Supreme Court No. 940932

Court of Appeals No. 74264-7-I

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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**ROBERT AND DORIS CUMMINGS,** husband and wife,

Petitioners,

vs.

**NORTHWEST TRUSTEE SERVICES OF WASHINGTON; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AND DEUTSCHE BANK NATIONAL TRUST CO., AS TRUSTEE IN TRUST FOR THE REGISTERED CERTIFICATE HOLDERS OF FIRST FRANKLIN MORTGAGE LOAN TRUST, ASSET-BACKED SECURITIES SERIES 2006-FF8**

Respondents.

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# APPELLANTS CUMMINGS' PETITION FOR REVIEW

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## CASE LAW



## MISCELLANEOUS AUTHORITY

## I IDENTITY OF PETITIONER

Robert and Doris Cummings ask this court to accept review of the court of appeals decision terminating review designated in Part II of this petition.

## II COURT OF APPEALS DECISION

Petitioners request this court review the Unpublished Opinion ("Opinion") issued and filed by the Court of Appeals on November 28, 2016, and the order denying Petitioners' motion for reconsideration ("Order") issued and filed on January 3, 2017. A copy of the Opinion is in the Appendix at pages A-1 through A-15. A copy of the Order is in the Appendix at page A-16.

## III ISSUES PRESENTED FOR REVIEW

1. Whether this Court's decision in *Brown v. Dept. of Commerce,* 184 Wn.2d 509 (2015) irreconcilably and unconstitutionally conflicts with RCW 62A.3-310 and therefore must be overturned.

2. Whether this Court's decision in Brown irreconcilably and unconstitutionally conflicts with RCW 62A.9A-203 and therefore must be overturned.

3. Whether this Court's decision in Brown irreconcilably and unconstitutionally conflicts with provisions of the Washington Deeds of Trust Act ("DTA") and therefore must be overturned.

## IV STATEMENT OF THE CASE

On April 12, 2006, First Franklin, a division of National City Bank of Indiana ("FF"), originated a mortgage loan on behalf of Petitioner. The loan consisted of a note ("Note") and deed of trust ("DOT"), both executed on or about April 12, 2006. *CP 408.* The Note and DOT named FF the lender, and the DOT named First American Title the trustee and Mortgage Electronic Registration Systems, Inc. ("MERS") the beneficiary. *Id.* FF recorded the DOT in the Snohomish County Auditor's Office on April 28, 2006. *Id.*

FF, the only entity that has ever acknowledged MERS as its *nominee*, went out of business in 2007. Accordingly, MERS could not have been acting as nominee for FF when MERS attempted to assign the Note and DOT to the Deutsche Bank National Trust Co., as Trustee for the Registered Certificate holders of First Franklin Mortgage Loan Trust, Asset-Backed Securities Series 2006-FF8 ("Trust") on October 6, 2011.

On July 26, 2009, several amendments to the Washington Deeds of Trust Act ("DTA") became law. One of those amendments -- RCW 61.24.030(7)(a) -- requires the *trustee* to have proof the *beneficiary* is the *owner* of the note secured by the DOT before recording, transmitting, or serving a notice of trustee's sale ("NOTS");[1] and authorizes the *trustee* to

[1] In *Brown*, this court, making no attempt to harmonize the "Beneficiary" language in RCW 61.24.005(2) with the beneficiary language in RCW 61.24.030(7)(a), decided the language in the two subparts could not be reconciled. After making that decision, the court analyzed the two subparts separately to determine which entity, the holder or owner, had the right to foreclose. After rigorous, but incorrect, analysis, the court decided that the *ownership* language in RCW 61.24.030(7)(a) and several other sections of the DTA should be ignored when determining who is entitled to foreclose. This

accept a declaration that contains language approved in .030(7)(a) from a beneficiary as *proof of ownership.*[2]

On October 6, 2011, MERS *attempted* to assign Plaintiffs' DOT (without the Note) to the Trust. *CP 410.*

Approximately September 23, 2014, Select Portfolio Servicing, LLP ("SPS"), claiming to be the attorney-in-fact for the Trust, *attempted* to appoint NWTS the successor trustee.[3] *CP 418.* Neither SPS nor NWTS ever provided proof SPS was the Trust's authorized agent. There is no evidence in the trial court record NWTS was ever lawfully appointed the successor trustee.

On August 27, 2014 and again on September 5, 2014, SPS allegedly delivered *beneficiary declarations* to NWTS. *CP 319, 321.* Also on September 16, 2014, SPS attempted to appoint NWTS the successor trustee. The *attempted appointment* was recorded on September 23, 2014.

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decision was an abdication of the court's responsibility to harmonize language in a statutory scheme if it is possible to do so. *King County v. Central Puget Sound Growth Management Hearings Board,* 142 Wn.2d 543, 560 (2000). The language is easily harmonized if one understands the laws of this state, and the DOT itself, require one to be both the ***holder and owner*** of the note to foreclose.

[2] The most important phrase in the second sentence of .030(7)(a) is the prepositional phrase, "proof as required under this subsection." The noun "proof" and its prepositional modifier "as required under this subsection," considered together, are an unmistakable reference to the "*proof-of-ownership-of-the-note*" requirement in the first sentence of (7)(a). Consequently, the two sentences of (7)(a) are in ***harmony*** with one another, not conflict. The focus of both sentences is on obtaining "proof" the beneficiary is the *owner* of the note. One can arrive at a different conclusion only by ignoring the prepositional phrase – a grammatical and legal-interpretation misstep.

[3] Even if SPS was Deutsche's agent when SPS attempted to appoint NWTS the successor trustee (there is no evidence SPS was acting as Deutsche's agent), RCW 61.24.010(2) does not authorize an agent to appoint a successor trustee; even if Deutsche was a lawful beneficiary, which it was not.

On September 24, 2014, NWTS, acting as the purported successor trustee, issued a notice of default ("NOD") to Plaintiffs. *CP 325 – 327.* On November 11, 2014, NWTS recorded a Notice of Trustee's Sale ("NOTS") that set a sale date of March 13, 2015.*CP 329 – 332.*

Several days before the sale, Plaintiffs sent NWTS a letter. The letter explained that the sale was being conducted in violation of numerous provisions of the DTA and requested that NWTS conduct a cursory investigation to determine whether allegations in the letter were valid. Plaintiffs received no response to the letter, and Plaintiffs' home was sold on March 13, 2015. This lawsuit followed.

