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No. 71143-1-I

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

DARLENE HOBBS and JOEL HOBBS,

Plaintiffs-Appellants,

v.

NORTHWEST TRUSTEE SERVICES, INC.; and WELLS FARGO BANK, N.A.

Defendants-Respondents.

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Rules

Other Authorities

I. INTRODUCTION AND SUMMARY

Darlene Hobbs and Joel Hobbs (the "Hobbs") challenge the lawfulness of the nonjudicial foreclosure that Wells Fargo Bank, N.A. ("Wells Fargo") initiated and attempted to complete through its trustee, Northwest Trustee Services, Inc. ("NWTS"). The Hobbs allege that Wells Fargo's and NWTS's conduct in attempting to foreclose on their property lacked legal authority and was unfair and deceptive, violating both the Deeds of Trust Act ("DTA"), RCW 61.24, and the Consumer Protection Act ("CPA"), RCW 19.86. The trial court dismissed the Hobbs' claims on summary judgment.

The Hobbs challenge the summary judgment on three grounds, each of which requires reversal. First, they challenge NWTS's authority to issue the notice of trustee's sale ("NOTS"), because RCW 61.24.030(7) requires that before a NOTS is issued, the trustee must have proof that the beneficiary is the owner of the note. Here, it is undisputed that Wells Fargo was ***not*** the owner and that NWTS ***knew*** that Wells Fargo was not the owner when it issued the NOTS. The beneficiary declaration executed by Wells Fargo stated that Federal Home Loan Mortgage Corporation ("Freddie

Mac") was the owner of the note. In holding that the foreclosure was authorized despite these circumstances, the trial court ignored the plain language of the statute and violated basic rules of statutory construction.

Second, the summary judgment should be reversed because the trial court erred in failing to consider RCW 61.24.030(7)(b), which states that a trustee may not rely on a beneficiary declaration as proof that a claimed beneficiary – here, Wells Fargo – is the owner of a note when, under the circumstances, reliance on the declaration would violate the trustee's duty of good faith owed to the homeowner under RCW 61.24.010(4). On the undisputed record, this Court should hold that NWTS's reliance on the declaration it received from Wells Fargo as proof of ***Wells Fargo***'s ownership of the note, when the declaration on its face stated that ***Freddie Mac*** was the owner, violated RCW 61.24.030(7)(b) and the trustee's statutory duty of good faith.

Third, Wells Fargo did not have the authority to commence the foreclosure because it was not the "beneficiary" under the DTA. The trial court found that Wells Fargo was the "beneficiary" based

on its physical custody of the promissory note, but that conclusion was error, because the court confused physical custody with legal possession, which Wells Fargo did not have, and which was required for it to be the "beneficiary." Under RCW 62A.9A.-313(h) and common law agency principles, and consistent with the case law from other jurisdictions, Freddie Mac had legal possession of the Note under RCW 62A.9A.-313(h) at all relevant times and was the holder under the UCC, and thus the beneficiary under the DTA.

For all of these reasons, the trial court's summary judgment was erroneous and should be reversed. Based on the undisputed facts in the record, and as a matter of law, this Court should reverse the trial court's summary judgment, enter summary judgment for Hobbs as the non-moving party on these same issues, and remand for trial on the remaining elements of their claims.

II. ASSIGNMENT OF ERROR

The trial court erred in entering its summary judgment orders dated August 27, 2013, CP 440-44, pursuant to its letter ruling of the same date, CP 435-39, dismissing the Hobbs' DTA and CPA claims

against Wells Fargo and NWTS. The Court should address three questions with respect to this assignment of error:

1. Did the trial court err in determining that NWTS lawfully issued the NOTS under RCW 61.24.030(7), which provides that before a trustee is authorized to issue a NOTS the trustee shall have proof that the beneficiary is the "owner" of the promissory note, when the declaration that NWTS received from Wells Fargo stated that Wells Fargo was the "actual holder" of the promissory note and that Freddie Mac was the "actual owner"?

2. Did the trial court err in not considering RCW 61.24.030(7)(b), which provides that a trustee may not rely on a beneficiary declaration as proof that a claimed beneficiary is the owner of the note where, as here, doing so would and did violate the trustee's duty of good faith owed to the homeowner under RCW 61.24.010(4)?

3. Did the trial court err in determining that Wells Fargo was the beneficiary of the note under RCW 61.24.005(2), where Wells Fargo had temporary custody of the note solely as an agent of Freddie Mac, the note owner, under Freddie Mac written instructions

that required Wells Fargo to agree that the note would be held in custody and trust for the benefit of Freddie Mac and that Wells Fargo would promptly return the note?

III. STATEMENT OF THE CASE

A. Factual Background.

On September 11, 2006, Darlene Hobbs executed a promissory note in favor of MortgageIt, Inc. (the "Note"). CP 309-18. To secure payment of the loan, she and her husband, Joel Hobbs, executed a Deed of Trust on the same date (the "Deed of Trust") against the home located at 9224 36th Avenue South, Seattle, WA 98118. CP 135-63.

The Deed of Trust named Chicago Title as trustee, MortgageIt, Inc. as lender, and Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for the lender and as the beneficiary under the Deed of Trust. CP 135-36. The Deed of Trust provides that the Note can be sold to a new owner, CP 146, and that the loan servicer can change unrelated to a sale of the Note. *Id.*

After the closing, MortgageIt, the lender, sold the Note to Freddie Mac. CP 298 & 322. Thereafter, the Note was stored by Wells Fargo Bank, N.A., Corporate Trust Services ("Custodian"), as

the custodian for the Note owner, Freddie Mac, at 1015 10th Avenue S.E., Minneapolis, MN 55414. CP 322.

The Hobbs' loan fell into default in 2011, and despite their attempts to negotiate a loan modification, they were unable to do so. CP 471, 486 & 498. On August 27, 2012, Wells Fargo, acting in its capacity as the servicer of the loan, requested through a standard form (Freddie Mac's "Form 1036") that the Custodian release the Note to Wells Fargo's loan servicing operation at 2701 Wells Fargo Way, Minneapolis, MN 55467. CP 322. Pursuant to that written request, the Custodian released the Note to the temporary custody of Wells Fargo's loan servicing location on August 30, 2012. *Id.*

On September 25, 2012, NWTS sent a notice of default to the Hobbs in which NWTS stated that it was a duly authorized agent of Wells Fargo. CP 293-96. NWTS informed the Hobbs in the notice of default that the owner of the Note was Freddie Mac. CP 295.

