

No. 42688-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOHN P. REISINGER and BARBARA J. REISINGER,
Plaintiffs/Appellants,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE
FOR THE CERTIFICATE HOLDERS OF SOUNDVIEW HOME
LOAN TRUST 2005-OPT3, ASSET-BACKED CERTIFICATES,
SERIES 2005-OPT3,

Defendant/Respondent.

On Appeal from the Superior Court of Pierce County
Honorable Susan K. Serko
Superior Court Docket Number 11-2-07656-

AMENDED BRIEF OF RESPONDENT

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I. SUMMARY INTRODUCTION

This is a wrongful foreclosure case filed by Appellants John and Barbara Reisinger (“Reisingers” or “Appellants”). The Reisingers defaulted on their mortgage loan and filed for bankruptcy protection. After the U.S. Bankruptcy Court granted relief from the bankruptcy automatic stay, Respondent Deutsche Bank National Trust Company, as Trustee for the Certificate Holders of Soundview Home Loan Trust 2005-OPT3 (“Deutsche Bank” or “Respondent”) completed a nonjudicial foreclosure pursuant to the Washington Deeds of Trust Act, Chapter 61.24 RCW (“WDTA”).

The Reisingers did not file a pre-foreclosure action to restrain the sale. Instead, after the foreclosure and five months after receiving the foreclosure notices they claim were defective, the Reisingers filed the underlying action attempting to set-aside the foreclosure and for damages under the Washington Consumer Protection Act, Chapter 19.86 RCW (“WCPA”).

The Complaint alleges that certain pre-foreclosure notices violated WDTA procedural requirements. Meanwhile, the Complaint’s WCPA cause of action is not based on any purported unfair or deceptive practices by Deutsche Bank. Rather, the Reisingers seek to hoist WCPA liability on Deutsche Bank based on allegations that the loan servicer mishandled their

request for a loan modification. Pursuant to CR 56¹, the trial court correctly granted Deutsche Bank's motion for summary judgment on both counts. The dismissal order should be affirmed.

First, the Reisingers waived their challenges to the nonjudicial foreclosure by not utilizing the pre-foreclosure process at RCW 61.24.130, and pursuant to the Washington Supreme Court's decision in *Plein v. Lackey*, 149 Wn.2d 214, 226, 67 P.3d 1061 (2003). Importantly, the undisputed record establishes that the Reisingers were aware of the alleged WDTA violations well before the foreclosure sale. Case after case has held that a party's failure to seek a pre-foreclosure order restraining the sale precludes a post-foreclosure challenge, if the borrower knew or should have known about the alleged foreclosure defenses before the sale.

While the Reisingers try to distance themselves from this authority by relying on *Albice v. Premier Mortgage Services of Washington, Inc.*, ___ P.3d ___, 2012 WL 1881022 (Wash. 2012), that case presents markedly different facts and issues, including the undisputed fact that that,

¹ Appellants' Brief incorrectly states that the trial court granted Respondent's motion to dismiss pursuant to CR 12(b)(6). That is incorrect and also does not conform the Appellants' Notice of Appeal. While Respondent initially filed its motion under CR 12(b)(6) and argued that CR 12(b)(6) was the proper rule, the trial court converted the motion to one for summary judgment, and entered the order of dismissal pursuant to CR 56. See Clerk's Papers 267-276. Moreover, Appellants' notice of appeal seeks review of the dismissal order entered pursuant to CR 56. Clerk's Papers 273.

unlike the plaintiffs in *Albice*, the Reisingers were aware of the alleged foreclosure defects pre-foreclosure.

Second, even if waiver does not apply, the undisputed record establishes that the foreclosure sale complied with the WDTA's procedural requirements. The Reisingers allege that the foreclosure violated the WDTA because (1) a new notice of default was not issued after the bankruptcy court granted relief from the bankruptcy stay; and (2) the Amended Notice of Trustee's Sale listed contradictory dates to reinstate and cure the loan default. Both allegations are factually and legally unsupported.

Third, the trial court properly concluded that the Reisinger's WCPA claim failed as a matter of law. Indeed, the Complaint does not include a single allegation that Deutsche Bank engaged in any wrongful conduct. Instead, the Reisingers base their WCPA violation on the alleged conduct of the loan servicer in connection with the Reisinger's efforts to modify their loan. The Reisingers fail to provide any legal authority supporting their position that Deutsche Bank can violate the WCPA based on vicarious liability. Moreover, even if the vicarious liability theory applied under the WCPA, there is no evidence that Deutsche Bank had control over the loan servicer such that it may be held liable for the loan servicer's purported actions.

