IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HARRIET NICHOLSON,

Plaintiff,

v. **C.A. NO. 3:21-cv-1779-G-BK**

BANK OF AMERICA and
COUNTRYWIDE HOME LOANS, INC.,
Defendants.

PLAINTIFF HARRIET NICHOLSON'S SECOND AMENDED RESPONSE AND BRIEF IN OPPOSITIONTO DEFENDANTS BANK OF AMERICA, N.A.'S AND COUNTRYWIDE HOME LOANS, INC.'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Pursuant to FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1), Plaintiff Harriet Nicholson files her Second Amended Response and Brief in Opposition to Defendants Bank of America, N.A. and Countrywide Home Loans, Inc.'s Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Motion") (Doc. 17) and would respectfully show the Court as follows:

Judicial estoppel bars BANA, CHLI, and Ms. Jones's argument, [The Second Court of Appeals affirmed the State District court's *final judgmen*t against Plaintiff.] (Dkt. 18, PageID 339)

The doctrine of judicial estoppel is equitable in nature and can be invoked by a court to prevent a party from asserting a position in a legal proceeding that is inconsistent with a position taken in a previous proceeding. *See Reed v. City of Arlington,* 650 F.3d 571, 573-74 (5th Cir. 2011) (en banc). The aim of the doctrine is to "protect the integrity of the judicial process." *New Hampshire v. Maine,* 532 U.S. 742, 749-50, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (citation and internal quotation marks omitted).

On October 16, 2019, Ms. Jones argued in BANA's and CHLI's Appellees' Brief in the Second Court of Appeals case 02-19-00085-CV, the summary judgment orders were interlocutory, a copy of which is attached hereto as Ex A, and is a matter of public record; which stated in relevant part:

ARGUMENT AND AUTHORITIES

I. The Court Should Dismiss Plaintiff's Improper Attempt to Appeal the Interlocutory Summary Judgment Orders for Lack of Jurisdiction Because Plaintiff Did Not Give Notice of Her Intent to Appeal Those Orders in the Notice of Appeal.

The Court should dismiss Plaintiff's first issue on appeal, in which she attempts to challenge the BANA MSJ Order and the CHLI MSJ Order, because Plaintiff's Notice of Appeal does not identify those interlocutory orders. As a

14

Ms. Connie Flores Jones, Defendants' counsel in the instant case, further argued, "Appellees filed a motion to sever Plaintiff's claims them from her claims

against the other nine (9) defendants that remained in the case and it would have been unfair to make BANA and CHLI wait until a final judgment was rendererd, which stated in relevant part:

STATEMENT OF THE CASE

This case is on appeal from proceedings before the 48th Judicial District Court, Tarrant County, Texas (the "Trial Court"), in case number 048-286132-16 (the "Original Case") and 048-304598-18 (the "Severed Case").[1]

In the case below, Plaintiff brought suit against eleven (11) separate defendants, including Appellees BANA and CHLI; David Stockman; ReconTrust Company, N.A. ("ReconTrust"); Nationstar Mortgage, LLC ("Nationstar"); Harvey Law Group; The Bank of New York Mellon ("BONY"); Donna Stockman; Denise Boerner; William Viana; and Trefe Trekel.[2] After the Trial Court granted summary judgment in favor of Appellees and against Plaintiff's operative pleading—the Eighth Amended Petition—Appellees filed a motion to sever Plaintiff's claims against them from her claims against the other nine (9) defendants (the "Motion to Sever") which remained in the case.[3] On November 28, 2018, the Trial Court issued an order granting the Motion to Sever (the "Severance Order").[4]

[1] Citations to "CR.###" refer to the Original Clerk's Record filed with the Clerk of this Court on May 1, 2019. Citations to "SCR1.###" refer to the 1st Supplemental Clerk's Record filed with the Clerk of this Court on May 3, 2019. Citations to "SCR2.###" refer to the 2nd Supplemental Clerk's Record filed with the Clerk of this Court on May 8, 2019. Citations to "SCR3.###" refer to the 3rd Supplemental Clerk's Record filed with the Clerk of this Court on July 2, 2019. Citations to "SCR4.###" refer to the 4th Supplemental Clerk's Record filed with the Clerk of this Court on August 15, 2019.
[2] CR. 17.
[3] CR. 107.
[4] CR. 143.

judgment on August 31, 2018.[87] Therefore, it would have been unfair to make BANA and CHLI—whose motions for summary judgment were granted on October 30, 2018, after more than two years of litigation and eight amended petitions by Plaintiff—to have to wait an indeterminate amount of time for Plaintiff to litigate her claims against the other nine defendants named in the case before

[85] CR. 549.
[86] CR. 549.
[87] SCR2. 5; SCR2. 229; SCR2. 454.

43

For this reason alone, BANA's and CHLI's Motion to Dismiss should be dismissed in its entirety for judicial estoppel.

Under the void ab initio exception, Rooker-Feldman does not apply in this case..

The *Rooker-Feldman* doctrine "holds that inferior federal courts do not have the power to modify or reverse state court judgments." *Union Planters Bank Nat. Ass'n v. Salih*, 369 F.3d 457, 462 (5th Cir. 2004). However, if a judgment is void *ab initio*, and not merely voidable, then *Rooker-Feldman* does not apply. *See U.S. v. Shepherd*, 23 F.3d 923, 925 (5th Cir. 1994). In Texas, a judgment is void *ab initio* if the rendering court lacked personal or subject matter jurisdiction, lacked jurisdiction to enter the judgment, or lacked the capacity to act as a court.

Browning v. Placke, 698 S.W.2d 362, 363 (Tex. 1985). Accordingly, the Court must determine whether a jurisdictional defect exists in the state court judgment such that it is void *ab initio*.

Under the void ab initio exception, a federal court may review a case entered in a state court if the state court proceedings are a legal nullity and void ab initio. If the court that rendered the prior judgment lacked jurisdiction, the judgment is void. *Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex.1990).(A judgment is void ... when it is apparent that the court rendering the judgment had no jurisdiction of the parties, no jurisdiction of the subject matter, no jurisdiction to enter the judgment, or no capacity to act as a court.")

A party may collaterally attack a void judgment. *See* *Holloway v. Starnes*, 840 S.W.2d 14, 18 (Tex. App. — Dallas 1992, writ denied) ("A collateral attack is proper only if the judgment is `void in law.'"), *cert. denied,* ___ U.S. ___, 114 S.Ct. 93, 126 L.Ed.2d 60 (1993). Under Texas law, courts have no jurisdiction where they lack 1) jurisdiction over the person of a party or the party's property, 2) jurisdiction over the subject matter, 3) jurisdiction to enter the particular judgment rendered, or 4) capacity to act as a court. *Steph v. Scott*, 840 F.2d 267, 270 (5th Cir.1988) State law governs a collateral attack on a state-court judgment. Id.

There appears to be only one exception to this hard and fast rule of federal-state comity, and it comes into play only when the state proceedings are considered a legal nullity and thus void *ab initio*. *Kalb*, 308 U.S. at 438-40, 60 S.Ct. at 345-47.

The distinction between a void judgment and one that is erroneously decided is crucial:

> A void judgment is to be distinguished from an erroneous one, in that the latter is subject only to direct attack. A void judgment is one which, from its inception, was a complete nullity and without legal effect. *In re James*, 940 F.2d 46 (3d Cir. 1991).

It bears emphasis to repeat that federal courts that are classed as "inferior" under Article III have the power to vacate only state court judgments that are considered void *ab initio*. *In re James*, 940 F.2d 46 (3d Cir. 1991). Sound jurisprudential reasons underlie this concept. Because a void judgment is null and without effect, **the vacating of such a judgment is merely a formality and does not intrude upon the notion of mutual respect in federal-state interests**. In re James, 940 F.2d at 52.

BANA and CHLI argued Harriet Nicholson is attempting to appeal from the Second Court of Appeals Judgment on the merits and that this Court lacks

jurisdiction to review that judgment pursuant to a rule of abstention known as the Rooker-Feldman doctrine. (Dkt. No. 18, PageID 339); see Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303,

Nevertheless, Harriet Nicholson is collaterally attacking the **Second Court of Appeals' Judgment in case 02-19-00085-CV for Lack of Jurisdiction.** (Doc 15,§V)

> Furthermore, if a court has not acquired jurisdiction of both the parties and the subject matter of the litigation, the judgment is void and is subject to both direct and ***collateral attack***. Browning v. Placke, 698 S.W.2d 362, 363 (Tex.1985); Martin v. Sheppard, 145 Tex. 639, 201 S.W.2d 810, 812 (1947).
>
> BANA and CHLI invocation of the Rooker-Feldman doctrine is ultimately inapt. Although BANA and CHLI are correct that under the Rooker-Feldman doctrine, "lower federal courts lack jurisdictional authority to sit in appellate review of state court decisions," Matter of Reitnauer, 152 F.3d 341, 343 (5th Cir. 1998), the Fifth Circuit has also made clear that "the Rooker-Feldman doctrine does not preclude review of void state court judgments." Burciaga v. Deutsche Bank Nat'l Trust, 871 F.3d 380, 385 (5th Cir. 2017) (emphasis added). In Texas, a state court's judgment is

"void" where the court lacked jurisdiction or the order was borne of fraud. See Browning v. Prostok, 165 S.W.3d 336, 346- 47 (Tex. 2005). Thus, even where the Rooker-Feldman doctrine would bar federal review of a state court decision on the merits, **federal courts are obligated to ensure that the state court's decision was rendered with proper jurisdiction.** Cf. United States v. Shepherd, 23 F.3d 923, 925 (5th Cir. 1994) (concluding that Rooker-Feldman applied only after determining that the state court judgment was not "void" for fraud). Thus, insofar as Harriet Nicholson's attack on the Second Court Appeals Judgment is confined to attacking the state court's jurisdiction to enter that judgment, this Court's jurisdiction is undisturbed by the Rooker-Feldman doctrine**.**

When a collateral attack is made on the jurisdiction of a court to act, the existence of the court's jurisdiction must be determined from the record in the case. E.D. Sys. Corp. v. Sw. Bell Tel. Co., 674 F.2d 453, 457 (5th Cir. 1982). And by the record in the case, the Fifth Circuit has made clear that review is limited to the "face" of "the state court record. Shepherd, 23 F.3d at 925.

