Supreme Court No. 94648-5

Court of Appeals No. 74705-3-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JOHN R and JACQUELINE WILSON, a married couple,

Petitioner,

v.

QUALITY LOAN SERVICE CORP OF WASHINGTON, a Washington State Corporation, and MCCARTHY and HOLTHUS, LLP, a California State Limited Liability Partnership

Respondents

APPELLANT WILSONS PETITION FOR REVIEW

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I. INTRODUCTION

The Wilsons seek reversal of the 01-14-2016 Snohomish County Superior Court order granting summary judgment to defendants Quality Loan Service Corp of Washington (QLSCW) and McCarthy and Holthus LLP (M&H) because a genuine issue(s) of material fact exists that bars summary judgment as a matter of law. Both sides extensively briefed summary judgment rules and case law and agree that presence of genuine issues of material fact blocks summary judgment. Simply put, defendants feel there are no such facts. Plaintiffs disagree.

II. IDENTITY OF PETITIONERS

ProSe John R. and Jacqueline M. Wilson are lifelong Washington State residents asking this court to accept review of the 4-17-17 appeals court decision.

III. COURT OF APPEALS DECISION

On Page 1 of the Division I 4-17-2017 decision the appeals court gave its *single* reason for affirming summary judgment in favor of defendants in lower court: *"Because Wilsons presented no genuine issue of material fact."* Wilsons strongly disagree. (Appendix 1). The court also wrongly inferred, misread, misunderstood and/or recorded other elements that may have contributed to appeal court error.

IV. ISSUES PRESENTED FOR REVIEW

A. [Genuine Material Facts] Whether a genuine issue of material fact exists which thereby bars summary judgment as a matter of law? At least three

"RCW <u>Requisite</u>" material fact violations are notable: (1) defendant's own sworn testimony agreed with plaintiffs' substantial <u>note ***NON***-owner claim</u> that bars various trustee foreclosure actions and was *opposite* of defendants briefs about ownership; the appeals court & defendant called the sworn testimony a 'mistake' but, as a material fact, such appellate label is grossly out-of-bounds as such facts must be decided only by a fact-finder—as a matter of law; (2) defendant violated the 'continuous physical trustee presence location' requirement—a multi-witnessed violation by defendants who in 2014 paid 450 homeowners nearly a half million dollars because of it—violations that illegally overlapped the second unlawful Wilsons foreclosure attempt by defendants; [NOTE: The Washington Supreme Court has yet to rule on the 'trustee continuous physical presence location' of the requisite RCW 61.24.030(6) that was incorrectly reviewed in federal court and thus needs state clarification]; and (3) financially incentivized intimate non-neutral bank-biased structure of QLSCW-M&H against homeowner.

B. [Requisites Are Non-Negotiable 'Gatekeeper' Requirements]

Whether plain language on the face of RCW 61.24.030 "Requisites" in subsection (6) and subsection (7) [*both of which add definitive enforcement words "Shall" and "Must"*] reflect legislative intent to create an impenetrable barrier—barring judges from turning "Requisites" into "NON-requisite" via convoluted interpretations?

C. Unlawful Foreclosure Causes Damage. Whether CPA applies when plaintiffs are damaged financially by being forced through defenses of unlawful foreclosure processes—whether or not an ultimate foreclosure may be justified?

D. Incorrect Brown v Commerce: Beneficiary, Note Owner & Note Holder *MUST* Be Identical. Whether any person or entity can become a foreclosing "beneficiary" under *correctly interpreted* RCWs 61.24, 62A.3 and 62A.9 simply by *holding* the note—*without also owning the note*—to somehow gain all powers of a true beneficiary? (see Appendix 2 UCC flow chart).

V. STATEMENT OF THE CASE

A. Acceptance of Supreme Court Review Criteria Met

1. **Judicial Restriction re Facts in Summary Judgment.** To grant summary judgment when genuine issues of material fact exist in this case amounts to judicial overreach and usurpation of citizen jury and bench judge roles, and thereby threatens a pillar centerpiece in American jurisprudence—against citizenry in violation of federal and state constitutions that ensure due process. In CR 56, judges are strictly limited to ruling on matters of law. Jury (or bench judge) trials must rule on material facts in all civil and criminal cases.

2. **Significant New Question of State Law Under Constitution.** The strict continuous physical presence of trustees is required under plain reading of *requisite* RCW 61.24.030(6), logic, and clear legislative intent—regardless of

homeowner decision to meet or not to meet with trustees. In 2014, QLSCW paid nearly $500,000 dollars to 450+/- homeowners and discontinued their foreclosures in a Washington AG lawsuit—despite most of these homeowners never choosing to meet trustees face-to-face. The plain reading of 61.24.030(6) "strictly construing the statute in the borrower's favor." *Albice v. Premier Mortgage Servs., Inc.*, 276 P.3d 1277, 1281 (Wash. 2012) led to the $450k outlay. Defendants rely on federal cases incorrectly heard in Washington where now a Supreme Court decision is needed to avoid courts usurping lawmaker roles.

3. **Trustee & Bank Encouragement to Violate Requisite Foreclosure Steps—As Long As Bank Claims To Hold The Note.** A misreading of UCC and RCWs has led to confusion in DTA foreclosure process that threatens current and future homeowners in Washington State. Washington RCWs in fact support proper UCC interpretation (*see* Appendix 2) that a beneficiary in a trust deed is the "note owner" and that the "beneficiary/note owner MUST also physically possess the note in order to foreclose—consistent with UCC and a 2017 Delaware

Supreme Court case ruling. *Brown v Dept of Commerce* 2015 confusion requires review to avoid a very harmful overreach by beneficiaries and trustees.

4. **Public Interest.** All three above issues alone and in aggregate meet very clear and substantial public interest criteria and threaten severe consequences if not clarified by our Supreme Court.

B. Wilsons v. QLSCW and M&H Case Summary

1. **Defendants' Summary Judgment Motion (SJM) Should Have Been Denied.** Important genuine issues of material fact existed which bar summary judgment.

