

No. 68516-3-I

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

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MICAH SCHNALL,

Appellant,

vs.

DEUTSCHE BANK NATIONAL TRUST COMPANY, MORTGAGE  
ELECTRONIC REGISTRATION SYSTEMS, AND JOHN DOES  
inclusive 1 through 20,

Respondents.

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APPELLATE DIVISION  
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REPLY BRIEF OF APPELLANT

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Appeal from King County Superior Court  
Case No: 11-2-19807-3SEA  
The Honorable Judge Barnett

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## I. FOREWORD

Presented for consideration is appellant's Reply Brief. For the convenience of this Court, the format of the Argument section is based on the format of the Response brief, e.g. "B.4." in this brief is a reply to "B.4." in the Response Brief. Clerk's Papers are cited to directly in this Brief, rather than via the index.

## II. ARGUMENT

### A. Schnall provided sufficient record for appellate review.

Deutsche Bank National Trust Company ("DB") and Mortgage Electronic Registration Systems ("MERS") allege that Schnall "purposefully chose not to include the December 16 [2011] hearing transcript," and that Schnall "deprived this Court of an adequate record to consider his arguments." Res. Br. p. 7. However, they admit that, apart from the issue of the December 16 hearing, the record is otherwise complete. "Mr. Schnall designated the parties' relevant written pleadings and the trial court's written order on these motions." Res. Br. p. 6.

1. **No recording was made.** Schnall attempted to obtain a verbatim report of proceedings, but no report was made by the court, electronically or otherwise, for the hearing on December 16. Appendix,

Attachments 1 and 2. The trial court did, however, provide a written ruling on the issues decided in the hearing on the 16th, which Schnall believes to be an accurate summary of the proceedings. CP 1275-1276. Said ruling, having been prepared and presented by Defendants' counsel, it is hard for them to argue that it is not an accurate representation of the proceedings.

2. **Defendants did not request recording.** CR 80 states that the recording of proceedings is at the "sole discretion of the court." The trial court chose not to record the proceedings. DB/MERS did not request that the court record the proceedings or make alternate arrangements. Waiver applies. The written order resulting from the hearing should be treated by this Court as sufficient.

3. **Narrative not required.** DB/MERS further claim that, pursuant to RAP 9.3, Schnall should have himself prepared a narrative report of proceedings. Res. Br. p. 6. This rule provides that the party seeking review *may* prepare a narrative report of proceedings, and that this should include a "statement of the occurrences in and evidence introduced." In the instant case, all evidence presented for the December 16 hearing was entered into the record by the parties before the date of the hearing, and Schnall has provided this Court with the totality of that record. Likewise, no statement of the occurrences in the hearing was possible. Schnall had expected the trial court to have recorded the hearing,

and so had not himself taken adequate notes to be able to construct a narrative from memory. Nor would Schnall expect this Court to give significant weight to a narrative prepared by a party other than a licensed attorney or officer of the court.

**4. Defendants failed to use available remedy.** DB/MERS admit that they were aware of this missing transcript "well before the Opening Brief was filed." Resp. Br. p. 6, bottom of page. RAP 9.2(c) provides that "If a party seeking review arranges for less than all of the verbatim report of proceedings...Any other party who wishes to add to the verbatim report of proceedings should within 10 days after service of the statement of arrangements file and serve on all other parties and the court reporter a designation of additional parts of the verbatim report of proceedings and file proof of service with the appellate court." DB/MERS did not do this. Instead, they took no action on this issue for almost six months, and now seek to use this as a basis to prevent this Court from ruling on the merits. Waiver applies.

**5. Schnall clearly stated breach of contract claim.** DB/MERS allege that Schnall did not assert a breach of contract claim. Res. Br. p. 6, n.3. They cite Schnall's initial complaint. Id. But Schnall's breach of contract claim is clearly enumerated in his proposed Amended Complaint. CP 1251, LL 21-22, CP 1257, LL 9-16. DB/MERS would no doubt claim

that the trial court's ruling was on the original Complaint, and not on the proposed Amended Complaint. But the trial court ruled on both the Motion to Dismiss and the Motion to Amend at the same hearing. It is Schnall's contention that, aside from any disputed findings pertaining to Causes in his original Complaint, his Motion to Amend should have been granted, which would have mooted the Motion to Dismiss.

**B. The trial court erred in light of Bain.**

**1. Agency Fails.**

DB/MERS now claim that MERS "acted only as an agent of the beneficiary and not as a beneficiary in its own right." Res. Br. p. 8.

**a. *No agency in the trial court.*** DB/MERS not only failed to claim agency or present evidence of agency in the trial court, they themselves in fact argued the opposite. "MERS' beneficial interest in the deed of trust was assigned to Deutsche bank on September 24, 2010." Motion to Dismiss, CP 555, LL 13-14. "MERS' beneficial interest in the trust deed was assigned to Deutsche Bank on September 24, 2010, and it no longer claims any interest in the trust deed." Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction, CP 106, LL 12-13. Clearly, in the trial court, DB/MERS themselves argue that the assignment from MERS to Deutsche Bank transferred MERS' own interest, and not the interest of any principal. DB/MERS are not entitled to now raise this

argument of agency in the instant appeal, for reasons of sandbagging, gamesmanship, and notice, that they themselves detail on page 15 of their Response Brief.

