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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

21st MORTGAGE CORPORATION, a Delaware corporation, Respondent, v. LINDA C. NICHOLLS, Defendant, DUNCAN K. ROBERTSON, Appellant, RESIDENTIAL FUNDING COMPANY, LLC, a limited liability company; NORTHWEST TRUSTEE SERVICES, INC., a Washington corporation; MARY A. MILLER, an Iowa resident; TYRONE THOROGOOD, a Pennsylvania resident; DOES 1-10, Third-Party Defendants, OCWEN LOAN SERVICING, LLC, a limited liability company, Respondent.	No. 83347-2-I DIVISION ONE OPINION PUBLISHED IN PART

DÍAZ, J. — At oral argument, counsel for the appellant, Duncan Robertson, stated, "This is a very, very simple case: whether or not 21st Mortgage held the

original promissory note and the allonges at the time the complaint was filed." Wash. Court of Appeals oral argument, Duncan K. Robertson v. Residential Funding Company, LLC., No. 833472 (Jan. 20, 2023), at 46 sec., through 1 min., video recording by TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2023011210/. Because there is no authority in support of the claim that a holder of a note must possess the note on (or affix supporting documents to the note by) the date of the filing of a complaint for judicial foreclosure in order to enforce the note, the verdict question so requiring was improper. Robertson's remaining assignments of error and defense to the foreclosure are unavailing. Thus, we remand this matter to the trial court to grant the decree of foreclosure in favor of respondent/cross-appellant 21st Century Mortgage Corp. (21st), which the jury found possessed the original note and allonges.

I. FACTS

A. Factual History[1]

Linda Nicholls inherited the property in question, which is located in South King County (Property). In 1999, she obtained a loan from Old Kent Mortgage Company (dba National Pacific Mortgage) for $100,000 and executed and delivered a promissory note secured by a deed of trust that encumbered the

[1] For additional detail on the factual background of this long running case, see 21st Mortgage Corp. v. Robertson et al., No. 75262-6-I, slip op. at 2-4 (Wash. Ct. App. Oct. 30, 2017) (unpublished), https://www.courts.wa.gov/opinions/pdf/752626.pdf; Ord. Den. Resp't's Mot. for Recons. & Appellant's Mot. for Partial Recons. & Amending Op., 21st Mortg. Corp. v. Robertson, No. 75262-6-I (Wash. Ct. App. Oct. 30, 2017), https://www.courts.wa.gov/opinions/pdf/752626.pdf; Robertson v. GMAC Mortg. LLC, 982 F. Supp. 2d 1202, 1205 (W.D. Wash. 2013).

property (Nicholls Loan).

In 2006, Nicholls borrowed $82,000 from Robertson (Robertson Loan). The Robertson Loan was secured by a deed of trust that acknowledged the Nicholls Loan and named Robertson as the beneficiary (Robertson Deed of Trust). id.

Shortly thereafter, Nicholls defaulted on the Robertson Loan and Robertson foreclosed on his Deed of Trust. The resulting non-judicial foreclosure sale subsequently occurred on September 26, 2008, where Robertson purchased the property, with the Nicholls Loan still intact.

During this time, Residential Funding Company, LLC (RFC) acquired the Nicholls Loan from Old Kent. Specifically, Old Kent endorsed the note to RFC. RFC placed the Nicolls Loan in a securitized trust and endorsed the note to Bank One as trustee for that trust. In an undated allonge attached to the note, Bank One as trustee for RFC endorsed the note in blank. In another allonge, the Bank of New York Mellon Trust Company, as trustee for RFC, endorsed the note to RFC. In a third allonge, pursuant to the bankruptcy proceedings described immediately below, RFC endorsed the note in blank and delivered it and its allonges to 21st, which it claims are the originals.

On May 14, 2012, RFC filed for bankruptcy. RFC liquidated the Nicholls Loan and sold it to Berkshire Hathaway (Berkshire), free and clear of any claims against the prior owners of the Nicholls Loan. Berkshire then deposited the Nichols Loan into the Knoxville 2012 trust and appointed Wilmington Savings Fund Society dba Christiana trust as trustee. Subsequently, Christiana elected 21st as the master servicer of the trust. In 2014, respondent Ocwen Loan Servicing (Ocwen)

sent a notice to Nicholls that 21st would service her loan.

Nicholls had defaulted on the Nicholls Loan long before 21st had become the master servicer. She had made her last payments on July 8, 2009 and August 11, 2009.

B. Procedural History

On July 24, 2014, 21st filed a complaint for judicial foreclosure against Nicholls and Robertson as co-defendants in King County Superior Court. Nicholls did not answer and was defaulted, while Robertson answered and asserted originally 22 affirmative defenses and 13 counter- or cross-claims against 21st and against others.[2] In summary, Robertson claimed that 21st did not have standing to bring a foreclosure action because it had obtained the note underlying the foreclosure fraudulently, and also brought in Ocwen, which Robertson claimed participated in the fraud.

In 2015, both Robertson and 21st brought motions for summary judgment. On March 14, 2016, the superior court judge denied Robertson's motion and granted 21st's in part: (1) finding Robertson's 2008 trustee sale was invalid, and thus that Robertson was not the owner of the property and 21st was entitled to a decree of foreclosure; (2) striking Robertson's affirmative defenses; and (3) continuing the stay of Robertson's counterclaims and third-party damage claims, still at issue in this appeal, in deference to a related federal proceeding. Importantly, the court did not rule on 21st's motion to strike the expert testimony

[2] For the purposes of this opinion, any discussion of the related proceedings in the U.S. District Court case and subsequent 9th Circuit appeal are omitted. See Robertson, 982 F. Supp. 2d 1202 (W.D. Wash. 2013).

still at issue in this appeal. Robertson appealed.

In 2017, this court issued an opinion affirming in part and reversing in part the summary judgement orders. Robertson, No. 75262-6-I, slip op. at 2. This court concluded that there were two genuine issues of material fact; namely, (a) as to whether the note presented by 21st was the original adjustable rate note on the Nicholls Loan or a copy thereof, and (b) as to whether the allonges were fraudulent, both thereby raising the question of whether 21st was the holder and was entitled to enforce the note. Id. at 4-7. Specifically, the court held that a report and affidavit by James Kelley (Kelley) provided evidence that the note and allonges were copies, stating, "To the extent that that affidavit is an admissible expert opinion, which is a question that is not before us, it creates a genuine issue of fact whether 21st is the holder of the note" and Kelly's testimony that "two of the allonges were made with a printer" created a genuine issue of material fact as to whether they were "fraudulent." Id. at 6-7 & 7-8.

