sued for unlawful detainer based upon the Steinmann's continued refusal to

relinquish the property. CP at 1. The Steinmanns answered and raised several affirmative defenses. CP at 9, 16, and 21.¹ Primarily, the Steinmanns argue that Fannie Mae is not entitled to possession of the premises because the nonjudicial foreclosure sale was improper, rendering the TDUS void. CP at 104. They posit that they raised material issues of fact precluding summary judgment and, consequently, that Fannie Mae does not have a right to evict them.

In its motion for summary judgment, Fannie Mae argued that there was no genuine issue of material fact for trial. Fannie Mae articulated that the Steinmanns' affirmative defense to eviction that the sale was invalid failed because under the Deed of Trust Act they had waived their right to challenge the finality of the foreclosure by failing to enjoin the sale before it occurred. CP at 95. The Steinmanns countered that their case falls within the narrow exception to this statutory provision, as established by *Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985). CP at 102. The trial court granted Fannie Mae's motion for summary judgment. CP at 174.

¹ The Steinmanns filed a pro se answer, then by and through their attorney filed an "Affidavit in Contravention of Plaintiff's Motion for Writ of Restitution" during the show cause hearing. CP at 16, 21.

SUMMARY OF ARGUMENT

The Steinmanns' affirmative defense to the eviction is that the sale was improper. But the record shows that the Steinmanns did not attempt to legally restrain the trustee's sale under chapter 61.24 of the Revised Code of Washington. By failing to timely seek the remedies provided by the Washington Deed of Trust Act, the Steinmanns waived this affirmative defense. Even if not waived, their arguments fail on the merits to present a question of material fact for trial, rendering summary judgment appropriate. Moreover, the majority of the issues and assignments of error that the Steinmanns make on appeal were not before the trial court and were not preserved on appeal.

ARGUMENT

A. Standard of Review.

A review of a trial court's summary judgment grant is de novo. *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 65, 837 P.2d 618 (1992). Summary judgment is proper where no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law. CR 56(c); *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 630, 71 P.3d 644 (2003).

Findings of fact are reviewed for substantial evidence. *Snyder v. Haynes*, 152 Wash. App. 809, 824, 951 P.2d 291 (1998). “The substantial evidence standard is deferential and requires the appellate court to view all evidence and inferences in the light more favorable to the prevailing party.” *Lewis v. Dep’t of Licensing*, 157 Wn.2d 446, 468, 139 P.3d 1078 (2006). An appellate court may affirm a correct trial court judgment on any theory, even if the trial court reached its result on some improper basis. *Olson v. Scholes*, 17 Wn.App. 383, 391, 563 P.2d 1275 (1977).

B. The Trial Court Properly Granted Summary Judgment to Fannie Mae as the Steinmanns Failed to Establish There Was Any Genuine Issue of Fact with Regard to the Unlawful Detainer.

The Steinmanns failed to raise any genuine issue of material fact with regard to the elements of Fannie Mae’s unlawful detainer action. The court’s jurisdiction in an unlawful detainer action is limited to determining the right to possession of the property. *Heaverlo v. Keico Indus., Inc.*, 80 Wn. App. 724, 728, 911 P. 2d 406 (1996). If it appears that the landlord has the right to be restored to immediate possession of the property, the court must issue a writ of restitution. RCW 59.18.380. Because title affects the right to possession, defenses related title can be heard. However, by failing to

seek the remedies afforded by RCW 61.24, the Steinmanns waived their right to assert this defense.

The only argument that the Steinmanns made against their eviction was that Fannie Mae does not have the right to evict them because the trustee's sale did not foreclose their interest in the property. CP at 106. The Steinmanns, however, are barred from contesting the validity of the trustee's sale as they failed to enjoin the sale before it occurred as required by Washington law. *CHP v. Boyles*, 138 Wn.App. 131, 137, 157 P.3d 415 (2007); see *Brown v. Household Realty Corp.*, 146 Wn.App. 157, 160, 189 P.3d 233 (2008). Because the Steinmanns are precluded from raising any issues of material fact regarding the validity of the TDUS, Fannie Mae is entitled to possession of the property as a matter of law.

C. The Steinmanns Failed to Enjoin the Trustee's Sale, Thus Barring Their Challenges to the Validity or Finality of the Sale.

