Case No. 328163

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

JAMES BLAIR

Plaintiff/Appellant,

v.

NORTHWEST TRUSTEE SERVICES, INC.; BANK OF AMERICA, N.A., MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC.; FEDERAL HOME LOAN MORTGAGE CORPORATION; and DOE DEFENDANTS 1 through 20

Defendants/Appellees.

PLAINTIFF JAMES BLAIR OPENING BRIEF ON APPEAL

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INTRODUCTION

This is a case which demonstrates the manner in which mortgage loan servicers continue to avoid the clear requirements of the Deed of Trust Act, RCW 61.24, *et seq.* ("DTA"), in order to more swiftly bring a nonjudicial foreclosure to the detriment of Washington property owners. Mr. Blair defaulted on his mortgage loan because the income from his title insurance company business faltered significantly with the recession in 2009. After default and his income began to increase again, Mr. Blair sought to bring his loan current and save his home by seeking a loan modification, but while Mr. Blair was engaging in those efforts, his loan servicer, Bank of America, N.A ("BANA"), initiated a non-judicial foreclosure without the legal authority do so under Washington law.

The record in this case is replete with the Defendants/Appellees' violations of the Deed of Trust Act in furtherance of their attempts to improperly foreclose on Mr. Blair's home nonjuidcially. These violations include intentional misrepresentations of the identity of the owner and holder of Mr. Blair's Promissory Note and the authority of Northwest Trustee Services to conduct a non-judicial foreclosure of Mr. Blair's home. Most significantly, no evidence was presented to the trial court which demonstrated that BANA was, at any time, the beneficiary of Mr. Blair's promissory note pursuant to the Deed of Trust Act or was anything more

than the loan servicer and custodian of the promissory note for Freddie Mac. Unfortunately, the trial court conflated BANA's status as loan servicer and custodian of the note with being a beneficiary, actual holder, and owner of the promissory note.

Because BANA was not the beneficiary of Mr. Blair's promissory note, it had no lawful authority to appoint Northwest Trustee Services as a foreclosure trustee and to direct Northwest Trustee to pursue a non-judicial foreclosure of Mr. Blair's home. Despite its knowledge that Bank of America was not a lawful beneficiary of Mr. Blair's promissory note, Northwest Trustee Services still initiated a non-judicial foreclosure of Mr. Blair's home. Involved in their pursuit of a non-judicial foreclosure of Mr. Blair's home was Northwest Trustee Services and BANA's public recording of a number of foreclosure- related documents that contained the false assertion that BANA was the beneficiary of Mr. Blair's promissory note and that Northwest Trustee Services was a lawfully appointed foreclosure trustee. BANA and Northwest Trustee's Services' conduct was especially unfair and deceptive considering that both parties were aware of the identity of the true beneficiary of Mr. Blaire's promissory note, the Federal Home Mortgage Loan Corporation ("Freddie Mac").

Contrary to the determination made by the trial court, Defendant/Appellees' deceptive and misleading conduct constituted both a

Consumer Protection Act violation and was negligent misrepresentation. Importantly, the Washington State Supreme Court recently held that a case with nearly identical facts, *Lyons v. U.S. Bank Nat. Ass'n,* raised sufficient issues of material fact to warrant remand to the trial court for reconsideration of its grant of Northwest Trustee Services' Motion for Summary Judgment. *Lyons v. U.S. Bank Nat. Ass'n,* 336 P.3d 1142 (2014). Based on *Lyons* and other recent case law, the trial court's decision in this case should be reversed.

STANDARD ON REVIEW

An appellate court should independently determine whether the findings of fact support the conclusions of law. *Crystal China and Gold Ltd. v. Factoria Center Investments, Inc.*, 93 Wn.App. 606, 610, 969 P.2d 1093 (1999); *American Nursery Products, Inc. v. Indian Wells Orchards,* 115 Wn.2d 217, 222, 797 P.2d 477 (1990); *Martin v. Seattle,* 111 Wn.2d 727, 733, 765 P.2d 257 (1988); and *Persing, Dyckman & Toynbee, Inc. v. George Schofield Co., Inc.*, 25 Wn.App. 580, 582, 612 P.2d 2 (1980). Here, the trial court's factual findings are completely disconnected from the evidence provided and the standard articulated by the binding authority on these subjects. Conclusions of law are reviewed *de novo*, as are the application of the facts to the law. *Id.; see also, Skamania County v. Columbia River Gorge Commission*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001).

