Supreme Court No. _____

Court of Appeals No. 47779-3-II

SUPREME COURT OF
THE STATE OF WASHINGTON

CYRIL J. WORM, a married man, as his sole and separate property,

Petitioner,

vs.

BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK AS TRUSTEE FOR THE HOLDERS OF CWALT, INC., ALTERNATIVE LOAN TRUST 2004-J12, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2004-J12; BAC HOME LOANS SERVICING, LP; RESIDENTIAL CREDIT SOLUTIONS, INC.; NORTHWEST TRUSTEE SERVICES OF WASHINGTON; and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

Respondents.

APPELLANT WORM'S PETITION FOR REVIEW

CYRIL J. WORM, Plaintiff Pro se
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TABLE OF CONTENTS

I IDENTITY OF PETITIONER....1

II COURT OF APPEALS DECISION....1

III ISSUES PRESENTED FOR REVIEW....1

IV STATEMENT OF THE CASE....1

I ARGUMENT....4

A. Acceptance of Review....4
1. Significant question of law under Constitution....4
2. Issue of substantial public interest....5

B. Petition commences good faith effort to reverse holding in *Brown,* appellate court and trial court....5

C. Brown irreconcilably conflicts with RCW 62A.3-310 and therefore potentially violates the Separation of Powers Doctrine....6

D. Brown irreconcilably conflicts with RCW 62A.9A-203 and therefore potentially violates the Separation of Powers Doctrine....8

E. Issue in Brown....13

F. Appellate court's ruling denying Respondents attorney fees undermines and destroys court's a trial court ruling.... 18

1. Deed of Trust Language is Clear and Unequivocal....19
a. Attorney fees and costs....19
b. DOT on Foreclosure....19

VII CONCLUSION....22

TABLE OF AUTHORITIES

CASE LAW

Brown v. Dept. of Commerce, 184
Wn.2d 509 (2015).....1,5, 9, 10, 11, 12, 13, 15, 16, 18

Cashmere Valley Bank, 181 Wn.2d 622 (2014).....4

Estate of Davis, 2001 ME 106, 775
A. 2nd 1127 (2001).....18

Farmer v. Broadhead, 230 So. 2nd 779,
1970 Miss. LEXIS 1561.....18

In re Lucy E. Crumholt Trust,
2013 La. App. Unpub. LEXIS 487.....18

In re Van Dusen, 834 N. W. 2nd 514, 2013
Minn. App. LEXIS 22.....18

Jacob v. Davis, 128 Md. App. 433, 738
A.2nd 904 (1999).....18

McHenry v. Reiner (In re Wendland-Reiner Trust),
267 Neb. 696, 677 N. W. 2nd 117 (2004).....18

Morris v. Kraft, 466 Mass. 92, 992 N. E. 2nd
1021 (2013).....18

O'Riley v. U. S. Bank, NA, 412 S. W. 3rd 400,
2013 Mo. App. LEXIS 1074.....18

Stanton v. Wells Fargo Bank Mont., NA,
335 Mont. 384, 152 P. 3rd 115 (2007).....18

Whittier Trust Co. v. Getty (In re OrepheusTrust),
123 Nev. 170, 179 P.3rd 562 (2008).....18

Williams v. Herbert (In re Herbert Trust), 303 Mich. App. 456, 844 N. W. 2nd 163 (2013).....18

STATE STATUTES

RCW CHAPTER 61.24

(1) RCW 61.24.030.....13, 14

(2) RCW 61.24.080.....17

(3) RCW 61.24.166.....13

RCW CHAPTER 62A.1

(1) RCW 62A.1-201.....8, 9

RCW CHAPTER 62A.3

(1) RCW 62A.3-310.....1, 5, 6, 7, 8, 12, 16, 17, 20

(2) RCW 62a.3-412.....16

RCW CHAPTER 62A.9A

(1) RCW 62A.9A-102.....9

(2) RCW 62A.9A-203.....5, 8, 9, 10, 11, 12, 13, 16

(3) RCW 62A.9A-313.....9

FEDERAL STATUTE

CASE LAW

1.

MISCELLANEOUS AUTHORITY

1.

I IDENTITY OF PETITIONER

Cyril J. Worm asks this court to accept review of the court of appeals decision terminating review designated in Part II of this petition.

II COURT OF APPEALS DECISION

Petitioner requests this honorable court review the Unpublished Opinion ("Opinion") issued and filed by the Court of Appeals on November 22, 2016. An order denying Petitioner's motion for reconsideration ("Order") was issued and filed by the court on December 16, 2016. A copy of the Opinion is in the Appendix at pages A-1 through A-16. A copy of the Order is in the Appendix at page A-17.

III ISSUES PRESENTED FOR REVIEW

1. Whether this Court's decision in *Brown v. Dept. of Commerce,* 184 Wn.2d 509 (2015) irreconcilably and unconstitutionally conflicts with RCW 62A.3-310 and therefore must be overturned.

2. Whether this Court's decision in Brown irreconcilably and unconstitutionally conflicts with RCW 62A.9A-203 and therefore must be overturned.

3. Whether a person can be denied attorney fees because it has not alleged or proven it is the Lender under the DOT, yet still be permitted to utilize the DOT to foreclose.

IV STATEMENT OF THE CASE

RBC Mortgage Co. originated Petitioner's mortgage loan on October 28, 2004. *CP* 136. As part of the loan transaction, Petitioner

executed a note ("Note") and deed of trust ("DOT"). *Id.* On a date prior to December 30, 2004, the Bank of New York Mellon FKA the Bank of New York as Trustee for the ***Certificate holders*** of CWALT, Inc., Alternative Loan Trust 2004-J12, Mortgage Pass-Through Certificates, Series 2004-J12 ("Trust 1") allegedly purchased Plaintiff's loan. *Id.*

On June 9, 2010, MERS, solely in its own name, attempted to assign Petitioner's Note and DOT to Trust 1 ("AA 1"). *CP* 59. ReconTrust Company recorded AA 1 on June 11, 2010 under Mason County Auditor's No. 1958547. *Id.*

On or about March 7, 2011, BAC Home Loans Servicing, LLP ("BAC"), modified Petitioner's loan, thereby -- per the terms of the Loan Modification Agreement ("LMA") -- becoming the new "owner" and "holder" of the Note and "beneficiary" of the DOT. *Id.* 66. The LMA was recorded in the Mason County Auditor's Office under file no. 1981711 on March 16, 2011. *Id.*

There have been two attempts to foreclose that are relevant to this Petition. *Id.* 81 and 89. Each of those attempts occurred after March 7, litigation 2011. *Id.* BAC, the alleged *owner and holder* of the Note and beneficiary of the DOT since March 7, 2011, was not the foreclosing entity on either occasion. *Id.*

On September 25, 2012, MERS, *again acting in its individual capacity*, attempted to assign the Note and DOT to Trust 1 for a second time ("AA 2"). *Id.* 60.

Approximately 16 months later, on January 30, 2014, Trust 1 attempted to assign *the DOT* ***only*** to the Bank of New York Mellon FKA the Bank of New York as Trustee for the ***Holders*** of CWALT, Inc., Alternative Loan Trust 2004-J12 ("Trust 2") ("AA 3"). *Id.* 62.

Assignment of a DOT in the absence of the note is a nullity.

But on December 16, 2013, one and one-half months ***before*** Trust 1 attempted AA 3, Trust 2 attempted to appoint Northwest Trustee Services, Inc. ("NWTS") the successor trustee. *Id.* 74. NWTS recorded the appointment on February 4, 2014. Thus, NWTS was appointed the successor trustee by an entity, Trust 2, that had not yet been assigned the note or DOT. And Trust 1 assigned the DOT, but not the note, to Trust 2 ***after*** Trust 2 had already appointed NWTS the successor trustee.

NWTS recorded a notice of trustee's sale ("NOTS 1") on March 25, 2014. *Id.* 81-85. At all times after March 7, 2011, BAC, not Trust 1 or Trust 2, was allegedly the owner and holder of the Note and beneficiary of the DOT.

On January 12, 2015, Petitioner filed the Complaint objecting to the illegalities herein recited and seeking injunctive relief until the merits of the objections could be adjudicated. *Id.* 133-142. Following initiation of the lawsuit, NWTS postponed the sale that had been scheduled for March 23, 2015. Subsequently, all Defendants moved to dismiss the case for failure to state a claim upon which relief could be granted. They asserted,

inter alia, that Trust 2, not BAC, was the noteholder and was therefore entitled to foreclose.

