

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

NO. 47484-1-II

DANIEL J. WAGNER and ALICE L. WAGNER,

Appellants,

v.

EMC MORTGAGE, LLC f/k/a EMC MORTGAGE CORPORATION;
ACQURA; VANTIUM CAPITAL, INC.; J.P. MORGAN CHASE BANK,
N.A.; J.P. MORGAN MORTGAGE ACQUISITION CORP.; KAREN L.
GIBBON, P.S.; and DOE Defendants 1-20

Respondents.

BRIEF OF RESPONDENT

APPEAL FROM PIERCE COUNTY SUPERIOR COURT

The Honorable Elizabeth Martin

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I. INTRODUCTION

This appeal arises out of an uncompleted non-judicial foreclosure proceeding initiated against Appellant Daniel and Alice Wagner (the “Wagners”) because of their long-standing default on their mortgage obligations due to chronic unemployment. The Wagners have been living virtually rent free for over five years, yet they make unsubstantiated claims that they suffered damages and injuries as a result of the Respondents’ alleged misconduct and noncompliance with the Washington Deed of Trust Act (“DTA”). The trial court agreed, finding that Wagners provided no evidence of any damages or other injury they suffered as a result of the Respondents’ alleged deceptive acts in connection with the foreclosure or FFA mediation. Consequently, the trial court granted summary judgment in favor of EMC Mortgage Corporation (“EMC”), J.P. Morgan Mortgage Acquisition Corp. (“JPMMAC”) and ClearSpring Loan Services, Inc. f/k/a Vantium Capital Inc. f/d/b/a Acqura Loan Services (“Clearspring”), hereinafter collectively referred to as Lender Respondents.

On appeal, Wagners contend that the trial court erroneously granted summary judgment in favor of Lender Respondents because the Wagners suffered pre-sale injuries and sustained damages as a result of Lender Respondent’s alleged misconduct. The trial record, however,

categorically supports the granting of summary judgment to Lender Respondents. The Wagners' claim for damages are either impermissible or insufficient as a matter of law or not supported by the evidence in the record. Moreover, the Wagners largely relied on erroneous legal theory that the foreclosing party be both the "owner" and "holder" of the note. In Washington, a note holder is entitled to enforce the note and foreclose.¹

As demonstrated below, the trial court correctly granted Lender Respondents motion for summary judgment because no dispute exists with respect to the following material facts: (1) the Wagners defaulted on their loan; (2) EMC is the holder of the Note; (3) EMC was entitled to commence a foreclosure because of Wagners defaulted and EMC holds their promissory note; (4) Wagners provided no evidence any damages or other injuries they suffered as a proximate result of Lender Respondents' conduct.

It is not enough for the Wagners to merely claim an unfair or deceptive act because under Washington law, a borrower must still produce evidence on each element required to prove his or her claim.

¹*Brown v. Dep't of Commerce*, 2015 WL 6388153 (Oct. 22, 2015)(resolved longstanding issue of whether beneficiary must be both the actual holder and owner of the Note to foreclose and holding that a person need not own a note to be entitled to enforce the note)

See Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 119, 285 P.3d 34 (2012). (CPA claim viable only if "the homeowner can produce evidence on each element required to prove a CPA claim"). The Wagners simply failed to produce the necessary evidence on any of their claims, yet now ask this Court to reverse the trial court and allow them a second bite at the apple.

Lender Respondents respectfully request that the trial court's entry of summary judgment should be affirmed because no material facts are in dispute and they are entitled to judgment as a matter of law.

II. COUNTER-STATEMENT OF ISSUES ON APPEAL

The Wagners frame the issues as conclusory statements of fact and law that are neither accurate nor supported by the trial court record.

The dispositive issue in this case are as follows:

1. Did the trial court properly grant summary judgment, where the evidence showed that EMC was the respective beneficiary under the Deed of Trust?
2. Did the trial court properly grant summary judgment, where the evidence showed that Chase Bank disclaimed any interest in subject loan or the Property?

3. Did the trial court properly grant summary judgment, where the Wagners failed to show alleged “injuries” or “damages” that were caused by Lender Respondents?

Lender Respondents briefly reply to the “issues” as framed by the Wagners.

1. First, as to Wagner’s claim concerning a lack of evidence on the identity of loan owner and note holder, ownership is not relevant. *Trujillo v. Nw. Trustee Servs., Inc.*, 181 Wn. App. 484, 326 P.3d 768 (2014)(“it is the holder that has the right to enforce the note, regardless of whether that entity also owns the note”). The trial court record includes ample evidence demonstrating EMC as the lawful beneficiary, including but not limited to, Declaration of Ownership; Affidavit from Servicing Agent for EMC; EMC Responses to Request for Admission, and presentation and possession of Original Note with counsel. Regarding the ownership of the loan that is not relevant in connection with the non-judicial foreclosure or the FFA mediation. The Supreme Court recently held in *Brown v. Washington State Department of Commerce* No. 90652-1 that the legislature intended the beneficiary to be the noteholder as the party who has authority to enforce the note. The *Brown* decision is consistent with *Bain* and *Trujillo*, which also held that the note holder is the proper party to foreclose.

2. Second, Appellants did not raise the signing of the Appointment of Successor Trustee until summary judgment oral argument. In fact, the Complaint asserts that the Appointment of Successor Trustee was signed by Vivian Farr, Vice President of EMC. CP 14. Lender Respondents, however, submitted a Declaration of Clearspring demonstrating that Acqura served as the servicing agent for EMC with respect to the subject loan, and in its role as servicing agent, EMC gave authority to Acqura to act on its behalf. Additionally, Karen L. Gibbons did not complete a foreclosure sale pursuant to said Appointment, and the Appointment is no longer operative as a new foreclosure will need to be commenced.

