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**No. 66721-1**

**COURT OF APPEALS DIVISION 1  
OF THE STATE OF WASHINGTON**

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**JACK GRANT**

Appellant

vs.

First Horizon Home Loans, aka FIRST HORIZON CORPORATION  
dba "First Horizon Home Loans" et al.,

Respondents

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**ON APPEAL FROM WHATCOM COUNTY SUPERIOR COURT  
(Hon. Steven J. Mura - cause no. 10-2-02676-9)**

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**Reply Brief of Appellant**

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**B. The Washington Legislature Defined “Beneficiary” as the Holder of the Note.**

Eight months after Grant’s Complaint was filed and no discovery, the Respondents have been unable to answer or support their position on the key question, namely, “Who owns the promissory note? It is telling that no proof has been offered to establish a chain of title, no offer of any document to support their suggestions of ownership. Under Washington’s Deed of Trust Act (“DOTA”) RCW 61.24.005(2), it is only the note holder/beneficiary that has the right to conduct any foreclosure proceedings.

Under the DOTA, the Legislature defines a “beneficiary” as **“holder of the instrument or document evidencing the obligations secured by the deed of trust**, excluding persons holding the same as security for a different obligation.” RCW 61.24.005 (emphasis added). This definition has remained unchanged since the statute was enacted and it is consistent with Article 3 of the UCC, as adopted by Washington, wherein the only person entitled to enforce the terms of a Promissory Note is the holder or a non-holder or transferee who obtains the right to enforce directly from the holder. RCW 62A.3-203. Frankly, it is irrelevant for purposes of utilization of the DOTA how the Deed of

Trust instrument in question defines “beneficiary”. The rights, duties and obligations contained in the DOTA are governed by the definitions contained in that statute and this mean that only an entity or person who meets the definition of “beneficiary” may perform the acts required of a “beneficiary” in the Deed of Trust Act.

The import of this definition of “beneficiary” is seen in the next section of the DOTA. RCW 61.24.010 specifies who may act as a trustee and the process by which a trustee is substituted.

RCW 61.24.010(2) requires:

(2) The trustee may resign at its own election or be replaced by the beneficiary. The trustee shall give prompt written notice of its resignation to the beneficiary. The resignation of the trustee shall become effective upon the recording of the notice of resignation in each county in which the deed of trust is recorded. If a trustee is not appointed in the deed of trust, or upon the resignation, incapacity, disability, absence, or death of the trustee, or the election of the **beneficiary** to replace the trustee, the **beneficiary** shall appoint a trustee or a successor trustee. Only upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee.

RCW 61.24.010(2) (emphasis added). Thus, only the “beneficiary” as defined in the DOTA may appoint the new trustee.

Since there is no evidence at this time regarding when the Note was endorsed to First Horizon or to Bank of New York Mellon or when either of them became the holder of the Note by obtaining

physical possession of the endorsed Note, there is nothing upon which QLS can rely to support an assertion that it was appointed by the proper party to be the new trustee. While First Horizon and QLS cite to a few federal court cases holding that MERS may act on behalf of others to conduct a foreclosure, not a single one of those decisions considers or even discusses the specific language of the Washington DOTA and its definition of “beneficiary”. While some of the federal cases have discussed MERS’ power to “act on behalf of whoever was the equitable owner of the rights in the Deed of Trust”, such holding has no import in Washington State because its Legislature has specifically defined “beneficiary” and MERS does not meet that definition. Silvas v. GMAC Mortgage, LLC, 2009 WL 4573234, \*8 (D. Ariz. 2009). Further, there are no Washington state cases which discuss this issue, and this is a state law question and not one which should be definitively decided by the federal courts such as in Vawter v. Quality Loan Service Corporation of Washington, 707 F.Supp.2d 1115 at 1124 (refer to Exhibit 1 for the proper method of certifying to State court).

QLS cites to Udall v. T.D. Escrow Services, Inc., 159 Wn.2d 903, 913 (2007) in support of its position, contending that the decision supports the notion that “agency principles” apply under

the DOTA. First, as noted in Udall, “A court’s objective in construing a statute is to determine the legislature’s intent.” Id. at 903. Here, the Legislature’s intent for the definition of “beneficiary” is made very clear – it specifically defines the word for use in the statute. RCW 61.24.005. The facts of Udall are relatively simple and do not correlate to the facts in this case as it was a dispute between a trustee whose agent initiated the sale with an incorrect bid amount and the bidder. The Court considered the language specifically of RCW 61.24.040 which states that the property may be sold by the “trustee or its authorized agent”. RCW 61.24.040. This portion of the DOTA therefore allows for some portion of the trustee’s responsibilities – the calling of the sale – to be completed by an “authorized agent”. This language does not alter the provisions of RCW 61.24.005 which define “beneficiary” nor does it change any of the qualifications of who may be a trustee, and there is nothing in the Udall holding which supports such assertion. RCW 61.24.010. The Udall Court also reminds us that “[t]he Act must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales. Queen City Sav. & Loan Ass'n v. Mannhalt, 111 Wn.2d 503, 514, 760 P.2d 350

(1988) (Dore, J., dissenting); Koegel v. Prudential Mut. Sav. Bank, 51 Wn.App. 108, 111, 752 P.2d 385, *review denied*, 111 Wn.2d 1004 (1988).” Udall at 916.

Further, the language of RCW 61.24.040 does not change the “duty” that a trustee has to the borrower, beneficiary and grantor as described by the plain language of the statute. RCW 61.24.010(4). This portion of the DOTA was changed effective July 2009 to a “duty of good faith” to those parties. In 2008, language was added to the statute and the trustee was supposed to adhere to a standard of “impartiality”. *Id.* This and was only in place for one year. Prior to the insertion of the trustee’s duty language in the DOTA, trustee had been required to adhere to a “fiduciary duty” as to all parties that was described in Cox v. Helenius, 103 Wn.2d 386 (1984).

