Supreme Court No. 93291-3

Court of Appeals No. 32816-3-III

SUPREME COURT OF THE STATE OF WASHINGTON

JAMES C. BLAIR, II,

Appellant,

v.

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

Respondents.

MEMORANDUM OF *AMICUS CURIAE* ATTORNEY GENERAL OF WASHINGTON IN SUPPORT OF PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

Benjamin J. Roesch, WSBA #39960
Amy Teng, WSBA #50003
Assistant Attorney General
Consumer Protection Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. IDENTITY AND INTEREST OF AMICUS

Amicus Curiae is the Attorney General of Washington (Attorney General). The Attorney General's constitutional and statutory powers include the submission of amicus curiae briefs on matters affecting the public interest.[1] The issue presented in this case affects the public interest because it impacts the extent to which Washington homeowners are able to seek relief through the Consumer Protection Act (CPA) for violations of the Deed of Trust Act (DTA) in the nonjudicial foreclosure process. The Attorney General enforces the CPA on behalf of the public, RCW 19.86.080, and has a strong interest in the development of CPA case law, RCW 19.86.095, including the availability of private CPA claims. *Scott v. Cingular Wireless*, 160 Wn.2d 843, 853, 161 P.3d 1000 (2007). Pursuant to RCW 61.24.172, the Attorney General's Consumer Protection Division is also directed by the Legislature to enforce the DTA.

II. INTRODUCTION

As this Court has emphasized, a trustee's failure to strictly comply with the DTA– in this case, relying on an ambiguous beneficiary declaration as the basis for filing a Notice of Trustee's Sale in violation of RCW 61.24.030(7)(a)– constitutes an unfair or deceptive act under the

[1] *See Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 208, 588 P.2d 195 (1978).

CPA. *See Lyons v. U.S. Bank Nat'l Ass'n,* 181 Wn.2d 775, 336 P.3d 1142 (2014); *Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 355 P.3d 1100 (2015). Homeowners have the right to challenge the foreclosure of their property when the trustee has improperly recorded a Notice of Trustee's Sale based on an ambiguous beneficiary declaration, and such violations of the DTA are not to be excused, as noted by the Court of Appeals. Am. Op. at 17.

Here, the Court of Appeals determined that even though Northwest Trustee Services, Inc. (NWTS) improperly relied on an ambiguous beneficiary declaration and recorded an unlawful Notice of Trustee's Sale, homeowner James Blair could not, "*as a matter of law*, . . . establish the causal link element of his CPA claim against NWTS." Am. Op. at 20 (emphasis added). It reasoned that because Bank of America, N.A. was uncovered to be the lawful beneficiary after Mr. Blair filed suit, had NWTS complied with RCW 61.24.030(7)(a) and not relied on the ambiguous declaration, it could have proceeded with a lawful foreclosure. *Id.* And because NWTS *could* have fulfilled its duties as trustee and proceeded lawfully, its actual unlawful Notice of Trustee's Sale did not cause Mr. Blair's injuries (the costs incurred to investigate and enjoin the foreclosure sale).

The Court of Appeals' reasoning conflicts with this Court's CPA and DTA jurisprudence and undermines the stated objectives of the DTA by favoring culpable trustees over homeowners. The Attorney General therefore respectfully requests that this Court accept review under RAP 13.4(b)(1), (2), and (4)

III. ARGUMENT

A. This Court Should Accept Review Under RAP 13.4(b)(1) And (2) Because The Decision Conflicts With Decisions Of This Court And Another Court Of Appeals

In private CPA actions, "[a] plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury." *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 84, 170 P.3d 10 (2007). Causation is a question of fact. *Id.* at 83.

Thus the question mandated here by *Indoor Billboard* is: "Would Mr. Blair have incurred costs to investigate and successfully restrain the unlawful sale but for NWTS's unfair or deceptive violation of RCW 61.24.030(7)(a) and the resulting unlawful Notice of Trustee's Sale?" The answer is no; had NWTS not recorded its unlawful Notice of Trustee Sale, Mr. Blair would have had no need to investigate or enjoin the sale. An unlawful foreclosure – whatever the particular illegality leading up to it– is an injury to the homeowner. The costs incurred to investigate and enjoin

an unlawful foreclosure, such as the one in this case, are injuries caused by the initiation of the unlawful foreclosure.

In contrast, the Court of Appeals framed its causation analysis without reference to either the facts available at the time the homeowner filed suit or to the actual injury that the homeowner suffered:

> Had NWTS complied with RCW 61.24.030(7)(a), it would not have relied on an ambiguous declaration. Instead, it would have contacted BofA 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 of his CPA claim against NWTS.

Am. Op. at 20. This reasoning must be rejected for several reasons. First, the analysis is not based on the factual inquiry mandated by *Indoor Billboard*, but on a hypothetical exercise that ignores this Court's recent holdings in *Trujillo* and *Frias*.

