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Court of Appeals
Division III
State of Washington

Case No. 328163

SC# 93291-3

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

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.

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.

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[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 13th day of June, 2016.

LAW OFFICES OF MELISSA A. HUELSMAN, P.S.

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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 Monday, June 13, 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
Joshua Schaer RCO Legal, P.S. 13555 SE 36th Street, Suite 300 Bellevue, WA 98006-1263 jschaer@rcolegal.com	☐ Legal Messenger ☒ Electronic Mail ☐ Federal Express ☐ Other: Regular U.S. Mail

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 Monday, June 13, 2016, at Seattle, Washington.

/s/ Tony Dondero
Tony Dondero, Paralegal

FILED
March 17, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

JAMES C. BLAIR, II,	)	No. 32816-3-III
	)	
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,	)	PUBLISHED OPINION
	)	
Respondents.	)	

LAWRENCE-BERREY, J. — James C. Blair appeals the trial court's summary judgment dismissal of his Consumer Protection Act (CPA), chapter 19.86 RCW, and misrepresentation claims against the respondents. Mr. Blair's claims arise out of a nonjudicial foreclosure proceeding initiated against his residential property. Mr. Blair predicates his CPA claims on asserted violations of the Deed of Trust Act (DTA), chapter 61.24 RCW. We hold that Northwest Trustee Services, Inc. (NWTS) violated the DTA when it relied on an ambiguous beneficiary declaration, but that Mr. Blair failed to

establish that NWTS's violation was causally linked to any injury he suffered. We additionally hold that Mr. Blair's misrepresentation claims lack a factual basis. We therefore affirm the trial court.

FACTS

In September 2008, James Blair refinanced his mortgage with Countrywide Bank, FSB (Countrywide). Mr. Blair signed a promissory note and a deed of trust that encumbered his Chelan County residence. The deed of trust identifies Land America as the original trustee, Countrywide as the lender, and Mortgage Electronic Registration Systems, Inc. (MERS) as the deed of trust beneficiary. The note likewise identifies Countrywide as the lender, and is endorsed in blank by Countrywide. In August 2010, Mr. Blair became delinquent on his mortgage payments. While Mr. Blair was seeking a loan modification and was more than $34,000 behind on monthly payments, Bank of America, N.A. (BoA) initiated nonjudicial foreclosure proceedings in spring 2012.

According to the Federal Home Loan Mortgage Corporation's (Freddie Mac's) website, it became the owner of Mr. Blair's "mortgage" on September 25, 2008. Clerk's Papers (CP) at 698. BoA has physically possessed Mr. Blair's note "for the benefit of Freddie Mac and in accordance with Freddie Mac guidelines" since that time. CP at 1142. Freddie Mac routinely enters into agreements where home loan promissory notes it

has bought are physically placed in the possession of a document custodian, who may also be the loan servicer. Under Freddie Mac's document custody procedures handbook, the primary duty of the document custodian is to "[h]old Notes and assignments in trust for the sole benefit of Freddie Mac." CP at 1046. Consequently, Freddie Mac and the document custodian "[d]o not enter into any understanding, agreement or relationship with any party to obtain, retain or claim any interest, including ownership or security, in Mortgages owned by Freddie Mac, unless specifically approved in writing, in advance." CP at 1046.

BoA serviced Mr. Blair's loan for Freddie Mac and was authorized "to take all actions necessary for the collection and enforcement of the Loan, including receiving and processing loan payments, communicating with [sic] regarding the loan, and, should such action be necessary, initiating foreclosure, consistent with the Note, Deed of Trust and Freddie Mac servicing guidelines." CP at 853.

After Mr. Blair became delinquent on his payments in August 2010, he applied for a loan modification through BoA in 2011 and early 2012. BoA rejected Mr. Blair's application on the asserted basis that he failed to provide the required documents. Prior to the initiation of the nonjudicial foreclosure proceedings, MERS assigned its interest in Mr. Blair's deed of trust to BoA. In a document dated October 18, 2011, BoA appointed

NWTS as the successor trustee of Mr. Blair's deed of trust. The document appointing NWTS as the successor trustee refers to BoA as the beneficiary, and was publicly recorded in March 2012.