A proper foreclosure action extinguishes the debt and transfers title to the beneficiary or to the successful bidder at a public foreclosure sale. *Albice v. Premier Mortg. Servs. of Wash.*, 157 Wn.App. 912, 920, 239 P.3d 1148 (2010). Any enumerated entity may restrain a trustee's sale on any proper found. *Id.* If a borrower does

not seek an injunction under RCW 61.24.130 to halt a foreclosure sale, the borrower waives any claims that could invalidate the sale if the elements of waiver are met. Under this doctrine, a waiver occurs when a party (1) receives notice of the right to enjoin the sale; (2) has actual or constructive knowledge of a defense to foreclosure before the sale; and, (3) fails to bring an action to enjoin the sale. *Brown*, 146 Wn.App. at 163.

The Steinmanns have not raised a material issue of fact as to any of the three elements of the waiver doctrine. To begin, the Steinmanns do not dispute that they failed to sue to restrain or enjoin the sale, which is the third element. With regard to the first waiver element, the Steinmanns admit that they received all presale notices of the sale and foreclosure. CP at 114-15. The record shows the notices conformed to the requirements of RCW 61.24.040 and informed them of their right to enjoin the sale. CP at 133-36. The language in these notices is statutory under the Deed of Trust Act. RCW 61.24.040(f) ("The notice shall be in substantially the following form[.]"). The Washington Court of Appeals has repeatedly held that the statutory notices of foreclosure and trustee's sale will usually be sufficient. *Country Express Stores, Inc. v. Sims*, 87 Wn.App. 741, 751, 943 P.2d 374 (1997) (citing *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn.App.

108, 114, 752 P.2d 385 (1988). Consequently, there is no genuine issue of material fact regarding the first and third elements of the waiver doctrine.

The second element of the waiver doctrine has similarly been established; the Steinmanns had actual or constructive knowledge of the facts that formed the basis of a claim which could invalidate a foreclosure sale.² A person is deemed to have constructive knowledge of a fact if a person exercising reasonable care could have known that fact. *Denaxas v. Sandstone Court of Bellevue*, 148 Wn.2d 654, 667, 63 P.3d 125 (2003). Generally only procedural defenses that arise during the sale itself (as opposed to substantive defenses) can form a basis for setting aside a sale, as there is no way for a borrower to be aware of these issues until the sale has taken place. *Plein v. Lackey*, 149 Wn.2d 214, 225, 7 P.3d 1061 (2003). For instance, courts have set aside a completed sale if during the sale the trustee sells the property for grossly below its worth, fails to accept a bid, or continues with the sale despite the borrowers curing the default. *Albice*, 157 Wn.App. at 921. These procedural defects must not be merely technical in

² By stating this standard Fannie Mae in no way believes that any of the Steinmanns' articulated bases for setting aside the sale are of merit, even if they did not waive them.

nature-rather, the defects must have unfairly harmed or prejudiced the borrowers. *Id.*

The Steinmanns have not raised an intelligible allegation of irregularity with the foreclosure sale process that could invalidate the completed sale. Instead, the Steinmanns believe the sale should be set aside because of substantive issues that they were aware of long before the sale date. Specifically, the Steinmanns state the sale process was “confusing” to nonlawyers, they were unsure as to who the beneficiary was, and they were denied the opportunity to see the original note and deed of trust. The record demonstrates that the Steinmanns knew of all of the issues prior to the sale’s occurrence with ample opportunity to restrain the sale. Yet, instead of enjoining the sale, they contend that the trustee itself was required to voluntarily continue the sale date. This argument is untenable. Thus, the second element of the waiver doctrine is established and the Steinmanns’ failure to enjoin the sale now precludes their post-sale challenge on these known bases.

D. The Trial Court Correctly Declined to Rule That There Was a Factual Basis for Setting Aside the Sale.

The Steinmanns urge this Court to engage in an inquiry concerning the proper holder of the note and seek to have this Court

void a trustee's sale in a post-sale challenge. As has been established, the Steinmanns have waived their opportunity to set aside the foreclosure sale. Fannie Mae argues that nothing before the Court warrants this extraordinary relief in derogation of the Washington Trust Deed Act. Even if the Court does not find that the Steinmanns waived their opportunity to challenge the sale, however they have still failed to show any valid basis for setting aside the sale. Thus, the ruling by the trial court should stand.

