SUPREME COURT NO.
COURT OF APPEALS NO. 72016-3-I

91779-5

SUPREME COURT OF THE STATE OF WASHINGTON

Sandra Shelley Jackson, a single woman,

Petitioner,

v.

Quality Loan Service Corporation of Washington, a Washington Corporation; Mortgage Electronic Registration System, Inc.; McCarthy & Holthus, LLP, a Washington Limited Liability Partnership; U.S. Bank, National Association as Trustee for WAMU Mortgage Pass Through Certificate for WMALT 2006-AR4 Trust Investors in WMALT 2006-AR4 Trust c/o J.P. Morgan Chase Bank, N.A.,

Respondents.

PETITION FOR REVIEW FROM WASHINGTON COURT OF APPEALS DIVISION I

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I. PETITIONER'S IDENTITY

Petitioner Sandra Shelley Jackson was the Plaintiff in the original action in King County, No. 13-2-15865-5 and the Appellant with the Court of Appeals, Division I, No. 72016-3-I.

II. COURT OF APPEALS DECISION

Ms. Jackson seeks review of the Court of Appeals' published decision, issued April 6, 2015. *See* Attach. 1–11, (*Jackson v. Quality Loan Serv. Corp.*, __ Wn. App. __, 347 P.3d 487 (Div. I 2015)). Ms. Jackson motioned for reconsideration of that decision, Jackson Mot. Recons.; the Court of Appeals denied Ms. Jackson's motion. Order Den. Mot. Recons. (May 7, 2015). Ms. Jackson seeks review of substantial portions of the entire Court of Appeals Decisions.

III. ISSUES

1. Does attachment of documents not contained or referenced in the complaint act to convert a CR 12(b)(6) into a CR 56 motion?

2. May a trial court, in deciding a CR 12(b)(6) motion, take judicial notice of hearsay within publicly recorded documents that contradict the allegations in the Complaint without converting the motion to a CR 56 motion?

3. Is the Court of Appeals' misreading of the record causing confusion in superior court cases involving the Deeds of Trust Act, RCW 61.24 ("DTA")?

4. Does the DTA, divest Washington Superior Courts of original jurisdiction over cases involving the title or possession of real property in conflict with Const. art. IV § 6?

IV. NARRATIVE

This action stems from Respondents' attempts to foreclose on Ms. Jackson's home without complying with the Deeds of Trust Act. On March 17, 2006, Ms. Jackson executed a Note for $715,00.00 in order to purchase property at 1533 33rd Avenue, Seattle, Washington, 98122. CP 29. Cameron Financial Group, Inc. DBA 1st Choice Mortgage ("Cameron") was the lender. CP 29.

On March 20, 2006, Ms. Jackson executed a document entitled "Deed of Trust." CP 38–53. It identifies Mortgage Electronic Registration System ("MERS") as the beneficiary and provides MERS acts "solely as nominee[1] for Lender and Lender's successors and assigns" and creates a power of sale. CP 40.

The Notice of Default states the "current owner of the Note secured by the deed of trust is: U.S. Bank, ... as trustee for WAMU Mortgage Pass Through Certificate for WMALT 2006-AR4 Trust" ("WAMU Trust"). CP 55. The Notice of Default identifies JP Morgan Chase Bank,

[1] "Nominee" means a "person designated to act in place of another, usu[ally] in a very limited way" or a "party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others." BLACK'S LAW DICTIONARY 1149 (Bryan Garner ed. 2009).

N.A. as the manager and servicer of the loan and recommends it as a contact for information. CP 56–58.

Quality Loan Service Corp. of Washington, ("Quality") recorded a Notice of Trustee's Sale in King County, December 21, 2012. CP 60–64. The Notice names MERS as "Grantee" acting "as nominee for" Cameron. CP 60. Further, LaSalle Bank, N.A., ("LaSalle") is named as a predecessor trustee for the WAMU Trust where Bank of America, N.A., ("BANA") became trustee by merger with LaSalle; US Bank is named as a successor trustee of BANA without explanation. CP 60. The Notice of Trustee sale never mentions Countrywide nor Bank of America Home Loans nor JPMorgan Chase. CP 60–62.

Respondents sent Ms. Jackson a copy of a document entitled "Allonge." CP 36. This document bears no signature but identifies Countrywide Bank, N.A, ("Countrywide") as the payee. CP 36. Notwithstanding the defects in the Allonge, there is a gap in evidence of ownership of the Note. There is nothing showing how LaSalle came to be the beneficiary of the Deed of Trust or own Ms. Jackson's promissory note. Lastly, there is no record of a beneficiary declaration, as provided by RCW 61.24.030(7)(a).

V. PROCEDURAL POSTURE

In this section, Ms. Jackson will discuss the specific allegations her complaint made regarding the initiation of the nonjudicial foreclosure.

Next, Ms. Jackson will examine the documents not mentioned anywhere in the Complaint the trial court inappropriately took judicial notice of. Finally, Ms. Jackson will analyze the Court of Appeals decision affirming the trial court's erroneous ruling.

A. Ms. Jackson's Amended Complaint Specifically Alleged Trustee Defendants Had Violated Their Duty of Good Faith Owed to Her, and There Was Not a Proper Beneficiary of the Deed of Trust, or Owner of Her Note.

Ms. Jackson filed suit April 8, 2013. CP 1–26. Ms. Jackson amended her complaint once, CP 82–108, and added facts related to the duty of good faith of the trustee. *Compare* CP 4 ¶2.3 *with* CP 85 ¶ 2.3. Ms. Jackson specifically alleged Trustee Defendants had violated their statutory duty of good faith owed to her. CP 92 ¶ 4.2.5, 93 ¶ 5.2.

Additionally, Ms. Jackson pleaded facts that none of the parties seeking to nonjudicially foreclose qualified as a beneficiary under the DTA. CP 93 ¶ 5.3. Further, she argued that DTA violates the constitution because it divests superior courts of original jurisdiction under Const. art. IV, § 6. CP 82–108, ¶¶ 1.4, 1.7, 2.3, 2.13, 3.14, 6.7–6.11.

