

No. 74979-0-1

IN THE COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

MARK AND JULIE DAVISCOURT

Appellants,

v.

QUALITY LOAN SERVICES CORPORATION OF WASHINGTON, a Washington corporation; SELECT PORTFOLIO SERVICING, INC., a foreign corporation; BANK OF NEW YORK MELLON fka BANK OF NEW YORK, a national association; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a foreign corporation; MERSCORP HOLDINGS, INC., a foreign corporation; ALTERNATIVE LOAN TRUST 2005-62, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2005-62; JOHN DOES 1-99

Respondents.

AMENDED APPELLATE BRIEF OF RESPONDENTS SELECT PORTFOLIO SERVICING, INC., MORTGAGE ELECTRONIC REGISTRATIONS SYSTEMS, INC., MERSCORP HOLDINGS, INC., AND BANK OF NEW YORK MELLON F/K/A BANK OF NEW YORK AS TRUSTEE

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COURT OF APPELLATES DIV I
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5A David Frisch, *Lawrence’s Anderson on the Uniform
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I. INTRODUCTION

Respondents,¹ Defendants below, submit this response brief in opposition to Appellants Mark and Julie Daviscourt's (the "Daviscourts") Opening Brief ("Daviscourt Brief").² The Daviscourts' arguments should be rejected. For the reasons advanced before the trial court, and explained herein, the trial court properly granted summary judgment.

II. RELEVANT FACTS

In September 2005, the Daviscourts borrowed \$875,000 from Countrywide Home Loans, Inc. ("Countrywide") d/b/a/ America's Wholesale Lender or AWL, and gave a note to evidence the obligation, and recorded a deed of trust against the Daviscourts' property in King County, Washington to secure payment of the note. CP 656, 660, 667. The current holder of the note and deed of trust is Bank of New York Mellon F/K/A Bank of New York, as Trustee for the Alternative Loan

¹ Select Portfolio Servicing, Inc. ("SPS"), Mortgage Electronic Registrations Systems, Inc. ("MERS"), MERSCORP Holdings, Inc. ("MERSCORP"), and Bank of New York Mellon F/K/A Bank of New York, Individually and as Trustee for the Alternative Loan Trust 2005-62, Mortgage Pass Through Certificates Series 2005-62 ("BONY as trustee") (collectively, "Respondents").

² The Daviscourts have not sought review of all of the many arguments they made to the trial court. Daviscourt Brief at 1. Although the Daviscourts appear to raise no claims on appeal against MERSCORP, as a precautionary action, MERSCORP joins in the response of these Respondents.

Trust 2005-62, Mortgage Pass Through Certificates Series 2005-62 (“BONY as trustee”).³

In or about January 2009, the Daviscourts defaulted under the note and deed of trust by failing to make their loan payments as they came due. CP 1, 36 (Sierra Herbert-West Decl.). As a result, BONY as trustee commenced a non-judicial foreclosure proceeding against the Daviscourts. CP 31 et seq. In response, the Daviscourts filed this lawsuit in King County Superior Court in July, 2014. In turn, the foreclosure proceedings were discontinued. CP 11 (paragraph 9).

This case is the second time the Daviscourts have sued on this loan. In 2008, the Daviscourts sued Countrywide, the original lender, claiming they were duped into refinancing their loan.⁴ Countrywide prevailed and the Daviscourts’ claims were dismissed in 2010. *See* CP 245, 269.

In the present case, BONY as trustee filed a summary judgment motion to dismiss the Daviscourts’ claims.⁵ Counsel for BONY as trustee brought the Daviscourts’ original note and deed of trust to court as evidence for the summary judgment hearing.⁶

³ CP 10, 54 (Sierra Herbert-West Decl.).

⁴ CP 245, 269 (Mark Daviscourt Decl.).

⁵ CP 634.

⁶ CP 656, 657.

The trial court entered a summary judgment order dismissing the Daviscourts' claims. This appeal followed.

III. LEGAL AUTHORITY AND ARGUMENT

A. Summary of the Argument

The Daviscourts assert that these Respondents conspired to record false documents in violation of several criminal statutes in furtherance of their allegedly wrongful efforts to foreclose on the Daviscourts' property; that "AWL" does not exist and is not a New York corporation; and that the Daviscourts' note is not a negotiable instrument. These allegations in turn, the Daviscourts argue, result in negligence claims, a series of violations of the Deed of Trust Act ("DTA"), the tort of outrage, and CPA violations.⁷

None of the Daviscourts' argument withstand scrutiny. The Daviscourts' false document argument is nothing more than an elaborate Rube Goldberg contraption contrived of various allegations leading nowhere. No false documents have been recorded, and there is no private right of action under the criminal statutes the Daviscourts cite. "AWL" is a well-known d/b/a for Countrywide, and no claims arise out of the alleged "non-existent" status of Countrywide. The Daviscourts' note is a

⁷ The Daviscourts' other arguments appear to be based on these primary claims and will be addressed herein.

negotiable instrument, and as these Respondents explained in their summary motion briefing to the trial court, the Davis courts' note, endorsed in blank, was transferred to BONY as trustee, making BONY as trustee the holder of the note, and the proper party to enforce the note and to conduct a non-judicial foreclosure proceeding.⁸ Summary judgment was correctly granted by the trial court, and the Davis courts' appeal should be denied.

B. The Davis courts' "Expert" Cannot Offer Legal Opinions

The Davis courts repeatedly rely upon the opinions of Marie McDonnell throughout their brief. *E.g.* Davis court Brief at 10-11, 23, 30, 33. However, Ms. McDonnell offers legal opinions regarding the application of several criminal statutes to facts Ms. McDonnell allegedly determined through an investigation or her legal opinion that this or that document contains "false" statements.

Opinion testimony on legal issues is not admissible. *King Cty. Fire Prot. Dist. No. 16 v. Hous. Auth. of King Cty.*, 123 Wn.2d 819, 826 & n.14, 872 P.2d 516 (1994) (citing *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 344, 858 P.2d 1054 (1993); *Parkin v. Colocousis*, 53 Wn. App. 649, 653, 769 P.2d 326 (1989)) (neither the

⁸ CP 634. The Davis courts have not appealed their arguments from below relating to the note as described, other than their "negotiability" argument, addressed *infra*, and their non-existent Countrywide argument.

trial court nor an appellate court can consider conclusions of law contained in an affidavit). ER 704 cmt. (“experts are not to state opinions of law or mixed fact and law”). As such, her conclusions of law are not admissible and were properly disregarded by the trial court.

