72065-1

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IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

No. ~~705920~~
72065-1

WILLIAM AND SHALAWN LEAHY, a married couple, as their community property,

Appellants,

vs.

QUALITY LOAN SERVICES OF WASHINGTON,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

OPENING BRIEF OF APPELLANTS

WILLIAM AND SHALAWN LEAHY
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I ASSIGNMENTS OF ERROR

A. Assignments of Error

1. **The trial court erred by finding Respondent strictly complied with the requirements of the WDTA.**

2. **The trial court erred in finding that waiver occurred in this case.**

B. Issues Pertaining to Assignments of Error

1. **Did Respondent fail to strictly comply with the Requirements of the WDTA when it failed to transmit new NOD's prior to the recording of NOTS 2 and NOTS 3?**

2. **Does the holding in *Schroeder v. Excelsior Mgmt Grp* apply to this case to prevent waiver of Appellants' claims?**

3. **Do the holdings in *Plein v. Lackey* and *Frizzell v.Murray* require waiver of Appellants' claims?**

4. **Does the April 9, 2010 NOD violate RCW 61.24.030(8) thereby independently invalidating the sale?**

II STANDARDS OF REVIEW

A. Summary Judgment

Summary judgment is reviewed de novo by the reviewing court.

The court engages in the same inquiry as the trial court under CR 56(c),

viewing the facts of the case and the reasonable inferences from those facts in the light most favorable to the non-moving party. *Harrington v. Spokane County*, 128 Wn. App. 202 (2005). The court is not authorized to dismiss a case on summary judgment if a genuine issue of material fact has been raised by the non-moving party. *Barrie v. Hosts of America*, 94 Wn.2d 640 (1980), A fact is material if the outcome of the case, in whole or in part, depends upon it. *Barber v. Bankers Life & Cas. Co., 81 Wn.2d 140, 500 P.2d 88 (1972).*

A moving party must demonstrate by uncontroverted evidence that there is no genuine issue of material fact. *Rossiter v. Moore,* 59 Wn.2d 722, 370 P.2d 250 (1962); and *6 J. Moore, Federal Practice* 56.07, 56.15(3) (2d ed. 1948). If the moving party does not sustain that burden, the court should not grant summary judgment, *regardless of whether the non-moving party submits affidavits or other materials.* (Italics added). *Trautman, Motions for Summary Judgment: Their Use and Effect in Washington*, 45 Washington Law Review 1, 15 (1970).

As the above standards relate to this case, if, after considering the material evidence in a light most favorable to Appellants, reasonable people might have reached different conclusions about the evidence presented, then Respondent's motion should have been denied. *Balise v.*

Underwood, 62 Wn.2d 195, 199, 381 P.2d 966 (1963); *See Also* 6 J. Moore, Federal Practice 56.11(3), 56.15(3).

B. The WDTA requirements for non-judicial foreclosure.

Under the Washington Deeds of Trust Act (WDTA), for non-owner-occupied real property, non-judicial foreclosure is a three-step process: (1) mailing and serving of a notice of default (RCW 61.24.031(1)(a) and (5)); (2) followed by at least 30 days by issuance of a notice of trustee's sale (RCW 61.24.030(8)); and (3) followed by at least 90 days by the public auction of the property (RCW 61.24.040(1)(a)). After the sale date is set by the NOTS, the sale may not occur more than 120 days beyond the scheduled sale date, at least not without reissuing the statutory notices. *Albice v. Premier Mortgage Services of Washington, Inc.*, 170 Wn.2d 1029 (2011); *Watson v. Northwest Trustee Services, Inc.*, No. 69352-2-I (2013).

C. Strict Compliance with the provisions of the Washington Deeds of Trust Act.

The Washington Supreme Court has stated on numerous occasions that beneficiaries and trustees must strictly comply with the provisions of the WDTA and, because the WDTA removes many of the traditional protections for borrowers, courts must interpret the act in favor of

borrowers. *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83 (2012); *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007) (citing *Queen City Sav. & Loan Ass'n v. Mannhalt*, 111Wn.2d 503, 514, 760 P.2d 350 (1988) (Dore, J., dissenting)).