On or about March 27, 2015, NWTS filed a Motion to Dismiss ("Motion") Plaintiffs' lawsuit against NWTS. *CP 272 – 288.* That motion was heard by this Court on April 16, 2015. *CP 270 – 271.* After the hearing, the Court granted Defendant Trust's motion to dismiss. *Id.* Several months later the remaining Defendants jointly moved for dismissal. There motion was granted on October 27, 2015. *CP 9 – 10.*

The appeal that is the subject of this Petition followed.

After briefing was completed and the court heard oral arguments, the appellate court affirmed the lower court rulings on November 28, 2016.

This Petition was timely filed.

## V ARGUMENT

### A. Acceptance of Review authorized by RAP 13.4(b)(3) and (4).

### 1. Significant question of law under Constitution.

The appellate court's ruling is founded on *Brown v. Dept. of Commerce,* 184 Wn.2d 509 (2015). That decision irreconcilably conflicts with numerous legislative enactments – RCW 61.24.005(2), RCW 61.24.030(3), and (7)(a), RCW 61.24.040(1)(f), RCW 61.24.080(2), RCW 61.24.100(3)(a)(i) (rents, insurance proceeds, or condemnation award belong to the beneficiary as defined under the DTA). In *Brown,* the person who would have been entitled to all those sums was Freddie Mac, not M & T Bank),[4] RCW 61.24.163(5)(c), RCW 62A.3-310(b)(3) and RCW 62A.9A-203(a), (b), (g) – in an area (regulation of commercial activity in Washington) in which Article II, Section 1 of the Washington Constitution grants the legislature plenary authority, subject to constitutional limitations. The *Brown* decision therefore is potentially violates the separation of powers doctrine. Because the *Brown* decision affects every foreclosure that occurs in the state, and will continue to do so if the decision is in force, the constitutional conflict is worthy of this Court's deliberation.

### 2. Issue of substantial public interest.

The *Brown* decision affects the way every foreclosure proceeding in Washington is conducted. Therefore, every foreclosure proceeding in Washington will be affected whether the decision is repealed or allowed to remain in force. This case is of substantial public interest.

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[4] This court says so in *Brown. Brown,* 184 Wn.2d at 524.

**B. *Security follows note doctrine* is basis of appellate court decision.**

The appellate court states:

> "First, this court and the supreme court have both held that the holder of a promissory note is the person entitled to enforce that obligation. (fn. Omitted) Ownership of the note is irrelevant to the power to enforce that note. (fn. Omitted) Second, the holder of the note has the power to enforce the deed of trust because the deed of trust follows the note by operation of law. In Bain v. Metropolitan Mortg. Grp., Inc., the supreme court explained that the Deeds of Trust Act "contemplates that the security instrument will follow the note, not the other way around." This statement is consistent with well-settled law.
> "These two principles demonstrate that the holder of the note is entitled to enforce both it and the deed of trust securing it. Here, it is undisputed that Deutsche Bank had possession of the note, which was indorsed in blank, at all times material to this matter. Accordingly, it is the holder of the note, which gives it the power to enforce it.
> The deed of trust follows the note. Accordingly, Deutsche Bank also has the power to enforce the deed of trust, by operation of law.
> Because Deutsche Bank has possession of both the note and deed of trust with the power to enforce both, it has established a prima facie case that it is entitled to summary judgment. The burden shifts to the Cummings to show the existence of a genuine issue of material fact.

*Opinion,* at 7-8.

The appellate court's decision is based on one well known, widely-accepted legal principle (the holder of the note is entitled to enforce the note) and one recently created, historically non-existent legal concept (the security follows the *right to enforce* the note). Since the appellate court's decision is based on the applicability of both the well-accepted legal principle ***and*** the historically non-existent legal concept, the appellate

court's holding is incorrect, notwithstanding this court's decisions in *Brown* and *Bain*.

### C. Transfer of right to enforce note does not transfer note or security for note.

#### 1. Security follows note.

As amply demonstrated by Washington court foreclosure decisions, Washington courts understand neither the nature of a mortgage loan transaction nor the true meaning of the *security follows the note* doctrine. The doctrine means precisely what it says. The security follows a *transfer of the note*. A transfer of the *right to enforce a note is not* a transfer of *the note*. It is a transfer of *one of the rights associated with the note*.

In or out of the hands of a note owner, a note is a *right to payment*. In the hands of a note holder, a note is a *right to enforce a right to payment*. As the doctrine indicates, the security follows the note (the right to payment), *a right that belongs to the owner of the note*. The centuries-old security follows the note doctrine ***does not state*** (and ***does not mean***) the security follows the *right to enforce* the note (the *right to enforce* the right to payment). Accordingly, transfer of PETE status, absent a simultaneous transfer of ownership of the note, does not transfer the right to enforce the DOT.

The security follows a transfer of the *note itself* has been the meaning of the *security follows the note* doctrine all over the United States for centuries. *Gilmore v. Westerman,* 13 Wash. 390, 395, 43 P. 345

(1896); *Sepp v. McCann,* 47 Minn. 364, 366 (1891) (It is a general rule that all securities for a debt[5] pass as incidents to it, upon an *assignment*[6] of it, unless the contrary intention appear); *Peters v. St. Louis & I.M.R. Co.,* 24 Mo. 586 (1857); *Bartlett Estate Co. v. Fairhaven Land Co.,* 49 Wash. 58, 63, 94 P. 900 (1908); *Brand v. Smith,* 99 Mich. 395, 401, 58 N.W. 363 (1894).

**2. *Brown* conflicts with Article II, Section 1.**

RCW 62A.9A-203(a), (b), (g), a statute constitutionally-enacted by the Washington legislature, enshrines the centuries-old version of the security follows the note doctrine. *See Official Comment 9 to UCC § 9-203.* Properly read, RCW 62A.9A-203 indicates the security follows a transfer of *ownership* of the note and of the underlying mortgage debt for which the note is taken as payment.[7] Thus, if Article 9 applies to this case, and it does, Respondent is not entitled to foreclose because it neither

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[5] Notice, the security passes with the "***debt***." The note is not the debt. Just as a personal check is the mutually agreed upon method of paying for groceries purchased in a grocery store transaction, a promissory note is the method of paying for money borrowed – money purchased -- in a mortgage loan transaction. Under the UCC, there is no difference in the way the two transactions are treated. *See RCW 62A.3-310(b)(1), (2), and (3).*

[6] *Black's Law Dictionary* defines the word "*Assignment*" as "A transfer or making over to another of the whole of any property, real or personal . . . . The transfer by a party to all of its right to some kind of property . . . ." *Black's Law Dictionary* (5th ed. 1979, at 109. In the absence of the transfer of ownership of a note, transfer of the right to enforce the note is not the transfer of all of the rights in the note.