STATEMENT OF ISSUES

The issues in this case are as follows:

1. If BANA was merely the custodian of Mr. Blair's Promissory Note, was it a "beneficiary" or "noteholder" as defined under Washington law? RCW 61.24.005(2).
2. If BANA was merely the custodian of Mr. Blair's Promissory Note, could it prove it was the "owner" of the loan by signing the Beneficiary Declaration, which states that it is an "actual holder" *or* has requisite authority under RCW 62A.3-301 to enforce said obligation…"?
3. If BANA was not a "beneficiary", an "actual holder," or an "owner" of Mr. Blair's Promissory Note, did it have the legal authority under Washington law to initiate a nonjudicial foreclosure?
4. If BANA did not have the legal authority to initiate a nonjudicial foreclosure based upon Mr. Blair's Promissory Note and Deed of Trust, is it liable to Mr. Blair's under the Consumer Protection Act ("CPA")? RCW 19.86, *et seq.* And if so, did Mr. Blair prove the elements of a CPA claim?

STATEMENT OF THE CASE

Mr. Blair is a resident of Wenatchee and a business owner in the city. CP 35-68. He has owned his home for more than 25 years. *Id.* He purchased the Residence by obtaining a mortgage loan, which was eventually refinanced when he obtained a new mortgage loan from Countrywide on September 10, 2008. *Id.* In connection with that loan, Mr. Blair signed a Promissory Note which was payable to Countrywide ("Promissory Note"). *Id*. He also signed a Deed of Trust ("Blair Deed of Trust"), which listed Countrywide as the Lender and Defendant Mortgage

Electronic Recording System ("MERS") as the purported "beneficiary". CP 45-52.

Ownership of Mr. Blair's promissory note was transferred to Freddie Mac on September 25, 2008. CP 698-699. Bank of America, N.A. ("BANA) and its predecessors Countywide Home Loans Servicing, LP and BAC Home Loans Servicing, LP have acted only as document custodians and loan servicers of the promissory note. Freddie Mac enters into agreements with loan servicers wherein loan servicers take possession of promissory notes and hold them for the benefit of Freddie Mac in their vault facilities. CP 1020-1051. No evidence was presented at the trial court that BANA or its predecessors were the actual holder or owner of the promissory note, but rather, evidence was presented which indicated that BANA and its predecessors had "possession" of the note through a custodial agreement with Freddie Mac and held it for the benefit of Freddie Mac. CP 1142.

Mr. Blair owns and operates a title insurance company. CP 35-41. As a result of the problems in the mortgage market beginning in 2008, Mr. Blair's business fell off significantly and he began to experience very serious financial problems. CP 35-41. He struggled to pay his business and personal expenses, but by August of 2010, he fell behind on his mortgage payments. *Id.* At that time, he was making his payments to Defendant BANA's predecessor, BAC Home Loan Servicing because he had received

communications from that entity about its servicing of the loan, including monthly statements. *Id.*

Through 2011 and 2012, Mr. Blair applied for a loan modification through BANA's predecessor. CP 35-68. Mr. Blair submitted multiple rounds of loan modification documents to BANA only to be continually told that he needed to submit more documents or that his loan modification was being denied because he did not submit the correct documents. *Id*.

While Mr. Blair was trying to bring his loan current through a loan modification, Defendants/Appellees were advancing a foreclosure of his. home. On August 1, 2011, an Assignment of Deed of Trust was executed, which purported to assign the beneficial interest in the Blair Deed of Trust to BAC Home Loan Servicing from MERS. CP 918. The Assignment was signed and purportedly notarized in Ventura County, California on August 1, 2011 by one Yomari Quintanilla, an alleged Vice President of Defendant MERS. *Id.* Plaintiff maintained, based upon information and belief, that Ms. Quintanilla is actually an employee of Defendant Bank of America. The Assignment was recorded in the records of Chelan County, Washington on August 2, 2011. *Id.*

Subsequent to this Assignment, an Appointment of Successor Trustee document was recorded in the records of Chelan County, Washington on March 7, 2012. CP 920. This document was purportedly

signed and dated October 18, 2011 in Dallas County, Texas by an Angela Hopson, Assistant Vice President of Defendant Bank of America. *Id.* This document purports to appoint Defendant NWTS as a successor trustee. *Id.*

On March 19, 2012, NWTS issued a Notice of Default. CP 922-925. The Notice of Default identified Freddie Mac as the owner of the promissory note and Bank of America, N.A. as the loan servicer. *Id.* NWTS issued a Notice of Trustee's Sale on April 24, 2012. CP 927-932. The Notice of Trustee's Sale set a sale date for August 3, 2012. *Id.* The Notice of Trustee's Sale identified BAC Home Loan Servicing, LP fka Countrywide Home Loans Servicing, LP as the "beneficiary" of the deed of trust. *Id.*

In order to issue the Notice of Trustee's Sale, NWTS relied upon declarations from Bank of America, which stated that BANA was the "actual holder of the promissory note or other obligation secured by the deed of trust *or* has requisite authority under RCW 62A.3-301 to enforce said obligation…" CP 505; 515; 562; 566. Mr. Blair maintained throughout the proceedings that NWTS knew the loan was owned by Freddie Mac and that BANA was nothing more than the loan servicer.

