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Supreme Court No. 92361-2

(Court of Appeals No. 71143-1-I)

SUPREME COURT
OF THE STATE OF WASHINGTON

DARLENE HOBBS and JOEL HOBBS,

Plaintiffs-Petitioners,

v.

NORTHWEST TRUSTEE SERVICES, INC., and
WELLS FARGO BANK, N.A.,

Defendants-Respondents.

PETITION FOR REVIEW

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TABLE OF CONTENTS

PETITION FOR REVIEW 1

I. IDENTITY OF PETITIONERS 3

II. COURT OF APPEALS' DECISION 3

III. ISSUES PRESENTED FOR REVIEW 4

IV. STATEMENT OF THE CASE 5

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED 8

A. The Court of Appeals' Interpretation of RCW 61.24.030(7) Conflicts with Numerous Decisions of this Court and Should Be Reviewed Under RAP 13.4(b)(1)... 11

1. The Court of Appeals' Decision and *Trujillo I* Conflict with this Court's Decisions Requiring that Statutes Be Interpreted to Avoid Rendering Language Superfluous. 11

2. The Court of Appeals' Decision and *Trujillo I* Conflict with this Court's Decisions Requiring that the DTA Must Be Construed in the Borrower's Favor. 18

3. The Court of Appeals' Decision and *Trujillo I* Conflict with this Court's Decisions Requiring that All of the Provisions the DTA Must Be Strictly Followed 19

B. The Court of Appeals' Interpretation of RCW 61.24.030(7) Is of Substantial Public Interest and Should Be Reviewed Under RAP 13.4(b)(4). 19

VI. CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Albice v. Premier Mortg. Servs. of Washington, Inc.,
174 Wn.2d 560, 276 P.3d 1277 (2012) 9, 10, 13, 18, 19

Bain v. Metro. Mortg. Grp. Inc.,
175 Wn.2d 83, 285 P.3d 34 (2012) 8, 11, 20

Caster v. Peterson,
2 Wash. 204 (1891) 15

Deutsche Bank Nat'l Trust Co. v. Pietranico,
928 N.Y.S.2d 818 (N.Y. Supr. Ct. 2011) 15

Gilbert H. Moen Co. v. Island Steel Erectors, Inc.,
128 Wn.2d 745, 912 P.2d 472 (1996) 13

In re Detention of C.W.,
147 Wn.2d 259, 53 P.3d 979 (2002) 9, 13

John Davis & Co. v. Cedar Glen No. Four, Inc.,
75 Wn.2d 214, 450 P.2d 166 (1969) 13

Klem v. Washington Mutual Bank,
176 Wn.2d 771, 295 P.3d 1179 (2013) 19, 20

Lowy v. PeaceHealth,
174 Wn.2d 769, 280 P.3d 1078 (2012) 18

Lyons v. U.S. Bank National Ass'n,
181 Wn.2d 775, 336 P.3d 1142 (2014) 8, 11, 17, 18

Plein v. Lackey,
149 Wn.2d 214, 67 P.3d 1061 (2003) 13

RMS Residential Properties, LLC v. Miller,
32 A.3d 307 (Conn. 2011) 15

Schroeder v. Excelsior Mgmt. Grp., LLC,
177 Wn.2d 94, 297 P.3d 677 (2013) 8, 10, 11, 18, 19, 20

State v. Bash,
130 Wn.2d 594, 925 P.2d 978 (1996) 14

State v. Johnson,
179 Wn.2d 534, 315 P.3d 1090 (2014) 9, 13

Timberline Air Service, Inc. v. Bell Helicopter-Textron, Inc.,
125 Wn.2d 305, 884 P.2d 920 (1994) 14

Trujillo v. Northwest Trustee Services, Inc.,
___ Wn.2d ___, 355 P.3d 1100 (2015) 1, 2, 7, 8, 11

Trujillo v. Northwest Trustee Services, Inc.,
181 Wn. App. 484, 326 P.3d 768 (2014) 1-4, 7, 9, 11-15, 18, 19

Udall v. T.D. Escrow Services, Inc.,
159 Wn.2d 903; 154 P.3d 882 (2007) 10, 18, 19

Walker v. Quality Loan Service Corp.,
176 Wn. App. 294, 308 P.3d 716 (2013) 18

Washington Imaging Services, LLC v. Dept. of Revenue,
171 Wn.2d 548, 252 P.3d 885 (2011) 16

Watson v. Northwest Trustee Services, Inc.,
180 Wn. App. 8, 321 P.3d 262 (2014) 18

Statutes

RCW 19.86 5

RCW 61.24 5

RCW 61.24.010(4) 4, 8, 16, 17

RCW 61.24.030 .... 8, 13

RCW 61.24.030(7) 1, 3-11, 14, 18, 19, 20

RCW 61.24.030(7)(a) 1, 3, 7, 8, 11-15, 17, 18, 19

RCW 61.24.030(7)(b) 3, 14, 16, 17, 19

RCW 61.24.040(2) 15

RCW 61.24.127(1)(c) 18

Legislative History

Laws of 1985, ch. 193 § 4 15

Laws of 1975, 1st Ex. Sess., ch. 129 § 4 15

Rules

RAP 13.4(b)(1) 2, 9, 10, 11, 20

RAP 13.4(b)(4) 2, 10, 19, 20

Other Authorities

Congressional Research Service, "GSEs and the Government's Role in Housing Finance: Issues for the 113th Congress," (Sept. 13, 2013), *available at* https://www.fas.org/sgp/crs/misc/R40800.pdf. 3