[7] An entity that holds the note, but does not own the note it holds, has zero interest in the underlying mortgage debt. The DOT exists to secure repayment of the underlying mortgage debt in the event the borrower fails to honor the covenants and agreements of the note. This court's decision in Brown gave an entity (M & T Bank) that had zero interest in the underlying mortgage debt, and that was not a party or an intended third-party beneficiary to the DOT contract, the right to enforce the DOT contract, while simultaneously refusing to give that right to an entity that owned the underlying mortgage debt, and that was a party to the DOT contract. That decision stands 1000 years of western jurisprudence on its head and cannot be right.

alleged nor proved it was the *owner* of the beneficial interest in the note or in the underlying mortgage debt for which the note was taken as payment.

The *Brown* decision conflicts with a statutory pronouncement of the Washington legislature in an area – regulation of commercial activity in Washington – in which the Washington Constitution gives plenary authority to the legislature. *Washington Constitution, Article II, Section 1. Brown* must yield.

### 3. DOT requires beneficiary of DOT to be owner and holder of note.

In exchange for the money lent, *every* Lender acquires five essential interests at the close of *every* mortgage loan transaction.

First, every DOT, including the DOT under consideration in this case, secures only the Lender, the Lender's Successor, or the Lender's Assignee. A Successor (*Black's Law Dictionary* ([5th ed. 1979], at 1283) or an Assignee (*Id.*, at 109) acquires *all the interests of its predecessor in interest (the Lender).*[8]

If there are common interests all lenders acquire at the close of all mortgage loan transactions, and if those common interests can be identified, then figuring out who is the beneficiary of the DOT becomes a very simple task. Simply compare the interests the foreclosing entity possesses against the interests all lenders acquire at the close of all mortgage loan transactions. If the foreclosing entity possesses *all* the

[8] The Trust may or may not have all the interests of its predecessor, but it did not allege or prove it had the ownership interest. Accordingly, the Trust did not allege a claim upon which relief could be granted, and did not prove its case.

interests *all* lenders acquire at the close of *all* mortgage loan transactions, then the foreclosing entity is legally entitled to foreclose. If, on the other hand, the foreclosing entity possesses less than *all* the interests *all* lenders acquire at the close of *all* mortgage loan transactions, then the foreclosing entity is not legally entitled to foreclose. It really is that simple.

Not one of the Washington cases which opines that the holder of a note, regardless of ownership of the note, is entitled to foreclose, including *Brown*, makes any effort to determine whether there are essential interests *all* lenders acquire at the close of *all* mortgage loan transactions. There are.

### 4. Five Interests acquired by *Every* Lender at the Close of *Every* Mortgage Loan Transaction.

At the close of *every* mortgage loan transaction the Lender acquires five essential interests. First, the mortgage debt created by the Borrower's acceptance of the Loan becomes the Lender's property. Consequently, the first interest that *every* Lender acquires at the close of *every* mortgage loan transaction is *ownership of a debt*.

Second, the Borrower issues a mortgage note in payment of the mortgage debt[9] created by the Borrower's acceptance of the loan.

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[9] This is another issue about which the courts are confused. The wealth of *security-follows-the-transfer-of-the-right-to-enforce-the-note* cases unanimously suggest, or explicitly state, that the note is the debt obligation secured by the DOT. This belief is nonsensical! The note is not the debt secured by the DOT. In fact, it is the opposite of the debt secured by the DOT. The note is the mutually agreed upon method of *paying the mortgage debt. See RCW 62A.3-310(b) and (b)(2).*

The performance of the covenants and agreements of the note is secured as the method of paying the underlying mortgage debt. However, the only *debt* that is secured by the DOT is the underlying mortgage debt. The failure to distinguish between the obligation to pay the note (the mutually agreed upon method of paying the underlying

Possession of that mortgage note is transferred to the Lender when the loan closes. Hence, in addition to acquiring ownership of the underlying mortgage debt, the Lender acquires *ownership* of the mortgage note that is taken in payment of the underlying mortgage debt at the close of *every* mortgage loan transaction. Ownership of the mortgage note is the second interest that *every* Lender acquires at the close of *every* mortgage loan transaction.

Third, the Lender takes possession of the note at the close of *every* mortgage loan transaction. The note that the Lender takes possession of is made payable to the Lender. Therefore, at the close of *every* mortgage loan transaction, the Lender takes possession of a mortgage note that is made payable to an identified person that is the Lender. Consequently, pursuant to RCW 62A.1-201(b)(21)(A), at the close of *every* mortgage loan transaction, the Lender becomes the *holder of the note. Holder of the note* status is the third interest that *every* Lender acquires at the close of *every* mortgage loan transaction.

Finally, as *holder of the note,* pursuant to RCW 62A.3-301, the Lender is *the person entitled to enforce* the note -- the PETE. PETE status is the fourth essential interest that *every* Lender acquires at the close of *every* mortgage loan transaction.

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mortgage debt) and the separate obligation to pay the underlying mortgage debt for which the note is taken as payment is a significant contributor to the glaringly obvious confusion this Court exhibited in *Brown v. Dept. of Commerce,* 184 Wn.2d 509 (2015).

The Fifth essential interest is acquired as the result of the Lender's acquisition of the other four. The fifth essential interest *every* Lender acquires at the close of *every* mortgage loan transaction is the designation as *Beneficiary of the DOT.*

A Successor or an Assignee always *acquires* the *entire interest* of its predecessor in interest in the thing transferred. And a DOT, including the DOT under consideration in this case, *never* secures anyone other than a Lender, a Successor Lender, or an Assignee Lender. *See TRANSFER OF RIGHT IN THE PROPERTY Section and* ¶ 13 of the DOT. Therefore, the person secured by the DOT (i.e., the Beneficiary of the DOT) will *always* possess the first four interests identified in the preceding paragraphs of this Section 4. It is the possession of these four interests that makes one the beneficiary of the DOT.