C. “America’s Wholesale Lender” or “AWL” Is a D/B/A for Countrywide Home Loans

Many of the Daviscourts’ arguments to this Court are based upon the premise that the original lender in this case does not exist because Ms. McDonnell was unable to find any record of “AWL” as a New York corporation.⁹ Ms. McDonnell then opines that AWL was not a New York corporation; that AWL had no interest it could assign to BONY as trustee and therefore BONY as trustee was not the “present beneficiary”; and that the notice of trustee’s sale therefore also contained “false” statements. *See id.* at 10-11, 29-30.¹⁰

These arguments are frivolous. The Daviscourts plainly knew in 2008 when they sued Countrywide that Countrywide was the “AWL” or “America’s Wholesale Lender” identified in their note and deed of trust. CP 245, 269 (Mark Daviscourt Decl.). Otherwise, the Daviscourts would have sued “America’s Wholesale Lender” in 2008.

⁹ Ms. McDonnell asserts that “AWL” was not a New York corporation in 2005 when it was identified as the lender on the deed of trust. Daviscourt Brief at 10.

¹⁰ In a separate line of attack, Ms. McDonnell opines that MERS had no interest in the deed of trust or note that it could assign to the BONY as trustee. *Id.*

“AWL,” or “America’s Wholesale Lender,” is a widely known and used d/b/a for Countrywide, a wholly unremarkable fact noted in many legal opinions. *See Jesinoski v. Countrywide Home Loans, Inc.*, No. 13-684 (U.S. Sept. 15, 2014) 2014 U.S. S. Ct. Briefs LEXIS 324 (“Countrywide Home Loans, Inc. d/b/a America’s Wholesale Lender, is a wholly owned subsidiary of Countrywide Financial Corporation, which in turn is a wholly owned subsidiary of Bank of America Corporation.”).¹¹ Ms. McDonnell’s search in New York’s corporate records for a corporation under its “d/b/a” name provides no evidence of any kind regarding the existence of the corporation.¹²

As such, Ms. McDonnell’s opinions regarding the existence or non-existence of Countrywide are irrelevant and unfounded speculation,

¹¹ *Chapman v. Bank of Am.*, 543 F. App’x 554, 554 (6th Cir. 2013) (unpublished) (“The Note was executed in favor of America’s Wholesale Lender (‘AWL’), which was the name Countrywide Home Loans, Inc. (‘Countrywide’) did business as in Tennessee.”); *Moretti v. Bank of N.Y. Mellon*, 604 F. App’x 431, 432 (6th Cir. 2015) (unpublished) (“On January 14, 2005, John Moretti executed an adjustable rate promissory note in favor of Countrywide Home Loans, Inc., d/b/a/ America’s Wholesale Lender (‘Countrywide’) for \$520,000.00.”); *Vera v. Bank of Am., N.A.*, 569 F. App’x 349, 350 (5th Cir. 2014) (unpublished) (“To finance the purchase, Plaintiffs signed both a promissory note (the ‘Note’) in the amount of \$98,800 payable to Countrywide Home Loans, Inc. d/b/a America’s Wholesale Lender . . .”).

¹² Indeed, one would have to question the qualifications of Ms. McDonnell on this point alone, if she is unaware of the long-established business practice of using d/b/a’s and/or failed to even consider this practice in any manner and disregarded it entirely in conducting her research and giving her opinion. Regardless of the shortcomings of Ms. McDonnell’s investigation, and general business practices, the fact is that Countrywide, the lender the Daviscourts sued in 2008 on this same loan, exists.

and were correctly rejected by the trial court. Because this premise lacks merit, the Daviscourts' many arguments based thereon likewise fail.

D. The Daviscourts' False Document Arguments Are Meritless

The Daviscourts failed to provide any evidence to the trial court demonstrating any false statements were contained in any document. Instead, the Daviscourts' false document arguments are all based upon Ms. McDonnell's erroneous opinion, as discussed above, from which the Daviscourts construct a series of cascading, and baseless, legal conclusions about "false" statements contained in the Daviscourts' deed of trust, the recorded MERS assignment of the deed of trust, the appointment of successor trustee, and a notice of trustee's sale. Daviscourt Brief at 8-11.

As noted above, the use of "AWL" or "American's Wholesale Lender," a d/b/a for Countrywide, in the loan documents or in foreclosure documents is not a "false statement." And likewise, the utilization of MERS in these documents does not constitute a "false" statement.¹³ The

¹³ MERS is identified in the deed of trust as "a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under the Security Agreement." CP 656, 667.

use of nominees in real estate transactions is a well-recognized and accepted practice.¹⁴

And the Davis courts mistake the role that a MERS assignment has in a non-judicial foreclosure process. In fact, the written assignment is not necessary to make BONY as trustee the beneficiary and is not what gives the current beneficiary the right to non-judicially foreclose; rather, it is possession of the original note and deed of trust. *See, e.g., Pelzel v. Nationstar Mortg., LLC*, No. 43294-3-II, 2015 WL 1331666, at *6 (Wash. Ct. App. Mar. 24, 2015) (unpublished) (“Thus, the deed of trust (the security interest) followed the note (the obligation the deed of trust

¹⁴ A “nominee” means “one designated to act for another as his representative in a rather limited sense.” *Schuh Trading Co. v. Comm’r*, 95 F.2d 404, 411 (7th Cir. 1938); *Nominee*, *Black’s Law Dictionary* (8th ed. 2004). “Nominees” or “agents” have been, and are frequently, used for a variety of purposes in real estate transactions, including to execute or hold security instruments. *See, e.g., Carr v. Cohn*, 44 Wash. 586, 87 P. 926, 927 (1906) (nominee to whom property has been deeded without consideration and merely as titleholder for grantors, to convey as they might direct, can bring quiet title action on deed); *Andrews v. Kelleher*, 124 Wash. 517, 534-36, 214 P. 1056 (1923) (bond holders’ agent authorized to prosecute foreclosure); *Fid. Tr. Co. v. Wash.-Or. Corp.*, 217 F. 588, 596 (W.D. Wash. 1914) (same); *Thayer v. Nehalem Mill Co.*, 31 Or. 437, 51 P. 202, 203 (1897) (confirming that agent had authority to execute mortgage on behalf of principal); *In re Cushman Bakery*, 526 F.2d 23, 30 (1st Cir. 1975) (citing cases), *cert. denied*, 425 U.S. 937 (1976); *In re Childs Co.*, 163 F.2d 379, 382 (2d Cir. 1947); *Barkhausen v. Cont’l Ill. Nat’l Bank Tr. Co.*, 3 Ill. 2d 254, 120 N.E.2d 649, 655, *cert. denied*, 348 U.S. 897 (1954); *accord Callaghan v. Scandling*, 178 Or. 449, 167 P.2d 119, (1946). The Restatement (Third) of Property (Mortgages) recognizes that agents may enforce a trust deed on behalf of a lender, even instructing courts to “be vigorous in seeking to find such [an agency] relationship, since the result is otherwise likely to be a windfall for the mortgagor and the frustration of [the lender’s] expectation of security.” Restatement (Third) of Property (Mortgages) § 5.4 cmt. e (1997). *See Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 94, 285 P.3d 34 (2012).

