Supreme Court No. 90509-6

(Court of Appeals No. 70592-0-I)

SUPREME COURT OF THE STATE OF WASHINGTON

ROCIO TRUJILLO,

Petitioner,

v.

NORTHWEST TRUSTEE SERVICES, INC.,

Respondent.

REVISED *AMICUS CURIAE* MEMORANDUM OF COALITION FOR CIVIL JUSTICE IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

This Court has held that in the context of *RCW 61.24, et seq.* (hereinafter "DTA"), the borrowers' ability to negotiate directly with the owner and holder of the obligation is crucial to the effective administration of the statute. *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 93-94, 97-98, 118, 285 P.3d (2012) (hereinafter "*Bain*"). At issue in this case, *Trujillo v. Northwest Trustee Services, Inc.*, --- Wn. App. ---, 326 P.3d 768 (2014) (hereinafter "*Trujillo*"), is the proper interpretation of *RCW 61.24.030(7)(a),* that requires as a precondition to foreclosure, the trustee "have ***proof*** that ***the beneficiary is the owner***". *RCW 61.24.030(7)(a)* (emphasis added). The proper interpretation and enforcement of this provision, *RCW 61.24.030(7)(a)*, is a question issue of first impression for the Supreme Court, and the answer will affect tens of thousands of Washington homeowners.[1]

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[1] Based on the 2012 Census figure of combined family and non-family households in Washington State, between 8% and 9% of total households in Washington have likely been affected by a foreclosure being started on their home (Sources, Mortgage Bankers Assoc. & U.S. Census Bureau). In the 1st Quarter of 2014 alone, nearly 50,000 mortgage loans are seriously delinquent; this number is lower than last year, but higher than 2009. Source: Mortgage Bankers Assoc., cited by Washington Department of Financial Institutions.

We are nearly eight years removed from the beginnings of the foreclosure crisis, with over five million homes lost. So it would be natural to believe that the crisis has receded. Statistics point in that direction. Financial analyst CoreLogic reports that the national foreclosure rate fell to 1.7 percent in June, down from 2.5 percent a year ago. Sales of foreclosed properties are at their lowest levels since 2008, and the rate of foreclosure starts—the beginning of the foreclosure process—is at 2006 levels. At the peak, 2.9 million homes suffered foreclosure filings in 2010; last year, the number was 1.4 million.

But these numbers are likely to reverse next year, with foreclosures spiking again. And it has nothing to do with recent-vintage loans, which actually have performed as well as any in decades. Instead, a series of temporary relief measures and legacy issues

II. ARGUMENT

It is undisputed for purposes of this appeal that the trustee, Northwest Trustee Services, Inc. ("NWTS"), knew that the loan servicer, Wells Fargo Bank, N.A. ("Wells Fargo"), was ***not*** the owner of the note. Yet despite lack of compliance with the proof of ownership requirement in *RCW 61.24.030(7)(a),* NWTS issued its Notice of Trustee's Sale anyway.

A. *RCW 61.24.030(7)(a)* is not ambiguous.

RCW 61.24.030(7)(a), provides as follows:

> It shall be requisite to a trustee's sale:
>
> * * *
>
> (7) (a) That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the **owner** of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under penalty of perjury stating that the **beneficiary** is the **actual holder** of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection. (Emphasis added).

RCW 61.24.030(7) is not the only provision found in the DTA in which the terms "beneficiary", "owner" and "holder" are equated. Please see *RCW 61.24.040(2) and RCW 61.24.163(5)(c).*

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from the crisis will begin to bite in 2015, causing home repossessions that could present economic headwinds. In other words, the foreclosure crisis was never solved; it was deferred. And next year, the clock begins to run out on that deferral.

http://www.newrepublic.com/article/119187/mortgage-foreclosures-2015-why-crisis-will-flare-again

The *Trujillo* court's ruling notwithstanding, there is really nothing ambiguous about the provisions of *RCW 61.24.030(7)(a)* and there is no reasonable way to read the statute in any other manner except that being the holder is a necessary, but not a sufficient condition to identifying the party entitled to initiate, authorize and conduct a non-judicial foreclosure: the "holder" must also be the "owner" of the obligation, particularly when declaring a default in the obligation and when appointing a successor trustee. *RCW 61.24.030* and *RCW 61.24.010*. These apparently contradictory sentences are easily harmonized: where **A [Owner] = B [Beneficiary] and B [Beneficiary] = C [Holder]; *ergo*: A [Owner] should equal C [Holder]**. This is incontrovertible logic.

