CASE NO. 91928-3

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON
(Court of Appeals Division III, Case No. 32315-3-III)

MICHAEL URIBE and HELEN URIBE husband and wife,

Appellants,

v.

LIBEY, ENSLEY & NELSON, PLLC, a Washington professional limited liability company; GARY LIBEY and JANE DOE LIBEY, husband and wife and the marital community comprised thereof, RANDALL RUPP AND LUZ DARYL-RUPP, husband and wife and the marital community comprised thereof; and 7HA FAMILY, LLC, a Washington limited liability company;

Respondents.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

Petitioners are Michael and Helen Uribe (the "Uribes" or "Uribe").

II. CITATION TO COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(2) and (4), this Court should review the unpublished decision by Division III of the Court of Appeals filed on May 5, 2015 in *Uribe v. Libey, Ensley and Nelson, PLLC,* et al. **(Appendix A)** Uribes' Motion for Reconsideration filed on May 20, 2015 is **(Appendix B)**; the Order Denying Reconsideration filed on June 9, 2015 **(Appendix C)**; and the Order Denying Motion to Publish filed on June 9, 2015 **(Appendix D).**

On June 4, 2015, the Court of Appeals issued a published opinion in *Merry v. Northwest Trustee Services, Inc.*, 2015 WL 3532992. This case presents many similar issues regarding a trustee's compliance with the Deeds of Trust Act, RCW 61.24 **(DTA)** and the waiver of legal claims for the trustee's failure to comply with the DTA. **(Appendix E)**

III. ISSUES PRESENTED FOR REVIEW

1. Review by the Supreme Court is required in order to resolve a direct conflict between this case, *Merry,* and many prior decisions of this Supreme Court and Division I and II on three issues:

(a) Strict construction of the DTA in favor of the borrower;

(b) Strict compliance with the DTA by the trustee; and

(c) The role of "minor, technical" violations of the DTA and waiver of the right to set the trustee's sale aside or sue for damages by failing to obtain an injunction prior to the trustee's sale.

2. Review by the Supreme Court is required in order to resolve a direct conflict between *Uribe* and *Udall v. T.D. Escrow Svcs., Inc.* 159 Wash. 2d 903, 154 P.2d 882 (2007) ("*Udall*"), wherein this Court ruled that the trustee formed a contract when he accepted the final bid at the trustee's sale. Division III's opinion also conflicts with the RCW 61.24. 100, and *Donovick v. Seafirst*, 111 Wn.2d 413, 757 P.2d 1378 (1985) ("*Donovick*") regarding multiple foreclosures.

3. Review by the Supreme Court is required in order to resolve a direct conflict between this case and numerous Washington appellate cases requiring a deed of trust trustee to exercise independent discretion as an impartial third party with fiduciary duties to *both* lender and borrower.

IV. STATEMENT OF THE CASE

The Uribes are the owners of an excavation company and were developing real property in Benton County ("Benton Property").

In 2007, Uribe obtained a line of credit from the Bank of Whitman (BW) for $571,000 to finance a pipeline construction project in Idaho.[1] Uribe's line of credit for $571,000 was evidenced by a promissory note and secured with a 1st lien deed of trust on the "Benton Property" (see: CP 0475-0488) and by Uribe's heavy equipment pursuant to a security agreement. See: CP 0525-0540, CP 0603, para. 4. The line of credit was also secured with real property in Franklin County, the "Franklin Property," with a 2nd lien mortgage. The Benton Property was valued at $1,500,000. (CP 856-860).

The Uribes also borrowed $1,655,185 from BW. That loan was secured with 1st lien deed of trust on the "Franklin Property" (see: CP 0457, Para. 2) and with a 2nd lien mortgage on the "Benton Property." (CP 201-213). The Franklin Property was valued at $521,221 (CP 858).

BW commenced a non-judicial foreclosure on September 8, 2010 and hired attorney Libey as the "Successor Trustee." BW had also previously hired Libey to file a replevin action to repossess and sell the Uribes' construction equipment. (CP 518-521).

The Resignation and Appointment of Successor Trustee (RAST) was recorded at 4:02 pm on September 8, 2010. (CP 563-565) However,

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[1] The failing Bank's role in the demise of Uribe's pipeline construction business is the subject of *FDIC v. Uribe, Inc.*, 171 Wn.App. 683, 287 P.3d 694 (2012).

Libey had already recorded the Notice of Trustee's Sale at 1:57 pm - two hours before the RAST. (CP 501-507). The RAST appointing Libey was notarized *two weeks* before it was actually signed by the former trustee.

According to the Notices of Trustee's Sales (2), the amount due on the Benton loan was approximately $420,000 and the amount due on the Franklin loan was approximately $2,432,990. See: CP 0495-0499 and CP 0500-0507.

During the foreclosure the trustee ("Libey") acted solely as the attorney and advocate for BW, thereby violating his duties of good faith and impartiality to Uribe. For example, after the Notices of Trustee's Sale for both properties were purportedly "given" by Libey, Libey advised BW of a way for BW to foreclose multiple properties securing a single note ostensibly based on *Donovick*. (CP 492). This scheme was designed to discourage other bidders for the Benton Property because it was worth a million dollars more than the Franklin Property and Libey had learned that a neighbor might bid up to the fair market value for the Benton Property at the trustee's sale. (See CP 492-493).[2]

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[2] In contrast to this case, *Donovick* involved only one note securing multiple parcels. After *Donovick* was decided in 1988, the legislature amended RCW 61.24.100 to permit the foreclosure of as many parcels as were encumbered by deeds of trusts that secured ***one*** note. See RCW 61.24.100(3)(b). This amendment covers that situation, but not the

Recognizing the potential liability, Libey requested an "Indemnity Agreement" from BW in case Libey, as the Successor Trustee, takes "...excess money from the bidder and applies it to the other loan" and then gets sued by Uribe. *Id.* The "Indemnity Agreement" protects Libey from liability for: "...any acts, errors, or omissions as trustee or successor trustee to any deed of trust foreclosure action." CP 0492-0493.

The trustee's sales took place on December 17, 2010. *First*, Libey sold the Franklin Property at 10:00 a.m. for **$390,000 cash *by the satisfaction in full of the secured obligation.*** CP 0494-0500 (emphasis added). *Next*, Libey sold the Benton County Property at 11:00 a.m. for **$1,200,000 *cash by the full satisfaction of the secured obligation***. CP 0512-0517 (emphasis added).

BW also replevied and sold Uribe's construction equipment (CP 0518-0521) *before* the trustees' sales, at public auctions, and failed to account for $281,245 received *after* both trustee's sales. CP 0523-0524. Libey did not credit these proceeds to the Benton loan. CP 523-524.

V. ARGUMENT

Under RAP 13.4(b)(2) and (4), this Court will accept review of a Court of Appeals decision that "is in conflict with another decision of the

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situation presented here where there are ***two*** (2) notes secured by ***two*** (2) separate parcels.

Supreme Court or Court of Appeals" and when "the petition involves an issue of substantial public interest." The decision by Division III in this case satisfies both criteria. Division III holds that a borrower waives the right to contest a trustee's sale post sale despite the fact that the trustee had no statutory authority to conduct the trustee's sale.

In light of the many similar cases pending on these issues statewide and Division III's aberrant decisions here and in *Merry*, which directly contradicts longstanding precedent in Divisions I and II and this Court, an issue of substantial public interest is presented by the erroneous decisions eliminating the mandate of RCW 61.24.010.

A. Strict Construction and Strict Compliance is Required.

RCW 61.24.010(2) states:

> (2)..... ***Only 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.*** (Emphasis added)

Under Washington black letter law, 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 the non-judicial foreclosure sales. *Udall*, pgs. 915-916. Moreover, lenders must strictly comply with the DTA and courts must strictly construe the DTA in the borrowers favor because the DTA dispenses with

many protections commonly enjoyed by borrowers in judicial foreclosures (*Albice v. Premier Mortgages Services of Wash. Inc.* 174 Wn.2d 560, 568, 276 P.3d 1277 (2012) (*"Albice"*); citing *Udall* at 915-16 ("As we have already mentioned and held, under this statute, strict compliance is required."))

Division III's decision goes to the heart of the interpretation and implementation of the DTA. Just how strict is strict construction? How strict is strict compliance? How strictly must a trustee comply with his duties of impartiality and good faith?

The answer from the Washington appellate courts has always been Strict means Strict! However, Division III has now taken a different tack from this long line of cases, ruling that courts need not strictly construe the DTA. And, a trustee need not comply with the "minor, technical" details imposed by the DTA, as enunciated in *Merry*.

Division III also ignores the plain and unambiguous words of RCW 61.24.010 that make it crystal clear that:

> (i) The lawful beneficiary must appoint a successor trustee *before* the successor trustee is "vested" with all the powers of the original trustee, and
>
> (ii). A lawful successor trustee *must* be properly appointed to have the powers of the original trustee.

Without a proper appointment, Libey had no statutory power to issue a Notice of Trustee's Sale. *Bavand v. One West Bank Bank,* 176 Wn.App. 475, 309 P3d 636 (Div 1, 2013) is directly on point. OneWest signed the appointment of RTS as trustee on 12-15-10. However, the assignment of the beneficial interest in the deed of trust to OneWest did not occur until the next day. RTS commenced foreclosure proceedings by issuing and recording the Notice of Trustee's Sale about three weeks later on 1-6-11.

The Division I held:

> The plain words of this statute establish that the beneficiary of a deed of trust is the sole entity entitled to appoint a successor trustee if the beneficiary elects to replace the original trustee named in that deed of trust. **This statute makes equally clear that *only upon the recording of the appointment of a successor trustee with the auditor in the relevant county is a successor trustee "vested with all the powers of an original trustee."*** Among these powers is, of course, the power to conduct a non-judicial foreclosure culminating in a trustee's sale. ***The only reasonable reading of this statute is that the successor trustee must be properly appointed to have the powers of the original trustee.***

Bavand, 176 Wn.App. at 486-87. Emphasis added.

Division III held that *Bavand* and *Schroeder v. Excelsior Mgmt. Grp.*, 177 Wn.2d 94, 297 P.3d 677 (2013) ("*Schroeder*"), cited by Uribe, are inapposite precedent because "both of these cases dealt with situations where the lender lacked statutory

authority under the DTA to initiate the foreclosure." This is a plainly incorrect interpretation of these cases. First, both cases hold that the DTA must be strictly construed by the courts and strictly complied with by the foreclosing trustee and lender. And, *Bavand* holds, under the rule of strict compliance, that the timing of the recording of the RAST is critical with respect to the trustee's authority to conduct a foreclosure.

As in our case, the successor trustee in *Bavand* was not the successor trustee at the time it "gave" Notice of Trustee's Sale." The Notice of Trustee's Sale was therefore void, *ab initio*, and the foreclosure was correctly set aside by the Division I Court of Appeals.

B. Procedural Irregularities Void a Trustee's Sale and Cannot be Waived.

Division III held:

> However, the Uribes had constructive knowledge of the order in which the documents were recorded by the county clerk. That is sufficient for waiver.

Again, RCW 61.24.010(2) states, in relevant part:

> ...***ONLY*** upon recording the appointment of successor trustee ....**the successor trustee shall be vested with all powers of the original trustee.**

The court of appeal's opinion ignores *Albice*, where this court held that the failure to strictly comply with the DTA time restrictions results in losing the statutory authority to conduct the trustee's sale:

> When a party's authority to act is prescribed by a statute and the statute includes time limits, as under RCW 61.24.040(6), failure to act within that time violates the statute and divests the party of statutory authority. Without statutory authority, any action taken is invalid.

Albice, 175 Wn.2d at 568.

Division III also misconstrued *Schroeder*, a case involving the statutorily prohibited non-judicial foreclosure of agricultural land:

> We conclude that the respondents' reliance on *Plein* is misplaced. It is well settled that the trustee in foreclosure must strictly comply with the statutory requirements. *Albice,* 174 Wash.2d at 568, 276 P.3d 1277 (citing *Udall,* 159 Wash.2d at 915–16, 154 P.3d 882). A trustee in a nonjudicial foreclosure may not exceed the authority vested by that statute. *Id.*

Schroeder, 177 Wn.2d at 111-12,

Division III's interpretation of *Bavand* is equally misplaced. *Bavand* cites *Shroeder* for the principal that waiver does *not* occur where the trustee's actions in a non-judicial foreclosure are *unlawful*:

> In so holding, the Supreme Court reinforced a basic statement of law that it originally had made in *Cox v. Helenius*: ***Even where a party fails to timely enjoin a trustee sale under RCW 61.24.130, if a trustee's actions are unlawful, the sale is void In such cases, there is no waiver of the right to seek and obtain relief.***

Bavand, 176 Wn.App. at 645. Emphasis added.

Next, waiver only applies to actions to vacate a sale, not to actions for damages. In *Frizzell* v. *Murray*, 179 Wn.2d 301, 313 P.3d 1171 (2013), Frizzell obtained a TRO but failed to pay the bond and the trial court held that was a waiver of all claims. The trial court was reversed on appeal and upheld by this Court because: "Waiver only applies to actions to vacate the sale and not to an action for damages." *Frizzell*, 179 Wn.2d at 1175, citing *Schroeder* 177 Wn.2d at 114 (quoting *Klem v. Washington Mutual Bank,* 176 Wn. 2d 771, 796, 295 P.3d 1179 (2013)

C. A valid and completed trustee's sale is a contract and Uribe is entitled to the benefits of that contract.

The Division III stated: "The Uribes make a variety of contentions that the sale violated the DTA, all of which are without legal support." (Unpublished opinion at p.7), including the argument that the Libey formed a contract with the Benton foreclosure:

> RCW 61.24.050(1) states:
>
> (1) Upon physical delivery of the trustee's deed to the purchaser, ..., if the trustee accepts a bid, then the trustee's sale is final as of the date and time of such acceptance if the trustee's deed is recorded within fifteen days thereafter.