**b. *MERS is not agent under Bain.*** DB/MERS argue that *Bain v. Metropolitan Mortgage Group, Inc. et al.*, 175 Wn.2d 83 (2012) (en banc) allows the use of agents, and refers to *Bain* at 106. However, on the next page, *Bain* goes on to explain why MERS is *not* an agent in the two cases before the Court. *Bain* at 107. The Court further clarifies its position on MERS serving as beneficiary by agency. "We will not allow waiver of statutory protections lightly. MERS did not become a beneficiary by contract or under agency principals." *Bain* at 108. Clearly, *Bain* finds MERS to be neither beneficiary nor agent of beneficiary under Washington's Deed of Trust Act, RCW 61.24 et seq. ("DOTA"), except in the extremely unlikely circumstance of MERS actually owning a loan.

**c. *MERS was not agent of IndyMac.*** DB/MERS attempt to distinguish *Bain* on the basis that "MERS did not purport to act on behalf of anyone other than the party that expressly designated it as nominee," and that "MERS acted solely as agent of the proper original beneficiary--Quicken Loans." Res. Br. p. 9-10. Yet DB/MERS admit that Quicken Loans sold the loan to IndyMac Bank, F.S.B., before the loan was transferred to Deutsche Bank. Res. Br. p. 2. The endorsements on the

promissory note itself support this. CP 574, LL 1-4 (counsel for DB/MERS, describing the signature page of the original note). If this Court were to entertain the proposition that MERS was acting as agent of the original lender, Quicken Loans, the facts in the instant case give rise to the exact same difficulty as in *Bain*.

"If MERS is an agent, its principals in the two cases before us remain unidentified. MERS attempts to sidestep this portion of traditional agency law by pointing to the language in the deeds of trust that describe MERS as 'acting solely as a nominee for Lender and Lender's successors and assigns.'" *Bain* at 107.

"But MERS offers no authority for the implicit proposition that the lender's nomination of MERS as a nominee rises to an agency relationship with successor noteholders. MERS fails to identify the entities that control and are accountable for its actions. It has not established that it is an agent for a lawful principal." *Id.*

In the instant case, if MERS was acting as agent of the beneficiary Quicken Loans, then MERS lost any power to act as agent of the beneficiary when Quicken Loans sold the loan to IndyMac. MERS, being neither beneficiary nor agent of a beneficiary, could only be acting on its own behalf, and "not on behalf on any principal." *Bain* at 117. MERS

would therefore not have the power to appoint a trustee to proceed with a nonjudicial foreclosure. *Bain* at 89. Thus, the assignment from MERS to Deutsche Bank could not convey beneficial interest, and the attendant power to appoint a successor trustee, to Deutsche Bank.<sup>1</sup>

**2. Acquisition of the promissory note in response to a lawsuit is not sufficient.**

DB/MERS argue that Deutsche Bank presented Schnall's original promissory note to the trial court, and that this satisfies *Bain*. Res. Br. pp. 10-12.

**a. *Deutsche Bank did not hold the note prior to serving Notice of Default and appointing successor trustee.*** The DOTA requires that one must be the beneficiary before one can serve a Notice of Default or appoint a successor trustee. RCW 61.24.030(8), "[W]ritten notice of default shall be transmitted by the beneficiary;" RCW 61.24.010(2), "The trustee may resign at its own election or be replaced by the beneficiary."

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<sup>1</sup> It is worthy of note that while *Bain* held that MERS appointed successor trustees in the cases of both *Bain* and *Selkowitz* (*Bain* at 90), the documents executing the appointments differ between the two cases. In the case of *Selkowitz*, the endorsement is on behalf of MERS. Appointment of Successor Trustee, Res. Br. Appendix, Attachment 3. In *Bain*'s case, the appointment was signed on behalf of IndyMac, the named recipient of beneficial interest on the assignment from MERS. Appendix, Attachment 3. This is similar to Schnall's case, where the appointment was signed on behalf of Deutsche Bank after an assignment of beneficial interest from MERS. CP 118-119. *Bain* held that, just as in Schnall's case, these appointments and assignments were signed on behalf of various loan servicers and MERS by employees of the same company, Lender Processing Service, Inc. ("LPS"). *Bain*, n.13. Schnall is unable to discern a pattern under which circumstances LPS makes the appointment in the name of MERS vs. other entities. It seems that the particulars of which entity is being represented in any given endorsement is not a significant factor.

But a year earlier, when Deutsche Bank served the Notice of Default and appointed a successor trustee, it did so *without* holding the note, and thus was not the beneficiary per *Bain*. "[A] beneficiary must either actually possess the promissory note or be the payee." *Bain*, at 104. Deutsche Bank met neither criterion.

**1) *IndyMac, not Deutsche Bank, owned the note.***

Defendants presented a declaration dated July 22, 2011, by Charles Boyle, a Vice President at OneWest Bank, F.S.B. CP 131. OneWest is the successor in interest to IndyMac F.S.B. CP 592, L 3. This declaration contains a copy of the promissory note. CP 181. On the signature page, there is a single endorsement by the original lender, Quicken Loans, in blank, with no payee filled in. CP 185. This shows that as of July 22, 2011, IndyMac (now OneWest) had purchased the note from Quicken Loans, and had the note in its possession.

**2) *Undated endorsement insufficient.*** In the hearing on September 27, 2011, counsel for defendants presented the physical note, which now possessed an additional endorsement. IndyMac was filled in as the payee, and IndyMac had further endorsed it in blank. CP 574, LL 1-4. This endorsement is undated. CP 575, LL 5-6. This endorsement is the only record of the transfer from IndyMac to Deutsche bank. They failed to date the endorsement, and they failed to record this

assignment with the county, either of which actions might have shown that this transaction occurred prior to foreclosure.

