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No. 72016-3-I

COURT OF APPEALS DIVISION ONE
OF THE STATE OF WASHINGTON

Sandra Shelley Jackson,

Appellant,

vs.

Quality Loan Service Corporation of Washington, et al.,

Respondents.

APPELLANTS SUPPLEMENTAL BRIEF

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This supplemental brief discusses the impact of recent precedent on issues before this Court. Section (1) addresses the definition of “beneficiary” under RCW 61.24.005(2) in light of *Cashmere*. Section (2) discusses the impact of *Rucker*, *Walker*, and *Bavand* in construing RCW 61.24.010(2) and RCW 61.24.030(7). Section (3) discusses how this Court’s interpretation of RCW 61.24.030(7) in *Trujillo* should be interpreted to be constitutional. Section (4) suggests *Frizzell* and *Frias* cause difficulties in construing the DTA because they presume the DTA confers appellate subject matter jurisdiction upon superior courts. Finally, Section (5) examines the impact of *Frias* on Jackson’s right to pre-foreclosure sale relief under the CPA.

1. Cashmere Supports Construing ALL of the Beneficiary Definition Criteria in RCW 61.24.005(2)

The DTA defines “Beneficiary” as, “[1] the holder of the instrument or document evidencing the obligations [2] secured by the deed of trust, [3] excluding persons holding the same as security for a different obligation.” RCW 61.24.005(2) (numbered brackets added). Washington’s Supreme Court has not construed the meaning of the second and third

criteria; in *Bain*, the Court only construed the meaning of the first criteria: a party must hold the promissory note.¹

In *Cashmere Valley Bank*, our Supreme Court held the statutory language “primarily secured by a residential mortgage” was legally significant—furthermore, the Court determined whether an investment was “secured” is based on the nature of the security trust agreement and the remedies provided therein.² Thus, the words “secured” and “security,” as well as “different obligation” in the second and third criteria of RCW 61.24.005(2) are legally significant, not merely superfluous.

2. *Rucker, Walker, and Bavand Advance that Trustee Reliance on a Beneficiary Declaration is Irrelevant where there is no Proper Beneficiary*

Only after a “proper beneficiary”³ appoints an entity as trustee pursuant to RCW 61.24.010(2), can that entity act as trustee and perform certain nonjudicial foreclosure proceedings.⁴ Additionally, a properly appointed trustee must strictly comply with the procedures set forth under

¹ See *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 110, 285 P.3d 34 (2012).

² *Cashmere Valley Bank v. Dept of Revenue*, ___ Wn.2d ___, ___ P.3d ___, Slip Op. 89367-5, 2014 Wash. LEXIS 769, *16 (2014).

³ A proper beneficiary meets all three criteria of RCW 61.24.005(2). See *supra* Section 1

⁴ See e.g., *Bavand v. OneWest Bank, FSB*, 176 Wn. App. 475, 484, 488, 309 P.3d 636 (Div. I, 2013); *Rucker v. NovaStar Mortg., Inc.*, 177 Wn. App. 1, 14, 311 P.3d 31 (Div. I, 2013); *Walker v. Quality Loan Serv. Corp. of Wash.*, 176 Wn. App. 294, 309, 308 P.3d 716 (Div. I, 2013) *overruled on other grounds by Frias v. Asset Foreclosure Servs., Inc.*, ___ Wn.2d ___, ___ P.3d ___, Slip Op. 89343-8, 2014 Wash. LEXIS 763 (2014).

the DTA⁵ including requisite provisions in RCW 61.24.030.⁶

A properly appointed trustee must strictly comply with RCW 61.24.030(7) as a condition *precedent* to “record[ing], transmitt[ing], or serv[ing]” a notice of trustee’s sale.⁷ Only a valid trustee pursuant to RCW 61.24.010(2), which has *never* violated its duty of good faith under RCW 61.24.010(4),⁸ may rely on a declaration, “made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust ... [as] sufficient proof” to initiate nonjudicial proceedings.⁹ Regardless of strict DTA compliance, a purported trustee’s nonjudicial foreclosure sales are void if it was not appointed by a proper beneficiary.