But this is not how the *Trujillo* court addressed the statute, which has prompted the Appellant, ROCIO TRUJILLO (hereinafter "Ms. Trujillo"), to petition this Court for discretionary review.

For purposes of this brief, the undersigned adopts the arguments and authorities offered by Ms. Trujillo in support of her Petition for Discretionary Review.

B. *Trujillo* Conflicts with Prior Decisions of this Court.

This Court has repeatedly held that the DTA must be strictly construed in favor of the homeowner. See *Bain*, at page 93 (citing *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 915, 154 P.3d 882 (2007)); *Albice v. Premier Mortg. Servs. of Washington, Inc.*, 174 Wn.2d 560, 567. 276 P.3d 1277 (2012); *Klem v. Washington Mutual Bank*, 176 Wn.2d 771,

789, 295 P.3d 1179 (2013); *Schroeder v. Excelsior Management Group, LLC,* 177 Wn.2d 94, 105, 297 P.3d 677 (2013). Substantial compliance is not enough. However, in judicially rewriting the provisions of *RCW 61.24.030(7)(a)* to eliminate the trustee's requirement to obtain proof of ownership, the *Trujillo* court necessarily favored the lender and trustee over the borrower by approving the short cuts adopted by NWTS, in violation of this Court's requirement of strict compliance with the DTA in favor of the borrower.

Moreover, in *Bain,* this Court emphasized the need for the borrower to know who the "actual holder" of the loan is to "resolve disputes" and to "correct irregularities in the proceedings." As this Court noted in *Bain,* at pages 93-94:

> Trustees have obligations to all of the parties to the deed, including the homeowner. *RCW 61.24.010(4)* . . . . Among other things, "the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust' and shall provide the homeowner with "the name and address of the owner of any promissory notes or other obligations secured by the deed of trust' before foreclosing on an owner-occupied home. *RCW 61.24.030(7)(a), (8)(l).*"). (Emphasis added).

This Court went on to explain the need for the borrower to have contact information of the owner or "actually holder" of the obligation in *Bain*, at page 118:

> But there are many different scenarios, such as when homeowners need to deal with the holder of the note to resolve disputes or to take advantage of legal protections, where the homeowner does need to know more and can be injured by ignorance. Further, if there have been misrepresentations, fraud or irregularities in the proceedings, and if the homeowner-borrower cannot locate the party accountable and with authority to correct the irregularity, there

certainly could be injury under the CPA.

In construing the provisions of *RCW 61.24.030(7),* the *Trujillo* court wrote the first sentence out of the statute: "the required proof is that the beneficiary must be the holder of the note. It need not show that it is the owner of the note." *Trujillo*, at page 776. In an apparent disregard of long standing rules of statutory construction, the *Trujillo* court justified its holding by noting that the first sentence of *RCW 61.24.030(7)(a)* was a legislative error and should be disregarded in its entirety: "Better still, the legislature could have eliminated any reference to 'owner' of the note of the note in the provision because it is the 'holder' of the note who is entitled to enforce it, regardless of ownership." *Trujillo*, at page 776. While writing the first sentence of *RCW 61.24.030(7)*(a) out of the statute, the *Trujillo* court failed entirely to address the provisions of *RCW 61.24.030(8)(l)* and *RCW 61.24.040(2),* which now conflict with the judicially re-written provisions of *RCW 61.24.030(7)(a).* Although the trustee now does not need to require proof that the beneficiary is the owner of the obligation under *RCW 61.24.030(7)(a),* the trustee must nevertheless provide "the name and address of the owner of any promissory notes" to the borrower under *RCW 61.24.030(8)(l)* and identify the "owner of the obligation" in the Notice of Foreclosure under *RCW 61.24.040(2).* Thus, *Trujillo* conflicts with *Bain* and leaves homeowners vulnerable to the mischief this Court sought to ameliorate in *Bain.* A loan servicer whose MERS authorized employee executes an assignment of a note and deed of trust in favor of the servicer, is unlikely to

"correct the irregularities" that arise from the servicer's wrongful foreclosure efforts.

