Supreme Court No. 93291-3
Court of Appeals Case No. 328163

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JAMES BLAIR

Plaintiff/Appellant,

v.

NORTHWEST TRUSTEE SERVICES, INC.; BANK OF AMERICA, N.A., MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC.; FEDERAL HOME LOAN MORTGAGE CORPORATION; and DOE DEFENDANTS 1 through 20

Defendants/Appellees.

AMENDED APPELLANT'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The Petitioner is James Blair, the owner of the real property that is the subject of this litigation and the injured party.

II. CIITATION TO COURT OF APPEALS DECISION

Mr. Blair seeks review of the decision of Division III of the Court of Appeals in this case (hereinafter the "Decision"), Case No. 328163. The Published Opinion was entered on March 17, 2016 and the Motion for Reconsideration filed by Mr. Blair was denied on May 12, 2016.

III. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals found that Northwest Trustee Services, Inc. ("NWTS") violated the requirements of the DTA by relying upon an ambiguous Beneficiary Declaration, which meant that it could not legally proceed with the issuance of the Notice of Trustee's Sale ("NOTS"). The issuance of the NOTS when it did caused injury to Mr. Blair because it happened sooner than it otherwise could have occurred. Mr. Blair was then required to investigate his claims with an attorney and to pay an attorney to help him obtain injunctive relief to prevent the foreclosure. The injuries he sustained and damages incurred were the direct result of the intentional and standard business practices of NWTS in relying upon ambiguous Beneficiary Declarations. This activity constitutes a violation of the Consumer Protection Act ("CPA"). RCW 19.86, *et seq.* and Mr. Blair should be permitted to proceed to trial.

IV. STATEMENT OF THE CASE

Procedural History

Mr. Blair filed suit in the Chelan County Superior Court on August 7, 2012 in Case Number 12-2-00919-2. CP 1-19. Mr. Blair filed a Motion for Temporary Restraining Order in order to stop the foreclosure sale that

was scheduled to take place on August 10, 2012. CP 20-68. A Order restraining the sale was entered by the Chelan County Superior Court on August 10, 2012 which required Mr. Blair to make a monthly payment to the Court Registry each month and to set a hearing from a preliminary injunction. CP 69-71. NWTS almost immediately filed a Motion to Dismiss on August 22, 2012. CP 72-120. Mr. Blair filed the Motion for Preliminary Injunction which was required by the Temporary Restraining Order and set it for hearing on September 28, 2012. CP 121-171. Defendant Bank of America, NA ("BANA") filed an Opposition to the Preliminary Injunction (CP 172-207) and Mr. Blair replied. (CP 235-402). Mr. Blair also responded to the Motion to Dismiss (CP 208-227) and NWTS replied (CP 228-234). The Preliminary Injunction Hearing was held on September 28, 2012 and an Order was entered granting the injunction. CP 403-405. On that same date, the Court denied NWTS' Motion to Dismiss. CP 406-407.

The Defendants then answered the Complaint and parties thereafter conducted discovery and worked on the case. CP 408-426. There was a Motion to Dissolve the Injunction brought by BANA based upon two late payments by Mr. Blair and an alleged change to the loan terms even though the Injunction Order did not allow for any such change. CP 427-452; 460-464. Mr. Blair responded and provided the Court with accurate

information about the payments and the information under his control. CP 453-459. The Court denied the Motion on June 14, 2013, noting that BANA had never provided Mr. Blair with information about the allegedly new payment amount due and that Mr. Blair had paid more than enough money into the Court Registry to comply with the Court's Orders. CP 465. NWTS filed a motion for summary judgment and a supporting declaration on June 20, 2013 (CP 466-515) but no hearing was set. NWTS then filed another motion on November 4, 2013 and set a hearing for December 5, 2013 (CP 516-584). Defendants BANA, Freddie Mac and MERS also brought a summary judgment motion set for the same hearing date. CP 585-932. Mr. Blair responded to the Motions and asked the Court to take Judicial Notice of additional information. CP 933-1051; 1052-1069; 1070-1093; 1094-1097. Defendants filed their own Reply briefs. CP 1098-1105; 1106-1115. The hearing was held on March 10, 2014 and Judge Allan took the matter under advisement. CP 1116. Without court authority, the Bank Defendants filed Supplemental Briefing and testimony. CP 1117-1146. On May 29, 2014 the Court issued its decision granting summary judgment to all of the Defendants. CP 1147-1150. In its Memorandum, the Court noted that under RCW 61.24.030(7), the Beneficiary Declarations relied upon by Defendant NWTS were insufficient to satisfy the requirements of the DTA, but the Court found that since BANA later

