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No. 35098-0 II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
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COURT OF APPEALS DIVISION II

TIMOTHY KRIENKE and BROOK KRIENKE,
Appellants,

vs.

CHASE HOME FINANCE, LLC; and NORTHWEST TRUSTEE SERVICES, INC.
Respondents

RESPONDENT'S BRIEF

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I. INTRODUCTION

Appellants Timothy R. Krienke and Brook L. Krienke purchased a house in 1990 “and obtained a mortgage loan for that purchase from Chemical Mortgage Company.” (CP 148). Respondent Chase Home Finance, LLC (“Chase”) “owned and serviced [the Krienkes’] home mortgage loan” at relevant times. (CP 147). In March 2005, the Krienkes were notified that they were in default, and that a foreclosure action would be commenced under Chapter 64.24 RCW. (CP 148-149).

In July 2005, the Krienkes sued Chase and Northwest Trustee Services, Inc. (“NWTS”), seeking damages and injunctive relief. (CP 1-8). The foreclosure sale was discontinued shortly thereafter. (CP 162).

In February 2006, the Pierce County Superior Court granted a motion for summary judgment in favor of Chase and NWTS, and in June 2006, the court denied the Krienkes’ motion for reconsideration. (CP 221-222, 243-244). The Krienkes timely appealed the denial of their reconsideration motion.

II. STATEMENT OF THE CASE

The Krienkes received a Notice of Default issued by NWTS on or about March 28, 2005. (CP 148). The Notice of Default specified that \$6,617.45 was due and owing on the Krienkes’ mortgage, and that a

foreclosure sale of the Krienkes' residence was scheduled for July 29, 2005. (CP 9, 149).

On July 22, 2005, the Krienkes filed a complaint to enjoin the foreclosure sale and for damages; a Motion for Preliminary Injunction to Restrain Foreclosure Sale; and the Declaration of Brook Krienke in support of the Motion for Temporary Restraining Order or Preliminary Injunction to Restrain Foreclosure Sale (hereinafter "Declaration filed on July 22, 2005"). (CP 1-146).

Shortly after these documents were filed, the Krienkes' former counsel, Melissa Huelsman, and counsel for defendant NWTS "agreed to a discontinuance of the foreclosure sale." (CP 162). On or about November 9, 2005, Ms. Huelsman filed a motion to withdraw because she and the Krienkes "were not in agreement about how to handle the case." (CP 162-164). The motion was granted. (CP 192).

On December 8, 2005, Chase filed a motion to dismiss pursuant to CR 12(b)(6), or alternatively, for summary judgment under CR 56. (CP 176-191). On December 30, 2005, Ms. Krienke filed a Motion and Declaration for Continuance. (CP 195-196).¹ The motion was denied by

¹ As the trial court noted, it was not clear what the Krienkes wanted continued. (RP 8:10-8:12).

the court on January 6, 2006. (CP 195-196, 299-300). The court advised Ms. Krienke that she should retain a “new attorney as soon as possible” and that “absent a request by an attorney to continue this matter,” Chase’s motion would be heard on January 20, 2006. (RP 8:20-9:20).

On January 19, 2006, Ms. Krienke filed an affidavit and a declaration, (CP 209-215), as well as a “Request to Strike Motion to Chase Home Finance’s Motion Memorandum in Support of Motion to Dismiss or Summary Judgment; Answer to Amended Amended Complaint; Parties, Claims and Defenses.” (CP 206-208) (sic). Therein, Ms. Kreinke accused Ms. Huelsman of “attorney misconduct.” (CP 209-210). Ms. Krienke alleged: “Our attorney has been engaging in conduct involving dishonesty, fraud, deceit an (sic) misrepresentation, she falsified various documents filed with the court, made false statements under oath, all without our knowledge or consent.” (CP 209-210). Apparently, the Kreinkes were unhappy that Ms. Huelsman filed an amended complaint and the Confirmation of Joinder of Parties, Claims and Defenses. (CP 213-214). Ms. Kreinke also accused Ms. Huelsman of failing to “fully investigate our claims or add all the defendants to our lawsuit” and failing to “do any type of discovery.” (CP 213-214).

The Kreinkes failed to address the merits of their claims or the arguments raised by Chase in its moving papers. (CP 206-215). Although Ms. Kreinke referred generally to “documents filed in this case,” (CP 206), she did not submit any exhibits or documentary evidence in opposition to Chase’s summary judgment motion, or otherwise call the trial court’s attention to any exhibits or documents. (CP 206-216).

