

NO. 47265-1-II  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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IOAN A. PAUNESCU and DANIELA PAUNESCU, husband  
and wife,

Plaintiffs/Appellants,

vs.

GERHARD H. ECKERT and MARGARETHE ECKERT AS  
TRUSTEES OF THE ECKERT FAMILY TRUST; and SCOTT  
RUSSON and JANE DOE RUSSON, husband and wife,

Defendants/Respondents,

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APPEAL FROM THE SUPERIOR COURT

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HONORABLE SUZAN CLARK

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BRIEF OF RESPONDENTS ECKERT

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**Table of Contents**

RESPONSE TO ASSIGNMENT OF ERROR ..... 1

RESPONSE TO ISSUES PRESENTED ..... 1

STATEMENT OF THE CASE..... 1

    I.    Operative Facts..... 1

    II.   The Eviction Proceeding..... 7

    III.  Course of Proceedings..... 7

    IV.  Post-Judgment Activity..... 8

ARGUMENT ..... 8

    I.    Standard of Review..... 8

    II.   The Paunescus Cannot Invalidate the Sale..... 9

        a.   Introduction..... 9

        b.   The Eckert Trust Is a Lawful Beneficiary..... 10

            i.   The Eckert Trust Is a Beneficiary under the Terms of RCW  
                61.24 ..... 10

            ii.  A Trust Can Be a Beneficiary of a Deed of Trust.....11

            iii.  Use of the Name “Eckert Trust” as Opposed to “Eckert  
                Family Trust” Makes No Difference..... 20

            iv.  The Paunescus Are Estopped from Basing Any Claim on  
                the Designation of the Eckert Trust as Beneficiary..... 22

            v.   Conclusion..... 24

        c.   The Trustee’s Sale was Validly Conducted..... 24

d.	The Paunescus Have Waived Any Ability to Void the Trustee’s Sale by Not Suing to Enjoin the Sale.....	28
e.	Conclusion. ....	32
III.	At Any Rate, the Deed of Trust and Promissory Note Are Not Void Because the Eckert Trust Was Named as Beneficiary and Holder. ....	33
IV.	The Paunescus Cannot Make Any Claim for Damages. ....	34
V.	The Paunescus Cannot Take Advantage of the Homestead Exemption. ....	36
VI.	The Summary Judgment Motion Was Ripe.....	37
VII.	The Paunescus Cannot Appeal from Orders Not Designated in Their Notice of Appeal. ....	39
VIII.	The Court Should Not Consider Other Questions Alluded to in the Paunescus’ Statement of Issues. ....	42
	ATTORNEY’S FEES.....	44
	CONCLUSION.....	45

**Table of Authorities**

**Cases**

*Albice v. Premier Mortgage Services of Washington, Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012) .....27, 29, 32, 35

*Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012).....10, 11, 19, 20, 33

*Barlindal v. City of Bonney Lake*, 84 Wn.App. 135, 925 P.2d 1289 (1996) .....40

*Bavand v. OneWest Bank, F.S.B.*, 176 Wn.App. 475, 309 P.3d 636 (2013).....10, 20, 30, 34

*Board of Regents v. City of Seattle*, 108 Wn.2d 545, 741 P.2d 11 (1987) .....23

*Brown v. Household Realty Corp.* 146 Wn.App. 157, 189 P.3d 233 (2008)..... 31, 34

*Cogle v. Snow*, 56 Wn.App. 499, 784 P.2d 554 (1990)..... 38

*Dragt v. Dragt/DeTray, LLC*, 139 Wn.App. 560, 161 P.3d 473 (2007) .....44

*Felton v. Citizens Federal Savings & Loan Association of Seattle*, 101 Wn.2d 416, 679 P.2d 928 (1984). ..... 37

*Federal National Mortgage Association v. Ndiaye*, \_\_\_ Wn.App. \_\_\_, \_\_\_ P.3d \_\_\_, 2015 W.L. 3755067 (June 4, 2015).....41

*Foss v. Culbertson*, 17 Wn.2d 610, 136 P.2d 711 (1943) .....21

*Frias v. Asset Foreclosure Services, Inc.* 181 Wn.2d 412, 334 P.3d 529 (2014)..... 34

*Frizzell v. Murray*, 179 Wn.2d 301, 313 P.3d 1171 (2013)..... 26, 28, 36

<i>Gander v. Yeager</i> , 167 Wn.App. 638, 274 P.3d 293 (2012).....	44
<i>Huff v. Northern Pacific Railway</i> , 38 Wn.2d 103, 228 P.3d 121 (1951)...	23
<i>In re Adoption of B.T.</i> , 150 Wn.2d 409, 78 P.3d 634 (2003).....	40
<i>Jacobsen v. State</i> , 89 Wn.2d 104, 569 P.2d 1152 (1977) .....	42
<i>Johnson v. Department of Licensing</i> , 71 Wn.App. 326, 858 P.2d 1112 (1993).....	42
<i>Lowman v. Guie</i> , 130 Wash. 606, 228 P. 845 (1924) .....	18
<i>Lyon v. U.S. National Bank National Association</i> , 181 Wn.2d 775, 336 P.3d 1142 (2014) .....	27
<i>Manteufel v. Safeco Insurance Company of America</i> , 117 Wn.App. 168, 68 P.3d 1093 (2003) .....	38
<i>McCombs Construction, Inc. v. Barnes</i> , 32 Wn.App. 70, 645 P.2d 1131 (1982).....	21
<i>McKee v. American Home Products Corp.</i> , 113 Wn.2d 701, 782 P.2d 1045 (1989).....	42
<i>Merry v. Northwest Trustee Services</i> , ___ Wn.App. ___, ___ P.3d ____, 2015 W.L. 3532992 (June 4, 2015).....	30, 32
<i>MGIC Financial Corp v. H.A. Briggs Co.</i> , 24 Wn.App. 1, 600 P.2d 573 (1979).....	40
<i>Michael v. Mosquera-Lacy</i> , 165 Wn.2d 595, 200 P.3d 695 (2009) .....	8
<i>Plein v. Lackey</i> , 149 Wn.2d 214, 67 P.3d 1061 (2003) .....	28, 29
<i>Portico Management Group, LLC, v Harrison</i> , 202 Cal.App.4 <sup>th</sup> 464, 136 Cal.Rptr.3d 151 (2011).....	18
<i>Ranger Insurance Co. v. Pierce County</i> , 164 Wn.2d 545, 192 P.3d 886 (2008).....	8

<i>Rucker v. Novastar Mortgage, Inc.</i> , 177 Wn.App. 1, 311 P.3d 31 (2013).....	20, 29, 32
<i>Ruvalcaba v. Kwang Ho Baek</i> , 175 Wn.2d 1, 282 P.3d 1083 (2012).....	8
<i>Schroeder v. Excelsior Management Group</i> , 177 Wn.2d 94, 297 P.3d 677 (2013).....	29
<i>Shafer v. State</i> , 83 Wn.2d 618, 521 P.2d 736 (1974).....	22
<i>Stastny v. Board of Trustees of Central Washington University</i> , 32 Wn.App. 239, 647 P.2d 496 (1982) .....	43
<i>Sunderland Family Treatment Services v. City of Pasco</i> , 107 Wn.App. 109, 26 P.3d 955 (2001) .....	48
<i>Walker v. Quality Loans Service Corp.</i> 176 Wn.App. 294, 308 P.3d 176 (2013).....	20, 33
<i>Wilson v. Steinbach</i> , 98 Wn.2d 434, 656 P.2d 1030 (1982) .....	8

**Statutes**

RCW 11.96A.030(6) .....	12
RCW 11.96A.030(8) .....	13
RCW 11.96A.050 (1)(b) .....	13
RCW 11.96A.070.....	13
RCW 11.96A.070(1)(b) .....	14
RCW 11.96A.160(4) .....	14
RCW 11.98.005.....	15