**3) Notice of Default admits Deutsche Bank did not hold the note.** The Notice of Default states, "The beneficial interest under said Deed of Trust and the obligations secured thereby are presently held *or will be assigned to* Deutsche Bank."(emphasis added) CP 31. This language plainly declares that Deutsche Bank refuses to disclose whether it owns the note, and thus must be construed to mean that it does not. Further implication is that Deutsche Bank intended to rely on the future assignment from MERS in order to acquire status as beneficiary.

**4) Deutsche Bank relied on assignment from MERS.** The Assignment of Deed of Trust was made on 8/18/2010 (CP 137), and the Appointment of Successor Trustee was made on 8/19/2010 (CP 118), the very next day, both by LPS employees in the same location in Texas. It is clear that the Appointment of Successor trustee relied on this assignment from MERS, not on any physical transfer or endorsement of the note.

**b. UCC is a distraction, "bearer" principles do not control.** DB/MERS make claims about the "Holder" being "entitled to enforce", with attendant citations to RCW 62A, Washington's adoption of the Uniform Commercial Code. Res. Br. p. 11. Here, as in the trial court,

defendants argue that the promissory note, endorsed in blank, is a negotiable instrument payable to bearer, and that they are entitled to take Schnall's property on this basis. *Id.*; CP 574, LL 4-6.

1) ***Deutsche Bank not suing on note.*** While it may be perfectly true that a promissory note endorsed in blank is payable to bearer, this fact has no relevance to the instant case. Deutsche Bank did not bring suit against Schnall for dishonoring the note. Instead, DB/MERS attempted nonjudicial foreclosure under the DOTA. The DOTA has requirements beyond those established in the UCC, and in this case, the DOTA controls.

2) ***Assignment by MERS fails under Bain.***

DB/MERS cite *Bain* at 111, claiming that they satisfied the requirement of holding the promissory note or documenting the chain of transactions. Res. Br. p. 10-11. However they did not quote the very next sentence, which says "Having MERS convey its 'interest' would not accomplish this." *Bain* at 111. This is exactly what occurred in the instant case. The only publicly documented transaction, in fact, the only dated transaction purporting to convey the note to Deutsche Bank prior to foreclosure, was the assignment at issue. See language, "Together with the Note" on Assignment of Deed of Trust. CP 136. Nor could this assignment from MERS be otherwise than an intended transfer of the note. It is not possible

to transfer a lien without also transferring the underlying obligation. "In Washington, '[a] mortgage creates nothing more than a lien in support of the debt which it is given to secure.'" *Bain* at 92, citing *Pratt v. Pratt*, 121 Wash. 298.

### **3) DOTA does not allow bearer foreclosure.**

Possession of a note endorsed in blank, i.e. "payable to bearer," does not give a party the right to foreclose on property. The DOTA requires the name of the beneficiary (i.e. note holder) to be publicly recorded. RCW 61.24.020. If the note were then sold or otherwise transferred, this public record would no longer be accurate, thus, a timely recordation of the assignment would be required in order to maintain compliance.

Assignments are also explicitly required under RCW 61.24.040(f), "NOTICE OF TRUSTEE'S SALE," section I. "...the beneficial interest in which was assigned by . . . . ., under an Assignment recorded under Auditor's File No." Further, *Bain* held that the identity of the noteholder must be disclosed to the borrower, and tied this to Washington's recording requirements. *Bain* at 98, n.7.<sup>2</sup>

### **3. The trustee's sale was held without authority; Schnall has shown good faith.**

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<sup>2</sup> *Bain* notes at n.4 that a bill was introduced in 2012 that would require every assignment to be recorded. Schnall thinks that such an amendment would be a much needed clarification of an existing requirement.

DB/MERS allege that the trustee had in its possession a declaration from the beneficiary before issuing the Notice of Trustee's Sale, as required in RCW 61.24.030(7)(a). They also allege that Schnall wishes to invalidate the Deed of Trust.

**a. *Trustee had no proof; sale is void under Albice.*** In their Response Brief, defendants refer to the Notice of Trustee's Sale that they presented as evidence in a declaration to the trial court. Res. Br. p. 12. However, the document they refer to represents a continuance, not the original notice. The original Notice of Trustee's Sale was served and recorded on 9/24/2010. CP 791 (Proposed Amended Complaint), LL 4-7, CP 1009 (Notice of Trustee's Sale). The required declaration by the beneficiary was not signed until 11/4/2010. CP 791 (Proposed Amended Complaint); LL 8-9, CP 124 (Affidavit of Holder of Note). Defendants admit that RTS did not receive said declaration until 11/9/2010. CP 115 LL. 2-4 (Decl. of Melissa Hjorten). This was 46 days after RTS served the Notice of Trustee's Sale. Issuance of the Notice of Trustee's Sale prior to possession of the declaration from the beneficiary constitutes statutory noncompliance. It is also a breach of the trustee's duty of good faith to the borrower under RCW 61.24.010(f)(4). Such violations divest the trustee of the power to conduct the sale, and courts may rule the sale void under these circumstances. *Albice v. Premier Mtg. Svcs.*, 276 P.3d 1277,1282

(2012), *Id.*, at 1285. In *Albice*, the trustee conducted a sale 41 days past the 120 day limit, and the Supreme Court ruled that the sale was invalid. *Id.* at 1282. *Albice* opined that this might have been corrected by "reissuing the statutory notices." *Id.* However, in Schnall's case, the violation is much more severe. Such a breach of good faith would effectively reduce the trustee to a mere agent, and cannot be corrected by simple issuance of a new Notice of Trustee's Sale. The trustee's sale in Schnall's case, as in *Albice*, is void.<sup>3</sup>

**b. *Schnall does not seek to avoid the loan.*** Respondents suggest that Schnall wishes to quiet title or invalidate the encumbrance, and is unwilling to "cure his default." Res. Br. p. 13. This is untrue. While Schnall would certainly be thrilled to shed the encumbrance, as anyone would, Schnall does not suggest this as an equitable remedy.