When Mr. Blair realized that he was facing the foreclosure of his home, he contacted a lawyer, Ms. Huelsman, to obtain an understanding of his rights under Washington law, to determine if help was available to

obtain a loan modification, and to attempt to stop the foreclosure sale of his home. CP 1094-1095. Mr. Blair paid $350 for an initial consultation with Ms. Huelsman. *Id.* Mr. Blair then retained Ms. Huelsman to obtain a hearing on a motion for restraining order and later a hearing on a motion for preliminary injunction in order to stop the trustee's sale of his home. *Id*. Mr. Blair paid Ms. Huelsman $5,000 for this work. *Id.* Mr. Blair signed a separate contingency fee retainer for Ms. Huelsman to work on his affirmative case relating to the wrongful attempted foreclosure of his home. *Id.* Mr. Blair also paid expenses associated with Ms. Huelsman's work in restraining the sale. *Id.*

Mr. Blair took time off of work to help transport Ms. Huelsman to Chelan County to attend the hearing on the temporary restraining order. *Id.* Mr. Blair also had to pay expenses to transport Ms. Huelsman to the hearing, for parking at the hearing, and for the costs of delivering copies of the pleadings to the trustee in advance of the hearing. *Id.* Those costs are estimated to be $595.83. *Id.*

ARGUMENT

I. There were genuine issues of material fact that remained to be determined with respect to Mr. Blair's Consumer Protection Act ("CPA") claim against Defendant/Appellees.

The law regarding CPA causes of action is fairly clear and settled.

A cause of action is available if the claim satisfies five elements: "(1) [an] unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.' " *Klem v. Wash. Mut. Bank,* 176 Wn.2d 771, 782, 295 P.3d 1179 (2013) (alteration in original) (quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wash.2d 778, 780, 719 P.2d 531 (1986)).

The Washington Supreme Court has recently and repeatedly reiterated the availability of a CPA cause of action for a violations of the Deed of Trust Act ("DTA"). *Frias v. Asset Foreclosure Services, Inc*., 181 Wn.2d 412, 334 P.3d 529 (2014); *Lyons,* 336 P.3d 1142; *Bain v. Metro. Mortg. Grp., Inc.,* 175 Wn.2d 83, 119, 285 P.3d 34 (2012); *Klem v. Wash. Mut. Bank,* 176 Wn.2d 771, 295 P.3d 1179 (2013). These cases articulate the necessity under Washington law to conform to the strict parameters of the DTA at all times or face liability.

In *Frias* and *Lyons*, the Supreme Court rejected the argument that plaintiffs may bring direct claims for violations of the DTA pre-foreclosure, but it reiterated its previous decisions and in fact strengthened its position on the bringing of claims for violations of the CPA predicated upon violations of the DTA requirements. The Court also made clear that any claims that are otherwise available under an existing body of law may be

brought predicated upon violations of the requirements of the DTA. In *Frias*, the Supreme Court stated: "even when there is no completed foreclosure sale and no allegation that plaintiff has paid foreclosure fees, it is possible for a plaintiff to suffer injury to business or property caused by alleged DTA violations that could be compensable under the CPA." *Frias* 181 Wn.2d at 18, citing to *Panag v. State Farm Ins. Co. of WA*, 166 Wn.2d 27, 57 (2009); *Lyons*, 336 P.3d at 1142.

Numerous other DTA cases decided by the Supreme Court require that language in the DTA be construed strictly in the homeowner's favor because it eliminates many protections enjoyed by borrowers in judicial foreclosures. *Bain*, 175 Wn.2d. at 93 (citing *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007)); *see also Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 105, 297 P.3d 677 (2013) (same); *Albice v. Premier Mortg. Servs.es of Washington, Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012) (same). The DTA "must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting non-judicial foreclosure sales." *Bain*, 175 Wn.2d. at 93.

A. Defendant/Appellees engaged in unfair and deceptive conduct in their attempts to conduct a non-judicial foreclosure of Mr. Blair's home.

1. BANA was only a servicer and custodian for the promissory note at

issue.