3. Third, as to the Wagners' CPA and misrepresentation claim, they must do more than articulate an "injury". The Wagners must satisfy each element of her CPA and misrepresentation claims, including but not limited to causation and damages, in order to survive summary judgment.

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background

1. *Wagners' Loan Documents and Default*

On or about March 15, 2005, Wagners executed a promissory note ("Note") in the amount of \$162,400.00 (the "Note") with Wells Fargo Bank.

N.A to purchase the property located at 21120 119th Street East, Sumner, Washington 98390 (the "Property"). CP 1318-1319. To secure payment of the Note, the Wagners executed a Deed of Trust, granting Wells Fargo and its successors a security interest in the Property. CP 1319. By signing the Deed of Trust, the Wagners agreed to convey the power of sale to the trustee if the Wagners did not make their loan payments. CP 1319. The Deed of Trust was recorded on March 18, 2005 as Instrument 200503180542 in the Official Records of Pierce County. CP 1319.

Subsequently, Wells Fargo Bank, N.A. endorsed the Note to EMC and executed a corresponding Assignment of the Deed of Trust. CP 1319. The Assignment of the Deed of Trust was recorded on January 11, 2008 as Instrument 200801110037 in the Official Records of Pierce County. CP 1319. EMC Mortgage, LLC is the successor in interest to EMC Mortgage Corporation. CP 1319.

A Declaration of Ownership of Note executed on May 30, 2012 indicates that EMC Mortgage as the "current owner and/or actual holder" of the Note. CP 1319. At all times relevant to Wagners' lawsuit, the record reflects that EMC Mortgage owned subject Note. CP 1319. Counsel for EMC presented the original note at the summary judgment hearing for inspection and remain in possession thereof. VRP : 20-21.

In 2006, only a year after origination, Wagners defaulted on their Note.

CP 1319. In 2008, after the initiating of a foreclosure proceeding, Wagners contacted EMC Mortgage regarding their default. CP 1319. EMC offered Wagners a repayment plan to allow Wagners the opportunity to cure their default. CP 1319. Wagners mischaracterize the repayment plan as a loan modification. CP 1319. Wagners' loan was not modified. CP 1319. Wagners were offered a repayment plan to cure their delinquency. CP 1319. Wagners defaulted on their repayment plan by failure to make the balloon payment. CP 1320. As result of Wagners' default, foreclosure proceedings resumed in 2009. CP 1320.

2. *Wagners' Bankruptcy Filings*

Consequently, Wagners filed for Chapter 13 bankruptcy to stop the trustee's sale set for September 4, 2009. CP 1320. EMC Mortgage filed a Proof of Claim in this bankruptcy on January 13, 2010 to assert its right as creditor. CP 1320. The Proof of Claim notified all interested parties that EMC was the owner and holder of Wagners' note. CP 1320. On September 28, 2010, Wagners objected to EMC's Proof of Claim, based partly on different copies of the note being filed, and EMC filed a response to the claim objection. CP 1320. Ultimately, Judge Lynch denied the objection thereby verifying that EMC's Proof of Claim, finding EMC was the proper party to assert the claim as beneficiary. CP 1320. On December 21, 2011, this Chapter 13 bankruptcy was thereafter dismissed based on Wagners' failure to pay arrears on the loan.

CP 1320.

Wagners also filed for a Chapter 7 Bankruptcy on November 29, 2012. CP 1320. Wagners disclosed in their bankruptcy schedules, signed under penalty of perjury, that the property was subject to a secured claim in the amount of approximately \$160,000 and an unsecured claim of approximately \$20,000 CP 1320. On March 13, 2013, Wagners were granted discharge. CP 1320.

3. *Ineffective and Unnecessary Assignment and Allonge*

In anticipation of a transfer that never actually occurred, on May 22, 2009, EMC Mortgage executed an Assignment of Deed of Trust to Chase. CP 1320-1321. This document, however, was never recorded. CP 1321. EMC Mortgage also created an allonge to JP Morgan Chase Bank, N.A. (“Chase”). Akin to an unrecorded assignment, an allonge is not operative unless it is affixed to the Note and delivered to a recipient. CP 1321. There is no evidence in the record establishing that this allonge was ever affixed to the Note. CP 1321. Wagners do not allege that the allonge was ever affixed to Wagners’ Note and Chase unambiguously disclaimed any interest. CP 1321. Furthermore, counsel for Lender Respondents obtained the collateral file at the onset of the litigation, which included the original note, and no such allonge was attached. VRP 5: 20-21; 6: 5-8. Defense counsel personally retrieved and inspected the original note and confirmed that no such allonge to Chase was

attached. VRP 6: 5-8. The original note has an allonge by EMC Mortgage in blank attached. VRP 6: 5-8. The original note has been logged into defense counsel's original documents inventory and is being stored in a fireproof secure safe on the law firm's premises where it will remain during the litigation proceedings. CP 1321. Counsel will make it available to this Court for inspection at any the time.

These two documents – the unrecorded assignment and unattached allonge – were drafted for a potential transfer to Chase that never actually occurred. CP 1321. There is no reliable evidence to the contrary.

4. 2009 Foreclosure

On December 11, 2007, EMC Mortgage recorded an Appointment of Successor Trustee appointing Quality Loan Service Corporation of Washington ("Quality") as successor trustee. CP 1322. Quality issued a Notice of Trustee's Sale on June 2, 2009 thereby prompting Wagners to file a Chapter 13 bankruptcy. CP 1322. Quality did not sell the property at trustee's sale. CP 1322. Quality is not a party to this lawsuit and the 2009 foreclosure proceedings are not at issue here.