1. The Steinmanns Fail to Raise a Material Issue of Fact Regarding the Trustee's Conduct.

The Steinmanns assign error to the trial court's failure to find that the trustee had an actual conflict of interest, resulting in a breach of its duties to the parties. The only proof the Steinmanns offered to the trial court of a conflict of interest was an inadmissible hearsay statement in Mrs. Steinmann's affidavit alleging that an employee of the trustee told her that they work for the bank. CP at 116-17. Even if this contention were true, it would still not be a basis for setting aside the sale because they allege they had this conversation with the trustee a month before the sale date, but they did not enjoin the sale.

2. The Steinmanns Failed to Offer Admissible Evidence that the Trustee Breached its Duty of Good Faith.

The Steinmanns offered a declaration of Kathleen Steinmann in support of their argument against summary judgment that stated that an employee for the trustee had told her, to summarize, that they could not postpone the sale without permission from the foreclosing party. CP at 116-17. Fannie Mae objected to this statement as hearsay without an exception and moved to strike this portion of the declaration as inadmissible. CP at 169. The trial court determined that the statement was admissible, but provided no reasoning for its ruling. Report of Proceedings (“RP”) at 15. Instead the judge concluded that the hearsay statement “appears to be properly before me.” RP at 15.

The trial court erred by finding this statement admissible. Declarations offered in opposition to a motion for summary judgment “shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” CR 56(e).

When deciding a summary judgment motion, a court cannot consider inadmissible hearsay statements. *Dunlap v. Wayne*, 105 Wn.App. 529, 535, 716 P.2d 842 (1986); *Albright v. State Dept. of*

Soc. Health Servs., 65 Wn.App. 763, 770, 829 P.2d 1114 (1992) (1992) (“[H]earsay ‘does not qualify as evidence since a party must provide affirmative factual evidence to oppose a motion for summary judgment.’”) (citing *Dunlap*, 105 Wn.App. at 536). The Washington Rules of Evidence define hearsay as an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). Hearsay is inadmissible unless the statement falls under a recognized exception to the general rule. ER 801, 022.

While “[a] ruling on a motion to strike is discretionary with the trial court,” *King County Fire Prot. Dist. No. 16 v. Hous. Authority*, 123 Wn.2d 819, 826 P.2d 516 (1994), the trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable reasons. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 107, 864 P.2d 937 (1994).

By deeming this hearsay statement admissible, the trial court abused its discretion. The trial court presented no tenable reason why this hearsay statement would be admissible, particularly given the weight of authority offered against admission. CP at 170.

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3. Even If This Hearsay Statement Was Properly Considered, it Fails to Prove a Breach of the Trustee's Duty of Good Faith.

The Steinmanns fail to raise a genuine issue of material fact that the trustee breached its duty of good faith to the parties. To begin, pursuant to Washington's Deed of Trust Act, a trustee is a neutral third party as between the borrower and the beneficiary. *Fawter v. Quality Loan Service Corp. of Washington*, 707 F.Supp.2d 1115, 1121 (W.D. Wash. 2010) (citing 18 William B. Stoebuck & John W. Weaver, *Washington Practice, Real Estate: Transactions* §20.1 at 403 (2d ed. 2004); John A. Gose, *The Trust Deed Act in Washington*, 41 Wash. L. Rev. 94, 96 (1966)). The legislature has established that the trustee has a duty to act in good faith, and does not have a special fiduciary duty to the borrower. RCW 61.24.010(3), (4).

The Steinmanns cite repeatedly to *Meyers Way v. University Savings Bank*, 80 Wn.App. 655, 665-66, 910 P.2d 1308 (1996), a pre-2008 case, for the proposition that a trustee owes an "exceedingly high" fiduciary duty because there is not judicial oversight. Even under a defunct standard, that case also establishes, quite clearly, that this duty is owed to both the lender and the borrower and does not "prevent a trustee from serving simultaneously as the creditor's

attorney, agent, employee or subsidiary.” *Id.* at 666 (citing RCW 61.24.020). Only an actual conflict of interest can precipitate a breach of fiduciary duty. *Id.* at 667. Furthermore, as a matter of law, a trustee “is not required to make sure that the borrowers were vigilantly guarding their rights.” *Id.* at 668. In *Meyers*, the court upheld an indemnity agreement between the lender and the trustee and stated that “[a] completed foreclosure is bound to result in an unhappy grantor, and often a grantor who may perceive, as in this case, breaches of fiduciary duty which ultimately prove not to have been breaches.” *Id.* at 667.