The Second Court of Appeals' jurisdiction is established exclusively by constitutional and statutory enactments. See, e.g., Tex. Const. art. V, § 6; Tex. Gov't Code Ann. § 22.220 (Vernon Supp.2009). Unless one of the

sources of our authority specifically authorizes an interlocutory appeal, we only have jurisdiction over an appeal taken from a final judgment. Lehmann v. Har-Con Corp., 39 S.W.3d 191, 195 (Tex.2001). (Dkt. 15,¶48, PageID 208)

The uncontroverted evidence in the state court's record proves, the trial court's "Final Judgment" was signed on February 19, 2020, disposing of all claims and parties in case 048- 286132-16. (Dkt. 15, PageID 328-329).

Here, the face of the state court's record demonstrates that the Second Court of Appeals was acting without jurisdiction in case 02-19-00085-CV on December 31, 2019, affirming non-appealable interlocutory summary judgment and severance orders in case 048-286132- 16. (Dkt. 15, PageID 306, 308, 310).

CONCLUSION AND PRAYER

Based on the foregoing, Harriet Nicholson requests that this Court deny Bank of America, N.A.'s and Countrywide Home Loans, Inc.'s Motion to Dismiss in its entirety. Harriet Nicholson further requests the Court award such other relief, including, but not limited to, the costs and fees incurred in responding to Defendants' frivolous motion to dismiss.

Notwithstanding, if Ms. Jones fails to withdraw this frivolous motion to dismiss, Ms. Nicholson plans to pursue sanctions pursuant to FED. R. CIV. P. 11(c). Ms. Nicholson plans to pursue sanctions against BANA, CHLI, Ms. Jones, and Winston Strawn on two bases: the motion was filed for an improper purpose, in violation of Rule 11(b)(1); and the legal contentions made were not warranted by existing law or a nonfrivolous argument for extending, modifying, or reversing existing law, in violation of Rule 11(b)(2).

Respectfully submitted,
/s/ Harriet Nicholson
Harriet Nicholson
2951 Santa Sabina Drive
Grand Prairie, Texas 75052
817-217-0245
harrietnicholson@yahoo.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served on the counsel of record by the court's electronic filing system on October 3, 2021.

/s/ Harriet Nicholson

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HARRIET NICHOLSON,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**C.A. NO. 3:21-cv-1779-G-BK**
	§	
BANK OF AMERICA and COUNTRYWIDE HOME LOANS, INC.	§	
	§	
	§	
Defendants.	§	

APPENDIX IN SUPPORT OF PLAINTIFF'S RESPONSE /OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Exhibit A	*Nicholson v. Bank of Am., N.A.*, No. 02-19-00085-CV, 2019 WL 7407739, (Tex. App.—Fort Worth, Dec. 31, 2019), BANA's and CHLI's Appellees Brief signed by Connie Flores Jones	App. 3

Dated: October 3, 2021

Respectfully submitted,

By: */s/ Harriet Nicholson*
Harriet Nicholson
2951 Santa Sabina Drive
Grand Prairie, Texas 75052
817-217-0245
harrietnicholson@yahoo.com

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October 2021, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system and caused a copy of same to be delivered counsel of record via email.

/s/ Harriet Nicholson

EXHIBIT A

ACCEPTED
02-19-00085-CV
SECOND COURT OF APPEALS
FORT WORTH, TEXAS
10/16/2019 2:58 PM
DEBRA SPISAK
CLERK

No. 02-19-00085-CV

IN THE SECOND COURT OF APPEALS
FORT WORTH, TEXAS

FILED IN
2nd COURT OF APPEALS
FORT WORTH, TEXAS
10/16/2019 2:58:49 PM
DEBRA SPISAK
Clerk

HARRIET NICHOLSON,
Plaintiff-Appellant,

v.

BANK OF AMERICA, N.A. AND COUNTRYWIDE HOME LOANS, INC.,
Defendants-Appellees.

Appeal from the 48th Judicial District Court
Tarrant County, Texas
Case Nos. 048-286132-16 (original case) and 048-304598-18 (severed case)

BRIEF OF APPELLEES BANK OF AMERICA, N.A. AND COUNTRYWIDE HOME LOANS, INC.

Dated: October 16, 2019

Connie Flores Jones
Texas State Bar No. 00793736
WINSTON & STRAWN, LLP
1111 Louisiana, 25th Floor
Houston, Texas 77002
Tel. (713) 651-2600
Fax (713) 651-2700
Email: cflores@winston.com

Attorneys for Appellees
Bank of America, N.A. and
Countrywide Home Loans, Inc.

IDENTITY OF PARTIES AND COUNSEL

The undersigned counsel of record certifies that the following is a complete list of all parties to the trial court's judgment or order appealed from, as well as names and addresses of all trial and appellate counsel, except as otherwise provided in Rule 9.8.

Appellants/Plaintiffs

1. Harriet Nicholson, pro se

Appellees/Defendants

2. Bank of America, N.A.

3. Countrywide Home Loans, Inc.

Counsel to Appellees

4. Connie Flores Jones, Esq.
Winston & Strawn, LLP
1111 Louisiana, 25th Floor
Houston, Texas 77002

5. Kathryn B. Davis, Esq.
Winston & Strawn, LLP
1111 Louisiana, 25th Floor
Houston, Texas 77002

STATEMENT REGARDING ORAL ARGUMENT

This case involves well-settled standards of review and clear legal principles. Accordingly, Defendants/Appellees Bank of America, N.A. and Countrywide Home Loans, Inc. do not believe oral argument is necessary to the Court's decision-making process. The facts and legal arguments are adequately presented in the briefs and record, and the decision process would not be significantly altered by oral argument. However, counsel for the Appellees welcomes and encourages oral argument to the extent the Court believes it would be helpful to make a just determination of this appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

COUNTER-STATEMENT OF THE ISSUES

1. Whether this Court has appellate jurisdiction over the lower court's interlocutory orders granting summary judgment in favor of Defendants-Appellees Bank of America, N.A. ("BANA") and Countrywide Home Loans, Inc. ("CHLI," and collectively with BANA, the "Appellees")?

2. If so, whether Plaintiff Harriet Nicholson ("Plaintiff") has demonstrated that the lower court committed reversible error in disposing of her claims against Appellees by summary judgment?

3. Whether Plaintiff is bound by this Court's denial of her petition for writ of mandamus and motion for emergency relief, in which Plaintiff argued that the lower court abused its discretion in granting Appellees' motion to sever Plaintiff's claims against Appellees, after being disposed of by summary judgment, from Plaintiff's remaining claims against the nine other defendants?

4. If Plaintiff is not so bound, whether Plaintiff has demonstrated that the Trial Court abused its discretion in granting Appellees' motion to sever?

STATEMENT OF THE CASE

This case is on appeal from proceedings before the 48th Judicial District Court, Tarrant County, Texas (the "Trial Court"), in case number 048-286132-16 (the "Original Case") and 048-304598-18 (the "Severed Case").[1]

In the case below, Plaintiff brought suit against eleven (11) separate defendants, including Appellees BANA and CHLI; David Stockman; ReconTrust Company, N.A. ("ReconTrust"); Nationstar Mortgage, LLC ("Nationstar"); Harvey Law Group; The Bank of New York Mellon ("BONY"); Donna Stockman; Denise Boerner; William Viana; and Trefe Trekel.[2] After the Trial Court granted summary judgment in favor of Appellees and against Plaintiff's operative pleading—the Eighth Amended Petition—Appellees filed a motion to sever Plaintiff's claims against them from her claims against the other nine (9) defendants (the "Motion to Sever") which remained in the case.[3] On November 28, 2018, the Trial Court issued an order granting the Motion to Sever (the "Severance Order").[4]

[1] Citations to "CR.###" refer to the Original Clerk's Record filed with the Clerk of this Court on May 1, 2019. Citations to "SCR1.###" refer to the 1st Supplemental Clerk's Record filed with the Clerk of this Court on May 3, 2019. Citations to "SCR2.###" refer to the 2nd Supplemental Clerk's Record filed with the Clerk of this Court on May 8, 2019. Citations to "SCR3.###" refer to the 3rd Supplemental Clerk's Record filed with the Clerk of this Court on July 2, 2019. Citations to "SCR4.###" refer to the 4th Supplemental Clerk's Record filed with the Clerk of this Court on August 15, 2019.
[2] CR. 17.
[3] CR. 107.
[4] CR. 143.