5. 2012 Foreclosure Fairness Act Mediation

In early 2012, the Wagners requested mediation under the FFA. CP 11. During mediation, Acqura served as servicing agent for EMC. CP 1090. Acqura possessed the ability to make loss mitigation decisions,

based on the authority provided to Acqura by EMC, relating to the Plaintiffs-borrowers loan obligation at issue. CP 1090-1091. As a part of the FFA document exchange, a Declaration of Ownership Note was provided, which indicated that EMC was “current owner and/or the actual holder of the promissory note dated March 14, 2005.” CP 1095. The ineffective Assignment to Chase, as well as the unaffixed allonge were also exchanged among the mediating parties but at no point did Acqura represent that it had legal authority to act on behalf of Chase. CP 1095. On May 25, 2012, the mediator reported that the loan restructure offer was not acceptable to Wagners but certified that both parties acted in good faith. CP 886-888; CP 1095. Wagners did not challenge or appeal the mediator’s finding. CP 888-889.

6. 2012 Foreclosure

Following the mediator’s certification, a Notice of Default dated April 6, 2012, identifying EMC Mortgage as the owner of the Note, was issued. CP 1322. EMC appointed Karen L. Gibbons, PS as the successor trustee. CP 14. The Appointment of Successor Trustee was recorded on June 5, 2012 as Instrument 201206050920 in the Official Records of Pierce County. CP 1322.

As stated in its Responses to Requests for Admission, EMC admitted that it is in possession of the original note and that the Note remained in its

possession since the transfer from Wells Fargo. CP 1323. Thus, at all times relevant to this lawsuit, EMC has held subject note and was the lawful beneficiary. CP 1323. The allonge and assignment from EMC to J.P. Morgan Chase Bank, N.A. was done in error. CP 1323.

After its appointment as successor trustee, Karen L. Gibbons, P.S. recorded a Notice of Trustee's Sale on July 26, 2012 as Instrument 201207260451 in the Official Records of Pierce County. CP 1322. The trustee's sale was set for November 30, 2012. CP 1323. Wagners, however, filed for bankruptcy to stop the foreclosure sale. CP 1323. The court granted Wagners' relief from stay. CP 1323. The foreclosure sale had been rescheduled to February 15, 2013. CP 1323.

On and around February 7, 2013, Wagners filed a Complaint in this Court and moved for a temporary restraining order. CP 1323. On April 11, 2013, Wagners filed a Motion for Preliminary Injunction. CP 1323. The Property never went to sale. CP 1323. Wagners continue to reside in the Property.

7. 2013 Foreclosure

On March 28, 2013, EMC Mortgage assigned its interest in the Deed of Trust to J.P. Morgan Mortgage Acquisition Corp. ("JPMMAC"). CP 1323. This assignment was recorded on November 13, 2013 as Instrument 20131120044 in the Official Records of Pierce County. CP 1323. Because

this assignment was done in error, an affidavit of rescission was prepared for recording. CP 1323. Maximum postponement was reached; therefore, the sale was ultimately cancelled. CP 1323. At this time, the loan remains in substantial default and the property has not been foreclosed on. CP 1323.

B. Procedural Background

1. *Wagners' Complaint.*

On February 7, 2013, Wagners filed a Complaint in Pierce County, Washington alleging three causes of action – (1) Preliminary Injunction, (2) Consumer Protection Act (“CPA”), and (3) Intentional/Negligent Misrepresentation. CP 1-22. The next day, Wagners filed a Motion for Temporary Restraining Order seeking to enjoin the then-pending trustee’s sale of the Property. CP 23-80. On April 11, 2013, Wagners filed a Motion for Preliminary Injunction. CP 199-328. Wagners made no payments into the court registry while the trial court litigation was pending.

2. *Discovery on EMC*

Defendant J.P Morgan Chase Bank, N.A. served Request for Admission concerning ownership of the Note. CP 591-593. EMC answered the discovery, verifying its ownership and possession of the Note. Wagners conducted no discovery or took any depositions to dispute or challenge the Admissions. CP 591-593.

3. *Lender Respondent's Prevailed on Summary Judgment.*

On March 2, 2015, EMC and JPMMAC filed a motion for summary judgment, requesting that the Court dismiss Wagner's claims against it on the grounds that (1) Wagners failed to demonstrate injury and prove causation for her CPA claim; and (2) Wagners failed to prove with clear and convincing evidence damages, causation and reliance on her misrepresentation claim. CP 1317-1341. EMC and JPMMAC also argued that the res judicata doctrine barred the Wagners from readdressing whether EMC is the note holder. CP 1325-1330.

ClearSpring Loan Services, Inc. f/k/a Vantium Capital Inc. f/d/b/a Acqura Loan Services ("Clearspring") also moved for summary judgment on similar grounds. CP 1092-1110. On March 27, 2015, the Superior Court granted Lender Respondents' motion for summary judgment finding that EMC was the holder of the Note; the purported allonge has no effect and had previously been adjudicated; and lack of evidence to support a misrepresentation or CPA claim. CP 1340-1341. VRP 44:20-25; 45: 1-3. On April 24, 2015, Wagners appealed to this Court.

4. *Loan Modification Efforts*

Contrary to the Wagners' claim that they only wanted a modification, they failed on multiple occasions to comply with the loan

modification application process. CP 1436-1437. After several months of document chasing and never receiving a complete loan modification package, Lender Respondents closed the review. CP 1439-1440.