Dale A. Whitman *et al.*, "Foreclosing on Nothing: The Curious Problem of the Deed of Trust Foreclosure without Entitlement to Enforce the Note," 66 Ark. L. Rev 21 (2013) 3

Oxford Dictionary of English Grammer 329 (2d ed. 2014) 17

PETITION FOR REVIEW

This case presents an issue that affects thousands of Washington homeowners. The same issue was presented to this Court but not decided in *Trujillo v. Northwest Trustee Services, Inc.*, ___ Wn.2d ___, 355 P.3d 1100 (2015) ("*Trujillo II*"). It turns on the proof of ownership requirement in the Deed of Trust Act, RCW 61.24.030(7), which requires that before a trustee records a notice of sale to foreclose on residential real property, the trustee must have proof that the beneficiary is the *owner* of the promissory note secured by the deed of trust.

The question is this: Where, as here, the beneficiary is *not* the owner of the note, and the trustee *knows* the beneficiary is not the owner, can the trustee rely on a declaration from the beneficiary stating that it is merely the holder of the note as proof that the beneficiary is the owner?

Here, even though the declaration itself that Wells Fargo Bank, N.A. ("Wells Fargo"), the beneficiary, provided to the trustee, Northwest Trustee Services, Inc. ("NWTS"), stated that Wells Fargo was *not* the owner of the note, and despite RCW 61.24.030(7)(a)'s explicit requirement that "before a notice of trustee's sale is recorded . . . the trustee shall have proof that the beneficiary is the *owner*" (emphasis added), the Court of Appeals held that Wells Fargo could authorize the trustee's sale and that the notice of sale was properly recorded by NWTS.

In reaching this decision, the Court of Appeals relied on its holding in *Trujillo v. Northwest Trustee Services, Inc.*, 181 Wn. App. 484, 498, 326

P.3d 768 (2014) ("*Trujillo I*") that: "[I]t is the status of the holder of the note that entitles the entity to enforce the obligation. Ownership of the note is not dispositive." *See* Slip Op., Appendix hereto, at A-2. In *Trujillo II*, because this Court reversed the Court of Appeals on more narrow grounds, it did not decide whether that core holding in *Trujillo I* was correct.[1] This critical issue that the Court did not reach in *Trujillo II* is now squarely presented for review and decision.

The Court should accept review under RAP 13.4(b)(1) because the Court of Appeals' decision and the holding in *Trujillo I* upon which it relies conflict with this Court's decisions requiring that statutes be interpreted to avoid rendering language superfluous, requiring that the Deed of Trust Act ("DTA") be strictly construed in favor of borrowers, and requiring that all of the provisions of the DTA be strictly followed.

The Court should also accept review under RAP 13.4(b)(4) because this is a major and recurring issue for many thousands of homeowners in Washington whose promissory notes are owned by GSEs ("government-sponsored enterprises") such as the Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation ("Freddie

[1] In *Trujillo II*, this Court stated that "whether RCW 61.24.030(7)(a) allows a trustee to rely on an *un*ambiguous declaration stating that the beneficiary is the actual holder of the note, even though the owner is a different party . . . is raised in a pending case," apparently referring to *Brown v. Department of Commerce*, No. 90652-1. *Trujillo II*, 355 P.3d at 1106 n.8 (emphasis original). *Brown* will not decide the issues presented here, however, because *Brown* does not address whether a non-owner beneficiary can authorize a trustee's sale, or the ability of a trustee to go forward with foreclosure when the beneficiary does not own the note and the trustee knows that the beneficiary is not the owner.

Mac").[2] In recent years, Fannie Mae and Freddie Mac when taken together have owned approximately 45% of all outstanding residential mortgages.[3]

I. IDENTITY OF PETITIONERS

Petitioners Darlene and Joel Hobbs (the "Hobbs") were Plaintiffs in King County Superior Court, Cause No. 13-2-22970-6 SEA, and the Appellants in the Court of Appeals, Division One, Cause No. 71143-1-I.

II. COURT OF APPEALS' DECISION

The Hobbs seek review of the Court of Appeals' decision filed on July 20, 2015, specifically the Court's analysis of RCW 61.24.030(7) as set forth on page 2 of the decision. *See* Slip Op. at A-2. Relying on *Trujillo I*, the Court of Appeals erroneously rejected the Hobbs' arguments that (1) the beneficiary, Wells Fargo, was required to prove it was the owner of the note to authorize foreclosure under RCW 61.24.030(7)(a) and failed to do so when it provided a declaration stating that Freddie Mac was the owner; and (2) under RCW 61.24.030(7)(b), NWTS was not entitled to rely on Wells Fargo's declaration stating it was the actual holder of the note to prove that Wells Fargo was the owner of the note, because NWTS knew and the declaration itself stated that Freddie Mac was the owner. *Id.*

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[2] *See* Dale A. Whitman, *et al.*, "Foreclosing on Nothing: The Curious Problem of the Deed of Trust Foreclosure without Entitlement to Enforce the Note," 66 Ark. L. Rev 21, 26 (2013) ("Fannie Mae and Freddie Mac . . . normally deliver possession of a note to the servicer when it is necessary to foreclose . . . Fannie or Freddie remains the owner and has the right to the proceeds of foreclosure.").