Ms. Keinke attended the hearing on January 20, 2006, without counsel. *See Appellants’ Revised Opening Brief*, at 6 (hereinafter “Appellants’ Brief”). The court heard argument by Ms. Krienke and counsel for Chase and NWTS. (CP 221-222). There is no support in the record for appellants’ statement that “Ms. Krienke was not given an opportunity to argue her case.” *Appellants’ Brief*, at 6.

On February 10, 2006, the trial court entered an order dismissing the Krienkes’ claims against both defendants. (CP 221-222). On February 21, 2006, Ms. Krienke filed a motion for reconsideration. (CP 223). In a declaration in support of the motion, Ms. Krienke re-hashed arguments previously made to the superior court – i.e., that her attorney failed to thoroughly investigate the case and conduct discovery. (CP 224-225). She also claimed the Krienkes “were denied [their] right for more time to find

new counsel.” (CP 225).² The Kreinkes failed to specify grounds for reconsideration under CR 59 and, once again, failed to address the merits of their claims. (CP 224-225, 227-233). On June 9, 2006, the court entered an order denying the Krienkes’ motion for reconsideration. (CP 243-244). A Notice of Appeal was served on July 7, 2006.

III. SUMMARY OF ARGUMENT

The trial court’s order dismissing the Krienkes’ claims should be affirmed for the following reasons: (1) the Kreinkes rely extensively on evidence that was not called to the attention of the trial court and which this Court should not consider under RAP 9.12; (2) even if this Court were to consider evidence not called to the attention of the trial court, there is no basis for reversal of the order granting summary judgment in defendants’ favor; (3) the fact that the Krienkes were not represented by counsel at certain times has no bearing on the issues on appeal; (4) the Krienkes’ wrongful foreclosure claim was properly dismissed because there was no trustee’s sale; (5) the Krienkes’ slander of title claim was properly dismissed because, inter alia, there was no pending sale of their home; (6)

² The Krienkes apparently did not retain new counsel until May 18, 2006, when Kelly Delaat-Maher and Veronica E. Shakotko appeared. (CP 315-316). Ms. Delaat-Maher and Ms. Shakotko withdrew on February 2, 2007.

the Krienkes' claim under the Fair Credit Reporting Act was properly because Chase was not notified of a dispute by a credit reporting agency; (7) the Krienkes' claim under the Consumer Protection Act was properly dismissed because there is insufficient evidence to establish all elements of the claim; (8) the Krienkes' breach of contract claim was properly dismissed because there is no evidence Chase breached a contractual obligation and, further, the Krienkes have incurred no recoverable damages; and (9) the Krienkes' claims for emotional distress damages are preempted.

IV. ARGUMENT

A. An appellate court may only consider evidence called to the attention of the trial court.

“The standard of review on summary judgment is well settled.” *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000). In reviewing a summary judgment order, the appellate court engages in the same inquiry as the trial court. *Benjamin v. Washington State Bar Ass'n*, 138 Wn.2d 506, 515, 980 P.2d 742 (1999).

Pursuant to CR 56, summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to

judgment as a matter of law.” CR 56(c). “[B]are assertions that a genuine material issue exists will not defeat a summary judgment motion in the absence of actual evidence.” *Ellis*, 142 Wn.2d at 458.

CR 56(e) states “all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.” “CR 56(h), of which RAP 9.12 is obviously a reflection, requires an order granting or denying summary judgment to ‘designate the documents and other evidence called to the attention of the trial court.’” *McClarty v. Totem Elec.*, 119 Wn. App. 453, 460 n.2, 81 P.3d 901 (2003), *rev’d on other grounds*, 157 Wn.2d 214, 137 P.3d 844 (2006)

Under RAP 9.12, an appellate court can only consider “evidence and issues called to the attention of the trial court.” *McClarty*, 119 Wn. App. at 460. *See also Webstad v. Stortini*, 83 Wn. App. 857, 862 n.3, 924 P.2d 940 (1996) (“Generally, an appellate court does not consider materials not submitted to the trial court”). “The purpose of this limitation is to effectuate the rule that the appellate court engages in the same inquiry as the trial court.” *Mithoug v. Apollo Radio of Spokane*, 128 Wn.2d 460, 462, 909 P.2d 291 (1996) (quotation omitted).