In March 2012, NWTS issued a notice of default to Mr. Blair. The notice of default states "[t]he owner of this note is Federal Home Loan Mortgage Corporation (Freddie Mac)" and "[t]he loan servicer for this loan is Bank of America, N.A." CP at 925. In April 2012, NWTS issued and recorded a notice of trustee's sale, setting a foreclosure date in August 2012. Prior to issuing the notice of trustee's sale, NWTS received a beneficiary declaration from BoA that it relied on. The beneficiary declaration stated:

> [BoA] is the beneficiary (as defined by RCW §61.24.005(2)) and actual holder of the promissory note or other obligation secured by the deed of trust *or has requisite authority under the RCW 62A.3-301 to enforce said obligation for the above mentioned loan account.*

CP at 566 (emphasis added).

Shortly before the scheduled trustee's sale, Mr. Blair filed this lawsuit, naming NWTS, BoA, MERS, and Freddie Mac as defendants. In his complaint, Mr. Blair sought (1) a temporary restraining order (TRO) and preliminary injunction prohibiting the trustee's sale, (2) damages under the DTA against NWTS, (3) damages under the CPA against all defendants, and (4) damages resulting from intentional or negligent

misrepresentation against all defendants. The crux of Mr. Blair's complaint was that the defendants misrepresented BoA as the DTA beneficiary, and because BoA was not the DTA beneficiary, it had no lawful authority to appoint NWTS as the successor trustee, and therefore the entire nonjudicial foreclosure was unlawful.

Mr. Blair incurred attorney fees of $5,350.00 in enjoining the trustee's sale. Additionally, Mr. Blair estimated that he incurred costs totaling $890.35 associated with the TRO and preliminary injunction, including missing work at the title insurance company he owns and operates. According to Mr. Blair's counsel, she has brought at least 10 cases against NWTS in the last few years containing similar allegations (and is aware of other attorneys doing the same).

NWTS moved for summary judgment in November 2013, arguing that it complied with the DTA by relying on BoA's beneficiary declaration, and that BoA was the note holder and DTA beneficiary with the power to appoint the successor trustee. NWTS also argued that any damages Mr. Blair incurred were proximately caused by his failure to make his home loan payments, and that he cannot prove he suffered "actual prejudice" relating to the nonjudicial foreclosure. BoA, MERS, and Freddie Mac (represented by the same counsel) also moved for summary judgment in November 2013, similarly arguing that BoA was the DTA beneficiary with the authority to appoint NWTS as the successor

trustee. Mr. Blair opposed both summary judgment motions, arguing that the DTA only allows a beneficiary who is also the owner of the note to initiate nonjudicial foreclosure. During the summary judgment hearing, Mr. Blair argued that BoA's beneficiary declaration was also insufficient because BoA had not proved it was in physical possession of the note when the beneficiary declaration was prepared. Consequently, the trial court allowed BoA to submit a supplemental declaration. The supplemental declaration shows that BoA had physical possession of the note at the time the beneficiary declaration was prepared.

The trial court granted summary judgment to all of the defendants. In a memorandum decision, the trial court stated that BoA "actually held the note" based on the "supplemental declaration establishing that it held the note continuously beginning September 25, 2008 as the successor to BAC Home Loans." CP at 1148. The trial court further held that although BoA's beneficiary declaration to NWTS was "insufficient" on its face, BoA "supplemented the record to establish that it in fact held the requisite documents at all relevant times to the attempted foreclosure in this case." CP at 1149. Therefore, BoA "had the authority to appoint NWTS as a successor trustee." CP at 1149. As the trial court concluded that the DTA claim should be dismissed, it likewise dismissed the CPA claim as it was predicated on the alleged DTA violation. Similarly,

the intentional and negligent misrepresentation claims were dismissed as "plaintiff has failed to establish a material false representation by any of the defendants that plaintiff relied on and proximately caused him damage." CP at 1150. Mr. Blair timely appeals.

