IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 20-0418

WADE AYALA,

Plaintiff, Counterclaim Defendant and Appellee,

v.

GAIL STAFFORD,

Defendant, Counter-Claimant, Third-Party Plaintiff, Appellant and Cross Appellee,

v.

RECONTRUST COMPANY, N.A; BANK OF AMERICA, N.A., FEDERAL NATIONAL MORTGAGE ASSOCIATION, AND EQUITY PROCESS MANAGEMENT, INC.,

Third-Party Defendants, Appellees and Cross-Appellants.

APPELLEE/CROSS-APPELLANT RECONTRUST COMPANY, N.A., BANK OF AMERICA, N.A., AND FEDERAL NATIONAL MORTGAGE ASSOCIATION'S ANSWERING BRIEF

On Appeal from the Second Judicial District
Butte-Silver Bow County, Montana
Case No. DV-18-267
Honorable Ray J. Dayton

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STATEMENT OF THE ISSUES

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II. Whether the District Court was correct in denying Appellee/Cross-Appellants ReconTrust Company, N.A., Bank of America, N.A., and Federal National Mortgage Association's Motion to Dismiss Appellant/Cross-Appellee Gail Stafford's claims for breach of contract, declaratory judgment, negligence, and violation of the Montana Unfair Trade Practices and Consumer Protection Act?

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY OF *STAFFORD I.*

On January 27, 2013, Federal National Mortgage Association ("Fannie Mae") initiated a wrongful detainer action in the Second Judicial District of Montana ("District Court") against Appellant/Cross-Appellee Gail Stafford ("Stafford") after it had taken title to real property at 86 Elkhorn Lane in Butte, Montana (the "Property") at a trustee's sale that had occurred about a month prior

on December 14, 2012. *See Fannie Mae v. Stafford*, 2019 MT 114N[1] (hereinafter "*Stafford I*").

On August 26, 2013, Stafford filed an Answer and Counterclaim against Fannie Mae. (District Court Record ("DCR") Doc. 9–10, Exhibit K). In the Counterclaim, Stafford asserted that she has "based on a written lease, a tenancy interest in" the Property and she "seeks a declaration of her tenancy interest in this action as of the date FNMA's complaint was filed." *Id.* In her prayer for relief, Stafford "request[ed] that the Court enter a declaratory judgment quieting title in her name as to a leasehold interest in the property for a period of one year." *Id.* The Counterclaim made no allegation or claim that Stafford had a binding contract to purchase the Property.

The parties filed cross-motions for summary judgment in early 2014 in this matter, and the District Court failed to issue a ruling on those motions until March 15, 2018, when Fannie Mae moved to voluntarily dismiss the case with prejudice because it has sold the Property to a third-party. *See Stafford I*, ¶¶ 6–7. Accordingly, at no time during the lengthy period in which the cross-motions for summary judgment were pending did Stafford make any effort to amend her claims to assert an ownership interest in the Property or allege that she had an enforceable

[1] As an unpublished opinion, *Stafford I* is not citable as binding precedent, but may be cited when relevant to establish the application of res judicata. Mont. Sup. Ct. Op. R. 3(c)(ii).

contract for its purchase. Stafford contested Fannie Mae's motion to dismiss by seeking to amend her complaint to add the very claims she is now asserting in this matter, as well as join Ayala, ReconTrust Company, N.A. ("ReconTrust"), Bank of America, N.A. ("BANA") (collectively with Fannie Mae the "Bank Defendants"), and Equity Process Management, Inc. ("Equity"). *See Stafford I*, ¶ 7.

On July 2, 2018, the District Court issued an Order granting Fannie Mae's motion to dismiss with prejudice and denying Stafford's motion to amend her counterclaim to assert a contract for ownership of the Property. *Id.* The District Court concluded that in was inappropriate to allow amendment of the claims because Stafford knew of the additional claims and parties for several years but only sought leave to amend after Fannie Mae filed its motion to dismiss. *Id.*

Upon appeal, this Court affirmed. First, because Stafford had already received the benefit of her one-year lease she had claimed and Fannie Mae no longer owned the Property, the litigation was moot and dismissal with prejudice was proper. *Stafford I*, ¶ 11. Second, this Court held that the lower court did not abuse its discretion by denying Stafford's motion to amend to name the additional parties and assert a claim to ownership of the Property:

> After Fannie Mae sold the property, the third-party purchaser would have become a relevant party in any lawsuit that sought to establish ownership of the property. The fact remains, however, that Stafford only sought to establish a leasehold interest in the property with her initial counterclaim. She did not assert an

> ownership interest until she filed her motion for leave to amend, and therefore, the District Court did not abuse its discretion by denying her motion under this theory.
>
> The District Court did not err when it held the initial action was moot, and it did not abuse its discretion by denying Stafford leave to amend her pleading. We affirm the court's decision to grant Fannie Mae's motion to dismiss and to deny Stafford's motion for leave to amend her pleading.

Stafford I, ¶¶ 18–19.

B. PROCEDURAL HISTORY OF THIS CASE.

After purchasing the Property from Fannie Mae on January 17, 2018, Ayala initiated his own wrongful detainer action against Stafford on July 5, 2018, just three days after the District Court's dismissal in *Stafford I*. (DCR Doc. 1). Five months later, Stafford filed her Answer, Counterclaim and Third-Party Complaint ("TP Complaint") against the Bank Defendants, Equity and others. (DCR Doc. 9 & 10). Stafford's third-party claims against Bank Defendants were as follows: (1) breach of contract; (2) declaratory judgment – violation of the Small Tract Financing Act ("STFA"); (3) actual fraud/constructive fraud/negligent misrepresentation; (4) declaratory judgment – fraudulent title; (5) quiet title; (6) negligence; and (7) a violation of the Montana Unfair Trade Practices and Consumer Protection Act ("UTPA"). *Id*. These claims are substantially the same claims that Stafford sought to assert in her proposed Amended Complaint in *Stafford I*, which the District Court and this Court found to be improper. *Compare*

(DCR Doc. 10) *with* (DCR Doc. 56).

