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Court of Appeals
Division I
State of Washington

Case No. 71945-9-I

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

JAMES KEITH RICHARDS and KIRSTEN RICHARDS,

Appellants,

v.

QUALITY LOAN SERVICE CORPORATION OF WASHINGTON,
INC.; LEHMAN BROTHERS BANK, FSB; AURORA LOAN
SERVICES, LLC; MORTGAGE ELECTRONIC REGISTRATION
SYSTEM, INC.; and DOE DEFENDANTS 1 through 20

Respondents.

**APPELLANTS RICHARDS'
REPLY BRIEF**

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TABLE OF CONTENTS

INTRODUCTION.....1

FACTS 1

ARGUMENT.....12

 A. The facts of the case support the Richards’ position and the trial
 court erred in its interpretation of the law.....12

CONCLUSION..... 24

TABLE OF AUTHORITIES

Cases

<i>Albice v. Premier Mortg. Svcs. of Wash., Inc.</i> , 174 Wn.2d 560, 276 P.3d 1277 (2012).....	22
<i>Bain v. Metropolitan Mortg. Grp., Inc.</i> , 175 Wn.2d 83, 285 P.3d 34 (2012).....	<i>passim</i>
<i>Bavand v. OneWest Bank, FSB</i> , 176 Wn.App. 475, 309 P.3d 636 (2013) ..	22
<i>Corporación Venezolana de Fomento v. Vintero Sales Corp.</i> , 452 F. Supp. 1108, 1116-18 (S.D.N.Y. 1978).....	14
<i>Cox v. Helenius</i> , 103 Wn.2d 383, 693 P.2d 683 (1985).....	16
<i>Frias v. Asset Foreclosure</i> , 181 Wn.2d 412, 334 P.3d 529 (2014).....	21, 22
<i>In re Kelton Motors, Inc.</i> , 97 F.3d 22, 26 (2d Cir. 1996).....	13
<i>Klem v. Washington Mut. Bank</i> , 176 Wn.2d 771, 782, 295 P.3d 1179 (2013).....	22
<i>Leingang v. Pierce County Med. Bureau, Inc.</i> , 131 Wn.2d 133, 930 P.2d 288 (1997).....	16
<i>Lowy v. PeaceHealth</i> , 174 Wn.2d 769, 779, 280 P.3d 1078 (2012).....	16
<i>MidFirstBank, SSB v. C.W. Haynes & Co., Inc.</i> , 893 F. Supp. 1304 (D.S.C. 1994).....	14
<i>Panag v. Farmers Ins. Co. of Wash.</i> , 166 Wn.2d 27, 53, 204 P.3d 885 (2009).....	21
<i>Rucker v. Novastar Mortg., Inc.</i> , 177 Wn.App. 1 (2013).....	22
<i>Schroeder v. Excelsior Mgmt. Grp., LLC</i> , 177 Wn.2d 94, 297 P.3d 677 (2013).....	22
<i>Tunstall ex rel. Tunstall v. Bergeson</i> , 141 Wn.2d 201, 211, 5 P.3d 691 (2000).....	20
<i>Trujillo v. Northwest Trustee Services, Inc.</i> , 326 P.3d 768, 774 (2014) ..	19
<i>Walker v. Quality Loan Service Corp.</i> , 176 Wn. App. 294, 308 P.3d 716, 720-24 (2013).....	<i>passim</i>

STATUTES

RCW 61.24.005(2).....	<i>passim</i>
RCW 61.24.010(2).....	5, 8
RCW 61.24.030	<i>passim</i>
RCW 61.24.040	18, 20
RCW 62A.1-103	14
RCW 62A.1-201(21)(A).....	13
RCW 62A.3-205(b).....	1
RCW 62A.3-201	14
RCW 62A.3-203	31

TREATISES

Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755 (2011).....17

INTRODUCTION

The Richards' position is supported by the body of Washington case law. Aurora, as the loan servicer and document custodian was never a "beneficiary" nor a loan owner, and it did not have the legal authority to initiate a nonjudicial foreclosure. Nor did MERS, as there was no proof at trial of the loan owner or anyone else ever contacting Aurora and/or MERS to give instruction about anything. The responsive brief filed by Aurora and MERS is telling in that they did not cite to any of the Washington case law addressing the requirements for nonjudicial foreclosure, including Washington Supreme Court opinions on the subject with the exception of *Bain v. Metropolitan Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012). Washington case law supports the Richards' claims, as did all of the facts and evidence submitted at trial, and the legal decision rendered by the trial court should be overturned.