Second, following this Court's holding that "[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, the CPA causation analysis should also be based on NWTS' conduct at the time it recorded the unlawful Notice of Trustee's Sale, and whether those actions caused Mr. Blair's injury. The Court of Appeals misapplied this

Court's holding by considering post hoc proof of the beneficiary's propriety in its causation analysis, as this was rejected by *Trujillo*.[2] Accordingly, because post hoc proof cannot be introduced to analyze the causation element of a CPA claim, the Court of Appeals' opinion is in error.

Third, this Court has made clear that "[a] CPA plaintiff can establish injury based on unlawful debt collection practices even where there is no dispute as to the validity of the underlying debt." *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 431, 334 P.3d 529 (2014). *Frias* makes clear that even if Bank of America had the right to foreclose, and even if NWTS could have complied with the law and foreclosed lawfully, CPA liability attaches to injuries "based on" – that is, caused by – the unlawful practice that actually occurred. At least one Court of Appeals decision appears to embrace this view of the law. *See Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 320, 308 P.3d 716 (2013) (holding that homeowner "plead[ed] facts sufficient to establish causation" in his CPA claim by alleging "the deceptive [recorded] documents induced [the homeowner] to incur expenses to investigate whether [the stated

[2] Even if the Court reads *Trujillo*'s holding as applying solely to the "unfair or deceptive" element of a private CPA claim, the Court of Appeals' use of the very post hoc proof rejected in *Trujillo* to defeat a private CPA claim based on that unfair or deceptive conduct at the subsequent causation element would render that holding a practical nullity.

beneficiary and the trustee] had authority to act against him and to address their alleged improper deceptive acts") (overruled on other grounds), cited in *Lyons*, 181 Wn.2d at 785, 787.

In sum, when the initiation of an unlawful foreclosure causes homeowner injury, such as the costs to investigate and stop the unlawful sale, this Court's precedent dictates a holding that the causal link necessary to establish a private CPA action is not broken as a matter of law by later evidence that the beneficiary had the right to foreclose. This Court should accept review because the Court of Appeals opinion conflicts with this precedent.

B. This Court Should Accept Review Under RAP 13.4(b)(4) Because There Is Strong Public Interest in Removing Barriers to Homeowner CPA Actions to Ensure Trustees' Strict Compliance with the DTA

The DTA has three basic objectives: "'First, the nonjudicial foreclosure process should remain efficient and inexpensive. Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, the process should promote the stability of land titles.'" *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 104, 297 P.3d 677 (2013) (citations omitted). "Because the [DTA] dispenses with many protections commonly enjoyed by borrowers under the judicial foreclosures," courts strictly construe the DTA in

homeowners' favor, and beneficiaries and trustees are held to strict compliance with the law. *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012); *see also Lyons*, 181 Wn.2d at 790-91. The CPA plays a central role in promoting these goals.

Homeowners cannot bring damages claims under the DTA itself for the unlawful initiation of foreclosure, *Frias*, 181 Wn.2d at 417; accordingly, private CPA claims take on an even greater importance as the primary vehicle by which (a) homeowners can recoup the costs imposed by a foreclosure trustee's unlawful action, and (b) trustees are incentivized to strictly comply with the DTA. As this Court has explained generally,

> Private actions by private citizens are now an integral part of CPA enforcement. Private citizens act as private attorneys general in protecting the public's interest against unfair and deceptive acts and practices in trade and commerce. Consumers bringing actions under the CPA do not merely vindicate their own rights; they represent the public interest and may seek injunctive relief even when the injunction would not directly affect their own private interests.

Scott, 160 Wn.2d at 853 (internal citations omitted). The public benefits by having the DTA and CPA violations that occurred in this case cured and remedied rather than swept under the rug.

As it stands, the decision below undermines the DTA's stated goals and denigrates the requirement of the parties' strict compliance with the DTA. The Court of Appeals held that "NWTS's wrongful act was its

violation of RCW 61.24.030(7)(a)," but mistakenly absolved NWTS of liability by reasoning that the statutory goal of that section "is to prevent wrongful foreclosures," and because Bank of America turned out to be the lawful beneficiary, the foreclosure was not wrongful. Am. Op., p. 20 & n.1. It therefore conceptualized "wrongful foreclosure" as a foreclosure where the purported beneficiary has no right at all to foreclose. But that isn't correct. *Any* foreclosure in which the trustee fails to satisfy the requisites for a valid sale, including RCW 61.24.030(7)(a) is "wrongful" in light of this Court's rulings in *Lyons* and *Trujillo* and for failing to meet the requirement of strict compliance with the DTA. *Cf.* RCW 61.24.130(1) (allowing restraint of trustee's sale "on *any* proper legal or equitable ground") (emphasis added). An illegal foreclosure proceeding need not satisfy some other standard of "wrongfulness" to cause homeowner injury under the CPA.