Accordingly, on March 18, 2019, Bank Defendants' filed a Motion to Dismiss the TP Complaint based on numerous grounds, including statute of limitations, lack of standing, and lack of legal duty. (DCR Doc. 38). Later, Ayala and Equity filed motions for summary judgment arguing that the uncontested facts did not establish that an enforceable contract for the purchase of the Property ever arose and that Stafford's claims were barred by the statute of limitations. (DCR Doc. 55 & 76).

On September 27, 2019, the District Court held oral argument on all pending motions. Because this Court had issued its decision in *Stafford I* in the interim, Ayala and Bank Defendants argued that, in addition to the grounds in the briefs, Stafford's claims were also barred by res judicata. *See* Trans. 72–82, 85–86; 122–129. On July 23, 2020, the District Court issued its decision on all pending motions. (DCR Doc. 89). The District Court denied the Bank Defendants' motion to dismiss with regard to all claims except Stafford's fraud claims. *Id.* at 2. It also granted in part and denied in part Equity's motion for summary judgment. *Id.* at 4. However, it granted Ayala's motion for partial summary judgment on the grounds that no contract was ever formed at the Trustee's sale for Stafford to purchase the Property. *Id.* at 3. Following the issuance of the Order on Pending Motions, Stafford filed her Notice of Appeal on August 21, 2020. (DCR Doc. 100). The

Bank Defendants and Equity then filed their notices of cross-appeal on September 4, 2020. (DCR Doc. 107 & 108).

STATEMENT OF THE FACTS

A. DECEMBER 14, 2012 TRUSTEE'S SALE.

Colin Caffrey ("Caffrey"), as grantor, executed a promissory note ("Note") in favor of Mann Mortgage, LLC ("Mann") related to the Property on or around January 18, 2008. (DCR Doc. 10, ¶ 16). At the same time, Caffrey executed a Deed of Trust, which listed Mortgage Electronic Registration Systems, Inc. ("MERS") as the grantee and nominee on behalf of Mann and its successor or assigns. *Id.* Stafford does not allege that she was a party to this Note or Deed of Trust. In December 2009, Stafford and Caffrey allegedly reached an agreement for Stafford to rent a house on the property referred to as the "back house." (DCR Doc. 10, ¶ 17). According to Stafford, the parties signed a residential landlord-tenant agreement for a period of one year with a month-to-month option at the end of the year. *Id.* Caffrey died on August 29, 2012 and Stafford claims she continued to live in the back house on the Property thereafter. (DCR Doc. 10, ¶ 18).

On July 6, 2012, an Assignment of the Deed of Trust was executed from MERS to BANA. (DCR Doc. 10, ¶ 19). BANA executed a Substitution of Trustee naming ReconTrust as the substitute trustee on August 6, 2012. (DCR Doc. 10,

¶ 20). On the same day, ReconTrust executed a Notice of Sale, stating that a foreclosure sale would occur on December 14, 2012, at 2 p.m. (DCR Doc. 10, ¶ 21). ReconTrust executed the Notice of Sale because Caffrey had defaulted on the Note and Deed of Trust, a fact of which Stafford, admittedly, has no knowledge. (DCR Doc. 10, ¶ 22). Stafford claims that she attended the sale on December 14, 2012, and that she informed the auctioneer, Joseph Nowakowski ("Nowakowski"), that she intended to bid on the Property. (DCR Doc. 10, ¶ 25-26). Nowakowski stated that the bidding would start at $190,851.90 and Stafford alleges that she immediately bid $190,852.90. (DCR Doc. 10, ¶¶ 27–28). She claims that, after her bid, Nowakowski stated that the group holding the sale required a bid of at least $233,000.00. (DCR Doc. 10, ¶ 28). Stafford was not able to bid that much and she later learned that the property was sold to Fannie Mae. (DCR Doc. 10, ¶ 29). A Trustee's Deed was recorded on December 24, 2012. *Id.* The sale price listed on the Trustee's Deed was $190,851.90. *Id.* Stafford became aware of the sale to Fannie Mae on December 27, 2012. (DCR Doc. 56, App. B at 2). This fact cannot be disputed, as Stafford signed a notarized affidavit on December 31, 2012, stating she became aware of the sale on December 27, 2012. (DCR Doc. 56, App. B at 2-3).

After the foreclosure sale, as explained above, the parties litigated *Stafford I*, which resulted in Fannie Mae dismissing its unlawful detainer action due to the

fact that it had sold its interest in the Property to Ayala. *See supra* Statement of the Case. After Ayala brought the instant unlawful detainer action, Stafford filed the TP Complaint alleging that she was the successful bidder at the foreclosure sale and alleging seven (7) claims for relief against Bank Defendants, as identified above. (DCR Doc. 10).

STANDARD OF REVIEW

The Court reviews *de novo* the grant or denial of a motion to dismiss to determine if the legal conclusions are correct. *Spooner Constr. v. Moner*, 2003 MT 43, ¶ 20, 314 Mont. 268, 66 P.3d 263. The proper legal standard for a motion to dismiss is that a complaint must be dismissed where it "fail[s] to state a claim upon which relief can be granted." Mont. R. Civ. P. 12(b)(6). Dismissal is proper "if the plaintiff would not be entitled to relief based on any set of facts that could be proven to support the claim." *Doty v. Mont. Comm'r of Political Practices*, 2007 MT 341, ¶ 9, 340 Mont. 276, 173 P.3d 700. Although the court must construe the complaint "in the light most favorable to the plaintiff . . . . The [c]ourt has no obligation . . . to accept as true legal conclusions or allegations that lack factual basis." *Harris v. St. Vincent Healthcare*, 2013 MT 207, ¶ 14, 371 Mont. 133, 305 P.3d 852.