Although both auctions were stopped, the Wilsons claim defendants executed two unlawful foreclosures against their homestead from late 2012 to mid 2014 in violation of RCW 61.24 Deed of Trust Act (DTA) and RPC 5.7 harming Wilsons in violation of RCW 19.86 Consumer Protection Act (CPA). The lower court ignored DTA violations and genuine issues of material fact which should have blocked summary judgment [CP 55:20-22, 56:9-12]. At closure, the lower court granted summary judgment to defendants based on the false assumption that "this case turned on Brown" [note holder/owner and PETE issues]. Wilsons claim 2015 Brown is misunderstood, misapplied and in need of revision. The error is clearest when combining/harmonizing RCW 61.24.005 and 61.24.030(7)(a) that prove UCC-consistent legislature intent that a note holder must be a note owner and is termed, "beneficiary" – the only entity with "beneficial interests." A plain

reading of RCWs reveals legislature intent and matches Websters/Blacks Law definition and recent decisions elsewhere (e.g., Shrewsbury, Delaware 2017). The ruling, if allowed to stand, sends an "Katy bar the door" message to homeowners and legislature that plain language detailed RCW steps don't matter as long as any party holds a note to ensure bank/trustee misconduct against Washington citizens.

VI. ARGUMENT

Background Concepts. It is necessary to review concepts of note and DOT transfer and securitization to understand the existence of genuine material facts in this case and why defendants fought so hard to recant securitization that QLSCW admitted in sworn testimony. A review of Non-Judicial foreclosure is also required to understand defendant violations of requisite RCWs.

What Is A Mortgage Note Owner? Only a note *owner* can: (1) initiate foreclosure upon a borrower in default, (2) sell and endorse a note over to a new owner, (3) assign its deed of trust over to a new owner. Note owners typically physically store original notes/DOTs and conveyance files in secure vaults inside a custodial bank (e.g., bank storing/securing only documents, not money) where only the note owners have access. Thus, "note owners" are also the "note holders" unless the note owner physically temporarily gives the original note to another entity—with a transaction receipt—such as to a servicer during foreclosure in some states and/or to a court of law. As below, only "note owners" can be "beneficiaries" as applied in the Wilsons case. No person or entity can be a

”beneficiary” of a note unless that person or entity is also the “note owner.”

What is a Deed of Trust (DOT) and What is a “Beneficiary?” A deed of trust is a **3-party transaction:** There is one grantor party (borrower gains funds to buy the home via debt to lender), one trustee party (trustee gains temporary *legal title interest* to the home until title transfer at borrower payoff or home sale to new buyer or default foreclosure sale to new buyer), and one lender party (bank/lender gains ***beneficial*** *interest* in the home [until the loan is paid in full] and legal rights to principle/interest payments and, hence, is called “beneficiary”). The promissory note entitles the beneficiary to enforce the note and rights to monthly principle/interest payments until term payoff. The DOT is a security contract to protect lenders in case of borrower default. In default, the lender can require a foreclosure sale of the home by the trustee or successor trustee in order to collect remaining principle balance due on the note. ***Only the beneficiary*** *has power to appoint a successor trustee—no one else,* such power remaining ***only with the beneficiary who owns the note***. From Bain v Metro:

> “The DTA regulates mortgage transactions in which a lender issuing a promissory note or other debt instrument to a borrower can secure the debt via a deed of trust. *Bain v. Metro. Mortgage Group, Inc.*, 285 P.3d 34, 38 (Wash. 2012). The borrower becomes the grantor of the deed of trust and the ***lender becomes the beneficiary*** of the deed of trust. *Id*. A trustee holds title to the property in trust for the lender. *Id*. If the borrower defaults on the loan, the trustee “may usually foreclose the deed of trust and sell the property without judicial supervision.” *Id*.

Here, *Bain* attests that the lender "owns" the note to *"become the beneficiary."* As will be seen below, two RCWs taken together further confirm this *'owner equals beneficiary' definition*: RCWs 61.24.005 and 61.24.030(7)(a) thus putting to rest any mistaken argument (such as defendants make in this case) that a servicer is and can be a "beneficiary" which is wrong/impossible (Appendix 2).

What is a Servicer and Servicer Role in a DOT? At DOT formation, the lender typically hires a "Servicer" to receive, record, manage and disburse monthly payments, and may negotiate occasional loan modifications, etc ---all for a small servicing fee. However, the servicer is not a party to the 3-party DOT transaction. And the servicer is not in any way and can never become a "beneficiary" in a simple DOT transaction or in a securitized trust transaction.

Only the lender is a "beneficiary" with "beneficial interests" in the property. Only the "beneficiary" can sell the note and DOT to a new owner who then becomes the new beneficiary/lender in the 3-party DOT. There is no limit on the number of times that a promissory note may be sold, with each sale creating a new *singular* "beneficiary" who then owns the "beneficial interests" in the property as above, including the right to enforce its right to monthly payments of principle & interest defined in the note. To legalize each sale of a note, *only the current beneficiary* can sign over (endorse) the note to a new beneficiary. And *only the current beneficiary* can sign over (assign) the deed of trust security to a new beneficiary. Thus, upon a sale of a DOT promissory note, two (usually

notarized) signatures are required from the single current beneficiary: one signature to endorse the note, and one signature to assign the DOT.