III STATEMENT OF THE CASE

A. Factual Background

William and Shalawn Leahy's ("Appellants'") mortgage debt fell into default on or about March 1, 2009. *Verbatim Report of Proceedings, December 6, 2013 ("RP1"),* at 6: 3-4; *CP* at 300. Evidence of the mortgage debt consisted of a promissory note ("Note") and a Deed of Trust ("DOT") that secured the debt obligation and the performance of Appellants' covenants and agreements under the Note.

1. First attempt to sell Property.

a. Notice of Default.

On or about April 9, 2010, Quality Loan Service of Washington ("Respondent"), purporting to act as the "authorized agent" for the WaMu Mortgage Pass-Through Certificates Series 2006-AR15 Trust ("Trust"), commenced a non-judicial foreclosure against Appellants' property commonly known as 9745 Phinney Ave N., Seattle, WA 98103

("Property") by transmitting a Notice of Default ("NOD") to Appellants.[1] *RP1* at 7: 8-10. The NOD did not contain many of the items of information *required* to be included in a NOD by RCW 61.24.030(8)(a) – (l). *CP* at 299-302.

b. First Notice of Trustee's Sale.

On July 21, 2010, Respondent recorded the first Notice of Trustee's Sale ("NOTS1"). *RP1* at 7: 20-22; *CP* at 311. Section VI of NOTS1 states the April 9, 2010 NOD is NOTS1's antecedent in the foreclosure process. *CP* at 312. Additionally, NOTS1 sets October 22, 2010 as the original sale date. *CP* at 311.

The 120th day after October 22, 2010 was February 19, 2011. Accordingly, pursuant to RCW 61.24.040(6), February 19, 2011 was the last date upon which the Property could lawfully be sold as a consequence of the original foreclosure proceeding.

October 22, 2010 came and went without any attempt to publicly auction the Property or to continue the sale to another date. February 19, 2011 came and went without any attempt to publicly auction the Property. No later than February 20, 2011, therefore, the original foreclosure proceeding was terminated by operation of law.

[1] The NOD identifies the Trust as the owner of the Note and beneficiary of the DOT.

2. Foreclosure Fairness Act

On July 22, 2011, the Foreclosure Fairness Act ("FFA") amended the Washington Deeds of Trust Act ("WDTA"). A true and correct copy of the FFA is attached hereto as Appendix C. Among other provisions, the FFA includes RCW 61.24.030, .031, and .040. These sections contain the FFA's and WDTA's notice requirements.

RCW 61.24.030(8) requires a NOD to be transmitted to the borrower at least 30 days prior to the recording, transmitting, or serving of a notice of trustee's sale. In a non-owner-occupied residential real property sale, the same type of sale at issue in the instant case, RCW 61.24.040(1) prohibits the sale of the property until at least ninety days have elapsed following the recording and mailing of the notice of trustee's sale. RCW 61.24.040(2) requires the trustee to include a copy of a "notice of foreclosure" with the notice of trustee's sale that is mailed to the borrower.

In the absence of a bankruptcy or preliminary injunction, RCW 61.24.040(6) prohibits the trustee from continuing the sale of a property, for any reason, for more than 120 days beyond the original sale date.

3. First attempt to resume sale of the Property.

The second attempt to foreclose the Property occurred on July 12, 2012, five hundred and eight (508) days after February 19, 2011, the last date upon which the sale could lawfully be conducted. *RP1* at 9: 3-5. On July 12th, Respondent recorded a new notice of trustee's sale ("NOTS2"). *Id.* Section VI of NOTS2, like Section VI of NOTS1, proclaims the April 9, 2010 NOD is its antecedent in the foreclosure proceeding *(CP* at 316), making NOTS2 an attempt to continue the original sale. NOTS2 set November 9, 2012 as the new sale date. *CP* at 315.

November 9, 2012 was *749 days after October 22, 2010*, the original sale day, *and 628 days after February 19, 2011,* the last date upon which the Property could be lawfully sold.

4. Second attempt to resume original sale of Property.

On September 19, 2012, while the first attempt to resume the original foreclosure proceeding was still active, Respondent made a second attempt to resume the original foreclosure proceeding by recording the third and final NOTS ("NOTS3"). *CP* at 323. Section VI of NOTS3, like Section VI of NOTS1 and NOTS 2, proclaims the April 9, 2010 NOD is its antecedent in the foreclosure proceeding *(CP* at 324), making NOTS3 a second attempt to continue the original sale. NOTS3 set January 18, 2013 as the new sale date. *CP* at 323.