This Court construed this statute in *Udall:* "Does RCW 61.24.050 mandate that the trustee deliver the deed of trust (aka "trustee's deed") to the purchaser following a non-judicial foreclosure sale, absent a procedural irregularity that voids the sale." *Udall* at 908. Or, stated another way, when is the sale final? And then - can the trustee alter the terms of the sale *after* it is final?

In *Udall*, the trustee hired an auctioneer to call the trustee's sale. The trustee instructed the auctioneer to make an opening bid of $159,421. However, the auctioneer missed a digit and made an opening bid of $59,421. Udall bid one dollar more. There were no other bidders. Udall tendered full payment and received a receipt.

A trustee's deed was not issued to Udall. The trustee discovered the $100,000 mistake and mailed Udall a check for the amount he paid along with the explanation that the auctioneer was not authorized to open bidding at $59,421.20. Udall filed an action to quiet title. *Udall*, 159 Wn.2d at 907-908.

This Court held that the plain meaning of the statute is: "the effective date for recording a trustee's deed relates back to the date and time of the non-judicial foreclosure sale if the deed is recorded within 15 days." *Id* at 910 (Emphasis added). The court stated:

> Acceptance at auction "is commonly signified by the fall of the hammer or by the auctioneer's announcement 'Sold,' after which the "sale is consummated [and n]either party can withdraw. ... When the auctioneer Hayes announced "sold," Hayes accepted Udall's bid on TD's behalf and a contract was formed. *TD could not* re-exercise its power of acceptance to *reject Udall's bid when it later discovered the erroneous opening bid amount.*

Udall, 159 Wn.2d at 912. (Emphasis added).

This Court also noted that:

> The trustee cannot withhold the delivery [of the deed] unless the sale itself is void due to a procedural irregularity that defeated the trustee's authority to sell the property. ... Insufficiency of price, as in this sale, is not a procedural irregularity that voids the sale it is merely a mistake.

Id at 911.

Udall is directly on point. When the auctioneer announced, "sold" at the Franklin trustee's sale, a contract was formed. The terms of the contract are confirmed in the Trustee's Deed, which states:

> 10..... the Trustee then and there sold at public to said Grantee, the highest bidder therefor, the property hereinabove described for the sum of Three Hundred Ninety Thousand Dollars ($390,000) cash by the satisfaction in full of the obligation then secured by said Deed of Trust.....

CP 513-517.

According to Division III, there were no procedural irregularities of a magnitude that would void the sale:

> "The Uribes are complaining of an extremely minor, technical failure in the foreclosure proceeding, which has not apparently harmed them in any way....."

Unpublished Opinion, pg. 5

If Uribe must live with the consequences of the "minor, technical" procedural irregularities, then under the mandatory authority of RCW 61.24.040 and *Udall*; the Franklin debt (e.g. approx. $2,432,990.58) was fully satisfied by the acceptance of $390,000 cash. As in *Udall*, this may be a mistake BUT the lender and trustee are bound by it.

And later, at the Benton trustee's sale, the principal amount of the debt secured by the Benton property was the amount expressly stated in the Notice of Trustee's Sale, $329,178.90. Any bid greater than that amount is a surplus that *must* be paid to Uribe under RCW 61.24.080(3).[3]

There is no other way to apply *Udall* or to construe the statute other than the method and manner used by Division III to nullify any rights Uribe had at the trustee's sale to protect Libey and future trustees.

D. Libey breached his duty of good faith during the entire foreclosure proceedings.

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[3] At the completion of the Benton Trustee's Sale all of the debt secured by Uribe's equipment was reduced to $0. Uribe is therefore also entitled to be paid the amounts received from the sale of their equipment after the foreclosure sale.

Division III held:

> The Uribes make a variety of contentions that aspects of the sale violated the DTA, all of which are without legal support.

2015 WL 2124358 at 3.

(1) *The anti-deficiency provisions of RCW 61.24.100.*

The anti-deficiency provisions of RCW 61.24.100 strictly prohibit a deficiency judgment against a borrower[4] following the non-judicial foreclosure of a deed of trust except in two situations in commercial loans. First, if the value of the property is impaired because of waste or the wrongful retention of rents per 61.24.100(3)(a). Secondly, under RCW 61.24.100(3)(b):

> (3) This chapter does not preclude any one or more of the following after a trustee's sale under a deed of trust securing a commercial loan executed after June 11, 1998.
>
> .....
>
> (b) Any judicial or non-judicial foreclosures of any other deeds of trust, mortgages .....covering any real or personal property granted to secure ***the obligation*** that was secured by the deed of trust foreclosed;

This statute specifically provides that BW could foreclose on other security agreements, such as a mortgage or deed of trust "granted to secure

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[4] RCW 61.24.100(3)(c) also permits a deficiency judgment against a "guarantor" of a commercial loan. This section is not applicable here because Uribe is not a "guarantor." Uribe is a "borrower" and therefore cannot be a "guarantor." RCW 61.24.005(8)

the obligation that was secured by the deed of trust foreclosed." "The obligation" is in the singular. This means **one loan** secured by **multiple properties,** which was the legislative response to the *Donovick*.[5]

There is just one way Libey and BW could have complied with this statute to recover the balance of the Franklin loan. That is by foreclosing the Franklin deed of trust non-judicially first and then conducting a *judicial* foreclosure of the mortgage on the Benton Property for the remaining balance due on the Franklin loan. There is no other way to interpret and strictly apply RCW 61.24.100(3)(b).

Mr. Libey and the Bank elected to take a shortcut that is not permitted by the DTA and there is no way to reconcile their actions with the DTA.

Division III's silence on this issue might also be construed as approval of the lack of concern Libey paid to the duties he owed to Uribe during the foreclosures.[6]

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[5] The appeals court noted that the trial court ruled on the issue relying on *Donovick*. The holding in *Donovick* is the same as § (3)(b) above; one note secured by multiple properties/ security agreements.

[6] The opinion is this case is unpublished and may not be cited as authority in a Washington case. GR 14.1. However, this court rule is not applicable to other courts including the Federal District Courts for the Eastern and Western Districts of Washington. See FRAP 32.1.

In the last 30 years since *Cox v. Helenius,* Washington appellate courts have consistently stated that the trustee must act independently and impartially – and not serve only the interests of one party to the detriment of the other:

> RCW 61.24.010(4) imposes a duty of good faith on the trustee toward the borrower, beneficiary, and grantor. "[U]nder our statutory system, a trustee is not merely an agent for the lender or the lender's successors. Trustees have obligations to all of the parties to the deed, including the homeowner." Bain, 175 Wash.2d at 93, 285 P.3d 34. **This duty requires the trustee to remain impartial and protect the interests of all the parties. *"[T]he trustee in a non-judicial 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, 295 P.3d 1179.**
>
> .....
>
> A trustee's failure to act impartially between note holders and mortgagees, in violation of the DTA, can support a claim for damages under the CPA (emphasis added)

Lyons v. U.S. Bank Nat'l Assn., 181 Wn.2d 775,786, 336 P.3d 1142, 1149 (2014) (Emphasis added).

After *Cox v. Helenius*, WSBA established ethical guidelines for attorneys when they are acting as trustee. WSBA Ethics Advisory Opinion 926 (1986). The WSBA framed the question; "are there circumstances under which a lawyer cannot serve as trustee?" The WSBA analyzed the issue under RPC 1.7(b), Conflict of Interest: Current Clients.

It is obvious that Libey was BW's advocate. Throughout the process he promoted BW's interest over his duties to Uribe. Libey's failure to exercise his independent discretion as an impartial third party with duties to both BW *and* Uribe is well illustrated by emails between Libey and the Bank where Libey is directing the procedures to be followed during the foreclosure, including the one he sent on November 9, 2010:

> Bill, as you know I am the trustee ... and am in the process of conducting... 2 Uribe foreclosure sales scheduled on 12/17... **Each of these customers is quite litigious as you know.** Both ... and Uribe have current claims against the Bank, and if you look at the principals in ...**all these foreclosures concern me as trustee from the liability potential from these sales**..... **However, Uribe may take issue with me taking the excess money from the bidder and applying it to the other loan...I may have to resign as trustee because of liability concerns if indemnification is not granted.**

CP 0492-0493 (Emphasis added.)[7]

Libey proceeded accordingly, clearly as BW's advocate, under the protection of his Indemnity Agreement, without disclosing what was being done. This scheme was actively concealed from Uribe despite Libey's duty to Uribe and effectively deprived Uribe of the 12 month redemption period he would have had if the "excess money" was not collected through the judicial foreclosure of the mortgage overlooking the obvious fact that the Franklin obligation had been satisfied in full. See *Cox v. Helenius*, 103 Wash.2d at 389-90; and RPC 1.7(b)(4).

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[7] Other similar emails are: 9-21-10, CP 0490; 12-6-10, CP 0509-0511; 12-20-10, CP 0580; and 7-12-11, CP 0523-0524

VI. CONCLUSION

Division III correctly found that the debt secured by the Franklin deed of trust was fully satisfied at the completion of the trustee's sale. Nevertheless and in obvious error, Division III permitted resurrection of the fully satisfied debt as an entirely different loan!

Division III also misconstrued the DTA that permits parties to commercial loan to secure ***that*** loan with multiple security interests on multiple properties. This case, however, *does not* involve a *single* loan involving multiple properties. This case involves *two loans secured by separate properties* foreclosed in two *separate* non-judicial foreclosures.

To strictly comply with RCW 61.24.100(4), the trustee would have non-judicially foreclosed on the Franklin property first and then instituted mortgage foreclosure action on the Benton property on the same note - as the transaction was structured by Uribe and BW or someone who read RCW 61.24.100(4). Proceeding as Libey did was clearly in BW's interest and not in Uribe's interest; because to have lawfully proceeded would have given Uribe the right to redeem the Benton property after the Sheriff's sale, which was entirely eliminated by Libey when he "took" the excess money from the Franklin Property and "applied" it to the Benton Property foreclosure.

The trustee, Libey, conducted the foreclosures in a manner that violated his ethical duties as an attorney under the RPC's. He was not impartial - he was acting as the bank's attorney before, during, and after the foreclosures. He disregarded his plainly evident conflict of interest to

Uribe's detriment. His failure to withdraw as trustee in the face of the conflict is a violation of the DTA.

Uribe obviously had "constructive notice" that the trustee misrepresented his authority when he recorded the Notice of Trustee's Sale. Notwithstanding that knowledge, Uribe was entitled to rely on the calculations in the Notice of Trustee's Sale and was never notified of the scheme to deprive him of his right to redeem the more valuable, Benton Property, after a sheriff's sale. The trustee and BW concealed their plans and also repossessed and foreclosed the equipment when both obligations had been fully satisfied.

Division III's opinion, which is also embodied by the *Merry* decision, will be read by banks as abrogation of the legislative deal that formed the basis of the DTA - the banks would get a quick and inexpensive foreclosure in return for the borrower waiving the right to redeem under a statute that would be strictly construed by the courts in favor of the borrower, not in favor of the lender, as was so construed by Division III under its own rule of statutory construction that excuses "minor" or "technical" violations of the DTA.

Libey simply had no statutory authority to conduct the trustee's sale and the sale should be set aside. Or, in the alternative, Uribe is entitled to the resulting surplus from the cash sale for the Benton Property, after reduction of the amount due by the proceeds from the sale of Uribe's personal property.

Respectfully submitted this 1st day of July 2015.

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Attorney for Petitioners

July 2, 2015
16046

APPENDICES

A. URIBE V. LIBEY, ENSLEY AND NELSON PLLC DECISION

B. MOTION FOR RECONSIDERATION

C. ORDER DENYING MOTION FOR RECONSIDERATION

D. ORDER DENYING MOTION TO PUBLISH

E. MERRY V. NORTHWEST TRUSTEE SERVICE, INC.

APPENDIX A

URIBE V. LIBEY, ENSLEY, AND NELSON DECISION

FILED
MAY 5, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

MICHAEL URIBE and HELEN URIBE husband and wife, Appellants, v. LIBEY, ENSLEY & NELSON, PLLC, a Washington professional limited liability company; BANK OF WHITMAN, now known as COLUMBIA BANK, successor in interest to the FDIC as Receiver of Bank of Whitman; and GARY LIBEY and JANE DOE LIBEY, husband and wife and the marital community comprised thereof, Respondents.	)	No. 32315-3-III UNPUBLISHED OPINION

KORSMO, J. — This appeal arises from the nonjudicial foreclosures of deeds of trust securing cross-collateralized commercial loans. Concluding that the trial court properly granted summary judgment in favor of the defendants, we affirm.

FACTS

In the early 2000s, Michael and Helen Uribe owned a 1,000 acre tract of land in Benton County, then valued in excess of $3.75 million. They also owned a substantially less valuable piece of property in Franklin County. In order to finance a commercial

endeavor, the Uribes took out a loan in the amount of $1,665,185.50 from the Bank of Whitman (Bank). The loan was secured by a deed of trust on the Franklin County property, a mortgage on the Benton County property, and a security interest in some vehicles and equipment used in the Uribes' business. A few years later, the Uribes took out a second commercial loan from the Bank in the amount of $571,000. This loan was secured by a deed of trust on the Benton County property, a mortgage on the Franklin County property, and a security interest in that same business property. Additionally, the deed of trust on the Benton County property included a clause whereby it further secured all prior indebtedness by the Uribes to the Bank.

Following the collapse of the real estate market, the Uribes defaulted on both loans. In March 2009, the Bank sent the Uribes notices of default. Before the Bank could take any further action, the Uribes filed for bankruptcy, resulting in an automatic stay on all foreclosure proceedings. The Bank then filed a motion for relief from the stay. One year later, the bankruptcy court lifted the stay and abandoned the property from the estate. That court determined that the total value of the security assets ($2,550,171) was less than the total debt owed on the two loans ($2,745,982.78). The Bank then initiated nonjudicial foreclosure proceedings on the two deeds of trust, as well as a replevin action on the business property.