showed that it was the holder (notably it only did so after the hearing and in supplemental briefing), the deficient Beneficiary Declaration was irrelevant (CP 1149). The Court then entered Orders reflecting the contents of her Memorandum. CP 1161-1164. Mr. Blair appealed from that Order. CP 1165. The appeal proceeded in the Court of Appeals. During the appellate process, several decisions of this Court were entered which impacted the manner in which the case was decided on appeal.[1]

Statement of Facts

Mr. Blair is a resident of Wenatchee and a business owner in the city, who has owned his Residence for more than 25 years. CP 35-68. He refinanced the Residence with Countrywide on September 10, 2008 by signing a Promissory Note payable to Countrywide ("Promissory Note") and a Deed of Trust ("DOT"). *Id.* Countrywide was listed as the Lender on the Note and DOT and MERS was listed as the "beneficiary". CP 45-52.

Ownership of the Promissory Note was transferred to Freddie Mac on September 25, 2008. CP 698-699. BANA and its predecessors Countywide Home Loans Servicing, LP and BAC Home Loans Servicing, LP acted only as document custodians and loan servicers of the

[1] *Walker v. Quality Loan Serv. Corp of Wash.,* 176 Wn.App. 294, 308 P.3d 716 (2013); *Frias v. Asset Foreclosure Services, Inc*., 181 Wn.2d 412, 334 P.3d 529 (2014); *Lyons v. U.S. Bank*, 181 Wn.2d 775, 336 P.3d 1142 (2014); *Trujillo v. NW Trustee Servs., Inc.,* 183 Wn.2d 820, 355 P.3d 1100 (2015) and *Brown v. Dep't of Commerce,* 184 Wn.2d 509, 539, 359 P.3d 771 (2015).

promissory note. Freddie Mac enters into agreements with loan servicers wherein loan servicers take possession of promissory notes and hold them for the benefit of Freddie Mac in their vault facilities. CP 1020-1051. The evidence presented to the trial court was consistent with the "usual" Freddie Mac servicing agreements, in that in supplemental briefing, BANA finally presented testimony which indicated that BANA and its predecessors had "possession" of the note through a custodial agreement with Freddie Mac and held it for the benefit of Freddie Mac. CP 1142.[2]

Mr. Blair owns and operates a title insurance company. CP 35-41. As a result of the Great Recession of 2008, Mr. Blair's business fell off significantly and he began to experience very serious financial problems. CP 35-41. He struggled to pay his business and personal expenses, but by August of 2010, he fell behind on his mortgage payments. *Id.* At that time, he was making his payments to BANA's predecessor, BAC Home Loan Servicing because he had received communications from that entity about its servicing of the loan, including monthly statements. *Id.*

Through 2011 and 2012, Mr. Blair applied for a loan modification through BAC. CP 35-68. Mr. Blair submitted multiple rounds of loan modification documents, but received the runaround about the need for

[2] Consistent with this Court's holdings in *Brown*, Mr. Blair conceded at oral argument on the appeal that he could no longer pursue his claims against Defendants BANA, Freddie Mac and MERS, since BANA held the Note for Freddie Mac. Mr. Blair is not asking this Court to review that portion of the Court of Appeals decision.

additional documents. *Id*. While Mr. Blair was trying to obtain a loan modification, the Defendants were advancing a foreclosure of his home.