The evidence presented to the trial court established that BANA and its predecessors have been servicers and custodians of the promissory note since September, 2008. It is undisputed that Freddie Mac has been the owner of Mr. Blair's promissory note since September, 2008. CP 698-699. The Declaration of Brieanne Siriwan, submitted in support of BANA's Motion for Summary Judgment states:

> On or about September 25, 2008, Freddie Mac became the owner of the Loan and Original Note was placed in storage with Countrywide Home Loans Servicing, LP fka Countrywide Home Loan Servicing LP (now Bank of America, N.A. by merger) for the benefit of Freddie Mac an in accordance with Freddie Mac guidelines.
>
> At all times from September 25, 2008, to the present, the Original Note has been in the *possession* of Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing LP.

CP 1142 (emphasis added). It is notable that Ms. Siriwan's Declaration does not state that Bank of America is the holder, actual holder, owner of the promissory note, but rather, that it has *possession* of the note. *Id.* This makes it clear that BANA maintains possession of the Promissory Note as a document custodian for Freddie Mac, as is consistent with Freddie Mac's business practices, but does not have the authority over the note involved in being an actual holder or owner of a promissory note.

Freddie Mac's Document Custody Procedures Handbook ("Freddie Mac Custody Procedures") establishes that it is the practice of Freddie Mac to take possession of promissory notes through loan custodians, but to retains ownership and continue to hold the promissory note in all meaningful respects. The Freddie Mac Servicing Guide ("servicing guidelines") states that "the Seller/Servicer selling Mortgages to Freddie Mac must deliver the original Notes for such Mortgages to a Document Custodian…" CP at 1020. The Freddie Mac Custody Procedures establishes that its loan custodians hold promissory note "in trust" for "sole benefit" of Freddie Mac. CP 1046. The servicing guidelines state that a custodian's duties are limited to the following:

1. Maintaining custody and control of the original Notes and assignments on behalf of Freddie Mac. If the Seller/Servicer delivers supplemental documents, such as original modifying instruments, the Document Custodian must place the supplemental documents with the related original Notes.

2. Holding the Notes and assignments in secure, fire-resistant facilities as described in Section 18.2(b).

3. Affixing the Freddie Mac loan number to the Note, if advised by the Seller/Servicer that Freddie Mac requires it. If the Note for a Mortgage contains the Freddie Mac loan number, changing the Freddie Mac loan number on a Note if advised in writing by the Seller/Servicer that Freddie Mac has changed the Freddie Mac loan number for the related Mortgage.

4. Making available for review by Freddie Mac (or its designee), at any time during normal business hours, with or without prior notice, the Notes and assignments and related storage facilities,

maintenance and release procedures, and control and tracking mechanisms, and other evidence of compliance with eligibility requirements as requested.

5. Making the custodial staff available for interview by Freddie Mac or its designee, at any time during normal business hours, with or without prior notice, for an assessment of the staff's familiarity with and adherence to Freddie Mac's custodial requirements and the Document Custodian's internal controls.

6. Indemnifying Freddie Mac for such losses as may occur as a result of any negligence by the Document Custodian in the performance of its duties under the Guide pertaining to Notes and assignments held for Freddie Mac and Form 1035, Custodial Agreement: Single-Family Mortgages, and Form 1035DC, Designated Custodial Agreement: Single- Family Mortgages.

7. Providing, in an electronic format acceptable to Freddie Mac, an accounting of all Notes held for Freddie Mac as described in Section 18.2

CP at 1022. In addition, the Freddie Mac Custody Procedures directs its custodians:

> Do not enter into any understanding, agreement or relationship with any party to obtain, retain or claim any interest, including ownership or security, in Mortgage owned by Freddie Mac, unless specifically approved of in writing, in advance by us.

CP at 1046.

The Freddie Mac Custody Procedures and Servicing Guidelines make it clear that its document custodians have no right to take any action or make any decisions with respect to the promissory note they hold. Instead, they simply act as a vault facility for Freddie Mac's benefit with no authority over the promissory notes they maintain possession of.

Therefore, BANA's role as document custodian for the true owner and beneficiary of the promissory note, Freddie Mac, did not render BANA a holder or actual holder of the promissory note.

The trial court's ruling was based solely on its belief that BANA "held" the "requisite documents at all relevant times to the attempted foreclosure in this case." CP at 1147-1150. This ruling was improper because BANA only presented evidence that it had possession of the Promissory Note as a custodian, not that it actually held the Promissory Note. The trial court's ruling improperly conflated possession of a promissory note with the holding of a promissory note. *Id.* But, the custodian/servicer of a promissory note is an entirely different party with a different relationship to a promissory note than an actual holder/owner/beneficiary. As will be discussed below, it is the owner/beneficiary that has the authority to perform key functions under the DTA foreclosure process and, importantly, has the incentive to negotiate and work with the borrower/homeowner to avoid foreclosure.

