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Court of Appeals Case No. 75946-9-I

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**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

KRISTIN BAIN,

Appellant,

v.

**METROPOLITAN MORTGAGE GROUP, INC.; INDYMAC BANK,
FSB; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS;
REGIONAL TRUSTEE SERVICES; LENDER PROCESSING
SERVICES; FEDERAL DEPOSIT INSURANCE CORP.; FIDELITY
NATIONAL TITLE; and Doe Defendants 1 through 20, inclusive,**

Respondents.

APPELLANT'S AMENDED PETITION FOR REVIEW

Melissa A. Huelsman, WSBA #30935
Attorney for Kristin Bain
Law Offices of Melissa A. Huelsman, P.S.
705 Second Avenue, Suite 601
Seattle, WA 98104
206-447-0103

TABLE OF CONTENTS

I. IDENTITY OF PETITIONER.....1

II. CITATION TO COURT OF APPEALS DECISION.....2

III. ISSUES PRESENTED FOR REVIEW.....2

IV. STATEMENT OF THE CASE.....2

V. STANDARD ON REVIEW.....12

VI. ARGUMENT.....12

VII. CONCLUSION.....20

ATTACHMENT A.....Procedural History

ATTACHMENT B.....Unpublished Opinion, April 30, 2018

ATTACHMENT C.....

.....Order Denying Motion for Reconsideration, May 30, 2018

TABLE OF AUTHORITIES

Cases

<i>Bain v. Metro. Mrtg. Group, Inc.</i> , 175 Wn.2d 83, 97-100, 285 P.3d 34 (2012).....	10, 16, 17, 18
<i>Cano-Garcia v. King County</i> , 168 Wn.App. 223, 277 P.3d 34 (Div. II 2012), <i>review denied</i> 175 Wn.2d 1010, 287 P.3d 594.....	13
<i>Cox v. Helenius</i> , 103 Wn.2d 383 (1985).....	5
<i>Frias v. Asset Foreclosure Services, Inc.</i> , 181 Wash.2d 412, 334 P.3d 529 (2014).....	17
<i>Hangman Ridge Training Stables v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778 (1986).....	15, 17
<i>Hill v. Cox</i> , 110 Wn.App. 394, 41 P.3d 495 (Div. III 2002), <i>review denied</i> 147 Wn.2d 1024, 60 P.3d 92.....	13
<i>Klem v. Washington Mut. Bank</i> , 176 Wn.2d 771, 782, 295 P.3d 1179 (2013).....	19, 20
<i>Leingang v. Pierce County Med. Bureau</i> , 131 Wn.2d 133, 150, 930 P.2d 288 (1997).....	16
<i>Lyons v. U.S. Bank National Ass 'n</i> , 181 Wn.2d 775, 789, 336 P.3d 1142 (2014).....	17, 20
<i>Mason v. Mortgage America</i> , 114 Wn.2d 842, 792 P.2d 142 (1990).....	18
<i>McNabb v. Dep't of Corrs.</i> , 163 Wn.2d 393, 397, 180 P.3d 1257 (2008).....	13
<i>Panag v. Farmers Ins. Co. of Wash.</i> , 166 Wn.2d 27, 50, 204 P.3d 885 (2009).....	16, 19
<i>Ranger Ins. Co. v. Pierce County</i> , 164 Wn.2d 545, 552, 192 P.3d 886 (2008).....	13
<i>Sato v. Century 21</i> , 101 Wn.2d 599, 681 P.2d 242 (1984).....	18
<i>St. Paul Ins. Co. v. Updegrave</i> , 33 Wn.App. 653, 656 P.2d 1130 (1983).....	18
<i>State v. Kaiser</i> , 161 Wn. App. 705, 719, 254 P.3d 850 (2011).....	15, 16
<i>State v. Ralph Williams' N. W. ChryslerPlymouth, Inc.</i> , 87 Wn.2d, 298, 305-09, 553 P.2d 423 (1976).....	16
<i>State v. Schwab</i> , 103 Wn.2d 542, 558, 693 P.2d 108 (1985) (Dore, J. dissenting).....	20
<i>Sw. Sunsites, Inc. v. Fed. Trade Comm'n</i> , 785 F.2d 1431, 1435 (9th Cir. 1986).....	16
<i>Talmadge v. Aurora Chrysler Plymouth, Inc.</i> , 25 Wn. App. 90, 605 P.2d 1275 (1979).....	18
<i>Trujillo v. NW Trustee Servs., Inc.</i> , 183 Wn.2d 820, 355 P.3d 1100 (2015).....	20
<i>Walker v. Quality Loan Serv. Corp of Wash.</i> , 176 Wn.App. 294, 309-10, 308 P.3d 716 (2013).....	20

Statutes

RCW 19.86, *et seq.* 2, 12
RCW 61.24, *et seq.* 1
RCW 61.24.005 1, 2, 7, 16
RCW 61.24.010 1, 2, 4, 5
RCW 61.24.026 1
RCW 61.24.030 1
RCW 61.24.040 1, 2, 3
RCW 61.24.050 1
RCW 61.24.060 1
RCW 61.24.110 1
RCW 61.24.127 1
RCW 61.24.130 1
RCW 61.24.135 1
RCW 61.24.143 1
RCW 61.24.146 1
RCW 61.24.160 1
RCW 61.24.163 through 61.24.177 1

Other Authorities

H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914) 20

Rules

CR 56 12, 13
RAP 13.4(b) 12

I. IDENTITY OF PETITIONER

Petitioner Kristin Bain is the former owner of the subject property who was injured and damaged as a result of the actions of Defendants, including Mortgage Electronic Registration Systems, Inc. (“MERS”), who falsely represented that it was the entity who was non-judicially foreclosing on Ms. Bain when it had no relationship whatsoever to her loan and it caused foreclosure documents to be executed nevertheless.

This case makes clear the manner in which MERS participated in Washington non-judicial foreclosures on behalf of mortgage loan lenders, servicers and foreclosing trustees who for years refused to comply with the requirements of the Deed of Trust Act, RCW 61.24, *et seq.* (“DTA”). MERS’ actions were designed to expedite nonjudicial foreclosures and to hide beneficiary identities from Ms. Bain and Washington property owners. Her case predates DTA changes resulting from the Washington Legislature’s increased awareness that these industries’ business models were predicated upon evading DTA requirements.¹ MERS did not comply with the DTA, as it existed when Ms. Bain filed her lawsuit, which resulted in her claims for violations of the Consumer Protection Act (“CPA”), RCW 19.86, *et seq.* She demonstrated to the trial court that she

¹ Substantive DTA changes were made beginning in 2008 through to the present. *See*, RCW 61.24.005, including Findings added to Notes in 2011; 61.24.010; 61.24.026; 61.24.030; 61.24.031; 61.24.040; 61.24.050; 61.24.060; 61.24.110; 61.24.127; 61.24.130; 61.24.135; 61.24.143; 61.24.146; 61.24.160; 61.24.163 through 61.24.177.

met all of the requirements of a CPA claim, including injury **or** damages and causation. RCW 19.86, *et seq.*

II. CITATION TO COURT OF APPEALS DECISION

Ms. Bain seeks review of the decision of Division I of the Court of Appeals in this case (hereinafter the “Decision”), Case No. 75946-9-I **as to MERS only**. The unpublished Opinion was filed on April 30, 2018 and Ms. Bain’s Motion for Reconsideration was denied on May 30, 2018.

III. ISSUES PRESENTED FOR REVIEW

1. Because MERS was not a “beneficiary” of Ms. Bain’s Promissory Note, it did not have the legal authority under Washington law to initiate a nonjudicial foreclosure of her residence or execute any documents in connection therewith. RCW 61.24.005(2); 61.24.010(2); 61.24.040.
2. Because MERS did not have the legal authority to initiate a nonjudicial foreclosure of Ms. Bain’s residence, and it participated in the process in spite of its lack of standing, it caused her injury and damages, and was therefore liable to her under the Consumer Protection Act (“CPA”). RCW 19.86, *et seq.*
3. There were genuine issues of material facts sufficient that precluded dismissal of the CPA claim on summary judgment and in fact, Ms. Bain supported her claims against MERS for its role in the wrongfully attempted non-judicial foreclosure that was expedited through involvement of MERS signers.

IV. STATEMENT OF THE CASE

Procedural History

See Attachment A.