An Appointment of Successor Trustee document was recorded in Chelan County, Washington on March 7, 2012. CP 920. This document was signed and dated October 18, 2011 by an Angela Hopson, Assistant Vice President of BANA and purports to appoint NWTS as a successor trustee. *Id.* On March 19, 2012, NWTS issued a Notice of Default ("NOD"). CP 922-925. The NOD identified Freddie Mac as the owner of the Note and BANA as the loan servicer. *Id.* NWTS then issued a NOTS on April 24, 2012, setting a sale date for August 3, 2012. CP 927-932.

In order to issue the NOTS and cause it to be recorded, NWTS relied upon declarations from BANA, which stated that it was the "actual holder of the promissory note or other obligation secured by the deed of trust *or* has requisite authority under RCW 62A.3-301 to enforce said obligation…" CP 505; 515; 562; 566. There were two versions of the document which were both defective upon their face and NWTS should never have relied upon either. CP 562 and 566. The fact that NWTS relied upon **two** versions of the Beneficiary Declaration, dated two years apart, in addition to all of the other cases brought against NWTS that have flooded the courts, make clear its complete disregard for the statute.

When Mr. Blair realized that he was facing the foreclosure of his home, he contacted a lawyer, Ms. Huelsman, to obtain an understanding of his rights under Washington law, to determine if help was available to obtain a loan modification, and to stop the foreclosure sale of his home. CP 1094-1095. Mr. Blair paid $350 for an initial consultation with Ms. Huelsman and retained her to obtain injunctive relief and stop the sale. Mr. Blair paid Ms. Huelsman $5,000 for this work.[3] *Id.* He took time off of work to help transport Ms. Huelsman to Chelan County to attend the hearing on the temporary restraining order and he paid expenses to transport Ms. Huelsman to the hearing, for parking at the hearing, and for the costs of delivering copies of the pleadings to the trustee in advance of the hearing - costs were estimated to be $595.83. *Id.* He maintained throughout all of the briefing that he would not have had to consult with an attorney and obtain injunctive relief if NWTS had required DTA compliance by not taking action until it was provided with a Beneficiary Declaration which complied with statutory requirements. CP 208-227; 933-1051; 1052-1069; 1070-1093; 1094-1097.

In rendering its decision, the Court of Appeals has ignored the DTA provisions express requirements before action can be taken (RCW

[3] Mr. Blair signed a separate contingency fee retainer for Ms. Huelsman to work on his affirmative case relating to the wrongful attempted foreclosure of his home. Mr. Blair also paid expenses associated with Ms. Huelsman's work in restraining the sale. *Id.*

61.24.030(7) and (8)) and in essence, has taken the position that foreclosing trustees are free to rely upon defective Beneficiary Declarations without fear of liability for their actions even when they are sued by the small percentage of borrowers who file suit so long as the "beneficiary" eventually comes up with some documents that meet the statutory requirements. This turns the obligations of the trustee to **strictly** adhere to DTA requirements on its head. It results in trustees like NWTS who ignore statutory requirements and gamble that there is little likelihood that they will ever be accountable for its refusal.

V. STANDARD ON REVIEW

RAP 13.4(b) sets forth the considerations governing acceptance of review by the Supreme Court. Mr. Blair maintains that the Appellate Court's decision is conflict with this Court's decisions (RAP 13.4(b)(1)) and involves an issue of substantial public interest (RAP 13.4(b)(4)). It is in conflict with this Court's recent decisions interpreting the DTA and its requirements, and it is a matter of substantial public interest because it would permit foreclosing trustees to ignore the DTA's requirements as a regular business practice – just as NWTS has done – until it is occasionally caught and hopefully held liable. As the Washington Attorney General's Office said in its *amicus* brief filed in support of Mr. Blair's Motion for Reconsideration,

> [H]appenstance should not be a defense to a trustee's violations as it would reward trustees for their lack of diligence and failure to comply with the DTA and the CPA while penalizing already-struggling homeowner (*sic*) forced to incur costs to enjoin the unlawful foreclosure sales.

Washington Attorney General Amicus Brief, pg. 1-2.

