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Court of Appeals
Division I
State of Washington

NO. 73522-5-I

COURT OF APPEALS
DIVISION I OF THE STATE OF WASHINGTON

MICAH SCHNALL,

Appellant,

v.

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

Respondents.

**ANSWERING BRIEF OF RESPONDENTS DEUTSCHE BANK
NATIONAL TRUST COMPANY, AS TRUSTEE FOR INDYMAC
INDX MORTGAGE LOAN TRUST 2006-AR39, MORTGAGE
PASS-THROUGH CERTIFICATES SERIES 2006-AR39 AND
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
I. INTRODUCTION.....	1
II. COUNTERSTATEMENT OF ISSUES.....	2
III. COUNTERSTATEMENT OF THE FACTS.....	3
A. Schnall takes out a loan to purchase property	3
B. Possession, ownership, and servicing of the Note subsequent to origination.....	4
C. Plaintiff defaults on the Loan.....	5
D. Non-judicial foreclosure proceedings.....	5
F. Plaintiff Files for Bankruptcy and Attempts to Render the Loan Unsecured.....	7
G. Plaintiff Files a Lawsuit to Stop the Non-Judicial Foreclosure; however, the Foreclosure is Completed.....	8
IV. ARGUMENT.....	8
A. Standard of Review.....	10
B. The Order denying Schnall’s motion for summary judgment is not appealable.....	11
C. The evidence establishes the Trust was the beneficiary of the Deed of Trust through the entire non-judicial foreclosure.....	13
i. The Trust was the holder of the Note pursuant to the uniform commercial code.....	14
ii. Schnall’s arguments are speculative and unsupported by any evidence.....	16

D.	Schnall’s evidentiary objections are not properly raised on appeal.....	19
	i. Schnall did not raise any objections to the Ortwerth Declaration in his response to the Trust’s summary judgment motion.....	19
	ii. The evidentiary objections are not properly raised on appeal.....	22
E.	The Ortwerth and Campbell Declarations do not provide a basis to overturn summary judgment in favor of the Trust.....	24
	i. Schnall did not raise any objections to the Ortwerth Declaration in his response to the Trust’s summary judgment motion.....	25
	ii. The trial court’s ruling may be affirmed even without the Campbell Declaration.	29
F.	DBNTC’s shipment of the Note to its servicing agent does not defeat holder status.....	31
G.	The Notice of Default was properly issued and does not provide a basis to overturn the trustee’s sale.....	33
	i. The Notice of Default was issued by the Trust, through its authorized agent.....	34
	ii. The Notice of Default identifies the owner of the Note.....	36
H.	Schnall cannot establish the requisite prejudice to void the non-judicial foreclosure sale.....	38
I.	Schnall has waived all claims against MERS.....	43
V.	Conclusion.....	43

TABLE OF AUTHORITIES

Cases

Albice v. Premier Mortg. Services of Washington, Inc., 174 Wn.2d 560,
276 P.3d 1277 (2012)..... 39

Amresco Independence Funding, Inc. v. SPS Properties, LLC, 129
Wn.App. 532, 119 P.3d 884 (2005)..... 38, 39

*Atherton Condo. Apartment-Owners Ass'n Bd. Of Directors v. Blume Dev.
Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990).....26

Bain v. Metropolitan Mortg. Group, Inc., 175 Wn.2d 83, 285 P.3d 34
(2012)..... 14, 31

Balise v. Underwood, 62 Wn.2d 195, 381 P.2d 966 (1963)..... 11

Baldwin v. Sisters of Providence in Wash., Inc., 112 Wn.2d 127, 769 P.2d
298 (1989)..... 11

Bavand v. OneWest Bank, FSB, 587 Fed.Appx. 392 (9th Cir.
2014).....39, 43

BC Tire Corp. v. GTE Directories Corp., 46 Wn.App. 351, 730 P.2d 726
(1986).....22

Brown v. Washington State Dept. of Commerce, --- Wn. ---, 359 P.3d 771,
(2015).....37, 42

Brown v. Spokane Fire Protection Dist. No. 1, 100 Wn.2d 188, 668 P.2d
571 (1983).....24

Bryant v. Bryant, 125 Wn.2d 113, 882 P.2d 169 (1994)..... 32

Burmeister v. State Farm Ins. Co., 92 Wn.App. 359, 966 P.2d 921
(1998).....28

Cook v. Tarbert Logging, Inc., ---Wn.App.---, 360 P.3d 855 (2015).....29

<i>Cotton v. Kronenberg</i> , 111 Wn.App. 258, 44 P.3d 878 (2002).....	20
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	26
<i>Davidson v. Serles & Assocs. v. City of Kirkland</i> , 159 Wn.App. 616, 246 P.3d 822 (2011).....	29
<i>Del Guzzi Constr. Co. v. Clobal Northwest ltd.</i> , 105 Wn.2d 878, 719 P.2d 120 (1986).....	12
<i>Dehaven v. Gant</i> , 42 Wn.App. 666, 713 P.2d 149 (1986).....	26
<i>DGHI, Enterprises v. Pacific Cities, Inc.</i> , 137 Wn.2d 933, 977 P.2d 1231 (1999).....	12
<i>Doty-Fielding v. Town of South Prairie</i> , 143 Wn.App. 559, 178 P.3d 1054 (2008).....	27
<i>Escude v. King County Pub. Hosp. Dist. No. 2</i> , 117 Wn.App. 183, 69 P.3d 895 (2003).....	22
<i>Folsom v. Burger King</i> , 135 Wn.2d 658, 958 P.2d 301 (1998).....	24
<i>Gleeson v. Lichty</i> , 62 Wn.656, 114 P. 518 (1911).....	31
<i>Gossen v. JPMorgan Chase Bank</i> , 819 F.Supp.2d 1162 (W.D. Wash. 2011).....	34
<i>Grimwood v. University of Puget Sound, Inc.</i> , 110 Wn.2d 355, 753 P.2d 517 (1988).....	25
<i>Hearst Communications, Inc. v. Seattle Times Co.</i> , 154 Wn.2d 493, 115 P.3d 262 (2005).....	10
<i>In re Estate of Springer</i> , 97 Wn. 546, 166 P. 1134 (1917).....	31
<i>Jacob's Meadow Owner's Ass'n v. Plateau 44 II, LLC</i> , 139 Wn.App. 743, 162 P.3d 1153 (2007).....	19
<i>Koegel v. Prudential Mut. Sav. Bank</i> , 51 Wn.App. 108, 752 P.2d 385 (1988).....	37, 38, 39, 40

<i>Lundgren v. Kieren</i> , 64 Wn.2d 672, 393 P.2d 625 (1964).....	16
<i>Rucker v. NovaStar Mortgage, Inc.</i> , 177 Wn.App. 1, 311 P.3d 31 (2013).....	38, 39
<i>Segaline v. Dep't of Labor & Indus.</i> , 144 Wn.App. 312, 182 P.3d 480 (2008).....	11
<i>Seven Gables Corp. v. MGM/US Entm't Co.</i> , 106 Wn.2d 1, 721 P.2d 1 (1986).....	11
<i>Shannon v. State</i> , 110 Wn.App. 366, 40 P.3d 1200 (2002).....	12
<i>Sneed v. Barna</i> , 80 Wn.App. 843, 912 P.2d 1035 (1996).....	34
<i>Snohomish County v. Rugg</i> , 115 Wn.App. 218, 61 P.3d 1184 (2002).....	25
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 945 P.2d 1120 (1997).....	29
<i>State v. Lynn</i> , 67 Wn.App. 339, 835 P.2d 251 (1992).....	19
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	19
<i>Sun Mountain Productions, Inc. v. Pierre</i> , 84 Wn.App. 608, 929 P.2d 494 (1997).....	27
<i>Vallandigham v. Clover Park Sch. Dist. No. 400</i> , 154 Wn.2d 16, 109 P.3d 805 (2005).....	10, 18