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SUMMARY OF ARGUMENT

As to Stafford's appeal of the District Court's Order granting Bank Defendants' Motion to Dismiss on Stafford's fraud claims, this Court should hold that the District Court was correct for three (3) reasons. First, Stafford's fraud claim is barred by res judicata because she could have raised the fraud claim in *Stafford I* but failed to do so in a timely manner, the subject matter of both cases is the same, the disputed foreclosure sale, and the parties or their privies are parties to this action. Furthermore, the District Court issued a judgment on the merits when it granted Fannie Mae's Motion to Dismiss the case with prejudice. Second, Stafford's fraud claims are barred by the two (2) year statute of limitations because Stafford was aware of the claim when she learned on December 27, 2012 that Fannie Mae had taken title to the Property on December 24, 2012, but she failed to bring this claim in a timely fashion. Finally, Stafford fails to allege key elements of a fraud claim with particularity, including that the Bank Defendants did not intend to keep their promise to sell the Property to the highest bidder and damages Stafford suffered as a result of the alleged fraud.

As to Bank Defendants' Cross-Appeal, this Court should hold that the District Court erred in failing to dismiss Stafford's remaining claims for relief. As an initial matter, all of these additional claims are barred by res judicata for

the same reasons as the fraud claim. Moreover, Stafford's breach of oral contract, UTPA, and negligence claims are barred by the respective statute of limitations. Finally, Stafford has no standing to challenge a completed foreclosure sale, she has not alleged the elements of an enforceable contract, Stafford has no standing to enforce a claim under the STFA, Stafford has no quiet title claim against Bank Defendants because Bank Defendants do not claim an interest in the Property, Stafford has failed to allege any duty owed to her in negligence by Bank Defendants, and Stafford has not alleged an ascertainable loss of money or property to support a UTPA claim. For these reasons, this Court should reverse the Order of the District Court and order that Stafford's remaining claims be dismissed with prejudice.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED STAFFORD'S FRAUD-RELATED CLAIMS.

In its Order on Pending Matters, the District Court simply stated that it was dismissing Stafford's fraud claims. (DCR Doc. 89). Although not stated in the Order, this dismissal presumably includes Stafford's claims for actual fraud/constructive fraud/negligent misrepresentation as well as Stafford's claim for fraudulent title. (DCR Doc. 10). Accordingly, Bank Defendants will demonstrate that the Order was correct in dismissing these fraud claims because they are barred by res judicata and the two (2) year statute of

limitations and Stafford failed to allege crucial elements of the fraud claim with particularity. Thus, this Court should affirm the District Court's Order to the extent that it dismissed Stafford's fraud claims.

A. Stafford's Fraud Claims are Barred by Res Judicata.

Although presented below (Trans. 72–82; 85–86; 122–129), the District Court's Order does not address res judicata in any manner. Res judicata is the legal doctrine that bars a party from re-litigating a matter that they have already had the opportunity to litigate in a prior case. *Poplar Elem. Sch. Dist. No. 9 v. Froid Elem. Sch. Dist. No. 65*, 2020 MT 216, ¶ 32, 401 Mont. 152, 471 P.3d 57. Res judicata applies not only to claims that were actually litigated, but also to claims that *could have been* litigated. *Id.* The doctrine of res judicata serves the purpose of avoiding piecemeal litigation, thus conserving judicial resources and preventing inconsistent judgments. *Reisbeck v. Farmers Ins. Exch*., 2020 MT 171, ¶ 13, 400 Mont. 345, 467 P.3d 557. In order for the doctrine to apply, the following elements must be present: (1) the subject matter of the present and past actions is the same; (2) the issues are the same and relate to the same subject matter; (3) the parties or their privies are the same; (4) the capacities of the persons are the same in reference to the subject matter and to the issues; and (5) a final judgment has been entered on the merits in the first action. *Poplar Elem. Sch. Dist. No. 9*, ¶ 39. These elements are present in this case.

1. The subject matter and issues in Stafford I are the same as this case.

This section addresses elements 1 and 2 as explained above. Both this case and *Stafford I* dealt with the same Property, and the issues – Stafford's rights to own or occupy the Property – are also the same. *Compare* (DCR Doc. 10) *with Stafford I*. Presumably, Stafford will assert that the issues are not the same because she was unable to litigate her claims to ownership of the Property in *Stafford I* as the District Court denied her motion to amend her complaint to assert those claims. However, such a claim lacks merit because this Court has applied the doctrine of res judicata in nearly identical circumstances in *City of Bozeman v. AIU Ins. Co*., 272 Mont. 349, 900 P.2d 929 (1995) (hereinafter "*AIU II*"). Though it is necessary to discuss a number of cases to explain the history of *AIU II*, *AIU II* will often be cited as it contains a thorough explanation of the case histories.

The Court in *AIU II* addressed the res judicata issue. One of the underlying cases, *Story v. Bozeman*, was litigated to the Supreme Court five years prior. *See Story v. Bozeman*, 242 Mont. 436, 791 P.2d 767 (1990) (hereinafter "*Story I*").

In *Story I*, a contractor, Mark Story, sued the City of Bozeman for defamation and breach of the implied covenant of good faith and fair dealing. *See Story I*, 242 Mont. 436, 440, 791 P.2d 767, 769 (1990). The City tendered the claim to its insurer, AIU, for both defense and indemnity, and AIU provided a defense but reserved its right to later deny coverage. *AIU II*, 272 Mont. at 350, 900

P.2d at 930. After a verdict in *Story I* establishing liability on the implied covenant claim but not on the defamation claim, AIU withdrew its defense. *Id.* at 351, 900 P.2d at 930. The City then filed suit against AIU for breaching the duty to defend—the Supreme Court in its *AIU II* opinion referred to this separate case and appeal as "*AIU I.*" *Id.* at 351, 900 P.2d at 931 (referring to the previous case brought by the City of Bozeman and appealed in the case *City of Bozeman v. AIU Ins. Co*., 262 Mont. 370, 865 P.2d 268 (1993), as *"AIU I").* In *AIU I* the City's original complaint against AIU did not raise any claim that the City had coverage under the policy. *AIU II* at 351, 900 P.2d at 931.