The Bank sent new notices of default and then appointed Gary Libey as trustee. Mr. Libey sent notices of trustee's sales to the interested parties. On September 8, 2010,

the notices and Mr. Libey's appointment as trustee were filed with the Franklin and Benton County Auditors. The notices were recorded approximately two hours before the appointments were recorded.

On December 17, 2010, both properties were sold at auction to the Bank; there were no other bidders. First, the Franklin County property was sold for $390,000 and the purchase price was credited to the Franklin County loan. Then, the Benton County property was sold for $1.2 million, with the purchase price credited in part to the Benton County loan and in part to the Franklin County loan. In the separate replevin action, the Bank realized an additional $281,487.14 from the sale of the Uribes' business property. On December 28 and 30, Mr. Libey recorded the trustee's deeds for the two properties, acknowledging full satisfaction of both loans. The Bank subsequently sold the Benton County property to Randall Rupp for approximately $1.28 million.

Ten months later, the Uribes brought an action against the Bank, Gary Libey, Libey Ensley & Nelson, PLLC, Randall Rupp, and 7HA Family, LLC, alleging violations of the Deeds of Trust Act (DTA), chapter 61.24 RCW, and the Consumer Protection Act (CPA), chapter 19.86 RCW, as well as collusive bidding, conversion, civil conspiracy, and racketeering. The Bank settled with the Uribes. The superior court later granted summary judgment in favor of the remaining defendants. The Uribes appealed from that decision, reasserting only their claims under the DTA and CPA.

ANALYSIS

The Uribes allege two violations of the DTA, relating respectively to the validity and procedure of the trustee's sale, which we will address in that order. Our resolution of those issues precludes any need to discuss the CPA claim.

The Validity of the Sale

The Uribes contend that because the notices of trustee's sales were recorded two hours prior to Mr. Libey's appointment as trustee, the trustee's sales were invalid and should be rescinded. In response, Mr. Libey contends that under the DTA, the Uribes waived their ability to challenge the validity of the trustee's sale by failing to bring an action to enjoin the sale.

The DTA should be construed liberally to further its basic objectives: (1) that the nonjudicial foreclosure process be efficient and inexpensive, (2) that the process should allow adequate opportunity for parties to prevent wrongful foreclosure, and (3) that the process should promote the stability of land titles. *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985). In order to prevent wrongful foreclosure, a statutory cause of action is available to the debtor to enjoin an invalid foreclosure. *See* RCW 61.24.130. To promote stability of land titles, failure to bring an action "may result in a waiver of any proper grounds for invalidating the Trustee's sale." RCW 61.24.040(1)(f)(IX). Waiver of a post-sale challenge occurs where a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior

to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale. *Plein v. Lackey*, 149 Wn.2d 214, 227, 67 P.3d 1061 (2003). Waiver is not strictly applied. It only will occur where it is equitable under the circumstances and furthers the goals of the act. *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 570, 276 P.3d 1277 (2012).

It is uncontested that the Uribes received adequate notice of their statutory rights and that they did not bring an action to enjoin the trustee's sale. They argue that waiver is inappropriate because they had no actual knowledge of the filing defects related to the appointment of Libey and his notices of sale. However, the Uribes had constructive knowledge of the order in which the documents were recorded by the county clerk.[1] That is sufficient for waiver. Additionally, equitable considerations favor applying waiver to these circumstances. The Uribes are complaining of an extremely minor, technical failure in the foreclosure proceeding, which has not apparently harmed them in any way. Finally, applying waiver here furthers the purposes of the DTA by promoting the stability of land titles in a situation where the complaining party had ample opportunity to correct the error before the sale. Consequently, application of waiver is appropriate in this situation.

[1] Indeed, the Uribes' theory of liability against Rupp was that Rupp purchased the property with constructive notice of the filing defect.

The Uribes argue unpersuasively that waiver cannot apply to procedural irregularities. They rely on inapposite precedent. *See Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013); *Bavand v. OneWest Bank, F.S.B.*, 176 Wn. App. 475, 309 P.3d 636 (2013). Unlike the present situation, both of these cases dealt with situations where the lender lacked statutory authority under the DTA to initiate the foreclosure, and the borrower brought an action to enjoin the sale.

The Uribes argue alternatively that waiver does not apply to an action for damages, and that if the sale is not to be invalidated, they should be able to obtain money damages.[2] Again, the cases cited to support this argument do not apply as they involve contractual or common law waiver rather than the statutory waiver of the DTA. *See Schroeder*, 177 Wn.2d at 114; *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 796, 295 P.3d 1179 (2013). Failure to bring an action under the DTA to enjoin a foreclosure cannot serve to waive claims for damages in certain situations. *See* RCW 61.24.127. However, that provision does not apply to the commercial loans at issue here. RCW 61.24.127(4). If this court were to conclude that waiver never applies to claims for damages, this provision of the DTA would be meaningless. Courts will not construe a statute so as to render it meaningless. *State v. K.L.B.*, 180 Wn.2d 735, 742, 328 P.3d 886 (2014).

[2] It seems doubtful that the Uribes would be able to sustain a claim for damages, as they have been unable to clearly state any harm actually resulting from this defect.

The Procedure of the Sale

The Uribes make a variety of contentions that aspects of the sale violated the DTA, all of which are without any legal support.

First, they contend that recovering on the Franklin County loan against the Benton County property constituted a deficiency judgment in violation of the DTA.[3] RCW 61.24.100. However, the DTA specifically allows for a party to pursue multiple foreclosures against separate collateral securing a *commercial* loan.[4] RCW 61.24.100(3)(b).

Next, the Uribes argue that Mr. Libey violated the DTA by failing to deposit the surplus from the sale of the Benton County property with the clerk of the county court. RCW 61.24.080. However, the Benton County deed of trust secured not just the Benton County loan, but also all other debt owed by the Uribes to the Bank. Since the total debt owed far exceeded the proceeds from the sale, there was no surplus to deposit.

Finally, the Uribes argue that because the Franklin County property was sold first, and the trustee's deed for the Franklin County property states that its sale satisfied in full

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[3] In briefing this issue, the Uribes rely heavily on a letter from Mr. Libey to the bank describing the anticipated foreclosure process and requesting indemnification. They argue that this letter indicated that Mr. Libey knew the foreclosure was unlawful. In fact the letter states a considered belief that the sale would be in compliance with the DTA, but that he expected trouble because the Uribes are "quite litigious."

[4] The trial court ruled on this issue relying on *Donovick v. Seattle-First Nat'l Bank*, 111 Wn.2d 413, 757 P.2d 1378 (1988).

the obligation secured by that deed of trust, the Franklin County loan was satisfied before the Benton County property was sold. However the Trustee's Deed was issued five days after both sales, and consequently after the Franklin County loan was credited with a portion of the sale from the Benton County property.

Because there is no merit to the Uribes' claims under the DTA, we need not address their claim under the CPA or their request for attorneys' fees.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Brown, J.

Siddoway, C.J.

APPENDIX B

MOTION FOR RECONSIDERATION

CASE NO. 32315-3-III

Court of Appeals
of the State of Washington
Division III

MICHAEL URIBE and HELEN URIBE husband and wife,

Appellants,

v.

LIBEY, ENSLEY & NELSON, PLLC, a Washington professional limited liability company; GARY LIBEY and JANE DOE LIBEY, husband and wife and the marital community comprised thereof, RANDALL RUPP AND LUZ DARYL-RUPP, husband and wife and the marital community comprised thereof; and 7HA FAMILY, LLC, a Washington limited liability company;

Respondents.

Appellant's Motion for Reconsideration
Of Decision Terminating Review. RAP12.4.

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I. INTRODUCTION

When applying the Deeds of Trust Act - how strict is strict construction? How strict is strict compliance? How strictly must a trustee comply with his duties of impartiality and good faith?

The answer from the Washington appellate courts has always been; Strict means Strict! These have been the bedrock principals supporting the Deeds of Trust Act for 30 years of jurisprudence since Cox v. Helenius.

The Superior Court and this Court have decided that this case should be treated differently. In all the other cases before it, the lender and trustee were held to the strict compliance standard. And, if they failed to explicitly follow the detailed procedures of the Act - negligently or intentionally - they were held accountable. In this case, the trustee, who committed multiple errors and violated his ethical duties from the beginning to the end of the foreclosures - gets a pass.

This foreclosure started out with a criminal act. The Resignation and Appointment of Successor Trustee was notarized 18 days before it was signed. Then the Successor Trustee, Libey,[1] assumed his duties by recording the Notice of Trustee's Sale before he had the power to do so under the controlling statute. Then after that, Libey violated his duty of

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[1] Throughout this memo defendants, Gary Libey and Libey, Ensley & Nelson, PLLC are referred to as "Libey." No disrespect is intended. The Deeds of Trust Act will be referred to

good faith and impartiality to Uribe by acting as the agent and advocate of the Bank. The Notices of Trustee's Sales correctly state the amounts owed under each of the loans. However, the Bank and Libey concocted a secret cross collateral scheme to chill the bidding for the valuable Benton property by taking about $800,000 from the Franklin loan and adding it to the bid at the Benton Trustee's Sale. Libey then made a tactical error by conducting the Franklin sale first, which, even under his cross-collateral theory, extinguished the large Franklin loan, leaving no debt to add to the bid at the Benton Trustee's Sale. The result under the plain language of the DTA was a surplus after the Benton Trustee's Sale. The outcome of this case should be vacating the sale for procedural irregularities, or in the alternative, for damages in the amount of the surplus. Then under either outcome, remand the case for factual determination of Uribe's Consumer Protection Act cause of action.

As it stands, this decision will be celebrated by mortgage servicing companies and trustees who have been chafing under the difficult burden of following the Act to the letter. Because now, in this part of the state, strict compliance with all of the technical details of the DTA is no longer required and they can violate the Act with impunity and without consequences.

The decision here must be revisited.

II. ARGUMENT

1. THIS COURT DETERMINED THAT LIBEY ACKNOWLEDGED THE FULL SATISFACTION OF THE DEBTS IN THE TRUSTEE'S DEEDS. BUT THEN THE COURT APPROVES HIS TRANSFER OF PART OF THE DEBT FROM ONE LOAN TO ANOTHER LOAN *AFTER* THAT DEBT WAS FULLY SATISFIED.

This court found that the Franklin County property was sold first and that the Trustee's Deed states that the sale satisfied the *entire* debt secured by that deed of trust. However, this Court then held that, despite the recitations in the deed, the entire obligation was not actually satisfied. The court notes, without explanation, that it is significant that the Trustee's Deed was recorded five days after the auction and that the Franklin County loan was credited with some of the proceeds from the sale of the Benton County property.

This reasoning is plainly contrary to the statute and controlling precedent. RCW 61.24.050(1) states:

> (1) Upon physical delivery of the trustee's deed to the purchaser, or a different grantee as designated by the purchaser following the trustee's sale, the trustee's deed shall convey all of the right, title, and interest in the real and personal property sold at the trustee's sale which the grantor had or had the power to convey at the time of the execution of the deed of trust, and such as the grantor may have thereafter acquired. Except as provided in subsection (2) of this section, **if the trustee accepts a bid, then the trustee's sale is final as of the date and time of such acceptance if the trustee's deed is recorded within fifteen days thereafter.** After a trustee's sale, no person

> shall have any right, by statute or otherwise, to redeem the property sold at the trustee's sale.[2] (Emphasis added).

The Supreme Court construed this statute in Udall v. T.D. Escrow Services, Inc., 159 Wash.2d 903,154 P.3d 882 (2007). The issue identified by the court was; "Does RCW 61.24.050 mandate that the trustee deliver the deed of trust to the purchaser following a nonjudicial foreclosure sale, absent a procedural irregularity that voids the sale." 159 Wash.2d at 908, 154 P.3d 886. Or, stated another way, when is the sale final?" And, can the trustee alter the terms of the sale *after* it is final?

In Udall, the trustee hired an auctioneer to call the trustee's sale. The trustee instructed the auctioneer to make an opening bid of $159,421. However, the auctioneer missed a digit and made an opening bid of $59,421. Udall bid one dollar more. There were no other bidders so the auctioneer closed the sale. Udall tendered full payment and received a receipt.

A trustee's deed was not issued to Udall. The trustee discovered the $100,000 mistake and mailed Udall a check for the amount he paid along with the explanation that the auctioneer was not authorized to open bidding at $59,421.20. Udall filed an action to quiet title. 159 Wash.2d at

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[2] Subsection (2) of this statute outlines the grounds and how the trustee can rescind the sale and declare the Trustee's Deed void. The trustee, Gary Libey, did not do that so Subsection (2) is not applicable here.

907-908, 154 P.3d 886.

The Supreme Court held that the plain meaning of this statute is, "the effective date for recording a trustee's deed **relates back** to the date and time of the nonjudicial foreclosure sale if the deed is recorded within 15 days." *Id* at 910, 295 154 P.3d 887. (Emphasis added). The court stated:

> Acceptance at auction "is commonly signified by the fall of the hammer or by the auctioneer's announcement 'Sold,' after which the "sale is consummated [and n]either party can withdraw" (Cite Omitted). ... When the auctioneer Hayes announced "sold," Hayes accepted Udall's bid on TD's behalf and a contract was formed. **T.D could not re-exercise its power of acceptance to reject Udall's bid when it later discovered the erroneous opening bid amount**.

159 Wash 2d at 912. 154 P.3d 888 (Emphasis added).

The Supreme Court stated that, "The trustee cannot withhold the delivery [of the deed] unless the sale itself is void due to a procedural irregularity that defeated the trustee's authority to sell the property. ... Insufficiency of price, as in this sale, is not a procedural irregularity that voids the sale it is merely a mistake." Id at 911, 154 P.3d 887.