The revelations providing in the preceding paragraphs of this Section 4 are so important to the correct analysis of a foreclosure case that they deserve to be emphasized. So, I will repeat them. Since both a Successor and an Assignee always *acquires* the *entire interest* of its predecessor in interest in the thing transferred, and a DOT *never* secures anyone other than a Lender, a Successor Lender, or an Assignee Lender, the person secured by the DOT (i.e., the Beneficiary of the DOT), whether it be the Lender, the Successor Lender, or the Assignee Lender, will *always* possess the four interests identified in the preceding paragraphs of this Section 4.

Given the above analysis, it should now be apparent that the *person entitled to foreclose* will always be the person who *both holds and owns the note*, and who *owns the underlying mortgage debt for which the note is taken as payment*. A person who merely holds the note lacks two of the interests the person is required to possess to be the Beneficiary of the DOT: (1) *ownership* of the note; and (2) *ownership* of the underlying mortgage debt for which the note is taken as payment. *See RCW 62A.3-310(b) and (b)(2), and Official Comment 3 to UCC § 3-310.*

Paragraph 22 of the DOT requires the *Lender* (or the *Successor* or *Assignee Lender*) to give notice of default to the borrower in the event of borrower's breach of any covenants or agreements in the DOT. If the default is not cured per the requirements of paragraph 22, the *Lender* is authorized to invoke the power of sale. Under paragraph 22, only the *Lender* – the owner of the debt is authorized to declare a default. The problem is under RCW 62A.3-604, only the PETE is legally authorized to declare a note in default. Thus, when the Lender voluntarily separates PETE status from ownership of the note (and of the debt the note was given in payment of), the right to foreclose does not survive the separation. *See Official Comment 3 to UCC, § 3-310.*

**D. RCW 62A.9A-203 conflicts with Article II, Section 1.**

RCW 62A.9A-203(a) states a security interest (ownership interest (See RCW 62A.1-201[b][35]) attaches to collateral (a mortgage note [RCW 62A.9A-102(a)(12)(B)]) when the ownership interest in the

mortgage note becomes enforceable against the debtor (the seller of the mortgage note [RCW 62A.9A-102(a)(28)(B)]).

Further, RCW 62A.9A-203(b) states that a security interest (ownership interest [See RCW 62A.1-201(b)(35)]) in collateral (a mortgage note [RCW 62A.9A-102(a)(12)(B)]) becomes enforceable against the world the instant three conditions have been met: (1) "value" has been given for the note (RCW 62A.9A-203[b][1]); (2) the seller has rights in the note or the power to transfer rights in the note to a purchaser (RCW 62A.9A-203[b][2]); and (3) either (a) the debtor (the seller of the note [RCW 62A.9A-102(a)(28)(B)]) has signed a security agreement (a security agreement is an agreement that creates or provides for a security interest (RCW 62A.9A-102[a][74]) that provides a description of the note (RCW 62A.9A-203[b][3][A]), or (b) pursuant to the terms of the debtor's security agreement, is possessed by someone other than the secured party (the purchaser of the note [RCW 62A.9A-102(a)(73)(D)]) under RCW 62A.9A-313 solely for the purchaser's benefit (RCW 62A.9A-203[b][3][B]). *See RCW 62A.9A-203(b)(3)(A) and (B) and RCW 62A.9A-313.*

RCW 62A.9A-203(g) -- and this is very important because courts have been completely misinformed about the true meaning of the "security follows the note doctrine -- is the codification of the common law "security follows the note" doctrine. *See Official Comment 9 to UCC §9-203.* Under 9A-203(g), the DOT is automatically transferred if, *and only*

*if*, the Note is transferred pursuant to 9A-203(a) and (b). That is, the DOT follows a transfer of *ownership of the Note*.

Under 9A-203(a), (b), and (g), a transfer of holder status alone carries the right to enforce the note, but not the right to enforce the DOT. The DOT secures repayment of the underlying mortgage, not payment of the note.[10] Consequently, the *Brown* decision and RCW 62A.9A-203, a constitutional enactment of the Washington legislature, are in irreconcilable conflict with one another, creating an Article II, Section 1 constitutional conflict.

The Washington Legislature is the top legislative authority in Washington. Within constitutional limits, that authority is absolute. In legislative enactments in areas that are traditional areas of legislative competence, the Washington Legislature's authority exceeds the authority of every court in the state, including the Washington Supreme Court. *See generally, State ex rel. Robinson v. Fluent*, 30 Wn.2d 194, 220, 191 P.2d 241, 255 (1948). Regulation of commercial activity in Washington is traditionally a prerogative of the Washington Legislature. Hence, Brown must yield.

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[10] Under the DOT, failure to pay the note is a default event (See *DOT, TRANSFER OF RIGHTS IN THE PROPERTY Section* at 3) that can trigger the ***Lender's right*** to invoke the power to sell the property to obtain foreclosure proceeds. *See DOT, ¶ 22.* Under the DTA, a default declared by anyone other than the Lender ***is not*** a default that makes operative the power to sell the property. *RCW 61.24.030(3).* Therefore, a default declared by a note holder that does not own the note it holds – and therefore is not the Lender – is not a declared default that makes operative the power to sell the property. *Id.* Pursuant to RCW 61.24.030(3), the trustee in *Brown* violated the DTA by conducting a foreclosure proceeding based on a declaration of default from M & T Bank.

## E. Brown irreconcilably conflicts with RCW 62A.3-310 and therefore potentially violates the Separation of Powers Doctrine.