**C. Respondents overlooked identification of cited cases that are under review or strongly rejected by the courts**

Mellish v. Frog Mountain Pet Care, 154 Wn.App. 395 – Petition for review granted by the Washington Supreme Court on July 7, 2010. First Horizon cites only the appeal level case in its Brief at page 10 when discussing equitable tolling.

At the trial level, Respondents relied heavily on the U.S.

District Court case of Vawter v. QLS. In its Brief, First Horizon continues to rely heavily on Vawter, citing the case at pages 10, 15, 16, 25 to 27, 33 and 34 of its Brief. QLS cites this case at page 10 of its Brief. QLS is a party to the Vawter case.

A Notice of Appeal has been filed on behalf of Rose and Henry Vawter (case # 2:09-cv-01585-JLR). The appellants' opening brief in that appeal is due September 6, 2011. The result of that appeal may have a bearing on this case (and vice versa).

At p. 29, 30 and 38 of his Brief, Grant asks this Court to distinguish the trial level decision in Vawter and, at p.27 and 30, Grant asks this Court to help clarify the law of the State about the breach by lenders and loan servicers of their obligations and duties under the DOTA.

Additionally, Grant notes that Vawter was distinguished and not applied on March 7, 2011 by the U.S. District Court in Seattle in Olander v. Recontrust, 2011 WL 841313 in a fact pattern that is similar to Grant's case (see discussion at page 14 of this Brief).

**D. Pending cases of Interest**

In his Complaint, Grant raises issues relating to the involvement of Mortgage Electronic Registration Systems, Inc. ("MERS") – see CP 232-236 (sections 4.25 to 4.44 of the

Complaint), CP 238 to 240 (sections 5.2 to 5.12 of the Complaint) and CP245-246 (sections 12.1 to 12.5 of the Complaint).

There are pending cases involving MERS that will be relevant to this case.

One such case is Kristin Bain v. Metropolitan Mortgage Group Inc, et al and Kevin Selkowitz v. Litton Loan Servicing LP et al US District Court case #C-09-0149-JCC, not reported in F.Supp.2d – referral to Washington Supreme Court (2011). On June 24, 2011, United States District Judge Coughenour certified a number of questions to the Washington Supreme Court dealing with MERS; the answers to those questions are relevant to this case. A copy of the order under case # C09-0149-JCC is attached hereto as Exhibit 1. The following questions were certified:

1 is MERS a lawful "beneficiary" within the terms of Washington's DOTA if it never held the promissory note secured by the deed of trust?

2 if so, what is the legal effect of MERS acting as an unlawful beneficiary under the terms of Washington's DOTA?

3 does a homeowner possess a cause of action under Washington's Consumer Protection Act against MERS if MERS acts as an unlawful beneficiary under the terms of DOTA?

In Vinluan v. Fidelity National Title and Escrow Co. et al. Washington Supreme Court in case #85637-1, certain related MERS questions have recently been reviewed by the Washington Supreme Court. QLS is a party to that action. Vinluan is referred to in the Bain case. For further background, a copy of the Court's Ruling Denying Review dated April 25, 2011 is attached hereto as Exhibit 2.

Finally, the oral argument has been completed in Klem v QLS CA 66252-0-1 and it might be pertinent for this Court to review the briefing and QLS' positions in that case.

**E. Wrongful assertions of fact by Respondents**

Certain arguments in the Briefs of Respondents First Horizon and QLS fail because they are based on false information:

1. At RP 34:1-6, Grant corrected Lane Powell's previously made false representations to the trial court that, in 2006, Grant discovered the fraud (or breach of contract/breach of fiduciary duties) relating to First Horizon's and/or Stewart Title's improper recording of the Quit Claim Deed ("QCD"). Lane Powell is well aware that 2007 was the correct year, yet three more times in its Respondent Brief at pages 10, 11,12, they repeat the false statement that discovery occurred one year earlier (in 2006),

presumably in a failed attempt to support their argument that the discovery rule can not apply. Stewart Title adopts the same false statement at pages 5, 8 and 9 of its Brief. QLS suggests the same thing at p.29 of its Brief;

2. The parties disagree on when the causes of action arose. In its pleadings, First Horizon has admitted the contract claims are not out of time under the 6 year rule and does not say otherwise in this Brief. However, at p. 18 of its Brief, First Horizon makes misleading suggestions as to what comprised the “contract”. Stewart Title admits the contract claims are not out of time under the 6 year rule at p. 11 of its Brief. At p. 2 and 6 of its Brief, Stewart Title suggests a different version of what comprised the “contract”. In either event, the contract claims are not out of time under the 3 year discovery rule if they use 2007 as the date of discovery instead of incorrectly suggesting discovery occurred one year earlier,

3. At p.1, 9-15 and 19 in its Brief, QLS asserts there were no “deficiencies” in their documents or foreclosure proceedings. Grant refers to the specific facts in the Complaint CP 221 -223 (see sections 2.2 and 2.6) and CP 230-238 (sections 4.18 to 4.55) and in Grant’s Brief at pages 18 to 44. The major

deficiencies: the identity of the true owner of the debt or security is unknown; there is no evidence that the original of the note is owned by the same party that purports to own the deed of trust; the trustee has not been properly appointed or authorized;

4. Contrary to QLS' suggestions at p.7 and 26 of its brief, Grant did raise the TILA claim in the Complaint and his Motions. Grant referred to the violation of consumer protection statutes at sections 4.46, 6.3 and 12.2 of the Complaint (CP 236, 241 and 245, respectively), and made specific reference to the TILA claim in Plaintiff's Opposition to Defendants' Motions (CP 153) and Plaintiff's Response to all Defendant Replies (CP 102).