On November 1, 2012, NWTS received a sworn declaration entitled "Beneficiary's Declaration of Ownership of Note," dated October 30, 2012. CP 320. The declaration was signed by a Wells Fargo officer and stated that Wells Fargo was the "actual holder" of

the Note. *Id.* The declaration stated unequivocally that Freddie Mac was "the actual owner" of the Note. *Id.*

On November 8, 2012, a NWTS employee, Vonnie McElligott, acting on behalf of Wells Fargo under a power of attorney, signed an appointment of successor trustee stating that Wells Fargo appointed NWTS as the successor trustee in this matter. CP 172.

On January 22, 2013, NWTS, recorded a notice of trustee sale scheduling a sale of the Hobbs' property for May 31, 2013. CP 178-82. On May 31, 2013, the original scheduled sale date, NWTS mailed a notice to the Hobbs postponing the sale date to June 21, 2013. CP 291 & 304.

B. Procedural History.

The Hobbs filed their Complaint on June 12, 2013, alleging that Wells Fargo's and NWTS's attempt to foreclose was unlawful and constituted an unfair and deceptive act or practice in violation of both the DTA, RCW 61.24, and the CPA, RCW 19.86. CP 469-74. They filed the case *pro se* and were not represented by counsel at any point before the trial court. *Id.; see also* CP 340-66; 447-68; 492-96.

In their Complaint, the Hobbs allege that Wells Fargo was not the "beneficiary" as defined in the DTA, RCW 61.24.005(2), and had no right to initiate the foreclosure. CP 472. They further allege that the foreclosure was unlawful under RCW 61.24.030(7) because under that provision, NWTS was required to obtain proof that Wells Fargo owned the Note before it issued the notice of trustee's sale, but when it issued the NOTS, NWTS knew Wells Fargo was ***not*** the owner. *Id.*

On the same day they filed the Complaint, June 12, 2013, the Hobbs moved for a preliminary injunction to enjoin the trustee's sale. Wells Fargo did not oppose the injunction, provided that the Hobbs make the payments required by RCW 61.24.130. CP 477. On July 10, 2013, subject to that agreed condition, the trial court granted the preliminary injunction. CP 504.

On July 23, 2013, Wells Fargo moved for summary judgment. CP 1-17.[1] The next day, on July 24, 2013, NWTS filed a motion to join in the summary judgment motion. CP 323-24. On August 12,

[1] Wells Fargo argued that the Hobbs' claim for damages for wrongful foreclosure "should be dismissed because no such claim exists under the Deed of Trust Act." CP 4 n. 1 (citing *Vawter v. Quality Loan Service Corp.*, 707 F. Supp. 2d 1115, 1123 (W.D. Wash. 2010)). *Vawter* has been rejected in *Walker v. Quality Loan Service Corp.*, 176 Wn. App. 294, 304-13, 308 P.3d 716 (2013).

2013, the Hobbs filed their opposition to Wells Fargo's motion. CP 340-66. On August 16, 2013, Wells Fargo filed its reply in support of summary judgment. CP 367-76.

On August 23, 2013, the trial court held a hearing on the summary judgment motion and heard arguments by Wells Fargo's counsel and by Mr. Hobbs *pro se*. RP 1-21. On August 27, 2013, the trial court issued a letter ruling granting the motion. CP 435-39. The trial court held that Wells Fargo and NWTS did not act contrary to law. CP 439. It entered an order granting summary judgment to Wells Fargo, CP 442-44, and a companion order granting summary judgment to NWTS. CP 440-41. The Hobbs then filed a motion for reconsideration, CP 447-63, which was denied on October 10, 2013. CP 466. The Hobbs timely appealed.

IV. STANDARDS OF REVIEW

This Court reviews orders of summary judgment *de novo*, taking all reasonable inferences in favor of the non-moving party. *See Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 104, 297 P.3d 677 (2013). Summary judgment is only appropriate if the record shows that there is no genuine issue as to any material fact

and that the moving party is entitled to judgment as a matter of law. *Id.*; *see also* CR 56(c). The interpretation of a statute is a question of law and is also reviewed *de novo*. *Lowy v. PeaceHealth*, 174 Wn.2d 769, 778-779, 280 P.3d 1078 (2012).

V. ARGUMENT

A. The Summary Judgment Was Erroneous Under RCW 61.24.030(7) Because Wells Fargo Did Not Own the Note and NWTS Knew that Wells Fargo Was Not the Owner.

The trial court's summary judgment was legal error because it is undisputed that Wells Fargo was not the owner of the Note and that NWTS knew before it issued the notice of trustee's sale that Wells Fargo was not the owner. CP 320 (beneficiary declaration NWTS received from Wells Fargo before issuing notice of trustee's sale, stating that Freddie Mac owned the Note); *see also* CP 437-38 (trial court's ruling recognizing that Wells Fargo was not the owner of the Note).

RCW 61.24.030 sets forth a list of "requisite[s] to a trustee's sale." *Schroeder*, 177 Wn.2d at 106-07. These requisites are not waivable rights held by the borrower; they are absolute "limits on the trustee's power to foreclose without judicial supervision." *Id.* at 107; *see also Bain v Metropolitan Mortgage Group*, 175 Wn.2d 83,

108, 285 P.3d 34 (2012) (DTA's requirement that beneficiary hold note or other instrument of indebtedness cannot be waived).

Among other things, RCW 61.24.030 requires "that the trustee have proof that the beneficiary is the owner of the obligation secured by the deed of trust." *Schroeder*, 177 Wn.2d at 107; *see also Bain*, 175 Wn.2d at 93 ("'the trustee ***shall*** have proof that the beneficiary is the ***owner*** of any promissory note or other obligation secured by the deed of trust' . . . before foreclosing") (citing RCW 61.24.030(7)(a); emphasis added).

The language of RCW 61.24.030(7) could not be clearer. It requires:

> (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 the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.
>
> (b) Unless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection.

RCW 61.24.030(7) (emphasis added).[2]

When NWTS recorded the notice of trustee's sale, it knew Wells Fargo was not the owner of the promissory note as required by RCW 61.24.030(7). The beneficiary declaration executed by Wells Fargo on October 30, 2012 stated that Freddie Mac was the "actual owner" of the Note. CP 298.

