 74979-0

COURT OF APPEALS I NO. 74979-0-I
SNOHOMISH COUNTY SUPERIOR COURT NO. 13-2-05366-5

COURT OF APPEALS,
DIVISION 1, OF THE STATE OF WASHINGTON

FILED
Aug 22, 2016
Court of Appeals
Division I
State of Washington

MARK and JULIE DAVISCOURT,
Husband and Wife and their marital community
Appellants,

v.

QUALITY LOAN SERVICES CORPORATION OF WASHINGTON, a Washington Corporation; SELECT PORTFOLIO SERVICING, INC., a foreign corporation; BANK OF NEW YORK MELLON FKA BANK OF NEW YORK, a national association; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a foreign corporation; MERSCORP HOLDINGS, INC., a foreign corporation; ALTERNATIVE LOAN TRUST 2005-62, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2005-62; JOHN DOES 1-99,

Respondents.

APPEAL FROM SUPERIOR COURT
FOR SNOHOMISH COUNTY

APPELLANTS MARK and JULIE DAVISCOURT'S OPENING BRIEF

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I. INTRODUCTION

Mark and Julie Daviscourt (Daviscourts), Appellants, brought an action in King County Superior Court (Trial Court) against several defendants. Notwithstanding the original notice of appeal indicated several orders were being considered for appeal, after reflection the Daviscourts have chosen to appeal only two interrelated orders of the Trial Court: those granting summary judgment to defendants Quality Loan Services Corporation of Washington (Quality), Select Portfolio Servicing, Inc. (SPS), Mortgage Electronic Registration Systems, Inc.(MERS), MERSCORP Holdings, Inc., and Bank of New York Mellon F/K/A Bank of New York Mellon (BNYM), Individually and as Trustee for the Alternative Loan Trust 2005-62., Mortgage Pass Through Certificates Series 2006-62.

The Fact section of this Opening Brief will demonstrate that the defendants have recorded public documents *which contain false statements* in order to advance the nonjudicial foreclosure of Daviscourts' home pursuant to Washington's Deeds of Trust Act (DTA), Ch. 61.24. RCW. The Fact section will also show the Lender named on the deed of trust was a corporate entity which did not exist, but which MERS claimed to be the "nominee" for. This deed of trust also claims MERS is its "beneficiary". Further, the Fact section will demonstrate how Daviscourts

claim these facts, along with others, have proximately caused them injuries and damages. (Mark Daviscourt is a World Trade Center (WTC) responder, who because of 9/11 and other life experiences, is an "eggshell" plaintiff.)

The Fact section also documents those issues of material fact which the Daviscourts claim precluded the trial from granting summary judgment.

The Argument portion of Daviscourts' Opening Brief begins by substantiating Daviscourts' claims that defendants engaged in concerted and cooperative efforts to advance the nonjudicial foreclosure of Daviscourts' home by filing false documents. They will illustrate how this practice (as well as other acts and omissions) created issues of fact regarding whether defendants were negligent, had committed the tort of outrage, and/or engaged in a Civil Conspiracy..

The final sections of Daviscourts' argument section focus on defendants violations of the DTA and Washington's public recording laws in order to show that questions of fact existed which precluded the trial court from granting a summary judgment that defendants had not violated Washington's Consumer Protection Act (CPA) Ch. 19.86 RCW.

II. ASSIGNMENTS OF ERROR AND ISSUES RELATING THERETO

ASSIGNMENT OF ERROR 1

The trial court erred in concluding as a matter of law that defendants recording false statements in Washington's land records, coupled with the other conduct demonstrated herein, could not constitute negligence, outrage, or civil conspiracy as a matter of law.

ISSUE RELATED TO ASSIGNMENT OF ERROR 1

Do issues of fact preclude the grant of summary judgment on the above causes of action?

ASSIGNMENT OF ERROR 2

The trial court erred in concluding BNYM was a beneficiary within the meaning of RCW 61.24.005(2) as a matter of law.

ISSUES RELATED TO ASSIGNMENT OF ERROR 2

1. Does the document claimed to be held by BNYM set forth an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order?
2. Is issue number 1 a question of fact which should be resolved by a jury?
3. Is the deed of trust void because the Lender identified therein is a non-existent corporation?

4. If the deed of trust is void what, if any, good faith reasons can be advanced by Countrywide, if it was actual lender in 2005, to make the deed enforceable?

ASSIGNMENT OF ERROR 3

The trial court erred in concluding as a matter of law that the defendants did not violate provisions of the DTA and Washington's public records laws and therefore was not liable to the Daviscourts for violations of Washington's CPA.

ISSUES OF FACT RELATED TO ASSIGNMENT OF ERROR 3

1. Do issues of fact exist with regard to whether defendants violated RCW 61.24.005(2); 010(2) & (4); 030(6) & (7); 040(1)(a) & (f); RCW 9.38.020 and RCW 40.16.030 in the course of their trade or business?
2. Did one of more of the violations of the statutes set forth above impact the public interest?
3. Did one or more of the violations of the statute set forth above proximately cause the Daviscourts injuries compensable under the CPA?

III. STATEMENT OF FACTS

A. Facts Re: Daviscourts' Interactions With SPS and Quality

Mark Daviscourt is a World Trade Center (WTC) responder, who served his country by going to New York City following the tragedy

which occurred on September 11, 2001. CP 246-247. According to Daviscourt, employees at SPS knew about his psychological maladies while they negotiated a loan modification with him and his wife in 2013. CP 251:23-254:39.

After Mark Daviscourt learned in 2013 that false records were being filed with the King County Auditor's office affecting his property he became concerned and tried to discuss the non-judicial foreclosure proceedings with both SPS, the servicer, and Quality, the company which purported to be the "trustee". CP 251:1-258:20.

Daviscourt sent SPS a request to provide him with materials including without limitation copies of the deed of trust. CP 253:25-254:8. The documents SPS provided indicated to Daviscourt that several documents had been forged. *Id.* At this point Daviscourt also began attempting to contact Quality. CP 254:9-258:20, because he understood based on Washington precedent the trustee was supposed to be a "neutral", *i.e.* a "substitute judge". Daviscourt believed the trustee had a legal duty to consider what Daviscourt had to say and act fairly as between a valid Beneficiary and himself when initiating and conducting non-judicial proceedings. CP 253:10-254:24.

In his efforts to contact Quality, Daviscourt first tried to call Tricia Moreno, the person who signed the Notice of Trustee's sale (NOTS). CP. 243:8-23 Daviscourt testifies:

> I was unable to reach her, and left a message with a Quality employee to have Ms. Moreno call me as soon as possible. The Quality employee I spoke with on the phone said Ms. Moreno was not in and laughed when I asked when I could talk with her. She also laughed when I asked to speak with someone about the nonjudicial foreclosure.

CP 254:12-17.

Unable to talk with Quality by phone Daviscourt attempted to go to Quality's office to speak with a trustee or an employee of Quality who could help him. The NOTS, a publicly recorded document, indicated Quality's physical address was 108 1st Ave. S, Suite 202 in Seattle. CP 254:25-258:20. Daviscourt went there on several occasions in February and March, 2014 hoping to be able to talk to someone, but never was able to find the office or any Quality employee located in or around this address. 254:9-258:20.

Each time he failed to make contact with Quality at its purported office Daviscourt experienced severe stress reactions. For example, Daviscourt testified that on one occasion after being unable to find Quality's office he had a panic attack: "I remember I had a panic attack that time. I laid down on the street and cried. I stayed there for what

seemed at least fifteen minutes when someone I knew stopped by and asked if I needed to go to the hospital. I was so ashamed." CP 256:12-17.

Late in March, Quality sent the Daviscourts a letter informing them that Quality had recently relocated its office from Poulsbo to Seattle. 257:13-22. Daviscourt testified this letter infuriated him because Quality purposely mislead him when it indicated on the February 12, 2014 NOTS that it had a physical address in Seattle.