IV. STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party bears the initial burden of showing the absence of an issue of material fact. See *Young v. Key Pharm., Inc.*, 11 Wn.2d 216, 225, 770 P. 2d 182 (1989). A material fact is one upon which the outcome of the litigation depends. *Graham v. Concord Constr., Inc.*, 100 Wn. App. 851, 854 (2000)

In responding to a summary judgment motion, the nonmoving party cannot rely on the allegations made in the pleadings. *Young*, 11 Wn.2d at 216. Instead, by affidavits or as otherwise provided in this rule, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *Id.* Mere allegations or conclusory averments of fact or legal conclusions are insufficient to raise a genuine issue of material fact. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P. 2d 298 (1989).

Summary judgment is reviewed de novo. *Vallandigham v. Clover Park Sch. Dist. No.*, 400. 154 Wn.2d 16, 26, 109 P.3d 805 (2005). This

Court will consider the same evidence that the trial court considered on summary judgment. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Yet, this Court may affirm the trial court ruling on any ground supported by the record, "even if the trial court did not consider the argument." *King Cnty. v. Seawest Inv. Assocs., LLC*, 141 Wn. App. 304, 310, 170 P. 3d 53 (2007) citing *LaMon v. Butler*, 112 Wn.2d 193, 200 -01, 770 P. 2d 1027 (1989)).

The trial court correctly applied these standards in granting summary judgment to Lender Respondents. Accordingly, this Court should affirm that decision for the reasons set forth below

V. ARGUMENT

A. Facts cited by Wagners are not properly pled and not relevant to this appeal.

The Wagners' Statement of Facts is replete with argument and legal conclusions. Under RAP 10.3, such a conclusory, unsupported and argumentative statement is inappropriate in the recitation of facts and should be disregarded by the Court. Self-serving statements in the appellate brief that were unsupported in the record are not to be considered on appeal. *Housing Authority of Grant County v. Newbigging*, 105 Wn. App. 178, 19 P.3d 1081 (2001).

The Wagners also advance an argument in the appeal that was first

made at oral argument on summary judgment— specifically that Acqura improperly signed the Appointment of Successor as attorney-in-fact for EMC claim. There is no indication that the Wagners made any attempt to disprove the authority of Acqura as attorney-in-fact for EMC. In fact, the Complaint states that EMC signed the Appointment. CP 14. It was not until the final hour at oral argument that the authority of Acqura to sign as attorney-in-fact for EMC came into question. The record, however, included a declaration from Acqura establishing it as the servicing agent for EMC. CP 1315-1316. “Washington law, and the deed of trust act itself, approves of the use of agents.” *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wash.2d 83, 106, 285 P.3d 34 (2012). Further, the Appointment is not operative because the trustee did not foreclose. Finally, the record is void as to how this Appointment of Successor Trustee document gave rise to a CPA or misrepresentation claim.

B. Res Judicata bars the Wagners’ claims concerning EMC as the real party in interest and proper party to foreclose.

The trial court relied on the doctrine of res judicata only to the extent that it found the allonge had no effect and that this issue was adjudicated in the Bankruptcy Court as well as by the trial court in J.P Morgan Chase Bank’s Motion for Summary Judgment. VRP 44: 21-25. The record before this Court clearly establishes res judicata also applies more broadly here.

Generally, the Wagners argue that their claims arose after the Chapter 13 Bankruptcy proceeding. This is simply not true because the lynchpin of Wagners' complaint hinges on their argument that EMC is not the holder of note, and the Wagners adjudicated this exact issue against EMC in the Chapter 13 bankruptcy proceeding in September 2009.

Plaintiffs filed for Chapter 13 bankruptcy protection to stop the sale of their home. On January 13, 2010, EMC, as creditor to the amounts owed on the Note, filed its Proof of Claim. CP 1320. Wagner filed their objection to EMC's Proof of Claim on September 2010. CP 1320. The Wagners cited to the unrecorded assignment and unattached allonge as the source of their alleged confusion – the same documents they point to in this instant action to refute EMC's note holder status. CP 1320. EMC filed a Response to the Claim Objection on November 3, 2010. CP 1320. EMC addressed the Wagners' allegations explaining that an old image of the note was filed with the claim, but that the claim was later amended and supported by a newer copy of the note as well as a copy of the filed deed of trust. The note was specially endorsed to EMC. CP 678-679. In their objection, EMC also addressed Wagners' other allegations including improper bankruptcy fees, double collecting of property taxes, and payments made under the repayment plan. CP 679-681. Judge Lynch heard oral argument from the parties and decided the matter on the merits, finding in favor of EMC as the note holder. CP 686.

The Wagners now seek to overturn that decision and relitigate the issue in the present case. The doctrine of res judicata, however, prohibits such action.

The doctrine of res judicata would be rendered meaningless if the Wagners were allowed to bring these same claims in the present action. Res judicata bars the relitigation of claims that were litigated to a final judgment or could have been litigated to a final judgment in a prior action. *Loveridge v. Fred Meyer, Inc.*, 125 Wn. 2d 759, 763, 887 P.2d 898, 900 (1995). The purpose of res judicata is to prevent the relitigation of already determined issues and reduce the multiplicity of actions. In order to have *res judicata* effect, a judicial determination must be final and on the merits, and the first and second proceedings must be identical with respect to (1) the subject matter; (2) the claim or cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. *Pederson v. Potter*, 103 Wn. App. 62, 67, 11 P.3d 833 (2000)(citing *Loveridge v. Fred Meyer, Inc.*, 125 Wn. 2d 759, 763, 887 P.2d 898 (1995)).

