

No. 68217-2-I

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

MARISA BAVAND

Appellant,

vs.

ONEWEST BANK, FSB,  
REGIONAL TRUSTEE SERVICES CORPORATION,  
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,  
DOE DEFENDANTS 1-10

Respondents

**OPENING BRIEF OF RESPONDENTS  
ONEWEST BANK, FSB AND  
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.**

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## **I. STATEMENT OF THE CASE**

On or about August 7, 2007, in consideration for a mortgage loan, Appellant Marisa Bavand (“Bavand”) executed a promissory note (the “Note”) in the amount of \$722,950.00, payable to IndyMac Bank, FSB, a Federally Chartered Savings Bank (“IndyMac”), and a Deed of Trust in favor of Mortgage Electronic Registration Systems, Inc. (“MERS”) as nominee for Lender, IndyMac, its successors and assigns. CP 136-160; *see also* CP 3 at ¶ 3.1, CP 46-48.

All parties to the Deed of Trust agreed that IndyMac was the lender, and that MERS, as nominee for IndyMac, would be the beneficiary of record as that term is defined in the Deed of Trust. *Id.* The Deed of Trust names Ticor Title Insurance Co. as the Trustee, and grants the Trustee the power of sale in the event of default. *Id.*

The Deed of Trust was recorded on August 13, 2007 under King County Auditor’s No. 20070813000606, and encumbered a piece of real property located in King County, commonly known as 2350 Yale Ave. East, Seattle, Washington 98102 (the “Property”). CP 1-2 at ¶ 1.1.

On December 27, 2010, OneWest recorded an Appointment of Successor Trustee naming Regional Trustee Services Corporation (“Regional Trustee”) as Successor Trustee and vesting Regional Trustee with the powers of the original trustee. CP 163-164; *see also* CP 4 at ¶

3.8. The Appointment of Successor Trustee was recorded under King County Auditor's No. 20101227002726. *Id.*

On or about January 6, 2011, as a result of Bavand's default on payments due under the Note secured by the Deed of Trust, she was sent a Notice of Default. CP 165-169.

On February 9, 2011, Regional Trustee recorded a Notice of Trustee's Sale concerning the Property under King County Auditor's No. 20110209002007. CP 170-174. The Notice of Trustee's Sale references the parties to, and recording information of the Deed of Trust. *Id.*

On or about May 5, 2011, Bavand filed a Complaint in the King County Superior Court, alleging claims for Declaratory Judgment, "Wrongful Foreclosure," Quiet Title, and a violation of the Washington Consumer Protection Act. CP 1-48.

On June 16, 2011, the King County Superior Court denied Bavand's attempt to obtain a Temporary Restraining Order due to insufficient notice, as required by RCW 61.24.130. *See* CP 75-78. On June 17, 2011, the Property sold at auction. CP 300-303.

On September 26, 2011, Respondents OneWest and MERS ("Respondents") filed a CR 12(b)(6) Motion to Dismiss Bavand's Complaint. CP 113-174. On November 29, 2011, the trial court granted Respondents' Motion. CP 452-456.

On December 9, 2011, Bavand asked for reconsideration on a collateral issue relating to Regional Trustee's Motion to Validate the Trustee's Sale. CP 476-480. Bavand did not seek reconsideration of the CR 12(b)(6) Motion. *Id.* On December 20, 2011, Bavand's Motion was denied. CP 482.

On January 16, 2012 – 49 days after the dismissal order – Bavand filed the instant appeal. CP 484-492. Regional Trustee's involvement in the underlying litigation remains unresolved.

## **II. RESPONSE TO ASSIGNMENTS OF ERROR**

1. The Trustee's Sale was proper, as Bavand failed to obtain a legally valid injunction based on the requirements of RCW 61.24.130.

2. The trial court did not err in refusing to find Respondents in Contempt of Court due to the Property sale.

3. The trial court correctly granted Respondents' CR 12(b)(6) Motion, as Bavand's Complaint failed to state a claim upon which relief could be granted in this case.

## **III. RESPONSE ARGUMENT**

A. The Trustee's Sale was Proper as No Valid Injunction Existed.

1. Bavand Failed to Follow RCW 61.24.130.

“Once a nonjudicial foreclosure of a deed of trust has been

commenced, an interested party (*i.e.*, the grantor or the holder of a subordinate lien) may halt the proceedings either by curing the default or, on proper grounds, restraining the sale.” *Woolworth v. Micol Land Co.*, 55 Wn.App. 671, 780 P.2d 264 (1989); *see also CHD, Inc. v. Boyles*, 138 Wn.App. 131, 157 P.3d 415 (2007) (“[t]he sole method to contest and enjoin a foreclosure sale is to file an action to enjoin or restrain the sale in accordance with RCW 61.24.130.”).<sup>1</sup>

RCW 61.24.130(2) specifically provides that:

*[n]o court may grant a restraining order or injunction to restrain a trustee’s sale unless the person seeking the restraint gives five days notice to the trustee of the time when, place where, and the judge before whom the application for the restraining order or injunction is to be made. This notice shall include copies of all pleadings and related documents to be given to the judge. (Emphasis added.)*

In *Brown v. Household Realty Corp.*, 146 Wn.App. 157, 189 P.3d 233 (2008), this Court holds that the requirement to enjoin a Trustee’s Sale pursuant to this statute is not overly burdensome, stating:

*[a] borrower/grantor waives any claims against a lender/beneficiary arising out of an obligation secured by a deed of trust by failing to request a preliminary injunction or restraining order enjoining a nonjudicial foreclosure sale at least five days before the sale date. (Emphasis added.)*

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<sup>1</sup> In a footnote to the *Boyles* opinion, Division Three noted that the plaintiff “had a spectrum of potential legal remedies available to forestall the sale ranging from declaring bankruptcy, filing suit with a *lis pendens*, curing the default, seeking an injunction in conjunction with a motion to shorten time, or appearing at the sale.” *Id.* at \*1.

Thus, the law is clear: an applicant must supply notice of the hearing location, time, and assigned judge, along with pleadings to be relied upon. “Simply bringing an action to obtain a permanent injunction will not forestall a trustee’s sale that occurs before the end of the action is reached.” *Plein v. Lackey*, 149 Wn.2d 214, 227, 67 P.3d 1061, 1066 (2003); *see also Steward v. First Magnus Fin. Corp.*, 2012 WL 1470163 (W.D. Wash. 2012) [no proof of five days’ notice]; *Tuttle v. Bank of New York Mellon*, 2011 WL 2532895 (W.D. Wash. 2011) [no proof of payment or notice].

Here, the record shows that neither Bavand nor her counsel met the requirements of RCW 61.24.130. Multiple notices to Regional Trustee contained the wrong time and courtroom for an injunction hearing – and one notice even mentioned a different county courthouse. CP 261-262, 267-268. Finally, an “amended notice,” apparently sent without copies of any supporting pleadings, was given to Regional Trustee fewer than 24 hours prior to the scheduled argument. CP 276-278.