RELEVANT FACTS

Aurora and MERS assert that Aurora meets the definition of "holder" included in the UCC, "means the person in possession of the instrument is payable to the bearer." RCW 62A.3-205(b); 62A.1-201(20) (now 21), citing to *Bain* at 89, 104. But Aurora was never the "holder" under any version of the definition because it was only the loan servicer

and later the document custodian. This is borne out by its agreement with the loan owner, which was entered into evidence. TE 56-140. The Servicing Agreement for the securitized trust that owned the Richards' loan outlines the obligations of the parties, including Aurora, and discusses the role of the "custodian" who holds the Promissory Note and other loan documents. *Id.* The Servicing Agreement identifies LaSalle National Bank as the "custodian". TE 63. Later, Aurora acquired possession of the Note from the first custodian, but it did so in its role as the loan servicer and the new custodian. It did not become the loan owner.

Aurora acquired custody of the Note from the new custodian after LaSalle had ceased to exist. RP 92; *see generally*, RP 88-198. The Servicing Agreement references the Custodian Agreement: "Each custodial agreement relating to the custody of certain of the Mortgage Loans, each between the applicable Custodian and Trustee, each dated as of August 1, 2007." TE 63. The Custodians are referred to as U.S. Bank and LaSalle and their successors. *Id.* The Trustee is identified as US Bank or its successors. TE 71. Aurora is only the "Master Servicer" and the "Servicer". TE 66. Article II, Section 2.01 describes Aurora's relationship to the loan documents as follows:

The Servicer's possession of any portion of the Mortgage Loan documents shall be at the will of the Trustee [US Bank] for the sole purpose of facilitating servicing of the

related Mortgage Loan [defined on Page 8 as “includes, without limitation the Mortgage Loan documents, the Monthly Payments, Principal Prepayments, Liquidation Proceeds, Condemnation Proceeds, Insurance Proceeds, REO Disposition Proceeds, and all other rights, benefits, proceeds and obligations arising from or in connection with such Mortgage Loan.”] pursuant to this Agreement and **such retention and possession by the Servicer shall be in a custodial capacity only. The ownership of each Mortgage Note, Mortgage and the contents of the Servicing File shall be vested in the Trustee and the ownership of all records and documents with respect to the related Mortgage Loan prepared by or which come into possession of the Servicer shall immediately vest in the Trustee and shall be retained and maintained, in trust, by the Servicer at the will of the Trustee in a custodial capacity only.** The portion of each Servicing File retained by the Servicer pursuant to this Agreement shall be segregated from the other books and records of the Servicer (which, except for collateral documents such as the Mortgage and the Mortgage Note, may be stored as imaged files) and shall be appropriately marked to clearly reflect the ownership of the related Mortgage Loan by the Trustee. The Servicer shall release from its custody the contents of any Servicing File retained by it only in accordance with this Agreement.

TE 72. Thus, under the terms of the contractual agreement between Aurora and the loan owner, the securitized trust, Aurora had no interest beyond that of a servicer and a custodian.

The Servicing Agreement, Section 2.02(d), indicates that: **“All rights arising out of the Mortgage Loans shall be vested in the Trustee, subject to the Servicer’s right to service and administer the Mortgage Loans hereunder in accordance with the terms of this**

Agreement.” TE 73. And in fact, Section 3.10 requires that the Servicer is supposed to make sure the indorsements on the Note are done to the Trustee. TE 61-62. The Custodial Agreement, which is incorporated by reference into the Servicing Agreement, contains similar language regarding the role of the custodian. TE 141-171. The Custodian, LaSalle Bank, shall “hold the Mortgage Loan Documents (as defined herein) **on behalf of the Trustee in accordance with the terms hereof . . .**”

(emphasis added). TE 144. Aurora is also identified as the “Servicer”. TE 145. The original Note is required to be indorsed payable to the Trustee or in blank and transferred to the Custodian. TE 146. In Section 4 of the Custodial Agreement, the parties agree that:

With respect to each Mortgage Note, Mortgage and Assignment of Mortgage, and other document constituting each Custodial File that is delivered to the Custodian or that comes into the possession of the Custodian pursuant to this Agreement, **the Custodian acknowledges and agrees that the Custodian is the custodian for the Trustee exclusively and that the Trustee of the Mortgage Loans has the legal right to, at any time and in its absolute discretion, direct, in writing the Custodian to release any Mortgage Loan File or all Mortgage Loan Files to the Trustee or the Trustee’s designee, as the case may be, at such place or places as the Trustee may designate.”** (Emphasis added.)