Claims adjudicated in a bankruptcy court cannot subsequently be litigated if those later claims were or could have been raised in the earlier bankruptcy proceeding. *Siegel v. Fed. Home Loan Mortgage Corp.*, 143 F.3d 525, 529 (1998). In *Siegel*, the Court found that the debtor or the trustee could have raised objections in the bankruptcy when Freddie Mac filed its proof of claims. *Id.* Because the debtor did not file objections and because

the present suit and the proofs of claim stem from the same nucleus of facts, involve similar evidence and interests at stake, the Court ruled that the debtor was barred by doctrine of res judicata from raising such objections in a separate case. *Id.* The *Siegel* Court rejected the debtor's contention that the proofs of claims filed by Freddie Mac were not final judgments giving rise to res judicata. *Id.* The bankruptcy court's allowance or disallowance of a proof of claim is a final judgment. *In re Los Gatos Lodge, Inc.*, 278 F.3d 890, 894 (9th Cir. 2002)(citing to *Siegel v. Fed. Home Loan Mortgage Corp.*, 143 F.3d 529-30 (1998)). As noted by Wagners, *Siegel* has not been overruled, and therefore, remains good and instructive case law today.

In line with *Siegel*, another court concluded that several courts, which have considered the effect of a debtor's failure to disclose a potential lender-liability lawsuit in a bankruptcy proceeding have universally, held that the debtor is equitably estopped, judicially estopped, or barred by res judicata. *Puget Sound Nat. Bank v. Ferguson*, 102 Wn. App. 400, 404, 7 P.3d 822, 825 (2000). Washington courts are no exception. In *Saluteen-Maschersky v. Countrywide Funding Corp.*, the court held that under the doctrine of res judicata, a plaintiff is barred from litigating claims that either were, or should have been, litigated in a former action." Because the debtor's claim of faulty accounting was earlier litigated in the bankruptcy proceeding, the court ruled the claim was barred by res judicata. *Saluteen-Maschersky v. Countrywide*

Funding Corp., 105 Wn. App. 846, 856, 22 P.3d 804, 809-10 (2001).

The Wagners argues that res judicata does not bar their CPA claim because the Complaint litigates acts that follow the Bankruptcy Order and not the issue of who had the right to follow the proof of claim. The problem with the Wagner's argument is that the basis for their objection the EMC's proof of claim is the same as it is in the litigation: EMC was not the note holder. Thus, the issues at their core involve the same claim and subject matter – who holds the Wagners' note. The Chapter 13 bankruptcy order verified that EMC was the rightful note holder. CP 686. Moreover, the 2009 allonge and assignment were created in 2009 – before the Proof of Claim filing, objection, and adjudication by the court. CP 598-599; 626-633; 686; 794.

Parties may not raise new legal theories based upon the same transactional nucleus of facts that could have been raised in the original action. *Sound Built Homes, Inc. v. Windermere Real Estate/South, Inc.* 118 Wash.App. 617, 72 P.3d 788, 796 (2003). The elements of the res judicata are satisfied here. The Wagners are bound by the decision in the Chapter 13 Bankruptcy Court because the same parties, subject matter, and cause of action are involved.

C. The Trial Court Properly Granted Summary Judgment in favor of Lender Respondents as to Pre-Sale DTA-Based Claims.

To the extent that Appellants argue damages stemming from violations alleged violations of the DTA, such claims are barred in a pre-trustee's sale situation. In *Frias v. Asset Foreclosure Services*, the Supreme Court recently held that in the absence of a foreclosure, no viable DTA claims remain. *Frias v. Asset Foreclosure Servs., Inc.* 181 Wn.2d 412, 428-30, 334 P.3d 529 (2014). Because there has been no foreclosure, the Wagners have no claims for damages under the DTA. The Wagners concede this much in their brief, stating that "[t]his means that the Wagners' claims for direct violations of the DTA are not moot." AOB 37. Therefore, the trial court properly resolved the Wagners' pre-sale DTA claims in favor of Lender Respondents.

D. EMC was the Holder of the Note and therefore the Proper Party to Foreclose under the Deed of Trust Act.

EMC was entitled to summary judgment because as the holder of the Note, it had the right to enforce upon the Wagners' default. The Wagners, however, assert that summary judgment should not have been granted because of genuine issues of material fact remain unanswered regarding whether EMC was the holder and loan owner. The core of the Wagner's case against Respondents centers on their argument – that there is some question as to whether EMC is the proper party to foreclose. This argument, however, is fatally flawed for several reasons. First, as

explained above, this issue has already been decided in the Chapter 13 Bankruptcy proceeding. Second, there is ample evidence in the record to the trial court that EMC was the note holder. Third, the Wagners' argument that the foreclosing entity must be the owner and holder is contrary to recent Appellate and Supreme Court decisions.

RCW 61.24.005(2) defines the beneficiary of a deed of trust as the actual note holder. See also *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 89, 285 P.3d 34 (2012). Consequently, *Bain* approves of foreclosures in cases where the note holder is the party seeking to enforce the security instrument and foreclose. *Id.* at 104; 44. Thus, as a matter of law, EMC's authority to foreclose derived from its status as the holder of the Note.

This *Bain* definition of beneficiary is consistent with Washington's UCC, which provides that a "person entitled to enforce" an instrument means:

(i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or 62A.3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

RCW 62A.3-301. The UCC defines holder with respect to a negotiable

instrument as, in part: “[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.” RCW 62A.1-201; RCW 62A.3-301. An instrument payable to an identified person may become payable to bearer if it is *indorsed in blank* pursuant to RCW 62A.3-205(b).” (emphasis added). Moreover, pursuant to RCW 62A.3-301, “a person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.”). Here, however, there is a specific indorsement to EMC.