ANALYSIS

A. *Standard of review*

This court reviews an order granting summary judgment de novo. *Lyons v. U.S. Bank NA*, 181 Wn.2d 775, 783, 336 P.3d 1142 (2014). Under de novo review, this court engages in the same inquiry as the trial court, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Id.* (quoting *State v. Reid*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998)). "The object and function of summary judgment procedure is to avoid a useless trial." *Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140, 144, 500 P.2d 88 (1972).

Summary judgment is appropriate only if the record demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Judgment as a matter of law for summary judgment purposes is warranted "if reasonable people could reach one conclusion based on the evidence when viewing the facts in the light most favorable to the nonmoving party." *O.S.T. v. Regence BlueShield*, 181 Wn.2d 691, 703, 335 P.3d 416 (2014). "A material fact is one upon

which the outcome of the litigation depends in whole or in part." *Atherton Condo. Apt.-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). "A trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact." *Barber*, 81 Wn.2d at 144.

The initial burden is on the moving party to show there is no genuine issue of any material fact. CR 56(e). "The burden then shifts to the nonmoving party to set forth specific facts demonstrating a genuine issue for trial." *Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667, 673, 292 P.3d 128 (2012). "Mere allegations or conclusory statements of facts unsupported by evidence are not sufficient to establish a genuine issue." *Rucker v. NovaStar Mortg., Inc.*, 177 Wn. App. 1, 10, 311 P.3d 31 (2013). This court "may affirm summary judgment on any grounds supported by the record." *Blue Diamond Grp., Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 453, 266 P.3d 881 (2011).

B. *DTA overview*

"The DTA sets up a three party system for mortgages where an independent trustee acts as the impartial party between a lender and a borrower instead of the court." *Lyons*, 181 Wn.2d at 786. A statutory deed of trust is essentially an "equitable mortgage" as it conveys title to the trustee to secure the home loan. *Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 305, 308 P.3d 716 (2013). "When secured by a deed of trust that

grants the trustee the power of sale if the borrower defaults on repaying the underlying obligation, the trustee may usually foreclose the deed of trust and sell the property without judicial supervision." *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 93, 285 P.3d 34 (2012). The DTA strives to serve three main policies: (1) "'the nonjudicial foreclosure process should remain efficient and inexpensive,'" (2) "'the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure,'" and (3) "'the process should promote the stability of land titles.'" *Id.* at 94 (quoting *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985)).

When construing a statute, this court's "goal is to determine and effectuate legislative intent." *Swinomish Indian Tribal Cmty. v. Dep't of Ecology*, 178 Wn.2d 571, 581, 311 P.3d 6 (2013). First, this court must "give effect to the plain meaning of the language used as the embodiment of legislative intent" where possible. *Id.* Second, "when technical terms and terms of art are used," this court "give[s] these terms their technical meaning." *Id.* Importantly, 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 nonjudicial foreclosure sales.'" *Bain*, 175 Wn.2d at 93 (quoting *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007)).

C. *CPA liability*

Mr. Blair acknowledges that he is not entitled to bring direct claims for pre-foreclosure violations of the DTA. He therefore asserts that the respondents are liable under the CPA for DTA violations.

The CPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. "To succeed on a CPA claim, a plaintiff must establish (1) an unfair or deceptive act (2) in trade or commerce (3) that affects the public interest, (4) injury to the plaintiff in his or her business or property, and (5) a causal link between the unfair or deceptive act complained of and the injury suffered." *Trujillo v. Nw. Trustee Servs., Inc.*, 183 Wn.2d 820, 834-35, 355 P.3d 1100 (2015).

