No. 92361-2

SUPREME COURT
OF THE STATE OF WASHINGTON

DARLENE HOBBS and JOEL HOBBS,

Plaintiffs-Petitioners

v.

NORTHWEST TRUSTEE SERVICES, INC., and WELLS FARGO BANK, N.A.,

Defendants-Respondents

ON PETITION FOR REVIEW FROM
COURT OF APPEALS, DIVISION I
(COA No.: 71143-1-I)

RESPONDENT WELLS FARGO BANK, N.A.'S RESPONSE TO PETITIONER'S PETITION FOR REVIEW

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I. INTRODUCTION & SUMMARY OF ARGUMENT

Petitioners Joel and Darlene Hobbs (Hobbs) have been in default on their loan for more than four years. They admit Wells Fargo Bank NA (Wells Fargo) is the note holder and the note owner is Federal Home Loan Mortgage Corporation (Freddie Mac). The trial court and Court of Appeals rejected the Hobbs' erroneous legal theory that a beneficiary of a deed of trust must be *both* the note holder and the note owner to initiate a trustee's sale. Subsequently, this Court rejected their theory in *Brown v. Dep't of Commerce*, --- Wn.2d ---, 359 P.3d 771, 2015 WL 6388153 (2015).

The rule laid down in *Brown* is stare decisis in this case involving identical material facts. *Brown* rules that the note holder -- not the note owner – may provide a declaration under penalty of perjury satisfying the Deed of Trust Act (DTA)'s proof of beneficiary provisions. *Brown*, 359 P.3d at 787 ¶ 72; *id.* at 789, ¶ 80. Wells Fargo provided that kind of declaration in this case. CP 298. The declaration did not contain the disjunctive "or has the requisite authority to enforce..." text that this Court held created ambiguity in *Trujillo v. Nw. Tr. Servs.*, 181 Wn. App. 484, 326 P.3d 768 (2014), *rev'd in part*, 183 Wn.2d 820, 355 P.3d 1100 (2015) and *Lyons v. U.S. Bank N.A.*, 181 Wn.2d 775, 336 P.3d 1142 (2014).

This case's core issue is the core issue this Court decided in *Brown*. The note owner is Freddie Mac in this case, just as in *Brown*. The same background of "Freddie Mac's Practices in the Secondary Market for Notes" and "The Rights of Note Holders and Note Owners under the UCC" frames this case and was the relevant background in *Brown*. *Brown*, 359 P.3d at 776-78 (subheadings 2 and 3 under Background). A bank is the note holder and servicer, just as in *Brown*. The note holder is entitled to initiate a trustee's sale, just as in *Brown*. The Hobbs have not shown the rule confirming the note holder's authorization to initiate a trustee sale laid out in *Brown* is incorrect and harmful. Therefore, this Court should deny their petition, for the reasons more fully developed below.

II. COUNTERSTATEMENT OF THE CASE

A. The Hobbs Defaulted on Uniform Secured Note.

In 2006, Darlene Hobbs borrowed $235,000 from MortgageIT, evidenced by a uniform secured note. CP 471, 309-18, 538-546. The note is secured by a deed of trust against their house in Seattle. CP 471; 135-163. The uniform note disclosed that MortgageIT could transfer the note and that "anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.'" CP 309-310, 538. The deed of trust disclosed that the note and deed of trust could

be sold without notice to the Hobbs, and the loan servicer who collects payments and performs other services could change without a sale of the note. CP 135-136, 146.

The Hobbs admit they defaulted on the loan by failing to make payments starting in May 2011. CP 471, 486, 498.

B. Wells Fargo Possessed the Indorsed In Blank Note.

Fifteen months after the Hobbs defaulted on the loan, Wells Fargo received the original collateral file (including the note and deed of trust) from its corporate trustee services facility in August 2012. CP 322.[1] The note indicates that MortgageIT specifically indorsed the note to Wells Fargo and Wells Fargo indorsed the note in blank. CP 541. Freddie Mac purchased the loan, and Wells Fargo retained the right to service the loan. Brief of Appellants (Br. of App.) at 6; CP 322.