It is important to distinguish the requirements of RCW 61.24.005(2) (which establishes the statutory criteria for being a proper beneficiary) from RCW 61.24.010(2) (which requires proof of a proper beneficiary before any valid appointment of a successor trustee can occur) from RCW 61.24.030(7) (which sets forth the proof a trustee with authority to act under the DTA must have in order to record a notice of

⁵ See RCW 61.24.040(6); see also *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 567-68, 276 P.3d 1277 (2012).

⁶ See *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 108, 297 P.3d 677 (2013).

⁷ *Trujillo v. Nw. Tr. Servs., Inc.*, 181 Wn. App. 484, 326 P.3d 768 (Div. I, 2014).

⁸ See RCW 61.24.030(7)(b).

⁹ *Trujillo*, 181 Wn. App 493-497.

trustee sale). What a trustee may rely on under RCW 61.24.030(7) is not equivalent to what satisfies the beneficiary criteria and establishes authority to act under the DTA under RCW 61.24.005(2) and RCW 61.24.010(2) respectively. Absent these distinctions, entities seeking to nonjudicially foreclose may issue robo-signed self-serving declarations *falsely* announcing themselves beneficiary, without affording interested parties an opportunity to challenge the authority of these entities to prevent wrongful foreclosures.¹⁰

That DTA policy is consistent with constitutional due process requirements. “[N]either due process nor equity will countenance a system that permits the theft of a person's property . . . under the guise of a statutory nonjudicial foreclosure.” Accordingly, a charlatan beneficiary and/or its trustee, acting without lawful authority, cannot foreclose on people's homes.¹¹

3. *Trujillo's* Application of RCW 61.24.030(7) May Result in Interpretations Inconsistent with Separation of Powers Principles Prohibiting the Legislature to Mandate Legal Conclusions

Jackson argued this Court should not interpret the second sentence of RCW 61.24.030(7) to allow a self-serving declaration to control the judicial inquiry of evidence regarding the existence of a proper

¹⁰ See *Bain*, 175 Wn.2d at 94 (quoting *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985)).

¹¹ *Klem*, 176 Wn.2d at 790; see also Art I, § 7 (No person shall be disturbed in his private affairs, or his home invaded, *without authority of law.*) (emphasis added).

beneficiary. OB, pp. 38-39. *Trujillo* comes dangerously close to such a result.¹² *Trujillo*'s interpretation of RCW 61.24.030(7) is questionable where other courts could apply it to allow a declaration, submitted to satisfy RCW 61.24.030(7), to dictate the result of the judicial inquiry as to the existence of a proper beneficiary under RCW 61.24.005(2).¹³ Interpretations of *Trujillo* that allow the legislature to substitute the outcome of judicial inquiries regarding the beneficiary criteria, based solely on a self-serving declaration, violate the Washington Constitution.

"Any legislative attempt to mandate legal conclusions . . . violate[s] the separation of powers."¹⁴ The legislature cannot make the declaration conclusive and irrebuttable proof that an entity satisfies the three criteria under RCW 61.24.005(2).

4. *Frizzell* and *Frias* Suggest that Superior Courts Exercise Appellate Jurisdiction over Nonjudicial Foreclosure Proceedings

Jackson argues superior courts' subject matter jurisdiction over foreclosures of land is constitutionally tied to their enumerated original

¹² See *Trujillo*, 181 Wn. App. at 501, 509-10.

¹³ See, e.g., *Frazer v. Deutsche Bank Nat'l Tr. Co.*, 2014 U.S. App. LEXIS 20112 (9th Cir. 2014) (citing RCW 61.24.030(7) and *Trujillo* for proposition that declaration submitted under RCW 61.24.030(7) was sufficient proof that Deutsche Bank National Trust was a proper beneficiary).

