No. 89688-7

COA No. 30891-0-III

SUPREME COURT OF THE STATE OF WASHINGTON

BUDGET FUNDING 1, LLC, a California corporation; BENTON FRANKLIN TITLE COMPANY; WELLS FARGO FOOTHILL INC., a California corporation; and CITY OF PASCO, a municipal corporation formed under the laws of the State of Washington,

Respondents,

v.

PHILLIP KAIREZ and CAROLYN KAIREZ, husband and wife,

Petitioners.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Budget Funding I, LLC ("Respondent" or "Budget"), by and through its counsel of record, files this Answer under RAP 13.4(d) and respectfully requests this Court deny review of the November 7, 2013 unpublished Court of Appeals opinion in *Phillip Kairez and Carolyn Kairez v. Budget Funding I, LLC*, No. 30891-0-III. The Court of Appeals decision affirmed summary judgment in favor of Budget.

II. COURT OF APPEALS DECISION

The Court of Appeals correctly decided this matter, affirming the trial court's ruling granting summary judgment in favor of Budget. The Court of Appeals concluded Petitioners Phillip and Carolyn Kairez ("Petitioners" or the "Kairezes") failed to present evidence of any genuine issue of material fact in support of their claim for an interest in the apartment complex. Without such interest, the Court properly reasoned none of the other claims raised on appeal by Petitioners could survive. As such, this Court should deny review of this matter.

III. STATEMENT OF THE CASE

The property subject to this dispute is an apartment complex in

Pasco, Washington, located at 604 Yakima Street. (the "Property").[1] In April 2006, NRK Investments, LLC ("NRK"), a Washington limited liability company, contracted to purchase the Property from James and Krista Gottula (the "Gottulas"). CP 101-106. This real estate contract (the "Gottula Contract") was recorded on April 11, 2006, in Franklin County under Recording No. 1680903. CP 101-106. Contemporaneous with the recording of the Gottula Contract, the Gottulas executed a fulfillment deed to be recorded when the contract was paid in full. CP 107. Nicholas Kairez ("Nick"), the son of the Petitioners, was the sole member of NRK. CP 12. NRK is no longer an active corporation in the State of Washington. CP 79; 155. Importantly, Nick was not personally a named party to the Gottula Contract, which was executed only by NRK.

A short time after NRK purchased the Property, Petitioners agreed to lend Nick $50,000.00. This agreement was memorialized in an undated promissory note (the "Note") signed by Nicholas. CP 108-109. At that time, Nick also personally executed a deed of trust (the "Deed of Trust") that identified the Property as the collateral for the loan. The Deed of Trust was recorded on May 17, 2006 in Franklin County under Recording No. 1682850. CP 110-114. Nick is listed as the grantor on the Petitioners'

[1] The legal description of the property is Lots 1, 2, and 3, Block 4, Gerry's Addition to Pasco, according to the Plat thereof recorded in Volume "B" of Plats, Page 18, records of Franklin County, Washington.

Deed of Trust. CP 110-114. In April 2007, the Kairezes and Nick attempted to amend the Note terms to include an additional $40,000.00, by recording an amendment to the Note on April 11, 2007 (the "Amendment"). CP 115-116. NRK is not mentioned at all in the Deed of Trust or the Amendment.

Both the Note and the Amendment identify Nick as the "maker". CP 108-109; 115-116. NRK is not mentioned in the Note or Amendment. CP 98. There is no express language in either the Note or the Deed of Trust that Nick intended to bind NRK to the Note, subsequent amendments or Deed of Trust. Each of these documents bears Nick's personal signature in his individual capacity, and is void of any reference to NRK.

Shortly after the Amendment was recorded, NRK sought financing from Budget and offered the Property as collateral for a prospective loan. CP 98. Budget agreed to extend a loan to NRK (the "Budget Loan"), and Nick executed numerous loan documents to memorialize a loan in the amount of $263,250.00. CP 98. These documents included a Loan Agreement and Disbursement Instructions, an Adjustable Rate Note, a deed of trust (the "Budget Deed of Trust") and an Assignment of Rents. The Budget Deed of Trust was recorded in Franklin County under Recording No. 1708310. In contrast to the Note, Amendment and Deed of Trust, each and every of these referenced documents contained a signature block for

"NRK Investments LLC", and a corresponding signature line for Nick as "Manager". CP 117-143. Budget prepared these loan documents exclusively for execution by NRK, and in anticipation of signature by Nick solely as an authorized agent of NRK. CP 98.