2. BANA did not have the authority to appoint NWTS as a successor trustee.

Only beneficiaries of promissory notes can appoint a successor trustees under the DTA. RCW 61.24.010(2) provides that a trustee can only be "replaced by the beneficiary" "upon recording the appointment of a

successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee." RCW 61.24.005 defines "Beneficiary" as "the holder of the instrument or document evidencing the obligations secured by the deed of trust…" In *Bain*, the Washington State Supreme Court held that "only the *actual holder* of the promissory note or other instrument evidencing the obligation may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property." *Bain*, 175 Wn.2d at 89 (emphasis added). In *Bain*, the Supreme Court went on to find that it can be unfair and/or deceptive for the purposes of the CPA for an entity that is not an actual holder of a promissory note to hold itself out or characterize itself as DTA beneficiary. *Id.* at 117. In other words, the Supreme Court has held that seeking to foreclose without being a holder of the applicable note is actionable in a claim for damages under the CPA. *Id.* 119.

In this case, BANA signed an Appointment of Successor Trustee, appointing NWTS as foreclosure trustee in October, 2011. CP 920. The Appointment of Successor Trustee was recorded in Chelan County on March 7, 2012. *Id.* But, there is no evidence in the record which shows that BANA was actually a lawful beneficiary under the DTA with the requisite authority to appoint NWTS as successor trustee in October 2011 or at any time thereafter.

At the trial court, BANA argued that it had the authority to appoint NWTS as a successor trustee because it executed declarations on November 18, 2008 and September 29, 2011, which stated that the "actual holder of the promissory note ***or*** other obligation secured by the deed of trust or has requisite authority under RCW 62A.3-301 to enforce said obligation…" CP 505; 515; 562; 566. This version of the "Beneficiary Declaration" is not sufficient to confer beneficiary status on BANA because, as will be discussed further below, a party with requisite authority to enforce an obligation under RCW 62A.3-301 is not an actual holder and cannot act as a DTA beneficiary. Because BANA was not a lawful beneficiary under the DTA, it did not have the authority to appoint NWTS as successor trustee. When BANA held itself in the Appointment of Successor Trustee, a publicly recorded document, as the beneficiary of the promissory note at issue, with the power to appoint a successor trustee, it made false assertions about its authority and, thereby, engaged in unfair and deceptive conduct as is provided for in *Bain*. *Bain,* 175 Wn.2d at 89.

3. NWTS' initiation of a non-judicial foreclosure sale of Mr. Blair's home at the behest of BANA constituted an unfair and deceptive act.

The Washington Supreme Court has held that the DTA requires a trustee to have proof that the beneficiary is the actual owner of the note to be foreclosed on. *Bain,* 175 Wn.2d at 119 (citing RCW 61.24.030(7)(a)),

111 ("If the original lender had sold the loan, [it] would need to establish ownership of that loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions."). In this case, NWTS did not have the requisite proof that BANA was the owner of the promissory note it sought to foreclose on, and it knew that the language on the Beneficiary Declaration was insufficient on its face.

RCW 61.24.030(7)(a) states that before a notice of trustee's sale is issued, "the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust." RCW 61.24.030 (7)(a) goes onto provide that "a declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection." But, the DTA then places an important limit on trustees, stating that the trustee cannot rely on a declaration made by a non-owner if the trustee has violated his duty of good faith to all parties in the non-judicial foreclosure, including the borrower and beneficiary. *See* RCW 61.24.030(7)(b); RCW 61.24.010(4).

In this case, NWTS did not have proof that BANA was either the owner or the actual holder of the promissory note at issue when it issued the Notice of Default and Notice of Trustee's Sale. NWTS argued to the trial

court that it was entitled to initiate a non-judicial foreclosure at the behest of BANA based on Declarations executed on November 18, 2009 and September 29, 2011, which stated that BANA was the "actual holder of the promissory note or other obligation secured by the deed of trust *or* has requisite authority under RCW 62A.3-301 to enforce said obligation…" CP 505; 515; 562; 566.

In the most recent Supreme Court decision interpreting the interplay between the DTA and the CPA, the Court was very clear that the exact same Beneficiary Declaration form used in this case does **not** comply with the DTA requirements. *Lyons*, 336 P.3d at 1150. The Supreme Court, in remanding the *Lyons* case, instructed the trial court to follow the analysis of Judge Jones, of the U.S. District Court for the Western District of Washington in *Beaton v. JPMorgan Chase Bank N.A.*, No. C11-0872 RAJ, 2013 WL 1282225 (Mar. 26, 2013). *Id.* Judge Jones noted that a beneficiary declaration identical except for the names to the one used in this foreclosure, which read, '" JPMorgan Chase Bank, N.A. successor in interest to Washington Mutual Bank flm Washington Mutual Bank, FA is the actual holder of the promissory note or other obligation evidencing the above-referenced loan or has requisite authority under RCW 62A.3-301 to enforce said obligation."' was not in conformity with the DTA requirements. *ld.* at *5. The court held that the qualifying provision ("or has requisite authority

