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STATE OF WASHINGTON
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No. 89343-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FLORENCE R. FRIAS,

Plaintiff,

v.

ASSET FORECLOSURE SERVICES, INC., et al.,

Defendants.

DEFENDANT ASSET FORECLOSURE SERVICES, INC., BRIEF

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TABLE OF CONTENTS

I. Introduction5

II. Summary of Issues Certified to the Supreme Court 6

III. Statement of the Case6

IV. Argument8

 A. THE COURT SHOULD HOLD THAT THERE ARE NO DAMAGES AVAILABLE THROUGH THE DEED OF TRUST ACT ABSENT A COMPLETED TRUSTEE’S SALE.....11

 1. The Framework Of The Statute Lacks Support For Pre-sale Monetary Damages.....15

 2. *Walker* Overlooks Public Policy Implications.....19

 a. Overarching Public Policy Impact.....19

 b. The Legislature Was Aware Of The Existing Case Law When It Amended The Statute21

 3. Consequences For Irregularities In The Foreclosure Process Should Not Be Pre Sale Monetary Damages.....25

 a. Consequences For Failure To Strictly Comply With The Statute Are Not Damages.....26

 b. Like The Protecting Tenants at Foreclosure Act, There Should Be No Private Cause Of Action29

V. Conclusion32

TABLE OF AUTHORITIES

Table of Cases

<i>Albice v. Premier Mortg. Svcs. Of Wash., Inc.</i> , 174 Wn.2d 560, 276 P.3d 1277 (2012).....	12,14,26,28
<i>Alexander v. Sandoval</i> , 532 U.S. 275 (2001).....	30
<i>Bain v. Metro. Mortg. Grp., Inc.</i> , 175 Wn.2d 83, 285 P.3d 34 (2012).	13,14
<i>Bavand v. OneWest Bank, FSB</i> , ___ Wn. App. ___. 309 P.3d 636 (2013)	15
<i>Bennett v. Hardy</i> , 113 Wn.2d 912, 784 P.2d 1258 (1990).	25
<i>Cox v. Helenius</i> , 103 Wn.2d 383, 693 P.2d 683 (1985).....	8,10,26
<i>Housing Authority v. Silva</i> , 94 Wn. App. 731 (1999).....	27
<i>Housing Authority v. Terry</i> , 114 Wn.2d 558 (1990).....	27
<i>Kessler v. Nielsen</i> , 3 Wn. App. 120 (1970).....	27
<i>Klem v. Washington Mut. Bank</i> , 176 Wn.2d 771, 295 P.3d 1179 (2013).....	13,14
<i>Krienke v. Chase Home Fin., LLC</i> , 140 Wn. App. 1032 (Div. II 2007)...	22
<i>Logan v. U.S. Bank National Association</i> , (9 th Cir. 2013).....	30
<i>Plein v. Lackey</i> , 149 Wn.2d 214, 67 P.3d 1061 (2003).....	24
<i>Rucker v. Novastar Mortg., Inc.</i> , ___ Wn. App. ___, 311 P.3d 31 (2013).	15
<i>Schroeder v. Excelsior Mgmt. Grp., LLC</i> , 177 Wn.2d 94, 297 P.3d 677 (2013).....	12,14
<i>Udall v. T.D. Escrow Services, Inc.</i> , 159 Wn.2d 903, 154 P.3d 882 (2007).....	26
<i>Vawter v. Quality Loan Service Corp. of Washington</i> , 707 F. Supp.2d 1115(2010).....	11,14,22

Walker v. Quality Loan Service Corp., ___ Wn. App. ___, 308 P.3d 716
(2013).....11,14,19,20,22

Statutes

RCW 19.86 (CPA).....12,13,23
RCW 59.18.....26
RCW 61.24.163.....15,21
RCW 61.24.163 (7)(a)(iii).....15
RCW 61.24.163(14)(3).....15,16
RCW 61.24.163 (12)(d).....15
RCW 61.24.127.....15,16,20,21,22
RCW 61.24.130.....10,16,29
RCW 61.24.050.....16,17,18
RCW 61.24.031.....9,21
RCW 61.24.010.....17,18,21
Pub. L. No 111-22, 701-04, 123 Stat. 1632, 1660-62 (2009).....29