¹⁴ *Sofie v. Fibreboard Corp.*, 112 Wn. 2d 636, 654, 771 P.2d 711 (1989). See also *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 417-18 63 P.2d 397 (1936) ("The legislature cannot indirectly control the action of the court by directing what steps must be taken in the progress of a judicial inquiry, for that is a judicial function.")

jurisdiction involving the title and possession of real property.¹⁵

In *Frizzell*, our Supreme Court held superior courts must strictly follow RCW 61.24.130(1), which conditions granting an injunction to stop an impending sale of the home upon the applicant’s payment of a bond, in an amount determined by the foreclosing party.¹⁶ Similarly, in *Frias*, our Supreme Court appeared to accept the legislative instructions in RCW 61.24.127, which favors and limits waiver—an equitable doctrine—of specific causes of action and remedies.¹⁷

A court’s subject matter jurisdiction, (“equitable,” “enumerated or general original,” and “appellate,” etc.) determines the extent of its review.¹⁸ Read together, *Frias* and *Frizzell* suggest that superior courts effectively exercise *appellate* jurisdiction under the DTA—the Court appears to accept legislative restrictions on its original jurisdiction in equity and waiver without determining whether the restrictions are

¹⁵ Wash. Const. Art. 4 § 6; OB, pp. 9-26; Consolidated Reply, pp. 6-15.

¹⁶ *Frizzell v Murry*, 179 Wn.2d at 303-304, 313-321; *but see Blanchard*, 188 Wash. at 415-416 (“The granting or withholding of an interlocutory injunction is addressed to the sound discretion of the court, to be exercised according to the circumstances of the particular case . . . **it is the duty of the court** to exercise its equity power and grant the necessary relief.”)

¹⁷ *Frias*, ___ Wn.2d ___, Slip Op. 89343-8, Wash. LEXIS 763 *1-2, 12-13, 25-33.

¹⁸ *See ZDI Gaming, Inc. v. Wash. State Gambling Comm’n*, 173 Wn.2d 608, 616-617, 268 P.3d 929, 933 (2012) (reciting that Supreme and Superior courts have irreducible jurisdiction).

appropriate.¹⁹ Accordingly, it is absolutely essential this Court announce the nature of the superior courts' jurisdiction to resolve cases arising pursuant to the DTA.

5. *Frias* grants Jackson a remedy under the CPA for Defendants' pre-foreclosure sale DTA violations

Where the Supreme Court has ruled authoritatively on an issue, its ruling applies retroactively unless the Court says otherwise.²⁰ *Frias* did not explicitly state its ruling on CPA causes of action related to the DTA was prospective.²¹ Thus, under *Frias*, the CPA provides Jackson a basis for relief from Defendants' DTA violations which were previously alleged as declaratory judgment causes of action.²²

¹⁹ See e.g. *In re Marriage of Buecking*, 179 Wn.2d 438, 449, 316 P.3d 999 (2013) ("legislation . . . divesting a constitutional court of its powers is void . . . the legislature may prescribe reasonable regulations that do not divest the court of its jurisdiction." (Citing *Blanchard*, 188 Wash. at 414, 418)); *Schroeder v. Weighall*, 179 Wn.2d 566, 316 P.3d 482 (2014) (suspending statute of limitations for minors bringing medical malpractice claims absent legislative justification violated Wash, Const. Art. I, § 12, and court's original general jurisdiction); *Blanchard*, 188 Wash. at 418 (The legislature cannot restrict the court's equity jurisdiction with regard to the superior court's discretion to issue an injunction because the constitution has specifically granted the superior court jurisdiction in equity).

²⁰ *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 279-80, 208 P.3d 1092 (2009).

²¹ See generally *Frias*, Slip Op. 89343-8, 2014 Wash. LEXIS 763 (2014).

²² *Id.*

DATED this 28th day of October, 2014 at Arlington, Washington.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "SEStafne", written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Ashley Burns, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

1. At all times hereinafter mentioned I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

2. That on the 28th day of October, 2014, I caused to be served a true and correct copy of the Appellants Supplemental Brief in the above title matter by causing it to be delivered to:

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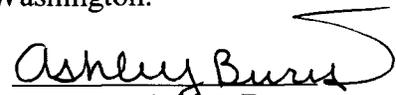
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DATED 28th day of October, 2014 at Arlington, Washington.


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