Further, by requiring, a homeowner to prove as a matter of law that the beneficiary had no right whatsoever to foreclose in order to establish that the trustee's illegal action caused his or her injury, the Court of Appeals ignored this Court's observation that "nothing about the DTA indicates a CPA claim should be subject to a different analysis where the CPA claim is premised on alleged DTA violations as opposed to any other alleged wrongful acts." *Frias*, 181 Wn.2d at 432. The Court of Appeals'

reasoning would immunize trustees from CPA liability for a wide variety of misconduct during the foreclosure as long as the homeowner was in default and the beneficiary turned out to have actually held the promissory note. This would routinely favor culpable trustees over homeowners.

Finally, the Court of Appeals decision disincentivizes homeowners from bringing meritorious CPA claims, which undermines the goal of strict compliance with the DTA. The nonjudicial foreclosure process involves an inherent informational asymmetry in which information available to the trustee is not always knowable by the homeowner. As the Court of Appeals frames the causation inquiry, the homeowner cannot know before suffering his or her injury – the costs to investigate and enjoin an unlawful trustee's sale – whether there are facts independent of the trustee's unfair or deceptive act that break the causal chain between the trustee's act and the injury that he or she is about to suffer. The homeowner is left to assume all the financial and legal risk that should rightly fall on the trustee that failed to comply with the DTA in the first place. By shifting the financial burden of a trustee's unlawful act all onto financially strapped homeowners and potentially discouraging them from bringing forth well-founded CPA claims based on these DTA violations, the Court of Appeals has disincentivized trustees from complying strictly with the DTA in the foreclosure process. This defeats the third goal of the

DTA—to promote the stability of the land titles. *Albice*, 174 Wn.2d 560, 572 ("Enforcing statutory compliance encourages trustees to conduct procedurally sound sales.").

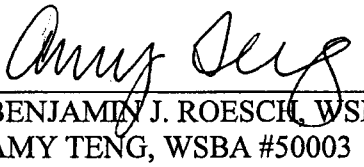
The Court should grant review and ensure that homeowners are able to bring successful CPA actions to challenge a trustee's unfair or deceptive violation of the DTA during the nonjudicial foreclosure process.

C. CONCLUSION

The Attorney General respectfully requests that the Court grant the Petition for Review pursuant to RAP 13.4(b)(1), (2), and (4).

RESPECTFULLY SUBMITTED this 12th day of August, 2016.

ROBERT W. FERGUSON
Attorney General



BENJAMIN J. ROESCH, WSBA #39960
AMY TENG, WSBA #50003
Assistant Attorney General
Attorneys for Amicus Curiae
Attorney General of Washington

CERTIFICATE OF SERVICE

I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein. I certify that on the 12th day of August, 2016, I caused a true and correct copy of Memorandum of *Amicus Curiae* Attorney General of Washington in Support of Petition for Review to be filed with the Court and served, via email and U.S. Mail, Postage Prepaid, to the following parties:

Melissa A. Huelsman
Law Offices of Melissa A. Huelsman, P.S.
705 2nd Ave. Ste. 601
Seattle, WA 98104-1726
mhuelsman@predatorylendinglaw.com

Matthew Daley
Witherspoon Kelley, P.S.
422 W. Riverside Ave., Ste. 1100
Spokane, WA 99201
mwd@witherspoonkelley.com

Joshua S. Schaer
RCO Legal, P.S.
13555 S.E. 36th St., Ste. 300
Bellevue, WA 98006
jschaer@rcolegal.com

DATED: August 12th, 2016, at Seattle, Washington.

P. JOSEPH DROUIN
Legal Assistant

OFFICE RECEPTIONIST, CLERK

From: Drouin, Joseph (ATG) <JosephD1@ATG.WA.GOV>
Sent: Friday, August 12, 2016 1:36 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Roesch, Benjamin (ATG); Teng, Amy (ATG); Rothbaum, Leslie (ATG); Corduneanu, Natalia (ATG); Ferazza, Michelle (ATG)
Subject: Blair v. Northwest Trustee Services, et al.
Attachments: 2016_08_12MtnFileMemoAmicusPetition.pdf; 2016_08_12MemoAmicusPetition.pdf

Case Name: Blair v. Northwest Trustee Services, et al.

Case No.: 93291-3

Person filing the document: Amy Teng, (206) 254-0571, Bar No. 50003, amyt2@atg.wa.gov

Attached is the (1) Motion of Attorney General of the State of Washington for Leave to File *Amicus Curiae* Memorandum in Support of Appellant's Petition for Review; and
(2) Memorandum of *Amicus Curiae* Attorney General of Washington in Support of Petition for Review.

Thank you for your consideration of this matter.

P. Joseph Drouin
Legal Assistant
Consumer Protection Division
Office of the Attorney General
Tel.: 206-389-3997 / Fax: 206-587-5636
Email: JosephD1@atg.wa.gov / MS: TB-14