I. INTRODUCTION

This particular case gives the Court an opportunity to clarify recent case law in the area of Washington foreclosures. As a result of the high volume of home loan defaults, the Washington legislature has made significant changes to the foreclosure statute in recent years to afford extensive protections to borrowers. With foreclosures in the spotlight, courts have been repeatedly forced to interpret the foreclosure statute, and until *Walker*, were consistently applying the same principles.

The Deed of Trust statute regulates a complex process regarding the process to non-judicially foreclose. This court should reason that the Deed of Trust statute governing non-judicial foreclosures does not support any claim for pre-sale monetary damages.

While the statute has been amended in recent years, there was never an addition to the statute to recover damages arising from the Deed of Trust Act absent a completed trustee's sale. Importantly, the framework of the statute does not include such a claim, because the legislature was aware of case law and contemplated appropriate remedies. Moreover, the consideration of public policy supports no claim for damages.

II. ISSUES CERTIFIED TO THE SUPREME COURT

Plaintiff defaulted on their home loan obligation. Defendants initiated a non-judicial foreclosure sale process that was never completed. Under Washington law, may a plaintiff state a claim for damages relating to a breach of duties under the Deed of Trust Act and/or failure to adhere to the statutory requirements of the Deed of Trust Act in the absence of a completed trustee's sale of real property?

If a plaintiff may state a claim for damages prior to a trustee sale of real property, which principles govern his or her claim under the Consumer Protection Act and the Deed of Trust Act?

III. STATEMENT OF THE CASE

Plaintiff signed a promissory note and deed of trust on or about September 29, 2008. "U.S. Bank," was identified as the lender and the security instrument identifies Mortgage Electronic Registration Systems (MERS) as beneficiary, Dkt. 2.

Only a year later in August 2009, Plaintiff defaulted on her loan. Dkt. 2. Following the failure to pay, Plaintiff was issued a Notice of Default on April 14, 2010, commencing a non-judicial foreclosure. Dkt. 2. LSI Title Agency, Inc., c/o Asset Foreclosure Services, Inc., was appointed as successor trustee in May 2010. Dkt. 2. After Plaintiff failed to cure the

Notice of Default, a Notice of Trustee's Sale was recorded May 19, 2010, setting an August 20, 2010, sale date. Dkt. 10. In 2010, Plaintiff filed bankruptcy and no sale occurred. In order to make it clear in the public records and on title, a formally recorded discontinuance of sale was recorded May 2011. *Id.*

In May 2011, the foreclosure was recommenced and a second Notice of Trustee's Sale was issued, setting a sale date of August 26, 2011. Dkt. 10-1. About three weeks before the sale date, Plaintiff made a mediation request under the newly established Washington Foreclosure Fairness Act. A first mediation session was purportedly scheduled without a beneficiary being able to attend on September 12, 2011. On September 23, 2011, a sale was scheduled to occur based on the Notice of Trustee's Sale, but ultimately no trustee's sale was completed and no Trustee's Deed Upon Sale was ever issued. A mediation session was conducted with all parties present October 11, 2011. To make it clear in the public record and on title that no sale was pending, on or about October 28, 2011, the second sale was discontinued. Dkt. 2; 10-1. A third mediation session was ultimately conducted to discuss the Plaintiff's loan even though there was no sale pending.

The Plaintiff filed an action in Superior Court alleging a variety of claims all arising from the default on her mortgage and attempt to

foreclose. The action was removed to federal court, and LSI resigned as trustee on or about May 8, 2013. Dkt. 10-1.

On May 9, 2013, Defendant LSI filed a motion to dismiss joined by Asset Foreclosure. MERS and U.S. Bank joined in the motion to dismiss the claim for a preliminary injunction. Dkt. 12. On July 26, 2013, the court granted Defendants' motions to dismiss and denied Plaintiff's motion to stay the action and certify three questions. Dkt. 34.