January 18, 2013 was *819 days after October 22, 2010*, the original sale day, *and 698 days after February 19, 2011*, the last date upon which the Property could lawfully be sold.

5. Recording of NOTS3 created simultaneous attempted extensions of original foreclosure proceeding.

As a result of the recording of NOTS3, on September 19, 2012, there were simultaneous attempts to extend the original foreclosure proceeding. Pursuant to NOTS2, the sale date was extended to November 9, 2012. *CP* at 315. Pursuant to NOTS3, on the other hand, the sale date was extended to January 18, 2013. *CP* 323. Both sale dates were more than 120 days after both October 22, 2010 and February 19, 2011.

IV STATEMENT OF ISSUES

1. **Did Respondent fail to strictly comply with the Requirements of the WDTA when it failed to transmit new NOD's prior to the recording of NOTS 2 and NOTS 3?**

2. **Does the holding in *Schroeder v. Excelsior Mgmt Grp., LLC* 177 Wn.2d 94 (2012) apply to this case to prevent waiver of the Appellants' claims?**

3. **Do the holdings in *Plein v. Lackey* and *Frizzell v. Murray* require waiver of Appellants' claims?**

4. **Did the April 9, 2010 NOD fail to comply with RCW 61.24.030(8) and thereby independently invalidate the sale?**

V ARGUMENT

1. Respondent materially failed to comply with the Requirements of the FFA and WDTA when it failed to transmit new NOD's prior to recording NOTS2 and NOTS3.

This Court recently decided this issue in *Watson v. Northwest Trustee Services, Inc.* ("*Watson*"), No. 69352-2-1. The opinion was issued on January 21, 2014 and published on March 18, 2014.

a. *Watson* procedural facts.

Northwest Trustee Services, Inc. ("NWTS") sought discretionary review of the trial court's denial of NWTS's motion for summary dismissal of Plaintiffs' claim for damages.[2] Cross-Appellants cross petitioned seeking review of the trial court's dismissal of their claims under the CPA, Chapter 19.86 ("CPA").

This Court granted Cross-Appellants' petition and reversed the trial court's dismissal of Cross-Appellants' CPA claims and denied NWTS's petition for discretionary review.

b. *Watson* historical facts.

Cross-Appellants financed the purchase of a home by executing a promissory note and deed of trust. Appellant Citibank acquired the note and deed of trust and, after Cross-Appellants defaulted on the loan, appointed Appellant NWTS the successor trustee.

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[2] RCW 61.24.030, .031, and .040.

On February 5, 2011, NWTS sent Cross-Appellants a NOD. Forty-five days later, on March 22, 2011, NWTS recorded the initial notice of trustee's sale. The notice scheduled the sale for June 24, 2011.

On June 20, 2011, four days before the scheduled sale, Cross-Appellants filed for bankruptcy. The automatic stay created by the bankruptcy filing caused Appellant to initially postpone and then *cancel* the sale.

On July 22, 2011, the FFA amended the WDTA. The FFA changed the requirements for pre-foreclosure notice and allowed recovery of damages for violations of the CPA.

NWTS recorded an "amended" notice of trustee's sale on November 8, 2011, one hundred thirty-seven (137) days after the original sale date. The "amended" notice scheduled the sale for December 23, 2011, one hundred eighty-two (182) days after the original sale date.

NWTS *did not transmit a new notice of default* before recording the "amended" notice of trustee's sale.

This Court observed that: (1) under the FFA, the trustee *must* transmit a NOD to the borrower before a NOTS is recorded, transmitted or served (*Id.* at 6.); and (2) RCW 61.24.040(6) authorizes the trustee to continue a sale for a period or periods not exceeding a total of 120 days. *Id.* at 6 – 7.