On June 16, 2011, the King County Superior Court rejected Bavand’s attempt to obtain a temporary restraining order (“TRO”) due to both the lack of sufficient notice, and her inability to pay a bond. CP 75-78.

The following day – upon which the Trustee’s Sale was scheduled to occur – Bavand shopped for another *ex parte* TRO. According to the record, notice of the hearing time and location was provided at 5:54 p.m. the night before, and at 7:53 a.m. the same morning. CP 289. These messages from Bavand’s counsel absolutely did not comply with the law.

Accordingly, the trial court found in its November 29, 2011 Order:

evidence... does not establish that the defendant [Regional Trustee] had knowledge of the existence of the TRO at the time the sale of the property was made. In addition, the plaintiff has not established the existence of a valid Temporary Restraining Order since there is no evidence the required bond was ever posted by the plaintiff.... CP 453.

Bavand’s current argument to unwind the Trustee’s Sale is essentially an end-run around her failure to properly enjoin the sale, due to lack of notice and requisite payment, in the first place.<sup>2</sup> Bavand was not entitled to a TRO on June 16, 2011 – and certainly not on June 17, 2011 – and she should be unable to now obtain a favorable result through her claims related to ex post facto statements of Regional Trustee’s counsel.

2. Respondents Were Not a Party to the Disputed Agreement.

Bavand contends that, concerning certain communications,

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<sup>2</sup> The lower court must also find a likelihood of prevailing on the merits in order to issue a TRO. See *Tyler Pipe Industries, Inc. v. Stat, Dept. of Revenue*, 96 Wn.2d 785, 638 P.2d 1213 (1982). No such finding was ever made in this case, which demonstrates yet another reason why a TRO would have been improper.

“Defendants [*sic*] intentions were clear, unequivocal, and unconditional,” and “Defendants should be promissorily estopped from denying their agreement.” Appellant’s Brief at 11, 13. Bavand’s CR 2A argument, however, actually does not implicate all “Defendants.”

Rather, it focuses *solely* on discussions with counsel for Regional Trustee – a party that should not even be subject to an appeal at this time. *Id.* at 11.<sup>3</sup> Thus, as a threshold matter, the Court should not consider it. *See, e.g. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992) [standing to raise claim must be “trace{able} to the challenged action of the defendant, and not... the result {of} the independent action of some third party not before the court.”]; *Wallin v. City of Los Angeles*, 15 F.3d 1095, fn. 3 (9<sup>th</sup> Cir. 1994) [court need not address argument implicating non-participant in appeal]; *cf. Genie Indus., Inc. v. Mkt. Transp., Ltd.*, 138 Wn.App. 694, 158 P.3d 1217 (2007), *citing* R.A.P. 5.3(i) [joinder of party on “side of the case” that would file an appeal, rule does not address the responding parties].

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<sup>3</sup> Regional Trustee is still an active litigant below, and Bavand did not seek discretionary review as to the orders pertaining to that party. CP 452-456; *cf.* RAP 2.2(a), 2.3.

3. The Record Does Not Show an Agreement Concerning the Litigation.

Nonetheless, insofar as Bavand asks this Court to “nullify the trustee’s sale... [and] vacate the Trustee’s Deed,” OneWest’s interests are affected by this issue. Appellant’s Brief at 15. Case law places the burden of establishing a CR 2A settlement strictly on Bavand. *See Brinkerhoff v. Campbell*, 99 Wn.App. 692, 994 P.2d 911 (2000) (“the party moving to enforce a settlement agreement has the burden of proving there is no genuine dispute as to the material terms of the agreement.”); *In re the Marriage of Ferree*, 71 Wn.App. 35, 856 P.2d 706 (1993) [when considering the existence of a settlement agreement, courts must view the evidence in a light most favorable to the non-moving party].

In this case, the evidence appears to relate to whether Regional Trustee would proceed with recording a Trustee’s Deed for the subject Property, but not “in respect to the proceedings in a cause” as CR 2A requires. CP 296. Given that the Rule is designed “[t]o give certainty and finality to settlements and compromises, if they are made,” and the referenced discussions with Regional Trustee’s counsel plainly did not seek to settle or compromise the underlying litigation, Bavand’s argument should fail. *Eddleman v. McGhan*, 45 Wn.2d 430, 432, 275 P.2d 729, 730 (1954).

4. There was No Basis to Hold Respondents in Contempt.

Furthermore, although Bavand raises an Assignment of Error contending that the trial court erred in “refusing to find *Defendants* in Contempt of Court” due to the Trustee’s Sale,” that issue was not briefed. Appellant’s Brief at 1 (emphasis added); *see Moore v. Harley-Davidson Motor Co. Group, Inc.*, 158 Wn.App. 407, 425, 241 P.3d 808, 817 (2010) *review denied*, 171 Wn.2d 1009, 249 P.3d 1028 (2011) (“we are not required to review arguments that are inadequately briefed and that lack any citation to authority. We may decline to reach an issue raised by inadequate briefing.”) [citations omitted]. As such, this Assignment of Error must be given no credence.

Moreover, no evidence suggests that Respondents should have been held in contempt with regards to an alleged agreement they did not make. CP 251 [motion only as to Regional Trustee]. Therefore, the only remaining issue for disposition on appeal is the dismissal of Bavand’s Complaint.

B. The Trial Court Correctly Granted Respondents’ Motion to Dismiss.

1. Standard of Review and Basis for CR 12(b)(6) Motions.

A trial court’s order of dismissal pursuant to CR 12(b)(6) is reviewed de novo. *Dave Robbins Const., LLC v. First Am. Title Co.*, 158

Wn.App. 895, 899, 249 P.3d 625, 626 (2010), *citing Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005).

Under CR 12(b)(6), a party may move to dismiss for failure to state a claim upon which relief can be granted. Dismissal is proper where claims are legally insufficient even after considering hypothetical facts. *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005); *see also Zabka v. Bank of America*, 131 Wn. App. 167, 170, 127 P.3d 722 (2005) [dismissal is proper where it appears beyond a reasonable doubt that the Plaintiff can prove no set of facts, consistent with the Complaint, which would entitle the Plaintiff to relief]; *Bowman v. John Doe*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985) [dismissal appropriate when “it appears beyond doubt that the... {non-moving party} can prove no set of facts, consistent with the complaint, which would entitle the... {non-moving party} to relief.”]. The court’s inquiry should focus on whether the plaintiff’s claim is legally sufficient, which is answered by looking to the face of the pleadings. *See Rodriguez v. Loudeye Corp.*, 144 Wn.App. 709, 725, 189 P.3d 168 (2008).

