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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

No. 46726-7-II

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

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Branch Banking & Trust Company, *Respondent*

v.

Sandra Scamehorn and Walter Scamehorn, *Appellants*

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**BRIEF OF APPELLANT**

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## TREATISES

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### A. STATEMENT OF THE CASE

On May 22, 2007, Defendants Walter and Sandra Scamehorn refinanced their home at 1834 Day Island Blvd., in University Place. They executed an adjustable-rate promissory note to Bayrock Mortgage Corporation, the lender, at an initial interest rate of 7.875%. The refinance was arranged by mortgage broker Mark Kinder. (Declaration of Walter D. Scamehorn, CP at 264).

In the May 22, 2007 refinance, the Scamehorns executed a promissory note, (“Note”), secured by a deed of trust (“Deed of Trust”). The Note was made to Bayrock Mortgage Corporation as Lender. (Exhibit A to Plaintiff’s Complaint, CP at 12-18). At some time subsequent to May 22, 2007, Bayrock assigned the Note to PFG Mortgage Trust I, by means of an undated allonge. (CP at 20). A second undated allonge purports to assign the Note, but does not name an assignee. (*Id.*, CP at 19). *The Note is never expressly assigned to Branch Banking and Trust Company*, the Plaintiff in this judicial foreclosure action.

The Deed of Trust, executed by the Scamehorns on the same date as the Note, and recorded in Pierce County on May 23, 2009 under AFN 200705230868, lists Mortgage Electronic Registration System, Inc. (MERS) as “the Beneficiary” of the Deed of Trust, (Exhibit B to Complaint, CP at 23-50), and as the Grantee, and states that MERS has the power of sale, even though Fircrest Escrow is listed as the Trustee. (*Id.*, CP at 25-26). MERS was never the owner or holder of the underlying Note (see above). Despite the Deed of Trust’s designation of MERS as the “Beneficiary” and “Grantee,” with power of sale, Bayrock is listed as the Lender. (*Id.*, CP at 24).

On January 27, 2012, MERS “as Beneficiary” assigned or purported to assign the Deed of Trust to PFG Mortgage Trust I, along with “the note or notes” secured thereby. This assignment was recorded in Pierce County on February 7, 2012, under AFN 201202070362. (Exhibit C to Complaint, CP at 52-53). On September 13, 2012, a *second* assignment, again by MERS, purports to assign the same Deed of Trust, “together with the note or notes,” again to PFG Mortgage Trust I. This second assignment of the same Deed of Trust was recorded in Pierce County on September 17, 2012, under AFN 201209170320 (Exh. C to

Complaint, CP at 54-55). Finally, a December 31, 2012 “Corporate Assignment” of the Deed of Trust by PFG Mortgage Trust I, recorded in Pierce County on April 22, 2013 under AFN 201304220252, purports to assign the Deed of Trust to Branch Banking and Trust Company. This “Corporate Assignment” does not contain an assignment of the Note. (Exh. D to Complaint, CP at 55-56). Bayrock, the original Lender and holder of the Note, never assigned the Deed of Trust – only MERS even attempted to do so.

At the time the Scamehorns refinanced their house, Neither Mr. Kinder nor anyone else explained the variable interest rate on the note to them. In particular, nobody explained that the note’s variable interest rate was to be based on the “LIBOR Six-Month Index.” (Scamehorn Decl., CP at 264-65). The Scamehorns subsequently learned that, for at least the first two years of their loan, the Six-Month LIBOR (London Inter-Bank Offer Rate) was being fraudulently manipulated by large banks such as Bank of America, Citigroup, Barclays, UBS, JP Morgan Chase, and Deutsche Bank, resulting in higher interest payments for homeowners whose ARMs were based on the LIBOR. (See Halah Touryalai, “Banks Rigged Libor To Inflate Adjustable-Rate Mortgages: Lawsuit,” Forbes

Magazine online ([www.forbes.com/sites/halahtouryalai/2012/10/15](http://www.forbes.com/sites/halahtouryalai/2012/10/15)), Oct. 15, 2012, Exhibit A to Scamehorn Decl., CP at 270-71). Because their loan interest rate was based on the LIBOR, the Scamehorns were also paying inflated interest rates.