This court further declined to reach whether Robertson acquired title to the property through the 2008 sale because his ownership status was immaterial to whether 21st was entitled to a decree of foreclosure. Id. at 9.

Finally, this court affirmed the trial court's decision to strike Robertson's twenty-two affirmative defenses, with the exception of standing, finding that, again *if* Kelley's affidavit was admissible, then it created "a genuine issue of material fact whether 21st holds the note. If 21st does not hold the note, then it does not have standing to enforce it." Id. at 10 (citing RCW 62A.3-301). This court, thus, remanded back to superior court for a new trial regarding "whether the note and

its allonges [in 21st's possession] are original, and thus whether 21st is the holder entitled to enforce the note." Id. at 8. There was no mention of remanding the matter to determine whether 21st possessed the note on a particular date.

On remand, on July 30, 2020, the trial court granted summary judgment in favor of 21st on ten of the eleven counterclaims brought by Robertson, all but four of which Robertson voluntarily withdrew or failed to defend. 21st moved for reconsideration on Robertson's final counterclaim of outrage, which the court granted.

Before trial, 21st submitted a motion to exclude two of Robertson's expert witnesses and the trial court held a Frye hearing for one witness (Kelley), but not the other (Marie McDonnell). Robertson offered these witnesses to testify that 21st did not properly obtain an authentic version of the note and, thus Robertson would argue, 21st did not have standing to enforce the note.

Following the Frye hearing for Kelley, the court, which admitted to "struggl[ing] . . . quite a bit" with its decision, granted 21st's motion to exclude Kelley, finding that, while Kelley's testimony would be "helpful" and he had "10 years experience examining documents" and "has some particularized knowledge," Kelley's "training and his experience do not rise to the level of the Court finding him to be an expert in this area." Further the court found, while "he definitely employed some of the methodologies," the "methodologies that were employed by Dr. Kelley were not those generally accepted in the scientific community." The trial court clarified that, while Kelley employed the correct methodologies ("Yes . . . he did this."), Kelly did not employ "the methodologies in

a global sense such that [his] conclusions . . . are born out of a proper application of the methodologies."

As to McDonnell, the court denied 21st's motion to exclude, but did limit, her testimony, in ways both parties now contest. In particular, the court excluded McDonnell's testimony as to the distant history of the various loans and, what 21st claimed, were legal conclusions. Trial commenced in September 2021.

At the end of the trial, the court gave the jury its instructions and questions on the verdict form, some of which 21st contested. Specifically, the court gave jury instructions nos. 12-15, which related to how a note is transferred and whether a person may enforce the note, including whether a person has standing to bring a foreclosure action, and limiting instructions thereto. And verdict question 3 asked the jury to determine whether the allonges were "affixed to the original Adjustable Rate Note" at the time 21st filed its foreclosure complaint against Robertson.

On October 5, 2021, the case was submitted to the jury and, the same day, the jury returned—what can only be called a mixed verdict—finding that 21st was in possession of the original note (verdict question 1) and the original allonges (verdict question 2), but that the original allonges were not affixed to the original Note on July 24, 2014, i.e., the date the Complaint was filed (verdict question 3).

After the trial court issued its final judgment, 21st filed a CR 50 motion for a judgment as a matter of law (JMOL) to strike verdict question 3 and, in the alternative, for a new trial pursuant to CR 59. The court denied 21st's motions. In the interim, Robertson was declared the prevailing party and filed additional motions to recover fees and costs, and to vacate the trial court's prior orders, all of

which the court denied, with the exception of granting Robertson a cost bill of $464.69.

Robertson and 21st appealed. Robertson requests a new trial because of (a) the total exclusion of Kelley; (b) the limitations the trial court imposed on the testimony of McDonnell, both of whom Robertson claimed would have testified as to how respondents 21st and Ocwen "fabricated a chain of title"; and (c) the pre-trial dismissal of myriad counterclaims against the respondents, as well as other claimed irregularities during and after trial.[3]

In its cross-appeal, 21st seeks reversal of the orders denying its motion for a JMOL and motion for a new trial because verdict question 3 (and its related jury instructions) had no factual or legal basis for its inclusion. Alternatively, 21st requested a new trial to remedy the partial inclusion of Robertson's second expert witness, and because of other claimed irregularities. We begin our analysis with 21st's assignments of error.

II. ANALYSIS

A. Verdict Question 3 and Standing to Foreclose

1. Judgment as a Matter of Law and Motion for New Trial

CR 50 motions for JMOL are reviewed in the same manner as the trial court. Johnson v. Liquor & Cannabis Bd., 197 Wn.2d 605, 611, 486 P.3d 125 (2021) (citing Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 32 P.3d 250 (2001)).

[3] Despite the fact that Robertson appealed the jury verdict and requested a new trial, counsel for Robertson asked this court at oral argument, surprisingly, to simply affirm the jury verdict. Wash. Court of Appeals oral argument, supra, at 43 sec. through 45 sec. We will disregard that contradictory statement and address the arguments as briefed.

"Granting a motion for [JMOL] is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." Guijosa, 144 Wn.2d at 915 (quoting Sing v. John L. Scott, Inc., 134 Wn.2d 24, 29, 948 P.2d 816 (1997)). "Substantial evidence is said to exist if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise.'" Id. (quoting Brown v. Superior Underwriters, 30 Wn. App. 303, 306, 632 P.2d 887 (1980)). A court "may affirm a trial court's disposition of a motion for summary judgment or judgment as a matter of law on any ground supported by the record." Johnson, 197 Wn.2d at 611 (quoting Washburn v. City of Federal Way, 178 Wn.2d 732, 753 n.9, 310 P.3d 1275) (2013).