RCW 11.98.008.....	17
RCW 11.98.070(21).....	15
RCW 11.98.075.....	16
RCW 19.80.010 .....	21
RCW 19.80.040 .....	21
RCW 6.13 .....	36
RCW 61.24.005(2).....	10, 19, 20
RCW 61.24.010(2).....	10
RCW 61.24.010(4), (5) .....	27
RCW 61.24.030.....	24, 27, 28
RCW 61.24.030 (1)(a) .....	24
RCW 61.24.030(2).....	29
RCW 61.24.031 .....	9, 24, 25, 26, 28, 31, 32
RCW 61.24.031(7)(a)(i).....	25, 26
RCW 61.24.060(1).....	41
RCW 61.24.127 .....	34, 35, 36
RCW 62A.1-201(21).....	11

**Rules**

CR 12(c)..... 30

CR 56(f) ..... 37

RAP 2.4(b) ..... 40

RAP 2.5(a) ..... 27, 37

RAP 5.4(a) ..... 40

RAP 6.1 ..... 40

RAP 18.1(a).....44

**Other Authorities**

52 Am.Jur.2d *Names* § 64 ..... 21

Restatement (Third) *Trusts* §2, *Comment a.* ..... 12

## RESPONSE TO ASSIGNMENT OF ERROR

The trial court properly granted Defendants' motion for summary judgment and correctly entered judgment dismissing Plaintiffs' claims.

## RESPONSE TO ISSUES PRESENTED

As the appealing party, the appellants are allowed to frame the issues as they see them. They have not supported some of the issues that they raise with any argument. This will be pointed out in the body of the brief. In general, this brief will follow and reply to the arguments as presented in the argument section of the Brief of Appellant.

## STATEMENT OF THE CASE

### I. Operative Facts.

Ioan Paunescu and Daniela Paunescu (the Paunescus) are husband and wife. In 2005, Mr. Paunescu purchased real estate at 5619 NE 56<sup>th</sup> Street, Vancouver (the Property) as his separate property for \$205,000.00. (CP 342; CP 362-65) MIT Lending loaned him the entire purchase price in two loans. One loan was for \$164,000 while the other was for \$41,000. The larger loan was secured by a first deed of trust, and the second was secured by a second deed of trust. (CP 366-95) Mortgage Electronic Registration Systems, Inc. (MERS) was listed as the as the beneficiary on both deeds of trust. (CP 367; CP 389)

In 2006, the Paunescus obtained a Home Equity Line of Credit with Bank of America in the amount of \$60,000.00. They used the proceeds of the loan to pay off the note secured by the second deed of trust to MIT Lending and also to pay off some credit card debt. The loan to Bank of America was secured by what amounted to a new second deed of trust. (CP 343, 397-411)

In 2007, the Paunescus wanted to add onto the Property for business purposes. They desired to create enough space so the property could be either a duplex or an Adult Family Home. (CP 344) They checked the zoning and other land use requirements for an Adult Family Home or a duplex at the Clark County Department of Community Development. (CP 345) They commissioned an architect to prepare plans for an addition to have an Adult Family Home on the premises. They consulted an engineer to provide input to those plans. (CP 355-56)

The plans were submitted to the Clark County Department of Community Development for approval on April 2, 2007. They called for the addition of six bedrooms, each with its own bathroom together with a living area and a small dining area. The application noted "Addition for Adult Family Care. . .six new bedrooms and six new bathrooms. . ." as the description. These plans were approved on April 27, 2007. (CP 349-50; CP 355-56; CP 422-24)

While their applications were pending, the Paunescus sought a loan for the purpose of adding onto the Property for either a duplex or a family home. They contacted Ben Lucescu, a mortgage broker. (CP 344) Mr. Lucescu told the Paunescus that they could get a loan from Gerhardt and Margarethe Eckert (the Eckerts).<sup>1</sup> (CP 345)

The Paunescus told the Eckerts that they wanted the loan to expand the Property to accommodate an Adult Family Home business. This was a condition of the loan as far as the Eckerts were concerned. They were not willing to loan for any non-business purpose or personal, family, or household purpose. The Eckerts had other requirements for the loan. First Mr. Paunescu had to execute a Deed of Trust pledging the Property as security. Second, a portion of the proceeds of the loan had to be used to pay off the existing loan to Bank of America so that the loan they were making could be in second position. (CP 461-62)

The loan was consummated in May of 2007. The Paunescus borrowed \$290,000.00 and executed a Promissory Note for that sum. Interest was set at twelve percent (12%) per annum on the unpaid balance from May 12, 2007. The Promissory Note called for “interest only” payments in the amount of \$2,900.00 per month with the entire balance of

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<sup>1</sup> In this brief, the term “the Eckerts” will refer to Mr. and Mrs. Eckert as trustees of their trust.

interest and principal due on May 12, 2008. It also contained the following provision:

**17. COMMERCIAL PROPERTY: (Optional—Not Applicable unless initialed by Holder and Maker to this Note)** Maker represents and warrants to Holder that the sums represented by this Note are being used for business, investment or commercial purposes, and not for personal, family, or household purposes.

Ms. Paunescu initialed this provision but the Eckerts did not. The Promissory Note referred to Mr. Paunescu as the “the Maker” and “the Eckert Trust” as the “Holder.” The Deed of Trust was also executed giving the Property as security.<sup>2</sup> It named the “Eckert Trust” as beneficiary and Fidelity National Title Insurance Company as trustee. (CP 346-48; CP 412-19) The money for the loan came from a money market account in the name of the Eckert Family Trust at Columbia Credit Union in Vancouver. (CP 745-46)

The Paunescus made no objection to the form of either the Promissory Note or the Deed of Trust. Had they made any objection, the loan would not have been made unless the objection was resolved. (CP 462)

The Paunescus received the net proceeds of the loan after charges, closing costs, and full payment of the loan to Bank of America. (CP 349;

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<sup>2</sup> Ms. Paunescu executed both documents in her capacity as Mr. Paunescu’s attorney in fact. (CP 412; CP 414; CP 417)

CP 421) They used the proceeds to add onto the Property for an Adult Family Home according to the plans from their architect and the permit obtained from Clark County. (CP 349)

Ms. Paunescu obtained a license from the State of Washington to operate an Adult Family Home on February 15, 2008. (CP 351; CP 425) She continued in that business thereafter as is reflected in the couple's federal income tax returns for 2008-2012. (CP 353-54; CP 426-42)

The Paunescus made the required monthly payments for the first year of the loan. They did not pay the entire principal balance when it was due on May 12, 2008. They continued to make monthly payments of \$2,900.00 through November of 2008. They also paid \$1,450.00 in December of 2008 with an additional \$1,450.00 in January 2009. (CP 463)

The Eckerts asked the Paunescus when they were going to make further payments. The Paunescus wrote to the Eckerts in May of 2009. As is pertinent, the letter reads as follows:

Dear Mr. and Mrs. Eckert:

We are responding to the letter that we received from you about the amount we owe. We are not disputing that we owe that amount. We do want to pay it back in full. It depends on our situation if I have residents and if my husband has loads.<sup>3</sup> If that happens we will pay the

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<sup>3</sup> Mr. Paunescu works as a long-haul trucker.

past due amount. We took out the private loan from the beginning with the thought that we will do the Adult Foster Care Home. This is what you knew the money was for. The loan was used all for the construction for the home we did not use the money to pay out the cars or the semi-truck or to take a vacation. . .