Factual History

Ms. Bain is a young woman with severe ADD, including difficulty

understanding documents, such as those associated with a home purchase and mortgage loan. Ms. Bain lived independently and worked, but she also received significant assistance from her parents and access to trust funds for specific purposes. CP 37-38; 39-41; 44-46; 47-48. Ms. Bain pursued claims in this case related to the loan origination, which were settled. *Id.* The original lender, IndyMac Bank, failed before Ms. Bain could meaningfully pursue her claims regarding loan origination, which meant she had a mortgage payment greatly in excess of what she could afford. *Id.*

Ms. Bain defaulted on the loan in May 2008. She then received a Notice of Default (“NOD”) from Regional Trustee Services (“RTS”), the foreclosing trustee (signed on **August 26, 2008**), on or about **August 28, 2008** (CP 277-281) and then a Notice of Trustee’s Sale (“NOTS”) dated **September 25, 2008**, which scheduled the auction of her home on December 26, 2008. CP 283-286. The NOTS was signed **exactly** 30 days after the NOD was signed, the exact amount of time permitted by the DTA. RCW 61.24.040(8). However, because the NOD was not posted until two days after execution, the NOTS should not have been issued when it was. *Id.* The NOTS read that RTS was foreclosing the Deed of Trust on behalf of “beneficiary” MERS, which was false. CP 1069-1081.

King County records include an Assignment of Deed of Trust signed on September 3, 2008 by Bethany Hood, “Vice President” of

MERS “as nominee for its successors and assigns”, purporting to have MERS assign an interest in Ms. Bain’s Deed of Trust to IndyMac Federal Bank, FSB, the successor entity to IndyMac Bank after its failure.² CP 32-33. The Assignment was recorded on **September 9, 2008**. On **August 26, 2008**, Christina Allen, “AVP” of IndyMac Federal Bank, FSB, signed an Appointment of Successor Trustee which purported to appointment RTS as the trustee. CP 35-36.³ The Appointment was recorded on **September 9, 2008**, immediately **after** the Assignment.⁴ *Id.* LPS employee Christina Allen’s signature indicated that she was signing the Appointment **before** IndyMac Federal allegedly acquired its interest in Ms. Bain’s Deed of Trust from MERS. This is an “interest” that MERS never possessed. *Id.*

Ms. Hood and Ms. Allen signed the documents at the behest of RTS, the entity who wanted to become the trustee, even though it had a concurrent duty to Ms. Bain and the “beneficiary”. No one from the actual “beneficiary”^{5 6} communicated with anyone at LPS or MERS. *Id.* MERS’ business model included as a primary pursuit allowing entities such as LPS and IndyMac to execute documents to pursue non-judicial

² Evidence obtained confirmed that Ms. Hood and Ms. Allen were LPS employees.

³ Notation next to the signature, in different handwriting, reads it is “effective” “9/3/08”.

⁴ An Appointment is not effective until recording. RCW 61.24.010(2).

⁵ Ms. Bain ONLY learned in the litigation that the Deutsche Bank securitized trust acquired the loan in 2007. CP 3386-3391; 3490-3499; 3501-3512 and 3514-3551.

⁶ The DTA was amended in 2009 to clarify the nature of the trustee’s duties. RCW 61.24.010(4); however, in 2008, the trustee’s quasi-fiduciary duty to both the borrower and the grantor was best described in *Cox v. Helenius*, 103 Wn.2d 383 (1985).

foreclosures in Washington and elsewhere, even though it never had any financial relationship to Ms. Bain's loan or any others. CP 387-400, 421-429, 455-464, 526-536. During litigation below and at the Supreme Court, MERS maintained that it was authorized to engage in these activities because of the language in the Deed of Trust. CP 52-79.

The foreclosure process began when RTS received an electronic referral through the LPS computer system from a third party, FIS, on **August 22, 2008**. CP 615. It instructed to foreclose in the name of IndyMac Federal Bank, even though the "investor" is identified as "Deutsche Bank". *Id.* RTS then set about drafting the documents necessary to foreclose, and it created the Assignment and Appointment of Successor Trustee, which were sent to LPS for signing, including signature on behalf of MERS. CP 1530-1535; 1631-1634; 1698-1722. The documents were sent on **August 26, 2008**, and the signatures were returned minutes later, confirming MERS' participation in facilitating the expeditious processing of the foreclosure. CP 1698-1722.

When Ms. Bain was able to obtain testimony from the LPS robo-signers, Ms. Hood admitted that she signed the Assignment prepared by others and she had no knowledge of the veracity of its contents, as part of her job of signing a stack of 25 to 75 documents every day. CP 1745-1752. Ms. Hood testified that documents, including the Assignment in this case,

are simply brought over to her and she makes sure that the identifying numbers match up, and then signs. She does not even know on whose behalf she is signing. *Id.* As a “signing officer” for MERS, she was not taking instruction or direction from anyone. *Id.*

This is consistent with MERS’ deposition testimony about its business practices. CP 365-586. Its business model was significantly focused on approving the authorization of signers on behalf of MERS to be appointed by lenders and servicers and without any oversight of their actions. CP 620-621. Mr. Blake, MERS’ deponent, admitted that Ms. Hood did not work at its offices, he did not know if MERS had ever directly communicated with her and in fact, he then tried to disavow the relevance of her testimony because it was not “on behalf of MERS”. CP 1564-1565; 1570-1577; 1580-1584. This is in spite of the fact that MERS authorized Ms. Hood and others to sign any documents on its behalf that were placed in front of her.

While there is no legal requirement in Washington for an Assignment in order to foreclose, it was used in this case to facilitate and speed up Ms. Bain’s non-judicial foreclosure to allow the “beneficiary” to avoid signing documents to comply with DTA requirements. RCW

61.24.005(2).⁷ CP 1745-1752. The Assignment here was used to give the false impression in King County records and to Ms. Bain that IndyMac Federal Bank, FSB had the legal authority to foreclose on Ms. Bain's residence, even though it did not have such authority. *Id.*

The NOD issued by RTS reads that the foreclosure was being pursued by MERS as the "beneficiary", which was facilitated by MERS' business model. CP 277-281. RCW 61.24.005(2). The NOD also reads: "The beneficial interest under said Deed of Trust and the obligations secured thereby are presently held by or **will be assigned to** INDYMAC FEDERAL BANK, FSB." *Id.* (emphasis added). This information was not true, as Ms. Bain discovered later in the litigation, because her loan had been sold in 2007 to the Deutsche Bank Trust. The NOTS issued read that the property was going to be sold at auction by the "Beneficiary", IndyMac Federal Bank, FSB, because the interest had been assigned by MERS on September 3, 2008. CP 283-286.

When Ms. Bain filed her case originally, she did not know who held her Promissory Note nor who had the right to enforce the terms of her Note and Deed of Trust to foreclose non-judicially. The Deutsche Bank Trust asserting it held her Note was first identified on February 17, 2011

⁷ During MERS' deposition, it refused to provide testimony about Ms. Hood and/or Ms. Allen's authority to sign documents on its behalf, even though those topics were noted in the deposition notice and no protective order was ever sought or entered.

in a Reply to Response to Motion for Summary Judgment. CP 3386-3391; 3490-3499; CP 3501-3512 and 3514-3551. After seeing an attorney, Ms. Bain became aware MERS was not the beneficiary because of information possessed by her attorney, but she did not know the identity of the noteholder because of misleading information in the foreclosure documents. CP 1745-1752. As evidenced by numerous amendments to Ms. Bain's complaint because of false representations about noteholder status, she did not get an answer until well into the litigation. CP 2219-2220; 2222-2226; 2991-3001; 3006-3018.

Once the case was ordered back to state court (CP 3703-3705), Ms. Bain took the deposition of the MERS representative, who admitted that neither he nor anyone else at MERS had knowledge about the location and possession of Ms. Bain's Note. CP 1564-1565; 1570-1577; 1580-1584. When MERS filed its summary judgment motion, it created an entirely new narrative about its alleged business model following the Supreme Court's ruling. MERS argued that it was acting as an "agent" for the "principal", either IndyMac and/or the Deutsche Bank Trust, contending that the "evidence" for such actions was contained in the Pooling and Servicing Agreement as between IndyMac Bank (the prior entity) and the Deutsche Bank Trust. CP 52-79; 82-586. While the PSA contained language allowing IndyMac Bank (the prior entity) to act as for the

Deutsche Bank Trust (CP 59), it did **not** appoint IndyMac or anyone else as an “agent” (as defined by this Court in the *Bain* decision) for the Trust. CP 60-62. Further, even if IndyMac **could** have acted as an “agent” for the Trust, that entity had ceased to exist as of August 2008, when the actions herein occurred, and even more importantly, it was LPS employees Hood and Allen who signed the foreclosure documents on behalf of MERS and IndyMac Federal Savings Bank, FSB, without ever receiving instruction from either of those entities to perform those actions. MERS also asked the trial court to rely upon a Limited Power of Attorney signed by the Deutsche Bank Trust to IndyMac Bank (prior entity), even though there was no testimony from Deutsche Bank or anyone else that the Power of Attorney was provided to the **new** IndyMac entity and/or that it allowed a third party not mentioned in the POA, MERS, the authority to act for the Deutsche Bank Trust as an agent. CP 59-61; 344-360. This particularly matters since the loan servicer who made the referral to foreclosure to RTS was actually OneWest – not the IndyMac entities. CP 1698-1722.