**1) *Beadles is not on point.*** Defendants cite *Beadles v. ReconTrust Co., N.A.*, 2012 WL 4904461 (E.D. Wash. Oct. 15, 2012). Res. Br. p. 13-14. However, in *Beadles*, the plaintiff failed to seek presale remedy, and was seeking to quiet title on the basis that MERS was listed as the beneficiary on the deed of trust. Schnall clearly sought presale remedy, as the denial of such was a basis of the instant appeal. Nor does

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<sup>3</sup> This is not the first breach of good faith by the trustee. RTS, apparently acting as agent for Deutsche Bank, served Schnall with a Notice of Default that failed to specify that Deutsche Bank was in fact the beneficiary at the time of service. *See* instant Brief, section B.2.a.(3).

Schnall seek to quiet title or invalidate the deed of trust as in *Beadles*.

Defendants are free to pursue judicial foreclosure as proper remedy, as prescribed in *Bain* at 109.

**2) *Equity favors Schnall.***

**a) *Lender acted in bad faith.*** Schnall made payments for nearly three years. Res. Br. p. 2. The interest rate was very high. CP 628(loan audit), CP 181(promissory note). Schnall contacted the lender before defaulting and was constructively refused modification. CP 780 (proposed Amended Complaint), at 3.2-3.4. After Schnall stopped paying, Schnall was offered a trial modification plan, which Schnall followed as required by the lender. *Id.*, at 3.8. Schnall contacted the lender many times, and was constructively refused modification by being repeatedly told no update was available on the application, and, after nearly three months, then requesting Schnall submit another set of paperwork. *Id.*, at 3.10-3.11. Schnall submitted the requested paperwork. *Id.* at 3.11. Exhausted from stress from continually jumping through hoops set by lender for over ten months, Schnall left for an extended trip to California. *Id.*, at 3.12-3.13. When Schnall found out about the offer, Schnall called the lender and explained the circumstances and tried to accept the offer, but the lender refused. *Id.*, at 3.15. Schnall resubmitted the signed modification agreement by fax as requested by lender. *Id.*, at

3.17. Schnall then repeatedly contacted the lender and was variously told that there were no updates or that modification was not possible. *Id.*, at 3.18. Notice of Default followed. *Id.*, at 3.21.

**b) *Lender benefited from default.*** The lender benefited more from Schnall's default than if Schnall had continued to pay. CP 792, at 4.22. Schnall would not have signed loan documents and made mortgage payments had he known this fact.

**c) *Schnall currently making payments.*** Schnall is currently making monthly payments into the court registry in the amount of the mortgage payment. Appendix, Attachment 4. This amount is based on the current monthly payment amount required under the promissory note. Appendix, Attachment 5.<sup>4</sup>

**d) *Preliminary injunction would have resolved equity.*** Had Schnall been granted preliminary injunction, bond would have been set under RCW 61.24.130(1), and Schnall would have been making these payments sooner. Nor is there indication that Schnall would not continue to make payments after the sale is set aside.

**e) *Damages exceed arrearages.*** Schnall believes that he will prevail on claims against defendants, and that

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<sup>4</sup> While this document is not in the Clerk's Papers, it was used as the basis for the bond amount that Schnall is currently required to pay. One could arrive at a similar figure by calculating the terms of the promissory note in relation to publicly available interest rates.

damages awarded will exceed arrearages.

**4. Schnall's argument is clear.**

Defendants argue that Schnall "contends that the trial court erred in making findings of disputed fact on a motion to dismiss." Res. Br. p. 14. This makes no sense. Schnall cannot be arguing about findings of facts made *in* the dismissal hearing. The hearing itself was not recorded by the court, and the written ruling does not give findings. However, defendants' Motion to Dismiss references earlier findings in the denials of preliminary injunction, and it seems likely that the trial court considered this when denying Schnall's Motion to Amend and granting dismissal. Schnall is simply arguing that earlier findings of fact made during denial of preliminary injunction were in error and that there were facts in dispute that should have gone to trial.

**C. The issue of recording requirements is properly before this Court.**

DB/MERS claim that Schnall failed to raise arguments related to RCW 61.24.040 in the trial court, and that his arguments lack specificity. Res. Br. pp. 14-15.

**1. Moot.** In the instant Brief, section B.2.b.(4), Schnall discusses recording requirements as a reply to UCC argument in defendants' Response Brief. Said reply is a discussion of how the law applies to the

issue of whether Deutsche Bank can foreclose on the property as holder, and how this relates to MERS, issues which were indisputably argued in the trial court. This renders moot the need to discuss recording requirements as an issue in itself.

**2. Schnall was specific, and has now given further specificity.**

Schnall's opening brief makes specific claim that recordation of assignment was required in the Notice of Trustee's Sale. Defendants admit this. Res. Br. p. 14, bottom (cont. on 15). This requirement is clearly stated in the first few lines of the Notice of Trustee's Sale, which form is plainly presented for substantial compliance under RCW 61.24.040(f). However, this point is moot, as Schnall has now given further specificity to the matter of recording requirements here and in this Brief under B.2.b.(4).