(CP 463-64)

The Paunescus next made a payment in the amount of \$500.00 in November of 2012. They continued paying this amount from January through April of 2013. They paid \$300.00 in May of 2013 but then stopped making payments. (CP 463)

On October 31, 2013, Margarethe Eckert, as trustee of the Eckert Trust, executed a document appointing Scott Russon as Successor Trustee. Mr. Russon subsequently issued a Notice of Default and Notice of Foreclosure. He saw to the recording and serving of a Notice of Trustee's Sale. It set the Trustee's Sale for February 7, 2014. The sale occurred on that date. A Trustee's Deed was issued to the Eckert Trust. The Eckerts then executed a quitclaim deed to Gerhardt and Margarethe Eckert as Trustees of the Eckert Family Trust "for no consideration but for a mere change in identity." (CP 443-60; CP 668-86; CP 699-708)

Prior to the sale, the Paunescus commenced no action to restrain the sale or for any other relief. (CP 463)

II. The Eviction Proceeding.

After the Trustee's Sale, the Paunescus did not immediately vacate the premises. The Eckerts commenced an unlawful detainer action against them. They obtained the Findings of Fact; Conclusions of Law; and Order for Judgment and Immediate Writ of Restitution (the Eviction Order) on March 28, 2014. CP 467-70; CP 621-37; CP 722-27) The Paunescus did not appeal.

III. Course of Proceedings.

The Paunescus did nothing until they filed this action on June 25, 2014. (CP 3-11) They subsequently filed an Amended Complaint on July 18, 2014, and the Eckerts answered. (CP 14-34)

On August 6, 2014, the Paunescus filed Plaintiffs' Motion for Partial Summary Judgment. (CP 35-36) At length, the Eckerts responded to that motion and filed their own motion for summary judgment. (CP 94) The Court heard these motions at the same time. It granted the Eckerts' motion and denied the motion made by the Paunescus. It dismissed the matter as to the Eckerts and awarded them attorney's fees. (CP 167-69; 754-57)

IV. Post-Judgment Activity.

The Eckerts have garnished bank accounts to satisfy the judgment for attorney's fees. The Paunescus have not filed any further notices of appeal.

ARGUMENT

I. Standard of Review.

The trial court decided all claims on summary judgment motions. The appellate court reviews the trial court's order for summary judgment *de novo* performing the same inquiry as the trial court. *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012).

A party moving for summary judgment must show both that there is no genuine issue of material fact when those facts are viewed in the light most favorable to the nonmoving party and that the moving party is entitled to judgment as a matter of law. *Ranger Insurance Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). A genuine issue of material fact exists when reasonable minds could reach different conclusions. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009). When reasonable minds can reach only one conclusion on the facts, however, summary judgment is appropriate. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

In this case, the facts lead to only one conclusion, as will be discussed below. Based on those facts, the trial court correctly ruled that the Eckerts were entitled to have all claims against them dismissed as a matter of law.

II. The Paunescus Cannot Invalidate the Sale.

a. Introduction.

The Paunescus appear to claim that trustee's sale was invalid because the Eckert Trust is not a proper beneficiary of a deed of trust and therefore could not validly appoint Mr. Russon to be Successor Trustee, and therefore, that Mr. Russon lacked any authority to proceed. This argument fails because the Eckert Trust is a lawful beneficiary and because the Paunescus are estopped to raise this claim. They further contend that the sale was invalid because there was no compliance with the requirements of RCW 61.24.031. But the Eckerts did not have to take the steps required by RCW 61.24.031 because the Eckerts made a commercial loan. Finally, the Paunescus waived any right to contest the validity of the sale because they failed to sue to restrain it.

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b. The Eckert Trust Is a Lawful Beneficiary.

i. The Eckert Trust Is a Beneficiary under the Terms of RCW 61.24.

The Deed of Trust was non-judicially foreclosed as allowed by RCW 61.24. The requirements of that statute must be met in the foreclosure process. *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 108, 285 P.3d 34 (2012). A Successor Trustee, such as Mr. Russon, is appointed by the beneficiary. RCW 61.24.010(2) The entity appointing the beneficiary must be a lawful beneficiary. Otherwise, both the appointment and the subsequent sale may be held to be invalid. *Bavand v. OneWest Bank, F.S.B.*, 176 Wn.App. 475, 309 P.3d 636 (2013) The Eckert Trust is a lawful beneficiary under the terms of RCW 61.24. Therefore, it had the power to appoint Mr. Russon as Successor Trustee.

The term “beneficiary” is defined in RCW 61.24.005(2) as follows:

“Beneficiary” means the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.

The term refers to the actual holder of a promissory note. *Bain v. Metropolitan Mortgage Group, Inc., supra*, 175 Wn.2d at 101. The Eckert Trust is referred to in the Promissory Note as the Holder. It is therefore a lawful beneficiary for the purposes of RCW 61.24.005(2)

The definition of “holder” in the Uniform Commercial Code can also be used to determine who the “holder” might be for the purposes of RCW 61.24. *Bain v. Metropolitan Mortgage Group, Inc.*, *supra*, 175 Wn.2d at 103-104. That definition is:

(21) “Holder” with respect to a negotiable instrument, means:

(A) 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(21) The Promissory Note is payable to an identified person in possession — once again, The Eckert Trust. (CP 413) Therefore, The Eckert Trust is a lawful beneficiary under the Uniform Commercial Code definition as well.

There is no issue of fact here. Since the Eckert Trust is the holder of the promissory note, it is a lawful beneficiary entitled to appoint Mr. Russon as the Successor Trustee. The Paunescus cannot argue to the contrary.

ii. A Trust Can Be a Beneficiary of a Deed of Trust.

The Paunescus appear to claim that the Eckert Trust cannot be a lawful beneficiary—regardless of whether it is the

holder of the Promissory Note—because a trust cannot be a beneficiary of a deed of trust. This argument fails.

A trust amounts to a lawful entity apart from the trustor, the trustee, and the beneficiary. Modern common-law and statutory concepts and terminology recognize the trust as a legal “entity” consisting of the trust estate and the associated fiduciary relation between the trustee and the beneficiaries. Restatement (Third) *Trusts* §2, *Comment a*.

Many provisions in Washington statutes show that Washington recognizes a trust as an entity distinct from the trustor, the trustee, and the beneficiary. A number of these are contained in Washington’s Trust and Estate Dispute Resolution Act (TEDRA). For example, the persons interested in the trust are defined as follows:

“Persons interested in the estate or trust” means the trustor, if living, all persons beneficially interested in the estate or trust, persons holding powers over the trust or estate assets, the attorney general in the case of a charitable trust where the attorney general would be a necessary party to a judicial proceeding concerning the trust, and any personal representative or trustee of the estate or trust.

RCW 11.96A.030(6) The “persons holding powers over the trust or estate assets” are clearly the trustees. All persons considered part of the trust relationship—the trustor, the trustee, and the beneficiary—are discussed in this definition as separate from that entity known as the trust.

The definition of “trustee” shows that the trustee is distinct from the trust. As RCW 11.96A.030(8) provides:

“Trustee” means any acting and qualified trustee of the trust.

The Paunescus may claim that the trustee is the owner of trust assets. TEDRA indicates that the assets to belong to the trust. When TEDRA discusses venue, it states in RCW 11.96A.050 (1)(b) as pertinent:

(1) Venue for proceedings pertaining to trusts is:

. . .

(b) For all . . . trusts, in the superior court of the county where any qualified beneficiary of the trust . . . resides, the county where any trustee resides or has a place of business, or the county where any real property that is an asset of the trust is located. . .

This language suggests that an asset belongs to the trust and not a trustee. Otherwise, this statute would have referred to an asset that the trustee holds in trust.