But in addition to the pleadings, “[d]ocuments whose contents are alleged in a complaint but which are not physically attached to the pleading may also be considered in ruling on a CR 12(b)(6) motion to dismiss.” *Rodriguez v. Loudeye Corp.* at 726. Submission of extraneous

material by either party, such as an affidavit, normally converts a CR 12(b)(6) motion into summary judgment. *See Hansen v. Friend*, 59 Wn.App. 236, 797 P.2d 521 (1990). However, “if the court can say that no matter what facts are proven within the context of claim, plaintiffs would not be entitled to relief, motion remains one under CR 12(b)(6).” *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 744 P.2d 1032 (1987).<sup>4</sup>

Here, the presented facts did not entitle Bavand to relief against Respondents. As such, the trial court’s ruling should be affirmed based on the argument set forth below.

2. RCW 61.24.127 Applied to Bar Most of Bavand’s Claims and Remedies.

It is a long-standing principle that action to seek restraint under RCW 61.24.130 “must be taken *before* the trustee’s sale, or the interested party may be precluded from obtaining relief.” *Woolworth v. Micol Land Co.*, 55 Wn.App. at 676 (emphasis in original). The waiver doctrine “furthers the goals of providing an efficient and inexpensive foreclosure process and promoting the stability of land titles.” *Plein, supra.* at 228, *citing Country Express Stores, Inc.*, 87 Wn.App. 741, 943 P.2d 374

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<sup>4</sup> Additionally, under ER 201(b), a court may take judicial notice of public documents if their authenticity cannot reasonably be disputed without converting a motion to dismiss into a motion for summary judgment. *Rodriguez, supra.* at 725.

(1997), *Peoples Nat'l Bank of Wash. v. Ostrander*, 6 Wn.App. 28, 491 P.2d 1058 (1971).

In *Brown v. Household Realty Corp.*, 146 Wn.App. at 171, this Court cites to *Hallas v. Ameriquest Mortgage Co.*, 406 F.Supp.2d 1176 (D.Or. 2005), and *Universal Life Church v. GMAC Mortgage Corp.*, 2007 WL 1185861 (W.D. Wash. 2007), as examples of other cases where courts agree that plaintiffs “parties must either pursue presale remedies or waive their right to bring any claims relating to obligations secured by the foreclosed deed of trust.” Presumably, this Court intended for parties to *properly* pursue such remedies – an effort that requires compliance with RCW 61.24.130 – in order to avoid waiving their right to bring certain claims.

In 2009, the Legislature enacted RCW 61.24.127, relating to foreclosures of owner-occupied residential real property. The statute allows for non-waived claims *limited to* fraud, misrepresentation, RCW Title 19 Consumer Protection Act violations, and the failure of a trustee to comply with the Deed of Trust Act (“DTA”).

Per RCW 61.24.127(2), these non-waived claims are also subject to further limitations, including not seeking a remedy other than monetary damages, and not affecting “in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property.” Subsection

(2)(b) also states that “[t]he claim must be asserted or brought within two years from the date of the foreclosure sale or within the applicable statute of limitations for such claim, whichever expires earlier....”<sup>5</sup>

The prerequisites of RCW 61.24.130 would be rendered meaningless if a borrower could violate the law when seeking injunctive relief, but still receive the benefits of perpetuating unlimited claims with the goal of unwinding a non-judicial foreclosure. That is precisely the type of inefficient, expensive result that would defeat the stability of land titles – all contrary to the waiver doctrine set forth in *Plein* and related cases.

Bavand’s briefing and supplemental authority refer to two recent cases addressing the waiver doctrine; however, both decisions are factually distinct from the instant matter. Appellant’s Brief at 17, *citing Albice v. Premier Mortg. Services of Washington, Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012); Appellant’s Supp. Auth. at 1, *citing Frizzell v.*

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<sup>5</sup> Given that the date of a Trustee’s Sale is always established in advance, per RCW 61.24.040, the Legislature’s use of “within” should not cause the statute to only apply in situations where a lawsuit is filed *after* the sale. *Accord City of Seattle v. Winebrenner*, 167 Wn.2d 451, 219 P.3d 686 (2009), *citing City of Seattle v. Quezada*, 142 Wn.App. 43, 48, 174 P.3d 129 (2007) (“the term ‘within seven years’ encompasses the period *both before and after*” an arrest.) [emphasis added]; *see also* “within,” <http://www.merriam-webster.com>, Nov. 26, 2012 [defined as “before the end of,” and also “not beyond the quantity, degree, or limitations of.”]

*Murray*, 283 P.3d 1139 (Aug. 28, 2012), *as amended* (Sept. 25, 2012).<sup>6</sup>

In *Albice*, the borrower “had no knowledge of their alleged breach in time to restrain the sale,” and “rightly assumed the sale would be canceled” after tendering a forbearance payment. *Supra.* at 571-72. Thus, the Supreme Court found there was “no reason to seek an order restraining a sale that may not even proceed.” *Id.* at 571.

In *Frizzell*, the borrower *properly* sought and obtained a TRO preventing sale, but was unable to pay \$25,000 into the court registry. *Supra.* at 1142. Division Two found that “it would be inequitable to apply waiver under these facts.” *Id.* at 1144.

Both the *Albice* and *Frizzell* borrowers were unsuccessful in obtaining injunctive relief, but not as a result of fault attributable to them. A lack of knowledge in the former case, and a suitable effort in the latter case, led to the respective conclusions that application of the waiver doctrine would have been unjust.

By contrast, Bavand *knew* the Trustee’s Sale was scheduled for June 17, 2011, and she even filed a complaint over two months prior. CP 1-48. Yet, she waited until the final days before sale to pursue a TRO, and then clearly *did not follow* RCW 61.24.130 in multiple respects. CP 94-

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<sup>6</sup> RCW 61.24.127 is not implicated in the *Albice* decision. See 174 Wn.2d at 580, fn. 2 (Stephens, J., concurring) [statutory enactment of RCW 61.24.127 post-dates the operative facts]. Likewise, *Frizzell* does not mention or analyze RCW 61.24.127 at all.

97.<sup>7</sup> These improprieties are notably different from the aforementioned situations described in either *Albice* or *Frizzell* – and even construing the Deed of Trust Act in Bavand’s favor should not excuse her from fulfilling its mandatory provisions. *See Koegel v. Prudential Mutual Sav. Bank*, 51 Wn.App. 108, 752 P.2d 385 (1988).

Thus, Bavand’s non-compliance with statutory notice and pleading requirements must not be rewarded on appeal. Rather, this Court should find that a waiver of all claims, except those raised under the Consumer Protection Act, occurred due to Bavand’s failures as evidenced in the record and noted herein.

3. The Trial Court Did Not Err in Dismissing Bavand’s Notion of a “Wrongful” Non-Judicial Process.
  - a. Bavand’s Claims Were Substantively Deficient on Their Face to Support a Possible Grant of Relief Against Respondents.

Bavand first argues that “the lender’s utilization of MERS perverted the security and foreclosure process, rendering her Deed of

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<sup>7</sup> The June 17, 2011 ex parte TRO, obtained without proper notice to Regional Trustee, and with no legitimate opportunity for a defensive response or appearance should be considered a legal nullity. CP 94-97.

Trust voidable....” Appellant’s Brief at 18.<sup>8</sup> From both a factual and legal standpoint, however, nothing could be further from the truth.