1. *Unfair or deceptive act*

Under the first element, "[w]hether an act is unfair or deceptive is a question of law." *Id.* at 835. Misrepresenting one's authority as the DTA beneficiary has the capacity to deceive and is therefore an unfair or deceptive act. *Bain*, 175 Wn.2d at 117. Here, Mr. Blair alleges that respondents misrepresented BoA's status as the DTA beneficiary.

In addition, a trustee's failure to follow the nonjudical foreclosure procedures of the DTA constitutes an unfair or deceptive act. *Lyons*, 181 Wn.2d at 787. Here, Mr. Blair alleges that NWTS failed to follow the DTA when it relied on an improper beneficiary declaration.

a. Status of BoA as beneficiary

The DTA beneficiary has the power to appoint a successor trustee and to instruct the trustee to initiate nonjudicial foreclosure. RCW 61.24.010(2); .020; .030. According to the DTA definitions, a "beneficiary" is "the holder of the instrument or document evidencing the obligations secured by the deed of trust." RCW 61.24.005(2).

Washington's version of the Uniform Commercial Code (UCC), Title 62A RCW, guides the interpretation of what constitutes a holder under the RCW 61.24.005(2) definition of "beneficiary." *Bain*, 175 Wn.2d at 104. Providing the commercial background, the *Bain* court stated:

> Traditionally, the "beneficiary" of a deed of trust is the lender who has loaned money to the homeowner . . . . Lenders, of course, have long been free to sell that secured debt, typically by selling the promissory note signed by the homeowner. [The DTA] recognizes that the beneficiary of a deed of trust at any one time might not be the original lender. The act gives subsequent holders of the debt the benefit of the act by defining "beneficiary" broadly . . . .

Id. at 88. When the note is sold, "the security instrument will follow the note, not the other way around." *Id.* at 104.

Based on "[a] plain reading of the statute," the *Bain* court concluded "that only the actual holder of the promissory note or other instrument evidencing the obligation may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property." *Id.* at 89. Specifically, the *Bain* court held that MERS could not be a DTA "beneficiary" as "a beneficiary must either *actually possess* the promissory note or be the payee." *Id.* at 104 (emphasis added). "*Bain* thus recognized that holding the note is essential to beneficiary status." *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 539, 359 P.3d 771 (2015).

Washington's UCC defines "holder" as "[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." RCW 62A.1-201(21)(A); *see* RCW 62A.3-201. If indorsed in blank, the note "becomes payable to bearer and may be negotiated by transfer of possession alone." RCW 62A.3-205(b).

In *Brown*, the Supreme Court of Washington recently held that the holder of the note under article 3 of the UCC was the DTA beneficiary, despite Freddie Mac owning

the beneficial interest of the note. *Brown*, 184 Wn.2d at 514-15. The *Brown* court provided background on Freddie Mac's involvement in the home loan industry:

> Freddie Mac does not lend to homebuyers. Instead, Freddie Mac purchases mortgage notes from the initial lenders. Often, Freddie Mac pools hundreds of these mortgage notes into a trust, and the trustee issues and sells securities to investors in various tranches of seniority. . . . Freddie Mac guarantees the borrowers' monthly payments on the underlying notes. If a borrower stops paying, Freddie Mac will step in and pay the investors. Freddie Mac does all of this to further its congressionally mandated mission to "provide ongoing assistance to the secondary market for residential mortgages" to thereby "promote access to mortgage credit throughout the Nation" and expand homeownership. 12 U.S.C. § 1716(3), (4).

Id. at 521. When Freddie Mac purchases a note, it authorizes the servicer to collect on the note, negotiate modifications, and foreclose on the note if necessary. *Id.* at 521-22. "Before the servicer institutes foreclosure proceedings, Freddie Mac provides the servicer with actual or constructive possession of the original note." *Id.* at 523.