Statutes

RCW 61.24.005(2).....	14, 30
RCW 61.24.030(8)(l).....	36
RCW 61.24.030(7)(a).....	36
RCW 62A.1-201(a)(21)(A).....	14
RCW 62A.3-205(a).....	14
RCW 61A.3-205(b).....	14, 15

UCC § 3-201 cmt. 1.....14, 31

Rules

King County LCR 56(e).....20, 21, 29

CR 56(c)..... 10

CR 56(e)..... 24, 25, 27, 28

CR 56(h).....20

RAP 2.2(a).....11, 12

RAP 2.5(a).....19, 25

RAP 6.2(b).....12

RAP 9.12.....12, 19, 21, 34

RAP 10.3(a)(4).....22

RAP 10.3(a)(5).....22

I. INTRODUCTION

This appeal involves Appellant Micah Schnall's ("Schnall") attempt to invalidate a foreclosure based on non-prejudicial technicalities. Schnall does not challenge his default; his testimony establishes that he knew who to pay, and ultimately, had no intent to reinstate his loan. This case is not about a borrower whose rights were impaired by a foreclosure notice. Tellingly, Schnall tried, and failed, to render the loan an unsecured debt through a Chapter 13 bankruptcy proceeding and subsequent appeal. Rather than pay his loan or allow an appropriate foreclosure, Schnall brought suit against the owner and holder of his loan, Deutsche Bank National Trust Company, as Trustee for IndyMac INDX Mortgage Loan Trust 2006-AR39, Mortgage Pass-Through Certificates Series 2006-AR39 (hereinafter the "Trust"), and Mortgage Electronic Registration Systems, Inc. ("MERS"), alleging that MERS and the Trust violated the Deed of Trust Act by serving a notice of default which did not clearly specify a beneficiary or a noteholder.

Schnall's suit has no merit. Application of well-settled Washington law to the proven facts establishes that the trial court properly granted summary judgment in favor of respondents MERS and the Trust, and also properly denied Schnall's summary judgment motion.

The trial court's rulings should be affirmed as the evidence establishes that there is no genuine issue for trial regarding the Trust's possession of the promissory note and its authority, as beneficiary of the deed of trust, to appoint Regional Trustee Services Corporation to effectuate the foreclosure. While Schnall provided speculation and conclusory allegations regarding the Trust's standing as the holder of the note, this kind of supposition does not create a genuine issue for trial.

Similarly, Schnall did not set forth any evidence that would establish he was prejudiced by the non-judicial foreclosure or any claimed deficiencies in the notice of default. As Schnall has failed to establish any material noncompliance with the Deed of Trust Act, the trial court properly declined to invalidate the trustee's sale.

Accordingly, the Trust and MERS respectfully request that this Court affirm the trial court's orders granting summary judgment in favor of the Trust and MERS, and denying Schnall's summary judgment motion.

II. COUNTERSTATEMENT OF ISSUES

1. Whether the Order denying Schnall's summary judgment motion is appealable.
2. Whether the evidence establishes that the Trust held the promissory note through the course of the non-judicial foreclosure.

3. Whether the Notice of Default issued prior to nonjudicial foreclosure violated the terms of the Deed of Trust Act.

4. Whether the evidence establishes there is no material violation of the Deed of Trust Act that would support rescission of the trustee's sale?

III. COUNTERSTATEMENT OF THE FACTS

The underlying facts and procedure pertinent to this appeal are as follows:

A. Schnall Takes Out a Loan to Purchase Property

On or about October 30, 2006, in consideration for a loan ("Loan"), Micah Schnall executed a promissory note ("Note") in the amount of \$460,000.00 in favor of Quicken Loans Inc. (CP 239.) On or about October 31, 2006, in order to secure repayment of the Note, Micah Schnall executed a deed of trust ("Deed of Trust") encumbering real property located at 11521 167th Place Northeast, Redmond, WA 98052 (the "Property"). (CP 239–240) The Deed of Trust was recorded on November 1, 2006 with the King County Auditor's Office as Ins. No. 20061101002111. (CP 240.) Collectively, the Note and Deed of Trust are referred to as the "Loan" or the "Loan Documents."

B. Possession, Ownership, and Servicing of the Note Subsequent to Origination

After Loan origination, the Loan was securitized and transferred to the IndyMac INDX Mortgage Loan Trust 2006-AR39, Mortgage Pass Through Certificates Series 2006-AR39. Deutsche Bank National Trust Company serves as the Trustee for the IndyMac INDX Mortgage Loan Trust 2006-AR39, Mortgage Pass-Through Certificates Series 2006-AR39 (collectively, the "Trust"). (See CP 92, CP 387.) On December 7, 2006, the Trust took physical possession of the Note. (CP 387.) On February 15, 2007, the Trust took physical possession of the Deed of Trust. (CP 387.) Through the course of the non-judicial foreclosure of the Property (discussed below), the Trust has maintained continuous possession of the Note either through its own storage facilities, or through its attorneys or mortgage loan servicer. (CP 387–388, CP 240.)

The fact that the Trust was in constant constructive possession of the Note even when it was with a loan servicer is documented in a Pooling and Servicing Agreement ("PSA"), which sets forth the Deutsche Bank National Trust Company's obligations as trustee of the IndyMac INDX Mortgage Loan Trust 2006-AR39, Mortgage Pass-Through Certificates Series 2006-AR39. See (CP 51.) Pursuant to Section 3.14 of the PSA, if any mortgage loan servicer has possession of the Note, then

the Note is held by the servicer on behalf of the Trust and remains the sole and exclusive property of the Trust. (CP 291.) OneWest Bank, FSB (OneWest Bank”) was a prior servicer of the Schnall Loan on behalf of the Trust, until November 4, 2013, when servicing of the loan transferred to Ocwen Loan Servicing, LLC. (CP 234, 237.)

C. Plaintiff Defaults on the Loan

Micah Schnall fell into default under the terms of the Note and Deed of Trust by failing to perform monthly payment obligations beginning with the September 1, 2009 installment. (CP 240.) Micah Schnall stated in a Hardship Affidavit, under penalty of perjury, that he could not make mortgage payments as (1) he split up with a girlfriend who had been helping pay expenses, (2) he had no cash reserves, and (3) he had significant credit card debt used to pay for living expenses. (CP 240.)