As a threshold matter, the DTA has no provision “that permits a cause of action for wrongful institution of foreclosure proceedings. Standing alone, the fact that the DTA establishes procedures and requisites for the non-judicial foreclosure process does not necessarily give rise to a cause of action.” *Vawter v. Quality Loan Serv. Corp. of Washington*, 707 F.Supp.2d 1115 (W.D. Wash. 2010).

As the *Vawter* decision notes:

[e]ven assuming a cause of action for damages for wrongful institution of nonjudicial foreclosure proceedings were to exist under the DTA, the court is not persuaded that it could be maintained without a showing of prejudice. *Cf. Amresco Independence Funding, Inc. v. SPS Props., LLC*, 129 Wn.App. 532, 119 P.3d 884, 886-87 (2005) (‘despite the strict compliance requirement, a plaintiff must show prejudice before a court will set aside a trustee sale.’); *Koegel v. Prudential Mutual Sav. Bank*, 51 Wn.App. 108, 752 P.2d 385, 387-89 (1988) (declining to set aside trustee’s sale despite trustee’s failure to comply with the DTA’s notice requirements because plaintiff had not shown prejudice). *Id.* at 1124.

Moreover, a “wrongful foreclosure” type of claim should be dismissed when the plaintiff/borrower has clearly defaulted. *See, e.g., Marks v. GreenTree Serv. and Default Resolution Network*, 461 F.Appx. 534 at \*1

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<sup>8</sup> Although Bavand’s Complaint contains distinct causes of action for Declaratory Judgment and “Wrongful Foreclosure,” her Opening Brief commingles those theories into one issue. *See* Appellant’s Brief at 16-22; *cf.* CP 6-7.

(9<sup>th</sup> Cir. 2011) (“[t]he district court properly dismissed Marks’s wrongful foreclosure claim because Marks failed to show that she was not in default on her mortgage loan.”); *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1043 (9<sup>th</sup> Cir. 2011) [wrongful foreclosure claims “available after foreclosure... are premised on allegations that the borrower was not in default, or on procedural issues that resulted in damages to the borrower.”].<sup>9</sup>

In this case, neither Bavand’s Complaint nor her briefing disputes the fact she defaulted on the loan. CP 1-48; CP 344-401. Bavand in fact admitted, in her response to the Motion to Dismiss, that she “agreed to the terms of the Deed of Trust.” CP 350.

Thus, although the facial nature of Bavand’s claims do not suggest a grant of relief against Respondents on the facts presented, her theories travel far beyond alleged defects in the foreclosure process itself. Bavand actually suggests that a non-judicial foreclosure of the Property could *never* occur, as the “subject Deed of Trust [is] an invalid lien....” Appellant’s Brief at 29.<sup>10</sup>

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<sup>9</sup> This Court has even refused to invalidate completed sales despite a trustee’s failure to comply with provisions in the DTA. See *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn.App. at 113-14, *Steward v. Good*, 51 Wn.App. 509, 515, 754 P.2d 150, review denied, 111 Wn.2d 1004 (1988).

<sup>10</sup> Further, apparently arguing in the alternative, Bavand suggests that “all *subsequent* actions taken under *the authority granted by the Deed* must fail.” Appellant’s Brief at 20 (emphasis added).

Bavand's argument essentially posits that her agreement to name MERS in the Deed of Trust should not only be found ineffective, but that enforcing the security instrument itself is completely impossible.<sup>11</sup> This Court should reject Bavand's reasoning, and instead reaffirm the non-judicial foreclosure requirements of the DTA.

b. The Note and Deed of Trust Were Not "Severed."

It is a basic premise that a promissory note is a simple contract to pay money, while a deed of trust creates a lien against the property it describes. *Reid v. Cramer*, 24 Wn.App. 742, 744-45, 603 P.2d 851, 852 (1979). As the Washington Supreme Court elaborates in *Am. Fed. Sav. & Loan Ass'n of Tacoma v. McCaffrey*, 107 Wn.2d 181, 189, 728 P.2d 155, 161 (1986), "[i]n transactions involving both notes and mortgages, the notes represent the debts, the mortgages security for payment of the debts. Either may be the basis of an action." *See also Helbling Bros., Inc. v. Turner*, 14 Wn.App. 494, 496-97 (1975).

State law codifies Article 3 of the Uniform Commercial Code (UCC), and governs the creation, transfer and enforceability of negotiable instruments, including promissory notes secured by mortgages on real estate. *See RCW 62A.3 et seq.* There are three relevant classes of persons

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<sup>11</sup> The result would likely be an equitable mortgage subject to judicial foreclosure pursuant to RCW 61.12 *et seq.* *Accord Thomas v. Osborn*, 13 Wn. App. 371, 375, 536 P.2d 8, 11 (1975).

entitled to enforce an instrument: (1) the holder of the instrument; (2) a nonholder in possession of the instrument who has the rights of a holder; and (3) a party who was in possession of a note that is now lost. *See, e.g.*, RCW 62A.3-309, 62A.3-418(d), 62A.3-301. In order to be a holder of an instrument, a party must first and foremost be in possession of the instrument. RCW 62A.3-201. The instrument must also be payable either to the party in possession or to bearer. *Id.*

The party to whom the instrument is payable may be changed after the instrument is issued through the process of negotiation. “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. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone. RCW 62A.3-201. If an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. *Id.* This may be either a special indorsement - one which identifies a person to whom the instrument is now payable - or a blank indorsement that makes the instrument bearer paper. RCW 62A.3-109.

Even where possession of the note is not accompanied by an indorsement to make the transferee a holder, the party in possession may be entitled to enforce the instrument where it has the rights of the holder.

*Id.* This occurs when the instrument is transferred - in other words, delivered by a person other than the issuer for the purpose of giving the receiver the right to enforce the instrument. *Id.* The transferee, even if it does not become the holder, gains any right the transferor had to enforce the note. *Id.*

The right to enforce the note *also* includes the right to enforce the deed of trust providing security for the note. *See Carpenter v. Longan*, 83 U.S. 271, 275, 21 L. Ed. 313 (1872) (“The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter.... All the authorities agree that the debt is the principal thing and the mortgage an accessory.”). This concept is well-settled in Washington law and also described in a long line of cases from many other jurisdictions.<sup>12</sup>

