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Court of Appeals Division One Case No. 80966-1

In the Supreme Court of the State of Washington

Superior Court of Whatcom County Case No. 16-2-01090-0

LAURA COZZA et al.,

***Appellant-Petitioner*,**

v.

PNC BANK, NATIONAL ASSOCIATION,

Plaintiff-Respondent.

PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

Defendant/Counterclaimant/Appellant below Laura Cozza (hereafter referred to as "Cozza") 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

On March 15, 2021, the Court of Appeals, Division I (hereafter "Court of Appeals") affirmed the trial court's decision granting summary judgment in favor of Plaintiff PNC Bank National Association, its successors in interest and/or assigns (hereafter "PNC") and denying Cozza's Cross Motion for Summary Judgment. *PNC Bank, Nat'l Ass'n v. Cozza*, No. 80966-1-I, 2021 Wn. App. LEXIS 547 (Ct. App. Mar. 15, 2021). A copy of this decision is in the Appendix at pages A–1 through A–17.

On March 15, 2021—after calling for a response to Cozza's Motion for Reconsideration, but without calling for a reply—the Court of Appeals denied Cozza's motion. A copy of that Order denying reconsideration is in the Appendix at A–18.

III. ISSUES PRESENTED FOR REVIEW

1. Where the parties agreed the foreclosure Complaint and Affirmative Defenses thereto were grounded in the superior court's equity jurisdiction was the superior court required to demonstrate whether it accepted such jurisdiction and, if so, explain how the court exercised its equitable discretion in a manner capable of appellate review?

2. Did equity and the impairment of contracts clauses of the United States and Washington Constitutions require the superior court to apply the law of mortgages which was in effect on February 17, 2008, (the day the note and deed of trust were signed) to determine whether the deed security had become split from the note in such a way that the security was not enforceable?

3. Must Washington courts apply the Federal Due Process precedents related to judicial neutrality when they are invoked by litigants as a grounds for judicial recusal?

IV. STATEMENT OF THE CASE

A. Relevant Facts

The Emergency Economic Stabilization Act of 2008, often called the "bank bailout of 2008," proposed by Treasury Secretary Henry Paulson, was passed by the 110th United States Congress, and signed into law by President George W. Bush as part of Public Law 110–343 on October 3, 2008, in the midst of the financial crisis of 2007–2008. The law created a 700-billion-dollar Troubled Asset Relief Program (TARP) to purchase distressed assets, mostly homes, from financial institutions. Ultimately, however, that fund was not used to purchase distressed assets (like Cozzas' mortgage loan). Instead, the money was given directly to banks to do with as they pleased.

PNC used some of the bailout money it was given to purchase National City Corporation and related entities. PNC's acquisition of

National City Bank was completed in 2009. The deal was controversial due to PNC using TARP funds to buy National City only hours after accepting the funds. The government chose not to provide any funds to the National City entities.

The Cozzas[1] presented to the superior court as background several PNC foreclosure cases involving its merger with PNC, including *Cabage v. Nw. Tr. Servs.*, No. 45953-1-II, 2015 Wn. App. LEXIS 2942 (Ct. App. Dec. 1, 2015)[2]. In *Cabage* PNC presented evidence that the merger between National City Bank and PNC occurred

> [t]hrough a series of mergers, [in which] National City Bank of Indiana and National City Mortgage merged into National City Bank on October 1, 2008, and National City Bank then merged into PNC on November 6, 2009. Timothy R. Justice, Mortgage Officer for PNC, explained the mergers as follows: On April 11, 2006, National City Mortgage, the original lender, endorsed Cabage's note in blank and assigned the deed of trust to National City Mortgage Company. On May 23, 2006, National City Mortgage Company then sold Cabage's loan to Goldman Sachs Mortgage Company.

Cabbage, at 3–5.

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[1] Both Laura Cozza and Matthew Cozza where named as Defendants and counterclaimants in the proceedings before in the superior court below. Laura Cozza, however, is the only Appellant on appeal.

[2] Other cases involving the purported PNC - National City Merger included, without limitation: *PNC Mortg. v. Khalsa*, 2017 N.M. App. Unpub. LEXIS 72 (Ct. App. Mar. 27, 2017); *PNC Mortg. v. Romero*, 2016-NMCA-064, 377 P.3d 461 (2016); *Green Tree Servicing, LLC v. Blazek*, No. 12CVE-11543, 2013 Ohio Misc. LEXIS 10907 (Ct. Com. Pl. Jan. 17, 2013).

In *Cabage*, Division II held that under the version of RCW 61.24 030(7) in effect in 2015 a genuine question of fact existed as to whether PNC had complied with Washington case law construing that statute. *See Cabage*, *supra.*, at **14–19. *See also* App. A64–65 (setting forth various versions of this statutory provision in effect since 1992.)

There is undisputed evidence in the record relating to the Cross Motions for Summary Judgment indicating National City, misrepresented, *i.e.,* inflated, Laura Cozza's income by $800.00 per month in order to sell the loan to Freddie Mac for purposes of securitization.

This evidence includes three letters, included as pages A19–28 of the Appendix. Two of the letters are from Freddie Mac to PNC. The PNC letters establish that Cozzas' loan was purchased by Freddie Mac *on April 14, 2008*, two days after the note agreement and deed of trust trust security instrument were agreed to. *See* Closing date set forth at App, A20 and again at A-27. Freddie Mac's two letters to PNC also charge that: "The Co-Borrower's [Laura Cozza's] income was overstated." *See* App at A22 and A27.

As can be seen PNC's response did not dispute the date Freddie Mac claims to have acquired the loan, *i.e.*, April 14, 2008. However, PNC does argue that Laura Cozza's income was not overinflated. *See* App at A24–25. But the testimony from Laura Cozza confirms PNC's illegal conduct in padding her income to obtain the Freddie Mac loan. "When Robert Nitz generated the loan application he padded my

income by about $800, and he knew this, while at the time he was forcing us to sign a loan under threat of foreclosure for an amount that was more than we had originally agreed to pay." App. A 29, paragraph 37. *See also* generally A29 through A30.

In Laura Cozza's Motion for Reconsideration of the Court of Appeals decision, she questioned how the Court of Appeals could ignore the date of Freddie Mac's purchase of the loan from National City, *see* App. A45-A50, and her own very clear testimony that National City purposely "padded" her income to sell the loan to Freddie Mac in the record pursuant to the cross motions for summary judgment. *See* App A45–A50. And in its responsive briefing to the motion for reconsideration PNC did not dispute that this evidence substantiated an alleged misrepresentation by PNC before the Superior Court that neither the Superior court nor the Court of Appeals has ever considered.

The Cozzas also argued to the Superior Court and Laura Cozza asserted on appeal that National City's illegal conduct in selling the loan to Freddie Mac based on Laura Cozza's misrepresented income and failure to return the loan to Freddie Mac when requested to do so split the mortgage deed security from the note in such a way as to make the deed of trust unenforceable. In support of this assertion Cozza relied upon *Bain v. Metro. Mortg. Grp., Inc.* 175 Wn2d 83, 285 P.3d. 34 (2012), which was part of the mortgage law in effect before the legislature modified the Deeds of Trust Act (DTA) in 2018 to allow

note holders to foreclose and thereby may have legislatively abrogated the Restatement of Law principles which applied in Washington up until then.

Finally, the Cozzas argued to the Superior Court and Laura Cozza argued in her Court of Appeals briefing and her Motion to Reconsider that the superior court judge adjudicating this case was required to disqualify himself based on objective Due Process precedents established by the United States Constitution. In support of the Superior Court judge's disqualification the Cozzas produced the then current Washington State Investment Board Thirty-Seventh Annual Report, which included a report on government workers', including judges', retirement accounts. This report demonstrated "that a substantial amount (in excess of 1 billion dollars) of judges and other public retirement funds are invested in mortgage-back securities, which are made up of loans like the one involved in this lawsuit."

The declaration of the Cozzas' attorney introducing this government document as evidence before the Superior Court, then went on to assert:

> 4. If such loans can be enforced through foreclosures, notwithstanding they originate in fraud, then investors, like judges and public employee's retirement funds will not lose money. If fraud, like has occurred in Laura's case, can prevent foreclosures then investors in mortgage-backed securities are less secure that their investments will be repaid given the rampant fraud relating to such investments which occurred from 2005–2009.

> 5. I bring this to the Court's attention on Laura's behalf because she and I both believe this situation poses a conflict of interest situation for judges and other public employees whose retirement funds are increased by the proceeds of foreclosures which are born out of fraud. This is because government employees directly profit at the expense of the people.
> 6. Under the Due Process Clause of the United States Constitution, a state judge should not be a judge in his own case or in a case where he or she has an interest in the outcome of the litigation. *See e.g., Rippo v. Baker*, 137 S. Ct. 905 (2017); *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580 (1986*); In re Murchison*, 349 U.S. 133, 136 (1955).

As can be seen, the Cozzas' challenge to the Superior Court was one based on *federal due process precedent.* As will be recalled the trial judge chose not to address Cozzas' disqualification argument. When Laura Cozza raised the same argument on appeal, Division I refused her federal due process challenge by claiming that there was no violation of similar Washington law. When Cozza moved to reconsider this decision based on the Court of Appeals failure to consider her Federal Due Process challenge, the Court of Appeals requested a response from PNC, but ultimately refused to reach this issue.