TE 149. Ultimate authority rests with the Trustee (the loan owner) and the Custodian acts at the discretion of the Trustee. In Section 15, the Custodian disclaims having any “adverse interest, by way of security or

otherwise, in any Mortgage Loan, and **hereby waives and releases any such interest which it may have in any Mortgage Loan as of the date hereof.**” TE 152. When Aurora was acting as the servicer it did not have any interest in the Note for itself, and it did not acquire an interest in the Note for itself when it became the Custodian. *Id.*

While the Supreme Court in *Bain* noted that nothing in the deed of trust document itself can change the language and requirements of the Deed of Trust Act (“DTA”), the Richards maintain that this is not the situation here. *Bain* at 107-108; RCW 61.24, *et seq.* Rather, Aurora is seeking to avoid the contractual requirements which it agreed to with the loan owner (wherein it agreed to be the servicer and the successor custodian), and it is in seeking to avoid the terms of the contract, that Aurora is violating the requirements of the DTA. RCW 61.24.005(2); 61.24.010(2); 61.24.030(7). Aurora was never the loan owner (RCW 61.24.030(7) and (8)) and it was never the “beneficiary” or noteholder (RCW 61.24.005(2)). It was the servicer and the custodian. Nothing more. And because of that limited relationship, it could act within the parameters of the requirements of the DTA. RCW 61.24.005(2); 030(7).

In spite of the fact that Aurora was only the servicer and document custodian, it retained the services of QLS and instructed it to issue the Notice of Default which was posted at the Richards’ residence. It was

signed on February 10, 2011 by Angelica Castillo, Assistant Secretary of QLS as “Agent for Aurora Loan Services, LLC as Beneficiary”. TE 32-45. RCW 61.24.005(2). The Notice of Default also read that Aurora is the “current owner/beneficiary of the Note secured by the Deed of Trust”. TE 38. This was information was false, but was included on the document based upon Aurora’s submission to QLS of a “Beneficiary Declaration” wherein it falsely asserted that it was the loan owner and noteholder. In the document attached to the Notice of Default, an employee of Aurora asserted on December 30, 2010 that Aurora is the “Beneficiary” as defined under the DTA and that someone acting on behalf of the “beneficiary” had contacted the Richards in order to assess their ability to pay the debt so that the borrower might avoid a foreclosure. TE 44-45.

On or about January 12, 2011, another employee of Aurora, Jan Walsh, signed a Corporation Assignment document falsely asserting that she was actually a Vice President of MERS and indicating that she had the authority to transfer the beneficial interest in Mr. Richards’ Deed of Trust to Aurora. TE 25. Ms. Walsh’s employer, Aurora, asserted that she was “appointed” as a Vice President of MERS solely for purposes of executing documents on its behalf. Ms. Walsh is an employee of Aurora and had no relationship with MERS. *Id.*; RP 104-106. MERS did not have a “beneficial” interest Mr. Richards’ Deed of Trust at any time because it

did not have an interest in his Promissory Note. *Id.* By April 2009 Lehman had ceased to exist and had changed its name to Aurora Bank, FSB. *Id.* Thus, it did not have the power to authorize MERS or anyone else to act on its behalf once it ceased to exist and in fact, there was no evidence at trial of anyone other than Aurora making decisions about the foreclosure. RP 104-110. Thus, the execution of the Assignment document was another step taken to create a false record in the records of King County about the identity of the owner of the Richards' Note and loan. Certainly, no one at Lehman ever instructed Ms. Walsh to execute the Assignment. Ms. Walsh and Aurora simply executed the document in order to facilitate the nonjudicial foreclosure. *Id.*