The TEDRA sets out periods of limitation to bring an action for a breach of trust in RCW 11.96A.070. In order to commence the running of the statute of limitation, the trustee must deliver a report that adequately discloses the existence of a potential claim. The statute goes on to discuss when a report adequately discloses the existence of a

potential claim for breach of trust in the following language contained in

RCW 11.96A.070(1)(b):

A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary . . . knows or should have known of the potential claim. A report that includes all of the items described in this subsection . . . that are relevant for the reporting period is presumed to have provided such sufficient information regarding the existence of potential claims for breach of trust for such period. . .

(ii) A statement of the assets and liabilities of the trust and their values at the beginning and end of the period. . .

By using the words “assets and liabilities of the trust,” the statute refers to an entity that owns the assets and owes the liabilities.

Finally, when a guardian ad litem is appointed, the compensation of the guardian ad litem is discussed in the following terms:

The guardian ad litem is entitled to reasonable compensation for services. Such compensation is to be paid from the principal of the estate or trust whose beneficiaries are represented.

RCW 11.96A.160(4). This statute discusses paying fees from the trust and not by the trustees. This indicates that the trust is an entity independent of the trustees.

The provisions for registration of a trust as a Washington trust also show that a trust is an entity in and of itself and independent of the trustee. As RCW 11.98.005 provides:

. . . the trustee may register the trust as a Washington trust . . . The trustee must register the trust by filing with the clerk of the court in any county where venue lies for the trust under RCW 11.96A.050, a statement including the following information:

- (i) The name and address of the trustee;
- (ii) The date of the trust, name of the trustor, and name of the trust, . . .

The statute then gives the form of the notice as follows:

NOTICE OF FILING OF REGISTRATION OF  
[NAME AND DATE OF TRUST] AS A  
WASHINGTON TRUST

This language recognizes that a trust is an entity in and of itself because the trust has a name separate from that of the trustees.

The statute that deals with the powers of a trustee shows that the trustee and trust are distinct. Specifically, RCW 11.98.070(21) provides as follows:

A trustee, . . . (has) discretionary power to acquire, invest, reinvest, exchange, sell, convey, control, divide, partition, and manage the trust property in accordance with the standards provided by law, and in so doing may:

. . .

(21) Manage any business interest, . . . and with respect to the business interest, have the following powers:

(a) To hold, retain, and continue to operate that business interest solely at the risk of the trust, without need to diversify and without liability on the part of the trustee for any resulting losses . . .

...

(d) To use the general assets of the trust for the purpose of the business and to invest additional capital in or make loans to such business;

(e) To endorse or guarantee on behalf of the trust any loan made to the business and to secure the loan by the trust's interest in the business or any other property of the trust. . .

This language clearly envisions the trust as its own separate entity. It recognizes that the Trust has assets; that a business can be operated at the risk of the trust — not at the risk of the Trustee in that capacity; and that the Trustee can take out a loan and secure that loan by the trust's interest in the business — not by the Trustee's interest in the business in his or her capacity as Trustee.

A trustee is allowed to certify a trust. That is discussed in RCW 11.98.075, which states:

(1) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:

- (a) That the trust exists and the date the trust instrument was executed;
- (b) The identity of the trustor;
- (c) The identity and address of the currently acting trustee;
- (d) Relevant powers of the trustee;
- (e) The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
- (f) The authority of co-trustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee; and
- (g) The name of the trust or the titling of the trust property.

In other words, the trust has its own name distinct from that of the trustee or the trustor.

The Paunescus mention RCW 11.98.008 in support of their argument. That statute provides as follows:

A trust may be created by:

(1) Transfer of property to another person as trustee during the trustor's lifetime or by will or other disposition taking effect upon the trustor's death;

(2) Declaration by the owner of the property that the owner holds identifiable property as trustee;  
or

(3) Exercise of a power of appointment in favor of a trustee.

This statute supports the Eckerts' position because it suggests that a trust can be created as an entity distinct from the trustee.

The Paunescus also cite several cases in support of their argument. The first, *Lowman v. Guie*, 130 Wash. 606, 228 P. 845 (1924), simply isn't helpful. That case involved the priority of creditors to enforce security interests in personal property belonging to what the pleadings said was a "common law trust." In distinguishing that entity from a partnership, the Court stated that since the owner of the personal property was a "common law trust" it was not a corporation. 130 Wash. at 607 That a trust is not a corporation is not helpful in determining whether or not a trust can be named as a beneficiary of a deed of trust.

The case of *Portico Management Group, LLC, v Harrison*, 202 Cal.App.4<sup>th</sup> 464, 136 Cal.Rptr.3d 151 (2011), provides no guidance because it was decided under California law and does not address the question presented. The Court held in that case that a judgment against a trust—as opposed to a judgment against the trustees of a trust in their capacities as such—could not be enforced. This was based on specific provisions of the California Code of Civil Procedure. The first provision of the Code of Civil Procedure stated that a judgment debtor is the

“person” against whom a judgment is rendered while the second did not include a trust within the definition of “person.” The Court reasoned that since a trust was not a “person,” it could not be judgment debtor against whom a judgment could be enforced. 202 Cal.App. 4<sup>th</sup> at 473 The Court did not address whether a trust could be a beneficiary under the terms of a deed of trust.

The Paunescus have spent considerable time in their brief discussing MERS. That entity was found not to be a proper trustee in *Bain v. Metropolitan Mortgage Group, supra*, because it was not the “holder” of the promissory note that the deed of trust secured in that case. MERS is not involved with the transaction at issue in this case. While it listed as the beneficiary in the deeds of trust connected to the Paunescus purchase of the property, it is not mentioned in the deed of trust that was foreclosed. (CP 416-19) The discussion of MERS in the Paunescus’ brief has no significance.

The Paunescus may also argue that the Eckert Trust is not licensed as a business. But the definition of the term “beneficiary” in RCW 61.24.005(2) contains no such requirement. This contention must be rejected for that reason.

At the end of the day, the analysis of who is a lawful beneficiary is based on the statutory definition of the term “beneficiary” as

contained in RCW 61.24.005(2). *Bain v. Metropolitan Mortgage, supra*; *Walker v. Quality Loan Service Corp.*, 176 Wn.App. 294, 308 P.3d 716 (2013); *Bavand v. OneWest Bank, F.S.B., supra*; *Rucker v. Novastar Mortgage, Inc.*, 177 Wn.App. 1, 311 P.3d 31 (2013). The Eckert Trust is the holder of the Promissory Note as that document states. It is therefore a lawful beneficiary. The discussion ends there.

In our case, the money loaned to the Paunescus came from trust assets. When trust assets are used to fund a loan and the resulting promissory trust names the trust as the holder or payee of the note, there is no reason why that trust cannot be the beneficiary of the deed of trust taken for security if it continues to be the holder of the promissory note. The Pauenscus have not supplied us with such a reason. The fact that the trust—as opposed, perhaps, to a trustee in that capacity—is named as beneficiary under the deed of trust simply does not and should not matter.

iii. Use of the Name “Eckert Trust” as Opposed to “Eckert Family Trust” Makes No Difference.

The funds for the loan came from an account in the name of the Eckert Family Trust. But “The Eckert Trust” is listed as the beneficiary of the Deed of Trust and the holder of the Promissory Note. This is a scrivener’s error. The proper reference should have been to “the

Eckert Family Trust.” The fact that the beneficiary is named “The Eckert Trust” as opposed to “The Eckert Family Trust” has no significance.

At worst, the name “the Eckert Trust” is a fictitious name of the “the Eckert Family Trust.” If a person enters into a contract under a fictitious name, the contract is still valid. Furthermore, a person may any name that he or she wishes in the absence of fraud. 52 Am.Jur.2d *Names* § 64. If the proper designation is as the Paunescus claim, then Mr. and Mrs. Eckert as Trustees have simply used “the Eckert Trust” as their assumed name on the Promissory Note and Deed of Trust.