When escrow was closed and the Budget Loan was funded, a portion of the loan proceeds was specifically slated to be used to satisfy the remaining balance on the Gottula Contract. CP 98. The Gottulas were paid from the Budget Loan proceeds, as reflected in the settlement statement showing a disbursement to the Gottula's agent, Title Management. CP 98; 144-145.

The Budget Loan proceeds were also specifically intended to dispose of the Deed of Trust. As an initial matter of record, the Deed of Trust encumbered the Property, and so Budget directly contacted Caroline Kairez prior to closing the Budget Loan and asked her to provide the amount needed to satisfy the Deed of Trust. CP 149. Caroline Kairez promptly supplied a payoff amount of $70,402 and instructions for wiring of the funds at closing. CP 149; 151. Accordingly, when the Budget Loan was funded, the exact sum of $70,672.00 was wired by Benton Title into a bank account designated by Petitioners. CP 149-150. Benton Title received written confirmation of the receipt of the wire into the Petitioners' account.

CP 149-150; 152. Budget recorded the Budget Deed of Trust to secure its interests in the Property on September 14, 2007.

Budget would not have funded the loan to NRK had it not been secured by a first position deed of trust. CP 98-99. This meant all prior encumbrances of record, whether valid or not, had to be discharged before Budget allowed the loan to close. CP 98-99. Yet, Petitioners failed to remove or reconvey the Deed of Trust as an encumbrance of record on the Property after receiving the full $70,672.00 payoff. CP 99. From the correspondence with Budget relating to the Budget Loan and their own payoff, the Petitioners were fully informed that the Budget Loan was taking place for the purpose of a new loan on the Property.

NRK defaulted on the Budget Loan in April 2009. CP 99. Without payments on the Budget Loan coming in, Budget initiated foreclosure proceedings. CP 99. The designated trustee conducted the foreclosure sale (the "Sale") on December 18, 2009 as provided by RCW 61.24, and Petitioners were not included in the mailing list for the Notice of Trustee's Sale. CP 99. The Property was ultimately conveyed to Budget as the successful bidder at the sale. CP 99; 146-147.

The Petitioners were aware the trustee sale of the Property was occurring, and even requested a copy of the trustee sale guarantee from Benton Franklin Title Company. Petitioners' Brief at 4. Petitioners took no

action to delay or stop the foreclosure by Budget. CP 99. Rather, in January, 2011, more than a year after the foreclosure sale and more than three years after receiving funds from Budget to satisfy the Deed of Trust, Petitioners filed this suit for quiet title to the Property.

IV. ARGUMENT

A. THE PETITION SHOULD BE DENIED FOR FAILING TO MEET THE QUALFICATIONS OF RAP 13.4(b)

Under RAP 13.4(b), a petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This Court should deny review in this instance because the Kairezes' petition not only omits discussion or reliance on the above grounds as a basis for review, but more importantly fails anyway for want of achieving any of the enumerated standards.

Petitioners assert authority under and discuss only the standard of review for summary judgment in their brief, but make no attempt to show

how, under RAP 13.4(b) this case conflicts with any Supreme Court or Court of Appeals decision, poses a significant question of law under the State or Federal Constitution, or involves any issues of substantial public interest. While it is correct that an appeal from an order granting summary judgment is reviewed de novo, *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004), such is not the first inquiry for this Court in a petition for discretionary review under the RAP.

Before Petitioners can even assert that the Court of Appeals somehow made a mistake in its own review of the trial court's decision granting summary judgment to Budget, they must first clear the hurdle of qualifying their case for discretionary review under RAP 13.4(b). Petitioners don't even mention RAP 13.4(b) in their Petition, let alone raise an issue that would make this case fit under its umbrella of review. For this reason alone, the Petition should be denied.