More importantly in an analysis regarding the correct entity who had the legal authority to foreclose nonjudicially, the original lender, Lehman, had sold the Richards' loan to a securitized trust shortly after the it was made in 2007, as evidenced by the records of MERS and Aurora. TE 172. A search of MERS' website done on June 3, 2011 makes it clear that Aurora is only the servicer of the loan and that the "Investor" is U.S. Bank as Trustee for an unidentified trust. TE 172. Therefore, when the Aurora employee, acting as an "officer" of MERS executed the Assignment, the records maintained by MERS (which is really its only purpose – operating a website) clearly contained information that

contradicted the information contained in the Assignment. *Id.*

On or about February 12, 2011, Cheryl Marchant, a Vice President of Aurora, signed an Appointment of Successor Trustee falsely asserting that Aurora was the “present Beneficiary” under the subject Deed of Trust and that it therefore had the authority to appoint QLS as a new trustee. TE 25. As noted above, Aurora was not the Note Holder or “Beneficiary”, as defined under the Washington DTA and therefore did not have the legal authority to appoint a new trustee. RCW 61.24.005(2); 61.24.010(2). Nor was it the loan owner, which is now the only entity under the DTA that is permitted to initiate a nonjudicial foreclosure. RCW 61.24.030(7) and (8). Nevertheless, Aurora caused the Appointment document to be recorded in the records of King County, Washington on February 9, 2011 through QLS and used it to initiate a nonjudicial foreclosure sale against the Richards’ real property when there was no legal authority to do so. TE 25.

On or about March 14, 2011, QLS, acting on behalf of Aurora, caused the Notice of Foreclosure document to be served upon the Richards. The document falsely asserts that Aurora is the “Beneficiary” and the “owner of the obligation”, and the same assertions were also contained in the Notice of Trustee’s Sale (“NOTS”). TE 50-52. The first page of the NOTS asserts that the beneficial interest in Mr. Richards’ Deed of Trust was transferred by MERS, in its capacity as the “nominee”

for Lehman to Aurora, contrary to the true nature of the relationship between the parties and the reality of the purported “assignment” of the Richards’ Deed of Trust. TE 50.

The Richards were required to file suit in order to enjoin the pending foreclosure sale. RP 248-252. They were trying to market and sell their property in order to pay back the amounts that were legitimately owed on the loan and to preserve the significant equity that they had in the property. RP 222-223. Consistent with the requirements of the Temporary Restraining Order, Mr. Richards made monthly payments to the Court Registry for many months, until he no longer had the money to make those payments. RP 251. By the time of trial, the Richards proved that they had sold the Property and had paid the loan balance in full, including all foreclosure fees and costs that had been added to the loan balance, as well as all late fees and charges added to the loan balance. RP 254-255.

Aurora tried to deflect from their actions by contending that the Richards had lived in the property “rent free” and thus were not harmed by the attempts at foreclosure. RP 36; 53. But this ignored the fact that the Richards had paid every single cent demanded on the loan balance to the new servicer and the loan owner by the time of trial. RP 254-255. Thus, the amounts wrongfully added to the payoff constituted a portion of the Richards’ damages. *Id.*

The record is clear that Aurora and MERS were engaged in unfair, deceptive and misleading acts on a regular basis with regard to other foreclosure sales that were taking place in Washington State. It is part of their regular business operations, as evidenced by the testimony provided at trial. RP 61. As a result of the unfair and deceptive actions of Aurora and MERS, the Richards faced the loss of their family home and all of the equity in the property, which was estimated to be at least \$2 million dollars at the time that the lawsuit was initiated. RP 222-223. This estimation was consistent with the sales price that was later achieved. *Id.*

At trial, Mr. Richards articulated his injury as being the threat of an improper foreclosure sale, and his damages were identified as the costs of investigating his claims, costs associated with traveling to meet for that investigation including parking, paying an attorney to bring a motion to enjoin the foreclosure sale, the costs associated with traveling to and paying for parking to attend the hearings on the motion to enjoin the sale and other motions held during the course of the litigation. RP 248-255; 293-295. He also had to pay the costs associated with litigating the case which are recoverable, such as the filing fee, service of process costs and deposition costs, and he paid the foreclosure fees when he paid off the loan. *Id.* Thus, the Richards established that they suffered injuries as a result of the actions of Aurora and MERS, and that they incurred out of

pocket monetary damages. *Id.*; RP 254-255.

During the trial, Aurora and MERS' witness also testified for the first time in the case that the actions of the Aurora employees in this case were part of the "policies and procedures" that were in existence at the time, even though there had been absolutely no evidence of such activities provided prior to the trial date. RP 235-241. As the Richards argued to the trial court when moving to strike the testimony, or to at least draw an adverse inference, the Defendants had refused to provide any evidence in the discovery phase regarding its policies and procedures. Further, even though there were two depositions of CR 30(b)(6) deponents on behalf of Aurora and MERS prior to trial, none of those deponents had ever testified that its employees were relying upon policies and procedures and/or statutory interpretations of the DTA prior to the trial date. *Id.* The record was clear that this testimony was constructed for the trial so that the Defendants could try to argue that the *Leingang* case provided them with cover for their unfair and deceptive acts. *Id.*

In this case, the trial court did not make any factual findings that contradicted those proffered by the Richards. CP 96-102. However, the trial court in its Findings of Fact and Conclusions of Law did completely ignore the Servicing Agreement and the Custodial Agreement. It made no reference whatsoever to the Agreements and therefore did not appear to

even consider the relationship Aurora had to the Note as defined in those Agreements. *Id.* The Richards maintain that this was clear error and that the Court was required to consider those agreements when determining the relationship of Aurora to the Note.