While the litigation with *AIU I* was pending, this Court overturned the verdict in the underlying *Story I* case and remanded the matter for a new trial. *Id.* Like the first trial, the jury again entered a verdict establishing liability on the implied covenant, but not on defamation. *Id.* AIU again informed the City that no part of the verdict was insured and it was withdrawing its defense. *Id.*

The City then sought to amend its complaint in the *AIU I* litigation to establish insurance coverage for Story's implied covenant claims. *Id.* However, AIU objected to the amendment and the district court agreed, denying the City's motion. *Id.* After the district court subsequently ruled that AIU had breached its duty to defend, AIU appealed. *See AIU I*, 262 Mont. 370, 865 P.2d 268. Importantly, in that appeal the City did not cross-appeal the district court's denial

of the motion to amend the complaint to add the coverage claims. This Court then reversed the district court's ruling that AIU breached its duty to defend. *Id.* at 377, 865 P.2d at 273.

After Story's monetary judgment against the City in the second trial was affirmed on appeal, the City initiated yet another lawsuit seeking declaratory relief that there was coverage for the judgment under the AIU insurance policy—this is the action that would eventually be appealed as *AIU II*. *AIU II*, 272 Mont at 352, 900 P.2d at 931. AIU was granted summary judgment on the grounds of res judicata and the City appealed. *Id.* The City argued that the issues in *AIU I* and *AIU II* are not the same because they were unable to litigate insurance coverage in *AIU I* when the district court denied their motion to amend. *Id.*

This Court affirmed summary judgment for AIU, citing the principal that "res judicata bars not only issues that were actually litigated, but also those that could have been litigated in a prior proceeding." *Id.* at 354, 900 P.2d at 932 (citation omitted).

> We hold that the coverage issue which the City of Bozeman now seeks to litigate was an issue which the City sought to litigate by way of an amended complaint in *AIU I*. When the District Court denied the motion to amend, the City accepted that ruling and chose not to appeal the coverage issue. The insurance coverage issue is thus barred by the doctrine of res judicata.

Id. at 354, 900 P.2d at 933.

The only difference between this case and *AIU II* is that Stafford did appeal, albeit unsuccessfully, the denial of her motion to amend in *Stafford I*. However, that difference does not alter the fact that she *could have* litigated those claims earlier in *Stafford I* if she had raised them in a timely manner. In fact, the application of res judicata is even more justified here as this Court reasoned that the claims Stafford sought to assert in her amended counterclaim should have been brought much earlier. This Court stated:

> The [district] court found the timing and nature of Stafford's proposed amendments problematic. It found Stafford knew about the potential additional parties and claims several years before filing her motion and took issue with the fact that she only filed her motion to amend after Fannie Mae filed its motion to dismiss. . . . Stafford also offered no meaningful justification for failing to move to amend her pleading earlier.

Stafford I, ¶ 14. Stafford attempted to assert fraud claims in her amended counterclaim and the fact that she was dilatory in asserting them in *Stafford I* fits precisely the rationale for applying res judicata, which is that the fraud claims could have been asserted much earlier, but Stafford failed to do so. Therefore, it is clear that the subject matter and issues are the same.

2. The parties (or their privies) and their capacities to litigate the subject matter are the same.

This section addresses elements 3 and 4 of res judicata identified above. The only parties named in *Stafford I* are Stafford and Fannie Mae. However,

Stafford attempted to amend her claims in that case to name additional defendants, including BANA and ReconTrust. *Stafford I*, ¶ 7. BANA and ReconTrust are in privity with Fannie Mae because BANA and ReconTrust's interests were represented in the prior action; BANA assigned its interest in the Deed of Trust to Fannie Mae prior to the sale and ReconTrust was appointed as substitute trustee on the mortgage. (DCR Doc. 10, ¶¶ 19-24); *Brault v. Smith*, 209 Mont. 21, 27, 679 P.2d 236, 239 (1984) (stating a "privy" for purposes of res judicata is "one whose interest has been legally represented at trial"); *see also Huggans v. Turnbow*, 2002 ML 4242, ¶ 48, 2002 Mont. Dist. LEXIS 2558 (Mont. 21st Jud. Dist. 2002), *quoting* 47 Am. Jur 2d Judgments § 663 ("There is privity within the meaning of the doctrine of res judicata where there is an identity of interest and privity in estate, so that a judgment is binding as to the subsequent grantee, transferee, lienor or lessee of property.").

The parties are also in the same capacity, or would have been if Stafford had timely filed her counterclaim in the first action. In *Stafford I*, she sought to add ReconTrust and BANA as third-party defendants, and in the case below, she did add them as third-party defendants. *See State ex rel. Harlem Irr. Dist. v. Montana Seventeenth Judicial Dist. Court*, 271 Mont. 129, 135, 894 P.2d 943, 946 (1995) (holding parties were in their same "capacities" as they were defendants in both actions).

3. A final judgment in Stafford I has been entered on the merits.

There can be no dispute that *Stafford I* was a final judgment on the merits. In its Order granting Fannie Mae's Motion to Dismiss, the District Court dismissed the claims and counterclaims with prejudice. *See Stafford I*, ¶ 7. Dismissal with prejudice, both voluntarily or involuntarily, is a final judgment on the merits for purposes of res judicata. *Touris v. Flathead Cty*, 2011 MT 165, ¶ 15, 361 Mont. 172, 258 P.3d 1 (stating that voluntary dismissal with prejudice is a decision on the merits); *Xin Xu v. McLaughlin Research Inst. for Biomedical Sci., Inc.*, 2005 MT 209, ¶ 36, 328 Mont. 232, 119 P.3d 100 (stating that involuntary dismissal with prejudice is a decision on the merits).

Accordingly, because all five elements are present, this Court should dismiss all of Stafford's fraud claims on the basis of res judicata.