II. RESTATEMENT OF THE ISSUES

1. Whether the Pierce County Superior Court correctly granted Deutsche Bank's motion under CR 56, dismissing the Reisinger's cause of action to rescind a completed nonjudicial foreclosure sale because (a) the Reisingers waived their claims challenging the nonjudicial foreclosure by not utilizing the pre-foreclosure process required by RCW 61.24.130, and pursuant to the Washington Supreme Court's decision in *Plein v. Lackey*, 149 Wn.2d 214, 226 (2003); and (b) the undisputed evidence establishes that the foreclosure complied with the WDTA.

2. Whether the Pierce County Superior Court properly granted Deutsche Bank's motion under CR 56, dismissing the Reisinger's cause of action under the WCPA because the record lacks any evidence of unfair or deceptive conduct by Deutsche Bank that caused the Reisinger's damage, or legal authority of evidence under which Deutsche Bank can be held liable for the conduct of the loan servicer.

III. STATEMENT OF THE CASE

A. Factual Background

1. The Reisinger's Mortgage Loan and Default

The Reisingers are husband and wife who formerly owned property located at 4406 W Julies Terrace, Tacoma, Washington 98466 ("Property"). Clerk's Papers ("CP") 2; 59. On or about July 20, 2005, the

Reisingers signed a Deed of Trust that secured their payments on a mortgage loan obtained from Option One Mortgage Corporation (“Option One”). CP 59-69. On July 25, 2005, the Deed of Trust was recorded in the Official Records of Pierce County and bears instrument number 200507250724. CP 59.

On January 22, 2008, an Assignment of Deed of Trust was recorded in the Official Records of Pierce County. CP 71. The Assignment recorded the transfer of Option One’s beneficial interest in the Reisinger’s Deed of Trust to Deutsche Bank National Trust Company, as Trustee for the Certificateholders of Soundview Home Loan Trust 2005-OPT3, Asset-Backed Certificates Series 2005-OPT3. *Id.* The Assignment of Deed of Trust is recorded under Pierce County instrument number 200801221001. *Id.*

Also on January 22, 2008, Deutsche Bank executed an Appointment of Successor Trustee, appointing Northwest Trustee Services, Inc. (“Northwest”) as successor trustee under the Reisinger Deed of Trust. CP 73. The Appointment was recorded in the Official Records of Pierce County on January 22, 2008 under instrument number 200801221002. *Id.*

Because the Reisingers stopped making their monthly mortgage payments, a Notice of Default was posted at the Reisinger’s property and

mailed to them in January 2008. CP 107. Then, on February 22, 2008, a Notice of Trustee's Sale was recorded in the Official Records of Pierce County, bearing instrument number 200802220447. CP 75-78. The Notice stated that the Reisingers were in default in the amount of \$8,951.78. *Id.* The trustee's sale notice scheduled the foreclosure sale for May 23, 2008. *Id.*

2. The Reisingers File Bankruptcy and Deutsche Bank Obtains Relief from Stay From the U.S. Bankruptcy Court

One day before the scheduled trustee's sale, on May 22, 2008, the Reisingers filed a Chapter 13 bankruptcy petition in the U.S. Bankruptcy Court for the Western District of Washington. CP 88-89.

On January 25, 2010, Deutsche Bank filed a Motion for Relief from Stay in the Reisinger's bankruptcy action, seeking an order lifting the bankruptcy stay so it could foreclose on the deed of trust. CP 95, 98-129. Deutsche Bank's motion was unopposed—the Reisingers filed no objection to Deutsche Bank's requested relief. CP 95 (Dkt #44), 131-133. On March 4, 2010, the bankruptcy court granted Deutsche Bank's motion, allowing it to proceed with foreclosure. CP 135-136. The bankruptcy court's order stated, *inter alia*, that Deutsche Bank "is granted leave to foreclose on the Real Property and to enforce the security interest under

recorded and the sale occurred on September 10, 2010, 116 days after the originally scheduled foreclosure. CP 199-200, 204; CP 3.

The Complaint alleges that American Home Mortgage Servicing, Inc. (now known as Homeward Residential, Inc.) (“AHMSI”), the loan servicer, engaged in loan modification discussions and correspondence with the Reisingers leading up to the foreclosure sale. CP 3. The Reisingers did not obtain a loan modification or cure the default and the Property was sold at public auction on September 10, 2010 to Deutsche Bank. CP 3.