Thereafter, on December 20, 2018, Plaintiff filed a motion to vacate the Severance Order (the "Motion to Vacate").[5] Eleven days later, on December 31, 2018, Plaintiff filed a motion for new trial and rehearing (the "Motion for New Trial").[6] Appellees opposed the Motion for New Trial on January 17, 2019, and they opposed the Motion to Vacate on January 18, 2019.[7] By Order dated February 12, 2019, the Trial Court denied the Motion for New Trial (the "Order Denying Motion for New Trial").[8] On February 26, 2019, Plaintiff filed a notice of appeal (the "Notice of Appeal").[9]

The Notice of Appeal does not reference the Trial Court's interlocutory orders granting summary judgment in favor of Appellees; instead, the Notice of Appeal lists ***only*** the Severance Order and the Order Denying Motion for New Trial as the orders that are the subject of the instant appeal.[10] Thus, the Trial Court's interlocutory summary judgment orders are not within this Court's jurisdiction because Plaintiff failed to provide notice of her intent to appeal those orders, as required by Rule 25.1 of the Texas Rules of Appellate Procedure. In any event, to the extent the Court concludes that those interlocutory orders are properly before this Court on appeal, the Court should affirm the grant of summary

[5] CR. 145.
[6] CR. 152; CR. 194.
[7] CR. 544; CR. 549.
[8] CR. 559.
[9] CR. 561.
[10] CR. 561.

judgment in the Appellees' favor because the Trial Court did not commit reversible error.

Additionally, Plaintiff is bound by this Court's denial of Plaintiff's petition for writ of mandamus and motion for emergency relief regarding the Severance Order, which predated the filing of the Notice of Appeal. *See In re Nicholson*, No. 02-19-00022-cv, 2019 WL 490132 (Tex. Civ. App.—Fort Worth Feb. 7, 2019) (reconsideration en banc denied Mar. 14, 2019). In any event, to the extent the Court finds that the Severance Order is properly before this Court on appeal, the Court should conclude that the Trial Court did not abuse its discretion in granting the Motion to Sever, and it should affirm the Severance Order.

Finally, because Plaintiff has failed to provide any briefing regarding her appeal from the Trial Court's Order Denying Motion for New Trial, the Court should conclude that Plaintiff has waived her appeal from that order.

STATEMENT OF FACTS

I. Factual Background.

On January 16, 2001, Plaintiff executed a deed of trust (the "Deed of Trust") on the property located at 2951 Santa Sabina Drive, Grand Prairie, Texas 75052 (the "Property") in favor of Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for lender Mid America Mortgage, Inc. ("Mid America")

and its successors and assigns.[11] The Deed of Trust secured a promissory note (the "Note") Plaintiff executed on January 16, 2001, in favor of Mid America, in exchange for a home mortgage loan in the principal amount of $125,048.00 (the "Loan").[12] On or around May 16, 2012, MERS assigned the Deed of Trust to The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificateholders of CWMBS, Inc., CWMBS Reforming Loan Remic Trust Certificates, Series 2005-R2 (the "BONY Trustee") (the "2012 Assignment").[13]

On July 3, 2012, after Plaintiff defaulted and failed to cure the default, substitute trustee David Stockman conducted a substitute trustee's sale, which purported to convey the Property to the BONY Trustee via a Substitute Trustee's Deed recorded as Instrument No. 212187326.[14] However, it was later discovered that, while the Property was located in *Tarrant* County, the notice of sale had erroneously provided the address for the *Dallas* County Courthouse as the location for the substitute trustee's sale, and that erroneous "place of sale" was also reflected in the Substitute Trustee's Deed.[15]

Thereafter, on July 24, 2014, David Stockman executed a Rescission of Substitute Trustee's Deed and Cancellation of Substitute Trustee's Deed (the "Rescission/Cancellation of Deed") in an attempt to purge the public record of the

[11] SCR2. 37.
[12] SCR2. 37.
[13] SCR2. 45.
[14] SCR2. 47.
[15] SCR4. 132; SCR2. 47.

substitute trustee's sale and Substitute Trustee's Deed, as both were invalid under Texas law due to the defect in the notice of sale.[16] The document was recorded as Instrument No. D214164490 on July 31, 2014.[17] The Rescission/Cancellation of Deed stated, in relevant part, that:

> 4. Unknown to me at the time of the foreclosure sale and recording of the Substitute Trustee's Deed, the Notice of Sale did not provide the correct Sale Location. Accordingly, as Substitute Trustee, I am rescinding the foreclosure sale and canceling the Substitute Trustee's Deed that was previously executed and recorded.
>
> 5. As Substitute Trustee, I do hereby stipulate and declare that the Substitute Trustee's Deed dated July 03, 2012 is void and of no force and effect whatsoever and that all acts conducted with regard to the foreclosure sale of July 03, 2012 are hereby rescinded and said property remains the property of HARRIET H. NICHOLSON, AN UNMARRIED PERSON, subject to said lien.
>
> 6. This document is executed and filed for record to purge such real property records of all evidence of such foreclosure by the Substitute Trustee's sale, including, without limitation, such Substitute Trustee's Deed described above as if such Deed had not been filed of record.[18]

On or around February 17, 2015, Nationstar Mortgage, LLC as attorney-in fact for Countrywide Home Loans, Inc. purported to assign the Deed of Trust to BONY (the "Nationstar Assignment").[19] But, MERS had previously assigned the

[16] SCR2. 51.
[17] SCR2. 51.
[18] SCR2. 51.
[19] SCR2. 54.

Deed of Trust to the BONY Trustee in 2012.[20] Thus, the Nationstar Assignment was duplicative of the 2012 Assignment and irrelevant to the chain of title.

CHLI or its sub-servicers serviced the Loan from origination until November 7, 2008, when CHLI transferred servicing rights to Countrywide Home Loans Servicing, LP.[21] Effective April 27, 2009, Countrywide Home Loans Servicing LP changed its name to BAC Home Loans Servicing, LP ("BAC").[22] Effective July 1, 2011, BAC merged with and into BANA.[23] BANA, including its predecessor BAC, serviced the Loan until November 30, 2014.[24] On November 12, 2014, BANA notified Plaintiff by letter (the "Service Transfer Letter") that the servicing of the Loan was being transferred Nationstar effective December 1, 2014.[25]

II. Procedural History.

Plaintiff filed suit against David Stockman on June 21, 2016 under Cause No. 048-286132-16.[26] On January 18, 2018, Plaintiff filed her Third Amended Petition, which added new defendants CHLI, ReconTrust, Nationstar, and Harvey Law Group.[27] On March 19, 2018, Plaintiff filed her Fourth Amended Petition,

[20] SCR2. 45.
[21] SCR2. 58.
[22] SCR2. 58.
[23] SCR2. 59.
[24] SCR2. 59.
[25] SCR2. 59; SCR2. 71.
[26] CR. 549.
[27] CR. 549.

which added new defendant BANA.[28] On March 23, 2018, Plaintiff filed her Fifth Amended Petition, which added new defendant BONY.[29] On June 8, 2018, Plaintiff filed her Seventh Amended Petition, which added new defendants Donna Stockman, Denise Boerner, William Viana and Trefe Treckle.[30]

On June 11, 2018, Plaintiff filed her Eighth Amended Petition, which is the operative pleading.[31] In the Eighth Amended Petition, Plaintiff asserted causes of action for violations of § 12.002 of the Civil Practice and Remedies Code, negligence per se, gross negligence per se, declaratory judgment pursuant to Chapter 37 of the Civil Practice and Remedies Code, civil conspiracy to commit fraud, fraud, and respondeat superior, based on allegations relating to the Substitute Trustee's Deed, the Notice of Rescission/Cancellation of Deed, and the Nationstar Assignment.[32]

On August 31, 2018, BANA filed its Motion for Summary Judgment with Supporting Memorandum of Law (the "BANA MSJ").[33] Also on August 31, 2018, CHLI filed its Motion for Summary Judgment with Supporting Memorandum of Law, and on the same day, CHLI filed its Corrected Motion for Summary

[28] CR. 549.
[29] CR. 549.
[30] CR. 549.
[31] CR. 17.
[32] CR. 17.
[33] SCR2. 5.

Judgment with Supporting Memorandum of Law (the "CHLI MSJ").[34] Contrary to Plaintiff's statements in the Opening Brief, BANA and CHLI did not file "no evidence" summary judgment motions; rather, BANA's and CHLI's summary judgment motions were filed as "traditional" motions for summary judgment.[35]

On October 4, 2018, Plaintiff filed her Opposition to the BANA MSJ and also filed an Opposition to the CHLI MSJ.[36] In connection with the Opposition papers, Plaintiff also moved to strike the affidavit and exhibits that supported the BANA MSJ and the CHLI MSJ.[37] On October 11, 2018, BANA filed its Reply in further support of the BANA MSJ, and on the same day, CHLI filed its Reply in further support of the CHLI MSJ.[38] On October 22, 2018, Plaintiff filed one sur-reply to both the BANA MSJ and the CHLI MSJ.[39] Plaintiff's sur-reply also addressed the motion for summary judgment filed by co-defendants David Stockman, Denise Boerner, and Donna Stockman.[40]

On October 30, 2018, the Trial Court granted summary judgment in favor of BANA and against the Eighth Amended Petition (the "BANA MSJ Order").[41]

[34] SCR2. 229; SCR2. 454.
[35] SCR2. 5; SCR2. 454.
[36] SCR2. 741; SCR2. 679.
[37] SCR2. 679.
[38] SCR2. 770; SCR2. 762.
[39] SCR2. 780.
[40] SCR2. 780.
[41] SCR2. 785.

That same day, the Trial Court also granted summary judgment in favor of CHLI and against the Eighth Amended Petition (the "CHLI MSJ Order").[42]

On November 5, 2018, Plaintiff filed a motion for reconsideration and clarification in regards to BANA MSJ Order, and a motion for reconsideration and clarification in regards to CHLI MSJ Order.[43] CHLI and BANA opposed Plaintiff's motions for reconsideration on November 20, 2018 and November 21, 2018, respectively, and on November 28, 2018, the Trial Court denied Plaintiff's motions for reconsideration.[44]

On November 9, 2018, BANA and CHLI filed the Motion to Sever in order to sever Plaintiff's claims against them from the claims still remaining against recently-added and late-served defendants.[45] On November 28, 2018, the Court granted the Motion to Sever and assigned Cause No. 048-304598-18 to the Severed Case.[46]

On December 20, 2018, Plaintiff moved to vacate the Severance Order.[47] On December 31, 2018, Plaintiff filed her Motion for New Trial.[48] Appellees opposed the Motion for New Trial on January 17, 2019, and they opposed the

[42] SCR2. 784.
[43] SCR2. 791; SCR2. 786.
[44] CR. 551.
[45] CR. 107.
[46] CR. 143.
[47] CR. 145.
[48] CR. 152; CR. 194.

