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STATE OF WASHINGTON

Supreme Court No. 92135-1

Court of Appeals No. 71724-3-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

MARISA BAVAND

Appellant/Plaintiff,
v.

CHASE HOME FINANCE LLC; a Delaware limited liability company; FLAGSTAR BANK FSB, a federal savings bank; FEDERAL NATIONAL MORTGAGE ASSOCIATION, a United States government sponsored enterprise; MORTAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation; NORTHWEST TRUSTEE SERVICES, INC. a Washington corporation, DOE DEFENDANTS 1-10,

Respondents/Defendants.

PETITION FOR REVIEW

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I. Identity of Petitioner.

The Petitioner is MARISA BAVAND (hereinafter "Ms. Bavand"), who was the Plaintiff in the original action under Snohomish County Superior Court Case No. 12-2-07395-1 and the Appellant in Court of Appeals, Division I, Case No. 71724-3-I.

II. Court of Appeals Decision.

Ms. Bavand seeks review of the unpublished decision of the Court of Appeals filed July 20, 2015 (hereinafter "subject decision"), a copy of which is attached hereto in the Appendix at ***Appendix "A".***

III. Issues Presented for Review.

A. Whether the subject decision to disregard the proof of ownership requirement in *RCW 61.24.030(7)(a)* conflicts with this Court's anticipated decision in its review of *Trujillo v. NWTS,* 181 Wn.App. 484, 502, 326 P.3d 768 (2014), *review granted,* 182 Wn.2d 1020 (2015) (hereinafter *"Trujillo"*) and conflicts with this Court's precedents requiring that statutes be interpreted to avoid rendering language superfluous and to harmonize their provisions, and that the Deed of Trust Act (*RCW 61.24, et seq.*) (hereinafter "DTA") be strictly construed in favor of the borrower, thus meriting review under *RAP 13.4(b)(1).*

B. Whether the subject decision determining the Declarations of Lisa Mahony and Karie Mullen: (1) are admissible in evidence for the purposes of *CR 56(e)* and *RCW 5.45, et seq.*, and/or (2) if so, are sufficient to establish the identity of the owner and actual holder of the subject obligation when the declarations characterize the nature of documents not attached contrary to this

Court's decision in *State v. Fricks*, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979) (hereinafter "*Fricks*"), thus meriting review under *RAP 13.4(b)(1)*.

C. Whether the subject decision affirming the trial court was based upon sufficient proof of Respondents' agency relationship with Fannie Mae to establish their status as "holders" of the obligation to initiate and prosecute a non-judicial foreclosure under the DTA.

D. Whether the subject decision affirming the trial court's striking of the Declaration of Tim Stephenson is contrary to existing law, thus meriting review under *RAP 13.4(b)(1)*.

E. Whether the subject decision affirming the trial court's denial of Ms. Bavand's request for additional discovery to challenge the Respondents' motions for summary judgment is contrary to this Court's precedent, thus meriting review under *RAP 13.4(b)(4)*.

F. Whether the subject decision holding that substantial evidence of a violation of the Washington Consumer Protection Act (*RCW 19.86, et seq.*) (hereinafter "CPA") does not exist despite the fact that: (1) the foreclosing trustee relied on a Deed of Trust in which the initial trustee was patently unqualified and the beneficiary was ineligible; (2) relied on an undated endorsement by a servicer that was inconsistent with the servicer's claim of status, either as owner, holder, servicer or investor; (3) ignored the competing claims by various entities as "beneficiary"; failing to verify the ownership of the obligation; (4) and, relied on improperly dated and notarized documents and multiple assignments of Ms. Bavand's Note and Deed of Trust that in at least

one instance the successor trustee executed, without seeking the express authority from the true and lawful owner and holder of the obligation; is contrary to the DTA and the Supreme Court precedent noted in Issue A, above, and *Lyons v. U.S. Bank*, 181 Wn. 2d 775, 336 P.3d 1142 (2014) (hereinafter "*Lyons*"), thus meriting review of this Court under *RAP 13.4(b)(1)*.

G. Whether the subject decision holding Respondents could not violate the Washington Criminal Profiteering Act (*RCW 9A.82, et seq.*) as a matter of law because Respondents' actions consisted of "servicing the loan" and "sending notices" without proof of authority of the true and lawful owner and actual holder of the obligation is contrary to Supreme Court precedent and the DTA, thus meriting review of this Court under *RAP 13.4(b)(1)*.

H. Whether any or all of the issues set forth above are of substantial public interest, thus meriting review under *RAP 13.4(b)(4)*.

IV. Statement of the Case.

On March 18, 2004, Ms. Bavand executed a Promissory Note in favor of Capital Mortgage Corporation, as lender and the party entitled to receive payments according to its terms. CP 1853-1856. This transaction was purportedly registered with Respondent, MORTAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (hereinafter "MERS") by Capital Mortgage Corporation under MIN No. 100052599985865654. Various versions of this Note were offered during discovery. CP 1502-1505. The purported endorsements on several versions of the Note were never authenticated and the original Note was never produced for verification.

To secure repayment of the Note, Ms. Bavand executed a Deed of Trust, dated March 24, 2004. CP 1858-1875. "Joan H. Anderson, EVP" on behalf of Flagstar, was named the trustee. Upon information and belief, "Joan H. Anderson, EVP" is not an individual qualified to act as trustee under *RCW 61.24.010.*

At no time relevant to this cause of action did Ms. Bavand owe any monetary or other obligation to MERS, nor has MERS ever been an owner or holder of the subject Promissory Note or other evidence of debt executed contemporaneously with the subject Deed of Trust, as the term "beneficiary" is defined under *RCW 61.24.005(2).* While Ms. Bavand acknowledges that she may owe money under the subject Note to someone, she does not owe money or any other obligation to any Respondent named herein.

On February 1, 2011, Chris Ashcraft, an employee of Respondent, NORTHWEST TRUSTEE SERVICES, INC (hereinafter "NWTS"), executed and recorded an Assignment of Deed of Trust "for value received", assigning all beneficial interest under the Deed of Trust from "lender" to Respondent, CHASE HOME FINANCE, LLC. (hereinafter "Chase Finance"). CP 1885. The identity of the "lender" or Note holder granting this authority was not specified. No evidence of any grant of authority by the true and lawful owner and holder of the obligation for this Assignment has been adduced.