MERS argued (as did RTS) that there was “constructive” possession of the Note by someone other than Deutsche. These arguments were rejected by the trial court as a basis for summary judgment, which is consistent with the requirements of the DTA and the findings by this Court in this case. *Bain v. Metro. Mrtg. Group, Inc.*, 175 Wn.2d 83, 97-100, 285

P.3d 34 (2012). MERS had no communication with anyone about this loan and it could not even identify the “principal” on whose behalf it was allegedly acting as an agent. Remember – the MERS “agent” acting for an alleged “principal” is an employee of another company, LPS, with whom it has never once communicated or even knows of her existence except that her name is on a list provided to it by her employer. CP 1562-1563; 1564-1565; 1570-1577. As Mr. Blake testified at deposition on behalf of MERS, its only involvement in the foreclosure process is to maintain computerized records and serve to be the publicly recorded name in county records as the “owner” of loans. *Id.* He admitted that MERS has no actual information about Ms. Hood. CP 1580-1584.

While Ms. Bain did default on the loan, the non-judicial foreclosure process was sped along and facilitated by the improper and illegal actions of MERS and LPS, at the behest of RTS, the defunct foreclosing trustee, and everything done by these defendants was done for the benefit of themselves and the beneficiary, Deutsche. But simply because she was delinquent in her loan payments, it was not an excuse for these Defendants’ intentional disregard of DTA requirements. The DTA’s procedural requirements contemplate and assume that the borrower is in default. It makes no sense to have requirements for the process if the Legislature intended that they be waived if a property owner is in default.

It would render the statutory requirements meaningless.

Ms. Bain knew that she had been lied to and deceived about her loan origination, and she knew that she was losing her home to foreclosure. She sought out legal assistance to preserve homeownership and she had to pay for some of the work involved in that process. CP 157-163, CP 241. The time between the default on her loan (May 2008) and the initiation of the foreclosure by the service of an NOD was less than four months (August 2008). Noteholders have the choice to utilize the non-judicial foreclosure process or to foreclose judicially in Washington. The loan servicer made a choice to use the non-judicial foreclosure process under the DTA and thus it, and those who help it enlisted (MERS and LPS) to speed it along, must comply with its requirements.

Ms. Bain testified about her injuries at deposition and the stress that she suffered as a result of the loan origination and foreclosure in a declaration. Her mother also described some of her struggles. CP 37-38; 39-41; 44-46; 47-48. Ms. Bain was required to take action swiftly to prevent the loss of her home to foreclosure because of the Defendants' expedited process. She defaulted on her loan in May 2008 and by August 28, 2008, she was being served with an NOD (signed on August 22, 2008 and served on August 26, 2008) and thirty (30) days later, she was served with an NOTS on or about September 25, 2008. The actions of these

defendants served their purpose – they were able to help facilitate the swiftness of this foreclosure and the hiding of the identity of the loan owner/beneficiary, the Deutsche Bank Trust. Contrary to the determination made by the trial court, MERS’ unfair, deceptive and misleading acts violated the requirements of the DTA, which therefore constituted a Consumer Protection Act violation. RCW 19.86, *et seq.*

V. STANDARD ON REVIEW

RAP 13.4(b) sets forth the considerations governing acceptance of review by the Supreme Court. Ms. Bain maintains that the Appellate Court’s decision is conflict with this Court’s decisions regarding the liability under the CPA for violations of the DTA.

VI. ARGUMENT

A. Division I’s Decision is not supported by Washington case law.

When rendering its decision affirming the trial court’s Order, the Court of Appeals erroneously found that Ms. Bain did not prove any injury or damages caused by MERS. This case is appropriate for this Court to review because it sets the standards for how to measure injury and/or damages related to the wrongful initiation of a non-judicial foreclosure by an entity that had no relationship whatsoever to the promissory note in question. The Court of Appeals’ opinion stands as an affirmation that so long as the parties who are unlawfully and improperly

manipulating the non-judicial foreclosure process do so behind the scenes, and irrespective of the falsehoods provided to a borrower which are prohibited by the DTA, may so act free from concerns about liability. This cannot be the standard in Washington if the Deed of Trust Act requirements are going to have any meaning at all.

1. Standard on Review at the Court of Appeals.

The Court of Appeals engaged in an analysis under Civil Rule 56 as to whether the trial court properly granted summary judgment. The Court of Appeals reviewed the matter *de novo*. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008); *McNabb v. Dep't of Corrs.*, 163 Wn.2d 393, 397, 180 P.3d 1257 (2008); *Hill v. Cox*, 110 Wn.App. 394, 41 P.3d 495 (Div. III 2002), *review denied* 147 Wn.2d 1024, 60 P.3d 92; *Cano-Garcia v. King County*, 168 Wn.App. 223, 277 P.3d 34 (Div. II 2012), *review denied* 175 Wn.2d 1010, 287 P.3d 594. Ms. Bain maintains that the Court of Appeals erred when affirming its decision dismissing MERS from this case.

2. The Court of Appeals did not engage in the requisite analysis of the facts and issues and did not apply the law appropriately. There were genuine issues of material fact present before the trial court which precluded granting summary judgment.

At its heart, this case is about whether Washington courts are going to endorse non-judicial foreclosure business models which were created

expressly to evade and contravene the requirements of Washington's DTA. Without MERS' willingness to assist in violating the DTA's requirements, the attempted non-judicial foreclosure of Ms. Bain's home may not have occurred in 2008, and Ms. Bain would have had to obtain injunctive relief to prevent a foreclosure in December, 2008. It would have happened at some point, but if MERS had not facilitated the improper execution of foreclosure documents within minutes of their submission to robo-signers at LPS, she would not have had act when she did.

MERS just ignored requirements of Washington law to help speed up the foreclosure process but maintain there cannot be any liability for their unfair and deceptive actions. The "costs" of the wrongfully-initiated foreclosure sale were added to the balance owed on Ms. Bain's loan, but later those amounts were deleted through Deutsche's manipulations in the judicial foreclosure action later filed against Ms. Bain and her property. CP 299-336. Ms. Bain not knowing the identity of noteholder and loan owner negatively impacted her ability to bring claims relating to loan origination against Deutsche. CP 3642-3654.

1. Ms. Bain has met the standard laid out in the *Bain* case to prove a CPA claim against these Defendants.

This Court made clear that Ms. Bain can pursue her claims for CPA violations against MERS, consistent with the requirements of

Hangman Ridge Training Stables v. Safeco Title Ins. Co., 105 Wn.2d 778 (1986). It requires a plaintiff to prove five elements: “(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 their business or property; (5) causation.” *Hangman Ridge* at 780. In examining MERS’ conduct in *Bain*, this Court reiterated that the proper standard for determining whether an act is deceptive for purposes of a CPA claim by quoting from several of its CPA cases, including *State v. Kaiser*, 161 Wn. App. 705, 719, 254 P.3d 850 (2011). This Court cited to *State v. Kaiser* as follows:

To prove that an act or practice is deceptive, neither intent nor actual deception is required. The question is whether the conduct has "the *capacity* to deceive a substantial portion of the public." *Hangman Ridge*, 105 Wn.2d at 785. Even accurate information may be deceptive "**if there is a representation, omission or practice that is likely to mislead.**" *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 50, 204 P.3d 885 (2009) (quoting *Sw. Sunsites, Inc. v. Fed. Trade Comm'n*, 785 F.2d 1431, 1435 (9th Cir. 1986)). **Misrepresentation of the material terms of a transaction or the failure to disclose material terms violates the CPA.** *State v. Ralph Williams' N. W. ChryslerPlymouth, Inc.*, 87 Wn.2d, 298, 305-09, 553 P.2d 423 (1976). Whether particular actions are deceptive is a question of law that we review de novo. *Leingang v. Pierce County Med. Bureau*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997).