B. It Was Improper for the Trial Court to Consider Documents Not Mentioned in Complaint and Extrinsic Evidence When Ruling on a CR 12(b)(6) Motion

Respondents supported their CR 12(b)(6) motion with exhibits contained within a Request for Judicial Notice. CP 150–66. Exhibit A contains "full and correct copies" of Ms. Jackson's loan documents. CP

150, 155–61. Exhibit B contains a document recorded in King County, entitled "Corporate Assignment of Deed of Trust" wherein MERS, as nominee for Cameron and its successors, purported to assign a Deed of Trust to U.S. Bank as trustee for WAMU Trust. CP 162. JPMorgan Chase is the named "contact" and the return addressee. CP 162.

Exhibit C contains a document entitled "Appointment of Successor Trustee," wherein U.S. Bank as Trustee for the WAMU Trust purports to appoint Quality as successor trustee. CP 164–66. Respondents never admitted into evidence, through a declaration or request for judicial notice, a document contemplated by RCW 61.24.030(7), also known as a "beneficiary declaration." *See* CP 150–66 (judicial notice), 211–17 (dismissal orders).

The Superior Court dismissed Ms. Jackson's suit against all Respondents with prejudice as a result of their CR 12(b)(6) motion to dismiss for failure to state a claim. CP 220 (order re McCarthy Holthus), CP 224–26 (order re U.S. Bank, MERS, and Chase), CP 227 (order re Quality). Parties never engaged in any discovery proceedings and Ms. Jackson was barred from further amending her complaint. The trial court considered Respondents' "Request for Judicial Notice and Exhibits Thereto" in ruling on CR 12(b)(6). CP 211:25–26. Respondents had attached the Corporate Assignment document as well as the unexecuted Allonge. CP 160–62.

C. Appellate Decision

The Court of Appeals concluded the following: (1) that the trial court could consider documents in a judicial notice in ruling on a CR 12(b)(6) motion to dismiss; (2) the legislature had authority to enact the DTA, which did not encroach on Superior Court jurisdiction, and (3) the trustee could rely on a declaration that the foreclosing entity was the holder of the note. Attach. at *1–11.

The Court of Appeals ruled that Ms. Jackson failed to give notice of her constitutional challenge to the attorney general, as provided under RCW 7.24.110. Even though the *Jackson* Court provided that it need not reach Ms. Jackson's constitutional challenges, it went on to perform constitutional analysis of the DTA. Attach. at *7–10. The Court of Appeals concluded Ms. Jackson waived her CPA causes of action; however, Ms. Jackson filed a supplemental brief, addressing new authority that Ms. Jackson's presale DTA causes of action are recoverable under the CPA, and to clarify that she sought relief for DTA violations under the CPA. Appellant Supp. Brief at *7 (Oct. 10, 2014) (citing *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014) (only CPA damages for DTA violations presale)).

The Court of Appeals rested its decision, in part, on *Trujillo v. Northwest Trustee Services, Inc.*, Attach. at *11, which this Court has accepted for review. 182 Wn.2d 1020, 345 P.3d 784 (2015). To the extent

a decision in *Trujillo* controls here, Ms. Jackson respectfully requests a ruling consistent with any pending decision.

VI. ANALYSIS FOR WHY REVIEW SHOULD BE GRANTED

This Court should accept review of the Court of Appeals' decision for several reasons. First, there is now conflicting appellate precedent regarding what documents may be examined in deciding a CR 12(b)(6) motion. Second, judicial notice of hearsay contained within publicly recorded documents raises issues of substantial public concern. Third, the Court of Appeals' misreading of her complaint is creating confusion in superior court cases regarding the DTA. Finally, the Court of Appeals' interpretation of the DTA frustrates the original exclusive superior court jurisdiction over cases involving real property under Const. art. IV, § 6.

A. Division I's decision to consider evidence outside of Ms. Jackson's complaint in resolving a CR 12(b)(6) motion to dismiss conflicts with other appellate precedent and rests on a case this Court accepted for review, *Trujillo*

The Court of Appeals circumvented the plain language of CR 12. CR 12(b)(7) provides that a CR 12(b)(6) motion "shall be treated as one for summary judgment and disposed of as provided in rule 56," if "matters outside the pleading are presented to and not excluded." CR 12(b)(7); *see also Sea-Pac Co., Inc. v. United Food & Commercial Workers Local Union 44*, 103 Wn.2d 800, 802, 699 P.2d 217 (1985) (citing CR 12(b)).

A trial court's ruling to dismiss under CR 12(b)(6) is reviewed de novo.[2] "When an area of law involved is in the process of development, courts are reluctant to dismiss an action on the pleadings alone by way of a CR 12(b)(6) motion." *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987).

The Court of Appeals here affirmed the trial court for considering a document entitled, "Corporate Assignment of Deed of Trust" in its ruling on Respondents' CR 12(b)(6) even though that document was not attached to nor mentioned in Ms. Jackson's complaint. *See* CP 28–63 (Compl. Exs.). Ms. Jackson attached an unexecuted allonge to highlight that document's flaws and a break in the chain of ownership of her mortgage, but the Court considered it in favor of Respondents. *Compare* CP 35–36 *with* CP 160, 211–12.

Although a party may submit documents outside of the pleading, those "submissions generally convert a CR 12(b)(6) motion into a motion for summary judgment." *Bavand v. Onewest Bank FSB*, 176 Wn. App. 475, 485, 309 P.3d 636 (Div. I, 2013) (citing *Hansen v. Friend*, 59 Wn. App. 236, 239, 797 P.2d 521 (Div. 1, 1990)). The Superior Court improperly considered documents attached to Respondents' request for judicial notice in granting their CR 12(b)(6) motion to dismiss; it should have converted

[2] *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007) (citing *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 329–30, 962 P.2d 104 (1998)).

their motion to a CR 56 motion for summary judgment. This Court should grant review because of conflicting analysis between courts of appellate jurisdiction on this issue. RAP 13.4(b)(1)–(2).