D. Non-judicial Foreclosure Proceedings

In light of the borrower’s default, the following steps were taken to initiate non-judicial foreclosure:

Limited Power of Attorney. On March 8, 2010, Deutsche Bank National Trust Company executed a Limited Power of Attorney (“Power of Attorney”), authorizing OneWest Bank, FSB to act as its attorney-in-fact with specific contractual authority to act on behalf of the Trust to effectuate the foreclosure of the Property. (CP 329–343)

Assignment of the Deed of Trust. On or about August 18, 2010, MERS, as nominee for Quicken Loans, Inc. and its successors and assigns, executed an assignment of deed of trust (“Assignment of Deed of Trust”) assigning MERS’ record and agency interest under the Deed of Trust to the Trust. (CP 241) The Assignment of Deed of Trust was recorded on September 24, 2010 with the King County Auditor’s Office as Ins. No. 20100924001360. (CP 241)

Appointment of Successor Trustee. On August 19, 2010, the Trust appointed Regional Trustee Services Corporation (“RTS”) as successor trustee under the Deed of Trust. (CP 241) The appointment of successor trustee (“Appointment of Successor Trustee”) was recorded with the King County Auditor’s Office on September 24, 2010 as Ins. No. 20100924001361. (CP 242)

Notice of Default. On August 24, 2010, RTS, as agent of the Trust, sent a notice of default (“Notice of Default”) to Plaintiff. (CP 242)

First Notice of Trustee’s Sale. On September 24, 2010, RTS recorded a notice of trustee’s sale (“1st Notice of Trustee’s Sale”), setting a trustee’s sale date of December 27, 2010. The 1st Notice of Trustee’s Sale was recorded with the King County Auditor’s Office as Ins. No. 20100924001362. (CP 242)

Beneficiary Declaration. On or about November 9, 2010, RTS received a sworn Affidavit of Holder of note declaring that the Trust is the current owner and holder of the Note. (CP 242)

Second Notice of Trustee's Sale. On November 10, 2010, RTS recorded a second notice of trustee's sale ("2nd Notice of Trustee's Sale"), setting a trustee's sale date of February 11, 2011. The 2nd Notice of Trustee's Sale was recorded with the King County Auditor's Office as Ins. No. 20101110002056. (CP 242)

E. Plaintiff Files for Bankruptcy and Attempts to Render the Loan Unsecured

On February 10, 2011, Schnall filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of Washington. (CP 175) On April 26, 2011, the Chapter 13 Trustee filed an objection to confirmation of the Schnall's Chapter 13 plan. (CP 193) The Chapter 13 Trustee objected to the Schnall's classification of the Loan as an unsecured debt. *Id.* On June 1, 2011, an Order was entered denying confirmation of the Schnall's Chapter 13 plan and dismissing the case. (CP 181–182)

On May 31, 2011, Schnall filed a Motion to Reconsider the Order denying confirmation. (CP 196) In the Motion for Reconsideration, Schnall acknowledged that the Trust was listed as the beneficiary in the

Notice of Default. (CP 207) The Motion for Reconsideration was denied by the Bankruptcy Court on June 28, 2011. (CP 212) Schnall appealed the Order Denying Motion for Reconsideration to the Ninth Circuit Bankruptcy Appellate Panel. On May 24, 2012, a Memorandum Opinion was issued confirming the Bankruptcy Court's Order. (CP 174)

F. Plaintiff Files a Lawsuit to Stop the Non-Judicial Foreclosure; however, the Foreclosure is Completed

On June 3, 2011, Schnall filed a complaint in King County Superior Court under Cause No. 11-2-19807-3, alleging claims against the Trust and MERS. (CP 1) The Complaint sought claims for violations of the Consumer Protection Act ("CPA"), Truth in Lending Act, Deed of Trust Act ("DTA"), and the Real Estate Settlement Procedures Act. (CP 13-17.)¹ Schnall alleges that the notice of default violated the DTA as it did not clearly specify a beneficiary or noteholder, thereby depriving Schnall of the opportunity to scrutinize and defend against action by the anonymous initiator of the foreclosure action. (CP 16-17.)

Meanwhile, the Trust Proceeded with foreclosure efforts. On August 19, 2011, RTS recorded a third notice of trustee's sale ("3rd Notice of Trustee's Sale"), setting a trustee's sale date of November 18,

¹ On December 20, 2011, the trial court dismissed all of the Plaintiffs claims without prejudice and Micah Schnall appealed the dismissal of the DTA and CPA claims. The Court of Appeals, Division I, reversed the dismissal of the DTA claim and affirmed the dismissal of the CPA claim. *Schnall v. Deutsche Bank National Trust Company, et al.*, 177 Wn.App. 1033, No. 68516-3-I (Nov. 18, 2013).

2011. The 3rd Notice of Trustee's Sale was recorded with the King County Auditor's Office as Ins. No. 20110819000348. (CP 4) On December 2, 2011, the Property was sold at a nonjudicial foreclosure by RTS. (CP 243) On December 12, 2011, RTS recorded a Trustee's Deed in favor of the Trust, with the King County Auditor's Office as Ins. No. 20111212000774. (CP 320) The Trust was the highest bidder with a credit bid amount of \$492,185.63. (CP 321)

On April 23, 2015, Micah Schnall filed a Motion for Summary Judgment, arguing that the Appointment of Successor Trustee, Notice of Default, Beneficiary Declaration, and the Notice of Trustee's Sale were issued in violation of the DTA, thereby rendering the trustee's sale invalid. (*See* CP 120–121) On April 24, 2015, the Trust filed a Motion for Summary Judgment against Michal Schnall's Deed of Trust Act claim and the Unlawful Detainer claim. (CP 144).

On May 27, 2015, the trial court entered an Order granting the Trust's Motion for Summary Judgment. (CP 390). On May 27, 2015, the trial court entered an Order denying Schnall's Motion for Summary Judgment. (CP 397). Plaintiff filed a Notice of Appeal on June 1, 2015, attributing error to both the Court's grant of summary judgment in favor of the Trust and MERS, as well as the Court's denial of Plaintiff's summary judgment motion.

On appeal, the Issues Pertaining to Assignments of Error narrow the scope of the issues presented to the trial court at the summary judgment hearing. Schnall focuses on the trial court's rulings as to (1) whether the Notice of Default complied with the DTA, (2) whether the Trust held the Note through the non-judicial foreclosure, and (3) whether failure to comply with the DTA renders the trustee's sale invalid. *See* Opening Brief, Pg. 2-3.

C. ARGUMENT

A. Standard of Review.

When reviewing an order granting summary judgment, we engage in the same inquiry as the trial court, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). Summary judgment is proper if, in view of all the evidence, reasonable persons could reach only one conclusion. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

Mere allegations or conclusory statements of facts unsupported by evidence are not sufficient to establish a genuine issue. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989). Nor may the nonmoving party rely on “speculation, argumentative assertions that unresolved issues remain, or in having its affidavits considered at face value.” *Seven Gables Corp. v. MGM/US Entm’t Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

B. The Order denying Schnall’s Motion for Summary Judgment is not appealable.

Schnall’s Opening Brief discusses the separate summary judgment motions, responses, replies, and evidentiary objections as if they constituted one summary judgment motion on appeal. To the contrary, the trial court’s order denying Schnall’s motion for summary judgment is not appealable because an order denying summary judgment is interlocutory and not final. Further, Schnall’s motion, the response, and the reply should not be considered in determining whether the trial court properly granted the Trust’s own motion for summary judgment.

Denial of a motion for summary judgment is generally not an appealable order under RAP 2.2(a) and discretionary review of such orders is not ordinarily granted. *DGHI, Enterprises v. Pacific Cities, Inc.*, 137 Wn.2d 933, 949, 977 P.2d 1231 (1999). But an appellate court will

accept discretionary review if the trial court “committed an obvious error which would render further proceedings useless.” *Shannon v. State*, 110 Wn.App. 366, 368–369, 40 P.3d 1200 (2002) (citing RAP 2.3(b)(1)).

In this case, the Order denying Schnall’s summary judgment motion is not a final appealable order under RAP 2.2(a). (CP 397–402) No motion for discretionary review was filed by Schnall as required by RAP 6.2(b). Moreover, the Opening Brief is drafted in such a way that it is impossible to verify whether the trial court committed an obvious error which would render further proceedings useless in denying Schnall’s summary judgment motion. Schnall does not articulate why the evidence he provided in support of his own summary judgment motion establishes there was no genuine issue for trial on the DTA claim.