On August 9, 2013, Plaintiff sought a revision of the court's order, stating that the recent *Walker* decision should be applied. Dkt. 36. Based on the development in case law, Judge Pechman certified two questions. Dkt. 48.

IV. ARGUMENT

If a borrower defaults on their loan, the beneficiary, through the Deed of Trust Act, can seek to foreclose on the mortgage through a non-judicial foreclosure process. Generally, the process is intended to be inexpensive and efficient, give interested parties an opportunity to prevent wrongful foreclosure, and to promote stability of land titles. *See Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985).

In the event that that borrower objects, the burden is on him to enjoin the sale judicially. *See* RCW 61.24.030. Ultimately, presale claims

arising from the Deed of Trust Act results in the interested party having a right to enjoin the sale. *Id.*

Generally, the foreclosure process is lengthy and affords protections to the borrower each step of the way with various statutory notices throughout.

The Deed of Trust Act strictly outlines the timeline and procedures for a non-judicial foreclosure to occur. Thirty days before the official notice of default, the lender must send the borrower a letter detailing their pre-foreclosure options, as described in RCW 61.24.031. The borrower can respond to the pre-foreclosure notice to seek assistance. If the homeowner responds to the contact, the notice of default may not be issued for an additional sixty days. RCW 61.24.030.

Next, a notice of default must be served on the borrower thirty days before notice of trustee's sale is served. *Id.* The notice of default must be served by both first-class mail and by registered or certified mail, return receipt requested, and by either posting the notice on the premises in a prominent place or by personal service on homeowner. *Id.* When the notice of default is received, the borrower again has the opportunity to discuss their default and explore home retention options.

If the notice of default is not cured, then the foreclosing party must record the notice to give public notice, and serve notice of sale in the same manner as the notice of default at least one hundred and twenty days before the sale date. Additionally, this notice is published in a newspaper. *Id.* Upon receipt of the notice of trustee's sale, a borrower again can home retention options and formal mediation can be requested up to twenty days following the recording of the notice. *Id.* The mediation process affords extensive opportunity for the borrower to work with their lender on foreclosure avoidance alternatives. A mediation certificate must be issued prior to a sale proceeding. Even if the sale proceeds, yet again, a borrower has another opportunity to contest the sale up until five days before the foreclosure auction; the homeowner may file a motion with the court to restrain the sale. RCW 61.24.130.

Ultimately, the overall foreclosure process takes a minimum of six months and is designed to be a balanced process for each party. *See Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985). Specific protections are granted each step of the way to the borrower, and it also explicitly affords the borrower the opportunity to contest the foreclosure at each point in the process.

A. THE COURT SHOULD HOLD THAT THERE ARE NO DAMAGES AVAILABLE THROUGH THE DEED OF TRUST ACT ABSENT A COMPLETED TRUSTEE'S SALE

The District courts have repeatedly and properly recognized that pre-sale remedies are limited, and do not include damages under the Deed of Trust Act. *See Vawter v. Quality Loan Serv. Corp. of Wash.*, 707 F.Supp.2d 1115, 1123 (2010). This Court should now decline to adopt the reasoning of the *Walker* Court and provide clear direction for Washington State foreclosures. *See Walker v. Quality Loan Service Corp.*, ___ Wn. App. ___, 308 P.3d 716 (2013)

Before the *Walker* decision, the issue of whether a plaintiff could state a claim for relief for pre-sale damages was consistently answered in the negative. *See* Dkt. 48. At the state and federal level, courts have continuously cited recent opinions, all of which ultimately point back to the rationale found in *Vawter*. *Id.*

The relevant portion of *Vawter's* logic is still applicable today, even with the recent case law and amendments to the statute; the Deed of Trust Act provides no statutory cause of action nor does recent case law implicitly create a new private right of action.