Most importantly, the Court of Appeals decision in this case does *not* conflict with any existing Supreme Court or Court of Appeals decision, or involve any issues of substantial public interest. This was a private real estate transaction, with multiple family loans from parents to their son that has no bearing on larger public interest questions. This case is not appropriate for discretionary review on its merits.

B. THE KAIREZES FAILED TO PRESENT EVIDENCE SUFFICIENT TO RAISE A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER THEY HAVE AN INTEREST IN THE SUBJECT PROPERTY

The Kairezes' argument that there is some factual dispute to be tried is just incorrect. Here, the Court of Appeals correctly realized the disagreement over whether Nicholas Kairez's ("Nick") signatures in his individual capacity could bind NRK as an entity "presents a legal dispute, not a factual one." Court of Appeals Opinion, at 8.

i. Summary Judgment Standard

On appeal of summary judgment, the standard of review is de novo, and the appellate court performs the same inquiry as the trial court. *Hisle*, *supra*, at 860. Summary judgment will be upheld if the pleadings and presented discovery establish there is no genuine issue of material facts and the moving party is entitled to judgment as a matter of law. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300-301, 45 P.3d 1068 (2002); CR 56(c). The moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Once the moving party meets that initial burden, the nonmoving party must present evidence that some material facts are in dispute. *Atherton Condo. Apartment-Owners Ass'n*

Bd. Of Directors v. Blume Dev. Co., 115 Wn.2d 506, 516, 700 P.2d 250 (1990). If the nonmoving party fails to present evidence that some material factual issue remains in dispute, summary judgment is proper. *Id.*

ii. Because Nicholas Kairez Never Had An Ownership Interest In The Subject Property Individually, He Could Never Convey An Interest In The Property To His Parents.

It is undisputed and a matter of common sense that a person cannot convey a greater interest in real estate than he owns. *Sofie v. Kane*, 32 Wn.App 889, 895, 650 P.2d 1124 (1982); *Firth v. Lu,* 146 Wn.2d 608, 615, 49 P.3d 117 (2002); *Simons v. Lee James Finance Co.*, 56 Wn.2d 234, 237 351 P.2d 509 (1960). A deed of trust signed by one without a valid interest in the property is a nullity and without force or effect. *Pennock v. Coe*, 64 U.S. 117, 121, 16 L. Ed. 436 (1859). The Court of Appeals correctly concluded here that one can convey real property only so far as he holds an interest in such property. Court of Appeals Opinion, at 7.

At summary judgment, the Kairezes' submitted declarations of Ms. Kairez and Nick to support their contentions that they all intended for the funds to be loaned to NRK. The entire disagreement in this case hinges on a dispute about the rights and obligations spelled out exclusively in the Note and Deed of Trust. There is simply no place else to look here for remedy.

As noted by the Court of Appeals, the Kairezes' personal understanding of the rights and obligations outside of the Note and Deeds of Trust is "...dictated by the statute of frauds and the recording statute". Court of Appeals Opinion, at 8. As it relates to real estate, the statute of frauds states, in relevant part, "[e]very deed shall be in writing, signed by the party bound thereby." RCW 64.04.020. Further, deeds of trust are subject to the statute of frauds. *GLEPCO, LLC v. Reinstra*, 175 Wn.App. 545, 554, 307 P.3d 744, *petition for review filed*, No. 89245-8 (Wash. Sept 3, 2013). With this in mind, there is no way the interest conveyed by a deed of trust can be created by some oral agreement or subjective understanding, like the type Petitioners assert here gave them an interest in the Property. Simply put, Nick didn't have the Property to offer as collateral to his parents for their loans.