While it is true that assumed names must be filed with the Department of Licensing, the sole effect of noncompliance is the inability to sue. RCW 19.80.010; RCW 19.80.040; *Foss v. Culbertson*, 17 Wn.2d 610, 627, 136 P.2d 711 (1943); *McCombs Construction, Inc. v. Barnes*, 32 Wn.App. 70, 645 P.2d 1131 (1982). The failure to file is not an impediment to loaning money, taking a deed of trust as security or foreclosing a deed of trust.

There is no fraud here. The Eckerts loaned money to the Paunescus in good faith based upon the execution of the Promissory Note and Deed of Trust. The name the Eckerts used does not matter.

iv. The Paunescus Are Estopped from Basing Any Claim on the Designation of the Eckert Trust as Beneficiary.

The Paunescus did not object when the Promissory Note and the Deed of Trust were presented to them. They did not claim that they could not be indebted to the “Eckert Trust” or that the “Eckert Trust” could not be a beneficiary of the deed of trust or the Holder of the Promissory Note. Had they made such an objection, the documents would have been changed to show Mr. and Mrs. Eckert as Trustees of the Eckert Family Trust as holders of the Promissory note and Beneficiaries of the Deed of Trust — or the loan would not have been made. (CP 462) The Paunescus are estopped from raising any objection now because they made no objection at the time.

A party relying on equitable estoppel must demonstrate (1) an admission, statement, or act inconsistent with a claim afterward asserted; (2) action by that party in reliance upon that act, statement or admission; and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. *Shafer v. State*, 83 Wn.2d 618, 623, 521 P.2d 736 (1974). The first element can be made out by silence. When a person with actual or constructive knowledge of facts induces another, by his words or conduct, to believe that he acquiesces in or ratifies a transaction and the other

person, in reliance on such belief, alters his position, such person is estopped from repudiating the transaction at the other's prejudice. Such an estoppel can arise from silence or inaction as well as from words or actions. *Huff v. Northern Pacific Railway*, 38 Wn.2d 103, 114-115, 228 P.3d 121 (1951); *Board of Regents v. City of Seattle*, 108 Wn.2d 545, 553-554, 741 P.2d 11 (1987).

All these elements are present here. The Paunescus did not object to the form of either the Promissory Note or the Deed of Trust at the time of the transaction and did not raise this issue prior to commencing suit. This silence satisfies the first element. The Eckerts relied on the signed documents to make the loan. Had there been an objection, the Eckerts would have required a change in the form of the documents or they would not have made the loan. The third element, damage, is also satisfied. The Paunescus apparently claim that the Promissory Note and the Deed of Trust are invalid, and that the Deed of Trust cannot be non-judicially foreclosed. If they are successful, the Eckerts will be out the money that they loaned the Paunescus or unable to realize any security through RCW 61.24.

The facts underlying this issue are undisputed. A clearer case of estoppel is hard to imagine.

v. Conclusion.

The Eckert Trust was a lawful beneficiary of the Deed of Trust. For that reason, the trustee's sale cannot be invalidated because Mr. Russon was appointed as Successor Trustee by the Eckert Trust. The trial court's decision in that regard was correct.

c. The Trustee's Sale was Validly Conducted.

The Paunescus claim that Scott Russon, as Successor Trustee, "failed to comply with RCW 61.24.030 and .031 as it pertains to the foreclosure of a primary residence and that appellant was denied proper notice and the opportunity to engage in alternative options to avert foreclosure as required by RCW 61.24 et al. [sic] resulting in the trustee's sale being invalid and not effectual against appellant(s') interest in Residential Property causing damage to the Paunescus." (Brief of Appellant, p. 25) There was no compliance with the procedures set out in RCW 61.24.031 because that statute is not applicable to our situation. Furthermore, all requirements of RCW 61.24.030 were met.

In RCW 61.24.031, the legislature has required a lender to send certain notices to a borrower and then attempt telephone contact to discuss referral to a housing counselor, among other things. RCW 61.24.031. These steps must be taken before the lender can invoke the non-judicial foreclosure process. As RCW 61.24.030 (1)(a) states:

A trustee, beneficiary, or authorized agent may not issue a notice of default under RCW 61.24.030 (8) until: (i) Thirty days after satisfying the due diligence requirements as described in subsection (5) of this section and the borrower has not responded; or (ii) if the borrower responds to the initial contact, ninety days after the initial contact with the borrower was initiated.

The Eckerts and Scott Russon as Successor Trustee were not required to comply with RCW 61.24.031 because that statute is not applicable here. As RCW 61.24.031(7)(a) states in pertinent part:

(7)(a) This section applies only to deeds of trust that are recorded against owner-occupied residential real property. This section does not apply to deeds of trust:

(i) Securing a commercial loan. . .

The term commercial loan is defined as follows in RCW 61.24.005(4):

“Commercial loan” means a loan that is not made primarily for personal, family, or household purposes.

The Paunescus borrowed money from the Eckerts to add onto the Property so that Ms. Paunescu could operate an Adult Family Home business there. They conceded as much in a letter they wrote to the Eckerts in May of 2009. The Paunescus told the Eckerts that this was the purpose of the loan. The Eckerts would not have made the loan if it was not commercial. Under the circumstances, reasonable persons could reach

only one conclusion — that the loan was a commercial loan.<sup>4</sup> That means that the Eckerts were not required to complete the steps set out in RCW 61.24.031.

The Paunescus contend that the secured property is residential property. That argument misses the point. A lender need not comply with the requirements of RCW 61.24.031 if the loan was for commercial purposes, not if the property is commercial property. That is what RCW 61.24.031(7)(a)(i) says.

The Paunescus' brief contains a reference to interactions between Mr. Russon and their then attorney, James Mayhew. (Brief of Appellant, pps. 23-24) Apparently, Mr. Mayhew and Mr. Russon discussed a possible resolution involving the Paunescus' deeding the property to the Eckerts through a deed in lieu of foreclosure with the Paunescus' paying the Eckerts \$30,000.00 and then leasing the property. An arrangement on these terms was never consummated. (CP 664, 710-11) The Paunescus do not tell us how this unsuccessful attempt to settle

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<sup>4</sup> The Paunescus have suggested that the loan documents were “rigged” to indicate that the loan was for commercial purposes when in fact it was not. Brief of Appellant, p. 23 Ms. Paunescu initialed the Promissory Note indicating that the transaction was in fact commercial—something that no one required her to do. The Supreme Court has indicated that the language in the loan documents is not dispositive on the question. *Frizzell v. Murray, infra*, 179 Wn.2d at 320, Gonzalez, J., concurring. Under the facts of this case, however, reasonable people could only conclude that the loan was in fact a commercial loan regardless of the statements made in the Promissory Note.

could somehow invalidate the foreclosure sale.<sup>5</sup> The discussions certainly did not rise to the level of a forbearance agreement like that discussed in *Albice v. Premier Mortgage Services of Washington, Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012). There is no evidence that the Paunescus were in the course of performing such an agreement when the Trustee's Sale took place. Furthermore, the Paunescus did not discuss this matter before the trial court. Therefore, they can't raise it now. RAP 2.5(a)

While the Paunescus claim that the requirements within RCW 61.24.030 were not followed, they do not tell us which one or ones were violated. In fact, there was no violation. Mr. Russon took each step required by RCW 61.24.030. Among other things, he served a Notice of Default in the proper form, and he recorded and served a Notice of Trustee's Sale in the proper form. (CP 445-48; CP 668-86; CP 699-708)

The facts are clear here. The Paunescus borrowed money from the Eckerts to improve their real property for Ms. Paunescu's Adult Family Home business. All the money went to that purpose, as the Paunescus stated in their 2009 letter to the Eckerts. Since the loan was a