Here, the record before this Court clearly establishes that EMC was the holder of the Note. Specifically, the Affidavit from Residential Credit Solutions, Inc., servicer of subject loan for EMC, was signed under the penalty of perjury and asserts that EMC has maintained continuous ownership of the Note since it purchasing of the loan from Wells Fargo. CP 1353. Counsel for Respondents received the original note at the onset of litigation and remain in possession today. CP 1342-1343. The endorsement from Wells Fargo to EMC coupled with EMC’s possession of the Note makes EMC the “holder” of the Note under Washington law. RCW 62A.3-205(b). The Declaration of Ownership also avers that EMC is the “current owner and/or actual holder of the promissory note dated March 14, 2005.” CP 13, 158. Additionally, the Bankruptcy Court also

adjudicated this issue and determined EMC was the note holder. CP 794-795. This is all consistent with the note endorsement and assignment of the deed of trust to EMC.

The Wagners argue for the first time on appeal that the language in the declaration is ambiguous and challenge the declaration on grounds it is not signed by EMC. It is well settled that the failure to present an issue to the trial court precludes its consideration on appeal. *State v. O'Connell*, 83 Wn.2d 797, 822, 523 P. 2d 872 (1974). Because these arguments were not presented to the trial court, they cannot be considered on appeal.

Notwithstanding the waiver of these arguments, there is also substantively no merit to such claims. The Declaration in the present case does not contain the same ambiguous language that the Court took issue with in *Lyons*. Specifically, in *Lyons*, the Washington Supreme Court found that a beneficiary declaration's reference to RCW 62A.3-301 was ambiguous, and therefore, the trustee could not rely on it, but the trustee could still demonstrate compliance with RCW 61.24.030(7)(a) through other evidence. *Lyons v. U.S. Bank Nat. Ass'n*, 181 Wash. 2d 775, 780-81, 336 P.3d 1142, 1146 (2014). Here, the Declaration contains no such ambiguity because "holder" is contained in both options. The Declaration of Ownership unequivocally states that EMC is the current owner and/or the actual holder. CP 385. The Wagners introduced no evidence

suggesting anyone other than EMC ever claimed to hold the Note or sought to enforce it.

Moreover, the Wagners' arguments about an alleged lack of credible evidence regarding the owner of loan do not accurately describe the current state of Washington law. Specifically, Washington law is not concerned about who has an ownership interest in the Note. *See Trujillo v. Nw. Tr. Servs., Inc.*, 181 Wn. App. 484, 498-500 (Wn. App. 2014) (noteholder may enforce note even if not also the owner). The Supreme Court echoed this holding in *Brown v. Washington State Dep't of Commerce*, which entirely discounts the Wagner's arguments on ownership. *Brown v. Washington State Dep't of Commerce*, No. 90652-1, 2015 WL 6388153, at *1 (Wash. Oct. 22, 2015). In *Brown v. Washington State Dep't of Commerce*, Brown executed a promissory note in favor of Countrywide Bank. Countrywide sold the note to Freddie Mac and M & T Bank became the servicer of the note. *Id.* The Court held that M & T Bank was the holder of the note and entitled to enforce it, determining that the holder, rather than the owner, of the promissory note was the beneficiary of the deed of trust and that a party's undisputed declaration submitted under penalty of perjury that the party is the holder of the note satisfies the DTA's proof of beneficiary provisions, RCW 61.24.030(7)(a) and RCW 61.24.163(5)(c). *Id.* The State Supreme

Court's decisively concluded that Washington law authorizes the "division of note ownership from note enforcement." *Id.* Thus, even if an entity other than EMC owned the loan, this does not give rise to an actionable claim because all the evidence points to EMC as the note holder. Under *Brown*, the owner of the loan is irrelevant and thus the owner language in the Declaration is superfluous. The Superior Court correctly found that there is no genuine dispute that EMC is the note holder and therefore the proper party to foreclose. The Court should affirm this finding.

E. The Superior Court Properly Dismissed the CPA claim against Lender Respondents.

The Superior Court properly granted Lender Respondents judgment on the CPA claim. To establish a violation of the Washington CPA, a plaintiff must prove "(1) an unfair or deceptive act, (2) in trade or commerce, (3) that affects the public interest, (4) injury to the plaintiff in his or her business or property, and (5) a causal link between the unfair or deceptive act complained of and the injury suffered." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). A plaintiff must "produce evidence on each element required to prove a CPA claim." *Bain*, 175 Wn.2d at 119. To establish a CPA violation, a plaintiff must show

injury to his or her business or property. *Hangman Ridge Training Stables, Inc.*, 105 Wn. 2d at 785; 719 P.2d 535; *Cooper's Mobile Homes, Inc. v. Simmons*, 94 Wash. 2d 321, 327, 617 P.2d 415 (1980) (CPA plaintiffs must show that injury resulted from defendant's acts). A plaintiff must also prove a proximate causal link between the unfair or deceptive act and the purported injury by plaintiff. *Hangman Ridge Training Stables, Inc.*, 105 Wn. 2d at 785; 719 P.2d 535.