"The grounds for granting a new trial are set forth at CR 59(a)," which states that a new trial can be granted for any or all parties on any or all issues. Aluminum Co. of Am. v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 537, 998 P.2d 856 (2000) (citing CR 59(a)). The appeals court will grant a new trial if the trial court abused its discretion. Aluminum Co., 140 Wn.2d at 537. An abuse of discretion is shown when "such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial." Id. (citing Moore v. Smith, 89 Wn.2d 932, 942, 578 P.2d 26 (1978)).

"A clear misstatement of the law [in a jury instruction] is presumed to be prejudicial." Keller v. City of Spokane, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002) (citing State v. Wanrow, 88 Wn.2d 221, 239, 559 P.2d 548 (1977)). The party who submits the presumptively prejudicial instruction must rebut this presumption.

Anfinson v. FedEx Ground Package Sys., Inc., 174 Wn.2d 851, 873, 281 P.3d 289 (2012).

2. Relevant Background on the Uniform Commercial Code

Article 3 of the Uniform Commercial Code (UCC), incorporated into state law at Title 62A RCW, governs who is entitled to enforce a negotiable instrument, which includes a promissory note. Bucci v. Nw. Tr. Servs., Inc., 197 Wn. App. 318, 326, 387 P.3d 1139 (2016) (considering a promissory note as the instrument in question). A negotiable instrument is "'an unconditional promise or order to pay a fixed amount of money, with or without interest . . . .'" Bucci, 197 Wn. App. at 329 (quoting RCW 62A.3-104(a)). Negotiability exists and is "determined from the face, the four corners, of the instrument at the time it is issued without reference to extrinsic facts." Id. (citing 5A Ronald A. Anderson, Anderson on the Uniform Commercial Code § 3-104:13, at 115 (3d ed. 1994)).

"'Negotiation' means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder." RCW 62A.3-201. "An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." RCW 62A.3-203(a).

"'Indorsement' means a signature . . . that . . . is made on an instrument for the purpose of . . . negotiating the instrument . . ." RCW 62A.3-204. An indorsement can be a special indorsement (i.e., one which identifies a person to whom it makes the instrument payable) or a "blank indorsement" (i.e., one which does not identify such an individual). RCW 62A.3-205(a)-(b). "When indorsed in

blank, an instrument becomes payable to the bearer and may be negotiated by transfer of possession alone until specially indorsed." RCW 62A.3-205(b).

A person or entity entitled to enforce an instrument includes the "holder" of the instrument. RCW 62A.3-301(i); RCW 62A.1-201(b)(21)(A); Bucci, 197 Wn. App. at 326-27. A "holder" of a negotiable instrument is "the person in possession if the instrument is payable to the bearer or . . . to an identified person . . . [that is] the person in possession." Bain v. Metro. Mortgage Grp., Inc., 175 Wn.2d 83, 104, 285 P.3d 34 (2012); RCW 62A.1-201(b)(21)(B).

3. Application of Law to Facts

a. Verdict Question 3 Was Improperly Given on the Law

i. Robertson's first argument pursuant to RCW 62A.1-201

In his briefing and during oral argument, Robertson argued that 21st did not have legal standing to enforce the note, making four arguments. We address each argument in turn.

First, Robertson argues that 21st did not have standing to enforce the note when it filed its foreclosure complaint in 2014 because the allonges were allegedly not affixed to the note at that time. In support of this claim, at oral argument, counsel for Robertson directed us to Page 44 of their brief, which cites to RCW 62A.1-201(b)(21)(A). Wash. Court of Appeals oral argument, supra, at 17 min., 50 sec. through 18 min., 32 sec.

That statute is merely the definition of a "holder." RCW 62A.1-201(b)(21)(A). Robertson cites no statute or other authority holding that a party seeking to enforce a note must have physically or digitally affixed the allonges to

the note at the time of foreclosure. More broadly, Robertson cites no statute or other authority that stands for the proposition that a holder of a note must possess the note on the date the holder of the note happens to file their complaint for judicial foreclosure to enforce the note. Indeed, the statutes enumerated above are silent as to *when* someone attempting to enforce a note must affix or possess a supporting allonge. Where a party fails to provide citation to support a legal argument, we assume counsel, like the court, has found none. State v. Loos, 14 Wn. App. 2d 748, 758, 473 P.3d 1229 (2020) (citing State v. Arredondo, 188 Wn.2d 244, 262, 394 P.3d 348 (2017)). For this reason alone, Robertson's first argument fails.

Proceeding nonetheless on the merits, as an initial thought experiment, one could possess the note on the days and years before the filing of the complaint (indeed, when the complaint was drafted), accidentally transfer it on the date of filing, and retrieve the note the next date and maintain it throughout the litigation, including on the date the note is offered and admitted into evidence at trial. Under Robertson's logic, the holder of this note could not enforce the note because it happened not to possess the note on the date a legal document happened to be filed. There is no authority for this proposition. On the contrary, and as discussed more below, the more salient question is whether one possesses the note (and, thus, may enforce the note) at the time of summary adjudication or trial.

Even reviewing the scant authority that does exist, in the few cases that have considered remotely similar arguments related to *when* a lender who is attempting to enforce a note must possess or affixed allonges, courts still have

focused its attention on *who* holds the note itself, not *when* they possessed or affixed the allonges.

In Marts v. U.S. Bank Nat'l Ass'n, our local U.S. district court held that a plaintiff's allegation that allonges were not affixed to a note were unavailing because the bank was still the unquestioned holder of the note. Marts v. U.S. Bank Nat'l Ass'n, 166 F. Supp. 3d 1204, 1210 (W.D. Wash. 2016), aff'd sub nom. Marts v. U.S. Bank, 714 Fed. Appx. 775 (9th Cir. 2018). There, plaintiff-homeowners brought a Consumer Protection Act claim against a bank attempting to foreclose on a note, alleging it engaged in an unfair and deceptive act by initiating foreclosure before perfecting an interest in the note, "because of some unidentified discrepancy in staple holes," raising the doubt that an allonge was ever affixed to the note. Id. at 1209. As in this matter, plaintiffs did not cite to any authority which "would invalidate the defendants' security interest on that basis." Id. at 1210. The court held that "evidence of *intent* to affix the allonge to the note is sufficient to establish a valid endorsement." Id. As here, the court found no issues of disputed material fact about the holder's "intent to affix the Allonge, but rather offer mere conjecture regarding staple holes." Id. In other words, pursuant to RCW 62A.3-301(i), the court focused on the undisputed fact that the bank still held the note and its allonges, plain and simple, and made no inquiry into when the allonges were affixed, where there was no evidence of any intent otherwise.