B. The Krienkes rely extensively on evidence that was not called to the attention of the trial court.

In their appeal brief, the Krienkes rely primarily on the Declaration of Ms. Krienke filed on July 22, 2005. *See Appellants' Brief*, at 2-4, 7-8, 10, 13-15, 18, 20. The Krienkes contend that the superior court should not have granted Chase's motion for summary judgment because "multiple issues of material fact were evident in reviewing [that declaration]." *Id.* at 8 (citing CP 15-146). However, the Krienkes did not proffer the Declaration filed on July 22, 2005 in opposition to Chase's motion for summary judgment, or otherwise call the declaration and its attachments to the attention of the trial court. (CP 206-215). The Declaration filed on July 22, 2005 was not listed among the documents considered by the trial court in granting Chase's motion. (CP 221-222). Thus, even if the declaration raises issues of material fact (which it does not), it is not properly before this court. RAP 9.12.³

³ *See Respondent's Motion to Strike.*

C. The Declaration of Brook Krienke filed on July 22, 2005 does not raise issues of material fact.

The Krienkes contend the Declaration filed on July 22, 2005, is evidence of an “ongoing dispute that continues to this day.” *Appellants’ Brief*, at 11. The existence of an “ongoing dispute” does not establish a genuine issue of material fact. *See, e.g., Barrie v. Hosts of America, Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980) (“A material fact is one upon which the outcome of the litigation depends, in whole or in part.”) The mere fact that the Krienkes dispute their loan status does not give rise to any cause of action.

The Krienkes also contend that documents attached to the Declaration filed on July 22, 2005 “demonstrated that all payments were timely made and that they should not be in default.” *Appellants’ Brief*, at 3. Contrary to the Krienkes’ contention, the attached documents show they made late payments, failed to pay late charges, and sometimes failed to include escrow payments. *See, e.g.*, CP 47 (statement showing unpaid late charges are assessed after 15-day grace period, and reflecting unpaid late charges and unpaid fees); CP 130 (February 2000 principle and interest payment received late, no escrow payment); CP 131 (March 2000 principle and interest payment received late, no escrow payment), CP 132 (April 2000 payment received late); CP 137 (September 2000 payment

received late); CP 139 (November 2000 payment received late); CP 142 (December 2000 payment received late).

The Declaration filed on July 22, 2005, does not create a genuine issue of material fact. Thus, even if this Court were to consider the declaration and the attached documents, there is no basis for reversal of the order granting summary judgment in defendants' favor.

D. The Krienkes' pro se status is not a basis for reversal.

According to the Krienkes, there was "arguably ... an irregularity in the proceedings due to the absence of counsel for the Krienkes." *Appellants' Brief*, at 8. However, the Krienkes' assignment of error does not relate to the "absence of counsel" or to the trial court's denial of their motion for a continuance. *Id.* at 1. The fact that the Krienkes acted in a pro se capacity from December 8, 2005, through May 18, 2006, has no bearing on the issues on appeal.⁴

⁴ RAP 10.3(a)(4) requires an appellant's brief to include a concise statement of each asserted trial court error, along with the issues pertaining to the assignments of error. An appellant's failure to assign error precludes consideration on appeal. *Halvorsen v. Ferguson*, 46 Wn. App. 708, 722, 735 P.2d 675 (1986).

Moreover, the record shows Ms. Huelsman advised the Krienkes “that she intended to withdraw and offered them an opportunity to substitute ... another attorney into the case to act on their behalf” sometime prior to November 9, 2005, and that the Krienkes “refused to do so.” (CP 163). In addition, the trial court encouraged the Krienkes to retain new counsel on January 6, 2006, (RP 8:20-9:20), but they did not. *See Appellants’ Brief*, at 6. The Krienkes were unrepresented at the summary judgment hearing and during the reconsideration proceedings because they failed to retain new counsel until May 18, 2006. (CP 315-316). The fact that the Krienkes were not represented by counsel is not a basis for reversal. *See, e.g., State v. Smith*, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985) (pro se defendant must comply with procedural rules); *In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d, 527 (1993) (pro se litigants “are subject to the same procedural and substantive laws” as counsel).

E. The Krienkes’ wrongful foreclosure claim was properly dismissed because there was no trustee’s sale.

The legislature enacted the non-judicial disclosure statutes, Chapter 61.24 RCW, to further three objectives: “(1) that the nonjudicial foreclosure process should be efficient and inexpensive; (2) that the process should result in interested parties having an adequate opportunity

to prevent wrongful disclosure; and (3) that the process should promote stability of land titles.” *Plein v. Lackey*, 149 Wn.2d 214, 225, 67 P.3d 1061 (2003) (emphasis added). “The act includes a specific procedure for stopping a trustee's sale so that an action contesting default can take place.” *Id.* See RCW 61.24.030(7)(j); RCW 61.24.130.