Without the causation link, a CPA claim fails. In *Indoor Billboard*, the court concluded that the definition of "proximate cause" as defined in Washington Pattern Instruction ("WPI") 15.01, which requires a plaintiff prove that "but for" the defendant's unfair or deceptive act, the plaintiff's injury would not have occurred, is required to establish the causation element of a CPA claim. *Indoor Billboard v. Integra Telecom*, 162 Wn. 2d 59, 83, 170 P.3d 10 (2007). The ordinary principles governing CPA claims apply to CPA claims premised on alleged violations of the Deed of Trust Act. *Frias v. Asset Foreclosure Services, Inc.*, 181 Wash. 2d 412, 421, 334 P.3d 529, 533 (2014). Moreover, Washington law does not recognize a claim of damages for the wrongful institution of foreclosure proceedings. *Id.* at 420; *Barkley v. Greenpoint Mortgage Funding, Inc.*, 190 Wash. App. 58, 68, 358 P.3d 1204 (2015) ("The DTA does not create an independent cause of action

for monetary damages based on alleged violations of its provisions when, as here, no foreclosure sale has occurred).

1. Wagners do Not Establish an Unfair or Deceptive Act.

In their opening brief, the Wagners largely seem to abandon their CPA claim. In the issues section of the brief, the Wagners argue that they articulated “their” injury and monetary damages caused by Defendants to allow them relief under the CPA. (AOB, pg. 9). The Wagners, however, fail to explain how the actions of Lender Respondents proximately caused them injury. The first CPA prong requires establishing “a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest.” *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 787 ¶ 32 (2013). Wagners do not allege a per se violation. Therefore, the alleged deceptive act must violate public interest. The Wagners failed to make this showing.

It is not clear from their briefing what exact misconduct the Wagners are claiming to support their CPA claim. Wagners point to an erroneous assignment and the “intentional avoidance of Chase and EMC to using “noteholder” or “loan owner” as acts that violated the CPA. (AOB, pg. 39). There is no explanation as to how these acts constitute

deceptive or unfair practices under the CPA, or how the Wagners were injured as a results of these practices.

To the extent that the Wagners are generally alleging that Lender Respondents violated the DTA. This claim fails because as Lender Respondents have proven, EMC was the note holder and proper party to foreclose. The trial court and bankruptcy court came to the same conclusion. As for the unrecorded assignment to Chase and unaffixed allonge to Chase, these documents do not give rise to a CPA claim because they were ineffective, and there is no evidence the record that Wagners relied on these documents to their detriment. There is also no evidence in the record as to how these documents had the capacity to deceive. The same holds true for the erroneous assignment to JP Morgan Mortgage Acquisition Corp., which has been subsequently rescinded, as well as the Appointment of Successor Trustee, because the trustee never sold the property.

To be “deceptive,” the act or practice must be one that “misleads or misrepresents something of material importance.” *Nguyen v. Doak Homes, Inc.*, 140 Wn. App. 726, 734 (2007). The Wagners failed to explain how on any of these inoperative and ineffective documents misrepresented a material fact or how they had a capacity to deceive. There is no evidence in the record that Wagners did not know who to

make loan payments to, how to cure their default, or who to contact about a loan modification. Moreover, even if any of the alleged acts could satisfy the first prong of the CPA claim, the Wagner' failed to demonstrate the remaining elements.

2. Lender Respondents' action did not impact public interest.

To prevail on a CPA claim, a plaintiff must show that the alleged unfair or deceptive act impacts the public interest. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn. 2d 778, 788, 719 P.2d 531, 536 (1986). Here, the Wagners failed to show how Lender Respondents took some action which "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves or outweighed by countervailing benefits." *Klem v. Washington Mut. Bank*, 176 Wn. 2d 771, 787, 295 P.3d 1179, 1187 (2013).

In a consumer transaction, like the one in the instant case, the following factors are relevant to establish 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?²

When applied to the present case, it is clear that the public interest cannot be met. In fact, the only factor that arguably the Wagners could possibly show would be the first factor relating to acts occurring in course of defendants' business. There is, however, no evidence that the alleged deceptive acts—presenting an unrecorded assignment and unaffixed allonge to Chase in the mediation— were part of a pattern or even happened outside of Wagners' FFA mediation. Thus, the acts are not part of a pattern or generalized course of conduct. Moreover, there is no real and substantial potential for repetition of Lender Respondents alleged acts because the alleged acts pertain only to plaintiffs' repayment plan and single mediation session. All of Wagners' claims in the Complaint relate exclusively to conduct allegedly committed against them (i.e. whether EMC held their note; whether their FFA mediation complied with the statute). Consequently, no other consumers were affected or likely to be affected by the alleged conduct which concerned plaintiffs' loan and private mediation session.

Plaintiffs fail to satisfy the public interest requirement. Their CPA claim is simply based only on a private dispute between a creditor and debtor rather than a consumer transaction. Importantly, as noted by the *Hangman*,

² *Hangman Ridge Training Stables, Inc.*, 105 Wn 2d at 790.

“where the transaction was essentially a private dispute . . . it may be more difficult to show that the public has an interest in the subject matter” and that “[o]rdinarily, 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.” *Hangman Ridge Training Stables, Inc.*, 105 Wn 2d at 790. There are no facts as to how the public was affected by the Lender Respondents’ conduct in the uncompleted foreclosure on the Wagner’s home. Consequently, the trial court’s dismissal of the CPA claim should be affirmed.

3. Wagners were Not Injured by the Conduct of the Lender Respondents.

To prove a CPA violation, the Wagners had to establish that but-for Lender Respondents’ conduct, they would not have suffered an injury. *Indoor Billboard*, 162 Wn.2d at 84. Likewise, the Wagners were required to prove an injury to their business or property. *See Hangman Ridge*, 105 Wn.2d at 792. Plaintiffs cannot be compensated for lost wages or personal injuries under the CPA. *Wash. Sate Physicians Inc. Exch. & Ass’n Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993). Thus, damages for mental distress, embarrassment, and inconvenience are not recoverable under the CPA.” *Panag v. Farmers Ins. Co. of Washington*, 166 Wn. 2d 27, 57, 204 P.3d 885, 899 (2009). Finally, the fees and costs incurred in litigating the CPA claim are not the type of

costs necessary to establishing the damages element of a CPA claim. *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wash.App. 553, 563–64, 825 P.2d 714 (1992). The Wagners failed to plead an injury that was proximately caused by Lender Respondents. Therefore, the trial court properly granted summary judgment for these reasons.