In his briefing, Robertson references two cases purporting to discuss, not specifically the timing of affixation or possession, but generally standing in

foreclosures, which are distinguishable and actually unhelpful to Robertson.

In Bavand v. OneWest Bank, this court concluded that *borrowers* in a nonjudicial foreclosure have standing to challenge the appointment of their mortgage's successor *trustee*. Bavand v. OneWest Bank, 196 Wn. App. 813, 835, 385 P.3d 233 (2016). This court in that matter did not confront the issue at hand, which is when a holder has standing to enforce a note based on the affixing of an allonge. Unhelpfully for Robertson, this court moreover merely reiterated the holding the holder (OneWest) had standing to enforce a promissory note because it possessed the original note, indorsed in blank. Id. at 843.

In his trial brief, Robertson also cites to an unpublished opinion of this court, Beverick v. Landmark Building & Development Inc. Beverick v. Landmark Building & Development Inc., No. 74210-8-I (Wash. Ct. App. Jul. 3, 2017) (unpublished), https://www.courts.wa.gov/opinions/pdf/742108.pdf. In that case, the court concluded that Nationstar Mortgage (a transferee) was the proper holder of the note because it maintained its possession throughout the foreclosure action, and presented the original note at a summary judgment hearing to prove its status. Beverick, No. 74210-8-1, slip op. at 16. The case stands for the proposition that the holder of the instrument may be entitled to enforce an instrument in a judicial foreclosure even if they are not the owner. Id. at 15-16. Further, the court held that, under the UCC, the holder of the note can commence a judicial foreclosure if they possess a negotiable instrument indorsed to the original payee, and maintain possession of the instrument throughout a judicial foreclosure action. Id. at 16 (citing Deutsche Bank Nat'l Tr. Co. v. Slotke, 192 Wn. App. 166, 175, 367 P.3d

600 (2016)).

There, the foreclosing party had an original note indorsed in blank that was transferred to another lender, and the transferee bank presented it at a summary judgment hearing. Id. With that, the transferee, Nationstar, showed it was the holder of the instrument, leaving no genuine issue of material fact as to whether they held the note. Id. Far from supporting Robertson's claim, Beverick again reasserts the point that possession at the time of adjudication establishes standing, without any need to determine when allonges were affixed to a note.

On this point, in Deutsche Bank Nat. Tr. Co. v. Slotke, this court similarly concluded that, procedurally, *one* way to enforce a note is to present it for inspection at a summary judgment hearing. Slotke, 192 Wn. App. 166, 175-176, 367 P.3d 600 (2016). This court noted that it would express no opinion that presenting an original promissory note at a summary judgment hearing was the *only* way for a holder to prove its right to enforce a note. Id. The other way for a holder to prove its right to enforce a note is, of course, by presentation of the note at trial. Bucci, 197 Wn. App. at 328 ("The "[m]ere production of a note establishes prima facie authenticity and is sufficient to make a promissory note admissible.") (citing United States v. Varner, 13 F.3d 1503, 1509 (11th Cir. 1994)).

In short, none of the authority Robertson adduced, or this court can locate, concludes that a fact finder must determine when allonges were possessed or affixed to a note to establish standing to enforce the note. We will not create such

authority on the facts presented here.

ii. Robertson's second argument pursuant to RCW 62A.3-204

In his second somewhat similar argument, again from his trial brief, Robertson argues that pursuant to RCW 62A.3-204(a), 21st must show that the allonges were "permanently" affixed to the note *at the time of the indorsement in blank* (here, by Bank One to RFC), otherwise the transfer was invalid and 21st lacked standing to enforce the note.

Robertson is attempting to get blood out of a turnip. Properly read, the last line of RCW 62A.3-204(a) simply states that a paper (such as an allonge) that is "affixed to the instrument is part of the instrument," importantly, "[f]or the purpose of determining whether a signature is made on an instrument." RCW 62A.3-204(a). In other words, if you want to know whether a signature (which could or could not constitute an "indorsement") is on an instrument, the UCC states you may consider any documents affixed to an instrument as part of the instrument.

Two errors follow from his argument. First, simply because something is a signature does not make it an indorsement. As stated in RCW 62A.3-204(a), a signature is an indorsement if it is made on the instrument "*for the purpose* of (i) negotiating the instrument . . ." Id. (emphasis added). So the inquiry to which affixation is relevant is, not standing to enforce, but whether the signature is evidence of negotiability or, more accurately, whether it "unambiguously" somehow shows that negotiability was *not* the purpose of the signature. Id. Affixation is not required for standing, where that is meant as the right to enforce.

Second, the right to enforce an instrument, at issue here, is discussed at

RCW 62A.3-203, which defines the transfer of an instrument creating a right to enforce. In other words, RCW 62A.3-203 is relevant, RCW 62A.3-204 is not, and there is no reference to affixing in RCW 62A.3-203. Further, RCW 62A.3-205(b) makes clear that, "When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed." RCW 62A.3-205(b). 21st held an indorsement in blank and a note indorsed in blank can be enforced and transferred by the bearer, i.e., the person who possesses it, without reference to affixations. Id.

Thus, the stray language of affixation at RCW 62A.3-204(a) is irrelevant to issues presented here: the enforceability of a note with an indorsement in blank in the possession of 21st.

iii. Robertson's last arguments pursuant to RCW 62A.3-308 and "public policy"

Third, at oral argument, Robertson's counsel cited to RCW 62A.3-308, which relates to proof of authenticity, validity or authority to make signatures, in support again of Robertson's claim that 21st was required to possess the note at the time of the filing of its complaint. Wash. Court of Appeals oral argument, supra, at 17 min. 54 sec. through 18 min., 22 sec. However, here, we have an indorsement in blank, which is expressly covered by RCW 62A.3-205 as stated above. Further, RCW 62A.3-308 simply does not state that the holder must hold the note and allonges at time of filing of the complaint. If anything, RCW 62A.3-308's emphasis on proof "at the time of trial" suggests that the proper time to verify the validity of signatures (again, not at issue here) to foreclose is when "proof" is required, which is the date the court considers the merits of the proposed decree

of foreclosure.[4] So Robertson's third argument also is insufficient as a matter of law.