Bain v. Metro. Mrtg. Group, Inc., *supra*, at 115, citing to *State v. Kaiser*, at 719 (emphasis added). This Court found that “characterizing MERS as the beneficiary has the capacity to deceive” and thus meets the first

element of a CPA claim. *Bain* at 115-116; *see also, Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 50, 204 P.3d 885 (2009). MERS helped create and cause to be recorded the Assignment which falsely asserted that it was the beneficiary and that it had the ability to assign any interest in Ms. Bain's loan to another entity. RCW 61.24.005(2). MERS also asserted that it could sign documents through LPS employees allegedly acting on behalf of IndyMac Federal Bank, FSB, even when it did not have any documents giving it authority to act as an "agent" for anyone else. Ms. Allen, LPS employee, signed the Appointment at the behest of RTS, who received a foreclosure referral from OneWest, the servicer. There is no evidence whatsoever of any "agency" relationship between MERS and anyone else or approving of it acting through another layer of "agents". *See also, Frias v. Asset Foreclosure Services, Inc.*, 181 Wash.2d 412, 334 P.3d 529 (2014); *Lyons v. U.S. Bank Nat. Ass'n*, 336 P.3d 1142 (2014).

Ms. Bain is also able to prove the second element of a CPA claim under the *Hangman Ridge* standard – that the unfair or deceptive act occurred "in trade or commerce". *Hangman Ridge* at 780. This Court already found that MERS meets this requirement. Similarly, this Court found that MERS met the third *Hangman Ridge* element, the "public interest element", finding "considerable evidence that MERS is involved in an enormous number of mortgages in the country (and our state),

perhaps as many as half nationwide. . . . If in fact the language is unfair and deceptive, it would have a broad impact. This element is also presumptively met.” *Bain* at 118-119 (citations omitted).

In evaluating whether the borrowers could articulate having any injury based upon MERS’ conduct, this Court considered several scenarios that would meet the criteria, such as “misrepresentations, fraud or irregularities in the [foreclosure] proceedings”, noting at footnote 18 that there was evidence presented of MERS being involved in issuing assignments that are incorrect or result in fraudulent transfers. *Bain* at 117-118. This Court found that that these could form the basis of meritorious claims against MERS. Here, Ms. Bain was treated unfairly and deceived when she had a foreclosure initiated by entities, including MERS, who did not comply with DTA requirements. Her foreclosure happened faster than it would otherwise have happened because of the robo-signing and expediting of the foreclosure process. She was also harmed by not knowing the identity of the beneficiary because she could not pursue claims against it relating to loan origination. CP 3642-3654. The CPA requires proof of damages or injury. *Sato v. Century 21*, 101 Wn.2d 599, 681 P.2d 242 (1984); *St. Paul Ins. Co. v. Updegrave*, 33 Wn.App. 653, 656 P.2d 1130 (1983); *Talmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, 605 P.2d 1275 (1979). Specific

monetary damages are not necessary, but still require an award of attorneys' fees. *Mason v. Mortgage America*, 114 Wn.2d 842, 792 P.2d 142 (1990). This Court noted in *Bain*,

As MERS itself acknowledges, its system changes "a traditional three party deed of trust [into] a four party deed of trust, wherein MERS would act as the contractually agreed upon beneficiary for the lender and its successors and assigns." MERS Resp. Br. at 20 (Bain). As recently as 2004, learned commentators William Stoebuck and John Weaver could confidently write that "[a] general axiom of mortgage law is that obligation and mortgage cannot be split, meaning that the person who can foreclose the mortgage must be the one to whom the obligation is due." 18 STOEBUCK & WEAVER, *supra*, § 18.18, at 334. MERS challenges that general axiom. Since then, as the New York bankruptcy court observed recently:

In the most common residential lending scenario, there are two parties to a real property mortgage—a mortgagee, *i.e.*, a lender, and a mortgagor, *i.e.*, a borrower. With some nuances and allowances for the needs of modern finance this model has been followed for hundreds of years. The MERS business plan, as envisioned and implemented by lenders and others involved in what has become known as the mortgage finance industry, is based in large part on amending this traditional model and introducing a third party into the equation. MERS is, in fact, neither a borrower nor a lender, but rather purports to be both "mortgagee of record" and a "nominee" for the mortgagee. MERS was created to alleviate problems created by, what was determined by the financial community to be, slow and burdensome recording processes adopted by virtually every state and locality. **In effect the MERS system was designed to circumvent these procedures. MERS, as envisioned by its originators, operates as a**

**replacement for our traditional system of public
recording of mortgages.**

Agard, 444 B .R. at 247.

Bain at 96 (emphasis added).

Another of this Court's decisions clarifies its CPA claims related to violations of the DTA. In *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 782, 295 P.3d 1179 (2013), quoting from *Panag*:

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would have undertaken an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of the country.

Klem, at 782, citing to *Panag*, 166 Wn.2d at 48 (quoting *State v. Schwab*, 103 Wn.2d 542, 558, 693 P.2d 108 (1985) (Dore, J. dissenting) (quoting H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914))). The *Klem* Court further noted that “an act or practice can be unfair without being deceptive” and that the statute clearly allows claims for “unfair acts **or** deceptive acts or practices.” *Klem*, at 782-783. As noted in *Trujillo v. NW Trustee Servs., Inc.*, 183 Wn.2d 820, 355 P.3d 1100 (2015), conduct is measured at the time of the action. *Trujillo*, 183 Wn.2d at 834, n. 10. “A foreclosure trustee must ‘adequately inform’ itself regarding the purported beneficiary's right to foreclose, including, at a minimum, a

‘cursory investigation’ to adhere to its duty of good faith.” *Lyons v. U.S. Bank National Ass’n*, 181 Wn.2d 775, 789, 336 P.3d 1142 (2014), citing to *Walker v. Quality Loan Serv. Corp of Wash.*, 176 Wn.App. 294, 309-10, 308 P.3d 716 (2013). The same standard should apply here to MERS.

VII. CONCLUSION

Ms. Bain respectfully requests that this Court agree to accept review of this case to make a determination of the proper analysis of the facts of this case while applying the law, including the import of its earlier decision in this case. The Court of Appeals’ Opinion is contrary to the other holdings of this Court in other cases involving non-judicial foreclosures and will harm other members of the public if it is permitted to stand as authority in Washington.

Respectfully submitted this 29th day of June, 2018.

LAW OFFICES OF MELISSA A.
HUELSMAN, P.S.

/s/ Melissa A. Huelsman
Melissa A. Huelsman, WSBA 30935
Attorney for Appellant Kristin Bain
705 Second Avenue, Suite 601
Seattle, WA 98104
P (206) 447-0103 / Fax (206) 673-8220
Email:
mhuelsman@predatorylendinglaw.com

CERTIFICATE OF SERVICE

I, Tony Dondero, declare under penalty of perjury as follows:

I am over the age of eighteen years, a citizen of the United States, not a party herein, and am competent to testify to the facts set forth in this Declaration.

That on July 2, 2018, I caused the foregoing document attached to this Certificate of Service plus any supporting documents, declarations and exhibits to be served upon the following individuals via the methods outlined below:

<p>Fred Burnside Hugh McCullough Davis Wright Tremaine 1201 Third Avenue Suite 2200 Seattle, WA 98101-3045 Ph: 206-757-8016 Fax: 206-757-7016 Email: fredburnside@dwt.com hughmccullough@dwt.com Attorneys for Mortgage Electronic Registration Systems</p>	<p><input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Federal Express <input type="checkbox"/> Other: <u>Regular U.S. mail,</u> <u>postage prepaid</u></p>
<p>Richard E. Spoonemore Siranni Youtz Spoonemore Hamburger 999 Third Avenue Suite 3650 Seattle, WA 98104 Ph: 206-223-0246 Email: rspoonemore@sylaw.com Attorney for Fidelity National Title, Lender Processing Services, Inc.</p>	<p><input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Federal Express <input type="checkbox"/> Other: <u>Regular U.S. mail,</u> <u>postage prepaid</u></p>
<p>Denise M. Hamel Thomas F. Peterson</p>	<p><input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Electronic Mail</p>

Socius Law Group, PLLC Two Union Square 601 Union St. Suite 4950 Seattle, WA 98101-4000 Ph: 206-838-9139 Email: dhamel@sociuslaw.com tpeterson@sociuslaw.com Attorneys for Fidelity National Title	<input type="checkbox"/> Federal Express <input type="checkbox"/> Other: <u>Regular U.S. mail,</u> <u>postage</u>
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing statement is both true and correct.

Dated July 2, 2018, at Seattle, Washington.



Tony Dondero, Paralegal

ATTACHMENT A

Procedural History

Ms. Bain, through her attorney Ms. Huelsman, filed a Complaint in King County Superior Court on December 23, 2008 in Case Number 08-2-43438-9 for a Temporary and Permanent Restraining Order; Infliction of Emotional Distress; Breach of Fiduciary or Quasi-Fiduciary Duty; Violations of the Consumer Protection Act; and Violations of the Truth in Lending Act 15 USC § 1601, *et seq.* CP 1-13. Ms. Bain filed a Motion for Temporary Restraining Order and Setting Preliminary Injunction in order to enjoin a pending non-judicial foreclosure sale. She obtained a temporary restraining order on December 23, 2008. CP 15-16. The attempted foreclosure was of her residence located at 15340 McAdam Road S., Unit B105, Seattle, Washington, 98188. *Id.*

On February 3, 2009 a Notice to Superior Court of Removal of Civil Action was filed in King County Superior Court removing the case to U.S. District Court for the Western District of Washington on behalf of Defendant IndyMac Bank, FSB by law firm Foster Pepper. CPSUPP 1110-1117.