5. Contrary to Stewart Title's statement at page 6 of its Brief, Grant's allegation of the agreement not to record the QCD is indeed contained in the Complaint CP 242-3 (see sections 7.6 and 7.7), in the Plaintiff's Opposition to Defendants Motion CP 151 and in Plaintiff's Response to Defendant's Replies CP 99. Stewart Title never denies the agreement to hold the QCD in its file.

6. In its Brief at p. 30, First Horizon falsely alleges that Grant conceded a "scrivener's error" in the names used in the documents. Actually, at p. 21 of his Brief, Grant stated a general proposition that the name of a party in a document is a material

term and such an error can void the document. In raising the point, First Horizon may have conceded the documents have “mistakes”;

**F. New issues raised by Respondents for the first time:**

1. Constructive notice. At page 5 of its Brief, Stewart Title raises for the first time an argument that Stewart Title should be excused, by the operation of RCW 4.16.080, from the consequences of recording the Quit Claim Deed without Grant’s consent or knowledge and in breach of its agreement not to do so. The recording statute does not say that recording is notice for the purposes of RCW 4.16.080 and it should not be allowed to be used as a defense against what appears to be a deliberate breach/fraud.

In Strong v. Clark, 352 P.2d 183, the Supreme Court found that a low option price was expressly disclosed in the recorded option and accordingly, denied a bankruptcy trustee’s motion to set aside a conveyance as fraudulent. In that case, the statute of limitations began to run upon recording of that instrument because the facts upon which the fraud was predicated were contained in that instrument. That case can be distinguished because there are no facts contained in the recorded QCD relevant to this appeal. Rather, the “fraud” is predicated upon Stewart Title's improper action in recording the QCD, contrary to the conditions of its

delivery. Grant had no reason to perform any due diligence since Grant believed an escrow agent could be trusted.

2. TILA tender At p.16, First Horizon argues that rescission under TILA must be accompanied by tender. While the courts have required tender after a notice of rescission in certain cases on equitable grounds, such is not the case here. The plain language of the TILA statute does not require tender.

In any event, the TILA sections dealing with the lender's obligations to disclose the "cost of borrowing" referenced by First Horizon at p.13 of its Brief are not the sections of TILA that are relevant to this case. On May 20, 2009, the "Helping Families Save Their Homes Act of 2009" was signed into law. Grant references the regulations passed under the 2009 amendments to the TILA statute that require lenders to give timely notice of "transfers". The language of the regulations was included in Grant's Motion CP 101-104. In breach of the regulations under TILA, Respondents failed to give Grant notice of transfers in a timely manner (or at all), giving rise to rights to damages, recoupment and rescission under TILA.

**G. Matters in Grant Brief not Addressed by Respondents have been Abandoned by Respondents (previous numbering from Appellant's brief used here)**

Two sections of Grant's Brief that were addressed by Respondents at the trial court level appear to have been ignored by Respondents in their Briefs and therefore, their apparent defenses and/or arguments are assumed abandoned on appeal. The two sections are "E5 Dismissal of contract claims, if based on Statute of Frauds, should be reversed" and "E8 Judicial notice of the divorce holdings should have been granted".

**H. ARGUMENT**

**H1 Additional Briefing on Breach of Duties under DOTA**

a) No Chain of Title to Security or Note

No evidence has been put forth by First Horizon or QLS that would show how, when and from whom it acquired an interest in the note upon which it relies to establish a debt owed and a right to foreclose.

The identity of the true owner of the note "is not a mere technical legal requirement: to allow the assignee of a security interest to enforce a security agreement would expose the obligor to a double liability, since a holder in due course of the promissory

note clearly is entitled to recover from the obligor” In re Leisure Time Sports, Inc., at 861.

In Olander v. Recontrust, 2011 WL 841313 (March 7, 2011), the Vawter case was distinguished and not applied. In that case, the United States District Court in Seattle found that where the lender did not exist at the time the deed of trust was executed, Olander was entitled to argue that any assignment of rights or enforcement of the deed of trust is invalid. “The Court finds this sufficient to state a claim for violation of the DOTA” (emphasis added). The Court found unpersuasive the lender’s argument that MERS was also a beneficiary on the deed of trust with the power to assign. In Olander, the borrower not only challenged MERS’ authority to act as a beneficiary under the deed of trust but also argued the deed of trust was void at its inception. This case applies directly to Grant’s facts and arguments.

b) Violation of DOTA

Grant has not brought a claim under the common law for wrongful foreclosure – contrary to the assertions of the other Respondents herein. His claim arises from a breach of QLS’ duties under the DOTA. There are no published Washington state court decisions which preclude the bringing of claims against a trustee

under the DOTA simply because the sale was prevented by the borrower's affirmative actions. It is also important to note that the DOTA and the interpreting case law favors borrowers acting before a foreclosure has taken place, but because of recent changes to the statute, homeowners may still pursue claims after a foreclosure has taken place. RCW 61.24.127 (effective July 2009). It is illogical to conclude that the Legislature acted to preserve rights for homeowners who failed to utilize the pre-foreclosure sale remedies but did not intend for those persons who used the remedies available to have an ability to seek recovery from the wrongdoers. Further, the Legislative history of RCW 61.24.127 makes clear that it was passed in direct response to a Washington Court of Appeals decision which seemed to preclude any claims when the borrower did not seek injunctive relief. Brown v. Household, 2008 Wash. App. LEXIS 1857 (Wash. Ct. App. July 28, 2008). Thus, the Legislature was not providing "new" rights for homeowners when it enacted RCW 61.24.127, but rather it was in essence telling the appellate courts that they were wrong in their interpretation of the statute's provisions and was restoring that which had always been there in the statute. The Legislature did not feel the need to explicitly state that homeowners were entitled to enforce the

provisions of the DOTA because no court has ever held that they could not do so and in fact, there is case law which allows a wronged homeowner to obtain relief for such violations. Cox v. Helenius, 103 Wn.2d 383, 693 P.2d 683 (1985)., Albice v. Premier Mortgage Services of WA, Inc. 239 P.3d 148 (2011).