Fourth, and finally, at oral argument, Robertson's counsel contended that "public policy" requires a showing of possession of the note and allonges at the time of the complaint. Wash. Court of Appeals oral argument, supra, at 3 min., 30 sec. through 3 min. 54 sec. Because this was the first time that counsel raised this argument, we will not consider Robertson's final argument. State v. Elliott, 114 Wn.2d 6, 15, 785 P.2d 440 (1990) ("This court will not consider claims insufficiently argued by the parties.") (citing State v. Wethered, 110 Wn.2d 466, 472, 755 P.2d 797 (1988)).

Thus, we conclude that there is no authority in support of the affirmative proposition that one must possess the note and allonges, or affix the allonges to the note, at the time of lawsuit happened to be filed, as Robertson urges.

Moreover, because a misstatement of law is presumptively prejudicial, the party who offered the improper instruction or verdict form must rebut the presumption that prejudice resulted. Anfinson,174 Wn.2d 851 at 874. Tellingly, Robertson does not address this question as to whether this is an error of law, rather he attempts to recharacterize 21st's argument as a "factual argument, not [sic.] legal one." That response is nearly non-responsive and we conclude that Robertson has not met his burden to show that 21st was not prejudiced by the

[4] Although it may be necessary to prove standing to foreclose at the time of filing a complaint in a *non*-judicial foreclosure, it is not for a judicial foreclosure (like here). See, e.g., Bavand, 196 Wn. App. at 824 (plaintiff's "show me the note" argument is simply untenable). Further, unlike in federal court, in state court, standing generally is not pled at the time a complaint is filed. CR 8(a).

inclusion of verdict question 3 and its related jury instructions.

b. Verdict Question 3 Was Improperly Given on the Facts

Even if Robertson's views were the law, 21st also argues that "the only relevant and admissible testimony presented at trial shows that 21st was in possession of the original Note and Allonges at the time the Complaint was filed," on that July date in 2014. 21st is correct. Robertson's witnesses confirmed that they did not have any personal knowledge of whether and when 21st was in possession of the note and allonges.

In response, Robertson baldly claims that "the jury found in favor of [him] because it did not find [Warkins] credible." He does not point to anything *in the record*, whether testimony or evidentiary, to provide an evidentiary basis upon which the jury could find Warkins not credible, other than one email in which a lawyer asks another lawyer to provide a copy of the note. It is not a reasonable inference to conclude that this email provides evidence 21st did not possess the note on a very specific day (of filing). Cf. Bucci, 197 Wn. App. at 328 ("USB produced the original note, indorsed in blank, for inspection by the trial court. This was sufficient to prove the status of USB as the holder of Bucci's note."). Thus, even considering the evidence in the light most favorable to the moving party, none of Robertson's witnesses provided any evidence to contradict Warkins's testimony.

Therefore, based on the available facts and authority, verdict question 3 was improperly presented to the jury because there was no factual support for the basis of that verdict. Stated otherwise, whether 21st possessed the note and allonges (affixed or not) at the time of the complaint or indorsement does not affect

the outcome of the foreclosure as a question of law or fact. Because this verdict question fails as a matter of law and fact, the trial court erred in denying 21st's motion for a JMOL. We reverse the denial of 21st's JMOL, and thus, do not consider or examine 21st's request, in the alternative, for a new trial.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

B. Expert Witnesses

Setting aside his counter-claims, Robertson's only remaining defenses to the decree of foreclosure are whether, in fact, 21st did not possess the "original" note and allonges, whether through fraud or otherwise, and whether 21st's case was built on inadmissible evidence.

As to the former, Robertson claims the trial court erred in excluding Kelley's testimony and limiting McDonnell's, both of who were offered to testify as to such alleged fraud.[5] We conclude that the trial court did not err in excluding Kelley's testimony nor did it err in limiting McDonnell's testimony. We discuss each in turn.

1. Law

A "trial court has a very wide discretion" in determining the admissibility of expert testimony and "this discretion will not be reversed on appeal" "absent an abuse thereof." Myers v. Harter, 76 Wn.2d 772, 781, 459 P.2d 25 (1969) (quoting

[5] Because we did not need to reach 21st's request for a new trial based on verdict question 3, we will address 21st's objections to the trial court's only partial exclusion of McDonnell's testimony only in the context of Robertson's assignment of error.

Hill v. C.&E. Construction Co., Inc., 59 Wn.2d 743, 745-46, 370 P.2d 255 (1962)). A trial court abuses its discretion by issuing "manifestly unreasonable" rulings or rulings based on untenable grounds, such as a ruling contrary to law. Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (citing Holbrook v. Weyerhaeuser Co., 118 Wn.2d 306, 315, 822 P.2d 271 (1992)). A reviewing court may not hold that a trial court abused its discretion "'simply because it would have decided the case differently.'" Gilmore v. Jefferson County Pub. Transp. Benefit Area, 190 Wn.2d 483, 494, 415 P.3d 212 (2018) (quoting State v. Perez-Cervantes, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000)).

To find abuse of discretion, a court "must be convinced that '*no reasonable person* would take the view adopted by the trial court.'" Id. If the basis for admission of the evidence is "fairly debatable," we will not disturb the trial court's ruling. Grp. Health Coop. of Puget Sound, Inc. v. Dep't of Revenue, 106 Wn.2d 391, 398, 722 P.2d 787 (1986) (quoting Walker v. Bangs, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979)).

"An expert's opinion is admissible if the witness is properly qualified, relies on generally accepted theories, and the expert's testimony is helpful to the trier of fact." Philippides v. Bernard, 151 Wn.2d 376, 393, 88 P.3d 939 (2004) (citing State v. Allery, 101 Wn.2d 591, 596, 682 P.2d 312 (1984)); Johnston-Forbes v. Matsunaga, 181 Wn.2d 346, 354, 333 P.3d 388 (2014).