UCC 9-109(a)(3) states, “The attachment of a security interest in a

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<sup>12</sup> *See Kennebec, Inc. v. Bank of the West*, 88 Wn.2d 718, 724-25, 565 P.2d 812, 816 (1977) (“the territorial legislature of 1869... provided that, ‘a mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law,’ and since such enactment a mortgage executed in this state, whatever its terms, has been merely a security incident to, and for the payment of, the principal debt.”); *see also In re Leisure Time Sports, Inc.*, 194 B.R. 859 (9<sup>th</sup> Cir. 1996); *Andrews v. Commissioner of Internal Revenue*, 38 F.2d 55 (2<sup>nd</sup> Cir. 1930); *U.S. Bank NA. v. Collymore*, 68 A.D.3d 752, 890 N.Y.S.2d. 578 (N.Y.A.D. 2009); *Northstream Investments Inc. v. 1804 Country Store Co.*, 2005 SD 61, 697 N.W. 2d 762 (S.D. 2005); *Prime Financial Services, LLC v. Vinson*, 279 Mich. App. 245, 761 N.W.2d 694 (Mich. Ct. App. 2008); *Columbus Investments v. Lewis*, 48 P.3d 1222 (Colo. Sup. Ct. 2002) (en banc); UCC sec. 3-110(c)(2)(ii) [providing that if an instrument is payable to “a person described as agent or similar representative of a named or identified person, the instrument is payable to the represented person, the representative, or a successor of the representative.”].

right to payment or performance secured by a security interest or other lien on personal or real property is also an attachment of a security interest in the security interest, mortgage or other lien.” Comment 9 confirms that it “codifies the common law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien.” *Id.*<sup>13</sup> RCW 62A.9A-102(55) also confirms that the Deed of Trust pledges the subject property as collateral for payment of the debt obligation.<sup>14</sup>

Numerous jurisdictions have rejected Bavand’s hypothetical claim of “irreparably severing” the Note and the Deed of Trust simply because MERS is named in the latter as nominee for the original lender. *See, e.g., Smith v. Bank of Am. N.A.*, 2012 WL 1944821 (D. Nev. 2012), *citing Vega v. CTX Mortg. Co. LLC*, 761 F.Supp.2d 1095, 1098 (D. Nev. 2011) (“transfer of the note or mortgage transfers both, and the last entity to have the note or mortgage would have the authority to foreclose.”); *Showell v.*

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<sup>13</sup> Under UCC §§ 9-203(g) and 9-308(e), attachment of a security interest in a promissory note is also attachment of a security interest in a mortgage, and the perfection of a security interest in a promissory note is also perfection of a security interest in a mortgage. After a mortgagee’s default, the secured party may exercise the mortgagee’s rights with respect to any property that secures the mortgagee’s obligations. *See* UCC § 9-607(a)(3).

<sup>14</sup> “Mortgage means a consensual interest in real property, including fixtures, which secures payment or performance of an obligation.” Per the statute’s official comment, “[u]nder Washington property law, the definition of ‘mortgage’ in subsection (55) encompasses deeds of trust and real estate contracts as well as traditional mortgages, but does not include an ownership interest.” Title to the collateral is irrelevant under RCW 62A.9A-202.

*BAC Home Loans Servicing, LP*, 2012 WL 4105472 (D. Idaho 2012) (“Plaintiffs’ reliance upon bankruptcy cases, such as *In re Wilhelm*, 405 B.R. 392 (Bankr.D. Idaho 2009), in its ‘split the note’ argument is misplaced.”); *Johnson v. Homecomings Fin.*, 2011 WL 4373975 (S.D. Cal. 2011), citing *In re Mortgage Elec. Registration Sys. (MERS) Litig.*, 2011 WL 251453 (D.Ariz. 2011); *Birkland v. Silver State Fin. Services, Inc.*, 2010 WL 3419372 (D. Nev. 2010), citing *Gomez v. Countrywide Bank, FSB.*, 2009 WL 3617650 (D.Nev. 2009)<sup>15</sup>; cf. Appellant’s Brief at 29, citing *In re Wilhelm*, 405 B.R. 392 (Bankr.D. Idaho 2009).

Bavand’s allegation that Respondents conducted a “wrongful foreclosure” due to an unenforceable Deed of Trust does not give rise to a possible grant of relief solely because MERS was named in the security instrument.<sup>16</sup> Indeed, even the recent Washington Supreme Court decision in *Bain v. Metro. Mortg. Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012), should not alter this result.

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<sup>15</sup> *Gomez* states: “[s]o long as the note is in default and the foreclosing trustee is either the original trustee or has been substituted by the holder of the note or the holder’s nominee, there is simply no defect in foreclosure, at least in states... where a trustee may foreclose non judicially.” 2009 WL 3617650 at \*3.

<sup>16</sup> It is important to note that the Deed of Trust at issue contains a severability clause, stating “in the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict *shall not affect* other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.” CP 151 at ¶ 16 (emphasis added). As such, because *Bain* does not stand for the proposition that a security instrument naming MERS is void, even giving no regard to MERS’ capacity as nominee for the Lender would not render Bavand’s Deed of Trust unenforceable by the Lender, or its assigns upon transfer of the Note it secures. *Bain* at 112, 114.

c. *Bain Does Not Create or Imply a Cause of Action Against Either OneWest or MERS.*

In *Bain*, the United States District Court for the Western District of Washington certified three issues for review under RCW 2.60: 1) whether MERS is a lawful beneficiary in Washington, 2) what is the legal effect of MERS acting as an unlawful beneficiary, and 3) whether a Consumer Protection Act violation accrues against MERS if it acted as an unlawful beneficiary. *Bain* at 91. The Washington Supreme Court answered that, according to the state Deed of Trust Act, MERS could not be a beneficiary if it “never held the promissory note or other debt instrument secured by the deed of trust.” *Id.* at 110. However, the Court could not rule on the effect of this result based on the record. *Id.* at 114.

*Bain* does specifically find, however, that one must be “the holder of the instrument or document evidencing the obligations secured by the deed of trust” in order to qualify as a lawful beneficiary under state law. *Id.* at 99-103. In fact, the requirement that “the beneficiary must hold the promissory note” was the Supreme Court’s principal concern. *Id.* at 102, 120.<sup>17</sup>

But unlike the facts of *Bain*, the trial court in this case was shown clear documentation establishing OneWest as the Note holder, i.e. legal

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<sup>17</sup> Given an absence of evidence in the record, the Supreme Court stated that, “the identity of the beneficiary would need to be determined.” *Id.* at 111.

beneficiary. CP 136-140, *see also* CP 3 at ¶ 3.1 [wherein Bavand admits signing the Note and Deed of Trust]. To require OneWest to have produced additional evidence of its authority would undermine non-judicial foreclosures in Washington by allowing plaintiffs to forcibly convert that process into a court proceeding, and then burden-shifting responsibility onto the defendant to “prove” its ability to foreclose. Moreover, there is no requirement for a lender or its assignee to “show the note.” *See, e.g., Fay v. Mortgage Elec. Registration Sys., Inc.*, 2012 WL 993437 (W.D. Wash. 2012), *citing Freeston v. Bishop, White & Marshall, P.S.*, 2010 WL 1186276 (W.D. Wash. 2010), *Diessner v. Mortgage Electronic Registration Systems*, 618 F.Supp.2d 1184 (D. Ariz. 2009) [collecting cases].