On February 1, 2011, Ken Patner, as Assistant Vice President of NWTS pursuant to the authority vested by a Limited Power of Attorney from Chase Finance, executed and recorded an Appointment of Successor Trustee

appointing his own company, NWTS, the successor trustee. CP 1891. No evidence of any grant of authority by the true and lawful owner and holder of the obligation for this Appointment has been adduced.

On February 1, 2011, NWTS, claiming authority as the "duly authorized agent" for Chase Finance, issued a Notice of Default that represented that the "Beneficiary (Note Owner)" of the deed of trust was Chase Finance. CP 1887-1889. This Notice of Default is problematic for several reasons. First, the Notice of Default deceptively and deliberately confused the "beneficiary" with the "note owner" and the "note holder", as the terms are defined under the DTA. Specifically, the Notice of Default identifies the "beneficiary (Note Owner)" as "Chase Home Finance LLC." NWTS knew or should have known that "Chase Home Finance LLC" was not the true and lawful owner or holder of the subject Note and Deed of Trust on February 1, 2011. Second, the Notice of Default does not identify the "note holder", as the term is defined in the DTA. Third, the Notice of Default fails to include any "Beneficiary Declaration" upon which it might rely to establish its authority to commence a non-judicial foreclosure as required under the DTA. Fourth, by identifying itself as an agent of the "beneficiary", Chase Finance, NWTS breached its fiduciary duty of good faith and neutrality to both parties to the transaction, in violation of *RCW 61.24.010.*

On April 1, 2011, Ms. Bavand prepared and mailed a Qualified Written Request to JPMorgan Chase Bank NA, the alleged servicer of the subject loan obligation. CP 1878-1881. At no time relevant to this cause of action has JPMorgan Chase Bank NA, or any Respondent named herein, responded to Ms.

Bavand's Qualified Written Request, for which Ms. Bavand is entitled to statutory damages.

On December 21, 2011, MERS executed a second Corporate Assignment of Deed of Trust "for good and valuable consideration", this time in favor of JP Morgan Chase. CP 996; 1437. At this point in time, MERS had nothing to assign, in view of the Assignment of February 1, 2011 to Chase Finance.

On April 18, 2012, apparently on the basis of the Assignment of Deed of Trust of December 21, 2011, Payne Davis, as Vice President of JP Morgan Chase, executed a second Appointment of Successor Trustee, again appointing NWTS as a successor trustee. CP 1433.

On May 8, 2012, Winston Kahn, as Assistant Vice President at NWTS executed and recorded a Notice of Trustee's Sale, setting a sale date for August 10, 2012, and a Notice of Foreclosure, pursuant to *RCW 61.24.040*. CP 1441-1446. The Notice of Trustee's Sale was dated effective May 2, 2012, but not notarized until May 8, 2012. No evidence of any grant of authority by the true and lawful owner and holder of the obligation for this Notice of Trustee's Sale and Notice of Foreclosure has been adduced, in violation of the DTA and in violation of NWTS's duty of good faith, under *RCW 61.24.010*. Moreover, the Notice of Foreclosure that was prepared by NWTS materially deviates from the statutory form proscribed by *RCW 61.24.040(2)*.

Frustrated by the lack of response to her Qualified Written Request, Ms. Bavand researched her loan on the internet. From a printed copy of

Respondent, FEDERAL NATIONAL MORTGAGE ASSOCIATION's (hereinafter "Fannie Mae") web loan lookup page, dated August 13, 2012, Ms. Bavand learned that Fannie Mae owned her mortgage loan, obtaining the same on or about April 1, 2004. CP 1893. This information materially contradicted the information provided by NWTS in its Notice of Default and Notice of Trustee's Sale and raised questions concerning the propriety of the various documents prepared by NWTS and its compliance with its duty of good faith to Ms. Bavand.

On August 20, 2012, Ms. Bavand brought suit against the Respondents for violation of the DTA, seeking damages and declaratory relief, violation of the Washington Consumer Protection Act (*RCW 19.86, et seq.*) (hereinafter "CPA"), violation of *RCW 9A.82, et seq.*, and reserving claims for violation of RESPA and FDCPA. CP 1836-1975.

In January of 2014, Respondents moved for summary judgment on all of Ms. Bavand's claims, pursuant to *CR 56*. CP 1515-1531, 1604-1623, 1624-1706.

On March 26, 2014, the trial court granted Respondents' motions for summary judgment. CP 52-56. At the same time the trial court entered an Order striking the Declaration of Tim Stephenson. CP 57-59. This appeal followed.

V. Argument and Authority.

A. Review should be granted to determine the validity of the Court of Appeals' holding that the foreclosing trustee need not have proof ownership of the note before recording a notice of trustee's sale as required under *RCW 61.24.030(7)(a)*.

The issue of the trustee's possession of proof of ownership of the Note herein is the same as the issue that is precisely the subject of review in *Trujillo,* which has been argued but not decided as of this writing. The decision of the Court of Appeals relies on *Trujillo* in two respects: (1) it claims that Ms. Bavand's evidentiary challenges to the Declarations of Lisa Mahony and Karie Mullen are immaterial insofar as they create material issues of fact as to the ownership of Ms. Bavand's Note; and (2) discounts the duty of the foreclosing trustee to act in good faith to determine whether the claimed beneficiary is the owner of the Note as well as the holder, with authority to foreclose. See *Lyons.*

The Court of Appeal's decision raises an issue of public importance as to whether all provisions of the DTA, specifically *RCW 61.24.030(7)(a),*[1] should be so construed and interpreted so as to avoid rendering the language of the statutes superfluous and to harmonize their provisions for the benefit of all borrowers in the State of Washington. *Gilbert H. Moen Co. v. Island Steel*

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[1] *RCW 61.24.030(7)(a)* and *(b)* provides as follows:

(a) That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the **owner** of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under penalties of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.

(b) Unless the trustee has violated his or her duty [of good faith] under RCW 61.24.010(4), the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under the subsection. (Emphasis added)

Erectors, Inc., 128 Wn.2d 745, 762, 912 P.2d 472 (1996); *In re Detention of C.W.*, 147 Wn.2d 259, 272, 53 P.3d 979 (2002); *State v. Johnson,* 179 Wn.2d 534, 546-547, 315 P.3d 1090 (2014).

Since review of *Trujillo* has been accepted and the case argued, the remedy here may be remand to the Court of Appeals for reconsideration in light of the anticipated opinion by this Court, depending upon the outcome for the same reasons articulated by Ms. Trujillo; or it may be simply to grant review in total insofar as the Court of Appeals' decision conflicts with the *Trujillo* opinion on review, pursuant to *RAP 13.4(b)(1)*; or it may raise an issue of substantial public importance on another issue that should be resolved by this Court and review should be granted pursuant to *RAP 13.4(b)(4)*.