[3] *See* Congressional Research Service, "GSEs and the Government's Role in Housing Finance: Issues for the 113th Congress" (Sept. 13, 2013) at 1, *available at* https://www.fas.org/sgp/crs/misc/R40800.pdf.

The Court of Appeals quoted and relied on the holding in *Trujillo I* that "it is the status of the holder of the note that entitles the entity to enforce the obligation" and that "[o]wnership of the note is not dispositive," *id.*, and concluded,"[w]e adhere to our decision in *Trujillo [I]*." *Id.*

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals' decision to allow Wells Fargo to authorize the trustee's sale when Wells Fargo was not the owner of the note and the beneficiary declaration it provided to NWTS said it was not the owner violates RCW 61.24.030(7)'s proof of ownership requirement and conflicts with this Court's decisions requiring that statutes be interpreted to avoid rendering language superfluous, that the DTA be construed in favor of borrowers, and that all provisions of the DTA be strictly followed.[4]

2. Whether the Court of Appeals' decision that NWTS did not violate RCW 61.24.030(7) by recording the notice of trustee's sale despite knowing that Wells Fargo was not the owner of the note conflicts with this Court's decisions requiring that trustees comply with their duty of good faith under RCW 61.24.010(4), requiring that statutes be interpreted to avoid rendering language superfluous, that the DTA be construed in favor of borrowers, and that all provisions of the DTA be strictly followed.[5]

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[4]A copy of RCW 61.24.030(7) is attached to the Appendix at A-5.

[5]A copy of RCW 61.24.010(4) is attached to the Appendix at A-6.

IV. STATEMENT OF THE CASE

In 2006, the Hobbs obtained a loan and executed a note in favor of MortgageIt, Inc. CP 309-18. To secure payment, they executed a deed of trust on the same date against their property. CP 135-63. Shortly thereafter, the lender, MortgageIt, sold the note to Freddie Mac. CP 298 & 322.

On September 25, 2012, after the loan fell into default and the Hobbs were unable to negotiate a loan modification, NWTS sent them a notice of default as agent for Wells Fargo. CP 293-96. The notice of default stated that the owner of the note was Freddie Mac. CP 295.

On November 1, 2012, NWTS received a beneficiary declaration from Wells Fargo stating that "Wells Fargo Bank, N.A. is the actual holder of the promissory note" and that "Federal Home Loan Mortgage Corporation [Freddie Mac] is the actual owner of the promissory note." CP 320.

On November 8, 2012, a NWTS employee, acting under power of attorney for Wells Fargo, appointed NWTS as successor trustee. CP 172. On January 22, 2013, NWTS, with knowledge that Freddie Mac was the owner of the note, recorded a notice of trustee sale and scheduled the sale of the Hobbs' property for May 31, 2013. CP 178-82.

The Hobbs filed a Complaint on June 12, 2013, alleging that Wells Fargo's and NWTS's attempt to foreclose violated the DTA, RCW 61.24, and Consumer Protection Act ("CPA"), RCW 19.86. CP 469-74. The Hobbs alleged that the defendants violated RCW 61.24.030(7) because under that provision, Wells Fargo was required to own the note to authorize foreclosure,

and NWTS was required to have proof that Wells Fargo was the owner before issuing the notice of sale, yet when it issued the notice NWTS knew Wells Fargo was *not* the owner. *Id.* On July 10, 2013, after the Hobbs' agreed to make monthly payments into the court registry, the trial court granted a preliminary injunction to enjoin the sale. CP 477 & 504-05.

On July 23, 2013, Wells Fargo moved for summary judgment and argued it had a right to authorize the nonjudicial foreclosure under the DTA despite the fact that the Hobbs' note was owned by Freddie Mac and despite NWTS's prior knowledge of that fact. CP 5 & 8-14. The next day, NWTS moved to join in the motion. CP 323-24. On August 12, 2013, the Hobbs filed an opposition, CP 340-66, and on August 16, 2013, Wells Fargo filed its reply in support of summary judgment. CP 367-76.

The trial court held the summary judgment hearing on August 23, 2013, RP 1-21, and on August 27, 2013, issued a letter ruling granting the motion. CP 435-39. The trial court held that Wells Fargo was not required to own the note to authorize a trustee's sale, and that even though NWTS knew *Freddie Mac* was the owner and Wells Fargo's own declaration said that, NWTS could rely on the declaration as proof that *Wells Fargo* was the owner under RCW 61.24.030(7). CP 438. The trial court granted summary judgment in favor of Wells Fargo, CP 442-44, and a companion order of summary judgment to NWTS. CP 440-41. The Hobbs filed a motion for reconsideration, CP 447-63, which was denied on October 10, 2013, CP 466, then timely appealed.

On July 20, 2015, prior to this Court's decision in *Trujillo II*, the Court of Appeals issued an opinion affirming the trial court, stating that "[w]e adhere to our decision in *Trujillo* [*I*]." Slip Op. at A-2. In doing so, the Court of Appeals rejected the Hobbs' statutory construction arguments that under RCW 61.24.030(7), Wells Fargo could not authorize the notice of trustee's sale, and NWTS could not lawfully record it, because Wells Fargo did not own the note and NWTS knew that fact when it recorded the notice of sale. On August 10, 2015, the Hobbs moved for reconsideration.