Currently, the Court of Appeals Divisions are in conflict on whether documents whose contents are referenced in a complaint may be considered in ruling on a CR 12(b)(6). *Compare Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725–26, 189 P.3d 168 (Div. I, 2008) *with Brummett v. Washington's Lottery*, 171 Wn. App. 664, 673, 288 P.3d 48 (Div. II, 2012), *review denied*, 176 Wn.2d 1022 (2013). The *Jackson* Court rested its analysis on *Rodriguez* and its progenitors.

Division I in *Rodriguez*, held for the first time in Washington that the court may consider documents outside of the complaint in a CR 12(b)(6) motion to dismiss; it acknowledged that no Washington Court ruled on this issue and rested upon Ninth Circuit federal court authority. *Rodriguez*, 144 Wn. App. at 726 n.44. Division II in *Brummett*, held that transcripts containing the content of documents referred to in the complaint converted the motion into a motion for summary judgment. *Brummett*, 171 Wn. App. at 672–73 n.13 (declining to follow *Rodriguez*). Even more recently, June 4, 2015, Division III of the Court of Appeals published *Merry v. Northwest Trustee Services, Inc.*, wherein it converted a CR 12(c) motion to a CR 56 motion because it included a trustee's deed not in the

complaint. ___ Wn. App. ___, ___ P.3d ___, No 32474-5-III, Slip. Op. at *7–8 (Div. III, June 4, 2015).

Because of these conflicting decisions among Divisions of the Court of Appeals as well as this Court's precedent, this Court should grant review. RAP 13.4(b)(1)–(2).

B. Judicial notice of documents recorded with the County by private entities involves a substantial public concern because the Superior Court considered those documents for the truth of facts contained therein

Here, Ms. Jackson cannot dispute that Respondents recorded these documents with King County but she can and does dispute the veracity of assertions within those documents. To clarify, a trial court could judicially notice these documents were recorded to show Respondents adhered to recording requirements of the statute[3] but that was not the basis of Ms. Jackson's claim. *See* CP 1–26. Typically, recording statutes exist to establish lien priority and to give notice to the public that a trustee intends to foreclose; they are common in other states. *See James v. ReconTrust Co.*, 845 F. Supp. 2d 1145, 1148 (D. Or. 2012) (suit based upon failure to publicly record document).

Affirming the trial court's analysis would invite anyone to write factual assertions in a document and record it with the county, and then rely on those facts without authenticating it or testifying as to its contents.

[3] *See, e.g.*, RCW 61.24.010(2), RCW 61.24.020, RCW 61.24.030(5).

Ruling under CR 12(b)(6) deprived Ms. Jackson of due process because she was not able to impeach Respondents' evidence or present evidence or her own. A CR 56 motion is the proper procedure to allow Ms. Jackson notice and opportunity to be heard. Here, Respondents never presented original loan documents. Regardless, there are defects on the face of these documents — the allonge lacks a signature — and there is a gap in evidence of ownership of Ms. Jackson's note even considering all of the documents presented. No document establishes how Lasalle came to own or possess anything, and Ms. Jackson specifically pleaded that there was no proper beneficiary of her Deed of Trust. Further, MERS cannot transfer interests it does not possess and its status as nominee lacks authority to act for others. *Bain v. Metro. Mortgage Grp., Inc.*, 175 Wn.2d 83, 107, 111, 285 P.3d 34 (2012). Accordingly, this Court should grant review because the appellate court's analysis invites abuse of the civil rules of procedure, when one party relies on publicly recorded documents, the other party is unable to provide evidence impeaching those documents or refuting their veracity in arguing against a CR 12(b)(6) motion, which creates substantial issues of public concern under RAP 13.4(b)(4).

C. Division I's misreading of Ms. Jackson's allegations of bad faith is causing confusion in superior court cases involving the DTA, creating an issue of substantial public concern

The Court of Appeals incorrectly stated Ms. Jackson failed to plead that Respondents who acted as trustee, Quality and M&H, violated their

duty of good faith. Attach. at *10–11.[4] On the contrary, Ms. Jackson pleaded that Quality and M&H acted as trustee while owing the foreclosing party fiduciary duties as its attorney. CP 85 ¶ 2.3. She also pleaded that the trustee gave her documents with conflicting statements of who the purported beneficiary was. CP 94 ¶ 5.8. Accordingly, her claims against the trustee should have survived CR 12(b)(6). *Frias*, 181 Wn.2d at 428–30.

Ms. Jackson's complaint contains the following allegations: Quality is completely controlled by M&H; Quality is M&H's *alter ego*, CP 85 ¶ 2.3; CP 93 ¶¶ 5.2–5.13; M&H is the attorney for foreclosing entities and owes them fiduciary duties, CP 84 ¶ 2.3; CP 93 ¶ 5.2. Otherwise, M&H acts as trustee and any action carried out by Quality is merely a legal fiction and a misleading use of the corporate form. CP 85 ¶ 2.3. M&H's employees are also Quality's employees, and the same persons who give legal advice to M&H's clients either perform the acts for Quality as trustee or direct others to carry out those acts. CP 85 ¶ 2.3. This is even shown by a document attached to Respondents' request for judicial notice — after recording, the Appointment of Successor Trustee document was to be returned to M&H, not Quality! CP 165–66. Furthermore, Ms. Jackson pleaded M&H and Quality had insufficient proof the foreclosing entity

[4] The Court of Appeals also noted "the beneficiary declaration is sufficient," but there is no beneficiary declaration in the record.

was a lawful beneficiary under the DTA. CP 94 ¶ 5.10. Accordingly, dismissing M&H and Quality pursuant to CR 12(b)(6) was inappropriate.