secures) to Nationstar. This is true regardless of whether the deed of trust was assigned properly or at all.”); *In re Butler*, 512 B.R. 643, 656 (Bankr. W.D. Wash. 2014) (“Therefore, any assignment of the Deed of Trust from MERS to One West had no legal effect on the ownership or possession of the Note and was irrelevant for purposes of the disputes at issue here.”); *Johnson v. CitiMortgage, Inc.*, No. 2:13-cv-00037, 2013 U.S. Dist. LEXIS 177065, at *8-10 (W.D. Wash. Dec. 17, 2013); *McPherson v. Homeward Residential*, No. C12-5920, 2014 U.S. Dist. LEXIS 15123, at *14-15 (W.D. Wash. Feb. 4, 2014); see *Lynott v. Mortg. Elec. Registration Sys., Inc.*, No. 12-cv-5572-RBL, 2012 WL 5995053, at *2 (W.D. Wash. Nov. 30, 2012); *Florez v. OneWest Bank, F.S.B.*, No. C11-2088-JCC, 2012 WL 1118179, at *1 (W.D. Wash. Apr. 3, 2012) (distinguishing *Bain* because defendant “had authority to foreclose, independent of MERS, since [defendant] held Plaintiffs’ Note at the time of foreclosure”); *Myers v. Mortg. Elec. Registration Sys., Inc.*, No. 11-cv-05582, 2012 WL 678148, at *3 (W.D. Wash. Feb. 24, 2012) (“Even if MERS had improperly assigned the Deed, Flagstar is empowered as the beneficiary to appoint the trustee because it holds [plaintiff’s] Note, not because of the assignment.”). The fact that the MERS assignment mentioned assignment of the note, when BONY as trustee holds the note by reason of negotiation

of the original note, is not material and, at most, precautionary surplusage.¹⁵

And BONY as trustee is the “present beneficiary” because BONY as trustee holds the original Davis court note.¹⁶ The Davis courts provided no contrary evidence, either to the non-judicial trustee or to the trial court.

The Davis courts’ “false documents” argument was properly rejected by the trial court.

E. The Davis courts Have No Private Right of Action Under the Criminal Statutes upon Which They Rely

The Davis courts argue that documents containing “false statements” or that constitute forgeries under RCW 9.38.020 and RCW 40.16.030 were recorded. The Davis courts’ argument is unfounded.

¹⁵ Other courts have concluded that a reference to assignment of a note in a MERS assignment is superfluous and precautionary. *See, e.g., Connell v. CitiMortgage, Inc.*, No. 11-0443-WS-C, 2012 WL 5511087, at *9 (S.D. Ala. Nov. 13, 2012) (applying Alabama law pertaining to the fact that an assignee only takes as much right as the assignor possessed to conclude that language in an assignment from MERS to CitiMortgage purporting to assign not only MERS’ interest in the mortgage but also “the note and indebtedness” was merely superfluous and inoperative); *Neel v. Fannie Mae*, No. 1:12CV311-HSO-RHW, 2014 WL 896754, at *10 (S.D. Miss. Mar. 6, 2014) (similar). A “superfluous” reference cannot be “material.” *Coleman v. BAC Servicing*, 104 So. 3d 195, 204 (Ala. Civ. App. 2012) (“Because, as previously discussed, BAC established that MidFirst had obtained physical possession of the note, a bearer instrument, on September 17, 2005, the trial court correctly determined that the purported written assignment of the note on August 27, 2009 was ‘superfluous.’”); *Fontenot v. Wells Fargo*, Cal. 198 Cal.App.4th 256, 129 Cal.Rptr.3d 467(2011).

¹⁶ CP 10, 31 et seq (Sierra Herbert-West Decl.)

The Davis courts rely upon two criminal statutes: RCW 40.16.030 (class C felony)¹⁷ and RCW 9.38.020 (gross misdemeanor).¹⁸ Both statutes provide a criminal penalty, and neither statute provides for a civil or private cause of action. The Davis courts do not provide any authority holding that a private right of action exists under either statute.

In Washington, when the Legislature intended to create a private civil right of action based upon violation of a criminal statute, it has done so explicitly. *See, e.g.*, RCW 70.105D.080 (authorizes a private right of action for the recovery of remedial action costs under the Model Toxics Control Act); RCW 70.94.430-.431 (authorizes both criminal and civil penalties for violations of the Clean Air Act); RCW 9A.82.100 (provides civil remedy for damage from criminal profiteering activity).

Criminal statutes are generally enacted for the benefit of the public only. Civil actions exist to enforce private rights or to protect a party against a private wrong. Therefore, the courts widely hold that a civil

¹⁷ “Every person who shall knowingly procure or offer any false or forged instrument to be filed, registered, or recorded in any public office, which instrument, if genuine, might be filed, registered or recorded in such office under any law of this state or of the United States, is guilty of a class C felony and shall be punished by imprisonment in a state correctional facility for not more than five years, or by a fine of not more than five thousand dollars, or by both.” RCW 40.16.030.

¹⁸ “Every person who shall maliciously or fraudulently execute or file for record any instrument, or put forward any claim, by which the right or title of another to any real or personal property is, or purports to be transferred, encumbered or clouded, shall be guilty of a gross misdemeanor.” RCW 9.38.020.

right of action does not arise from the violation of a criminal statute unless such intent is expressed therein or clearly implied. *See, e.g., Beegle v. Thomson*, 138 F.2d 875, 880 (7th Cir. 1943), *cert. denied*, 322 U.S. 743 (1944); *Mezullo v. Maletz*, 331 Mass. 233, 118 N.E.2d 356, 359 (1954); *Parker v. Lowery*, 446 S.W.2d 593, 595-96 (Mo. 1969)¹⁹ (noting fundamental distinctions between civil and criminal actions and stating that “[i]f every citizen were held to have a right of action for civil damages because of violations of the criminal law which were detrimental to the public interest, we would have utter chaos in our courts.”). Courts “do not invent new causes of action which are not justified by recognized legal principles, nor may we extend the interpretation of our criminal statutes beyond the obvious legislative intent.” *Parker*, 446 S.W.2d at 596; *Harlow v. LSI Title Agency, Inc.*, No. 2:11-CV-01775-PMP-VCF, 2012 WL 5425722, at *2 (D. Nev. Nov. 6, 2012).