This same issue was presented, and rejected, in *Moon v. GMAC*, 2009 WL 3185596 (W.D. Wash. Oct. 2, 2009). There, the borrowers claimed that the trustee informed them it could not “postpone the sale without the consent of the lender GMAC.” *Id.* at *10. The district court found that the borrowers had failed to explain how this statement was “inaccurate, misleading, or a breach of fiduciary duty.” *Id.* In fact, the court observed that the trust deed act specifically states that a trustee “has no obligation to, but may” continue a sale on its own accord. Moreover, the court observed that not “all trustees of all deeds of trust have authority to postpone a foreclosure sale without the consent of the beneficiary.” *Id.*

(distinguishing the facts from those in *Cox*, 103 Wn.2d at 390, on the basis that in *Cox* the trustee was representing the beneficiary in a separate law suit regarding the debt, and that this posed an actual conflict of interest). The Steinmanns have failed to present any authority that a trustee under the facts presented in this case could or should elect to postpone a trustee's sale.

Here, the record establishes that the Steinmanns were denied a permanent loan modification under HAMP. CP at 116. They were informed of this repeatedly, starting in September 2010. CP at 115-17, 134-35, 138-46. They protested the denial and requested that the trustee reschedule the sale, but did not seek an injunction. CP at 147 ("I am pleading with you to resolve this matter privately and civilly as to avoid burdening our courts with this matter. If I have to, I will see you in court. This is not an idle threat.") At the time of the sale, the Steinmanns were over \$31,000 in arrears. CP at 130. The trustee did not breach its duties to the parties by declining to continue the sale.

4. The Steinmanns' Other Factual Bases for Setting Aside the Sale Also Fail.

The substance of the Steinmann's other arguments for setting aside the foreclosure sale also fail. The fact that the Steinmanns were

confused, did not hire a Washington attorney prior to the sale, were “not familiar with the statutes of the State of Washington,” or “never fully understood the various players” are not mistakes or defenses that can be imputed on Fannie Mae. CP at 98-99. In fact, such arguments were raised and summarily rejected in *Brown*, where the court of appeals held that for waiver to occur “a person is not required to have knowledge of the existence of a legal cause of action, but merely knowledge of the facts necessary to establish the elements of a claim” and that the failure or “inability to retain counsel . . . is not an excuse to the waiver doctrine.” *Id.* (citing *Doutchette v. Bethel Sch. Dist.*, 117 Wn.2d 805, 814, 818 P.2d 1362 (1991)). Here, the Steinmanns had actual or constructive knowledge of all of the allegations they believe invalidate the sale.

E. The Steinmanns Claim No Burden for Proving Their Own Affirmative Defenses.

The Steinmanns argue that it was Fannie Mae’s affirmative duty to prove that the foreclosure sale was valid. This is incorrect. In Washington, the party raising an affirmative defense has the burden of proving the defense elements. *August v. U.S. Bancorp*, 146 Wn.App. 328, 343, 190 P.3d 86 (2008). Therefore, even if the Steinmanns could

raise that the sale was invalid as an affirmative defense, it is their burden to prove.

In particular, the Steinmanns instead argue that because Fannie Mae did not, as part of its eviction action, offer evidence as to who the holder of the note and deed of trust was, they failed to prove who was entitled to complete the foreclosure. App. Am. Br. at 27. They state,

Since there was never any effort by [Fannie Mae] or [IndyMac] or any of the related agencies to prove to either the Trustee or the [Steinmanns] that they were actually the holders of the real Promissory Note, then there should not have been an Order Granting Respondent's Motion for Summary Judgment because there is a material issue of fact. Did [Fannie Mae] or the foreclosing entity really have the Promissory Note in question? Was it a holder? Since that answer has never been satisfied either by RCW 61.24.030(7), or by the demand under RCW 62A.3-302 et seq., then there were clearly material issues of fact that were unresolved.

