70706-0

70706-0

No 70706-0-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

KELLY BOWMAN,

Appellant/Plaintiff,
v.

SUNTRUST MORTGAGE, INC., a Virginia Corporation, a subsidiary of SUNTRUST BANKS, INC.; FEDERAL NATIONAL MORTGAGE ASSOCIATION, a United States government sponsored enterprise; NORTHWEST TRUSTEE SERVICES, INC.; a Washington Corporation; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation; and DOE DEFENDANTS 1-10,

Respondents/Defendants.

APPELLANT'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES **Page**

STATUTES AND COURT RULES

OTHER AUTHORITIES

I. ARGUMENT AND AUTHORITY

This Court has directed the parties to file supplemental briefing addressing the impact of its own decision in *Trujillo v. Northwest Trustee Services Inc., et al.*, ---Wn.App. ---, ---P.3d---, 2014 (LEXIS 1343, 2014 WL 2453092) (hereinafter "*Trujillo*"), issued on June 2, 2014. Petitioner submits the following to highlight how this case is distinguishable from *Trujillo* factually and legally.

First, *Trujillo* was reviewed under the standard of a *CR 12(b)(6)* motion and this case involves a summary judgment by the trial court. The biggest distinction of course is that this Court reviewed *Trujillo* "where the 'basic operative facts are undisputed and the core issue is one of law'", where here, Appellant, KELLY BOWMAN (hereinafter "Mr. Bowman") made no concession of the facts as presented by the parties to the trial court. *Passim*. In fact, Mr. Bowman challenged the validity, veracity, form and substance of the documents relied upon by the Respondents to foreclose on his home, as well as the declarations filed in support of the Respondents' motion for summary judgment. [1]

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[1] Amongst these, the Corporate Assignment of Deed of Trust signed by MERS during which time Fannie Mae was identified as the "owner" or "investor" of the loan, "in exchange for good and valuable consideration" and the transfer was made to appear to involve the underlying Note "the Said Assignor [MERS] hereby assigns unto the above-named [SunTrust] ... the said Deed of Trust having an original sum of

Mr. Bowman's overall claim is that *via* these documents, the Respondents were able to act in concert to conceal, obfuscate, mislead and otherwise made it extremely difficult and costly for him to determine who had authority to resolve the mortgage default with him.

The Note signed by Mr. Bowman in favor of SunTrust on or about October 1, 2008 contains a specific definition of "Note Holder" and states that the Note Holder is the party *entitled to* payments as described within the document. CP 18-20. If it were true that SunTrust sold the Note to Fannie Mae on or about October 1, 2008, then the contractual definition of the "Note Holder" governs and Fannie Mae, who supposedly paid consideration for the mortgage loan, would be the entity "entitled" to mortgage payments, the only party entitled to declare Mr. Bowman in default and exercise otherwise exercise all the other rights and privileges described in the loan documents. Since the "Note Holder" is specifically

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$417,000.00 with interest, secured thereby, with all moneys now owing or that may hereafter become due or owing in respect thereof..." CP 43, 292-293.

The Beneficiary Declaration signed by SunTrust declaring that it is the "holder" of the Note. CP 171. Notice of Default issued by NWTS in its capacity as "duly authorized agent" of SunTrust but assessing trustee's fee. The same Notice of Default identified Fannie Mae as "owner" but not explaining how owner status is reconciled with "investor." CP 45-48, CP 306.

The Appointment of Successor Trustee executed by SunTrust as "present beneficiary" CP 53.

The Notice of Trustee's Sale executed by Nanci Lambert of NWTS on November 19, 2012, but not notarized until November 27, 2012. CP 55-58.

defined within the parties' contract (the Note), the Court need not resort to any other body of law, including the DTA or the UCC for the definition of "Note Holder." *Hawk v. Branjes*, 97 Wn. App. 776, 780, 986 P.2d 841 (1999) ("[W]here, as here, the agreement already contains a bilateral attorneys' fee provision, *RCW 4.84.330* is generally inapplicable."); *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 288, 787 P.2d 946 (1990) (the statutory "prevailing party" provision of *RCW 4.84.330* does not control over the plain language of a contract that contains a bilateral attorney fee clause); *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 425, 191 P.3d 866 (2008) (Undisputed contract language controls and where no extrinsic evidence to be presented, courts may decide the issue as a matter of law); *Vadheim v. Cont'l Ins. Co.*, 107 Wn.2d 836, 734 P.2d 17 (1987) (The language of insurance contract, not statutory policy, controls underinsured motorist coverage).

Second, because the *Trujillo* court decided the case on a pure question of law, its interpretation of *RCW 61.24.030(7)(a)* is sharply focused and must be examined for compliance with the rule of statutory construction. *Trujillo* held that Holder status alone is dispositive on the question of who had authority to enforce the note and mortgage and ownership is largely irrelevant for purposes of enforcement and discharge.

The logical question raised by this holding is if that were the case, why did the legislature, in amending the Deed of Trust Act, decide to include the first sentence of *RCW 61.24.030(7)(a)* as it did: "That, for residential property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the **owner** of any promissory note or other obligation secured by the deed of trust"?