In November, 2008, Mark Kinder, the mortgage broker who had sold the subject loans to the Scamehorns, was charged by the Washington State Department of Financial Institutions with literally dozens of violations of the Mortgage Broker Practices Act, for not giving the proper disclosures for adjustable rate mortgages in numerous transactions. (See DFI Consent Order in Case Nos. C-07-316-09-CO01 and C-06-177-09-CO02, Exhibit B to Scamehorn Decl, CP at 273-76). The Scamehorns were expecting the higher interest rates to begin seven years into their loan instead of five years. If they had known that Mr. Kinder was misrepresenting, by two years, the amount of time they would have to refinance before the higher rate kicked in, they would never have entered into this transaction. (Scamehorn Decl., CP at 266). They were unprepared for the sudden spike in their interest rate, which has adversely affected their credit and made it impossible for them to refinance with another lender. (*Id.*).

## **B. APPELLANTS' ASSIGNMENTS OF ERROR**

### **A. Standard of Review**

The trial court's grant of a motion for summary judgment is reviewed de novo. *Mohr v. Grantham*, 172 Wn.2d 844, 859, 262 P.3d 490 (2011). Summary judgment is appropriate only where the pleadings, affidavits, depositions, and admissions in the record demonstrate *the absence of any genuine issues of material fact*. CR 56(c); *Shepard v. Washington Insurance Guaranty Assn.*, 120 Wn. App. 263, 265, 84 P.3d 940 (2004). In deciding on a motion for summary judgment, the court must consider all evidence submitted in the light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn. 2d 434, 437, 656 P.2d 1030 (1982).

A "material fact" is one upon which the outcome of the litigation depends. *Tucker v. Hayford*, 118 Wn. App. 246, 251, 75 P.3d 980 (2003). "The burden is on the moving party to prove no genuine issue of material fact exists." *Id.* The trial court erred in this matter in finding that no issues of material fact were raised by the evidence produced on summary judgment.

**Assignment of Error No. 1:**  
**The Trial Court Erred In Finding That The Promissory Note Was**  
**Ever Assigned to Branch Banking In The Manner Required By**  
**Applicable Law to Confer Standing to Foreclose On It.**

In its Memorandum in Support of Motion for Summary Judgment, Plaintiff asserts that “there is no dispute that Branch Banking is the beneficiary entitled to repayment under the terms of the Note and Deed of Trust.” This statement is untrue. As the following discussion and supporting evidence will show, Branch Banking’s status as an assignee of the Note, and therefore its standing to pursue a nonjudicial foreclosure of the Deed of Trust, are very much in dispute. The evidence shows that Branch Banking is not a lawful assignee of the Note. It therefore has no right under the Foreclosure of Real Estate Mortgages Act, Chapter 61.12 RCW, to judicially foreclose on the Deed of Trust.

The first thing to understand about the present lawsuit is that the Plaintiff has chosen a *judicial* foreclosure, governed by Ch. 61.12 RCW, as opposed to a *nonjudicial* foreclosure, which would be subject to the foreclosure provisions of the Deed of Trust Act, Ch. 61.24 RCW. This means, among other things, that simple possession of the Note, without more, does *not* give Plaintiff the right to enforce the Note. Plaintiff is evidently operating on this assumption, (see Plaintiff’s Memorandum in

Support of Summary Judgment (“Memorandum”), CP at 86), and if the Deed of Trust were being foreclosed nonjudicially, its assumption might well be valid. *See, e.g., Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 103-04, 285 P.3d 34 (2012) (in a nonjudicial foreclosure, the “holder” of the Note, entitled to enforce the Deed of Trust, means “the person in possession of the Note”). But, again, the Plaintiff has chosen *judicial* foreclosure under Ch. 61.12 RCW.

RCW 61.12.040 provides that only “the mortgagee or his or her assigns” are entitled to judicially foreclose on a mortgage. RCW 61.12.040. Obviously, the Plaintiff is not the mortgagee, so the issue is whether or not Plaintiff is an “assign.” Under Washington law, Plaintiff is not an “assign.”

Although Ch. 61.12 RCW contains no definition of the terms “assign” or “assignee,” the meaning and legal significance of the term is well settled. Black’s Law Dictionary defines “Assigns” as “those to whom property is, will, or may be assigned. . . . It generally comprehends all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act of law.” BLACK’S LAW DICTIONARY at 119 (6<sup>th</sup> Ed. 1990). Generally, a valid

assignment must be in writing, and must contain “language showing the owner’s intent to transfer and invest property *in the assignee.*” Carlisle v. Harbour Homes, Inc., 147 Wn. App. 193, 208, 194 P.3d 280 (2008) (italics added). Similarly, RCW 4.08.080 provides that any assignment of a “judgment, bond, specialty, book account, or other chose in action” must be in writing, signed by the person authorized to make the assignment (and of necessity must designate the assignee). RCW 4.08.080.