The courts have already evolved to establish that a trustee's sale can be found void or invalid if there are procedural irregularities or equitable grounds for setting the sale aside. *Albice v. Premier Mortgage Services*, 174 Wn.2d 560 (2012). The consequences of a trustee who makes any mistake in the process of a foreclosure is significant; they must start all over again. *See id.*

In *Schroeder v. Escelsior Mgmt. Group*, the Washington Supreme Court explained that requisites to a trustee's sale are “. . . not . . . rights held by the debtor; instead they are limits on the trustee's power to foreclose without judicial supervision.” *Id.* Specifically, they addressed statutory requirements in the Deed of Trust Act that specifically require judicial supervision when agricultural land is foreclosed upon. 177 Wash.2d 94, 106, 297 P.3d 677 (2013). The Court explained that the trustee's act of proceeding with a non-judicial foreclosure sale on agricultural land, when it knew or should have known the property fell into an agricultural category, had the capacity to be unfair or deceptive under the Washington Consumer Protection Act (CPA). *See id.*

It is clear from the recent case law, that a claim post sale under the CPA is a remedy afforded to the borrower. Moreover, the statute itself limits the power of the trustee, and therefore,

failure to follow the mandates will divest a trustee's of its power to foreclose; but *Schroeder* still does not outline a pre-sale cause of action. *See id.*

In *Klem v. Washington Mutual Bank*, the court addressed a trustee's widespread practice of falsely notarizing documents in order to expedite the sale process, which the court found deceptive. *See* 176 Wn.2d 771, 295 P.3d 1179 (2013). Although *Klem* did address pre-sale irregularities, the case does not stand for a trustee's broad liability for damages, when no sale has occurred. *See id.*

Similarly, the decision in *Bain v. Metro. Mortg. Grp., Inc.*, still did not establish any claim for wrongful foreclosure based on irregular proceedings. 175 Wn.2d 83, 285 P.3d 34 (2012). *Bain* addressed whether MERS can be a lawful beneficiary on a deed of trust when it is not the holder of the promissory note. *Id.* at 98. In a related question, the Court held that listing MERS on the deed of trust, when it does not hold the note, is deceptive and may constitute a per se violation under the Consumer Protection Act. *Id.* at 115. However, *Bain* did not address whether other procedural irregularities in foreclosure proceedings would give rise to a claim for damages under the Deed of Trust Act.

Until *Walker v. Quality Loan Service Corp.*, the District Court still found nothing in each of these recent Washington Court opinions which would undermine *Vawter*'s sound reasoning that the Deed of Trust does not authorize a cause of action for damages for the wrongful initiation of non-judicial foreclosure proceedings where no trustee's sale occurs. See ___ Wn. App. ___, 308 P.3d 716 (2013).

Presently, the certification from the District Court in this case has an extensive string cite demonstrating the extent to which the courts have consistently applied the *Vawter* principal of "no sale, no damages." See Dkt. 48; See *Vawter v. Quality Loan Serv. Corp. of Wash.*, 707 F.Supp.2d 1115, 1123 (2010). Even with the most recent case law to include *Klem*, *Schroeder*, *Albice*, and *Bain*, the District Court has still found no basis to interpret Washington law as allowing actions for damages under the Deed of Trust Act against trustees prior to sale. See *id.*

In *Walker*, which is immediately followed by *Rucker*, the court takes a drastic stance and ultimately overturns the years of case law that has been followed in this state at both the state and federal level. See *Walker* at 720 -22; *Rucker v. Novastar Mortg., Inc.*, ___ Wn. App. ___, 311 P.3d 31 (2013). The result is disrupting

the careful balance that the legislature created because now cases such as *Bavand* exist which follow Walker rationale. *Bavand v. OneWest Bank, FSB*, ___ Wn. App. ___, 309 P.3d 636 (2013).

Walker outright disagrees with the extensive case law in the area and explains that *Vawter* is essentially outdated and that the introduction of RCW 61.24.127 must mean that the legislature intended to have pre-sale claims. *See id.* However, the Court now has an opportunity to review the historical development of the statute, case law, and consider policy implications, which should demonstrate that the *Walker* rationale should not be adopted by this court.