Judge Daniel L. Goodell heard the motion and, basing its decision largely on this court's holding in *Brown*, granted Defendants' motions June 8, 2015.

Petitioner timely appealed.

The appellate court, also relying principally on this court's holding in *Brown*, confirmed the trial court ruling. However, in doing so, the court denied Respondents' request for attorneys' fees and costs as the prevailing party. It reasoned thus in denying the motion for attorneys' fees and costs:

> But assignment of the Deed of Trust does not necessarily change the identity of the Lender. *See Cashmere Valley Bank,* 181 Wn.2d at 626 n.4 (explaining that a lender may sell the mortgage and deed of trust to a buyer, but the "lender may foreclose on the property [in default] and pass along proceeds from the sale, less the lender's fee or share, to the buyer.") Here, the last identified Lender was BAC, per the LMA. The *record does not show that Trust 2 is the Lender*, and *Trust 2 does not argue that it is the Lender*. Rather, *Trust 2 argues only that it is entitled to attorney fees and costs because it unequivocally held the secured Note* during the time relevant to Mr. Worm's allegations. *Therefore, we deny Trust 2 request for reasonable attorney fees and costs because it has not demonstrated it is entitled to attorney fees and cost under the Deed of Trust*.

Unpublished Opinion, A-15.

The Petition was timely filed on January 17, 2017.

VI ARGUMENT

A. Acceptance of Review

1. Significant question of law under Constitution.

As was true of the trial court's ruling, the appellate court's ruling is based primarily on this Court's decision in *Brown v. Dept. of Commerce,* 184 Wn.2d 509 (2015). That decision irreconcilably conflicts with two legislative enactments – RCW 62A.3-310 and RCW 62A.9A-203 – in an area (regulation of commercial transactions in Washington) in which Article II, Section 1 of the Washington Constitution grants the legislature plenary authority, subject to constitutional limitations. The Brown decision therefore is potentially unconstitutional. Because the Brown decision affects every foreclosure that occurs in the state, and will continue to do so as long as the decision is in force, the constitutional conflict is of significant moment.

2. Issue of substantial public interest.

The *Brown* decision affects the way every foreclosure proceeding in Washington is conducted. Therefore, if the decision is determined to be unconstitutional, or unlawful for one of the other reasons provided herein below, the repeal of the decision will also significantly affect the way all non-judicial foreclosures are conducted in this state. This case is of substantial public interest.

B. Petition commences good faith effort to reverse holding in *Brown,* appellate court and trial court.

Petitioner, of course, is aware *Brown v. Dept. of Commerce,* 184 Wn.2d 509 (2015) -- and all cases in the *Brown* line of cases – concludes the holder of a secured mortgage note, regardless of ownership of the note, is entitled to utilize the deed of trust to foreclose. That holding is now

famous or infamous depending on whether you are a lender or a homeowner.

The arguments in this section of the Petition are offered in good faith for the ultimate purpose of achieving a reversal of the holding in *Brown* and of the appellate court's affirmance of the trial court ruling on summary judgment. Both the appellate court and the trial court leaned heavily on *Brown* in arriving at their respective decisions. If that case is unconstitutional, or unlawful for one of the other reasons detailed below, the appellate and trial court decisions must be reversed.

C. Brown irreconcilably conflicts with RCW 62A.3-310 and therefore potentially violates the Separation of Powers Doctrine.

Under RCW 62A.3-310(b)(3), if the note is dishonored ***and*** the obligee of the obligation for which the note was taken as payment (the owner of the mortgage debt and note) is the person entitled to enforce the note (the holder of the note), then the obligee of the obligation (the owner of the mortgage debt and note) may enforce ***either*** the note ***or*** the underlying mortgage debt.[1] If, on the other hand, the owner of the underlying mortgage debt obligation and note ***is not*** the holder of the note, which is the situation presented by the facts of this case, then the owner of the note and underlying mortgage debt obligation ***may not*** enforce the

[1] Under the terms of the DOT (the agreement between the homeowner and Lender), the underlying mortgage debt, not the note, is enforced by selling the homeowner's property at public auction. As with any other promissory note, a defaulted upon mortgage note is enforced by suing on the note. This is a routine legal fact the courts seem to have lost sight of in resolving these foreclosure cases.

note ***or*** the underlying mortgage debt obligation.[2] This result obtains because the *Lender* is unable to declare the note dishonored because only the PETE can declare the note dishonored. And until the note is declared dishonored, the underlying mortgage debt remains *suspended*! *RCW 62A.3-310(b)(2).*

Official Comment 3 to UCC § 3-310 makes the point very clearly:

> 3. Subsection (b) concerns cases in which an uncertified check or *a note* is taken for an obligation. The typical case is that in which a buyer pays for goods or services by giving the seller the buyer's personal check, or in which the *buyer signs a note for the purchase price*. . . . *If the* check or *note is dishonored*, the *seller* [lender sells (or loans) the money the borrower purchases (or borrows) in a mortgage loan transaction] may sue on *either* the dishonored instrument [note] *or* the contract of sale [the DOT in a mortgage loan transaction] *if* the *seller* has possession of the instrument [note] *and* is the person entitled to enforce it. If the right to enforce the instrument is held by *somebody other than the seller* [BONY in this case], the seller *can't* enforce the right to payment of the price under the sales contract because that right is represented by the instrument [the note] which is enforceable by somebody else [BONY]. Thus, if the seller sold the note or the check to a holder *and* has not reacquired it after dishonor, *the only right that survives is the right to enforce the instrument* [the note].

(bracketed material and emphasis added).

Please notice, RCW 62A.3-310 does not give a noteholder that does not own the note it holds the option of enforcing the underlying mortgage debt (the DOT). Ever! Unless the noteholder owns the underlying mortgage debt, the note holder has no interest in the underlying

[2] The *Brown* decision makes the noteholder that does not own the note it holds the only entity lawfully entitled to enforce the underlying mortgage debt. RCW 62A.3-310 and the *Brown* decision irreconcilably conflict on this point.

mortgage debt. And if the noteholder has no interest in the underlying mortgage debt, the noteholder has no right to utilize the DOT to obtain foreclosure proceeds to pay off the underlying mortgage debt.[3]

BONY has neither alleged nor proven it owns the note it holds. Consequently, BONY has not proven that it has any interest in the underlying mortgage debt. Therefore, BONY has not proven it is a party to the DOT contract. *The Brown* decision ***authorizes*** BONY to foreclose under these circumstances; RCW 62A.3-310(b)(3) ***prevents*** BONY from foreclosing under these circumstances. Therefore, *Brown* and RCW 62A.3-310(b)(3) irreconcilably conflict over a subject (regulation of commercial transactions in Washington) that Article II, Section 1 of the constitution grants the legislature plenary authority to control. This conflict raises a significant constitutional question.

D. Brown irreconcilably conflicts with RCW 62A.9A-203 and therefore potentially violates the Separation of Powers Doctrine.