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<sup>5</sup> Mr. Russon had no fiduciary duty to the Paunescus but was obliged to use good faith in all of his dealings with them and their attorneys. RCW 61.24.010(4), (5) Mr. Russon complied with the duty of good faith by transmitting settlement proposals. If the Paunescus are concerned about his actions, they have a cause of action against him for damages. *Lyon v. U.S. National Bank National Association*, 181 Wn.2d 775, 336 P.3d 1142 (2014) Since he complied with all other requirements of RCW 61.24, the sale cannot be invalidated.

commercial loan as defined by statute, the Eckerts were not required to comply with the requirements of RCW 61.24.031. Since the Eckerts were not required to comply with RCW 61.24.031, the trustee's sale cannot be invalidated because its requirements were not followed. Furthermore, Mr. Russon performed all the prerequisites for a trustee's sale stated in RCW 61.24.030. The trustee's sale therefore cannot be invalidated for failure to follow the requirements contained in RCW 61.24.030 and RCW 61.24.031. The trial court ruled correctly on this issue as well.

d. The Paunescus Have Waived Any Ability to Void the Trustee's Sale by Not Suing to Enjoin the Sale.

The Paunescus took no action to restrain the trustee's sale. Therefore, they cannot invalidate it.

The failure of a Grantor under a deed of trust to take any action to restrain the sale waives claims to invalidate the sale. Waiver applies when the grantor received notice of the right to enjoin the sale; had actual or constructive notice of a defense to foreclosure; and failed to bring an action to enjoin the sale. *Plein v. Lackey*, 149 Wn.2d 214, 227, 67 P.3d 1061 (2003); *Frizzell v. Murray*, 179 Wn.2d 301, 307, 313 P.3d 1171 (2013) This doctrine advances the policies within RCW 61.24 — (1) the nonjudicial foreclosure process should remain efficient and inexpensive;

(2) the process should provide an adequate opportunity for interested parties to prevent wrongful disclosure; and (3) the process should promote the stability of land titles. *Plein v. Lackey, supra*, 149 Wn.2d at 225

This doctrine is not absolute, however. Waiver will not be enforced when it is inequitable to do so. *Albice v. Premier Mortgage Services of Washington, Inc., supra*, 174 Wn.2d at 570 For example, the Court in that case refused to apply waiver when the parties entered into a forbearance agreement that called for periodic payments; the lender continued the foreclosure sale based upon the forbearance agreement; the lender accepted late payments until the last payment; the foreclosure sale was held on the date that the last payment was refunded without providing any additional notice to the borrower; and the sale occurred without the statutory time limits. The Court in *Rucker v. Novastar Mortgage, Inc., supra*, stated that the doctrine might also not be applicable if the beneficiary told the borrower that the sale would be continued and then did not continue the sale. The Court held that the waiver doctrine did not apply in the context of a non-judicial foreclosure of agricultural property because RCW 61.24.030 (2) does not allow such proceedings in *Schroeder*

*v. Excelsior Management Group*, 177 Wn.2d 94, 112, 297 P.3d 677 (2013).<sup>6</sup>

In *Merry v. Northwest Trustee Services*, \_\_\_ Wn.App. \_\_\_, \_\_\_ P.3d \_\_\_, 2015 W.L. 3532992 (June 4, 2015), the Court of Appeals ruled that the notion of equity in determining application of the waiver rule applies both ways and enforced it against a party who made hyper-technical objections to the process but did not attempt to restrain the trustee's sale. In that case, the plaintiff was the beneficiary of a deed of trust junior to the deed of trust being foreclosed. He did not attempt to enjoin the trustee's sale of the senior deed of trust. He then sued and claimed that the trustee had no power to conduct the sale because it had been appointed by MERS. The trial court dismissed the plaintiff's claim under CR 12(c). On appeal, the Court ruled that application of the doctrine of waiver should be based on equitable considerations. It affirmed the trial court's decision and stated:

Mr. Merry's complaint did not identify any respect in which Countrywide's use of a deed of trust form that included MERS as a purported beneficiary and mortgagee harmed him. He did not identify how Bank of America's, Northwest Trustee's, or Nationstar's actions taken in an effort to foreclose the problematic MERS-inclusive deed of trust harmed him. Instead, he attempted to seize on what

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<sup>6</sup> The Court in *Bavand v. OneWest Bank, F.S.B.*, *supra*, intimated that the doctrine of waiver did not apply when a person other than a lawful beneficiary appointed the successor trustee. But in that case, the Court also found that the doctrine of waiver did not apply because the grantor had attempted to restrain the sale. 176 Wn.App. at 492

proves to have been Countrywide's mistake in identifying MERS as beneficiary as a basis for asking the Chelan County Superior Court to treat the more than \$235,000 owed by (the grantor of the senior deed of trust) on a bona fide obligation as unenforceable, resulting in a priority windfall to him. . .

The trial court in this case had before it no evidence that (the) \$235,000-plus obligation was not due and owing. It had before it no evidence that Nationstar was not acting as the agent for a successor to the original lender. It had before it only Mr. Merry's identification of formal, technical nonprejudicial violations of (RCW 61.24) with no suggestion that they could not have been corrected if timely raised. The trial court appropriately applied waiver.

(Paragraphs 55, 58) It is important to note that the Court affirmed a summary ruling made by the trial court on this issue.

In our case, there is no doubt about the facts, and only one conclusion is possible—all the elements of waiver are satisfied. The Notice of Trustee's Sale told the Paunescus that they had the right to attempt to enjoin the sale. (CP 670) The Paunescus had knowledge of the issues they are raising now. They could read the Deed of Trust to see that the Eckert Trust was the beneficiary, and they knew that they had not been contacted as required by RCW 61.24.031. They may not have known the legal significance of those matters. But a party is deemed to have knowledge for the purposes of waiver if he or she is aware of the relevant facts. *Brown v. Household Realty Corp.* 146 Wn.App. 157, 164-65, 189 P.3d 233 (2008) Nonetheless, they did not sue to enjoin the sale. They

have not shown how they were harmed by either issue. More importantly, the problems were correctable if they had sued. The Eckerts, if nothing else, could have sued to reform the Deed of Trust to state that they were beneficiaries in their capacities as trustees of the Eckert Family Trust. They could also have started again and complied with the requirements of RCW 61.24.031 had they determined that they were required to do so.

The Paunescus should be treated no differently from Mr. Merry in *Merry v. Northwest Trustee Services, supra*. They have not pointed to any harm they sustained by the issues they raise. Their situation bears no resemblance to that of the plaintiffs in *Albice v. Premier Mortgage Services of Washington, Inc., supra*, or in *Rucker v. Novastar Mortgage, Inc., supra*. There is no doubt that they owed \$290,000.00 together with accrued interest to the Eckerts. There is no equitable reason not to apply the waiver rule in this case. The Paunescus are foreclosed from invalidating the trustee's sale because they did not seek to restrain it.

e. Conclusion.

The Paunescus cannot invalidate the trustee's sale for all the reasons stated above. The trial court's ruling to that effect was correct.

III. At Any Rate, the Deed of Trust and Promissory Note Are Not Void Because the Eckert Trust Was Named as Beneficiary and Holder.

The Paunescus claim that the Deed of Trust and Promissory Note are void because the Eckert Trust is named as Holder of the Promissory Note and Beneficiary of the Deed of Trust. This argument must be rejected.