In Washington, a cause of action will be implied from a statute if the plaintiff is within the class for whose “especial” benefit the statute was

¹⁹ “As we all know, crimes are punished by the state with elaborate statutory provisions fixing the procedure and the substantive law. It has frequently been said that a civil or remedial right of action does not arise from the violation of a criminal statute unless such an intent is expressed therein or clearly implied, and that generally such statutes are enacted for the benefit of the public only.” *Parker*, 446 S.W.2d at 595.

enacted,²⁰ if the legislative intent explicitly or implicitly supports creating a remedy and if implying a remedy is consistent with the underlying purpose of the legislation. *Bennett v. Hardy*, 113 Wn.2d 912, 920, 784 P.2d 1258 (1990); *Tyner v. State Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 77-78, 1 P.3d 1148 (2000).

In this case, there is no basis to imply a remedy or reason to guess at the Legislature's intent. Both statutes expressly provide only for a criminal law remedy, thereby demonstrating that the Legislature intended only a criminal remedy.

We will not imply a private cause of action when the drafters of a statute evidenced a contrary intent; public policy is to be declared by the Legislature, not the courts.

Bird-Johnson Corp. v. Dana Corp., 119 Wn.2d 423, 428, 833 P.2d 375 (1992); *Cazzanigi v. Gen. Elec. Credit Corp.*, 132 Wn.2d 433, 445, 938 P.2d 819 (1997) ("No cause of action should be implied when the Legislature has provided an adequate remedy in the statute."); *Shoblom v. Pitchler*, 161 Wn. App. 1040 (2011) (unpublished).

Further, under the maxim *expressio unius est exclusio alterius*, the absence of any reference in the statute to a private right of action, or even

²⁰ When a statute protects the general public instead of an identifiable class of persons, a plaintiff is not a member of the class for whose especial benefit the statute was enacted. *Fisk v. City of Kirkland*, 164 Wn.2d 891, 895, 194 P.3d 984 (2008).

a “citizens action,” demonstrates that the Legislature intended only a criminal remedy, not a private remedy.²¹ See *Crisman v. Pierce Cty. Fire Prot. Dist. No. 21*, 115 Wn. App. 16, 60 P.3d 652 (2002).

Moreover, borrowers who believe that a foreclosure process is wrongful or infirm, or that their lender is proceeding wrongly, have a host of existing common-law and statutory remedies under the DTA, the CPA, the parties’ contracts, and otherwise.²² The existence of these common-law and statutory remedies argues strongly against implying a private cause of action under a criminal statute that itself provides no evidence of a legislative intent to provide a private cause of action.

The Daviscourts have no private right of action under RCW 40.16.030 or RCW 9.38.020. Summary judgment was properly granted.

F. The Daviscourts Do Not Meet the Standards of RCW 40.16.030

Regardless of whether a private remedy exists, the Daviscourts do not meet the statutory test for a claim under RCW 40.16.030. An instrument is not “false” under RCW 40.16.030 unless it meets the following test:

²¹ *Davenport v. Wash. Educ. Ass’n*, 147 Wn. App. 704, 719, 197 P.3d 686 (2008) (“Hence, to apply the maxim *expressio unius est exclusio alterius* (to express one thing is to exclude another) is again to conclude that the 1992 voters implied the absence, not the presence, of intent that Section 16 be the basis for a private statutory cause of action.” (footnote and emphases omitted)).

²² *Davenport*, 147 Wn. App. at 720 n.43 (noting existing remedies).

This test in effect contains three separate requirements. First, the document must be required or permitted by statute or valid regulation. It must fall within the literal scope of a state law. Secondly, the test requires that the content of the document be scrutinized for materiality. Finally, the court must consider the likelihood and extent of others' reliance on the document.

State v. Hampton, 143 Wn.2d 789, 794, 24 P.3d 1035 (2001) (emphasis omitted).²³ It has long been held that assignments of deeds of trust do not fall within the statute. *Howard v. Shaw*, 10 Wash. 151, 155, 38 P. 746 (1894); *State v. Hampton*, 143 Wn.2d 789, 24 P.3d 1035 (2001). Therefore, Davis courts' argument that the MERS recording the assignment of deed of trust was wrongful is baseless.²⁴

²³ "RCW 40.16.030 encompass[es] a document which is required or permitted by statute or valid regulation to be filed, registered, or recorded in a public office if (1) the claimed falsity relates to a material fact represented in the instrument; and (2a) the information contained in the document is of such a nature that the government is required or permitted by law, statute or valid regulation to act in reliance thereon; or (2b) the information contained in the document materially affects significant rights or duties of third persons, when this effect is reasonably contemplated by the express or implied intent of the statute or valid regulation which requires the filing, registration, or recording of the document."

Hampton, 143 Wn.2d at 793-94 (emphasis omitted; brackets in original) (quoting *State v. Price*, 94 Wn.2d 810, 819, 620 P.2d 994 (1980)).

²⁴ Based upon the form of notice of trustee's sale set forth in the statute, the Davis courts also claim that the DTA requires an assignment to be recorded in order to proceed with a non-judicial foreclosure. RCW 61.24.040(1)(f). To the contrary, the form of notice is prefaced with the language in the statute that the form of notice is only required to be "substantially in this form." Washington case law has expressly recognized that "the security follows the note" and does not require a written assignment.

The other documents identified by the Daviscourts likewise do not meet this test. The claimed “falsities,” as demonstrated above, are not “material” because they are not “false statements” in the first place. Moreover, it was undisputed by the Daviscourts that BONY as trustee is the present beneficiary because it holds the Daviscourts’ note.²⁵ Finally, the fact that the MERS assignment mentioned a transfer of the note is superfluous and not “material” when it is true that BONY as trustee holds the note.²⁶

In addition, the documents do not meet the second and third requirements under the *Price* test set forth above. The information does not require or permit the government to act in reliance thereon: the non-judicial foreclosure process is by definition not a governmental action.²⁷

And the information does not materially affect the significant rights and duties of third parties. The “rights and duties” of third parties – such as the non-judicial foreclosure trustee – turn on the possession of the original note by BONY as trustee, not any document challenged by the

²⁵ The Daviscourts’ argument regarding negotiability of the note is addressed *infra*.