The Kairezes' subjective understanding of an alleged intention by Nick to bind the Deed of trust to the Property is void against Budget under Washington State's recording statute. RCW 65.08.070. They just never properly memorialized anything to signify this alleged intention to bind NRK by and through the Deed of Trust, and cannot claim now what they "meant" trumps the fair and simple process providing notice under the recording laws. Petitioners can't (and don't) argue against clear law where an unrecorded interest in real property is subordinate to a recorded

interest in that same property, or that the Deed of Trust in this case is a conveyance subject to the recording statute. RCW 65.08.070; *Zervas Grp. Architects, PS v. Bay View Tower LLC,* 161 Wn.App.322, 325, 254 P.3d 895 (2011). The Court of Appeals correctly ruled that in failing to effectuate their alleged intentions, the Kairezes do not have an interest in the Property.

Out of the gates, Petitioners paint a bull's-eye on Budget's apparent reliance on *Griffin v. Union Savings and Trust Co.,* 86 Wash. 605, 150 P. 1128 (1915). However, irrespective of Budget's mere passing reference to the *Griffin* case in its brief on appeal, the Court of Appeals discarded that case as "inapposite", since it found "no ambiguity in the written deed of trust in this case." Court of Appeals Opinion, at footnote 3, pp. 9-10. Like the trial court, the Court of Appeals correctly concluded that the parol evidence of whether Nick could bind NRK "flatly contradicts the deed of trust's plain meaning", and thus "cannot be given substantive effect." Court of Appeals Opinion, at 9. The Court of Appeals did not need or entertain a discussion on Nick's *capacity* to decide he had no interest as an individual in the Property to convey his parents.

Petitioners still argue at this stage Nick had "... actual and apparent authority to bind NRK". CP 88; Petitioners Brief at 8. But, as

argued at the trial court level and again at the Court of Appeals, the issue is not whether Nick *had* the authority to bind NRK. Undisputedly, he did retain that authority. The issue is that he *elected not to bind* NRK, instead only binding himself personally on the Note, Deed of Trust and Amendment. The Note, Deed of Trust and Amendment are all missing NRK's signature block or any reference at all to a corporate seal of approval. Instead, Nick signed the recorded documents in his individual capacity, leaving only himself liable on the contracts with his parents. There is nothing to be inferred from this conclusion, other than what the written record itself reflects. There is no ambiguity.

Petitioners further argue that somehow when NRK ceased to exist Nick automatically acquired title to the Property, and therefore did bind the LLC by virtue of the Deed of Trust. However, as realized by the Court of Appeals, that argument makes no factual sense when placed on a timeline. Here, the Deed of Trust was conveyed to Budget from NRK in September 2007. NRK ceased to exist as an LLC in July 2008. Petitioners Brief, at 10. Therefore, even if Nick acquired NRK's interest in the Property, it would have been *after* the LLC ceased to exist in July 2008. By Petitioners' own admission, Nick had no interest to convey in 2007. Again, the Kairezes have simply failed to show that Nick as an individual could grant a security interest in the Property clearly held by NRK as an entity.

iii. Whether The Acceptance Of Funds At Closing By The Kairezes Was Intended As Fulfillment Of The Deed Of Trust Is Immaterial Since They Had No Interest In The Property.

There is still no issue of fact for the Court to decide as to whether the Petitioners taking a payoff at closing of the Budget Loan of $70,672.00 constitutes fulfillment of the Deed of Trust. As argued above, the Kairezes do not have an interest in the Property. Without a legal interest in the Property, it does not matter whether they are precluded from asserting their right to a claim for more that the payoff from Budget at the closing of the Budget Loan.

Petitioners leap to the conclusion that because a fulfillment deed or "similar documentation was not procured with respect to the Kairezes' lien", a material issue of fact exists to somehow preclude summary judgment. Petitioners' Brief, at 11. However, whatever mysterious information Petitioners assert is missing will not magically create an interest in the Property, nor can it make a factual issue out of a legal dispute.