B. Procedure Below

The caption of the complaint and summons identifies "PNC, National Association, *its successors in interest and/or assigns*" as the Plaintiff in the "Complaint for Deed of Trust Foreclosure" of property owned by Laura Cozza and her former husband, Matthew. PNC's

foreclosure complaint also named as Defendants other parties PNC alleged might claim an interest in that real property.

The first paragraph of the complaint alleges "1. PNC Bank, National Association ("Plaintiff") is authorized to bring suit for foreclosure pursuant to 12 U.S.C. § 24." The Complaint alleges in the second allegation to its "Facts" section: "2. Plaintiff is the holder of the Note." The Complaint alleges in the fifth paragraph of that section: "5. Plaintiff, as successor by merger to National City Mortgage, a division of National City Bank is the current beneficiary of the Deed of Trust."

Cozzas denied each of these allegations in their Answer.

The Cozzas alleged as affirmative defenses that the Court lacked "personal jurisdiction" over husband, Matthew Cozza, and lacked "subject-matter jurisdiction" over the case. Cozzas also alleged as affirmative defenses—which related to the foregoing jurisdictional defenses—that Plaintiff failed "to comply with statutory prerequisites" and acted in a manner "prohibited by statute," "lacked standing", had committed "fraud," and engaged in such other misconduct for which courts of equity have traditionally afforded relief.[3]

On April 9, 2018, PNC moved for summary judgment, including

[3] The Cozza's also alleged undue influence, unconscionability, unclean hands, unjust enrichment, and laches as a basis for equitable relief.

summary judgments on all of Cozzas' affirmative defenses including those that sounded in equity, but presented no facts in support of its challenges to the Cozzas' equitable claims. In its motion for summary judgment PNC reiterated, and supported by declaration, the allegation of its Complaint that "Plaintiff, *as successor by merger to National City Mortgage, a division of National City Bank, is the current beneficiary of the Deed of Trust.*" PNC also argued that it had standing to foreclose simply because it held the note.

On August 26, 2019, the Cozzas filed a Cross Motion for Summary Judgment, which sought judgment regarding issues related to the superior court's jurisdiction as alleged in the pleadings, including among them whether the case should be decided pursuant to the superior court's equity jurisdiction.

On September 12, 2019, PNC responded to Cozzas' Cross Motion for Summary Judgment stating: "PNC agrees that claims for judicial foreclosure are equitable in nature."

On September 13, 2019, the Cozzas' responded to PNC's Motion for Summary Judgment and argued the 2008 note and deed of trust agreements signed by the Cozzas must be interpreted pursuant to the law as it existed in 2008. (Cozza contends the law in Washington in 2008 which applied to this mortgage was reflected in *Restatement (Third) of Property: Mortgages* § 5.4 (1997). This contention is based in part on this Court's decision in *Bain v. Metro. Mortg. Grp., Inc.* 175 Wn.2d at 112–13.)

Cozzas' response was supported by the Declaration of Cozzas' attorney who presented evidence that (1) the trial court appeared to a non-neutral judicial forum because all government workers, including judges, benefit economically by the Washington State Investment Board investing their retirement funds in mortgage-back securities which only become valuable if courts enforce mortgages as a matter of course outside of equity, notwithstanding that many, like this one, are steeped in misrepresentation, unconscionability, fraud and deceit; (2) affirmed that the documents from Freddie Mac asserting National City's overinflated Laura Cozza's earnings were produced by PNC in discovery; and (3) attached the 2018 amendments to the Deed of Trust Act, which appear designed to legislatively abrogate the application of the *Restatement (Third) of Property: Mortgages* § 5.4 (1997), which holds that under circumstances where a mortgage instrument security is intentionally split from its paired note that security is unenforceable.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The trial court made no findings of fact nor conclusions at law because the superior court judge deemed them superfluous, stating:

> It is well settled in Washington State that findings of fact and conclusions of law are not required in summary judgment proceedings, with some reviewing courts describing them as completely superfluous. *See Sinclair v. Betlach*, 1 Wn. App. 1033 at 1034. This is undoubtedly because any reviewing court will do so de novo engaging in

> the same inquiry as this Court. *See Columbia Community Bank v. Neuman Park, LLC,* 177 Wn.2d 566 at 573.
>
> Following oral argument and after considering the pleadings and cross-pleadings of the parties in the light most favorable to the other party, the Plaintiff's [PNC and successors'] motion for summary judgment is granted. The Defendants' [Cozzas'] motion for summary judgment is denied.

This Court should accept review of this appeal pursuant to RAP 13.4(a) and (b) for the reasons stated herein.

A. The trial court had an obligation to provide a reasoned decision capable of appellate review with regard to those disputes arising in equity.

Since before the birth of Christ until now there has been an omnipresent tension, greater or lesser at various times depending on governmental oppression, between governments' enforcement of laws and governments' need to provide justice for the people being governed. *See e.g.,* Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 Fordham L. Rev. 23, 25-40 (1951). By the eleventh century it became apparent to this Nation's English ancestors that enforcement of laws did not always result in justice, particularly in cases where fraud, duress, unconscionable behavior, unjust enrichment and inflexible rules were involved. *Id. See also* Joseph J. Story LL. D, *Commentaries on Equity Jurisprudence as Administered*

in England and America, Vol. I (Fourth Edition 1864). *Cf.* Federal Judicial Center, Jurisdiction: Equity.[4]

Even today it remains true that "equity is the means by which a system of law balances out the need for certainty in rule-making with the need to achieve fair results in individual circumstances." Hudson, Alastair, Principles of Equity and Trusts, 2nd ed., p. 5. And Washington courts, particularly this Court, claim these same equitable principles still apply in Washington in the 21st century.

> The goal of equity is to do substantial justice. Equity exists to protect the interests of deserving parties from the "'harshness of strict legal rules." ***Washington courts embrace a long and robust tradition of applying the doctrine of equity.***

Columbia Cmty. Bank v. Newman Park, LLC, 177 Wn.2d 566, 569, 304 P.3d 472, 473 (2013). (Emphasis Supplied).

Certainly, there is a need for justice in Washington. In 2015 this Court published the Civil Legal Needs Study Update,[5] which updated its 2003 report, The Washington State Civil Legal Needs Study.[6] The Executive Summary of the 2015 Update begins: "Justice is absent for low income Washingtonians who frequently experience serious civil

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[4] Last accessed on May 16, 2021, at: https://www.fjc.gov/history/courts/jurisdiction-equity

[5] Last accessed on July 8, 2019, at https://ocla.wa.gov/wp-content/uploads/2015/10/CivilLegalNeedsStudy_October2015_V21_Final10_14_15.pdf.

[6] Last accessed on July 8, 2019, at https://www.courts.wa.gov/newsinfo/content/taskforce/CivilLegalNeeds.pdf

legal problems."[7]

Many people in Washington believe this statement does not really express the truth about Washington's judicial system, which is that justice is absent for homeowners who must challenge moneylenders and debt buyers inequitable conduct because courts no longer routinely apply equitable principles when dealing with foreclosures that now economically benefit the government, its workers (including judges), and their wealthy collaborators.

The Court of Appeals in this decision treats equity jurisdiction as if it is an illegitimate child of the law, when precisely the opposite is true. Acknowledging that different standards apply to summary judgments brought pursuant to the superior court's equity jurisdiction, the Court of Appeals nonetheless holds the trial court does not have to tell the parties and public what jurisdiction it is exercising to decide these cross motions for summary judgment. *See*. App. A8. In fact, the Court of Appeals observes that it does not know how the superior court resolved this jurisdictional issue but finds no fault with the trial court keeping its resolution of this jurisdictional issue secret. *Id*. And then the Panel avoids deciding whether this foreclosure case, and the equitable defenses thereto, must be resolved in equity.

[7] It is interesting to note that the 2003 Study included homeowners being dispossessed as part of those who were being harmed by a lack of justice. Notwithstanding, the number of homeowners being dispossessed in 2015 was much greater than in 2003, the 2015 Update excluded them from its purview.

This decision conflicts with *Borton & Sons, Inc. v. Burbank Props., LLC*, 196 Wn.2d 199, 471 P.3d 871 (2020) where this Court indicated reviewing courts should review *de novo* whether equity jurisdiction applies and, if so, review the Court's fashioning of equitable remedies based on an abuse of discretion standard. The Court of Appeals did neither here. The Court of Appeals simply indicated it did not know how the trial court resolved this jurisdictional issue, but whatever the trial court did was sufficient to pass its appellate review; which review ignored disputed facts and stretched to find favorable facts in support of National City and PNC.

At a time when it has become obvious that justice is absent for most litigants in Washington's courts, it is a matter of grave and substantial public importance to the People that this Court weigh in on the issue of whether superior courts must apply their equitable discretion in cases like this one, *i.e.,* where the parties plead causes of action that sound in equity and agree that relief should be pursuant to the superior court's equity jurisdiction.

B. Equity and the impairment of contracts clauses of the United States and Washington Constitutions require courts to apply the law of mortgages which was in effect at the time note and deed of trust agreements were executed.