VI. ARGUMENT

A. Division III's Decision is not supported by this Court's other opinions and promotes a public policy of statutory violations.

The Appellate Court's analysis of the requirements of RCW 61.24.030(7) was correct and consistent with the Washington Supreme Court's decision in *Trujillo v. NW Trustee Servs., Inc.,* 183 Wn.2d 820, 355 P.3d 1100 (2015) except for its conclusion that the wrongful initiation of a foreclosure based upon these defective documents did not cause Mr. Blair any injury or damages. This Court specifically noted in Footnote 10 that the clarification of the law requested by the Washington Attorney General's Office in the *amicus* briefing in *Trujillo* was correct and consistent with the Court's position. *Trujillo,* 183 Wn.2d at 834, n. 10.

Even after Mr. Blair asked for reconsideration of the Appellate Court's decision, pointing out the inconsistencies with Supreme Court opinions, it amended its decision to reiterate that Mr. Blair had failed to prove causation of his injuries even as it confirmed NWTS' intentional violations of the requirements of the DTA. *See,* Order Denying Motion for

Reconsideration and Amending Opinion, 1-2. It rendered this decision in spite of other appellate decisions and the provisions of the DTA that specifically allow the borrower to seek to restrain a trustee's sale "on any proper legal or equitable ground". RCW 61.24.130(1).[4] It is especially problematic in this case since the information about the identity of the actual "noteholder" (RCW 61.24.005(2)) was only provided to the Court and presumably NWTS by BANA in Supplemental Briefing filed in 2013. CP 1117-1146. Otherwise, all of the defendants would have presented this information to the Court in their raft of initial MSJ pleadings. CP 516-584; 585-932; 1098-1105; 1106-1115. This means that NWTS did not confirm the identity of the noteholder until more than two years after the foreclosure was initiated. CP 1117-1146.

> 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. *See* Br. of Amicus Curiae of Att'y Gen. of State of Wash. at 10; RCW 61.24.030(7)(a) *("[B]efore* 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)). A court must assess the propriety of the trustee's conduct based upon the trustee's evidence and investigation at that time.

Trujillo, 183 Wn.2d at 834, n. 10. "Because NWTS relied on the ambiguous beneficiary declaration prior to recording, transmitting, or

[4] This is also true in light of the provisions in the DTA which allows for recovery of fees and costs incurred in obtaining injunctive relief. RCW 61.24.090(2).

serving the notice of trustee's sale, it violated RCW 61.24.030(7)(a)." Op., 18. This Court then went on to analyze whether or not Mr. Blair met the injury elements of a CPA claim and concluded that he met that element because he had incurred attorneys' fees and costs associated with consulting with an attorney to investigate NWTS' authority to foreclose. Opinion, 18-19.

Turning to the question of whether Mr. Blair proved the casual element of a CPA claim, this Court held, in its Amended Opinion:

> Moreover, NWTS's wrongful act was its violation of RCW 61.24.030(7)(a). This provision requires the trustee to have proof that the beneficiary is the owner of the note prior to the trustee recording, transmitting, or serving the notice of trustee's sale. The purpose for requiring such proof is to prevent wrongful foreclosures. But the CPA has a causation requirement. A borrower must prove more than the trustee violated the statute, and he was injured. A borrower must prove, but for the violation of the statute, he would not have been injured. *Indoor Billboard,* 162 Wn.2d at 84. Had NWTS complied with RCW 61.24.030(7)(a), it would not have relied on an ambiguous declaration. Instead, it would have contacted BoA before instituting foreclosure, learned BoA was the holder of the note endorsed in blank, thus having the proof required by the statute and allowing it to proceed with foreclosure against Mr. Blair's property. Thus, Mr. Blair would have been injured even had NWTS complied with RCW 61.24.030(7)(a). We conclude Mr. Blair has failed, as a matter of law, to establish the causal link element of his CPA claim against NWTS.

Op. 19. Unfortunately, this conclusion is disconnected from the facts of how nonjudicial foreclosures are conducted and misconstrues what is properly identified as the "unfair or deceptive act". RCW 19.86.020.