B. Stafford's Fraud Claim is Barred by the Two-Year Statute of Limitations.

A second, independent reason why the fraud claim fails as a matter of law is that Stafford failed to file this claim within the statute of limitations. Any claim for fraud, including constructive fraud, must be brought within two (2) years of the time the cause of action accrues. Mont. Code Ann. § 27-2-203. Where the nature of the fraud or deceptive act is concealed, the statute of limitations is tolled until the plaintiff discovers the existence of the cause of action or should have

discovered its existence by ordinary diligence. *Osterman v. Sears, Roebuck & Co.*, 2003 MT 327, ¶ 27, 318 Mont. 342, 80 P.3d 435.

Here, Stafford pled two (2) fraud claims—one for fraud/constructive fraud/negligent misrepresentation and one for fraudulent title. Both of Stafford's fraud claims claim are barred by the two (2) year statute of limitations. Stafford alleges that she discovered that Bank Defendants would sell the Property to Fannie Mae either at the time of the sale on December 14, 2012, or shortly thereafter when ReconTrust recorded the Trustee's Deed on December 24, 2012. (DCR Doc. 10, ¶ 29). Regardless, Stafford was on notice as of at least December 24, 2012, when the Trustee's Deed to Fannie Mae was recorded and certainly on December 27, 2012 when she had actual notice of recordation of the Trustee's Deed to Fannie Mae, of the alleged fraudulent statement and, therefore, was required to bring this claim within two (2) years. (DCR Doc. 10, ¶ 29 & 56, App. B at 2). Stafford did not file this claim until December 4, 2018, nearly six (6) years later.

Stafford may argue that her fraud claims are not barred by the statute of limitations because the statute of limitations was equitably tolled when she filed one counterclaim for quiet title in Fannie Mae's unlawful detainer action, which was filed in 2013. However, Stafford only pled one counterclaim for quiet title in that action and her pleadings did not put Fannie Mae or any of the Bank Defendants on notice of the claims that she is making in the instant lawsuit.

Stafford I, ¶ 6. Therefore, equitable tolling does not apply and her claims are barred by the statute of limitations.

"Equitable tolling allows in limited circumstances for an action to be pursued despite the failure to comply with relevant statutory filing deadlines." *Lozeau v. GEICO Indem. Co.*, 2009 MT 136, ¶ 14, 350 Mont. 320, 207 P.3d 316. The Montana Supreme Court has set forth a three-part test for application of the doctrine:

> the statute of limitations may be tolled when a party reasonably and in good faith pursues one of several possible legal remedies and the claimant meets three criteria: (1) **timely notice to the defendant within the applicable statute of limitations in filing the first claim**; (2) lack of prejudice to the defendant in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct by the plaintiff in filing the second claim.

Lozeau, ¶ 14 (citing *Let the People Vote v. Bd. of Cty. Comm'rs. of Flathead Cty.*, 2005 MT 225, ¶ 18, 328 Mont. 361, 120 P.3d 385) (emphasis added).

In this case, Stafford may rely upon the quiet title counterclaim that she filed on August 29, 2013, in response to Fannie Mae's unlawful detainer action to support her equitable tolling argument. However, in that counterclaim, Stafford does not put Fannie Mae or any other party on notice of the claims she is making in the TP Complaint because she simply states that Fannie Mae does not have an interest in the Property but she has a leasehold interest, and requests that the Court quiet title in her leasehold interest for a period of one year. (DCR Doc. 10, Exhibit

K). She does not reference any of the instant claims she makes or any of the facts she alleges in the TP Complaint, namely that she made the highest bid at the foreclosure sale and should be the rightful owner of the Property. *Id.*

Therefore, Stafford's fraud claims are barred by the two-year statute of limitations and she cannot rely upon equitable tolling to support these claims. The Court's Order dismissing the fraud claims should be affirmed.

C. The District Court Properly Held that Stafford Failed to Plead the Elements of Fraud with Particularity.

The final reason why the fraud claim fails is that Stafford fails to plead the elements of fraud with particularity. In her TP Complaint, Stafford alleges that Bank Defendants committed fraud and obtained fraudulent title to the Property because they represented that they would sell the Property to the highest bidder on the day of the sale, but when she allegedly placed the highest bid, the auctioneer refused to accept the bid and ultimately sold the Property to Fannie Mae for a lower bid amount. (DCR Doc. 10, ¶¶ 73–85). However, Stafford fails to plead with particularity that Bank Defendants did not intend to keep their promise or how she was damaged by the alleged fraud and this claim should be dismissed with prejudice.

In order to state a viable claim for fraud, Stafford must allege: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity, or ignorance of its truth; (5) his intent that it should be acted upon by the

person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance upon its truth; (8) his right to rely thereon; (9) and his consequent and proximate injury. *Morrow v. Bank of Am., N.A.*, 2014 MT 117, ¶ 57, 375 Mont. 38, 324 P.3d 1167; *Lee v. Stockmen's Nat'l Bank*, 207 P. 623, 630 (Mont. 1922). Additionally, where the alleged fraud involves a promise of future action, the plaintiff must plead that the speaker did not have the intent to keep the promise. *Roberts v. Mission Valley Concrete Indus*., 222 Mont. 268, 271, 721 P.2d 355, 356–57 (1986); *Int'l Harvester Co. v. Merry*, 199 P. 704, 706 (Mont. 1921). Finally, Rule 9(b) of the Montana Rules of Civil Procedure requires that Stafford plead the elements of her fraud claims with particularity, which requires her to provide adequate notice that allows the adverse parties to prepare responsive pleadings. *Fossen v. Fossen*, 2013 MT 299, ¶ 9, 372 Mont. 175, 311 P.3d 743. For example, in one case the Montana Supreme Court held that the fraud pleading was adequate when it identified the person who made the statement, the time at which it was made, that the defendant knew the statement was false (or, as stated above, did not intend to keep a promise), that she was misled, and that she suffered damages. *Irving v. Valley Cty. Sch. Dist.*, 248 Mont. 460, 467, 813 P.2d 417, 424 (1991).