Washington's legislature refused to pass laws that would enforce power of sales clauses nonjudicially in 1955, 1957, 1959, 1961, and 1963. *See* Gose, John A., *The Deed of Trust Act in Washington*, 41 Wash. L. R. 94 at n. 1 (1966). Gose suggests in this

article that the then recently enacted Deed of Trust Act, Ch. 61.24 RCW ("DTA") allowing "lenders/ beneficiaries" to foreclose nonjudically was finally passed in 1965 as a necessary accommodation to the wealthy; so that they would loan money to the People of Washington. *Id.* at 95, note 7. Gose's article concludes by setting forth a list of amendments which would make the DTA better from creditors' perspective. *Id.* at 104–107. The statute was promptly amended by Washington's political branches in 1967 to promote the interests of the wealthy. Since then, the political branches have amended the DTA on numerous occasions at the behest of lenders, including without limitation in 1975, 1981, 1985, 1987, 1989, 1990, 1991, 1998, 2004, 2008, 2009, 2011, 2012, 2013, 2014, and 2018.

It has long been "universal law that the statutes and laws governing citizens in a state are presumed to be incorporated in contracts made by such citizens, because the presumption is that the contracting parties know the law." *Leiendecker v. Aetna Indem. Co.*, 52 Wash. 609, 611, 101 P. 219 (1909); *accord Fischler v. Nicklin*, 51 Wn.2d 518, 522, 319 P.2d 1098 (1958) ("[E]xisting law is a part of every contract, and must be read into it."). This principle, *i.e.*, contracts incorporate existing law, applies both to "statutes and the settled law of the land at the time the contract is made." *In re Application of Kane*, 181 Wn. 407, 410, 43 P.2d 619 (1935). *See also Coolidge v. Long*, 282 U.S. 582, 51 S. Ct. 306 (1931) (Federal impairment of contracts clause applied to a trust deed).

Cozzas argued below that the law which applied to her note and security instrument was that which existed in 2008, when they signed these agreements. PNC did not dispute this legal contention but argued Washington law has always held the security instrument follows the note. This, of course, is not true.

At the time *Bain* was decided in 2012 this Court interpreted the DTA as incorporating longstanding mortgage law which held the note and deed of trust can be intentionally split from one another in such a way that the deed of trust becomes unenforceable. *Id.* at 175 Wn.2d at 112–13 *citing Restatement (Third) of Property: Mortgages* § 5.4 (1997). Indeed, this Court in *Bain* specifically rejected the Fourth Circuit's analysis in *Horvath v. Bank of N.Y., NA*, 641 F.3d 617, 620 (4th Cir. 2011) that a deed of trust security instrument could not be split from the note based on a UCC holder analysis. Bain, 175 W.2d at 105–06. "We do not find *Hovarth* helpful." *Id.* at 106.

Generally, laws apply only prospectively in this Nation unless the political branches have made clear their intent that a law should be applied retroactively. And even where the political branches want a law to apply retroactively such an application must comply with constitutional restraints such as due process, the impairment of contracts clause, and equity. *See e.g., Opati v. Republic of Sudan*, 206 L.Ed.2d 904 (U.S. May 18, 2020) *citing Landgraf v. Usi Film Prods.*,

511 U.S. 244, 114 S. Ct. 1483 (1994); *Sveen v. Melin*, 138 S. Ct. 1815, 201 L.Ed.2d 180 (2018).[8]

The Court of Appeals should have at least considered the arguments advanced above*, i.e.,* that the mortgage law applicable to this case was that in effect when the pertinent agreements were signed, based on the Supreme Court authority, both at the state and federal level, cited to it. Because the Court of Appeals chose not to do so, its decision conflicts with both the state and federal constitutional provisions set forth above and the supreme court decisions interpreting these constitutional provisions.

C. The Court of Appeals was required to review Cozza's Federal Due Process claims pursuant to the Federal Constitution

In her motion for reconsideration filed with the Court of Appeals Laura Cozza presented two issues regarding judicial neutrality. First, she argued both the Superior Court and the Court of Appeals had violated the principle of Party Presentation, which she asserted should have required those courts to have decided those equity issues and judicial neutrality issues which are now before this Court for resolution because both lower courts did not address them.

This Court recently dealt with the same Party Presentation principles as are reflected in *United States v. Sineneng-Smith*, 140 S.

[8] Washington follows these same principles. *See e.g., Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 208 P.3d 1092 (2009) (court decisions apply prospectively); *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 507- 8, 198 P.3d 1021 (2009)(statutes apply prospectively); *Klem v. Wash. Mut. Bank*, *supra.*, 176 Wn.2d at 790.

Ct. 1575, 206 L.Ed.2d 866 (2020) in *State v. Blake*, 197 Wn.2d 170, 176, n. 3 & 211-12, 481 P.3d 521 (2021). In *Blake* this Court appears not to have been asked by the parties whether Washington courts are required to follow this principle as part of those judicial neutrality principles made applicable to the states through the Fourteenth Amendment. But Cozza is presenting that precise issue here in the context of the refusal of both the Superior Court and Court of Appeals to rule on parties' presentation that the foreclosure aspects of this case fell within the superior court's equity jurisdiction.

Because the lower courts' failure to address this issue was not supple, *see Sineneng-Smith*, 140 S. Ct. at 1759, Laura Cozza asserts those courts' failure to address the equity issues the parties raised violated her rights to be heard by a neutral forum which resolves those issues raised by the parties. *See e.g.,* Sineneng-Smith, supra, 140 S.Ct. at 1759; *Greenlaw v. United States*, 554 U.S. 237, 243-44, 128 S. Ct. 2559 (2008); U.S. v. Samuels, 808 F. 2d 1298, 3101 (8th Cir. 1987)(R. Arnold, J., concurring in denial of reh'g en banc). *See also Rippo v. Baker*, 239 U.S. 807, 137 S. Ct. 905, 197 L. Ed. 2d 167 (2017); *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909-10, 195 L.Ed.2d 132 (2016). And it is Cozza' position that the failure to decide these issues presented by the parties below amounts to a manifest error under RAP 2.5.

Cozza also claims that where she challenged the superior court judge should be disqualified based on the federal due process grounds,

the lower courts should have addressed her specific legal challenges. This is both because she has the right to present her own legal theories and also because the point she was making, *i.e.,* that government workers in all three branches of Washington's state government benefitted economically from not following the traditional rules of equity, violated her right to have a neutral judge—who also appeared to be neutral—adjudicate this foreclosure action in equity.

Courts applying federal due process principles have held that where state laws put state judges in situations which compromise or appear to compromise those judges' neutrality the decisions of those judges are void. *See e.g., Cain v. White,* 937 F.3d 446 (5th Cir. 2019) *cert. denied* 140 S. Ct. 1120 (2020); *Caliste v. Cantrell*, 937 F.3d 525 (5th Cir. 2019). *Caine* and *Caliste* demonstrate a state's political branches can create institutional federal due process problems by enacting statutes that appear to compromise the impartiality of state judges.

While the Fifth Circuit observed that "[a]ll questions of judicial qualification may not involve constitutional validity" the issue under these facts were "whether the Judges' administrative supervision over the JDF, while simultaneously overseeing the collection of fines and fees making up a substantial portion of the JEF" crosses the constitutional line. *Cain v. White*, 937 F.3d at 451 (5th Cir. 2019). And the Fifth Circuit held it did in that case.

This Court should hold Cozza has the right to present the same

constitutional issue here, through counsel, without her claims being unfairly manipulated by the courts in order to make these issues easier to resolve in a way that benefits judges.

VI. CONCLUSION

Cozza's petition for discretionary review should be granted.

Dated this 21st day of May, 2021.

Respectfully submitted,

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Court of Appeals
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PNC BANK, NATIONAL ASSOCIATION, its successors in interest and/or assigns, Respondent, v. LAURA COZZA, Appellant, MATTHEW COZZA; CITIFINANCIAL, INC.; OCCUPANTS OF THE PREMISES, Defendants.	No. 80966-1-I DIVISION ONE UNPUBLISHED OPINION

CHUN, J. — Laura Cozza defaulted on her mortgage. PNC Bank, the holder of the promissory note, brought this action seeking judicial foreclosure. Cozza answered PNC's complaint and asserted counterclaims broadly alleging fraud. PNC moved for summary judgment for decree of foreclosure and to dismiss Cozza's counterclaims. Cozza cross-moved for summary judgment on judicial foreclosure. The trial court granted PNC's motion for summary judgment and denied Cozza's cross-motion. We affirm.

I. BACKGROUND

In 2007, Laura Cozza and her then-husband Matthew Cozza agreed to a construction loan from National City Bank—PNC's predecessor by merger. They

used the loan to construct a home in Washington.

In February 2008, the Cozzas signed a promissory note (Note) to refinance the construction loan into a permanent mortgage loan (Loan) payable to National City Mortgage, a division of National City Bank. They also executed a Deed of Trust to secure the Note. National City Mortgage, a division of National City Bank, endorsed the Note to National City Mortgage Co., a subsidiary of National City Bank, which endorsed the note in blank.[1]

National City Corporation—National City Bank's parent company—merged with PNC in December 2008 and, as a result, National City Bank became a subsidiary of PNC. Before April 2013, PNC sold the Loan to Freddie Mac. In April 2013, Freddie Mac informed PNC that because PNC overstated Laura Cozza's income in violation of Freddie Mac's requirements, PNC needed to repurchase the Loan.