> How could I show this neutral decision-maker [in Seattle] the forgeries? I was beside myself because it seemed clear to me the whole system was a fraud. Then I panicked. I couldn't breathe. I cried. And then a silent shame came over me and I decided I should die.

257:18-23.

Significantly, Quality indicates that it discontinued the Daviscourts' trustee sale on March 6, 2014 without ever notifying Daviscourts. CP 11, 56 & 57. Had Quality simply notified Daviscourts that the sale had been cancelled he would not have felt compelled to talk to the trustee at the Seattle location, which the Daviscourts claim did not exist.

The record indicates that Quality may have chosen to quietly discontinue the sale because of a consent order it agreed to, to settle a claim by the Washington Attorney General that it was not maintaining an

office in Washington State as required by RCW 61.24.030(6). CP 488-490

When Daviscourt later learned that there was no ***New York*** corporation known as America's Wholesale Lender ("AWL") in 2005, which is listed as the lender on the deed of trust, he had a complete breakdown. He had flashbacks, nightmares, panic attacks, depression and "a deep and abiding anger at what was happening to me, my family, ***and our country***." CP 258:3-10 (emphasis added). Daviscourt testifies: "I hated the dishonest banks which had put me in this situation, as well as the corrupt servicers and trustees, like SPS and Quality, which prey on people by falsely claiming to be entitled to take our homes." *Id.* This provoked another suicide plan, which was only aborted through Daviscourt's referral to Dr. Peter Hunsberger for treatment. CP 258:3-20.

At least part of Daviscourt's testimony is corroborated by his wife, Julie, who went with him on one occasion to Seattle to find the promised land, i.e. Quality's physical address in Seattle. CP 177-179.

B. Facts Related to Forged and/or False Records Recorded with the King County Recorder's Office

In this section the Daviscourts will identify several documents which are recorded with King County Recorder's Office which contain false statements or constitute forgeries in violation of RCW 9.38.020 and 40.16.30.

Deed of Trust. The Deed of Trust identifies the Lender as "AMERICA'S WHOLESALE LENDER, Lender is a CORPORATION organized and existing under the laws of NEW YORK". CP 200.

MERS is identified as a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. The deed states: "MERS is the beneficiary under this Security Instrument." CP 202.

Assignment of Deed of Trust. A document recorded in 2011 titled "ASSIGNMENT OF DEED OF TRUST" purportedly signed by an assistant secretary of MERS and electronically recorded as 201109220001101. The recorded document purports to transfer all of MERS' interests in the deed of trust ***and note*** to BNYM f/k/a as Trustee for defendant Trust for the benefit of Defendant Investor Certificate holders.

Appointment of Successor Trustee. Another document recorded with the King County Recorder's office in 2013 was entitled "Appointment of Successor Trustee". This document falsely states BNYM is the "present beneficiary". CP 236-237. It also does not document through a chain of title in the public records how BNYM became the "beneficiary". The document is signed by an employee of defendant SPS purportedly as an "Attorney in Fact" on behalf of BNYM, but without any

evidence that a power of attorney by BNYM to SPS actually exists. CP 237.

NOTS. The NOTS was recorded with the King County Recorder's Office on or about February 12, 2014. CP 239-242. The notice states the trustee sale is to "secure an obligation in favor of MERS, as nominee for America's Wholesale Lender (or by its successors in interest and/or assigns, if any) to defendant BNYM f/k/a Bank of New York as trustee…"

Marie McDonnell testified as an expert witness regarding the truth and falsity of statements contained in these publicly recorded documents. Neither her expertise nor opinions based upon findings were challenged in the trial court. *See* CP 370, SPS MSJ 1-20; CP 597-610. McDonnell's qualifications and areas of expertise are set forth in her declaration and exhibits attached thereto at CP 67-70 and 79-89.

McDonnell concludes in her affidavit:

1.) AWL was not a New York Corporation in 2005 when it was identified as the lender on the deed of trust which was recorded with the King County Recorder's office. CP 71-72.

2.) "Mortgage Electronic Systems, Inc. had no interest in the deed of trust or the promissory note which it could assign to BNYM, as trustee and therefore its statements to the contrary in the recorded assignment are … false." CP 72.

3. “America’s Wholesale Lender had no interests in the deed of trust or promissory note which it and/or MERS could assign to BNYM, as trustee. Therefore the statement that BNYM, as trustee, became the ‘present beneficiary’ thereby, on a more likely than not basis, is a false statement. If BNYM, as trustee, was not a beneficiary within the meaning of RCW 61.24.005(2) then it has no authority to appoint Quality as a trustee pursuant to RCW 61.24.010(2). If BNYM, as trustee was not a beneficiary then the statement that it appointed Quality as a trustee to foreclose on the AWL deed of trust was also false.” CP 72-73.

4. “My opinion is that this Notice of Trustee Sale contains numerous false statements, including without exclusion 1.) that there was any obligation owed to MERS and/or the non-existent AWL based on the “Assignment of the Deed of Trust” which was signed only on behalf of MERS; b.) that MERS owned any beneficial interest in the deed of trust when the deed of trust states MERS owns only legal title to the Security Instrument and c.) that BNYM, as trustee received any interest from MERS and/or AWL in the deed of trust which could have been a basis for compliance with the requirements of RCW 61.24.040(1)(a). CP 73.

McDonnell’s conclusions set forth above are further corroborated based on the audit she performed for the City of Seattle, which is attached as an exhibit to her affidavit. See CP 73-77.

C. Unrecorded Documents

Promissory Note.The AWL Adjustable Rate Note, which was not recorded, can be found as an Exhibit 4 to Scott Stafne's October 19, 2015 declaration at CP 226-229. The note shows the principal is $825,000 but indicates that it can be changed. In fact, the note is designed so that the amount of principal will likely change. CP 226 ¶ 1 (loan amount); CP 227 ¶ 3(E) "Additions to My Unpaid Principal" The document evidencing the obligations purportedly secured by the AWL deed of trust requires the Note Holder to recalculate principal and interest monthly.

> (E) Additions to My Unpaid Principal.
> Since my monthly payment amount changes less frequently than the interest rate, and since the monthly payment is subject to the payment limitations described in Section D, any minimum payment could be less or greater than the amount of the interest portion of the monthly payment that would be sufficient to repay the monthly unpaid principal I owe at the monthly payment date in full on the maturity date in substantially equal payments. For each payment that my monthly payment is less than the interest portion, the Note Holder will subtract from the amount of my monthly payment from the amount of the interest portion and will add to the difference to my unpaid principal, and interest will accrue on the amount of this difference at the interest rate required by Section 2. For each month that the monthly payment is greater than the interest portion, the Note Holder will apply the payment as provided in Section 3(A).

CP 227.

March 16, 2013 Correspondence between Quality and SPS

In response to discovery, Quality produced a letter Quality sent to SPS on March 16, 2013. The correspondence states:

> Dear Select Portfolio Servicing, Inc.,
>
> Enclosed is a draft of the Appointment of Successor Trustee. ***This document is needed for us to advance the non-judicial foreclosure that we are processing for you. Per your instructions, the attached document was prepared by us and contains information relative to this loan based on information provided to us during the course of the foreclosure by either you or your vendor.***
>
> Please review this document to confirm the information and assertions set forth are true and correct. ***Once the accuracy of the document has been confirmed please detach this letter from the document, have this document signed and return it to us***. Should a challenge ever be made to the foreclosure, you may be called to testify regarding this document.
>
> ***To assist you in confirming that all elements of the documents are accurate***, we have verified the following information based on our records maintained in the ordinary course of business relative to this Loan:
>
> **T.S. No.: WA-13-545350-SH**
> **Order No.: 130048641-WA-GSI**
>
> ***If you have any questions or concerns relative to this document or find any errors please contact us immediately and we will revise as needed.***
>
> Thank you for your assistance and as always we appreciate you allowing us to be of service.
>
> **PLEASE DO NOT RETURN THIS NOTICE WITH THE EXECUTED DOCUMENT.**

CP 234. (All underlined text is in original document. All bolded and italicized text has been added)

It will be recalled that expert McDonnell concluded the Appointment of Successor Trustee document contained false statements. CP 72-73.