Ms. Jackson pleaded facts that none of the Respondents were entitled to be a beneficiary under the DTA, and pleaded in the alternative that if US Bank possessed the note as trustee for WAMU trust it could not foreclose because the investors *held* the note. CP 85–86 ¶ 2.6. The Court of Appeals unfairly bound Ms. Jackson to one of her competing legal theories. Attach. at *10–11.

When another court reads Ms. Jackson's complaint and reads the Court of Appeals' opinion, it could conclude that alleging trustee bias and breach of its duty of good faith is irrelevant. These create substantial issues of public concern under RAP 13.4(b)(4) and this Court should accept review.

D. Review should be granted because the DTA frustrates Original Exclusive Superior Court Jurisdiction under Const. art. IV § 6 by vesting original jurisdiction in a Trustee instead of Superior Courts.

The DTA, in attempting to make the process efficient and inexpensive, raises serious constitutional jurisdiction concerns by taking away original jurisdiction over disputes relating to real property arising out of nonjudicial foreclosures from the Superior Courts and vesting

them to DTA trustees.[5] Because the trustee must engage in fact finding and act like a judge while wielding equitable powers, it effectively has original jurisdiction. Accordingly, Superior Courts become akin to courts of limited or appellate jurisdiction in reviewing these foreclosures.

1. Completely without judicial oversight, an entity may sell another person's home under authority from the DTA while acting as a judicial substitute

The DTA allows for a private entity to sell the home of another when third party claims the homeowner is in default. RCW 61.24.030; RCW 61.24.050. Through the DTA, lenders can forfeit borrowers' interests with relative ease without taking into account equitable considerations because of the lack of judicial oversight in conducting nonjudicial foreclosure sales.[6]

Under the DTA, the trustee "undertakes the role of a judge." *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 790, 295 P.3d 1179 (2013). The trustee must conduct, at a minimum, a "cursory investigation" to identify a "beneficiary" within the meaning of RCW 61.24.005(2).[7] Accordingly, the trustee must have proof the "beneficiary" of the deed of trust owns the note before initiating nonjudicial foreclosure proceedings. *Id.* at 789

[5] Approximately half of all states only allow for judicial foreclosure. Larson, Stephen D., *The Prohibition Against Recovering Attorney Fees in Mortgage Foreclosure*, 87 N.D. L. Rev. 255, 264 n.91 (2011).

[6] *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 789, 295 P.3d 1179, 1188 (2013) (quoting *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 915–16, 154 P.3d 882 (2007))).

[7] *Lyons v. U.S. Bank Nat. Ass'n*, 181 Wn.2d 775, 787, 336 P.3d 1142 (2014).

(citing RCW 61.24.030(7)(a)). The trustee's mandatory procedures amount to judicial inquiries and result in adjudicatory determinations.

The DTA alters the parties' burdens of proof, frustrating the jurisdiction of superior court. Under RCW 61.12, a lender bears the burden of proving the borrower's breach of contract. 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 300.02 (6th ed.) (burden of proof on contract action). In challenging a DTA foreclosure, the homeowner must prove that the foreclosing party's own statements are untrue. *See* RCW 61.24.130. Further, by placing the impetus for suit on the homeowner, she must bear the burden of initiating suit and is disadvantaged by having to survive pretrial dispositive motions. The shift in burden acts to frustrate the jurisdiction of the superior court's contrary to Const. art. IV, § 6.

Although a trustee is not an administrative agency, it is statutorily created and it performs adjudicative functions. *See Ledgering v. State*, 63 Wn.2d 94, 103–04, 385 P.2d 522 (1963). Here, the trustee performs judicial functions because a superior court could undertake its fact-finding role and could conduct a sale of the home. *Id.* at 103–04. Furthermore, foreclosure has also historically been vested with the courts. *See id.* at 104–05. The Court of Appeals never conducted this analysis and this Court should grant review under RAP 13.4(b)(1).

The court in *Tacoma v. O'brien* considered legislation that relieved contractors from liability under certain circumstances and provides when

those circumstances are met.[8] The court held that the legislature had undertaken a judicial role and struck down that portion as a violation of the separation of powers doctrine. *Id.* at 272. Here, the legislature has provided the trustee with what amounts to proof of ownership of a note; a beneficiary declaration. RCW 61.24.030(7). The DTA contains an overstep similar to that in *Tacoma v. O'brien,* and this court should grant review under RAP 13.4(b)(3).

2. Washington's constitution grants exclusive jurisdiction to superior courts to conduct foreclosures at they concern rights of title and possession of real property

Washington's constitution provides "Superior courts and district courts have concurrent jurisdiction in cases in equity.[9] The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property." Const. art. IV, § 6.

When compared to *Kennebec, Inc. v. Bank of the West*, Ms. Jackson's constitutional question is novel. 88 Wn.2d 718, 565 P.2d 812 (1977). The Court in *Kennebec* concluded that the DTA did not run afoul of Wash Const. art. 1 § 3 (due process) largely because the foreclosure is performed by a private individual similar to UCC self help provisions. *Kennebec,* 88 Wn.2d. at 720–22. Unlike the UCC, which governs goods,

[8] *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 271–72, 534 P.2d 114 (1975).
[9] Const. art. IV, § 6 was amended in 1993 so as to give district courts concurrent jurisdiction in equity. *State v Brennan*, 76 Wn. App. 347, 356, n.8, 884 P. 2d 1343 (1994) review denied 127 Wn.2d 1003 (1995).

the DTA can change rights concerning title and possession of *real property*. Const. art. 4 § 6.