B. Review should be granted to determine whether hearsay narrative statements may be admitted under the Business Records Act (*RCW 5.45.020*) contrary to *CR 56(e)*.

On summary judgment, the trial court relied on "facts" alleged the Declarations of Lisa Mahony and Karie Mullen, to which Ms. Bavand took timely objection. CP 1498-1507; 1552-1603. The issue squarely presented for review is whether *CR 56(e)'s* requirement that summary judgment declarations must be on personal knowledge can be circumvented by a narrative declaration characterizing "business records", rather than laying a proper foundation with the production of the records relied upon into evidence.

Ms. Mahony offered the trial court only her conclusory statement that she had "personal knowledge" and that she had reviewed the "records regularly kept by Flagstar," including those of JPMorgan Chase. For her part, all Ms.

Mullen said about her basis of knowledge is that she was "familiar with the manner in which Chase maintains its books and records, including its computer records relating to the servicing of this loan," including records from Capital Mortgage Corporation, Flagstar, Fannie Mae, MERS and NWTS. But neither provided the trial court either the documents reviewed or facts that would establish the reliability of the information provided. See *RCW 5.45.020*; *State v. Smith*, 16 Wn.App. 425, 558 P.2d 265 (1976) and *State v Kane*, 23 Wn.App. 107, 594 P.2d 1357 (1979). Under *CR 56(e)*, conclusory statements or "mere averment" that the affiant has personal knowledge are insufficient to support a motion for summary judgment. *Blomster v. Nordstrom, Inc., supra.;* Editorial Commentary to *CR 56* (citing *Antonio v. Barnes*, 464 F2d 584, 585 4th Cir. 1972.

Many of the records reviewed and relied upon by Ms. Mahony and Ms. Muller were necessarily prepared, compiled and maintained by third parties. Such third-party records must be separately authenticated by the third party who compiled the records to meet the business records exception to the hearsay rule and meet the requirement that such testimony be based on personal knowledge from the third party's records custodian to satisfy each of the elements of *RCW 5.45.020*. *State v. Weeks*, 70 Wn.2d 951, 953, 425 P.2d 885 (1967); *MRC Receivables Corp. v. Zion*, 152 Wn. App. 625, 631 & n. 9, 218 P.3d 621 (2009). For example, Ms. Mullen attests:

> 2. I am familiar with the manner in which Chase maintains its books and records, including its computer records relating to the servicing of this loan. It is Chase's routine business practice to make records at or near the time of the occurrence . . . . I have personal

knowledge of the matters set forth herein based upon my review of the records relating to the loan at issue in this matter. . . .

* * *

5. According to our records, Fannie Mae became the investor of the obligation on April 8, 2004, was the investor when servicing of the loan was transferred to Chase in October 2004, and is the current investor. . . .

* * *

6. Bavand is past due on her obligation under the Note from September 1, 2010. Thereafter, Chase initiated nonjudicial foreclosure proceedings. . . . . (CP 1553-1554)

However, Ms. Mullen did not offer the documents that lead her to the conclusions she reached. Such narrative statements in the Declarations of Ms. Mahony and Ms. Mullen were not offered to authenticate any business records, but were offered to set forth their hearsay version of events acquired from some source other than their personal knowledge.

This is a serious but not uncommon departure in these kinds of cases[2] from Supreme Court precedent, justifying review under *RAP 13.4(b)(1). Fricks* is on point. There the state attempted to prove the amount of money stolen from a gas station based on the manager's testimony regarding the contents of a tally sheet kept by employees, but not offered into evidence. This Court held, at page 391, as follows:

> In seeking to prove the contents of the tally sheet, the State must comply with the so-called Best evidence Rule. This basic principle of evidence generally requires that "the best possible evidence be produced." *Larson v. A.W. Larson Constr. Co.*, 36 Wn.2d 271, 217 P.2d 789 (1950) As applied to proof of the terms of a writing, it requires that the original writing be produced unless it can be shown to be unavailable "for some

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[2] See *McDonald v. OneWest*, 929 F. Supp. 2d 1079, 1090-1091 (2013).

> reason other than the serious fault of the proponent." McCormick, *Handbook of the Law of Evidence* Sec.230, at 560 (2d Ed. 1972). *See also Larson v. A. W. Larson Constru. Co., supra.* In this case the State failed to produce the document or to make any showing of its unavailability. Under these circumstances the testimony of the manager as to its contents was not an acceptable method of proof.
>
> Even production of the tally sheet would not necessarily make its contents admissible as evidence, however. The tally sheet is itself hearsay which must be shown to be admissible, in this case under the Uniform Business Records as Evidence Act, RCW 5.45. Appropriate testimony must establish its identity and mode of preparation in order to lay a foundation for admission. See RCW 5.45.020

The rolling narrative hearsay from Ms. Mahony and Ms. Mullen was the sole basis upon which the trial court concluded that Ms. Bavand was in default and that Chase was the holder of the obligation and had the right to initiate non-judicial foreclosure proceedings against Ms. Bavand and appoint NWTS as successor trustee, despite Fannie Mae's apparent ownership of the obligation. But Ms. Mahony's and Ms. Mullen's testimony was rank hearsay and the subject decision affirming this testimony contradicts an opinion of this Court, justifying review under *RAP 13.4(b)(1)* and, given the number of wrongful foreclosure cases before the courts of this state in which similar testimony is offered by the mortgage lending industry, is of substantial public importance justifying review under *RAP 13.4(b)(4)*.

C. Review of the subject decision should be granted because the opinion permitted an alleged agent (holder) to establish its agency by an employee's declaration rather than the words and actions of its alleged principal, contrary to this Court's precedent, justifying review under *RAP 13.4(b)(1)*.

No Respondent named herein, except Fannie Mae, has ever represented themselves to be the owner of the subject obligation, but claim, for purposes of

this foreclosure, that they are merely a "holder" of Ms. Bavand's Note, acting as an agent for Fannie Mae. But the only basis for any alleged agency relationship between Respondents and Fannie Mae comes from the Declaration of Ms. Mahony, as an employee of Flagstar (CP 1498-1500) and the Declaration of Ms. Mullen, as an employee of JPMorgan Chase (CP 1552-1603). No sworn statement was ever offered during the course of litigation from Fannie Mae acknowledging: (1) the existence of any agency relationship with Respondents; or (2) the scope of Respondents' agency relationship, if any, with Fannie Mae.