**3. Recording requirement was raised in trial court.** Defendants contend that "Schnall never raised any arguments related to Section 61.24.040." Res. Br. p. 15. This is untrue. Schnall argued in the trial court that defendants failed to comply with the recording requirements of the DOTA. *See* CP 228, LL 15-19, Schnall arguing that there should have been an assignment recorded from Quicken Loans to IndyMac; CP 609, Schnall arguing that the lack of said assignment violated the DOTA. While Schnall did not specifically mention RCW 61.24.040, this is the only section within the DOTA which specifically requires recordation of

assignments. Defendants cannot now claim they are prejudiced by lack of specificity. Defendants state no theory under which Schnall might have been referring to some other recording requirement which would thus render them unable to prepare a defense.

4. **Argument waived.** MERS/DB did not contest the recording requirement issue in the trial court, which would have afforded Schnall the opportunity to explain with more specificity in the trial court. Further, MERS/DB have admitted, by their actions, that assignments must be recorded. MERS/DB handle untold billions of dollars of mortgages, and have large teams of legal counsel. MERS was specifically designed to *avoid* the recording requirement, to enhance liquidity, as well as avoid recording fees. *Bain* at 88. If Defendants did not think that recordation of assignments was necessary, they surely would not have recorded the assignment from MERS to Deutsche Bank in the instant case. CP 136 (Assignment of Deed of Trust).

5. **Issue is properly decided in the instant appeal.** Schnall's Complaint was dismissed without prejudice. CP 1276. Additionally, *Bain* found that the use of MERS has the capacity to deceive. *Bain* at 117. If Schnall did fail to properly raise the recording requirement argument, as defendants suggest, then Schnall would file a new complaint, as Schnall did not have a chance to explore the ramifications of MERS' deception

before the *Bain* opinion, which would include the effect of MERS' actions with respect to recording requirements. Schnall would likely end up back before this Court in any case. To conserve judicial resources, it seems prudent for this Court to consider the matter now.

**D. Denial of Schnall's Motion to Amend was improper.**

Defendants cite *Wilson v. Horsley*, 137 Wn.2d 500 (1999) (en banc) in support of the denial of Schnall's motion to amend his Complaint.

1. **Hearing not recorded.** As discussed in section A.1. of the instant Brief, the trial court did not record the hearing on December 16, 2011, in which Schnall's Motion to Amend was denied and defendants' Motion to Dismiss was granted. The only record of the trial court's intent is the written ruling. CP 1275-1276. The choice to of whether to record proceedings is at the trial court's discretion. CR 80. The court chose not to do so. Therefore, the only reasoning provided by the trial court for its decision was the written ruling.

2. **No prejudice to defendants.** Defendants cite *Wilson v. Horsley*, 974 P.2d 316. This Court is not unfamiliar with *Wilson*. In 2007, it cited *Wilson* in its reversal of a trial court's refusal to amend, holding that courts should "allow amendment of the pleadings except where amendment would result in prejudice to the opposing party." *Chadwick Farms Owners Ass'n v. FHC, LLC*, 160 P.3d 1061,1067. In *Wilson*, the

trial court refused to allow amendment because "allowing amendment after arbitration 'would be grossly unfair' and would prejudice Wilson." *Wilson*, at 320. Here, there is no such prejudice. By the time of the hearing, preliminary injunction had already been denied. Defendants had conducted a trustee's sale. CP 1307. The purchaser was Deutsche Bank themselves. *Id.* There was simply no prejudice to defendants in allowing Schnall to amend his Complaint.

**3. Dismissal without prejudice supports amendment.** The matter of dismissal is inextricably linked with the denial of Schnall's motion. Had amendment been allowed, dismissal would have been inappropriate, as parties would have needed time to litigate claims in the amended complaint. While Schnall acknowledges that a dismissal without prejudice is not generally appealable, it is used here as evidence that the denial of amendment was an abuse of discretion. The dismissal without prejudice shows the court's intent to allow Schnall to amend his Complaint. There is no explanation given as to why the court would force the parties and the courts to bear the extra burden of starting a new action and familiarizing a new judge with the case.

**E. Denial of Injunctive Relief was improper, and the trustee's sale should be set aside.**

Defendants argue that denial of injunctive relief was proper, on equitable grounds and because Deutsche Bank held the promissory note.

1. **Deutsche Bank did not hold the note.** Once again, defendants argue that Deutsche Bank "held his original promissory note and was entitled to enforce." Res. Br. p. 17. As discussed earlier in this Brief, Deutsche Bank only acquired the promissory note subsequent to Schnall filing suit against them, and did not hold the note at the time they took foreclosure action. Raising UCC "enforcement" arguments on the basis that they *currently* hold the note is purely a distraction from the subject matter of Schnall's motion for preliminary injunction, compliance with the DOTA.

2. **Equity favors Schnall.** See instant Brief, section B.3.b.(1).

3. **Equity favors granting preliminary injunction under DOTA.** The trial court denied preliminary injunction, finding, among other things, that Schnall "has not contested the default" and that the "balance of equities in this circumstance favors the lender." CP 593. This was an incorrect finding given that the request for injunction was being made pursuant to RCW 61.24.130(1). This statute specifically prescribes the requirement of bond, which would allow the court to balance the

equities for the duration of the injunction. Had it been granted, there would have been no prejudice to Deutsche Bank.

### III. CONCLUSION

Relief requested:

1. Order the Trustee's sale that occurred on December 2, 2011 void.
2. Reverse trial court's denial of preliminary injunction.
3. Set bond per RCW 61.24.130(1) at current amount of \$1,616.66 per month as set by Judge Erlick (Appendix, Attachment 4, p. 2).
4. Reverse trial court's denial of Motion to Amend.
5. Remand for further proceedings.

Respectfully submitted this 13<sup>th</sup> day of December, 2012,



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Micah Schnall  
Appellant, Pro Se.