Even if the trial court found any compensable injury claims, the Wagners failed to demonstrate that their asserted injuries were proximately caused by Lender Respondents. The foreclosure resulted from the Wagners' default in their loan obligations and their subsequent failures including: (1) fail to comply with the repayment plan to cure their delinquency; (2) fail to accept the loan restructure offered at the FFA mediation; and (3) fail to submit a loan modification package. CP 1319-1320, 888, 1436-1449. The default and foreclosure did not result from the actions of Lender Respondents. The Wagners simply could not afford their house and created their own alleged injury—the potential loss of their property, but that injury is caused by their default and not for any other reasons. Wagners allege no facts to satisfy the “but-for” causation standard under the CPA claim.

F. The Superior Court Properly Dismissed the Misrepresentation claim against Lender Respondents.

The Wagners' misrepresentation claim largely mirrors their CPA claim and fails for the same reason. Wagners failed to make the requisite showing of all the necessary elements. To establish a claim of intentional misrepresentation/fraud, a plaintiff must prove by clear, cogent, and convincing evidence:

- (1) a representation of existing fact,
- (2) its materiality,
- (3) its falsity,
- (4) the speaker's knowledge of its falsity,
- (5) the speaker's intent that it be acted upon by the person to whom it is made,
- (6) ignorance of its falsity on the part of the person to whom the representation is addressed,
- (7) the latter's reliance on the truth of the representation,
- (8) the right to rely upon it, and
- (9) consequent damage.

Eicon Constr., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 166, 273 P.3d 965 (2012). CR 9(b) requires dismissal when a complaint fails to plead fraud with particularity. CR 9(b). "The complaining party must plead both the elements and circumstances of fraudulent conduct." *Haberman v. Washington Public Power Supply System*, 109 Wn. 2d 107, 16, 744 P.2d 1032 (1987)(citing 3A L. Orland, Wash.Prac. 129 (3d ed. 1980).

A claim of negligent misrepresentation requires clear, cogent, and convincing evidence that

- (1) the defendant supplied information for the guidance of others in their business transactions that was false,
- (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business

transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages.

Ross v. Kirner, 162 Wn.2d 493, 499, 172 P.3d 701 (2007).

Thus, to prevail under either theory, a plaintiff must establish by clear, cogent, and convincing evidence that the defendant told the plaintiff something false that plaintiff reasonably relied on the information and that false information caused proximate damage to plaintiff.

Here, the Wagners assert the same alleged misrepresentations and damages for the intentional and negligent misrepresentation claim. And as to both claims, the Wagners failed to provide clear, cogent, and convincing evidence to prove that Lender Respondents made a false misrepresentation of material fact. Wagners only vaguely allege misrepresentations related to the initiation of the non-judicial foreclosure and the FFA mediation. Lender Respondents, however, set forth substantial evidence demonstrating that EMC is the holder of the Note, such as (1) Declaration of Ownership of Note executed on May 30, 2012; (2) EMC's Responses to Request for Admission; and (3) presentation of the original note by EMC's counsel. CP 158; CP 591-594; CP 1342-1343; VROP 5:20-21. The DTA does not require the

beneficiary also prove ownership because ownership is not relevant in determining who may enforce the note in accordance with Washington law. *Trujillo*, 181 Wn. App at 498-502, 326 P.3d at 774-76. Therefore, the Wagners' arguments along this line are also unavailing.

As for the FFA mediation, the Wagners claim that the mediation was based on false information about the identity of the parties. The trial court, however, reviewed undisputed evidence showing Acqura was the authorized agent of the beneficiary as the servicing agent for EMC and possessed the ability to make loss mitigation decisions, based on the authority provided to Acqura by EMC, relating to the Wagners' loan obligation at issue. CP 1095. The FFA mediation expressly authorized an agent of the beneficiary to participate in the mediation on its behalf. RCW 61.24.163(8). Additionally, the mediator certified the mediation in good faith. CP 1095. As the mediator certified that parties mediated in good faith, this Court should affirm the trial court's granting of summary judgment.

Additionally, the Wagners failed to demonstrate any reliance on the alleged misrepresentation or resulting damage as a result of the alleged misrepresentations. The record is entirely void of any evidence showing that the Wagners act or failed to act based on any alleged misrepresentation to their detriment. The Wagners defaulted on their

loan as a result of chronic unemployment. The Wagners failed to accept a loan restructuring offered at the FFA mediation. The Wagners failed to complete a loan modification package. There is no evidence that Lender Respondents engaged in misrepresentations that Wagners relied on that proximately caused them injury. The record is void as to how the Wagner relied on the 2009 allonge or assignment or subsequent assignment to JP Morgan Mortgage Acquisition Corporation much less to their detriment. A trustee's sale never occurred and the Wagners continue to reside in subject property for free. In sum, the trial court properly dismissed the misrepresentation claim.

VI. CONCLUSION

For the foregoing reasons, there are no genuine issue of material fact in this case, and the trial court properly granted summary judgment in favor of Lender Respondents. Accordingly, this Court should affirm the summary judgment order entered on March 27, 2015.

Respectfully submitted this 19th day of January, 2016.

/s/ Wesley Werich
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January 19, 2016 - 3:54 PM

Transmittal Letter

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