After the case was removed to federal court, Metropolitan Mortgage filed its Answer on March 5, 2009. On April 22, 2009 Ms. Bain filed a Motion to Substitute Lender Processing Services, Inc. in the Place and Stead of Defendant Fidelity National Title Company. CP 2219-2220. On April 24, 2009, Defendants IndyMac Bank FSB, Mortgage Electronic Systems (MERS), and Fidelity National Title filed a Motion to Substitute Federal Deposit Insurance Corporation as Receiver Indymac Bank F.S.B., in the Place and Stead of Indymac Bank, F.S.B. CP 2222-2226. On April 28, Defendant Fidelity National Title filed its Response to Ms. Bain's Motion to Substitute Lender Processing Services, Inc. in the Place and Stead of Defendant Fidelity National Title Company. CP 2236-2238. On May 28, 2009 Judge John C. Coughenour

signed a Minute Order granting Ms. Bain's Motion to Substitute Lender Processing Services, Inc. in the Place and Stead of Defendant Fidelity National Title Company and Defendants IndyMac Bank FSB, Mortgage Electronic Systems, and Fidelity National Title's Motion to Substitute Federal Deposit Insurance Corporation as Receiver Indymac Bank F.S.B., in the Place and Stead of Indymac Bank, F.S.B. CP 2240-2241.

On July 8, 2009 Defendant Metropolitan Mortgage filed a Joint Motion to Dismiss Party Metropolitan Mortgage. Judge Coughenour signed as Order of Dismissal dismissing Metropolitan Mortgage from the case with prejudice and without costs. CP 2243-2244.

On October 16, 2009 Regional Trustee Services Corp. filed an Answer to the Complaint and on November 16, 2009, Lender Processing Services, filed an Answer to the Complaint.

On December 9, 2009 Defendant Lender Processing Services, Inc. (LPS) filed a Motion for Summary Judgment. CP 2246-2252. On December 11, 2009 Defendant Regional Trustee Services Corp. (RTSC) filed a Motion for Summary Judgment. CP 2278-2284. On December 28, 2009, Ms. Bain filed her Response and supporting declarations to the Motions for Summary Judgment. CP 2333-2503. On January 4, 2010 Ms. Bain filed another Response to the Motions for Summary Judgment. CP 2508-2524. On January 19, 2010 Ms. Bain filed a Motion to Continue Trial Date and supporting declaration. On January 23, 2010 Defendant Lender Processing Services, Inc. filed its Reply in support of its MSJ and supporting declarations. CP 2526-2567. On January 25, 2010, Ms. Bain filed her another response to the Motions for Summary Judgment and supporting declaration, and on January 26, 2010 she filed another Response to RTSC's MSJ. CP 2569-2733, 2741-2749. On January 26, 2010, an Order to Continue Trial Date was granted by Judge Coughenour setting it for July 19, 2010. CP 2738-2739. On January 28, 2010 LPS filed another Motion for Summary Judgment and supporting

declarations. On January 29, 2010 RTSC filed its Reply in to Ms. Bain's Response. CP 2795-2802. On February 19, 2010, LPS filed its Reply to Ms. Bain's Response. CP 2816-2818. On March 11, 2010 Judge Coughenour signed an Order that granted LPS' MSJ. CP 2820-2830.

On March 23, 2010 Ms. Bain filed a Motion for Relief from Judgment and/or Reconsideration with supporting declarations. CP 2832-2844, 2850-2852. She filed another supporting declaration on March 25, 2010. CP 2854.

On March 29, 2010 a Motion for Summary Judgment by Defendant Federal Deposit Insurance Corporation (FDIC) was filed. Also, on March 29, 2010 LPS filed its Response to the Motion for Relief from Judgment and/or Reconsideration. CP 2856-2858. On April 6, a Motion for Summary Judgment by Defendant MERS was filed. CP 2860-2868. On April 19, 2010 a Motion for Summary Judgment by RTSC was filed with a supporting declaration. CP 2875-2892. A Response by Ms. Bain to FDIC's MSJ was filed on May 3, 2010 with a supporting declaration. CP 2894-2901. A Response by Ms. Bain to RTSC's MSJ was filed on May 10, 2010 with a supporting declaration. CP 2903-2923. A Response by Ms. Bain to RTSC'S MSJ and MERS' MSJ was filed on May 14, 2010 with a supporting declaration. CP 2925-2954. Also on May 14, 2010 a supplemental declarations were filed in support of Ms. Bain's Response to FDIC's MSJ. CP 2956-2972. FDIC filed a Surreply in support of its MSJ, and RTSC filed a Reply to Ms. Bain's Response to its MSJ along with a supplemental declaration in support on May 14, 2010. CP 2974-2984. On June 3, 2010 Ms Bain filed another Response to FDIC's MSJ. CP 2986-2987. On June 9, 2010, Judge Coughenour granted FDIC's Motion to Dismiss and FDIC was terminated from the case. CP 2989.

On June 15, 2010, Ms. Bain filed a Motion to Substitute Parties and Amend Complaint with a supporting declaration. CP 2991-3001. On July 7, 2010, Judge Coughenour granted Ms.

Bain's Motion to Substitute Deutsche Bank and OneWest Bank, F.B.S. in the Place and Stead of FDIC, and Amend the Complaint to Conform to the Evidence. CP 3003-3004. The Amended Complaint Substituting Deutsche Bank National Trust Company and OneWest Bank, F.S.B. in the Place and Stead of FDIC against defendants, along with a Praecepto to Issue Summons was filed by Ms. Bain on July 14, 2010. CP 3006-3018.

Answers to the Amended Complaint were filed by Deutsche Bank National Trust Company, MERS, and OneWest Bank on July 28, 2010.

A Supplement re MERS MSJ was filed by MERS on August 3, 2010. CP 3020-3031. A Supplemental Motion for Summary Judgment was filed by RTSC on August 6, 2010. CP 3099-3102.

An Answer to the Amended Complaint was filed by RTSC on August 9, 2010.

A Response by Ms. Bain to the Supplemental MSJ by RTSC was filed on August 20, 2010. CP 3104-3109.

On September 20, 2010 Judge Coughenour issued an Order to Show Cause asking all parties to respond with briefing no later than October 20, 2010.

Defendant Deutsche Bank National Trust filed a Motion for Partial Summary Judgment on September 22, 2010. CP 3111-3118. Defendant OneWest Bank filed a Motion for Summary Judgment on October 15, 2010 with supporting declarations. CP 3155-3384. A Response by Ms. Bain to Deutsche Bank National Trust's Motion for Partial Summary Judgment was filed on October 18, 2010. CP 3386-3391. Deutsche Bank filed its Reply to the Response of Ms. Bain to its MSJ on October 21, 2010. CP 3393-3398.

Responses to the Order to Show Cause were filed by MERS, Deutsche Bank and One West Bank, RTSC and Ms. Bain on October 27, 2010.

Ms. Bain filed her Response to OneWest Bank's MSJ on November 15, 2010. CP 3400-3401.

Defendant Deutsche Bank National Trust Company filed a Motion for Partial Summary Judgment on January 19, 2011, with a supporting declaration. CP 3403-3488. Ms. Bain filed her Response to Deutsche Bank's Motion for Partial Summary Judgment on February 15, 2011. CP 3490-3499. Deutsche Bank filed its Reply to Ms. Bain's Response to its Motion for Partial Summary Judgment on February 18, 2011 with a supporting declaration. CP 3501-3551. Ms. Bain filed a Praecipe on February 25, 2011 with an attached declaration in support of her Response to Deutsche's Motion for Partial Summary Judgment on February 25, 2011. CP 3553-3632. Deutsche filed its Surreply in Support of its Motion for Partial Summary Judgment on February 28, 2011. CP 3638-3640. On March 15, 2011, Judge Coughenour granted in part and denied in part MERS, RTSC, One West Bank and Deutsche Bank's Motions for Summary Judgment, dismissing defendants Deutsche Bank and OneWest Bank F.S.B. CP 3642-3654.

On June 27, 2011 Judge Coughenour issued an Order Certifying Question to the Washington Supreme Court, staying the action until the Washington Supreme Court answers the certified questions. The Certified Questions were the following:

1) Is Mortgage Electronic Registration Systems, Inc., a lawful "beneficiary," within the terms of Washington's Deed of Trust Act, Revised Code of Washington section 61.24.005(2), if it never held the promissory note secured by the Deed of Trust?