Under RCW 61.24.130(1), a borrower may file suit to restrain the trustee's sale “on any proper ground.” In this case, the Krienkes filed their complaint and a motion to restrain the sale of their property on July 22, 2005. (CP 1-14). The sale was voluntarily cancelled by NWTS within a week of the date the Krienkes filed suit. (CP 162).

Without citation to authority, the Krienkes contend they may maintain a cause of action for “wrongful institution of the foreclosure process.” *Appellants’ Brief*, at 12-13 (emphasis added). Indeed, there is no statutory basis for a claim for damages for “wrongful institution” of foreclosure proceedings. Nor are there any Washington cases supporting a cause of action for initiating (but not completing) an allegedly wrongful foreclosure sale.

Courts in other jurisdictions have held that to maintain a cause of action for wrongful foreclosure, a foreclosure sale must have actually been completed. In other words, initiating foreclosure proceedings by filing

notice is not sufficient to establish a cause of action. *See, e.g., McKinley v. Lamar Bank*, 919 So.2d 918, 930 (Miss.2005) (“There was no wrongful foreclosure because there was never a foreclosure at all.”); *Hulse v. Ocwen Fed. Bank, FSB*, 195 F.Supp.2d 1188, 1204 n. 5 (D.Or.2002) (“If the foreclosure process had not been aborted prior to sale, plaintiffs could possibly pursue a claim for wrongful foreclosure under Oregon's non-judicial foreclosure statutes based on the invalid assignment allegations. Without an actual foreclosure, however, it may be that plaintiffs have no remedy for the alleged initiation of the foreclosure process by the wrong entity.”) In each of these cases, the plaintiffs’ claim was based on the fact that a wrongful foreclosure sale was actually completed, not merely noticed.

In *Reese v. First Missouri Bank and Trust Co. of Creve Coeur*, 736 S.W.2d 371, 373 (Mo.1987), the court found that only three of twenty-nine states that allowed nonjudicial foreclosure through a power of sale recognized a cause of action for a lender's attempted foreclosure that did not result in a sale. Consistent with the weight of authority, the Missouri court declined to authorize a claim for “attempted wrongful foreclosure” because it would “effectively nullify the purposes for having the expeditious non-judicial foreclosure of deeds of trusts.” *Id.* at 373.

Nonjudicial foreclosure significantly reduces the amount of time a lender must wait to collect a debt due and borrowers find credit easier to obtain where lenders are assured of a quick and efficient means of foreclosure upon default. ...

Under Missouri law, the legislature has seen fit to provide only one method for delaying non-judicial foreclosure. Sections 443.410-440, RSMo 1986, make provision for having an equity of redemption for a period of one year by serving the notice and making the bond therein provided. In our view, our authorizing a cause of action for wrongful attempted foreclosure would effectively nullify the purposes for having the expeditious non-judicial foreclosure of deeds of trusts. If further provision for delaying foreclosure of security instruments is to be made, we believe the legislature should make the decision. Our conclusion is compatible with the holdings of the large majority of the states recognizing nonjudicial foreclosure.

Id. (citations omitted).

Likewise, in *Hardy v. Jim Walter Homes, Inc.* Slip Copy, 2007 WL 174391 (S.D.Ala., January 18, 2007), the court held that because a foreclosure sale never actually happened, the cause of action was not cognizable under Alabama law.

Under Alabama law, “[a] mortgagor has a wrongful foreclosure action whenever a mortgagee uses the power of sale given under a mortgage for a purpose other than to secure the debt owed by the mortgagor.” Here the Complaint alleges nothing more than that WMC “scheduled a foreclosure sale” of plaintiffs' property. Plaintiffs have cited no Alabama authority, and the undersigned has found none, under which the mere scheduling of a foreclosure sale, without more, has been found to constitute a mortgagee's exercise of the power of sale. A plain reading of that legal standard strongly suggests that it cannot, and

that the power of sale is exercised by selling, not merely by running a newspaper advertisement preparatory to selling.

Id. at 6 (citations omitted).