Despite this, the trial court found no violation of the Act because Wells Fargo had also stated that it was the "actual holder" of the note and that this satisfied the statutory requirements. CP 437. In reaching this conclusion, the trial court found that there was an ambiguity in RCW 61.24.030(7) and resolved it by giving emphasis to the second sentence of the subsection reasoning that it clearly laid out the proof necessary to meet the subsection's requirements. *Id.* In so holding, the trial court ignored basic rules of statutory construction, and turned the statute on its head. The trial court's interpretation of RCW 61.24.030(7) ignored the plain language of the provision, failed to strictly construe the statutory language in

[2] The cross-referenced provision, RCW 61.24.010(4), provides that the "trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor."

favor of the Hobbs, and would lead to an absurd result. It should be reversed.

1. Wells Fargo and NWTS Were Required to Strictly Comply with the DTA, and the Statute Must Be Construed in Favor of the Hobbs.

Because a nonjudicial foreclosure lacks many protections that borrowers enjoy in a judicial foreclosure, lenders and trustees must strictly comply with the DTA. *Schroeder*, 177 Wn.2d at 106 ("under this statute, strict compliance is required"). Moreover, the DTA "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." *Id.* at 105 (citation omitted); *see also Walker,* 176 Wn. App. 294, 306, 308 P.3d 716 (2013) (same). Here, the trial court failed to require Wells Fargo and NWTS to strictly comply with RCW 61.24.030(7), and failed to construe the DTA in favor of the borrower.

2. The Trial Court's Interpretation Is Contrary to the Plain Language of RCW 61.24.030(7) Because Wells Fargo Did Not Own the Note and NWTS Knew that Wells Fargo Was Not the Owner.

When NWTS recorded the notice of trustee's sale, it knew that Wells Fargo was ***not*** the owner of the Note as required by RCW

61.24.030(7). As noted above, the declaration executed by Wells Fargo on October 30, 2012, which NWTS received on November 1, 2012, stated unequivocally that Freddie Mac was the "actual owner" of the Note. CP 298.

The plain meaning of a statutory provision is derived from the ordinary meaning of its language, as well as the general context of the statute, related statutory provisions, and the statutory scheme as a whole. *Hosea v. Toth*, 156 Wn. App. 263, 267, 232 P.3d 576 (2010). Here, as evidenced by the Supreme Court's reference to RCW 61.24.030(7) in *Schroeder*, 177 Wn.2d at 107, the language of this provision is plain and unambiguous: "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) (emphasis added).

The fact that a word is not defined in a statute does not mean the statute is ambiguous. *In re Dependency of A.P.*, 177 Wn. App. 871, 312 P.3d 1013, 1016 (2013). Rather, "an undefined term should be given its plain and ordinary meaning unless a contrary

legislative intent is indicated." *Id.* (citing *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 920-21, 969 P.2d 75 (1998)). Here, the legislature's use of the term "owner" creates no ambiguity. The term has a plain and ordinary meaning.

According to *Webster's Third New International Dictionary of the English Language Unabridged* (2002), an "owner" is "one that has the legal or rightful title whether the possessor or not." In the context of a securitized mortgage loan, as in this case, the owner of the promissory note secured by the deed of trust is the party who has the right to the economic value or benefits of the note. *See* Report of the Permanent Editorial Board for the Uniform Commercial Code, "Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes" (ALI Nov. 14, 2011) ("PEB Report") at 8, available at http://www.ali.org/00021333/PEB%20Report%20-%20November%202011.pdf (defining the "owner" of a mortgage note as the party "entitled to the economic value of the note").

Wells Fargo argued that the legislature used the term "owner" in RCW 61.24.030(7)(a) as a synonym for "holder." CP 11. Wells Fargo asserted that it would make no sense for the legislature to have

created a scenario in which a party entitled to enforce a note under the UCC could not initiate nonjudicial foreclosure under the DTA. CP 8-9. According to Wells Fargo, the DTA must be interpreted so that any party entitled to enforce a note under the UCC must have a concomitant right to initiate a nonjudicial foreclosure under RCW 61.24. *Id.* That is not the law.

Under Article 3 of Washington's UCC a "person entitled to enforce" a negotiable instrument includes: (i) the holder of the instrument; (ii) a nonholder in possession of the instrument who has the rights of a holder; ***or*** (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A-3-309 or 62A.3.418(d). RCW 62A.3-301 (emphasis added).

By contrast, under the DTA, only an entity who is a "holder" and therefore a "beneficiary" as defined in RCW 61.24.005(2) may initiate a nonjudicial foreclosure. *Bain*, 175 Wn.2d at 98-105. Despite Wells Fargo's assertions to the contrary, not all persons entitled to enforce the note under the UCC are "holders" and thus

"beneficiaries" who may initiate nonjudicial foreclosures under RCW 61.24, as shown above.

Wells Fargo's argument that the legislature used the term "owner" as a synonym for "holder," CP 11, also fails for another reason. Under established principles of statutory interpretation, when the legislature uses different language in the same provision or related provisions, the difference should be regarded as intentional and should be given meaning. *See, e.g., In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 842, 215 P.3d 166 (2009). Yet under Wells Fargo's interpretation, "owner" and "actual holder" as used in RCW 61.24.030(7)(a) would be interchangeable.

Thus, because the statute requires that before the NOTS is recorded, "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), and because NWTS had proof of the opposite, namely that Freddie Mac was the owner of the Note, the recording of the NOTS violated the plain language of the statute. *See Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9,

43 P.3d 4 (2002) ("if the statute's meaning is plain on its face, then the court must give effect to that plain meaning").

Moreover, the trial court's conclusion, under which NWTS could accept a declaration stating that ***Freddie Mac*** was the owner of the Note as the "proof" that ***Wells Fargo*** was the owner, would be an absurd result. Thus, not only is Wells Fargo's interpretation contrary to the plain language of the statute, but it should also be rejected because it would produce an absurd result. *See Lowy*, 174 Wn.2d at 779 ("It is fundamental that in construing any statute we avoid absurd results").

3. The Trial Court's Reading of RCW 61.24.030(7) Failed to Harmonize Its Provisions and Found Ambiguity Where None Existed and Rendered Part of Its Language Superfluous.