II. ARGUMENT

A. **The facts of the case support the Richards’ position and the trial court erred in its interpretation of the law.**

Aurora and MERS focused in their briefing on case law that supports the notion that the trier of fact is in the best position to determine credibility, the persuasiveness of the evidence and whether or not there is “substantial evidence” in support of the legal conclusions reached by the trial court. *In re Marriage of Akon*, 160 Wn.App. 48, 248 P.3d 94 (2011). However, the power of the trial court is not as broadly construed as asserted by Aurora and MERS. There is nothing in the case law which supports the notion that this Court may not determine whether or not the trier of fact properly applied the facts to the law of the case, and as has happened here, whether it was appropriate for the trial court to completely ignore evidence that was presented by the losing party. In this case, the trial court did ignore the evidence presented regarding the relationship that Aurora had with the loan owner and the fact that it was never anything more than the loan servicer and document custodian. *In re Marriage of*

Akon stands for the proposition that “presumptions must give way in light of evidence”. It does not support the notion that a trial court may completely ignore uncontroverted evidence presented to it, as the trial court did here. *See, also, Dorsey v. King County*, 51 Wn.App. 664, 754 P.2d 1255, *review denied*, 111 Wn.2d 1022 (1988).

The trial court relied entirely upon the fact that Aurora has possession of the Note to support its findings that it met the definition of a “beneficiary”, ignoring completely that Aurora had possession as a custodian, acting for the securitized trust. Aurora was never in possession for its own benefit, consistent with the contractual language in the Servicing Agreement and the Custodial Agreement, that it ignored entirely. CP 103-104. In addition, the trial court incorrectly found that a mere servicer and custodian such as Aurora, and a party with no relationship to the Note whatsoever, MERS, could initiate a nonjudicial foreclosure under the Washington DTA. *Id.* And for these reasons, the trial court found that the Richards could not prevail on their claims for violations of the Consumer Protection Act (“CPA”) and their claims for intentional and negligent misrepresentation because “Aurora was the beneficiary”. CP 102-106.

The UCC defines the “holder” of a note, in relevant part, as “[t]he person in *possession* of a negotiable instrument that is payable either to

bearer or to an identified person that is the person in possession.” RCW 62A.1-201(21)(A) (emphasis added). The term “possession” as used in the UCC’s definition of “holder” is not defined, however, anywhere in the UCC. *See In re Kelton Motors, Inc.*, 97 F.3d 22, 26 (2d Cir. 1996) (“The Uniform Commercial Code nowhere defines ‘possession’”); *see also* RCW 62A.1-201 (definitions section of UCC, nowhere defining “possession”). The UCC does, however, provide that the principles of law and equity, including common law agency, supplement its provisions. *See* RCW 62A.1-103 (“Unless displaced by the particular provisions of this Title [*i.e.*, the UCC as a whole], the principles of law and equity, including . . . principal and agent . . . shall supplement its provisions”); *see also* RCW 62A.3-201, cmt. 1 (stating that a promissory note may be possessed “either directly or through an agent”).

Relying on agency principles, courts have found parties to be the holders entitled to enforce notes and other negotiable instruments when the notes and other instruments were in the custody of their agents. *See, e.g., In re Kelton Motors, Inc.*, 97 F.3d at 26-27 (holding based on common law agency principles that the party with “possession” of checks under UCC’s “holder” definition and the right to enforce them was the party that had the legal right to control checks, not the party with physical custody of the checks); *MidFirstBank, SSB v. C.W. Haynes & Co., Inc.*,

893 F. Supp. 1304, 1314-15 (D.S.C. 1994) (holding that owner of loan had “possession” and was thus the “holder” of notes under UCC where owner’s agent, Bank of America had physical custody of the notes for the owner); *Corporación Venezolana de Fomento v. Vintero Sales Corp.*, 452 F. Supp. 1108, 1116-18 (S.D.N.Y. 1978) (holding that owners of promissory notes had “possession” and were “holders” as defined in UCC, where the notes were delivered to owners’ document custodians). In each of these cases, consistent with RCW 62A.1-103 and RCW 62A.3-201, cmt. 1, the courts applied agency principles and held that the owners of the notes and instruments had “possession” as required to be a “holder” under UCC Article 3 where the owners’ agents had physical custody on behalf of the owners, and thus the owners were the “holders” who had the right to enforce the notes which they possessed through their agents.