under RCW 62A.3-301") indicated that "Chase could be a nonholder in possession or a person not in possession who is entitled to enforce the instrument neither of which is proof that 'the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust.'" *Id.* (citation omitted) (quoting RCW 61.24.030(7)(a)). Because DTA provisions must be strictly complied with, the ambiguity regarding whether the beneficiary declaration satisfied the statutory requirement created enough of a question of whether there was a violation of the DTA to survive summary judgment in that case. *Id.* The Supreme Court found the same to be true in *Lyons. Id.*

Furthermore, even if NWTS had sufficient proof that BANA was the actual holder of the promissory note (which it did not), it would need proof that BANA was *also* the owner of the promissory note in order to initiate a nonjudicial foreclosure at BANA's direction alone. In *Lyons,* the Supreme Court also found that a beneficiary must be both owner and holder of the note in order to authorize nonjudicial foreclosure as a result of the Legislature's enactment of RCW 61.24.030(7). *Lyons,* 336 P.3d at 1147-1150. This is so because RCW 61.24.030(7)(a) expressly requires that "before the notice of trustee's sale is recorded, transmitted or served, the trustee *shall* have proof that the beneficiary is the *owner*." RCW 61.24.030(7)(a) (emphasis added). *Id.* In *Lyons,* the Court expressly found

that the form of Beneficiary Declaration used in this foreclosure "does not comply with RCW 61.24.030(7)(a)." *Id.* The mandatory language of RCW 61.24.030(7)(a) imposes an absolute limit on the trustee's authority to foreclose, including the express requirement of proof that the beneficiary is the owner. *Id.*

The *Lyons* holding is also consistent with the older *Bain* decision, which similarly cited to RCW 61.24.030(7)(a) and noted the ownership requirement. *Bain*, 175 Wn.2d at 93-94. Such an interpretation of the statute is consistent with the language in RCW 61.24.040(2) wherein the "beneficiary" and the "owner" of the note are equivalent to each other. In this case, NWTS did not have proof that BANA was the note owner. In fact, it is clear that NWTS knew that Freddie Mac was the note owner because it issued a Notice of Default, which denominated Freddie Mac as the owner of the note.

Moreover, even if RCW 61.24.030(7)(b) allows a trustee to rely on a declaration by the actual holder in some cases, NWTS was not permitted to rely on the declaration by BANA in this case for two reasons. First, the declaration described in RCW 61.24.030(7)(b) is used to prove *ownership* of a loan. *See* RCW 61.24.030(7)(a). It would be entirely unreasonable for the legislature to have intended for a non-judicial foreclosure trustee to be able to rely on a declaration by an entity who was admittedly not the owner

of the promissory note when the trustee had actual knowledge of the identity of the true owner of the promissory note. It is indisputable that NWTS knew that Freddie Mac was the owner of the promissory note because NWTS prepared the Notice of Default dated March 19, 2012, which identified Freddie Mac as the owner of the promissory note and BANA as the loan servicer. CP 922-925.

In addition RCW 61.24.030(7)(b) states that a trustee can rely on a declaration by an "actual holder" of a promissory note "unless the trustee has violated his or her duty under RCW 61.24.010(4)." 61.24.010(4) describes the trustee's "duty of good faith to the borrower, beneficiary, and grantor." Mr. Blair maintains that there is no evidence in the record that BANA was an "actual holder" of the subject promissory note, but even if there was such evidence, NWTS' reliance on a declaration from the loan servicer when it knew the actual identity of the owner of the promissory note violated its duty of good faith to Mr. Blair.

Another Supreme Court case, *Klem v. Washington Mutual Bank*, analyzes the content of the trustee's duty of good faith. *Klem*, 176 Wn.2d at 771. *Klem* holds that "the trustee in a nonjudicial foreclosure action has been vested with incredible power. Concomitant with that power is an obligation to both sides to do more than merely follow an unread statute and the beneficiary's directions." *Id.* Clearly, the trustee's duty of good faith to

the borrower/homeowner include transparency regarding the actual identity of the entity that is directing it to pursue a non-judicial foreclosure of the borrower's home.