The *Trujillo* court held that the legislature intended the words "owner" and "holder" to mean different things but does not explain why the legislature wrote these two sentences in conjunction with each other, thus requiring the two parts to be read in tandem. In order to arrive at its conclusion that NWTS did not violate its duty of good faith, the *Trujillo* court suggested that the first sentence of the section should be disregarded in its entirety, "Better still, the legislature could have eliminated any reference to 'owner' of the note of the note in the provision because it is the 'holder' of the note who is entitled to enforce it, regardless of ownership." *Passim*. To reach its ruling, *Trujillo* ignored the first sentence entirely and wrote its own rule that in residential non-judicial foreclosures, "the required proof is that the beneficiary must be the holder of the note. It need not show that it is the owner of the note." This violates all established rules of statutory construction.

In *G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 310-311, 237 P.3d 256 (2012), the Supreme Court reversed the Court of Appeals on the ground of faulty statutory construction:

> Turning first to the question of the purpose of the local BNG tax, the Court of Appeals declined to consider any expression of legislative intent, stating that it could not "resort to extrinsic sources in interpreting a statute unless we find more than one reasonable interpretation of the statutory language.' We have previously criticized such a crabbed notion of statutory interpretation, holding instead that a statute's plain meaning should be "discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Moreover, an enacted statement of legislative purpose is included in a plain reading of a statute*.

Id., (internal citations omitted) (Emphasis added).

Follow the Supreme Court's mandate set out above, the plain reading of *RCW 61.24.030(7)(a)* provides that the primary requirement is proof of ownership. To fulfill this requirement, and assuming that the trustee acts in good faith, the trustee may accept a declaration from the entity who can swear that ownership is genuine and provable *via* "actual holder" status. The primary proof requirement of ownership comports with the Legislature's concerns that the mass securitization of mortgage loans does and in fact has led to many unscrupulous practices where the loan servicers and other third-parties, who have no skin in the game,

process foreclosures on an assembly line in total disregard for proof of ownership. Moreover, courts have stated countless times that 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. *Albice v. Premier Mortgage Service of Washington, Inc,,* 174 Wn.2d 560, 568, 276 P.3 1277 (2012); *Schroeder v. Excelsior Management Group, LLC,* 177 Wn.2d 94, 297 P.3d 677 (2013). Yet, in *Trujillo,* the Beneficiary Declaration contains not only the verbiage required by the statute of holder status, but also the additional, "OR otherwise authorized to enforce under UCC 3-301." Nowhere in the statute does it provide that if the requirement that beneficiary be the owner is not met, you can substitute another entity within the UCC definition of a holder. This would permit a thief to assert standing under the DTA. In strict construction of the DTA, the *Trujillo* court should have held that the aberration presented by the beneficiary declaration was unacceptable because it was not in strict compliance with the statute. In other words, even though *RCW 61.24.030(7)* requires a declaration by the "beneficiary" who actually owns the obligation, the *Trujillo* court allowed NWTS to rely on a declaration under which Wells Fargo could have been a non-holder in

possession with rights of a holder under UCC 3-301(ii), and NOT a beneficiary/ower as required by the statute. This is one of the issues currently pending before the Supreme Court in *Lyons v. U.S. Bank, N.A.*, Case 89132-0, Oral Argument held Tuesday, May 27, 2014.

Trujillo does not apply to this case because Mr. Bowman vehemently challenges the process by which the Respondents' practices of manufacturing, transmitting, falsely notarizing and recording documents they then relied upon to conduct the foreclosure of his homestead, as lacking in legality and veracity. As jarring as the term "robo-signing" is to the Court, it is real and it is insidious, yet is central to the process of foreclosure and the Respondents' collective business model, which is to crank out foreclosures as fast as possible because the faster they can be done, the more profits can be reaped. The Consumer Financial Protection Bureau announced on June 17, 2014, that the Department, HUD and the attorneys general in 49 states filed a proposed federal court order compelling SunTrust to take certain remedial actions based on, *inter alia*, the company's "robo-signing" of foreclosure documents, "including preparing and filing affidavits whose signers had not actually reviewed any information to verify the claims." Robo-signing is not a homeowner's petty whining about why he shouldn't lose his home to foreclosure; it is

real and it is infecting thousands of foreclosures in our country and undermining the integrity of our legal system.[2] http://www.consumerfinance.gov/newsroom/cfpb-federal-partners-and-state-attorneys-general-file-order-requiring-suntrust-to-provide-540-million-in-relief-to-homeowners-for-servicing-wrongs/. Thus, where Mr. Bowman questions the form and substance of the foreclosure documents, including the Beneficiary Declaration, and the declarations submitted in support of summary judgment, on the basis that this mass-produced, assembly-type of foreclosure practice, in total disregard for even the most basic and rudimentary legal requirements of personal knowledge or honoring the notary oath, this Court is asked to review more than a question of law and the rulings in *Trujillo* do not apply.