Each motion for summary judgment is separate, with different moving parties. Facts are considered in a light most favorable to the non-moving party. *Del Guzzi Constr. Co. v. Clobal Northwest Ltd.*, 105 Wn.2d 878, 882, 719 P.2d 120 (1986); *See also*, RAP 9.12. The trial court considered a different motion, response, and reply in rendering its decision for each respective summary judgment motion. (CR 391, 398)

Ultimately, Schnall fails to identify any specific errors attributable to the Order denying Schnall’s motion for summary judgment, which would allow this Court to identify an obvious error which would render

further proceedings useless. Accordingly, the order denying Schnall's summary judgment motion is not appealable, and this Court should reject Schnall's arguments and evidentiary objections grounded in his own summary judgment motion, as well as the reply in support of his summary judgment motion. (CP 120–142, 375–377).

C. The evidence establishes the Trust was the beneficiary through the course of the entire non-judicial foreclosure proceeding.

Schnall contends that the Trust was not the holder of the Note through the non-judicial foreclosure because two different copies of the Note establish IndyMac Bank, FSB (“IndyMac”) indorsed the Note sometime after July 22, 2011, nearly a year after the appointment of RTSC as successor trustee. However, the evidence established that the Trust had two versions of the Note in its possession: the original Note and a copy of the Note, with differing indorsements. (CP 240). Under the UCC, the fact that a Note holder possesses a copy of the Note in its business records does not impair its status as a holder under the UCC. Application of Washington law and the evidence to the facts establish that the contentions are meritless and the trial court's decision should be affirmed.

- i. The Trust was the holder of the Note pursuant to the Uniform Commercial Code.

Washington's Deed of Trust Act defines "beneficiary" as "the holder of the instrument or document evidencing the obligations secured by the deed of trust." RCW 61.24.005(2). The term "holder" is guided by definition of "holder" in the Uniform Commercial Code, as adopted in Washington ("UCC"). *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 89, 285 P.3d 34 (2012) ("*Bain*")

Pursuant to the UCC, the term "holder" with respect to a negotiable instrument means the 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(a)(21)(A). If an indorsement identifies a person to whom it makes the instrument payable, it is a special indorsement. RCW 62A.3-205(a). When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed. RCW 62A.3-205(b). A holder can possess a note "directly or through an agent." UCC § 3-201 cmt. 1.

In this case, application of the evidence to Washington law establishes that the Trust was the holder of the Note at all times throughout the foreclosure. First with regards to possession of the Note, the evidence established that the Trust first took physical possession of the Note on December 7, 2006. (CP 387) The evidence also establishes that the Trust maintained continuous possession of the Note, either in the

Trust's secure safe or through its servicing agent OneWest Bank, throughout the entire foreclosure process. (CP 387)

In response to the evidence, Schnall provided no evidence that would create a genuine issue for trial regarding the Trust's possession of the Note through the course of the foreclosure. To the contrary, Schnall's testimony confirmed that aside from seeing the Note at the preliminary injunction hearing, Schnall had no personal knowledge regarding whether the Trust had possession of the Note through the foreclosure process. (CP 225–226)

Second, the evidence establishes that the original Note has a special indorsement from Quicken Loans, Inc. to IndyMac Bank, FSB. (CP 245–249). The Note also contains a blank indorsement executed by IndyMac Bank, F.S.B. (CP 249) As the Note is indorsed in blank, by operation of law, the Note is bearer paper. RCW 62A.3-205(b). When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed. *Id.*

As the Trust had possession of the Note, indorsed in blank through the course of the non-judicial foreclosure, the trial court properly ruled that there was no genuine issue for trial regarding the Trust's status as holder of the Note and beneficiary of the Deed of Trust.

- ii. Schnall's Arguments are speculative and unsupported by any evidence.

Schnall contends that summary judgment was not appropriate because IndyMac indorsed the Note sometime after July 22, 2011, and IndyMac's indorsement at that time is "incontrovertible evidence" that IndyMac held the Note at the time it made the indorsement. Appellant's Brief, Pg. 7. The basis for this contention is that the copy of the Note submitted with the Boyle Declaration on July 22, 2011 contained different indorsements than the original Note brought to the preliminary injunction hearing on July 27, 2011. *Id.*

This is pure conjecture. On summary judgment, each party must furnish the factual evidence on which he relies. *Lundgren v. Kieren*, 64 Wn.2d 672, 677, 393 P.2d 625 (1964). Yet Schnall failed to provide *any evidence* regarding the possession of the Note by any entity, or when IndyMac allegedly indorsed the Note in July 2011. Notably absent from Schnall's argument is any actual evidence regarding when the Trust first obtained possession of the Note, whether IndyMac ever obtained possession of the Note, and when the respective indorsements on the Note were executed. While the trial court was presented with evidence regarding the possession of the Note and the indorsements on the Note, none of the evidence was submitted by Schnall.

The evidence before the trial court regarding the Trust's possession of the Note is set forth in the declarations supporting the Trust's summary judgment motion. The Campbell Declaration establishes that the Trust first received possession of the original Note, indorsed in blank, on December 7, 2006. (CP 387). The Trust shipped the Note to its servicing agent, OneWest Bank, on July 25, 2011, and the Note was subsequently returned to the Trust on December 8, 2011. (CP 387–388). Schnall presented no evidence that would create a genuine issue for trial as to the dates of the Trust's possession of the Note.

Moreover, the Trust presented evidence explaining the discrepancy between the copy of the Note presented in the Boyle Declaration, and the original Note. The supporting declarations establish that a separate copy ("Indorsed Copy") of the promissory note was indorsed in blank by Quicken Loans, Inc. (CP 240) The Indorsed Copy is not the original Promissory Note. *Id.*

In rebuttal, Schnall failed to present any evidence that would allow a reasonable person to conclude that the Trust did not obtain possession of the Note, indorsed in blank, on December 7, 2006. Schnall also failed to present any evidence that the Trust had lost possession of the Note during the course of the non-judicial foreclosure. Similarly, Schnall failed to present any evidence that would allow a reasonable person to conclude

that the Trust did not have both the Note and the Indorsed Copy of the Note in its possession.

Instead of presenting evidence, Schnall set forth evidentiary objections, and speculation. Schnall, as the nonmoving party, had the obligation to present evidence that demonstrates that material facts are in dispute. *Vallandigham v. Clover Park School Dist. No., 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citations omitted). Schnall's theories and hypothesis regarding IndyMac's possession of the Note and indorsements of the Note were not supported by facts, and are ultimately, conjecture. A party's self-servicing statements of conclusions and opinions alone are insufficient to defeat a summary judgment motion. *Segaline v. Dep't of Labor & Indus.*, 144 Wn.App. 312, 325, 182 P.3d 480 (2008) (citations omitted). Accordingly, the trial court properly granted summary judgment in favor of the Trust, and denied Schnall's own summary judgment motion.

D. Schnall's evidentiary objections are not properly raised on Appeal.

Within the Opening Brief, Schnall sets forth evidentiary objections to admissibility of the Campbell and Ortwerth Declarations. The evidentiary objections fail as they are either not properly raised on appeal

or were not raised before the trial court in response to the Trust's Motion for Summary Judgment.

- i. Schnall did not raise any objections to the Ortwerth Declaration in his response to the Trust's summary judgment motion.