Although there are no cases explicitly defining the elements of a wrongful foreclosure claim in Washington, the rationale of the cases cited above is applicable. Like the non-judicial foreclosure statutes in Missouri and Alabama, Chapter 61.24 RCW, does not authorize damages for “attempted wrongful foreclosure.” As the *Plein* court explained, the non-judicial foreclosure statutes in Washington provide a mechanism intended to prevent an allegedly wrongful foreclosure “so that an action contesting default can take place.” *Plein*, 149 Wn.2d at 225. Because no sale was completed in this case, the Krienkes’ wrongful foreclosure claim was properly dismissed.

F. The Krienkes cannot establish the elements of a slander of title claim.

The Krienkes allege Chase “caused to be recorded various documents including a Notice of Default and a Notice of Trustee Sale which impaired Krienkes’ title, which constitutes slander of title.” (CP 5-6). “Slander of title is defined as: (1) false words; (2) maliciously published; (3) with reference to some pending sale or purchase of property; (4) which go to defeat plaintiff’s title; and (5) result in plaintiff’s

pecuniary loss.” *Rorvig v. Douglas*, 123 Wn.2d 854, 859, 873 P.2d 492 (1994).

Even if the Krienkes could establish the falsity element (i.e., by showing they were not in default), they cannot establish the remaining elements of a slander of title claim. First, there is no evidence Chase or NWTS acted maliciously or in bad faith. In fact, the Krienkes admit Chase “evaluated [their] payment history from January 2003” and that NWTS relied on documentation provided by Chase prior to commencing the foreclosure action. (CP 2-3).

“Malice is not present where the allegedly slanderous statements were made in good faith and were prompted by a reasonable belief in their veracity.” *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 375, 617 P.2d 704 (1980). Thus, contrary to the Krienkes’ contention, recording a Notice of Default and Notice of Trustee’s Sale does not establish malice when the underlying payment history is disputed.

In *Brown*, the appellants initiated an action against Safeway for an alleged breach of a written lease, which Safeway claimed constituted slander of title precluding a proposed sublease to a third party. *Id.* at 375. The court held “[t]he initiation of litigation to determine the rights of the respective parties to a lease cannot, without more, be characterized as

malicious conduct.” *Id.* Likewise, the initiation of foreclosure proceedings cannot be deemed malicious in the context of a bona fide dispute over mortgage payments. *See, e.g., Hulse*, 195 F.Supp.2d at 1207-08 (lender was entitled to rely on the concept of a qualified or conditional privilege, and thus was not liable on claim that it libeled borrowers by publishing notice of foreclosure of deed of trust and notifying credit reporting agencies of the foreclosure; borrowers failed to show that defendants abused their privilege since there was a reasonable dispute as to whether any amount was due).

Second, there is no evidence that a sale was pending when the notices of default and trustee’s sale were recorded. If no one was interested in purchasing the property, the notices could not adversely affect a potential sale, thus precluding the Krienkes’ slander of title claim. *See Clarkston Cmty. Corp. v. Asotin County Port Dist.*, 3 Wn. App. 1, 472 P.2d 558, 560 (1970) (“Assuming arguendo there exists issues of fact regarding the maliciousness and falsity of defendant’s claim to title, defendant still has shown there was no pending sale adversely affected which resulted in plaintiff’s injury.”)

The Krienkes argue “[w]hether or not there was or could have been a pending sale is an issue of fact.” *Appellants’ Brief*, at 15. This argument

fails under CR 56 because the Krienkes were obligated to produce evidence of a pending sale to establish an issue of fact. *See Ellis*, 142 Wn. 2d at 458 (“bare assertions that a genuine material issue exists will not defeat a summary judgment motion in the absence of actual evidence.”) Moreover, the argument contradicts Ms. Krienke’s prior sworn testimony that she and her husband had no intention of selling their home. *See Declaration Filed on July 22, 2005*, ¶ 9. (CP 17).

As to the final element, the Krienkes produced no evidence of pecuniary loss as a result of the notices. There is no evidence that the Krienkes’ credit has been damaged or of consequential damages arising from the cancelled foreclosure sale. *See Appellants’ Brief*, at 15. Because there is no evidence of bad faith on Chase’s part; no evidence of a pending sale of the Krienkes’ residence; and no evidence of damages, the Krienkes’ cause of action for slander of title was properly dismissed. *See Seals v. Seals*, 22 Wn. App. 652, 658, 590 P.2d 1301 (1979) (claim for slander of title properly dismissed where husband could not establish actual damages).