The trial court only referenced the *Bain* case regarding DTA interpretation, and it ignored entirely the more recent case law interpreting the DTA (CP 102-106), which the Richards maintain is an error of law. Not only did the trial court get the facts wrong – Aurora was never the noteholder – it failed to understand that under RCW 61.24.030(7), the entity initiating the nonjudicial foreclosure must also be the loan owner. The DTA was amended to include this requirement and this Court cannot ignore the Legislature’s change. RCW 61.24.030(7)(a) and RCW

61.24.163(5)(c). The Legislature’s chosen language must be given effect. *See Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985) (courts “are required, when possible, to give effect to every word, clause and sentence of a statute”); *accord, American Legion Post #149 v. Washington State Dept. of Health*, 164 Wn.2d 570, 585, 192 P.3d 306 (2008)).

Even in *Bain*, a case that involved a consolidation of two separate lawsuits which involved claims brought before and after the legislative changes from 2009, including the addition of the ownership requirement in RCW 61.24.030(7), the Supreme Court noted importance of the identification of the loan owner to the process. *See Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d at 103 (“[T]he legislature intends to . . . [c]reate a framework for homeowners and beneficiaries to communicate with each other to reach a resolution and avoid foreclosure whenever possible; and [p]rovide a process for foreclosure mediation.”) (citing legislative findings, Foreclosure Fairness Act of 2011, Laws of 2011, ch. 58, § 3(2)); *see also* RCW 61.24.005, Reviser’s Note (legislative findings).

In finding for Aurora and MERS, the trial court ignored the cardinal rule that where “the plain language of a statute is unambiguous and legislative intent is apparent, [the court] will not construe the statute otherwise.” *Lowy v. PeaceHealth*, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012). The Richards agree that “‘courts must construe the statute so as to

effectuate the legislative intent.” The intent behind the DTA, however, is to promote resolution of defaults through direct negotiation between note owners and borrowers. *See Bain*, 175 Wn.2d at 98 n.7 (“there is considerable reason to believe that servicers [as opposed to owners of loans] will not or are not in a position to negotiate loan modifications or respond to similar requests”) (citing Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755 (2011)).

The DTA defines a “beneficiary” as “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.” RCW 61.24.005(2) (emphasis added). The DTA also specifies particular circumstances where a beneficiary must prove itself to be the *owner* of the note at issue in order to take sensitive actions. For example, “[i]t shall be requisite to a trustee’s sale . . . [t]hat, 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 61.24.030(7)(a) (emphasis added). Here, Aurora knew that it did not own the Note but it still took affirmative actions to hide the identity of the loan owner, including causing the issuance of the foreclosure documents which

identified Aurora as the loan owner and servicer, which was false. This is the same false assertion that was included on the “Beneficiary Declaration”, which was signed by Aurora’s employees and which did not comply with the requirements of the DTA. RCW 61.24.030(7). TE 25.

Ownership status “may” be shown by the declaration described in RCW 61.24.030(7)(a), but where, as here, the parties are *aware* that the entity submitting the declaration is not in fact the owner of the Note or the holder, the DTA’s demands for proof of owner status are not satisfied. The “owner” requirement also surfaces in the required language on a Notice of Default, which requires both “the name and address of the *owner* of any promissory notes or other obligations secured by the deed of trust,” and “the name, address, and telephone number of a party acting as a *servicer*.” RCW 61.24.030(8)(1) (emphasis added). Likewise, a Notice of Trustee’s Sale “shall” include language specifying which entity is “the *Beneficiary* of [the grantor’s] Deed of Trust *and owner* of the obligation secured thereby.” RCW 61.24.040(2) (emphasis added). Here, Aurora and the securitized trust that owned the loan created and agreed to the terms of the Servicing and Custodial Agreements and therefore agreed to be bound by their terms. TE 56-171. It was improper for the trial court to allow Aurora to disavow the roles that the parties to those agreements decided to have with respect to the Note in order to facilitate ignoring the requirements of

the DTA. It was improper for the trial court to ignore entirely the evidence of this relationship.¹