Declaration of Ownership. Another unrecorded document, entitled "DECLARATION OF OWNERSHIP" was signed by Debra Watson a Document Control Officer for SPS on May 6, 2013. CP 244. Ms. Watson claims she is "duly authorized to" declare on behalf of "The Bank of New York Mellon, f/k/a The Bank of New York, as trustee… Hereby known as beneficiary … is the actual holder of the Promissory Note evidencing the above referenced loan." *Id.* Further, Ms. Watson states: "[B]eneficiary understands that the trustee foreclosing the deed of trust securing the above referenced loan will rely on this Declaration before issuing the notice of trustee sale." *Id*.

It is apparent from the face of the document that Ms. Watson works for SPS and not BNYM. *Id.* There is nothing in the document, or which was ever been provided to the Trial Court, that confirms Ms. Watson's claim that she is duly authorized to make a declaration of ownership on behalf of defendant BNYM as trustee.

Notice of Default and Debt Validation Letter. On September 12, 2013 Quality served a Notice of Default on the Daviscourts. CP 36-41. On that same date Quality also sent out a Debt Validation Notice which states:

> This Debt Validation Notice pertains to the debt/loan secured by the Deed of Trust dated 9/23/2005, executed in favor of MORTGAGE REGISTRATION SYSTEMS, INC., AS NOMINEE FOR AMERICA'S WHOLESALE LENDER, as beneficiary, which was recorded on 9/30/2005, as Instrument No. 2005093001246 in Official Records in the Office of the Recorder of King County, State of Washington.
>
> This debt/loan is currently owed to : The Bank of New York Mellon, f/k/a The Bank of New York, as Trustee…
>
> * * *
>
> As of 9/12/2013 the total amount owed on the debt/loan is $1,216,071.42. …

Proceedings Below

Quality filed a nine page motion for summary judgment. Quality conceded that the only way a summary judgment should be granted is "if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CP 3:1-4. In support of its motion Quality submitted the declarations of Sierra Herbert West and attorney Joe MacIntosh. CP 2:16-20. MacIntosh testified that he attached as Exhibit A to his declaration "true and correct copies of instruments with the Plaintiffs' signatures recorded with the King County Recorder's Office." MacIntosh did not explain how he knew these documents were actually signed by the plaintiffs. The signatures themselves look different. *Compare* CR 60 with 63 with 66. The Daviscourts disputed the signatures were theirs.

The declaration of Sierra Herbert-West contains several exhibits, but not the adjustable rate note. Paragraph 7 of Herbert-West's declaration states:

> Attached hereto as Exhibit D is a true and correct copy of the recorded Notice of Sale issued by Quality. The notice correctly lists Quality's physical address at 108 1st Ave South Street 202 Seattle, WA 98104. At the time the Notice of Sale was issued, and continuing to the present date, Quality has physically occupied that office. I have knowledge of this fact because I am one of the employees that has worked in the office since that time. ***Quality has no records of the Plaintiffs attempting to visit the office.***

CP 11:5-11. (emphasis added) Exhibit D establishes the NOTS was prepared on December 12, 2014. Thus, Ms. Herbert-West is testifying that since February 12, 2014 until the date she signed the declaration on October 15, 2015 Quality operated an office at 108 1st Ave. South Street, 202 Seattle, Washington.

Quality argued that it was properly appointed as successor trustee because BNYM was the "holder of the instrument or document evidencing the obligations secured by the deed of trust" and therefore met the definition of beneficiary set forth in RCW 61.24.005(2). CP 3:12-14; *see also* CP 3:12-26. Based on its legal conclusion that BNYM was the beneficiary within the meaning of RCW 61.24.005(2) Quality argued the Daviscourts could not establish liability for any of its other causes of action, including those for negligence, outrage, civil conspiracy and violation of the Consumer Protection Act.

The Daviscourts filed a response memorandum on October 19, 2015. CP 321-345. The Daviscourts filed on that same date declarations by Julie Daviscourt (CP 177-179), Mark Daviscourt, (CP 245-320), Peter Hunsberger (CP 180-194), Marie McDonnell (CP 67-176), and Scott E. Stafne (CP 195-244) and (CP 346-369[1]) in support of their Response. The declarations of both Mark and Julie Daviscourt contradict Herbert-West's testimony that Quality operated an office at that address during February and March, 2014.

Quality filed a Reply Memorandum. (CP 370-375). The Reply reiterated: "The 'beneficiary' is the holder of the 'instrument or document evidencing the [secured] obligation". RCW 61.24.005(2)" CP 370:15-17. Further, that Daviscourts' declaration about trying to find Quality's office was self-serving and did not show prejudice. CP 372.

Oral argument was held October 30, 2015 and the Court took the matter under advisement.

While the motion was under advisement and before any ruling was made the Daviscourts submitted additional evidence for the Court to

[1] This declaration attaches Quality's discovery responses and replies to Requests for admission as exhibits.

consider. This included the declarations of Josh Auxier (CP376-386[2]) and Scott Stafne (CP 387-498).

Stafne's declaration included additional evidence that Quality was not operating an office at the address in question, including the testimony of personnel from the Office of the Attorney General of Washington. Jan Simonds testified that on February 18, 2014 she was unable to gain entrance to Quality's office at 108 1st Ave South, Suite 202 in Seattle. (CP 387-498; Ex. B Decl. of Jan Simonds ¶ 2. CP 443-44. Deputy Attorney General Benjamin Roesch testified that on February 21, 2014 he mailed a letter to Quality in which he disclosed the Attorney General's Office had received complaints regarding the whereabouts, if any, and ability to access Quality's office. CP 387-498; Ex. B Decl. of Benjamin Roesch ¶ 4 CP 444-46; Ex. 3 CP 468-70.

About a month and a half after this evidence had been filed, the Court entered an order granting Quality's motion for summary judgment on December 29, 2015.

On or about January 25, 2016 SPS, MERS, MERSCORP, and BNYM as trustee for defendant Alternative Loan 2005-62 Trust Mortgage-Pass-Through Certificates Series 2005-62 moved for summary

[2] Auxier's declaration contained further evidence corroborating that no corporation existed in 2005 in New York State which was known by the name of America's Wholesale Lender.

judgment. Subpart 97,[3] 1-20, CP __. Like Quality the SPS defendants conceded they would have to demonstrate the absence of a material fact in order to prevail. *Id*., 3:4-6.

Like Quality, the SPS defendants argued they could meet this burden because BNYM was the actual holder of the note. *Id.* 4:22-5:15.CP___

Because the SPS defendants referenced and relied upon the Trial Court's order granting summary judgment in favor of Quality as a basis for its motion, the Daviscourts brought to the Court's attention for purposes of ruling on SPS defendants' motions all of the evidence that was before the Trial Court for purposes of Quality's motion for summary judgment. CP 572:13-573:10.

IV. ARGUMENT

A. Summary Judgment Standards:

The initial burden under CR 56(c) is on the moving party to prove that no fact issue is genuinely in dispute and that the moving party is entitled to judgment as a matter of law. *La Plante v. State*, 85 Wn.2d 154,

[3] Through an inadvertent mistake, the January, 2016 motion for summary judgment filed by Defendants Select Portfolio Servicing, Inc., Mortgage Electronic Registration Systems, Inc., MERSCORP Holdings, Inc., and Bank of New York Mellon F/K/A Bank of New York Mellon, Individually and as Trustee for the Alternative Loan Trust 2005-62., Mortgage Pass Through Certificates Series 2006-62 was not designated as part of the Clerk's Papers. The Daviscourts have taken steps to correct this error. For purposes of this motion the Daviscourts refer to this motion as subpart 97, CP ---.

158, 531 P.2d 299 (1975). To meet this burden, the Bank must prove "by uncontroverted facts" that no genuine issue of material fact exists. *Id*.