A review of the rather limited body of published Washington state case law interpreting the DOTA makes it clear that all of them except one involve post-foreclosure actions and much of the focus in the decisions was on whether or not the claims were waived because the sale was not enjoined. Simply put, it makes no sense at all to interpret the statute in such a fashion as to require homeowners to bear the financial burden of seeking to enjoin the foreclosure which was wrongfully initiated without recourse to the wrongfully foreclosing entity to recover those costs. In fact, the DOTA makes clear that the “prevailing party” in an action to restrain or enjoin a foreclosure sale is entitled to its attorneys fees in several places. RCW 61.24.130(1)(b).

[T]he court may condition granting the restraining order or injunction upon the giving of security by the applicant, in such form and amount as the court deems proper, for the payment of such costs and damages, including attorneys' fees, as may be later found by the court to have been incurred or suffered **by any party** by reason of the restraining order or injunction.

RCW 61.24.130(1)(b) (emphasis added).

RCW 61.24.090

(2) Any person entitled to cause a discontinuance of the sale proceedings shall have the right, before or after reinstatement, to request any court, excluding a small claims court, for disputes within the jurisdictional limits of that court, to determine the reasonableness of any fees demanded or paid as a condition to reinstatement. **The court shall make such determination as it deems appropriate, which may include an award to the prevailing party of its costs and reasonable attorneys' fees, and render judgment accordingly.** An action to determine fees shall not forestall any sale or affect its validity.

RCW 61.24.090(2) (emphasis added).

Respondents cannot cite to any published Washington state cases in support of its position. The only case which it cites to is the federal case of Vawter and the only case decided by a Washington Court that the District Court relies upon is Krienke v. Chase Home Fin., LLC, 140 Wn.App. 1032 (2007). The Court of Appeals in Krienke made a conscious decision not to publish the decision. Clearly it did not intend for it to be a binding precedent; QLS could not rely upon the unpublished decision. Accordingly, when the Respondents cite to Vawter, they really are citing to Krienke. As well, this Court can not rely on Vawter because then it would be doing an end run around the prohibition to cite to an

unpublished decision.

As pointed out in Judge Coughenour's order, it is proper for the federal courts to certify to the state court to decide on state matters; foreclosure is exclusively a state remedy. This Court should not be guided in making on making a decision on an issue of first impression under state law by relying on federal judges that don't know the state law

None of the Respondents deny they owed Grant the duty of good faith implied as part of Washington's general contract law. At page 35 of his Brief, Grant laid out the history of legislative amendment of RCW 61.24.010(3) to provide (on 06-12-08) that a trustee under a deed of trust would not owe a fiduciary duty to any party, but nonetheless the trustee would still be required to "act impartially between the borrower, grantor and beneficiary." (see SB 5378 (2007-08) and to add (effective 07-26-09) that the trustee owed a duty of good faith to both the bank and borrower. Contrary to QLS suggestions at p. 19 of its brief, the principles from Cox v. Helenius, affirmed in 2010 by this Court , Division 2 in Albice v. Premier Mortgage) described by Grant in his Brief at p. 27, 30-32 and 36 survived the 2008 legislative change removing the fiduciary obligations.

c. Violations of Consumer Protection Act

Grant has the right to pursue his claims for violations of the CPA based upon a violation of the trustee's duties under the DOTA.

The claims against QLS for violations of the Consumer Protection Act (RCW 19.86, *et seq.*) stem from its violation of its duties under the DOTA. Grant maintains that he can prove a claim for a violation of the CPA.

The CPA expressly confirms its provisions "shall be liberally construed" to fulfill its objective of protecting the public against "unfair, deceptive, and fraudulent acts or practices." RCW 19.86.920. The CPA is subject to enforcement by the Attorney General, by other state governmental entities, and by private individuals. RCW 19.86.080, 090. As noted by the Washington Supreme Court in Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 204 P.3d 885 (Wash. 2009), "The purpose of the CPA is to "complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts and practices in order to protect the public and foster fair and honest competition." RCW 19.86.920; Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 169, 744 P.2d 1032, 750 P.2d 254 (1987).

In a foreclosure setting, there is no reason to believe that the Legislature did not intend for the sale of a person's home at auction by the trustee to be considered as falling within the definition of "trade and commerce." RCW 19.86.010(2). Further, "trade" and "commerce" are defined terms under the CPA to "include the sale of assets or services, *and any commerce directly or indirectly affecting the people of the state of Washington.*" RCW 19.86.010(2) (emphasis added).

It is important to note that QLS did not cite to a single case which supported its assertion that it cannot be liable for a CPA claim based upon its failure to adhere to the requirements of the DOTA and the fact that it initiated a foreclosure sale when it had not been appointed as the trustee by the "beneficiary" as defined in the DOTA. There is still no evidence which can be considered by this Court as to when First Horizon acquired possession of Grant's Promissory Note and thus, there is no evidence as to the identity of the "beneficiary" at the time that foreclosure was initiated by QLS.

## **H2. Dismissal of Grant's Defenses and Rights of Recoupment Should be Reversed**

Grant has a right to know the identity of the creditor to assert his defenses under RCW 62A.3-305 (and see Olsen v. Pesarik, 118

Wash.App. 688-692, 77 P.3d 385 (2003)). At p. 36 of its Brief, First Horizon discusses the “merits” of the case but fails to provide particulars. For example, the tests for “duress” are subjective. There has been no discovery. Lane Powell can point to nothing in the record that shows how Grant’s defenses fail “on the merits”.