The trial court found no violation of the DTA because the declaration that Wells Fargo provided to NWTS also stated that Wells Fargo was the "actual holder" of the Note. CP 437. In reaching this conclusion, the trial court found that there was an ambiguity between the first and sentences of RCW 61.24.030(7)(a) and resolved it by giving emphasis to the second sentence at the expense of the first. *Id.* In reaching this erroneous conclusion, the

trial court failed to harmonize the provisions of the statute, and it rendered the first sentence superfluous.[3]

As discussed above, RCW 61.24.030(7)(a) clearly states that in the case of 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). There is no ambiguity in this sentence.

The trial court found an ambiguity in RCW 61.24.030(7) by placing emphasis on the second sentence of this subsection rather the first sentence. CP 437. The second sentence provides:

> A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the ***actual holder*** of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.

RCW 61.24.030(7)(a) (emphasis added). In doing so, the trial court erred as a matter of law by finding an ambiguity that does not exist and rendering the first sentence superfluous.[4]

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[3] *See Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007) ("Statutory provisions and rules should be harmonized whenever possible"); *see also Campbell & Gwinn, LLC*, 146 Wn.2d at 11 (statute should be interpreted so as to avoid rendering any language superfluous).

When both sentences of RCW 61.24.030(7)(a) are read together, the meaning of the provision as a whole is clear. The first sentence states the statutory requirement that the beneficiary must provide the trustee with proof of the beneficiary's ownership of the promissory note or other obligation secured by a deed of trust before the trustee is authorized to issue the NOTS. That is an absolute requirement, as the Supreme Court has made clear. *See Schroeder,* 177 Wn.2d at 106-07; *Bain*, 175 Wn.2d at 93. The second sentence does not create an exception. Rather, it allows the trustee to rely on a declaration stating that the beneficiary is the "actual holder" as a ***proxy*** to establish the required proof of the beneficiary's ownership.

Further, under RCW 61.24.030(7)(b), the trustee is not always permitted to rely on such a declaration stating that the beneficiary is the "actual holder" as a ***proxy*** for establishing that the beneficiary owns the note, but only if under the circumstances it would not violate the trustee's statutory duty of good faith to rely on the declaration as a proxy to establish the beneficiary's ownership of

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[4] *See Campbell & Gwinn,* 146 Wn.2d at 11 (when interpreting a statute, the court should "giv[e] effect to all the language used").

the note. *See* RCW 61.24.030(7)(b) (cross-referencing RCW 61.24.010(4)).

The first sentence of RCW 61.24.030(7)(a) required NWTS to obtain proof that the person claiming to be the "beneficiary" was the "owner" of the Note. Thus, the "beneficiary" declaration permitted by the second sentence is a declaration that must be made by the ***owner of the Note***. This is necessarily the case, because the first sentence requires that the "beneficiary" and the "owner" of the Note be the ***same person***. As a consequence of this fact (*i.e.*, that the beneficiary and owner of the Note must be the same person), if the declaration is not provided by the ***owner of the Note***, regardless of what it states, it cannot satisfy RCW 61.24.030(7)(a). Unlike the trial court's interpretation of the statute, this reading harmonizes all of the provisions of RCW 61.24.030(7), and it should be adopted for this reason as well.[5]

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[5] *Corales v. Flagstar Bank, FSB*, 822 F. Supp. 2d 1002 (W.D. Wash. 2011), *In re Reinke*, 2011 WL 5079561 (Bankr. W.D. Wash. 2011), and *Zalac v. CTX Mortgage Corp.*, 2013 WL 1990728 (W.D. Wash. 2013), cited by the trial court, CP 437-38, do not support its decision. *Reinke* involved a nonjudicial foreclosure initiated before RCW 61.24.030(7) went into effect. *Corales* and *Zalac* did not consider RCW 61.24.030(7), and did not involve undisputed facts such as those in this case where the foreclosing trustee knew the claimed beneficiary did not own the note.

Because the beneficiary declaration that Wells Fargo provided to NWTS stated that ***Freddie Mac*** was the owner of the Note, NWTS could not rely on the declaration under RCW 61.24.030(7) as the required proof under that ***Wells Fargo*** owned the Note, and the trial court erred in holding that the foreclosure was authorized under these circumstances.[6]

B. The Trial Court's Finding that RCW 61.24.030(7)(b) Did Not Apply Because There Had Been No Allegations that NWTS Violated Its Duty of Good Faith was Erroneous.

The trial court also committed error by failing to consider RCW 61.24.030(7)(b), which provides that a trustee may not rely on a declaration as proof that a claimed beneficiary is the owner of a promissory note if, under the circumstances, the trustee's reliance on the declaration would violate the trustee's duty of good faith owed to the homeowner under RCW 61.24.010(4). RCW 61.24.030(7)(b).

NWTS was not entitled to rely on Wells Fargo's declaration as evidence of proof of ownership of the Note under RCW 61.24.30(7), because when NWTS issued the NOTS it knew that

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[6] This same issue is currently before the Court in *Trujillo v. Northwest Trustee Services, Inc.*, Washington Court of Appeals, Division One, Case No. 70592-0-I. That appeal is scheduled for oral argument on April 24, 2014.

Freddie Mac, and ***not*** Wells Fargo, was the owner of the Note. *See* CP 291, ¶ 5 (Stenman Declaration) & CP 320 (beneficiary declaration received by NWTS on November 1, 2012, stating that Freddie Mac owned the Note); *see also* CP 295 (September 25, 2012 notice of default issued by NWTS stating that Freddie Mac owned the Note).

In their opposition to summary judgment, the Hobbs cited RCW 61.24.030(7)(b), CP 365, and argued: "The Notice of Default (NOD) that NWTS sent to us . . . stated that Freddie Mac was the Note owner . . . Wells certainly knew it was not the owner. Thus, Wells could not have offered its declaration for the purpose of proving it was the owner of the Note; and ***even if Wells did offer the declaration to prove it was the owner of the Note, NWTS could not have accepted the declaration for that purpose***." CP 358-59 (emphasis added).

Similarly, in their Complaint, the Hobbs alleged that NWTS acted unfairly and deceptively and violated the Consumer Protection Act because: "Prior to recording the NOTS, NWTS had proof that Freddie Mac, not Wells, was the owner of the loan. Nevertheless, on

January 22, 2013, NWTS, with Wells' blessing, recorded the NOTS." CP 472; *see also* CP 473 (where the Hobbs alleged that, "Defendants' conduct in attempting to foreclose without legal authority amounts to an unfair and deceptive act in violation of RCW 19.86.020").