Motion to Vacate on January 18, 2019.[49] By Order dated February 12, 2019, the Trial Court denied the Motion for New Trial.[50] By separate order dated February 12, 2019, the Trial Court denied the Motion to Vacate.[51]

On January 24, 2019, Plaintiff filed a Petition for Writ of Mandamus (the "Mandamus Petition"), in which she asked this Court to issue a writ of mandamus ordering the Trial Court to vacate the November 28, 2018 Severance Order based on an abuse of discretion. The Clerk docketed the Mandamus Petition as Case # 02-19-00022-cv. On February 7, 2019, this Court issued its Per Curiam Memorandum Opinion denying the Mandamus Petition and denying Plaintiff's motion for emergency relief. *See In re Nicholson*, No. 02-19-00022-cv, 2019 WL 490132 (Tex. Civ. App.—Fort Worth Feb. 7, 2019) (reconsideration en banc denied Mar. 14, 2019). On February 26, 2019, Plaintiff filed a motion for rehearing en banc, which this Court denied on March 14, 2019. *See id.*

On February 26, 2019, after this Court denied the Mandamus Petition, and concurrently with the filing of her motion for rehearing en banc, Plaintiff filed the Notice of Appeal, in which she appealed only the November 28, 2018 Severance Order and the February 12, 2019 Order Denying Motion for New Trial.[52] There is

[49] CR. 544; CR. 549.
[50] CR. 559.
[51] The Order denying the Motion to Vacate was not included in the Original Clerk's Record or any of the Supplemental Court Records. In any event, that order is not pertinent to this appeal because Plaintiff did not appeal it. *See* CR. 561.
[52] CR. 561.

no reference in the Notice of Appeal to the BANA MSJ Order or the CHLI MSJ Order, or Plaintiff's notice of her intent to appeal those interlocutory orders.[53] The next day, Plaintiff filed a letter with the District Court Clerk, in which she affirmatively stated:

> On February 26, 2019, I filed a "Notice of Appeal". The orders being appealed are entitled "Order Granting Bank of America and CHLI Motion to Sever signed on November 28, 2018" and "Order Denying Plaintiff's Motion for New Trial filed on December 28, 2018 and signed on February 12, 2019.[54]

Thus, Plaintiff ***twice represented*** to the parties and the Court that her appeal pertained only to the Severance Order and the Order Denying Motion for New Trial.[55] Conversely, Plaintiff did not provide any notice of her intent to appeal the interlocutory summary judgment orders.

SUMMARY OF THE ARGUMENT

The Court should affirm the Trial Court's orders because the record below shows that the Trial Court did not commit reversible error in disposing of Plaintiff's meritless case.

In her Opening Brief, Plaintiff identifies two issues for this Court to consider on appeal: whether the Trial Court erred in granting summary judgment for Appellees and whether the Trial Court abused its discretion in granting Appellees'

[53] CR. 561; *see also* CR. 564 (identifying the November 28, 2018 and February 12, 2019 orders as the "orders being appealed").
[54] CR. 564.
[55] CR. 561; CR. 564.

Motion to Sever. However, Plaintiff's first issue on appeal, as identified in the Opening Brief, is inconsistent with the Notice of Appeal and Plaintiff's February 27, 2019 letter to the District Court Clerk, in which Plaintiff identified only the November 28, 2018 Severance Order and the February 12, 2019 Order Denying Motion for New Trial and affirmatively stated that those orders were the "orders being appealed."[56] Because Plaintiff did not identify the Trial Court's interlocutory orders granting BANA's and CHLI's respective motions for summary judgment in the Notice of Appeal, the Court should find that it does not have appellate jurisdiction over those interlocutory orders. Alternatively, should the Court find that it has appellate jurisdiction over the BANA MSJ Order and the CHLI MSJ Order, it should affirm those interlocutory orders because the record below shows that the Trial Court properly granted summary judgment in favor of BANA and CHLI, and Plaintiff's arguments on appeal do not demonstrate reversible error by the Trial Court.

As to Plaintiff's second issue on appeal, i.e., whether the Trial Court abused its discretion in granting Appellees' Motion to Sever, this Court has already denied Plaintiff's Mandamus Petition, in which Plaintiff argued that the Trial Court abused its discretion in entering the Severance Order. *In re Nicholson*, No. 02-19-00022-cv, 2019 WL 490132 (Tex. Civ. App.—Fort Worth Feb. 7, 2019)

[56] CR. 561; CR. 564.

(reconsideration en banc denied Mar. 14, 2019). Thus, the Court should find that Plaintiff is bound by this Court's prior decision and that Plaintiff is not entitled to a second review of the Severance Order. Alternatively, to the extent the Court concludes that it has appellate jurisdiction over the Severance Order, it should affirm that order because the record below shows that the Trial Court did not abuse its discretion, and Plaintiff's arguments do not demonstrate reversible error.

Finally, Plaintiff's Opening Brief does not address the Trial Court's February 12, 2019 Order Denying Motion for New Trial. Thus, although Plaintiff listed that order in the Notice of Appeal, she has waived her appeal from that order by failing to provide any briefing or argument in relation to that order.

Accordingly, for the reasons set forth more fully below, the Court should affirm any and all orders it deems to be properly within its jurisdiction, and it should dismiss all or a portion of Plaintiff's appeal to the extent it determines that it lacks appellate jurisdiction.

ARGUMENT AND AUTHORITIES

I. The Court Should Dismiss Plaintiff's Improper Attempt to Appeal the Interlocutory Summary Judgment Orders for Lack of Jurisdiction Because Plaintiff Did Not Give Notice of Her Intent to Appeal Those Orders in the Notice of Appeal.

The Court should dismiss Plaintiff's first issue on appeal, in which she attempts to challenge the BANA MSJ Order and the CHLI MSJ Order, because Plaintiff's Notice of Appeal does not identify those interlocutory orders. As a

result of Plaintiff's failure to provide notice of her intent to appeal those orders, this Court lacks jurisdiction to review those orders on appeal.

The Texas Supreme Court has held that the specific language in a notice of appeal defines the scope of the appeal, thereby limiting the appellate court's jurisdiction. *Webb v. Jorns*, 488 S.W.2d 407, 409 (Tex. 1972). Appellate jurisdiction is never presumed, and issues relating to this Court's jurisdiction over an appeal may be raised at any time. *M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 673 (Tex. 2004); *Brashear v. Victoria Gardens of McKinney, L.L.C.,* 302 S.W.3d 542, 546 (Tex. App.—Dallas 2009, no pet.).

Rule 25.1(b) of the Texas Rules of Appellate Procedure states that the "filing of a notice of appeal by any party invokes the appellate court's jurisdiction over all parties to the trial court's judgment or order appealed from." Tex. R. App. P. 25.1(b). Here, the record below shows that the Severance Order is the "trial court's judgment" for purposes of Rule 25.1(b) because it disposed of all parties and all claims as between Plaintiff and Appellees. As a result, if Plaintiff sought to appeal from any order by the Trial Court in addition to the Severance Order, including any interlocutory orders or post-judgment orders by the Trial Court, she was required to identify those orders in the Notice of Appeal in order to invoke this Court's appellate jurisdiction over those orders.

In the Notice of Appeal, Plaintiff identified the Severance Order and the Order Denying Motion for New Trial as the "judgment or order appealed from," and she did not make any reference to the interlocutory BANA MSJ Order or the interlocutory CHLI MSJ Order.[57] Moreover, the day after she filed the Notice of Appeal, Plaintiff filed a letter with the District Court Clerk, in which she made clear that she was only appealing the Severance Order and the Order Denying Motion for New Trial, as she affirmatively stated:

> On February 26, 2019, I filed a "Notice of Appeal". **The orders being appealed are entitled** "Order Granting Bank of America and CHLI Motion to Sever signed on November 28, 2018" and "Order Denying Plaintiff's Motion for New Trial filed on December 28, 2018 and signed on February 12, 2019.[58]

Thus, Plaintiff twice represented to the parties and the Trial Court that her appeal pertained only to the Severance Order and the Order Denying Motion for New Trial.[59] Conversely, Plaintiff failed to provide any notice of her intent to appeal the interlocutory summary judgment orders.

In view of Plaintiff's affirmative representation in both the Notice of Appeal and the February 27, 2019 letter to the District Court Clerk that the Severance Order and the Order Denying Motion for New Trial were the only orders she was appealing, the Court should find that Plaintiff is bound by the Notice of Appeal,

[57] CR. 561.
[58] CR. 564 (emphasis added).
[59] CR. 561; CR. 564.

and it should conclude that the interlocutory BANA MSJ Order and CHLI MSJ Order are not within this Court's appellate jurisdiction. Thus, the Court should dismiss Plaintiff's appeal from those interlocutory orders for lack of jurisdiction.

II. Alternatively, to the Extent the Court Determines that It Has Appellate Jurisdiction Over the Interlocutory Summary Judgment Orders, the Court Should Overrule Plaintiff's First Issue on Appeal and Affirm those Summary Judgment Orders.

Alternatively, to the extent the Court determines that the BANA MSJ Order and the CHLI MSJ Order are properly within its jurisdiction, the Court should overrule Plaintiff's first issue on appeal and affirm the summary judgment orders. The record below shows that the Trial Court did not commit reversible error in granting summary judgment in favor of BANA and CHLI, and on appeal, Plaintiff has failed to negate all possible grounds for the grant of summary judgment and has failed to demonstrate reversible error by the Trial Court.