The Cozzas separated in 2010 and in 2011, during their divorce proceeding, Matthew Cozza transferred all his interest in the property to Laura Cozza.[2] After the separation, Laura Cozza stopped making mortgage payments. While the parties dispute when Laura Cozza ceased payments, they agree she has not made payments since 2012. In 2014, Laura Cozza moved to Pennsylvania and has since rented out the property at issue.

[1] When endorsed in blank, a note is "payable to bearer and may be negotiated by transfer of possession alone." Brown v. Dep't of Commerce, 184 Wn.2d 509, 523, 359 P.3d 771 (2015) (quoting RCW 62A.3-205(b)).

[2] The record does not show this transfer, but the parties agree it occurred.

In 2016, PNC sued the Cozzas, seeking judicial foreclosure. The Cozzas answered, asserting counterclaims. In 2019, PNC moved for summary judgment for judicial foreclosure and dismissal of the Cozzas' counterclaims. The Cozzas cross-moved for summary judgment, seeking dismissal of the foreclosure claim.

At a hearing on the motions, PNC produced the original Note signed by the Cozzas and endorsed in blank. At a second hearing, the trial court granted PNC's motion and denied the Cozzas' cross-motion. Neither the oral ruling nor the written order on the motions includes findings of fact or conclusions of law. The trial court then entered a Judgment and Decree of Foreclosure, which dismisses the Cozzas' counterclaims with prejudice.

Laura Cozza[3] appeals.

II. ANALYSIS

A. PNC's Motion for Summary Judgment

Cozza says that the trial court erred in granting PNC's motion for summary judgment for judicial foreclosure and dismissal of counterclaims because genuine issues of material fact exist as to multiple issues. We disagree.

We review de novo summary judgment rulings. Matter of Estate of Ray, 15 Wn. App. 2d 353, 356, 478 P.3d 1126 (2020). "Summary judgment is appropriate if the record shows there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Id. A fact is material if the outcome of the litigation depends on it. Id. Courts "consider the

[3] Below, this opinion refers to Laura Cozza as "Cozza" as Matthew Cozza is not a party to the appeal.

facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party." Id. at 357. "The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits accepted at face value." Heath v. Uraga, 106 Wn. App. 506, 513, 24 P.3d 413 (2001). If the nonmoving party fails to show a genuine issue of material fact, then summary judgment is proper. Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

1. Judicial foreclosure

a. Standing

Cozza says that a genuine issue of material fact exists as to whether PNC had standing to sue. She contends the record shows that Freddie Mac, and not PNC, is the owner of the Note and Deed of Trust, so PNC cannot seek foreclosure. PNC responds that it has such standing, given that it is the holder of the Note. We agree with PNC.

"[I]t is the holder of a note who is entitled to enforce it."[4] Deutsche Bank Nat'l Tr. Co. v. Slotke, 192 Wn. App. 166, 173, 367 P.3d 600 (2016). And one who possesses a note holds it. Id. "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 [of the status to enforce the note]." Bavand v. OneWest Bank,

[4] Cozza says that a related issue is "whether PNC's fraud requires" the application of prior law. Citing Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 285 P.3d 34 (2012), she notes that prior law required that a creditor must own and hold the note to foreclose on a deed of trust. As discussed below, Cozza does not establish any issue of fact as to fraud, and thus we do not address this argument.

196 Wn. App. 813, 824, 385 P.3d 233 (2016), as modified (Dec. 15, 2016) (emphasis omitted) (quoting RCW 61.24.030(7)(a)).

PNC submitted evidence that it holds and owns the Note. The declaration of PNC employee Sarah Greggerson says that PNC possessed the Note when it initiated the complaint. During her deposition, Cozza stated that she recognized her signature on the Note. And at the first summary judgment hearing, PNC produced what it claimed was the original Note in its possession.[5] National City Mortgage Co., a subsidiary of National City Bank, endorsed the note in blank and then National City Bank merged with PNC.[6]

Cozza submitted correspondence between Freddie Mac and PNC from 2013 in which Freddie Mac informed PNC that PNC must repurchase the Subject Loan because PNC inflated Cozza's income, which violated the sale guidelines. But this merely indicates that Freddie Mac owned the Note at some point. Nothing in this correspondence indicates that PNC did not buy back the loan.

Cozza contends that PNC should have produced evidence that it bought back the Loan. But possession of the Note suffices for PNC to have standing. See Deutsche Bank, 192 Wn. App. at 173.

Cozza also says that PNC cannot sue because it committed fraud by overstating Cozza's income and claiming ownership of the Loan when it was not

[5] While Cozza disputed at the hearing that the Note was in fact the original Note, she does not make a similar argument on appeal.

Cozza suggests that Tara Ingram, the document custodian who endorsed the Note in blank, lacked the authority to do so, but points to no evidence to support this suggestion.

[6] When endorsed in blank, a note is "payable to bearer and may be negotiated by transfer of possession alone." Brown, 184 at 523 (quoting RCW 62A.3-205(b)).

the owner. We conclude that Cozza has not established a genuine issue of material fact about fraud, and thus fraud cannot constitute the basis for an argument that PNC lacks the authority to sue.[7]

Cozza relies only on the correspondence between Freddie Mac and PNC in her attempt to establish a genuine issue of material fact as to the existence of fraud. In these documents, Freddie Mac required PNC to repurchase the Loan because PNC overstated Cozza's income. PNC responded that it did not overstate Cozza's income and that Freddie Mac failed to establish that PNC must repurchase the Loan. Freddie Mac responded by reiterating its previous position. This exchange hardly suffices to raise a genuine issue of material fact about fraud. Freddie Mac does not accuse PNC of fraud, and overstated income alone is not evidence of fraud. Thus, the trial court did not err.

b. Default

Cozza says that a genuine issue of material fact exists as to whether PNC "manufactured" her default. Cozza says that she made her mortgage payments for January, February, and March 2011, and that this conflicts with PNC's contention that she made none of those payments. PNC disagrees. We

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[7] The elements of fraud are:

> (1) a representation of existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity, (5) the speaker's intent that it be acted upon by the person to whom it is made, (6) ignorance of its falsity on the part of the person to whom the representation is addressed, (7) the latter's reliance on the truth of the representation, (8) the right to rely upon it, and (9) consequent damage.

Frontier Bank v. Bingo Inv., LLC, 191 Wn. App. 43, 59, 361 P.3d 230 (2015) (quoting Elcon Constr., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 166, 273 P.3d 965 (2012)). They "must be established by clear, cogent, and convincing evidence." Id.

conclude that, even assuming Cozza established an issue about when she stopped making payments, she has not established materiality.

Greggerson's declaration says that Cozza failed to make payments in January and February 2011. It says that Cozza made a payment in March 2011 but PNC returned the payment as insufficient to bring the account current. Greggerson noted that Cozza has not made a regular monthly payment under the Note since March 2011. Financial documents from 2011 corroborate this declaration. Greggerson stated that in 2012, Cozza made three payments under a trial payment plan for a potential loan modification, but afterward Cozza did not make any payments on the Loan. PNC submitted financial documents showing that the three payments Cozza made in 2012 were combined and used to pay off her balance from January and February 2011.

During her deposition, Cozza stated that she had made her January, February, and March 2011 payments as well as three payments in 2012. Her declaration makes similar statements and says that PNC returned her March 2011 payment with no explanation. Cozza submitted a series of documents PNC sent her that state that she was in default as of March 2011. One undated document titled "Current Loan Information," states that the "year to date" total payments equal $3,766.46 and that the next payment was due on March 1, 2011.

Cozza concedes that she has not made payments since 2012. But she says she has established a genuine issue of material fact as to whether PNC "manufactured" the default. Cozza says that PNC's calculations for the total amount owed "have to be off." Assuming she has shown an issue as to the

timing of the default, she has not pointed to evidence showing how that issue is material to the question of whether PNC "manufactured" the default. See Ray, 15 Wn. App. at 356 (holding that an issue is material only if it affects the outcome of the litigation).

c. Case of equity

Cozza seemingly argues the following: this is a case of equity, the trial court seems to have agreed, summary judgment is often inappropriate in equity cases, thus the trial court should have "set forth" its decision to apply equity jurisdiction in its summary judgment ruling. See Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship, 158 Wn. App. 203, 220–21, 242 P.3d 1 (2010) ("Due to the discretionary nature of decisions made in equity, granting equitable relief on summary judgment may be inappropriate in many cases."). Cozza says, based on the trial court's ruling, one cannot tell whether the trial court considered her arguments that PNC lacked standing and that the trial court should exercise equity jurisdiction.

The parties agree that the case is equitable in nature. But the trial court did not indicate whether it was treating the case as such.[8] Cozza cites no legal authority requiring that if a court exercises equity jurisdiction, it say so in its summary judgment ruling. We conclude that the trial court did not err.

[8] During a hearing, the trial court noted, "[T]he Defendants specifically requested that this court exercise its considerable powers in equity in their favor" and ruled that by doing so, Cozza waived any personal jurisdiction argument. But this does not show whether the trial court agreed that it should exercise equitable jurisdiction.

2. Dismissal of counterclaim for trespass

As to her claim for trespass,[9] Cozza says that a genuine issue of material fact exists as to the reason she moved out of her Washington home to Pennsylvania. She contends that she was forced out by harassing trespassers sent by PNC. PNC responds that she left to rent out the property. It says that the trial court properly dismissed Cozza's claims because no trespass occurred. We conclude no genuine issue of material fact exists on this issue.