If expert testimony concerns "novel scientific evidence", "it first must satisfy the Frye standard and then must meet the other criteria in ER 702." Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co., 176 Wn. App. 168,

175, 313 P.3d 408 (2013) (citing State v. Gregory, 158 Wn.2d 759, 829–30, 147 P.3d 1201 (2006)) (referring to Frye v. United States, 293 F. 1013, 34 A.L.R. 145 (D.C. Cir. 1923)); State v. Riker, 123 Wn.2d 351, 360 n. 1, 869 P.2d 43 (1994) ("Nevertheless, in this state, we continue to adhere to the view that the Frye analysis is a threshold inquiry to be considered in determining the admissibility of evidence under ER 702.").

Generally, "[u]nder Frye, the primary goal is to determine whether the evidence offered is based on established scientific methodology." State v. DeJesus, 7 Wn. App. 2d 849, 859-60, 436 P.3d 834 (2019) (citing Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 603, 260 P.3d 857 (2011)). However, "if the proffered evidence does not involve new methods of proof or new scientific principles, then the Frye inquiry is not necessary." State v. Sipin, 130 Wn. App. 403, 415, 123 P.3d 862 (2005) (citing State v. Ortiz, 119 Wn.2d 294, 311, 831 P.2d 1060 (1992)). "This is because full acceptance of a process in the relevant scientific community obviates the need for a Frye hearing." Id. (citing State v. Russell, 125 Wn.2d 24, 41, 882 P.2d 747 (1994)).

2. Application of Law to Facts

a. Kelley

The trial court found, and 21st conceded at the Frye hearing, that a properly qualified expert, testifying to the subject matter Kelley intended to testify to, could be helpful to the trier of fact, thereby satisfying the third of the three Frye factors. RP 300 (trial court describing this testimony as "extra helpful"); RP 297 (21st's concession). Because "[w]e construe helpfulness to the trier of fact broadly,"

Philippides, 151 Wn.2d at 393 (citing Miller v. Likins, 109 Wn. App. 140, 148, 34 P.3d 835 (2001)), we find this first factor met.

In dispute are the first and second factors, namely, whether the court properly found Kelley to be not qualified, and whether Kelley relied on generally accepted theories, which was the primary subject of the Frye hearing. Philippides, 151 Wn.2d at 393.

"A witness may qualify as an expert 'by knowledge, skill, experience, training, or education.'" L.M. v. Hamilton, 193 Wn.2d 113, 135, 436 P.3d 803 (2019) (quoting ER 702). "Nothing in ER 702 requires an expert witness to be licensed in his profession to give testimony. On the contrary, practical experience alone may suffice to qualify a witness as an expert." Johnston-Forbes, 177 Wn. App. at 411 (citing State v. Yates, 161 Wn.2d 714, 765, 168 P.3d 359 (2007)). Further, when determining whether a witness is an expert, courts may look beyond "academic credentials," as "[t]raining in a related field . . . alone may also be sufficient." Harris v. Robert C. Groth, MD, Inc., 99 Wn.2d 438, 449-50, 663 P.2d 113 (1983) (citing 5A K. Tegland, Wash.Prac., Evidence § 289 (1982)).

As to the content of an expert's knowledge, "the line between chemistry, biology, and medicine is too indefinite to admit of a practicable separation of topics and witnesses." Id. at 450 (quoting 2 J. Wigmore, Evidence § 569, at 790 (rev.1979)). Nonetheless, when making the determination, courts must consider whether the expert has "sufficient expertise in the relevant specialty." Frausto v. Yakima HMA, LLC, 188 Wn.2d 227, 232, 393 P.3d 776 (2017) (quoting Young v.

Key Pharm., Inc., 112 Wn.2d 216, 228, 770 P.2d 182 (1989)).

Our Supreme Court has recognized that some "inconsistencies" courts generate in qualifying witnesses (even the same witness in different cases) may be "due to the abuse of discretion standard" we apply. L.M., 193 Wn.2d at 136 (citing Johnston-Forbes, 181 Wn.2d at 353). "The broad standard of abuse of discretion means that courts can reasonably reach different conclusions about whether, and to what extent, an expert's testimony will be helpful to the jury in a particular case." Johnston-Forbes, 181 Wn.2d at 353-54 (quoting Stedman v. Cooper, 172 Wn. App. 9, 18, 292 P.3d 764 (2012)). "The broad standard also means that courts can reasonably reach different conclusions about whether an expert is qualified." L.M., 193 Wn.2d 136 (quoting Johnston-Forbes, 181 Wn.2d at 353-54).

Here, the trial court acknowledged that Kelley had "10 years experience examining documents," "has some particularized knowledge," has "some education," which "makes him maybe more familiar with this area . . . than a lay person may be." Kelley was also a member of some relevant professional associations that do "almost the same thing" he does. Ultimately, however, the court found that "his training and his experience do not rise to the level of the Court finding him to be an expert in this area."

The trial court's conclusion is supported by the following evidence, all of which Kelley provided himself:

- None of Kelley's formal education and decades-long work experience was in forensic document examination; instead, he was

educated in mathematics and worked in an extraordinarily wide range of fields from computer engineering and nuclear and advance weapons design to technical management, when he happened to be asked to examine a document in 2013 for a private detective because "they knew [Kelley] was a computer guy";

- Since then, Kelley has not taken any formal forensic document examination courses or training, including courses to distinguish between different forms of ink, courses in writing instruments, or courses in handwriting analysis;
- Likewise, Kelley did not receive supervised training under a forensic document examiner or complete any apprenticeship in the area of forensic document examination;
- In short, Kelley described himself as "an electrical and computer engineer"; and
- Finally, Kelley had never been retained by a lender or mortgage servicer (with the possible exception of one credit union) to provide document examination. Indeed, Kelley acknowledged that "generally" he does not review loan documentation, which is at issue here.

Robertson provides no specific argument in response, other than repeating the general standards of review listed above and asserting it was error for the court to allow a rebuttal expert to "testify about Kelley's qualifications" at the Frye hearing. It is not responsive to the attack on his putative expert's qualifications to

claim that 21st's rebuttal expert's testimony "[a]t most . . . suggests Kelley's conclusions may have been inaccurate or of limited utility" or are "more appropriately addressed by cross-examination at trial, not by disqualification under Frye." And the court is not required to search the record to locate the portions relevant to a litigant's arguments, if any, about his expert's qualifications. Cowiche Canyon Conservancy v. Bosley,118 Wn.2d 801, 819, 828 P.2d 549 (1992) (citing RAP 10.3(a)). For this reason alone, Roberton's defense of his expert fails.