The Washington Supreme Court recently clarified how trial courts should determine whether or not a genuine issue of fact exists:

> the "purpose [of summary judgment] is not to cut litigants off from their right of trial by jury if *they really have evidence which they will offer on a trial*, it is to carefully test this out, in advance of trial *by inquiring and determining whether such evidence exist*." Preston v. Duncan, 55 Wn.2d 678, 683, 349 P.2d 605 (1960) (quoting Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir.1940)).

Keck v. Collins, 184 Wn.2d 358, 369, 357 P.3d 1080 (2015) (emphasis in original).

The *Keck* Court found an issue of genuine material fact exists "if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party," including a declaration and the reasonable inferences taken therefrom. *Keck*, 184 Wn.2d at 370. Accordingly, this Court must first ask whether the defendants have shown no genuine issue of fact exists and that each of them are entitled to judgment as a matter of law. *La Plante*, 85 Wn.2d at 158. If so, then this Court should consider whether the written testimony and evidence of Mark Daviscourt, Julie Daviscourt, Dr. Peter Humsberger, Marie McDonnell, Josh Auxier and Scott E. Stafne are sufficient to create genuine issues of material fact from which a

reasonable juror could find for the Daviscourts with regard to any of their causes of action against defendants. CR 56(c), (e); *Keck*, 184 Wn.2d at 370.

B. The Facts Before the Court Were Sufficient to Create A Factual Question with Regard to Whether Each of the Defendants Were Negligent.

"The standard of review of an order granting summary judgment is de novo, and the appellate court performs the same inquiry as the trial court." *Washington Fed. v. Harvey*, 182 Wn.2d 335, 339-40, 340 P.3d 846 (2015) (quoting *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002)). Because this same standard of review applies with regard to every issue the trial court decided pursuant to the challenged summary judgment motions, this same standard of review is incorporated for every argument advanced below, except for the one related to Civil Conspiracy.

Quality argued: "[a] claim for negligence requires (1) duty; (2) breach of that duty; (3) causation; and (4) damages." CP 7:1-2. As support Quality cited *Schooley v Pinch's Deli Mkt, Inc.*, 912 P.2d 1044, 1046 (1996) aff'd 951 P.2d 749 (1998). CP 7:2-3. *Schooley* appropriately discusses how courts should determine whether a duty exists for purposes of establishing a negligence cause of action.

Daviscourts argued defendants, like all persons, have a common law duty to act reasonably under the circumstances, citing *Washburn v.*

City of Federal Way, 178 Wn.2d 732, 757, 310 P.3d 1275 (2013). CP 582. In *Washburn*, the City of Federal Way was sued for damages resulting from an act of domestic violence which occurred within hours of the alleged "negligent" service of a protection order by a City employee. The City argued it could not be held negligent because it owed no duty to the victim. The Supreme Court disagreed.

> Actors have a duty to exercise reasonable care to avoid the foreseeable consequences of their acts. Restatement (Second) of Torts § 281 cmts. c, d (1965). This duty requires actors to avoid exposing another to harm from the foreseeable conduct of a third party. Restatement § 302. Criminal conduct is generally unforeseeable. *Nivens v. 7–11 Hoagy's Corner*, 133 Wash.2d 192, 205 n. 3, 943 P.2d 286 (1997). Consequently, there is generally no duty to prevent third parties from causing criminal harm to others. *Robb v. City of Seattle*, 176 Wash.2d 427, 429–30, 295 P.3d 212 (2013).
>
> 26 ¶ 57 Criminal conduct is, however, not unforeseeable per se. *See, e.g., Bernethy v. Walt Failor's, Inc.*, 97 Wash.2d 929, 934, 653 P.2d 280 (1982) (citing *McLeod v. Grant County Sch. Dist. 128*, 42 Wash.2d 316, 321, 255 P.2d 360 (1953)). Recognizing this, we have adopted *Restatement* § 302B, which provides that, in limited circumstances, an actor's duty to act reasonably includes a duty to take steps to guard another against the criminal conduct of a third party. *Robb*, 176 Wash.2d at 439–40, 295 P.3d 212.
>
> Specifically, *Restatement* § 302B provides that " '[a]n act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.' " *Robb*, 176 Wash.2d at 434, 295 P.3d 212 (alteration in original) (quoting Restatement § 302B). The duty to protect against the criminal acts of third parties can arise " 'where the actor's own affirmative act has created or

> exposed the other to a recognizably high degree of risk of harm through such misconduct.' " *Id.* (emphasis omitted) (quoting Restatement § 302B cmt. e).
>
> Governmental entities and employees, like municipal police officers, may owe a duty under *Restatement* § 302B. *Robb*, 176 Wash.2d at 439–40, 295 P.3d 212….

178 Wn.2d at 757–58.

Forensic expert Marie McDonnell testifies that documents containing false statements were publicly recorded by, on behalf of, or in support of each defendant's interest in the prosecution of the nonjudicial foreclosure against the Daviscourts. CP 70-77. Defendants chose not to rebut her testimony so it is undisputed here.

SPS defendants appeared to concede below that false statements are being made, but argued that recording public documents containing false statements should be excused because there is no duty to record them at all. CP 605-606. But that argument is a red herring. Washington law has long held that if one undertakes a task, s/he must complete that undertaking in a non-negligent manner. *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 299–300, 545 P.2d 13, 18 (1975)(One who undertakes, albeit gratuitously, to render aid to or warn a person in danger is required by our law to exercise reasonable care in his efforts, however commendable.) Moreover, from a policy perspective SPS's argument makes no sense. Why should parties who are not required to record documents be allowed

to include false statements in those documents when they voluntarily record them?

Surely, it is foreseeable to servicers, potential DTA trustees, and potential beneficiaries that the public and owners of property rely on recorded documents evidencing interests in land and filed in the public records as being correct. "The whole of our system of title registration hinges upon the integrity of the documents which comprise it. As in the instant case, the corruption of that system may cause substantial economic loss to the parties involved." *Meyers v. Meyers*, 81 Wn.2d 533, 534, 503 P.2d 59 (1972) (notary who notarized forged signatures on a forged deed answerable in negligence to subsequent purchasers).

Defendants clearly understand the duty they have under the principles of ordinary care not to record documents containing false information as part of this State's public records. Indeed, the correspondence between Quality and SPS makes this point. *See* CP 234 (Quality expressing to SPS the importance that a recorded document be accurate.) Certainly, the entities which were working together to have these documents recorded must have known that there would be ramifications if they contained false statements which were a proximate cause of foreseeable damages.

In this case, Daviscourt's declaration explains that the concerns which led to his quest to find Quality in Seattle and ultimately the identity of the beneficiary was these very records and the false statements set forth in them. CP 251-258. And SPS and Quality do not dispute Mark Daviscourt told them about, and they were aware of, his specific psychological vulnerabilities when they were filing these documents and when cancelling the sale without notice to the Daviscourts at a time they knew he was still trying to access Quality's physical office. *Id.*

If this Court holds the trial court erred in dismissing the Daviscourt's negligence action against Quality and SPS there will likely be a factual issue with regard to whether SPS was acting as the agent for BNYM and the trust when recording documents and with regard to other acts and omissions which have proximately caused the Daviscourts' special and general damages.

C. The Facts Before the Court Were Sufficient to Create A Factual Question with Regard to Whether Quality Committed the Tort of Outrage.

"The tort of outrage requires the proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress." *Kloepfel v. Bokor,* 149 Wn.2d 192, 195, 66 P.3d 630 (2003). "The question of whether certain conduct is sufficiently outrageous is ordinarily for the

jury, but it is initially for the court to determine if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability." *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989); *see Robel v. Roundup Corp.*, 148 Wn.2d 35, 51, 59 P.3d 611 (2002).

In determining whether a cause of action should be decided by a jury, a trial court should consider:

> (a) the position the defendants occupied; (b) whether the plaintiff was peculiarly susceptible to emotional distress, and if the defendants knew this fact; (c) whether the defendant's conduct may have been privileged under the circumstances; (d) whether the degree of emotional distress the defendants caused was severe as opposed to merely annoying, inconvenient, or embarrassing to a degree normally occurring in a confrontation between these parties; and (e) whether the defendants were aware that there was a high probability that their conduct would cause severe emotional distress, and they consciously disregarded it.