Yet even though the Hobbs alleged NWTS's lack of good faith in their complaint and in their summary judgment brief, and even though the trial court was fully aware of the requirements of RCW 61.24.030(7)(b) and cited it in its ruling, CP 438, the court found that "***Northwest Trustee Services did not have to do anything more than receive the declaration*** according to the statute ***because there has been no allegation that it violated its duty of good faith*** under RCW 61.24.010(4)." CP 438 (citing RCW 61.24.030(7)(b)) (emphasis added). Again, the trial court committed plain legal error.

The trial court's finding that there was "no allegation that [NWTS] violated its duty of good faith," CP 438, cannot be squared with the Hobbs' explicit allegations both in their Complaint and in their opposition to summary judgment concerning NWTS's unfair and deceptive conduct and lack of good faith. The allegations were

more than sufficient under liberal notice pleading standards. *See, e.g., Champagne v. Thurston County*, 163 Wn.2d 69, 85-87 (2008) (under liberal notice pleading, allegations are sufficient so long as they give notice of general nature of a plaintiff's claim).[7]

Even if this Court were to accept the trial court's assertion that there had been no allegation by Hobbs that NWTS violated its duty of good faith, this would not have excused the trial court from reviewing all the evidence before it to determine whether NWTW was entitled to rely on the beneficiary declaration as sufficient proof of ownership as set forth in RCW 61.24.030(7). The provisions of RCW 61.24.030(7)(a) and (b) must be applied in tandem. But for the provisions of 7(b), the second sentence in 7(a) would create an irrebuttable presumption: namely, that the holder of a note and the owner are always the same. That is not always the case, however, and in this case, Wells Fargo certainly was ***not*** the owner.

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[7] The trial court's finding that the Hobbs' did not adequately allege NWTS's lack of good faith was even more inappropriate and improper when one considers that the Hobbs were *pro se* litigants. *See Garaux v. Pulley*, 739 F.2d 437, 439 (9th Cir. 1984) ("The rights of *pro se* litigants require careful protection where highly technical requirements are involved, especially when enforcing those requirements might result in a loss of the opportunity to prosecute or defend a lawsuit on the merits.").

A statute that creates a presumption which is arbitrary or which operates to deny a fair opportunity to repel the presumption, violates the due process clause. *City of Seattle v. Ross*, 54 Wn.2d 655, 660, 344 P.2d 216 (1959). If possible, a court must construe a statute so as to render it constitutional. *City of Seattle v. Montana*, 129 Wn.2d 583, 590, 919 P.2d 1218 (1996). To avoid a construction of RCW 61.24.030(7) that would be unconstitutional, this Court must read the provisions of RCW 61.24.030(7)(a) and (b) in tandem and hold that where a trustee knows otherwise, it cannot rely on a beneficiary declaration as sufficient proof of ownership where the purported holder is not the owner of the note.

Given these undisputed facts, the Court should rule that NWTS's reliance on the beneficiary declaration it received from Wells Fargo as proof of ***Wells Fargo***'s ownership of the note, when the declaration on its face stated that Wells Fargo was ***not*** the owner, violated RCW 61.24.030(7)(b) and the trustee's duty of good faith under RCW 61.24.010(4). *See also Albice v. Premier Mortgage Services of Washington, Inc.*, 157 Wn. App. 912, 934, 239 P.3d 1148 (2010), *aff'd*, 174 Wn.2d 560, 276 P.3d 1277 (2012) ("a trustee

must take reasonable and appropriate steps to avoid sacrificing the debtor's interest in the property").

C. The Summary Judgment Was Erroneous Because Wells Fargo Was Merely an Agent with Temporary Custody of the Note and Was Not a Lawful "Beneficiary" Under the DTA.

The trial court's summary judgment decision was also legal error because Wells Fargo was an agent for Freddie Mac with no more than temporary custody of the Note, and did not have the legal possession required to be the "beneficiary" authorized foreclose under the DTA. Although the trial court recognized that Wells Fargo did not own the Note, CP 436-37, it found that Wells Fargo "physically possessed the note, a negotiable instrument." CP 436. Ignoring the fact that Wells Fargo had physical custody only in its capacity as a loan servicing agent for Freddie Mac, the trial court found that Wells Fargo met "the definition of a 'holder' under RCW 62A.1-201(b)(21)" of the UCC, and in turn "was the 'beneficiary' under RCW 61.24.005 of the DTA." CP 436-37.

The trial court's error was to confuse Wells Fargo's physical custody of the Note as a loan servicing and collection agent with the type of possession required by the DTA. Because legal possession

remained at all times with the Note owner, Freddie Mac, and Wells Fargo had custody under a custodial agreement with Freddie Mac and nothing more, Wells Fargo was not the "beneficiary" as required under the DTA.

1. Wells Fargo Could Not Initiate the Foreclosure Without Being the "Beneficiary" Under the DTA.

The DTA requires that any party initiating a nonjudicial foreclosure must be the "beneficiary." *See Bain*, 175 Wn.2d at 98-105. The "beneficiary" is defined in the statute 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 another obligation." RCW 61.24.005(2) (emphasis added). As a result of numerous provisions in the DTA, Wells Fargo could not initiate a lawful foreclosure without being the "beneficiary" under this provision.

For instance, Wells Fargo was required to be the "beneficiary" in order to issue the Notice of Default, RCW 61.24.030(8), as it did here acting through NWTS as its agent. CP 293-96. Wells Fargo was also required to be the "beneficiary" in order to appoint NWTS as a successor trustee, RCW 61.24.010(2), as it subsequently did

when NWTS's employee, acting for Wells Fargo by power of attorney, appointed NWTS as the new trustee. CP 172. And NWTS, after being appointed as successor trustee, was required to have proof that Wells Fargo, as the lawful "***beneficiary***," was "the ***owner*** of any promissory note or other obligation secured by the deed of trust." RCW 61.24.030(7)(a) (emphasis added).