Legal arguments aside, on a common-sense level it should be obvious that an “assign” *has to be expressly named* in the written assignment: how else is one to know that he or she, as opposed to someone else, was the intended assign? It has to be more than mere possession. “Title to a note does not pass by delivery alone.” Glaser v. Connell, 47 Wn.2d 622, 624, 289 P.2d 364 (1955). And yet in this case, there is no writing of any kind assigning the Note from PFG Mortgage Trust I to the Plaintiff, Branch Banking and Trust.

Plaintiff is thus not the lawful “assign” of the Note in this case. And, as Plaintiff correctly points out, “the security instrument will follow the note, not the other way around,” (Memorandum, CP at 87). It follows,

then, that if the Note is unenforceable because the Plaintiff is not the lawful assignee, the Deed of Trust is likewise unenforceable.

Branch Banking will no doubt argue that this slapdash chain of assignments and purported assignments is “close enough,” and that it should therefore be allowed to proceed, *now*, with a sale of the Defendants’ house. Defendants would argue that both the existence of unresolved issues of fact, and the high level of care that should be taken to examine all evidence before taking away a person’s home, require that the law be strictly observed and all factual issues fully explored prior to foreclosure. Plaintiff is not entitled to judgment as a matter of law, and is not entitled to foreclose on a Note that has never been assigned to it.

**Assignment of Error No. 2:**  
**The Trial Court Erred In Finding That MERS Ever Held The Promissory Note, Such That It Would Have Had Authority To Assign Either the Note, Or The Deed of Trust.**

In this case, MERS never held the Promissory Note. Although the Deed of Trust executed by the Scamehorns on May 22, 2007 contains representations that “MERS is the Beneficiary,” (CP at 25), the Scamehorns executed the Note on that date to Bayrock, not to MERS. MERS was never subsequently assigned the Note, and has never held the Note.

Defendants do not argue here that MERS's status as an unlawful beneficiary voids the Deed of Trust per se. The Court of Appeals recently declined to void a deed of trust outright based solely on its designation of an ineligible entity (MERS) as beneficiary. Walker v. Quality Loan Servicing Corp., 176 Wn. App. 294, 322-23, 308 P.3d 716 (2013). The Walker court did not end the discussion there, though; it went on to follow the Washington Supreme Court's holding in Bain v. Metropolitan Mortgage Group, making the enforceability of the deed of trust dependent upon the enforceability of the underlying note: "if in fact MERS is not the beneficiary, then the equities of the situation would likely (though not necessarily in every case) require the court to deem that the real beneficiary is the lender whose interests are secured by the deed of trust or that lender's successors." Walker, 176 Wn. App. at 322, citing Bain v. Metropolitan Mortgage Group, 175 Wn.2d 83, 111, 285 P.3d 34 (2012).

We are thus thrown back on the underlying Note – which, as we have discussed, was never assigned to the Plaintiff, and is therefore not enforceable by the Plaintiff.

**Assignment of Error No. 3:**  
**The Trial Court Erred In Finding That the Negative Amortization**  
**Terms of the Scamehorns' Note Were Not Unconscionable.**

Plaintiff argues that, *ipse dixit*, that “there is nothing inherently shocking to the conscience or monstrously harsh about the Note’s negative amortization terms such that they could be considered substantively unconscionable.” (Memorandum, CP at 90). First of all, this begs the question as to whether the Plaintiff should be deciding that factual issue for us, or whether perhaps it might be better to allow the finder of fact to decide it at trial.