**IV. APPENDIX**

Attachment 1 – Clerk’s Minutes for December 16, 2011 Hearing

Attachment 2 – Email from Dolores Rawlins re December 16

Attachment 3 – Appointment of Successor Trustee for Bain

Attachment 4 – Judge Erlick’s Order Setting Bond

Attachment 5 – New Interest Rate Notice

Rules

**CLERK'S MINUTES**

SCOMIS CODE: MTHRG

Judge: Suzanne Barnett  
Bailiff: Kim Whittle  
Court Clerk: Joseph Mason  
Not Reported

Dept. 46  
Date: 12/16/2011

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**KING COUNTY CAUSE NO.: 11-2-19807-3 SEA**

**Micah Schnall vs. Deutsche Bank, et ano**

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**Appearances:**

Plaintiff appearing Pro Se

Defendants appearing via telephone by counsel William Larkins

**MINUTE ENTRY**

Defendants' motion to dismiss -- Granted

Order allowing Mr. McDonald to withdraw as Plaintiff's counsel is signed

Plaintiff's motion to amend complaint -- Denied

Order to be presented

**Eric Taneda**

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**From:** Rawlins, Dolores <Dolores.Rawlins@kingcounty.gov>  
**Sent:** Monday, November 19, 2012 1:32 PM  
**To:** Eric Taneda  
**Subject:** RE: Schnall v Deutsche Bank

**Importance:** High

Hello, Mr. Taneda:

So sorry for the misunderstanding.

No, sorry to say there was no recording made of the hearing, nor was there a court reporter in the courtroom at the time of the hearing.

So, I am sorry, but there is not anything verbatim of the hearing. The only record of the hearing is what is in the clerk's notes of the hearing.

If you want a copy of that you will have to go to the 6<sup>th</sup> floor of the King County Superior Court, to the Clerk's Office and request a copy of the entry.

If I can be of any assistance, please, let me know.

Sincerely

Dolores A. Rawlins, RPR, CRR, CCR, CCP  
Official Court Reporter, King County  
516 Third Avenue, Rm. C-912  
Seattle, Washington 98104  
(206) 296-9171

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**From:** Eric Taneda [mailto:eric@onsitehelp.com]  
**Sent:** Monday, November 19, 2012 1:25 PM  
**To:** Rawlins, Dolores  
**Subject:** RE: Schnall v Deutsche Bank

Hi,

When we originally spoke, you said you saw that the November 15 and December 2 hearings could be transcribed, and you did this. I came by to pick these up but the transcripts were not available at Room C-912 when I showed up, probably because I waited too long to pick them up. But I walked down to the Appeals Court and made Xerox copies from the filed copy there. So there is nothing outstanding with respect to the November 15 and December 2 transcripts.

What I wanted to ask about was for a separate thing -- there was also a hearing that took place on December 16, 2012, for which you mentioned it seemed like there was no recording available to do a transcript. But you said you would check with other sources to double-check and get back to me. I wanted to follow up on that and see if indeed the December 16, 2012 hearing was not recorded and could not be transcribed.

This is for case 11-2-19807-3SEA.

Please let me know what you find/found.

Thank you,

Eric Taneda

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**From:** Rawlins, Dolores [<mailto:Dolores.Rawlins@kingcounty.gov>]  
**Sent:** Monday, November 19, 2012 12:59 PM  
**To:** Eric Taneda  
**Subject:** RE: Schnall v Deutsche Bank  
**Importance:** High

Dear Mr. Eric Taneda:

I am sorry but I don't understand your email. It is following an email thread that I specifically said:

Mr. Taneda:

I have filed the transcript in the above requested matter.

I will leave the transcripts for your pick up on the 9<sup>th</sup> floor of the King County Superior Court, Room C-912  
In my mailbox.

Thank you for your attention to this matter.

I have filed the transcript of the hearing with the Court of Appeals, as I stated. I have a copy that I left in my mailbox, but it was never picked up. I hadn't heard from you after my email, so I brought it up to my office.

If I can be of any help, please, let me know.

Thank you for your attention to this matter.

Dolores A. Rawlins, RPR, CRR, CCR, CCP  
Official Court Reporter, King County  
516 Third Avenue, Rm. C-912  
Seattle, Washington 98104  
(206) 296-9171

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**From:** Eric Taneda [<mailto:eric@onsitehelp.com>]  
**Sent:** Friday, November 16, 2012 4:52 PM  
**To:** Rawlins, Dolores  
**Subject:** RE: Schnall v Deutsche Bank

Hi Dolores,

Can you confirm that the December 16, 2012 hearing could not be transcribed because the hearing was not recorded?  
The case number is 11-2-19807-3SEA.

Thank you,

Eric Taneda

---

**From:** Rawlins, Dolores [<mailto:Dolores.Rawlins@kingcounty.gov>]  
**Sent:** Thursday, June 28, 2012 4:08 PM  
**To:** Eric Taneda  
**Subject:** Schnall v Deutsche Bank  
**Importance:** High

Mr. Taneda:

I have filed the transcript in the above requested matter.

I will leave the transcripts for your pick up on the 9<sup>th</sup>  
floor of the King County Superior Court, Room C-912  
In my mailbox.  
Thank you for your attention to this matter.

Dolores A. Rawlins, RPR, CRR, CCR, CCP  
Official Court Reporter, King County  
516 Third Avenue, Rm. C-912  
Seattle, Washington 98104  
(206) 296-9171

---

**From:** Eric Taneda [<mailto:eric@onsitehelp.com>]  
**Sent:** Thursday, May 10, 2012 5:49 AM  
**To:** Rawlins, Dolores  
**Subject:** RE: Status request

Hi Dolores

I sent a check for \$225 on 5/5/2012, by postal mail, to the address in your signature line. Please let me know if you still have not received this.