A Securitized Trust ***Permanently* Owns *AND* Is ***Permanent*** Beneficiary For All Notes and DOTs Within.** In residential real estate, promissory notes are often sold into a security trust that contains hundreds or thousands of similar such mortgage notes formed into saleable bond certificates. The pathway into a security trust bond begins with a note sale from the mortgage originator BankA (beneficiary/lender) to a "Sponsor" BankB who becomes the new beneficiary who then sells the note to a "Depositor" BankC who then sells the note to a TrustZ who is then "permanent note owner," "permanent DOT owner" and "beneficiary" of the note and DOT—and usually becomes the "note holder" via a locked vault in a custodial bank. While a mortgage note can be sold many times, in order to retain major IRS tax advantages (worth millions) in a security trust bond, there must be at least three "true sales" with consideration (i.e., money/value exchanged upon sale) that makes the trust is "bankruptcy remote" (i.e., if originator BankA goes bankrupt, creditors cannot access the trust). Once the trust is completed according to tight SEC rules, trust bond certificates (that give investors a portion of the monthly payments stream) are sold to public or private investors. This process of preparing "mortgage backed security" (MBS) bonds as a security for sale to the public is called "securitization." When an early new SEC-approved MBS trust is being formed, it is assigned a cutoff date after which no more notes

can be added into the trust. Since larger trusts are more lucrative, this creates a high speed/high pressure race of note/DOT selling to get them properly endorsed and assigned into the target trust by its midnight cutoff date. In the end, TrustZ permanently owns all of the notes within and is the sole "beneficiary" with "beneficial interests" in each home in the trust, including the legal rights to monthly payments, rights to enforce the notes, rights to appoint a foreclosing successor trustee if homeowner defaults, and rights to direct foreclosure *only if the "beneficiary" physically holds (possesses) the original note* (Appendix 2).

Notably, a servicer or other person or entity is not a "beneficiary" and not a note owner and therefore cannot direct a trustee or appoint a successor trustee to foreclose—even if the entity holds the note. *Only a beneficiary who owns and holds the note can foreclose* (Appendix 2).

The Wilsons' Note Was Securitized And Is Owned Permanently By A Trust. The Trust Is The Beneficiary—NOT Chase. QLSCW lawyers briefed and told Wilsons and their lawyers that Chase "Owned" The Wilsons Note and DOT—Directly Opposite of QLSCW's Sworn Testimony That *Affirmatively* Created A Genuine Issue Of Material Fact.

A trust owns and is beneficiary of the Wilsons' note according to WaMu 2005 securitization practice, 11 Wilson-briefed elements, and QLSCW's own sworn testimony. Therefore, Chase is not beneficiary or note owner. Since Chase was not the beneficiary, Chase had no power to appoint a successor trustee. Since Chase had no power to appoint a successor trustee, QLSCW had no authority to initiate notices of trustee sale, notices of default, or other trustee communications.

QLSCW falsely called Chase the owner and beneficiary while simultaneously giving opposite sworn testimony that the Wilsons' note and DOT were in fact securitized just as Wilsons argued. Also, because the 2005 Wilsons note & DOT was securitized in 2005, the Wilsons note had been owned in 2005 by several other entities in at least three sales (i.e., a Sponsor Bank, then Depositor Bank before sale to the trust) *several years before the FDIC takeover of remaining WaMu assets in September 2008.* Thus, *the only Wilson asset owned by WaMu in September 2008 was the servicing contract purchased by Chase from FDIC*—but definitely not the note or DOT sold off by WaMu years earlier.

Finally, if QLSCW and M&H wanted to prove FDIC actually DID have the Wilsons note and DOT, they could have easily proved it in court but did not. They could have brought the original note to be examined by experts to prove non-forgery, they could have shown the receipt for pulling the original note from the secure custodial bank, they could have shown the FDIC endorsement signatures on the note (to Chase as new owner) and FDIC assignment signature on the DOT and the entire conveyance file on the Wilsons property—but defendants did not do so and could not do so because the note was securitized as according to WaMu's well publicized business model for OptionARM notes during 2003-2007 years as covered in Wilsons opening brief. Instead of actual proofs of their note owner and beneficiary claim, in desperation defendants produced a series of 'So-What' and bizarre '*non-evidence*' elements as so-called

"proofs" which were proof of anything at all, including (1) an internet copy of the FDIC 2008 PAA (purchase and assumption agreement) *without any reference to Wilsons' note or DOT*, (2) an FDIC letter to King County records that Chase bought unspecified "WaMu assets," *again without any reference to Wilsons' note or DOT* [and why *King* County when Wilsons property is in Snohomish County?], (3) LPS (Lender Processing Services) computer screen printouts [NOTE: LPS was shut down after the 2011 national 60-Minutes TV program expose´ for running a high volume mortgage forgery/fraud robosigning mill to create false mortgage assignments covering years prior to 2008 including the time of Wilsons note/DOT [see https://www.youtube.com/watch?v=eClDqlPgBRg], and (4) a beneficiary declaration signed by a robosigner (CP 61 per Tricia Adams) who falsely identified himself as a Chase Vice President instead of his true title "Foreclosure Specialist." As in Wilsons opening appeals brief, another QLSCW declaration also noted Chase was only as servicer, and another declaration statement that WaMu had sold servicing rights, not notes, and therefore *not* note ownership. The QLSCW attorney and foreclosure officer cannot have it both ways. They *affirmatively* created this ***genuine issue of material fact*** that blocks summary judgment as a matter of law and warrants a fact-finder trial.

Non-Judicial Foreclosure. Judicial foreclosure was the only foreclosure method in the U.S. until several decades ago when **non**judicial became an *optional second method* in half of states, including Washington (RCW 61.24).