In this case, Stafford fails to allege that Bank Defendants did not intend to keep their promise to sell the Property to the highest bidder. She simply claims

that their statement that they would sell the Property to the highest bidder was knowingly false, without specifying that Bank Defendants did not intend to keep their promise. (DCR Doc. 10, ¶ 77). Given that Montana law requires a plaintiff to plead that the speaker did not intend to keep their promise, Stafford has failed to plead this claim. *See Merry*, 199 P. at 706.

Additionally, Stafford utterly fails to plead how she has been damaged by the alleged fraudulent conduct of the Bank Defendants. Stafford has not pled that she paid any money or otherwise changed her position in reliance upon the alleged fraudulent statements. Rather, she simply did not get to purchase the Property in which she had no interest. Given that Stafford has failed to show a consequent and proximate injury, the fraud claim was properly dismissed.

For the foregoing reasons, this Court should affirm the Court's Order dismissing Stafford's fraud claims.

II. THE DISTRICT COURT ERRED IN FAILING TO DISMISS STAFFORD'S REMAINING CLAIMS FOR RELIEF.

Bank Defendants also filed a cross-appeal in this action and now request that this Court reverse the Order of the District Court that did not dismiss Stafford's claims for breach of contract, declaratory judgment based upon a violation of the STFA, quiet title, negligence, and a violation of the UTPA. All of these claims are barred by res judicata for the same reasons as the fraud claim. Further, Stafford has no standing to challenge a completed foreclosure sale. Moreover, the breach of

contract, negligence, and UTPA claim are barred by their respective statutes of limitation. Finally, Stafford fails to plead the elements of these claims sufficiently to survive a motion to dismiss. Therefore, this Court should reverse the Order of the District Court that did not dismiss Stafford's remaining claims.

A. All of Stafford's Claims are Barred by Res Judicata.

Bank Defendants incorporate by reference the arguments made in Part I.A of this brief to support their argument that Stafford's remaining claims are barred by the res judicata. *See, supra,* Part I.A. Similar to the fraud claim, all of these claims could have been brought in *Stafford I* because they are all related to the disputed foreclosure sale. Accordingly, for the reasons stated above, Stafford's remaining claims are barred by res judicata.

B. Stafford does not have Standing to Challenge a Completed Foreclosure Sale.

In addition to res judicata, Stafford's additional claims fail because she has no standing to challenge a completed sale. "When the trustee's deed is recorded in the deed records of the county or counties where the property described in the deed is situated, the recitals contained in the deed and in the affidavits required under section 71-1-315(2) are prima facie evidence in any court of the truth of the matters set forth in the recitals, except that the recitals are conclusive evidence in favor of subsequent bona fide purchasers and encumbrancers for value and without notice." Mont. Code Ann. § 71-1-318. In the TP Complaint, Stafford admits that

the Trustee's Deed was recorded on December 24, 2018, and she does not claim that the Trustee's Deed failed to make the necessary recitals. (DCR Doc. 10, ¶ 29).

Stafford fails to identify any basis upon which she, as a disappointed bidder, may challenge the sale. Montana Code Annotated § 71-1-315 states that the only people entitled to notice of a foreclosure sale are the grantor, a successor in interest to the grantor, any person designated to receive notice in the trust indenture, a person who filed a request for notice within the required time, or a person who has a subsequent lien on the property which was recorded as of the date of the notice of sale. Stafford does not argue that she holds an interest in the Deed of Trust. She has no ownership interest in the Property, she does not have a lien on the Property, she was not designated to receive notice of the sale, and she did not file a request for notice of the sale; rather, she was simply a holdover tenant who was not entitled to notice of the sale. As such, she has experienced no injury to a property right that would give her standing to challenge the sale. *See Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 33, 360 Mont. 207, 255 P.3d 80.

Stafford did not lose any money as a result of the sale, nor did she have a contract as a result of the sale, as explained herein. There is simply no injury that could be remedied by maintaining this action. *Id.* Thus, it is unclear how she could challenge the completed Trustee's sale or overcome the presumption of the Trustee's Deed in this case, so this Court should reverse the decision of the District

Court and dismiss the remaining claims with prejudice.

C. Three of Stafford's Additional Claims are Barred by the Statute of Limitations.

In addition to res judicata, Stafford's additional claims fail because she has no standing to challenge a completed sale.

1. Stafford's Breach of Oral Contract Claim is Barred by the Five (5) Year Statute of Limitations.

In her TP Complaint, Stafford alleges an oral contract with Bank Defendants in that she claims that they offered to sell the Property to the highest bidder and she orally accepted that offer by bidding the highest amount at the sale. (DCR Doc. 10, ¶¶ 27–28). Under Montana law, such an oral contract is subject to a five (5) year statute of limitations from the date of the breach. Mont. Code Ann. § 27-2-202(2). Stafford learned that a "contract," if any, had been breached when she observed on December 27, 2012, the Trustee's Deed of Sale to Fannie Mae, (DCR Doc. 56, App. B at 2), recorded on December 24, 2012, (DCR Doc. 10, ¶ 28). Given that she did not file this TP Complaint until more than five (5) years later, this breach of oral contract claim is barred by the statute of limitations.

2. Stafford's UTPA Claim is Barred by the Two (2) Year Statute of Limitations.

Any claim under the UTPA is subject to a two (2) year statute of limitations from accrual of the cause of action. *Osterman*, 2003 MT 327, ¶ 24. Even where the nature of the deceptive act is concealed, the statute of

limitations is tolled until the plaintiff discovers the existence of the cause of action or should have discovered its existence by due diligence. *Id*. at ¶ 26.