At p. 38 of its Brief, First Horizon confirms that Grant is not at risk of being liable for a shortfall in sale proceeds. However, the more likely scenario here is that the sale proceeds will exceed the first lender’s debt because of Grant’s substantial equity in the Property. However, Grant may still be at risk of being liable for shortfalls suffered by the junior lender. Here, for both those reasons, there will need to be a determination of the amount owing under the debt and to the extent that Grant has rights of set-off, there will be a deduction from that amount. Contrary to First Horizon’s assertions otherwise, the “debt” is absolutely an issue in this case in order to account to Grant for the excess sale proceeds whether sold at foreclosure or by Grant at a private sale.

### **H3. Dismissal of Claims Based on Statute of Limitations should be reversed**

For those claims that were dismissed as being barred by a limitation period, discovery rules, the continuing tort doctrine and

the equitable tolling are in place to prevent such outcomes.

Equitable tolling is allowed when justice requires. Millay v. Cam 135 Wash.2d. 193, 955 P.2d 791 and see In re Parentage of C.S., 134 Wash.App. 141 (2006), a decision of this Court. First Horizon cited Mellish v. Frog Mountain Pet Care, 154 Wn.App. 395 for the proposition that Grant bears the burden of proof (see Brief at page 10, 11) but First Horizon overlooked the fact that this Division 2 case is under review by the Supreme Court.

The Court of Equity was created to change the outcome of unfair applications of the law. Equity should be applied in this case.

In Crisman v. Crisman, 85 Wash.App. 15 (1997), Division 2 of this Court held that there were 2 ways to establish fraudulent concealment or misrepresentation:

"The plaintiff may affirmatively plead and prove the 9 elements of fraud or may simply show that the defendant breached an affirmative duty to disclose a material fact... either method of proof will activate the statutory discovery rule for fraud."

At all material times, Stewart Title owed fiduciary duties to Grant as escrow holder and trustee under the deed of trust (see Cox v. Helenius). First Horizon owed quasi-fiduciary duties to Grant at all material times. First Horizon and Stewart Title fraudulently concealed the recording of the QCD while a fiduciary

and while it had a duty to disclose. As a result, the 3 year statute of limitation was tolled under the doctrine of fraudulent concealment August v. U.S. Bancorp, 146 Wash.App. 328, 190 P3.d 86 (2008).

At pages 45-49 of Appellant's Brief, Grant outlines why the Statute of Limitations is inapplicable to some claims and all defenses in the Complaint. Grant's recoupment defense, his defenses under the Uniform Commercial Code and the recoupment defense under the Truth in Lending Act are not subject to time limitations and cannot be defeated on those grounds. "Statutes of limitation never run against defenses arising out of the transaction sued upon and "recoupment or offset is one of the defenses that is not barred by the statute of limitations" Olsen v. Pesarik, 118 Wash.App. 688-692, 77 P.3d 385 (2003); and see Dove v. McCormick, 698 So.2d 585 (1997).

The trial judge erred in accepting Respondents' false suggestions that December 1, 2004 was the accrual date for all claims in Grant's case RP 11, 38, line 8. Here the parties disagree as to the date that the causes of action accrued. Respondents can point to nothing in the record that proves all causes of action (not just the claims based on the loan documents) arose December, 2004 (alleged by First Horizon at p. 1, 7-10 of its brief, by Stewart

Title at p. 5 of its Brief. (Nothing in the record reveals the trial Court's reasoning beyond the judge believing that 4 causes of action (emotional distress, interference with contractual relationship, negligence and CPA) were barred by the Statute of Limitations RP 10:13, 27:6-15, that Stewart Title was entitled to dismissal of the breach of contract and fiduciary claims (RP 30:1 and that QLS was entitled to dismissal of a claim that QLS called "wrongful initiation of foreclosure" RP30:25. At RP 36:5-13, on February 4, 2011, the trial Judge could not recall his disposition of the hearing on January 14, 2011 - To get their form of Order, Lane Powell appears to have misrepresented what was said/decided at the January 14, 2011 hearing RP 36:14-25.

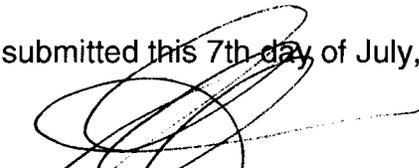
#### **H4 Leave to Amend Complaint Should Have Been Given**

Grant should be entitled to amend the Complaint for fraud, fraudulent concealment and to add parties.

#### **I CONCLUSION**

For the reasons stated above, Grant respectfully requests that this Court grant the relief requested by Grant in his Appellant Brief.

Respectfully submitted this 7th day of July, 2011



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Bellingham, WA, 98225  
(360) 671-1116 Pro Se Appellant

THE HONORABLE JOHN C. COUGHENOUR

# EXHIBIT # /

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

KRISTIN BAIN,

Plaintiff,

v.

METROPOLITAN MORTGAGE  
GROUP INC. et al.,

Defendants.

CASE NO. C09-0149-JCC

ORDER CERTIFYING QUESTION  
TO THE WASHINGTON SUPREME  
COURT

KEVIN SELKOWITZ,

Plaintiff,

v.

LITTON LOAN SERVICING LP et al.,

Defendants.

CASE NO. 10-5523-JCC

**I. BACKGROUND**

This Court previously ordered the parties in *Bain v. Metropolitan Mortgage Group Inc.*, No. C09-0149-JCC (W.D. Wash. removed Feb. 3, 2009), to show cause why this Court should

1 not decline to exercise supplemental jurisdiction over Plaintiff's state-law claims. In its order, the  
2 Court asked the parties to identify whether Washington law addresses Mortgage Electronic  
3 Registration Systems' (MERS)—and similar organizations'—ability to serve as the beneficiary  
4 and nominee of the lender under Washington's Deed of Trust Act when it does not hold the  
5 promissory note secured by the deed of trust. (Dkt. No. 130.) The Court also ordered the parties  
6 to identify whether Washington law addresses the legal effect in a nonjudicial foreclosure of an  
7 unauthorized beneficiary's appointment of a successor trustee. (*Id.*) The parties' responses  
8 demonstrated that Washington law does not specifically address these issues.