This Court's an opinion in *Trujillo v. Northwest Trustee Services, Inc.*, 326 P.3d 768, 774 (2014), which the Richards acknowledge is, on its face, precedential authority. However, *Trujillo* expressly contradicts the decision of the Washington Supreme Court in *Bain*. As this Court is aware, we are awaiting a ruling from the Supreme Court regarding *Trujillo*. However, as noted, the Richards maintain that *Bain* does not support the position of Aurora and MERS, which was adopted by the trial court in this case. The trial court was too literal in reading *Bain* and in concluding that the decision in that case allows for mere custodians to act as "noteholders". *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d at 88-89. The *Bain* Court held that the trustee in a non-judicial foreclosure "shall have proof that the beneficiary is the *owner* of any promissory note or other obligation secured by the deed of trust," *Bain* at 93-94 (RCW 61.24.030(7)(a)) (emphasis added), and that "[i]f the original lender [has] sold the loan, that purchaser would need to establish *ownership* of the loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions." *Id.* at 111 (emphasis added). The *Bain* Court did not find that the "owner" language was superfluous

¹ Notably, Aurora never contended during trial that it was the loan owner, in spite of the fact that this was the assertion made in all of the foreclosure documentation. RP 366.

nor that it could be read out of the statute. And in fact, it would be inappropriate for the Supreme Court to do so. The Legislature chose to include the “owner” language in the DTA when it created the Notice of Foreclosure language at RCW 61.24.040(2) years ago, and it made the choice again when it used the language multiple times in recent years with additions to the statute which are all designed to protect property owners.²

It is inconsistent with the *Bain* decision for the trial court to enter the findings that it did, which were premised entirely upon the notion that when Aurora was acting as a custodian, it became a “noteholder”. RCW 61.24.005(2). The trial court incorrectly found that Aurora was the “holder” or “actual holder” and that the Washington Legislature really meant the term “owner” in the DTA to mean the same thing as “holder” in the Uniform Commercial Code. RP 365-370; CP 32-35; 102-106. The trial court made this finding in spite of the fact that there are numerous instances in the DTA, as outlined above, where the Legislature used both words in the same sentence and clearly indicated that there they are two separate words and concepts. RP 365- 370; 394-398; CP 102-106. *See Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691

² The legislature added this additional “proof of ownership” requirement to the DTA in 2009. *See* Laws of 2009, ch. 292, § 8 (7)(a). At the same time, it added the requirement that in any non-judicial foreclosure on residential real property, the notice of default must identify the “name and address of the owner of any promissory notes or other obligations secured by the deed of trust.” *Id.* § 8 (8)(l).

(2000) (“To resolve apparent conflicts between statutes, courts generally give preference to the more specific and more recently enacted statute.”) (collecting cases).³

The Supreme Court in *Frias* recently clarified that plaintiffs may not bring direct claims under the DTA (which were settled in this case against QLS), but it reiterated language in its previous decisions and made clear that plaintiffs may bring claims for violations of the CPA predicated upon violations of the DTA requirements. “Even when there is no completed foreclosure sale and no allegation that plaintiff has paid foreclosure fees, it is possible for a plaintiff to suffer injury to business or property caused by alleged DTA violations that could be compensable under the CPA.” *Frias v. Asset Foreclosure*, 181 Wn.2d 412, 430, 334 P.3d 529 (2014), citing to *Panag v. State Farm Ins. Co. of WA*, 166 Wn.2d 27, 57, 204 P.3d 885 (2009). The Supreme Court noted that “injuries” rather than “damages” are compensable under the CPA, and quantifiable monetary loss is not necessary. *Id.* at 19. Although the *Frias* case did not ultimately decide the issues in the case because it was certified questions, Ms. Frias made some of the same allegations as those made here – that the foreclosing trustee was not properly appointed and could not act as a foreclosing trustee, and that the entities who empowered that unqualified

³ There is no definition of “owner” in the UCC. RCW 62A.1-201 and 62A.3-103.

trustee were liable for the injury and damages incurred as a result. *Frias* at 412-417. Nothing in the *Frias* decision supports the notion that an entity who is merely a custodian may nonjudicially foreclose. *See also, Walker v. Quality Loan Service Corp. of WA*, 176 Wn. App. 294, 308 P.3d 716 (2013) and the other recent published opinions interpreting the DTA.⁴ “We will not allow waiver of statutory protections lightly.” *Bain*, 175 Wn.2d at 108. Further, the Supreme Court found in *Bain, Frias* and *Lyons v. US Bank*, 336 P.3d 1142 (2014) that the use of false information in connection with an attempted nonjudicial foreclosure can meet the “unfair” and “deceptive” elements under the CPA, as did the Court of Appeals in *Walker* and *Rucker*.