1. The Framework Of The Statute Lacks Support For Pre-sale Monetary Damages

An implied cause of action is not appropriate, as even the newest amendments to the Deed of Trust Act contemplate limited remedies.

One of the newest additions to the statute includes the obligation for the beneficiary to participate in mediation if requested, once a foreclosure is commenced. RCW 61.24.163. The statute even imposes a clear duty upon the parties to mediate in good faith. RCW 61.24.163 (7)(a)(iii). It also requires that the

mediator certify in writing whether the parties did so. *Id.* The statute contemplates that if there is failure to mediate in good faith, it “constitutes a defense to the non-judicial foreclosure action that was the basis for initiating the mediation.” *Id.* at RCW 61.24.163(14)(3). “In any action to enjoin the foreclosure, the beneficiary is entitled to rebut the allegation that it failed to act in good faith.” *Id.* at (12)(d).

Thus, this provision of the statute explicitly provides for injunctive relief if the beneficiary fails to mediate in good faith, and an opportunity for the allegation to be rebutted; thus, contemplating that it is the sole remedy. Further, the statute gives a particular remedy of restraining the sale on any proper legal or equitable ground. *See* RCW 61.24.130.

Although RCW 61.24.127 allows the recovery of money damages in certain circumstances, the provision of the statute specifically applies when a borrower fails to enjoin the sale, and then seeks post sale damages for the trustee’s failure to comply with the requirements. Until that time, the only remedy is to seek to enjoin the sale.

Importantly, the statute contemplates discontinuance or rescission of trustee's sale. RCW 61.24.050.

Except as provided in subsection (2) of this section, if the trustee accepts a bid, then the trustee's sale is final as of the date and time of such acceptance *if the trustee's deed is recorded within fifteen days* thereafter. After a trustee's sale, no person shall have any right, by statute or otherwise, to redeem the property sold at the trustee's sale.

(2)(a) Up to the eleventh day following the trustee's sale, the trustee, beneficiary, or authorized agent for the beneficiary *may declare the trustee's sale and trustee's deed void for the following reasons:*

(i) The trustee, beneficiary, or authorized agent for the beneficiary assert that *there was an error with the trustee foreclosure sale process* including, but not limited to, an erroneous opening bid amount made by or on behalf of the foreclosing beneficiary at the trustee's sale;

(ii) The borrower and beneficiary, or authorized agent for the beneficiary, had *agreed prior to the trustee's sale to a loan modification agreement, forbearance plan, shared appreciation mortgage, or other loss mitigation agreement to postpone or discontinue the trustee's sale;* or

(iii) The beneficiary or authorized agent for the beneficiary had accepted funds that fully reinstated or satisfied the loan even if the beneficiary or authorized agent for the beneficiary had no legal duty to do so.

(b) This subsection does not impose a duty upon the trustee any different than the

obligations set forth under RCW 61.24.010 (3) and (4). RCW 61.24.050.

...

(3) The trustee or successor trustee shall have no fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust.

(4) The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor. RCW 61.24.010

...

(5) If the reason for the rescission stems from subsection (2)(a)(i) or (ii) of this section, the trustee *may set a new sale date not less than forty-five days* following the mailing of the notice of rescission of trustee's sale. RCW 61.24.050.

Because the legislature included a provision in the statute regarding rescission, it is clear that they contemplated the idea that irregularities could occur during the process; even going to sale with a loan modification agreement reached, which is clearly unacceptable, yet they still did not include anywhere in the statute that this would result in damages for the Plaintiff.

Therefore, there is no statutory support that a trustee should be liable for presale irregularities, when the statute itself contemplates that this could very well occur, and sets out a procedure to rescind the sale and set a new sale date.

The overall statute is a comprehensive framework and was not intended to include a private right of action.

2. *Walker* Overlooks Public Policy Implications And The Historical Development Of The Industry

Until the *Walker* ruling, Washington State case law still consistently and properly supported the proposition that there were no presale Deed of Trust Act claims against a trustee absent a completed sale.