RCW 62A.9A-203(a) states a ***security*** interest (***ownership*** interest (*See* RCW 62A.1-201[b][35]) attaches to collateral (a mortgage note (RCW 62A.9A-102[a][12][B]) when the ownership interest in the

[3] This point is lost on those who believe – as the *Brown* court clearly did believe (*See fn. X*) -- the borrower has a single obligation – the obligation to pay the note per its covenants and agreements. The borrower has a second obligation – the obligation to repay the underlying mortgage debt. These two obligations are separate and distinct. The fact that paying the note per its covenants and agreements discharges to the extent of the payment both the obligation to pay the note and the separate obligation to repay the underlying mortgage debt does not turn the obligation to pay the note into the obligation to repay the mortgage debt. Even though one payment simultaneously satisfies both obligations to the extent of the payment, they remain separate obligations. For what should be obvious reasons, this fact is extremely important to keep in mind when trying to determine who has the right to foreclose.

mortgage note becomes enforceable against the debtor (the ***seller*** of the mortgage note (RCW 62A.9A-102[a][28][B]). Further, RCW 62A.9A-203(b) states that a security interest (ownership interest (*See* RCW 62A.1-201[b][35]) in collateral (a mortgage note (RCW 62A.9A-102[a][12][B]) becomes ***enforceable*** against the world the instant three conditions have been met: (1) "*value*" has been given for the note (RCW 62A.9A-203[b][1]); (2) the ***seller*** has rights in the note or the power to transfer rights in the note to a purchaser (RCW 62A.9A-203[b][2]); and (3) either (a) the ***debtor*** (the ***seller*** of the note (RCW 62A.9A-102[a][28][B]) has signed a *security agreement* (a *security agreement* is an agreement that creates or provides for a *security interest* [(RCW 62A.9A-102[a][74] that provides a description of the note (RCW 62A.9A-203[b][3][A]), or (b) pursuant to the terms of the *debtor's* security agreement, is *possessed* by someone other than the ***secured party*** (the ***purchaser*** of the note (RCW 62A.9A-102[a][73][D]) under RCW 62A.9A-313 solely for the ***purchaser's*** benefit (RCW 62A.9A-203[b][3][B]). *See RCW 62A.9A-203(b)(3)(A) and (B) and RCW 62A.9A-313.*

This court undertook essentially the same analysis in *Brown* (*Brown,* 184 Wn.2d at 528-529), with one small but highly significant difference. After analyzing RCW 62A.9A-203(a), and (b) virtually identically to the analysis provided in the preceding paragraph, the court, in fn. 9, analyzed RCW 62A.9A-203(g) in the following way:

> The parties agree the note is secured by a publicly recorded deed of trust, but the deed is not in this court's record. The

> deed's absence from the record does not affect this case because RCW 62A.9A-203(g) ' "codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien[.]" '

Id., at fn. 9.

The *Brown* court assumed the language of RCW 62A.9A-203(g) applies to the transfer of the right to enforce the note. It made this mistake because it incorrectly assumed the borrower emerges from the closing of the mortgage loan transaction with only one obligation – the obligation to pay the note per its covenants and agreements.[4] Thus, the court reasoned, if the right to receive the note payments per the note's covenants and agreements was transferred from one party to another, the security for the right to receive the note payments ("DOT") would also be transferred. This reasoning is logical, but fatally flawed because the assumption on which the reasoning rests is incorrect.

In every mortgage loan transaction, the borrower emerges from the close of the transaction as the obligor of two obligations, not one: 1) the obligation to pay the note per its covenants and agreements;[5] and 2) the obligation to repay the underlying mortgage debt for which the note is

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[4] This assumption can be seen in several places in the *Brown* Opinion. On page 527: "In sum, the borrower *owes and discharges his or her* <u>*obligation*</u> [a single obligation] to the PETE." Again, page 527: "When the borrower pays the PETE—and only when the borrower pays the PETE—the borrower's obligation is discharged. (cite omitted) ('[A]n instrument is paid to the extent payment is made . . . to a person entitled to enforce the instrument[, a PETE]. To the extent of the payment, the obligation of the party obliged to pay the instrument is discharged . . . .' (emphasis added))."

Please appreciate, the quotes in the preceding paragraph (and several other references to a single obligation sprinkled throughout the opinion) relate to the obligation to pay the note *only*. They do not relate to the obligation to pay the underlying mortgage debt.

[5] In a mortgage loan transaction in Washington, this obligation is owed to anyone who holds the note, regardless of ownership of the note. RCW 62A.3-301.

issued as the method of payment.[6] It is to this second obligation, which is always owed to the owner of the note and underlying mortgage obligation for which the note is taken as payment, that the language of RCW 62A.9A-203(g) speaks.

When coupled with RCW 62A.9A-203(a) and (b), RCW 62A.9A-203(g) is the codification of the common law "security follows the note" doctrine. *See Official Comment 9 to UCC §9-203.* Under 9A-203(g), if the three requirements for transfer of the secured note are met,[7] the security for the note (the DOT) is automatically transferred.

Under RCW 62A.9A-203(a) the ownership interest (security interest) a purchaser of a note (a right to payment) obtains by purchasing the note (the right to payment) ***attaches*** to the note (to the right to payment) when the ownership interest (security interest) becomes ***enforceable*** against the seller (debtor) and the rest of the world. Under RCW 62A.9A-203(b), the ownership interest (security interest) becomes ***enforceable*** against the seller of the note (the right to payment) when conditions are met. So, when the three conditions are met,[8] the ownership interest in the note (the right to payment) ***attaches*** to the note (the right to payment) and is ***enforceable*** against the entire world. Under RCW

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[6] Unlike the note, the obligation to repay the underlying mortgage debt ***is owed to only one person in the world*** – the lender (or the lender's successor or the lender's assignee).
[7] As the Brown court indicated, "A *purchaser* of a promissory note gains '*outright ownership*' of a note when the thee conditions in RCW 62A.9A-203(b) are met." *Brown,* 184 Wn.2d at 528. The purchaser gains more than that.
[8] The first one of the three conditions is that the purchaser must give ***value*** for the note (the right to payment). In other words, the purchaser must buy the note (the right to payment).

62A.9A-203(g), if the note (the right to payment) is secured, the ***attachment*** of a security interest (ownership interest) in the right to payment (the note) is also the attachment of the security interest (ownership interest) in the security for the right to payment (the DOT). In other words, the security follows the ***sale*** of the right to payment (the note).

Please, Petitioner implores you, to re-read the preceding paragraph until you understand it. Because the preceding paragraph accurately explains what the *security follows the note* doctrine has always meant historically, and what it currently means under Washington statutory law. 0One of the three requirements for transferring the note is that *value* be given. if, *and only if*, the Note is transferred pursuant to 9A-203(a) and (b). That is, the DOT follows a transfer of *ownership* of the Note.

The idea that the *security follows the note* doctrine means the security follows *the transfer of the right to enforce the note* is an idea of recent vintage and, given RCW 62A.9A-203(a), (b), and (g), is utter nonsense. Therefore, *Brown* and RCW 62A.9A-203(a), (b), and (g) irreconcilably conflict over a subject (regulation of commercial transactions in Washington) that Article II, Section 1 of the constitution grants the legislature plenary authority to control. As is true with *Brown's* conflict with RCW 62A.3-310(b)(3), this conflict raises a significant constitutional question.

BONY has not proven, or even attempted to prove, that it owns the note. As such, pursuant to the requirements of RCW 62A.9A-203(a), (b), and (g), BONY has not proven that it has any interest in the DOT. Without a proven interest in the DOT, BONY had no right to foreclose, and NWTS had no right to commence foreclosure.

E. Issue in Brown

In *Brown*, the primary issue was whether Darlene Brown, the Plaintiff, was entitled to a mediation hearing. If M & T Bank ("M & T") was the beneficiary of the DOT, Ms. Brown was not entitled to a hearing because M & T was entitled to the exemption provided in RCW 61.24.166. If, on the other hand, Freddie Mac was the beneficiary of the DOT, Ms. Brown was entitled to a hearing because Freddie Mac was not entitled to the exemption provided in RCW 61.24.166.

The parties presented the court with a binary choice. The problem is the actual universe of choices is not binary; it is trinary. There is a third choice – one must be both the *holder and owner* of the note to be entitled to foreclose. The Brown court admitted this third choice was the result the legislature was attempting to achieve when it enacted the Foreclosure Fairness Act in 2011:

> With RCW 61.24.030(7)(a), the legislature attempted to resolve this problem of homeowners not knowing who has the authority to enforce and modify their notes by including *both* the concepts *of owning and holding the note*.

Brown, 184 Wn.2d at 543. (emphasis added).

But the *Brown* court concluded that RCW 61.24.030(7)(a) was ambiguous when the owner and holder of the note were different entities: "Yet in cases where the owner and the holder of the note are different entities, as here, the provision is ambiguous." *Id.* It relied on a couple of commentators – Dale A. Whitman (a law professor at the University of Arkansas) and Drew Milner (one of Professor Whitman's law students) – as authoritative support for the claim. The problem is neither Professor Whitman nor Drew Milner are authorities on this subject.[9] They pretend to be, but the law review article gives them away.