Under RCW 62A.3-310(b)(3), if the note is dishonored *and* the obligee of the obligation for which the note was taken as payment (the owner of the mortgage debt and note) is the person entitled to enforce the note (the holder of the note), then the obligee of the obligation (the owner of the mortgage debt and note) may enforce *either* the obligation to pay the note *or* the obligation to pay the underlying mortgage debt.[11] If, on the other hand, the owner of the underlying mortgage debt and note ***is not*** the holder of the note, which is the situation presented by the facts of this case, then the owner of the note and underlying mortgage debt ***may not*** enforce the note ***or*** the underlying mortgage debt obligation.[12] This result obtains because the *Lender* is unable to declare the note dishonored because only the PETE can declare the note dishonored. And the Lender may not enforce the underlying mortgage debt because the obligation to pay the underlying mortgage debt is represented by the note.[13] until the

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[11] Under the terms of the DOT (the trust-governing agreement between the homeowner and Lender), the obligation to pay the underlying mortgage debt, not the obligation to pay the note, is enforced by selling the homeowner's property at public auction. For this reason, as the court acknowledges in *Brown* (*Brown,* 184 Wn.2d at 523), the foreclosure proceeds are paid to the owner of the mortgage debt and note, not the holder of the note. *See RCW 61.24.080(2).* The court's failures to understand: (1) that the borrower assumes two obligations, not one, at the close of a mortgage loan transaction, and (2) which obligation the power to sell the property is inserted in the DOT to secure – the DOT secures repayment of the mortgage debt per the covenants and agreements of the note – is another significant contributing factor to the court's failure to understand that one must be both the ***holder and owner of the note*** to be entitled to foreclose.

[12] The *Brown* decision makes the noteholder that does not own the note it holds the only entity lawfully entitled to enforce the underlying mortgage debt. RCW 62A.3-310 and the *Brown* decision irreconcilably conflict on this point.

[13] Remember, at the close of the mortgage loan transaction the Lender agrees to accept payment of the note per its terms as the method of paying the underlying mortgage debt

note is declared dishonored, the underlying mortgage debt remains *suspended*! *RCW 62A.3-310(b)(2).*

Official Comment 3 to UCC § 3-310 makes the point very clearly:

> 3. Subsection (b) concerns cases in which an uncertified check or *a note* is taken for an obligation. The typical case is that in which a buyer pays for goods or services by giving the seller the buyer's personal check, or in which the *buyer signs a note for the purchase price*. . . . *If the* check or *note is dishonored*, the *seller* [lender sells (or loans) the money the borrower purchases (or borrows) in a mortgage loan transaction] may sue on *either* the dishonored instrument [note] *or* the contract of sale [the DOT in a mortgage loan transaction] *if* the *seller* has possession of the instrument [note] *and* is the person entitled to enforce it. If the right to enforce the instrument is held by *somebody other than the seller* [arguably the Trust in this case because the trust has not attempted to prove it is the *lender*], the seller *can't* enforce the right to payment of the price under the sales contract because that right is represented by the instrument [the note] which is enforceable by somebody else. Thus, if the seller sold the note or the check to a holder *and* has not reacquired it after dishonor, ***the only right that survives is the right to enforce the instrument*** [the note].

(bracketed material and emphasis added).

Please notice, RCW 62A.3-310 does not give a noteholder that *does not own the note it holds* (or has not alleged or proven it is the owner of the note) the option of enforcing the underlying mortgage debt.

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until the Lender is forced to declare the note in default because the borrower fails to pay the note per its terms. *See ¶ 22 of DOT.* This agreement between the Borrower and Lender ***suspends*** the Borrower's obligation to pay the underlying mortgage debt. *RCW 62A.3-310(b)(2).* Pursuant to paragraph 22 of the DOT, until the ***Lender declares the note in default***, the obligation to pay the underlying mortgage debt remains suspended and the power to sale the property cannot become operative. *RCW 61.24.030(3).* In *Brown,* it was undisputed that M & T Bank was not the Lender. Thus, M & T's declaration of default was not a default declaration that, ***under the terms of the DOT***, made operative the power to sell the property. The sale of the property was a violation of RCW 61.24.030(3), one of the ***requisites*** to a lawful trustee's sale, and was therefore illegal.

Unless the noteholder owns the underlying mortgage debt, the note holder has no interest in the underlying mortgage debt. And if the notcholdcr has no intcrcst in thc undcrlying mortgagc dcbt, by what lcgal theory or principle is the noteholder permitted to exert rights in a contract the borrower and the owner of the underlying mortgage debt (the Lender)?

The Trust has neither alleged nor proven it owns the note it holds. Conscqucntly, thc Trust has not provcn that it has any intcrcst in thc underlying mortgage debt. Therefore, the Trust has not proven it is a party to the DOT contract, or that it has the right, under the terms of that contract, to declare a default that makes operative thc power to sell the propcrty.

*The Brown* decision ***authorizes*** the Trust to foreclose under the circumstances outlined above. RCW 62A.3-310(b)(3) ***prevents*** the Trust from foreclosing under the circumstances outlined above. Therefore, *Brown* and RCW 62A.3-310(b)(3) irrcconcilably conflict ovcr a subjcct (regulation of commercial activity in Washington) that Article II, Section 1 of the constitution grants the legislature plenary authority to control. This conflict raises a significant constitutional question.

## VI CONCLUSION

For the reasons listed herein above, the court should grant Petitioner's request for review.

**DATED** this 01st day of February, 2017.

Respectfully submitted,
JAMES A. WEXLER

James A. Wexler, WSBA#7411
*Attorney for Petitioners Cummings*

# VII. APPENDICES

## COURT OF APPEALS DIVISION ONE

## Order Denying Motion for Reconsideration

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
**DIVISION ONE**

| | |
|---|---|
| ROBERT and DORIS CUMMINGS, husband and wife,<br><br>Appellants,<br><br>v.<br><br>NORTHWEST TRUSTEE SERVICES OF WASHINGTON, a Washington corporation; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation; and DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE IN TRUST FOR THE REGISTERED CERTIFICATE HOLDERS OF FIRST FRANKLIN MORTGAGE LOAN TRUST, ASSET-BACKED CERTIFICATES, SERIES 2006-FF8,<br><br>Respondents,<br><br>and<br><br>JOHN DOES 1-10<br><br>Defendants. | No. 74264-7-I<br><br>ORDER DENYING MOTION FOR RECONSIDERATION |

Appellants, Robert and Doris Cummings, have moved for reconsideration of the opinion filed in this case on November 28, 2016. The court having considered the motion has determined that the motion for reconsideration should be denied. The court hereby

ORDERS that the motion for reconsideration is denied.

Dated this 2nd day of January 2017.

For the Court:

Cox, J.