Here, Stafford's claim for a violation of the UTPA is barred by the two (2) year statute of limitations. Stafford alleges that she discovered that Bank Defendants would sell the Property to Fannie Mae either at the time of the sale on December 14, 2012, or shortly thereafter when ReconTrust recorded the Trustee's Deed on December 24, 2012. (DCR Doc. 10, ¶ 29). Regardless, Stafford was on notice as of at least December 27, 2012, of the alleged deceptive statement and, therefore, was required to bring this claim within two (2) years. (DCR Doc. 56, App. B at 2). Stafford did not file this claim until December 4, 2018, nearly six (6) years later. Accordingly, the UTPA claim is barred by the statute of limitations.

3. Stafford's Negligence Claim is Barred by the Three (3) Year Statute of Limitations.

A claim for negligence is subject to a three (3) year statute of limitations from the date the claim accrued. Mont. Code Ann. § 27-2-204. As stated above, Stafford became aware of the alleged negligence of the trustee in conducting the sale either when her bid was not accepted at the sale or, at the very latest, when she discovered that the Property was sold to Fannie Mae on December 27, 2012. (DCR Doc. 10, ¶ 29; DCR Doc. 56, App. B at 2). Given that these events occurred in December 2012, Stafford was required to bring this Negligence claim by

December 2015, which she failed to do. Mont. Code Ann. § 27-2-204. For this reason, Stafford's Negligence claim is barred by the statute of limitations.

D. Stafford Fails to Plead the Elements of the Remaining Claims.

Finally, Stafford fails to allege the elements to support the additional claims in the TP Complaint. First, Stafford has failed to allege that the auctioneer accepted the offer she made or that Bank Defendants gave any consideration to support the breach of contract claim. Second, Stafford's declaratory relief claim based upon a violation of the STFA fails because Stafford has no standing to enforce the Deed of Trust. Third, the quiet title claim is not applicable to Bank Defendants because they are no longer claiming an interest in the Property. Fourth, Stafford fails to plead that the STFA is a public safety statute that would support her negligence *per se* claim. Fifth, Stafford has not alleged an ascertainable loss of money or property to support her UTPA claim. For these reasons, this Court should reverse the District Court's Order that refused to dismiss Stafford's additional claims.

1. Stafford has not Alleged an Enforceable Contract.

Stafford alleges that she had a "contract" with ReconTrust because the agent for ReconTrust offered to sell the Property to the highest bidder and Stafford allegedly accepted that offer by placing her bid, which she claims was the only bid. (DCR Doc. 10, ¶¶ 57–62). Thus, she claims that ReconTrust breached the contract

by ending the bidding and allowing Fannie Mae to purchase the Property. (DCR Doc. 10, ¶ 62). Stafford does not allege that Fannie Mae or BANA was involved in this alleged contract and, therefore, she cannot properly state this claim against those parties.

Moreover, Stafford has failed to allege that the auctioneer ever explicitly accepted Stafford's offer or ReconTrust gave consideration. Thus, no contract ever formed and the breach of contract claim is defective. In accordance with Montana law, a contract is formed when: (1) identifiable parties capable of contracting; (2) give their consent; (3) to a lawful object; and (4) a sufficient cause or consideration is given. *Chipman v. Nw. Healthcare Corp.*, 2014 MT 15, ¶ 15, 373 Mont. 360, 317 P.3d 182. A good consideration may consist of "[a]ny benefit conferred or agreed to be conferred upon the promisor by any other person . . . or any prejudice suffered or agreed to be suffered by the person." Mont. Code Ann. § 28-2-801.

At its core, a trustee's sale under the STFA is simply an auction. Indeed, the Notice of Trustee's Sale in this case specifically states that the Property is being sold at "public auction." Mont. Code Ann. § 71-1-315(3) & *Stafford I*, ¶ 4 ("A trustee's sale was held at the county courthouse *to auction off the property* . . . ."). Commensurate with basic contract principles, the bidder at an auction makes an offer, which, if accepted by the auctioneer constitutes an executory contract. *Yellowstone Livestock Comm'n v. Dupuis*, 133 Mont. 454, 459, 325 P.2d 691, 693

(1958). Like any contract, an auction requires both an offer and an acceptance of that offer before an enforceable contract arises. *See* Mont. Code Ann. § 28-2-102(2). "A sale by auction is complete when the auctioneer announces the sale by the fall of the hammer or other customary manner." Mont. Code Ann. § 30-11-502(2); *Baker v. State*, 218 Mont. 235, 238, 707 P.2d 20, 22 (1985) ("It is a well-founded principle of contract law that a contract does not exist prior to the acceptance of a bid . . . ."). Thus, even accepting Stafford's allegations as true, no contract ever formed between ReconTrust and Stafford to support a breach of contract claim.

Finally, ReconTrust never agreed to confer any benefit upon Stafford specifically, and she has not alleged that she agreed to suffer some prejudice. *See* Mont. Code Ann. § 28-2-801. Accordingly, no consideration existed and an enforceable contract never formed between ReconTrust and Stafford. For these reasons, the Court should reverse the District Court's Order denying Bank Defendants' request to dismiss the breach of contract claim.

2. Stafford Fails to State a Declaratory Relief Claim for a Violation of the STFA because she has no Standing to Enforce the Deed of Trust.

Stafford alleges that Bank Defendants violated the STFA by not strictly complying with the requirements to sell the Property to the highest bidder. (DCR Doc. 10, ¶ 67). Specifically, she claims that ReconTrust violated the STFA by not

selling the Property to the highest bidder. *Id.* She alleges a claim for a violation of the STFA and demands declaratory relief that the Trustee's Deed is void. However, the STFA only applies to the Deed of Trust in this matter, to which Stafford was not a party, as she acknowledges. (DCR Doc. 10, ¶ 17). Accordingly, Stafford has no standing to enforce the terms of the Deed of Trust or the application of the STFA to the Deed of Trust.