²⁶ It does not change the Daviscourts’ obligations to pay the holder of the note whether BONY as trustee obtained the note through negotiation or assignment.

²⁷ “(2a) the information contained in the document is of such a nature that the government is required or permitted by law, statute or valid regulation to act in reliance thereon.” *Hampton*, 143 Wn.2d at 793 (quoting *Price*, 94 Wn.2d at 819).

Daviscourts.²⁸ The Daviscourts defaulted on their loan obligations, triggering the contractual remedy to which the Daviscourts agreed, namely, the use of Washington’s non-judicial foreclosure procedure. As the current “holder” of the Daviscourts’ note and deed of trust, BONY as trustee had the right to commence and prosecute a non-judicial foreclosure procedure against the Daviscourts’ property.²⁹ No rights or obligations of third parties are affected by these statements. In short, the documents upon which the Daviscourts rely do not fall under RCW 40.16.030.

²⁸ *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 94, 285 P.3d 34 (2012); *Brown v. Dep’t of Commerce*, 184 Wn.2d 509, 359 P.3d 771 (2015). *Pelzel*, 186 Wn. App. 1034; *Butler*, 512 B.R. 643; *Myers*, 2012 WL 678148, at *3 (“Even if MERS had improperly assigned the Deed, Flagstar is empowered as the beneficiary to appoint the trustee because it holds [plaintiff’s] Note, not because of the assignment.”).

²⁹ The Daviscourts’ argument that securitization of the note somehow raised a doubt that BONY as trustee did not have the right to foreclose is without legal support. Daviscourt Brief at 42-43. Securitization does not change the rights and obligations of the note’s holder or borrower. *See McCarty v. U.S. Bank, N.A.*, No. 11-cv-5078, 2012 U.S. Dist. LEXIS 68588 (W.D. Wash. May 16, 2012); *see also Kuc v. Bank of Am., NA*, No. CV 12-08024-PCT-FJM, 2012 WL 1268126, at *3 (D. Ariz. Apr. 16, 2012) (“[T]he theory that securitization renders the Deed of Trust unenforceable has been repeatedly rejected.”); *White v. IndyMac Bank, FSB*, No. 09-00571 DAE-KSC, 2012 WL 966638, at *6 (D. Haw. Mar. 20, 2012) (“The argument that parties lose their interest in a loan when it is assigned to a securitization trust or REMIC has been rejected by numerous courts.”); *Washburn v. Bank of Am., N.A.*, No. 1:11-cv-00193-EJL-CWD, 2011 WL 7053617, at *5 (D. Idaho Oct. 21, 2011); *West v. Bank of Am., N.A.*, No. 2:10-CV-1966, 2011 WL 2491295, at *2 (D. Nev. June 22, 2011); *Hafiz v. Greenpoint Mortg. Funding, Inc.*, 652 F. Supp. 2d 1039 (N.D. Cal. 2009); *Chavez v. Cal. Reconveyance Co.*, No. 2:10-cv-00325-RLH-LRL, 2010 WL 2545006, at *2 (D. Nev. June 18, 2010) (“The alleged securitization of Plaintiffs’ Loan did not invalidate the Deed of Trust, create a requirement of judicial foreclosure, or prevent Defendants from being holders in due course.”).

G. Retroactive Application of Criminal Statutes Is Strongly Disfavored

Because RCW 9.38.020 provides for a criminal penalty, but no private right of action, the Davis courts have no claim thereunder. Moreover, the Davis courts submitted no evidence to the trial court that MERS “maliciously” or “fraudulently” recorded the assignment (RCW 9.38.010) or that MERS “knowingly” procured the filing of a “false or forged” instrument.³⁰ The fact that the effect and operation of a MERS assignment was not decided until the Washington Supreme Court issued its opinion in *Bain* in 2012 demonstrates that MERS proceeded in good faith in 2011.³¹ And the fact that, as a result of a later ruling, the effect of the 2011 assignment may have changed does not, retroactively, convert the filing into a crime. See *In re Estate of Burns*, 131 Wn.2d 104, 110, 928 P.2d 1094 (1997) (“Courts disfavor retroactivity because of the unfairness of impairing a vested right or creating a new obligation with respect to past transactions.”).

³⁰ Moreover, the 2011 assignment document recorded by MERS assigned whatever interest MERS possessed in the Deed of Trust to the trust two years before QLS was appointed successor trustee by the trust and the non-judicial foreclosure was commenced. MERS was not involved in the foreclosure process. There is no requirement in the deed of trust statute that a written assignment of the deed of trust be recorded.

³¹ Cf. *Leingang v. Pierce Cty. Med. Bureau*, 131 Wn.2d 133, 155, 930 P.2d 288 (1997) (“Acts performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the [CPA.]”).

Moreover, there is no showing that the Daviscourts knew of the existence of this document at any material time, much less that they were deceived in any way by these documents or that any party relied upon them in any way. They provide no evidence or explanation as to how the recordation of the 2011 assignment caused them any injury or damage. The Daviscourts stopped paying their mortgage debt and are subject to non-judicial foreclosure, the remedy to which they agreed.

H. The Daviscourts' Tort of Outrage Claim Fails as a Matter of Law

“The tort of outrage requires the proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress.” *Kloepfel v. Bokor*, 149 Wn.2d 192, 195, 66 P.3d 630 (2003). “The question of whether certain conduct is sufficiently outrageous is ordinarily for the jury, but it is initially for the court to determine if reasonable minds could differ on whether the conduct was sufficiently extreme to result in liability.” *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989).

As noted above, the name “America’s Wholesale Lender” is a well-known d/b/a for Countrywide. See *Jesinoski* and cases cited *supra* in footnote 11. Using a d/b/a is a long-standing, common, and well-

recognized business practice. It is not “extreme or outrageous” conduct that intentionally or reckless inflicts emotional distress. There is no outrage claim based upon the use of a commonly known d/b/a.³²

The Daviscourts’ claim for outrage is also barred by the economic loss rule.

As a general principle, the economic loss rule bars recovery for alleged breach of tort duties where a contractual relationship exists and the losses are economic in nature. In determining whether the economic loss rule applies, “[t]he key inquiry is the nature of the loss and the manner in which it occurs, *i.e.*, are the losses economic losses, with economic losses distinguished from personal injury or injury to other property.” Where the claimed loss is an economic one, and no exception to the economic loss rule applies, the parties will be limited to contractual remedies. Courts have applied the economic loss rule to bar outrage claims arising in circumstances similar to this case.