G. The Krienkes' claim under the Fair Credit Reporting Act was properly dismissed because Chase was not notified of a dispute by a credit reporting agency.

The Krienkes allege Chase “transmitted derogatory information about Krienkes’ payment history on their mortgage to various credit reporting agencies” (CRAs), and that Chase qualifies “as a provider of information to CRAs under the Fair Credit Reporting Act [FCRA].” (CP 150, 153). The Krienkes contend they “are entitled to maintain a private cause of action against Chase” under the FCRA, 15 U.S.C. §1681s-2(b), §1681o and §1691n(a)(2). (CP 153).

Sections 1681n(a) and 1681o(a) create remedies for violations of §1681s-2, the former in favor of victims of willful and the latter in favor of victims of negligent failures to comply with the FCRA. Section 1681s-2(b) takes effect when a reporting person (i.e., Chase) “receives notice pursuant to section 1681i(a)(2) ... of a dispute with regard to the completeness or accuracy of any information provided.” (Emphasis added). Section 1681i(a) requires a consumer reporting agency that is notified by consumers that information in its files is disputed to reinvestigate the current accuracy of the information or delete it and, within five business days, to notify the person (i.e., Chase) who furnished the information of the dispute. Thereafter, the reporting person must take

steps to investigate and correct inaccurate information. 15 U.S.C. §1681s-2(b). Section 1682s-2(b) of the FCRA does not provide a private cause of action simply because a person furnishes allegedly inaccurate information to a credit reporting agency, as the Krienkes seem to suggest. *Appellants' Brief*, at 17. The duties imposed by §1681s-2(b) arise "only after the furnisher receives notice of the dispute from a consumer reporting agency, not just the consumer." *Aklagi v. Nationscredit Fin. Services Corp.*, 196 F.Supp.2d 1186, 1193 (D.Kan.2002).

The terms of the statute are quite clear. Even assuming the existence of a private right of action for violation of Section 1681s-2(b), that right of action exists only for violations post-dating the furnisher's receipt of a report *from the credit reporting agency*. If Congress had meant to create liability for violations once the furnisher had notice from any source of the existence of a dispute, it would have been a simple matter to say so. The fact that it nevertheless limited Section 1681s-2(b) is entitled to respect. ...

Elmore v. North Fork Bancorporation, Inc., 325 F.Supp.2d 336, 341 (S.D.N.Y. 2004) (emphasis in original).

Moreover, while §1681s-2(a) imposes upon furnishers of information a duty to provide accurate information, the statutory scheme specifically assigns exclusive responsibility for enforcement of §1681s-2(a) to federal or state agencies and officials. 15 U.S.C. §1681s-2(d). It can be inferred from the structure of the statute that Congress did not want

furnishers of credit information exposed to suit by every consumer dissatisfied with the credit information furnished. Congress limited the enforcement of the duties imposed by §1681s-2(a) to governmental bodies. There is no private right of action for the erroneous report itself.

In this case, Krienkes complained to Chase directly. (CP 149). Chase did not receive notice from a credit reporting agency pursuant to §1681i(a)(2), and thus is not subject to liability under §1681s-2(b). *See Nelson v. Chase Manhattan Mortgage Corp.*, 282 F.3d 1057, 1059 (9th Cir. 2002). As a matter of law, the Krienkes' FCRA claim was properly dismissed "because [they] fail[ed] to allege that the bank violated the duties imposed upon it after receiving notice of the existence of a dispute from a credit reporting agency." *Elmore*, 325 F.Supp.2d at 341.

H. Because the Krienkes cannot establish an unfair or deceptive act or practice, or an injury to their business or property, their CPA claim was properly dismissed.

A CPA claim "may be based on a per se violation of a statute or on unfair or deceptive practices unregulated by statute." *Keyes v. Bollinger*, 31 Wn. App. 286, 289, 640 P.2d 1077 (1982). Plaintiffs claiming a per se violation of the CPA must show (1) the existence of a pertinent statute; (2) violation of that statute; (3) the violation was the proximate cause of damages sustained; and (4) they were within the class of people the statute

sought to protect. *Id.* at 289-90. A CPA claim not based on a specific statutory violation requires proof that: “(1) the defendant has engaged in an unfair or deceptive act or practice, (2) in trade or commerce, (3) that impacts the public interest, (4) the plaintiff has suffered injury in his or her business or property, and (5) a causal link exists between the unfair or deceptive act and the injury suffered.” *Leingang v. Pierce County Medical Bureau, Inc.*, 131 Wn.2d 133, 149, 930 P.2d 288 (1997), citing *Industrial Indem. Co. of Northwest, Inc. v. Kallevig*, 114 Wn.2d 907, 920-21, 792 P.2d 520 (1990); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 792-93, 719 P.2d 531 (1986).