A. The Standard of Review

This Court reviews a trial court's decision to grant or deny a motion for summary judgment de novo. *Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007). Under the traditional standard for summary judgment, the movant has the burden to show that no genuine issue of material fact exists and that the trial court should grant judgment as a matter of law. Tex. R. Civ. P. 166a(c); *KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). The motion must state the specific

grounds relied upon for summary judgment. *See id.* A defendant moving for traditional summary judgment must conclusively negate at least one essential element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997) (citations omitted).

B. Plaintiff Failed to Negate All Possible Grounds Supporting the Grant of Summary Judgment on Appeal.

The record below shows that the Summary Judgment Orders do not specify the ground or grounds on which they were based.[60] In accordance with Texas law, a party appealing such orders must negate "***all possible grounds*** upon which the order could have been based by either asserting a separate issue challenging each possible ground, or asserting a general issue that the trial court erred in granting summary judgment and within that issue providing argument negating all possible grounds upon which summary judgment could have been granted." *Wilhite v. Glazer's Wholesale Drug Co.*, 306 S.W.3d 952, 954 (Tex. App.—Dallas 2010, no pet.) (emphasis added). If the appellant does not challenge each possible ground for summary judgment, this Court must uphold the summary judgment on the unchallenged ground. *Adams v. First Nat'l Bank of Bells/Savoy*, 154 S.W.3d 859, 875 (Tex. App.—Dallas 2005, no pet.) ("[A] reviewing court will affirm the summary judgment as to a particular claim if an appellant does not present

[60] SCR2. 785; SCR2. 784.

argument challenging all grounds on which the summary judgment could have been granted.").

Here, Plaintiff has failed to present argument challenging all grounds on which the BANA MSJ Order and the CHLI MSJ Order could have been granted in her Opening Brief. As the record below reflects, Appellees moved for summary judgment against the Petition on multiple grounds, including the application of the economic loss doctrine to Plaintiff's tort claims and Plaintiff's inability to prove one or more of the required elements of her claims for violation of Tex. Civ. Prac. & Rem. Code § 12.002, negligence per se, gross negligence per se, civil conspiracy to commit fraud, fraud, declaratory judgment, and agency and respondeat superior.[61] Yet, on appeal, Plaintiff does not address the economic loss doctrine, nor does she provide any factual or legal analysis of a single claim or claim element or provide any argument demonstrating reversible error by the Trial Court. *See generally* Op. Br. Additionally, Plaintiff does not refer the Court to any evidence in the record demonstrating that the Trial Court committed reversible error in granting summary judgment against her claims. *See* Op. Br. at 12-14. Instead, Plaintiff discusses the legal standards for a traditional motion for summary judgment and a no-evidence summary judgment—which is inapplicable here because Appellees did not seek summary judgment under the no-evidence

[61] SCR2. 5; SCR2. 454.

standard—and she provides a one paragraph argument for why she believes Appellees "were not entitled to summary judgment on any basis." *See id.*

The failure to adequately brief an issue or claim on appeal results in a waiver of the issue or claim on appeal. *Howell v. T S Commc'ns, Inc.*, 130 S.W.3d 515, 518 (Tex. App.—Dallas 2004, no pet.). Accordingly, because Plaintiff has failed to present argument challenging all grounds on which summary judgment could have been granted in Appellees' favor, and because Plaintiff has failed to adequately brief a single issue or claim in her Opening Brief, the Court should find that Plaintiff's briefing is inadequate to demonstrate reversible error, and it should affirm the BANA MSJ Order and the CHLI MSJ Order.

C. The Summary Judgment Record Shows the Trial Court Properly Granted Summary Judgment Against Plaintiff's Claims.

In the event the Court is inclined to engage in a review of the summary judgment record, in spite of Plaintiff's failure to adequately brief a single issue or claim in her Opening Brief, Appellees offer the following legal argument, out of an abundance of caution, which demonstrates that the Trial Court properly granted summary judgment in Appellees' favor and against Plaintiff's claims.

1. The Economic Loss Doctrine Barred Plaintiff's Tort Claims as a Matter of Law.

The Trial Court correctly granted summary judgment in Appellees' favor and against Plaintiff's causes of action for negligence per se, gross negligence per

se, and fraud (collectively, the "Tort Claims") because those claims were barred by the economic loss doctrine as a matter of law. The economic loss doctrine bars recovery in tort when a party's only injury is economic loss under a contract. *Acad. of Skills & Knowledge, Inc. v. Charter Sch., USA, Inc.*, 260 S.W.3d 529, 541 (Tex. App.—Tyler 2008, pet. denied); *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 495 (Tex. 1991); *UMLIC VP LLC v. T&M Sales and Envtl. Sys., Inc.*, 176 S.W.3d 595, 614 (Tex. App.—Corpus Christi 2005, pet. denied)). That is, if the only duty that is owed is created by contract, then the economic-loss doctrine is applicable. *Id.* Here, as discussed in the BANA MSJ and the CHLI MSJ, Plaintiff's Tort Claims stemmed from the contractual relationship between Plaintiff and Appellees created by the Note and Deed of Trust, and as a result, the economic-loss doctrine applied and barred Plaintiff's Tort Claims as a matter of law.[62] In opposing Appellees' motions for summary judgment, Plaintiff failed to provide any evidence to show the existence of a duty outside of the Note and Deed of Trust.[63] Thus, the Trial Court correctly granted BANA's and CHLI's respective motions for summary judgment against the Tort Claims, and this Court should affirm.

[62] SCR2. 23; SCR2. 473.
[63] SCR2. 679; SCR2. 741.

2. The Trial Court Correctly Granted Summary Judgment Against Plaintiff's Claim for Violation of § 12.002 of the Civil Practice and Remedies Code.

To prevail on her fraudulent lien claim brought pursuant to § 12.002 of the Civil Practice and Remedies Code and overcome BANA's and CHLI's respective motions for summary judgment, Plaintiff was required to raise a genuine issue of material fact regarding the following claim elements: "(1) the defendant made, presented, or used a document with knowledge that it was a fraudulent lien, (2) the defendant intended that the document be given legal effect, and (3) the defendant intended to cause plaintiff physical injury, financial injury, or mental anguish." *Merritt v. Davis*, 331 S.W.3d 857, 860 (Tex. App.—Dallas 2011, pet. denied) (citing Tex. Civ. Prac. & Rem. Code § 12.002(a)). The record below shows that Plaintiff did not carry her burden, and therefore, the Trial Court properly granted summary judgment in Appellees' favor.

Section 12.001 of the Civil Practice and Remedies Code defines a "lien" as "a claim in property for the payment of a debt and includes a security interest." Tex. Civ. Prac. & Rem. Code § 12.001(3). According to the Texas House's Bill Analysis, the purpose of Section 12.002 was to "creat[e] a private cause of action against a person who files fraudulent judgment liens or fraudulent documents purporting to *create* a lien or claim against real or personal property in favor of a person aggrieved by the filing." *Marsh v. JPMorgan Chase Bank, N.A.,*

888 F. Supp. 2d 805, 813 (W.D. Tex. 2012). (quoting House Comm. on Criminal Jurisprudence, Bill Analysis, Tex. H.B. 1185, 75th Leg., R.S. (1997)) (emphasis in original). Similarly, the Texas Senate's Bill Analysis states that "[t]his bill also provides for civil remedies by creating a private cause of action against a person who files fraudulent judgment liens or fraudulent documents purporting to *create* a lien against real or personal property." *Id.* (*quoting* Senate Jurisprudence Comm., Bill Analysis, Tex. H.B. 1185, 75th Leg. R.S. (1997)) (emphasis in original). Accordingly, "[b]ased on the plain meaning of the statute's words and the legislative history," § 12.002 applies only to a document purporting to create a claim against property. *Id.*

In the Petition, Plaintiff alleged as the basis for her § 12.002 claim that "Defendants made, presented, or used" the following documents with knowledge that they were fraudulent: (i) the Notice of Rescission/Cancellation of Deed recorded on July 31, 2014; (ii) the Nationstar Assignment recorded on February 17, 2015; and (iii) an assignment of the Deed of Trust recorded on December 17, 2017.[64] The record below shows that the Trial Court properly granted summary judgment against Plaintiff's § 12.002 claim and in favor of BANA and CHLI, respectively, because Plaintiff could not prove one or more elements of her § 12.002 claim against BANA and CHLI as a matter of law and undisputed fact.

[64] CR. 29.

a. Plaintiff's § 12.002 Claim Against BANA Failed.

To the extent Plaintiff alleged her § 12.002 claim against BANA, the claim failed as matter of law and undisputed fact. First, BANA provided summary judgment evidence which showed that BANA ceased servicing Plaintiff's Loan effective December 1, 2014, which was well before the Nationstar Assignment and the 2017 assignment were recorded.[65] Therefore, because BANA had no interest and claimed no interest in the Loan or the Property when the Nationstar Assignment and 2017 assignment were recorded, those documents were not actionable against BANA. Plaintiff appeared to concede this fact, as she did not make allegations against BANA in relation to those documents.[66]

Second, as to the portion of her § 12.002 claim relating to the Notice of Rescission/Cancellation of Deed recorded on July 31, 2014, Plaintiff also did not specifically assert that claim against BANA, as she only identified David Stockman, Donna Stockman, Denise Boerner, and ReconTrust Company as part of her claim, and she alleged that "David Stockman, Donna Stockman, Denise Boerner and Recontrust Company executed, signed, and filed a fraudulent document in the Tarrant County, Texas real property records purporting to reinstate a lien."[67]

[65] SCR2. 59.
[66] CR. 31-37.
[67] CR. 30-31.