This Court recently recognised "mistakes" in Const. art IV, § 6 jurisprudence and stated that even longstanding precedent must be reexamined when "made without the benefit of an article IV, section 6 analysis."[10] In construing our Constitution, this Court has repeatedly provided original jurisdiction is *exclusive* and even universal.[11]

> By the constitution all the judicial power (which is a distinct branch of the sovereignty) is vested in the courts therein created, independently of all legislation. **The jurisdiction of these courts is universal**, covering the whole domain of judicial power

Blanchard, 188 Wash. at 414 (emphasis added) (quoting *In re Cloherty*, 2 Wash. 137, 139, 27 P. 1064 (1891).

During the 1800s, enforcement of "power of sale" clauses was prohibited under United States equity jurisprudence. *See* Jackson Mot. Recons. at *11–20; *Norfor v Busby*, 19 Wash. 450, 453–4, 53 P. 715 (1898).

The Court of Appeals' decision contradicts decisions of this Court and other Courts of Appeals providing that the legislature cannot grant the superior court's original exclusive jurisdiction to another entity. For example, in *Dennis v. Moses*, 18 Wash. 537, 52 P. 333 (1898) this Court

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[10] *Ralph v. State Dep't of Natural Res.*, 182 Wn.2d 242, 258, 343 P.3d 342 (2014).

[11] *See State v. Posey*, 174 Wn.2d 131, 136, 272 P.3d 840 (2012) (citing Const. art. IV, § 6) (superior court jurisdiction of juvenile sentencing of a felony was proper because it comes from the constitution not the legislature); *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 414, 63 P.2d 397 (1936).

invalidated as unconstitutional an antideficiency statute and recognised "[c]ourts of equity have always exercised a control over sales of property," disregarding power of sales clause when equity so requires. *Id.* at 578. Similarly, in *State v. Mohar*, this Court observed the legislature could not divest superior courts of their equitable and original jurisdiction at law of all cases which involve the title or possession of real property. 169 Wash. 368, 375, 13 P.2d 454, 456 (1932). In *Blanchard v. Golden Age Brewing Co.*, this Court recognised the legislature cannot interfere with superior courts' powers in equity.[12] 188 Wash. at 414.

Decisions of this Court show that the legislature cannot give the superior court's original jurisdiction to another entity. *See e.g. Posey*, 174 Wn.2d at 136; *State v. Haye*, 72 Wn.2d 461, 469, 433 P.2d 884 (1967); *State v. Schaffer*, 31 Wash. 305, 306, 71 P. 1088 (1903); *Moore v. Perrot*, 2 Wash. 1, 5, 25 P. 906 (1891). As the Court of Appeals observed in *State v. Brennan*, the Constitution has to be amended so as to allow another entity to share the superior court's exclusive original jurisdiction. 76 Wn. App. at 356.

The Court of Appeals provided that the power to privately foreclose is made pursuant to the Deed of Trust's power of sale clause and is not

[12] "Thus, by the Constitution, and independently of any legislative enactment, the judicial power over cases in equity has been vested in the courts, and ... such power may not be abrogated or restricted by the legislative department." *Blanchard*, 188 Wash. at 415.

made pursuant to a judgment. Attach. at *8–9. The Court of Appeals' analysis is not helpful because it is circular and misses the point. *See id.* It provides that a private person may sell another's property (absent a judgment) because the owner agreed to by contract; curiously, the very ability to conduct a private sale stems from the statute Ms. Jackson asserts is unconstitutional. Ch. 61.24 RCW. The Court of Appeals provided no additional analysis or authority to support its conclusion. *See* Attach. at *8–9. Of course there is no "judgment" driving nonjudicial foreclosure — there cannot be a judgment when superior courts are stripped of jurisdiction.

Accordingly, this Court should grant review under RAP 13.4(b)(1)–(4): the Court of Appeals decision conflicts with analysis of art. 4 § 6, which is independently a significant question of law under Washington's constitution, and the constitutionality of Washington's nonjudicial foreclosure statute is a significant public concern.

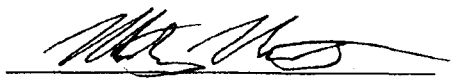
VII. CONCLUSION

For the reasons stated herein, Ms. Jackson respectfully requests this Court grant her petition for review.

Dated this 8th day of June, 2015 at Arlington, Washington.

Respectfully Submitted By:

STAFNE TRUMBULL, PLLC



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CERTIFICATE OF SERVICE

I, Ashley Burns, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

1. At all times hereinafter mentioned I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

2. That on the 8th day of June, 2015, I caused to be served a true and correct copy of Petition for Review from Washington Court of Appeals Division I to respondents in the above title matter by causing it to be delivered to:

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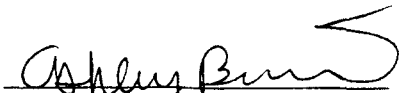

Ashley Burns

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Cc: Fred Burnside; Bugaighis, Zana; Diane Hitti; Eleanor DuBay; Kathy Salyer; Dacuag, Evelyn; Mitchel Wilson; Scott Stafne; Joshua Trumbull; Brian Fisher
Subject: Supreme Court No. Court of Appeals No. 72016-3-I; Jackson v. Quality Loan Service Corporation of Washington et. al.

Dear Clerk of the Supreme Court:

On behalf of Petitioner Sandra Jackson Mitchel F. Wilson, WSBA# 49216 of Stafne Trumbull, PLLC 239 N. Olympic Ave, Arlington, WA 98223 would like to file the attached documents:

- Petition for Review from Washington Court of Appeals Division One

A check for $200.00 has been sent via U.S. First Class Certified Mail for the filing fee.

Please contact us at 360.403.8700 or mitch@stafnetrumbull.com if you have any questions.

Thank you.