Judge

RICHARD D. JOHNSON,

*The Court of Appeals*
of the
*State of Washington*

DIVISION I
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January 3, 2017

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CASE #: 74264-7-I

Robert and Doris Cummings, Appellants v. NW Trustee Services of WA, et al., Respondents

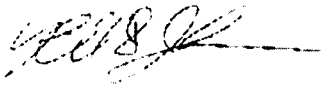
Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,



Richard D. Johnson

Court Administrator/Clerk

LAM

Enclosure

c: Reporter of Decisions

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

| | | |
|---|---|---|
| ROBERT and DORIS CUMMINGS, husband and wife,<br><br>Appellants,<br><br>v.<br><br>NORTHWEST TRUSTEE SERVICES OF WASHINGTON, a Washington corporation; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation; and DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE IN TRUST FOR THE REGISTERED CERTIFICATE HOLDERS OF FIRST FRANKLIN MORTGAGE LOAN TRUST, ASSET-BACKED CERTIFICATES, SERIES 2006-FF8,<br><br>Respondents,<br><br>and<br><br>JOHN DOES 1-10,<br><br>Defendants. | ) | No. 74264-7-I<br><br>DIVISION ONE<br><br>UNPUBLISHED<br><br>FILED: November 28, 2016 |



Cox, J. — Robert and Doris Cummings (collectively, Cummings) appeal the trial court's order granting summary judgment to Mortgage Electronic Registration Systems Inc. (MERS) and Deutsche Bank National Trust Company. They fail to show that there are any genuine issues of material fact for their

claims of violations of the Deeds of Trust Act or the Consumer Protection Act (CPA). MERS and Deutsche Bank are entitled to judgment as a matter of law. We affirm.

In April 2006, Cummings borrowed $240,000 from First Franklin. They executed a promissory note dated April 12, 2006 in the principal amount of $240,000 to memorialize this obligation.

In order to secure payment of the note, Cummings also executed a deed of trust dated April 24, 2006 encumbering their home. The deed of trust was recorded in the Auditor's Records of Snohomish County. It named First Franklin as the lender, First American Title as the trustee, and MERS as the beneficiary nominee for First Franklin.

Thereafter, First Franklin specially endorsed this note to First Franklin Financial Corporation.[1] First Franklin Financial Corporation then endorsed this note in blank.[2] Deutsche Bank has had possession of both this note and the deed of trust securing it at all times material to enforcement of the obligations evidenced by these documents.

Cummings defaulted on the loan by missing payments due under the terms of the note.

MERS purported to assign "all beneficial interest" in the note and deed of trust to Deutsche Bank by an Assignment of Deed of Trust dated October 6,

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[1] Clerk's Papers at 62.

[2] Id.

2011. That assignment was recorded in the Auditor's Records of Snohomish County on October 18, 2011.

Deutsche Bank recorded an agreement dated June 5, 2014 granting Select Portfolio Serving Inc. (SPS) limited power of attorney to service the loan and, if necessary, appoint a successor trustee to foreclose the deed of trust. Deutsche Bank, through SPS, gave Northwest Trustee Services (NWTS) two beneficiary declarations stating that Deutsche Bank, as trustee for the First Franklin Mortgage loan trust, was the actual holder of the note.

On September 23, 2014, Deutsche Bank, through SPS, appointed NWTS as successor trustee. NWTS sent a notice of default to Cummings the next day.

NWTS recorded a notice of trustee's sale on November 11, 2014, setting a sale date for March 13, 2015. The home was sold at the trustee's sale on March 13, 2015.

On March 20, 2015, Cummings commenced this suit against MERS, Deutsche Bank, and NWTS. They claimed violations of the Deeds of Trust Act and the CPA. They sought declaratory and injunctive relief, damages, and attorney fees.

NWTS moved to dismiss all claims against it. The trial court granted that motion. Cummings sought to appeal, but a commissioner of this court directed

them to file a motion for discretionary review.[3] They did not do so, and this court dismissed that appeal.[4] That dismissal is now final.

The trial court then granted summary judgment to MERS and Deutsche Bank. Cummings's notice of appeal that is now before us designates only this order.

**SCOPE OF REVIEW**

NWTS argues that the summary judgment order dismissing it from this action is not properly before this court because Cummings did not designate that order in their notice of appeal. We agree.

The notice of appeal dated November 11, 2015 designates only the order granting summary judgment to MERS and Deutsche Bank. It neither designates nor refers to the prior order dismissing NWTS. Thus, under RAP 2.4(a), the NWTS order is not before this court.

We note that Cummings attempted to appeal the order dismissing claims against NWTS in a prior notice of appeal. But a commissioner of this court decided that the order was interlocutory and not yet subject to appeal.[5] At that time, all claims of all parties had not yet been resolved. The commissioner directed Cummings to file a petition for discretionary review.[6] They did not do so.

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[3] Cummings v. Trujillo v. Nw. Tr. Servs., Inc., No. 74264-7-I (Wash. Ct. App. May 16, 2016) (notation ruling).

[4] Id.

[5] Id.

[6] Id.

At oral argument, Cummings contended that they rely upon their earlier notice of appeal to somehow preserve for our review the earlier order of dismissal. They are mistaken.

An interlocutory notice of appeal has no effect upon consideration of a later appeal from a final judgment unless designated in that later appeal.[7] Thus, the prior notice of appeal does not change our conclusion that the prior order is not properly before us.

Under RAP 2.4(b), the appellate court reviews orders not designated in the notice of appeal when the undesignated order satisfies two elements. The order must "prejudicially affect[] the decision designated in the notice," and the order must have been entered before the appellate court accepted review of the case.[8]

As for the first element, "prejudicial effect" means that the "order appealed from would not have happened but for the" undesignated order.[9] This requires that the two orders "be so entwined that to resolve the order appealed, the court must consider the order not appealed."[10] This element is not satisfied because the dismissal of NWTS had no bearing on the subsequent order granting summary judgment in favor of MERS and Deutsche Bank.

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[7] State v. Thorne, 39 Wn.2d 63, 65, 234 P.2d 528 (1951).

[8] RAP 2.4(b).

[9] Right-Price Recreation, LLC v. Connells Prairie Cmty. Council, 146 Wn.2d 370, 380, 46 P.3d 789 (2002).

[10] Id. at 379 (internal citation omitted).

Because of failure to meet the first element, we need not address the second.

In sum, the claims directed against NWTS are not properly before this court. Likewise, there is no need to address the remaining arguments of NWTS. We shall not address either any further.