While the Court held in *Bain v. Metropolitan Mortgage Group, Inc., supra*, that MERS is not a valid beneficiary of a deed of trust because it is not the holder of a promissory note, it was skeptical of whether having MERS as the beneficiary would void the deed of trust. 175 Wn.2d at 114. On two occasions, the Court of Appeals has specifically held that a deed of trust is not void because MERS was named as the beneficiary. In *Walker v. Quality Loans Service Corp. supra*, 176 Wn.App. at 322, the Court discussed the issue in the following terms:

Here Walker does not allege a claim to quiet title based upon the strength of his own title. Instead, he asks the court to void a consensual lien against his property because of a defect in the instrument creating that lien, the designation of an ineligible entity as beneficiary of the deed of trust. As previously noted, he cites no authority recognizing this defect as a basis to void a deed of trust and offers no equitable reason why a court should recognize his claim. As a matter of first impression, we decline to do so. We reject the argument that this defect in a deed of trust, standing alone, renders it void and note that Washington courts have repeatedly enforced

between the parties a deed or mortgage that failed to comply with the statutory requirement of an acknowledgement. . . .

Accord, *Bavand v. OneWest Bank, F.S.B., supra*, 176 Wn.App. at 501-502

This reasoning is sound and consistent with the parties' expectations. The Eckerts loaned money to the Paunescus expecting to realize on the security given if they were not repaid. The Paunescus expected to pay the loaned amount back and also recognized that they were granting a security interest to the Paunescus. In these circumstances, it makes no sense to void either the Promissory Note or the Deed of Trust.

In any event, the Eckert Trust is a valid beneficiary as noted above. But even if it were not, both the Promissory Note and the Deed of Trust are valid and cannot be voided.

#### IV. The Paunescus Cannot Make Any Claim for Damages.

The Paunescus cannot make a claim for damages because such claims are not allowed by RCW 61.24.127.

Prior to 2009, the grantor of a deed of trust had no claim against the beneficiary or the trustee for damages if the grantor did not restrain the trustee's sale. *Brown v. Household Realty Corp., supra*. The legislature responded by enacting RCW 61.24.127 in 2009. *Frias v. Asset*

*Foreclosure Services, Inc.* 181 Wn.2d 412, 425-26, 334, P.3d 529 (2014).

That statute reads as follows as is pertinent:

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

(a) Common law fraud or misrepresentation;

(b) A violation of Title 19 RCW;

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

(d) A violation of RCW 61.24.026

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

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

(c)<sup>7</sup> The claim may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property. . .

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

(4) This section does not apply to the foreclosure of a deed of trust used to secure a commercial loan.

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<sup>7</sup> The language in this statute indicating that a grantor is limited to monetary damages and that any claim cannot affect the validity of the foreclosure sale led Justice Stephens to question whether the sale in *Albice v. Premier Mortgage Services of Washington, Inc.*, *supra*, could be set aside for failure to comply with statutory requirements. 174 Wn.2d at 580, fn. 2, Stephens, J., concurring

In summary, RCW 61.24.127 allows owners of owner-occupied residential real property to make certain damages claims even if they have not enjoined the trustee's sale. Those claims cannot, however, affect the validity of the sale in question. Finally, and most importantly, if the deed of trust secures a commercial loan, the grantor of owner-occupied real property cannot make a claim under the terms of this statute. *Frizzell v. Murray, supra*, 179 Wn.2d at 312.<sup>8</sup>

The loan at issue here was a commercial loan as defined in RCW 61.24. There is no genuine issue of material fact on that question as discussed above. Therefore, the Paunescus cannot make any damages claims under RCW 61.24.127. The trial court correctly dismissed the Paunescus' Amended Complaint seeking that relief.

V. The Paunescus Cannot Take Advantage of the Homestead Exemption.

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<sup>8</sup> In their Amended Complaint, the Paunescus claimed that the Promissory Note was usurious; that the Eckerts violated the Consumer Loan Act, RCW 31.04; that they were entitled to relief under the Consumer Protection Act; and that the Eckerts were guilty of slander of title. (CP 21-29) They appear to have abandoned these allegations because there is no mention of them in their brief. The Eckerts will therefore not address them.

The Paunescus argue that they are entitled to the homestead exemption contained in RCW 6.13 in connection with the foreclosure sale because Daniela Paunescu signed the deed of trust as attorney in fact for her husband and not in her own capacity. (Brief of Appellant, pps. 25-27) A party cannot claim the homestead exemption in response to a non-judicial foreclosure of a deed of trust. *Felton v. Citizens Federal Savings & Loan Association of Seattle*, 101 Wn.2d 416, 679 P.2d 928 (1984). This contention has no merit for that reason.

VI. The Summary Judgment Motion Was Ripe.

The Paunescus claim that the summary judgment motion was not ripe because all discovery had not been completed. (Brief of Appellants, pps. 27-29) The only discovery they claim that was not done, however, was a deposition of Mr. Paunescu. The Paunescus made the first summary judgment motion without any depositions having been taken. And, they never moved to continue the summary judgment proceedings as is allowed by CR 56(f). Finally, as near as can be determined, they did not raise this issue before the trial court. Therefore, the Court should not consider this question. RAP 2.5(a)

Nonetheless, the Eckerts will address the merits of this issue. Continuances of summary judgment proceedings are governed by CR 56(f). That rule provides as follows:

Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just.

A motion made on the basis of this rule may be denied if (1) the party seeking the continuance does not give a good reason for the delay in obtaining the evidence; (2) the party seeking the continuance does not state what evidence would be established through the additional discovery; or (3) the evidence sought will not raise an issue of fact. *Coggle v. Snow*, 56 Wn.App. 499, 507, 784 P.2d 554 (1990). Furthermore, a plaintiff seeking a continuance of a summary judgment motion cannot obtain that continuance solely on the grounds that all discovery has not been completed. *Manteufel v. Safeco Insurance Company of America*, 117 Wn.App. 168, 68 P.3d 1093 (2003).

The Paunescus have given no reason why they could not or did not obtain any further evidence. They were free to present any declarations from Mr. Paunescu that they desired. The failure to depose him, therefore,

cannot serve as a basis for any continuance. They also give no reason why they did not depose anyone else. They filed their complaint on June 24, 2014. They moved for summary judgment on August 6, 2014. The Eckerts moved for summary judgment on December 16, 2014. The Paunescus have also not stated what evidence might come forward and how that evidence might raise a genuine issue of material fact. For all these reasons, they were not entitled to a continuance of the summary judgment motion. Furthermore, there is no reason why the parties' summary judgment motions should not have been heard when they were.

VII. The Paunescus Cannot Appeal from Orders Not Designated in Their Notice of Appeal.

In their brief, the Paunescus question the grant of the Eviction Order on March 28, 2014, in the unlawful detainer action filed after the trustee's sale. (Brief of Appellant, p. 25) They also mention the garnishment proceedings to enforce the Eckerts obtained for attorney's fees. (Brief of Appellant, pps. 30-31) The Court cannot review any order made in connection with either proceeding.

The Paunescus filed their Notice of Appeal on February 24, 2015. They sought review of the Order on Motion for Attorney's Fees and Judgment entered January 30, 2015, and attached a copy of that order to

their Notice of Appeal.<sup>9</sup> No order connected to the eviction or the garnishment is designated in the Paunescu's Notice of Appeal.

The Court will review an order not designated in the Notice of Appeal only if the order or ruling prejudicially affects the decision designated in the Notice of Appeal and if the order was made before the Court accepts review. RAP 2.4(b) The Court accepted review on the Paunescus' filing of their Notice of Appeal. RAP 6.1 The Eviction Order was made before the Court accepted review and before the Order on Motion for Attorney's Fees and Judgment but it does not affect that order in any way. It was entered in an entirely different proceeding. Any order in garnishment proceedings was entered after the Order on Motion for Attorney's Fees and Judgment and cannot affect it for that reason. Therefore, the Court cannot review these matters.