The Krienkes have not identified a specific statutory basis for their CPA claim, (CP 152), and have not shown Chase violated either the FCRA or the Deeds of Trust Act. *See* RCW 61.24.135 (the only violation of RCW 61.24 which is also a violation of the CPA is a trustee's improper influence over the bidding process). Absent a per se statutory violation, the Krienkes must show they suffered injury to their “business or property” as a result of an unfair or deceptive act or practice that impacts the public interest. *Hangman Ridge*, 105 Wn.2d at 742. Whether actions “constitute an unfair or deceptive trade practice under the CPA is an issue of law.”

State v. Pacific Health Center, Inc., 135 Wn. App. 149, 170, 143 P.3d 618 (2006).

The Krienkes assert they have established an unfair act or practice because Chase allegedly began “foreclosure proceedings under the assumption that their mortgage payments were delinquent when in fact they were not.” *Appellants’ Brief*, at 19. Although the Consumer Protection Act does not define the term “unfair,”⁵ the Act mentions sources to which Washington courts should look for guidance in construing its provisions, including federal court interpretations the Federal Trade Commission Act, 15 U.S.C. §45. *Blake v. Federal Way Cycle Center*, 40 Wn. App. 302, 310, 698 P.2d 578 (1985). Three criteria are considered to determine whether a practice or act is unfair under the federal statute:

(1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law or otherwise-whether, in other words, it is within at least the penumbra of some common-law, statutory, or other

⁵ Unfairness and deception are two different, although related, concepts. 1A WASHINGTON PRACTICE §46.16 (4th ed. 1997). The Krienkes do not argue that Chase committed a deceptive act (i.e., an act with the capacity to deceive a substantial portion of the public). *Appellants’ Brief*, at 19.

established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other business men).

Blake, 40 Wn. App. at 310 (quoting *Federal Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n. 5 (1972)). Here, “the evidence does not support a conclusion that [Chase] engaged in activity that can be characterized as immoral, unethical, oppressive, or unscrupulous.” *Id.* at 311. Rather, the Krienkes contend Chase made an erroneous “assumption.” *Appellants’ Brief*, at 19.

Moreover, “breach of a private contract affecting no one but the parties to the contract [ordinarily] is not an act or practice affecting the public interest.” *Hangman Ridge*, 105 Wn.2d. at 790. “[I]t is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes the factual pattern from a private dispute to one that affects the public interest.” *Id.* The Krienkes fail to explain how “the public is impacted by a mortgage servicer’s institution of an unjustified foreclosure.” *Appellants’ Brief*, at 20.

As to the injury element, the Krienkes argue “a successful foreclosure results in the damage and actual loss of their property.” *Id.* at 20 (emphasis added). However, the foreclosure sale in this case was not “successful” – i.e., it was not completed. The Krienkes did not lose their

residence and have shown no other business or property loss. Krienkes' assertion that their credit was "placed in jeopardy" does not establish an actual injury; and, in any case, a claim related to impaired credit is preempted by the FCRA, 15 U.S.C. §1681t(b)(1). *See infra*, Section J. Because they suffered no compensable injury, the Krienkes' CPA claim was properly dismissed.

- I. The Krienkes' breach of contract claim was properly dismissed because they failed to establish a breach or show that they incurred recoverable damages.

The Krienkes argue (for the first time) that Chase breached its contractual obligation "of accepting timely payments made" and crediting their account. *Appellants' Brief*, at 21. The Krienkes imply that the Declaration of Ms. Krienke filed on July 22, 2005, is evidence of this alleged breach. *Id.* at 20. As stated above, the declaration was not submitted to the trial court and therefore is not properly before this Court. RAP 9.12. In any event, the declaration does not show Chase failed to accept payments or credit the Krienkes' account. Rather, documents attached to the declaration show the Krienkes failed to pay for late charges and other assessed fees. (CP 15-143). This ultimately led to their default. *See Saluteen-Maschersky v. Countrywide Funding Corp.*, 105 Wn. App. 846, 856, 22 P.3d 804 (2001) (dismissing claim of negligent breach of

duty to account for payments received because the plaintiff failed to explain how the defendant's "decision to apply the remainder of the balance to fees and late charges was improper.")