Cozza submitted a declaration stating that people came onto her property "every week," took photographs, and verbally abused her. Cozza submitted photographs that PNC's agents took of her house, a description of her home by an agent, and photographs of a car allegedly belonging to someone who came to empty the house. These establish only that PNC's agents have been to the property. And Section 7 of the Deed of Trust states, "Lender or its agent may make reasonable entries upon and inspections of the Property." Also, Section 9 states, "If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument . . . the Lender may do and pay for whatever is reasonable, or appropriate to protect Lender's interest in the Property and rights under this Security Instrument." Cozza's evidence falls short of establishing a genuine issue of fact as to trespass, particularly since she must establish an issue of fact as to each of the elements of trespass.

[9] "To establish intentional trespass, a plaintiff must show (1) an invasion of property affecting an interest in exclusive possession; (2) an intentional act; (3) reasonable foreseeability that the act would disturb the plaintiff's possessory interest; and (4) actual and substantial damages." Wallace v. Lewis County, 134 Wn. App. 1, 15, 137 P.3d 101 (2006), as corrected (Aug. 15, 2006).

3. Credibility

Cozza says that because this case involved issues of credibility, granting summary judgment for PNC was error. PNC responds that Cozza introduced no evidence creating an issue as to credibility. We conclude that the trial court did not err in this regard.

Cozza relies on Balise v. Underwood, 62 Wn.2d 195, 381 P.2d 966 (1963), for the proposition that if a party provides impeaching or contradicting evidence, an issue of credibility arises and in such a case, a court should deny a motion for summary judgment. But later cases clarify that "while a court should not resolve a genuine issue of credibility at a summary judgment hearing, '[a]n issue of credibility is present only if the party opposing the summary judgment comes forward with evidence which contradicts or impeaches the movant's evidence on a material issue.'" Laguna v. Dep't of Transp., 146 Wn. App. 260, 266–67, 192 P.3d 374 (2008) (alteration in original) (quoting Howell v. Spokane & Inland Empire Blood Bank, 117 Wn.2d 619, 626–27, 818 P.2d 1056 (1991)). "Impeachment of a witness does not establish the opposite of [their] testimony as fact," thus impeachment does not necessarily establish a genuine issue of material fact. Laguna, 146 Wn. App. at 267.

Cozza purports to have impeached PNC's contention that it may foreclose, and that PNC has not denied multiple allegations, including that it acted in bad faith and engaged in trespass. Cozza says that because this case turns on whether Cozza and her business records are more credible than PNC and its records, summary judgment is inappropriate. Cozza has not provided

evidence impeaching PNC's assertion that it held the Note when it initiated the complaint or establishing that PNC acted in bad faith[10] or committed trespass. Nor has she provided any evidence to impeach any other material factual assertion by PNC. Cozza has not established a "genuine issue of credibility." See id. at 266.

4. PNC's failure to mediate in good faith

Cozza says that because a mediator found that PNC failed to mediate in good faith, Cozza is entitled to a defense under the Foreclosure Fairness Act. PNC responds that the applicable statutory provision precludes such a defense against judicial foreclosure. We agree with PNC.[11]

RCW 61.24.163(14)[12] provides:

> (14)(a) The mediator's certification that the beneficiary failed to act in good faith in mediation constitutes a defense to the nonjudicial foreclosure action that was the basis for initiating the mediation. In any action to enjoin the foreclosure, the beneficiary is entitled to rebut the allegation that it failed to act in good faith.
>
> (b) The mediator's certification that the beneficiary failed to act in good faith during mediation *does not constitute a defense to a judicial foreclosure or a future nonjudicial foreclosure action if a modification of the loan is agreed upon and the borrower subsequently defaults*.

(Emphasis added).

[10] Cozza offers no evidence arguing that PNC acted in bad faith as to the modifications. Cozza submitted a declaration alleging bad faith, but Cozza does not cite it on appeal, nor is the declaration enough to establish a genuine issue of material fact. See Heath, 106 Wn. App. at 513 (a party cannot reply on "having its affidavits accepted at face value").

[11] Because we conclude that PNC's failure to mediate in good faith is not a defense to judicial foreclosure, we do not address Cozza's contention that a genuine issue of material fact exists as to "bad faith modifications."

[12] In her opening brief, Cozza cites the 2011 version of the statute, but the current version is identical in pertinent part. Former RCW 61.24.163(11) (2011).

Division Two of this court held that this statute[13] precludes a defense against judicial foreclosure when a mediator decides a beneficiary failed to act in good faith. Wells Fargo Bank, N.A. for Option One Mortg. Loan Tr. 2006-1, Asset-Backed Certificates, Series 2006-1 v. Gardner, noted at 5 Wn. App. 2d 1011, slip op. at 10 (2018); see GR 14.1 ("Washington appellate courts should not, unless necessary for a reasoned decision, cite or discuss unpublished opinions in their opinions"). The court set forth two reasons why the defense does not apply to judicial foreclosures:

> First, the absence of any reference to "judicial foreclosure" in subsection (a) suggests that the legislature did not intend to provide an affirmative defense to judicial foreclosure. If the legislature had intended to extend the affirmative defense to both judicial and nonjudicial foreclosures, it could have clearly expressed that intent by including both terms in subsection (a). Second, the last antecedent rule is not merely a formalistic maxim based on punctuation, but is a sign of legislative intent. Under that rule, the qualifying phrase "if a modification of the loan is agreed upon and the borrower subsequently defaults," applies only to "a future nonjudicial foreclosure action," because that is the immediately preceding antecedent and there is no comma before the qualifying phrase.

Id. at 9 (quoting former RCW 61.24.163(14)(b)).[14] We agree with this reasoning and conclude that Cozza was not entitled to a defense under RCW 61.24.163.

B. Cozza's Cross-Motion for Summary Judgment

We review de novo summary judgment rulings. Ray, 15 Wn. App. at 356.

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[13] The court in this case interpreted the 2014 version of the statute. The language in the pertinent part of the 2014 version is identical to the current version.

[14] Gardner, slip op. at 8 ("one rule of grammar applied to statutory interpretation is 'the last antecedent rule, which states that qualifying or modifying words and phrases refer to the last antecedent.'" (quoting State v. Bunker, 169 Wn.2d 571, 578, 238 P.3d 487 (2010))).

1. PNC's name in the case caption

Cozza says that PNC failed to name the proper party in the complaint's caption by including "successors and assigns" after its name. PNC says Cozza waived this argument and, in any event, no law prevents PNC from including such boilerplate language in their name. We agree with PNC that Cozza waived this argument.

"Generally, any objection to the capacity of a business to bring suit based solely on the identity of the named plaintiff must be raised in a preliminary pleading or by answer or the objection is deemed waived." Bus. Serv. of Am. II, Inc. v. WaferTech, LLC, 188 Wn.2d 846, 851, 403 P.3d 836 (2017). Cozza did not make any such objection. Thus, she waived her argument on this issue.

2. Issues of equity

Cozza says that the trial court erred in how it resolved issues of equity. She contends that the trial court failed to apply principles of equity by declining to provide its reasoning for its rulings. As discussed below, the trial court did not err in declining to enter findings of fact and conclusions of law. And Cozza cites no law requiring any other type of reasoning in cases of equity. Aside from this contention, Cozza does not explain how the trial court erred in resolving issues of equity.

C. Findings of Fact and Conclusions of Law

Relying on the party presentation principle[15] and the separation of powers

[15] According to the party presentation principle, "courts are essentially passive instruments of government" and should not be too involved in the adversarial process. See United States v. Sineneng-Smith, __ U.S. __, __, 140 S. Ct. 1575, 1579, 206 L. Ed.

doctrine, Cozza says that the trial court erred by not issuing findings of fact and conclusions of law. Cozza asks this court to remand the case for findings and conclusions related to whether recusal was required and whether a violation of the separation of powers doctrine occurred. PNC responds that Cozza waived this argument. PNC also says Washington law establishes a trial court need not enter findings of fact and conclusions of law when granting summary judgment. We conclude that even if Cozza did not waive this argument,[16] the trial court did not err.

The trial court relied on Sinclair v. Betlach, 1 Wn. App. 1033, 1034, 467 P.2d 344 (1970), in determining that entering findings of fact in a motion for summary judgment would be superfluous. Cozza contends that Sinclair is distinguishable on the facts, but other cases similarly hold. See, e.g., Davenport v. Washington Educ. Ass'n, 147 Wn. App. 704, 716 n.23, 197 P.3d 686 (2008) ("the Washington Supreme Court has 'held on numerous occasions that findings of fact and conclusions of law are superfluous in both summary judgment and judgment on the pleadings proceedings.'" (quoting Washington Optometric Ass'n v. Pierce County, 73 Wn.2d 445, 448, 438 P.2d 861 (1968))). Cozza relies on State v. Agee, 89 Wn.2d 416, 419, 573 P.2d 355 (1977), but that criminal case

2d 866 (2020) (quoting United States v. Samuels, 808 F.2d 1298, 1301 (8th Cir. 1987)). Cozza says the trial court violated this principle. But the record does not show that the trial judge was too involved in the adversarial process or otherwise failed to act as a neutral arbiter. And Cozza does not convincingly explain how this principle or the separation of powers doctrine required the trial court, contrary to other law, to enter findings and conclusions.