Moreover, we need not rely on 21st's expert rebuttal testimony when Kelley's own testimony about the limitations of his qualifications go undeveloped. In turn, we grant the trial court the significant deference due as its determination that this expert did not have "sufficient expertise in the relevant specialty." Frausto, 188 Wn.2d at 232. In other words, based on the record before it, we are not "convinced that 'no reasonable person would take the view adopted by the trial court.'" Gilmore, 190 Wn.2d at 494 (quoting Perez-Cervantes, 141 Wn.2d at 475). Thus, the trial court did not abuse its discretion in excluding Kelley. Because we conclude that the trial court did not err in excluding Kelley based on his qualifications, we need not and will not reach whether his testimony involved new methods of proof or new scientific principle following the Frye hearing.

b. Marie McDonnell

Marie McDonnell was qualified to testify as an expert witness based on her experience as a forensic mortgage examiner, including technical experience evaluating mortgage titles through public record, and other types of documents. Robertson offered her testimony in support of his claim that the note and the

allonges were not authentic.

21st moved to exclude McDonnell multiple times under ER 402 and 403, including at trial. In pertinent part, 21st argued initially that any testimony about events prior to the RFC's bankruptcy were irrelevant and included legal conclusions. 21st further argued that McDonnell had no personal knowledge of the underlying documents and her testimony was cumulative.

The trial court denied the motion to exclude the entirety of her testimony, but, in granting in part 21st's motion, limited McDonnell's testimony to only events that occurred after the date the Nicholls Loan was sold in bankruptcy (the Sale Order), as 21st requested. As a result, the trial court did not allow McDonnell to testify about securitization generally or the pooling of the Nicholls Loan specifically, as well as not allowing McDonnell to testify as to legal conclusions.

However, to allow Robertson to argue his theory of the case, the court did allow McDonnell to testify "about the allonges, when they were affixed, whether they were permanently affixed, how they appeared, when they appeared, *whether this note is legitimate such that 21st can execute*." (emphasis added). And Robertson confirmed that McDonnell, subject to the above limitations, would "be talking about the history of the loan and how it came about *and how 21st Mortgage didn't take possession of the original promissory note*." (emphasis added).

Indeed, McDonnell testified that, in her review of the mortgage file, she was unable to find evidence of the allonges in the publicly available documents or in the service log between the time RFC sold its assets and the time 21st filed its complaint. From this, McDonnell concluded that these facts create "a real, of

course, outstanding question about who created them and when," while opining they were created "sometime after 2014."

In other words, even if error occurred in admitting her testimony (as 21st claims) *or* error occurred by limiting her testimony (as Robertson claims), McDonnell testified as to her ultimate opinion in support of Robertson's claim that 21st did not possess the original note or allonges before July 2014. Cf. State v. Jennings, 199 Wn.2d 53, 66, 502 P.3d 1255 (2022) (where "the defendant had the opportunity to present his version of the incident, even if some evidence was excluded," a defendant's heightened right to present a defense is not disturbed). Thus, no prejudice can be established.

Further, Robertson does not explain how the trial court's decision to prohibit McDonnell from testifying about the history of the Nicholls Loan prior to the bankruptcy (whose relevancy the trial court found to be marginal at best) or about her own legal conclusions materially undermined the breadth of her testimony. The jury was confronted with two versions of events, that of 21st's witness and McDonnell, and simply did not, apparently, credit her testimony in returning verdict questions 1 and 2, which found 21st possessed the original instruments.

For these reasons, as with Kelley, we do not find an abuse of discretion in limiting or including her testimony, because we are far from "convinced that no reasonable person would take the view adopted by the trial court" to allow McDonnell to testify as to her ultimate opinion and reasons therefore, without straying into facts of marginal relevance or legal conclusions. Gilmore, 190 Wn.2d

at 494 (quoting Perez-Cervantes, 141 Wn.2d at 475).

C. Hearsay

Robertson next argues that certain documents admitted at trial were admitted in error because they were hearsay. We conclude that it was not error to admit these documents because they were self-authenticating under ER 902, as commercial paper.

The contested documents at issue in this case are the promissory note, allonges, deed of trust (DOT), corporate assignments of DOT, and the asset purchase agreement between some defendants and Berkshire.[6]

Pursuant to ER 902(i), commercial paper is self-authenticating because it has an operative legal effect that is not subject to the hearsay rule. Kepner–Tregoe, Inc. v. Leadership Software, Inc., 12 F.3d 527, 540 (5th Cir. 1994) ("'Signed instruments such as wills, contracts, and promissory notes are writings that have independent legal significance and are not hearsay.'") (quoting THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 180 (1988)). In other words, documents, such as these, which have "operative" or "independent" legal effect are not subject to the prohibition on hearsay. ROBERT H. ARONSON & MAUREEN A. HOWARD, THE LAW OF EVIDENCE IN WASHINGTON § 10.05[2][f] (5th ed. 2016).

Apparently misunderstanding the nature of the documents, Robertson claims these documents are not "business records" and cites to State v. White. State v. White, 72 Wn.2d 524, 531, 433 P.2d 682 (1967). First, White is a criminal

[6] It is worth noting that such documents are not actually in the record before this court.

case where hospital records included a hearsay statement which went to an ultimate issue resulting in reversible error. White, 72 Wn.2d at 531. This is facially distinguishable. Second, the "'[m]ere production of a note establishes prima facie authenticity and is sufficient to make a promissory note admissible.'" Bucci, 197 Wn. App. at 328 (citing United States v. Varner, 13 F.3d 1503, 1509 (11th Cir. 1994)). As there is no dispute that all the documents in question were operative legal documents, the trial court did not err in admitting such documents.

D. Summary Judgment on Robertson's Counterclaims

As a review of his counterclaims was stayed on appeal, we examine whether they appropriately were dismissed for the first time. We conclude it was not error for the superior court to grant 21st's motion for summary judgment dismissing each of Robertson's four counterclaims, which we address in turn.