The court agrees with Chase and MERS that the economic loss rule precludes the Vawters’ intentional infliction of emotional distress claim. Even viewing the complaint in their favor, the Vawters have not pleaded sufficient factual allegations to sidestep the economic loss rule. The relationship between the Vawters and Chase and MERS is contractual in nature and arises from the Note and Deed of Trust. As the *Pfau* court emphasized, “[t]he Washington Court of Appeals specifically addressed a claim for emotional distress related to the alleged mishandling of a mortgage and the resulting foreclosure,” and ultimately “held that the lack of express provisions for

³² “The actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.” Restatement (Second) of Torts § 46 cmt. g (1965).

these damages did not prevent the application of the economic loss rule.” The result, as in *Davis* and *Pfau*, is no different here: the economic loss rule bars the Vawters’ intentional infliction of emotional distress claim.

Vawter v. Quality Loan Serv. Corp. of Wash., 707 F. Supp. 2d 1115, 1128-29 (W.D. Wash. 2010) (citations omitted; brackets in original).

I. The Davis courts’ Claims for Civil Conspiracy Were Properly Dismissed

The Davis courts argue that these Respondents acted in a civil conspiracy to record public documents that contain false statements. Davis court Brief at 29.³³ This claim is not supported by any facts or any applicable law.

An act consistent with a lawful and honest undertaking cannot form the basis of a civil conspiracy. *Lewis Pac. Dairymen’s Ass’n v. Turner*, 50 Wn.2d 762, 772, 314 P.2d 625 (1957); *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 223, 450 P.2d 166 (1969). Here, the Davis courts defaulted in payment under their Note and Deed of

³³ “A conspiracy is a combination of two or more persons contriving to commit a criminal or unlawful act, or to commit a lawful act for criminal or unlawful purposes. To establish a civil conspiracy, a plaintiff must prove that: (1) two or more people combined to accomplish an unlawful purpose or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the conspiracy. Civil conspiracy is not, by itself, an actionable claim. The plaintiff must be able to show an underlying actionable claim which was actually accomplished by the conspiracy for the civil claim of conspiracy to be valid.” *Allstate Ins. Co. v. Tacoma Therapy, Inc.*, No. 13-CV-05214-RBL, 2014 U.S. Dist. LEXIS 52934, at *10-11 (W.D. Wash. Apr. 16, 2014) (citations omitted).

Trust, and BONY as trustee sought to non-judicially foreclose on its collateral. There is no civil conspiracy, or underlying criminal or unlawful act, when a party acts to enforce its contractual and statutory remedies. The Daviscourts' claim for civil conspiracy was properly dismissed.

J. The Daviscourts' Negligence Claims Were Properly Dismissed

The Daviscourts also argue a negligence claim against Respondents. The Daviscourts suggest that Respondents negligently recorded false documents, or having undertaken the task of recording the documents needed to complete the task in a non-negligent manner. Daviscourt Brief at 22-23. The Daviscourts allege vaguely that "all persons" have a "common law duty to act reasonably under the circumstances." *Id.* at 21.

But these arguments, as discussed in the foregoing sections, are based upon the Daviscourts' erroneous premises that AWL is a non-existent corporation, that "false" documents were recorded, etc. And there is nothing unreasonable or negligent about a lender proceeding to enforce contractual rights to foreclose a deed of trust when a borrower fails to pay. To the contrary, the parties' obligations are governed by the underlying contracts (note, deed of trust) or statute (DTA), which give the holder of the Daviscourts' note the right to enforce the note and deed of trust through foreclosure.

Proximate cause is an element of negligence, and proximate causation requires both cause in fact and legal causation. *Ang v. Martin*, 154 Wn.2d 477, 482, 114 P.3d 637 (2005). Legal causation is a determination that the cause in fact of the plaintiff's harm should be deemed the legal cause of that harm. *Id.* Legal causation presents a question of law. *Id.* The cause of the non-judicial foreclosure proceeding was the Daviscourts' default under their loan documents. The Daviscourts' negligence claim was properly dismissed.

K. The Daviscourt Note Is a Negotiable Instrument

The Daviscourts claim that their note is not a negotiable instrument.³⁴ The Daviscourts assert that the principal of a negotiable instrument must "remained fixed," and that because their note contains a negative amortization feature it is not negotiable. Daviscourt Brief at 35, *et seq.*

The Daviscourts' argument fails under the rules governing negotiability. The courts have long held that in determining negotiability it is commercial certainty, not mathematical certainty, that is sought.

³⁴ In its summary judgment motion opening brief, these Respondents laid out the relevant facts that (1) the note is a bearer instrument and transferred by possession; (2) the deed of trust follows the note; and (3) the note and deed of trust are self-authenticating. *See* CP 634 *et seq.* Respondents brought the original note as evidence to the summary judgment argument. CP 656, 657.

If the intent of the Code was to aid in the continued expansion of commercial practices, then common sense would tell us that when faced with a widespread commercial practice, such as in the present case, this court should acknowledge it.

“The rule requiring certainty in commercial paper was a rule of commerce before it was a rule of law. It requires commercial, not mathematical, certainty. An uncertainty which does not impair the function of negotiable instruments in the judgment of business men ought not to be regarded by the courts. . . . The whole question is, do [the provisions] render the instruments so uncertain as to destroy their fitness to pass current in the business world?”

Goss v. Trinity Sav. & Loan Ass’n, 1991 OK 19, 813 P.2d 492, 498 (1991) (ellipsis and brackets in original) (quoting *Taylor v. Roeder*, 234 Va. 99, 360 S.E.2d 191, 196 (1987) (Compton, J., dissenting)). The U.C.C.’s focus on commercial certainty, not mathematical certainty, is reflected in the modern U.C.C. rules governing negotiability.

1. The Daviscourts’ Note Contains a Promise to Pay a Fixed Amount

The Daviscourts’ note provided that the Daviscourts will pay the fixed amount of “\$875,000.”³⁵ See RCW 62A.3-104. The authorities hold that to meet the fixed amount requirement, the fixed amount generally must be determinable by reference to the instrument itself without any reference to any outside source. 4 William D. Hawkland & Lary

³⁵ “I promise to pay U.S. 4 875,000.00 (this amount is called ‘Principal’) plus interest, to the order of Lender.” CP 656, 660.