Third, Plaintiff's claim failed as a matter of law and undisputed fact because the Notice of Rescission/Cancellation of Deed did not create a fraudulent lien or claim. Rather, the Notice of Rescission/Cancellation of Deed was a document that was recorded in the public record "to purge" the real property records of the substitute trustee's sale and the Substitute Trustee's Deed "as if such Deed had not been filed of record" because the notice of sale and the Substitute Trustee's Deed were invalid under Texas law.[68] As discussed above, the notice of sale and Substitute Trustee's Deed erroneously identified the Dallas County Courthouse—rather than the Tarrant County Courthouse—as the location for the substitute trustee's sale. [69] Therefore, because the Property was located in Tarrant County, the notice of sale did not comply with § 51.002 of the Texas Property Code. *See* Tex. Prop. Code § 51.002. The summary judgment evidence showed, therefore, that the Notice of Rescission/Cancellation of Deed was recorded in an attempt to clarify the real property records regarding the non-compliant notice of sale and invalid Substitute Trustee's Deed, and not due to fraud or fraudulent intent, and it did not constitute a fraudulent lien or claim.

Finally, Plaintiff's claim failed because Plaintiff did not provide any evidence to show that BANA "made, presented, or used" the Notice of Rescission/Cancellation of Deed with knowledge that it was a fraudulent lien, nor

[68] SCR2. 51.
[69] SCR2. 51.

did Plaintiff allege that BANA took such actions. Additionally, Plaintiff did not provide any evidence to show that the Notice of Rescission/Cancellation of Deed was fraudulent, or that BANA intended to cause Plaintiff to suffer physical injury, financial injury, or mental anguish in relation to the Notice of Rescission/Cancellation of Deed.

For all of these reasons, Plaintiff could not overcome BANA's motion for summary judgment. Thus, the Trial Court properly granted summary judgment in favor of BANA and against Plaintiff's § 12.002 claim. Because Plaintiff has not demonstrated reversible error by the Trial Court, this Court should affirm.

b. Plaintiff's § 12.002 Claim Against CHLI Failed.

To the extent Plaintiff alleged her § 12.002 claim against CHLI, the claim failed as matter of law and undisputed fact. First, CHLI was not a party to the Notice of Rescission/Cancellation of Deed or the 2017 assignment, and Plaintiff did not allege that it was. Therefore, those documents were not actionable against CHLI and could not serve as the basis for Plaintiff's § 12.002 claim.

Second, as to the portion her § 12.002 claim relating to the Nationstar Assignment, Plaintiff's claim failed as a matter of law and undisputed fact because an assignment is a ***transfer*** of an ***existing*** deed of trust from one entity to another,

and it does not represent the "creation" of a lien or claim.[70] *See, e.g., Lassberg v. Barrett Daffin Frappier Turner & Engel, LLP*, No. 4:13-CV-577, 2015 WL 123756, at *5 (E.D. Tex. Jan. 8, 2015) (an assignment does not create a lien); *Ferguson v. The Bank of New York Mellon Corp.*, No. H-13-279, 2014 WL 2815487, at *5 (S.D. Tex. June 23, 2014) (an assignment does not create a lien but "simply transfer[s] [it]"); *Medcalf v. Ocwen Loan Servicing LLC*, No. A-14-CA-096-SS, 2014 WL 2722325, at *3 (W.D. Tex. June 16, 2014) (an assignment is "not [a] lien[] or claim[] against the property; [it] merely reflect[s] an assignment of an actual claim").

Third, the Nationstar Assignment also was not a lien or claim because it did not convey any interest in the Deed of Trust, since MERS assigned the Deed of Trust to BONY in 2012, as previously discussed. *See Lance v. Robinson,* 543 S.W.3d 723, 743 (Tex. 2018) (holding "the Deed without Warranty did not convey any ownership interest in the dispute area … because the Franks had no such interest to convey"). The Nationstar Assignment, therefore, could not serve as the basis for Plaintiff's § 12.002 claim as a matter of law.

[70] Neither the Texas Supreme Court nor the Texas appellate courts have addressed the issue of whether an assignment of a deed of trust falls within the parameters of § 12.002. In an unpublished decision, the 1st Court of Appeals declined to address the issue of whether an assignment constitutes a "court record" or "lien" as those terms are defined in § 12.001, but affirmed the grant of summary judgment against a § 12.002 claim based on an assignment on other grounds, finding that the plaintiffs failed to present any evidence that the assignment was executed with the intent to cause them to suffer physical injury, financial injury, or mental anguish. *See Ybarra v. Ameripro Funding, Inc.*, No. 01-17-00224-cv, 2018 WL 2976126 (Tex. App.—Houston [1st Dist.] June 14, 2018, pet. denied).

Fourth, as to the remaining elements required for Plaintiff to prove her § 12.002 claim, Plaintiff did not provide any evidence to show that the Nationstar Assignment was executed with the intent to cause Plaintiff to suffer physical injury, financial injury, or mental anguish, nor did she provide any evidence to show that Plaintiff suffered damages as a result of the Nationstar Assignment. *See Ybarra*, 2018 WL 2976126, at * 8 (citing *Preston Gate, LP v. Bukaty*, 248 S.W.3d 892, 897 (Tex. App.—Dallas 2008, no pet.) (affirming grant of summary judgment on debtor's section 12.002 claim where record had no evidence that appellees intended to cause debtor financial injury) & *Lassberg v. Bank of Am., N.A.*, 660 F. App'x 262, 268–69 (5th Cir. 2016) (affirming grant of summary judgment on mortgagor's section 12.002 claim when mortgagor provided no evidence of how assignment of deed or appointment of substitute trustees were executed with intent to cause mortgagor injury)). This alone was fatal to Plaintiff's claim.

Finally, Plaintiff did not and could not provide evidence to show that CHLI played any role in "making, presenting, or using" the Nationstar Assignment, as those terms are used in § 12.002(a), because the document stated on its face that Nationstar prepared it as the purported attorney-in-fact for CHLI. Plaintiff also did not provide any evidence to show that CHLI authorized Nationstar to prepare the Nationstar Assignment as attorney-in-fact for CHLI, nor did she provide any evidence to show that the Nationstar Assignment was fraudulent, that CHLI had

actual knowledge that the Nationstar Assignment was fraudulent, or that CHLI intended that the Nationstar Assignment be given legal effect with knowledge that it was fraudulent.

For all of these reasons, Plaintiff could not overcome CHLI's motion for summary judgment, and the Trial Court properly granted summary judgment in favor of CHLI and against Plaintiff's § 12.002 claim. Because Plaintiff has not demonstrated reversible error by the Trial Court, this Court should affirm.

3. The Trial Court Correctly Granted Summary Judgment Against Plaintiff's Claim for Negligence Per Se.

Plaintiff alleged a claim against Appellees for negligence per se based on allegations that "Defendants were negligent per se in the misconduct alleged herein, … [including] violation of section 12.002… by filing false and deceptive record…."[71] Thus, Plaintiff's negligence per se claim stemmed from her § 12.002 claim, which as discussed above, failed as a matter of law and undisputed fact. On this basis alone, the Trial Court properly granted summary judgment in Appellees' favor and against Plaintiff's claim for negligence per se.

In addition, Plaintiff could not overcome Appellees' motions for summary judgment because Appellees demonstrated that Plaintiff could not prove one or more elements of her claim. The Texas Supreme Court has described negligence per se as "a tort concept whereby the civil courts adopt a legislatively imposed

[71] CR. 37.

standard of conduct as defining the conduct of a reasonably prudent person." *Moughon v. Wolf*, 576 S.W.2d 603, 604 (Tex. 1978); *see Reeder v. Daniel*, 61 S.W.3d 359, 361-62 (Tex. 2001). "To establish negligence per se, a plaintiff must prove: (1) the defendant's act or omission is in violation of a statute or ordinance; (2) the injured person was within the class of persons which the ordinance was designed to protect; and (3) the defendant's act or omission proximately caused the injury." *Ambrosio v. Carter's Shooting Ctr., Inc.*, 20 S.W.3d 262, 265 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (citations omitted). Here, Plaintiff did not provide any evidence to show that Appellees committed a statutory violation, nor did she provide any evidence to show that she was within a class of persons which the statute or ordinance was designed to protect. Additionally, Plaintiff did not provide any evidence to show that she suffered any injury or damages in relation to her § 12.002 claim, as discussed above.

For all of these reasons, Plaintiff's negligence per se claim failed as a matter of law and undisputed fact, and the Trial Court correctly granted summary judgment in favor of Appellees. Because Plaintiff has not demonstrated reversible error by the Trial Court, this Court should affirm.

4. The Trial Court Correctly Granted Summary Judgment Against Plaintiff's Claim for Gross Negligence Per Se.

In addition to her negligence per se claim, Plaintiff alleged a claim for "gross negligence per se," based on the same allegations as those she made in

support of her failed negligence per se and § 12.002 claims.[72] No Texas court has recognized "gross negligence per se" as a cause of action in Texas, and to the extent Plaintiff intended to allege a claim for gross negligence, the claim failed as a matter of law and undisputed fact.

To recover for gross negligence, Plaintiff was required to prove that: (1) viewed objectively from the standpoint of the actor, the act or omission involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) the actor had actual, subjective awareness of the risk involved, but nevertheless proceeded in conscious indifference to the rights, safety, or welfare of others. *Boerjan v. Rodriguez*, 436 S.W.3d 307, 311 (2014); Tex. Civ. Prac. & Rem. Code § 41.001(11). However, Plaintiff did not provide any evidence to show how the recording of the documents on which she based her claim involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others or acts performed with a conscious indifference to the rights, safety, or welfare of others. Additionally, Plaintiff did not provide any evidence to show that Appellees had "actual, subjective awareness of the risk involved," or took any actions in conscious indifference to the rights, safety, or welfare of others. Thus, because Plaintiff could not prove one or more elements of her claim, the Trial Court correctly granted summary judgment against

[72] CR. 37.