Finally, there is presently a Division I Court of Appeals case, *Trujillo v. Northwest Trustee Services, Inc.*, 326 P.3d 768, 774 (2014), which appears on its face to lend some support to the Defendants' position with respect to the relationship between BANA and Freddie Mac. However, the Supreme Court is deciding whether or not to review *Trujillo*. As it stands now, *Trujillo* conflicts greatly with the Court's decisions in *Frias* and *Lyons*, in spite of the fact that the Court of Appeals altered its opinion in the wake of the issuance of those decisions. It is inconsistent with *Bain* for the *Trujillo* Court to have found that after the Legislature amended the DTA to include an express proof of ownership requirement for the noteholder in RCW 61.24.030(7)(a) and required that the owner be identified under RCW 61.24.030(8)(*l*), it intended there to be an even lower standard for use under the DTA which allows parties with a lesser relationship to the note – less than the "noteholder" and "owner" requirements recognized in *Bain* – to non-judicially foreclose.[1]

[1] The legislature added this additional "proof of ownership" requirement to the DTA in 2009. *See* Laws of 2009, ch. 292, § 8 (7)(a). At the same time, it added the requirement that in any non-judicial foreclosure on residential real property, the notice of default must

4. The DTA's Legislative History Shows the Legislature Intended to Protect Homeowners By Providing That Only the Note Owner May Take Key Actions.

The statutory language of the DTA is clear that, while an entity may qualify as a beneficiary for general purposes as a *holder*, only beneficiaries that *own* a given Note are empowered to take sensitive actions like causing a Trustee's Sale to take place, appearing at mediation, and causing the issuance of Notices of Default or Trustee's Sale. *See* RCW 61.24.010(2); RCW 61.24.163; RCW 61.24.030(8)(l); RCW 61.24.030(7)(a). The DTA's specific references to owner-beneficiaries are consistent with the legislative intent of facilitating direct borrower-owner negotiation by ensuring that no one stands between the owner and borrower at key points in the foreclosure process. *See Bain*, 175 Wn.2d at 103 ("'[T]he legislature intends to .... [c]reate a framework *for homeowners and beneficiaries to communicate with each other to reach a resolution* and avoid foreclosure whenever possible; and [p]rovide a process for foreclosure mediation.'") (citing legislative findings, Foreclosure Fairness Act of 2011, Laws of 2011, ch. 58, § 3(2)).

Washington's Legislature was entitled to conclude as it did that, unlike a mere servicer or an entity purportedly appointed to act on behalf of

identify the "name and address of the owner of any promissory notes or other obligations secured by the deed of trust." *Id.* § 8 (8)(*l*).

the owner, the owner of a promissory note has a unique incentive to compromise when brought to the table to negotiate with its borrower. *Bain* at 98 n.7 ("there is considerable reason to believe that servicers will not or are not in a position to negotiate loan modifications or respond to similar requests") (citing Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755 (2011), and other authorities).

Furthermore, as stated *supra*, the legislature added an additional "proof of ownership" requirement to the DTA in 2009. *See* Laws of 2009, ch. 292, § 8 (7)(a). At the same time, it added the requirement that in any non-judicial foreclosure on residential real property, the notice of default must identify the "name and address of the owner of any promissory notes or other obligations secured by the deed of trust." *Id*. § 8 (8)(*l*).

B. NWTS' unfair and deceptive conduct affected the public interest.

The recording of the Appointment of Successor Trustee signed by a representative of the non- beneficiary, BANA, and the recording of the Notice of Trustee's Sale issued by the improperly appointed NWTS satisfies the "public interest impact" prong of the CPA. The public recording of false documents is an act that has the capacity to deceive the public, no matter that it takes place in the context of an effort to foreclose on individual

consumers' property. *See Bain,* 175 Wn.2d at 117 (recorded assignments of MERS' interest in property constituted unfair or deceptive acts or practices because "characterizing MERS as the beneficiary has the capacity to deceive"). Furthermore, the point of the "capacity to deceive" requirement is not that substantial portions of the public have actual knowledge of, and actually are deceived by, the conduct underpinning any individual CPA plaintiff's injury; rather, the requirement is meant to ensure that only conduct tending to deceive a reasonable person is actionable under the CPA. *See Hangman Ridge, Co.*, 105 Wn.2d 785 ("The purpose of the capacity-to-deceive test is to deter deceptive conduct before injury occurs.") (citing 60 Wash.L.Rev. 925, 944 (1985)).

C. The Defendant/Appllees' Unfair and Deceptive conduct proximately caused Mr. Blair's Injuries

"A plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." *Indoor Billboard* at 162 Wn.2d 59, 83. To establish injury and causation in a CPA claim, it is not necessary to prove one was actually deceived. It is sufficient to establish that the deceptive act or practice proximately caused injury to the plaintiff's 'business or property.'" *Panag,* 166 Wn.2d at 63-64 (plaintiff "sufficiently alleged injury by stating he had to take time away from his landscaping business to consult with an attorney as a result of [the

defendant's] false representations").