In the law review article, Professor Whitman correctly explains that the distinction between ownership and PETE status has been widely misunderstood in the past and has been the source of considerable confusion in court decisions and statutes.[10] Dale A. Whiteman & Drew Milner, *Foreclosing on Nothing: The Curious Problem of the Deed of Trust Foreclosure without Entitlement to Enforce the Note,* 66 Ark. L. Review 21, 26. He then properly pays homage to the brilliance of the PEB's November 14, 2011 Report on notes and mortgages, and asserts, without proof, that courts have gotten better at understanding the distinction between ownership and PETE status since the Report was issued. *Id.,* at 27. The professor does not explain why courts have gotten

[9] Citing these two individuals as authority for the proposition that the holder of the note is entitled to foreclose is proof the *Brown* court did not fully understand the subject.
[10] This statement is true. And the distinction between ownership and PETE status continues to be a source of tremendous confusion in court cases and statutes, including, with all due respect, in the *Brown* case

better at understanding the distinction between ownership and PETE status as the result of issuance of the Report when most courts have never seen the Report, would not understand most of what is in it if they read it, and have no idea the Report exists. I have reviewed thousands of foreclosure cases, and the only case I have seen in which the PEB's 2011 Report is even mentioned is *Brown*.

Next, the professor correctly identifies the central question:

> The potential bifurcation of ownership and PETE status raises the following question: given the truth of the aphorism that 'the mortgage follows the note,' if ownership and PETE status are separated, which of those rights does the mortgage follow?

Id.

This is the right question, but the professor clearly does not know the answer to the question.

Instead of answering the question by analyzing the terms of a standard deed of trust, or by analyzing the mortgage-related provisions of the UCC, or by analyzing property-related laws in different states, Professor Whitman punts. Professor Whitman answers the question by talking about what the consensus is among court decisions. *Id.* Mind you, these are the same courts that the professor acknowledges, correctly, have been confused for a very long time about the distinction between ownership and PETE status.

The professor — drawing conclusions without conducting any independent analysis -- then concludes that PETE status, not ownership, confers the right to foreclose, essentially because the courts say so. He

claims this outcome is sensible because foreclosure is simply one way for a creditor to realize payment of the debt that the note represents, and foreclosure proceeds must be applied against the balance owed ***on the note***. *Id.,* at 27-28.

The problem is foreclosure proceeds are not applied against the balance owed on the note. If they were, the proceeds would be paid to the noteholder, the person to whom the obligation to pay the note is owed. *RCW 62A.3-412*. But the proceeds are not paid to the noteholder, unless the noteholder is also the note owner.

In *Brown*, this court acknowledged appropriately that foreclosure proceeds are owed and should be paid to the owner of the note (and of the underlying mortgage debt for which the note is taken as payment), regardless of whether the owner holds the note. *Brown,* 184 Wn.2d at 523. ("As the note owner, Freddie Mac remains entitled to 'the ultimate economic benefit of payments on the note.' (cite omitted). Thus, the monthly note payments ***or the proceeds of a foreclosure sale*** flow to Freddie Mac, less the servicer's fee.").[11]

[11] If the law had been properly interpreted in Brown, neither Freddie Mac nor M & T would have been entitled to foreclose. RCW 62A.9A-203(a), (b), and (g) and RCW 62A.3-310(b)(3) (and Official Comment 3 to UCC, Section 3-310)) require the holder and owner of the note to be the same entity for the note holder, ***or*** the note owner to be entitled to foreclose. Under these two statutory provisions, a note owner who does not hold the note he owns is not entitled to foreclose, and a noteholder who does not own the note he holds is not entitled to foreclose. Where ownership of the underlying mortgage debt (and, consequently, of the note given in payment of that debt) is separated from PETE status, each of these two statutory provisions indicates the right to foreclose does not survive. Moreover, Paragraph 22 of a standard DOT, the DOT that was at issue in Brown, is to the same effect. It is frightening that the courts of this state seem to be unequiped to decipher the meaning of these fundamental provisions.

Foreclosure proceeds pay off the mortgage debt obligation secured by the DOT, *not the note*. *RCW 61.24.080(2)*. The lender is required by the DOT, the DTA, and RCW 62A.3-310(b)(3) to declare the note in default ***before*** the trustee is legally authorized to commence a non-judicial foreclosure. By declaring the note in default, the lender un-suspends the borrower's obligation to immediately pay the underlying mortgage debt. *See RCW 62A.3-310(b)(2)*. Once the note is declared in default, the trustee is authorized to commence a non-judicial foreclosure proceeding to obtain funds ***to pay off the underlying mortgage debt obligation***, not the note.

Just as payment of the note discharges the underlying mortgage debt obligation to the extent of the payment, payment of the underlying mortgage debt obligation discharges the note to the extent of the payment. It is a two-way street, not a one-way street.

By voluntary agreement between the borrower and lender, there are two ways of paying off the underlying mortgage debt. The preferred way: payment of the note per its covenants and agreements and simultaneous reduction of the underlying mortgage debt (owed to the lender) to the extent of the payment; and the disfavored way: trustee's sale of the property and delivery of the foreclosure proceeds to the lender. Either way fulfills the borrower's obligation to repay the mortgage debt to the lender to the extent of the payment. And payment by one method discharges the responsibility to pay by the other method. The lender is entitled to only one repayment of the debt.

Thus, because foreclosure proceeds are the funds that are utilized to pay off (or pay down) the underlying mortgage debt in the event of a default, foreclosure proceeds are the benefit the DOT delivers to the beneficiary of the DOT in the event of a default on the note. Accordingly, as with every other trust ever created,[12] the person entitled to receive foreclosure proceeds is the beneficiary of the DOT.

In *Brown,* this court determined the person entitled to receive foreclosure proceeds was Freddie Mac (the lender), not M & T. That was an appropriate determination because Freddie Mac was the entity to which the mortgage debt was owed. That determination, however, runs directly contrary to, and cannot be reconciled with, the court's holding in *Brown.* Therefore, in *Brown*, the court's holding notwithstanding, Freddie Mac, not M & T, was the beneficiary. Therefore, M & T had no lawful right to foreclose.

F. Appellate court's ruling denying Respondents attorney fees undermines and destroys court's a trial court ruling.

There is an irreconcilable conflict between the appellate court's ruling that (1) Petitioner ***is not entitled*** to attorney fees and costs because it failed to allege or prove it is the *Lender*, and the additional ruling that

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[12] *Whittier Trust Co. v. Getty (In re OrepheusTrust),* 123 Nev. 170, 179 P.3rd 562 (2008); *McHenry v. Reiner (In re Wendland-Reiner Trust),* 267 Neb. 696, 677 N. W. 2nd 117 (2004); *O'Riley v. U. S. Bank, NA,* 412 S. W. 3rd 400, 2013 Mo. App. LEXIS 1074; *Stanton v. Wells Fargo Bank Mont., NA,* 335 Mont. 384, 152 P. 3rd 115 (2007); *Farmer v. Broadhead,* 230 So. 2nd 779, 1970 Miss. LEXIS 1561; *In re Van Dusen,* 834 N. W. 2nd 514, 2013 Minn. App. LEXIS 22; *Williams v. Herbert (In re Herbert Trust),* 303 Mich. App. 456, 844 N. W. 2nd 163 (2013); *Morris v. Kraft,* 466 Mass. 92, 992 N. E. 2nd 1021 (2013); *Jacob v. Davis,* 128 Md. App. 433, 738 A.2nd 904 (1999); *Estate of Davis,* 2001 ME 106, 775 A. 2nd 1127 (2001); *In re Lucy E. Crumholt Trust, 2013 La. App. Unpub. LEXIS 487.*

(2) Respondent BONY is entitled to foreclose even though it failed to allege or prove it is the *Lender*. This conflict illuminates the appellate court's position and destroys the foundation of that court's decision, the trial court's ruling, and this court's decision in *Brown*.

1. Deed of Trust Language is Clear and Unequivocal.

a. Attorney fees and costs.

The plain language of the Deed of Trust ("DOT") authorizes ***only*** the ***Lender***[13] to recover attorney fees and costs "in any action or proceeding to construe or enforce any term of this Security Instrument." *DOT,* at 13. Since Respondent Bank of New York Mellon ("BONY") neither alleged nor proved it was the *Lender*, the appellate court correctly concluded BONY was not entitled to attorneys' fees or costs. *A-15.*

b. DOT on Foreclosure.