**DEEDS OF TRUST ACT**

Cummings first argues that the foreclosure of the deed of trust securing their delinquent note was wrongful. There is no merit to this claim.

Summary judgment is proper "only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."[11] "A genuine issue of material fact exists if 'reasonable minds could differ on the facts controlling the outcome of the litigation.'"[12]

Summary judgment is subject to a burden-shifting scheme.[13] The movant is entitled to summary judgment by submitting affidavits establishing its entitlement to judgment as a matter of law.[14] The nonmoving party avoids summary judgment by setting forth "'specific facts which sufficiently rebut the moving party's contentions'" and disclosing the existence of a genuine issue of

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[11] Scrivener v. Clark Coll., 181 Wn.2d 439, 444, 334 P.3d 541 (2014); see also CR 56(c).

[12] Knight v. Dep't of Labor & Indus., 181 Wn. App. 788, 795, 321 P.3d 1275 (quoting Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008)), review denied, 339 P.3d 635 (2014).

[13] Ranger Ins. Co., 164 Wn.2d at 552.

[14] Id.

material fact.[15] To accomplish this, the nonmoving party may not rely either on argumentative assertions that unresolved factual issues remain or on speculation.[16]

We review de novo a trial court's grant of summary judgment.[17]

We may affirm on any basis supported by the record whether or not the argument was made below.[18]

We start with basic principles applicable to this case. They arise from the note and deed of trust on which this foreclosure was based.

First, this court and the supreme court have both held that the holder of a promissory note is the person entitled to enforce that obligation.[19] Ownership of a note is irrelevant to the power to enforce that note.[20]

Second, the holder of the note has the power to enforce the deed of trust because the deed of trust follows the note by operation of law. In Bain v. Metropolitan Mortgage Group, Inc., the supreme court explained that the Deeds

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[15] Id. (quoting Meyer v. Univ. of Wash., 105 Wn.2d 847, 852, 719 P.2d 98 (1986)).

[16] Id.

[17] Id.

[18] First Bank of Lincoln v. Tuschoff, 193 Wn. App. 413, 422, 375 P.3d 687 (2016).

[19] Brown v. Dep't of Commerce, 184 Wn.2d 509, 514, 359 P.3d 771 (2015); Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 104, 285 P.3d 34 (2012); Trujillo v. Nw. Tr. Servs., Inc., 181 Wn. App. 484, 502, 326 P.3d 768 (2014), rev'd on other grounds, 183 Wn.2d 820, 355 P.3d 1100 (2015).

[20] Id.

of Trust Act "contemplates that the security instrument will follow the note, not the other way around."[21] This statement is consistent with well-settled law.

Commentators have explained that "transfer of the [note] alone will carry the [deed of trust] along with it."[22] Other commentators have elaborated:

> [B]etween the parties to a transfer the assignment or negotiation of the note itself is all that must be done. It is unnecessary to have any separate document purporting to transfer or assign the mortgage on the real estate, for it will follow the obligation automatically.[23]

These two principles demonstrate that the holder of the note is entitled to enforce both it and the deed of trust securing it. Here, it is undisputed that Deutsche Bank has had possession of the note, which was indorsed in blank, at all times material to this matter. Accordingly, it is the holder of the note, which gives it the power to enforce it.

The deed of trust follows the note. Accordingly, Deutsche Bank also has the power to enforce the deed of trust, by operation of law.

Because Deutsche Bank has possession of both the note and deed of trust, with the power to enforce both, it has established a prima facie case that it is entitled to summary judgment. The burden shifts to Cummings to show the existence of a genuine issue of material fact.

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[21] 175 Wn.2d 83, 104, 285 P.3d 34 (2012).

[22] 18 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE § 18.18 at 334 (2d ed. 2004 & updated 2016).

[23] 1 GRANT S. NELSON & DALE A. WHITMAN, PRACTITIONER TREATISE SERIES: REAL ESTATE FINANCE LAW § 5.28 at 429 (4th ed. 2002).

Cummings first argues that RCW 62A.9A-203, part of Article 9 of the Uniform Commercial Code, determines who is entitled to enforce the deed of trust. This argument is without merit.

RCW 61.24.030(7)(a), the controlling portion of the Deeds of Trust Act, states who is entitled to enforce a deed of trust that secures a delinquent note. Case authority makes clear that Article 3 controls the right to enforce a note and deed of trust under this statute.[24] Article 9 has no bearing on enforcement of a note and deed of trust.

Cummings next claims that "[t]here has never been a subsequent assignment" of the note and deed of trust to Deutsche Bank. This contention is irrelevant to the resolution of this case.

First, the note was indorsed in blank and Deutsche Bank has had possession of this note at all times material to the foreclosure. The negotiation by this indorsement is sufficient to make Deutsche Bank the holder of that instrument, entitled to enforce it. A separate assignment is not required. Thus, the purported assignment of an interest in the note by MERS is irrelevant.

Second, they argue that MERS's purported assignment of "a beneficial interest" under the deed of trust was improper. This, too, is irrelevant.

In Bain, the supreme court recognized that MERS could not appoint a successor trustee because it never held the promissory note and was thus an

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[24] Brown, 184 Wn.2d at 528; Bain, 175 Wn.2d at 103-04.

"ineligible beneficiary" under the Deeds of Trust Act.[25] MERS thus lacked any rights to confer on a successor trustee.[26]

But the lack of a valid assignment by MERS does not preclude Deutsche Bank's ability to enforce the deed of trust in this case. That is because it has possessed the note at all times material to the foreclosure.

As we previously discussed in this opinion, the deed of trust follows the note. So when the bank obtained possession of the note, the deed of trust followed it, by operation of law. Deutsche Bank possessed both the note and deed of trust at all times that are material to the foreclosure. MERS's lack of a "beneficial interest" under the deed of trust to assign to the bank is irrelevant.

Cummings also argues that MERS's assignment of its purported interest under the deed of trust to Deutsche Bank was improper because it was made over five years after the loan trust closed. As such, they contend this loan did not become a "qualified mortgage" under 26 U.S.C. § 860 of the federal tax code. This too is irrelevant to Deutsche Bank's right to foreclose. There is no persuasive explanation why a MERS assignment, whether or not it complies with the federal tax code, affects enforceability of the note and deed of trust in this case. Accordingly, we reject this argument.