Precedent of this Court and other divisions of the Court of Appeals clearly holds that an agency relationship can only be established through the words and acts of the principal, not the alleged agent. *Auwarter v. Kroll*, 89 Wash. 347, 351, 154 Pac 438 (1916) ("the rule is universal that the declarations of a supposed agent are inadmissible to prove the fact of agency."); *Lamb v. General Associates, Inc.*, 60 Wn.2d 623, 627, 374 P.2d 677 (1962); *Equico Lessors Inc. v. Tow*, 34 Wn.App. 333, 338, 661 P.2d 600 (1983); *Smith v. Hansen, Hansen & Johnson*, 63 Wn.App. 355, 366-368, 818 P.2d 1127 (1991).

The question of how one proves his or her status as "holder" of an obligation under the DTA is fundamental to the non-judicial foreclosure process where the owner acts through agents to initiate and prosecute the foreclosure. This issue recurs in almost every wrongful foreclosure case and is a matter of substantial public interest. Moreover, the Court of Appeals affirmed the efforts of purported foreclosing agents without the proper proof of agency which

clearly contradicts prior precedent of this Court. Therefore, review is merited under *RAP 13.4(b)(1), (2)* and *(4)*.

D. Review should be granted to determine whether the Declaration of Tim Stephenson was properly stricken.

The trial court should not have stricken the testimony of Tim Stephenson (CP 1368-1386), which directly contradicted the testimony of Ms. Mahony and Ms. Mullen as to Respondents' status as owners or holders of the subject Note. His testimony was clearly permissible under *ER 702, ER 703* and *ER 704*.

Generally, a trial court has wide discretion in its consideration of expert testimony. *Miller v. Likins,* 109 Wn.App. 140, 34 P.3d 835 (2001). But this discretion should be "exercised liberally in favor of admitting evidence" that would assist the Court in evaluating the issues before it. *State v. Hansen*, 46 Wn.App. 656, 731 P.2d 1140 (1987). See also *Davis v. Baugh Industrial Contractors, Inc.*, 159 W.2d 413, 420-421, 150 P.3d 545 (2007).

The subject decision affirming the trial court's striking Mr. Stephenson's Declaration was contrary to existing law of this Court and merits review under *RAP 13.4(b)(1)*.

E. Review should be granted to determine whether Ms. Bavand's request for additional discovery under *CR 56(f)* was justified.

The hearsay problem created by the submission of and the trial court's reliance on the Declarations of Ms. Mahony and Ms. Mullen, noted above, was exacerbated by the affirmation of the trial court's refusal to permit additional discovery, pursuant to *CR 56(f)*. There is no way to anticipate what might be

offered in a declaration before it is filed and served. A challenge to the admissibility of a declaration based upon the declarant's competency to attest to its contents and its cure is categorically different than a plea to conduct discovery that has been neglected or has been frustrated and should not require a separate motion and declaration justifying a delay to obtain new evidence. Indeed, the incompetence of the declarations themselves should be sufficient to warrant a continuance to cure the deficiencies, without the need for a separate motion and declaration outlining the testimony sought. In this case the testimony of Tim Stephenson should have been enough.

The subject decision affirming the trial court's denial of an opportunity to test the testimony of Ms. Mahony and Ms. Mullen, given the number of wrongful foreclosure cases before the courts of this state in which similar testimony is offered by the mortgage lending industry, is of substantial public importance justifying review under *RAP 13.4(b)(4)*.

F. Review of the subject decision's holding that substantial evidence of a CPA violation does not exist given the foreclosing trustee's conduct herein is justified.

Once again, the Court of Appeals' handling of Ms. Bavand's CPA claims is a direct consequence of its reliance on *Trujillo*. Specifically, ignoring the plain terms of *RCW 61.24.030(7)(a)*, the Court of Appeals held that mere possession of Ms. Bavand's Note, endorsed in blank, is enough to establish Chase as the "beneficiary" of the obligation with the right to foreclose. This holding ignored Fannie Mae's purported ownership of the Note and the absence of any grant of authority for Chase to act on behalf of Fannie Mae. Indeed,

there was no evidence of an agency relationship between Chase and Fannie Mae was ever provided.

Moreover, by embracing *Trujillo,* the Court of Appeals discounted the foreclosing trustee's duty of good faith to Ms. Bavand to assure that the "beneficiary" is the owner as well as the holder of the obligation before serving and recording its Notice of Trustee's Sale. *RCW 61.24.010(4); RCW 61.24.030(7)(a); Lyons.* Specifically, it was Ms. Bavand's contention on appeal that by relying on a Deed of Trust in which the trustee was patently unqualified and the beneficiary was ineligible, relying on an undated endorsement by Flagstar that was inconsistent with its claim of status, either as owner, holder, servicer or investor, ignoring the competing claims of JP Morgan Chase and Chase Finance to status as "beneficiary" on the face of contradictory beneficiary declarations, failing to verify the ownership of the obligation, relying on improperly dated and notarized documents and multiple assignments of Plaintiff's Note and Deed of Trust that in at least one instance, NWTS executed, without seeking the express authority from the true and lawful owner and holder of the obligation, NWTS breached the "fiduciary duty of good faith" by attempting to prosecute a non-judicial foreclosure on Respondents' behalf without strictly complying with all requisites of sale.[3] Based on *Trujillo*, the Court of Appeals ignored these concerns, despite this Court's ruling in *Lyons* that held that foreclosing trustees, such as NWTS, have an affirmative duty to '"adequately inform' itself regarding the purported beneficiary's right to

[3] Under *Klem v. Washington Mutual Bank,* 176 Wn.2d 771, 790, 295 P.3d 1179 (2013) (hereinafter *"Klem"),* this Court has held that trustees such as NWTS have a fiduciary duty to act in good faith.

foreclose." *Lyons*, at page 787. Moreover, the Court of Appeals ignored Ms. Bavand's damages, based on *Panag v. Farmers Ins. Co. Of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009), *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014) and *Lyons*. Thus, the subject decision affirming the trial court's dismissal of Ms. Bavand's wrongful foreclosure and CPA claims was contrary to existing law of this Court and merits review under RAP 13.4(b)(1).

G. Review of the subject decision's holding that substantial evidence of a violation of *RCW 9A.82, et seq.* does not exist given the Respondent's unjustified foreclosure efforts is justified.