A Trustee’s Deed conveying the property to Deutsche Bank was recorded in the Official Records of Pierce County on September 17, 2010 and bears instrument number 201009170629. CP 85-86.

B. Procedural History of the Case

The Reisingers filed their action on March 24, 2011. CP 1. On June 13, 2011, Deutsche Bank filed a Motion to Dismiss pursuant to CR 12(b)(6). CP 33-49. With that motion, Deutsche Bank filed certain public records recorded with the Official Recorder of Pierce County and in the United State Bankruptcy Court. CP 54-136. On June 22, 2011, the Reisingers filed their “Objections/Opposition” and an “Amended Objections/Opposition” to the Deutsche Bank’s motion to dismiss. CP 137-166; 167-248.

Following an initial hearing on Deutsche Bank's motion to dismiss during which the trial court converted the motion to a CR 56 motion for summary judgment, on August 8, 2011 the Reisinger's filed their Response to Deutsche Bank's motion for summary judgment. CP 8-25. On August 16, 2011, Deutsche Bank filed a reply in support of its converted motion for summary judgment. CP 249-256. On September 16, 2011, following a hearing at which the Reisingers were represented by legal counsel, the trial court granted Deutsche Bank's motion and dismissed the case. CP 267-269.

On October 14, 2011, the Reisingers filed their "Petition for Appeal of Summary Dismissal." CP 270-272. On October 17, 2011, the Reisingers filed a "Notice of Appeal, Revised," which clarified that they sought appeal of the CR 56 dismissal order entered on September 16, 2011. CP 273-275.

IV. ARGUMENT

A. Standard of Review

On appeal, summary judgment orders are reviewed *de novo*, with the appellate court performing the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). A court may grant summary judgment if the pleadings, affidavits, and depositions establish there is no genuine issue of any material fact and the

moving party is entitled to judgment as a matter of law. CR 56(c); *Hisle*, 151 Wn.2d at 861. The burden is on the moving party to prove that there is no genuine issue of material fact that could influence the outcome of a trial. *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). A genuine issue of material fact exists only where reasonable minds could differ on the facts controlling the outcome of the litigation. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

On review, the nonmoving party is entitled to have the court look at the evidence in a light most favorable to her and against the moving party. *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987). The party opposing the motion must set forth specific facts to show that genuine issues of material fact exist. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). The materials opposing the motion may consist of new declarations, factual materials already on file, or some combination of the two. 14A Karl B. Tegland, *Washington Practice* § 25.6, at 96 (2003).

B. The Trial Court Correctly Dismissed the Reisinger's Post-Foreclosure Efforts to Void the Nonjudicial Foreclosure

The trial court's decision to dismiss the Reisinger's post-foreclosure challenges to the sale was correct because (1) the Reisingers waived challenges to the foreclosure by not attempting to enjoin the

foreclosure; and (2) even if the claims were not waived, the undisputed evidence establishes that the foreclosure sale complied with the WDTA.

1. The Washington Deed of Trust Act Requirements

The WDTA has three goals: (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 foreclosure, and (3) that the process should promote stability of land titles. *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985). Courts are extremely cautious about voiding sales in the post sale context to preserve and foster these goals. “Undermining public confidence in the finality of foreclosure sales is contrary to the [Deed of Trust] Act’s goals of promoting efficient, inexpensive, and procedurally sound foreclosures and the stability of land titles.” *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 916, 154 P.3d 882 (2007).

2. The Reisingers Waived Post-Foreclosure Challenges to the Sale

The Reisingers did not file any pre-foreclosure action to restrain the sale. Because the Reisingers had notice of their right to pre-foreclosure remedies and had actual knowledge of the foreclosure defenses raised in their post-foreclosure action, waiver applies.

The WDTA provides a procedure by which a party may restrain a trustee’s sale, *before the sale occurs*, “on any proper ground.” RCW

61.24.130²; *Plein*, 149 Wn.2d at 226. A party waives objections or claims related to the trustee's sale if the party (1) received notice of the right to enjoin the sale; (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale; and (3) failed to bring an action to obtain a court order to enjoin the sale before the sale occurred. *Id.* at 227-29 (citing *Cox*, 103 Wn.2d at 388).