C. The Beneficiary Declaration Identifies Wells Fargo as the Note Holder and Freddie Mac As the Note Owner.

Three weeks after Wells Fargo received the collateral file, Northwest Trustee Services, Inc. (NWTS) as Wells Fargo's agent issued a notice of default, dated September 25, 2012, itemizing an arrearage of almost $30,000. CP 293-298. Five days later, Wells Fargo executed a

[1] Contrary to the Hobbs' implication, the fact that a servicer would store a note in a corporate vault is entirely expected and appropriate. *See Barton v. JP Morgan Chase Bank, N.A.*, No. C13-0808RSL, 2013 WL 5574429, *1 (W.D. Wash. Oct. 9, 2013) (recognizing that "[o]riginal promissory notes are bearer paper: the holder of the note has the right to collect payments thereunder according to its terms. It is hardly surprising that original notes are not bandied about or otherwise put at risk of loss or destruction.").

"Beneficiary's Declaration of Ownership of Note," identifying Wells Fargo as the actual holder of the Note and Freddie Mac as the actual owner of the Note. CP 298.

MERS executed a corporate assignment of deed of trust in favor of Wells Fargo, which was recorded on November 16, 2012. CP 170. NWTS was appointed the successor trustee nine weeks later on January 17, 2013. CP 172. Five days later, NWTS recorded a notice of trustee's sale that set a trustee's sale for May 31, 2013. CP 178-180. NWTS subsequently postponed the sale to June 21, 2013. CP 184.

D. The Court of Appeals Concluded a Note Holder May Satisfy the Beneficiary Declaration Requisite for A Trustee's Sale.

Ten days before the rescheduled sale, the Hobbs sued to restrain the trustee's sale and to recover damages from Wells Fargo and NWTS. CP 469-473. The parties stipulated to an injunction against the sale on the condition that the Hobbs make the monthly payments required by RCW 61.24.130. CP 504; Br. of App. at 8.

On August 28, 2013, the court granted Wells Fargo's and NWTS' motions for summary judgment dismissal. CP 440-44. The court denied the Hobbs' reconsideration motion, and the Hobbs appealed. CP 466.

E. The Hobbs Petitioned for Review Before this Court Decided *Brown*.

In July 2015, the Court of Appeals affirmed the summary judgment dismissal. *See Hobbs v. Nw. Tr. Servs. Inc.*, 188 Wn. App. 1057, 2015 WL 4400516, at *1 (2015). The unpublished decision was decided after this Court heard in June 2015 the oral argument in *Trujillo v. Nw. Tr. Servs. Inc.*, 183 Wn.2d 820, 355 P.3d 1100 (2015) *reversing in part*, 181 Wn. App. 484, 510, 326 P.3d 768 (2014). *Compare Hobbs*, 188 Wn. App. 1057 (decided Jul. 20, 2015*) with Trujillo*, 183 Wn.2d at 820 (argued on June 23, 2015).

The Court of Appeals denied the Hobbs' reconsideration motion after this Court decided *Trujillo*. *See Trujillo*, 183 Wn.2d at 820 (decided on August 20, 2015). The Hobbs petitioned for review on October 5, 2014. Seventeen days later, this Court decided *Brown*.

III. ARGUMENT AGAINST DISCRETIONARY REVIEW

Brown resolves the core issues the Hobbs ask this Court to review. They claim review is warranted under RAP 13.4(b)(1) and (b)(4). These subsections permit discretionary review if the decision in question "is in conflict with a decision of the Supreme Court" or "involves an issue of substantial public interest that should be determined by the Supreme Court," respectively. The unanimous *Brown* decision, however,

harmonizes the prior decisions and the text of the DTA. The *Brown* decision also resolved the unresolved question of substantial public interest raised in the petition. *Accord State ex. rel. Evans v. Amusement Ass'n of Washington*, 7 Wn. App. 305, 308 499 P.2d 906 (1972) (ruling repeal of statutes and adoption of new statutes mooted declaratory relief about status of pinball machines as possibly gambling devices; and ruling there was no reason to apply the continuing and substantial public interest exception to the rule against deciding moot questions).