On appeal, Ms. Bavand argued that Respondents violated *RCW 9A.82, et seq.*, by (1) attempting to collect a debt for which they have no lawful interest, in violation of *RCW 9A.82.045;* and (2) demanding payment on a debt to which they have no lawful interest and threatening to take Ms. Bavand's property by non-judicial means, in violation of *RCW 9A.56.120* and *RCW 9A.56.130*. See also *RCW 9A.04.110(27)(j)*. The pattern of misconduct alleged herein is similar to what others in the State of Washington in Ms. Bavand's position suffer. See *Bain v. Metropolitan Mortgage Group,* 175 Wn.2d 83, 285 P.3d 34 (2012); *Klem, Schroeder v. Excelsior Management Group,* 177 Wn.2d 94, 297 P.3d 677 (2013) (hereinafter "*Schroeder*"); *Walker v. QLS,* 176 Wn.App. 294, 308 P.3d 716 (2013); *Bavand v. OneWest Bank, FSB,* 176 Wn.App. 475, 309 P.3d 636 (2013), among others. Indeed, this Court has applied the statute to misconduct associated with the DTA. *Bowcutt v. Delta North Star Corp.*, 95 Wn.App. 311, 976 P.2d 643 (1999).

In the subject decision, the Court of Appeals dismissed Ms. Bavand's claims under *RCW 9A.82,* holding that Respondents' actions "consist[ed] of serving the loan and sending numerous notices about the foreclosure," in apparent reliance of *Trujillo.* However, absent *Trujillo,* Respondents' actions would not have been lawful absent verification of the existence and scope of their agency relationship with Fannie Mae and their use of the non-judicial foreclosure procedures under the DTA merely a means of extorting funds from Ms. Bavand, in violation of *RCW 9A.82.*

The subject decision affirming the trial court's dismissal of Ms. Bavand's claims under *RCW 9A.82* was contrary to existing law of this Court and merits review under RAP 13.4(b)(1).

H. Review of the subject decision is justified under *RAP 13.4(b)(4)* given the existence of substantial public interest in the issues.

Homeowners facing non-judicial foreclosure, such as Ms. Bavand, rely upon the DTA's protections to ensure fair treatment by the foreclosing trustee and the entities that authorize therm. This Court's prior decisions amply demonstrate that mortgage industry compliance with the DTA has been problematic, at best, making it all the more important that this Court accept review in this case. See *Klem,* at pages 788-792, *Schroeder,* at pages 105-106, *Bain,* at pages 94-110. The misconduct alleged herein by Ms. Bavand is typical of what homeowners across this state face at the hands of unscrupulous

servicers and lenders and will continue to face in the future, given the continuing mortgage foreclosure crisis.[4]

Accordingly, the issues raised herein by Ms. Bavand are of substantial public interest and warrant this Court's review of the subject decision pursuant to *RAP 13.4(b)(4)*.

VI. Conclusion.

Based upon the foregoing and the briefing submitted below, this Court should accept review of the subject decision of the Court of Appeals, pursuant to *RAP 13.4(b)(1)* and *RAP 13.4(b)(4)*.

REPECTFULLY SUBMITTED this 18th day of August, 2015.

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[4] Despite a decrease in national foreclosure filings from 2012 to 2013, the foreclosure rate in Washington increased during the same period by 13%. See http://www.realtytrac.com/Content/foreclosure-market-report/2013-year-end-us-foreclosure-report-7963. In 2014, scheduled foreclosures have increased by 36% in Washington according to the same source. In 2015, scheduled foreclosures have increased by 17%. See http://www.realtytrac.com/content/foreclosure-market-report/us-foreclosure-activity-down-4-percent-in-february-to-lowest-level-since-july-2006-despite-9-percent-rise-in-reos-8211.

CERTIFICATE OF SERVICE

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

That on August 19, 2015, I arranged for service of the foregoing Petition for Review on the following parties in the manner indicated:

Fred B. Burnside, WSBA No. 32491	_____	Facsimile
Ryan Gist, WSBA No. 41816	X	Messenger
DAVIS WRIGHT TREMAINE LLP	_____	U.S. 1st Class Mail
1201 3rd Avenue, Suite 2200	_____	Overnight Courier
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Attorneys for MERS; and Flagstar Bank FSB		

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Katie A. Axtell, WSBA No. 35545	_____	Facsimile
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Attorneys for Chase Home Finance, LLC and Federal National Mortgage Association	_____	Electronically

Washington State Court of Appeals	_____	Facsimile
Division One – Court Clerk	_____	Messenger
600 University Street	_____	U.S. 1st Class Mail
One Union Square	_____	Overnight Courier
Seattle, WA 98101-1176	X	Electronically
Telephone (206) 464-7750		
Facsimile (206) 389-2613		

DATED this 19 day of August, 2015.

Susan L. Rodriguez
Paralegal

APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

MARISA BAVAND, Appellant, v. CHASE HOME FINANCE LLC, a Delaware limited liability company; FLAGSTAR BANK FSB, a federal savings bank; FEDERAL NATIONAL MORTGAGE ASSOCIATION, a United States government sponsored enterprise; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation; NORTHWEST TRUSTEE SERVICES, INC., a Washington corporation; DOE DEFENDANTS 1-10, Respondents.	No. 71724-3-I DIVISION ONE UNPUBLISHED OPINION FILED: July 20, 2015

LEACH, J. — After Marisa Bavand's lender initiated nonjudicial foreclosure proceedings following Bavand's default on her mortgage loan, Bavand filed suit. She appeals the summary judgment dismissal of her complaint for injunctive relief and damages against Chase Home Finance LLC, Flagstar Bank FSB, Federal National Mortgage Association (Fannie Mae), Mortgage Electronic Registration Systems Inc. (MERS), and Northwest Trustee Services Inc. (NWTS). She claims that genuine issues of material fact exist as to the respondents' alleged violations of the deeds of trust act (DTA or act), chapter 61.24 RCW, the Consumer Protection Act (CPA), chapter 19.86 RCW, and the

Criminal Profiteering Act, chapter 9A.82 RCW. She challenges certain trial court evidence rulings. And she contends that the court abused its discretion by denying her request for a continuance of the summary judgment hearing. We conclude that the trial court did not abuse its discretion in its evidentiary decisions or in denying Bavand's request for a continuance. And because no trustee's sale of Bavand's property occurred and Bavand identifies no genuine issue of material fact related to any deceptive, unfair, or criminal act by the respondents, summary dismissal of her claims was proper. We affirm.