The factual circumstances and legal analysis in *Plein* determines this case. In that case, the borrower received notice of the foreclosure sale, including his presale right to seek a restraining order. *Plein*, 149 Wn.2d at 220. Two months before the sale, the borrower filed an action seeking a permanent (but not temporary) injunction barring the foreclosure sale on the grounds that he did not default on the debt. *Id.* With no temporary injunction in place, the foreclosure sale proceeded as scheduled.

The Washington Supreme Court held that the borrower had waived challenges to the sale by not seeking a presale injunction as provided for under RCW 61.24.130. *Id.* at 228. Because the borrower had adequate

² Failure to enjoin a foreclosure under the WDTA, however, does not waive post-sale claims only for monetary damages asserting claims for, *inter alia*, fraud, misrepresentation, violation of the Washington Consumer Protection Act (Title 19 of RCW). However, even these limited, allowable post-foreclosure claims may not seek a remedy other than for monetary damages, and the claim may not affect the validity or finality of the foreclosure. RCW 61.24.127(b)-(d), (f).

notice and opportunity to assert his presale remedies and had notice of the foreclosure defenses, the court found that waiver advanced the goals of the WDTA. *Id.* at 228; *see also County Express Stores, Inc. v. Sims*, 87 Wn. App. 741, 744, 752, 943 P.2d 374 (1997) (applying waiver rule to bar post-foreclosure challenges); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 116, 752 P.2d 385 (1988) (borrower aware of grounds to contest foreclosure as early as a month prior to sale waived right to contest post-foreclosure); *Peoples Nat'l Bank of Wash. V. Ostrander*, 6 Wn. App. 28, 32, 491 P.2d 1058 (1971) (post-sale challenge to foreclosure dismissed because defendants waited until after sale, about five months after discovering the basis for their foreclosure challenge).

Here, the trial court correctly determined that the Reisingers, under *Plein*, waived post-sale efforts to upset the foreclosure sale.

First, the Reisingers received notice of the right to enjoin the sale through the Notice of Trustee's Sale. *See* CP 2; CP 80-83, 151-154. The Notice stated

Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in waiver of any proper grounds for invalidating the Trustee's sale.

CP 82, 153.

Second, well before the foreclosure, the Reisingers had actual or constructive notice of the same procedural defects with the foreclosure process that they asserted in the Complaint. Specifically, the Complaint alleges that the foreclosure violated the WDTA because the Amended Notice of Foreclosure Sale—which they received five months before the foreclosure sale—improperly relied on a January 2008 Notice of Default. CP 3. The Reisingers claim that the 2008 Notice of Default was stale and a new default notice required. *Id.*

The Reisingers were aware in April 2010, five months before the September 10, 2010 foreclosure sale, that the foreclosure would proceed based on reference to the January 2008 Notice of Default in the Amended Notice of Trustee’s Sale. CP 153 (“A written notice of default was transmitted ... to the Borrower ... on 1/16/08...”). The foreclosure sale took place on September 10, 2010. CP 85. The Reisingers, therefore, had notice of the foreclosure defense related to the Notice of Default five months before the foreclosure sale. CP 147-148, 153. Waiver under *Plein* applies.

The Complaint also alleges that the foreclosure violated the WDTA because the April 2010 Amended Notice of Trustee’s Sale “gave contradictory dates to reinstate [the loan]....” CP 3. This, too, was an

issue the Reisingers knew five months before the September 2010 foreclosure sale, when they received the April 2010 Amended Notice of Trustee's Sale. This defense is waived.³

Finally, there is no dispute that the Reisingers failed to enjoin the sale before it occurred—the last element under *Plein* required to make a finding of waiver.

The Reisingers argue that the recent Washington Supreme Court decision in *Albice v. Premier Mortg Services of Washington, Inc.* allows their post-foreclosure challenge.⁴ However, *Albice* presented markedly different facts, most notably, the party challenging the foreclosure raised

³ The Complaint also alleges that the Trustee's Deed is invalid because it references a 2008 Notice of Trustee's Sale, rather than the Amended Notice of Trustee's Sale recorded in April 2010. CP 2-3. However, the Reisingers do not raise this issue in the Opening Brief. In any event, the allegation is completely without merit and, in fact, disingenuous in so much as it is contradicted by the Reisingers own allegations establishing that the sale complied with the WDTA. As the Complaint itself alleges, the Reisingers received an Amended Notice of Trustee's Sale in April 2010. CP 3. The trustee's sale notice was recorded with the Official Recorder and set the sale for May 14, 2010. CP 80-83. The trustee's sale occurred on September 10, 2010—within 120 days of the original sale date. CP 3; 85-86. Therefore, reference in the trustee's deed to the original 2008 notice of foreclosure it is immaterial because the Official Records include the required notices and documents showing compliance with the WDTA. *See* RCW 61.24.030 (listing requisites to trustee's sale); RCW 61.24.050 (trustee's deed conveys interest to purchaser upon acceptance of bid).