The **non**judicial method became popular due to its faster, low cost incentives that yield higher profits for lenders. Our courts call nonjudicial foreclosure an "*incredible power of sale*" (*Frias v. Asset Foreclosure Servs., Inc.,* 181 Wn.2d 412, 430-31, 334, P.3d 529, 537 (2014); *Klem v. Wash. Mutual Bank,* 176 Wn.2d 771, 782, 790, 295 P.3d 1179 (2013); *Bain v. Metro. Mortg. Grp. Inc*., 285 P.3d 34, 49-50 (Wash. 2012); *Schroeder v. Excelsior Mgmt. Grp., LLC,* 177 Wn.2d 102 note 3, 2013 WL 791863 (Wash. Feb, 28, 2013)) that comes at the price of *requiring neutral* judge-like trustees who *must* carry out exacting, detailed, and precisely timed steps explicitly written into law (RCW 61.24) that *must be interpreted and strictly construed in favor of borrowers* in any gray zone areas. (Albice vs Premier Mortgage Servs., Inc., 276 P.3d 1277, 1281 (Wash. 2012 and *Frias v. Asset Foreclosure Servs., Inc.,* 181 Wn.2d 412, 430-31, 334, P.3d 529, 537 (2014). Thus, to lawfully foreclose nonjudicially, lenders and trustees must follow precise RCW steps and timings painstakingly developed by legislators while trustees ensure neutrality to lender *and* homeowner while always interpreting any RCW "gray zone areas" in favor of borrowers. Because the Klem court insisted that DTA trustees must act independently and neutrally toward borrower and lender (*Klem v. Wash. Mutual Bank,* 176 Wn.2d 771, 782, 790, 295 P.3d 1179 (2013)), *the only way a trustee can be seen as independent and neutral is to precisely follow exacting RCW steps and do so without conflicts-of-interest while interpreting RCW gray zone areas in most favorable light of borrowers*.

In Wilsons case, defendants violated RCWs interpreted in a self-serving manner that favored their (by far) largest strategic client of 'survival size' (the largest bank in the U.S.) – defendants simply could not afford to displease Chase.

The Wilsons Complaint. Most simply, Wilsons claim defendants attempted two unlawful foreclosure actions against their homestead from late 2012 to mid 2014. Both were stopped before sale. Both violated explicit *requisites* and process required by RCW 61.24 Deed of Trust Act (DTA). Both harmed Wilsons financially despite stoppage before a sale and despite inactive foreclosure status at the time of the January 2016 SJM hearing. At the hearing, defendants shifted court focus away from genuine issues of material fact to Brown v Commerce issue: "Whether a *servicer* who physically holds (but does not "own") the original note is a PETE (person entitled to enforce the note) with power to appoint a successor trustee, assign deeds, issue notices of default, and activate trustee sale steps. Wilsons argue that only a note owner, not an agent (e.g., servicer, trustee, etc), can endorse a note, and only a note owner, not an agent, can assign a deed of trust. On 10-06-15, the senior trustee foreclosure officer gave sworn written testimony (CP 192:8-10) that Wilsons note was securitized and therefore not owned by Chase (in full agreement with Wilsons' well briefed arguments) but was by definition owned by a securitized trust—making Chase ownership an impossibility as Wilsons had argued all along. A clumsy and deceptive attorney-driven recant attempt followed but was too late. The genuine

issue of material fact was already *affirmatively* created by the trustee itself. QLSCW was caught in their own contradictory trap by previously stating that Chase was "owner" of the Wilsons note but now admitting that the Wilsons claim was correct—that WaMu had securitized their loan into a publicly sold trust (the new true note owner) three years earlier as per WaMu's publicized business model, long before FDIC took over *remaining* WaMu assets in 2008 that *only included a servicing contract* on the Wilsons loan—*not* the note itself that was by then owned by a trust. Therefore, QLSCW had lied about ownership which "ownership discovery" is their principle responsibility before foreclosure start:

> RCW 61.24.030(7)(a) It shall be requisite to a trustee's sale 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. (Emphasis & caps added)

Incentivized financially by Chase, QLSCW earlier said that Chase was note owner using a bizarre new term not written or stated in the "Beneficiary Declaration (HOLDER)" but awkwardly concocted a new false term, 'Declaration Of *Ownership*' for the true term 'Beneficiary Declaration', including what appears as a submitted forged signature declaration, and other deceptive acts described in opening appeal brief).

All litigants in this case already agree that, in Washington, where the servicer holds the original note from the note owner, a trustee still must follow specifically detailed foreclosure steps prescribed by the legislature in RCW

61.24—and all the more in 61.24.030 "Requisites" where words "shall" and "must" are explicit emphases that prevent court interference in the process. For example, in Washington State, speeding tickets are dropped if a radar gun wasn't calibrated per state procedures. In non-judicial foreclosure, yes, a trustee can foreclose if a servicer holds the original note from the beneficiary and the homeowner is in default—*as long as the legislature-prescribed RCW steps are legally followed by beneficiary and trustee*. In this case, QLSCW did not comply and therefore had to start over on two foreclosure attempts that were both stopped. Wilsons were financially harmed by the missteps on both occasions which easily meet the 5-test CPA damages criteria.

Bottomline Wilsons Claim: *If DTA steps are not followed (especially requisite steps) as the legislature defined, then trustees have conducted an unlawful foreclosure, cannot foreclose and must start the process over. And if financial damages were incurred, Plaintiffs can sue for recovery under CPA.*

In the two discontinued foreclosure attempts, Wilsons claim that QLSCW and M&H worked in an unfair unlawful manner in violation of the DTA harming the Wilsons. However, the central issue now being petitioned to the Supreme Court is: *Were genuine issues of material fact presented to lower courts and, if so, summary judgment cannot be granted.* To allow summary judgment in this case containing genuine issues of material fact sends a seriously wrong message to bankers, lenders, trustees, homeowners and would-be homeowners that

encourages and bolsters heavy bias against homeowners and against explicit Supreme Court rulings (Klem v. WaMu et al) and legislature-intended and RCW-directed trustee neutrality. Finally, if courts can now overlook the existence of genuine material facts in granting summary judgment, a pillar or 'finger in the dike' of American jurisprudence will have been shamefully removed in violation of state and federal constitutional rights to trial by jury of peers (or bench trial judges).

Note Holder Must Also Be Note Owner. QLSCW attorney Salyer wrongly argued that Brown ends all arguments because Chase *purportedly* holds the original note (although never proved anywhere and countered by QLSCW defendant's own testimony) and, thus, Chase is a PETE empowered to foreclose whether or not it is owner of the note—such "ownership" also never proven).