Udall is directly on point. When the auctioneer announced "Sold" at the Franklin trustee's sale, a contract was formed. The terms of the contract are confirmed in the Trustee's Deed that was drafted by Libey, which states:

> 10. The defaults specified in the Notice of Trustee's Sale not having been cured ten days prior to the date of the Trustee's Sale and said obligation secured by said date of sale, which was not less than 190 days from the date of default in the obligation secured, the Trustee then and there sold at public to said Grantee, the highest bidder therefor, the property hereinabove described for the sum of Three Hundred Ninety Thousand Dollars ($390,000) cash by the **satisfaction in full** of the obligation then secured by said Deed of Trust, together with all fees, costs and expenses as provided by statute. (Emphasis added). CP 513-517. [3]

Therefore, if this court finds there were no procedural irregularities that voided the sale, then under the mandatory authority of RCW 61.24.040 and Udall; the Franklin debt, which is stated to be $2,432,990.58 in the Notice of Trustee's Sale, was fully satisfied by the acceptance of $390,000 cash.[4] As in Udall, the fact that $390,000 was accepted as full satisfaction of the debt might be a mistake BUT the lender and trustee are bound by it.

Later, when the Benton trustee's sale was called, the principal amount of the debt secured by the Benton property was the amount expressly stated in the Notice of Trustee's Sale, $329,178.90. [5] Any bid greater than that is a surplus that *must* be paid to Uribe under RCW

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[3] A copy of the Franklin Trustee's Deed is attached as Appendix A.

[4] The Franklin Notice of Trustee's Sale is found at CP 495-499 and Appendix B.

[5] The Benton Notice of Trustee's Sale is found at CP 500-507. Appendix C.

61.24.080(3).[6]

There is no other way to apply Udall or construe the statute.

2. THIS COURT DID NOT CORRECTLY APPLY RCW 61.24.100, WHICH RELIEVES THE BORROWER OF ANY OBLIGATION FOR A DEFICIENCY AFTER A TRUSTEE'S SALE EXCEPT FOR TWO LIMITED CIRCUMSTANCES NOT APPLICABLE HERE.

In the first sentence of its opinion, this court states that the appeal arises from foreclosures of deeds of trust securing cross-collateralized commercial loans. The court correctly notes that the Benton deed of trust has language stating that in addition to securing the Benton loan, the property "secures all obligations, debts and liabilities" owed by Uribe to the Bank of Whitman.[7]

The court then correctly articulates the manner in which the Benton and Franklin loans were secured. The Franklin loan was for $1,665,185.50 and was secured by a [first position] deed of trust in the Franklin property and a [second position] mortgage in the Benton property. The $571,000 Benton loan was secured by a [first position] deed of trust in the Benton property and a [second position] mortgage in the Franklin property. Both loans were also secured by a UCC security

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[6] At the completion of the Benton Trustee's Sale all of the debt secured by Uribe's equipment was reduced to $0. Uribe is therefore entitled to be paid the amounts received from the sales of the equipment in any case.

[7] Benton Deed of Trust. CP 475-488. APPENDIX D.

interest in Uribe's equipment.

However, the court incorrectly construed RCW 61.24.100(3)(b), which, in only one specific scenario, permits a lender to pursue multiple foreclosures against separate collateral securing a single promissory note. The court did not appreciate that the statute does not apply to the loans and deeds of trust here

The antideficiency provisions of RCW 61.24.100 strictly prohibit a deficiency judgment against a borrower[8] following the nonjudicial foreclosure of a deed of trust except in two situations; First, if the value of the property is decreased because of waste or the debtor has wrongfully retained rents per 61.24.100(3)(a). Second, under RCW 61.24.100(3)(b) which states:

> (3) ...This chapter does not preclude any one or more of the following after a trustee's sale under a deed of trust securing a commercial loan executed after June 11, 1998.
> ...
>
> (b) Any judicial or nonjudicial foreclosures of any other deeds of trust, mortgages, security agreements, or other security interests or liens covering any real or personal property granted to secure *the obligation* that was secured by the deed of trust foreclosed;

This statute specifically provides that the Bank could foreclose on

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[8] RCW 61.24.100(3)(c) also permits a deficiency judgment against a guarantor of a commercial loan. This section is not applicable here because Uribe is not a "guarantor." Uribe is a "borrower" and therefore cannot be a "guarantor." RCW 61.24.005(8)

other security agreements, such as a mortgage or deed of trust "granted to secure *the obligation* that was secured by the deed of trust foreclosed."

"The obligation" is in the singular. That can only mean **one loan** secured by **multiple properties**.[9]

Mr. Libey and the Bank of Whitman could have utilized this statute to recover the large loan by foreclosing the Franklin deed of trust nonjudicially first; and then conduct a *judicial* foreclosure of the mortgage on the Benton property. There is no other way to interpret and strictly apply RCW 61.24.100(3)(b).[10]

Mr. Libey and the Bank elected to take a shortcut that is not permitted by the Deeds of Trust Act and there is no way to reconcile their actions with the law. This is another reason that Uribe is entitled to the surplus from the trustee's sale of the Benton property unless the foreclosure is void due to a procedural irregularity.

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[9] The appeals court noted that the trial court ruled on the issue relying on *Donovick v. Seattle-First Nat's Bank*, 111 Wn.2d 413, 757 P.2d 1378 (1988). The holding in Donovick is the same as § (3)(b) above; one note secured by multiple security agreements.

[10] Or, maybe for purposes of argument – let's assume the cross-collateral clause in the Benton deed of trust did in fact secure the large loan in addition to the line of credit. There is just one way that trustee Libey could have been able to bid $1.2 million for the Benton property without incurring a surplus. That is, if he conducted the Benton trustee's sale **before** the Franklin trustee's sale. Libey just got it backwards under the premise of this hypothetical.

3. THE ACTIONS OF MR. LIBEY AS SUCCESSOR TRUSTEE WERE FLAGRANT VIOLATIONS OF HIS ETHICAL DUTIES TO URIBE.

The opinion in this case does not address the issues briefed and argued by Uribe regarding the various ways Libey violated his ethical duties during the foreclosures, except to say:

> The Uribes make a variety of contentions that aspects of the sale violated the DTA, all of which are without legal support.

2015 WL 2124358 at 3.

This Court's silence might be construed as approval of the lack of concern Libey paid to duties he owed to Uribe during the foreclosures.[11] We argued and presently contend that Libey's violation of his duties as trustee is unquestionable. Mr. Libey *did not* don the robe of good faith and impartially when he became the successor trustee – he just continued to be the Bank's advocate and attorney throughout each of the foreclosures.

Again, a deed of trust "is a statutorily blessed "three-party transaction in which land is conveyed by a borrower, the 'grantor,' to a 'trustee,' who holds title in trust for a lender, the 'beneficiary,' as security for credit or a loan the lender has given the borrower." Klem v.

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[11] The opinion is this case is unpublished and may not be cited as authority in a Washington case. GR 14.1. However, this court rule is not applicable to other courts including the Federal District Courts for the Eastern and Western Districts of Washington. See FRAP 32.1. And now there is a motion to publish.

Washington Mutual Bank, 176 Wash.2d 771, 782, 295 P.3d 1179 (2013).

In the last 30 years since Cox v. Helenius, 103 Wash.2d 383, 389, 693 P.2d (1985) Washington appellate courts have consistently stated from then to now that the trustee must act independently and impartially – and not serve the interests of one party to the detriment of the other:

> RCW 61.24.010(4) imposes a duty of good faith on the trustee toward the borrower, beneficiary, and grantor. "[U]nder our statutory system, a trustee is not merely an agent for the lender or the lender's successors. Trustees have obligations to all of the parties to the deed, including the homeowner." Bain, 175 Wash.2d at 93, 285 P.3d 34. **This duty requires the trustee to remain impartial and protect the interests of all the parties**. "[T]he 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."
>
> ...
>
> A trustee's failure to act impartially between note holders and mortgagees, in violation of the DTA, can support a claim for damages under the CPA. Klem, 176 Wash.2d at 792, 295 P.3d 1179. (Emphasis added.)

Lyons v. U.S. Bank Nat'l Assn.,181 Wash.2d 775,786, 336 P.3d 1142, 1149 (2014).

After Cox v. Helenius, WSBA established ethical guidelines for attorneys when they are acting as trustee. WSBA Ethics Advisory Opinion 926 (1986).[12] The WSBA framed the question; "are there circumstances

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[12] The Ethics Opinion is in Appendix E.

under which a lawyer cannot serve as trustee?" The WSBA analyzed the issue under RPC 1.7(b), Conflict of Interest: Current Clients, which provides, "(b) a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." The Opinion observes, "A lawyer cannot, consistent with the Rules of Professional Conduct, act as a fiduciary exercising discretion and as an advocate."

It is plainly evident here that Libey was Bank of Whitman's advocate and throughout the foreclosure he was promoting the Bank's interests, in secret. This is a direct conflict of interest with respect to his duties to Uribe.

Libey's failure to exercise his independent discretion as an impartial third party with duties to both BW *and* Uribe is well illustrated by emails between Libey and the Bank where Libey is directing the procedures to be followed during the foreclosure, including the one he sent on November 9, 2010:[13]

> Bill, as you know I am the trustee ... and am in the process of conducting ... 2 Uribe foreclosure sales scheduled on 12/17 ... **Each of these customers is quite litigious as you know.** Both ... and Uribe have current claims against the Bank, and if you look at the principals in ...**all these foreclosures concern me as trustee from the liability potential from these sales**. Let me explain why. In

[13] Copies of the emails are in Appendix F. The 11-9-10 email here is complete except that the names of unrelated third parties and the names of attorneys are redacted.

Uribe there are both separate mortgages and deeds of trust on land in both Benton and Franklin County. There are 2 loans: 5091 in the original sum of $1.65m from 5/31/02, now up to 2.4 million on the Franklin county piece; and 5006 in the original sum of $571k from 9/5/07, now $400k, on the Benton county piece. The BW in my opinion has correctly decided to foreclose non judicially, which means that the trustee conducts the sale, there is no deficiency and no right of redemption. [Although the land at one time was farmland, from my review of the files there were no crop, just crp, on the land since the loans were made to date, so the BW has the option to foreclose nonjudicially.] The sales are public and anyone can bid. I will have an agent at each sale to conduct the sales. The BW will have a person at each sale to bid. Normally this is not a concern as the BW bids its debt and acquires title from a deed I execute as trustee. **However I expect something unusual may happen in any of these sales from the nature of the borrowers involved**. I have the first Uribe foreclosure sale scheduled in Franklin County at 10 am. This is land with a current fmv of $600k, although the debt is close to $2.4m. The second Uribe foreclosure sale is scheduled in Benton County at 11 am. This land with a current fmv of [illegible number] and a debt of $400k. (I suspect the BW will bid up to the fmv of the Franklin County property of $600k, although the debt is close to $2.4m, **and then roll the excess debt** into the second sale whereby the BW would bid up to or close to the $1.4m fmv of the Benton County land to maximize the value of both pieces of land due to the cross-collateralization as explained below). **I have been contacted by an attorney [Crane Bergdall] who says he has a client interested who will likely bid on the Benton county land because the land may have $1m in equity. The Benton County Deed of Trust contains a cross-collateralization clause which states in part that in addition to Note referenced; the Deed of Trust also secures all other indebtedness from Uribe to the BW, *which is great of course.* However, Uribe may take issue with me as the trustee taking the excess money from the bidder and applying it to the other loan.** If I get sued as trustee by these borrowers or any third party who may be involved, then I need full and

> complete indemnification from the BW. .... **I may have to resign as trustee because of liability concerns if indemnification is not granted**. Would you please review this with outside counsel such as ... or ... [... has a conflicton Uribe] at your earliest as yes I am genuinely concerned from the history of these borrowers and confirm your willingness to approve at the next board meeting? Thanks so much. I hope I didn't rattle on here too long, but I wanted to give you an accurate of a picture of what is happening. (Emphasis added.)

Libey did obtain an Indemnity Agreement from BW and went forward with the clumsy implementation of the cross collateral scheme. Libey was clearly acting as the agent and advocate for BW, concocting a scheme to chill the bidding on the Benton County property by bidding in part of the Franklin debt at the Benton foreclosure sale to deter other bidders from bidding the value of the 1000 acres. Libey knew that adding the Franklin debt to the Benton debt was likely unlawful, and so he demanded an indemnity agreement. Finally, Libey concealed all this from Uribe despite Libey's duty to disclose his plans to Uribe and obtain Uribe's informed consent in writing. See Cox v. Helenius, 103 Wash.2d at 389-90; and RPC 1.7(b)(4) (Conflict of Interest – Current Clients).

This Court's approval of Libey's actions in Footnote 3 should be reconsidered because, when this email is placed into context with the other emails, and with Libey's actions throughout the foreclosure, there is just no way that Libey was anything but the Bank's attorney. The Court's

approval cannot be reconciled with Libey's duty of impartiality and good faith to Uribe. If this is not clearly apparent as a matter of law, then this case should be remanded for additional discovery and fact finding by the trial court.

4. WASHINGTON COURTS MUST STRICTLY CONSTRUE AND TRUSTEES MUST STRICTLY COMPLY WITH THE DEEDS OF TRUST ACT.

As we stated earlier, the issues in this case are: How strict is strict construction; how strict is strict compliance; and how strictly must a trustee comply with his duties of impartiality and good faith?

Washington law is well settled on these points. As stated in Albice v. Premier Mortg. Services of Wash., 174 Wash.2d 560, 276 P.3d 1277 (2012):

> Because the act dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures, lenders must strictly comply with the statutes and courts must strictly construe the statutes in the borrower's favor. Udall v. T.D.Escrow Servs., Inc., 159 Wash.2d 903, 915-16, 154 P.3d 882 (2007); Koegel v. Prudential Mut. Sav. Bank,51 Wash.App. 108-111-12, 752 P.2d 385 (1988) The procedural requirements for conducting a trustee sale are extensively spelled out in RCW 61.24.030 and RCW 61.24.040. Procedural irregularities, such as those divesting a trustee of its statutory authority to sell the property, can invalidate the sale. Udall, 159 Wash 2d at 911, 154 P.3d 882.
>
> 174 Wash.2d at 567, 276 P.3d 1281.