Additionally, in the instant matter, MERS neither sought to foreclose in its own name or took actions contrary to the DTA, such as appointing the trustee. *Cf. Bain* at 90 [MERS appointed the successor trustee in both *Bain* and the companion case, *Selkowitz v. Litton Loan Servicing, LP*, 2010 WL 3733928 (W.D. Wash. 2010); this right is strictly reserved to a beneficiary under RCW 61.24.010(2).] Nonetheless, Bavand’s oft-repeated argument on appeal is that MERS’ execution of an Assignment of Deed of Trust destroys all “subsequent actions” to enforce the Deed of Trust. Appellant’s Brief at 20, *inter alia*.

But, as explained below, an “Assignment” is unnecessary when conducting a non-judicial foreclosure in this state, and therefore cannot give rise to a defect in that process.

d. Assignments of a Deed of Trust are Recorded for Notice Purposes, But Do Not Effect the Propriety of a Foreclosure.

A non-judicial foreclosure of owner-occupied residential real property in Washington includes: 1) issuing a Notice of Default (RCW 61.24.030), 2) recording an Appointment of Successor Trustee if applicable (RCW 61.24.010(2)), 3) recording a Notice of Trustee’s Sale (RCW 61.24.040), and 4) delivery and recordation of a Trustee’s Deed to the purchaser at sale (RCW 61.24.050).<sup>18</sup> Noticeably absent is any requirement to “prove” one’s status as beneficiary, or execute or record an Assignment of the Deed of Trust.

This is because the purpose of an Assignment “is to put parties who subsequently purchase an interest in the property on notice of which entity owns a debt secured by the property.” *Corales v. Flagstar Bank*,

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<sup>18</sup> At the time of the subject foreclosure, a borrower’s right to mediation during the process accrued even prior to the Notice of Default, but is currently only available after that Notice issues and up to twenty days subsequent to the Notice of Sale being recorded. See RCW 61.24.163 (current and former). The record does not show that Bavand elected mediation, and it is unclear whether the Property was owner-occupied.

*FSB*, 2011 WL 4899957 (W.D. Wash. 2011), *citing* RCW 65.08.070.<sup>19</sup> In fact, “an Assignment of a deed of trust... is valid between the parties whether or not the assignment is ever recorded.... Recording of the assignments is for the benefit of the parties.” *In re United Home Loans*, 71 B.R. 885, 891 (Bankr. W.D. Wash. 1978), *aff’d* 876 F.2d 897 (9<sup>th</sup> Cir. 1989); *see also Williams v. Wells Fargo Bank, N.A.*, 2012 WL 72727 (W.D. Wash. 2012), *Fed. Nat. Mortg. Ass’n v. Wages*, 2011 WL 5138724 (W.D. Wash. 2011), *St. John v. Nw. Tr. Services, Inc.*, 2011 WL 4543658 (W.D. Wash. 2011) [“Washington State does not require recording of such transfers and assignments.”], *In re Mortgage Elec. Registration Sys. (MERS) Litig.*, 2011 WL 4550189 (D. Ariz. 2011) *reconsideration denied*, 2012 WL 932625 (D. Ariz. 2012).<sup>20</sup>

Consequently, Bavand’s contentions focusing on the “efficacy of the Assignment of Deed of Trust,” a “fraudulently executed Assignment,” and MERS “never... [having] a right to assign the Deed of Trust,” are all immaterial to a conceivable cause of action for violating the DTA or “wrongfully foreclosing.” Appellant’s Brief at 19, 21, 22.

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<sup>19</sup> RCW 65.08.070 states: “[e]very such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his or her heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded.”

<sup>20</sup> *See In re MERS Litig.* at \*5 (“an action to declare an assignment void could only be brought by someone who can demonstrate a concrete and particularized injury in fact that is fairly traceable to the challenged assignment.”).

- e. Bavand Knew the Beneficiary's Identity and She Possessed No Justiciable Claim Against Respondents.

In this case, the evidence demonstrates that the specific requirements of non-judicial foreclosure under the DTA were satisfied. CP 136-174. At no time did Bavand ever suggest that some entity *other than* OneWest held the Note, which is indorsed in blank. CP 136-140.

Rather, Bavand received actual notice at every step of the foreclosure process that OneWest was the legal beneficiary. CP 161-162 (“OneWest... who is the present beneficiary, hereby appoints Regional Trustee....”), CP 384-386 (“defaults in the obligation to OneWest... the current Beneficiary of your Deed of Trust and owner of the obligation secured thereby.”), CP 170-174 (“the beneficial interest... which is presently held by OneWest....”), CP 394 [letter to trustee forwarded to OneWest], CP 396-397 [letter from OneWest to Bavand regarding her contact on the loan account, and noting the investor was also OneWest].<sup>21</sup> These facts address the Supreme Court’s primary concern in *Bain* – i.e., that a borrower know the note holder’s identity.

Based on this evidence, the trial court did not err in dismissing Bavand’s claims for Declaratory Judgment and “Wrongful Foreclosure”

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<sup>21</sup> *Bavand* – not OneWest – provided all of these documents to the trial court in response to the Motion to Dismiss.

due to purported defects in loan documents supporting OneWest's non-judicial foreclosure action.

4. The Trial Court Did Not Err in Dismissing Bavand's Quiet Title Claim.

Quiet title actions are “designed to resolve competing claims of ownership...[or] the right to possession of real property.” *Kobza v. Tripp*, 105 Wn.App. 90, 18 P.3d 621 (2001). Deeds of trust and mortgages create only secured liens on real property and do not convey any ownership interest or right to possession. *See* RCW 7.28.230(1); *State v. Superior Court for King County*, 170 Wash. 463, 16 P.2d 831 (1932). “The law is well settled in this state that a mortgage[e] of real property is not entitled... to the possession of the mortgaged property.” *Id.* at 467. Thus, until the foreclosure is complete, a beneficiary does not have a right to possession or ownership of the property. *See, e.g., Eason v. IndyMac Bank, FSB*, 2010 WL 4573270 (D. Ariz. 2010) *aff'd sub nom., Eason v. Indymac Fed. Bank FSB*, 2012 WL 4358626 (9<sup>th</sup> Cir. 2012); *Walters v. Fid. Mortg. of CA*, 730 F.Supp.2d 1185 (E.D. Cal. 2010).

Furthermore, “a party seeking to quiet title to property must succeed on the strength of his or her own title, not on the weakness of the other party's title.” *Kesinger v. Logan*, 113 Wn.2d 320, 328, 779 P.2d 263

(1989), *see also* RCW 7.28.010.<sup>22</sup>

In the foreclosure context, a plaintiff “cannot assert an action to quiet title against a purported lender without demonstrating they have satisfied their obligations.” *Evans v. BAC Home Loans Servicing*, 2010 WL 5138394, \*3 (W.D. Wash. 2010).