⁴ The Washington Supreme Court issued the *Albice* decision on May 24, 2012, after the Reisingers filed their opening brief, which references the Division II decision.

defenses in the post-foreclosure action that were unknown before the sale. The Reisingers cannot and do not make a similar claim here.

In *Albice*, the purchaser of property at a nonjudicial foreclosure sale brought an unlawful-detainer action against the borrowers/grantors of deed of trust and sought to quiet title. *Albice*, 2012 WL 1881022 at *2. The borrowers/grantors countersued, seeking to quiet title in an action to set aside the sale based on alleged violations of the WDTA and allegations that the lender breached a written agreement to modify the loan and cancel the foreclosure. *Id.*

The Washington Supreme Court affirmed Division II's decision allowing post-foreclosure challenges based on alleged violations of the WDTA. In doing so, however, it specifically acknowledged that waiver will apply under the *Plein* decision when the factors announced therein, including pre-foreclosure knowledge of the defense, are present. The Court specifically highlighted the factual differences with *Plein* in justifying its decision:

Further, unlike *Plein*, where the borrower had a defense almost two months prior to the sale, here, Tecca had no knowledge of their alleged breach in time to restrain the sale.

Albice, 2012 WL 1881022 at *5.

The facts here are like *Plein* and not *Albice*. The Reisingers had knowledge of their asserted foreclosure defenses asserted in the Complaint five months before the foreclosure sale, when they received the Amended Notice of Trustee's Sale that allegedly did not comply with WDTA. CP 2-3; CP 80-83. The Reisingers took no action at that time to enjoin the foreclosure. *Plein* bars their action.

Moreover, while the Reisingers argue that they believed the loan servicer would postpone the foreclosure sale because of communications about a loan modification, there is no evidence in the record remotely suggesting that the loan servicer made any promises or agreements, contrary to the written notices of foreclosure sale the Reisingers received, to delay the sale. Indeed, in their opening brief the Reisingers concede that the loan servicer had no obligation to modify the loan. *See* Brief of Appellant, p. 4 (“Appellants recognize that AHMSI was under no obligation to accept appellants’ application for loan modification.”). They also acknowledge that the loan servicer never promised or agreed to delay foreclosure, which would have been in contradiction to the written foreclosure notices the Reisingers received. *Id.* (“By postponing the actual foreclosure date on four separate occasions, AHMSI established *an unstated policy that ... AHMSI would postpone foreclosure until the*

adjustment procedure had run its course.” (emphasis added)); *see also* CP 151-154, 199-200, 204 (foreclosure sale notices).

The undisputed facts establish that the waiver rule announced in *Plein* bars the Reisinger’s post-foreclosure challenges. Accordingly, the trial court properly dismissed the Reisinger’s claims attempting to void the foreclosure because of alleged procedural violations of the WDTA.

3. Even if the Reisinger’s Foreclosure Challenges Were Not Waived, as a Matter of Law the Foreclosure Complied with the WDTA

The Reisingers failed to present any evidence that the foreclosure violated the WDTA’s procedural requirements.

RCW 61.24.030 sets forth eight requirements for a valid trustee’s sale:

1. The deed of trust must contain a power of sale.
2. The deed of trust must include a statement that the property conveyed is not used principally for agricultural purposes.
3. A default has occurred on the obligation that triggers the power of sale.
4. The beneficiary of the deed of trust has not commenced legal action to seek satisfaction of an obligation secured by the deed of trust.
5. The deed of trust has been recorded in each county in which the land is situated.

6. The trustee must maintain a street address in this state where personal service of process may be made, and the trustee must maintain a physical presence and have telephone service at such address.

7. The trustee must have proof of the beneficial owner of the promissory note secured by the deed of trust.

8. 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 and contain certain required information, including a statement that the beneficiary has declared the borrower in default.