So then, under these standards, how must a court interpret the plain language of the last sentence of RCW 61.24.010(2); "Only 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."

In this case the trustee recorded the Notice of Trustee's sale *before* the Resignation and Appointment of Successor Trustee.[14] Under the plain language of the statute he was therefore not the trustee when he recorded the Notice of Trustee's Sale. However, the court excused Libey's ultra-vires act, stating that it was just "an extremely minor, technical failure." That is; the failure to be vested with the statutory authority to conduct the trustee's sale is a "minor, technical failure." This holding means, in this Division, a trustee can satisfy his duty of "strict compliance" by something less than "strict compliance" and a court is not required to "strictly construe" the DTA.

The Court then dismisses Uribe's reliance on Schroeder v. Excelsior Mgmt. Grp., 177 Wash. 2d 94, 297 P.3d 677 (2013) and Bavand v. One West Bank F.S.B.,176 Wash.App. 475, 309 P.3d 636 (2013). Both of these cases are directly on point.

---

[14] The Resignation and Appointment of Successor Trustee is in Appendix G.

In Bavand, One West Bank appointed as the successor trustee the day before MERS assigned the beneficial interest to One West. The court of appeals looked at the plain language of RCW 61.24.010(2) and decided:

> The plain words of this statute establish that the beneficiary of a deed of trust is the sole entity entitled to appoint a successor trustee if the beneficiary elects to replace the original trustee named in that deed of trust. **This statute makes equally clear that only upon the recording** of the appointment of a successor trustee with the auditor in the relevant county **is a successor trustee "vested with all the powers of an original trustee." Among these powers is, of course, the power to conduct a nonjudicial foreclosure culminating in a trustee's sale**.

176 Wash.App. at 486, 390 P.3d 642. (Emphasis added).

The Bavand court found, "This is a material procedural defect and not a mere technicality" and set the trustee's sale aside. Id at 489, 390 P.3d 644. Bavand is on point here as the case shows how to interpret the statute when it is strictly construed.

Schroeder is cited for the same principle. That is, the DTA must be strictly construed and strictly complied with. Parties to a deed of trust securing agricultural cannot contract around the part of the DTA that prohibits the nonjudicial foreclosure of agricultural land. They are required to strictly comply with the provisions of the DTA and that those terms of the contract are void. 177 Wash,2d at 107, 297 P.2d 683-84.

Schroeder also holds that waiver does not apply where the trustee's actions in a nonjudicial foreclosure are unlawful. *Id.* at 111-12. And, waiver never applies to an action for damages. *Id.* at 114.

There is another irregularity with the Resignation and Appointment of Successor Trustee that is not addressed by the Court. Chicago Title Company's representative, Jennifer Lopez, signed the Resignation and Appointment of Successor Trustee "DATED this 26th day of August, 2010." However, Notary Public, Tracy M. Rosane's jurat states:

> I certify that I know or have satisfactory evidence that **Jennifer Lopez is the individual who appeared before me**, and said individual acknowledged that her/she signed this instrument, on oath stated that he/she was authorized to execute the instrument and acknowledged it as the person of Chicago Title Insurance Company, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.
>
> **DATED this 8th day of August, 2010.**
>
> [Signature] (Emphasis added)

It is not totally evident in the document itself why the Trustee, Chicago Title Insurance Company, notarized the Resignation and Appointment of Successor Trustee eighteen days *before* it was signed, but this appears to be the same issue that was of **huge** concern to the Washington Supreme Court in Klem v. Washington Mut. Bank, 176 Wash. 2d 771, 295 P.3d 1178 (2013).

In Klem, the foreclosing trustee, Quality Loan Services, had its notaries predate notices of sale, a practice known as "robo-signing." On appeal, the trustee implored the court that the false dating notarization practice was not a material problem because the debtors received all the required notices under the Act. The Supreme Court replied:

> **This no-harm, no-foul argument again reveals a misunderstanding of Washington law and the purpose and importance of the notary's acknowledgment under the law**. A signed notarization is the ultimate assurance upon which the whole world is entitled to rely that the proper person signed a document on the stated day and place. Local, interstate, and international transactions involving individuals, banks, and corporations proceed smoothly because all may rely upon the sanctity of the notary's seal. This court does not take lightly the importance of a notary's obligation to verify the signor's identity and the date of signing by having the signature performed in the notary's presence. *Werner v. Werner*, 84 Wash.2d 360, 526 P.2d 370 (1974). As amicus Washington State Bar Association notes, "The proper functioning of the legal system depends on the honesty of notaries who are entrusted to verify the signing of legally significant documents." Amicus Br. of WSBA at 1. While the legislature has not yet declared that it is a per se unfair or deceptive act for the purposes of the CPA, it is a crime in both Washington and California for a notary to falsely notarize a document. .... *Klem*, 176 Wash.2d at 792-93. 295 P.3d 1190.
>
> ...
>
> We hold that the act of false dating by a **notary** employee of the trustee in a nonjudicial **foreclosure** is an unfair or deceptive act or practice and satisfies the first three elements under the Washington CPA. *Id* at 794-95. 295 P.3d 1191.

...

> The trustee argues as a matter of law that the falsely notarized documents did not cause harm. The trustee is wrong; a false notarization is a crime and undermines the integrity of our institutions upon which all must rely upon the faithful fulfillment of the notary's oath. There remains, however, the factual issue of whether the false notarization was a cause of plaintiff's damages. That is, of course, a question for the jury. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 314, 888 P.2d 1054 (1993) (citing *Ayers v. Johnson & Johnson Baby Prods, Co.*,117 Wash.2d 747,753-56, 818 P.2d 1337 (1991).

176 Wash.2d at 792-95, 295 P.3d. 1189-1191. (Emphasis added).

The false notarization of the resigning trustee's signature casts doubt on the integrity of the recorded Resignation and Appointment of Trustee and therefore the validity of the appointment of Gary Libey as the Successor Trustee. This should remanded to the trial court to be resolved as a per se violation of the Washington Consumer Protection Act.

III. CONCLUSION

This case is about a trustee in a deed of trust foreclosure who failed to strictly comply with the Deed of Trust Act during the foreclosure. The trustee also violated his fiduciary duties to the borrower by acting as the agent and advocate for the bank throughout the foreclosure.

This Court correctly found that the debt secured by the Franklin deed of trust was fully satisfied at the completion of the trustee's sale.

Nevertheless, the Court allowed the trustee to resurrect the fully satisfied debt and add it to another debt secured by a different deed of trust and evidenced by another promissory note. This is a breach of fiduciary duty by the trustee and plain error by the Court.

The Court also misconstrued the provisions of the Deeds of Trust Act that permit the parties to a commercial loan to secure that loan with deeds of trust on multiple properties. The Bank of Whitman, Mr. Libey, and this Court mistakenly concluded that is what happened here. This is error because our case *does not* involve a *single* loan secured by multiple deeds of trust. Here we have *two loans*, each secured by a *separate deed of trust,* which were foreclosed in separate nonjudicial foreclosures.

The trustee could have utilized that because the large loan was secured by multiple properties - a deed of trust in the Franklin property and a mortgage against the Benton property. He would have nonjudicially foreclosed the Franklin property, and then he could conduct a judicial foreclosure of the Benton property. However, this was not acceptable to the trustee and the failing bank because the Bank would not take possession immediately and Uribe would have the right to redeem the property.

The trustee conducted the foreclosures in a manner that violated his statutory duty of good faith and his ethical duties as an attorney under

the Washington Rules of Professional Conduct. He was not impartial - he was the bank's attorney/advocate before, during, and after the foreclosures. He disregarded his plainly evident conflict of interest to Uribe's detriment. His failure to comply with his duty of good faith is a violation of the Deeds of Trust Act.

Uribe may have had "constructive notice" that the trustee misrepresented his authority when he recorded the Notice of Trustee's Sale. Uribe was, however, entitled to rely on the numbers recited in the Notice of Trustee's Sale and he was entitled to be informed if the trustee intended to do something different. He was not. The trustee and soon to be defunct bank kept their plans secret so that the bank could have Uribe's land and the equipment - and put him out of business – confident, that with his resources gone, Uribe would not be able to something about it. [15]

The Court also erred by construing the Deeds of Trust Act in a manner that excused the trustee's failure to strictly comply with his statutory obligations. The Court's opinion will be read by mortgage loan servicers and trustees around the state, who have been chafing under the strict requirements imposed by the statute and courts, that they need not comply with the "minor" and "technical" provisions in the Act. This is

---

[15] The Bank's earlier role in the demise of Uribe's pipeline construction business is the subject of, FDIC v. Uribe, Inc., 171 Wash.App. 683, 287 P.3d 694 (2012).

contrary to the rule that courts are required to give effect to every word, clause and sentence of a statute. This holding breaks from longstanding precedent that lenders must strictly comply with the Act and that courts must strictly construe the Act in the borrower's favor.

The correct and only possible outcomes dictated by the Deeds of Trust Act is to nullify a trustee's sale conducted by a "trustee" with no statutory authority to conduct the trustee's sale, and because of the other procedural irregularities, including the crime of false notarization. Or, in the alternative, subtract the amount actually due on the Benton debt, from the $1,200,000 bid and deposit the resulting surplus plus the amounts later received from the sale of Uribe's equipment into the Court Registry.

This Court should grant this motion for reconsideration and recall the case for further argument as to whether Uribe is entitled to payment of the surplus. Or, set aside the trustee's sale of the Benton property for procedural irregularities. And, finally, remand the case for a determination of the consequences for violating the Consumer Protection Act.

DATE: May ___, 2015.

Robert M. Seines, WSBA 16046
Attorney for Mike and Helen Uribe

APPENDIX C

ORDER DENYING MOTION FOR RECONSIDERATION

Renee S. Townsley
Clerk/Administrator

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The Court of Appeals
of the
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June 9, 2015

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CASE # 323153
Michael and Helen Uribe v. Libey, Ensley & Nelson, PLLC et al
BENTON COUNTY SUPERIOR COURT No. 112026709

Dear Counsel:

Enclosed is a copy of the Order Denying Motion for Reconsideration.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a Petition for Review, an original and a copy of the Petition for Review in this Court within 30 days after the Order Denying Motion for Reconsideration is filed (may be filed by electronic facsimile transmission). RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service.

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:ko
Attachment

FILED
JUNE 9, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

MICHAEL URIBE and HELEN URIBE husband and wife, Appellants, v. LIBEY, ENSLEY & NELSON, PLLC, a Washington professional limited liability company; BANK OF WHITMAN, now known as COLUMBIA BANK, successor in interest to the FDIC as Receiver of Bank of Whitman; and GARY LIBEY and JANE DOE LIBEY, husband and wife and the marital community comprised thereof, Respondents.	)	No. 32315-3-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered respondent's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of May 5, 2015 is hereby denied.

DATED: June 9, 2015

PANEL: Judges Korsmo, Brown, Siddoway

FOR THE COURT:

LAUREL SIDDOWAY
Chief Judge

APPENDIX D

ORDER DENYING MOTION TO PUBLISH

Renee S. Townsley
Clerk/Administrator

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June 9, 2015

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CASE # 323153
Michael and Helen Uribe v. Libey, Ensley & Nelson, PLLC et al
BENTON COUNTY SUPERIOR COURT No. 112026709

Dear Counsel:

Enclosed is your copy of this Court's Order Denying Motion to Publish Court's Opinion of May 5, 2015, which was filed today.

A petition for review, if any, is due 30 days after an order determining a timely motion to publish is filed, RAP 13.4(a). A petition for review should be filed in the Court of Appeals.

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:ko
Attach.

FILED
JUNE 9, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

MICHAEL URIBE and HELEN URIBE husband and wife, Appellants, v. LIBEY, ENSLEY & NELSON, PLLC, a Washington professional limited liability company; BANK OF WHITMAN, now known as COLUMBIA BANK, successor in interest to the FDIC as Receiver of Bank of Whitman; and GARY LIBEY and JANE DOE LIBEY, husband and wife and the marital community comprised thereof, Respondents.	)	No. 32315-3-III ORDER DENYING MOTION TO PUBLISH

THE COURT has considered the motion to publish the court's opinion of May 5, 2015, and the record and file herein, and is of the opinion the motion to publish should be denied. Therefore,

IT IS ORDERED, the motion to publish is denied.

PANEL: Judges Korsmo, Brown, Siddoway

DATED: June 9, 2015

FOR THE COURT:

LAUREL SIDDOWAY
Chief Judge

APPENDIX E

MERRY V. NORTHWEST TRUSTEE SERVICES, INC.
DECISION

2015 WL 3532992
Only the Westlaw citation is currently available.
Court of Appeals of Washington,
Division 3.

Thomas F. MERRY, Appellant,
v.
NORTHWEST TRUSTEE SERVICES, INC.,
and
Nationstar Mortgage, LLC, Respondents.

No. 32474–5–III. | June 4, 2015.

Synopsis

Background: After trustee commenced, purportedly on behalf of mortgagee, a nonjudicial foreclosure, holder of deed of trust on property brought declaratory judgment action to establish priority of deed of trust. The Chelan Superior Court, Lesley A. Allan, J., dismissed action. Holder appealed.

Holdings: The Court of Appeals, Siddoway, C.J., held that:

[1] waiver by failure to restrain a trustee's sale is a defense to claimed Deeds of Trust Act (DTA) violations if applying waiver is not inequitable and is consistent with the purposes of the act, and

[2] there was nothing inequitable or inconsistent with DTA in finding that holder in instant case waived right to seek entitlement to portion of proceeds of trustee's sale.

Affirmed.