Background

In March 2004, Marisa Bavand borrowed $160,000 from Capital Mortgage Corp. to finance the purchase of an investment property, signing a promissory note and companion deed of trust. The deed of trust lists Capital Mortgage as the lender, "Joan H. Anderson, EVP on behalf of Flagstar Bank, FSB" as the trustee, and MERS, "a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns," as beneficiary. Capital Mortgage endorsed the note to Flagstar, and Flagstar endorsed in blank. Flagstar documents list Fannie Mae as the investor as of April 2004. Chase Home Finance began servicing the loan after transfer of the loan from Flagstar. Chase took physical possession of the note in November 2004.

Beginning September 1, 2010, Bavand failed to make her monthly loan payments. On February 1, 2011, MERS signed an assignment of deed of trust,

transferring its interest as beneficiary nominee to Chase. The same day, Chase appointed NWTS as successor trustee.[1]

Also on February 1, 2011, NWTS, acting as Chase's "duly authorized agent," sent Bavand a notice of default. The notice identified Chase as the creditor, "Beneficiary (Note Owner)," and servicer of the loan. The notice included contact information for Chase and for NWTS.

On May 1, 2011, Chase Home Finance LLC merged with JPMorgan Chase Bank NA. On January 26, 2012, a JPMorgan Chase Bank vice president signed a beneficiary declaration stating that JPMorgan Chase Bank was the holder of the promissory note.

In early May 2012, NWTS issued a notice of trustee's sale. The notice set a sale for August 10, 2012. On August 8, 2012, Bavand's counsel asked that the sale be postponed, alleging deficiencies related to notice, among other concerns. On August 10, NWTS confirmed via e-mail that the sale would be postponed until August 24 for "good faith investigation based on the issues presented." On August 20, Bavand filed this lawsuit, alleging wrongful foreclosure and violations of the DTA, the CPA, and the Criminal Profiteering Act, chapter 9A.82 RCW. NWTS canceled the trustee's sale, and it has not been rescheduled.

In January 2014, all defendants moved for summary judgment dismissing Bavand's claims. In February, Bavand filed an opposing memorandum in which

[1] Chase made this appointment through its attorney-in-fact Ken Patner, an assistant vice president of NWTS.

she requested a continuance under CR 56(f). She also filed the declaration of Tim Stephenson. The defendants moved the court to strike Stephenson's declaration.

On March 26, 2014, the trial court granted the defendants' motions for summary judgment. The trial court struck Stephenson's declaration.

Bavand appeals.

Analysis

We review de novo a trial court's order granting summary judgment.[2] Summary judgment is appropriate if, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party, no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law.[3] A genuine issue of material fact exists if reasonable minds could differ about the facts controlling the outcome of the lawsuit.[4]

A defendant may move for summary judgment by demonstrating an absence of evidence to support the plaintiff's case.[5] If the defendant makes this showing, the burden shifts to the plaintiff to establish the existence of an element

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[2] Janaszak v. State, 173 Wn. App. 703, 711, 297 P.3d 723 (2013) (citing Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003)).

[3] Janaszak, 173 Wn. App. at 711 (citing CR 56(c)); Michak, 148 Wn.2d at 794-95).

[4] Janaszak, 173 Wn. App. at 711 (citing Hulbert v. Port of Everett, 159 Wn. App. 389, 398, 245 P.3d 779 (2011)).

[5] Knight v. Dep't of Labor & Indus., 181 Wn. App. 788, 795, 321 P.3d 1275 (quoting Sligar v. Odell, 156 Wn. App. 720, 725, 233 P.3d 914 (2010)), review denied, 181 Wn.2d 1023 (2014).

essential to her case.[6] If the plaintiff fails to meet her burden as a matter of law, summary judgment for the defendant is proper.[7]

Deeds of Trust Act

The DTA creates a three-party transaction, in which a borrower conveys the mortgaged property to a trustee, who holds the property in trust for the lender as security for the borrower's loan.[8] If a borrower defaults, a lender may nonjudicially foreclose by a trustee's sale.[9] The act furthers three goals: (1) an efficient and inexpensive foreclosure process, (2) adequate opportunity for interested parties to prevent wrongful foreclosure, and (3) stability of land titles.[10] Because the DTA eliminates many of the protections afforded borrowers under judicial foreclosures, "lenders must strictly comply with the statutes and courts must strictly construe the statutes in the borrower's favor."[11] A trustee has a duty of good faith to all parties and "is not merely an agent for the lender or the lender's successors."[12]

The DTA describes the steps a trustee must take to start a nonjudicial foreclosure. Among other requirements, a trustee may not schedule a sale

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[6] Knight, 181 Wn. App. at 795 (citing Sligar, 156 Wn. App. at 725).

[7] Knight, 181 Wn. App. at 795-96.

[8] Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 92-93, 285 P.3d 34 (2012); Albice v. Premier Mortg. Servs. of Wash., Inc., 174 Wn.2d 560, 567, 276 P.3d 1277 (2012).

[9] Bain, 175 Wn.2d at 93; Albice, 174 Wn.2d at 567.

[10] Albice, 174 Wn.2d at 567 (citing Cox v. Helenius, 103 Wn.2d 383, 387, 693 P.2d 683 (1985)).

[11] Albice, 174 Wn.2d at 567 (citing Udall v. T.D. Escrow Servs., Inc., 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007); Koegel v. Prudential Mut. Sav. Bank, 51 Wn. App. 108, 111-12, 752 P.2d 385 (1988)).

[12] RCW 61.24.010(4); Bain, 175 Wn.2d at 93.

before confirming that the beneficiary of the obligation holds the note and thus has authority to enforce the obligation. The act requires

> (7)(a) That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.
>
> (b) Unless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection.[13]

Declarations of Lisa Mahony, Karie Mullen, and Tim Stephenson

Bavand makes two claims related to the trial court's decisions about evidence. We review these decisions de novo.[14]

First, Bavand argues that the court should not have considered the testimony of Lisa Mahony and Karie Mullen, who submitted declarations as officers of Flagstar and Chase, respectively. A business record is admissible as competent evidence

> if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.[15]

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[13] RCW 61.24.030(7)(a), (b).
[14] Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).
[15] RCW 5.45.020.