[16] Cozza did not object below when the court declined to issue findings and conclusions. Under RAP 2.5(a) we may decline to address issues raised for the first time on appeal. And Cozza does not respond to this waiver contention in her reply brief. But we address it because some of Cozza's other arguments relate to it.

addresses a CrR 4.5 motion to suppress and not summary judgment. The trial court did not err in declining to enter findings of fact and conclusions of law on its summary judgment rulings.

D. Recusal

Cozza says the trial judge erred by failing to address a potential conflict of interest. PNC says that the trial judge did not have an interest requiring recusal. We conclude that the trial court acted within its discretion.

"We review a trial court's recusal decision for an abuse of discretion." Tatham v. Rogers, 170 Wn. App. 76, 87, 283 P.3d 583 (2012). "The court abuses its discretion when its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons." Id.

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." Id. at 90 (quoting Marshall v. Jerrico, Inc., 446 U.S. 238, 242, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980)). But because "the common law and state codes of judicial conduct generally provide more protection than due process requires" courts typically "resolve questions about judicial impartially [sic] without using the constitution." JPMorgan Chase Bank, N.A. v. Stehrenberger, noted at 193 Wn. App. 1035, slip op. at 3–4 (2016); see GR 14.1. Under the Code of Judicial Conduct, a judge must recuse if their impartiality may reasonably be questioned. West v. Washington Ass'n of County Officials, 162 Wn. App. 120, 136–37, 252 P.3d 406 (2011). But recusal is unnecessary if a judge's interest is de minimis. Kok v. Tacoma Sch. Dist. No. 10, 179 Wn. App. 10, 26, 317 P.3d 481 (2013). De

minimis interests are insignificant and include "an interest in the individual holdings within a mutual or common investment fund." Stehrenberger, slip op. at 5 (quoting Comment 6 to the CJC 2.11).

Cozza says that the trial court judge, and likely all Washington state judges, have a conflict of interest in this case. She says that a "substantial amount" of judges' retirement funds are invested in mortgage-backed securities comprised of loans such as the one at issue here. She contends that judges are disinclined to rule against foreclosures in cases involving fraud because doing so will impact the stability of mortgage backed securities. She says this is so given the "rampant" fraud relating to these types of investments. She says that the Due Process Clause of the United States Constitution prevents a judge from hearing a case in which the judge has an interest.

Cozza raised this argument before the trial court. She did not move to disqualify the judge—her attorney raised the issue in his declaration in support of her cross-motion for summary judgment. She requested that if the trial court believed a potential conflict existed, it should appoint a non-sitting Judge Pro Tempore. And she requested that if the trial judge declined to recuse himself, the court include reasoning for that decision in its summary judgment ruling. The trial judge did not address this issue at the hearings or in his order and did not recuse himself.

"[A]n interest in the individual holdings within a mutual or common investment fund"—such as the interest at issue—is de minimis. See Stehrenberger, slip op. at 5 (quoting Comment 6 to the CJC 2.11). This case is

like Stehrenberger in which the court held that the judge's retirement fund being invested by the state in diversified investments—including holdings in JPMorgan, the plaintiff there—was a de minimis interest not requiring recusal. Id. at 4–5; see GR 14.1. And while Cozza states that a failure to address a request to recuse borders on "judicial tyranny," she does not cite law requiring that a trial court explicitly address such a request, which she did not make in a separate motion. The trial court did not err by declining to address the conflicts issue or recuse himself.

We affirm.

Chun, J.

WE CONCUR:

Cobun, J.

Bremmer, J.

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

PNC BANK, NATIONAL ASSOCIATION, its successors in interest and/or assigns, Respondent, v. LAURA COZZA, Appellant, MATTHEW COZZA; CITIFINANCIAL, INC.; OCCUPANTS OF THE PREMISES, Defendants.	No. 80966-1-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Laura Cozza moved for reconsideration of the opinion filed on March 15, 2021. Respondent PNC Bank filed an answer to the motion. A majority of the panel has considered the motion pursuant to RAP 12.4 and has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Chun, J.
Judge

Exhibit 15

PNC Bank et al. v. Cozza

No.:16-2-01090-0

Freddie Mac
We make home possible ™

8200 Jones Branch Drive, MS 287
McLean, VA 22102-3107
Phone: (703) 903-2036
Fax: (703) 903-2068

April 22, 2013

Linda Newton
Vice President Repurchase Manager
PNC BANK, NA
3232 Newark Dr., Bldg 3
Miamisburg, OH 45342

RE:		
	Seller/Servicer #:	445603
	Contract #:	30265846
	Funding Date:	April 14, 2008
	Freddie Mac Loan #:	[redacted]64
	Property Location:	SEDRO WOOLLEY, WA 98284
	Review Type:	Non Performing Loan Review

Dear Ms. Newton:

The attached mortgage(s) were selected by Freddie Mac for a post purchase quality control review. As a result of the recently completed quality control review(s), Freddie Mac has determined that the attached mortgage(s) must be repurchased. Pursuant to Section 72.1 of the Single-Family Seller/Servicer Guide (the Guide), mortgages that do not comply with Freddie Mac's requirements must be repurchased. An explanation of why the attached mortgage(s) do not meet Freddie Mac's requirements is attached.

Repurchase of the mortgage(s) must be completed on or before **June 21, 2013**. The repurchase procedures to be followed are determined by the status of the mortgage, and are stated in full in Section 78.20 of the Guide and summarized as follows:

* Active Mortgages: Repurchases of active mortgages are to be reported through the repurchase Loan Level Transaction to Freddie Mac via automated means using Service Loans Application. The repurchase amount must be remitted to Freddie Mac via our on-line automated cash remittance system (through our service provider, Global Payments Inc.) by which you make your regular monthly remittances.

* Inactive Mortgages: Repurchases of inactive mortgages must be reported as a payoff - mortgage repurchase. Proceeds must be remitted to Freddie Mac via our on-line automated cash remittance system (through our service provider, Global Payments Inc.) described above.

* Real Estate Owned (REO): Repurchases of mortgages transferred to REO are accounted for and reported by remitting the proceeds to the applicable Freddie Mac office (Attention, REO Accounting Department) by check, accompanied by Form 105. The repurchase amount must be verified with the applicable REO Accounting Department.

NOTE: If the status of the mortgage should change at any time prior to the actual repurchase, you should follow the procedures outlined above for the appropriate status at the time the repurchase funds are remitted.

At Freddie Mac's discretion, the repurchase price may also include any premium paid for mortgages purchased under the Gold Cash method of pricing.

Should you have any questions regarding the repurchase procedure, please refer to Section 78.20 of the Guide, or call Freddie Mac's 1-800-FREDDIE Customer Service Line. You will be asked for your Seller/Servicer number.

If you have facts that you believe demonstrate that the mortgage(s) complies with Freddie Mac's requirements, you may submit them to remedy_mgmt_appeal@freddiemac.com on or before the repurchase due date indicated above. In accordance with the requirements of Section 72.6 of the Guide, the submission must be full and complete, contain a summary of the relevant facts, and a statement of why the repurchase request should be rescinded.

Thank you for your prompt attention to this matter.

Sincerely,

Tamara LaBarbera
Underwriter, Quality Control
(703) 903-3407

Attachment(s)

LTV: 85.000%
Mortgage Purpose: Refinance (OO)
S/S Loan Number: [redacted]8871
Note Date: February 12, 2008

Freddie Mac has determined the above referenced loan is not of acceptable quality due to the violations of the Single-Family Seller/Servicer Guide sections and/or Master Agreement as noted below.

THIS LOAN WAS UNDERWRITTEN TO THE TERMS AND PROVISIONS OF THE SELLER'S MASTER AGREEMENT FOR MORTGAGES ORIGINATED USING FANNIE MAE'S DESKTOP UNDERWRITER (DU) AUTOMATED SCORING SYSTEM MASTER AGREEMENT #07032066.

CAPACITY
The Co-Borrower's income was overstated.

* The subject loan application indicated that the Co-Borrower had been employed with H&R Block aka J&K Mason Enterprises LLC with a monthly income of $2,065.88.

* The Co-Borrower's paystubs, Verification of Employment (VOE), and 2006 Income Tax Transcript were provided to document the Borrower's employment and income.

* Using the Co-Borrower's VOE, Freddie Mac calculated the Co-Borrower's monthly income to be $1,176.54. 2006 income of $10,822 + 2007 income of $17,415 = $28,237/24 = $1,176.54. It should be noted there were two VOE's in file; however, the VOE dated 1/22/2008 was used to calculate the Borrower's income. Additionally, the VOE reflected the Co-Borrower's hourly pay of $18.54; however, it was unclear how many hours a week the Co-Borrower worked and a supporting paystub was not provided.

* The subject loan application indicated that the Borrower has been employed with Wilson Auto Brokers with monthly income of $3000. Freddie Mac accepts this income.

* Using monthly income of $4,177, PITI of $ 2,783 and total other monthly obligations of $354, the debt payment-to-income ratio increased to 75.10%, which indicates insufficient income to support total obligations. The DU Findings are invalidated. The subject loan is not acceptable as a manually underwritten loan.

The subject loan was not eligible for sale to Freddie Mac.