In addition to limiting the recovery of attorneys' fees or costs to the ***Lender alone*** (*DOT,* at 13, ¶ 26), the DOT authorizes ***only*** the *Lender*

[13] The word *Lender* is defined in the DOT as the originator of the Loan, RBC Mortgage Co. (*DOT,* at 1, ¶ C) or the *Lender's Successor or Assign* (*DOT,* at 10-11, ¶ 13). *Black's law Dictionary* defines a *Lender* as "He from whom a thing or money is borrowed[,]" *Black's Law Dictionary* (5th ed. 1979), at 812; a *Successor*, as the term relates to corporations, as "another corporation which, through amalgamation, consolidation, or other legal succession, becomes invested with rights and assumes burdens of first corporation, *Black's,* 1283; and an *Assignee* as "[a] person to whom an *assignment* is made, *Black's,* at 109; and an *Assignment* as "[a] transfer or making over to another of the ***whole*** of any property . . .," *Id.* In this case, Plaintiff did not allege or prove it is the *Lender*, or the *Lender's Successor,* or the *Lender's Assign.* Consequently, the court was unquestionably right to deny Plaintiff attorneys' fees.

The court's reasoning also provides easily understood proof that *Brown* is wrongly decided. In *Brown*, M & T Bank admitted it was not the Lender, the Lender's Successor, or the Lender's Assign by admitting Freddie Mac was the owner of the Note (i.e., the original Lender's Assign). Thus, under the deed of trust contract, M & T Bank had no more right to foreclose in *Brown* than Plaintiff has to attorneys' fees in this case.

to perform each significant action that is essential to the conduct of a *lawful* foreclosure.

The DOT authorizes ***only*** the ***Lender*** to notify the Borrower of a default.[14] *DOT,* at 12, ¶ 22. If the Borrower is notified of a default by the ***Lender***, and the default is not cured on or before the date specified in the notice, the DOT authorizes ***only*** the ***Lender***, at the ***Lender's*** option, to "require immediate payment in full of all sums secured by this Security Instrument without further demand" and ***to invoke the power of sale.*** *Id.* ***Lender alone,*** as the appellate court correctly points out in its opinion, is entitled to recover all expenses incurred in pursuing the remedies provided in ¶ 22 of the DOT, "including, but not limited to, reasonable attorneys' fees and cost . . . ." *Id.* If ***Lender*** *invokes the power of sale*, ***Lender*** must give notice to the Trustee of the occurrence of a default event and of the

[14] If the lender does not hold the note, it cannot fulfill this requirement. Only the PETE is entitled to declare the note in default. Therefore, neither the Lender (the owner of the right to enjoy the economic benefit of the payment that is received) nor the PETE (the possessor of the right to enforce delivery of the payment) is entitled to foreclose when the right to enforce payment is separated from the right to the economic benefit of the payment that is received.

The PETE can't foreclose because the PETE is not the lender, the lender's successor, or the lender's assignee. Hence, the PETE is not a party to the contract that creates the right to foreclose (the DOT). The lender cannot foreclose because the DOT requires the lender to declare the note in default ***before*** the trustee is contractually authorized to foreclose. But the lender can't declare a default because the lender is not the PETE. This inability of either party to foreclose under these circumstances is mandated by RCW 62A.3-310(b)(3). *See Official Comment 3 to UCC, § 3-310.* This is the choice the *Brown* court did not even consider. The third choice. Yet it is this third choice – the legislature's constitutionally-enacted choice -- that the *Brown* decision ignores, thereby creating a conflict of constitutional dimension between the statutory provision and the court decision. Since, under Article II, Section 1 of the Washington Constitution, the legislature has plenary authority over the legislation of commercial transactions in the state, the Separation of Power Doctrine prevented the *Brown* court from ignoring the statute.

The *Brown* decision violates state law, and impermissibly infringes on the legislature's prerogatives, and therefore must yield.

"***Lender's*** election to cause the Property to be sold." *Id.* (emphasis added). Only after the ***Lender*** gives notice to the Trustee of the occurrence of a default event, and of the ***Lender's*** intention to sell the Property, and after the amount of time required by "Applicable Law" has passed, is the Trustee authorized to sell the Property. *Id.*

In this case, as the appellate court points out at A-15, BONY neither alleged nor proved it is the Lender, the Lender's successor, or the Lender's assignee. Hence, there is no proof in the record that the foreclosing entity is the ***Lender***. Accordingly, there is no proof in the record that the foreclosing entity is entitled to attorneys' fees and costs.

Because there is no proof in the record that BONY is the Lender, there is no proof in the record that BONY was authorized to: (1) notify Appellant of a default (*DOT,* at 12, ¶ 22); (2) require Appellant to immediately pay (or pay at all) in full all sums secured by the DOT (*Id.*); (3) ***invoke the power of sale*** (*Id.*); (4) recover any expenses incurred in pursuing the foreclosure (*Id.*); (5) appoint a successor trustee (DOT, at 13, ¶ 24); or (6) give notice to the Trustee of the occurrence of a default event (*DOT,* at 12, ¶ 22).

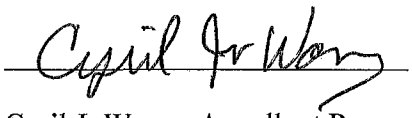
Under the DOT, and Washington law, each of the events designated (1) through (6) in the preceding paragraph is required to be performed by the ***Lender***. As the appellate court correctly observed, BONY neither alleged nor proved it is the ***Lender***. Consequently, BONY had no right to foreclose.

VII CONCLUSION

For the reasons listed herein above, the court should reverse the appellate court's dismissal of Plaintiff's lawsuit and remand the case to the trial court for trial on the regular court calendar.

Respectfully submitted,

CYRIL J. WORM



Cyril J. Worm, Appellant Pro se

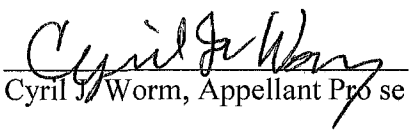
V CONCLUSION

For the reasons listed herein above, the court should reverse the trial court's dismissal of Plaintiff's lawsuit and remand the case to the trial court for trial on the regular court calendar.

DATED THIS 17th Day of January, 2017.

Respectfully submitted,

CYRIL J. WORM



Cyril J. Worm, Appellant Pro se

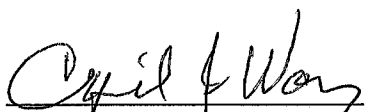
DECLARATION OF SERVICE

THE UNDERSIGNED declares under penalty of perjury under the laws of the State of Washington that he caused Petitioner's Petition for Review to be served on the following representative for Defendants at the below stated address by U.S. Mail as previously agreed between the parties to this litigation:

Joshua S. Schaer
RCO Legal, P.S.
13555 S.E. 36th St., Suite 300
Bellevue, WA. 98006

DONE this 17th day of January, 2017 at Tacoma, WA.

CYRIL J. WORM



Cyril J. Worm, Plaintiff Pro se

Filed
Washington State
Court of Appeals
Division Two

November 22, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CYRIL J. WORM, Appellant, v. NORTHWEST TRUSTEE SERVICES OF WASHINGTON, a Washington corporation; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation; BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK AS TRUSTEE FOR THE HOLDERS OF CWALT, INC., ALTERNATIVE LOAN TRUST 2004-J12; MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2004-J12; RESIDENTIAL CREDIT SOLUTIONS, INC., Respondents.	No. 47779-3-II UNPUBLISHED OPINION

LEE, J. — Cyril Worm appeals from the superior court's CR 12(b)(6) dismissal of his complaint alleging violations of the Consumer Protection Act (CPA)[1] relating to nonjudicial foreclosure proceedings on his property. We hold that (1) the entity that initiated the nonjudicial foreclosure proceedings was entitled to foreclose because it held the promissory note; (2) the assignments of the deed of trust complied with Washington law and the mortgage documents; (3) a new notice of default was not required even though the sale date noted in the second notice of trustee's sale was more than 120 days after the sale date noted in the first notice of trustee's sale;

[1] Ch. 19.86 RCW.

A1

and (4) we decline to address Worm's claim that the superior court erred in awarding attorney fees to respondents. Therefore, we affirm.