It is [the Appellate Court's] duty to review evidentiary rulings made by a trial court; we do not ourselves make evidentiary rulings. Similarly, it is [the Appellate Court's] duty to review a trial court's ruling on summary judgment on the record actually before the trial court. *Jacob's Meadow Owner's Ass'n v. Plateau 44 II, LLC*, 139 Wn.App. 743, 756, 162 P.3d 1153 (2007) (citations omitted). That record includes those documents designated in an order granting summary judgment and any supplemental order of the trial court. RAP 9.12. Pursuant to RAP 2.5(a), an evidentiary error cannot be raised for the first time on appeal. *State v. Lynn*, 67 Wn.App. 339, 342, 835 P.2d 251 (1992). RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988); *See also, Cotton v. Kronenberg*, 111 Wn.App. 258, 273, 44 P.3d 878 (2002) ("Because he did not preserve below any objections either on hearsay grounds or on the basis of ER 403, we will not address those grounds for the first time on appeal.") The rule reflects a

policy of encouraging the efficient use of judicial resources. *State v. Scott*, 110 Wn.2d at 685.

Pursuant to the King County Superior Court Local Rules, a party objecting to the admissibility of evidence submitted by an opposing party must state the objection in writing in a responsive pleading, a separate submission shall only be filed if the objection is to materials filed in the reply. King County LCR 56(e).

Here, the Ortwerth Declaration was submitted in support of the Trust's Motion for Summary Judgment. (CP 236). However, Schnall failed to raise any evidentiary objection to the Ortwerth Declaration in his response to the Trust's Motion for Summary Judgment. (CP 368–374). Schnall also failed to file a separate motion to strike, as required by King County LCR 56(e), when the Trust cited the Ortwerth Declaration in the reply in support of the Trust's summary judgment motion. (CP 381.)

In granting summary judgment to the Trust, the trial court did not rule on any evidentiary objection regarding the Ortwerth Declaration, as none was raised. (CP 390–396). This corresponds with the requirements of CR 56(h) and the designated documents in the Order granting the Trust's summary judgment motion. *See* CR 56(h).

To the extent Schnall appeals and assigns error to the trial court's ruling granting the Trust's Motion for Summary Judgment, Schnall is

precluded from raising any evidentiary objection regarding the Ortwerth Declaration for the first time on appeal.

The only time Schnall raised any evidentiary objection to the Ortwerth Declaration was in his reply filed in support of his *own* summary judgment motion. (CP 376). The trial court's ruling on each summary judgment motion is based on a different motion, a different response, and ultimately, a different record. RAP 9.12. Schnall's reply in support of his own summary judgment motion was not considered by the trial court in granting summary judgment to the Trust. (CP 390–396).

As set forth in LCR 56(e), Schnall had an obligation to raise any evidentiary objections to the Trust's Motion for Summary Judgment in his response. By failing to do so, Schnall is precluded from challenging the Ortwerth Declaration on appeal with regards to the trial court's ruling on the Trust's Motion for Summary Judgment. Allowing Schnall to blend two separate orders based on different motions, responses, and evidentiary objections would eviscerate RAP 9.12 and LCR 56(e).

- ii. The Evidentiary Objections are not properly raised on appeal.

The Rules of Appellate Procedure require that the appellant's brief contain a separate and concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the

assignments of error. RAP 10.3(a)(4). The appellant must present argument supporting the issues presented for review, citations to legal authority, and references to relevant parts of the record. RAP 10.3(a)(5).

This court will not review a claimed error unless it is (1) included in an assignment of error or clearly disclosed in the associated issue pertaining thereto, and (2) supported by argument and citation to legal authority. *BC Tire Corp. v. GTE Directories Corp.*, 46 Wn.App. 351, 355, 730 P.2d 726 (1986) (citations omitted). It is well settled that a party's failure to assign error to or provide argument and citation in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error. *Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn.App. 183, 190 n.4, 69 P.3d 895 (2003).

In this case, Schnall sets forth three assignments of error: (1) the trial court erred in denying Schnall's motion for summary judgment, (2) the trial court erred in granting the Trust's motion for summary judgment, and (3) the trial Court erred in dismissing the Complaint and granting a writ of restitution in favor of the Trust. Opening Brief, Pg. 2.

The Issues Pertaining to the Assignments of Error disclosed by Schnall addresses whether the Notice of Default complied with the Deed of Trust Act, whether the Trust held the Note throughout the non-judicial

foreclosure, and whether non-compliance with the DTA rendered the foreclosure sale invalid. *Id.*

Schnall fails to set forth any assignments of error regarding the trial court's evidentiary rulings. Nor does Schnall identify any evidentiary issues in the corresponding issue statements. However, in the Opening Brief, Schnall contends that portions of the Ortwerth Declaration, and the entire Campbell Declaration, are inadmissible. Opening Brief, Pg. 8–10. Schnall does not contend that the trial court erred in admitting the Ortwerth Declaration or the Campbell Declaration in the Assignments of Error, or the associated Issue Statements. Opening Brief, Pg. 2–3.

Schnall does not actually state the trial court erred in admitting the Ortwerth and Campbell declarations. To the contrary, while Schnall argues that the entire Campbell Declaration is inadmissible, he sets forth an entire section in the Opening Brief relying on Barbara Campbell's testimony. Opening Brief, Pg. 10, 15.

Ultimately, any evidentiary ruling by the trial court is not properly before this Court on appeal. The trial court's evidentiary rulings are not included in an assignment of error, nor are they disclosed in the associated issue statement. Moreover, the brief itself establishes that Schnall's arguments regarding the evidentiary rulings are unsupported by any citation to legal authority. Schnall fails to cite to any of the Rules of

Evidence in the Opening Brief, or any authority regarding the business records statute he claims was violated. Accordingly, Schnall's argument that the Campbell Declaration and portions of the Ortwerth Declaration are inadmissible should be disregarded in its entirety.

E. The Ortwerth and Campbell Declarations do not provide a basis to overturn summary judgment in favor of the Trust.

The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). If a trial court makes an erroneous evidentiary ruling, the question becomes 'whether the error was prejudicial, for error without prejudice is not grounds for reversal.' *Brown v. Spokane Fire Protection Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983) (citations omitted).

CR 56(e) is explicit in its requirements for affidavits and declarations. Affidavits must (1) be made on personal knowledge, (2) shall set forth such *facts* as would be admissible in evidence, and (3) shall show affirmatively that the affiant is competent to testify to the matters stated therein. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988) (*emphasis* in original).

A fact is an event, an occurrence, or something that exists in reality. *Id* (citations omitted). It is what took place, an act, an incident, a

reality as distinguished from supposition or opinion. *Id.* (citations omitted). An affidavit does not raise a genuine issue of fact unless it sets forth facts evidentiary in nature, i.e., information as to what took place, an act, an incident, a reality as distinguished from supposition or opinion. *Snohomish County v. Rugg*, 115 Wn.App. 218, 224, 61 P.3d 1184 (2002).

- i. The Ortwerth Declaration was properly considered by the trial court.

In this case, Schnall contends that Paragraphs 11 and 12 of the Ortwerth Declaration are inadmissible based on their failure to comply with CR 56(e). Paragraph 11 refers to the separate copy of the Note which exists in Ocwen's business records. (CP 240) Paragraph 12 references the Trust's ownership and holder status of the Note through the course of the non-judicial foreclosure. *Id.* A review of the RAP and Washington case law establishes that these evidentiary objections are meritless.

First, with regards to Schnall's contention that Paragraph 11 of the Ortwerth Declaration contains false testimony, this alleged "error" was not raised by Schnall in the trial court and thus cannot be raised for the first time on appeal. RAP 2.5(a); *Dehaven v. Gant*, 42 Wn.App. 666, 669, 713 P.2d 149 (1986); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)

Second, the bald accusation regarding “false” testimony does not constitute a valid evidentiary objection based on the Rules of Evidence, nor does it satisfy Schnall’s obligations as the non-moving party on summary judgment. The non-moving party has the obligation to present evidence that demonstrates that material facts are in dispute. *Atherton Condo. Apartment-Owners Ass’n Bd. Of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Schnall presented no evidence that would establish a genuine issue regarding the Trust’s possession of the Indorsed Copy of the Note.