“Negative amortization” provisions were a common feature of adjustable-rate mortgages (ARMs) offered by mortgage lenders during the real estate boom of the late 2000s. Explained in the simplest terms, this is how they work: the borrower pays an initial interest rate that is significantly lower than the interest that would be due under a normal amortization schedule. As the Plaintiff points out, (Memorandum, CP at 89-90), this results in a much lower monthly interest payment – *initially*, anyway. But the difference between the “normal” interest payment the borrower would otherwise be paying, and the reduced initial interest

payment, does not just disappear. That portion of the interest payment *is added to the unpaid principal balance.*

The problem with this is the provision that appears in many negative-amortization ARMs, including the Note in this case. While the words, “FIRST 7 YEARS NEGATIVE AMORTIZATION FEATURE” appear in large, bold, capital letters at the top of the Note, (CP at 12), and appear to match the language of the Note, (see Section 3(B), CP at 13), hidden in the fine print is a proviso that switches the loan to a monthly interest-only payment as soon as the unpaid principal balance, (which has been increasing due to the addition of unpaid interest every month) exceeds 135% of the original principal balance. This proviso operates to switch the loan to an interest-only basis as soon as the 135% threshold is reached, regardless of whether or not seven years have passed. (Section 3(C)(i), CP at 13). In the Scamehorns’ case, the 135% proviso was hidden from them; it kicked in after only five years, not the seven they were led to believe, and it resulted in much higher monthly payments. (Scamehorn Decl. CP at 266).

“Negative amortization” is a predatory lending tactic designed to add principal to the loan, and switch the loan to an interest-only basis,

resulting in higher payments and far more principal paid by the borrower – and of course much higher profits for the lender. Whether or not this tactic “shocks the conscience” sufficiently to be considered an unconscionable term, is a question that can only be decided by the finder of fact.

**Assignment of Error No. 4:**  
**The Trial Court Erred In Finding That the LIBOR-Based Interest Rate of the Scamehorns’ Note Was Not Unconscionable.**

The variable interest rate of the Note is based on the “LIBOR Six-Month Index.” Although this language also appears in bold at the top of the Note, nobody explained it to the borrowers. (Scamehorn Decl., CP at 264-65). The Scamehorns subsequently learned that, for at least the first two years of their loan, the Six-Month LIBOR (London Inter-Bank Offer Rate) was being fraudulently manipulated by large international banks, resulting in higher interest payments for the Scamehorns and other homeowners whose adjustable mortgage rates were based on the LIBOR.

Again, it is well documented that the LIBOR was manipulated by the banks as late as 2009, with the goal of artificially increasing interest rates and reaping profits. Meanwhile, average homeowners paid higher

interest on their loans. We believe this to be unconscionable. Whether or not it should be found so by this court, is an issue of fact for trial.

**C. CONCLUSION.**

For the reasons set forth above, Appellants respectfully ask this court to REVERSE the trial court's grant of summary judgment to the Plaintiff/Respondent, and REMAND this matter back to the trial court for further proceedings.

RESPECTFULLY SUBMITTED This 27<sup>th</sup> day of January, 2015.

BRITTON LAW OFFICE, PLLC

by:



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*Attorney for Appellants*  
*Walter and Sandra Scamehorn*

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STATE OF WASHINGTON

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DEPUTY

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

BRANCH BANKING AND TRUST  
COMPANY,

No. 467267-II

Respondent,

v.

SANDRA J. SCAMEHORN; WALTER  
D. SCAMEHORN; ALSO ALL  
PERSONS CLAIMING ANY RIGHT,  
TITLE, LIEN, OR INTEREST IN THE  
PROPERTY DESCRIBED IN THE  
COMPLAINT HEREIN,

**DECLARATION OF SERVICE  
(BRIEF OF APPELLANTS)**

Appellants.

LOUELLA K. WILSON hereby declares as follows:

On this 27<sup>th</sup> day of January 2015, I caused a true and correct copy of the Brief of Appellant in this matter to be delivered via legal messenger service to Craig A. Peterson, counsel for Respondent, at the following address:

Craig A. Peterson  
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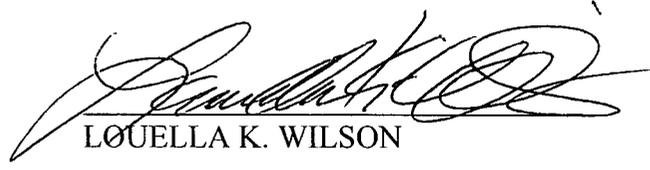
DECLARATION OF SERVICE - 1

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ORIGINAL

1 I hereby certify under penalty of perjury under the Laws of the State of Washington that  
2 the foregoing is true and correct.

3 SIGNED at Tacoma, Washington this 27<sup>th</sup> Day of January, 2015.

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6 LOUELLA K. WILSON

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