9 This Court later learned that a Washington Superior Court certified to the Washington  
10 Supreme Court similar (if not identical) questions involving MERS's role in the foreclosure  
11 process, namely, whether MERS was a lawful beneficiary under Washington's Deed of Trust  
12 Act and, if not, the resulting legal effect of the unlawful beneficiary. This Court stayed its cases  
13 involving MERS pending resolution by the Washington Supreme Court. *Bain v. Metropolitan*  
14 *Mortgage Group Inc.*, No. C09-0149-JCC (W.D. Wash. removed Feb. 3, 2009) (Dkt. No. 155);  
15 *Selkowitz v. Litton Loan Servicing LP*, No. C10-5523-JCC (W.D. Wash. removed July 27, 2010)  
16 (Dkt. No. 39).

17 On April 25, 2011, the Commissioner of the Washington Supreme Court, Steven Goff,  
18 entered a ruling denying discretionary review of the Superior Court's certified question. Under  
19 Washington Rule of Appellate Procedure 2.3(a), "a party may seek discretionary review of any  
20 act of the superior court not appealable as a matter of right." The Commissioner concluded that  
21 because the Superior Court had not yet ruled on the merits of the MERS issue, there was no "act"  
22 of the Superior Court on which to seek discretionary review.

23 Although the Superior Court's certification was not the proper vehicle for review by the  
24 Washington Supreme Court, the Commissioner described both the importance of the legal  
25 questions posed by the Superior Court as well as the probability that the Washington Supreme  
26 Court would eventually address the issue:

1 I agree with Mr. Vinluan that whether MERS can be a deed of trust  
2 beneficiary under Washington law is an important issue that deserves resolution,  
3 probably by this court. It appears that there is considerable ongoing foreclosure  
4 litigation on the point in both state and federal courts, with no authority from this  
5 court [or] the Court of Appeals to guide those decisions.

6 *Vinluan v. Fidelity Nat'l Title & Escrow Co.*, No. 85637-1, at \*4 (Wash. Apr. 25, 2011) (ruling  
7 denying review).<sup>1</sup>

## 8 II. CERTIFICATION

9 Pursuant to Washington Revised Code section 2.60.020,

10 When in the opinion of any federal court before whom a proceeding is pending, it  
11 is necessary to ascertain the local law of this state in order to dispose of such  
12 proceeding and the local law has not been clearly determined, such federal court  
13 may certify to the supreme court for answer the question of local law involved  
14 and the supreme court shall render its opinion in answer thereto.

15 The certification process serves the important judicial interests of efficiency and comity. As  
16 noted by the United States Supreme Court, certification saves "time, energy, and resources and  
17 helps build a cooperative judicial federalism." *Lehman Bros. v. Schein*, 416 U.S. 386, 391  
18 (1974). Because this matter involves important and far-reaching issues of first impression  
19 regarding MERS's ability to serve as the beneficiary and nominee of the lender under  
20 Washington's Deed of Trust Act, this matter should be presented for expedited review to the  
21 Washington Supreme Court. The following questions are hereby certified to the Washington  
22 Supreme Court:

- 23 1. Is Mortgage Electronic Registration Systems, Inc., a lawful "beneficiary"  
24 within the terms of Washington's Deed of Trust Act, Revised Code of  
25 Washington section 61.24.005(2), if it never held the promissory note secured  
26 by the deed of trust?

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<sup>1</sup> The Commissioner also noted that this Court had stayed its cases pending the  
Washington Supreme Court's decision whether to accept certification from the Superior Court.

- 1 2. If so, what is the legal effect of Mortgage Electronic Registration Systems,  
2 Inc., acting as an unlawful beneficiary under the terms of Washington's Deed  
3 of Trust Act?  
4 3. Does a homeowner possess a cause of action under Washington's Consumer  
5 Protection Act against Mortgage Electronic Registration Systems, Inc., if  
6 MERS acts as an unlawful beneficiary under the terms of Washington's Deed  
7 of Trust Act?

8 This Court does not intend its framing of the questions to restrict the Washington  
9 Supreme Court's consideration of any issues that it determines are relevant. If the Washington  
10 Supreme Court decides to consider the certified questions, it may in its discretion reformulate the  
11 questions. *See Affiliated FM Ins. Co. v. LTK Consulting Servs. Inc.*, 556 F.3d 920, 922 (9th Cir.  
12 2009). Further, this Court leaves to the sound discretion of the Washington Supreme Court the  
13 choice of which of the two (or both) of the above-captioned cases it believes serves as the  
14 preferable vehicle through which to resolve the questions posed.

15 The Clerk of Court is directed to submit to the Washington Supreme Court certified  
16 copies of this Order; a copy of the docket in the above-captioned matters; Docket Numbers 1, 10,  
17 21, 22, 24, 30, 31, 39, 41, 42, 44, 48, 57, 62, 65-69, 77, 79, 80, 82, 86-88, 90, 91, 94, 96, 98, 99,  
18 102, 104, 107-109, 111, 112, 116-118, 120, 122, 123, 128, 130, 131, 132, 138-146, 148, 149,  
19 153, 155, and 156 in Case No. 09-0149-JCC; and Docket Numbers 7-9, 12-17, 20-31, 33, and  
20 38 in Case No. C10-5523-JCC. The record so compiled contains all matters in the pending  
21 causes deemed material for consideration of the local-law questions certified for answer.

22 This Court STAYS these actions until the Washington Supreme Court answers the  
23 certified questions.

24 DATED this 24th day of June 2011.

25 

26 John C. Coughenour  
UNITED STATES DISTRICT JUDGE

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

EXHIBIT # 2

REYNALDO D. VINLUAN,

Petitioner,

v.