Cummings further contends that the assignment was untimely, given the terms of the loan trust's Pooling and Servicing Agreement. But this record does not contain a copy of this agreement. It is appellant's burden to provide an

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[25] 175 Wn.2d 83, 105, 285 P.3d 34 (2012).

[26] Id.

adequate record for review, and they have failed in this burden. Thus, we need not address this argument any further.[27]

Cummings next argues that the MERS assignment was invalid because MERS did not exchange value for the note. They base this contention on the mistaken notion that Article 9 of the UCC governs. It does not. Moreover, the MERS assignment, as we already explained in this opinion, is irrelevant to the authority of the bank to enforce the note and deed of trust.

For these reasons, we conclude that Cummings has failed to show there are any genuine issues of material fact for their claim that either Deutsche Bank or MERS violated the provisions of the Deeds of Trust Act. MERS and Deutsche Bank are entitled to judgment as a matter of law.

**CONSUMER PROTECTION ACT**

Cummings brings several claims under the CPA. To succeed on these claims, Cummings must show "(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."[28] A claimant must establish all five elements to prevail.[29]

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[27] See Darkenwald v. Emp't Sec. Dep't, 183 Wn.2d 237, 248, 350 P.3d 647 (2015); RAP 10.3(a)(6).

[28] Trujillo v. Nw. Tr. Servs., Inc., 183 Wn.2d 820, 834-35, 355 P.3d 1100 (2015).

[29] Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 74, 170 P.3d 10 (2007).

Whether a particular action constitutes a CPA violation is reviewable as a question of law.[30]

The only CPA claims that we consider are those made against MERS and Deutsche Bank.

*MERS*

Cummings claims that the purported assignment by MERS of its "beneficial interest" under the deed of trust is presumptively deceptive. We must agree.

Here, MERS purported to assign its "beneficial interest" in the note and deed of trust to Deutsche Bank by an instrument dated October 6, 2011. But MERS never held the note in which it claims an interest. Deutsche Bank held the note at all times material to the foreclosure. And MERS never had a beneficial interest in the deed of trust.

As our supreme court explained in Bain, "characterizing MERS as the beneficiary has the capacity to deceive."[31] Thus, that court held that listing MERS in the deed of trust as a beneficiary is presumptively deceptive.

Deutsche Bank and MERS respond to this argument by pointing to Bain's holding that "the mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury."[32] While this is true inasmuch as a claimant must

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[30] Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 150, 930 P.2d 288 (1997).

[31] 175 Wn.2d at 117.

[32] Id. at 120.

also show a separate injury, it does not alter the presumption that MERS acts deceptively when it improperly lists itself as having a "beneficial interest" under a deed of trust where it has no such interest.

Bain controls this issue. We are constrained to conclude that MERS representing that it has a "beneficial interest" under a deed of trust in a recorded assignment of that deed of trust that gives notice of its contents is presumptively deceptive.

But that conclusion does not end our inquiry. Cummings must also show a genuine issue of material fact as to causation. They have not.

Deutsche Bank is the holder of the note. As we previously discussed, the deed of trust and the power to enforce it follow the note.[33] Here, Deutsche Bank's possession of the note, and not any purported assignment by MERS, gave Deutsche Bank the power to foreclose. Thus, there is no injury causally connected to the purported assignment by MERS.

The absence of a genuine issue of material fact as to this necessary element makes all other factual issues for the other elements of the CPA claim immaterial for summary judgment purposes. The trial court properly granted summary judgment in favor of MERS on this claim.

*Deutsche Bank*

Cummings also challenges Deutsche Bank's actions in appointing NWTS as successor trustee, arguing that the appointment violated the CPA as an unfair

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[33] Id. at 104. See also STOEBUCK & WEAVER, supra, § 18.18; NELSON & WHITMAN, supra, 5.28.

and deceptive act. They mount two arguments to support this contention. First, Cummings argues that such conduct was impermissible because Deutsche Bank only held the note. As discussed throughout this opinion, the power to enforce a note and deed of trust derives from possession of the note. This first challenge fails.

Second, Cummings argues that Deutsche Bank could not appoint the successor trustee through use of an agent, SPS. Even if Deutsche Bank could use an agent, Cummings alleges that SPS was not an agent but instead an independent contractor. Cummings argues a beneficiary cannot act through an independent contractor.

The supreme court has explicitly permitted the use of agents in appointing a successor trustee.[34] Thus, Cummings's argument on this point lacks merit.

A beneficiary cannot employ an independent contractor to appoint a successor trustee so that such beneficiary remains accountable for its conduct.[35] In Rucker v. NovaStar Mortgage, Inc., we concluded that a beneficiary does not make another party its agent by an agreement explicitly "intended by the parties to be that of an independent contractor and not that of a joint venture, partner or agent."[36]

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[34] Id. at 106.

[35] Rucker v. NovaStar Mortg., Inc., 177 Wn. App. 1, 16, 311 P.3d 31 (2013).

[36] Id. at 15-16 (emphasis omitted).

Here, SPS was not an independent contractor. On June 5, 2014, Deutsche Bank executed an agreement granting limited power of attorney to SPS to make certain carefully specified transactions. The agreement authorizes SPS to take such actions "in the name" of Deutsche Bank, the principal. It specifies that SPS's authority is limited to its enumerated transactions and does not extend to a general power of attorney. It does not authorize SPS to conduct litigation in Deutsche Bank's name.

As such, this agreement is unlike that in Rucker. That case has no bearing here.

Cummings has failed to show a genuine issue of material fact that Deutsche Bank violated the CPA. The bank is entitled to judgment as a matter of law.

We affirm the order granting summary judgment to Deutsche Bank and MERS.

Cox, J.

WE CONCUR:

Leach, J.

Becker, J.

## DECLARATION OF SERVICE

**THE UNDERSIGNED** declares under penalty of perjury under the laws of the State of Washington that he caused Petitioner's Petition for Review to be served on the Clerk Washington Supreme Court , on this date, 01st February 2017 by email (supreme@courts.wa.gov) as instructed by the Clerk, Supreme Court, filing fee of $200.00 being paid by mail 01 February 2017, as instructed by the Clerk and the following representative for Respondents at the below stated address by emai as agreed by counsel l and by email as agreed on this date 01st February 2017.

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**DONE** this 01st day of February, 2017 at Issaquah, WA.

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