Third, the trial court’s consideration of Paragraph 11 is not prejudicial, given that Schnall has raised no objection on appeal, to Paragraph 9 of the Ortwerth Declaration, identifying the true and correct copy of the Note. (CP 239).

Fourth, the Ortwerth Declaration sets forth facts that are evidentiary in nature. The declaration explains something that exists in reality – that Ocwen’s business records include both the Note and a copy of the Note, which bears an indorsement in blank by Quicken Loans. (CP 239–240). This is not supposition, or opinion, as the testimony describes documents in Ocwen’s business records, and identifies and produces those documents. *Id.* Nor is the declaration conclusory, as the testimony is supported by adequate foundation which explains the basis for Ortwerth’s

assertions: her own personal review of Ocwen's business records. *See Doty-Fielding v. Town of South Prairie*, 143 Wn.App. 559, 566, 178 P.3d 1054 (2008); *Sun Mountain Productions, Inc. v. Pierre*, 84 Wn.App. 608, 619, 929 P.2d 494 (1997).

Finally, Schnall contends that Paragraph 12 of the Ortwerth Declaration, identifying the Trust's status as owner and holder of the Note, is inadmissible because (1) there is no reference to supporting records, and (2) the statement constitutes an overbroad conclusory statement of ultimate fact. Opening Brief, Pg. 8–9. Neither of these arguments have merit.

Supporting and opposing affidavits must (1) be made on personal knowledge; (2) set forth facts as would be admissible in evidence; and (3) show that the affiant is competent to testify on the matters therein. *Burmeister v. State Farm Ins. Co.*, 92 Wn.App. 359, 365, 966 P.2d 921 (1998). Sworn or certified copies of papers referred to in an affidavit must be attached to or served with the affidavit. CR 56(e). If documents are not submitted in this form, the opposing party must move to strike before entry of summary judgment. *Burmeister v. State Farm Ins. Co.*, 92 Wn.App. at 365.

In this case, Paragraph 12 of the Ortwerth Declaration does not set forth any testimony regarding the content of documents that are not in the

record. (CP 240). Ortwerth's testimony covers the Trust's possession and ownership of the Note. To the extent Paragraph 12 does identify a document, the Note, Schnall's arguments fail as the Note was properly authenticated and before the Court in Paragraph 9 of the Ortwerth Complaint, (CP 239).

Similarly, the testimony regarding the Trust's ownership and possession of the Note is not conclusory. The testimony covers facts that are evidentiary in nature, as it speaks to possession and ownership of the Note – neither of which constitutes supposition or opinion. Accordingly, for the reasons set forth above, the Ortwerth Declaration was properly considered by the trial court.

- ii. The trial court's ruling may be affirmed even without the Campbell Declaration.

Schnall contends the Campbell Declaration is inadmissible on the basis that Barbara Campbell failed to attach any records to her declaration, in violation of CR 56(e). *See* Opening Brief, Pg. 9. Here, Campbell summarized the document custody history of Schnall's loan based on a review of the relevant business records. (CP 385–388). While the Campbell declaration testifies to the contents of documents not in the record, the trial court's consideration of the Campbell declaration does not constitute prejudicial error.

An erroneous evidentiary ruling is not grounds for reversal absent prejudicial error. *Cook v. Tarbert Logging, Inc.*, ---Wn.App.---, 360 P.3d 855, 869 (2015). Error will be harmless “if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.” *State v. Bourgeois*, 133 Wn.2d 389, 403. 945 P.2d 1120 (1997). The trial court’s grant of summary judgment may be affirmed on any basis adequately supported by the record. *Davidson v. Serles & Assocs. v. City of Kirkland*, 159 Wn.App. 616, 624, 246 P.3d 822 (2011). Here, Schnall objects to the Paragraphs 7 and 9 in the Campbell Declaration regarding Deutsche Bank National Trust Company’s possession of the Note and Deed of Trust. Opening Brief, Pg. 9. Even assuming that the Campbell declaration was erroneously considered by the trial court, there was no prejudice given Schnall’s failure to raise any evidentiary objection to the Ortwerth declaration in his response to the Trust’s motion for summary judgment as required by King County LCR 56(e).

The Ortwerth declaration sets forth evidence establishing (1) Schnall’s execution of the Note and Deed of Trust, (2) the indorsements on the Note, (3) the Trust’s status as owner and holder of the Note through the course of the non-judicial foreclosure, (4) Schnall’s default, (5) and the issuance of the Notice of Default by RTS, as agent of the Trust. (*See* CP 239–242). As the Ortwerth declaration alone establishes the default and

the Trust's authority as the beneficiary of the Deed of Trust to appointment RTS as successor trustee to effectuate the non-judicial foreclosure, the consideration of the Campbell declaration does not constitute a prejudicial error that would be grounds for reversal.

F. DBNTC's shipment of the Note to its servicing agent does not defeat holder status

Schnall, in reliance on the Campbell Declaration, contends that the shipment of the Note by the Trust to OneWest Bank on July 25, 2011, and the subsequent shipment back to the Trust on December 8, 2011, defeats the Trust's standing as holder of the Note on the date of the foreclosure. Opening Brief, Pg. 10. This argument was not presented to the trial court and should be disregarded. Regardless, a review of the record, and Washington authority regarding the Deed of Trust Act and the Uniform Commercial Code establish that this argument is meritless.

The DTA defines "beneficiary" as the "holder of the instrument or document evidencing the obligations secured by the deed of trust." RCW 61.24.005(2). The term "holder" is guided by definition of "holder" in the Uniform Commercial Code ("UCC"). *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 104, 285 P.3d 34 (2012).

Both the UCC and pre-UCC Washington case law recognize that constructive possession is sufficient to make one a holder of a note. *See*

UCC § 3-201 cmt. 1 (a holder may possess a note “directly or through an agent”); *Gleeson v. Lichty*, 62 Wn.656, 659, 114 P. 518 (1911) (“But, if we assume that the note was not [in the defendant’s] actual possession, it was clearly under his control, and constructively therefore in his possession.”)

A power of attorney is a written instrument by which one person, as principal, appoints another as agent and confers on the agent authority to act in the place and stead of the principal for the purposes set forth in the instrument. *Bryant v. Bryant*, 125 Wn.2d 113, 118, 882 P.2d 169 (1994) (citations omitted). Powers or attorney are strictly construed. *In re Estate of Springer*, 97 Wn. 546, 551, 166 P. 1134 (1917).

Here, the record establishes that the Trust granted authority to OneWest Bank to act as its attorney-in-fact with specific contractual authority to effectuate the non-judicial foreclosure of the Property on behalf of the Trust. (CP 334–335) Additionally, Section 3.14 of the Pooling and Servicing Agreement also establishes that the servicer, OneWest Bank, had possession of the Note for and on behalf of the Trust. (CP 291). The provisions of the Pooling and Servicing Agreement further confirm the fact that the Note is the sole and exclusive property of the Trust. *Id.*

Notably, Schnall does not contest the Marks Declaration or the Limited Power of Attorney attached to the Marks Declaration. Nor does Schnall raise any challenges to Paragraph 15 of the Ortwerth Declaration, regarding the Pooling and Servicing Agreement and OneWest Bank's role as servicer. (CP 241)

The record before the trial court established that during the period of July 25, 2011 through December 8, 2011, the Trust had constructive possession of the Note through its servicing agent, OneWest Bank. The conclusory allegation that the shipment of the Note to OneWest extinguished the Trust's status as holder is based on speculation, and ultimately, contradicted by the unchallenged evidence. Accordingly, Schnall failed to establish a genuine issue for trial regarding the Trust's possession of the Note through the course of the non-judicial foreclosure, the trial court's rulings should be affirmed.