On August 20, 2015, while the Hobbs' motion for reconsideration was pending, this Court decided *Trujillo II* and held that "[t]he DTA requires a trustee to have proof that the beneficiary actually *owns* the note on which the trustee is foreclosing." 355 P.3d at 1106 (emphasis original). This Court further held that "[a] trustee must have the requisite proof of the beneficiary's ownership of the note *before* recording, transmitting, or serving the notice of trustee's sale." *Id.* at 1107 n. 10 (emphasis original).

However, because the declaration that the beneficiary provided to the trustee in *Trujillo II* was ambiguous as to whether the beneficiary held the note, this Court held the declaration did not satisfy the second sentence of RCW 61.24.030(7)(a) and that the trustee could not lawfully rely on the declaration as proof of the beneficiary's ownership of the note, irrespective of the trustee's prior knowledge that the beneficiary was *not* the owner. *Id.* at 1104 & 1106-07. As a result, this Court reversed the Court of Appeals in *Trujillo II* without deciding whether RCW 61.24.030(7)(a) allows a trustee

to rely on a declaration stating that the beneficiary is the actual holder of a note as proof that it is the *owner* when the trustee knows the beneficiary is *not* the owner. *See Trujillo II*, 355 P.3d at 1106 n.8. On September 4, 2015, the Court of Appeals denied the Hobbs' motion for reconsideration, A-4, and the Hobbs then timely petitioned for review under RAP 13.4(a).

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

In *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013), this Court held that RCW 61.24.030 imposes absolute "limits on the trustee's power to foreclose without judicial supervision," and that compliance with each of the subprovisions of RCW 61.24.030—including the requirement "that the trustee have proof that the beneficiary is the owner of the obligation secured by the deed of trust" as set forth in .030(7)(a)—is a requisite to a lawful foreclosure that cannot be waived by the borrower. *Id.* at 106-07 (citing RCW 61.24.030(7)).

In *Lyons v. U.S. Bank National Ass'n*, 181 Wn.2d 775, 336 P.3d 1142, 1146 (2014), this Court reiterated that under this proof of ownership requirement, the trustee must "have proof that the beneficiary is the actual *owner* of the note to be foreclosed on." *Id.* at 789 (citing *Bain v. Metro. Mortg. Grp. Inc.*, 175 Wn.2d 83, 102, 285 P.3d 34 (2012), which cited RCW 61.24.030(7)(a)) (emphasis added). The Court further held in *Lyons* that the statutory duty of good faith under RCW 61.24.010(4) requires the trustee to "'adequately inform' itself regarding the purported beneficiary's right to foreclose," that the trustee "must investigate possible issues using

its independent judgment to adhere to its duty of good faith," and that "if there is an indication that the beneficiary declaration might be ineffective, a trustee should verify." *Id.* at 787 & 790.

This Court has yet to decide whether a beneficiary who holds, but does not own, a note has authority to foreclose under the DTA when the trustee knows that is the case, given the proof of ownership requirement set forth in RCW 61.24.030(7). The Court of Appeals in *Trujillo I* and in its decision here has determined what a trustee must do to comply with RCW 61.24.030(7), but it has done so incorrectly by ignoring the plain language of the statute and established rules of statutory interpretation. As a result, the Court of Appeals erroneously found that Wells Fargo could authorize foreclosure, and that NWTS could rely on Wells Fargo's declaration stating that it was the actual holder of the note as proof of its ownership of the note, despite the notice of default NWTS issued as the agent for Wells stating that the note was owned by *Freddie Mac*, CP 295, and despite Wells' own declaration that it provided to NWTS stating that *Freddie Mac* was the owner. CP 320.

This Court should accept review to correct the Court of Appeals' erroneous statutory interpretation on this important and recurring issue. Review is warranted under RAP 13.4(b)(1) because the Court of Appeals' decision conflicts with this Court's numerous decisions requiring that statutes be interpreted to avoid rendering language superfluous and to

harmonize their provisions;[6] conflicts with its decisions in *Albice* and *Schroeder* requiring that in any nonjudicial foreclosure all provisions of the DTA must be strictly met;[7] and conflicts with its decisions requiring that the DTA be construed in favor of borrowers.[8]

Review should also be granted under RAP 13.4(b)(4) because this issue arises in a majority of nonjudicial foreclosures in Washington, and the foreclosure crisis is far from over.[9] The issue affects tens of thousands of homeowners in our State[10] and it has been the source of great confusion in the lower courts. Clarity on this issue will benefit homeowners, trustees and beneficiaries alike and will serve the DTA's goals of creating a quick and efficient process, promoting stability of title, and avoiding wrongful foreclosures. *See Albice,* 174 Wn.2d at 567.

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[6] *See, e.g., State v. Johnson*, 179 Wn.2d 534, 546-47, 315 P.3d 1090 (2014); *In re Detention of C.W.*, 147 Wn.2d 259, 272, 53 P.3d 979 (2002).

[7] *See Albice v. Premier Mortg. Servs. of Washington, Inc.,* 174 Wn.2d 560, 567, 276 P.3d 1277 (2012); *Schroeder*, 177 Wn.2d at 111-12.

[8] *See Schroeder*, 177 Wn.2d at 105; *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 915, 154 P.3d 882 (2007); *Albice*, 174 Wn.2d at 567.