NWTS claimed the NOD sent to Cross-Appellants on February 5, 2011 fulfilled NWTS's notice obligations under the FFA and WDTA. The trial court disagreed.

c. *Watson v. Northwest Trustee Services, Inc.*, No. 69352-2-1

In Watson, this Court made the following findings: (1) the March 22, 2011 notice of trustee's sale described a sale that was supposed to occur on June 24, 2011; (2) NWTS first continued and then *cancelled* that sale; and (3) RCW 61.24.040(6) permitted NWTS to continue the June 24, 2011 sale for no more than 120 days, or until October 22, 2011. *Id.* at 7. After making these findings, the Court concluded:

> After that date [October 22, 2011], the DTA required a new notice. Therefore, although NWTS labeled its second notice an "amended" notice of trustee's sale, this notice necessarily scheduled a new sale. Because NWTS recorded the "amended" notice in November 2011, the notice requirements of the FFA applied.

Id.

This Court then granted Cross-Appellants' petition, reversed the trial court's dismissal of the CPA claims, and remanded the case to the trial court for further proceedings consistent with its opinion. *Id.* at 8 – 9.

d. Effect of *Watson v. Northwest Trustee Services* on this case.

Because the facts in this case mirror the facts in *Watson* in every consequential respect, the ruling in this case should mirror the ruling in *Watson*.

In the instant case, although Section VI of both NOTS2 and NOTS3 contain the claim that the April 9, 2010 NOD are their antecedent in the foreclosure process, the sale dates set by NOTS2 and NOTS3 were both more than 120 days after the original, October 22, 2010 sale date. Exactly the same factual circumstance was present in *Watson*. In Watson, the second attempt to sell the property was scheduled for a date that was 182 days after the original sale date.

The violations of RCW 61.24.040(6) are much more egregious in this case. NOTS2 scheduled a sale date that was *749 days* after the October 22, 2010, original sale date. NOTS3 scheduled a sale date that was *819 days* after the original sale date. Consequently, as in *Watson,* to strictly comply with the requirements of RCW 61.24.030(8) and 61.24.040(6), Respondent Quality was required to send a new NOD prior to recording NOTS2 and prior to recording NOTS3. Quality *did not send a new notice of default* before recording either NOTS2 or NOTS3.

The trial court found that a new NOD was not required before Quality filed either NOTS2 or NOTS3 (*Verbatim Report of Proceedings, April 18, 2014 ("RP2")*, at 14: 10-15.) and that Quality had strictly

complied with the requirements of the WDTA prior to recording NOTS2 and NOTS3. *CP* at 17: 3-5.

2. Holding in *Schroeder v. Excelsior Mgmt Grp., LLC*, 177 Wn.2d 94 (2012) prevents waiver of Appellants' claims.

During the summary judgment hearing, Appellants argued *Schroeder v. Excelsior Management Grp.*, 177 Wn.2d 94 (2013) (*"Schroeder")* applied to prevent "waiver" of Appellants' claims. *RP2* at 11: 3-17. Respondent Quality countered that *Schroeder* applied only to attempts to non-judicially foreclose agricultural land, and, since this case did not involve the non-judicial foreclosure of agricultural land, *Schroeder* did not apply. *RP2* at 15: 8-21

The trial court, agreeing with Respondent Quality, stated that: (1) the "waiver doctrine" clearly applies to the facts of this case; and, (2) because of the factual differences between the facts in this case and the facts in *Schroeder*, the holding in *Schroeder* does not apply to this case and does not prevent application of the "waiver doctrine." Additionally, the trial court, again agreeing with Quality, found that *Frizzell v. Murray*, No 87927-3 (2013) (*"Frizzell"*) applies, and, consequently, Appellants herein "waived" the right to contest the sale of their home.[3] *RP2* at 17: 3 – 19: 13.

[3] The court stated: "Beyond that, the Court would find that there is clearly waiver under the case law, including the cases that have come out recently. *Frizzell. Schroeder* is

The trial court was wrong. *Schroeder* applies, and *Plein v. Lackey*, 149 Wn.2d 214 (2003) (*"Plein") and Frizzell* do not.

Schroeder does indeed hold that agricultural land may not be foreclosed non-judicially. That specific holding, however, is not the defining legal principle for which *Schroeder* will be cited in years to come. In fact, the *Schroeder* holding is not even the source of the prohibition against non-judicial foreclosure of agricultural land. Agricultural land in Washington may not be foreclosed non-judicially because RCW 61.24.030(2) forbids non-judicial foreclosure of agricultural land.