The *Trujillo* court's approval of substantial compliance with the DTA over strict compliance, the favoring of the trustee's and lender's interest over the borrower's and its re-writing of *RCW 61.24.030(7)(a)* to further frustrate the borrower's ability to meet and confer with the true and lawful owner and holder of her loan conflict with *Bain* and other prior decisions of this Court.

C. Petition Involves Issues of Substantial Public Interest.

Washington case law is replete of this very fact pattern, due to the bundling of mortgages, where the original lender is no longer around; MERS is the nominee/beneficiary; the loan servicer as agent for an undisclosed principal is the initiator or the referrer of foreclosure, but the loan is owned by a securitized trust, or a GSE, and the original note is held by yet another unidentified entity who acts as custodian of records.[2] Because this fact pattern is so pervasive and the issue is recurring, the issue is of substantial public interest warranting review under *RAP 13.4(b)(4)*.

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[2] *McDonald v. OneWest,* 929 F.Supp.2d 1079 (W.D.Wash. 2013) (Lender as Indymac, MERS as nominee/beneficiary, OneWest as servicer and purported note holder while Freddie Mac is owner); *Bavand v. OneWest*, 176 Wn.App. 475, 309 P.3d 636 (2013); *Walker v. Quality Loan Serv. Corp.*, 176 Wn.App. 294, 308 P.3d 716 (2013) (Credit Suisse as Lender, MERS as nominee/beneficiary, Select Portfolio Serv. as loan servicer and holder); *Lucero v. Bayview Loan Serv.,LLC*, 2013 U.S. Dist. LEXIS 144317 (W.D. Wash. Oct. 4, 2013) (Taylor Bean Whitaker as Lender, Freddie Mac as owner, Cenlar as servicer and purported holder of note); *Massey v. BAC Home Loans,* 2013 U.S. Dist. 148402 (W.D.Wash. 2013) (Countrywide Bank as Lender, MERS as nominee/beneficiary, BAC Home Loans as servicer and Freddie Mac is owner). See also *Walker v. QLS Service Corp.*, 176 Wn.App. 294, 306, 308 P.3d 716 (2013) and *Bavand v. OneWest Bank, FSB*, 176 Wn.App 475, 499, 309 P.3d 636 (2013).

The volume of potential cases is borne out in documents prepared by the Washington Department of Financial Institutions (hereinafter "DFI"), that puts out quarterly reports of Defaults and Foreclosure Statistics. According to the Washington State Department of Financial Institutions, between 208,000 to 237,000 foreclosures were initiated in Washington between June of 2007 and March of 2014. A remarkable number of these foreclosures were initiated by NWTS during this period of time. According to Mr. Jeff Stenman, the current Director of Operations for NWTS and an employee of the company since 1996 in publicly available court records, NWTS conducts between "a hundred to two hundred" foreclosures per month in the Seattle/King County area alone. This would mean that NWTS has conducted between 8,400 and 16,800 foreclosures in the Seattle/King County area, and that does not included foreclosures conducted by NWTS in adjacent counties, such as Snohomish County, Pierce County, Kitsap County, Kittitas County and throughout the state, California and Alaska. The over-whelming number of these were initiated on behalf of out-of-state loan servicers, national lenders and banks and mortgage backed security trusts.

In dealing with the volume of foreclosures referred to their offices, NWTS necessarily relies on standard forms, such as the Beneficiary Declaration utilized in this matter. According to Mr. Stenman, this form is prepared and submitted to the "clients" by NWTS for signature, service and filing, as a general business practice. This would necessarily mean that the sort of violations of *RCW 61.24.030(7)(a)* and *(8)(l),* where someone other

than the true owner and holder of the obligation is identified, will continue to occur into the future, adversely affecting several thousands of families across this State. This is not a unique situation with NWTS. The other major corporate trustees, including Quality Loan Servicing of Washington and Regional Trustee Service, conduct their business in essentially the same way.