[9] Despite a decrease in national foreclosure filings from 2012 to 2013, the foreclosure rate in Washington *increased* during that period by 13%. *See* http://www.realtytrac.com/Content/foreclosure-market-report/2013-year-end-us-foreclosure-report-7963. The foreclosure rate in Washington was up another 7% in 2014 and appears to be trending even higher at 11% as of May 2015. *See* http://www.realtytrac.com/content/foreclosure-market-report/november-2014-foreclosure-market-report-8198; http://www.realtytrac.com/content/foreclosure-market-report/rise-in-bank-repossessions-fuels-1-percent-increase-in-foreclosure-activity-to-19-month-high-in-may-8220.

[10] As of June 30, 2015, Freddie Mac and Fannie Mae owned 817,731 home loans in the State of Washington, 9,593 of which were seriously delinquent. *See* http://www.fhfa.gov/DataTools/Tools/Pages/Borrower-Assistance-Map.aspx.

A. The Court of Appeals' Interpretation of RCW 61.24.030(7) Conflicts with Numerous Decisions of this Court and Should Be Reviewed Under RAP 13.4(b)(1).

This petition for review should be granted under RAP 13.4(b)(1) because the Court of Appeals' decision here, and the decision in *Trujillo I* on which it relies, in misinterpreting RCW 61.24.030(7) and disregarding its explicit proof of ownership requirement as discussed below, conflict with numerous decisions of this Court.

1. The Court of Appeals' Decision and *Trujillo I* Conflict with this Court's Decisions Requiring that Statutes Be Interpreted to Avoid Rendering Language Superfluous.

The language of RCW 61.24.030(7)(a) is clear: "[F]or residential real 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." (Emphasis added.) Under this plain language, Wells Fargo could not authorize NWTS to record the notice of sale, and NWTS could not lawfully do so, because NWTS knew Wells Fargo was *not* the owner when it recorded the notice of sale, and Wells Fargo's own beneficiary declaration stated that Wells Fargo was *not* the owner.

This Court has repeatedly held that the DTA requires a trustee to have proof that the beneficiary actually owns the note on which the trustee is foreclosing. *See Trujillo II*, 355 P.3d at 1106; *Lyons*, 181 Wn.2d at 789; *Schroeder*, 177 Wn.2d at 107; *Bain,* 175 Wn.2d at 102. In each case, the Court held that the proof of ownership requirement means what it says.

By contrast, in *Trujillo I* and here, the Court of Appeals overlooked this statutory requisite to a trustee's sale. Ignoring basic rules of statutory construction, the Court of Appeals effectively read the first sentence of RCW 61.24.030(7)(a) out of the statute. The Court of Appeals was candid about doing so, stating "the legislature could have eliminated any reference to 'owner' of the note [in the first sentence of RCW 61.24.030(7)(a)] because it is the 'holder' of the note who is entitled to enforce it, regardless of ownership." *Trujillo I*, 181 Wn. App at 500-01. In this case, the Court of Appeals adhered to that decision in *Trujillo I* which this Court has yet to review, and perpetuated the error. Slip Op. at A-2.

To justify its judicial editing of the statute, the Court of Appeals in *Trujillo I* seized on the second sentence of RCW 61.24.030(7)(a), which says that a declaration "stating that a beneficiary is the 'actual holder' of the promissory note . . . shall be sufficient proof as required under this subsection," *i.e.*, RCW 61.24.030(7)(a). *Id.* at 500-01. Under the Court of Appeals' interpretation, a trustee can rely on a declaration stating that the beneficiary is the actual holder of the note to establish that it is the owner despite the trustee's knowledge that a different entity, here Freddie Mac, is the owner. *Id.* at 501-03. According to the Court of Appeals' decisions, "RCW 61.24.030(7)(a), properly read, does not require Wells Fargo to also be the 'owner' of the note." *Id.* at 502; Slip Op. at A-2.

Courts are not permitted to ignore statutory language as the Court of Appeals has done here by ignoring the proof of ownership requirement

in RCW 61.24.030(7)(a). The Court of Appeals' interpretation renders the first sentence of RCW 61.24.030(7)(a) superfluous and directly violates this Court's decisions requiring that statutes be interpreted to avoid making any language superfluous and to harmonize all provisions.[11]

This Court has recognized, when interpreting the DTA, that the DTA "must not be judicially construed in a way that renders any part of the statute superfluous." *Plein v. Lackey*, 149 Wn.2d 214, 227, 67 P.3d 1061 (2003). The Court of Appeals in *Trujillo I* and here overlooked this basic rule of statutory construction, failing even to discuss it.

In deciding *Trujillo I*, the Court of Appeals erroneously relied on a *judicial* foreclosure case even though the requirements for nonjudicial foreclosure are substantially different from the requirements for judicial foreclosure. *See* 181 Wn. App. at 498-501 (relying on *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 450 P.2d 166 (1969)); *compare Albice*, 174 Wn.2d at 567 (noting that the requirements for nonjudicial foreclosure are "extensively spelled out" in the DTA and that lenders must "strictly comply" with those requirements including the "requirements for conducting a trustee's sale . . . in RCW 61.24.030").