2) If so, what is the legal effect of Mortgage Electronic Systems, Inc., acting as an unlawful beneficiary under terms of Washington's Deed of Trust Act?

3) Does a homeowner possess a cause of action under Washington's Consumer Protection Act against Mortgage Electronic Systems, Inc., if MERS acts as an unlawful

beneficiary under the terms of Washington's Deed of Trust Act? CP 3656-3659.

Ms. Bain filed an Opening Brief to the Supreme Court on September 21, 2011. MERS filed its Response on October 20, 2011, RTSC filed its Response on October 21, 2011. Ms. Bain filed her Reply to the Responses on November 2, 2011. Numerous Amicus Curae briefs were filed as well as a Response from MERS to those.

The Washington Supreme Court issued its ruling on August 16, 2012 with following answers to the three questions: 1) If MERS does not hold the note, it is not a lawful beneficiary. 2) The Court concluded that it was unable to determine the "legal effect" of MERS not being a lawful beneficiary based upon the record and argument before it. 3) Finally, if a homeowner has a CPA claim based upon MERS representing that it is a beneficiary, a homeowner may have a claim, but it will turn on the specific facts of each case. CP 3661-3701.

Ms. Bain filed a Motion to Substitute Defendant Deutsche Bank and to File Amended Complaint on October 31, 2012 with a supporting declaration. MERS filed a Response to the Motion to Substitute Defendant Deutsche Bank and to File Amended Complaint, RTSC filed a Joinder to MERS Response, on November 12, 2012. Deutsche Bank and One West Bank FSB filed their Response to the Motion to Substitute Defendant Deutsche Bank and to File Amended Complaint on November 13, 2012. Ms. Bain filed in Reply to the Responses to her Motion to Substitute Defendant Deutsche Bank and to File Amended Complaint on November 15, 2012. Ms. Bain filed an Affidavit of Service of Deposition Subpoena upon Deutsche Bank on November 27, 2012. MERS filed a Motion for Protective Order and supporting declaration on November 28, 2012. RTSC filed a Motion for Protective Order and supporting declarations on November 29, 2012.

On December 4, 2012 Judge Coughenour signed an Order Remanding Case to King

County Superior Court. CPSUPP 1119-1121.

MERS filed a Reply in Support of its Motion for Protective Order on December 6, 2012.

With the case back in King County Superior Court, Defendant MERS filed a Motion for Summary Judgment and supporting declaration on July 12, 2013. CP 52-617. Defendant RTSC filed a Joinder to MERS MSJ with a supporting declaration on July 15, 2013. Ms. Bain filed a Response to MERS MSJ with a supporting declaration on August 5, 2013, and another Response to MERS MSJ on August 19, 2013. CP 618-683.

Ms. Bain filed a Motion to Compel Deposition Testimony of RTSC and the Production of Documents for an Award of Attorneys' Fees and Costs Against RTSC and for a Continuance of the Pending MSJ Date Under CR 56(f) with a supporting declaration on August 22, 2013.

MERS filed its Reply to the Responses to its MSJ with a supporting declaration on August 23, 2013. CP 684-779.

MERS and RTSC filed their Responses to Ms. Bain's Motion to Compel Deposition Testimony of RTSC and the Production of Documents for an Award of Attorneys' Fees and Costs Against RTSC and for a Continuance of the Pending MSJ Date Under CR 56(f) on August 26, 2013 and August 28, 2013 respectively. CP 779-789.

On August 30, 2013 Judge Catherine Shaffer signed an Order Granting MERS Motion for Summary Judgment dismissing MERS with prejudice. CP 875-877.

Ms. Bain filed her Reply to the Responses to her Motion to Compel Deposition Testimony of RTSC and the Production of Documents for an Award of Attorneys' Fees and Costs Against RTSC with supporting declaration on September 4, 2013, and another supporting declaration was filed on September 5, 2013. CPSUPP 1162-1193. RTSC filed its Surreponse to the Motion to Compel Deposition Testimony of RTSC and the Production of Documents for an

Award of Attorneys' Fees and Costs Against RTSC and a supporting declaration on September 5, 2013. CPSUPP 1194-1120. Ms. Bain filed a Motion to Strike RTSC's Surreponse to the Motion to Compel Deposition Testimony of RTSC and the Production of Documents for an Award of Attorneys' Fees and Costs Against RTSC along with a supporting declaration on September 6, 2013. CPSUPP 1201-1207. On September 5, 2013, Judge Shaffer signed an Order Granting Ms. Bain's Motion to Take Deposition of RTSC. CP 878-880.

On January 9, 2014, RTSC filed a Motion to Stay Case Pending Outcome of the Certified Questions to the Washington Supreme Court, along with a Request for Judicial Notice. CPSUPP 1210-1263. Ms. Bain filed her Response to the Motion to Stay Case Pending Outcome of the Certified Questions to the Washington Supreme Court, with a supporting declaration on January 15, 2014. CPSUPP 1263-1279. RTSC filed its Reply to Ms. Bain's Response to its a Motion to Stay Case Pending Outcome of the Certified Questions to the Washington Supreme Court, with a supporting declaration on January 16, 2014. CPSUPP 1280-1302. On January 21, 2014, Judge Shaffer signed an Order Denying the Motion to Stay Case Pending Outcome of the Certified Questions to the Washington Supreme Court. CPSUPP 1303-1304.

RTSC filed a Joinder to MERS MSJ, and supporting declaration on May 22, 2014. CPSUPP 1305-1332. Ms. Bain filed a Second Motion to Compel Deposition Testimony of RTSC and the Production of Discovery Responses and Production of Documents; for an Award of Attorneys' Fees and Costs Against RTSC; and for Sanctions Against RTSC and its Attorneys; and to Continue the Hearing on the MSJ and supporting declaration on June 6, 2014. CP 881-923. Ms. Bain filed a Response and supporting declaration to RTSC's Joinder to MERS' MSJ on June 9, 2014. CP 924-987. RTSC filed a Response and supporting declarations to Ms. Bain's Second Motion to Compel Deposition Testimony of RTSC and the Production of Discovery

Responses and Production of Documents; for an Award of Attorneys' Fees and Costs Against RTSC; and for Sanctions Against RTSC and its Attorneys; and to Continue the Hearing on the MSJ on June 11, 2014. CP 988-994, CPSUPP 1337-1359. Ms. Bain filed a Reply to the Response to her Second Motion to Compel Deposition Testimony of RTSC and the Production of Discovery Responses and Production of Documents; for an Award of Attorneys' Fees and Costs Against RTSC; and for Sanctions Against RTSC and its Attorneys; and to Continue the Hearing on the MSJ, and supporting declaration on June 12, 2014. CPSUPP 1360-1366. RTSC filed a Reply to the Response to its Joinder to MERS MSJ on June 16, 2014. CPSUPP 1367-1372. On June 17, 2014, Judge Shaffer signed an Order **Denying** Second Motion to Compel Deposition Testimony of RTSC and the Production of Discovery Responses and Production of Documents; for an Award of Attorneys' Fees and Costs Against RTSC; and for Sanctions Against RTSC and its Attorneys; and **Granting** the Motion Continue the Hearing on the MSJ. CP 995-997.

On June 26, 2014, RTSC filed a Motion for Protective Order to limit the scope of its deposition testimony and use of its deposition transcript, and supporting declarations. CPSUPP 1373-1491. RTSC also filed a Motion to Hear its Motion for Protective Order on Shortened Time on June 26, 2014. CPSUPP 1492-1493. Ms. Bain filed a Response to the Motion for Protective Order and supporting affidavit on July 1, 2014. CP 998-1008. RTSC filed a Reply to Ms. Bain's Response to its Motion for Protective Order on July 2, 2014. CP 1009-1011.

RTSC filed its own Motion for Summary Judgment and supporting declaration on July 2, 2014. CPSUPP 1498-1525.

On July 7, 2014, Judge Shaffer signed an Order Granting in Part RTSC's Motion for Protective Order, agreeing that the deposition transcripts shall be used solely for the legitimate

purposes of the litigation, prohibiting dissemination to third parties, however that does not affect public consumption of what excerpts may be in the court file. CPSUPP 1526-1527.

Ms. Bain's attorney Ms. Huelsman conducted a Deposition of a Representative of Defendant RTSC on July 16, 2014.

Ms. Bain filed an Amended Response to RTSC's Joinder to MERS MSJ, and supporting declarations on July 21, 2014. CPSUPP 1528-2012.