This court reviews motion for summary judgment orders from a trial court de novo, performing the same inquiry as the trial court. Wilkinson v. Chiwawa Cmtys. Ass'n, 180 Wn.2d 241, 249, 327 P.3d 614 (2014) (citing Davis v. Baugh Indus. Contractors, Inc., 159 Wn.2d 413, 416, 150 P.3d 545 (2007)). We may affirm the trial court order if there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. Id. (citing Dowler v. Clover Park Sch. Dist. No. 400, 172 Wn.2d 471, 484, 258 P.3d 676 (2011)). We so affirm.

1. Consumer Protection Act

The Washington Consumer Protection Act (CPA) is violated if a defendant engaged in: (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3)

which affects the public interest; (4) causation between the act and the injury; and (5) injury to the plaintiff's business or property. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986). A CPA claim can only proceed when each element is met. Id. at 793.

As to the first element, Robertson's opening brief states that the unfair or deceptive act or practice is 21st's (alleged) act of falsifying or forging documents, though there is also some suggestion that bringing a judicial foreclosure action is also the unfair or deceptive act or practice. Robertson's cites to Klem v. Wash. Mut. Bank, 176 Wn.2d 771, 794-95, 295 P.3d 1179 (2013), for the proposition that falsifying or forging documents is an unfair and deceptive practice that satisfies the first three elements under the CPA.

First, the falsification in Klem ("robo-signing") arose in the context of a *nonjudicial* foreclosure sale. Klem, 176 Wn.2d at 794-795 & 797. This is a judicial foreclosure matter and there is no authority offered that falsification of documents is an unfair or deceptive act for purposes of the CPA. Indeed, "the act [governing nonjudicial foreclosures] dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures [and] lenders must strictly comply with the statutes and courts must strictly construe the statutes in the borrower's favor." Albice v. Premier Mortgage Servs. of Wa., Inc., 174 Wn.2d 560, 567, 276 P.3d 1277 (2012) (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)).

Second, Robertson cites nothing in the record to support the sweeping

assertion that both 21st and Ocwen engaged in *intentional* efforts to mislead the public writ large. Robertson asks this court to make such an inference based on alleged irregularities in the documents (such as suspect staple holes), without adducing a material fact in support upon which such an inference could be drawn. As in Marts, Robertson identifies "no material issues of disputed fact regarding the parties' intent . . . but rather offer mere conjecture regarding staple holes." Marts, 166 F. Supp. 3d at 1210. In turn, again as in Marts, Robertson has "failed to produce sufficient evidence to permit a jury to reasonably find in [his] favor and summary judgment is appropriate." Id.

Although we need not address any of the remaining elements of Robertson's CPA claim, we also hold that, as to the second element, there is no authority that a *judicial* foreclosure is an act occurring in trade or commerce. "'Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.'" City of Seattle v. Levesque, 12 Wn. App. 2d 687, 697, 460 P.3d 205 (2020) (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

Without meeting the first, let alone the second element, Robertson's CPA claim cannot proceed as a matter of law. Therefore, we conclude that summary judgment against Robertson's CPA claim was proper.

2. Outrage

We conclude the trial court properly granted 21st's motion for reconsideration regarding Robertson's counterclaim of outrage, and thus properly

granted its motion for summary judgment regarding the same.

Denial of a motion for reconsideration is reviewed for an abuse of discretion. "[a] trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds," such as basing "its ruling on an erroneous view of the law." Wash. State Physicians Ins. Exch., 122 Wn.2d at 339.

"To prevail on a claim for outrage, a plaintiff must prove three elements: '(1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) severe emotional distress on the part of the plaintiff.' The first element requires proof that the conduct was 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" Robel v. Roundup Corp., 148 Wn.2d 35, 51, 59 P.3d 611 (2002) (citing Dicomes v. State, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989) (quoting Grimsby v. Samson, 85 Wn.2d 52, 59, 530 P.2d 291 (1975)). The "first element of the test goes to the jury only after the court 'determine[s] if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability.'" Id.

Robertson does not point to a specific fact in the record that would purport to show how 21st or Ocwen engaged in extreme and outrageous conduct, stating only that they "knew they did not have complete chain of title." Without an example of behavior that goes beyond the "possible bounds of decency," we cannot reach the other elements of this claim. Dicomes, 113 Wn.2d at 630. Although Robertson alleges behavior that could raise an inference of extreme and outrageous acts by 21st and Ocwen (such as intentionally hiding the allonges and note) if it were

grounded in fact, Robertson cites to no specific behavior or incident providing such grounding. And the court is not required to search the record to locate the portions relevant to a litigant's arguments, if any. Cowiche Canyon Conservancy,118 Wn.2d at 819. Therefore, it was proper for the trial court to deny Robertson's counterclaim for outrage.

3. Civil Conspiracy

To establish a claim of civil conspiracy, a party must show "by clear, cogent and convincing evidence that (1) two or more people contributed to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the object of the conspiracy." Wilson v. State, 84 Wn. App. 332, 350-51, 929 P.2d 448 (1996).

Robertson alleges conspiracies between Ocwen and 21st under criminal statutes. However, because Robertson does not support these assertions with citations to the record to show that there is clear and cogent evidence that Ocwen and 21st entered into any agreement, let alone a coordinated attempt to falsify records, we conclude that Robertson's civil conspiracy claim fails as a matter of law.

4. Quiet Title

We conclude that the trial court did not err in denying Robertson's counterclaim seeking quiet title.

Robertson is not the record owner of the property. The trial court voided Robertson's trustee deed in its summary judgment order, and the finding was not reversed in this court's 2017 decision. Robertson, No. 75262-6-I, slip op. at 2.

Because Robertson is no longer the record owner under RCW 7.28.300, he does not have standing to bring a quiet title action. RCW 7.28.300. Therefore, we affirm the trial court order on this counterclaim.[7]

c. CONCLUSION

We affirm verdict question 1 and 2, reverse the trial court's denial of 21st's motion for JMOL as to verdict question 3, and remand this matter to the trial court to grant 21st a decree of foreclosure on the Property.

Díaz, J.

WE CONCUR:

Andrus, C.J.

Duyn, J.

[7] Because of how we are resolving this matter, we need not reach whether the trial court erred in denying Robertson's motion to vacate under CR 60(b)(11) and his motion to reinstate his trustee's deed under CR 60(b)(6), or any other issues raised by either party.