West Headnotes (6)

[1] **Evidence**

Documents whose contents are alleged in a complaint and whose authenticity no party questions but that are not physically attached to the complaint may be considered in ruling on a motion to dismiss.

Cases that cite this headnote

[2] **Mortgages**

When the deed of trust grants the trustee the power of sale if the borrower defaults on repaying the underlying obligation, the trustee may usually foreclose the deed of trust and sell the property without judicial supervision.

Cases that cite this headnote

[3] **Mortgages**

Failure to seek the presale injunction authorized by statute governing restraint of trustee's sale can operate as waiver of right to seek a declaratory judgment establishing entitlement to a portion of proceeds of trustee's sale. West's RCWA 61.24.130.

Cases that cite this headnote

[4] **Mortgages**

A party will be deemed to have waived his or her right to challenge a trustee's sale when the party: (1) received notice of the right to enjoin the sale; (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale; and (3) failed to bring an action to obtain a court order enjoining the sale. West's RCWA 61.24.130.

Cases that cite this headnote

[5] **Mortgages**

Waiver by failure to restrain a trustee's sale is a defense to claimed Deeds of Trust Act (DTA) violations if applying waiver is not inequitable and is consistent with the purposes of the act. West's RCWA 61.24.130.

Cases that cite this headnote

[6] **Mortgages**

There was nothing inequitable or inconsistent with the purposes of the Deeds of Trust Act (DTA) in finding that holder of deed of trust waived right to seek a declaratory judgment establishing holder's entitlement to portion of proceeds of trustee's sale, after holder took no action to restrain the trustee's sale but subsequently alleged in declaratory judgment action that violation of DTA occurred in nonjudicial foreclosure, where holder alleged only a formal, technical, nonprejudicial violation of DTA through mortgagee's use of a deed of trust form that mistakenly included electronic mortgage registry as a purported beneficiary, and there was no suggestion that such violation could not have been corrected if timely raised. West's RCWA 61.24.130.

Cases that cite this headnote

Appeal from Chelan Superior Court; Lesley A. Allan, Judge.

Attorneys and Law Firms

Thomas F. Merry, Leavenworth, WA, pro se.

John Anthony Mcintosh, Bellevue, WA, Rebecca R. Shrader, Bishop, White, Marshall & Weibel, PS, Seattle, WA, for Respondent(s).

PUBLISHED OPINION

SIDDOWAY, C.J.

***1** ¶ 1 Thomas Merry appeals the dismissal of a declaratory judgment action in which he sought to establish the priority of his deed of trust on a residential property after a trustee, claiming to act on behalf of Nationstar Mortgage, LLC, commenced nonjudicial foreclosure. Relying on *Bain v. Metropolitan Mortgage Group*, 175 Wash.2d 83, 93, 285 P.3d 34 (2012), Mr. Merry contends that Nationstar had no enforceable deed of trust and that the promissory note it held had been rendered void. But Mr. Merry took no action to restrain the trustee's sale. After the sale was completed, Nationstar and the trustee successfully argued that Mr. Merry's interest was eliminated by the sale and he had waived any right to set it aside.

¶ 2 Mr. Merry argues that recent decisions of the Washington Supreme Court and this court hold that waiver will not be applied to prevent a plaintiff from seeking to set aside a completed trustee's sale where the plaintiff demonstrates a failure to strictly comply with the requirements of Washington's deeds of trust act (DTA), chapter 61.24 RCW. We agree *that A Ibice v. Premier Mortgage Services of Washington, Inc.*, 174 Wash.2d 560, 568, 276 P.3d 1277 (2012) and *Schroeder v. Excelsior Management Group, LLC*, 177 Wash.2d 94, 104, 297 P.3d 677 (2013) are controlling authority that if the conduct of a foreclosure sale does not strictly comply with the DTA, a court can set aside a sale if it would be inequitable under the circumstances and inconsistent with the goals of the DTA to apply the defense of waiver.

¶ 3 But Mr. Merry relies on technical, formal, likely correctable and non-prejudicial violations of the DTA arising because Nationstar, and its predecessors in interest, were members of Mortgage Electronic Registration Systems, Inc. (MERS), a privately-operated mortgage registry whose practices in creating and transferring beneficial interests conflicted with requirements of the DTA. While *Bain* recognized that those practices had the potential to prejudice Washington borrowers—particularly those needing to identify their lender to explore modification of their loans—Mr. Merry's claim is not that MERS's practices harmed him. It is instead that MERS's practices have somehow rendered void a bona fide, senior $235,000–plus obligation secured by the subject property.

¶ 4 The longstanding elements of the doctrine of waiver are present: Mr. Merry received notice of his right to enjoin the trustee's sale, had actual knowledge that MERS had acted as an unlawful beneficiary under the deed of trust interest asserted by Nationstar, and failed to bring action to enjoin the sale. For that reason, and because it is not inequitable nor is it inconsistent with the goals of the DTA to apply waiver, we hold that the trial court properly applied waiver and dismissed Mr. Merry's complaint. We affirm,

FACTS AND PROCEDURAL BACKGROUND

¶ 5 In 2007, Sharon Weirich borrowed $205,440 from Countrywide Home Loans, Inc. and executed a deed of trust

on her real property located in Dry den, Washington, as security. The deed of trust identified Countrywide as the lender, Landsafe Title of Washington as the trustee, and MERS as "a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns." Clerk's Papers (CP) at 41. It stated, "MERS is the beneficiary under this Security Instrument." *Id.*

***2** ¶ 6 In December 2011, MERS executed an assignment of deed of trust as "holder," transferring "all beneficial interest" under the 2007 Weirich–to–Countrywide deed of trust to Bank of America, N.A. CP at 61. The assignment was recorded in Chelan County on December 8, 2011.

¶ 7 According to a notice of trustee's sale later filed in Chelan County, Northwest Trustee Services, Inc. (Northwest Trustee), acting on behalf of Bank of America, mailed and personally served Ms. Weirich with a notice of default on October 31, 2012. The notice of default identified the owner of the note as the Federal National Mortgage Association (Fannie Mae) and identified Bank of America as the loan servicer.

¶ 8 In November 2012, Bank of America, as "present beneficiary under [the Weirichto–Countrywide] deed of trust" appointed Northwest Trustee as successor trustee under the deed of trust. CP at 66.

¶ 9 Meanwhile, on the borrower's side of the transaction, and also in November 2012, Ms. Weirich executed a deed of trust to the appellant, Thomas Merry. According to its terms, it secured payment of a $68,000 promissory note. Ms. Weirich executed a power of attorney and a0ignment of legal claims to Mr. Merry in the same timeframe.

¶ 10 Shortly after these November dealings, Ms. Weirieh received a notice of trustee's sale dated December 12, 2012, informing her that her property would be sold to satisfy her promissory note obligation to MERS, as nominee for Countrywide, which had been assigned to Bank of America. The notice identified the date of the trustee's sale as April 19, 2013. The sale did not occur on that date, however, and the 120–day statutory timeline for conducting a sale following service of notice passed without any rescheduled sale. Ms. Weirich's arrears on her promissory note continued to grow.

¶ 11 In May 2013, Bank of America executed an assignment, transferring its beneficial interest under the deed of trust together with the note to Nationstar. The assignment was recorded in Chelan County on June 6, 2013.

¶ 12 On October 8, 2013, Northwest Trustee recorded an amended notice of trustee's sale in Chelan County, identifying the date of the trustee's sale as November 15, 2013. The notice indicated that over $235,000 was then owed on the note Ms. Weirich had given Countrywide in 2007.[1] Although no evidence of service of the notice of trustee's sale is included in the record on appeal, the notice was required by the DTA to be served on Ms. Weirich, as grantor, and Mr. Merry, as holder of a junior deed of trust, at or about the same time. RCW 61.24.040(l)(b). Consistent with RCW 61.24.040(1)(f), which prescribes the form of notice, the notice of trustee's sale stated:

> Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.

***3** CP at 81.

¶ 13 Before the scheduled sale date, Mr. Merry commenced legal action against Northwest Trustee and Nationstar in Chelan County by serving both with a "Complaint to Declare Lien Priority, and to Declare Deed of Trust Void and Promissory Note Unenforceable." CP at 3. Among matters alleged by Mr. Merry's complaint were a number of technical violations of the DTA in the form of actions by entities who had been improperly designated or appointed or otherwise lacked authority.

¶ 14 It is clear from Mr. Merry's pro se complaint that he was aware of the trustee's sale scheduled for November 15.[2] His complaint stated that in response to a request for a true copy of the promissory note signed by Ms. Weirich, Northwest Trustee had provided her with a photocopy that appeared to bear Countrywide's endorsement in blank.

¶ 15 The complaint sought the court's declaration that Northwest Trustee was not trustee at the time it issued the notice of default; that Nationstar lacked standing to enforce the note, initiate nonjudicial foreclosure, or appoint

a substitute trustee; that Ms. Weirich's promissory note and deed of trust to Countrywide were unenforceable and void; that the note was a lost or stolen instrument; and that Mr. Merry's deed of trust was in first position on the property.

¶ 16 Mr. Merry did not attempt to enjoin the trustee's sale of the property. After one brief postponement, Northwest Trustee proceeded with the sale on January 3, 2014, selling the property to Nationstar, which immediately conveyed its interest to Fannie Mae.

¶ 17 Nationstar and Northwest Trustee then answered Mr. Merry's complaint and in February Northwest Trustee moved for judgment on the pleadings under CR 12(c), arguing that Mr. Merry waived his right to challenge the completed sale by failing to seek an order restraining it.

¶ 18 In March 2014, having reviewed the parties' briefing, documents referenced by Mr. Merry's complaint and that Northwest Trustee attached to its motion, and having heard argument from the parties, the court granted the motion and dismissed the complaint with prejudice. Mr. Merry's motion for reconsideration was denied.

ANALYSIS

[1] ¶ 19 Mr. Merry argues that the trial court erred in granting the motion to dismiss his complaint because he presented "issues of material fact" as to the invalidity of the interests in the Weirich property asserted by MERS, Bank of America, Northwest Trustee, and Nationstar, possibly leaving his deed of trust as the only valid encumbrance against the property. Br. of Appellant at 14. While Northwest Trustee framed its motion as a motion for judgment on the pleadings under CR 12(c),[3] one document submitted with its motion and critical to the dismissal relief was the trustee's deed, establishing that the trustee's sale had taken place. Because that document was not mentioned in Mr. Merry's complaint (it postdated his complaint), the fact that it was presented and was not excluded by the court converted the defendants' CR 12(c) motion into one for summary judgment. *City of Moses Lake v. Grant County*, 39 Wash.App. 256, 258, 693 P.2d 140 (1984).

*4 ¶ 20 The fact that the foreclosure sale had taken place was not disputed by Mr. Merry and the motion presented a pure legal issue: whether, even if Mr. Merry is right about ineffective assignments and appointments, the trial court properly applied waiver because he failed to pursue a presale injunction authorized by RCW 61.24.130 and failed to allege any basis on which waiver would not apply. We review questions of law and summary judgment rulings de novo. *Lyons v. U.S. Bank Nat. Ass'n*, 181 Wash.2d 775, 783, 336 P.3d 1142 (2014).

Failure to seek the presale injunction authorized by RCW 61.24.130 can operate as a waiver

[2] [3] ¶ 21 In obtaining a loan, a borrower, as "grantor," may execute a deed of trust to encumber his or her interest in real property as security for the performance of its obligation. RCW 61.24.005(7) (defining "grantor"). When the deed of trust grants the trustee the power of sale if the borrower defaults on repaying the underlying obligation, the trustee may usually foreclose the deed of trust and sell the property without judicial supervision—a "significant power." *Bain*, 175 Wash.2d at 93, 285 P.3d 34.

¶ 22 To protect interested parties against an improper exercise of this significant power, the DTA provides affected parties with a broad opportunity to challenge the sale before it occurs. RCW 61.24.130(1) states that nothing contained in the DTA shall prejudice "the right of the borrower, grantor ... or any person who has an interest in, lien, or claim of lien against the property ... to restrain, on any proper legal or equitable ground, a trustee's sale." Before conducting a nonjudicial foreclosure, the trustee is required to draw the attention of affected parties to their right to restrain the sale and the possible consequence of waiver should they fail to do so with the form of notice provided by Northwest Trustee, described above.

[4] ¶ 23 It has long been held that "RCW 61.24.130 sets forth the only means by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure." *Cox v. Helenius*, 103 Wash.2d 383, 388, 693 P.2d 683 (1985). A party will be deemed to have waived his or her right to challenge a trustee's sale when the party "(1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale." *Plein v. Lackey*, 149 Wash.2d 214, 227, 67 P.3d 1061 (2003) *see also Frizzel v. Murray*, 179 Wash.2d 301, 306–07, 313 P.3d 1171 (2013). In *CHD, Inc. v. Boyles*, 138 Wash.App. 131, 157 P.3d 415 (2007), we held that a plaintiff waives the right to seek a declaratory judgment

establishing his entitlement to a portion of the proceeds of the trustee's sale if he or she fails to restrain the sale.

¶ 24 Because all of the elements of waiver were present here, the superior court properly dismissed Mr. Merry's complaint.

In some situations, courts have not applied waiver to deny an interested party's effort to set aside the trustee's sale.

***5** ¶ 25 Mr. Merry nonetheless relies on recent case law holding that a trustee's noncompliance with the DTA is a sufficient basis for allowing a challenge to a completed trustee's sale. And during the same timeframe, our Supreme Court decided in *Bain* that common mortgage banking practices following the creation of MERS fail to comply with the DTA, with the result that many completed trustee sales are potentially subject to invalidation. It is the noncompliant mortgage banking practices traceable to designating MERS as beneficiary on which Mr. Merry relies in contending that his was the only valid encumbrance on Ms. Weirich's Dryden property. He claims that two decisions by the Court of Appeals—*Rucker v. NovaStar Mortgage, Inc.*, 177 Wash.App. 1, 311 P.3d 31 (2013) and *Bavand v. OneWest Bank, F.S.B.*, 176 Wn, App. 475, 176 Wash.App. 475, 309 P.3d 636 (2013), *abrogated in part on other grounds by Frias v. Asset Foreclosure Services, Inc.*, 181 Wash.2d 412, 334 P.3d 529 (2014)[4] —support his challenge to the dismissal of his claims.