In *Evans*, Judge Martinez of the United States District Court for the Western District of Washington held that:

[u]nder a deed of trust, a borrower’s lender is entitled to invoke a power of sale if the borrower defaults on its loan obligations. As a result, the borrower’s right to the subject property is contingent upon the borrower’s satisfaction of loan obligations. Under these circumstances, it would be unreasonable to allow a borrower to bring an action to quiet title against its lender without alleging satisfaction of those loan obligations. *Id.*

Likewise, in the recent decision of *Sidorenko v. National City Mortgage Co.*, 2012 WL 3877749, at \*2 (W.D. Wash. 2012), Judge Leighton of the same Court recognized that:

[d]eeds of trust and mortgages create only a secured lien on real property. They do not convey ownership or a right to possession. None of the Defendants have a current claim of ownership.

Analyzing a strikingly similar set of allegations to this case, Judge Leighton found that “Washington law did not require PNC to prove its ownership of the Note or its status of beneficiary to Sidorenko prior to

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<sup>22</sup> RCW 7.28.010 requires a party seeking to quiet title to have both a “valid subsisting interest” *and* right to the property in question.

foreclosure.” *Id.* at \*2. Consequently, in *Sidorenko*, the defendants’ Quiet Title claim against both the lender and trustee was dismissed.

*Bain v. Metropolitan Mortgage Group, Inc.* also dispels any notion that a plaintiff suing to stop foreclosure can void a deed of trust and quiet title in his or her name. The Court noted that Bain understood “she is going to have to make up the mortgage payments that have been missed.” 175 Wn.2d at 114. The Court expressly *rejected* co-plaintiff Selkowitz’s theory that quieting title to the property was the appropriate remedy due to MERS’ role in a Deed of Trust. *Id.* at 112.<sup>23</sup>

Here, even putting aside whether this claim was barred under RCW 61.24.127, Bavand did not allege that she satisfied her loan obligation secured by the Deed of Trust. She offered no factual basis supporting the strength of her purported title interest; rather, she argued precisely what *Kesinger* and related cases prohibit – namely, that OneWest’s enforcement of its lien was deficient and “void.” Appellant’s Brief at 32.

Quieting title to the Property in Bavand’s name, and awarding her a free house despite a loan default, would have been unjustified. The trial court properly granted Respondents’ Motion to Dismiss this claim.

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<sup>23</sup> Selkowitz had no authority “that listing an ineligible beneficiary on a deed of trust would render the deed void and entitle the borrower to quiet title.” *Id.*

5. The Trial Court Did Not Err in Dismissing Bavand's Consumer Protection Act (CPA) Claim.

Bavand's lawsuit essentially asserted that Respondents violated the CPA by relying on false documents, breaching some unknown part of RCW 61.24.020, recording documents without authority, engaging in repetitive conduct negatively impacting the public, and causing injury to Bavand. CP 8-9.<sup>24</sup>

The five elements necessary to establish a CPA claim are: (1) an unfair or deceptive act or practice, (2) the act or practice occurred in the conduct of trade or commerce, (3) the act or practice impacted the public interest, (4) an injury to the plaintiff's business or property, and (5) a causal link between the unfair or deceptive act or practice and the injury. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986); *see also* RCW 19.86 *et seq.* Failure to meet any one of these elements is fatal and necessitates dismissal. *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298 (2002). “[W]hether a particular action gives rise to a CPA violation is reviewable as a question of law.” *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 930 P.2d 288 (1997).

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<sup>24</sup> Now, for the first time, Bavand focuses on other “acts” not identified in her Complaint. Appellant's Brief at 22-23 [declaration of default in violation of RCW 61.24.030(7)(c), and unpled violations of the Fair Debt Collection Practices Act]. This Court should refuse to expand the bounds of what Bavand can raise on appeal.

- a. Based on the *Bain* Decision, the Only Possible “Deceptive Act or Practice” Impacting the Public Interest was the Presence of MERS in the Deed of Trust.

“Implicit in the definition of ‘deceptive’ under the CPA is the understanding that the practice misleads or misrepresents something of material importance.” *Holiday Resort Comm. Ass’n v. Echo Lake Assoc., LLC*, 134 Wn.App. 210, 135 P.3d 499 (2006). But “acts performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law.” *Leingang, supra*. at 155.

Bavand was therefore required to show that Respondents engaged in an act or practice with either: 1) “a capacity to deceive a substantial portion of the public,” or 2) that “the alleged act constitutes a per se unfair trade practice.” *See Saunders v. Lloyd’s of London*, 113 Wn.2d 330, 779 P.2d 249 (1989), quoting *Hangman, supra*; accord RCW 19.86.093.<sup>25</sup>

In *Bain v. Metropolitan Mortgage Group, Inc.*, the Supreme Court found that MERS’ role in a deed of trust was not “per se deceptive,” but agreed that “characterizing MERS as the beneficiary has the capacity to

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<sup>25</sup> An unfair trade practice “requires a showing that a statute has been violated which contains a specific legislative declaration of the public interest impact.” *Hangman*, 105 Wn.2d at 791. Bavand’s citation to RCW 61.24.135 is inapposite, as that statute addresses procedural irregularities in a sale such as the borrower filing bankruptcy prior to the sale, or where there is a pending action on the obligation. *See Udall v. T.D. Escrow Services*, 159 Wn.2d 903, 154 P.3d 882 (2007).

deceive....” 175 Wn.2d at 117. The Court also found a “broad impact” of naming MERS in mortgages which “presumptively” showed an effect on the public interest. *Id.* at 118.

All of Bavand’s allegations related to OneWest’s ability to foreclose, i.e. false documents, lack of authority, etc., are predicated on this point. Nowhere in Bavand’s Complaint does she suggest that Respondents did anything specific to either her or the general public that constitutes an “unfair or deceptive act.” CP 1-48.

Moreover, because Assignments of the Deed of Trust are not required to effectuate foreclosure under the DTA, Bavand’s suggestion that Respondents did not follow the provisions of RCW 61.24 *et. seq.* is simply devoid of factual support. Appellant’s Brief at 22-23. Bavand’s theories do not facially satisfy the “public interest” prong under either *Hangman Ridge* or RCW 19.86.093; this fact alone was sufficient to render Bavand’s CPA claim subject to CR 12(b)(6) dismissal, but Respondents will additionally address the inadequate causal link between their purported actions and potential damages.

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b. The Presence of MERS in the Deed of Trust Did Not Injure Bavand.

Under *Hangman Ridge*, the alleged deceptive acts must also result in injury to a plaintiff. See 105 Wn.2d at 792, citing *Cooper's Mobile Homes, Inc. v. Simmons*, 94 Wn.2d 321, 617 P.2d 415 (1980).

Damages for lost wages or personal injuries, including pain and suffering, are not compensable under the CPA. See *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993), *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn.App. 722, 959 P.2d 1158 (1998). An award under the CPA is strictly limited to damage “in... [a plaintiff’s] business or property....” RCW 19.86.090, see also *Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009).

In *ESCA Corp. v. KPMG Peat Marwick*, this Court states:

[s]ufficiency of the evidence to prove damages must be established with enough certainty to provide a reasonable basis for estimating it. Although the precise amount of damages need not be shown, damages must be supported by competent evidence in the record. To be competent, the evidence or proof of damages must be established by a reasonable basis and it must not subject the trier of fact to mere speculation or conjecture. [Citations omitted.] 86 Wn.App. 628, 939 P.2d 1228 (1997), *aff'd*, 135 Wn.2d 820, 959 P.2d 651 (1998).