The beneficiary declaration is not a document that is provided to a homeowner. Rather, RCW 61.24.030(7) requires that the document be provided to the trustee. The only reason that Mr. Blair saw the document was because he initiated litigation. He then restrained the sale and questioned the entire foreclosure process because of the totality of the actions taken by the Defendants, including NWTS. He was only able to do this because he sought assistance from a lawyer to investigate his claims and for which he made payment. Op., 17-18. During that process, he discovered that just as he alleged in his Complaint, NWTS did not have the proper legal authority to issue the Notice of Trustee's Sale document because it did not have a proper beneficiary declaration. RCW 61.24.030(7)(a). *Id.*

The Appellate Court incorrectly concluded that the "unfair and deceptive act" at issue was the execution of the improper beneficiary declaration. In fact, the actual "unfair and deceptive" act was NWTS' reliance upon the ambiguous beneficiary declaration to issue the NOTS document and the scheduling of a foreclosure auction, which Mr. Blair was required to enjoin. Mr. Blair would not have had to take this action

were it not for NWTS' refusal to adhere to its statutory duties, and he might not have ever needed to take that action if he had obtained a loan modification before NWTS ever got around to enforcing the requirements of the DTA on its customers. Further, NWTS' reliance upon this exact same ambiguous declaration is part of its regular business activities, as evidenced not only by the testimony of Mr. Blair's attorney (CP 1096-1097), but by the facts and findings in *Trujillo* and *Lyons v. U.S. Bank*, 181 Wn.2d 775, 336 P.3d 1142 (2014). "A foreclosure trustee must 'adequately inform' itself regarding the purported beneficiary's right to foreclose, including, at a minimum, a 'cursory investigation' to adhere to its duty of good faith." *Lyons* at 789; citing to *Walker v. Quality Loan Serv. Corp of Wash.*, 176 Wn.App. 294, 309-10, 308 P.3d 716 (2013).

As the Supreme Court noted in *Trujillo,*

> Following our recent decision in *Lyons v. U.S. Bank National Ass 'n*, 181 Wn.2d 775, 336 P.3d 1142 (2014), we hold that **a trustee cannot rely on a beneficiary declaration containing such ambiguous alternative language**. Trujillo therefore alleged facts sufficient to show that NWTS breached the DTA and also to show that that breach could support the elements of a Consumer Protection Act (CPA) claim.

Trujillo at 820 (emphasis added). If NWTS "**cannot**" rely on such a declaration, and therefore could not issue an NOTS and cause it to be recorded, and the foreclosure was only stopped because Mr. Blair paid a

lawyer to obtain injunctive relief, how does this activity fail to meet the causal requirement under the CPA?

The facts of the *Lyons* case should help inform the Court. While there were a multitude of matters at issue in that case which are not directly analogous to the facts of Mr. Blair's case, the issues surrounding the import of the beneficiary declaration are the same. There was no evidence whatsoever that Ms. Lyons knew the contents of the beneficiary declaration before she filed her case. But this Court noted that Ms. Lyons had raised issues related to a wrongfully initiated nonjudicial foreclosure by NWTS. Lyons at 783-785. The Supreme Court found that what mattered as to NWTS was that it tried to use the ambiguous and improper beneficiary declarations to initiate and continue to pursue a nonjudicial foreclosure through the NOTS document and that this was the action that was the "unfair and deceptive acts".

The *Lyons* case involved the reversal of a summary judgment and the Supreme Court found that because NWTS had not demonstrated that it had proof other than the defective beneficiary declaration that would have allowed it to issue the NOTS, Ms. Lyons' claims should have survived summary judgment. *Lyons* at 789. This Court indicated that NWTS in *Lyons* could find that Wells Fargo had possession of the Note, but it did not indicate that such a finding would relieve it from liability for its prior

acts. *Id.* Here, the only evidence before the Court is that NWTS did not complain about the first ambiguous declaration to BANA when it was submitted, and it then relied upon the second ambiguous beneficiary declaration to issue and record the subject NOTS. CP 562; 566. There was only testimony from NWTS was that it relied upon the second defective beneficiary declaration when issuing the NOTS. CP 566; 582-584. Its declarant, Mr. Stenman, provides no testimony on behalf of NWTS which would allow any other conclusion. CP 582-584. Thus, the factual record is clear that NWTS issued the NOTS that was expressly challenged by Mr. Blair based upon a document that it could not rely upon. *Trujillo* at 820.[5]