Plaintiff's claim for gross negligence. Because Plaintiff has failed to demonstrate reversible error on appeal, this Court should affirm.

5. The Trial Court Correctly Granted Summary Judgment Against Plaintiff's Claim for Civil Conspiracy to Commit Fraud.

In the Petition, Plaintiff brought a claim for "civil conspiracy to commit fraud." In support of her claim against BANA, Plaintiff alleged that BANA "relied on the Notice of Rescission to reinstate Plaintiff's loan without notifying Plaintiff or the Court" and that BANA "allegedly transferred servicing of the reinstated loan to Nationstar Mortgage to service and collect."[73] In support of her claim against CHLI, Plaintiff alleged that "Countrywide Home Loans, Inc. (defunct entity) relied on Notice of Rescission to allegedly assign Plaintiff's Deed of Trust to Bank of New York Mellon as Trustee on February 17, 2015."[74] Because Plaintiff did not and could not prove one or more elements of her claim for conspiracy, the Trial Court properly granted summary judgment against it.

An action for civil conspiracy has five elements: (1) a combination of two or more persons; (2) the persons seek to accomplish an object or course of action; (3) the persons reach a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts are taken in pursuance of the object or course of action; and (5) damages occur as a proximate result. *Tri v. J.T.T.*, 162 S.W.3d

[73] CR. 44.
[74] CR. 44.

552, 556 (Tex. 2005). An actionable civil conspiracy requires specific intent to agree to accomplish something unlawful or to accomplish something lawful by unlawful means. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 222 (Tex. 2017). As the Texas Supreme Court has held:

> For a civil conspiracy to arise, the parties must be aware of the harm or the wrongful conduct at the beginning of the combination or agreement [or when the party joins the conspiracy].… One cannot agree, expressly or tacitly, to commit a wrong about which he has no knowledge.

Firestone Steel Prods. Co. v. Barajas, 927 S.W.2d 608, 614 (Tex. 1996) (citing *Triplex Commc'ns, Inc. v. Riley*, 900 S.W.2d 716, 719 (Tex. 1995) ("[C]ivil conspiracy requires specific intent. For a civil conspiracy to arise, the parties must be aware of the harm or wrongful conduct at the inception of the combination or agreement.")). Thus, intent and knowledge are required elements of any conspiracy claim.

Here, as to her claim against BANA, Plaintiff's conclusory allegation that "Defendants devised or intended to devise a scheme or artifice to defraud Plaintiff and this court and execute this scheme or artifice by recording [the Notice of Rescission] to coerce Plaintiff to start loan repayment to reinstate the loan contract by deception," failed as a matter of law and fact.[75] That is because the summary judgment evidence presented by BANA showed that David Stockman, the

[75] CR. 45.

substitute trustee, did not record the Notice of Rescission/Cancellation of Deed for the purpose of fraud or with any fraudulent intent, as the summary judgment record showed that he recorded the Notice of Rescission/Cancellation of Deed for the purpose of clarifying the public record regarding the invalid Substitute Trustee's Deed, which resulted from a defective notice of sale and defective substitute trustee's sale, as previously discussed.[76] In response to the BANA MSJ, Plaintiff did not provide any evidence to show that BANA acted with the "specific intent" to agree to accomplish something unlawful or to accomplish something lawful by unlawful means, nor did she provide evidence to show that BANA had knowledge of such an agreement. Plaintiff also did not provide evidence to show that she suffered any damages as a result of the recording of the Notice of Rescission/Cancellation of Deed. Finally, Plaintiff did not provide any evidence to show that any of the alleged actions constituted fraud, as discussed *infra* in relation to Plaintiff's common law fraud claim. For all of these reasons, the Trial Court properly granted summary judgment in favor of BANA and against Plaintiff's claim for civil conspiracy, and this Court should affirm.

As to Plaintiff's claim against CHLI, Plaintiff's conclusory allegation that "Defendants devised or intended to devise a scheme or artifice to defraud Plaintiff and this court and execute this scheme or artifice by recording [the Notice of

[76] SCR2. 51.

Rescission] to coerce Plaintiff to start loan repayment to reinstate the loan contract by deception," failed as a matter of law and fact.[77] First, CHLI was not a party to the substitute trustee's sale, the Substitute Trustee's Deed, or the Notice of Rescission/Cancellation of Deed, and Plaintiff did not provide any evidence to show that it was. Second, as previously discussed, the Nationstar Assignment was duplicative of the 2012 Assignment, which had already assigned the Deed of Trust to BONY.[78] Thus, the 2012 Assignment was not "unlawful." Third, as discussed above in relation to Plaintiff's § 12.002 claim, Plaintiff did not provide any evidence to show that CHLI had any involvement in the making, presenting, or use of the Nationstar Assignment, that CHLI authorized Nationstar to prepare the Nationstar Assignment as its attorney-in-fact, that CHLI acted with the "specific intent" to agree to accomplish something unlawful or to accomplish something lawful by unlawful means, or that CHLI had knowledge of such an agreement. Fourth, Plaintiff did not provide any evidence to show that she suffered any damages as a result of the Nationstar Assignment. Finally, Plaintiff did not provide any evidence to show that any of the alleged actions constituted fraud, as discussed *infra* in relation to Plaintiff's common law fraud claim. For all of these reasons, the Trial Court properly granted summary judgment in favor of CHLI and against Plaintiff's claim for civil conspiracy, and this Court should affirm.

[77] CR. 45.
[78] SCR2. 54; SCR2. 45.

6. The Trial Court Correctly Granted Summary Judgment Against Plaintiff's Claim for Common Law Fraud.

In the Petition, Plaintiff asserted a claim for fraud against all defendants. As with her claim for civil conspiracy against BANA, Plaintiff alleged that BANA "relied on the Notice of Rescission to reinstate Plaintiff's loan without notifying Plaintiff or the Court" and that BANA "allegedly transferred servicing of the reinstated loan to Nationstar Mortgage to service and collect."[79] Likewise, as with her claim for civil conspiracy against CHLI, Plaintiff alleged that "Countrywide Home Loans, Inc. (defunct entity) relied on Notice of Rescission to allegedly assign Plaintiff's Deed of Trust to Bank of New York Mellon as Trustee on February 17, 2015."[80] As with her claim for civil conspiracy, Plaintiff could not prove one or more elements of her fraud claim against Appellees, and as a result, the Trial Court properly granted summary judgment against it.

To prevail on her claim for common law fraud, Plaintiff was required to prove that (i) Appellees made a representation to Plaintiff; (2) the representation was material; (3) the representation was false; (4) when Appellees made the representation, Appellees knew it was false or made the representation recklessly and without knowledge of its truth; (5) Appellees made the representation with the intent that Plaintiff act on it; (6) Plaintiff relied on the representation; and (7) the

[79] CR. 46.
[80] CR. 47.

representation caused the plaintiff injury. *See Ernst & Young, LLP v. Pacific Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001). Plaintiff, however, failed to provide any evidence regarding ***any*** *representation* made by BANA to Plaintiff, or by CHLI to Plaintiff, *on which she detrimentally relied*, let alone one that was *material or false*. This alone was fatal to her claim for fraud.

Additionally, Plaintiff did not provide any evidence to show that BANA or CHLI made a knowingly false representation to Plaintiff or that either BANA or CHLI made a misrepresentation to Plaintiff recklessly and without knowledge of its truth. Likewise, Plaintiff did not provide any evidence to show that either BANA or CHLI made a knowing or reckless misrepresentation of fact to Plaintiff with the intent that she rely on the misrepresentation to her detriment. Finally, Plaintiff did not and could not demonstrate detrimental reliance because, as the summary judgment record reflects, Plaintiff testified in open court that she never left the Property and that she did not pay any rent to BONY following the substitute trustee's sale.[81] Thus, there was no detrimental reliance, and no damages suffered, by Plaintiff to support a fraud claim.

For all of these reasons, the Trial Court properly granted summary judgment in favor of Appellees and against Plaintiff's claim for fraud, and this Court should affirm.

[81] SCR2. 164-166; SCR2. 188-189.

7. The Trial Court Correctly Granted Summary Judgment Against Plaintiff's Claim for Declaratory Relief.

In the Petition, Plaintiff asked the Trial Court to make numerous declarations in her favor pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code, also known as the Uniform Declaratory Judgment Act (the "UDJA").[82] Plaintiff, however, was not entitled to declaratory relief as against Appellees because there was no justiciable controversy between Plaintiff and Appellees that would support declaratory relief.

The UDJA confers on Texas courts the authority to "declare rights, status, and other legal relations whether or not further relief is or could be claimed." Tex. Civ. Prac. & Rem. Code Ann. § 37.003. The Legislature intended the UDJA to be remedial, to settle and afford relief from uncertainty and insecurity with respect to rights, and to be liberally construed. *Id.* A declaratory judgment under the UDJA is appropriate only if: (1) a justiciable controversy exists as to the rights and status of the parties; and (2) the controversy will be resolved by the declaration sought. *See Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995). A justiciable controversy is one in which a real and substantial controversy exists involving a genuine conflict of tangible interest and not merely a theoretical dispute. *Id.*

Here, no justiciable controversy existed between Plaintiff and Appellees to support declaratory relief because, as discussed above, neither BANA nor CHLI

[82] CR. 38-41.

held or claimed to hold any interest in the Deed of Trust or the Property when Plaintiff filed her lawsuit. As the summary judgment record shows, MERS assigned the Deed of Trust to the BONY Trustee in 2012, and BANA was a former servicer of the Loan, having ceased servicing on November 30, 2014.[83] Thus, there was no justiciable controversy as to the rights and status of Plaintiff vis-à-vis Appellees. Accordingly, the Trial Court properly granted summary judgment in favor of Appellees and against Plaintiff's requests for declaratory judgment, and this Court should affirm.