FACTS

A. PROVISIONS OF THE LOAN INSTRUMENTS

In late October 2004, Worm took out a mortgage loan on property in Belfair, Washington (Property). Pursuant to the mortgage, Worm executed a promissory note (Note) in favor of RBC Mortgage Company (RBC) and secured the Note with a deed of trust (Deed of Trust). Worm acknowledged that the lender could transfer the Note, and that the lender, or whoever the lender transferred the Note to, would be considered the "Note Holder" and would be entitled to receive the payments under the Note. Clerk's Papers (CP) at 36. In the Note, Worm also acknowledged that failure to pay the full amount due each month would result in default, at which point "the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount." CP at 37.

The Deed of Trust identified Worm as the Borrower, RBC as the Lender, Evergreen Title Company, Inc. as the Trustee, and Mortgage Electronic Registration Systems, Inc. (MERS) as "a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns." CP at 42. In bold typeface, the Deed of Trust stated that "MERS is the beneficiary under this Security Instrument." CP at 42 (boldface omitted). The fact that MERS, including its successors and assigns, was the beneficiary of the Deed of Trust was repeated several other times throughout the Deed of Trust. *See e.g.* CP at 43 ("The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS").

A2

The Deed of Trust also stated, "The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. . . . There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note." CP at 51. In addition, the Deed of Trust stated that "Lender may from time to time appoint a successor trustee" without conveying the Property, and the successor trustee will "succeed to all the title, power and duties conferred" to the Trustee. CP at 53. Should Worm default and the Lender decide to accelerate the loan, the Deed of Trust required the lender to provide notice to Worm that included, among other things

> (c) a date, not less than 30 days from the date the notice is given to [Worm], by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property at public auction at a date not less than 120 days in the future.

CP at 52 (boldface omitted). Finally, the Deed of Trust provided for attorney fees "in any action or proceeding to construe or enforce any term of this Security Instrument." CP at 53.

B. TIMELINE OF THE LOAN INSTRUMENTS

1. First Assignment of the Deed of Trust

On June 9, 2010, MERS assigned the Deed of Trust to "The Bank of New York Mellon FKA The Bank of New York as Trustee for the Certificateholders CWALT, Inc. Alternative Loan Trust 2004-J12 Mortgage Pass-Through Certificates, Series 2004-J12" (Trust 1). CP at 59 (some capitalization omitted). This assignment of deed of trust (Assignment of Deed of Trust) was recorded with Mason County on June 11, 2010.

A3

2. Loan Modification Agreement

On March 7, 2011, Worm entered into a Loan Modification Agreement (LMA) with BAC Home Loans Servicing, LP (BAC), which was recorded with Mason County on November 16, 2011.[2] The LMA stated that BAC "is a subsidiary of Bank of America, N.A." CP at 66. In the LMA, Worm was designated as the grantor and borrower, BAC was designated as the lender, and MERS was designated as the grantee. The LMA stated that the Note and Deed of Trust would remain otherwise unchanged, and that the borrower and lender under the LMA would remain otherwise bound by the terms set forth in the Note and Deed of Trust. The signatures on the LMA of both Worm and a vice president of MERS, as "[n]ominee for Bank of America N.A. as successor by [m]erger to BAC" were notarized. CP at 68.

3. Second Assignment of the Deed of Trust

On October 1, 2012, a second Assignment of Deed of Trust was recorded in Mason County. In it, MERS assigned the Deed of Trust to "The Bank of New York Mellon FKA The Bank of New York as Trustee for the Holders of CWALT, Inc., Alternative Loan Trust 2004-J12, Mortgage Pass-Through Certificates, Series 2004-J12" (Trust 2).[3] CP at 60 (some capitalization omitted).

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[2] The cover page of Worm's opening and reply briefs on appeal identify BAC as a Respondent. However, BAC was not listed as a defendant in the caption of Worm's complaint. The issue of whether BAC is a defendant is not before us.

[3] Despite the very similar names, this assignee, Trust 2, is slightly different than Trust 1, the June 9, 2010 assignee. *Cf.* CP at 60 (having the term "Holders" in Trust 2's name) *with* CP at 59 (having the term "Certificateholders" in Trust 1's name). Further proof that Trust 1 and Trust 2 are different entities is found at CP 62, where Trust 1 assigns the Deed of Trust to Trust 2. Trust 2 appears to be the defendant named in Worm's complaint, except Worm's complaint recited part of Trust 2's name ". . . Trust 2004-J2 . . ." rather than, ". . . Trust 2004-J12 . . . ." *Cf.* CP 60 (reciting Trust 2's name) *with* CP 133 (complaint) (some capitalization omitted).

4. Beneficiary Declaration

On January 13, 2014, a vice president and assistant secretary for Residential Credit Solutions, Inc., as attorney-in-fact for Trust 2, signed a beneficiary declaration stating that Trust 2 was "the actual holder of the promissory note or other obligation evidencing the above-referenced loan." CP at 72.

5. Third Assignment of the Deed of Trust and Appointment of Successor Trustee

On February 4, 2014, a third Assignment of Deed of Trust was recorded with Mason County. In this Assignment of Deed of Trust, Trust 1 assigned the Deed of Trust to Trust 2. On the same day, also recorded with Mason County was an Appointment of Successor Trustee. The Appointment of Successor Trustee noted that the current trustee was Evergreen Title Company, Inc., and that Trust 2, as the "present beneficiary under [the Deed of Trust]" appointed Northwest Trustee Services, Inc. (NWTS), as the successor trustee. CP at 74.

6. First Notice of Default and First Notice of Trustee's Sale

On February 14, 2014, NWTS, on behalf of Trust 2, issued a Notice of Default (NOD) to Worm. The NOD identified Trust 2 as the "owner" of the note, Residential Credit Solutions, Inc. as the loan servicer, and NWTS as the trustee. In bold typeface, the NOD stated, "If you do nothing, a notice of sale may be issued as soon as 30 days from the date of this notice of default. The notice of sale will provide a minimum of 120 days' notice of the date of the actual foreclosure sale." CP at 76 (boldface omitted).

On March 25, 2014, a Notice of Trustee's Sale (first NOTS) was recorded with Mason County. NWTS and Trust 2 were listed as the grantors, and Worm was listed as the grantee. The first NOTS set the sale date for August 1, 2014.

7. Second Notice of Trustee's Sale

On September 24, 2014, a notice of discontinuance of trustee's sale was recorded with Mason County. It stated that NWTS, as trustee, was discontinuing the sale that was set in the first NOTS but was not "waiving any breach or default" under the Deed of Trust or "impairing any right or remedy thereunder." CP at 87. It was signed by a representative of NWTS.

The same day, September 24, a second Notice of Trustee's Sale (second NOTS) was recorded with Mason County. Again, this second NOTS listed NWTS and Trust 2 as the grantors and Worm as the grantee. The second NOTS set the sale date for January 23, 2015.

8. Present Action is Initiated

On January 12, 2015, Worm filed suit against NWTS, MERS, Trust 2, Residential Credit Solutions, Inc., and John Does 1-20 in Mason County. CP at 133. In his complaint, Worm alleged violations of the CPA. Specifically, Worm argued that: (1) MERS improperly assigned "interests in the Note and DOT [Deed of Trust] on two separate occasions," CP at 140; (2) the Note and Deed of Trust were not placed in Trust 2 within a time period required by federal law; (3) Trust 2 did not have an ownership interest in the Note or Deed of Trust but pursued nonjudicial foreclosure anyway; (4) Trust 2 assigned the Note and Deed of Trust to itself; (5) NWTS was not the successor trustee; (6) NWTS could not rely on the NOD to issue the second NOTS; and (7) the sale date in the second NOTS violated RCW 61.24.040(6) because it was 175 days after the sale date set in the first NOTS.

Respondents moved to dismiss under CR 12(b)(6), arguing Worm had failed to state a claim under which relief could be granted. The superior court agreed and dismissed the case.

Worm appeals.

ANALYSIS

A. STANDARD OF REVIEW

We review CR 12(b)(6) dismissals for failure to state a claim under which relief can be granted de novo. *Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 830, 355 P.3d 1100 (2015). Generally, when considering a motion to dismiss under CR 12(b)(6), the superior court may only consider the allegations contained within the pleadings. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 725, 189 P.3d 168 (2008). Dismissal is proper if the plaintiff is unable to prove a set of facts sufficient to justify the relief sought. *Trujillo*, 183 Wn.2d at 830.