Doe v Corp of Church of Jesus Christ of Latter Day Saints, 141 Wn. App. 407, 429-430, 167 P. 3d 1193 (2007).

Here, applying the evidence most favorable to the Daviscourts, with regards to these factors, a.) the evidence shows defendant SPS was Daviscourt's servicer; Defendant Quality was the purported trustee claiming the power of sale based on the arguably void deed of trust; Defendant BNYM was the purported beneficiary, relying on the potentially void deed, and apparently allowing SPS and Quality to record documents on its behalf. Daviscourt has b.) presented expert medical testimony that he was

and is peculiarly susceptible to emotional distress and that SPS and Quality were aware of this. CP 180-194; 251:1-16. Daviscourt asserts c.) Defendants were not privileged with regard to recording public records which contained false statements. Indeed, Daviscourt would argue persons in these positions have a duty to follow public records law. Daviscourt's declaration substantiates d.) that the emotional distress he experienced as the result of SPS and Quality recording and serving documents containing false statements as well as Quality's failure to maintain the Seattle office caused him severe emotional distress, culminating in suicidal ideation and attempts, which required him to obtain medical care; and e.) the evidence shows that Quality discontinued the sale, but never told Daviscourt about it notwithstanding that Sierra Herbert-Wright arguably knew who he was and about his vulnerabilities. CP 11:5-17.

Conduct during foreclosure can support a claim for intentional infliction of emotional distress, but it must satisfy the high burden applicable to these claims. Restatement (Second) of Torts § 46, cmt. d (1965); *see In re Keahey*, 414 F. App'x 919, 921 (9th Cir. 2011)(Trustee found liable for outrage because he conducted sale in his garage.); *Lucero v. Cenlar FSB*, No. C13-0602RSL, 2016 WL 337221, at 7-8 (W.D. Wash. Jan. 28, 2016)(finding loan servicer used a strained and unprincipled analysis of the Deed of Trust to justify the imposition of unpredictable and enormous

charges knowing this would likely cause severe emotional distress was liable for the tort of outrage.); *Montgomery v. SOMA Fin. Corp.,* No. C13–360 RAJ, 2014 WL 2048183, at 7 (W.D.Wash. May 19, 2014) (plaintiffs alleged that the bank induced them to default, then foreclosed on the property using a perjured declaration was sufficient to create a question of fact whether this egregious conduct was sufficiently outrageous to survive summary judgment).

D. The Facts Before the Court Were Sufficient to Create A Factual Question with Regard to the Existence of a Civil Conspiracy

Standard of Review. A plaintiff in a civil conspiracy action has the burden of proving the case by a preponderance of the evidence, and must establish the existence of the conspiracy by clear, cogent and convincing evidence. *Corbit v. J.I. Case Co.,* 70 Wash.2d 522, 528-29, 424 P.2d 290 (1967). Notwithstanding the clear and convincing evidentiary standard involved in civil conspiracy cases, the evidence at issue must be construed in the light most favorable to the nonmoving party. *Sterling Bus. Forms, Inc. v. Thorpe*, 82 Wn. App. 446, 450–51, 918 P.2d 531, 533 (1996)

An action for civil conspiracy requires proof of "an agreement by two or more persons to accomplish some purpose, not in itself unlawful, by unlawful means." *Sterling*, 82 Wn. App. at 451.

A finding that a conspiracy exists may be based on circumstantial evidence, but " 'circumstances must be inconsistent with a lawful or honest purpose and reasonably consistent *only* with [the] existence of the conspiracy.' " *Sterling*, 82 Wn. App. at 451 (emphasis added, alternation in original) (quoting *Corbit v. J. I. Case Co*, 70 Wash. 2d 522, 529, 424 P.2d 290 (1967)). Evidence is sufficient if it shows "concert of action" or other facts and circumstances that create a "natural inference" that the unlawful acts were " 'committed in furtherance of a common design, intention, and purpose of the alleged conspirators.' " *Lyle v. Haskins*, 24 Wn.2d 883, 899, 168 P.2d 797 (1946) (quoting 11 AM. JUR. *Conspiracy* § 56 at 585 (1937)).

Here, the evidence shows every defendant in this case participated in a conspiracy to record public documents which contained false statements. See e.g. CP 234 (letter between Quality and SPS related to BNYM appointing Quality as trustee); 353-355 (Quality's response to interrogatories regarding where the publicly recorded documents were prepared as well the means of communication between SPS, Quality and BNYM)

In this case the publicly recorded documents which contain false statements include: 1.) the deed of trust (states MERS is the

nominee of AWL, a New York corporation, which does not exist and is the beneficiary of the deed of trust) CP 200 & 202; 70-78; 2. the Assignment of Deed of Trust (falsely states MERS is assigning its interest in the note and deed of trust to BNYM as trustee) CP 72, 231; Appointment of Successor Trustee (falsely states BNYM is the present beneficiary of the deed of trust) CP 72-73, 236; the Notice of Trustee Sale (falsely states that property to be sold is to secure an obligation in favor of MERS, as beneficiary, to BNYM as trustee. See also CP 49-55, 73 ¶ 29.

The Daviscourts have presented evidence, including without limitation the affidavit of Marie McDonnell, CP 67-176[4], the declaration of Sierra Herbert-West, CP 10-57; Josh Auxier, CP 376-386, and Scott Stafne, CP 195-244 and 346-369, which tend to prove all defendants have conspired together to record documents containing false statements in violation of RCW 40.16.030[5] and

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[4] McDonnell includes as an exhibit to her expert affidavit a certified copy of her report to the city of Seattle. In that report McDonnell describes what and who defendants MERS and MERSCORP are. See CP 107-120.

[5] RCW 40.16.030 provides:

> Every person who shall knowingly procure or offer any false or forged instrument to be filed, registered, or recorded in any public office, which instrument, if genuine, might be filed, registered or recorded in such office under any law of this state or of the United States, is guilty of a class C felony and shall be punished by imprisonment in a state correctional facility for not more than five years, or by a fine of not more than five thousand dollars, or by both

9.38.020[6] in order to bring nonjudicial foreclosure proceedings against the Daviscourts. The filing of a false instrument, when one has no legal authority to file such an instrument, constitutes a separate offense of filing a forged instrument. See *In re Tortorelli*, 149 Wn.2d 82, 96, 66 P.3d 606, (2003); *State v. Sanders*, 86 Wn. App. 466, 937 P.2d 193, 195 (1997) ("RCW 40.16.030 clearly and unambiguously provides that a violation occurs if a person simply offers any false or forged instrument to be filed or recorded in a public office...the statute does not require that the forged document be 'materially false.[7]'"

None of the defendants have disputed McDonnell's affidavit or have claimed they do not routinely record public records containing false statements. Nor have defendants attempted to show that they even have the right to file such documents.

The reason defendants' recorded documents containing false statements is simple.

> The Bain [v. Metropolitan Mortg. Group, Inc.175 Wn.2d 83,285 P.3d 34 (2012)] decision has presented problems for

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[6] RCW 9.38.020 has never been construed by a Washington appellate court. It states:

> Every person who shall maliciously or fraudulently execute or file for record any instrument, or put forward any claim, by which the right or title of another to any real or personal property is, or purports to be transferred, encumbered or clouded, shall be guilty of a gross misdemeanor.

[7] Defendants' claims they need not file these public records at all may create another problem for them under the rule set forth in these cases, because now they must prove they had the right to file such documents in order to avoid forgery charges. Id.

> foreclosure of deeds of trust like Ms. Weirich's, in which lenders designated MERS as a nominee or mortgagee of record. Because MERS does not hold the underlying promissory notes, banks who are assigned a "beneficial interest" in a deed of trust by MERS do not thereby acquire a beneficial interest within the meaning of the DTA nor are they able, legally, to appoint a successor trustee.

Merry v. Nw. Tr. Servs., Inc., 188 Wash. App. 174, 188, 352 P.3d 830 (2015).