Furthermore, the Eviction Order was entered on March 28, 2014, well before this action was filed. The Paunescus did not appeal from that order. The Court lacks jurisdiction to review that order for that reason as well. *MGIC Financial Corp v. H.A. Briggs Co.*, 24 Wn.App. 1, 600 P.2d

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<sup>9</sup> The Notice of Appeal is in the records of this case because the Clark County Clerk filed it with the Court pursuant to RAP 5.4(a) The Court of Appeals may take judicial notice of its own records in the case under review. *In re Adoption of B.T.*, 150 Wn.2d 409, 415, 78 P.3d 634 (2003)

573 (1979); *Barlindal v. City of Bonney Lake*, 84 Wn.App. 135, 925 P.2d 1289 (1996).

The Paunescus claim that the Eviction Order was not valid because the Eckerts' loan to them was not a commercial loan. This argument has no merit. The unlawful detainer action was commenced based on RCW 61.24.060(1), and the writ of restitution was issued under that statute. (CP 724-27) It reads as follows as is pertinent:

The purchaser at the trustee's sale shall be entitled to possession of the property on the twentieth day following the sale, as against the borrower and grantor under the deed of trust and anyone having an interest junior to the deed of trust, including occupants who are not tenants, who were given all of the notices to which they were entitled under this chapter. The purchaser shall also have a right to the summary proceedings to obtain possession of real property provided in chapter 59.12 RCW.

As can be seen, there is nothing in the statute that conditions any relief on whether the loan in question is or is not commercial in nature. The Court should reject their argument even if it was considered.<sup>10</sup>

For all these reasons, the Court cannot consider these issues and would reject them in any event.

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<sup>10</sup> A grantor of a deed of trust cannot litigate the propriety of the foreclosure process in the unlawful detainer proceeding. Specifically, the grantor cannot raise issues related to MERS being named as a beneficiary in the deed of trust. *Federal National Mortgage Association v. Ndiaye*, \_\_\_ Wn.App. \_\_\_, \_\_\_ P.3d \_\_\_, 2015 W.L. 3755067 (June 4, 2015)

VIII. The Court Should Not Consider Other Questions Alluded to in the Paunescus' Statement of Issues.

In their statement of the issues, the Paunescus refer to a hearing on December 12, 2014, concerning the status of the trial court judge, the identity and qualifications of the mortgage broker, and the award of attorney's fees presumably in the Order on Motion for Attorneys' Fees and Judgment. (Brief of Appellant, p. 6) They do not discuss any of these issues in their brief or support any argument about these questions with citation to authority. Therefore, the Court should not consider these matters. *McKee v. American Home Products Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989); *Johnson v. Department of Licensing*, 71 Wn.App. 326, 332-33, 858 P.2d 1112 (1993)

The trial court did not err concerning these issues in any event. The Paunescus raised questions before the trial court that related to both the Promissory Note and the Deed of Trust. They claimed that the Promissory Note was usurious and that the loan violated the Consumer Loan Act. (CP 26-27) The Eckerts moved for summary judgment on these issues. (CP 83-89) The Promissory Note contains a provision allowing attorney's fees to the prevailing party in any action to determine the rights of the parties under its terms. (CP 414) The Deed of Trust has a similar provision. See *infra*. The Eckerts unquestionably prevailed and

are entitled to an award of attorney's fees. See *infra*. The Paunescus have not provided as part of the Clerk's Papers the declarations submitted in support of the award to the Eckerts. These are necessary to consider the propriety of the amount of the award. Therefore, this aspect cannot be reviewed either. *Jacobsen v. State*, 89 Wn.2d 104, 112, 569 P.2d 1152 (1977); *Sunderland Family Treatment Services v. City of Pasco*, 107 Wn.App. 109, 116, 26 P.3d 955 (2001)

The Paunescus have no complaint about the proceedings on December 12, 2014. Coincidentally, the trial judge assigned to this matter had also heard the eviction proceedings. In her deposition, Ms. Paunescu suggested that she was going to file some sort of complaint, perhaps with the Commission on Judicial Conduct, against the trial judge for her handling of the eviction matter. (CP 522) Counsel for the Eckerts and for Mr. Russon brought this to the judge's attention so that she would not be "blindsided" and so that she could take whatever action she thought appropriate in light of a previously set hearing date for summary judgment motions. The Paunescus were asked if they were objecting to the trial judge's hearing the summary judgment motions, and they replied that they did not. That ended the matter. (RP—December 12, 2014 3-4) When the Paunescus made no objection at the trial court level, they can hardly assert

error on appeal. *Stastny v. Board of Trustees of Central Washington University*, 32 Wn.App. 239, 249, 647 P.2d 496 (1982)

The identity and qualifications of the mortgage broker have no connection or relevance to the enforcement of the Promissory Note and the Deed of Trust or compliance with procedures set out in RCW 61.24. The trial court was correctly skeptical when the Paunescus raised this issue. (RP—January 16, 2015 23)

#### ATTORNEY’S FEES

The Eckerts request an award of attorney’s fees on appeal. This section of the brief is written to comply with RAP 18.1(a).

A party is entitled to an award of attorney’s fees if a statute, contractual provision, or rule of equity entitles that party to such relief. *Gander v. Yeager*, 167 Wn.App. 638, 645, 274 P.3d 293 (2012). The Paunescus have made several different claims concerning the Deed of Trust. It contains the following language:

To protect the security of this Deed of Trust, Grantor covenants and agrees:

...

(5) to pay all costs, fees, and expenses in connection with this Deed of Trust, including the expenses of the Trustee incurred in enforcing the obligations secured hereby and Trustee’s and attorney’s fees actually incurred as provided by statute.

(CP 417) This provision applies here. This action is clearly related to and connected with the Deed of Trust. Furthermore, a contractual provision for attorney's fees supports an award of attorney's fees on appeal. *Dragt v. Dragt/DeTray, LLC*, 139 Wn.App. 560, 578, 161 P.3d 473 (2007) Based on this provision, the Eckerts are entitled to an award of attorney's fees on appeal.

CONCLUSION

The Paunescu's arguments lack merit. The trial court properly granted summary judgment dismissing their suit. The Court should affirm that dismissal. The Court should also grant the Eckerts their attorney's fees on appeal.

RESPECTFULLY SUBMITTED this 15 day of July, 2015.

  
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BEN SHAFTON, WSB #6280  
Of Attorneys for the Eckerts

**NO. 47265-1-II  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II**

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**IOAN A. PAUNESCU and DANIELA PAUNESCU, husband  
and wife,**

**Plaintiffs/Appellants,**

**vs.**

**GERHARD H. ECKERT and MARGARETHE ECKERT AS  
TRUSTEES OF THE ECKERT FAMILY TRUST; and SCOTT  
RUSSON and JANE DOE RUSSON, husband and wife,**

**Defendants/Respondents,**

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**APPEAL FROM THE SUPERIOR COURT**

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**HONORABLE SUZAN CLARK**

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**DECLARATION OF MAILING**

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DIVISION II  
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY \_\_\_\_\_**

COMES NOW AMY ARNOLD and declares as follows:

1. My name is AMY ARNOLD. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party to this action.

2. On July 15, 2015, I deposited in the mails of the United States of America, first class mail with postage prepaid, a copy of the BRIEF to the following person(s):

Anthony R. Scisciani III  
Rebecca Reed Morris  
Scheer & Zehnder LLP  
701 Pike Street, Suite 2200  
Seattle, WA 98101-2358

Ioan Paunescu and Daniela Paunescu  
P.O. Box 87847  
Vancouver, WA 98686

I DECLARE UNDER PENALTY OF PERJURY AND THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

DATED at Vancouver, Washington, this 15 day of July, 2015.

  
\_\_\_\_\_  
AMY ARNOLD