NWTS stated that the Court of Appeals' decision involves "solely a private dispute over whether Wells Fargo . . . could non-judicially foreclose" and that "there is no issue of substantial public interest." NWTS Answer at 18-19. Nothing could be further than the truth, as the numbers discussed above demonstrate. In addition to the thousands of foreclosures initiated in the state each month, NWTS is currently involved in a multitude lawsuits in various courts throughout the State over its notices of default that identify the holder of the note as someone other than the owner: *Williams v. Northwest Trustee Services, Inc.* Pierce County Superior Court, 14-2-11106-7 (removed by 3:14-cv-05631-RJB, W.D. Wash.) (alleging a pattern or practice of issuing notices of default declaring that the loan servicer is also the note holder and the creditor to whom the debt is owed while simultaneously disclosing the GSE Freddie Mac as the owner of the note); *Lucero v. Bayview Loan Servicing LLC, et al.*, 2:13-cv-00602-RSL (same); *Butler v. OneWest Bank, et al.* (*In re Butler*), Adversary Proceeding No. 12-01209-MLB, W. Dist. Wash. Bankruptcy Court; *Bowman v. Suntrust Mortgage et al.*, Court of Appeals, Div. I, Case 70706-0-1, *Hobbs v. NWTS*, Court of Appeals, Div. I, No. 71143-1-I. Thus, in the interest of avoiding piecemeal litigation, which

will certainly produce inconsistent results, the Court should review the Court of Appeals' decision to resolve this recurring issue of substantial public interest.

III. CONCLUSION

Washington case law is replete of this very fact pattern, due to the bundling of mortgages: the original lender is no longer around; MERS is the nominee/beneficiary; the loan servicer is the initiator or the referrer of foreclosure who acts on behalf of an undisclosed principal: the loan is owned by a securitized trust, or a GSE, and the original note is held by yet another unidentified entity who acts as custodian of records.[3] Since the *Trujillo* fact pattern is so pervasive and the issue is recurring, consideration of *Trujillo* is of substantial public interest warranting review under *RAP 13.4(b)(4)*.

NWTS' actual knowledge that the servicer is not the owner of the note is commonplace. In the Notice of Default NWTS stated, as trustee, that the note was owned by Fannie Mae, but the entity authorizing the foreclosure was the loan servicer, Wells Fargo, who is a complete stranger to the three-party deed of trust. This is typical in the industry. NWTS has been sending

[3] See *McDonald v. OneWest,* 929 F.Supp.2d 1079 (W.D.Wash. 2013) (Lender as Indymac, MERS as nominee/beneficiary, OneWest as servicer and purported note holder while Freddie Mac is owner); *Bavand v. OneWest*, 176 Wn.App. 475, 309 P.3d 636 (2013) (hereinafter "*Bavand*"); *Walker v. Quality Loan Serv. Corp.*, 176 Wn.App. 294, 308 P.3d 716 (2013) (hereinafter "*Walker*") (Credit Suisse as Lender, MERS as nominee/beneficiary, Select Portfolio Serv. as loan servicer and holder); *Lucero v. Bayview Loan Serv.,LLC*, 2013 U.S. Dist. LEXIS 144317 (W.D. Wash. Oct. 4, 2013) (Taylor Bean Whitaker as Lender, Freddie Mac as owner, Cenlar as servicer and purported holder of note); *Massey v. BAC Home Loans,* 2013 U.S. Dist. 148402 (W.D.Wash. 2013) (Countrywide Bank as Lender, MERS as nominee/beneficiary, BAC Home Loans as servicer and Freddie Mac is owner).

tens of thousands of these cut-and-paste-template based notices of default to Washingtonians, under *RCW 61.24.030(7)* and *RCW 61.24.030(8)(l)*.

For the foregoing reasons, Coalition for Civil Justice asks the Court to grant the pending Petition for Review and accept review of Division One's published decision in this case.

RESPECTFULLY SUBMITTED this 1st day of October, 2014, on behalf of Coalition for Civil Justice.

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CERTIFICATE OF SERVICE

I certify that today I served a true and correct copy of this *Amicus Curiae* Memorandum of Coalition for Civil Justice in Support of Petition for Review, by first-class mail, postage prepaid, upon:

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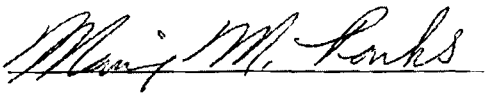

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Thank you!

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