Reviewing courts interpret the statutory terms "custodian" and "other qualified witness" broadly.[16]

Mahony's and Mullen's declarations satisfy the requirements of RCW 5.45.020. Each declared under penalty of perjury that (1) she was an employee or officer of Flagstar or Chase, (2) she had personal knowledge of her employer's practice of maintaining business records, (3) she had personal knowledge from her own review of the relevant records related to Bavand's note, and (4) the attached account records were true and correct copies of documents made in the ordinary course of business at or near the time of the transactions. Bavand's contention that contradictions between the two declarations raise disputed issues of fact is without merit. Flagstar's records attached to Mahony's declaration show that Fannie Mae became the investor in April 2004, paying Flagstar on April 9, 2004, and transferring servicing rights to Chase on October 1, 2004. This is consistent with Mullen's declaration, and Mahony's statement that "in May 2004, the loan was sold to JPMorgan Chase Bank, N.A.," does not raise any material disputed fact. The trial court did not err by admitting Mahony's and Mullen's declarations.

Next, Bavand contends that the trial court erred by striking the declaration of Tim Stephenson, Bavand's proffered expert witness. We disagree.

Under ER 702, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,

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[16] State v. Quincy, 122 Wn. App. 395, 399, 95 P.3d 353 (2004).

a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." While an expert witness's testimony can embrace an ultimate issue for the trier of fact to determine, a witness may not give legal conclusions.[17] Here, Stephenson stated a number of legal conclusions about documents, case law, and statutory terms. The trial court struck Stephenson's declaration, determining that it "contains almost entirely impermissible legal conclusions, is not helpful in resolving the claims alleged in the Complaint, offers no admissible evidence refuting Chase's evidence that it holds Plaintiff's Promissory Note, and is inadmissible under ER 702." The court did not abuse its discretion.

Deeds of Trust Act Claims

Bavand contends that Chase and the other respondents are liable for wrongful foreclosure and violations of the DTA. She points to "material defects in the deed of trust" because Joan H. Anderson "does not meet any of the criteria set forth in RCW 61.24.010."[18] And her principal contention is that "Respondents misrepresented the identity of the owner and holder of her loan in a clear attempt (conspiracy) to frustrate her efforts to contact her lender directly to modify or renegotiate her loan." Her claims fail.

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[17] State v. Olmedo, 112 Wn. App. 525, 532-33, 49 P.3d 960 (2002); Hyatt v. Sellen Constr. Co., 40 Wn. App. 893, 898-99, 700 P.2d 1164 (1985).

[18] Under RCW 61.24.010, a trustee may be a corporation, title insurance company, attorney, agency of the United States government, or national bank, savings bank, or savings and loan.

As a threshold matter, in Frias v. Asset Foreclosure Services, Inc.,[19] our Supreme Court held that without a completed foreclosure sale, the DTA does not provide a cause of action for damages. Because no trustee's sale of Bavand's property occurred, she cannot bring claims for wrongful foreclosure or violations of the DTA.

Bavand's claims also fail on the merits. Even if Bavand showed that Anderson, as an agent of Flagstar Bank, was an unqualified trustee when named in 2004, neither Anderson nor Flagstar took any action against Bavand. By the time Chase issued a notice of default, NWTS had replaced Anderson as trustee, and Flagstar had not held the note for over six years. Bavand does not dispute that NWTS is a proper trustee. Bavand identifies no defect in the deed of trust that is material to her case.

Bavand also argues that RCW 61.24.030(7)(a) requires that "the 'holder' [of the note] must also be the 'owner' of the obligation, particularly when declaring a default in the obligation and when appointing a successor trustee." (Emphasis omitted.) But in Trujillo v. Northwest Trustee Services, Inc.,[20] we expressly rejected this argument. In Trujillo, we followed our Supreme Court in applying definitions in the Uniform Commercial Code[21] to hold that "it is the status of holder of the note that entitles the entity to enforce the obligation. Ownership

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[19] 181 Wn.2d 412, 422-23, 334 P.3d 529 (2014).

[20] 181 Wn. App. 484, 326 P.3d 768 (2014), review granted, 182 Wn.2d 1020 (2015).

[21] Bain, 175 Wn.2d at 103-04.

of the note is not dispositive."[22] And we noted that state common law is consistent with this conclusion.[23] Bavand fails to persuade us that our decision in Trujillo is distinguishable or "demonstrably incorrect or harmful."

Here, JPMorgan Chase Bank NA declared under penalty of perjury that it is the holder of Bavand's note. "Absent conflicting evidence, the [beneficiary] declaration should be taken as true."[24] Bavand's lengthy argument that genuine issues of material fact exist as to whether Fannie Mae owned the note is not relevant to the question of who held the note and thus had the authority to enforce the obligation. She has not raised any genuine issue of material fact.

Bavand also alleges that "NWTS failed to comply with the DTA and its fiduciary duty of good faith."[25] She argues that NWTS "engag[ed] in an unethical process of unreasonably relying upon documents it knew or should have known to be false and misleading." But Bavand does not show that the deed of trust and the endorsement by Flagstar are either false or misleading. And we find her argument that the merger of Chase Financial and JPMorgan Chase Bank created

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[22] Trujillo, 181 Wn. App. at 498.

[23] Trujillo, 181 Wn. App. at 498-501 (citing John Davis & Co. v. Cedar Glen # Four, Inc., 75 Wn.2d 214, 450 P.2d 166 (1969); see also Lucero v. Cenlar FSB, No. C13-0602, 2015 WL 520441 (W.D. Wash. Feb. 9, 2015) (holder, party in possession of note, is entity entitled to receive payments; trustee has no independent duty to verify information in beneficiary declaration absent some notice of faulty information); accord Meyer v. U.S. Bank, N.A., No. 14-00297, 2015 WL 1619048 (W.D. Wash. Apr. 10, 2015). These cases were included in respondent's statement of additional authorities.

[24] Trujillo, 181 Wn. App. at 496.

[25] The standard Bavand articulates here—"fiduciary duty of good faith"—is unhelpful. Under RCW 61.24.010(3) and (4), trustees have a duty of good faith to all parties but no fiduciary duty or obligation.

confusion about the noteholder's identity unpersuasive. Also unconvincing are her allegations that the notice of default "deceptively and deliberately confused the 'beneficiary' with the 'note owner' and the 'note holder.'"

Bavand also contends that "the Notice of Foreclosure issued by NWTS on or about May 2, 2012 fails to comply with [the] statutory form." But this notice informed her of the date of the sale, who was enforcing the obligation, the amount needed to cure the default and whom she should contact to do so, and her right to contest the default, as required by the act. As we also noted in Trujillo, RCW 61.24.040 directs only that a notice of sale must be in "substantially" the statutory form.[26] Therefore, contrary to Bavand's assertion, a trustee does not fail to strictly comply with the terms of the DTA by not strictly following the statutory form language.