Opposing Brown v Commerce 2015: As DTA RCWs are currently written, a note holder has no power to enforce the note and foreclose *UNLESS the note holder is also the note owner and beneficiary*—as UCC-consistent (see Appendix 2) and strongly echoed by Delaware Supreme Ct in 2017 Shrewsbury v Bank of NY Mellon).

RCWs below prove that Washington agrees with the 2017 Delaware Supreme Court in Shrewsbury v Bank of NY Mellon and agrees with UCC (Appendix 2) that note holder, note owner and beneficiary inarguably MUST and DO refer to the same person/entity in order to be an empowered PETE to forclose via DTA. Thus, RCWs taken together below are logical and wholly UCC-compliant in plain language, and harmonize well in words and grammar usage on its face as follows:

RCW 61.24.005(2) Definitions…. (2) "Beneficiary" means the ***HOLDER*** of the instrument or document evidencing the obligations secured by the deed of trust…" *[NOTE: This does NOT mean that any entity that holds the original note is the beneficiary as defendants claim (CP 14:13-15). Rather, this simply means the beneficiary (i.e., note owner) must also physically possess the note as UCC prescribes (see Appendix 2) in foreclosure. Two other elements are notably false/misleading CP14:14 (1) QLSCW counsel falsely states that QLSCW calls Chase the note owner without referring to QLSCW sworn testimony stating otherwise, and (2) Wilsons never stated that Chase "holds" the note; in fact, Wilsons believe Chase does NOT own or hold the note as it was securitized and no proof has been put forward otherwise]*

RCW 61.24.030(7)(a) "It shall be requisite to a trustee's sale 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."

RCW 61.24.040(2) "…The attached Notice of Trustee's Sale is a consequence of default(s) in the obligation to [name of the Beneficiary here], ***the Beneficiary of your Deed of Trust and OWNER*** of the obligation secured thereby."

[NOTE: when harmonized there are no other uses of these words (beneficiary, holder, owner) that contradict the above plain meaning, grammar and logic that is fully consistent with UCC and the recent Delaware Supreme Ct in Shrewsbury 2017) that requires beneficiary be both note holder and owner.

The only rational RCW 61.24 interpretation when harmonized is that the beneficiary, note owner and note holder are all the same entity and that a servicer (or any other non-beneficiary entity) cannot in anyway "become" a beneficiary by "holding" an original note as QLSCW counsel claims.

Defendants cannot have it both ways and argue that in RCW 61.24.005 the Servicer can somehow "become a beneficiary" and PETE (person entitled to enforce) if the Servicer (or any other non-beneficiary/non-owner entity) simply possesses or holds the original note. RCW 61.24.030(7)(a) with 61.24.005(2) and UCC do not allow such nonsense and require the beneficiary to *OWN* & *HOLD* the original note to become a PETE with foreclosing power (Appendix 2)—also consistent with Shrewsbury 2017.

In the Wilsons case, the 01-14-2016 lower court judge improperly sided with the wrong-headed QLSCW belief that "even if Chase were only a servicer it would still have the right to enforce the note as a result of its possession of the note. *Brown, 2015 WL 6388153 at *7, 2015 Wash. LEXIS 1191 at *19."* This QLSCW interpretation is way off. Still, the judge bought this argument and stated at hearing end that "this case turns on Brown" because she too "believed" that the servicer Chase holds the original note (although still an *unproven* defendants claim), and that Chase is therefore a PETE with foreclose power.

Even if Chase does hold the original note (which is still unproven), this is an incorrect interpretation of Brown and must be clarified and repaired by the Washington State Supreme Court now who should rule in agreement with RCWs

and Delaware that the beneficiary in all cases is by definition the "owner" of all notes and DOTs in Washington State and that the beneficiary can become a PETE with rights to enact foreclosure *if* the beneficiary also physically *holds* the note.

Finally, because QLSCW did not have proof that Chase was the owner beneficiary or holder of the original note, QLSCW and Chase's law firm M&H conspired to unlawfully foreclose on the Wilsons homestead causing financial loss, however small, to the Wilsons which fully meets 5-fold CPA criteria as well explained in Wilsons briefing along the way to this Supreme Court petition.

VI. CONCLUSION

At least one genuine material fact exists in this case which blocks summary judgment as a matter of law. Unlawful foreclosure acts were invoked by defendants that caused CPA-justified financial harm to plaintiffs—however small. The beneficiary by "full DTA reading" and consistent with UCC is the note owner and may foreclose a defaulted homeowner only if the beneficiary also holds the original note.

If defendants wish to legally foreclose on the Wilsons home, they MUST: (1) prove that Chase is the beneficiary, owner and holder of the Wilsons note, and (2) follow *all* of the detailed DTA foreclosure steps[1] outlined in RCW 61.24.

[1] From *Bain v. Metro. Mortgage Group, Inc.*, 285 P.3d 34, 38 (Wash. 2012). "Because the DTA "dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures, lenders must strictly comply with the statutes and courts must strictly construe the statutes in the borrower's favor." *Albice v. Premier Mortgage Servs., Inc.*, 276 P.3d 1277, 1281 (Wash. 2012).

DATED this 21st day of July 2017.

SIGNED

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APPENDIX - 1

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

JOHN R. WILSON, a married man, and JACQUELINE M. WILSON, a married woman, Appellants, v. QUALITY LOAN SERVICE CORP., OF WASHINGTON, a Washington corporation, MCCARTHY and HOLTHUS, LLP, a California limited partnership, Respondents.	)	No. 74705-3-I UNPUBLISHED OPINION FILED: April 17, 2017

VERELLEN, C.J. — John and Jacqueline Wilson appeal the summary judgment dismissal of their lawsuit against Quality Loan Service Corp. of Washington (Quality) and McCarthy & Holthus. Because the Wilsons identify no genuine issue of material fact, we affirm.

FACTS

In 2005, the Wilsons executed a promissory note in the amount of $567,000 in favor of Washington Mutual Bank (WaMu). The note was secured by a deed of trust encumbering the Wilsons' residential property. The deed of trust identified WaMu as the lender and Talon Group as the trustee.