Ms. Bain and RTSC filed Motions to Continue the Trial Date on July 30, 2014, and on August 4, 2014, an Order Continuing the Trial Date and Amending Case Schedule was signed by Judge Shaffer. CPSUPP 2013-2014, 2017-2020, 2024-2027.

Ms. Bain filed a Motion to Dismiss Defendant RTSC, which was in receivership, on August 31, 2016, and on September 12, 2016, Judge Shaffer signed an Order Dismissing RTSC from the case. CP 1029-1034.

On October 12, 2016, Ms. Bain filed her Notice of Appeal in King County Superior Court, appealing the granting of the Motion for Summary Judgment to Defendant Lender Processing Services (**USDC, Docket #42**), entered by Order of the U.S. District Court, Western District of Washington at Seattle on March 11, 2010; the granting of the motions for partial summary judgment and dismissal of claims to Defendants MERS (**USDC, Docket #88 and 122**, claims for intentional emotional distress and for breach of fiduciary duty or quasi-fiduciary duty with prejudice) and Deutsche Bank National Trust Company (**USDC Docket #131 and 146**, claims for breach of fiduciary duty or quasi-fiduciary duty, claims for violation of the Truth in Lending Act, infliction of emotional distress and violation of the Consumer Protection Act) entered by Order of the U.S. District Court, Western District of Washington at Seattle on March 15, 2011; and the granting of the Motion for Summary Judgment to Defendant MERS (**KCSC**

Docket #47 on the Consumer Protection Act claim), entered by Order of King County Superior Court, on August 30, 2013. CP 1035-1068.

Following a couple extensions, Ms. Bain filed her opening brief in the Court of Appeals case, No. **75946-9-I**, on May 22, 2017. MERS filed its Response Brief on June 21, 2017.

On April 30, 2018, the Court of Appeals Division I issued its unpublished opinion affirming the trial court decisions to grant the summary judgment orders. Defendant LPS filed an Affidavit for Fees and Expenses and Cost Bill on May 10, 2018. Ms. Bain filed a Motion for Reconsideration on May 21, 2018 and Response to LPS' Affidavit for Fees and Expenses and Cost Bill.. On May 29, 2018 LPS filed a Reply in Support of its Affidavit for Fees and Expenses and Cost Bill. On May 30, the Court of Appeals Division I issued an Order denying the Motion for Reconsideration. On June 20, 2018, Commissioner Mary Neel issued a ruling awarding fees and costs to LPS.

ATTACHMENT B

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

KRISTIN BAIN,)	No. 75946-9-I
)	
Appellant,)	
)	
v.)	
)	
METROPOLITAN MORTGAGE)	
GROUP, INDYMAC BANK, FSB;)	
MORTGAGE ELECTRONIC)	
REGISTRATION SYSTEMS;)	
REGIONAL TRUSTEE SERVICES;)	
LENDER PROCESSING SERVICES;)	UNPUBLISHED OPINION
FIDELITY NATIONAL TITLE, and)	
Doe Defendants 1 through 20,)	FILED: April 30, 2018
Inclusive,)	
Respondents.)	

VERELLEN, J. — Kristen Bain appeals the summary judgment orders dismissing her claims against Mortgage Electronic Registration Systems (MERS), Lender Processing Services (LPS) and Deutsche Bank National Trust Company for violations of Washington’s Consumer Protection Act (CPA).¹ Because Bain presented no evidence that the actions of MERS caused any injury to her property and because she waived any challenge as to LPS and Deutsche Bank, we affirm.

¹ Ch. 19.86 RCW.

FACTS

In March 2007, Bain borrowed \$193,000 from IndyMac Bank, FSB in order to buy a condominium in Tukwila, Washington. The loan was secured by a deed of trust identifying the lender as IndyMac, the trustee as Stewart Title Guarantee Company, and the beneficiary, "acting solely as a nominee for Lender and Lender's assigns," as MERS. The loan documents provided that Bain's monthly loan payment would be \$1,720.76, to be paid to IndyMac.

In June 2007, IndyMac sold Bain's loan to a securitized trust known as the Home Equity Mortgage Loan Asset-Backed Trust Series INABS 2007-B. Deutsche Bank serves as trustee and is the physical custodian of Bain's note.² Deutsche Bank appointed IndyMac as the servicer of the loans owned by the trust.

In May 2008, Bain lost her job and fell behind on her loan payments.³ On August 26, 2008, Bain received a notice of default. The notice informed Bain that failure to cure the default within 30 days could result in a trustee's sale of her home.

Both IndyMac and MERS used LPS, a provider of mortgage processing services, to assist with loan transactions.⁴ On September 3, 2008, Bethany Hood,

² Deutsche Bank had continuous physical control over the original note and deed of trust until April 3, 2013, when it provided them to OneWest Bank, FSB, who was Bain's loan servicer at the time, upon request from OneWest.

³ Aside from one partial monthly payment, Bain has not made any loan payments since that time.

⁴ "Lender Processing Service, Inc., which processed paperwork relating to Bain's foreclosure, seems to function as a middleman between loan servicers, MERS, and law firms that execute foreclosures." Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 107 n.13, 285 P.3d 34 (2012).

an employee of LPS acting in her capacity as a vice president of MERS, executed an assignment of the deed of trust which purported to assign to IndyMac “all beneficial interest” under the deed of trust.⁵ However, several days earlier, on August 26, 2008, Christina Allen, an employee of LPS acting in her capacity as assistant vice president of IndyMac, “the present beneficiary,” appointed Regional Trustee Services (RTS) as the successor trustee.⁶ Both the assignment and the appointment were recorded on September 9, 2009.

On September 25, 2008, RTS recorded a notice of trustee’s sale, scheduling the sale of Bain’s home for December 26, 2008.⁷

Bain sued MERS, LPS, and Deutsche Bank, in addition to several other defendants.⁸ The complaint alleged that the defendants “assisted in the preparation and creation of false and misleading documentation . . . regarding the standing of themselves or others to initiate and maintain a foreclosure sale” and that Bain was “damaged by the initiation of a foreclosure by an entity who was not the holder of her Promissory Note in that she has been unable to negotiate a resolution regarding the default of her loan because she has not known the identity of the Note holder.”⁹ As to MERS and Deutsche Bank, Bain alleged claims for

⁵ Clerk’s Papers (CP) at 32.

⁶ CP at 35.

⁷ The trustee’s sale was stayed when Bain filed suit, and never took place. Deutsche Bank, as trustee of the trust, ultimately initiated a judicial foreclosure action and obtained a judgment in 2013.

⁸ Bain’s various claims against Metropolitan Mortgage, IndyMac, RTS, and OneWest Bank, FSB are not at issue in this appeal.

⁹ CP at 3016.

intentional infliction of emotional distress, breach of fiduciary duty, and violation of the CPA.¹⁰ As to LPS, Bain alleged only a claim for intentional infliction of emotional distress.¹¹

The defendants removed the case to federal court. LPS moved for summary judgment. In her response, Bain for the first time asserted a CPA claim as to LPS. On March 11, 2010, the federal court granted LPS's motion for summary judgment dismissal of the intentional infliction of emotional distress claim. The federal court noted that Bain's CPA was improperly pleaded because she did not allege it in her complaint.¹² Bain filed a motion for relief from judgment or, in the alternative, a motion for reconsideration. The federal court denied the motion. However, Bain did not otherwise appeal the order granting summary judgment.

MERS and Deutsche Bank also moved for summary judgment. On March 15, 2011, the federal court granted summary judgment dismissal of the CPA claim against Deutsche Bank and the intentional infliction of emotional distress and

¹⁰ Bain also alleged that Deutsche Bank violated the Truth in Lending Act, a claim that is not at issue in this appeal.

¹¹ Bain's original complaint named Fidelity National Title as a defendant, but Bain moved to substitute LPS after it was spun off from Fidelity as a separate corporate identity.

¹² The federal court concluded that even if Bain had properly pleaded the CPA claim, it would not survive summary judgment because LPS's practice of giving its employees titles so that they could execute documents on behalf of MERS and IndyMac was not deceptive because "[t]here is simply nothing deceptive about using an agent to execute a document, and this practice is commonplace in deed of trust actions." CP at 1049.

breach of fiduciary duty claims against both defendants. Bain did not appeal the order granting summary judgment.

The federal court stayed the CPA claim against MERS and certified three questions of state law to the Washington Supreme Court: (1) whether MERS was a lawful beneficiary as defined by RCW 61.24.005(2) if it has never held the promissory note secured by the deed of trust; (2) the legal effect of MERS acting as such a beneficiary; and (3) whether a homeowner possesses a cause of action under the CPA if MERS acts as such a beneficiary.