G. The Notice of Default was properly issued and fails to provide Schnall with a basis to overturn the trustee's sale.

Schnall claims that the trustee's sale of the Property is invalid as the Notice of Default did not satisfy the requirements of the Deed of Trust Act. However, the record establishes that the Notice of Default was properly issued by the Trust due to Schnall's uncontested default under the terms of the Loan. Moreover, the record also establishes that Schnall was

not prejudiced in any way by the Notice of Default, or any other foreclosure notices. Accordingly, the trial court's decision should be affirmed.

- i. The Notice of Default was issued by the Trust, through its authorized agent.

Schnall contends that the Notice of Default was not issued by either the beneficiary of the Deed of Trust, or the trustee. Opening Brief, Pg. 14. However, a review of the record and the requirements of the Deed of Trust Act establish that the Notice of Default was properly issued.

Under the Deed of Trust Act, a default notice need not be recorded or signed, unlike the Notice of Trustee's Sale, which must be both recorded and signed. *Gossen v. JPMorgan Chase Bank*, 819 F.Supp.2d 1162, 1169 (W.D. Wash. 2011). The Deed of Trust Act also expressly allows the beneficiary to direct an authorized agent to issue the notice of default. RCW 61.24.031.

In this case, the Trust issued the Notice of Default through its authorized agent, RTSC. (CP 242) Schnall does not challenge the Trust's ability to issue a Notice of Default through an agent. To the contrary, Schnall contends that any agent of the Trust would not have been acting as the agent of the beneficiary of the Deed of Trust, as the Trust did not yet hold the Note. Opening Brief, Pg. 15. However, as set forth above, the

evidence before the trial court regarding the Trust's possession of the Note establish that the Trust first obtained possession of the Note on December 7, 2006, and had possession of Note either in its safe or through its agents, through the course of the non-judicial foreclosure. (CP 386–387). No evidence was provided by Schnall that would create genuine issue for trial regarding the Trust's possession of the Note when the Notice of Default was issued.

Moreover, Schnall contends that the record does not show that RTSC was acting as the authorized agent when it issued the Notice of Default. Opening Brief, Pg. 15. To the contrary, the Trust submitted a declaration in support of its summary judgment motion setting forth testimony regarding RTSC's issuance of the Notice of Default as agent of the Trust. (CP 242). In his response to the Trust's summary judgment motion, Schnall failed to raise any evidentiary challenge or argument regarding RTSC's issuance of the Notice of Default as the agent of Trust. (CP 368–374). To the extent Schnall challenges the trial court's grant of the Trust's summary judgment motion, Schnall cannot raise this issue for the first time on appeal. *Sneed v. Barna*, 80 Wn.App. 843, 847, 912 P.2d 1035 (1996); *See also*, RAP 9.12.

While Schnall did contest the Ortwerth Declaration in his reply in support of his own summary judgment motion, he failed to submit any

evidence that would create a genuine issue for trial regarding the disputed agency relationship. Regardless, on appeal, Schnall raises only a limited challenge to the Ortwerth Declaration, taking issue with Paragraphs 11 and 12. Schnall does not challenge Paragraph 18 of the Ortwerth Declaration, regarding the issuance of the Notice of Default by RTSC in its capacity as authorized agent. (CP 242).

Ultimately, the evidence establishes that the Notice of Default was issued by the authorized agent of the Trust, who was the beneficiary of the Deed of Trust at the time of issuance. Moreover, Schnall failed to challenge RTSC's agency relationship when presented the opportunity to do so in his response to the Trust's summary judgment motion. (CP 368–374) Nor does he do so now on appeal, as evidenced by his limited objection to the Ortwerth Declaration. Accordingly, the trial court's decision should be affirmed.

ii. The Notice of Default identifies the owner of the Note

Schnall also contends that the Notice of Default is invalid as it failed to identify the owner of the Note. Opening Brief, Pg. 12–13. A review of the Notice of Default and the Deed of Trust Act provide guidance as to why the trial court's decision should be affirmed.

The notice of default must inform the borrower, among other things, of “the name and address of the *owner* of any promissory notes or

other obligations secured by the deed of trust” and “the name, address, and telephone number of a party acting as a *servicer* of the obligations secured by the deed of trust.” *Brown v. Washington State Dept. of Commerce*, --- Wn. ---, 359 P.3d 771, 784, 359 P.3d 771 (2015).

In this case, the Notice of Default identifies the Trust, as well as the Trust’s address. (CP 299, 303). As the Trust is the owner of the Note, the Notice of Default satisfies the requirements of RCW 61.24.030(8)(l). (CP 240, 291).

Moreover, the Notice of Default identifies the beneficiary and holder of the Note, the Trust. (CP 299, 303). It is important to note that the Deed of Trust Act requires the beneficiary to provide proof to the trustee that it is the owner of the promissory note. RCW 61.24.030(7)(a). The Washington Supreme Court has noted that the holder of the note satisfies this provision and is the beneficiary because the legislature intended the beneficiary to be the party who has authority to modify and enforce the note. *Brown v. Washington State Dept. of Commerce*, 359 P.3d at 773. The rationale in *Brown* is applicable in the present case. The statutory requirements for the notice of default require identification of the owner of the note. RCW 61.24.030(8)(l). Accordingly, as the Notice of Default identifies the address and name of the beneficiary, the Notice of Default is in compliance with the Deed of Trust Act.

H. Schnall cannot establish the requisite prejudice to void the non-judicial foreclosure sale.

Schnall contends that the trial court improperly declined to invalidate the trustee's sale, in reliance on *Amresco Independence Funding, Inc. v. SPS Properties, LLC*, 129 Wn.App. 532, 119 P.3d 884 (2005) ("*Amresco*"). Opening Brief, Pg. 13. Specifically, Schnall argues that *Amresco* has since been superseded by decisions issued by the Washington Supreme Court. Tellingly, Schnall does not challenge the trial court's finding that any errors in the Notice of Default were non-prejudicial. This mirrors his interrogatory response. While a material violation of the Deed of Trust Act can invalidate a trustee's sale, Schnall cannot establish a material statutory violation, or any prejudice required to invalidate the non-judicial foreclosure.

The DTA allows a trustee to sell a property without a judicial process. *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn.App. 108, 111, 752 P.2d 385 (1988) ("*Koegel*"). Because these statutes remove many protections borrowers have under a mortgage, lenders must strictly comply with the statutes, and courts must strictly construe the statutes in the borrower's favor. *Id.* at 111. Despite the strict compliance requirement, **a plaintiff must show prejudice before a court will set aside a trustee sale.** *Amresco Independence Funding, Inc. v. SPS Properties, LLC*, 129

Wn.App. 532, 537, 119 P.3d 884 (2005) (citations omitted) (**emphasis added**).

Courts have declined to invalidate sales even where trustees have not complied with the statute's technical requirements. *Amresco Independence Funding, Inc. v. SPS Properties, LLC*, 129 Wn.App. 532, 537, 119 P.3d 884 (2005) (citing *Koegel*, 51 Wn.App. at 112–113; *Steward v. Good*, 51 Wn.App. 509, 515, 754 P.2d 150 (1998)). *See also, Bavand v. OneWest Bank, FSB*, 587 Fed.Appx. 392, 394–395 (9th Cir. 2014) (“Second, Washington state courts have required the borrower to show prejudice before they will set aside a trustee’s foreclosure sale in the face of allegations of technical errors.”)