B. *BAIN* CONTROLS: A NOTE HOLDER IS ENTITLED TO ENFORCE

Worm argues that Trust 2 was not a beneficiary, so it was not entitled to foreclose because it did not own the Note. Worm asserts that RCW 61.24.030(7)(a), RCW 62A.9A.203(a), (b), and (g),[4] and RCW 62A.3-310(b)[5] limit enforcement of the obligations under a promissory note to the

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[4] This is a case involving negotiable instruments. Therefore, article 9 of the Uniform Commercial Code, codified at chapter 62A.9A RCW, does not apply because that chapter governs secured transactions.

[5] RCW 62A.3-310(b) provides:

> Unless otherwise agreed and except as provided in subsection (a), if a note or an uncertified check is taken for an obligation, the obligation is suspended to the same extent the obligation would be discharged if an amount of money equal to the amount of the instrument were taken, and the following rules apply:
>
> (1) In the case of an uncertified check, suspension of the obligation continues until dishonor of the check or until it is paid or certified. Payment or certification of the check results in discharge of the obligation to the extent of the amount of the check.
>
> (2) In the case of a note, suspension of the obligation continues until dishonor of the note or until it is paid. Payment of the note results in discharge of the obligation to the extent of the payment.

A7

person or entity *owning* the promissory note.[6] We follow our Supreme Court's decision in *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 88, 285 P.3d 34 (2012) (quoting RCW 61.24.005(2)), and hold that only "'the holder of the instrument or document evidencing the obligations secured by the deed of trust'" can be the beneficiary.

Our Supreme Court in *Bain* held "only the actual holder of the promissory note or other instrument evidencing the obligation may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property." *Id.* at 89. The Supreme Court recently upheld the *Bain* opinion in *Brown v. Department of Commerce*, 184 Wn.2d 509, 540, 359 P.3d 771 (2015). There, the court held that it would

> follow *Bain*'s affirmation of the plain language of the definition of beneficiary in RCW 61.24.005(2). That statute defines a beneficiary as "the holder of the instrument" and makes no mention of ownership. RCW 61.24.005(2). Consistent with article 3's recognition that a holder of a note is entitled to enforce the note, we adhere to *Bain*'s holding that RCW 61.24.005(2) requires the beneficiary be the holder of the note. *See Bain*, 175 Wn.2d at 91, 120. To conclude otherwise—i.e.,

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> (3) Except as provided in subsection (b)(4), if the check or note is dishonored and the obligee of the obligation for which the instrument was taken is the person entitled to enforce the instrument, the obligee may enforce either the instrument or the obligation. In the case of an instrument of a third person which is negotiated to the obligee by the obligor, discharge of the obligor on the instrument also discharges the obligation.
>
> (4) If the person entitled to enforce the instrument taken for an obligation is a person other than the obligee, the obligee may not enforce the obligation to the extent the obligation is suspended. If the obligee is the person entitled to enforce the instrument but no longer has possession of it because it was lost, stolen, or destroyed, the obligation may not be enforced to the extent of the amount payable on the instrument, and to that extent the obligee's rights against the obligor are limited to enforcement of the instrument.

[6] To the extent Worm argues that BAC owns the Note because of the pooling and services agreement, that argument is immaterial. "[A] person need not own a note to be entitled to enforce the note." *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 525, 359 P.3d 771 (2015) (emphasis omitted).

> to hold that the "beneficiary" for purposes of the mediation exemption statute, RCW 61.24.166, is the owner and *not* the note holder—would undermine *Bain*'s core rationale that rested on the definition of a beneficiary in RCW 61.24.005(2) as the note holder.

Brown, 184 Wn.2d at 540. The *Brown* court reasoned that RCW 62A.3-301 "provides that a person *need not* own a note to be entitled to enforce the note." *Id.* at 525.

The *Brown* court also noted that its decision in *Cashmere Valley Bank v. Department of Revenue*, 181 Wn.2d 622, 334 P.3d 1100 (2014),

> reinforces what we have said about the distinction between an owner of a note and a holder of a note. [In *Cashmere Valley Bank*, w]e held there that merely because an institution has a right to the economic benefits of mortgage-backed securities (i.e., is the owner of the mortgage notes or is a trust beneficiary where the settlor of the trust owns the notes) does not necessarily mean the institution has "any legal recourse to the underlying trust assets in the event of default." [181 Wn.2d. at 625]. We further recognized an institution could be the person entitled to enforce the mortgage note, the [person entitled to enforce], even though it was not the owner. *Id.* at 626 n.4 (noting that when a lender sells a mortgage note on the secondary market, the "lender may continue servicing the mortgage for a fee" and "in the event of the borrower's default, the lender may foreclose on the property and pass along proceeds from the sale, less the lender's fee or share, to the buyer"), 636 (recognizing that when the trustee of a pool mortgage-backed securities *holds* the mortgage notes on behalf of the owner of the mortgage notes, the trustee can foreclose), 641 (similar).

Id. at 540 n.16.

Thus, the law in Washington is well settled that "only the actual holder of the promissory note or other instrument evidencing the obligation may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property." *Bain*, 175 Wn.2d at 89. Accordingly, we hold that Worm fails to state a claim upon which relief can be granted because his argument that Trust 2 could not enforce the obligations under the Note because Trust 2 did not own the Note fails.

89

C. ASSIGNMENTS OF THE DEED OF TRUST

Worm next argues that the superior court erred in dismissing his suit because MERS's assignments of the Deed of Trust were invalid.[7] Specifically, Worm argues that MERS's assignments were "legally ineffective because MERS *never* possessed the lien interest it purported to transfer" and "MERS never 'held' or 'owned' the Note." Br. of Appellant at 19. We hold that MERS assignment of the Deed of Trust was valid because it complied with Washington agency law as well as the terms of the Note, the Deed of Trust, and the LMA.[8]

Our Supreme Court has recognized that the use of agents to make assignments of security instruments is valid under Washington law, so long as the agent's principal is identified. *Bain*, 175 Wn.2d at 106-07. However, in *Bain*, our Supreme Court held that "the language in the deeds of trust that describe MERS as 'acting solely as a nominee for Lender and Lender's successors and assigns'" was insufficient to create an agency relationship between MERS and successive noteholders. *Id.* at 107 (quoting the record).

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[7] In his Assignments of Error, Worm contends that the superior court "erred by failing to rule each of the assignments of deeds of trust invalid." Br. of Appellant at 1 (assignment of error 3). However, Worm only presents argument relating to the first and second assignments of the Deed of Trust that were effected by MERS in 2010 and in 2012. And in his complaint, Worm only argues violations of the CPA for MERS assigning interests in the Note and Deed of Trust "on two separate occasions." CP at 140. The third assignment of the Deed of Trust was effected by Trust 1 in favor of Trust 2 on February 4, 2014. The record does not explain the authority by which Trust 1 could assign the Deed of Trust to Trust 2, as Trust 2 had been assigned the Deed of Trust in 2012 by MERS and held the Note at the time, per a declaration by its attorney-in-fact on January 13, 2014. But without argument on the potential error or its effect, we do not consider it.

[8] Worm also argues that he has standing to challenge the legality of all of the assignments. We do not address the standing and statute of limitations challenges because we hold that MERS had authority to assign the Deed of Trust.

A10

Here, the LMA designated MERS as the grantee and the nominee for the lender, BAC.[9] CP at 64-68. MERS signed the LMA on behalf of BAC. The LMA stated that "[e]xcept as otherwise specifically provided in this Agreement, the Note and Security Instrument will remain unchanged, and the Borrower and Lender will be bound by, and comply with, all terms and provisions thereof, as amended by this Agreement." CP at 66. Under the Deed of Trust, "[t]he Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower." CP at 51. Nothing in the LMA changed this provision in the Deed of Trust.

When MERS assigned the Deed of Trust on October 1, 2012, MERS had been identified as the agent for BAC, who was the beneficiary under the Note. Therefore, MERS's assignment of the Deed of Trust was valid because the assignment complied with Washington agency law and complied with the provisions of the Note, Deed of Trust, and LMA. Thus, Worm fails to state a claim upon which relief can be granted because MERS's assignments of the Deeds of Trust were valid.