8. Plaintiff's Claims for Agency and Respondeat Superior Failed.

As part of her extensive, 90-page Petition, Plaintiff alleged that BANA should be held liable for the actions of defendants David Stockman, Donna Stockman, Denise Boerner, and ReconTrust, (collectively, the "BANA Alleged Tortfeasors"), and that CHLI should be held liable for the actions of defendants Nationstar and William Viana (collectively, the "CHLI Alleged Tortfeasors"), under theories of agency and respondeat superior.[84] Plaintiff, however, was not entitled to relief against BANA or CHLI under either theory of liability.

As to her agency claim against BANA, Plaintiff did not provide any evidence to show that the BANA Alleged Tortfeasors were acting as agents of

[83] SCR2. 45; SCR2. 59; SCR2. 71.
[84] CR. 48.

BANA, or that: (i) she had a reasonable belief in the agent's authority, (ii) her belief was generated by some act or neglect of BANA, and (iii) she was justified in relying upon the representation of authority. *See Valdez v. Pasadena Healthcare Management, Inc.*, 975 S.W.2d 43, 46 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). Likewise, as to her agency claim against CHLI, Plaintiff did not provide any evidence to show that the CHLI Alleged Tortfeasors were acting as agents of CHLI, or that: (i) she had a reasonable belief in the agent's authority, (ii) her belief was generated by some act or neglect of CHLI, and (iii) she was justified in relying upon the representation of authority. *See id.* Thus, the Trial Court properly granted summary judgment in favor of Appellees and against Plaintiff's agency claim, and this Court should affirm.

In addition, as to her claim for respondeat superior, Plaintiff did not provide any evidence to show that the BANA Alleged Tortfeasors were agents or employees of BANA, or that the CHLI Alleged Tortfeasors were agents or employees of CHLI, for purposes of respondeat superior. Under the doctrine of respondeat superior, an employer can be held vicariously liable for the negligence of an agent or employee acting within the scope of his or her agency or employment, although the principal or employer has not personally committed a wrong. *Baptist Memorial Hosp. System v. Sampson*, 969 S.W.2d 945, 947 (1998). Because Plaintiff did not provide any evidence to show that BANA was the

employer of the Alleged Tortfeasors, or that CHLI was the employer of Nationstar or William Viana, respondeat superior was inapplicable. Thus, the Trial Court properly granted summary judgment in favor of Appellees and against Plaintiff's respondeat superior claim, and this Court should affirm.

III. Plaintiff Is Bound by this Court's Prior Determination that the Trial Court Did Not Abuse its Discretion in Entering the Severance Order.

In the second issue on appeal, Plaintiff argues that the Trial Court abused its discretion in entering the Severance Order. However, this is the second time that Plaintiff has posed this issue to this Court, as Plaintiff sought mandamus review of the Severance Order before she filed the Notice of Appeal. On February 7, 2019, this Court issued a Per Curiam Memorandum Opinion, which denied Plaintiff's petition for writ of mandamus and motion for emergency relief. *In re Nicholson*, No. 02-19-00022-cv, 2019 WL 490132 (Tex. Civ. App.—Fort Worth Feb. 7, 2019) (reconsideration en banc denied Mar. 14, 2019). On March 14, 2019, the Court denied Plaintiff's motion for reconsideration en banc. *Id.* Accordingly, the Court should find that Plaintiff is bound by its prior determination, vis-à-vis the Mandamus Petition and denial of her motion for reconsideration en banc, that the Trial Court did not abuse its discretion, and it should dismiss Plaintiff's appeal from the Severance Order.

IV. Alternatively, to the Extent the Court Finds that Plaintiff Is Not Bound by Its Prior Order, the Court Should Find that the Trial Court Did Not Abuse its Discretion in Entering the Severance Order.

Alternatively, to the extent the Court is inclined to consider Plaintiff's appeal from the Severance Order, the Court should find that the Trial Court did not abuse its discretion in entering the Severance Order, and it should overrule Plaintiff's second issue on appeal.

A. The Standard of Review

Rule 41 of the Texas Rules of Civil Procedure governs the severance of claims and states that "[a]ny claim against a party may be severed and proceeded with separately." Tex. R. Civ. P. 41. Rule 41 affords trial courts broad discretion in the severance of causes of action. *Guaranty Fed. Sav. Bank v. Horseshoe Operating Co.,* 793 S.W.2d 652, 658 (Tex. 1990). This Court reviews a trial court's decision to grant or deny a motion to sever claims for an abuse of discretion. *Liberty Nat. Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 629 (Tex. 1996); *Guaranty,* 793 S.W.2d at 658.

B. The Trial Court Did Not Abuse its Discretion.

The Court should find that the Trial Court properly exercised its broad discretion on matters of severance and correctly severed Plaintiff's claims against Appellees from the Original Case. The Texas Supreme Court has held that a trial court properly exercises its discretion in severing claims when: (1) the controversy involves more than one cause of action; (2) the severed claim is one that could be

asserted independently in a separate lawsuit; and (3) the severed actions are not so interwoven with the other claims that they involve the same facts and issues. *Guaranty Fed.,* 793 S.W.2d at 658. "The controlling reasons for a severance are to do justice, avoid prejudice, and further convenience." *Id.*

As the record below shows, during the course of proceedings before the Trial Court, Plaintiff filed eight amended petitions, in which she continued to add new claims and new defendants in an effort to delay the resolution of her case. For example, Plaintiff added new defendants Donna Stockman, Denise Boerner, William Viana and Trefe Treckle to the case when she filed the Seventh Amended Petition on June 8, 2018.[85] Additionally, defendants ReconTrust and Harvey Law Group, which had been previously named, were not served with citation until July 24, 2018.[86] Thus, Plaintiff's litigation against at least those six defendants was only weeks old when BANA and CHLI filed their respective motions for summary judgment on August 31, 2018.[87] Therefore, it would have been unfair to make BANA and CHLI—whose motions for summary judgment were granted on October 30, 2018, after more than two years of litigation and eight amended petitions by Plaintiff—to have to wait an indeterminate amount of time for Plaintiff to litigate her claims against the other nine defendants named in the case before

[85] CR. 549.
[86] CR. 549.
[87] SCR2. 5; SCR2. 229; SCR2. 454.

obtaining a final and appealable judgment. Additionally, the resolution of Plaintiff's claims against Appellees had no bearing on the remaining defendants' purported liability because the other defendants were separate entities with separate interests. Thus, the severed claims were not so interwoven with Plaintiff's claims against the remaining defendants, and Plaintiff could have filed separate lawsuits against each separate defendant. Thus, the Severance Order furthered the interests of justice, avoidance of prejudice, and convenience.

Where summary judgment in favor of a single defendant is proper in a case with multiple defendants, severance of that claim is proper so that it may be appealed. *Cherokee Water Co. v. Forderhause,* 641 S.W.2d 522, 526 (Tex. 1982); *Arredondo v. City of Dallas*, 79 S.W.3d 657, 665 (Tex. App.—Dallas 2002, pet. denied); *Smith v. Texas Farmers Ins. Co.*, 82 S.W.3d 580, 588 (Tex. App. 2002—San Antonio, pet. denied); *Guidry v. National Freight, Inc.*, 944 S.W.2d 807, 812 (Tex. App.—Austin 1997, no writ). Here, the record shows that the Trial Court properly granted summary judgment and disposed of Plaintiff's claims against Appellees. Likewise, the Trial Court properly exercised its broad discretion in granting the Motion to Sever, thus allowing Appellees to obtain a final and appealable judgment after over two years of litigation, while Plaintiff continued to litigate against the remaining defendants. The Court should, therefore, find that the

Trial Court did not abuse its discretion, and it should overrule Plaintiff's second issue on appeal and affirm the Severance Order.

CONCLUSION AND PRAYER

For the reasons stated herein, the Court should affirm any and all orders it deems to be properly within its jurisdiction, and it should dismiss all or a portion of Plaintiff's appeal to the extent it determines that it lacks appellate jurisdiction.

This the 16th day of October, 2019.

/s/Connie Flores Jones
Connie Flores Jones
WINSTON & STRAWN LLP
1111 Louisiana Street ~ 25th Floor
Houston, TX 77002
(713) 651-2600
(713) 651-2700
cflores@winston.com

CERTIFICATE OF COMPLIANCE WITH TEX. R. APP. P. 9.4(I)(2)(B)

This brief complies with the type-volume limitation of Tex. R. App. P. 9.4(i)(2)(B) because, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(1), it contains 10,318 words.

This the 16th day of October, 2019.

/s/ Connie Flores Jones

Connie Flores Jones
WINSTON & STRAWN LLP
1111 Louisiana Street ~ 25th Floor
Houston, TX 77002
(713) 651-2600
(713) 651-2700
cflores@winston.com

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2019, I caused a copy of the foregoing BRIEF OF APPELLEES BANK OF AMERICA, N.A. AND COUNTRYWIDE HOME LOANS, INC. to be electronically filed and served through the court's eFileTexas.gov service, and to be served on the following by depositing a copy of the foregoing in a depository of the United States Postal Service, first-class, postage prepaid, addressed as shown below:

Harriet Nicholson
2951 Santa Sabina Drive
Grand Prairie, Texas 75052

/s/Connie Flores Jones
Connie Flores Jones