The court should consider the historical developments in the statute because it supports limiting the remedies available to the Plaintiff. The legislature did not intend to create a tort claim against a trustee. The *Walker* court's decision stretches the statute beyond its intended scope unnecessarily, and judicially creates a cause of action that the legislature did not write into the statute, even after taking the time to amend the statute on more than one occasion.

a. Overarching Public Policy Impact

Walker's rationale fails to explore the overall policy implications of their judicial legislation. "Holding the lending industry liable for damages caused by its DTA

violations should produce greater compliance and a reduction in future litigation. Thus, the availability of a presale cause of action for damages could significantly reduce the long-term system wide expenses of non-judicial foreclosures under the DTA.” *Walker* at 14.

This rationale fails to address the true policy implications of the Superior and District courts being flooded with complaints, because they would “state a claim for which relief could be granted” and are unable to be disposed of on a motion to dismiss. Further, imposing such presale liability on trustees will have the natural response of beneficiaries proceeding judicially. Therefore, the result that *Walker* intends, is not the realistic result of the industry.

As a general policy matter, this court should support trustee’s halting foreclosure actions prior to a Trustee’s sale actually occurring if they suspect an irregularity. If this court takes the position that a trustee be liable for tort damages even without a sale occurring, there is no benefit in a trustee discontinuing a sale when the statute might

provide greater protections to the trustee post sale, where claims are clearly limited under RCW 61.24.127.

Further, the legislature could not have intended to subject trustee's to such liability and compensate them with such a minimal fee. The trustee is charged with the duty of conducting a complicated statutory process over the course of several months, for approximately seven hundred fifty dollars as listed in the Notice of Trustee Sale. *See* Dkt. 10-1. It is unimaginable that the legislature would intend a neutral third party to bear such a burden.

Overall, the *Walker* court mischaracterizes the likely results of their judicial legislation and this court should evaluate the true public policy implications of imposing a presale Deed of Trust Act claim.

b. The Legislature Was Aware Of The Existing Case Law When It Amended The Statute

The legislature specifically amended the statute in 2009 and again in 2011 to include new provisions requiring pre-foreclosure workout notices, changing statutory language of the notices provided to borrowers, extending the overall timeline for a foreclosure to occur, affording a right to

mediation, and adding a post-sale claim. RCW 61.24.127; RCW 61.24.010; RCW 61.24.030; RCW 61.24.031; RCW 61.24.163.

With the extensive statutory changes, the legislature was aware that the courts had been applying the ‘no sale, no damages’ principle from *Vawter*, and yet they made no changes to assert a presale claim through the Deed of Trust Act. *See id.*

The courts consistently and repeatedly applied the rationale and ultimately cited *Vawter v. Quality Loan Service Corp. of Washington*, 707 F.Supp.2d 1115 (2010); *Krienke v. Chase Home Fin., LLC*, 140 Wn. App. 1032 (Div. II 2007).

Thus, the legislature had judicial awareness and still failed to include any provision in the Deed of Trust statute regarding what type of Plaintiff could recover damages, under what circumstances, or define how to enforce the provisions.

The *Walker* court relies on the addition of RCW 61.24.127 to advance their reasoning that there must be

claims pre-sale if they cannot be “waived.” *See Walker* at 720-22.

(1) The failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter may not be deemed a waiver of a claim for damages asserting:

(a) Common law fraud or misrepresentation;

(b) A violation of Title 19 RCW;

(c) Failure of the trustee to materially comply with the provisions of this chapter; or

(d) A violation of RCW 61.24.026.

(2) The nonwaived claims listed under subsection (1) of this section are subject to the following limitations:

(a) The claim must be asserted or brought within two years from the date of the foreclosure sale or within the applicable statute of limitations for such claim, whichever expires earlier;

(b) The claim may not seek any remedy at law or in equity other than monetary damages;

(c) The claim may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property;

(d) A borrower or grantor who files such a claim is prohibited from recording a lis pendens or

any other document purporting to create a similar effect, related to the real property foreclosed upon;

(f) The relief that may be granted for judgment upon the claim is limited to actual damages. However, if the borrower or grantor brings in the same civil action a claim for violation of chapter 19.86 RCW, arising out of the same alleged facts, relief under chapter 19.86 RCW is limited to actual damages, treble damages as provided for in RCW 19.86.090, and the costs of suit, including a reasonable attorney's fee.