Lawrence, *Uniform Commercial Code Series* § 3-106:2, Westlaw (database updated June 2016).³⁶ Because the Davis courts' note satisfies this rule, the note is negotiable.

2. A Negative Amortization Feature Does Not Render a Note Non-Negotiable; There Is No Requirement That the Principal Balance of a Note “Remain Fixed”

Nevertheless, the Davis courts argue that their note is not a negotiable instrument because, while the U.C.C. permits interest may be stated in any way, and vary, “the amount of principal must remain fixed.” Davis court Brief at 36.

The Davis courts' argument is based upon two erroneous premises regarding principal and interest in a negotiable instrument. First, the rules of negotiability do not require that the amount of principal “remain fixed.” Negotiability requires a promise to pay a fixed amount.³⁷ It does not

³⁶ Former section 3-106(1)(b) recognized that a “sum certain” was being paid even if the note provided that it could be paid “with a stated discount or addition if paid before or after the date fixed for payment.” Respondents have found no case law or other authority suggesting that the outcome is different when the language employed is “fixed amount” of money.

³⁷ RCW 62A.3-104(a): “negotiable instrument” means “an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order ...” A note may not be negotiable if, *on the face of the note*, the principal is not “fixed.” *Cf., e.g., In re Hipp, Inc.*, 71 B.R. 643, 649 (Bankr. N.D. Tex. 1987) (the “principal sum of TWO MILLION AND NO/100 (\$2,000,000.00) DOLLARS, or so much thereof as may be advanced to the undersigned” (emphasis added) (quoting note)); *Heritage Bank v. Bruha*, 283 Neb. 263, 812 N.W.2d 260, 268 (2012) (“[T]he text of the note states that Bruha ‘promises to pay ... the principal amount of Seventy-five Thousand & 00/100 Dollars (\$75,000.00) *or so much as may be outstanding*”

require that the amount of principal “remain fixed.” Indeed, the *subsequent current* principal balance of a note always changes – that is true of almost every note upon which payments are made. But there is no requirement that the *current balance* of a note must remain fixed or be found on the face of the note, as the Daviscourts argue. The outstanding principal note balance will change over time as payments are made or not made, and the *current balance* of a note, principal or interest, ordinarily cannot be determined from the face of the note.³⁸ Notably, it is the *rights, duties, and obligations* of the transferee – not the current balance – that must be found on the face of the note. See *Alpacas of Am., LLC v. Groome*, 179 Wn. App. 391, 397, 317 P.3d 1103 (2014).

The Daviscourts’ argument, that the principal amount must “remain fixed,” is not supported by any legal authority. Moreover, the Daviscourts have submitted no cases holding that the fact that the principal balance of a note may increase as a result of negative amortization of interest renders a note non-negotiable. Because the accrual of interest, even if such accrual results in negative amortization, is

(Emphasis supplied.) Further, the note states that it ‘evidences a revolving line of credit’ and that Bruha could request advances under the obligation up to \$75,000.”).

³⁸ Under the Daviscourts’ theory, every note would lose its negotiability status once a payment of principal is made because the current principal balance changes due to payments and, therefore, fails to “remain fixed.” That absurd result demonstrates the fallacy of the Daviscourts’ theory.

fully disclosed on the face of the Davis courts' note, and because the "amount or rate of interest may be stated or described in the instrument in any manner," the note is negotiable under modern U.C.C. law.³⁹

3. The Face of the Note Fully Discloses the Note's Transferee's Rights, Duties, and Obligations

The courts apply a version of the "four corners" or "face of the note" rule to determine negotiability from the face of the instrument, although the modern U.C.C. permits reference to other documents as described below. "Negotiability is determined from the face, the four-corners, of the instrument without reference to extrinsic facts." *Holsonback v. First State Bank of Albertville*, 394 So. 2d 381, 383 (Ala. Civ. App. 1980), *cert. denied*, 394 So. 2d 384 (Ala. 1981). This rule, which is reflected throughout the U.C.C. negotiability provisions and the related comments, follows from the purpose and policy behind the concept of a negotiable instrument.⁴⁰

³⁹ Under RCW 62A.3-112(b), "[i]nterest may be stated in an instrument as a fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require reference to information not contained in the instrument." (Emphasis added.)

⁴⁰ The whole purpose of the concept of a negotiable instrument under Article 3 is to declare that transferees in the ordinary course of business are only to be held liable for information appearing in the instrument itself and will not be expected to know of any limitations on negotiability or changes in terms, etc., contained in any separate documents. The whole idea of the facilitation of easy transfer of notes and instruments requires that

Alpacas of America, 179 Wn. App. at 397 cited above, demonstrates this approach. (“We analyze the promissory notes’ contents to determine whether the notes’ holder could determine her or his rights, duties, and obligations with respect to the payment on the notes without having to examine any other documents.” (citing RCWA 62A.3-106 cmt. 1)).

RCWA 62A.3-106 cmt. 1 states, “The rationale is that the holder of a negotiable instrument should not be required to examine another document to determine rights with respect to payment.” And an instrument can retain its negotiability when it merely refers to the existence of another writing and does not require reference to the other writing as to whether or when payment is due.

Id. at 397 n.1 (citation omitted).⁴¹ The Daviscourts’ note is negotiable because it sets forth the parties’ rights, duties, and obligations on the face of the note.

a transferee be able to trust what the instrument says, and be able to determine the validity of the note and its negotiability from the language in the note itself.

First State Bank at Gallup v. Clark, 91 N.M. 117, 570 P.2d 1144, 1147 (1977). Whether an instrument is negotiable is a question of law to be determined by the court. *See N. Bank v. Pefferoni Pizza Co.*, 252 Neb. 321, 562 N.W.2d 374, 376 (1997); *Cartwright v. MBank Corpus Christi, N.A.*, 865 S.W.2d 546, 549 (Tex. App. 1993); 5A David Frisch, *Lawrence’s Anderson on the Uniform Commercial Code* § 3-101:48, Westlaw (database updated Sept. 2016).

⁴¹ These negotiability rules also comport with the rules governing enforcement of a note. Because, as noted above, “merely by producing a properly indorsed or issued instrument the plaintiff proves that he is entitled to enforce it as a holder,” the holder of the note is not required to know the amount currently owed in order to enforce it. To the contrary, “payment” is an affirmative defense the borrower must raise and prove. CR 8(c); *U.S. Bank Nat’l Ass’n v. Whitney*, 119 Wn. App.