Thank you,

Eric Taneda

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**From:** Rawlins, Dolores [<mailto:Dolores.Rawlins@kingcounty.gov>]  
**Sent:** Friday, May 04, 2012 10:37 AM  
**To:** Eric Taneda  
**Subject:** RE: Status request  
**Importance:** High

Hello, Mr. Taneda:

So sorry to not get back to you sooner.  
The transcript on 12-2-2011 would be a total of

\$75.00.

The transcript for 11/15/11 would be a total of \$150.00 for a grand total for both transcripts of \$225.00.

At the receipt of your check/money order, I will begin transcription and alert you when the transcript is ready for pickup.

Thank you for your attention to this matter.

Sincerely,

Dolores A. Rawlins, RPR, CRR, CCR, CCP  
Official Court Reporter, King County  
516 Third Avenue, Rm. C-912  
Seattle, Washington 98104  
(206) 296-9171

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**From:** Eric Taneda [<mailto:eric@onsitehelp.com>]  
**Sent:** Thursday, May 03, 2012 3:03 PM  
**To:** Rawlins, Dolores  
**Subject:** Status request

Hi Dolores,

We spoke a couple of weeks ago about case number 11-2-19807-3SEA.

There was a hearing on 11/15/2011 and another hearing on 12/2/2011 for which you were going to determine the fees that need to be paid to transcribe them.

There was another hearing on 12/16/2011 for which there did not appear to be any recording, but you were going to check with your other resources to see, as I would like to see this transcribed as well if possible.

Please let me know the status of this, how much I need to pay, as the deadline is looming for the appeals court, to make a statement of arrangements.

My cell number is 425.444.8680. I tried to call you but got a voicemail message that said you cannot return calls if it is to a number outside of area code 206. Please let me know if this is an issue preventing you from calling me back, I may be able to arrange to have a temporary 206 area code phone number attached to my phone.

Thank you,

Eric Taneda

When recorded, mail to:

REGIONAL TRUSTEE SERVICES CORPOR  
618 1st Avenue, Suite 500  
Seattle, WA 98104



20080909001150  
FIDELITY NATIO AST  
PAGE 01 OF 022  
09/09/2008 13:51  
KING COUNTY, WA  
15.00

Trustee's Sale No: 01-FMB-62059

\*FMB620590010000000\* FIDELITY NATIONAL TITLE  
80808 2/16

**APPOINTMENT OF SUCCESSOR TRUSTEE**

**KNOW ALL MEN BY THESE PRESENTS** that, KRISTIN BAIN A SINGLE PERSON is the Grantor, and STEWART TITLE GUARANTY CO. is the Trustee, and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR ITS SUCCESSORS AND ASSIGNS is the Beneficiary under that certain trust deed dated 3/9/2007, under Auditor s/Recorder s No. 20070319001732, records of KING County, WASHINGTON.

**NOW, THEREFORE**, in view of the premises, INDYMAC FEDERAL BANK, FSB, who is the present beneficiary, hereby appoints REGIONAL TRUSTEE SERVICES CORPORATION, whose address is 618 1st Avenue, Suite 500, Seattle, WA 98104, as Successor Trustee under said trust deed, to have all the powers of said original trustee, effective as of the date of execution of this document.

**IN WITNESS WHEREOF**, the undersigned beneficiary has hereunto set his hand; if the undersigned is a corporation, it has caused its corporate name to be signed and affixed hereunto by its duly authorized officers.



RECEIVED  
CIVIL

12 OCT 26 PM 3:35

KING COUNTY SHERIFF

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

DEUTSCHE BANK NATIONAL TRUST  
COMPANY, AS TRUSTEE  
Plaintiff/Petitioner,

No. 12-2-03428-1 SEA

vs.

ORDER ON CIVIL MOTION

MICHA SCHNAU, et al  
Defendant/Respondent.

THIS MATTER having come on duly and regularly before the undersigned Judge of the  
above-entitled Court upon Defendant's Motion for Revision of Commissioner's  
order entered on August 15, 2012, granting Plaintiff a writ of  
restitution.

and this Court being otherwise fully advised in the premises; NOW, THEREFORE,  
IT IS HEREBY ORDERED that Defendant's Motion for Revision is granted  
and the order issuing writ of restitution is vacated  
IT IS FURTHER ORDERED that this unlawful detainer action is  
stayed until Defendant's appeal of superior court order

DATED this \_\_\_ day of \_\_\_\_\_

John P. Erlick, Judge

ORDER

Judge John P. Erlick  
King County Superior Court  
516 Third Avenue  
Seattle, WA 98104  
206-296-9345

Case Name: DEUTSCHE BANK v. SCHMIDT  
Cause Number: 12-2-03428-1 SEY

NUMER 11-2-19807-3 SEA (Div 1: 03428-3) is resolved. The stay on the unlawful detainer is conditioned on Defendant making monthly payments by the first of each month and no later than the fifth of each month, into the King County Clerk Registry. Each monthly payment shall be in the amount of \$1,000.00. The failure of Defendant to make the payment on time will result in a lift of the stay on the unlawful detainer action. Should this stay be lifted, Plaintiff shall be entitled to obtain a writ of restitution, ex parte, upon providing proof to the court that Defendant failed to timely make a monthly payment. Plaintiff shall provide notice to Defendant five days prior to Plaintiff submitting its motion for writ of restitution to the ex parte department. Notice shall include the motion and cover letter indicating the date Plaintiff intends to have the motion presented, and notice shall be by first class mail to the property address as well as by email to [micahlegal@gmail.com](mailto:micahlegal@gmail.com).