A. *Brown* Broadly Holds the Note Holder Is the Proper Party to Authorize a Nonjudicial Foreclosure.

Brown construes four provisions in the Deed of Trust Act: the definition of beneficiary, the proof of beneficiary status in two subsections, and the mediation exemption. *Brown*, 359 P.3d at 784, ¶ 47 (citing RCW 6.24.005(2) (definition of "beneficiary"), .163(5)(c) (proof of beneficiary status), .030(7) (proof of beneficiary status), .166 (mediation exemption provision). The court concluded: "In cases such as this one, where the holder and the owner of the note are different entities, we conclude these provisions are ambiguous." *Id.* Construing the ambiguous statute, the court analyzed the statutory text and context with the goal of "adopt[ing] the 'interpretation that best advances the perceived legislative purpose." *Id.* at 782-87, ¶ 71. The court determined:

> The legislature's clear purpose was to ensure the party with the authority to enforce and modify the note is the party engaging in mediation and foreclosure. As discussed above, the holder of the note, the PETE, is the person with the authority to enforce and modify the note.

Id. ¶ 71. In view of that purpose, the court stated its holding:

> We hold that a party's undisputed declaration submitted under penalty of perjury that it is the holder of the note satisfies RCW 61.24.030(7)(a)'s requisite to a trustee sale and RCW 61.24.163(5)(c)'s proof of beneficiary provision for FFA mediation.

Id. ¶ 72.

The "Conclusion" section of *Brown* reiterates the same holding:

> We hold a party satisfies the proof of beneficiary provisions RCW 61.24.030(7)(a) and RCW 61.24.163(5)(c) when it submits an undisputed declaration under penalty of perjury that it is the actual holder of the promissory note. That party is the beneficiary for the purposes of the mediation exemption provision, RCW 61.24.166, because the note holder is the party entitled to modify and enforce the note.

Id. at 789, ¶ 80 (underlining added).

The first underlined sentence broadly states the rule for satisfying the beneficiary provisions: that rule is the note holder may satisfy those provisions. *Id.* at 789, ¶ 80.

The second sentence states the same rule applied to the mediation exemption provision: the note holder is the beneficiary for the purpose of determining exemption from mediation. *Id.* The second sentence clarifies

the note holder is "the person entitled to modify and enforce the note." *Id.* Under Article 3 of the UCC, the note holder is the "person entitled to enforce" (PETE) under the first method of obtaining PETE status under RCW 62A.3-301 – being a holder of the negotiable instrument (note). *See Brown*, 359 P.3d at 783, ¶ 55.

Brown's unremarkable holding is that the note holder/PETE may initiate a nonjudicial foreclosure – a trustee's sale – under the DTA.

B. *Brown's* Holding is Stare Decisis for This Case Involving the Same Facts.

Stare decisis "means no more than that the rule laid down in any particular case is applicable only to the facts in that particular case or to another case involving identical or substantially similar facts." *Floyd v. Dep't of Labor & Indus.*, 44 Wn.2d 560, 565, 269 P.2d 563 (1954) (emphasis omitted). The doctrine of stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 347, 217 P.3d 1172 (2009) (ruling documents in court case files were not required to be disclosed under the Public Records Act); *see Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 282, 358 P.3d 1139 (2015). This respect for precedent "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and

contributes to the actual and perceived integrity of the judicial process." *Koenig*, 167 Wn.2d at 347.[2]