Exhibit 16

PNC Bank et al. v. Cozza

No.:16-2-01090-0

PNC MORTGAGE℠
LEADING THE WAY

Date 5/15/2013

VIA EMAIL

PNC Mortgage, a Division of PNC Bank, NA
The PNC Financial Services Group
3232 Newmark Dr. - Bldg. 6 - B6-YM13-01-A
Miamisburg, OH 45324

Borrower Information

Borrower Name	COZZA
PNC Loan No.	[redacted]8871
Investor No.	[redacted]0164
Repurchase Demand Date	6/21/2013

Dear Joseph Burnham:

PNC Mortgage, a division of PNC Financial Services Group, Inc., is in receipt of the above-dated letter from Freddie Mac purporting to require repurchase of the above-referenced loan.

It is Freddie Mac's burden to establish facts sufficient to justify its decision to require repurchase of this loan. Freddie Mac has failed to meet its burden.

Freddie Mac's Position

Freddie Mac has determined the above referenced loan is not of acceptable quality due to the violations of the Single-Family Seller/Servicer Guide sections and/or Master Agreement as noted below.

THIS LOAN WAS UNDERWRITTEN TO THE TERMS AND PROVISIONS OF THE SELLER'S MASTER AGREEMENT FOR MORTGAGES ORIGINATED USING FANNIE MAE'S DESKTOP UNDERWRITER (DU) AUTOMATED SCORING SYSTEM MASTER AGREEMENT #07032066.

CAPACITY
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* The Co-Borrower's paystubs, Verification of Employment (VOE), and 2006 Income Tax Transcript were provided to document the Borrower's employment and income.

* Using the Co-Borrower's VOE, Freddie Mac calculated the Co-Borrower's monthly income to be $1,176.54. 2006 income of $10,822 + 2007 income of $17,415 = $28,237/24 = $1,176.54. It should be noted there were two VOE's in file; however, the VOE dated 1/22/2008 was used to calculate the Borrower's income. Additionally, the VOE reflected the Co-Borrower's hourly pay of $18.54; however, it was unclear how many hours a week the Co-Borrower worked and a supporting paystub was not provided.

* The subject loan application indicated that the Borrower has been employed with Wilson Auto Brokers with monthly income of $3000. Freddie Mac accepts this income.

* Using monthly income of $4,177, PITI of $ 2,783 and total other monthly obligations of $354, the debt payment-to-income ratio increased to 75.10%, which indicates insufficient income to support total obligations.
The DU Findings are invalidated. The subject loan is not acceptable as a manually underwritten loan.

The subject loan was not eligible for sale to Freddie Mac.

PNC Mortgage Response

We have reviewed Freddie Mac income calculation $1176.54 and we do not agree on this calculation as it was based on the borrower's prior lower income at an hourly rate of $14.98 and the fact that the co-borrower was working as a seasonal employee for the year 2007.
The file contained two VOE's dated 12/26/2007 and 1/22/2008 which demonstrated the co-borrower's hourly rate being increased and demonstrated the co-borrower being reclassified from seasonal employee to an employee as a part time position were included in the file.
The VOE from 1/22/2008 signed by Jane Mason indicated that co-borrower accepted a year round position from 2-3 days a week beginning April 15th. Additionally, the co-borrower worked for this company since December of 2004. Freddie Mac indicated it was unclear how many hours a week the co-borrower worked and a supporting paystub was not provided. However, the owner indicated the co-borrower will be working 2-3 days a week beginning April 15th. PNC conservable used 2.5 days per week to qualify the co-borrower and the loan closed 2/12/2008.
Additionally, the VOE confirmed the co-borrower made $1459 /29.18 for the period of 1/1-1/15 and the co-borrower worked in the tax preparation business. This confirmed income for 2008 and PNC monthly amount to qualify are consistent with they're prior income, income used to qualify for the new position.

PNC kindly requests that you rescind your repurchase demand.

Sincerely,

Jeanine Patino
Repurchase Reviewer/Underwriter
Jeanine.Patino@pncmortgage.com
(813) 843-6948

Exhibit 17

PNC Bank et al. v. Cozza

No.:16-2-01090-0

Freddie Mac
We make home possible℠

8200 Jones Branch Drive, MS 287
McLean, VA 22102-3107
Phone: (703) 903-2036
Fax: (703) 903-2068

July 18, 2013

Linda Newton
VICE PRESIDENT REPURCHASE MANAGER
PNC BANK, NA
3232 NEWARK DR., BLDG 3
MIAMISBURG, OH 45342

RE:		
	Seller/Servicer #:	445603
	Contract #:	30265846
	Funding Date:	April 14, 2008
	Freddie Mac Loan #:	[redacted]0164
	Seller/Servicer Loan #:	[redacted]3871
	Property Location:	SEDRO WOOLLEY, WA 98284
	Review Type:	Non Performing Loan Review

Dear Ms. Newton:

We have reviewed the information you provided regarding the above referenced loan in your appeal letter dated June 18, 2013 and must affirm our initial decision that requires you to repurchase this loan.

Your appeal did not support a change in our decision for the following reasons:

We have received and reviewed your response dated 6/18/2013 regarding the Co-Borrower's income.

Our repurchase request stated the Co-Borrower's income was overstated. We stated we calculated the Co-Borrower's income to be $1,176.54 using the VOE in file dated 1/23/08. Your response stated you disagreed with our assessment; however, you did not provide any clarification from the employer or other evidence to support the Co-Borrower's qualifying income was supported. Your response acknowledged the VOE reflected the Co-Borrower was to become a permanent employee as of April 15th working 2-3 days a week. We cannot determine how many hours per day/week the Co-Borrower would be working since the Co-Borrower had not yet started her new position; therefore, we can only used earned income to qualify the Co-Borrower. Freddie Mac has recalculated the Co-Borrower's income using a 12.5 month average from the 2007 income and the year-to-date income reflected on the VOE as follows: $17,415 + $1,459 = $18,874/12.5 = $1,509. Using total income of $4,509, PITI of $2,783 and total other monthly obligations of $324, the debt payment-to-income ratio is now 68.91% which is still above tolerance and indicates insufficient income to support total obligations. The deficiency remains outstanding.

Repurchase must be completed within 15 calendar days from the date of this letter. Our decision regarding this appeal is final. If you have any questions concerning this matter, please do not hesitate to contact this office.

Sincerely,

Tamara LaBarbera
Underwriter, Quality Control
(703) 903-3407

income was misstated. Tamara LaBarbera's (Freddie Mac Underwriter in Quality Control) letter dated April 14, 2008, lays out exact instructions on how to purchase the note and is attached hereto as ***Exhibit 6.***

36. If PNC bought the note they should be able to show the payment and subsequent documents involved in the purchase. Freddie Mac states the loan is fraudulent and tells PNC they must repurchase the loan. *See* ***Exhibit 6***

37. When Robert Nitz generated the loan application he padded my income by about $800, and he knew this, while at the time he was forcing us to sign a loan under threat of foreclosure for an amount that was more than we had originally agreed to pay.

38. We never saw any paperwork until the day we had to go to the title company, which was February 22, 2008, a full ten days later than the paperwork is dated. This is when I learned that Robert Nitz had padded my income by about $800.

39. We had no time to work with another mortgage company because Robert Nitz, who refused to speak with me at this point, had said either agree to our terms and sign this week, or we will foreclose.

40. I argued there was no reason that I shouldn't get the first mortgage for three hundred thirty-three thousand. Robert said the first mortgage "just went away" and wasn't a product offered anymore.

41. In order to get PMI added, the amount we owed needed to be increased. You have to be over 80% loan to value, which we weren't with the original loan that we applied for and agreed to. Robert Nitz said the first mortgage went away and forced us into this interest only mortgage with a higher principal and PMI under threat of foreclosure.

42. The amount I was charged to pay off the first loan is incorrect, I did not receive $353,650 from the first loan. I actually received about $333,000. Plus I had paid for a second closing in the first loan which was not returned when it was no longer available to close permanently as originally agreed upon. If they hadn't overcharged me, I wouldn't have PMI. My loan to value would have been just under eighty percent. ***Exhibit 6***

43. This forced loan overall was an additional $400 per month than the original loan, it was interest only and set to go to principal and interest in 10 years which would then increase the payment an additional $700.

44. I was more than upset, as PNC states, I was being threatened and swindled out of my own money. I couldn't find an attorney to help because

No. 80966-1

On Appeal from Whatcom County No. 16-2-01090-0

In the Court of Appeals for the State of Washington Division One

LAURA COZZA et al.,

***Defendant-Appellant*,**

v.

PNC BANK, NATIONAL ASSOCIATION,

Plaintiff-Respondent.

APPELLANT'S MOTION FOR RECONSIDERATION

Scott E. Stafne, WSBA No. 6964
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I. DESIGNATION OF PERSON FILING THIS MOTION

Laura Cozza was the Defendant and Counterclaimant below. She is the Appellant herein. Cozza moves this Panel for the relief set forth in Section II.

II. RELIEF REQUESTED

Cozza requests this Court reconsider pursuant to RAP 12.4 the following parts of its Unpublished Opinion (Un. Op.): (1) that portion of the decision finding Cozza's objection to the standing, *i.e.,* justiciability, of this action by "PNC Bank, National Association, its successors in interest and/or assigns" to bring this action had been *waived*. Un. Op. 12–13; (2) that portion of the decision finding PNC had standing to foreclose—in both a statutory and justiciability context—based on the operative Note and deed of trust executed on February 12, 2008. Un. Op. 8 & 11; (3) that portion of the decision that applied Washington's recusal law to Cozza's claim Washington court judges are required to recuse themselves from this case based on federal Due Process standards. Un. Op. 458–460, 463–632.