Under Montana law, a third party can occasionally be a beneficiary to the contract. However, this Court has held that unless one is an intended third-party beneficiary of a contract, a stranger to a contract lacks standing to enforce compliance of the contract. In the case of *Palmer v. Bahm*, the parties entered into a buy-sell agreement for the purchase of certain land. *Palmer v. Bahm*, 2006 MT 29, ¶ 6, 331 Mont. 105, 128 P.3d 1031. The seller sold a piece of that land to another purchaser pursuant to an option contract with her. *Id.* at ¶ 8. The buyer brought the action alleging that the purchaser failed to properly exercise the option contract between seller and purchaser. *Id.* at ¶ 10. Both the trial court and the Montana Supreme Court ruled in favor of the seller. The Montana Supreme Court held that, since the buyer was not a party to the contract, he lacked standing to require strict compliance with the contract or to assert that the contract was unenforceable under the statute of frauds. *Id*. at ¶¶ 12, 15.

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The Montana Supreme Court has described an intended third-party beneficiary as follows:

> (1) Unless otherwise agreed between promissor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> > (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
> >
> > (b) the circumstances indicate that the promise intends to give the beneficiary the benefit of the promised performance.

Dick Anderson Constr., Inc. v. Monroe Constr. Co., LLC, 2009 MT 416, ¶ 47, 353 Mont. 534, 221 P.3d 675.

The Deed of Trust was a contract between Caffrey as the mortgagor, and Mann, the original lender. (DCR Doc. 10, ¶ 17). On its face, it is clear that Stafford is not an identifiable party in the Deed of Trust. It is also evident that she was not an intended third-party beneficiary of the contract. Stafford is not an intended third-party beneficiary of the Deed of Trust because the promise made by Caffrey to pay back the loan amount was not made to satisfy an obligation of Caffrey to pay money to Stafford, nor do circumstances indicate that the promise made by Caffrey to pay back the loan amount was intended to give Stafford the benefit of the promised performance.

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Like the buyer in *Palmer*, Stafford is not a party to the Deed of Trust. Additionally, Stafford is not a third-party beneficiary of the Deed of Trust. Thus, she lacks standing to argue that ReconTrust did not comply with the terms of the Deed of Trust or the STFA, as it relates to the Deed of Trust, and the Court should hold that the District Court erred in refusing to dismiss the declaratory judgment claim.

3. Bank Defendants have no Interest in the Property and, Therefore, the Quiet Title Claim is not Applicable to them.

Stafford attempts to plead a claim for quiet title against Bank Defendants. However, given that Fannie Mae sold this Property to Ayala as of January 23, 2018, as identified in the Complaint, none of the Bank Defendants are claiming an interest in this Property. (DCR Doc. 10, ¶ 38). Accordingly, this claim should have been dismissed against Bank Defendants because they no longer have an interest in this Property.

4. Stafford Fails to Plead her Negligence Claim.

Stafford pleads that Bank Defendants had an alleged duty to ensure the sale complied with the STFA, and breached that duty by not selling the Property to the highest bidder. However, Stafford has failed to plead a claim for negligence *per se* because the STFA is not a public safety statute. Therefore, this claim should be dismissed.

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To maintain an action in negligence, a plaintiff must prove four essential elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached that duty, (3) the breach was the actual and proximate cause of an injury to the plaintiff, and (4) damages resulted. *Bonilla v. Univ. of Mont.*, 2005 MT 183, ¶ 14, 328 Mont. 41, 116 P.3d 823. Moreover, to the extent that a plaintiff attempts to plead a claim for negligence *per se* based upon the violation of a statute, the statute must be one that is aimed at public safety. *Rader v. Nicholls*, 140 Mont. 459, 462–63, 373 P.2d 312, 314 (1962) (holding that, when a statute enacted for public safety is violated, it is negligence as a matter of law).

In this case, Stafford bases her entire negligence claim upon Bank Defendants' alleged violation of the STFA. Given that she does not plead the elements of negligence, she appears to argue that a violation of the STFA is negligence *per se*. (DCR Doc. 10, ¶¶ 103–07). However, Stafford does not and cannot claim that the STFA was enacted for purposes of "public safety" because it does not involve a risk of physical harm to the intended beneficiaries. *Cf. Nicholls*, 140 Mont. at 462–63, 373 P.2d at 313 (holding that statutes which give rise to a negligence *per se* claim are those statutes that are intended to protect public safety). Therefore, the entire basis for Stafford's negligence claim is meritless. For these reasons, this Court should order the District Court to dismiss the negligence claim.

5. Stafford Fails to Allege an Ascertainable Loss of Money or Property to Support her UTPA Claim.

Stafford alleges that Bank Defendants violated the UTPA by promising to sell the Property to the highest bidder, refusing to sell it to Stafford, and instead selling the Property to Fannie Mae. (DCR Doc. 10, ¶ 110). However, Stafford has failed to allege any ascertainable loss of money or property as a result of the alleged violation. Thus, this claim is deficient.

Under the UTPA, a violation consists of any "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." *See* Mont. Code Ann. § 30-14-103. The UTPA only permits a private cause of action if a plaintiff suffers an "ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act, or practice declared unlawful by 30-14-103 . . . ." Mont. Code Ann. § 30-14-133. A plaintiff can recover "actual damages" or $500, whichever is greater. *Id.*

In this case, Stafford has not alleged any ascertainable loss of money or property. She does not claim that she paid any money due to the acts of the Bank Defendants and she does not allege she lost any property. She simply did not have a chance to purchase the Property but does not allege that she has actually lost any money or property as a result of the actions of Bank Defendants. For this reason, this Court should reverse the Order of the District Court and order that the UTPA

claim be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's Order granting Bank Defendants' Motion to Dismiss as to Stafford's Fraud Claims and reverse the District Court's Order denying Bank Defendant's Motion to Dismiss Stafford's claims for breach of contract, declaratory judgment, quiet title, negligence, and a violation of the UTPA.

Dated this 29th day of January, 2021.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By */s/ Mark D. Etchart*
Mark D. Etchart

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4), Mont.R.App.P., I certify that ***APPELLEE'S BRIEF***, is double spaced, is a proportionately spaced 14-point Times New Roman typeface, and contains 8,689 words.

/s/ Mark D. Etchart
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CERTIFICATE OF SERVICE

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