¶ 26 We begin with our Supreme Court's decisions in *Albice* and *Schroeder*. In *Albice*, homeowners who had fallen behind in payments on a loan and received a notice of trustee's sale negotiated a forbearance agreement under which they would pay seven agreed monthly payments. *Albice*, 174 Wash.2d at 564, 276 P.3d 1277. The trustee named by their deed of trust continued the date of the foreclosure sale each time the first six monthly payments required by the forbearance agreement were made, even though each of the six payments was made late. When the seventh and last forbearance agreement payment was made, however (and was also made late), the trustee rejected it and proceeded with the sale. The price at which the property was sold was a small fraction of the homeowners' equity.

¶ 27 The first issue accepted by the Supreme Court for review *in Albice* was whether a trustee's sale taking place beyond the 120 days for a sale permitted by RCW 61.24.040(6) warranted invalidating the sale.[5] *Id.* at 566, 276 P.3d 1277. A primary consideration for the court, as in all cases construing the DTA, were the three basic objectives the act is deemed to further: "(1) that the nonjudicial foreclosure process should be efficient and inexpensive, (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure, and (3) that the process should promote stability of land titles." *Id.* at 567, 276 P.3d 1277 (citing *Cox*, 103 Wash.2d at 387, 693 P.2d 683).

¶ 28 The *Albice* court observed that "[b]ecause the act dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures, lenders must strictly comply with the statutes" and that "[p]rocedural irregularities, such as those divesting a trustee of its statutory authority to sell the property, can invalidate the sale," placing principal reliance on *Udall v. T.D. Escrow Services, Inc.*, 159 Wash.2d 903, 915–16, 154 P.3d 882 (2007). *Albice*, 174 Wash.2d at 567, 276 P.3d 1277. It concluded:

> ***6** When a party's authority to act is prescribed by a statute and the statute includes time limits ... failure to act within that time violates the statute and divests the party of statutory authority. Without statutory authority, any action taken is invalid. As we have already mentioned and held, under this statute, strict compliance is required.

Id. at 568, 276 P.3d 1277.

¶ 29 The successful bidder at the trustee's sale argued that even if the DTA had been violated, the homeowners waived their right to bring a postsale challenge because they could have, but did not, seek to restrain the sale under RCW 61.24.130. The *Albice* court observed, however, that the statute says " '[f]ailure to bring ... a lawsuit *may* result in waiver of any proper grounds for invalidating the Trustee's sale,' " and thereby "neither requires nor intends for courts to strictly apply waiver. Under the statute, we apply waiver only where it is equitable under the circumstances and where it serves the goals of the act." *Id.* at 570, 276 P.3d 1277 (quoting RCW 61.24.040(1)(f)(IX) (alteration in original).[6]

¶ 30 In *Schroeder*, decided one year after *Albice*, the owner of allegedly agricultural land located in Stevens County challenged the nonjudicial foreclosure of a deed of trust and sale of his property. The DTA does not permit the nonjudicial foreclosure of land principally used for agricultural purposes; where agricultural ground is pledged as security, the deed

of trust must be foreclosed judicially. 177 Wash.2d at 105, 297 P.3d 677. Mr. Schroeder initially obtained a temporary order restraining sale of his property based on its asserted agricultural character but the order was later dissolved because Mr. Schroeder had "knowingly" agreed with his lender, in resolving a prior attempted foreclosure, to "waive[ ] any and all right he may have to judicial foreclosure of the subject property on the grounds it is used for agricultural purposes." *Id.* at 100, 297 P.3d 677.

¶ 31 The Supreme Court held that Mr. Schroeder could not *contractually* waive compliance with the DTA, explaining that it "is not a rights-or-privileges-creating statute. Instead, it sets up a list of 'requisite[s] to a trustee's sale." ' *Id.* at 106, 297 P.3d 677 (quoting RCW 61.24.030). "These ... are limits on the trustee's power to foreclose without judicial supervision." *Id.* at 107, 297 P.3d 677

¶ 32 In later addressing the trustee's argument that Mr. Schroeder had waived his challenge by failing to exercise his right to seek to restrain the sale, the court did not explicitly discuss why it would be inequitable under the circumstances or contravene goals of the DTA to apply the doctrine of waiver. The court did state that if the land was agricultural, then the statute did not apply. *Id.* at 111, 297 P.3d 677, The Supreme Court vacated the order dissolving the temporary injunction and held that "the trial court must hold a hearing to determine whether the property was primarily agricultural at relevant times." *Id.* at 115, 297 P.3d 677. "[I]f it was," the court held, "the nonjudicial foreclosure sale shall be vacated." *Id.*

The implications of Bain for vacating foreclosure sales

*7 ¶ 33 Within a couple of months after deciding *Albice* and six months before deciding *Schroeder,* our Supreme Court was called upon to decide whether business practices of members of MERS in transferring beneficial interests in borrowers' notes and deeds of trust through the MERS registry, without any public recording, might themselves violate the DTA. MERS was established in the 1990s by entities in the mortgage banking industry to create a central registry that would facilitate the tracking and transfer of mortgage rights and interests. *See Bain,* 175 Wn.2d 94–98. To that end, members of MERS included it as an additional party to a traditional deed of trust transaction so that MERS could later effect transfers within its registry on its members' behalf. The MERS system "changes 'a traditional three party deed of trust [grantor, trustee, and lender/beneficiary] [into] a four party deed of trust, wherein MERS would act as the contractually agreed upon beneficiary for the lender and its successors and assigns.' " *Bain,* 175 Wash.2d at 96, 285 P.3d 34. *Bain* cited the observation of a New York bankruptcy court that while MERS was created to alleviate perceived problems of delay created by state and local recording processes, " 'in effect the MERS systems was designed to *circumvent* these procedures. MERS, as envisioned by its originators, operates as a *replacement* for our traditional system of public recordation of mortgages.' " *Id.* at 97, 285 P.3d 34 (emphasis added) (quoting *In re Agard,* 444 B.R. 231, 247 (Bankr.E.D.N.Y.2011), *vacated in part on other grounds sub nom. by In re Agard v. Select Portfolio Servicing, Inc.,* 2012 WL 1043690 (Mar. 28, 2012) (court order)).

¶ 34 The Supreme Court was presented in *Bain* with three questions certified by the federal district court for the Western District of Washington. The first asked:

> Is Mortgage Electronic Registration Systems, Inc., a lawful "beneficiary" within the terms of Washington's Deed of Trust Act, [RCW §] 61.24.005(2), if it never held the promissory note secured by the deed of trust?

Id. at 91, 285 P.3d 34. The Supreme Court construed the plain language and the purpose of the DTA as requiring that the beneficiary of a deed of trust be the party who holds the promissory note from the mortgagor. *Bain,* 175 Wash.2d at 110, 285 P.3d 34. MERS does not hold the promissory notes given to and generally resold by its members. The court's answer to the first certified question was, "[s] imply put, if MERS does not hold the note, it is not a lawful beneficiary." *Id.* at 89, 285 P.3d 34.

¶ 35 The second question asked was whether, if MERS was an unlawful beneficiary,

> [W]hat is the legal effect of Mortgage Electronic Registration Systems, Inc., acting as an unlawful beneficiary under the terms of Washington's Deed of Trust Act?

Id. at 91, 285 P.3d 34. The Supreme Court declined to answer the second question, explaining that resolution "depends on what actually occurred with the loans before us, and that evidence is not in the record." *Id.* at 114, 285 P.3d 34. The

court did reject MERS's argument that at most, MERS would simply need to assign its interest in the deed of trust to the lender or perhaps the holder of the note. The problem, according to the court, was "it is unclear what rights, if any, [MERS] has to convey." *Id.* at 111, 285 P.3d 34.

***8** ¶ 36 The *Bain* decision has presented problems for foreclosure of deeds of trust like Ms. Weirich's, in which lenders designated MERS as a nominee or mortgagee of record. Because MERS does not hold the underlying promissory notes, banks who are assigned a "beneficial interest" in a deed of trust by MERS do not thereby acquire a beneficial interest within the meaning of the DTA nor are they able, legally, to appoint a successor trustee.

¶ 37 Division One of this court addressed whether infirmities with deed of trust interests and appointments traced to an unlawful beneficiary can be the basis for an action to set aside a completed trustee's sale in *Rucker v. NovaStar Mortgage, Inc.*, 177 Wash.App. 1, 311 P.3d 31 (2013). In that case, the borrowers and grantors of a deed of trust, relying on *Bain,* argued that because NovaStar, a purported beneficiary of the deed of trust, did not hold their promissory note, it could not be a beneficiary within the meaning of the DTA; that it lacked the power to appoint the successor trustee who had proceeded with a nonjudicial foreclosure; and that the trustee's sale was therefore invalid. 177 Wash.App. at 14–15, 311 P.3d 31, Division One agreed with the borrowers that the actions of the improperly appointed trustee constituted a material violation of the DTA and that its sale of the property was therefore improper. It recognized that a vacation of the trustee's sale was a potentially available remedy. *Id.* at 17–18, 311 P.3d 31.

¶ 38 Turning to whether the borrowers waived their right to challenge the sale by failing to bring an action to restrain it, the court discussed *Albice's* holding that "waiver is applicable 'only where it is equitable under the circumstances and where it serves the goals of the act.' " *Id,* at 18–19, 311 P.3d 31. Viewing the evidence in the light most favorable to the borrowers, the court pointed to the fact that one of the borrowers claimed to have been told by an employee of the trustee that the trustee's sale would be postponed. *Id.* at 8, 311 P.3d 31. Because there were genuine issues of material fact whether this false representation was made, and if so, whether the borrowers reasonably relied on it in failing to bring a lawsuit to restrain the sale, the court held that summary judgment had been improperly granted.

¶ 39 One month later, in *Bavand,* Division One applied similar reasoning to reverse, for the most part, trial court orders dismissing a postsale challenge to a trustee's sale. It pointed out that OneWest Bank, FSB, a self-proclaimed beneficiary at the time it appointed a successor trustee, relied for its authority on an assignment of the deed of trust that was executed the day *after* it had appointed the trustee. *Bavand,* 176 Wash.App. at 483, 309 P.3d 636. The court concluded that MERS could not cure the defective appointment of a trustee because it is not a proper beneficiary under the DTA. *Id.* at 488, 309 P.3d 636. It held the fact that the successor trustee's lack of authority was "a material procedural defect and not a mere technicality." *Id.* at 490, 309 P.3d 636.

***9** ¶ 40 In response to the argument by the bank and MERS that Ms. Bavand waived any claim by failing to restrain the sale under RCW 61.24.130, the court disagreed, although in this case it construed *Schroeder* as holding that waiver does not occur where the trustee's actions in a nonjudicial foreclosure are unlawful.

¶ 41 Both *Rucker* and *Bavand* support Mr. Merry's argument that his effort to invalidate a trustee's sale based on MERS-related violations of the DTA might not be waived by a failure to restrain a trustee's sale. But for reasons we turn to next, they do not provide germane or persuasive guidance on whether the trial court erred in applying waiver here.

We hold that waiver by failure to restrain a trustee's sale remains a defense to claimed DTA violations if applying waiver is not inequitable and is consistent with the purposes of the act.

[5] ¶ 42 If *Bavand* reads *Schroeder* as holding that any lapse from strict compliance with the DTA immunizes an action to set aside a completed trustee's sale from the defense of waiver, then we disagree. The *Schroeder* decision never suggested that it was overruling or modifying the court's earlier decisions in *Plein* and *Albice;* it merely distinguished them. *Schroeder* presented an apparent flouting of the DTA. If Mr. Schroeder's property was used principally for agricultural purposes, then the deed of trust he executed was never eligible for nonjudicial foreclosure. The case presented unique facts and the court resolved it on a unique basis:

> We emphasize the obvious. If Schroeder's land was agricultural, then not only did the trustee not

> have authority to proceed with an nonjudicial foreclosure, but the very statute on which the trustee relies to support its five-day notice requirement, ROW 61.24.130(2), is inapplicable.

177 Wash.2d at 111, 297 P.3d 677.

¶ 43 Distinguishing *Plein*, the *Schroeder* court said:

> Nothing in *Plein* suggests that waiver might cause the deed of trust act to apply to transactions to which the deed of trust act does not apply. If Schroeder's 200 acres were used primarily for agricultural purposes, *Plein* is inapplicable.

Id. at 112, 297 P.3d 677. Our Supreme Court recently reiterated this distinguishing aspect of *Schroeder* in *Frizzell*, 179 Wash.2d at 311–12, 313 P.3d 1171, stating that in *Schroeder*, "the statutory provisions for enjoining a nonjudicial foreclosure sale, including the waiver provision, were inapplicable."

¶ 44 It was in *Plein* that our Supreme Court first recognized the three elements[7] that give rise to what it characterized as a "waiver rule" that "appropriately effectuates [a] statutory directive." *Plein*, 149 Wash.2d at 229, 67 P.3d 1061. Its source for the elements were decisions by this court, which had relied in turn on a law review comment by now-Professor, then law student, Joseph Hoffmann: Joseph L. Hoffmann, Comment, *Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington*, 59 WASH. L.Rev. 323 (1984).[8] Notably, the Court of Appeals decisions on which *Plein* relied included two decisions in which attempts to set aside a completed trustee's sale based on violations of the DTA were held to have been waived: *Koegel v. Prudential Mutual Savings Bank*, 51 Wash.App. 108, 114, 752 P.2d 385 (1988) and *Steward v. Good*, 51 Wash.App. 509, 515–17, 754 P.2d 150 (1988).