However, Courts have set aside trustee’s sales where there is material noncompliance with the Deed of Trust Act. In *Albice*, the court set aside a trustee’s sale where the trustee continued the sale beyond the date it was statutorily authorized to sell the property. *Albice v. Premier Mortg. Services of Washington, Inc.*, 174 Wn.2d 560, 568, 276 P.3d 1277 (2012). In *Rucker*, this Court invalidated a non-judicial foreclosure sale on the grounds that the actions of the improperly appointed trustee constituted a material violation of the Deed of Trust Act. *Rucker v. NovaStar Mortgage, Inc.*, 177 Wn.App. 1, 17–18, 311 P.3d 31 (2013).

In this case, Schnall contends that the Trust has failed to establish ownership of the loan when the successor trustee was appointed. Opening Brief, Pg. 15. As set forth above, ownership of the Note is irrelevant – the holder of the Note is the beneficiary of the Deed of Trust with the requisite authority to appoint a successor trustee. Schnall has presented no evidence that would create a genuine issue for trial regarding the Trust’s possession of the Note.

Moreover, as set forth above, the Trust had possession of the Note, through its servicing agent, OneWest Bank, at the time of the non-judicial foreclosure sale in 2011. Schnall failed to present any evidence that would refute the terms of the Pooling and Servicing Agreement, or the Limited Power of Attorney between OneWest Bank and the Trust.

Finally, to the extent Schnall contends there are defects in the Notice of Default, the failure to identify the address and identity of the owner of the Note are a violation of a notice requirement, similar to *Koegel*. In *Koegel*, this Court upheld a trustee’s sale even though the notice of default contained an inaccurate description of the property and the notice of sale was prematurely served. *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn.App. 108, 112–113, 752 P.2d 385 (1988).

As set forth in *Koegel*, “The purpose of the notice of default is to notify the debtor of the amount he owes and that he is in default.” *Id.* at

1112. In this case, Schnall admits to taking out the Loan and defaulting. (CP 122). Moreover, the Notice of Default identifies the delinquent payments and the amounts in arrears. (CP 300)

Schnall's deposition testimony establishes his default under the terms of the Loan. (CP 227). Importantly, the 2009 default was not due to any action taken by the Trust, but due to the mortgage payment being unaffordable due to personal reasons, lack of cash reserves, and significant credit card debt. (CP 276) Also important is Schnall's testimony that he never attempted to reinstate the mortgage by curing the past due amounts. (CP 223). Schnall also admits to receiving the Notice of Default. (CP 123). These facts, which are unchallenged on by Schnall on appeal, establish that Schnall was not prejudiced by the Notice of Default. Schnall admits to his default, and that he had no intention of curing the arrears.

Schnall's own allegations establish that he knew the identity of the servicer of his Loan who collected payments, was in contact with the servicer, and knew how to make mortgage payments to the servicer. *See* (CP 7, 10). None of these facts were contested in the filings associated with the summary judgment motions, and are verities on appeal. Importantly, Schnall failed to set forth any testimony or evidence that would establish he was damaged or otherwise injured by the non-judicial

foreclosure. This fact is confirmed by Schnall's interrogatory response. (CP 230).

Ultimately, Schnall's true intentions are established by his actions, which are also uncontested on appeal. Prior to initiating the underlying lawsuit, utilizing the bankruptcy process, Schnall attempted to render the mortgage debt unsecured through his chapter 13 bankruptcy and subsequent Ninth Circuit Bankruptcy Appellant Panel appeal, where he raised similar arguments contesting the Trust's authority to enforce the Note and Deed of Trust. *See* (CP 174–191). Schnall listed the mortgage debt as unsecured, and his proposed chapter 13 plan failed to provide for any payments on the mortgage. (CP 176).

Schnall's challenge to the Notice of Default is purely technical. As the Trust was the holder of the Note, the Notice of Default was properly issued by the beneficiary. The Notice of Default identifies the Trust as the beneficiary, and as noted by the Washington Supreme Court, the legislature intended the beneficiary to be the party who has authority to modify and enforce the note. *Brown v. Washington State Dept. of Commerce*, --- Wn. ---, 359 P.3d 771, 784, 359 P.3d 771, 773 (2015). Schnall himself has already acknowledged that the Trust was listed as the beneficiary in the Notice of Default. (CP 207)

Overall, even assuming *arguendo* that the Notice of Default failed to comply with the Deed of Trust Act, Schnall was not prejudiced by any failure to identify the owner of the Note in the Notice of Default. The record establishes he knew who to pay, did not contest his default, and had no intent to reinstate his loan. Washington case law establishes that prejudice must be established in order to void a foreclosure sale resulting from a technical error. As recognized by the Ninth Circuit Court of Appeals, any technical non-prejudicial issues in the Notice of Default should not bar foreclosure proceedings. *Bavand v. OneWest Bank, FSB*, 587 Fed.Appx. 392, 395 (9th Cir. 2014). Accordingly, the trial court's decision should be affirmed as there was no material violation of the Deed of Trust act that would merit a rescission of the trustee's sale.

I. Schnall has waived all claims against MERS.

Schnall is not appealing the dismissal of MERS through the trial court's Order granting the Motion for Summary Judgment. Opening Brief, Pg. 1. Accordingly, all claims against MERS are dismissed with prejudice.

D. CONCLUSION

In an attempt to avoid a foreclosure and skirt his contractual responsibilities, Schnall has challenged the Trust's authority to foreclose in multiple courts, with this being the third appellate matter. Here, the evidence establishes that the Trust had the requisite authority under the

Deed of Trust Act to effectuate the non-judicial foreclosure of the Property. Moreover, Schnall's own testimony and admissions establish that any errors associated with the Notice of Default were technical and non-prejudicial.

Accordingly, the Trust respectfully requests this Court to affirm the trial court's ruling.

RESPECTFULLY SUBMITTED this 13th day of January, 2016.

HOUSER & ALLISON, APC



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Robert W. Norman, WSBA #37094
Attorneys for Respondents

CASE NO. 73522-5-I
COURT OF APPEALS
DIVISION I OF THE STATE OF WASHINGTON

MICAH SCHNALL,
Appellant,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, REGIONAL TRUSTEE
SERVICES, AND JOHN DOES inclusive 1 through 20
Respondents.

PROOF OF SERVICE

Attorneys for Respondents Deutsche Bank National Trust Company, as
Trustee for IndyMac INDX Mortgage Loan Trust 2006-AR39, Mortgage
Pass-Through Certificates Series 2006-AR39 and Mortgage Electronic
Registration Systems, Inc.

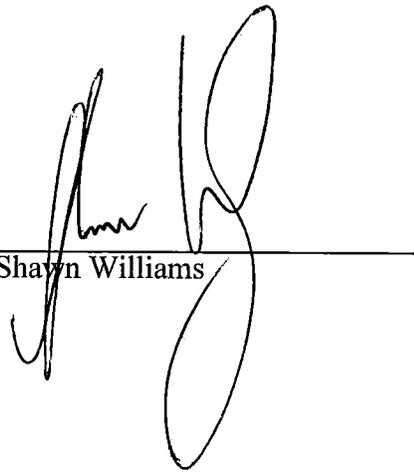
I THE UNDERSIGNED STATE AS FOLLOWS: I am not a party to this action and I am over the age of 18 years. On January 13, 2016, I served the Answering Brief of Respondents Deutsche Bank National Trust Company, as Trustee for IndyMac INDX Mortgage Loan Trust 2006-AR39, Mortgage Pass-Through Certificates Series 2006-AR39 and Mortgage Electronic Registration Systems, Inc., on the following individual(s) via email per agreement and U.S.

Mail to:

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Defendant

Dated: January 13, 2016


Shawn Williams