The precedential holding of *Brown* (quoted above) is the outcome determinative rule in this case. *Brown* is stare decisis, requiring the denial of the petition. Here, Wells Fargo "submit[ted] an undisputed declaration under penalty of perjury that it is the actual holder of the promissory note." *Id.* at 789, ¶ 80 (first sentence of the holding stated in the Conclusion section) (underlining added). Therefore, Wells Fargo's declaration "satisfies the beneficiary provisions" that is one of the requisites to a trustee's sale in RCW 61.24.030. *Brown*, 359 P.3d at 789. *See generally id.* at 773-76 (Heading entitled "Residential Foreclosure under the DTA"); *see* RCW 61.24.030 (entitled "Requisites to trustee's sale.") In short, this case squarely falls within the first sentence of the holding in *Brown* (which was quoted above). Wells Fargo is the note holder satisfying the proof of beneficiary provisions that are a requisite for a trustee's sale.

This case has identical material facts to *Brown*: Freddie Mac is the note owner and a bank is the servicer and note holder "is entitled to

[2] The doctrine of stare decisis has its roots in the common law (or "court-made law"). *In re Stranger Creek & Tributaries in Stevens Cnty.*, 77 Wn.2d 649, 653, 466 P.2d 508, 511 (1970). Yet, this Court has invoked the doctrine when construing statutes. *Koenig*, 167 P.3d at 346-47 (common law exceptions to the Public Records Act). Regardless of whether the label is the rule of precedent or doctrine of stare decision, *Brown* controls and should not be abandoned.

enforce it." *Brown*, 359 P.3d at 777 ¶ 27. *Brown* broadly frames the issue:

> Freddie Mac's practice of splitting note ownership from note enforcement is at the heart of this case. Freddie Mac owns Brown's note. At the same time, a servicer, M&T Bank, holds the note and is entitled to enforce it. As we will describe below, Washington's Uniform Commercial Code (UCC) authorizes this division of note ownership from note enforcement.

359 P.3d at 777, ¶ 27. 359 P.3d at 781, ¶ 40 ("M&T Bank services her note"); *id.* ¶ 42 (M&T indorsed the note in blank). The "heart of this case" is the same -- the only difference is Wells Fargo is the bank instead of M&T Bank. 359 P.3d at 777, ¶ 27.

The Hobbs tried hedge their bets on the outcome of *Brown*, arguing in a footnote that "*Brown* will not decide the issues presented here... because *Brown* does not address whether a non-owner beneficiary can authorize a trustee's sale." Pet. for Review at 2 n. 1. Their hedge failed. The twice repeated holding in *Brown* addresses and conclusively resolves the issue presented of whether a note holder (who is not a note owner) can authorize a trustee's sale.

Brown analyzes the same two proof of beneficiary provisions in .030(7)(a) which are a requisite for a trustee's sale and are the basis for the petition for review. *Compare Brown*, 359 P.3d 775, ¶ 15; *id.* at 782-83, ¶¶ 50-51; *id.* at 789, ¶ 80 *with* Pet. for Rev. at 9, 11-18. *Brown* resolved

the very same ambiguity that the Hobbs raise in their request for review. *See, e.g.*, Pet for Rev. 13-14 (arguing that the Court of Appeals erred by ignoring the "language at the beginning of the second sentence of RCW 61.24.030(7)(a) requiring that the declaration must be made 'by the *beneficiary*'...that is required under the first sentence of RCW 61.24.030(7)(a) to prove that it is the *owner* of the note.") (italics in original). *Id.* at 3 (arguing that "the beneficiary, Wells Fargo, was required to prove it was the owner of the note to authorize foreclosure under RCW 61.24.030(7)(a) and failed to do so when it provided a declaration stating that Freddie Mac was the owner"). *Id.* at 4 (identifying one of the "Issues Presented for Review" as whether the decision "to allow Wells Fargo to authorize the trustee's sale when Wells Fargo was not the owner of the note and the beneficiary declaration it provided to NWTS said it was not the owner").