The "causal" connection to Mr. Blair's injuries, as approved by this Court, is to the wrongful "recording, transmitting, or serving the notice of trustee's sale" when NWTS did not know that the entity signing the beneficiary declarations had physical possession of Mr. Blair's Note. *Id.* But for NWTS relying upon the defective ambiguous beneficiary declaration, it would not have issued the Notice of Trustee Sale and Mr.

[5] It is also important to note that when NWTS brought its Motion to Dismiss, it relied upon the contents of the First Beneficiary Declaration in support of its position that it was relieved from liability for its actions. It only provided the Court with the 2009 Beneficiary Declaration at that time. CP 72-86. The Court's attention is specifically drawn to CP 75, where NWTS argues that it was entitled to rely upon the first "ambiguous" beneficiary declaration without question in support of its activities. CP 111. It was only at summary judgment that NWTS produced the second Beneficiary Declaration and contended that it was reliable. CP 933-1051. But Mr. Stenman also admitted that NWTS had previously relied on the first Declaration in 2009 (CP 583) and that it was acting in reliance on the second Declaration in 2011. (CP 584.)

Blair would not have been required to meet with a lawyer to investigate his claims, to file suit and to pay a lawyer to enjoin the foreclosure sale when he did so. CP 1094-1095. NWTS has a choice about how to operate in conformity with the requirements of the DTA, and it would vitiate the importance of the requirements of the DTA if its business operations can predicated upon the regular reliance upon defective documentation and a hope that the information will really turn out to be correct.

Numerous other DTA cases decided by the Supreme Court require that language in the DTA be construed strictly in the homeowner's favor because it eliminates many protections enjoyed by borrowers in judicial foreclosures. *Bain,* 175 Wn.2d. at 93 (citing *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007)); *see also Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 105, 297 P.3d 677 (2013) (same); *Albice v. Premier Mortg. Servs. of Washington, Inc., supra*. 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 non-judicial foreclosure sales." *Bain v. Metropolitan Mrtg. Group,* 175 Wn.2d 83, 98-110 (2012).

RCW 61.24.030 establishes the "requisites" to a valid trustee's sale. These requisites to a sale, including .030(7) "are limits on the trustee's power to foreclose without judicial supervision." *Schroeder v.*

Excelsior Mgt. Group, LLC, 177 Wn.2d 94, 107, 297 P.3d 677 (2013). A sale conducted without satisfying each of RCW 61.24.030's requisites is invalid. Because of the lack of judicial supervision, the Supreme Court has emphasized that "[s]trict compliance with the mandated requisites [of the DTA] is required." *Id.* at 107 n.7. "It is well settled that the trustee in foreclosure must strictly comply with the statutory requirements." *Scrhoeder* at 111-12; *see also, Albice v. Premier Morg. Servs. Of Wash., Inc.*, 174 Wn.2d 560, 568,276 P.3d 1277 (2012). "As we have already mentioned and held, under this statute [the DTA], strict compliance is required." As the Washington Attorney General noted in its *amicus* briefing in support of the Motion for Reconsideration, "RCW 61.24.030(7)(a) is not just prophylactic against foreclosures commenced by the wrong beneficiary. It is a requisite to a valid NOTS and a valid sale." Wash. AG Amicus, 4-5.