--

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SANDRA SHELLEY JACKSON, a single woman,	)	No. 72016-3-I
Appellant,	)	DIVISION ONE
v.	)	PUBLISHED OPINION
QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington Corporation, MORTGAGE ELECTRONIC REGISTRATION SYSTEM INC., MCCARTHY & HOLTHUS, LLP, a Washington Limited Liability Partnership, U.S. BANK, NATIONAL ASSOCIATION as trustee for WAMU MORTGAGE PASS THROUGH CERTIFICATE FOR WMALT 2006-AR4 TRUST INVESTORS IN WMALT 2006-AR4 TRUST c/o J.P. MORGAN BANK, NA,	)	FILED: April 6, 2015
Respondents.	)	

TRICKEY, J. — Notification to the state attorney general is a mandatory prerequisite to challenge a statute's constitutionality. Here, the plaintiff sought to have Washington's deeds of trust act (DTA), chapter 61.24 RCW, declared unconstitutional but failed to notify the attorney general as required by statute. Even if the plaintiff in this case were able to pass the procedural bar to her action, we conclude that the DTA is constitutional.

Any remaining claims that the plaintiff might have under the DTA, have been addressed and disposed of by recent Supreme Court decisions. Accordingly, we affirm the trial court's CR 12(b)(6) dismissal.

FACTS

In March 2006, Sandra Shelley Jackson refinanced her home with a $715,000 loan from Cameron Financial Group, Inc., dba 1st Choice Mortgage. The loan was evidenced by a promissory note and secured by a deed of trust encumbering Jackson's home located in Seattle. In the deed of trust, 1st Choice Mortgage was identified as "lender," Fidelity National Title as "trustee," and Mortgage Electronic Registration Systems, Inc. (MERS) as a "nominee for Lender and Lender's successors and assigns," where MERS is the "beneficiary under this Security Instrument."[1] The deed of trust is recorded under King County Recorder's No. 20060331001860. The note and deed of trust provide for a nonjudicial foreclosure of the property in the event of default, pursuant to the DTA.

The loan was subsequently sold to a securitized trust known as the "WAMU Mortgage Pass Through Certificate For WMALT 2006-AR4."[2] In her complaint, Jackson recognizes that under the terms of the note WMALT 2006-AR4 trust is a "note holder." U.S. Bank, National Association is the trustee for WMALT 2006-AR4 trust and possesses the note.

In January 2011, Jackson defaulted on her loan payments. On September 20, 2012, MERS, acting as the nominee for U.S. Bank as trustee for WMALT 2006-AR4 trust, terminated its agency interest when it assigned its nominee interest in the deed of trust back to its principal, U.S. Bank as trustee.

In November 2012, Jackson received a notice advising her that her loan was in default. The notice disclosed that her loan had been sold to U.S. Bank as

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[1] Clerk's Papers (CP) at 88; Exhibit (Ex.) 3.
[2] CP at 85-86.

trustee for the WMALT 2006-AR4 trust, J.P. Morgan Chase Bank, N.A. was her loan servicer, and her arrears were approximately $127,000. The notice also informed her that a foreclosure sale might be scheduled if she did not cure her default, but "ha[d] recourse to the courts pursuant to RCW 61.24.130 to contest the alleged default on any proper ground."[3]

On November 13, 2012, U.S. Bank, the note holder, recorded an appointment of successor trustee appointing Quality Loan Service Corporation of Washington as the new trustee under the deed of trust. On December 21, 2012, when Jackson failed to cure her default, Quality Loan Service recorded a notice of trustee's sale, scheduling the sale for April 26, 2013. The notice of trustee's sale referenced the notice of default, identifying the original parties to the deed of trust, in order to permit the recorder's office to link to the deed of trust. The notice identified U.S. Bank as successor in interest to Jackson's loan.

Shortly before the scheduled foreclosure, Jackson filed a complaint asserting claims against U.S. Bank, Chase Bank, MERS, Quality Loan Services, and its legal counsel, McCarthy & Holthus, LLP. Jackson amended her complaint to include claims asserting that the deed of trust is unenforceable, violates the DTA, violates the Washington Constitution, violates the Consumer Protection Act (CPA),[4] and for breach of contract, unconscionability, negligence, and quiet title. The trial court dismissed the complaint under CR 12(b)(6). Jackson appeals.

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[3] CP 55-57; Ex. 4.
[4] Ch. 19.86 RCW.

ANALYSIS

Standard of Review

This court reviews de novo an order granting a motion to dismiss under CR 12(b)(6). FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 180 Wn.2d 954, 962, 331 P.3d 29 (2014); Kinney v. Cook, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). Dismissal under CR 12(b)(6) is appropriate in those cases where the plaintiff cannot prove any set of facts consistent with the complaint that would entitled the plaintiff to relief. Bravo v. Dolsen Cos., 125 Wn.2d 745, 750, 888 P.2d 147 (1995). "[A]ny hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support the plaintiff's claim." Bravo, 125 Wn.2d at 756 (alteration in original) (quoting Halvorson v. Dahl, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978)). All facts alleged in the plaintiff's complaint are presumed true. Tenore v. AT&T Wireless Servs., 136 Wn.2d 322, 330, 962 P.2d 104 (1998). However, the complaint's legal conclusions are not required to be accepted on appeal. Haberman v. Washington Pub. Power Supply Sys., 109 Wn.2d 107, 120, 744 P.2d 1032 (1987). "If a plaintiff's claim remains legally insufficient even under his or her proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate." Gorman v. Garlock, Inc., 155 Wn.2d 198, 215, 118 P.3d 311 (2005).

Issues of statutory constitutionality are reviewed de novo. HomeStreet, Inc. v. Dep't of Revenue, 166 Wn.2d 444, 451, 210 P.3d 297 (2009).