The Court of Appeals' decision also ignored the language at the beginning of the second sentence of RCW 61.24.030(7)(a) requiring that the

[11] *See State v. Johnson*, 179 Wn.2d at 546-47; *In re Detention of C.W.*, 147 Wn.2d at 272; *see also Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 762, 912 P.2d 472 1996) (courts must "construe statutes so as to give effect to all words, clauses and sentences").

declaration must be made "by the *beneficiary*," the same "*beneficiary*" that is required under the first sentence of RCW 61.24.030(7)(a) to prove that it is the *owner* of the note. This use of the term "beneficiary" in both sentences of .030(7)(a) expressly links the first sentence to the second. Because the first sentence requires the trustee to have proof that the "beneficiary" owns the note before issuing a notice of sale, the declaration "by the beneficiary" in the second sentence must be made by the "beneficiary" that is the *owner* of the note as required in the first sentence.[12] Any other conclusion creates an irreconcilable inconsistency between the two sentences of .030(7)(a) and contradicts the plain language of the statute.[13]

In holding that "the legislature could have eliminated any reference to 'owner' of the note because it is the 'holder' of the note who is entitled to enforce it, regardless of ownership," *Trujillo I*, 181 Wn. App at 500-01, the Court of Appeals also ignored the term "proof" that appears in every sentence of RCW 61.24.030(7), each time referring to the required "proof" that the beneficiary is and must be the *owner* of the note to authorize a nonjudicial foreclosure sale. Specifically, the first sentence of .030(7)(a) requires "proof that the beneficiary is the owner," the second sentence of

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[12] *See Timberline Air Service, Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wn.2d 305, 313-14, 884 P.2d 920 (1994) ("The meaning given the same language in the first sentence of the provision should accord with that given this language in the second sentence").

[13] *See State v. Bash*, 130 Wn.2d 594, 602, 925 P.2d 978 (1996) (when interpreting statute, court will assume that the "legislature did not intend to create an inconsistency").

.030(7)(a) refers to that "proof as required by this subsection," and the single sentence in .030(7)(b) again refers to the same "proof as required by this subsection." Through each of these references to the same proof of ownership requirement in every sentence of .030(7), the statute could not be clearer in requiring that the beneficiary must be the owner.[14]

The Hobbs' interpretation, unlike the Court of Appeals' decisions here and in *Trujillo I*, harmonizes the first and second sentences and gives effect to all of the language in RCW 61.24.030(7)(a). Under the Hobbs' interpretation, the second sentence does not create an exception to the proof of ownership requirement in the first sentence. Rather, the second sentence allows the trustee to rely on a beneficiary's declaration stating that the beneficiary is the "actual holder" of the note as a *presumption* to meet the proof of ownership requirement in the first sentence. The second sentence does not negate the proof of ownership requirement of the first sentence, however, and the presumption of ownership does not hold when it is facially untrue.[15] A trustee is allowed to rely on an "actual holder"

[14] The DTA's requirement that a foreclosing beneficiary be the *owner* of the note is also reflected in RCW 61.24.040(2), which provides that in addition to sending the borrower a notice of trustee's sale, the trustee must provide a notice of foreclosure stating that the foreclosure is a result of a default on the borrower's obligation to the "Beneficiary of your Deed of Trust and *owner* of the obligation." RCW 61.24.040(2) (emphasis added). This statutory language equating the beneficiary of the deed of trust with the *owner* of the note was enacted in 1985, and replaced the prior language of RCW 61.24.040(2) that had equated the beneficiary of the deed of trust with the *holder* of the note. *Compare* Laws of 1985, ch. 193, § 4 *with* Laws of 1975, 1st Ex. Sess., ch. 129, § 4.

[15] *See Caster v. Peterson*, 2 Wash. 204, 208 (1891) ("presumption as to ownership" arises from possession of negotiable paper); *see also Deutsche Bank*

declaration when it can do so in good faith, but not when it knows the beneficiary is not the owner of the note.

RCW 61.24.030(7)(b) makes clear that the declaration only creates a *presumption* of ownership. It provides that the trustee cannot rely on a beneficiary's declaration stating that it is the "actual holder" as proof of the beneficiary's ownership if the trustee will violate its duty of good faith to the borrower by doing so. *See* RCW 61.24.030(7)(b) (cross-referencing the trustee's duty of good faith under RCW 61.24.010(4)). Here, NWTS could not in good faith rely on Wells Fargo's declaration as proof of Wells' ownership of the note because NWTS knew Wells did not own the note. NWTS knew that because the notice of default it issued as agent for Wells Fargo and Wells' own beneficiary declaration that it provided to NWTS both stated that the note was owned by Freddie Mac. CP 295 & 320.

NWTS issued the notice of default to the Hobbs as Wells Fargo's agent. CP 293-96. NWTS also acted solely on behalf of Wells Fargo under power of attorney when an NWTS employee appointed NWTS as the successor trustee. CP 172. In both instances, NWTS owed fiduciary duties only to Wells Fargo.[16] When it became trustee, however, NWTS was no

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Nat'l Trust Co. v. Pietranico, 928 N.Y.S.2d 818, 830 (N.Y. Supr. Ct. 2011) ("possession of a promissory note . . . provides presumptive ownership of that note by the current holder"); *RMS Residential Properties, LLC v. Miller*, 32 A.3d 307, 311 (Conn. 2011) ("possession of a note raises a rebuttable presumption that a holder of a note is the owner of the debt").