The *Brown* court stated that the definition of "holder" in RCW 62A.1-201(21)(A) "does not turn on ownership," and "focuses on the party who possesses the note in order to protect the borrower from being sued fraudulently or by multiple parties on the same note." *Id.* at 525-26; *accord John Davis & Co. v. Cedar Glen # Four, Inc.*, 75 Wn.2d 214, 222-23, 450 P.2d 166 (1969) ("The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument. . . . It is not necessary for the holder to first establish that he has some beneficial interest in

the proceeds."). The court noted that "[the servicer] is the holder of [the] note because [the servicer] possesses the note and because the note, having been indorsed in blank, is payable to bearer." *Brown*, 184 Wn.2d at 535-36. Consequently, the *Brown* court concluded that the servicer in possession of the note indorsed in blank was the DTA beneficiary. *Id.* at 540.

Here, prior to the initiation of the nonjudicial foreclosure, BoA physically possessed Mr. Blair's note indorsed in blank. A note indorsed in blank is payable to its bearer. RCW 62A.3-205(b). BoA became the holder by virtue of physically possessing Mr. Blair's note indorsed in blank. RCW 62A.1-201(21)(A); *see* RCW 62A.3-201. For the first time at the summary judgment hearing, Mr. Blair attempted to dispute whether BoA physically possessed the note. However, "[m]ere allegations or conclusory statements of facts unsupported by evidence are not sufficient to establish a genuine issue." *Rucker*, 177 Wn. App. at 10. We therefore conclude that there is no issue of material fact disputing BoA's possession of Mr. Blair's note.

Mr. Blair argues that BoA is not the DTA beneficiary, and is only a document custodian, as it holds the note for Freddie Mac's benefit and follows Freddie Mac's guidelines. However, the Supreme Court of Washington in *Brown* rejected the argument that the DTA beneficiary must also be the owner of the note. *Brown*, 184 Wn.2d 509.

Moreover, BoA stated that it was authorized to take actions that a beneficiary would take, such as collecting on the note and initiating nonjudicial foreclosure. Because actual physical possession of the original note indorsed in blank conveys holder status under Washington law, Mr. Blair has not raised a genuine issue of fact regarding BoA's status as the DTA beneficiary. *See Bain*, 175 Wn.2d at 104; *see also Brown*, 184 Wn.2d 509. As a matter of law, because BoA was the beneficiary, the respondents did not misrepresent BoA's DTA beneficiary status, and Mr. Blair has failed to establish CPA liability against any of the respondents based on his first argument.

b. NWTS's reliance on a defective beneficiary declaration

Under the DTA, the trustee is tasked with conducting the nonjudicial foreclosure. RCW 61.24.040. However, "'a trustee is not merely an agent for the lender or the lender's successors.'" *Lyons*, 181 Wn.2d at 787 (quoting *Bain*, 175 Wn.2d at 93). Although not rising to the level of a fiduciary duty, "[t]he trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor." RCW 61.24.010(4). "'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.'" *Trujillo*, 183 Wn.2d at 831-32 (quoting *Lyons*, 181 Wn.2d at 787).

The requisites of a trustee's sale are set forth in RCW 61.24.030. Pertinent to this court's analysis, RCW 61.24.030(7)(a) provides:

> 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 . . . shall be sufficient proof as required under this subsection.

The trustee is entitled to rely on the beneficiary's declaration unless it has violated its duty of good faith. RCW 61.24.030(7)(b); *see Lyons*, 181 Wn.2d at 790 ("if there is an indication that the beneficiary declaration might be ineffective, a trustee should verify its veracity before initiating a trustee's sale to comply with its statutory duty").

The *Trujillo* court discussed the first sentence of RCW 61.24.030(7)(a). It reiterated that a trustee must "have proof that the beneficiary actually *owns* the note on which the trustee is foreclosing." *Trujillo*, 183 Wn.2d at 832. "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 834 n.10.

The *Trujillo* court also discussed the second sentence of RCW 61.24.030(7)(a). The *Trujillo* court held that its recent decision in *Lyons* was dispositive. *Trujillo*, 183 Wn.2d at 833. In *Lyons*, the beneficiary declaration stated, "'Wells Fargo Bank, NA, is

the actual holder of the promissory note . . . *or has requisite authority under RCW 62A.3-301 to enforce said [note].*'" *Lyons*, 181 Wn.2d at 780 (emphasis added). The *Lyons* court reasoned:

> On its face, [the beneficiary declaration] is ambiguous whether the declaration proves [the purported beneficiary] is the holder or whether [the purported beneficiary] is a nonholder in possession or person not in possession who is entitled to enforce the provision under RCW 62A.3–301. But [the trustee] can still prove that [the purported beneficiary] was the owner of the note in a way other than through the beneficiary declaration referenced in RCW 61.24.030(7)(a). Thus, there remains a material issue of fact as to whether [the purported beneficiary] was the owner prior to initiating the trustee's sale. [The trustee] will need to furnish that proof but may not just rely on this ambiguous declaration.

Id. at 791.

Here, BoA's beneficiary declaration stated that it "is the beneficiary (as defined by RCW §61.24.005(2)) and actual holder of the promissory note or other obligation secured by the deed of trust *or has requisite authority under the RCW 62A.3-301 to enforce said obligation for the above mentioned loan account.*" CP at 515 (emphasis added). As acknowledged by the trial court, and consistent with *Trujillo* and *Lyons*, NWTS cannot satisfy its DTA duties by relying on this ambiguous beneficiary declaration.

The trial court allowed BoA to file a supplemental declaration. The supplemental declaration stated that BoA had held the promissory note for all times relevant. Based on this, the trial court excused NWTS's violation. In doing so, the trial court erred.

The supplemental declaration came after the fact, and NWTS had to comply with RCW 61.24.030(7)(a)'s proof requirement "*before* recording, transmitting, or serving the notice of trustee's sale." *Trujillo*, 183 Wn.2d at 834 n.10. Because NWTS relied on the ambiguous beneficiary declaration prior to recording, transmitting, or serving the notice of trustee's sale, it violated RCW 61.24.030(7)(a).

2. *Injury to the plaintiff in his business or property*

NWTS argues that Mr. Blair cannot satisfy the injury element of his CPA claim. "Because the CPA addresses 'injuries' rather than 'damages,' quantifiable monetary loss is not required." *Frias v. Asset Foreclosure Servs. Inc.*, 181 Wn.2d 412, 431, 334 P.3d 529 (2014). "The injury element does not require that the homeowner lose their property in order to bring a claim under the CPA." *Lyons*, 181 Wn.2d at 786 n.4. Further an "injury" can be based on unlawful collection practices even where there is no dispute as to the validity of the underlying debt, and the element "can be met even where the injury alleged is both minimal and temporary." *Frias*, 181 Wn.2d at 431. Consequently, attorney fees and costs incurred in enjoining a wrongful trustee's sale may qualify as an "injury" under the CPA. *See Trujillo*, 183 Wn.2d at 837 ("investigation expenses and other costs associated with dispelling the uncertainty about who owns the note" are sufficient); *see also Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 62-63, 204 P.3d

885 (2009) (costs to consult an attorney, resulting from a deceptive business practice, establish injury). We conclude that Mr. Blair has satisfied the injury element of his CPA claim by virtue of his expenditure of attorney fees and costs associated with investigating NWTS's authority to initiate foreclosure proceedings.

3. *Causal link between the unfair or deceptive act complained of and the injury suffered*

NWTS argues that Mr. Blair cannot satisfy the causation element of his CPA claim. To satisfy the causation element, 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). This requires "a causal link between the misrepresentation and the plaintiff's injury." *Id.* at 83. The existence of a causal link is usually a factual question. *Id.*

Although causation generally is a question of fact, one must nevertheless aver facts that support a causal link. In one declaration, Mr. Blair states that he incurred attorney fees and costs investigating the improper designation of BoA as beneficiary and BoA's resulting improper appointment of NWTS as successor trustee. We have held that BoA was the beneficiary and, as the beneficiary, its appointment of NWTS as successor trustee was not improper. Mr. Blair does not aver that NWTS's violation of RCW

61.24.030(7)(a) caused him any injury. We are unable to locate any facts in the record that support a causal link between NWTS's violation of RCW 61.24.030(7)(a) and Mr. Blair's injury.

Moreover, NWTS's wrongful act was its violation of RCW 61.24.030(7)(a)'s requirement that it investigate BoA's status *prior to* recording, transmitting, or serving the notice of trustee's sale. Had NWTS complied with RCW 61.24.030(7)(a), it would have learned that BoA was the holder of the note indorsed in blank, and that institution of the nonjudicial foreclosure proceeding was arguably proper.[1] Consequently, NWTS's violation of RCW 61.24.030(7)(a) did not cause a wrongful initiation of foreclosure. Because the initiation of foreclosure was not wrongful, Mr. Blair has failed to establish a causal link between NWTS's wrongful act and his injury. We conclude that Mr. Blair has failed, as a matter of law, to establish the causal link element of his CPA claim against NWTS.

4. *Actual prejudice*

[1] "[A]cts or practices performed in good faith under an arguable interpretation of existing law do not constitute unfair conduct violative of the consumer protection law." *Perry v. Island Sav. & Loan Ass'n*, 101 Wn.2d 795, 810, 684 P.2d 1281 (1984); *accord Leingang v. Pierce Co. Med. Bureau, Inc.*, 131 Wn.2d 133, 155, 930 P.2d 288 (1997); *Courchaine v. Commonwealth Land Title Ins. Co.*, 174 Wn. App. 27, 49, 296 P.3d 913 (2012); RCW 19.86.920 ("It is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the

NWTS asks that we require borrowers who bring a CPA claim premised on the wrongful nonjudicial foreclosures to establish that the DTA violation actually prejudiced them. NWTS cites a number of unpublished cases from Washington federal courts to support its request. We see no need to adopt the requested rule. *See Halvorson v. Dahl*, 89 Wn.2d 673, 676, 574 P.2d 1190 (1978). We prefer to base our decision on the prima facie framework of a CPA claim. We note that the failure to establish a causal link between a wrongful act and a borrower's injury would have led to similar results in the federal cases.

D. *Intentional/negligent misrepresentation liability*

Although Mr. Blair's opening brief refers to his claim as "Intentional and/or Negligent Misrepresentation," he only provides argument relating to negligent misrepresentation. Appellant's Br. at 27. We therefore restrict our analysis to the issue briefed. *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998).

"Washington has adopted the RESTATEMENT (SECOND) OF TORTS with respect to the elements of negligent misrepresentation." *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 826, 959 P.2d 651 (1998). Each element must be proved by clear, cogent,

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development and preservation of business . . . .").

and convincing evidence. *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002). The *Restatement (Second) of Torts* describes negligent misrepresentation as

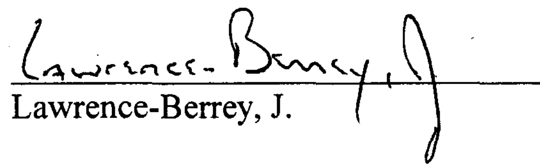
> [o]ne who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

RESTATEMENT (SECOND) OF TORTS § 552(1) (AM. LAW. INST. 1977), *quoted in Lawyers Title Ins. Corp.*, 147 Wn.2d at 545. In the context of alleged negligent misrepresentation based on information provided in nonjudicial foreclosure forms, the threshold concern is whether the forms contained false or misleading information. *Mann v. Household Fin. Corp. III*, 109 Wn. App. 387, 391-92, 35 P.3d 1186 (2001).

Here, Mr. Blair argues that "Defendant/Appellees supplied false information to Mr. Blair and the public at large when they indicated through publicly recorded documents that [BoA], not Freddie Mac, was the beneficiary of Mr. Blair's deed of trust/promissory note and had the authority to appoint NWTS as a foreclosure trustee." Appellant's Br. at 28. We have held that BoA, because it is the holder of the note indorsed in blank, is the DTA beneficiary. As the lawful beneficiary, it had the power to appoint NWTS to serve as successor trustee. Because Mr. Blair has failed to establish

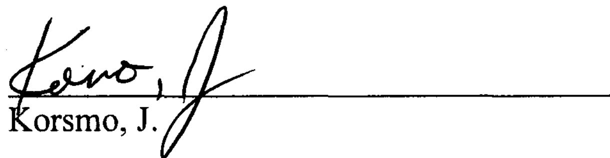
that any entity supplied false information, his negligent misrepresentation claim was properly dismissed on summary judgment.

Affirmed.

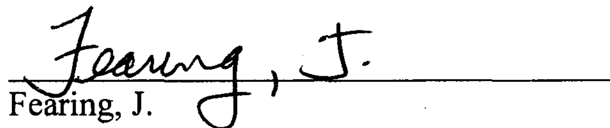


Lawrence-Berrey, J.

WE CONCUR:



Korsmo, J.



Fearing, J.

FILED
May 12, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

JAMES C. BLAIR, II,	)	**No. 32816-3-III**
	)	
Appellant,	)	
	)	
v.	)	**ORDER DENYING**
	)	**MOTION FOR**
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,	)	**RECONSIDERATION AND AMENDING OPINION**
	)	
Respondents.	)	

The court has considered appellant's motion and memorandum in support of reconsideration, the State of Washington's amicus memorandum, and the answers thereto, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's decision of March 17, 2016, is denied.

IT IS FURTHER ORDERED that the opinion filed on March 17, 2016, shall be amended as follows:

On pages 1 and 2, the sentence that begins and ends with "We hold . . . was causally linked to any injury he suffered" shall be deleted and the following shall be inserted in its place:

We hold that only Northwest Trustee Services, Inc. (NWTS) violated the DTA, and it did so when it relied on an ambiguous beneficiary declaration. But because Mr. Blair failed to establish NWTS's violation was causally linked to any injury he suffered, he may not recover against NWTS on his CPA claim.

In the first full paragraph on page 19 that begins "NWTS argues that Mr. Blair,"

the following material shall be deleted:

> This requires "a causal link between the misrepresentation and the plaintiff's injury." *Id.* at 83. The existence of a causal link is usually a factual question. *Id.*

The first full paragraph on page 20 that begins "Moreover, NWTS's wrongful act"

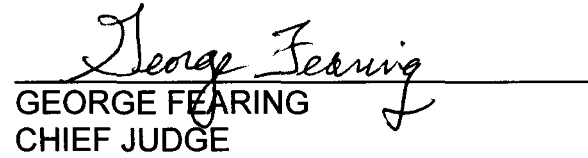
shall be deleted and the following shall be inserted in its place:

> 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.[1] 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.

[1] Requiring proof of causation does not impede the statutory goal of preventing wrongful foreclosures: If BoA was *not* a lawful beneficiary (by possessing the note endorsed in blank), its appointment of NWTS as successor trustee would have been invalid. And anyone instituting a foreclosure proceeding, other than a valid trustee, would be subject to CPA liability.

PANEL: Judges Lawrence-Berrey, Fearing, and Korsmo

FOR THE COURT:



GEORGE FEARING
CHIEF JUDGE

Log Number: P-012
Oral Argument Date: 12/10/2015

Court of Appeals Division III
State of Washington

Opinion Information Sheet

Docket Number: 32816-3
Title of Case: James C. Blair, II v. Northwest Trustee Services, et al
File Date: 03/17/2016

SOURCE OF APPEAL

Appeal from Chelan Superior Court
Docket No: 12-2-00919-2
Judgment or order under review
Date filed: 09/09/2014
Judge signing: Honorable Lesley A Allan

JUDGES

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