So why do defendants continue to record documents containing false statements? Because the DTA requires the recording of such an assignment as a predicate to the issuance of a Notice of Trustee Sale (NOTS.) RCW 61.24.040(1)(a)(f) requires the procedure for a nonjudicial foreclosure under the DTA be commenced by the recording of a NOTS which references those other recorded documents by which the present beneficiary acquired its authority to foreclose[8]. Here, the NOTS simply ignores this requirement and announces that BNYM is the beneficiary, CP 49, but never references the assignment of the deed of trust, CP 231, or the Appointment of Successor Trustee, CP 236, claiming this status is based on MERS transfer of its interest in the deed of trust.

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[8] The specific language which requires references to those transfers of beneficiary status in the public records provides the NOTS shall state the property being foreclosed upon:

> is subject to that certain Deed of Trust dated . . . . . ., . . ., recorded . . . . . ., . . ., under Auditor's File No. . . . ., records of . . . . . County, Washington, from . . . . . ., as Grantor, to . . . . . ., as Trustee, to secure an obligation in favor of . . . . . ., as Beneficiary, the beneficial interest in which was assigned by . . . . . ., under an Assignment recorded under Auditor's File No. . . . . [Include recording information for all counties if the Deed of Trust is recorded in more than one county.]

The recorded assignment transferring beneficiary status is absolutely necessary to initiate non judicial foreclosures because the NOTS, which begins the process, is required to reference the recorded assignment transferring the beneficial interest. RCW 61.24.040(1)(f).

Why does the DTA require the NOTS refer to the public records? Because the DTA was intended to be an open process, where borrowers and public alike could obtain necessary information from public land records to evaluate the merits of a nonjudicial foreclosure. This fundamental purpose of the DTA is reflected in its policy objectives: "First, the nonjudicial foreclosure process should remain efficient and inexpensive. Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, the process should promote the stability of land titles." *Bain*, 175 Wn.2d at 94. See also CP 77-78 (Opinion of Marie McDonnell)

The routine recording of false assignments regarding MERS and other beneficiaries, in violation of Washington's criminal statutes, constitutes a civil conspiracy even if such a foreclosure is, as defendants contend, legal because someone holds a negotiable instrument. This is because an action for civil conspiracy requires only proof of "an agreement by two or more persons to accomplish some purpose, not in itself unlawful, by unlawful means." *Sterling*, 82 Wn. App. at 451. Defendants never

disputed these documents were false and clearly argued they were filed to prosecute non judicial foreclosure of the Daviscourts' home.

Holding defendants liable for civil conspiracy is the correct result. "[O]ur system of title registration hinges upon the integrity of the documents which comprise it..." *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 794, 295 P.3d 1179 (2013); *see also Bain*, 175 Wn.2d at 111-12 (rejecting MERS' proposal that it be allowed to file assignments transferring its interest in the deed of trust, because it likely had none); *Knecht*, 2015 WL 3618358 at *6-7 (concluding after a trial that MERS had no interest in the deed of trust to transfer and the assignment was a nullity).

As this case demonstrates defendants now routinely record public documents falsely claiming beneficial interests in and beneficiary status for entities under the deed of trust. This is done so that such false and forged documents can be referenced in recorded NOTS and provide a chain of title in the public record that trustees can rely upon to initiate nonjudicial foreclosures. RCW 61.24.040(1)(a) (f). If the borrower complains, MERS and its members argue (as they do here) that beneficiary status was really transferred out of public sight long ago by the transfer of an endorsed negotiable instrument that the public is not allowed to see until the vultures choose to sweep down from the sky.

E. BNYM is not a Beneficiary Within the Meaning of RCW 61.24.005(2)

1. The AWL document evidencing the Daviscourt obligations is not a Negotiable Instrument.

The Daviscourts assert that whether the document in this case is a is an unconditional promise "to pay a fixed amount of money and interest" is a question of fact for a jury to resolve in this case. *See e.g. Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 649–50, 771 P.2d 711, 718–19 (1989), *amended*, 780 P.2d 260 (Wash. 1989)(emphasizing that cases involving debt have long been resolved by juries.) Having a jury, rather than a judge, resolve this appears the most appropriate course of action as the defendants are only arguing policy considerations for construing the law in a manner inconsistent with its plain language. See CP 001:20-605:7. Courts should be wary of exercising legislative prerogatives under the guise of judicial power.

RCW 61.24.005(2) states: "'Beneficiary' means the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation." Defendants argue that instrument evidencing the obligations secured by the deed of trust in this case is a negotiable instrument which

can be enforced through possession. Daviscourts disagree with defendants' interpretation of the statute.

" 'Negotiable instrument' means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, …" RCW 62A.3-104(a). Under the provisions of the instrument purportedly signed by the Daviscourts, they could pay less than the monthly accrual of interest, and the unpaid interest would be added by the Noteholder that month to the principal amount of the loan. Decl. of Scott Stafne Ex. 1 § 3(E) (Adjustable Rate Rider) (CP 212-217); *see also* Black's Law Dictionary (9th ed. 2009) (defining "negative amortization" as "an increase in a loan's principal balance caused by monthly payments insufficient to pay accruing interest").

While a negotiable instrument (1) may bear interest; (2) interest may be fixed or variable and (3) the amount or rate of interest may be stated in any manner and may require reference to information not contained in the instrument, the amount of the principal must remain fixed. RCW 62A.3-112; RCW 62A.3-104(a). The Uniform Commercial Code already provides that the amount due on a negotiable instrument may vary because of interest and other charges so the only possible meaning for "fixed amount" is in relation to the principal obligation. RCW 62A.3-104(a).

Holding that an instrument that contemplates fluctuations in principal is negotiable would render the words "fixed amount" in RCW 62A.3-104(a) without any possible effect. *Cashmere Valley Bank v. State Dept. of Revenue*, 175 Wn.App. 403, 305 P.3d 1123 (2013) ("we cannot interpret the phrase 'amounts derived from' right out of the statute").

Any provision in an instrument that permits variation in the amount of the principal obligation must necessitate looking outside Article 3 for rules governing its enforcement. RCW 62A.3-102 (scope of Art. 3). *See e.g.* Elizabeth Renuart, *Uneasy Intersections: The Right to Foreclose and the UCC*, 48 Wake Forest L. Rev. 5, 29-30 (2013) (In a note with negative amortization "[t]he actual principal is never certain, rendering the note nonnegotiable"). *See also* 76 ALR 5th 289, *What Constitutes "Fixed Amount of Money "for Purposes of [Rev.] Section 3–104 of Uniform Commercial Code Providing Negotiable Instruments Must Contain Unconditional Promise to Pay Fixed Amount of Money;* Anderson, *On the Uniform Commercial Code*, Thompson/West 2003 ed. section 3–104: 18 R, p. 55. *See also Bank of Am., N.A. v. Alta Logistics, Inc.,* 05-13-01633-CV, 2015 WL 505373, at *2–3 (Tex. App. Feb. 6, 2015)(Note is not negotiable because it is not the equivalent of money); *Heritage Bank v. Bruha*, 283 Neb. 263, 269–70, 812 N.W.2d 260, 267–68 (2012)(Principal

must be fixed.); *Yin v. Society National Bank Indiana*, 665 N.E.2d 58, 63 (Ind.App.1996) (Principal must be fixed).

Given the statutory language is clear, this Court should direct the trial court to treat this issue (i.e. whether the document is an unconditional promise to pay a fixed amount?) as being one to be decided by the jury.

2. The Deed of Trust is Void.

The use of the word "person" in the exclusionary clause of RCW 61.24.006(2) is telling. It demonstrates the definition of beneficiary contemplates the holder will always be a "person". The DTA defines "person" to mean "any natural person, or legal or governmental entity." RCW 61.24.005(11). Neither Quality nor the SPS defendants have presented evidence that AWL, a New York corporation, was a person in 2005.