[16] *See, e.g., Washington Imaging Services, LLC v. Dept. of Revenue*, 171 Wn.2d 548, 562, 252 P.3d 885 (2011) (agency is a "fiduciary relationship").

longer an agent for Wells Fargo and it owed a duty to act in utmost good faith to both Wells Fargo *and* the Hobbs under RCW 61.24.010(4). As this Court emphasized in *Lyons*, this statutory duty of good faith requires the trustee to be impartial and protect the interests of all parties. 181 Wn.2d at 787. As such, NWTS could not blindly rely on the declaration stating that Wells Fargo was the actual holder of the note as proof that Wells Fargo was the *owner*, when the declaration itself stated that Wells Fargo was *not* the owner and NWTS knew it was not the owner.

RCW 61.24.030(7)(b) provides that a foreclosing trustee cannot rely on a beneficiary's declaration stating it is the actual holder of a note as proof that the beneficiary is the *owner* if the trustee "has violated" its duty of good faith owed to the borrower under RCW 61.24.010(4). "Has violated" is in the present perfect tense and thus refers to an action that began in the past and may be still ongoing,[17] without requiring a prior, separate violation of the duty of good faith. It includes a trustee's violation of the duty of good faith that, as here, began when the trustee prepared a notice of trustee's sale despite its knowledge that the beneficiary was *not* the owner of the note as required by .030(7)(a), and continued when the trustee recorded that notice of sale. In addition, it makes no sense to interpret .030(7)(b) to allow NWTS to rely on a "actual holder" declaration as proof that Wells Fargo owned the note, when the declaration itself said that Wells Fargo was not the owner

[17] *See Oxford Dictionary of English Grammar* 329 (2d ed. 2014) (the present perfect tense "expresses that a situation began in the past and continues up to the moment of speaking, and possibly beyond").

and NWTS knew Wells Fargo was not the owner when it prepared the notice of trustee's sale, before recording it.[18] The Court should accept review and reject the Court of Appeals' decision that failed to give plain meaning to RCW 61.24.030(7), and created this absurd result.

2. The Court of Appeals' Decision and *Trujillo I* Conflict with this Court's Decisions Requiring that the DTA Must Be Construed in the Borrower's Favor.

The Court of Appeals' decision to ignore RCW 61.24.030(7)(a)'s proof of ownership requirement and effectively write it out of the DTA should also be reviewed because it violates this Court's decisions holding that the Act must be strictly construed in the borrower's favor. *See Lyons*, 181 Wn.2d at 791; *Schroeder*, 177 Wn.2d at 105; *Albice*, 174 Wn.2d at 567; *Udall*, 159 Wn.2d at 915. Even though in other recent cases, the Court of Appeals, Division I, has cited and applied this requirement that the DTA be construed in favor of borrowers,[19] in this case and in *Trujillo I*, it did not even mention that rule when it interpreted RCW 61.24.030(7). *See Trujillo I*, 181 Wn. App. at 484-512; Slip Op. at A-1 to A-3. The Hobbs' interpretation follows this rule; the Court of Appeals' decision and the holding in *Trujillo I* upon which it relies do not.

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[18] *See Lowy v. PeaceHealth*, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012) (courts construe statutes to "avoid absurd results").

[19] *See Walker v. Quality Loan Service Corp.*, 176 Wn. App. 294, 310, 308 P.3d 716 (2013) (emphasizing that court should "constru[e] RCW 61.24.127(1)(c) in a borrower's favor"); *Watson v. Northwest Trustee Services, Inc.*, 180 Wn. App. 8, 321 P.3d 262, 265 (2014) (construing DTA in favor of borrowers and reversing summary judgment on their CPA claims against NWTS).

3. The Court of Appeals' Decision and *Trujillo I* Conflict with this Court's Decisions Requiring that All of the Provisions the DTA Must Be Strictly Followed.

Because the DTA dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures, lenders must strictly comply with its statutory requirements. *Schroeder*, 177 Wn.2d at 111-12 *Albice*, 174 Wn.2d at 567; *Udall*, 159 Wn.2d at 915-16. The Court of Appeals' decisions here and in *Trujillo I* conflict with this mandate by allowing the trustee to foreclose when the beneficiary is not the owner of the note and the beneficiary's declaration says it is not the owner, contrary to the proof of ownership requirement in RCW 61.24.030(7). Allowing the trustee to foreclose without judicial supervision when it knows the proof of ownership requirement is not met does not strictly comply with the DTA as required by this Court's decisions and calls into question the constitutionality of Washington's nonjudicial foreclosure process as a whole. *See Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 790 n.11, 295 P.3d 1179 (2013) (independent and impartial trustee that acts in good faith and fairly respects the interests of both the lender and the debtor is a minimum to satisfy the statute, the constitution, and equity").

B. The Court of Appeals' Interpretation of RCW 61.24.030(7) Is of Substantial Public Interest and Should Be Reviewed Under RAP 13.4(b)(4).