In a case with similar facts, *Walker v. Quality Loan Service Corp*., Division I held that Walker had valid claims even without the foreclosure being complete because he had suffered harm. *Walker* states:

> In *Panag v. Farmers Insurance Co. of Washington*, our Supreme Court held, "[T]he injury requirement is met upon proof the plaintiff's 'property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal.'" Investigative expenses, taking time off from work, travel expenses, and attorney fees are sufficient to establish injury under the CPA.
> ….
> Because Walker pleads facts that, if proved, could satisfy all five elements, we conclude that the trial court erred by dismissing his CPA claim.

Walker v. Quality Loan Service Corp., 176 Wn.App. 294 (2013), citing to *Panag,* 166 Wn 2d at. 53.

In *Frias*, the Washington State Supreme Court, analyzed the scope of CPA injuries that can arise in pre-foreclosure cases that allege violations of the DTA. *Frias*, 181 Wash.2d at 538. The Supreme Court held that Frias' injuries could include the demand by the foreclosing trustee defendants for fees not permitted by the Deed of Trust Act, the cost of investigating the legality of LSI and Asset's demand for fees, and Frias' inability to obtain a loan modification based on the Defendants' lack of good faith in her Foreclosure Fairness Act ("FFA") mediation. *Id.*

In this case, Mr. Blair has similar injuries as Ms. Frias. Mr. Blair

had to meet with an attorney to investigate the Defendant/Appellees' unfair and deceptive conduct and to eventually enjoin the wrongful foreclosure of his home. CP 1094-1095. Mr. Blair had to pay attorney's fees and costs and take time off of work to meet with the attorney, and he had to pay for the expenses related to stopping the foreclosure sale. *Id.*

Defendant/Appellees' representations that NWTS and BANA had lawful authority to conduct a non-judicial foreclosure of Mr. Blair's home, through the issuance of the Appointment of Successor Trustee, Notice of Default, and Notice of Trustee's Sale, caused Mr. Blair to incur the costs associated with investigating and then stopping the unlawful foreclosure of his home.

II. There are issues of material fact regarding Mr. Blair's Claims for Intentional and/or Negligent Misrepresentation remaining.

The Washington Supreme Court has adopted the definition of negligent misrepresentation in the Restatement (Second) Torts:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

ESCA Corp. v. KPMG Peat Marwickm 135 Wn.2d 820, 826, 959 P.2d 651

(1998). Similarly, when a court determines whether a party had a right to rely upon the representations made by another, it must engage in an analysis that involves consideration of the party's "diligence in ascertaining the facts for himself" and the "exercise of care and judgment in acting upon representations which run counter to knowledge within his possession or reach." *Rummer v. Throop*, 38 Wn.2d 624, 231 P.2d 313 (1951).

In this case, Defendant/Appellees supplied false information to Mr. Blair and the public at large when they indicated through publicly recorded documents that BANA, not Freddie Mac, was the beneficiary of Mr. Blair's deed of trust/promissory note and had the authority to appoint NWTS as a foreclosure trustee. CP 920; CP 927-932.

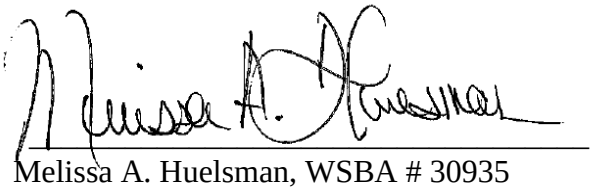
Defendant/Appellees failed to exercise reasonable care or competence in communicating this information because all Defendant/Appellees knew that Freddie Mac, not BANA, was the true owner/beneficiary of Mr. Blair's deed of trust/promissory note. CP 922-925. It is indisputable that all parties knew that Freddie Mac was the owner/beneficiary because the Notice of Default issued by NWTS states that Freddie Mac is the owner. *Id.*

Defendant/Appellees conduct caused Mr. Blair pecuniary loss because he had to hire an attorney to investigate and stop the non-judicial foreclosure of his home by Defendant/Appellees. CP 1094-1095.

CONCLUSION

For all the foregoing reasons, Mr. Blair respectfully urges the Court to find that the trial court's granting of summary judgment on his Consumer Protection Act and Negligent Misrepresentation claims was improper.

Respectfully submitted this 2nd day of February 2015.



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DECLARATION OF SERVICE

I, Carl Turner, certify under penalty of perjury under the laws of the State of Washington, that on the day I signed this declaration of service, I caused a copy of the Plaintiff's Opening Brief, to be electronically mailed and served as follows upon counsel of record and filed with the Court:

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Signed at Seattle, Washington, this 2nd day of March, 2015.

LAW OFFICES OF MELISSA A. HUELSMAN, P.S.

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Carl Turner