Bavand also asserts that "NWTS appears to have engaged in a practice of falsely dating mandated foreclosure documents," citing the notice of trustee's sale, which included an "effective" date of May 2, 2012, but was notarized on May 8, 2012. In support of this assertion, Bavand cites Klem v. Washington Mutual Bank.[27] But Klem is inapposite. In that case, Klem presented evidence of a practice of falsely predated notarizations that unfairly expedited foreclosures.[28] Here, the presence of an "effective" date earlier than the notarization date in one

[26] RCW 61.24.040(1)(f), (2).
[27] 176 Wn.2d 771, 295 P.3d 1179 (2013).
[28] Klem, 176 Wn.2d at 777-78.

document does not constitute evidence of false notarization and leads to no unfair result, as in Klem. This contention has no merit.

Consumer Protection Act Claims

Bavand also argues that the defendants violated the CPA. Although she cannot bring a claim for damages under the DTA without a foreclosure sale, she may bring a claim for similar actions under the CPA.[29] To prevail on an action for damages under the CPA, the plaintiff must establish "(1) [an] unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation."[30] "[W]hether a particular action gives rise to a Consumer Protection Act violation is reviewable as a question of law."[31]

Under our Supreme Court's Hangman Ridge[32] test, a plaintiff may base a claim under the Washington CPA upon a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of the public interest.[33] Bavand does not allege any per se violations but argues that several actions by Chase and the other respondents were unfair or deceptive acts or practices that violated the public interest.

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[29] Lyons v. U.S. Bank NA, 181 Wn.2d 775, 784, 336 P.3d 1142 (2014).

[30] Hangman Ridge Training Stables Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

[31] Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 150, 930 P.2d 288 (1997).

[32] Hangman Ridge Training Stables Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

[33] Klem, 176 Wn.2d at 787.

Bavand argues that "the improper assignment and appointment of NWTS, among other violations of the DTA alleged herein, constitute unfair and deceptive acts or practices." But Chase possessed the note, which Flagstar had endorsed in blank, and was thus a proper beneficiary under the DTA. Therefore, Chase had authority to appoint NWTS as successor trustee. It was not deceptive to refer to Chase as the beneficiary on the notice of default and notice of trustee's sale. Although the reference to Chase as "owner" of the note is arguably ambiguous, Bavand presents no evidence that it was deceptive as to whom she owed the obligation. And contrary to Bavand's assertion that "Respondents have deceived and prevented her from meaningfully pursuing her options under the federal Home Affordable Modification Program (HAMP)," the record shows that Chase sent at least a dozen letters informing Bavand that she could pursue foreclosure assistance through HAMP,[34] along with other letters describing different options for assistance. Any inability on Bavand's part to "meaningfully pursu[e] her options" was not because of any lack of reasonable notice or opportunity to seek foreclosure assistance.

The record also contradicts Bavand's assertion that she did not learn of Fannie Mae's involvement until 2014, given that a year and a half earlier, she stated in her complaint that she learned in 2012 that Fannie Mae owned her loan. In summary, extensive correspondence between Bavand and Chase from at

[34] Most of these letters were sent both to an address of record for Bavand and to the subject property's address.

least 2010 to 2012 demonstrates that Bavand knew who held her note, who was enforcing the obligation, and to whom she could apply for assistance. And while she observes correctly that "a homeowner might have a CPA claim against MERS if MERS acts as an ineligible beneficiary," our Supreme Court has held that "the mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury."[35] The notice of trustee's sale states that Chase, not MERS, is the beneficiary enforcing the obligation. Because Bavand does not show any deceptive MERS act, this claim also fails. The trial court did not err by granting summary judgment on Bavand's CPA claims.

Criminal Profiteering Act Claims

Finally, Bavand contends that the trial court improperly granted summary judgment dismissing her claims under RCW 9A.82, the Criminal Profiteering Act. This act provides a civil cause of action to a person if injured in his or her "person, business, or property by an act of criminal profiteering that is part of a pattern of criminal profiteering activity, or by an offense defined in [several criminal statutes]."[36]

Here, the record does not support any claim for criminal profiteering. The respondents' actions related to Bavand's loan consist of servicing the loan and sending numerous notices about the foreclosure following Bavand's undisputed default. The trial court did not err by granting summary judgment on this claim.

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[35] Bain, 175 Wn.2d at 120.
[36] RCW 9A.82.100(1)(a).

Request for CR 56(f) Continuance

Finally, Bavand claims that the trial court erred by denying her request to continue discovery under CR 56(f). Under this rule,

> [s]hould it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

A party seeking a continuance must provide an affidavit stating what evidence it seeks and how this evidence will raise an issue of material fact precluding summary judgment.[37] We review a trial court's denial of a CR 56(f) motion for abuse of discretion.[38]

A trial court may deny a motion for continuance when:

> (1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact.[39]

Here, Bavand filed no motion or affidavit, simply making the request at the conclusion of her response to the defendants' motions for summary judgment. More importantly, she provided no good reason for delay. She cited as a basis for her request "particularly the recently disclosed involvement of Fannie Mae

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[37] Durand v. HIMC Corp., 151 Wn. App. 818, 828, 214 P.3d 189 (2009).

[38] Qwest Corp. v. City of Bellevue, 161 Wn.2d 353, 369, 166 P.3d 667 (2007).

[39] Qwest, 161 Wn.2d at 369 (quoting Butler v. Joy, 116 Wn. App. 291, 299, 65 P.3d 671 (2003)).

and the Trust." But she discovered Fannie Mae's ownership in 2012—not exactly "recently." Bavand presents no evidence raising a genuine issue of material fact that would justify a continuance. The trial court did not abuse its discretion by denying her request.

Attorney Fees

Chase requests an award of attorney fees and costs on appeal under the terms of the note and deed of trust and as provided under RAP 18.1. RCW 4.84.330 permits a party to recover reasonable attorney fees and costs in any action on a contract where the contract provides for this award. The promissory note Bavand signed provides, "[T]he Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees." The deed of trust 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 on appeal.

The trial court granted Chase's motion for fees and costs below. We grant Chase's request for attorney fees and costs on appeal upon its compliance with RAP 18.1.

Conclusion

Because the trial court did not abuse its discretion in its evidentiary rulings or err in granting the defendants' motions for summary judgment, we affirm.

WE CONCUR:

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