The proper interpretation of the proof of ownership requirement in RCW 61.24.030(7) affects thousands of homeowners and is a matter of substantial public interest. This is especially true for the large number of

Washington homeowners whose home loans are owned by Fannie Mae and Freddie Mac. *See supra* at 3 n.3 & 10 n.8.Review is thus warranted under RAP 13.4(b)(4) as well. The foreclosure rate in Washington continues to exceed the national rate. *See supra* at 10 n.7. Homeowners facing foreclosure depend on the DTA's strict protections to ensure lawful conduct by the trustees and those who authorize them. This Court's decisions show that the industry's compliance with the DTA has been problematic, *e.g., Klem*, 176 Wn.2d at 788-92; *Schroeder*, 177 Wn.2d at 105-06; *Bain*, 175 Wn.2d at 94-110, making it even more important that the Court accept review to clarify the law on this critical issue at the heart of RCW 61.24.030(7).

VI. CONCLUSION

Pursuant to RAP 13.4(b)(1) and 13.4(b)(4), this Court should accept review and reverse the Court of Appeals.

DATED this 5th day of October, 2015.

Respectfully submitted,

COLUMBIA LEGAL SERVICES

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Attorneys for Petitioners-Plaintiffs
Darlene Hobbs and Joel Hobbs

DECLARATION OF SERVICE

I, Annabell Joya, certify under penalty of perjury under the laws of the State of Washington that on this day, I caused a copy of the foregoing Petition for Review to be served by email and first-class mail, postage prepaid, upon the following counsel of record:

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STATE OF WASHINGTON

DATED this 5th day of October, 2015.

Annabell Joya

Appendix

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DARLENE T. and JOEL HOBBS, Appellants, v. NORTHWEST TRUSTEE SERVICES, INC.; and WELLS FARGO BANK, NA, Respondents.	)	No. 71143-1-I DIVISION ONE UNPUBLISHED OPINION FILED: July 20, 2015

BECKER, J. — The actual holder of a note is entitled to enforce it. Because there is no dispute that respondent Wells Fargo Bank NA was the actual holder of the note given by the appellants, summary judgment in favor of Wells Fargo was appropriate. We affirm.

The appellants are Darlene and Joel Hobbs. This appeal arises out of their default on a note owned by the Federal Home Loan Mortgage Corporation (hereinafter "Freddie Mac") and held by Wells Fargo. The respondents began nonjudicial foreclosure proceedings after the Hobbs defaulted. Wells Fargo transmitted a beneficiary declaration to Northwest Trustee Services Inc., stating that Wells Fargo was the "actual holder" of the note and Freddie Mac was the owner. At Wells Fargo's direction, Northwest Trustee issued a notice of trustee's

sale. The Hobbs filed suit to restrain the sale and recover damages from Wells Fargo and Northwest Trustee for violations of the deed of trust act, chapter 61.24 RCW, and the Consumer Protection Act, chapter 19.86 RCW. The court enjoined the sale, subject to the Hobbs making payment required by RCW 61.24.130. The court granted motions for summary judgment made by Wells Fargo and Northwest Trustee on the claims for damages. The Hobbs appeal.

The Hobbs argue that a beneficiary must be both the actual holder and the owner of a note to enforce it. Because Northwest Trustee knew that Wells Fargo was not the owner of the note, the Hobbs maintain that, under RCW 61.24.030(7)(b), Northwest Trustee was not entitled to rely on Wells Fargo's beneficiary declaration. Relying on RCW 62A.9A-313, the Hobbs also argue that Wells Fargo did not have "legal possession" of the note and thus was not the "actual holder" for purposes of RCW 61.24.030(7).

This court persuasively rejected the same arguments in Trujillo v. Northwest Trustee Services, Inc., 181 Wn. App. 484, 510, 326 P.3d 768 (2014), review granted, 182 Wn.2d 1020 (2015). First, the court concluded that "it is the status of holder of the note that entitles the entity to enforce the obligation. Ownership of the note is not dispositive." Trujillo, 181 Wn. App. at 498. Second, the court concluded that Trujillo's "legal possession" argument was based on § 9-313 of the Uniform Commercial Code, a section which is concerned with security interests in notes and is therefore inapplicable to nonjudicial foreclosure proceedings. Trujillo, 181 Wn. App. at 502-04. We adhere to our decision in Trujillo.

No. 71143-1-I/3

Affirmed.

Becker, J.

WE CONCUR:

Leach, J.

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

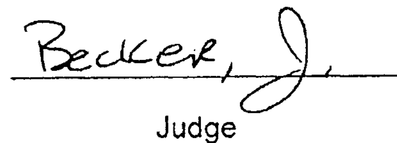
DARLENE T. and JOEL HOBBS,	)	
	)	No. 71143-1-I
Appellants,	)	
	)	ORDER DENYING MOTION
v.	)	FOR RECONSIDERATION
	)	
NORTHWEST TRUSTEE SERVICES,	)	
INC.; and WELLS FARGO BANK, NA,	)	
	)	
Respondents.	)	

Appellants, Darlene and Joel Hobbs, have filed a motion for reconsideration of the opinion filed on July 20, 2015, and the court has determined that said motion should be denied. Now, therefore, it is hereby

ORDERED that appellants' motion for reconsideration of the opinion filed on July 20, 2015, is denied.

DATED this 4th day of September, 2015.

FOR THE COURT:



Judge

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STATE OF WASHINGTON
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RCW 61.24.030

Requisites to trustee's sale.

It shall be requisite to a trustee's sale:

. . .

(7)(a) That, for residential real 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. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.

(b) Unless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection.

RCW 61.24.010

Trustee, qualifications — Successor trustee.

. . .

(4) The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor.