No. 93872-5

THE SUPREME COURT OF THE
STATE OF WASHINGTON

D. RYAN PATRICK and RHONDA PATRICK, husband and wife,

Appellants,

vs.

WELLS FARGO BANK, N.A., a national banking association; QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington corporation; QUALITY LOAN SERVICE CORPORATION, a California corporation; MCCARTHY & HOLTHUS, LLP, a California law firm; and HSBC BANK, USA, N.A. AS TRUSTEE FOR WELLS FARGO ASSET-BACKED PASS-THROUGH CERTIFICATES SERIES 2007-AR8, a National Bank as Trustee for a New York common law trust,

Respondents.

WELLS FARGO AND HSBC'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

STATE STATUTES AND RULES

I. IDENTITY OF RESPONDENTS

This Answer is submitted on behalf of Respondents Wells Fargo Bank, N.A. and HSBC BANK, USA, N.A. as trustee for Wells Fargo Asset-Backed Pass Through Certificates Series 2007-AR8 (collectively "Wells Fargo").

II. DECISION AT ISSUE

Wells Fargo joins in Petitioner's Citation to the Court of Appeals Opinion, included as Appendix A to the Petition for Review (the "Opinion").

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court should decline review where the Opinion is consistent with precedent.

2. Whether the Court should decline review where the Opinion poses no Constitutional questions.

4. Whether the Court should decline review where the public has little interest in further interpretation of a statute that has been applied uniformly since inception.

IV. STATEMENT OF THE CASE

A. The Patricks Borrow Money Secured by a Deed of Trust.

On July 10, 2007, the Patricks executed a promissory note to receive a $435,960 loan from Wells Fargo ("Note"). CP 856. To secure their payment obligations, they executed a deed of trust encumbering

property located at 4028 164th Place SE, Bothell, WA 98012 ("Property"). CP 840. Wells Fargo later assigned its interest in the loan to HSBC as trustee for a mortgage backed security fund. CP 843. HSBC thereafter became the holder of the Note. CP 434, 860, 2918. Wells Fargo remained the servicer. CP 838.

B. The Patricks Purposefully Default on Their Mortgage Payments.

Despite the 2008 market crash, the Patricks were employed and had no trouble making their monthly mortgage payments. CP 2, ¶¶ 4-7. Nevertheless, Ryan Patrick believed the Property had declined in value. In 2009, he contacted Wells Fargo to request consideration for a loan modification "to see what their options were." RP 25-26. It merits emphasis that the Patricks were fully capable of making their loan payments under the agreed upon terms. RP 25. They did not need a loan modification, they just wanted one.

In their declarations, the Patricks contend that an unnamed Wells Fargo representative informed them over the phone that "there were multiple loan modification programs available," but they could not qualify if they were current on their payments (i.e. not experiencing financial hardship). CP 3 at ¶¶ 7-8. They allege that this representative "advised" them to stop making payments in order to be considered. CP 3 at ¶¶ 7-8, 2779. In January 2009, the Patricks intentionally defaulted on their

payments. CP 3, 841, 2779. They then applied for and were reviewed for a loan modification.

On March 3, 2009, Wells Fargo notified the Patricks that the investor had declined to modify their loan. CP 2119. They applied again and, in September 2010, were offered a loan modification agreement that allowed them to recommence their payments at approximately the same amount as before (which they could afford), and tacked their missed payments onto the end of their loan without interest. They accepted the modification. CP 4-5, 30. The last page of the agreement is an affidavit of eligibility, in which the Patricks certified that "[they] did not intentionally or purposefully default on the Mortgage Loan in order to obtain a loan modification . . . ." CP 35.

In 2012, the Patricks purposefully defaulted on their loan payments a second time in the hopes of obtaining a modification with better terms. CP 5 ("I intentionally missed mortgage payments in order to obtain a true loan modification from Wells Fargo."). Curiously, in the contemporaneous applications they submitted to Wells Fargo they said they were experiencing financial hardship. CP 208-209. Moreover, they attested to the following under the penalty of perjury:

> I understand that ***if I have intentionally defaulted on my existing mortgage***, engaged in fraud or misrepresented any fact(s) in connection with this request for mortgage relief or if I do not provide all required documentation, ***the Servicer may cancel any mortgage relief granted and may pursue foreclosure on my home and/or pursue any available legal remedies***.

CP 68 at ¶ 4 (emphasis added). The Patricks' signatures appear directly below this key term.

The Patricks conceded that Wells Fargo never promised them a loan modification. RP 22-23. To the contrary, they were repeatedly told that they did not qualify. CP 461 (July 2012 denial letter); CP 470 (November 2012 denial letter); CP 466 (December 2012 denial letter); CP 463 (January 2013 denial letter); CP 473 (June 2013 denial letter); CP 480 (February 2014 denial letter); CP 2431 (April 2014 denial letter).

C. The Patricks Chose Not to Restrain the Trustee's Sale.

The Patricks failed to make a single payment on their loan after July 2012. On November 19, 2013, the trustee sent the Patricks a Notice of Default showing they remained in default for their July 2012 payment and all subsequent payments due thereafter. CP 885. On September 8, 2014, the trustee recorded a Notice of Trustee's Sale, setting the date of the nonjudicial foreclosure sale for January 9, 2015. CP 2938.

The Patricks filed suit on December 15, 2014, but never took any further steps to restrain the trustee's sale. At the trial court hearing, their counsel conceded that they ***chose*** not to invoke statutory procedures to restrain the sale, which would have required them to make monthly payments into the registry of the court. RP 29. Because they neither cured their default nor restrained the sale, the Property sold at public auction on February 13, 2015, more than two and a half years after the

Patricks stopped making payments. CP 2913. As of the date of this brief, the Patricks continue to reside in the Property.

D. The Trial Court Granted Summary Judgment and The Court of Appeals Properly Upheld the Judgment.

Appellants' contention that the trial court heard "cross motions for summary judgment" and "denied the Patrick's [sic] motion for summary judgment" is false. Petition at pg. 3. The Patricks never filed a summary judgment motion. Only Wells Fargo and the trustee filed summary judgment motions. The trial court granted both defense motions, and the Court of Appeals affirmed. CP 739-743.

V. ARGUMENT

A petition for review may only be accepted if the Court of Appeals' Opinion (1) conflicts with Supreme Court or other Court of Appeals precedents, (2) poses a significant constitutional question, or (3) involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b). Appellants' petition fails to satisfy any one of these criteria and should therefore be denied.

A. The Opinion Does Not Conflict with any Precedent.

1. The Court Applied the Plain Language of RCW 61.24.127.

Washington's Deeds of Trust Act ("DTA"), RCW 61.24 *et seq*., sets forth procedures that must be followed in order to obtain a pre-sale injunction to halt a nonjudicial foreclosure sale. RCW 61.24.130. "This statutory procedure is the 'only means by which a grantor may preclude a

sale once foreclosure has begun with receipt of the notice of sale and foreclosure."' *Brown v. Household Realty Corp*., 146 Wn. App. 157, 163 (Div. I 2008) (*quoting Cox v. Helenius*, 103 Wn.2d 383, 388 (1985)); *In re Marriage Kaseburg*, 126 Wn. App. 546, 588 (Div. II 2005) ("The Act provides the sole method to contest and enjoin a foreclosure sale under RCW 61.24.13 0(1).").

The failure to enjoin a nonjudicial foreclosure sale may waive a party's ability to contest the sale or the underlying debt obligation extinguished by the sale. *Frizzell v. Murray*, 179 Wn.2d 301, 307-309 (2013). DTA waiver occurs when a party (1) had notice of the right to enjoin the sale, (2) had actual knowledge of his defenses prior to the sale, and (3) failed to obtain a court order enjoining the sale. *Id.* at 309; *Plein v. Lackey*, 149 Wn.2d 214, 227 (2003).

RCW 61.24.127(1) is a safe harbor provision. It provides that a failure to enjoin a sale under the DTA may not be deemed a waiver of a claim for damages asserting:

(a) Common law fraud or misrepresentation;

(b) Violation of [the CPA];

(c) Failure of the trustee to materially comply with the provisions of [the DTA]; or;

(d) A violation of RCW 61.24.026.

The legislature's primary purpose in enacting RCW 61.24.127 was to soften the holding of *Brown*, 146 Wn. App. at 157, which held that a borrower waives all claims against a lender related to the loan, including

claims related to the origination and servicing of the loan, if the borrower fails to restrain the trustee's sale. *Frias v. Asset Foreclosure Servs*., 181 Wn.2d 412, 425 (2014).

In this case, the Court of Appeals was asked to decide whether claims for damages other than those expressly listed in § 127 could be waived. The Court applied long standing canons of statutory construction and correctly held that damages claims related to a nonjudicial foreclosure that are not listed in § 127 can be waived.

The import of the statutory list of "non-waived" claims in RCW 61.24.127 is clear: "an inference arises in law that all things or classes of things omitted from [the list] were intentionally omitted by the legislature under the maxim *expression unius est exclusion alterius*. . . ." *Ellensburg Cement Prods., Inc. v. Kittitas County*, 179 Wn.2d 737, 750 (2014) (*quoting Wash. Natural Gas Co. v. Public Util. Dist.*, 77 Wn.2d 94, 98 (1969)). As the Court of Appeals explained, if the legislature intended to save all damages claims from waiver, it would have simply stated that claims for damages are not waived. Indeed, a holding that no claim for damages can be waived would render the legislature's specific list in § 127 meaningless.

Prior to the Opinion, federal courts in Washington consistently and uniformly held that only those claims for damages that are specifically identified in RCW 61.24.127 are saved from waiver. *Coble v. SunTrust Mortg., Inc*., 2015 U.S. Dist. LEXIS 19434, at *10-12 (W.D. Wash. Feb. 18, 2015) (borrowers waive all but claims expressly listed in RCW

61.27.127(1)); *Bakhchinyan v. Countrywide Bank, N.A.*, 2014 U.S. Dist. LEXIS 46943, at *19 (W.D. Wash. Mar. 27, 2014) (negligence claim waived because it "is not included in the list of claims" enumerated in RCW 61.24.127(1)); *Ness v. Northwest Trustee Serv*s., 2012 U.S. Dist. LEXIS 189842, at *7 (W.D. Wash. Apr. 6, 2012) (breach of contract claim waived because it does "not fall within one of those exceptions" enumerated in RCW 61.24.127); *Campbell v. Indymac Mortg. Servs.*, 2011 U.S. Dist. LEXIS 100028, at *6 (W.D. Wash. Sept. 6, 2011) (dismissing complaint because it was "not asserting any of those claims" enumerated in RCW 61.24.127); *see also Merry v. Nw. Tr. Servs., Inc.*, 188 Wn. App. 174, 194 (Div. III 2015) ("This legislative preference for presale remedies is even more clear following the legislature's enacting in 2009 of a provision explicitly identifying claims for damages arising out of foreclosures of owner-occupied residential real property that are not waived by a failure to enjoin a foreclosure sale.").

The Court of Appeals' Opinion harmonizes prior case law holding that all claims for damages are waived with the clear language of the statute, saving only the listed claims from waiver. *See Brown*, 146 Wn. App. 157 (Div. I 2008) (all claims related to foreclosure and underlying default waived); *In re Marriage of Kaseburg*, 126 Wn. App. 546 (Div. II 2005) (same).

(a) The Opinion Does Not Conflict with Supreme Court Precedent.

The Opinion is not in conflict with any precedent because, as Appellants acknowledge, no Washington court had yet interpreted the interplay between RCW 61.24.127 and DTA waiver. This Court's decisions in *Frizzell*, *Schroeder*, and *Klem* are not at odds.[1] Indeed, this Court made clear in *Frizzell* that it was **not** deciding the interplay between DTA waiver and RCW 61.24.127. 179 Wn.2d 301, 310 (2013) ("We have not yet had occasion to discuss the interplay of the waiver provision in RCW 61.24.040(a)(f)(IX) with RCW 61.24.127(1)"). Instead, the Court remanded the *Frizzell* case to determine which "non-waived" claims remained in light of RCW 61.24.127. *Id*.

Nor is the Opinion in conflict with this Court's decisions in *Schroeder* and *Klem*. *Schroeder v. Excelsior Mgmt*., 177 Wn.2d 94 (2013), turned on whether the property at issue was agricultural. If so, the nonjudicial sale would have to be set aside because the DTA prohibited nonjudicial foreclosures of agricultural property. *Schroeder* held that parties cannot contractually waive the prohibition against nonjudicial foreclosure of agricultural property. *Id*. at 107. If the property was agricultural, the DTA did not apply and the defendant lacked authority to

[1] The Earth mourns each time Appellants file a brief. Their petition for review is no exception. In addition to the limited appendix documents called for under RAP 13.4, Appellants stuffed their appendix with hundreds and hundreds of irrelevant briefs from other cases, including all of the petition and answer briefs filed in *Frizzell, Schroeder* and *Klem.* Appellants should be admonished against such practices.

nonjudicially foreclose. *Schroeder* did not apply DTA waiver and contains no discussion of RCW 61.24.127.

Klem v. Wash. Mut. Bank, 176 Wn.2d 771, 783 (2013), approved the lower courts' ruling that it was inequitable to apply waiver against the guardianship estate of an elderly woman when circumstances made it impossible to obtain pre-sale injunctive relief. Specifically, Klem's guardian could not obtain pre-sale injunctive relief "due to the time frame, the need for court approval [i.e., from the guardianship court to even pursue a pre-sale injunction], and the lack of assets in the guardianship estate." *Id.* at 780, 783 n.7. *Klem* held that waiver was inequitable under those unique facts. It did not hold that all claims for damages survive waiver, and it contained no discussion of RCW 61.24.127.

(b) <u>The Opinion is Consistent With Other Court of Appeals' Decisions.</u>

Although no Washington court had the opportunity to directly address the interplay between DTA waiver and § 127 prior to this case (as noted above, the federal courts had uniformly interpreted the listed claims as a limit on what could survive wavier), several decisions in the past few months have applied an identical analysis. *See Conner v. Everhome Mortg. Co.*, 2016 Wn. App. LEXIS 2799 at * 11 (Div. I Nov. 21, 2016) ("We therefore find that under RCW 61.24.127(1), Conner waived all but her CPA claims and her good faith claim against the trustee."); *Manning v. MERS, Inc.*, 2016 Wn. App. LEXIS 2629 at * 9 (Div. I Oct. 31, 2016)

("The Mannings thus waived claims that RCW 61.24.127(1) does not preserve.).

Appellants' assertion that the Opinion conflicts with *Bavand v. OneWest Bank*, 176 Wn. App. 475 (Div. I 2013), lacks merit. In *Bavand*, the bank was not the beneficiary when it attempted to appoint a foreclosure trustee, so the trustee lacked authority to foreclose. *Id.* at 494. The case stands for the general truism that waiver cannot breathe life into a void trustee sale. *See also Rucker v. NovaStar Mortg., Inc.*, 177 Wn. App. 1, 14-15 (2013) (where bank was not beneficiary, it lacked authority to appoint successor trustee, and therefore trustee lacked authority to conduct sale). These cases say nothing about what claims survive where DTA waiver applies.

The Opinion applied the plain language of RCW 61.24.127 and harmonized it with the existing doctrine of DTA waiver. It is not in conflict with any precedent and therefore does not merit review by this Court.

2. Dismissal of Appellants' CPA Claim is Supported by Precedent.

The Court of Appeals aptly concluded that the record lacked sufficient evidence upon which a reasonable juror could conclude that any act by Wells Fargo was the "but for" cause of the Patricks' alleged injuries under the CPA. Pet. Appx. Ex. A, pg. 11-12. Appellants' contention that this conclusion is in conflict with Supreme Court and Court of Appeals case law lacks merit.

Appellants concede that it is "well established" that mere allegations and conclusory statements of facts, unsupported by evidence, are not sufficient to avoid summary judgment. Petition at pg. 14; *Guile v. Ballard Cmty. Hosp.,* 70 Wn. App. 18, 25 (Div. I 1993) ("Affidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment."). Routine application of this well-established rule is not adequate grounds for review in this Court.

It merits emphasis that the Patricks chose to default hoping for a better deal. There were no allegations that they were ever promised a loan modification, only a conclusory allegation that they were "advised" that they would need to be in default in order to be considered. They were considered. And, they were repeatedly denied. There was no evidence that the Patricks would not have applied for a loan modification "but for" Wells Fargo's alleged statement that they needed to have a financial hardship to qualify. Nor was there any evidence that the Patricks would not have defaulted "but for" that alleged call with a Wells Fargo representative. To the contrary, they attested in the applications that they were experiencing hardship. CP 208-209. The Court of Appeals properly concluded that their CPA claim failed as a matter of law.

B. The are No Significant Constitutional Issues.

1. The Well Established Application of Waiver Raises No Significant Constitutional Issues.

Appellants argue that the Court of Appeals' interpretation of RCW 61.24.127 is unconstitutional because it requires a plaintiff to invoke the DTA procedures to enjoin a sale in order to preserve non-listed claims for damages related to the foreclosure. They assert that the statutory process unconstitutionally limits access to justice and grants "special immunity" to beneficiaries and trustees. Petition at pgs. 12-13. The law does not support this argument.

The legislature and Washington Supreme Court established the law by which the Patricks waived their claims. Waiver is not a special immunity. It is a long standing common law doctrine that says if you sit on your rights for too long, you may lose them. It is no more unconstitutional than a statute of limitations. By choosing not to follow known DTA procedures, the Patricks voluntarily relinquished their rights to contest the sale and underlying default.

Access to courts is not a fundamental right. Thus, this Court has recognized that the proper standard of review for waiver is rational basis. *Nielsen v. Dep't of Licensing*, 177 Wn. App. 45, 56 (Div. I 2013). This Court has repeatedly recognized that the DTA furthers three legitimate purposes: (1) promoting efficient and inexpensive nonjudicial foreclosures, (2) allowing the parties adequate opportunity to prevent wrongful foreclosure, and (3) promising stability of land titles. *Frizzell*,

179 Wn.2d at 306-307; *Plein v. Lackey*, 149 Wn.2d 214, 225 (2003). Waiver is a well-established and rational means of promoting efficient and inexpensive nonjudicial foreclosures that allows the parties adequate opportunity to prevent wrongful foreclosure by simply restraining the sale. This case presents no significant constitutional questions that merit review.

2. Appellants' CPA Claim Poses No Significant Constitutional Questions.

As set forth in § V.A.2, *infra*, the Court of Appeals concluded that the Patricks lacked any evidence beyond conclusory and self-serving statements that Wells Fargo caused their damages. The Court of Appeals did not weigh issues of credibility—it merely ruled that the Patricks failed to raise a genuine issue of material fact. Appellants utterly fail to show how this conclusion raises a "significant" constitutional question as required for review in this Court.

C. The Public Has Little Interest in Another Affirmation of DTA Waiver.

Appellants make general assertions about the societal impact of foreclosure, but fail to identify any specific reasons why the public would have a substantial interest in this particular case. The fact that it arose out of a foreclosure does not render it of such substantial public interest as to merit review by the state's highest court. If that were the standard, this Court would be busy indeed.

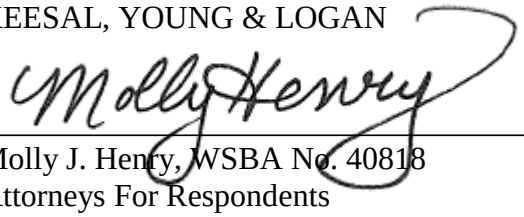
The Opinion was little more than a straight-forward application of DTA waiver as it relates to RCW 61.24.127. It is in line with every federal court who has addressed the issue, and in line with this Court and other Court of Appeal's precedent. There is no substantial public interest meriting review.

VI. CONCLUSION

Appellants failed to show any grounds for review under RAP 13.4(b). Accordingly, Wells Fargo respectfully requests that the Court decline review.

DATED this 21st day of December, 2016.

KEESAL, YOUNG & LOGAN



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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that, on the date given below, she caused to be served a copy of the foregoing WELLS FARGO AND HSBC'S ANSWER TO PETITION FOR REVIEW upon the following person via Email and First Class U.S. mail, postage prepaid:

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DATED this 21st day of December, 2016, at Seattle, Washington.

Hillary Poole

KYL4815-4448-8253.1