The Washington Attorney General also succinctly pointed out another of the flaws in the Amended Opinion,

> A NOTS recorded without satisfying all requisites of RCW 61.24.030 is illegal under both the DTA and the CPA. A trustee's sale scheduled pursuant to an illegal NOTS can and should be enjoined under the DTA. RCW 61.24.130(1). Moreover, recording the illegal NOTS is unfair because it schedules an illegal sale of the homeowner's property, and requires a homeowner to investigate and take legal action to stop the illegal deprivation of his or her home. See *Blake v. Federal Way Cycle, Ctr.*, 40 Wn. App. 302, 310, 698

> P.2d 578 (1985), review denied 104 Wn. 2d 1005 (1985) (outlining federal standard for "unfair" acts). It is also deceptive under the CPA because it implicitly misrepresents to both the homeowner and potential bidders that all requisites have been satisfied. See RCW 61.24.040(7) (requiring trustee's deed to successful bidder to "recite the facts showing that the sale was conducted in compliance with all of the requirements of this chapter and of the deed of trust.").
>
> An illegal NOTS becomes no less illegal if the purported beneficiary on whose behalf the trustee improperly recorded the NOTS turns out later to be the proper party to foreclose. Compliance with RCW 61.24.030(7)(a) must be judged at the time of recording the NOTS. See *Trujillo v. NW Trustee Servs., Inc.,* 183 Wn.2d 820, 834 n.10, 355 P.3d 1100 (2015).
>
> Because RCW 61.24.030(7)(a) is a legal requisite to a valid NOTS and requires the trustee's strict compliance – **not a mere prophylactic against "wrong-beneficiary foreclosures** – the Court erred in basing its causation analysis on whether Bank of America proved to be the proper beneficiary after the fact. Instead, the analysis should focus on whether the trustee's act of recording the illegal NOTS in violation of both the DTA and the CPA caused the homeowner's injury.

Wash. Attorney General Amicus Brief, p. 5-6 (emphasis added).

The law regarding CPA causes of action is fairly clear and settled. A cause of action is available if the claim satisfies five elements: "(1) [an] unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.' " *Klem v. Wash. Mut. Bank,* 176 Wn.2d 771, 782, 295 P.3d 1179 (2013) (alteration in original) (quoting *Hangman Ridge*

Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wash.2d 778, 780, 719 P.2d 531 (1986)). This Court has confirmed that a CPA cause of action is appropriate for violations the DTA. *Frias*, 181 Wn.2d 412; *Lyons*, 336 P.3d 1142; *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83; *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771. These cases articulate the necessity under Washington law to conform to the strict parameters of the DTA at all times or face liability. In *Frias*, this Court held: "even when there is no completed foreclosure sale and no allegation that plaintiff has paid foreclosure fees, it is possible for a plaintiff to suffer injury to business or property caused by alleged DTA violations that could be compensable under the CPA." *Frias* 181 Wn.2d at 18, citing to *Panag v. State Farm Ins. Co. of WA*, 166 Wn.2d 27, 57 (2009); *Lyons*, 336 P.3d at 1142.

Other DTA cases decided by this Court require that language in the DTA be construed strictly in the homeowner's favor because it eliminates many protections enjoyed by borrowers in judicial foreclosures. *Bain*, 175 Wn.2d. at 93 (citing *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007)); *see also Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 105, 297 P.3d 677 (2013); *Albice v. Premier Mortg. Servs. of Washington, Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012) (same). 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 non-judicial foreclosure sales." *Bain*, 175 Wn.2d. at 93. The Amended Opinion allows foreclosing trustees to simply ignore statutory requirements with impunity, so long as they get lucky that the paperwork is in order later.

The Washington Attorney General also correctly pointed out:

> The opinion erroneously suggests that no causation exists because the trustee's actions may have been "performed in good faith under an arguable interpretation of existing law." Slip Op. at 20 n.1. The seldom-used "arguable interpretation" doctrine does not apply to the causation element of a CPA claim. Instead, it applies only to the first element – whether the act in question is unfair or deceptive in the first place. See *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 155, 930 P.2d 288 (1997) ("Acts performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law.") Following *Lyons* and *Trujillo* – each of which also involved an illegal NOTS issued by Northwest – there can be no dispute that the first element of a CPA claim is satisfied because Northwest committed an unfair practice when it recorded the unlawful NOTS. Slip Op. at 15-20. The "arguable interpretation" doctrine is irrelevant to whether the trustee's undisputedly unfair or deceptive act *caused* the homeowner's injury. But even if the "arguable interpretation" doctrine were relevant to causation, it cannot help Northwest here.
>
> First, the Supreme Court already declined to adopt the "arguable interpretation" argument in this context when Northwest previously advanced it *Lyons*.[6] This court should do the same. Lyons was based on the plain statutory