Judicial Notice

Jackson argues that the trial court improperly took judicial notice of documents attached to defendants U.S. Bank, MERS, and Chase Bank's motion

to dismiss. In general, when ruling on a CR 12(b)(6) motion to dismiss, the trial court may only consider the allegations contained in the complaint and may not go beyond the face of the pleadings. Brown v. MacPherson's, Inc., 86 Wn.2d 293, 297, 545 P.2d 13 (1975). But the trial court may take judicial notice of public documents if the authenticity of those documents cannot be reasonably disputed. Berge v. Gorton, 88 Wn.2d 756, 763, 567 P.2d 187 (1977). ER 201(b)(2) authorizes the court to take judicial notice of a fact that is "not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Additionally, where a plaintiff asserts allegations in a complaint on specific documents, but does not physically attach those documents, the documents may be considered in ruling on a CR 12(b)(6) motion for judgment on the pleadings. Rodriguez v. Loudeye Corp., 144 Wn. App. 709, 189 P.3d 168 (2008); see, e.g., In re Stac Elecs. Sec. Litig., 89 F.3d 1399, 1405 n.4 (9th Cir. 1996) (appropriate for trial court to consider other portions of document referenced in complaint in a motion to dismiss and doing so does not convert the motion into one for summary judgment).

U.S. Bank sought to have the trial court take judicial notice of the adjustable rate note, prepayment penalty addendum, and an allonge to the note for the loan, which were repeatedly referenced in Jackson's complaint. The other two documents that U.S. Bank sought to introduce were publicly recorded property records easily accessed through the King County Recorder's Office—a recorded

corporate assignment of the deed of trust and a recorded appointment of successor trustee, Quality Loan Service Corporation.

Although the record does not indicate whether the trial court did in fact take judicial notice of these documents, the court's consideration of the documents was appropriate in this CR 12(b)(6) motion. Jackson's complaint was based on the alleged breach of the DTA, which was based in part on the documents presented to the court. Because Jackson cannot challenge the authenticity of these readily available public documents, the trial court did not err in taking judicial notice of these documents.

Nonconstitutional Claims

Jackson failed to address her claims for violation of the CPA, breach of contract, unconscionability, negligence, and quiet title in her opening appellate brief. An appellant's brief must contain "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6).

An appellate court will not consider a claim of error that a party fails to support with legal argument in her opening brief. Mellon v. Reg'l Tr. Servs. Corp., 182 Wn. App. 476, 486, 334 P.3d 1120 (2014) (citing Howell v. Spokane & Inland Empire Blood Bank, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991); Fosbre v. State, 70 Wn.2d 578, 583, 424 P.2d 901 (1967); RAP 10.3.(a)(6)). "While an appellate court retains the discretion to consider an issue raised for the first time on appeal, such discretion is rarely exercised." Karlberg v. Otten, 167 Wn. App. 522, 531,

280 P.3d 1123 (2012) (citing Smith v. Shannon, 100 Wn.2d 26, 38, 666 P.2d 351 (1983)).

Jackson's failure to assign error to and argue against the court's decision for failure to state a claim on these issues, waives any argument as to those claims.

Constitutionality of the DTA

Jackson's complaint sought a declaratory judgment regarding the constitutionality of the DTA. In her argument before the trial court, Jackson specifically asserted that she was making arguments under the constitution and not the DTA.[5]

RCW 7.24.110 requires notification to the state attorney general when there is a constitutional challenge to state legislation. Jackson failed to notify the state attorney general. Dismissal of constitutional claims challenging the facial constitutionality of a state statute is appropriate where the state attorney general has not been notified. See Kendall v. Douglas, Grant, Lincoln, and Okanogan Counties Pub. Hosp. Dist. No. 6, 118 Wn.2d 1, 11-12, 820 P.2d 497 (1991) (service on the attorney general is mandatory and a prerequisite); Camp Fin., LLC v. Brazington, 133 Wn. App. 156, 160, 135 P.3d 946 (2006) (attorney general must be served when a party challenges the constitutionality of a statute). Jackson's attack on the constitutionality of the DTA is procedurally deficient, and thus, dismissal on that ground alone was appropriate.

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[5] "We're not coming before you under the Deed of Trust Act. We're coming before you directly under the Constitution. We're saying the statute is unconstitutional. And even if it isn't unconstitutional, these folks can't bring an action because they haven't complied with those acts that are a necessary condition predicate to bringing an action under the DTA." Report of Proceedings (RP) (July 19, 2013) at 27-28.

Even if we were to consider the substance of Jackson's arguments, we disagree that the DTA is unconstitutional. Jackson argues that the DTA violates several Washington State constitutional provisions by "creating a trustee to exercise exclusive judicial power reserved to the superior court."[6] In particular, Jackson bases her arguments on article IV, section 6 and article II, section 1 of the Washington State Constitution. Those articles set forth the legislative powers and the jurisdiction of the superior courts.

Article IV, section 6 provides that "[t]he superior court shall have original jurisdiction in all cases at law which involve the title or possession of real property." Jackson relies on Klem v. Washington Mutual Bank, 176 Wn.2d 771, 295 P.3d 1179 (2013) as support for her theory that the nonjudicial foreclosure process involves a judicial inquiry. But Klem merely addressed the duties of a trustee and drew an analogy between judicial and nonjudicial foreclosure. Klem did not, as Jackson contends, elevate the DTA's process into a judicial one. Klem recognized the authority of a trustee when it noted that a "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." Klem, 176 Wn.2d at 791.

Moreover, a nonjudicial foreclosure is not made pursuant to a judgment but rather is one conducted under a power contained in a mortgage or a degree of foreclosure.[7] As such, it is made through an agreement between the grantor and

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[6] Appellant's Opening Br. at 11 (emphasis omitted).

[7] "In short, a nonjudicial trustee sale is not a forced sale, because of its consensual nature. The nonjudicial trustee sale is not an execution sale, because there is no judgment involved. Thus, a homestead is not exempted from such a sale by RCW 6.12.090." Felton

the beneficiary of the deed of trust. The DTA does not divest the superior court of jurisdiction. Indeed, the superior court's constitutional grant of jurisdiction is preserved in specific portions of the DTA.[8] Until a party challenges the foreclosure, there is no judicial involvement. It is at that point that the superior's court's jurisdiction is invoked. See Felton, 101 Wn.2d at 422-23.