On the other hand, Daviscourts have presented abundant evidence that AWL did not exist as a New York corporation. *See e.g.* CP 70-77 (Affidavit of Marie McDonnell that AWL was not a New York corporation in 2005); Declarations of Scott Stafne, CP 196, 223-224 (Information from New York Secretary of State) CP 366:10-19 (Quality's responses to Request for Admission); Declaration of Josh Auxier, CP 376-386 (various probative evidence, including a copy of a Negative Certificate under seal from the New York Department of State).

Most cases in Washington involving situations of misuse of corporations have involved contracts which were created either *prior* to formation of a corporation *or after* the corporation's dissolution. *See e.g. Ballard Square Condo. Owners Ass'n v. Dynasty Const. Co.*, 158 Wn.2d 603, 609, 146 P.3d 914, 917–18 (2006); *Equipto Div. Aurora Equip. Co. v. Yarmouth*, 134 Wn.2d 356, 950 P.2d 451 (1998); *White v. Dvorak*, 78 Wn. App. 105, 896 P.2d 85, 88 (1995). *See also Olander v. Recontrust Corp.*, C11-177 MJP, 2011 WL 841313, at *3–5 (W.D. Wash. Mar. 7, 2011)

This case is factually analogous to *Olander v Recontrust Corp.* In that case the Deed of Trust identified First Independent Mortgage Company ("FIMC") as the lender and MERS as "the nominee for Lenders successors and assigns" and as the "beneficiary". Just as allegedly occurred in this case, the borrowers negotiated with Countrywide, but FIMC was listed as the lender. FIMC's corporate license had expired more than four years prior to the time it was listed as the Lender on the note and deed of trust.

Olander argued the lack of FIMC's corporate existence voided the deed of trust.

> Olander believes this fraud renders the Deed of Trust void. In addition, Olander argues MERS cannot be considered the beneficiary because MERS is merely the "nominee" of

> the lender, and cannot have any greater rights than the FIMC even if the Deed of trust is enforceable. ....

Olander v. Recontrust Corp., at *1.

In determining Olander's complaint against the trustee was not subject to dismissal under Fed. R. Civ. Pro. 12(b)(6), the Court reasoned:

> Olander brought suit in Snohomish County Superior Court to stop ReconTrust from executing the trustee sale. Specifically, Olander alleges neither MERS nor BAC have valid proof of ownership of the Note and therefore no authority to assign and appoint ReconTrust as successor trustee. As alleged, Olander negotiated with Countrywide Home Loans representatives in 2004 although FIMC is listed as the lender as part of a scheme to charge excessive and illegal origination fees. (Compl.¶ 12.) Olander observes FIMC's corporate license had been expired more than four years at the time of the 2004 loan transaction. (Compl. ¶ 10; Dkt. No. 10, Olander Decl., Ex. 4.) Olander believes this fraud renders the Deed of Trust void. In addition, Olander argues MERS cannot be considered the beneficiary because MERS is merely a "nominee" of the lender, and cannot have any greater rights than FIMC even if the Deed of Trust is enforceable. (Compl.¶ 17.) Since Olander can assert breach of a fiduciary duty as a defense against FIMC, Olander contends the same defense applies to MERS and subsequent assignees.
>
> * * *
>
> In sum, Olander alleges the Deed of Trust is invalid and any attempt to enforce it violates the DTA. Since Plaintiff alleges facts upon which relief may be granted, the Court DENIES Defendant's motion to dismiss Olander's DTA claim.

Id., at *1-5.

The Court found Orlander's claims demonstrated a sufficient likelihood of success so as to grant injunctive relief precluding any sale from going forward. *Id.* at *6–7. Judge Pechman's decision in Olander is

consistent with Judge Bryan's decision in *United States v Miller*, No. C98-5022 RJB, 1999 WL 675328, at *3 (W.D. Wa. July 26, 1999). *Miller* interprets Washington law regarding this issue in the context of a summary judgment motion.

In *Miller* the government moved for a summary judgment that defendants had purposely deeded their property to a non-existent entity for purposes of avoiding taxes and that as a result the deed was void. *United States v. Miller*, C98-5022 RJB, 1999 WL 675328, at 3. The Court found that "empty assertions that it is a legal entity do not, without more, raise any factual questions. As a matter of law, Mountain Air Dome is not a legal entity. For this reason it is incapable of holding property…" *Id.*

Here, if this Court determines the Daviscourts have presented sufficient evidence AWL, a purported New York corporation, did not exist in 2005 and therefore was never a person within the meaning of RCW 61.24.005(11) then the deed of trust is void and the Daviscourts should be entitled to summary judgment to that effect. *Id.* RCW 61.24.005(2) & (11). *See also Olander v. Recontrust Corp., supra.; John Davis & Co. v Cedar Glen No. Four Inc.*, 75 Wn. 2d 214, 220, 450 P. 2d 166 (1969); *Loose v. Locke*, 25 Wn.2d 599, 604, 171 P.2d 849, 852 (1946).

If, on the other hand, the court believes defendants have presented sufficient evidence to create a question of fact as to AWL's corporate

existence for purposes of being a beneficiary under this deed of trust, then this Court should also reverse the summary judgments in favor of defendants. This is because the question of Countrywide's good faith in identifying AWL, a non-existent corporation, as the Lender in the 2005 deed of trust is an issue of fact which should be resolved by a jury. *See Equipto Div. Aurora Equip. Co. v. Yarmouth*, 134 Wn.2d at 371. *Cf. Sparkman & McLean Co. v. Derber*, 4 Wn. App. 341, 348–49, 481 P.2d 585 (1971)(defining "good faith")

3. The Trial Court Ignored the Exclusionary Clause.

Notwithstanding Beneficiary means "the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation" defendants argued to the trial court that simply being the holder was enough. Daviscourt argued that in order to prove BNYM was the beneficiary it had to present evidence that it is 1.) the holder of the document or instrument evidencing obligations, 2.) those obligations were secured by the AWL corporation deed of trust, and 3.) that BNYM was not excluded from being a beneficiary because it was a holder who held the document ***as security for a different obligation***. CP 328:5-329:8.

All of the defendants concede the note in question has been securitized. CP 1:24-2:2; CP 370:25-371:3. Defendants admit securitization

creates a separate obligation for the trustee to the investors, but argue without explanation that this does not matter.

But how does the Court know that the separate obligation owed by the trustee to investors does not involve rehypothecation unless the purported beneficiary provides some evidence addressing this fact? Defendants want this Court to ignore the exclusionary clause. This Court cannot do that. *Cox v. Helenius,* 103 Wn.2d 383, 693 P.2d 683 (1985)("We are required, when possible, to give effect to every word, clause and sentence of a statute. ... No part should be deemed inoperative or superfluous unless the result of obvious mistake or error." *Id.*, at 387-388)

F. Defendants have violated the DTA and Consumer Protection Act.

1. Violations of the DTA constitute unfair and deceptive practices under the Consumer Protection Act

Daviscourt asserts defendants' violations of the following statutory provisions constitute unfair and deceptive practices under the CPA: RCW 61.24.005(2) & (11); 61.24.010(2) & (4); 030(6) & (7); 040(1)(a) & (f); RCW 938.020 and RCW 40.16.030. See *Frias v Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 430, 334 P.3d 529 (2015).

a.) RCW 61.24.010(2)

Even if the Court accepts the Bank is a beneficiary, the putative appointment in this case was made by SPS, not the Bank. CP 236-237.

The Bank is purported to be in possession of the Note, both the Declaration of Ownership executed by SPS and the pleadings by Quality, SPS and the Bank assert this. CP 244. This is problematic because the person appointing a successor trustee must be the holder of the Note. *Rucker v. Novastar Mortg., Inc.*, 177 Wn.App. 1, 14, 311 P.3d 31 (2013) finding that because "NovaStar" had already conveyed the note to "JPMorgan Chase and J.P. Morgan Trust" Quality's appointment by NovaStar was ultra vires); *accord Brown v. Washington State Dept. of Commerce*, 184 Wn. 2d 509, 359 P.3d 771 (2015) (finding the alleged "holder" was a beneficiary notwithstanding an ownership interest held by another).