NO. 85637-1

FIDELITY NATIONAL TITLE AND ESCROW COMPANY, a Washington Corporation; UNITED PACIFIC MORTGAGE, d/b/a AVENTUS, INC., a Washington Corporation; SAXON MORTGAGE SERVICE, INC., a Texas Corporation; OCWEN LOAN SERVICING, a Florida Corporation; DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR REGISTERED HOLDERS OF MORGAN STANLEY ABS CAPITAL INC. TRUST 2007-NC3 MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2007-NC-3, a Delaware Corporation; REGIONAL TRUSTEE SERVICE CORPORATION, a Washington Corporation; and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation; BRANDIVATION, LLC, successor to NEW CENTURY HOME MORTGAGE, an Illinois Corporation; QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington Corporation,

Respondents.

RULING DENYING REVIEW

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2011 APR 25 P 2:38  
BY RONALD R. GARRENTER  
CLERK

In 2006 Reynaldo Vinluan purchased a Seattle condominium, executing a deed of trust naming Fidelity National Title and Escrow Company as trustee; Mortgage Electronic Systems, Inc. (MERS) as beneficiary; and United Pacific

611/44

Mortgage, d/b/a Aventus, Inc., as lender. MERS is a private corporation formed in 1993 by the Mortgage Bankers Association, Fannie Mae, Freddie Mac, Ginnie Mae, the Federal Housing Authority, and the Department of Veteran Affairs. Gerald Korngold, *Legal and Policy Choices in the Aftermath of the Subprime and Mortgage Financing Crisis*, 60 S. C. L. Rev. 727, 741-42 (2009). MERS provides a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. MERS becomes the mortgagee of record for participating members through assignment, and is listed as the grantee in county records. MERS is compensated for its services by fees charged to participating MERS members. The lender retains the note and the servicing rights to the mortgage, and can sell these interests without having to record the transaction in the public record. *Mortg. Elec. Registration Sys. v. Neb. Dep't of Banking Fin.*, 270 Neb. 529, 530, 704 N.W.2d 784 (2005). Thus, these transfers of interest between members are unknown to those outside the MERS system. Apparently, MERS has played a key role in permitting financial entities to securitize home loans. As is typical in these transactions, Mr. Vinluan's deed of trust recites that MERS is a separate corporation that is acting solely as the nominee for the lender and the lender's assigns, is the beneficiary under the deed, and is the legal title holder with the right to exercise all of the lender's interests under the deed.

In July 2009 Regional Trustee Services Corporation notified Mr. Vinluan that he was in default on his loan. (MERS had appointed Regional as successor trustee, although this instrument was not recorded until August 21, 2009). In August 2009 Regional gave notice of a trustee's sale. In November 2009 Regional discontinued the trustee sale, perhaps as a result of Mr. Vinluan's bankruptcy filing.

MERS later assigned the deed of trust to Deutsche Bank National Trust Company.<sup>1</sup> A foreclosure sale was held November 5, 2010, and Deutsche Bank acquired the property.

Meanwhile in June 2010 Mr. Vinluan brought this King County lawsuit against Fidelity (the original trustee); United Pacific (the original lender); Saxon Mortgage Service, Inc. (a loan servicing company); Ocwen Loan Servicing (another loan servicing company); Deutsche Bank; Regional; and MERS. He alleges causes of action for quiet title, wrongful foreclosure, libel and defamation of title, malicious prosecution, violation of the Truth in Lending Act, violation of Washington's Consumer Protection Act, and violation of the Federal Fair Debt Collection Act. In November and December 2010 the various defendants moved for dismissal under CR 12(b)(6). On January 18, 2011, the superior court issued an order dismissing Saxon and Fidelity from the lawsuit without prejudice, and denying all other motions to dismiss. And purportedly pursuant to RAP 2.3(b)(4),<sup>2</sup> the court certified to this court the questions whether MERS is a lawful beneficiary under Washington's Deed of Trust Act, *see* RCW 61.24.005(2), and what would be the legal effect under the Deed of Trust Act of MERS acting as an unlawful beneficiary. Mr. Vinluan now seeks this court's discretionary review of the superior court's order. Deutsche Bank, Ocwen, and MERS (but not Saxon and Fidelity) have responded to this motion.

Mr. Vinluan urges this court to grant review to decide whether MERS can be considered a grantee who can control the assignment of trustees under Washington's Deed of Trust Act. His argument on that point is not well developed in

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<sup>1</sup> The assignment says that it was made and entered into November 16, 2009, though the signature of "Vice President" Scott W. Anderson was notarized on April 5, 2010. This instrument was recorded April 21, 2010.

<sup>2</sup> RAP 2.3(b)(4) permits an appellate court to accept review of an act of the superior court if "[t]he superior court has certified, or ... all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is a substantial ground for a difference of opinion and ... immediate review of the order may materially advance the ultimate termination of the litigation."

his motion, but it stems from the statutory definition of “beneficiary” found in RCW 61.24.005(2): “‘Beneficiary’ means the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.” Mr. Vinluan seems to contend that the “instrument ... evidencing the obligations” in this case is the note he gave his lender, United Pacific, and that MERS has never been the holder of that note and United Pacific has the right to payments under the note. The note itself identifies United Pacific as the note holder, United Pacific has the right to payments on the note, the note says the deed of trust secures the rights of the note holder, and the note says that the lender may invoke any remedies permitted by the deed of trust. Accordingly, the argument goes, MERS has no beneficial interest in the deed of trust, and thus cannot assign rights and interests that it does not have. The contrary argument, though not much discussed by the parties, would be that the law ought to permit assignment of some of the lender’s rights to a nominee such as MERS.

I agree with Mr. Vinluan that whether MERS can be a deed of trust beneficiary under Washington law is an important issue that deserves resolution, probably by this court. It appears that there is considerable ongoing foreclosure litigation on the point in both state and federal courts, with no authority from this court of the Court of Appeals to guide those decisions.<sup>3</sup> But I am not convinced that this motion presents a viable vehicle for deciding that question.