As a matter of law, the two WDTA procedural defects alleged by the Reisingers are not supported by the record or the unambiguous language in the WDTA.

a. The Notice of Default complied

The Reisingers wrongly allege that the January 2008 Notice of Default became stale, thus reference to it in the Amended Notice of Trustee's Sale did not comply with the eighth requirement under the WDTA. The claim lacks merit for two reasons. First, RCW 61.24.030(8) states that a written notice of default containing certain information must be transmitted to the borrower *at least 30 days before* issuance of the notice of trustee's sale; it does not include any requirements that a Notice of Default must be re-issued at any time:

(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 at their last known addresses by both first-class and either registered or certified mail, return receipt requested, and the beneficiary or trustee shall cause to be posted in a conspicuous place on the premises, a copy of the notice, or personally served on the borrower and grantor. This notice shall contain the following information...

RCW 61.24.030(8) (emphasis added).⁵

Here, the Reisingers admit that they received a Notice of Default in 2008. *See* CP 3 (“... Defendant did not issue a new Notice of Default.”); *see also* CP 107 (“... a Notice of Default was posted on the subject property and mailed to [the Reisingers] on January 18, 2008.”). This was at least 30 days before the notice of sale. Accordingly, the foreclosure complied with requirement eight of the WDTA.

Second, the WDTA also includes special notice provisions in connection with foreclosures that occur after a U.S. Bankruptcy Court

⁵ In 2009, the legislature amended the WDTA provisions by adding RCW 61.24.031, which requires the beneficiary attempt to contact the borrower to explore foreclosure avoidance options thirty days before issuing a notice of default, and provide a declaration regarding such efforts within the notice. Importantly, however, this subsection *does not apply* if there is a bankruptcy stay or the lender has been granted relief from the stay, which was the case with Reisinger. RCW 61.24.031(6)(b). In addition, this new section does not apply in this case because the Reisingers received a notice of Default in 2008, before the provision was passed.

issues an order granting a lender relief from the automatic bankruptcy stay. Most importantly, the WDTA does not require a new notice of default following the bankruptcy court's relief from stay. Rather, it requires only that (1) the trustee sale be set at least 45 days after the bankruptcy court's order granting relief from stay; and (2) the trustee issue a new notice of trustee's sale with the new date issued:

(4) If a trustee's sale has been stayed as a result of the filing of a petition in federal bankruptcy court and an order is entered in federal bankruptcy court granting relief from the stay or closing or dismissing the case, or discharging the debtor with the effect of removing the stay, the trustee may set a new sale date which shall not be less than forty-five days after the date of the bankruptcy court's order. The trustee shall:

(a) Comply with the requirements of RCW 61.24.040(1) (a) through (f) [Notice of Sale requirements] at least thirty days before the new sale date; and

(b) Cause a copy of the notice of trustee's sale as provided in RCW 61.24.040(1)(f) to be published in a legal newspaper in each county in which the property or any part thereof is situated, once between the thirty-fifth and twenty-eighth day before the sale and once between the fourteenth and seventh day before the sale.

RCW 61.24.130(4).

Here, the trustee's sale fully complied with these requirements. Indeed, the Reisingers do not allege that Deutsche Bank or the trustee failed to issue a valid notice of trustee's sale. The record establishes that proper notices were recorded in compliance with the statute, setting the trustee's sale date more than 45 days after the bankruptcy court granted relief from stay. *See* CP 135 (March 4, 2010 Order Granting Relief from Stay) and CP 80-83 (Amended Notice of Trustee's Sale setting foreclosure for May 14, 2010).

b. The Amended Notice of Trustee's Sale complied with the WDTA requirements

The Reisingers argue that the Amended Notice of Trustee's Sale listed contradictory dates to reinstate the loan and cure the default, and thus failed to comply with the WDTA. CP 3. Their claim is contradicted by the evidentiary record, and was properly rejected by the trial court.

First, RCW 61.24.040(1)(f) provides that the notice of trustee's sale shall substantially follow the form shown within the subsection. The Amended Notice of Trustee's Sale that the Reisingers received substantially complies with the form set forth in RCW 61.24.040(1)(f). Compare RCW 61.24.040(1)(f) with CP 80-83. The record below lacks any evidence disputing that the Amended Notice of Trustee's Sale substantially followed the form in the statute.

Second, the Amended Notice of Trustee's Sale does not include conflicting dates to cure the default. The Reisingers allege that the notice lists one date to reinstate that was 11 days prior to the sale, "and another that was not." CP 3.

The relevant language is at Section V of the Amended Notice of Trustee's Sale. CP 81-82. That section sets the sale date at May 14, 2010. CP 81. It further states that the default amount (\$57,663.50) "must be cured by 05/03/10 (11 days before the sale date, to cause discontinuance of the sale." *Id.* In addition, Section V states that the sale may be terminated any time *after* 11 days before the sale, but before the sale, if the Reisingers pay the entire balance of the loan: "The sale may be terminated any time after 05/03/10 (11 days before the sale date), and before the sale by the Borrower ... paying the entire balance of principal and interest secured by the Deed of Trust...." CP 81-82.