[9] In *Bain*, 175 Wn.2d at 107, our Supreme Court seemed to concede that a lender's nomination of MERS as a nominee could create an agency relationship between MERS and that particular lender, so long as that lender is clearly identified as the principal accountable for MERS actions.

D. REQUIREMENT OF A NEW NOTICE OF DEFAULT

Worm argues that NWTS was required to have issued a new NOD after the first NOTS was discontinued and before the second NOTS was issued because the sale date set in the second NOTS was more than 120 days beyond the sale date noted in the first NOTS. We disagree.

Worm cites RCW 61.24.030(8) and .040(6) and relies on the following passage from *Albice v. Premier Mortgage Services of Washington, Inc.*, 174 Wn.2d 560, 568, 276 P.3d 1277 (2012): "[U]nder RCW 61.24.040(6), a trustee is not authorized, at least not without reissuing the statutory notices, to conduct a sale after 120 days from the original sale date, and such a sale is invalid." Worm contends that, in this passage, our Supreme Court has held that a trustee's sale must be held within 120 days of the sale date set forth in the first notice of trustee's sale, or a new notice of default must be issued. We follow the reasoning explained by Division One of this court in *Leahy v. Quality Loan Service Corp. of Washington*, 190 Wn. App. 1, 359 P.3d 805 (2015), *review denied*, 185 Wn.3d 1011 (2016), and reject Worm's contention that a new NOD needed to be issued after the first trustee's sale was discontinued and a new NOTS was issued.

The timeline in *Leahy* was as follows: April 2010 – notice of default was issued; July 2010—notice of trustee's sale was issued and set for October 2010; July 2012—second notice of trustee's sale was issued; September 18, 2012—third notice of trustee's sale was issued; September 26, 2012—discontinuance of the trustee's sale was noted in the second notice of trustee's sale; January 2013—the trustee's sale was held as noted in the third notice of trustee's sale. *Leahy*, 190 Wn. App. at 4. The plaintiffs argued that under RCW 61.24.030 and .040, the deed of trust act required a new notice of default, and that, under *Albice*, "when a trustee's sale does not occur

A12

within 120 days of the originally scheduled date for the sale, a new sale cannot be scheduled unless the trustee sends out a new notice of default." *Id.* at 5-6.

In response to the plaintiffs' statutory argument in *Leahy*, Division One explained that RCW 61.24.030(8) requires the written notice of default to contain certain information that must be transmitted to the borrower at least 30 days before a notice of sale is recorded, and that RCW 61.24.040(1) and (6) require certain information in the notice of sale and allow the trustee to "postpone the sale for up to 120 days from the date provided in the notice of sale without issuing a new notice. If the sale is not held within 120 days from the date provided in the notice of sale, a new notice of sale is required." *Id.* at 5-6 (internal citations omitted). With respect to the plaintiffs' argument, Division One held that based on the statutory language, "[n]o such requirement exists in the act." *Id.* at 5.

After quoting the same portion of *Albice* that Worm now relies on, Division One explained:

> The Leahys rely on the court's use of the plural "notices" in the sentence emphasized above. They assume that the statutory notices that must be reissued include not only the notice of trustee's sale, but also the notice of default. There is no basis for this assumption in either the plain language of the statute or in *Albice*. There are other statutory notices that the court may have been referring to, such as the notice of foreclosure that must accompany the notice of trustee's sale. RCW 61.24.040(2). And the holding in *Albice* pertained to the specific statutory limit that requires a scheduled sale to occur within 120 days of the recording of the notice of sale. The court did not announce a new, nonstatutory requirement for reissuing a notice of default.
>
> In light of the function served by the notice of default as compared to the notice of trustee's sale, it would not make sense to interpret the act as requiring reissuance of the notice of default. "The purpose of the notice of default is to notify the debtor of the amount he owes and that he is in default." *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 112, 752 P.2d 385, *review denied*, 111 Wn.2d 1004 (1988). The original notice serves that purpose. The notice of trustee's sale, by contrast, must be recorded to give notice to the world that a foreclosure sale is scheduled for a specific date. The sale can be continued, but not beyond the 120–

R 13

> day period. Once the 120–day period expires, a new trustee's sale must be scheduled and a new notice of sale must be issued and recorded to ensure that potential buyers are informed of the new sale date.

Id. at 6-7.

Here, NWTS filed a notice of discontinuance of the trustee's sale on September 24, 2014. That notice discontinued the sale that was set in the first NOTS for August 1, 2014. The same day that NWTS discontinued the sale noted in the first NOTS, it filed a second NOTS, setting the sale date for January 23, 2015. Worm argues that setting the sale date for January 23, 2015 was invalid without a new NOD being issued because January 23 is more than 120 days beyond the August 1, 2014 sale date that was set in the first NOTS. As explained above, this is the same argument rejected by Division One in *Leahy*. We follow Division One's holding in *Leahy* and reject Worm's argument that a new NOD needed to be issued after the first NOTS was discontinued and the second NOTS set the sale date more than 120 days from the sale date noted in the first NOTS. Because we hold that a new NOD was not required, Worm fails to state a claim upon which relief can be granted.

E. ATTORNEY FEES

1. Superior Court Attorney Fees

Worm assigns error to the superior court's award of attorney fees pursuant to the Deed of Trust and in favor of respondents. However, Worm does not dedicate any portion of his argument to this assignment of error. Where "a party fails to support assignments of error with legal arguments, they will not be considered on appeal." *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 624, 818 P.2d 1056 (1991).

2. Attorney Fees on Appeal

Trust 2 requests reasonable attorney fees and costs on appeal under RAP 18.1, RAP 14.2, and RAP 14.3. Trust 2 argues that it is the prevailing party on appeal and so is entitled to an award of attorney fees pursuant to the terms in the Deed of Trust. We deny Trust 2's request for attorney fees.

The Deed of Trust provides that:

> Lender shall be entitled to recover its reasonable attorneys' fees and costs in any action or proceeding to construe or enforce any term of this Security Instrument. The term "attorneys' fees," whenever used in this Security Instrument, shall include without limitation attorneys' fees incurred by Lender in any bankruptcy proceeding or on appeal.

CP at 53. The Deed of Trust named RBC the "Lender." CP at 41. The LMA amended the Deed of Trust and BAC became the "Lender." CP at 66. Trust 2 was assigned the Deed of Trust in 2012 and held the Note by mid-January 2014.

But assignment of the Deed of Trust does not necessarily change the identity of the Lender. *See Cashmere Valley Bank*, 181 Wn.2d. at 626 n.4 (explaining that a lender may sell the mortgage and deed of trust to a buyer, but the "lender may foreclose on the property [in default] and pass along proceeds from the sale, less the lender's fee or share, to the buyer."). Here, the last identified Lender was BAC, per the LMA. The record does not show that Trust 2 is the Lender, and Trust 2 does not argue that it is the Lender. Rather, Trust 2 argues only that it is entitled to attorney fees and costs because it unequivocally held the secured Note during the time relevant to Mr. Worm's allegations. Therefore, we deny Trust 2 request for reasonable attorney fees and costs because it has not demonstrated it is entitled to attorney fees and costs under the Deed of Trust.

CONCLUSION

Worm's allegations supporting his CPA fail because Trust 2, as holder of the Note, could proceed with a nonjudicial foreclosure on the property; MERS's assignments of the Deed of Trust were valid; and a new notice of default was not required. Thus, Worm fails to state a claim upon which relief could be granted. Therefore, we affirm the superior court's CR 12(b)(6) dismissal of this case and its award of attorney fees to respondents.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Johanson, J.

Maxa, A.C.J.

A16

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CYRIL J. WORM,

Appellant,

v.

NORTHWEST TRUSTEE SERVICES OF WASHINGTON, a Washington corporation; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation; BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK AS TRUSTEE FOR THE HOLDERS OF CWALT, INC., ALTERNATIVE LOAN TRUST 2004-J12; MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2004-J12; RESIDENTIAL CREDIT SOLUTIONS, INC.,

Respondents.

No. 47779-3-II

ORDER DENYING MOTION FOR RECONSIDERATION

Cyril J. Worm, appellant, moved for reconsideration of this court's unpublished opinion filed on November 22, 2016. After consideration of the motion and record herein, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 16th day of December, 2016.

FOR THE COURT: Johanson, J.; Maxa, J.; Lee, J.

Lee, J.

817