Jackson's argument that the legislature does not have the power to legislate regarding title and possession of real property is entwined with her argument that the constitution granted exclusive jurisdiction to the courts for all property concerns.[9] The DTA creates a method of mortgaging real property involving three parties: a grantor (borrower), a beneficiary (lender), and a trustee. See Bain v. Metro Mortg. Grp., Inc., 175 Wn.2d 83, 92-93, 285 P.3d 34 (2012); RCW 61.24.005.

The DTA was enacted by the legislature to further three objectives for the nonjudicial foreclosure process. It requires that the process (1) be efficient and inexpensive, (2) provide an adequate opportunity for interested parties to prevent wrongful foreclosure, and (3) promote the stability of land titles. Cox v. Helenius, 103 Wn.2d 383, 387, 693 P.2d 683 (1985). In Morrell v. Arctic Trading Co., Inc., 21 Wn. App. 302, 304, 584 P.2d 983 (1978), the court held that a trustee attempting

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v. Citizens Fed. Sav. & Loan Ass'n of Seattle, 101 Wn.2d 416, 420, 424, 679 P.2d 928 (1984).

[8] See, e.g., RCW 61.24.130(1) (buyer has right to file action in superior court to restrain a trustee's sale); RCW 61.24.130(8)(j) (granting borrower power to initiate court action); RCW 61.24.040(2); RCW 61.24.090(2) (granting borrower right to request any court to determine reasonableness of fees).

[9] Several recent federal district courts have addressed and rejected Jackson's claims that the DTA is unconstitutional. Knecht v. Fidelity Nat'l Title Ins. Co., No. C12-1575RAJ, 2014 WL 4057148 (W.D. Wash. Aug. 14, 2014); Galyean v. Nw. Tr. Servs., Inc., No. C13-1359 MJP, 2014 WL 3360241 (W.D. Wash. July 9, 2014).

to notify an interested party of an impending foreclosure sale, was not obligated to search for an address when no address was found in the deed of trust documents. The purpose of strict notice requirements in a nonjudicial sale of property secured by trust deed is to inform persons with an interest in the property of the pending sale of the property, so that they may act to protect those interests. See also Kennebec, Inc. v. Bank of the West, 88 Wn.2d 718, 726, 565 P.2d 812 (1977) (holding that chapter 61.24 RCW as it existed prior to the 1975 amendments was passive state involvement and did not violate the due process clause of the Fourteenth Amendment or article I, section 3 of the Washington State Constitution). Here, there is no dispute that Jackson received notice.

The legislature had authority to enact the DTA and its enactment did not encroach upon the jurisdiction of the superior court.

Allegations of DTA Violations

Jackson asserts that the nonjudicial foreclosure violated the DTA. She argues that the trustee failed to comply with RCW 61.24.030(7)(a) because there was "[in]sufficient proof identifying the beneficiary and note owner prior to instigating this private sale."[10]

RCW 61.24.030(7)(a) provides that a "declaration by the beneficiary made under the penalty of perjury stating 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."

[10] CP at 94 (emphasis omitted).

Jackson's complaint asserts that the investors are the note holders and entitled to her payments. But see Cashmere Valley Bank v. State, Dep't of Revenue, 181 Wn.2d 622, 634, 334 P.3d 1100, 1106 (2014) (investor has no interest in underlying mortgages and deeds of trust and is not a beneficiary of those instruments).

Furthermore, this court has recently addressed this particular issue in Trujillo v. Trustee Services, Inc., 181 Wn. App. 484, 496, 326 P.3d 768 (2014). There, we held that the beneficiary is the holder of the note and, further, a trustee may rely on a beneficiary's declaration as proof of the beneficiary's right to foreclose. In Lyons v. U.S. Bank National Ass'n, 181 Wn.2d 775, 789-90, 336 P.3d 1142 (2014), the Supreme Court held that the trustee was entitled to rely on the beneficiary declaration unless it has violated its duty of good faith. Since there was no allegation of bad faith here, the beneficiary declaration is sufficient.

Moreover, the Supreme Court recently held that in the absence of a foreclosure, no viable DTA claims remain. Frias v. Asset Foreclosure Servs., Inc. 181 Wn.2d 412, 428-30, 334 P.3d 529 (2014). Because there has been no foreclosure, Jackson has no claims for violations of the DTA. As discussed above, no remaining claims have been preserved for appeal.

The trial court is affirmed.

Trickey, J

WE CONCUR:

Dwyer, J.

Becker, J.

OFFICE RECEPTIONIST, CLERK

To: Ashley Burns
Cc: Fred Burnside; Bugaighis, Zana; Diane Hitti; Eleanor DuBay; Kathy Salyer; Dacuag, Evelyn; Mitchel Wilson; Scott Stafne; Joshua Trumbull; Brian Fisher
Subject: RE: Supreme Court No. Court of Appeals No. 72016-3-I; Jackson v. Quality Loan Service Corporation of Washington et. al.

Received 6-8-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Ashley Burns [mailto:ashley@stafnetrumbull.com]
Sent: Monday, June 08, 2015 4:47 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Fred Burnside; Bugaighis, Zana; Diane Hitti; Eleanor DuBay; Kathy Salyer; Dacuag, Evelyn; Mitchel Wilson; Scott Stafne; Joshua Trumbull; Brian Fisher
Subject: Re: Supreme Court No. Court of Appeals No. 72016-3-I; Jackson v. Quality Loan Service Corporation of Washington et. al.

Dear Clerk of the Supreme Court:

I apologize, attached is the Court of Appeals decision that goes with the petition for review which is attached to the first email.

Thank you,

On Mon, Jun 8, 2015 at 4:25 PM, Ashley Burns <ashley@stafnetrumbull.com> wrote:

Dear Clerk of the Supreme Court:

On behalf of Petitioner Sandra Jackson Mitchel F. Wilson, WSBA# 49216 of Stafne Trumbull, PLLC 239 N. Olympic Ave, Arlington, WA 98223 would like to file the attached documents:

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