The undisputed record establishes the cure dates listed in the Amended Notice of Foreclosure to prevent foreclosure are internally consistent and comply with the WDTA. The trial court properly dismissed the Reisinger's challenges.

C. The Trial Court Properly Dismissed the Reisinger's Washington Consumer Protection Act Claim

The Reisingers allege that Deutsche Bank violated the WCPA.

Under the WCPA, the Reisingers need to establish that: (1) *the defendant* has engaged in an unfair or deceptive act or practice; (2) occurring 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. *Indus. Indem. Co. v. Kallevig*, 114 Wn.2d 907, 920-21, 792 P.2d 520 (1990) (construing RCW 19.86.010 *et. seq.* and citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986)).

1. The Reisingers Cannot Establish a WCPA Violation Based on the Loan Servicer's Conduct (Vicarious Liability)

The Reisingers do not allege or present evidence that Deutsche Bank engaged in any unfair or deceptive conduct. Instead, the alleged misconduct relates to the Reisinger's dealings with the loan servicer in connection with their loan modification requests. CP 3-4. It is undisputed that Deutsche Bank had no role in the loan modification process (e.g., the Reisingers never spoke to or corresponded with Deutsche Bank). Thus, at best, the alleged WCPA violation is based on the vicarious liability theory—which the trial court correctly rejected.

2. Even if Vicarious Liability Applies, the Reisingers Offered No Evidence Supporting Its Application

Even if the vicarious liability theory applied under the WCPA, the Reisingers failed to present any evidence that Deutsche Bank had the right to control the loan servicer such that vicarious liability applies.

“Vicarious liability is legal responsibility by virtue of a legal relationship.” 16 David K. DeWolf & Keller W. Allen, *Washington Practice: Tort Law and Practice* § 3.1, at 116 (3rd ed.2006). A defendant may be vicariously liable for another’s tort if the tortfeasor was an (1) employee acting in the course and scope of employment; (2) an agent whose tort is imputed to her principal; or (3) a family member for whom the other is legally responsible. 16 DeWolf & Allen, *supra*, at 116. Here, the Reisingers argue, albeit without offering evidentiary support, that the loan servicer was an agent of Deutsche Bank.

Evidence of the principal’s right to control the agent is indispensable to vicarious liability. *See Adams v. Johnston*, 71 Wn. App. 599, 610–611, 860 P.2d 423 (1993) (joint venturers must have an equal right of control); *Kroshus v. Koury*, 30 Wn. App. 258, 267, 633 P.2d 909 (1981) (principal liable only for agent’s activities over which principal has a right of control).

The Reisingers failed to present any evidence that Deutsche Bank controlled any aspect of the loan servicer's loan modification dealings with them. The only evidence of Deutsche Bank's involvement in the Reisinger's loan is that it served as the trustee for the mortgaged-backed security assigned the beneficial interest. *See* CP 71. Accordingly, there was no basis upon which to impose vicarious liability on Deutsche Bank based on the loan servicer's conduct. The trial court, therefore, properly granted summary judgment to Deutsche Bank.

3. Even if Vicarious Liability Applies, the Undisputed Record Supports Dismissal of the WCPA Claim

Even if Deutsche Bank could violate the WCPA based on the actions of the loan servicer, the Reisingers failed to present evidence of a WCPA violation, including deceptive conduct and resulting damages.

a. There is no evidence of an unfair or deceptive act or practice

First, the Reisingers presented no evidence of an "unfair or deceptive act or practice". To establish this first WCPA element, a plaintiff must allege an unfair or deceptive act or practice that actually deceived or had "the capacity to deceive a substantial portion of the public." *Hangman Ridge*, 105 Wn.2d at 785. The WCPA does not define the term "deceptive," but implicit in that term is "the understanding that the actor misrepresented something of material importance." *Hiner v.*

Bridgestone/Firestone, Inc., 91 Wn. App. 722, 730, 959 P.2d 1158 (1998). Appellate courts have concluded that an act or practice is unfair if it (1) offends public policy, statutes, or the common law; (2) is immoral, unethical, oppressive, or unscrupulous; or (3) it causes substantial injury to consumers. *Magney v. Lincoln Mut. Sav. Bank*, 34 Wn. App. 45, 57, 659 P.2d 537 (1983) (quoting *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972)⁶).