In 2008, the Federal Deposit Insurance Corporation (FDIC) placed WaMu in receivership and transferred many of WaMu's assets, including all of its loans and loan commitments, to JPMorgan Chase Bank N.A. (Chase). The Wilsons made payments to Chase until sometime in 2010, when they defaulted on the loan.

On May 11, 2011, Chase submitted a foreclosure transmittal package to Quality, instructing Quality to foreclose on the Wilsons' property. The foreclosure transmittal package identified Chase as the holder of the Wilsons' note and provided electronic copies of the note and deed of trust for Quality to review.

On October 1, 2012, Quality was appointed as the successor trustee for the purpose of foreclosing on the Wilsons' property. The appointment provides

> JOHN R. WILSON AND JACQUELINE M. WILSON, HUSBAND AND WIFE is/are the grantor(s), TALON GROUP, A CALIFORNIA CORPORATION is the trustee and WASHINGTON MUTUAL BANK, A WASHINGTON CORPORATION is the beneficiary under that certain deed of trust dated April 22, 2005 and recorded on May 2, 2005 . . . .
>
> The present beneficiary under said deed of trust appoints QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington corporation, whose address is 19735 10TH AVENUE NE SUITE N-200 POULSBO, WA 98370, as successor trustee under the deed of trust with all powers of the original trustee.[1]

The appointment was signed by a vice president of Chase. The appointment was recorded on October 10, 2012.

On October 16, 2012, Quality sent the Wilsons a notice of default. The notice provides that Chase is "the current owner of the Note secured by the Deed of Trust."[2]

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[1] Clerk's Papers (CP) at 344.

[2] CP at 347.

On November 19, 2012, Chase executed a beneficiary declaration stating that it was the holder of the Wilsons' note. The declaration states, "JPMorgan Chase Bank, National Association, is the holder of the promissory note or other obligation evidencing the above-referenced loan."[3] Quality received the declaration on November 30, 2012.

On December 11, 2012, Quality recorded a notice of trustee's sale. The notice lists Quality's physical address as "Quality Loan Service Corp. of Washington, 19735 10th Avenue NE, Suite N-200, Poulsbo, WA 98370."[4] The notice also informed the Wilsons that Chase was the owner of the note. Quality postponed the sale multiple times, and no sale has occurred.

The Wilsons filed a lawsuit against Quality and its legal counsel, McCarthy & Holthus, seeking declaratory relief and to enjoin the foreclosure based on alleged violations of the Deeds of Trust Act (DTA), chapter 61.24 RCW, and the Consumer Protection Act (CPA), chapter 19.86 RCW. The superior court granted summary judgment dismissal of the Wilsons' complaint. The Wilsons appeal.

DECISION

This court reviews summary judgments de novo.[5] A defendant can move for summary judgment by showing that there is an absence of evidence to support the plaintiff's case.[6] The burden then shifts to the plaintiff to set forth specific facts showing

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[3] CP at 339. The declaration lists the address of the Wilsons' property securing the deed of trust.

[4] CP at 357.

[5] Michael v. Mosguera-Lacy, 165 Wn.2d 595, 601, 200 P.3d 695 (2009).

[6] Young v. Key Pharm., Inc., 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

a genuine issue of material fact for trial.[7] While we construe all evidence and reasonable inferences in the light most favorable to the nonmoving party, if the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," summary judgment is proper.[8] The plaintiff may not rely on mere speculation or unsupported assertions, facts not contained in the record, or inadmissible hearsay.[9]

The Wilsons argue that the trial court erred in dismissing their claims for relief based on the DTA. But, as the Wilsons acknowledged below, the DTA does not create an independent cause of action for monetary damages when, as here, no trustee's sale has occurred.[10]

However, a plaintiff may bring a CPA claim based on alleged DTA violations, even without a completed sale.[11] Washington's CPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."[12] To prevail on a CPA claim, a plaintiff must prove (1) the defendant engaged in an unfair or deceptive act or practice, (2) that the act occurred in trade or commerce, (3) that the act affects the public interest, (4) that the plaintiff suffered injury

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[7] Id. at 226.

[8] Id. at 225 (quoting Celotex, 477 U.S. at 322).

[9] Higgins v. Stafford, 123 Wn.2d 160, 169, 866 P.2d 31 (1994) (quoting Peterick v. Explosives Corp. of America, 22 Wn. App. 163, 181, 589 P.2d 250 (1977)).

[10] Frias v. Asset Foreclosure Servs., Inc., 181 Wn.2d 412, 417, 334 P.3d 529 (2014).

[11] Lyons v. U.S. Bank Nat'l Ass'n, 181 Wn.2d 775, 784, 336 P.3d 1142 (2014) (quoting id.).

[12] RCW 19.86.020.

to his business or property, and (5) the injury was causally related to the act.[13] The failure to establish even one of these elements is fatal to the claim.[14]

First, the Wilsons argue that Chase lacked authority to appoint Quality as a successor trustee because Chase was not the holder of the note. Thus, the Wilsons contend, Quality committed an unfair or deceptive practice by attempting to foreclose on the property without authority to do so.

Under the Washington DTA, the term "beneficiary" is defined as the "holder of the instrument or document evidencing the obligations secured by the deed of trust."[15] The holder of an instrument, such as a promissory note, is the "person entitled to enforce" the terms of the note.[16] Only a lawful beneficiary has the power to appoint a successor to the original trustee named in the deed of trust.[17] Only a properly appointed trustee may proceed with a nonjudicial foreclosure of real property.[18] Thus, if an unlawful beneficiary appoints a successor trustee, that trustee lacks legal authority to carry out the foreclosure.[19]

Here, the record establishes that Chase was the holder of the Wilsons' note. The record contains a declaration signed by an officer of the FDIC that states Chase

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[13] Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

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

[15] RCW 61.24.005(2).

[16] RCW 62A.3-301; RCW 62A.3-104(e).