Only a lawful beneficiary has the power to appoint a successor trustee, and only a lawfully appointed successor trustee has the authority to issue a notice of trustee's sale. *Walker*, 176 Wn. App. at 306. When an unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and serve a notice of trustee's sale. *Id.*

2. A "Beneficiary" as Defined by the DTA Must Be a "Holder" within the Meaning of the UCC.

Because a mortgage note is a specific type of promissory note, the UCC generally controls the transfer of holder (RCW 62A.3) and owner (RCW 62A.9) interests in, and enforcement (RCW 62A.3) of, mortgage notes in Washington. The Supreme Court recognized this in *Bain* where it found that the UCC's definition of "holder" should be used when interpreting the same

term as used in the DTA's definition of the "beneficiary" under RCW 61.24.005(2). *Bain*, 175 Wn.2d at 103-04. After quoting the UCC's definition, the Court stated: "The plaintiffs argue that our interpretation of the deed of trust act should be guided by these UCC definitions, and thus a beneficiary must either actually ***possess*** the promissory note or be the payee . . . ***We agree***." *Id.* at 104 (citation omitted; emphasis added).[8] The Court in *Bain* went on to hold that because MERS had never held the promissory note it was not a beneficiary under the terms of the DTA. *Id.* at 110.

3. Wells Fargo Did Not Have Legal Possession of the Note and Was Not the "Holder" Under the UCC or the "Beneficiary" Under the DTA.

In order to be the "holder" of the Note under the UCC, and thus the "beneficiary" with authority to foreclose under the DTA, Wells Fargo was required to have *possession* of the Note as defined by Washington common law, including the common law of agency.

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[8] In *Bain*, the Court was not asked to decide and did not address whether *physical custody* of a note is the equivalent of "*possession*" as the term "*possession*" is used in the UCC. In *Bain*, the fact that MERS had never obtained *physical custody* of the mortgage note was uncontested. *Bain*, 175 Wn.2d at 94-97. The distinction between an agent's physical custody of a note and legal possession was not at issue in *Bain.* Thus, in ruling that the beneficiary must "*possess*" the note, the Court was not making any statement about the legal meaning of *"possession"* as used in the UCC's definition of "holder."

As merely the loan servicer or agent for Freddie Mac, Wells Fargo's temporary physical custody of the Note was not sufficient to qualify it as "the beneficiary" under the DTA. Because of this, Wells Fargo was not the lawful "beneficiary" and did not have authority to appoint NWTS as the successor trustee under RCW 61.24.010(2) or otherwise initiate a nonjudicial foreclosure under the Act.

The UCC's definition of "holder" in effect when Wells Fargo initiated the foreclosure at issue here defined the "holder" as:

> The 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(b)(21)(A) (emphasis added). Similarly,

Black's Law Dictionary defines "holder" as:

> 1. A person who has ***legal possession*** of a negotiable instrument and is entitled to receive payment on it. 2. A person with ***legal possession*** of a document of title or an investment security.

Black's Law Dictionary 736 (7th ed. 1999) (emphasis added). Thus, underlying Wells Fargo's claim that it was the "beneficiary" under the DTA, and the "holder" of the Note, is the requirement that Wells Fargo must have ***legal possession*** of the Note as required to be a "holder" under the UCC, which it did not.

Just as the DTA's definition of the "beneficiary" relies on the term "holder" that is not defined in the DTA, the UCC's definition of "holder" relies on a term, "possession," that is not defined in the UCC. *See* RCW 62A.1-201. Because the term "possession" is not defined, common law agency principles apply and determine what constitutes legal possession of the Note. *See* RCW 62A.9A-313, Comment 3 (UCC Official Comment, entitled "Possession," stating that "***in determining whether a particular person has possession, the principles of agency apply***") (emphasis added); *see also* RCW 62A.1-103 (unless otherwise stated in the UCC, common law "principles of law and equity, including . . . principal and agent" supplement the provisions of the UCC).

The common law agency principle of legal possession is now codified in RCW 62A.9A.-313(h), which provides as follows:

> A secured party having possession of collateral ***does not relinquish possession by delivering the collateral*** to a person other than the debtor or a lessee of the collateral from the debtor in the ordinary course of the debtor's business if the person was instructed before the delivery or is instructed contemporaneously with the delivery:

(1) ***To hold possession of the collateral for the secured party's benefit***; or

(2) ***To redeliver the collateral to the secured party***.

RCW 62A.9A-313(h) (emphasis added).[9]

The applicability of this principle to mortgage notes is emphasized in recent guidance issued by the Permanent Editorial Board for the Uniform Commercial Code, which agrees that the courts should interpret RCW 62A.9A.-313(h) as a codification of common law agency principles. *See* PEB Report at 9 n. 38, available at http://www.ali.org/00021333/PEB%20Report%20-%20November%202011.pdf (explaining that "[a]s noted in Official Comment 3 to UCC § 9-313, "in determining whether a particular person has possession [of a mortgage note], the principles of agency apply," then discussing § 9-313(h)).

This critical distinction between physical custody and legal possession of a mortgage note is consistent with the common law definition of "possession," which *Black's Law Dictionary* defines as:

[9] *See also State v. Spillman*, 110 Wash. 662, 666-67, 188 P. 915 (1920) (defining "possession in law" as "that possession which the law annexes to the legal title or ownership of property, and where there is a right to the immediate, actual possession of property").

> 1. The fact of having or holding property in one's power; the exercise of dominion over property. 2. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object.

Black's Law Dictionary 1183 (7th ed. 1999). While Wells Fargo had temporary physical custody of the Note pursuant to Freddie Mac's Form 1036, CP 322, its rights as a servicer and temporary custodian of the Note were strictly limited and did not constitute legal possession. *See* 18 William B. Stoebuck & John W. Weaver, W*ashington Practice: Real Estate Transactions* § 18.31 at 365 (2d ed. 2004) (discussing mortgage notes and the role of loan servicers as collection agents, emphasizing that the owner of the mortgage note, and not the servicer, is "the mortgage holder").

The applicability of RCW 62A.9A.-313(h) becomes clear when the UCC definitions of the terms "secured party," "collateral" and "debtor" are considered in turn. A "secured party" under the UCC includes "[a] person to which . . . promissory notes have been sold." RCW 62A.9A-102(72)(D). Similarly, "collateral" is defined to include "promissory notes that have been sold." RCW 62A.9A-102(12)(B). The "debtor," as defined under the revised Article 9, is

"[a] person having an interest, other than a security interest or other lien, in the collateral," including "[a] seller of . . . promissory notes; or . . . consignee." RCW 62A.9A-102(12)(B). Finally, a "security interest" includes the interest of "a buyer of . . . a promissory note." RCW 62A.1-201(35).