Moreover, even if Petitioners had an interest in the Property, there is no genuine issue of material fact to be decided concerning the payoff sum of their loan. Again, the documentary evidence already of record firmly and quite simply establishes why Budget paid $70,000.00 at the

closing of the Budget Loan. What remains is merely an issue of law, already properly disposed of by the Court of Appeals. There is no dispute that the Petitioners actually received $70,402 from the Budget loan proceeds,[2] representing more than 75% of the initial loan balance of $90,000. Common sense alone dictates that Petitioners knew or should have known their payoff statement would be relied upon by the escrow agent and Budget as assurance of the Kairezes' willingness to release their lien upon tender of the payoff. They further knew or should have known Budget would not have paid such a substantial portion of the loan balance, and, indeed, would not have funded the loan to NRK at all, but for the Kariezes' assurance the payment completely discharged their Deed of Trust.

The Kairezes can't pretend, without great inequity, to have made some secret deal to keep a separate interest alive after permitting the Budget Loan to close. *Jones v. Curtiss*, 20 Wn.2d 470, 147 P.2d 912 (1944). There is no issue of fact on this point, and the Court of Appeals affirmation of the Summary Judgment was appropriate.

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[2] The actual amount paid to the Kairezes was $70,672, slightly more than requested. CP 148-151.

C. WITH NO LEGAL INTEREST IN THE PROPERTY, THERE ARE NO ISSUES OF FACT CONCERNING A NEGLIGENCE OR CPA CLAIM AGAINST BUDGET

First, as argued above, since the Kairezes have no interest in the Property, it cannot be argued that Budget owed them a duty under any proffered theory. Without such a duty, both the negligence and Consumer Protection Act ("CPA") claim fail. Second, as concluded by the Court of Appeals, even if they had an interest in the Property, Petitioners' asserted claims for negligence and violations of the CPA fail because speculation as to why the Deed of Trust was not included in a trustee sales' guarantee ("TSG") does not give rise to material facts sufficient to survive summary dismissal.

In the most elementary sense, Petitioners' claim fails in that there is nothing deceptive about the Sale and Budget's acquisition of the Property. There was no simply no relationship between Budget and the Kairezes other than the demand for payoff amount on the Deed of Trust. And that process was handled threw escrow. As argued above at length, Petitioners never had an interest in the Property to begin with, since the Deed of Trust was ineffective to secure any such claim. The relationship between Budget and the Kairezes was limited to a single transaction through an escrow company where the payoff amount was supplied and then paid.

Whether specific conduct gives rise to a CPA claim is a question of law. *Hangman Ridge Training Stables, Inc., v. Safeco Title Ins. Co.,* 105 Wn.2d 778, 791, 719 P.2d 531 (1986); *See Also, Indoor Billboard, Inc. v. Integra Telecom of Washington, Inc.,* 162 Wn.2d 59, 74, 170 P.3d 10 (2007). A CPA claimant must establish that "but for" the alleged unfair or deceptive practice, he or she would not have suffered injury. *Indoor Billboard,* 162 Wn.2d , at 84. In the context of mortgage practices, a plaintiff cannot rest a CPA claim on acts or practices that are done in a good faith belief that the mortgage practices are lawful. *Perry v. Island Savings and Loan Ass'n*, 101 Wn.2d 795, 810, 684 P.2d 1281(1984).

Even stretching the alleged facts in the supporting affidavits to the furthest implications, they give no rise to material facts to support a CPA or negligence claim against Budget. Not only does the record establish no actual relationship between Budget and the Kairezes in this case, but also any "...allegations, speculations, or argumentative assertions..." as to why the Deed of Trust was omitted from the TSG are insufficient to defeat summary judgment. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Without supporting facts to establish at least some relationship, causal link or anything more than conjecture, these claims were properly dismissed as a matter of law.

V. CONCLUSION

Based on the above argument, Budget respectfully requests the Court deny review in this matter. Petitioners have failed to show that review is appropriate under RAP 13.4(b), and the record and applicable law show that the Court of Appeals correctly decided all the issues presented. As such, the Court should deny any further review of this case.

Respectfully submitted this 7th day of January, 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the date given below I cause to be served the foregoing on the following individuals in the manner indicated via Federal Express Overnight Mail and E-mail:

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Dated: January 7, 2014

/s/ Kristen Linton
Kristen Linton,
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OFFICE RECEPTIONIST, CLERK

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Cc: Womac, Daniel; Larkin, Tom; jeff@srlaw.org
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