[17] Bavand v. OneWest Bank, F.S.B., 176 Wn. App. 475, 486, 309 P.3d 636 (2013).

[18] Id. at 486-87.

[19] Walker v. Quality Loan Service Corp., 176 Wn. App. 294, 306, 308 P.3d 716 (2013).

acquired "all loans and all loan commitments" of WaMu on September 25, 2008.[20] The record also contains a copy of a purchase and assumption agreement showing that the FDIC transferred all of WaMu's loans and loan commitments to Chase on that date.[21] "Transfer of an instrument . . . vests in the transferee any right of the transferor to enforce the instrument."[22] Because Chase was entitled to enforce the terms of the note, Chase had the authority to appoint Quality as the successor trustee, and Quality was thus entitled to foreclose on the Wilsons' property.

The Wilsons allege that Chase was not the holder of the note because WaMu likely sold the note to a securitized trust prior to the date its assets were transferred to Chase. This claim rests primarily on the Wilsons' unsupported assertions and beliefs about WaMu's business practices. However, the Wilsons also point to an inconsistency between two declarations submitted by Quality in support of its motion for summary judgment. Quality submitted a declaration of Sierra Herbert-West, a Quality employee, dated October 6, 2015, in which she stated:

> Quality has processed non-judicial foreclosures of loans that have been securitized for many years. Its employees are generally aware that the documents reflecting the securitization and servicing of a securitized loan are available on the SEC website. Quality employees, including myself, accessed and reviewed various securitization documents, *including trusts established by WaMu such as the trust into which Wilson's loan was deposited.*[23]

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[20] CP at 443.

[21] CP at 397.

[22] Federal Financial Co. v. Gerard, 90 Wn. App. 169, 176-77, 949 P.2d 412 (1998) (emphasis omitted) (quoting RCW 62A.3–203(b)).

[23] CP at 192 (emphasis added).

It appears that Herbert-West's declaration was erroneous, and Quality subsequently submitted a second declaration, dated October 8, 2015, in which she stated:

> Quality has processed non-judicial foreclosures of loans that have been securitized for many years. Its employees are generally aware that the documents reflecting the securitization and servicing of a securitized loan are available on the SEC website. Quality employees, including myself, accessed and reviewed various securitization documents, *including the FDIC Purchase and Assumption Agreement which transferred all of the assets of WaMu to Chase on September 25, 2008.*[24]

It is not clear whether the trial court considered the earlier declaration. But even if it did, it does not establish a genuine issue of material fact because Herbert-West did not state that WaMu sold or otherwise transferred the Wilsons' note before it was assumed by Chase.

The Wilsons next contend Quality violated its duty of good faith under RCW 61.24.010(4) and its duty to comply with RCW 61.24.030(7)(a) by relying on Chase's beneficiary declaration without conducting an independent inquiry into the identity of the holder.[25] "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."[26]

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[24] CP at 220 (emphasis added).

[25] RCW 61.24.010(4) provides that the "trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor." RCW 61.24.030(7)(a) requires 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 or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection."

[26] Lyons, 181 Wn.2d at 787 (quoting Walker, 176 Wn. App. at 309-10).

But a trustee "can rely on a declaration consistent with its duty of good faith if the declaration unambiguously states the beneficiary is the actual holder."[27] Here, Chase's beneficiary declaration unambiguously states that it is the holder of the Wilsons' note. Moreover, the foreclosure transmittal package received by Quality identified Chase as the holder. The Wilsons fail to raise a genuine dispute of material fact as to whether Quality violated its statutory obligations.[28]

The Wilsons next argue that Quality violated RCW 61.24.030(6) by failing to consistently maintain a physical address in Washington.[29] In support of this claim, the Wilsons provided declarations from individuals who attempted to visit Quality at its Seattle office in February and March 2014 and had difficulty doing so because the office was in a locked building with a call box and there was no phone number listed to reach the office.[30] In response, Quality provided another declaration from Herbert-West, stating that Quality moved its Washington office from Poulsbo to Seattle on January 2, 2014. Herbert-West stated that the Seattle office was open and accessible to the public

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[27] Brown v. Wash. State Dep't of Commerce, 184 Wn.2d 509, 544, 359 P.3d 771 (2015).

[28] The Wilsons argue that Quality did not receive Chase's beneficiary declaration until November 30, 2012, approximately six weeks after Quality sent the Wilsons a notice of default. But RCW 61.24.030(7)(a) requires only that a trustee have proof of the beneficiary prior to recording a notice of trustee's sale.

[29] RCW 61.24.030(6) requires that "prior to the date of the notice of trustee's sale and continuing thereafter through the date of the trustee's sale, the trustee must maintain a street address in this state where personal service of process may be made, and the trustee must maintain a physical presence and have telephone service at such address."

[30] Many of these declarations were filed in an unrelated lawsuit brought against Quality by the Attorney General's Office, alleging that Quality failed to maintain a physical address in Washington in February 2014, after it vacated its Poulsbo office but before the Seattle office was accessible to the public.

at all times after that date, though it was inadvertently left off of the call box until February 26, 2014.

However, even assuming that there were periods of time when Quality failed to maintain a physical location in Washington accessible to the public, in order to establish a violation of the CPA, the Wilsons must demonstrate that they suffered an injury due to Quality's alleged unfair or deceptive act. Here, nothing in the record suggests that the Wilsons attempted to contact Quality in early 2014 at the Seattle office and were unable to do so. John Wilson stated in a declaration only that "[o]n a weekday in the early summer of 2013, I drove to the [Quality] Poulsbo, Washington office and [Quality] staff were not present and so no contact could be made."[31] And Wilson stated in both his deposition and in interrogatories that he refused to contact Quality at all because he believed they would not help him. The Wilsons do not establish a genuine issue of material fact as to the injury element of a CPA claim.