[6] See Respondent NWTS' Response Brief, p. 26, in *Lyons v. U.S. Bank, N.A. et al*, Case No. 89132-0 in the Washington State Supreme Court, available at https://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coaBriefs.ScHome&courtIDC=A08 (last visited April 11, 2016).

> language and the rule of strict compliance. 181 Wn.2d at 791. The trustee's reliance on an argument contrary to the statute's language and the fundamental rule for interpreting the DTA cannot shield it from liability under the CPA.
>
> Second, the "arguable interpretation" doctrine has been applied almost exclusively to insurance bad faith cases, in which the very reasonableness of the insurer's policy interpretation defines the tort of bad faith and associated per se CPA claim.[7] But the Supreme Court's more recent jurisprudence has made clear – that unlike in *Leingang* – an insurer may no longer rely on an "arguable" interpretation of law or its policy to deny a benefit. *American Best,* 168 Wd.2d at 411. The Court should not resurrect the doctrine here to create a penumbra of illegal trustee acts that do not give rise to liability – particularly in light of the "strict construction" and "strict compliance" required by the DTA and the "liberal interpretation" given to the CPA.
>
> Third, the Supreme Court intended the doctrine to be confined to special circumstances not applicable here: "Such conduct in a single case attempting to determine the legal rights and responsibilities of both parties should not be considered 'unfair' in the context of the consumer protection law." *Perry v. Island Sav. And Loan Ass'n*, 101 Wn.2d 795, 810, 684 P.2d 1281 (1984). Northwest's practice of recording illegal NOTS without satisfying RCW 61.24.030(7)(a) is not a "single case" – there are already two Supreme Court decisions involving the same conduct – but rather its regular business practice. And in any event, the doctrine applies only the "unfairness" prong of the CPA's prohibition on unfair or deceptive acts or practices. *Perry,* 101 Wn.2d at 810. As explained above, an unlawful NOTS is also a deceptive practice.

Washington Attorney General Amicus Brief, p. 7-9. This analysis correctly parses the requirements under the DTA for NWTS.

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[7] *American Best Food, Inc. v. Alea London, Ltd.* 168 Wn.2d 398, 412, 229 P.3d 693 (2010); *Ledcor Indus. (USA), Inc. v. Mut. Of Enumclaw Ins. Co.,* 150 Wn. App. 1, 206 P.3d 1255 (2009)

VII. CONCLUSION

Mr. Blair respectfully requests that this Court agree to accept review of this case. The Court of Appeals' Amended Opinion is contrary to the holding of this Court in other cases and will harm other members of the public if it is permitted to stand as binding authority in Washington, as it is a license for foreclosing trustees to routinely violate the requirements of the Deed of Trust Act with impunity.

Respectfully submitted this 12th day of July, 2016.

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CERTIFICATE OF SERVICE

I, Tony Dondero, declare under penalty of perjury as follows:

1. I am over the age of eighteen years, a citizen of the United States, not a party herein, and am competent to testify to the facts set forth in this Declaration.

2. That on the Tuesday, July 12, 2016, I caused the attached document with any exhibits and supporting pleadings to be served upon the following individuals via the methods outlined below:

Matthew W. Daley WITHERSPOON KELLY 422 West Riverside Avenue, Suite 1100 Spokane, WA 99201-0300 mwd@witherspoonkelley.com	□ Legal Messenger ☒ Electronic Mail □ Federal Express ☐ Other: Regular U.S. Mail
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing statement is both true and correct.

Dated this Tuesday, July 12, 2016, at Seattle, Washington.

_/s/ Tony Dondero_____
Tony Dondero, Paralegal