The Krienkes also fail to show any recoverable damages as a result of the alleged breach. *Appellants' Brief*, at 20-22. They allege they "suffered significant emotional distress because of the potential for the loss of their family home and the significant equity they have in the property." (CP 150). A "potential" loss of equity is not a recoverable loss, *see, e.g., Wilkerson v. Wegner*, 58 Wn. App. 404, 409-10, 793 P.2d 983 (1990) (affirming summary judgment for defendant on breach of contract claim when proof of damages was entirely speculative), and breach of contract claims do not give rise to liability for emotional distress. *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 448, 815 P.2d 1362 (1991). Because there is no evidence of breach or actual pecuniary damages, the Krienkes' contract claims were properly dismissed. *See Lehrer v. State*, 101 Wn. App. 509, 516, 5 P.3d 722 (2000) ("a plaintiff in a contract action must prove a valid contract between the parties, breach, and resulting damage").

J. There is no basis for recovery of the Krienkes' alleged emotional distress.

The Krienkes allege Chase is liable for the tort of outrage “due to the consistent reporting of bad credit to the appropriate agencies.” *Appellants' Brief*, at 22-23. While the tort of outrage may be applicable to collection practices in the creditor-debtor context,⁶ it has not been recognized “in a situation where credit has erroneously been damaged” as the Krienkes suggest. *Id.* at 23.

The Kreinkes also argue they “may seek emotional damages” because Chase allegedly “acted in bad faith.” *Id.* at 22-23. They do not offer any analysis or justification for the proposed cause of action. (*See* CP 151). They merely cite *Werlinger v. Clarendon Nat. Ins. Co.*, 129 Wn. App. 804, 120 P.3d 593 (2005), which holds that to succeed on a bad faith

⁶ In *Jackson v. Peoples Federal Credit Union*, 25 Wn. App. 81, 604 P.2d 1025 (1979), the court recognized that “the business community must be given some latitude to pursue reasonable methods of collecting debts even though such methods often might result in some inconvenience or embarrassment to the debtor.” *Id.* at 84-85. Courts must ensure that “the outrage theory will not emasculate legitimate creditor remedies on the one hand, or open the floodgates of litigation on the other.” *Id.* at 85.

claim in the insurance context, a “policyholder must show the insurer’s breach of the insurance contract was unreasonable, frivolous or unfounded.” *Id.* at 808 (quotation omitted).

There is no authority authorizing an outrage or a bad faith claim against a lender for “reporting of bad credit to the appropriate agencies.” *Appellants’ Brief*, at 23. Indeed, any such claim would be preempted by the Fair Credit Reporting Act. *Lin v. Universal Card Services, Corp.*, 238 F.Supp.2d 1147, 1152-1153 (N.D.Cal.2002). Section 1681t of the FCRA provides, in relevant part:

[n]o requirement or prohibition may be imposed under the laws of any State

(1) with respect to any subject matter regulated under--

...

(F) section 1681s-2 of this title, relating to the responsibilities of persons who furnish information to consumer reporting agencies . . .

15 U.S.C. §1681t(b)(1).

Courts have inferred from this language that Congress intended the FCRA to be the sole remedy for a consumer against furnishers of information to credit reporting agencies. *Howard v. Blue Ridge Bank*, 371 F.Supp.2d 1139, 1143 (N.D.Cal.2005). Since “[f]ederal law preempts the area of private consumer actions against furnishers of credit information,”

Lin, 238 F.Supp.2d at 1153, the Krienkes' outrage, negligent infliction of emotional distress and bad faith claims were properly dismissed.

V. CONCLUSION

For the foregoing reasons, Chase respectfully requests this Court affirm the trial court's summary judgment in defendants' favor.

Dated this 3 day of March, 2007.

Etter, McMahon, Lamberson & Clary, P.C.



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DECLARATION OF SERVICE

I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

TIMOTHY AND BROOKE KRIENKE
907 EAST 54TH STREET
TACOMA, WA 98404

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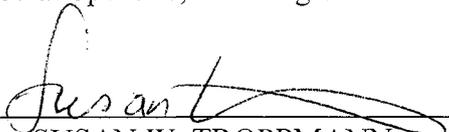
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 2 day of March 2007 at Spokane, Washington.


SUSAN W. TROPPEMANN