App. Am. Br. at 28.

Fannie Mae's right to possess the property rests upon a recorded TDUS, presented as evidence before the trial court. CP at 63, 86. The trustee's deed recites that the sale was conducted in compliance with the Act. These recitals are prima facie evidence of compliance and conclusive evidence in favor of bona fide purchasers and encumbrancers for value. RCW 61.24.040(7). A

party that purchases property at a foreclosure sale is not required to produce the original note and deed of trust as evidence to evict, as the Steinmanns argue.

F. The Steinmanns' Brief Contains Additional Arguments on a Number of Issues that Were Not Addressed in the Order Subject to this Appeal.

With limited exception not found here, arguments not raised in the trial court will not be considered upon appeal. RAP 2.5(a). The Steinmanns' brief is largely comprised of arguments and assignments of error that were not before the trial court during the unlawful detainer and not raised in summary judgment. As these arguments were not presented to the trial court they are not properly before this Court on appeal.

For instance, the Steinmanns assign error to the trial court's failure to find genuine issues of material fact regarding the "breach of covenant of good faith and fair dealing in the dual tracking of loan modification and foreclosure [sic]" and the trial court's failure to determine the "entity actually entitled to complete the foreclosure." App. Am. Br. at 1, 17-24. Moreover, they contend that RCW 61.24.010, as amended in 2009, violates Washington's Separation of Power Doctrine. App. Am. Br. at 15.

These arguments were never presented to the trial court and cannot be raised for the first time in an appellate brief.

G. Fannie Mae Is Entitled to Its Attorney's Fees and Costs.

Fannie Mae requests fees on appeal under RAP 18.1, RCW 59.18.290(2), and the deed of trust. RAP 18.1 permits recovery if applicable law grants to a party the right to recover. A contract provision for attorney fees is a recognized right to recover in Washington. The deed of trust includes a provision awarding attorney fees to the prevailing party. Further, RCW 59.18.290(2) allows an award of attorney's fees to a landlord who prevails in an unlawful detainer action. *Tippie v. Delisle*, 55 Wn.App. 417, 419-20 n.3, 777 P. 2d 1080 (1989). Fannie Mae is entitled to its fees and costs.

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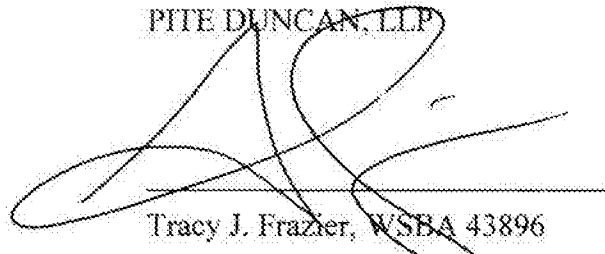
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CONCLUSION

For the reasons set forth above this Court should affirm the trial court's entry of judgment in favor of Fannie Mae.

RESPECTFULLY SUBMITTED this 10th day of September, 2012.

PITE DUNCAN, LLP

A large, stylized handwritten signature in black ink, appearing to be 'Tracy J. Frazier', is written over a horizontal line. The signature is highly cursive and loops around the line.

Tracy J. Frazier, WSBA 43896

Rochelle L. Stanford, WSBA 38690

621 SW Morrison St, Ste 425

Portland, OR 97205

Attorneys for Respondent

Federal National Mortgage
Association

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STATE OF WASHINGTON

DECLARATION OF SERVICE

Ch
~~DEPUTY~~

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 10, 2012, I arranged for service of **BRIEF OF RESPONDENT**, to the court and to the parties to this action as follows:

Office of the Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402 Fax: (253) 593-2970	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail
Brian H. Wolfe, Esq. Brian H. Wolfe, P.C. 105 West Evergreen Boulevard Vancouver, WA 98660 Attorney for Appellants Ronald Steinmann and Kathleen Steinmann	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Federal Express <input type="checkbox"/> E-Mail

DATED at Portland, Oregon on this 10th day of September, 2012.



Stephanie L. Hyde