Returning to RCW 62A.9A.-313(h), but substituting these governing UCC definitions as they apply here, RCW 62A.9A.-313(h) provides and operates as follows:

> A secured party [*person to whom promissory note has been sold, i.e., Freddie Mac*] having possession of collateral [*the promissory note*] does not relinquish possession by delivering the collateral [*the promissory note*] to a person other than the debtor [*the seller or consignee of the promissory note, i.e., the lender that sold the Note to Wells Fargo, MortgageIt*] . . . if the person was instructed before the delivery or is instructed contemporaneously with the delivery:
>
> (1) To hold possession of the collateral [*the promissory note*] for the secured party's [*person to whom promissory note has been sold, i.e., Freddie Mac*] benefit; or
>
> (2) To redeliver the collateral [*the promissory note*] to the secured party [person to whom promissory note has been sold].

RCW 62A.9A.-313(h) (emphasis added; UCC definitions inserted).

Under these principles of agency law, as codified in RCW 62A.9A.-313(h), Freddie Mac did not relinquish its legal possession

of the Note when the Custodian temporarily relinquished custody of the Note to Wells Fargo, the loan servicer and Freddie Mac's agent, under Freddie Mac's Form 1036, CP 322, because the custodial transfer instructions instructed Wells Fargo that it had temporary physical custody of the Note for Freddie Mac's benefit (*see* RCW 62A.9A.-313(h)(1)) ***and*** that Wells Fargo was required to redeliver the Note to Freddie Mac's Custodian (*see* RCW 62A.9A.-313(h)(2)).

In particular, the Form 1036 expressly required Wells Fargo to agree that (1) all documents released to Wells Fargo would be "held in trust for the benefit of Freddie Mac," and (2) Wells Fargo would "promptly return the documents to the Custodian when [its] need therefor no longer exists, except where the Mortgage is paid in full or otherwise disposed of in accordance with Freddie Mac's Single-Family Seller/Servicer Guide." CP 322.

These conditions that Wells Fargo agreed to under the Form 1036 when it requested and obtained physical custody of the Note exactly tracked ***both*** conditions of RCW 62A.9A.-313(h), namely (1) that Wells Fargo agree to hold the Note for Freddie Mac's

benefit, and (2) that it agree to redeliver the Note to Freddie Mac. *See* RCW 62A.9A.-313(h) (1) & (2).

Clearly, Freddie Mac put the Form 1036 together with UCC Article 9, § 3-313(h) in mind. RCW 62A.9A.-313(h) speaks directly to the issue before the Court and is the law of Washington governing the possession of a promissory note under the UCC where, as here, it is in the temporary custody of another person that is acting for the benefit of the owner. Accordingly, under the Washington law governing legal possession of the Note, the Custodian for the owner, Freddie Mac, did "not relinquish possession" by delivering the Note to Wells Fargo. RCW 62A.9A.-313(h).

This conclusion is consistent with the case law from other jurisdictions discussing the difference between physical custody and legal possession of a promissory note under the agency principles and the UCC.[10] In *MidFirst Bank, SSB v. C.W. Haynes & Co., Inc.*, 893 F. Supp. 1304 (D. S.C. 1994), for example, the promissory notes

[10] In the UCC context, decisions from other jurisdictions are particularly persuasive due to the uniform nature of the UCC. Thus, Washington courts often look to UCC case law from other jurisdictions in interpreting Washington's UCC. *See, e.g., Badgett v. Security State Bank*, 116 Wn.2d 563, 572-73, 807 P.2d 356 (1991); *Lydig Construction, Inc. v. Rainier National Bank*, 40 Wn. App. 141, 144-45, 697 P.2d 1019 (1985).

at issue were sold to Government National Mortgage Association ("GNMA," also known as "Ginnie Mae"), but Bank of America kept physical custody of the notes "on behalf of GNMA." *Id.* at 1314. The issue before the court was whether GNMA had "possession" of the notes and was thus the "holder" as defined under Article 1-201 of the UCC. The court held that because Bank of America had physical custody of the notes for GNMA, GNMA had "possession" and was therefore the "holder" under the UCC. *Id.* at 1314-15.

Similarly, in *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 452 F. Supp. 1108 (S.D.N.Y. 1978), the issue was whether the owners of the promissory notes at issue, which had acquired them from Merban Corp., had "possession" and were the "holders" as defined under the UCC, where "the Notes are not in the physical possession of intervenors but rather in the custody of Chemical (in the case of the April series of Notes) and Security Pacific (in the case of the October series)." *Id.* at 1116. The court held that because the notes were delivered to custodians, Chemical and Security Pacific, whose role was limited to "that of depository

and collection agent," *id.*, the owners had legal "possession" and were the "holders" under the UCC. *Id.* at 1117-18.[11]

Wells Fargo is likely to argue that even though Freddie Mac did not relinquish its possession of the Note under RCW 62A.9A-313, Wells Fargo had physical custody, and that this should be sufficient under the UCC for Wells Fargo to qualify as the holder. The question, however, is whether its physical custody is sufficient to render it the "beneficiary" under the DTA. In addition to the arguments and authorities set forth above, basic rules of statutory construction demonstrate otherwise.

It is an elementary rule of statutory construction "that where the legislature uses certain statutory language in one instance and different language in another, there is a difference in legislative

[11] *See also In re Kelton Motors, Inc.*, 97 F.3d 22, 26-27 (2d Cir. 1996) (noting that the UCC "nowhere defines 'possession,'" and holding based on common law agency principles that the party with "possession" of checks under UCC § 1-201(20), the prior version of what is now RCW 62A.1-201(b)(21)(A), was the party that had the legal right to control the checks, not the party that had physical custody of the checks); *First Nat'l Bank in Lenox v. Lamoni Livestock Sales Co.*, 417 N.W.2d 443, 447-48 (Iowa 1987) (again noting that "[p]ossession is not defined in the UCC," holding that temporary physical custody did not constitute "possession" and that "as applied to the facts of this case [it] means ownership").

intent." *City of Kent v. Beigh*, 145 Wn2d. 33, 45-46, 32 P.3d 258 (2001). *Accord, Hosea*, 156 Wn. App. at 271.