Date: 10/26/12

[Signature]  
Judge

Copy Received  
[Signature]  
Attorney for Plaintiff  
Bar Number: 42960

Copy Received  
[Signature] micah schmidt  
Attorney for Defendant  
Bar Number: pro se

**IndyMac Mortgage Services,**  
 a division of OneWest Bank®, FSB  
 6900 Beatrice Drive • Kalamazoo, MI 49009



October 10, 2011

#BWDXCT  
 #6688163432003103#

0029388L071/C36T  
  
 MICAH SCHNALL  
 11521 167TH PL NE  
 REDMOND WA 98052-2749

MORTGAGE LOAN NUMBER: 3002343618  
 PROPERTY ADDRESS: 11521 167th Pl Northeast  
 Redmond WA 98052

Your Adjustable Rate Mortgage is scheduled for an interest rate and payment change.

A new interest rate of 2.75000% is effective November 01, 2011. As a result of this rate change, your new mortgage payment is \$1,054.17. This new payment, due December 01, 2011 will be reflected on your December 01, 2011 billing statement.

Below is a summary review of this interest rate and resulting payment change.

	PRIOR	NEW
<b>Interest Rate Calculation</b>		
Index	*	0.55783%
Margin	2.25000%	2.25000%
Interest Rate	7.62500%	2.75000%
<b>Payment Breakdown</b>		
Principal & Interest	\$2,922.92	\$1,054.17**
Escrow/Insurance		\$562.49
Total Payment		\$1,616.66

\* Your original interest rate was not based on an index.  
 \*\* New principal and interest payment calculated using a projected principal balance of \$460,000.00

Your new interest rate was calculated using the margin plus index method. Please note that there may be times when this interest rate does not equal the index plus margin. This is due to the terms of your note capping the change in the interest rate or rounding the result of the index plus margin.

If you have questions, please contact our Customer Service Department at 800.781.7399. Representatives are available Monday through Friday, from 8:00 a.m. until 9:00 p.m. (Eastern Time).

This company is a debt collector and any information obtained will be used for that purpose. However, if you have filed a bankruptcy petition and there is either an "automatic stay" in effect in your bankruptcy case, or your debt has been discharged pursuant to the bankruptcy laws of the United States, this communication is intended solely for information purposes.

### RAP 9.2(c)

Notice of Partial Report of Proceedings and Issues. If a party seeking review arranges for less than all of the verbatim report of proceedings, the party should include in the statement of arrangements a statement of the issues the party intends to present on review. Any other party who wishes to add to the verbatim report of proceedings should within 10 days after service of the statement of arrangements file and serve on all other parties and the court reporter a designation of additional parts of the verbatim report of proceedings and file proof of service with the appellate court. If the party seeking review refuses to provide the additional parts of the verbatim report of proceedings, the party seeking the additional parts may provide them at the party's own expense or apply to the trial court for an order requiring the party seeking review to pay for the additional parts of the verbatim report of proceedings.

### RAP 9.3

#### NARRATIVE REPORT OF PROCEEDINGS

The party seeking review may prepare a narrative report of proceedings. A party preparing a narrative report must exercise the party's best efforts to include a fair and accurate statement of the occurrences in and evidence introduced in the trial court material to the issues on review. A narrative report should be in the same form as a verbatim report, as provided in rule 9.2(e) and (f). If any party prepares a verbatim report of proceedings, that report will be used as the report of proceedings for the review. A narrative report of proceedings may be prepared if either the court reporter's notes or the videotape of the proceeding being reviewed are lost or damaged.

### CR 80

#### COURT REPORTERS

(a) (Reserved.)

(b) Electronic Recording. In any civil or criminal proceedings, electronic or mechanical recording devices approved by the administrator for the Courts may be used to record oral testimony and other oral proceedings in lieu of or supplementary to causing shorthand notes thereof to be taken. In all matters the use of such devices shall rest within the sole discretion of the court.

(c) Recording Proceedings in Superior Court by Means of Videotape. All superior courts that elect to use video equipment to record proceedings shall comply with courtroom procedures published by the Office of the Administrator for the Courts.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

Micah Schnall, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 Deutsche Bank National Trust Company, )  
 )  
 Mortgage Electronic Registration Systems, )  
 )  
 Regional Trustee Services, and John Does )  
 )  
 inclusive 1 through 20, )  
 )  
 Respondents, )  
 )

Case No. 68516-3-I  
DECLARATION OF SERVICE

I, Eric Taneda, under penalty of perjury under the laws of the state of Washington declare the following are true and correct to the best of my knowledge:

1. I am over 18 years of age, an inhabitant of Washington State, and competent to be a witness herein.
2. On December 13, 2012, I delivered by fax, and by U.S. postal service, true copies of the Reply Brief with five (5) attachments for the above captioned case. The service was to:

**DECLARATION OF SERVICE**

Eric Taneda  
11521 167th PI NE  
Redmond, Washington 98052  
425-562-0066

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Attn: Danielle J. Hunsaker  
Larkins Vacura LLP  
621 SW Morrison St Ste 1450  
Portland, Oregon 97205  
Fax # 503.827.7600

Signed at Redmond, King County, state of Washington, on December 13, 2012,

  
\_\_\_\_\_  
Eric Taneda  
11521 167th Place NE  
Redmond, Washington 98052  
425-562-0066

425-562-0066  
11521 167th PI NE  
Redmond, WA 98052