Schroeder would not be noteworthy if its holding merely confirmed the WDTA prohibition against non-judicial foreclosure of agricultural land. *Schroeder, however,* is extremely noteworthy. This is because it holds: (1) each of the eight subparts of RCW 61.24.030 is a "*limit on the trustee's power*" to foreclose without judicial supervision, not a "*right*" or "*privilege*" of the borrower;[4] (2) if a trustee *violates any one of the eight requisites* in conducting a non-judicial foreclosure, the trustee's foreclosure actions fall wholly outside the WDTA and are

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completely distinguishable in that it talks about an agreed contractual waiver between parties dealing with agricultural land, and the law of that case is that the Deed of Trust Act does not apply. The waiver and the Deed of Trust Act does not apply to agricultural lands." VRP2 at 18: 18 – 25.

[4] *Schroeder*, at 106 – 07.

actionable; and (3) restrictions written into the WDTA in opposition to borrowers taking legal action against the trustee, including the "waiver" and "owner-occupied" restrictions, do not apply if the borrower's legal action is based on the trustee's violation of one or more of the eight requisites to a lawful non-judicial foreclosure sale.

The Schroeder court makes the point in the following terms:

> The difficulty with the defendants' waiver argument is that RCW 61.24.030 is not a rights-or-privileges-creating statute. Instead, it sets up a list of "requisite[s] to a trustee's sale." *Among other things*, it is a requisite to a trustee's sale that the deed contain the power of sale, .030(1); that the property not be used primarily for agricultural purposes, .030(2); that a default has occurred, .030(3); that there is no other pending action by the beneficiary to seek satisfaction of the obligation, .030(4); that the deed has been recorded in the relevant counties, .030(5); that the trustee maintain an address for service of process, .030(6); that the trustee have proof that the beneficiary is the owner of the obligation secured by the deed of trust, .030(7); *and that the beneficiary has given written notice of the default to the debtor containing specific statutory language advising the debtors of their rights, .030(8). These are not, properly speaking, rights held by the debtor; instead, they are limits on the trustee's power to foreclose without judicial supervision.*

Schroeder, at 106 - 07. (Italics added.)

As the above quote indicates, RCW 61.24.030(8) forbids non-judicial foreclosure of residential real property if the NOTS that schedules the sale date is not preceded in the foreclosure process by transmission of

a legally-viable NOD to the borrower. Moreover, pursuant to the rulings in Schroeder, a borrower's opportunity to assert a violation of RCW 61.24.030(8) cannot be waived because it is a statutorily-imposed limit on the trustee's power to foreclose, not a *"right"* or *"privilege"* of the borrower.

Because NOTS2 and NOTS3 each set a sale date that was more than 120 days after the original sale date, Quality's failures to transmit a new NOD prior to recording and mailing each of NOTS2 and NOTS3 were violations of RCW 61.24.030(8). Each of those violations, standing alone, invalidated the attempt to resume the original foreclosure proceeding with which it was associated. Therefore, neither the "waiver doctrine" stated in RCW 61.24.040(1)(f)(IX) nor the "owner-occupied" requirement contained in RCW 61.24.127(3) applies to Appellants with respect to these two foreclosure proceedings.

3. Neither *Plein v. Lackey* nor *Frizzell v. Murray* require "waiver" in this case.

a. Respondent and the trial court's reliance on *Plein* is misplaced.

Like Respondent Quality, respondents in *Schroeder* relied on *Plein* in support of their assertion that plaintiff had waived all claims by failing to bring a timely action to restrain the sale. The *Schroeder* court observed

that the facts in *Plein did not involve a violation of RCW 61.24.030*[5] and then rejected respondents' reliance on *Plein* in the following terms:

> *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 Wn.2d at 568 (citing *Udall*, 159 Wn.2d at 915-16). A trustee in a nonjudicial foreclosure may not exceed the authority vested by that statute. *Id.* As we have recently held, the borrower may not grant a trustee powers the trustee does not have by contracting around provisions in the deed of trust statute. *Bain*, 175 Wn.2d at 100.
>
> *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.

Schroeder, at 111 - 112. (Emphasis added.)