Similarly, “lost profits cannot be recovered where they are speculative, uncertain and conjectural.” *Tiegs v. Watts*, 135 Wn.2d 1, 954 P.2d 877 (1998).

Even where damages may exist, “the doctrine of mitigation of damages, or avoidable consequences, prevents an injured party from recovering damages that the injured party could have avoided if it had taken reasonable efforts after the wrong was committed. *TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc.*, 134 Wn.App. 819, 142 P.3d 209 (2006), citing *Bernsen v. Big Bend Elec. Coop.*, 68 Wn.App. 427, 842 P.2d 1047 (1993).

Moreover, Bavand’s allegations must be analyzed “under the ‘but for’ standard of proximate causation under WPI 15.01, as subsequently adopted in *Indoor Billboard.*” *Schnall v. AT&T Wireless Services, Inc.*, 171 Wn.2d 260, 259 P.3d 129 (2011), citing *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 170 P.3d 10 (2007).<sup>26</sup> The *Indoor Billboard* decision clarifies that reliance on false or deceptive acts is not a element under the CPA. 162 Wn.2d at 84.

The Supreme Court concluded that “where a defendant has engaged in an unfair or deceptive act or practice, and there has been an affirmative misrepresentation of fact, our case law establishes that there

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<sup>26</sup> See also *Carlile v. Harbour Homes, Inc.*, 147 Wn.App. 193, 194 P.2d 280 (2008) [“The injury must be expressly “by” a violation of RCW 19.86.020, meaning that “but for” a defendant’s conduct, the alleged injury would not have occurred.”]

must be some demonstration of a causal link between misrepresentation and the plaintiff's injury.” *Indoor Billboard*, 162 Wn.2d at 81-82.

The question of “injury” based on MERS’ role in a deed of trust is fact-specific under *Bain*, meaning that the failure to present such factual averments in the face of a complaint would result in CR 12(b)(6) dismissal. *See, e.g., Citizens for Rational Shoreline Planning v. Whatcom County*, 172 Wn.2d 384, 258 P.3d 36 (2011).

Here, Bavand’s Complaint did not aver she was misled by MERS in any fashion, or that MERS’ presence in the Deed of Trust is what caused foreclosure of the Property. While Bavand claims a “distraction and loss of time to pursue business and personal activities,” she fails to plead a causal linkage between those vague losses and either the contents of her loan documents, or the non-judicial foreclosure process. CP 9 at ¶ 6.7.<sup>27</sup>

Ultimately, no matter how often Bavand wishes to disavow the terms contained in the Deed of Trust, the unchallenged fact remains that she defaulted on her loan and foreclosure of the Property as collateral was

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<sup>27</sup> On appeal, Bavand suddenly contends that she expended the costs of “postage, parking, and consulting an attorney... to address the misconduct of the [*sic*] OneWest, RTS, and MERS” as proof of her injury. Appellant’s Brief at 27. Yet, none of those items – conveniently commensurate with her citation to *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009) – are found in the Complaint. CP 1-48. *Accord Demopolis v. Galvin*, 57 Wn.App. 47, 786 P.2d 804 (1990) [litigation expenses are not an “injury” under the CPA].

appropriate. Bavand apparently had no problem with, or injury caused by, Respondents for the three years from when she signed the loan documents until she stopped paying her mortgage. CP 165-166.

Consequently, Bavand's CPA cause of action did not state a basis for granting relief against Respondents, and the trial court was correct to have dismissed it.

c. OneWest Should Receive Attorneys' Fees and Costs For Defending Against This Appeal.

Under RAP 18.1(a), "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court."<sup>28</sup>

Additionally, under RAP 14.2, "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." Under RAP 14.3(a), certain expenses are allowed as awardable costs.

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<sup>28</sup> RAP 18.1(b) requires that a "party must devote a section of its opening brief to the request for the fees or expenses."

OneWest respectfully requests that it be awarded attorneys' fees based on the Deed of Trust, which permits recovery of fees, and "the term 'attorneys' fees'... shall include without limitation attorneys' fees incurred by Lender in any... appeal." CP 153.<sup>29</sup> OneWest should also be awarded costs for those items specified in RAP 14.3(a) upon the presentation of a cost bill pursuant to RAP 14.4.<sup>30</sup>

#### **IV. CONCLUSION**

First, Bavand's failure to follow the DTA with regards to seeking injunctive relief should have barred all presented claims, except under the CPA, while rendering her unable to unwind the Trustee's Sale. There is also no basis to enforce a purported CR 2A agreement involving Regional Trustee.

Second, to the extent that this Court reviews such claims, no set of facts existed in the underlying litigation to support the theories of liability set forth in the Complaint.

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<sup>29</sup> See also RCW 4.84.330:

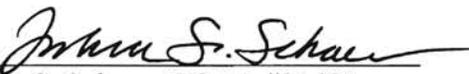
[i]n any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

<sup>30</sup> Bavand's request for fees should be denied, not only as a non-prevailing party, but also due to the absurdity of invoking Paragraph 26 of the Deed of Trust, which does not entitle the *borrower* to recover on appeal. Appellant's Brief at 32-33; cf. CP 153.

The trial court committed no error when it granted Respondents' Motion to Dismiss. That ruling below should be affirmed, with fees and costs in OneWest's favor.

DATED this 12<sup>th</sup> day of December, 2012.

**ROUTH CRABTREE OLSEN, P.S.**

By:   
Joshua S. Schaer, WSBA #31491

Attorneys for Respondents OneWest  
Bank, FSB and Mortgage Electronic  
Registration Systems, Inc.

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

MARISA BAVAND,  
  
Appellant,  
  
v.  
  
ONEWEST BANK, FSB, a federally  
chartered Saving Bank; REGIONAL  
TRUSTEE SERVICES CORPORATION, a  
Washington corporation; MORTGAGE  
ELECTRONIC REGISTRATION  
SYSTEMS, INC., a Delaware corporation and  
DOE DEFENDANTS 1-10,  
  
Respondents

Case No: 68217-2-I  
  
**DECLARATION OF SERVICE**

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent be a witness herein.
2. That on December 13, 2012, I caused a copy of **Opening Brief of Respondents OneWest Bank, FSB and Mortgage Electronic Registration Systems, Inc., and this Declaration of Service** to be served to the following in the manner noted below:

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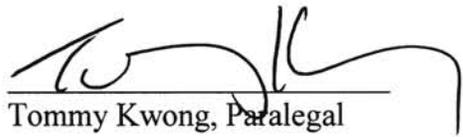
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 Overnight Mail  
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Attorneys for Regional Trustee Services Corp.

I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 13<sup>th</sup> day of December, 2012.

  
Tommy Kwong, Paralegal