The Wilsons next assert that Quality violated its duty of good faith by failing to act impartially towards them. Specifically, the Wilsons assert Quality shared office space and employees with its legal counsel, McCarthy & Holthus, and McCarthy & Holthus has previously represented banks and other lenders. A trustee "must treat both sides equally and investigate possible issues using its independent judgment to adhere to its duty of good faith."[32] But there is no evidence that McCarthy & Holthus ever

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[31] CP at 55. The Wilsons have appended an additional declaration to their opening brief that addresses the summer 2013 visit to the Poulsbo office in more detail. But this declaration was not part of the record before the trial court and we do not consider it. RAP 10.3(8).

[32] Lyons, 181 Wn.2d at 787.

represented Chase in these proceedings or that Quality's relationship with McCarthy & Holthus affected its duties to the Wilsons.

Finally, the Wilsons assert that Quality committed various discovery violations and that they submitted declarations with forged signatures. But these issues were either not raised by the Wilsons below or rest on materials outside the record. "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court."[33]

Affirmed.

WE CONCUR:

[33] RAP 9.12.

APPENDIX - 2

APPENDIX 2: Required First 3 of 6 Foreclosure Review Steps & UCC Authority

1 Which UCC Article Governs: 3 or 9?

Was the loan securitized or transferred to new owner?

- **Yes** → **Article 9 Nonnegotiable Loans**
- **No** → Review the FOUR Conditions/Rules for Negotiability

A negotiable note *MUST*:

- ☐ contain an unconditional promise to pay a fixed amount
- ☐ be payable to bearer or to order when first possessed by holder
- ☐ be payable on demand or at specified time
- ☐ have no other required action other than payment.

Does loan meet all FOUR Negotiability Rules?

- **Yes** → This loan is a Negotiable Loan → **UCC Article 3 *plus* Property Law Principles govern this loan** → **Article 3 Negotiable Loans**
- **No** → This loan is a Nonnegotiable Loan → **UCC Article 9 *plus* Contract Law govern this loan** → **Article 9 Nonnegotiable Loans**

2 Who Owns the Note?

(entitled to economic value of the note)

ARTICLE 3

Is the payee the same person possessing Note?

- **Yes** → Did payee deliver the Note to buyer?
  - **Yes** → Payee owns the Security (mortgage/deed)
  - **No** → Did payee indorse the Note to buyer?
    - **Yes** → Buyer owns the Note & Security (mortgage/deed)
    - **No** → Did payee indorse the Note?
      - **Yes** → Buyer owns the Note but with no rights to the security (mortgage)
      - **No** → Payee indorsed the Note to bearer or "in blank" → Bearer owns the Note
- **No** → Apply Principles of Property Law to determine ownership → Payee gains possession of the Note → Does the payee wish to sell the loan?
  - **Yes** → Payee & buyer agree to a price → Did payee sign a mortgage/deed assignment contract?
    - **Yes** → Did payee deliver the assignment contract?
      - **Yes** → Buyer owns the Note & Security (mortgage/deed)
      - **No** → Payee owns the Security (mortgage/deed)
    - **No** → Buyer owns the Note but with no rights to the security (mortgage)
  - **No** → The sale is null & void → Payee owns the Note

ARTICLE 9

i.e. Is Title unbroken?

Is original lender (Note seller) legal owner of Note & Mortgage?

- **No** → **The Note cannot be sold**
- **Yes** → Does the original lender wish to sell the loan?
  - **No** → Written agreement properly describes the Note?
    - **No** → **The Note cannot be sold**
    - **Yes** → Did the buyer pay for (give value for) the Note?
      - **Yes** → The buyer owns the Note (but may or may not possess the Note)
      - **No** → The sale is null & void
  - **Yes** → Did seller & buyer make an oral agreement?
    - **No** → Written agreement properly describes the Note?
    - **Yes** → Seller delivers the Note to the buyer → Did the buyer pay for (give value for) the Note?
      - **Yes** → The buyer owns and possesses the Note
      - **No** → The sale is null & void

3 Who Is Entitled To Enforce the Note?

Is the Note lost, stolen or destroyed?

- **Yes** → Can person prove PETE status at time of loss?
  - **Yes** → Can person prove Note terms at time of loss?
    - **Yes** → Can person insure the debtor if true holder later appears?
      - **Yes** → This person is a Note Holder & **PETE** (person entitled to enforce) the Note
      - **No** → Did the holder properly transfer possession to a transferee?
        - **Yes** → The transferee now possesses the Note → This person is a Note Holder & **PETE** (person entitled to enforce) the Note
        - **No** → **This person is *NOT* a Note Holder or PETE (person entitled to enforce) the Note**
    - **No** → This person is a Note Holder & **PETE** (person entitled to enforce) the Note
  - **No** → Is the Note endorsed to this person?
    - **Yes** → This person is a Note Holder & **PETE** (person entitled to enforce) the Note
    - **No** → **This person is *NOT* a Note Holder or PETE (person entitled to enforce) the Note**
- **No** → Does this person possess the Note?
  - **Yes** → Is the Note endorsed to this person?
    - **Yes** → This person is a Note Holder & **PETE** (person entitled to enforce) the Note
    - **No** → **This person is *NOT* a Note Holder or PETE (person entitled to enforce) the Note**
  - **No** → Does this person possess the Note?
    - **Yes** → Is the Note endorsed to this person?
      - **Yes** → This person is a Note Holder & **PETE** (person entitled to enforce) the Note
      - **No** → **This person is *NOT* a Note Holder or PETE (person entitled to enforce) the Note**
    - **No** → **This person is *NOT* a Note Holder or PETE (person entitled to enforce) the Note**

Can the buyer get the original Note?

- **No** → The Note is NOT enforceable
- **Yes** → The buyer obtains the original Note → This person is a Note Holder & **PETE** (person entitled to enforce) the Note

Flowchart based on UCC and *Uneasy Intersections: The Right to Foreclose and the UCC*, Elizabeth Renuart, Albany Law School; 48 Wake Forest L. Rev. Issue 5 (2013)

JOHN WILSON - FILING PRO SE

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