In this case as in *Schroeder*, because Respondent violated RCW 61.24.030 -- .030(8) in this case, not .030(2) as in *Schroeder* – by not transmitting new NOD's prior to recording NOTS2 and NOTS3, the same legal principles that applied in *Schroeder* apply in this case. Accordingly, as was true in Schroeder, nothing in *Plein* suggests that "waiver" or the "owner-occupied" restriction applies to prevent Appellants from challenging Quality's failure to transmit new NOD's prior to recording NOTS2 and NOTS3.

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[5] ". . . in *Plein* the primary issue was whether Cameron, who had paid off a debt secured by a deed of trust on a piece of property, could proceed with a foreclosure under that deed of trust since the underlying debt had been paid." *Schroeder*, at 111 - 112.

b. Respondent and the trial court's reliance on *Frizzell* is misplaced.

For the same reasons, *Frizzell* is inapplicable to this case. Frizzell's suit alleged the following violations of law: (1) common law and statutory fraud in the course of a residential loan; (2) civil conspiracy; (3) unconscionability; (4) CPA claims; (5) that the loan was actually a defacto sale; (6) that the loan was for noncommercial use; (7) that one of the defendants lacked a real estate license; and (8) that the underlying deed of trust was invalid because of her lack of capacity to contract. *Frizzell,* at 3.

None of Frizzell's claims involved the trustee's violation of one or more of *the requisites to a trustee's sale* (i.e., RCW 61.24.030), as the case before this court does and *Schroeder* did. Therefore, *Frizzell* does not apply to this case.

4. The information contained in the NOD did not satisfy the requirements of RCW 61.24.030.

In addition to the violations recited above, the April 9, 2010 NOD did not include numerous items of information required by RCW 61.24.030(8)(a) – (l). The NOD: (1) contained the name, but ***not*** the address, of the Trust;[6] 2) listed WMB, a company that had been out of business for 1 year and 8 months by the time the NOD was transmitted to

[6] A violation of RCW 61.24.030(8)(l).

Appellants, as the loan servicer;[7] 3) provided JPMorgan Chase's Florida address as WMB's address;[8] 4) did not provide JPMorgan Chase's name as the loan servicer;[9] 5) did not provide a telephone number for JPMorgan Chase, as the actual loan servicer, or WMB, as the alleged loan servicer;[10] 6) did not provide an exact amount that Appellants had to pay to reinstate the Note and DOT;[11] 7) listed Quality's address as the Trust's (beneficiary's) address;[12] and 8) indicated Respondent Quality was the successor trustee, even though Respondent was "appointed" the "successor trustee" on July 13, 2010, more than 3 months ***after*** the NOD was transmitted.[13]

Given these eight violations of the *requisites* for a lawful NOD, even if the April 9, 2010 NOD could have lawfully served as the antecedent to NOTS2 and NOTS3, the sale still would have been unlawful because the April 9, 2010 NOD did not strictly conform to the requirements of RCW 61.24.030(8)(a) – (l).

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[7] A violation of RCW 61.24.030(8)(l)
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] A violation of RCW 61.24.030(8)(f).
[12] A violation of RCW 61.24.030(8)(l).
[13] This is a violation of Quality's RCW 61.24.010(3) legal obligation to avoid incurring a fiduciary duty to any "persons having an interest in the property subject to the deed of trust." The Trust's security interest in the property is "an interest in the property."

VI CONCLUSION

The failures to transmit new NOD's prior to recording NOTS2 and NOTS3 were violations of RCW 61.24.030(8), a *requisite* to a lawful non-judicial foreclosure sale. As a result of these violations, each attempt to resume the original foreclosure proceeding was unlawful. Consequently, the sale of Appellants' home at auction on January 18, 2013 was also unlawful. Moreover, even if it had been lawful to utilize the April 9, 2010 NOD as the antecedent to NOTS2 and NOTS3, the sale still would have been unlawful. The April 9, 2010 NOD violated numerous subparts of RCW 61.24.030(8).

Appellants did not "waive" their right to challenge the unlawfulness of the sale by failing to obtain a preliminary injunction. The *requisites to a trustee's sale* are limits on the power of a trustee to conduct a lawful non-judicial foreclosure, not *"rights"* or *"privileges"* of a borrower that can be waived.

This case should be remanded with instructions to the trial court to: (1) reinstate Appellants' material failure to comply claim; and (2) summarily rule that Quality materially failed to comply with the WDTA and therefore sold Appellants' home unlawfully.

Respectfully submitted,

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