***10** ¶ 45 In *Koegel*, the original and amended notices of default served on the borrower and grantor incorrectly described the subject property, and the notice of sale was sent less than 30 days after the amended notice of default. 51 Wash.App. at 109, 752 P.2d 385. While the court discussed the duty of trustees to strictly comply with the DTA and the strict construction of the act's requirements in favor of the borrower, neither deterred the court from applying waiver. It held that a party should be required to establish prejudice in order to void a sale "where, as here, the trustee's error was a technical, formal error ... and correctable." *Id.* at 113, 752 P.2d 385. In the case before it, "[t]he trustee's error was nonprejudicial and the debtor could have invoked judicial protection prior to the sale but failed to do so." *Id.*

¶ 46 In *Steward*, a successor trustee mailed a notice of default to the borrowers nine days before his appointment and failed to record the notice of sale 90 days before the actual sale. But the court endorsed *Koegel's* holding that technical, formal, correctable errors must be prejudicial to justify setting aside a trustee's sale. *Steward*, 51 Wash.App. at 515, 754 P.2d 150. The court held, "Each of the alleged wrongdoings could or should have been known to them, therefore the Stewards should have brought a timely action to contest the default or restrain the sale. As the Stewards did not avail themselves of the statutory remedies available to them, they are precluded from doing so now." *Id.* at 517, 754 P.2d 150.

¶ 47 The Supreme Court in *Plein* "agree[d] that the waiver rule applied by the Court of Appeals in ... *Steward, Koegel* and like cases appropriately effectuates the statutory directive that any objection to the trustee's sale is waived where presale remedies are not pursued." 149 Wash.2d at 229, 67 P.3d 1061. The Supreme Court also cited to the following discussion in the law review comment on which the *Koegel* and *Steward* courts had relied, stating that the doctrine of waiver

> should preclude an action by a party to set aside a completed trustee's sale whenever the party (1) received notice of the right to enjoin the trustee's sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to enjoin the sale. In most cases, the statutory notices of foreclosure and trustee's sale should be sufficient to inform a party of the right to enjoin the sale. Furthermore, most substantive defenses to foreclosure arise early enough to permit the filing of a presale injunction action. Therefore, in most cases, a party's failure to bring a presale injunction action should be held to constitute

> a waiver of the right to contest the completed sale.

Hoffman, 59 WASH. L.REV.. at 335 (cited by *Plein* at 149 Wash.2d at 227, 67 P.3d 1061).

¶ 48 There is no textual basis in the DTA for concluding that its liberal allowance of presale injunctions was not intended to include injunctions for failure by the trustee or beneficiary to strictly comply with the DTA. RCW 61.24.130(1) speaks of the right to restrain the sale "on any proper legal or equitable ground." The notice provided by RCW 61.24.040(1)(f)(IX) informs recipients that the opportunity to restrain the sale extends to "[a]nyone having any objection to the sale on any grounds whatsoever" and that failure to bring such a lawsuit may result in a waiver "of any proper grounds for invalidating the ... sale."

***11** ¶ 49 *Plein* discussed provisions of the DTA that signal its disfavor for attacks on completed sales, explaining:

> The Deed of Trust Act discourages the use of postsale remedies in three ways. First, the Act does not expressly provide for any court actions to contest a completed trustee's sale. Second, the Act indicates that the right to contest a completed sale may be waived by a party's failure to bring a presale injunction action. Finally, the Act requires that the trustee's deed issued to the purchaser "recite the facts showing that the sale was conducted in compliance with all of the requirements" of the Act and the particular deed of trust. This recital of statutory compliance is "prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value ." [RCW 61.24.040(7).]

149 Wash.2d at 228, 67 P.3d 1061 (alteration in original) (quoting Hoffman, 59 Wash. L.Rev. at 329 (footnotes omitted)). At the same time, the DTA "manifests a legislative preference for the presale injunction remedy by reserving to ... interested parties the right to restrain the trustee's sale on 'any proper ground.' " Hoffman, 59 **Wash. L.Rev.** at 327.

¶ 50 This legislative preference for presale remedies is even more clear following the legislature's enactment in 2009 of a provision explicitly identifying claims for damages arising out of foreclosures of owner-occupied residential real property that are not waived by a failure to enjoin a foreclosure sale. LAWS OF 2009, ch. 292, § 6, *codified as* RCW 61.24.127. The legislature's primary purpose in enacting the new provision was to supersede the holding in *Brown v. Household Realty Corp.*, 146 Wash.App. 157, 189 P.3d 233 (2008), which held that an action seeking damages for wrongful foreclosure is waived if the borrower does not seek to enjoin the foreclosure sale. *Frias*, 181 Wash.2d at 425, 334 P.3d 529.

¶ 51 Among the postsale claims for damages that the 2009 act recognizes is a borrower's or grantor's claim for damages "asserting ... [f]ailure of the trustee to materially comply with the provisions of this chapter." But the nonwaived claim is subject to the limitation (among others) that the claim may not seek any remedy other than monetary damages. RCW 61.24.127(2). Notably, while the legislature explicitly recognized that a grantor's or borrower's claim for *damages* for a material violation of the DTA could survive completion of the foreclosure sale, it did not explicitly recognize a grantor's or borrower's claim to set aside the sale for a material DTA violation as surviving the sale. Not only that, but it showed a general disapproval for the latter type of legal challenge by providing that a grantor or borrower hoping to recover postsale damages may not include any claim that would affect the validity or finality of the sale or operate to encumber or cloud title to the property.

¶ 52 Even after *Albice* and *Schroeder,* Washington law continues to support the application of waiver to individuals like Mr. Merry who, with knowledge of a material violation of the DTA, fail to restrain a sale—as long as courts heed *Albice's* admonition that "we apply waiver only where it is equitable under the circumstances and where it serves the goals of the act." *Albice,* 174 Wash.2d at 570, 276 P.3d 1277.[9]

As a matter of law, there is nothing inequitable or inconsistent with the purposes of the DTA in applying waiver to Mr. Merry.

***12** **[6]** ¶ 53 To conclude our analysis, we address why the trial court could summarily conclude that there was no reason *not* to apply the waiver rule. In *Frizzell,* our Supreme Court affirmed the summary judgment dismissal of a postsale challenge to a trustee's sale and in doing so, rejected an argument for exceptional treatment under the principles of *Albice* by examining the absence of evidence that waiver would be inequitable or inconsistent with the purposes of the DTA,

¶ 54 Mr. Merry's complaint alleged that Northwest Trustee lacked standing to act as trustee because it was appointed by MERS, an unlawful beneficiary. He alleged that Nationstar lacked standing to enforce the note because it was not the holder of the note, and finally that the note is unenforceable because it is a lost or stolen instrument. His prayer for relief asked that the court declare the Weirich–to–Countryside note lost or stolen and the deed of trust interest claimed by Nationstar to be unenforceable.

¶ 55 Mr. Merry's complaint did not identify any respect in which Countrywide's use of a deed of trust form that included MERS as a purported beneficiary and mortgagee harmed him. He did not identify how Bank of America's, Northwest Trustee's, or Nationstar's actions taken in an effort to foreclose the problematic MERS-inclusive deed of trust harmed him. Instead, he attempted to seize on what proves to have been Countrywide's mistake in identifying MERS as beneficiary as a basis for asking the Chelan County Superior Court to treat the more than $235,000 owed by Ms. Weirieh on a bona fide obligation as unenforceable, resulting in a priority windfall to him.

¶ 56 The *Bain* court was unable to determine the effect of MERS's identification as an unlawful beneficiary on the parties to the federal action due to insufficient information. But Justice Chambers' decision for the court signaled disapproval of the type of hypertechnical, inequitable result requested by Mr. Merry's complaint. The opinion states that "the equities of the situation would likely (though not necessarily in every case) require the court to deem that the real beneficiary is the lender whose interests were secured by the deed of trust or that lender's successors." *Bain*, 175 Wash.2d at 111, 285 P.3d 34. Responding to the argument of one of the federal plaintiffs, Kevin Selkowitz, that his obligation under his promissory note should be invalidated, the Supreme Court said, "[Mr. Selkowitz] offers no authority in his opening brief for the suggestion that listing an ineligible beneficiary on a deed of trust would render the deed void and entitle the borrower to quiet title." *Id.* at 112, 285 P.3d 34. Distinguishing a case cited by Mr. Selkowitz in which no mortgagee or obligee had been identified in a security agreement, the *Bain* court stated "the deeds of trust before us name all necessary parties and more." *Id.*

¶ 57 MERS had argued in *Bain* the violation of the deed of trust act " 'should not result in a void deed of trust, both legally and from a public policy standpoint,' " and the *Bain* court answered, "[W]e tend to agree." *Id.* at 114, 285 P.3d 34. But it noted the insufficient record.

***13** ¶ 58 The trial court in this case had before it no evidence that Ms. Weirich's $235,000–plus obligation was not due and owing. It had before it no evidence that Nationstar was not acting as the agent for a successor to the original lender. It had before it only Mr. Merry's identification of formal, technical, nonprejudicial violations of the DTA with no suggestion that they could not have been corrected if timely raised. The trial court appropriately applied waiver.

¶ 59 Affirmed.

WE CONCUR: KORSMO, J., and BROWN, J.

Footnotes

1 According to the notice, the amount owed to reinstate the obligation as of October 1, 2013, was $43,291.67 and the principal balance owing was $193,592.47. CP at 80.

2 Given Mr. Merry's clear awareness of the trustee's sale reflected in the complaint, his candid confirmation at oral argument in this court that he received notice of the sale, and the absence of any argument from him at any time that notice of the trustee's sale was deficient, we deny the respondents' joint motion asking us to take judicial notice of documents outside the record that would demonstrate that he was served with notice. The evidence has proved unnecessary.

3 Documents whose contents are alleged in a complaint and whose authenticity no party questions but that are not physically attached to the complaint may be considered in ruling on a motion to dismiss. *Rodriguez v. Loudeye Corp.*, 144 Wash.App. 709, 726 n. 45, 189 P.3d 168 (2008); *Trujillo v. Northwest Trustee Services, Inc.*, 181 Wash.App. 484, 491, 326 P.3d 768 (2014), *review granted* 182 Wash.2d 1020, 345 P.3d 784, (2015).

4 *Frias* holds, contrary to one of the holdings of *Bavand*, that the DTA does not give rise to an implied cause of action for *monetary damages* premised on DTA violations absent a completed foreclosure sale. Compare *Frias*, 181 Wash.2d at 422–23, 334 P.3d 529 with *Bavand*, 176 Wash.App. at 496, 309 P.3d 636 (restating its holding in *Walker v. Quality Loan Service Corporation of Washington*, 176 Wash.App. 294, 308 P.3d 716 (2013) that a cause of action for wrongful institution of foreclosure proceedings exists beyond that provided by RCW 61.24.127).

5 RCW 61.24.040(6) provides in relevant part that the trustee "may, for any cause the trustee deems advantageous, continue the sale for a period or periods *not exceeding a total of one hundred twenty days* " by giving the statutorily required notice. (Emphasis added.)

6 A concurring opinion in *Albice* expressed concern that because the DTA's procedural requirements are "extensive," and because "it is hard to imagine a claim for relief *not* based on a violation of some legal obligation ... the majority's approach would actually permit postsale challenges to foreclosure sales as a general rule, at least where 'the claims are promptly asserted.' " *Albice v. Premiere Mort. Servs. of Wash., Inc.*, 174 Wash.2d 560, 581 & n. 13, 276 P.3d 1277 (2012) (Stephens, J' concurring).

7 Notice of the right to restrain the sale, knowledge of the defense, and failure to restrain the sale.

8 The Hoffmann law review comment has been cited in all of the following reported Washington decisions: *Cox,* 103 Wash.2d at 387, 693 P.2d 683; *Savings Bank of Puget Sound v. Mink,* 49 Wash.App. 204, 208, 741 P.2d 1043 (1987); *Glidden v. Municipal Authority of Tacoma,* 111 Wash.2d 341, 346, 758 P.2d 487 (1988); *Queen City Sav. & Loan Ass'n v. Mannhalt,* 111 Wash.2d 503, 508, 760 P.2d 350 (1988); *Koegel v. Prudential Mut. Sav. Bank,* 51 Wash.App. 108, 115, 752 P.2d 385 (1988); *Steward v. Good,* 51 Wash.App. 509, 512, 754 P.2d 150 (1988); *Country Exp. Stores, Inc. v. Sims,* 87 Wash.App. 741, 751, 943 P.2d 374 (1997); *Plein,* 149 Wash.2d at 227, 67 P.3d 1061; *Udall v. T.D. Escrow Servs., Inc.,* 132 Wash.App. 209, 302, 130 P.3d 908 (2006), *rev'd on other grounds by Udall v. T.D. Escrow Servs. Inc.,* 159 Wash.2d 903, 154 P.3d 882 (2007); *Brown v. Household Realty Corp.,* 146 Wash.App. 157, 170, 189 P.3d 233 (2008); *Bain,* 175 Wash.2d at 94, 285 P.3d 34; *Schroeder,* 177 Wash.2d at 104, 297 P.3d 677 (2013); and *Mellon v. Regional Trustee Services Corp.,* 182 Wash.App. 476, 498, 334 P.3d 1120 (2014).

9 The Hoffmann comment suggests the following circumstances under which waiver should not apply:

> [B]ecause waiver can occur only when a party has actual or constructive knowledge of the right waived, a party should not be held to have waived the right to contest the completed sale if that party was not provided with the proper statutory notices or was justifiably unaware of a defense to foreclosure until after the sale was completed. In addition, a party who unsuccessfully attempted to enjoin the sale should not be held to have waived the right to contest the completed sale. Under such circumstances, an action to set aside the trustee's sale may be appropriate.

Hoffman, 59 WASH. L.REV.. at 335–36 (footnote omitted).

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