(3) This section applies only to foreclosures of owner-occupied residential real property.
RCW.61.24.127.

This rationale is not applicable because the court misunderstands the history of the industry; the reason the legislature was so concerned with “waiver” was because historically a borrower waived the right to challenge the default or foreclosure unless enjoined. *See Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061 (2003).

In the past, not only did a borrower have no Deed of Trust Act claims pre-sale, but they also could not raise any claims post-sale under unless they enjoined the sale prior. *See id.* “We hold that by failing to obtain a preliminary injunction or other restraining order restraining the trustee's

sale, as contemplated by RCW 61.24.130, Plein waived any objections to the foreclosure proceedings.” Hence, the legislature amended and added RCW 61.24.127 to allow certain claims not to be waived post-sale to avoid such a harsh result as in *Plein v. Lackey*. *See id.*

Moreover, if the legislature truly intended the statute to include presale claims for damages because of irregularities in the process, it is unclear why they would they limit it to “owner occupied” residential real property. RCW 61.24.127.

Overall, given the revisions to the statute in recent years, there was judicial awareness, this court should not have to “imply” or read into the statute, because it would have been added in recent amendments. If the court looks historically at the developments in the statute and case law, it is clear that the legislature purposefully excluded the idea of pre-sale claims.

3. Consequences For Irregularities In The Foreclosure Process Should Not Be Pre Sale Monetary Damages

Plaintiff’s opening brief maintains that this court should judicially recognize a tort action for damages. Plaintiff asserts that

Defendants' pre-foreclosure actions raise claims under the Deed of Trust Act. *Bennett v. Hardy*, 113 Wn.2d 912, 919, 784 P.2d 1258 (1990).

Using a three part test, Plaintiff argues that borrowers are (1) within the class for which the benefit of the statute was enacted; (2) there is legislative intent, explicitly or implicitly, that supports creating or denying a remedy; and (3) the remedy is consistent with the underlying purpose of the legislation. *See id.*

Here, the court should not create a new cause of action because even if the borrowers are within a benefited class, the underlying purpose of the legislation was not to create a private right of action, nor was it ever implicitly or explicitly supported in the Deed of Trust Act. *See id.*

a. Consequences For Failure To Strictly Comply With The Statute Are Not Damages

The Deed of Trust statute has been interpreted to require strict compliance with the methods prescribed in a non-judicial foreclosure sale. *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985).

This court has repeated this expectation in recent cases. Because the Deed of Trust Act “dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures, lenders must strictly comply with the statutes, and courts must strictly construe the statutes in the borrower’s favor.” *Albice* at 567 citing *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d, 903, 915-16, 154 P.3d 882 (2007).

This high expectation is analogous to Washington State law for the Residential Landlord Tenant Statute RCW 59.18. The courts have determined that a tenant’s rights are so important and a derogation of common law, that the statute must be strictly complied with and construed in favor of the tenant. *Housing Authority v. Terry*, 114 Wn.2d 558 (1990), *See also Housing Authority v. Silva*, 94 Wn. App. 731 (1999); *Kessler v. Nielson*, 3 Wn. App. 120, 123 (1970).

In an unlawful detainer action, the procedural timing of tenant notices and content, are jurisdictional to any action initiated by the landlord against a tenant to evict them. *See id.* Washington courts have repeatedly ruled in

favor of strict compliance. *Id.* The policy supports this because of the gravity of the outcome; a tenant is evicted from their home. In the event that a tenant does not pay rent, although the landlord has every right to collect those amounts, the tenant is afforded the protections of the statute requiring strict compliance. *See id.*

Importantly, the consequences for failure to comply strictly with the Residential Landlord Tenant Act, is that a landlord would not get the benefit of a summary process if they make any mistakes; instead they would have to start all over again. *See id.* However, nowhere in the process does a tenant have damages for “wrongful initiation of an eviction.” While the courts have repeatedly recognized the importance of strict compliance, there is already a logical consequence in place and damages are not available.