Taken to its logical conclusion, the Hobbs' argument is the term "beneficiary" as used in .030(7)(a) equates with "holder" in the context of the Foreclosure Fairness Act but something else in other contexts. But their argument runs afoul of the basic principles of statutory construction. The goal is a "fair and reasonable interpretation, and one which will harmonize the entire statute and make the provisions consistent and harmonious." *State ex rel. Sater v. St. Bd. of Pilotage Comm'rs*, 198

Wash. 695, 700, 90 P.2d 238 (1939). *Brown* achieves that goal. The goal is a "fair and reasonable construction" so that the provisions in .030(7)(a) "can be reconciled and both given effect." *Babcock v. Sch. Dist. No. 17 of Clallam Cnty.*, 57 Wn.2d 578, 581, 358 P.2d 547, 548 (1961).

Brown starts with the Deed of Trust Act's definition of beneficiary as note holder, analyzes the ambiguity in the provisions addressing how a party proves beneficiary status, and resolves the ambiguity in view of the other indicators of legislative intent and consistent with the UCC's focus that the note holder/PETE has authority, "thereby satisfying RCW 61.24.030(7)(a) and RCW 61.24.163(5)(c)." *Brown*, 359 P.3d at 784. Id. 359 P.3d at 783-87 (analysis).

The fact that *Brown* resolved the issue in the context of the mediation exemption statute does not limit the breadth of its twice-stated holding. The statutory text used in the analysis is the same text at issue in this appeal.

C. A Nonjudicial Foreclosure Trustee is Entitled to Rely on the Holder's Sworn, Unambiguous Declaration of Beneficiary Status.

The Hobbs' other main reason for seeking review is their claim that *Brown* does not address whether a trustee can advance a nonjudicial foreclosure when the trustee knows that the party claiming beneficiary status does not own the note. *See* Pet. for Rev. at 2, n. 1.

Wells Fargo anticipates that NWTS will address this issue squarely in its Answer to the Petition for Review from the nonjudicial foreclosure trustee's perspective. Wells Fargo observes that in *Brown*, when faced with an unambiguous declaration just like the one at issue in this case, this Court stated: "As relevant here, our holdings in *Lyons* and *Trujillo* confirm that a trustee can rely on a declaration consistent with its duty of good faith if the declaration unambiguously states the beneficiary is the actual holder. *Brown*, 359 P.3d at 786. (underlining added). Even the way the Hobbs frame the issue for review demonstrates that *Brown* controls the trustee knowledge issue:

> Where, as here, the beneficiary is *not* the owner of the note, and the trustee *knows* the beneficiary is not the owner, can the trustee rely on a declaration from the beneficiary stating that it is merely the holder of the note as proof that the beneficiary is the owner?

Pet. for Rev. at 1 (italics in original). The beneficiary declaration provided to NWTS in this case unambiguously stated that Wells Fargo was the holder and Freddie Mac was the owner. CP 298. As with their other arguments, the Hobbs' attempt to distinguish this case from *Brown* on the basis of the trustee knowledge issue is unavailing. Their distinction is artificial and illusory. The *Brown*'s analysis of the meaning of .030(7)(a) is as equally applicable to the trustee knowledge issue as it is to the proof of beneficiary status issue.

IV. CONCLUSION

Brown harmonizes earlier decisions and the provisions of the DTA. Therefore, the petition for review cannot establish the "conflicting" decisions requirement for review under RAP 13.4(b)(1)-(2). Separately, *Brown* eliminated "the issue of substantial public interest that should be determined by the Supreme Court" as a ground for review under RAP 13.4(b)(4). *Brown* "determined" that issue against the Hobbs.

The rule stated in *Brown* is neither incorrect nor harmful. The PETE – the actual note holder – is entitled to modify and enforce the note and "satisfies the proof of beneficiary provisions" that are requisites to a trustee' sale. *Brown*, 359 P.3d at 789, ¶ 80. This Court should not abandon the unanimous, well-reasoned decision in *Brown*. For the reasons above, this Court decline review of the unpublished *Hobbs* decision.

RESPECTFULLY SUBMITTED this 4th day of December, 2015.

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By: _____
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