Similarly, the Richards maintain that the facts, if properly construed by the trial court, support their claims for intentional and negligent misrepresentation. Aurora repeatedly falsely asserted that it had the legal authority to foreclose nonjudicially under Washington law because it was the “beneficiary” as defined here. It was never the “noteholder”. Further, neither it nor MERS ever received direction from the loan owner to act under the DTA and they cannot relation on any

⁴ *Albice v. Premier Mortg. Services*, 174 Wn.2d 560, 270 P.3d 1277 (2012); *Bain v. Metro. Mrtg. Group, Inc.*, 175 Wn.2d 83, 97, 285 P.3d 34 (2012); *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013); *Schroeder v. Excelsior Mngmt.*, 2013 WL 791863 (2013); *Rucker v. Novastar, Inc.*, 177 Wn.App. 1 (2013); *Bavand v. One West Bank, FSB*, 176 Wn.App. 475, 309 P.3d 636 (2013).

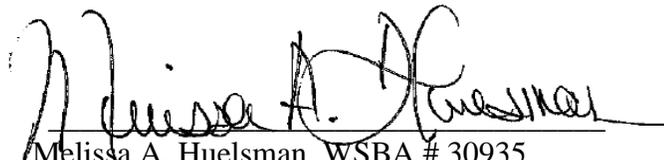
“agency” type arguments. (The Richards maintain that this would still be improper under Washington law, as it does not allow these actions to be performed by “agents”.) The assertion that the Richards did not “rely” upon the false representations mischaracterizes what occurred. The Richards certainly did “rely” upon the totality of all of the documents that were used in order to attempt to nonjudicially foreclose, even if they did not see the documents themselves. Rather, the recorded documents were a part of the nonjudicial foreclosure process and the attempt to acquire title to their home. There is nothing in the case law regarding misrepresentation, whether intentional or negligent, that supports the notion that so long as the wronged persons do not see the documents used to fraudulently take their property, the wrongdoer avoid liability.

CONCLUSION

The Richards maintain that the trial court erred when it found that there were no violations of the requirements of the DTA by Aurora and MERS who provided false, unfair and deceptive information regarding the ownership of the Richards’ Note. Further, the trial court erred when it found that Aurora was a “noteholder” as defined by the DTA and had the legal authority to appoint a successor trustee and initiate a nonjudicial foreclosure sale, and therefore denied the Richards’ claims for violations of the CPA and for misrepresentation. Similarly, the trial court erred

when it found that MERS was not liable to the Richards for its part in the nonjudicial foreclosure by way of its execution of false documents that were used as part of the attempted nonjudicial foreclosure. The Richards ask that this Court reverse and remand.

Respectfully submitted this 27th day of July, 2015.

A handwritten signature in black ink, appearing to read "Melissa A. Huelsman". The signature is written in a cursive style with a large, stylized initial "M".

Melissa A. Huelsman, WSBA # 30935
Attorney for Appellants James Keith Richards
and Kirsten Richards

CERTIFICATE OF SERVICE

I, Carl Turner, declare under penalty of perjury as follows:

1. I am over the age of eighteen years, a citizen of the United States, not a party herein, and am competent to testify to the facts set forth in this Declaration.

2. That on July 27, 2015, I caused the foregoing document attached to this Certificate of Service to be served upon the following individuals via the methods outlined below:

Adam G. Hughes, Esq. David A. Weibel, Esq. Bishop Marshall & Weibel, P.S. 720 Olive Way, Suite 1201 Seattle, WA 98101-1801 Ph: 206-622-5306 ahughes@bwmlegal.com dweibel@bwmlegal.com	<input checked="" type="checkbox"/> Legal Messenger: <input type="checkbox"/> Same Day <input checked="" type="checkbox"/> Next Day <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Federal Express <input type="checkbox"/> Other: _____
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing statement is both true and correct.

Dated July 27, 2015, at Seattle, Washington.

/s/ Carl Turner _____
Carl Turner, Paralegal