The Washington Supreme Court addressed these questions in Bain v. Metropolitan Mortgage Group, Inc. (Bain I).¹³ The court concluded that only the actual holder of a promissory note is a “beneficiary” with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property and that MERS was never a beneficiary because it never held Bain’s note.¹⁴ However, the court held that “the mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury” under the CPA, and a claimant must show a separate injury resulting from MERS’s involvement.¹⁵

After the court issued its opinion in Bain I, the federal court remanded Bain’s lawsuit to superior court. On August 30, 2013, the superior court granted summary judgment dismissal of the CPA claim against MERS.

¹³ 175 Wn.2d 83, 90, 285 P.3d 34 (2012).

¹⁴ Id. at 98-110.

¹⁵ Id. at 119-20.

DECISION

We review an order granting summary judgment de novo.¹⁶ Summary judgment is appropriate when, viewing all facts and reasonable inferences in the light most favorable to the nonmoving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.¹⁷

The CPA prohibits “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.”¹⁸ To prevail on a CPA claim, a plaintiff must show (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) a public interest impact, (4) injury to the plaintiff in his or her business or property, and (5) a causal link between the unfair or deceptive act and the injury.¹⁹ “[T]he injury requirement is met upon proof the plaintiff’s ‘property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal.’”²⁰ The causal link must demonstrate that the alleged injury would not have occurred “but for” the

¹⁶ Hayden v. Mut. of Enumclaw Ins. Co., 141 Wn.2d 55, 63-64, 1 P.3d 1167 (2000).

¹⁷ Lybbert v. Grant County, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

¹⁸ RCW 19.86.020.

¹⁹ Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

²⁰ Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 57, 204 P.3d 885 (2009) (quoting Mason v. Mortgage Am., Inc., 114 Wn.2d 842, 854, 792 P.2d 142 (1990)).

defendant's unlawful acts.²¹ We review whether a particular action constitutes a CPA violation as a question of law.²²

Bain first challenges the summary judgment dismissal of her CPA claim against MERS. Characterizing MERS as the beneficiary on the deed of trust is presumptively deceptive.²³ But to establish a violation of the CPA, Bain must also show that she would not have suffered injury absent MERS' allegedly deceptive practices.

Bain asserts that she was injured by MERS' actions because "[h]er foreclosure happened faster than it would otherwise have happened because of the robo-signing and expediting of the foreclosure process."²⁴ But even assuming this premise to be true, that MERS' involvement accelerated the pace of foreclosure proceedings, Bain received the full amount of notice required by the statute.²⁵ Moreover, Bain fails to put forth facts of any injury related to the speed of the foreclosure proceedings. Bain stated in her deposition that, after she lost her job, she attempted to contact IndyMac to discuss a payment plan, but that

²¹ Schnall v. AT & T Wireless Servs., Inc., 171 Wn.2d 260, 278, 259 P.3d 129 (2011) (quoting Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 82, 170 P.3d 10 (2007)).

²² Bavand v. OneWest Bank, 196 Wn. App. 813, 840, 385 P.3d 233 (2016).

²³ Bain, 175 Wn.2d at 117; see also Bavand, 196 Wn. App. at 841 (characterizing MERS as the beneficiary in a recorded assignment is presumptively deceptive).

²⁴ Appellant's Br. at 29.

²⁵ Under RCW 61.24.030(8), the trustee must transmit written notice of default to the grantor by mail and by posting or serving the notice at least 30 days before notice of sale is recorded. The trustee must record the notice of sale at least 90 days before the foreclosure sale. RCW 61.24.040(1)(a).

IndyMac refused to offer her one, and she did not contact them again. Bain does not establish that, but for MERS' involvement, she would have had sufficient time to cure her default.

Bain additionally claims that she was harmed "by not knowing the true identity of her loan owner (allegedly Deutsche) because she could not pursue claims against it relating to loan origination."²⁶ But the sale of Bain's loan to the trust was not attributable to MERS. Moreover, this claim is inconsistent with the record. In her deposition, Bain repeatedly acknowledged that she knew that IndyMac was the entity to whom she was required to make loan payments. And Bain knew that IndyMac had authority to modify her loan terms. Bain stated that she contacted IndyMac to modify her loan and that IndyMac offered to allow her to refinance, which Bain did not want to do.

Finally, Bain claims that she "made clear at her deposition that she had damages related to retaining an attorney to stop the foreclosure sale."²⁷ But "[c]onsulting an attorney to dispel uncertainty regarding the nature of an alleged debt is distinct from consulting an attorney to institute a CPA claim. Although the latter is insufficient to show injury to business or property, the former is not."²⁸ Bain stated in her deposition that she retained an attorney in order to see if they could work out a deal and then get the readjusted, not to dispel any uncertainty

²⁶ Appellant's Br. at 29-30.

²⁷ Id. at 44.

²⁸ Panaq, 166 Wn.2d at 62 (citations omitted).

about the identity of the note holder.²⁹ And Bain admitted that she had no question that she owed IndyMac the amount that IndyMac said she did.

Bain thus fails to establish the existence of any genuine issue of material fact as to any injury caused by MERS' conduct. The superior court properly dismissed Bain's CPA claim against MERS.

Bain also appeals the dismissal of her CPA claims against LPS and Deutsche Bank. But, as the federal court noted, Bain never pleaded a CPA claim against LPS. In any event, as to both LPS and Deutsche Bank, Bain fails to establish, or even assert, that she is entitled to review of the federal court's orders here.³⁰

Respondent LPS requests attorney fees and costs pursuant to RAP 18.9. RAP 18.9(a) permits this court to award a party attorney fees when the opposing party files a frivolous appeal.³¹ "An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon

²⁹ Bain asserts that this case is similar to Walker v. Quality Loan Serv. Corp., 176 Wn. App. 294, 320, 308 P.3d 716 (2013), in which the plaintiff alleged as injuries "the distraction and loss of time to pursue business and personal activities due to the necessity of addressing the wrongful conduct through this and other actions" and "the necessity for investigation and consulting with professionals to address [the] wrongful foreclosure and collection practices and violation of RCW 61.24, et seq." Walker is inapposite because it involved a dismissal pursuant to CR 12(c) and, accordingly, considered hypothetical facts.

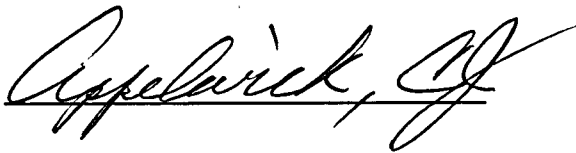
³⁰ See, e.g., Porter v. Williams, 436 F.3d 917 (8th Cir. 2006) (when a federal district court grants summary judgment on certain claims and remands the remaining claims to a state court, the federal district court's partial summary judgment becomes final as to the claims on which the federal district court granted summary judgment and the federal district court's resolution of those claims is appealable to the federal circuit court).

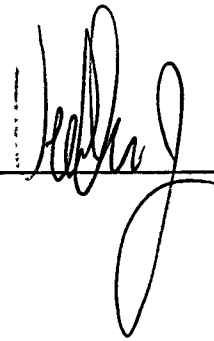
³¹ Reid v. Dalton, 124 Wn. App. 113, 128, 100 P.3d 349 (2004).

which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal.”³² As to LPS, the appeal is frivolous because Bain waived her challenge to the summary judgment order. Accordingly, LPS may recover its attorney fees and costs on appeal, subject to compliance with RAP 18.1(d).

Affirmed.

WE CONCUR:





Cox, J.

³² Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hearings Bd., 170 Wn.2d 577, 580, 245 P.3d 764 (2010).

ATTACHMENT C

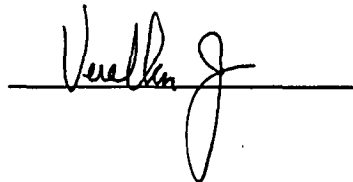
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

KRISTIN BAIN,)	No. 75946-9-1
)	
Appellant,)	
)	
v.)	
)	
METROPOLITAN MORTGAGE)	
GROUP, INDYMAC BANK, FSB;)	
MORTGAGE ELECTRONIC)	
REGISTRATION SYSTEMS;)	
REGIONAL TRUSTEE SERVICES;)	
LENDER PROCESSING SERVICES;)	ORDER DENYING MOTION
FIDELITY NATIONAL TITLE, and)	FOR RECONSIDERATION
Doe Defendants 1 through 20,)	
Inclusive,)	
Respondents.)	

Appellant filed a motion for reconsideration of the court's April 30, 2018 opinion. Following consideration of the motion, the panel has determined it should be denied. Now, therefore, it is hereby

ORDERED that the appellant's motion for reconsideration is denied.

FOR THE PANEL:



A handwritten signature in black ink, appearing to read 'Verellen J', is written over a horizontal line.

LAW OFFICES OF MELISSA HUELSMAN

July 02, 2018 - 2:32 PM

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