This case involves another layer of complexity in that the Respondents have announced that Fannie Mae is the investor and/or the owner of Mr. Bowman's loan, but produce no evidence of agency relationship or grant of authority by which Respondents are authorized to act on behalf of Fannie Mae to take any of the actions they have taken against Mr. Bowman. Many a time, the foreclosing entities simply refer

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[2] The Settlement involves SunTrust Mortgage, Inc., a wholly owned subsidiary of SunTrust Bank, Inc., that handles customer service, collections, loan modification and foreclosures.

to the "Servicing Guidelines" instead of the requisite document conferring agency authority. Unlike *Trujillo,* where the court presumed Fannie Mae "transferred possession of the Note" to Wells Fargo, who then initiated foreclosure, in this case, Mr. Bowman calls into doubt all of all of Respondents' proof in support of summary judgment and requests discovery, as he contends that the jury is still out on where his Note has been and whether it was transferred to SunTrust for purpose of foreclosure before the process was initiated.

Lastly, Mr. Bowman urges this Court to consider that its decision in *Trujillo* was demonstrably incorrect or harmful and therefore, does not constitute binding precedent on his case. On more than one occasion, the Court of Appeals, Division One, has reversed itself. Specifically, in *King v. W. United Assurance Co.*, 100 Wn. App. 556, 561, 997 P.2d 1007 (2000), the court declined to follow its own precedent in *Castronuevo v. Gen. Acceptance Corp.*, 79 Wn. App. 747, 905 P.2d 387 (1995), because its holding "conflicts with the statutory scheme set forth by the Legislature and inequitably shields a promisor from liability for attorney's fees in the context of an unmeritorious action on a note brought under the usury statute." The Supreme Court similarly approved the court of appeal's approach to overruling a previous

decision based on legal and equitable considerations. *Int'l Ass'n of Fire Fighters, Local 46 v. Citi of Everett,* 146 Wn.2d 29, 37, 42 P.3d 1265 (2002).

Mr. Bowman respectfully submits that *Trujillo* was incorrect as to the statutory construction applied by the Court. Aside from the broad and unequivocal legislative mandate that the nonjudicial foreclosure process be transparent and the parties who have a direct stake in the loan transaction be identified so that they can engage in a meaningful discussion, the Court was required to read the two parts of *RCW 61.24.030(7)(a)* in tandem where the conclusion is certain: where A [Owner]=B [Beneficiary] and B [Beneficiary]=C [Holder]; A [Owner] should equal C [Holder]. This is incontrovertible logic.

Mr. Bowman submits that *Trujillo* is harmful to the legislative's effort to make nonjudicial foreclosures transparent, with the goal of saving more homes from foreclosure than are lost. Given the fact that the beneficiary declarations are generally (1) manufactured *en masse* by the institutional trustees or third-party vendor and not the owner, beneficiary or holder of the obligation; (2) signed in large volumes by individuals who are strangers to the transaction; (3) not provided to homeowners at the inception of the foreclosure process, forcing

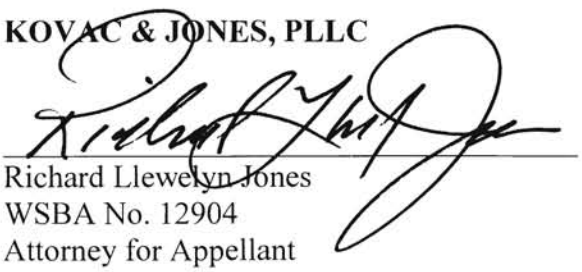
homeowners, including Ms. Trujillo and Mr. Bowman to file expensive lawsuits to ascertain whether this document is truthful and has been executed by the person having legal authority to do so, *Trujillo's* blanket approval of beneficiary declarations coming out of these mills is the very evil that Washington Legislature and this Court have attempted to cure through the adoption of *RCW 61.24.030(7)(a)*.

II. CONCLUSION

For all of the foregoing reasons, this Court should overrule *Trujillo,* or in the alternative, hold it to be inapplicable to the facts of this case, reverse the summary judgment that the trial court entered in favor of the Respondents, and remand for trial of the claims made by Mr. Bowman.

RESPECTFULLY SUBMITTED this 3rd day of July, 2014.

KOVAC & JONES, PLLC



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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am now and have been at all times mentioned herein a resident of the State of Washington, over the age of eighteen years, not a party to this action and I am competent to testify herein.

2. That on July 3, 2014, I caused a copy of the foregoing APPELLANTS' SUPPLEMENTAL BRIEF to be served to the following in the manner indicated:

John S. Devlin, III, WSBA No. 23988 Andrew C. Yates, WSBA No. 34239 Abraham K. Lorber, WSBA No. 40668 LANE POWELL PC 1420 Fifth Avenue, Suite 4100 Seattle, WA 98101	____ X ____	Facsimile Messenger U.S. 1st Class Mail
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DATED this 3rd of July, 2014, at Bellevue, Washington.

Susan L. Rodriguez

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