The Reisingers argue in their opening brief that their WCPA claim is based on the loan servicer's efforts to address their loan modification request. But they fail to point to any evidence in the record from which a reasonable jury could find that Deutsche Bank, through the loan servicer, engaged in immoral or unethical conduct, or conduct that offends public policy. Importantly, the Reisingers admit that they had a legal, contractual obligation to make monthly mortgage payments and they defaulted on that obligation. Deutsche Bank (and the loan servicer) had no obligation to modify the Reisinger's contractual obligation. *See* Appellants' Brief on Appeal, p. 4. Moreover, the Reisingers offered no evidence that they were

⁶ The Washington Supreme Court has determined that, when deciding whether an act is unfair or deceptive, courts should consider administrative determinations made by the Federal Trade Commission (FTC) in administering the Federal Trade Commission Act, 15 U.S.C. § 41. *Pang v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 47, 204 P.3d 885 (2009).

ever (1) promised a loan modification; (2) promised that foreclosure would not occur; or (3) promised they could continue to reside in their home without foreclosure occurring per the written notices they received. In short, while it is unfortunate that the Reisingers were unable to pay their loan or obtain a modification, their situation cannot be converted to a WCPA violation.

b. There is no evidence establishing the public interest element of a WCPA claim

The Reisingers also failed to offer any evidence from which a jury could find that Deutsche Bank engage in deceptive conduct that impacts the public interest—the second required element of a WCPA claim. Every private plaintiff asserting a WCPA claim must show that the acts complained of affect the public interest, which fulfills the legislative statement of purpose, that the Act “shall not be construed to prohibit acts or practices which . . . are not injurious to the public interest.” *Hangman Ridge*, 105 Wn.2d at 788. Normally, the factors to be considered when evaluating this element depend upon the context in which the alleged acts were committed. *Id.* at 789-790. “Where the transaction was essentially a private dispute . . . , it may be difficult to show that the public has an interest in the subject matter. Ordinarily, a breach of a private contract

affecting no one but the parties to the contract is not an act or practice affecting the public interest.” *Id.* at 790 (citations omitted).

Where, such as here, the acts complained of involve a consumer transaction, the following five factors are relevant to determining public interest:

(1) Were the alleged acts committed in the course of defendant’s business? (2) Are the acts part of a pattern or generalized course of conduct? (3) Were repeated acts committed prior to the act involving plaintiff? (4) Is there a real and substantial potential for repetition of defendant’s conduct after the act involving plaintiff? (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it?

Id. at 790.

Considering these factors, the Reisingers failed to present any evidence to meet the public interest element. For example, the record lacks any evidence that the purported conduct is part of a pattern of conduct; that there were repeated acts prior to the allegations concerning the Reisingers; that there is risk of repeat; or that many consumers were impacted. Indeed, the sparse allegations in the Complaint involving Deutsche Bank, which are not even supported by evidence in the record, do not establish a violation of any state or federal laws. The Reisinger’s mortgage loan was a private transaction, and the Complaint and

evidentiary record is insufficient to meet the public interest element of a WCPA claim.

c. There is no evidence that the Reisingers were injured by Deutsche Bank's conduct

Finally, the Reisingers failed to present facts establishing causation. Causation requires at least some credible allegations of a causal link between the alleged misrepresentation and the purported injury. *See Indoor Billboard v. Integra Telecom*, 162 Wn.2d 59, 63 (2007). In *Indoor Billboard*, the Washington Supreme Court adopted the proximate cause standard embodied in WPI 15.01 for WCPA claims, which requires a plaintiff to establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury. *Id.*

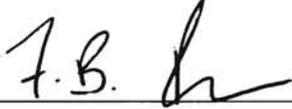
The Reisingers failed to present evidence—or even plead allegations—meeting this necessary element. The Reisingers entered into a loan in June 2005, and made monthly payments under the loan for approximately two and a half years before defaulting. The harm alleged is the Reisinger's loss of their home by foreclosure, but that was the result of their failure to make required monthly payments, not by any action of Deutsche Bank in exercising its rights under the Deed of Trust and the WDTA. For this reason as well, the trial court properly dismissed the WCPA cause of action.

V. **CONCLUSION**

The trial court's order granting Deutsche Bank's Motion for Summary Judgment should be affirmed. Deutsche Bank is entitled to an award of its costs on appeal as a prevailing party.

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