4. Negative Amortization Does Not Make a Note Non-Negotiable

The Daviscourts' argument is also contrary to the U.C.C.'s provisions for the statement of interest in a negotiable instrument. Under RCW 62A.3-112(b), “[i]nterest may be stated in an instrument as a fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require reference to information not contained in the instrument.” (Emphasis added.)⁴²

The Daviscourts' note fully discloses, in detail, how interest accrual may result in negative amortization, depending on the amount the Daviscourts choose to make as a monthly payment.⁴³ Negative

339, 347, 81 P.3d 135 (2003); *W. Coast Credit Corp. v. Pedersen*, 64 Wn.2d 33, 35-36, 390 P.2d 551 (1964); *Frick v. Wash. Water Power Co.*, 76 Wash. 12, 14, 135 P. 470 (1913) (“The defense of payment in such cases is an affirmative defense, and must be proved as such.”); *Iowa Mortg. Ctr., L.L.C. v. Baccam*, 841 N.W.2d 107, 112 (Iowa 2013).

⁴² A “negotiable instrument” means “an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order.” RCW 62A.3-104(a) (emphasis added). A further example of this principle is reflected in Official Comment 1 to U.C.C. § 3-106: “Many notes issued in commercial transactions are secured by collateral, are subject to acceleration in the event of default, or are subject to prepayment. A statement of rights and obligations concerning collateral, prepayment, or acceleration does not prevent the note from being an instrument if the statement is in the note itself. See Section 3-104(a)(3) and Section 3-108(b).” (Emphasis added.)

⁴³ The provisions of the Daviscourts' note for the accrual and payment of variable amounts of interest and interest rates, some of which may, under specified circumstances as stated on the face of the instrument, be re-characterized as

amortization will occur only if the Davis courts choose not to pay the full amount of interest due each month and only if the monthly payment is insufficient to cover the accrued interest. The Davis courts' note provides for a monthly payment, but the Davis courts are not limited to paying only the "monthly" payment. The note expressly permits the Davis courts to make prepayments of principal. CP 656, 660-662.⁴⁴ In sum, the Davis courts' note is negotiable.

K. The Davis courts' CPA Claims Fail as a Matter of Law

The Davis court Brief argues that Respondents violated the CPA by engaging in a number of unfair or deceptive acts and by violating the DTA.⁴⁵

The Davis courts' CPA claims against these Respondents were properly dismissed because the Davis courts cannot point to any unfair or

principal up to a maximum limit, are disclosed and set out in detail on the face of the note. CP 656, 660-662.

⁴⁴ The courts have recognized that prepayment terms in notes do not destroy negotiability, because prepayment is voluntary. *Cf. HSBC Bank USA, Nat'l Ass'n v. Gouda*, No. F-20201-07, 2010 WL 5128666, at *3 (N.J. Super. Ct. App. Div. Dec. 17, 2010) (unpublished) ("Quite the opposite, the right of prepayment is a voluntary option that [borrowers] may elect to exercise solely at their discretion. Indeed, such an allowance confers a benefit, not a burden, upon [borrowers], who can freely choose to decline the opportunity."); *In re Steinberg*, 498 B.R. 391 (table), 2013 WL 2351797, at *4 & n.34 (B.A.P. 10th Cir. 2013) (unpublished) (prepayment voluntary).

⁴⁵ As an initial matter, to the extent the Davis courts' claims relate to actions taken by any of these Respondents at the time the original Note or Deed of Trust was entered into, such claims are barred as a matter by the four-year statute of limitations applicable to claims under the CPA. RCW 19.86.120.

deceptive conduct by these Respondents that caused them any injury. A claim under the CPA requires proof of five elements: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009). The absence of any one of these elements requires dismissal. *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002).

Here, the Daviscourts were properly subject to a non-judicial foreclosure because, for several years, they have failed to make their loan payments. Because BONY as trustee is the beneficiary of the Daviscourts' Deed of Trust, BONY as trustee is entitled to conduct a non-judicial foreclosure, the remedy to which the Daviscourts expressly agreed. The Daviscourts have no CPA claim because their own defaults in making payments are the "but for" cause for BONY as trustee exercising the agreed remedy. *Babrauskas v. Paramount Equity Mortg.*, No. C13-0494RSL, 2013 WL 5743903, at *4 (W.D. Wash. Oct. 23, 2013) (finding no injury under the CPA because "plaintiff's failure to meet his debt obligations is the 'but for' cause of the default, the threat of foreclosure, any adverse impact on his credit, and the clouded title"); *McCrorey v. Fed. Nat'l Mortg. Ass'n*, No. C12-1630RSL, 2013 WL 681208, at *4 (W.D.

Wash. Feb. 25, 2013) (finding no injury under the CPA because “it was [plaintiffs’] failure to meet their debt obligations that led to a default, the destruction of credit, and the foreclosure”).

The Daviscourts failed to show that any action of Respondents to enforce their contractual rights after the Daviscourts’ multiple payment defaults was the “but for” cause of any damage or injury:

“A plaintiff must establish that, but for the defendant’s unfair or deceptive practice, the plaintiff would not have suffered an injury.” “[B]orrowers, as third parties to the assignment of their mortgage . . . cannot mount a challenge to the chain of assignments unless a borrower has a genuine claim that they are at risk of paying the same debt twice if the assignment stands.” Estribor’s claim falls squarely within this precedent, and he has failed to show that, but for MERS or Chase’s alleged misconduct, Chase would not have initiated a foreclosure on his house. Estribor does argue that the Assignment was the “initial step” in the attempted foreclosure . . . , but an agreement entered into only for the benefit of subsequent purchasers fails to establish but for causation under the CPA. Therefore, the Court grants Chase’s and MERS’s motions on Estribor’s CPA claim.

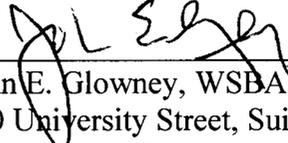
Estribor v. Mtn. States Mortg., 2013 WL 6499535 (W.D. Wash. Dec. 11, 2013) (citations omitted). As such, the Daviscourts’ CPA claims were properly dismissed as a matter of law.

IV. CONCLUSION

The Court is respectfully requested to deny the Daviscourts' appeal.

Respectfully submitted this 18th day of October 2016.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that I caused the **Amended Appellate Brief of Respondents** to be filed with the Court of Appeals (original and one copy); and caused a true and correct copy of same to be served upon the party listed below by email/pdf:

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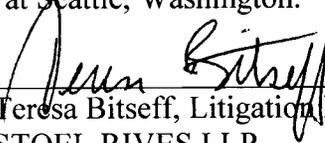
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2016 OCT 18 AM 10:57
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