Just as there is no claim for wrongful initiation of an eviction, there should be no claim for damages for initiating a foreclosure. This rationale is analogous to the issue before this court. There is no question that a landlord must strictly comply with the statute, and failure to provide the tenant all the required notices, with required language,

content, and proper timing, will deprive the landlord of the right to evict a tenant. Instead, the landlord has to start over from the beginning. *See id.*

Similarly, the consequences for violations of the Deed of Trust Act are that the Trustee would have to start all over again, because they would not have the benefit of conveying clear title following a Trustee's sale, and the Trustee's Deed Upon Sale would be invalid. *See Albice* at 567.

Thus, this Court should rationalize that just because the statute requires strict compliance does not equate to damages when a party fails to comply. The purpose is to ensure a fair process and any irregularities have inherent consequences. Those consequences are not a claim for damages.

Simply, prior to the sale the remedy under the Deed of Trust Act is to seek to enjoin the sale; there should be no private cause of action absent a sale. *See* RCW 61.24.130.

b. Like The Protecting Tenants At Foreclosure Act, There Should Be No Private Cause Of Action

Along with increased homeowner protections, the volume of foreclosures also paved the way for new protections for tenants occupying foreclosed homes. The Protecting Tenants at Foreclosure Act of 2009 is a defense to an eviction, but violations of it do not create a claim for damages. *See* Pub. L. No 111-22, 701-04, 123 Stat. 1632, 1660-62 (2009).

The issue presented before this court is also comparable to the Protecting Tenants at Foreclosure Act of 2009 (PTFA) which also doesn't allow a claim for damages for violation because the consequences are clear. Courts have declined to allow a private right of action for monetary damages through the PTFA. "Without clear evidence of such intent, courts may not create a cause of action 'no matter how desirable . . . as a policy matter, or how compatible with the statute.'" *Logan v. U.S. Bank National Association*, (9th Cir. 2013) *citing Alexander v. Sandoval*, 532 U.S. 275 (2001).

The court reasons that there is nothing explicit in the statute explaining how to enforce the statute's provisions, and the court declined to create one by implication. *See id. at 14.* While the overall purpose of the statute is to benefit tenants, there was silence on the issue of damages. *Id.* The Protecting Tenants at Foreclosure Act was amended in July 2010 and still there was no addition of a private right of action, even with case law, and therefore, the court assumed that the Congress acted with awareness of judicial decisions. *See id at 19.*

Ultimately, the Protecting Tenants at Foreclosure Act “ was intended to provide a defense in state eviction proceedings rather than a basis for offensive suits . . .” *Id. at 20.*

Similarly, in the issue before the court here, the statute is silent on damages under the Deed of Trust Act. Just as the Protecting Tenants at Foreclosure Act was intended to provide a defense to the eviction for tenants to plead, procedural irregularities are a defense to the foreclosure and an offensive private monetary claim for damages absent a trustee's sale is unreasonable.

V. CONCLUSION

After review of the historical development of the Deed of Trust Act and analysis of the evolving case law, this court should feel comfortable holding that there are no presale damages available under the statute outside injunctive relief. The statute already contemplates a complete framework and provides ample borrower protections. Moreover, the public policy implications support such a finding. We respectfully request that this court hold that the statute limits the remedies available to the borrower as intended by the legislature.

Respectfully submitted this 13th day of December, 2013

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Proof of Service

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I declare under penalty of perjury under the laws of the
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Dated: December 13, 2013.

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Subject: 89343-8 Frias v. Asset Foreclosure Services, Inc.
Attachments: Final Supreme Court Brief PDF version-20131213KEG.pdf

To the Court Clerk: I attach Asset Foreclosure's Brief in this matter.

Counsel: A hard copy is in the mail today. Thank you.

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