SPS, the person executing Quality's appointment, was most definitely *not* in possession of the Note. *See Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wash. 2d 83, 285 P.3d 34 (2012) (observing a holder must, at least generally, be in possession of a promissory note). Thus, just as in *Rucker*, summary judgment here should be reversed. *Rucker*, 177 Wn.App. at 18 ("A trial is required to determine whether [Quality] was a properly-appointed successor trustee entitled to conduct the sale.").

b.) RCW 61.24.030(7)

In a situation similar to that under RCW 61.24.010(2) in this case, SPS, not the Bank, executed the declaration required under RCW

61.24.030(7). It follows that if the questions of fact are present that required reversal of summary judgment on that issue in *Rucker*, the same facts will require reversal on this question.

But, further, while Washington Courts have accepted that agents may act to comply with certain requirements of the Deeds of Trust Act, the Daviscourts contend this is not feasible for RCW 61.24.030(7).

First, the statute specifically requires a "declaration ***by the beneficiary***[9] made under the penalty of perjury". RCW 61.24.030(7)(a) (emphasis added). Second, there are good reasons to require that the beneficiary, not its agent, make the declaration under penalty of perjury.

The good reasons include the fact that declarations are supposed to be sworn testimony by a person, having personal knowledge of the facts asserted therein. So a declaration signed by a servicer without proof of some authority that she is authorized to do so is problematic on several levels. First, SPS is purporting to have authority to sign on behalf of the BNYM in its fiduciary capacity as a trustee. Second, SPS does not set forth any grounds to establish how she has personal knowledge of these facts.

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[9] Daviscourt acknowledges the DTA does provide that in some cases an agent can act for the beneficiary. But such provisions merely prove the point that if the legislature intends that an agent can for the beneficiary it knows how to say so. *Compare e.g.* RCW 61.24.030(8)("That at least thirty days before notice of sale shall be recorded, transmitted or served, written notice of default shall be transmitted by the beneficiary or trustee to the borrower and grantor..."); RCW 61.24.031(1)(a) ("A trustee, beneficiary, or authorized agent may not issue a notice of default under RCW 61.24.030(8) until…").

c.) RCW 61.24.030(6)

"It is the sole province of the trier of fact to pass on the weight and credibility of evidence." *Boeing Co. v. Heidy*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002), overturned on other grounds, *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 201 P.3d 1011 (2009). Issues of credibility are questions of fact which are not determined by summary judgement unless no reasonable person could possibly find the testimony of the nonmoving party credible. *Hartley v. State*, 103 Wn. 2d 768, 775-77, 698 P.2d 77 (1985).

Evidence regarding whether Quality maintained a office in compliance with RCW 61.24.030(6) was submitted in the form of declarations by both sides. This competing evidence is discussed, supra., pp 16-18. Given the testimony of Sierra Herbert-West that the office was open and Daviscourt never visited it or tried to get in, it is obvious that the credibility of this testimony will be an issue for a jury to decide. *See Amend v Bell*, 89 Wn.2d 124, 129, 570 P.2d 138 (1977); *Dunlap v Wayne*, 105 Wn.2d 529, 536-537, 716 P.2d 842 (1986); *Balise v Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963).

d.) RCW 61.24.010(4)

Quality should be aware it must be properly appointed, have a valid beneficiary declaration and maintain its independence from a

putative beneficiary. *See generally Klem v. Washington Mut. Bank*, 176 Wn. 2d 771, 295 P.3d 1179 (2013); *Walker v. Quality Loan Service Corp.*, 176 Wn.App. 294, 308 P.3d 716 (2013); *Rucker v. NovaStar Mortg., Inc.*, 177 Wash. App. 1, 311 P.3d 31 (2013). In this case, Quality ignored obvious problems with its appointment as trustee to foreclose on a potentially void deed of trust by a company which didn't exist but nonetheless named MERS as its nominee and "beneficiary." Rather than question the appropriateness of such deed and assignment, the evidence indicates Quality, in communication with SPS, created and recorded more public records based on this falsehood to advance the nonjudicial foreclosure. CP 234.

Then after becoming aware of Mr. Daviscourt's vulnerabilities with regard to handling the stress their notices and public recordings created, Quality cancels the trustee sale but does not inform Daviscourt of this.

Taken separately these are violations of Quality's duty of good faith; taken together they border on malice and a jury could find were intended to cause Mark and Julie Daviscourt harm.

All of the above described actions have been found to be violative of the CPA. *Klem*, 176 Wn. 2d 789-792 (abandonment of independent judgment); *Lyons v. U.S. Bank NA*, 181 Wn.2d 775, 787, 336 P.3d 1142

(2014) (same; also requiring trustees to investigate possible issues[10]); *Lyons*, 181 Wn.2d. at 791-92 (reliance on ineffective declaration); *Walker*, 176 Wn.App. 306-308; 320 (unlawfully appointed trustees acts actionable under CPA). Even just threatening nonjudicial foreclosure without lawful authority is actionable. *Id*.

2. Public Interest Impact

Violations of RCW 61.24.005, 61.24.030(6), and (7) conclusively meet the CPA's "public interest impact" criteria. See RCW 19.86.093(2). See also http://apps.leg.wa.gov/rcw/default.aspx?cite=61.24.030 (view bottom of page for: "Notes: ... Findings - -2008 c 108: See RCW 19.144.005"). Further, the recording of false documents in violation of Washington criminal statutes by MERS, as the alpha document, followed by a cascade of other false documents prepared by Quality, SPS and BNYM feigning compliance with the recording requirements of the DTA involves issues relating to all MERS assignments and therefore implicates the public interest. *Bain v. Metro. Mortgage Grp., Inc*., 175 Wn.2d at 118. McDonnell Affidvait at CP 70-78 (noting similar false assignments recorded with the King County Recorder's Office.)

3. Causation/Damages

[10] Approving of *Walker*, 176 Wn.App. at 309-10.

Continuing the age old chant of money lenders, Defendants argued to the trial court that the Daviscourts injuries were caused by their default; not defendant's violations of civil and criminal laws, *i.e.* unfair and deceptive practices. While it once was an open question as to whether owing debt forfeited rights in Washington, it no longer is. In *Frias* the Supreme Court concluded: "A plaintiff can establish injury based on unlawful debt collection practices [under COA] even when there is no dispute to the validity of the underlying debt." *Frias,* 181 Wn.2d at 431 (citing Panag 55-56.) CPA injury in this case includes without limitation and at a minimum, Daviscourts' expenses with regard to his attempts to locate Quality's physical address as identified on the recorded NOTS and his mailing of materials to Quality and SPS, who were apparently both working on behalf of BNYM and its investors to prosecute the nonjudical foreclosure. *Panang v Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 40, 57-65, 204 P.3d 885 (2009); *See also Stephens v Omni Ins. Co.*, 138 Wn.App. 151, 159 P.3d 10 (2007).

CONCLUSION

For the reasons stated above the trial court's grant of motions by defendants for summary judgment should be REVERSED and this case should be remanded back to the trial court for further proceedings.

DATED this 19th day of August, 2016 at Arlington, Washington.

Respectfully Submitted,

CHURCH OF THE GARDENS ADVOCACY PROGRAM

s/Scott E. Stafne

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CERTIFICATE OF ELECTRONIC SERVICE

I, Linda Avery Rodriguez, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

1. At all times hereinafter mentioned I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

2. That on the 19th day of August, 2016, I caused to be served a true and correct copy of Petitioners Mark and Julie Daviscourt's Opening Brief to Respondents in the above title matter by causing it to be delivered via the Washington State Appellate Court Filing System to:

John Glowney Vanessa Soriano Power Stoel Rives, LLP 600 University St. Suite 3600 Seattle, WA 98101 john.glowney@stoel.com vanessa.power@stoel.com	Facsimile Express Mail U.S. First Class Mail Hand Delivery Legal Messenger Service ☒ Electronic Service
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DATED this 19th day of August, 2016 at Arlington, Washington.

s/ *Linda Avery Rodriguez*
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