A party may seek discretionary review of any “act” of the superior court not subject to appeal. RAP 2.3(a). A basic requisite of appellate review, recognized in

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<sup>3</sup> The United States District Court for the Western District of Washington had contemplated petitioning this court to determine this state law question under the Federal Court Local Law Certificate Procedure Act. See RAP 16.16. But after learning of the superior court’s certification of the issues in this case, the court instead stayed its cases pending a decision of this court whether to grant this motion for discretionary review. *Selkowitz v. Litton-Loan Servicing*, Cause No. C10-5523; *Bain v. One West Bank F.S.B.*, Cause No. 09-0149.

Washington very early on, is that the party seeking review be aggrieved of the lower court's ruling. See RAP 3.1 ("Only an aggrieved party may seek review by the appellate court.") An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected by the lower court's decision. *State v. Watson*, 155 Wn.2d 574, 582, 122 P.3d 903 (2005); *State v. Taylor*, 150 Wn.2d 599, 80 P.3d 605 (2003) (personal right or pecuniary interest). Ordinarily, mere disagreement with the lower court's reasoning does not make one aggrieved of the court's decision. *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 685, 743 P.2d 793 (1987). The mere fact that one may be hurt in his feelings, or be disappointed over a certain result does not entitle him to appeal. *State v. Taylor*, 114 Wn. App. 124, 56 P.3d 600 (2002). Generally, a party is not aggrieved of a decision in its favor, and cannot properly seek review of such a decision. *Paich v. N. Pac. Ry. Co.*, 88 Wash. 163, 152 P. 719 (1915). While this court recently held that RAP 3.1 could be waived to address a clear error in published Court of Appeals reasoning having sweeping implications, *Watson*, 155 Wn.2d at 577-78, Mr. Vinluan has not demonstrated any error affecting his personal or pecuniary interests. As noted, the superior court's order dismisses defendants Saxon and Fidelity from the lawsuit without prejudice, but declined to dismiss the other defendants, including MERS. Nothing in the record reveals the court's reasoning, and the parties' pleadings to this court are not instructive on the point.

During oral argument I asked Mr. Vinluan's counsel why the superior court dismissed Saxon and Fidelity from the lawsuit without prejudice, and whether Mr. Vinluan can be considered an aggrieved party of the decision declining to dismiss the remaining defendants, including MERS. Counsel responded the he could not speculate why Saxon and Fidelity were dismissed or why the court did so without prejudice, and seemingly that the trial court's certification of the questions involving MERS pursuant

to RAP 2.3(b)(4) means that his client need not be aggrieved in order to seek a decision by this court on those questions.

I asked the parties to provide me with further argument on the aggrieved party question by way of supplemental memoranda, which they have done. Mr. Vinluan reiterates that he does not know why Saxon and Fidelity were dismissed without prejudice. Respondents point out that Saxon (a prior loan servicer) and Fidelity (the prior trustee) did not obtain an interest in Mr. Vinluan's deed of trust through MERS, and suggest that Saxon and Fidelity were dismissed because there was insufficient allegations of wrongdoing in the complaint to state a viable claim against them. They posit that Mr. Vinluan did not seek review of those dismissals, but only of those portions of the decision that are beneficial to him. They urge that he may not do so, since he is not aggrieved of the court's decision in that regard.

Mr. Vinluan seems to maintain that he need not be aggrieved in order to seek review under RAP 2.3(b)(4), despite the plain wording of RAP 3.1. He notes that when subsection (4) was added to the rule in 1998 the drafters said it parallels a similar provision allowing federal courts to certify to this court controlling questions of state law. *See* RAP 16.16; RCW 2.60.010 *et seq.* Under that rule the court will decide a question of state law even though the federal court has not yet decided the question.

But I am not convinced that RAP 2.3(b)(4) was meant to create a method whereby a superior court can certify a legal question to this court for resolution without first having decided that question. As noted, a party may seek discretionary review of any "act" of the superior court not subject to appeal. RAP 2.3(a). But it is unclear whether the superior court has even acted on the question of MERS's authority under the Deed of Trust Act, let alone to Mr. Vinluan's detriment.

Moreover, RAP 2.3(b)(4) has never been employed by this court in the manner suggested by Mr. Vinluan. Rather, the court has granted discretionary review of superior court decisions pursuant to RAP 2.3(b)(4) in several instances, but only in cases where the superior court had actually decided the question in the first instance. (Most such decisions were made by me or the court's prior commissioner, though some were made by the justices.) My review of the published caselaw citing the rule revealed no decision holding, or even suggesting, that the rule operates to permit a superior court to certify a question to an appellate court without first having decided the question. Rather, in each case the court granted discretionary review to review an order deciding the question. Here, the trial court's order did not express its views on the "certified" questions, or explain whether or how its views on the questions affected the decision to dismiss Saxon and Fidelity but not United Pacific, Ocwen, Deutsche Bank, Regional, or MERS. The court's reasoning is not sufficiently known or concrete at this point to allow for meaningful review. And it must be remembered that this court's role in such matters is that of a reviewing court, not a court of original jurisdiction.

Mr. Vinluan argues alternatively that he is aggrieved of the order insofar as it dismisses Saxon and Fidelity. But he acknowledges that he does not know why the court dismissed those defendants, and he raises no issue that might obtain their reinstatement. Rather, he only asks the court to decide the issues relating to MERS and its authority to act as a beneficiary under the deed of trust. But on those questions he apparently obtained no ruling from the trial court, or a ruling to his benefit.

An appellate court decision on whether MERS can be a proper beneficiary under Washington's Deed of Trust Act would be helpful in resolving lawsuits challenging foreclosure or attempted foreclosures. But this motion is not a proper

vehicle for deciding that question. Accordingly, the motion for discretionary review is denied.

  
COMMISSIONER

April 25, 2011