Here, the plain language of RCW 61.24.005(2) in defining the term "beneficiary" is explicit. "Beneficiary" means "***the*** holder." RCW 61.24.005(2) (emphasis added). The definition does not include the holder's agents within the definition of beneficiary, as it easily could do. Moreover, the statute only authorizes beneficiaries to appoint a successor trustee by recording an appointment of a successor trustee. *See* RCW 61.24.010(2) (stating that "***the*** beneficiary shall appoint a trustee or a successor trustee") (emphasis added).

By contrast, there are numerous provisions throughout the DTA where the "beneficiary" or "its authorized agent" is required or authorized to take certain actions. For example, the statute provides that the beneficiary "or authorized agent" may issue the notice of default. RCW 61.24.031(1)(a). However, before doing so, the beneficiary "or authorized agent" must make initial contact with the borrower. RCW 61.24.031(1)(b). Any notice of default must include a declaration from the beneficiary "or authorized agent" that

they have complied with these requirements. RCW 61.24.031(2) and (9). Similarly, in another section of the DTA, a beneficiary "or authorized agent" may declare a trustee's sale and trustee's deed void in certain defined circumstances. RCW 61.24.050. The DTA was also recently amended to require that the beneficiary "or authorized agent" participate in mediation with the borrower. RCW 61.24.163(8)(a).

Moreover, the fact that the DTA refers to "***the*** holder," RCW 61.24.005(2) (emphasis added), singular, as opposed to "***a*** holder," further demonstrates that there can be only one holder of the Note under the statute, which precludes Wells Fargo from arguing that it and Freddie Mac might somehow both be, concurrently, ***a*** "holder" of the Note. *Haselwood v. Bremerton Ice Arena, Inc.*, 137 Wn. App. 872, 155 P.3d 952 (2007), is instructive. There, the statutory term in question was the term "the claim of lien" under RCW 60.04.061. *Id.* at 885. The Haselwoods argued that the statute should be interpreted to encompass two different types of liens, both "liens on realty and liens on improvements." *Id.* at 885 n.5. The court rejected that interpretation because it was contrary to the plain language of the

statute, which referred to "***the*** claim of lien," singular. As it explained, "[t]he 'claim of lien' referred to in the relation-back statute is singular, implying that chapter 60.04 RCW creates only one kind of lien." *Id.* at 885.

Here, likewise, the DTA's "beneficiary" definition refers to "the holder," singular, which shows that the statute contemplates only one "holder." Here, for all of the reasons discussed above, the "holder" in this case – which was the owner of the Note and had legal possession of the Note at all relevant times – was Freddie Mac.

In short, under the DTA only the entity with legal possession, which includes the ultimate right of interest or control, of the note can claim the status of "the beneficiary" under RCW 61.24.005(2). Servicers or other custodial agents of the note owner are not the lawful beneficiaries with authority to appoint a successor trustee under RCW 61.24.010(2) or to initiate nonjudicial foreclosure under the Act. Because Freddie Mac retained *legal possession* of the Note under RCW 62A.9A.-313(h), Wells Fargo was not the "holder" under RCW 62A.1-201(b)(21), and thus was not the "beneficiary" of

the Note under the DTA.[12] Thus, the trial court erred in finding that Wells Fargo was the "beneficiary" with authority to foreclose under the DTA.[13]

D. The Court Should Enter Summary Judgment for the Hobbs as the Non-Moving Party.

Because the material facts are undisputed and the Hobbs are entitled to judgment on these issues as a matter of law, the Court should enter summary judgment in favor of the Hobbs, the non-moving party, on these issues, namely: (1) that Wells Fargo was not the beneficiary authorized to foreclose under the DTA, and (2) that the notice of trustee's sale that NWTS issued in this case violated RCW 61.24.030(7), because NWTS did not have the required proof

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[12] The trial court cited *Zalac v. CTX Mortgage Corp.*, 2013 WL 1990728 (May 13, 2013), for the proposition that physical custody of a promissory note is sufficient by itself to establish beneficiary status under the DTA. *See* CP 437. The *Zalac* court did not consider the distinction between a loan servicer's temporary physical custody of a note and the note owner's legal possession, nor did it consider RCW 62A.9A.-313(h) and governing principles of agency law, *Zalac*, 2013 WL 1990728 at *3. Its analysis is cursory and incomplete and should not be followed.

[13] This is also an issue of first impression, and this issue is also currently before the Court in the case of *Trujillo v. Northwest Trustee Services, Inc.*, Washington Court of Appeals, Division One, Case No. 70592-0-I. Ms. Trujillo presented supplemental briefing on this issue in that case at this Court's request. *See* Supplemental Brief of Appellant, dated January 2, 2014.

that Wells Fargo was the owner of the Note and knew that Freddie Mac was the owner.

The Hobbs did not cross-move for summary judgment, but they argued to the trial court that summary judgment in their favor was appropriate, *see* CP 340, and a cross-motion was not necessary. *See Impecoven v. Department of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992) (summary judgment for non-moving party entered by appellate court); *Home Realty Lynnwood, Inc. v. Walsh*, 146 Wn. App. 231, 242, 189 P.3d 253 (same). Because the material facts here are undisputed, and because the Hobbs are entitled to judgment on these issues as a matter of law, the Court should reverse and grant summary judgment to the Hobbs on these issues.

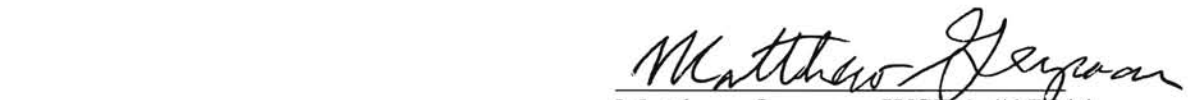
VI. CONCLUSION

For all of the foregoing reasons, this Court should reverse the summary judgment that the trial court entered for Wells Fargo and NWTS, should enter summary judgment for the Hobbs on these issues as the non-moving parties, and should remand for trial of the remaining elements of the Hobbs' claims.

DATED this 28th day of March, 2014.

Respectfully submitted,

COLUMBIA LEGAL SERVICES



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DECLARATION OF SERVICE

I, Annabell Joya, certify under penalty of perjury under the laws of the State of Washington that on this day I caused a copy of the foregoing Brief of Appellants to be served both by email and by first-class mail, postage prepaid, upon the following counsel of record:

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