III. REFERENCE TO PERTINENT PARTS OF THE RECORD

The parts of the record that support this Motion include the appellate briefs this Court was required to review in deciding this Appeal and the Clerk's Papers (CP) referenced herein.

IV. A STATEMENT OF THE GROUNDS FOR RELIEF SOUGHT WITH SUPPORTING ARGUMENT

A. Introduction

Each of the grounds proposed for reconsideration goes to standing

and/or justiciability issues. Black's Law Dictionary defines *standing* as "[a] party's right to make a legal claim or seek enforcement of a duty or right. *Id.* at 1536, Ninth Edition, (2006). The term standing has a relatively recent—mid-twentieth century origin. *See* Joseph Vinning, Legal Identity 55 (1978).

Justiciability, on the other hand, is a much older term than standing and encompasses *standing* concepts within its breadth. Russell W. Galloway, *Basic Justiciability Analysis*, 30 Santa Clara L. Rev. 911 (1990). *Justiciability* means "[t]he quality or state of being appropriate or suitable for adjudication by a court." Black Law Dictionary, Ninth Edition, *supra*., p. 923. The requirement that disputes must be justiciable before they can be adjudicated by a court flows from the nature of judicial power, which requires that individual disputes between adverse parties be adjudicated by judges who are and appear to be neutral. *See infra.* When a dispute is not justiciable courts do not have subject-matter jurisdiction to decide it. *See e.g., Ronald Wastewater Dist. v. Olympic View Water & Sewer Dist.*, 196 Wn.2d 353, 474 P.3d 547 (2020)(holding a Washington superior court did not have subject-matter jurisdiction to adjudicate a case where the court had no statutory authority to provide relief and all the parties needed for a just adjudication were not before it.) *See also* Symposium: *State Constitutionalism in the 21st Century, State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 Penn St. L. Rev. 923 (Spring 2011); "*The Boundaries of Justiciability*," International and Comparative Law Quarterly 60, pp. 981–1019 (October 1, 2010).

B. Cozza did not and could not waive her objection to this case being prosecuted on behalf of successors and assigns

Cozza properly raised her objections to "PNC, National Association, its successors and or assigns" bringing this lawsuit. In this regard, she initially asserted objections related to the justiciability of this case as well as the standing of the Plaintiff to bring it under 12 U.S.C. § 24 when she denied the paragraphs of the operative Complaint alleging those claims. *Compare e.g.,* Paragraph 1 of the Complaint alleging "Plaintiff is authorized to bring suit for foreclosure pursuant to 12 U.S.C. § 24," at CP 1, with Answer, at CP 30:1. *Compare also* Paragraph 5 of "Fact" section of Complaint, *i.e.,* "Plaintiff, as successor by merger to National City Mortgage, a division of National City Bank, is the current beneficiary of the Deed of Trust," CP at 3:19–20, with Answer at CP 31:6 denying this allegation. *Compare also* Paragraph 3 of section of the Complaint "Decree of Foreclosure," *i.e.,* "Plaintiff asserts its right per the terms of the Deed of Trust for the court to enter a decree of foreclosure," at CP 5:8-9 with Answer at 32:3.

In addition to her denials, Cozza further framed these standing and justiciability issues by way of her affirmative defenses, which PNC and its successors moved be stricken as part of its Summary Judgment Motion. *See e.g.,* Affirmative Defenses and opening Motion for Summary Judgment (MSJ). *Compare*: affirmative defense "1. Lack of personal jurisdiction," Answer at CP 40:17, *with* MSJ at CP 69-70. *Compare* "2. Lack of subject-matter jurisdiction," Answer at CP 40:18, with MSJ, CP 70:17-21. *Compare* "11. Failure to comply with statutory prerequisites/ action prohibited by

statute," Answer at CP 41:11 with MSJ. CP 74:24-75:2. *Compare* "12. Lack of Standing," Answer at CP 41:5 *with* MSJ where PNC and successors argue: "there is no dispute that PNC has standing because it holds the properly indorsed original Note and is the person entitled to enforce it." MSJ at 75:5-6.

Cozza then filed a Cross-Motion for Summary Judgment against "Plaintiff 'PNC Bank National Association, its successors and assigns'" arguing, among other things, that the entities named in the caption "had no standing to foreclose on Cozza's real property as a matter of law."CP 175. In her Cross-Motion for Summary Judgment Cozza asserts that the Plaintiff identified in the caption "appears to be three different possible entities, *i.e.,* PNC Bank, **or** its successors in interests **or** its assigns." CP 178. Further Cozza argued:

> Paragraph 1 of the Complaint states: "PNC Bank, National Association (Plaintiff) is authorized to bring suit for foreclosure pursuant to 12 U.S.C. § 24." But the Note and Deed of Trust do not identify the Plaintiff or any national banking association as the lender and beneficiary of the loan.
>
> The Plaintiff also does not explain what subpart of 12 U.S.C. 24 it is claiming authorizes this lawsuit. This is problematic because this statutory provision contains numerous subparts and is approximately eight pages long. In any event, it is Laura Cozza's position after reading 12 U.S.C. 24 that the . . . language of that statute prohibits PNC from foreclosing on this loan that was sold to Freddie Mac: . . .

CP 177–178.

PNC responded by stating:

There is no prohibition in Washington law to a party including

> the phrase "its successors in interest and/ or assigns" in the caption of a Complaint, nor does the inclusion of that language somehow deprive the party of standing to bring a lawsuit.

CP 450:17–20

PNC and its successors then argued alternatively that because Cozza never specifically identified this *standing* defense "in a preliminary pleading or by answer" she waived it. CP 450:3–13. And this Court agreed, holding based solely on *Bus. Serv. of Am. II, Inc. v. WaferTech, LLC*, 188 Wn.2d 846, 851, 403 P.3d 836 (2017) that: "Cozza did not make any such objection. Thus, she waived her argument on this issue." Un. Op. at 13.

Cozza asserts this is not a reasonable factual finding or legal conclusion under the pleadings as described *supra* at pp. 3–4, because Cozza denied the jurisdictional and standing allegations set forth in the Complaint and asserted affirmative defenses that this action was being brought by PNC and successors without jurisdiction, without standing, and in violation of the applicable statutes. Furthermore, Cozza's Cross-Motion was in direct response to PNC's Motion for Summary Judgment on standing and to strike her jurisdictional, standing, and statutory standing defenses.

This case is not even similar to *Bus. Servs. of Am. II, Inc. v. WaferTech, LLC*, *supra*., which involved protracted litigation (over a decade) and multiple appeals (at least 3) before the Defendant raised as an issue that the Plaintiff had improperly identified itself in the caption to the Complaint. Here, Cozza did everything right according to *Bus. Servs. of Am. II, Inc.* because she timely raised these issues in her Answer and preliminary pleadings and the issues were argued below.

Moreover, it is Cozza's position that her objection to "PNC and its successors" (who may or may not exist) bringing this case goes to justiciability and the superior court's (and this Court's) subject-matter jurisdiction over hypothetical parties. *See e.g., Ronald Wastewater Dist. v. Olympic View Water & Sewer Dist.*, *supra*. (Courts are "without authority to order an entity that is not a party to the litigation to do anything." *Id.* 196 Wn.2d at 370–71 citing *Seattle v. Fontanilla*, 128 Wn.2d 492, 502, 909 P.2d 1294, 1300 (1996).)

By affirming a judgment in favor of these hypothetical successors in interest of a debt against Cozza this Court goes beyond that judicial power which has always limited the subject-matter jurisdiction of courts in our adversary system of justice. *See infra*. Further, it violates both statutory and constitutional restrictions on its exercise of judicial power for the reasons stated in the next section of this motion.

C. This Court should have addressed the justiciability, including standing, issues which Cozza raised

Courts across the nation routinely hold mortgage debtors, like Cozza, can only be foreclosed upon pursuant to requisite statutory procedures . *See e.g.*, *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 107 (2012)(Under Washington law an agent purporting to foreclose on behalf of a "beneficiary" must prove control by the principal seeking to foreclose. *Id.* at 106-07); *Deutsche Bank Nat'l Tr. Co. v. Slotke*, 192 Wn. App. 166, 176 n. 35 (2016)("[W]hen 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, not a Servicer without an authorization to do so." *Id.* at n. 35.) *See also Yvanova v. New Century Mortg. Corp.*, 62 Cal. 4th 919, 937-38, (2016) ("The mortgage contract . . . is an agreement that if the homeowner defaults on the loan, the mortgagee may sell the property pursuant to the requisite legal procedures.") *Id.* at 938.; *Shrewsbury v. Bank of N.Y. Mellon*, 160 A.3d 471, 475-78 (Del. 2017)(collecting cases from various jurisdictions).

The following material facts were in evidence pursuant to the Summary Judgment and the Cross- Motions for Summary Judgment filed by Plaintiff "PNC and its successors" and Defendant Cozza: (1) National City Mortgage a division of National City Bank—the predecessor to PNC and its successors—sold the mortgage loan to *Freddie Mac* on April 18, 2008. CP 737 (see funding date); CP 739 (see funding date); CP 744 (see funding date); (2) National City Mortgage merged with National City Bank and became a division of National City Bank on October 1, 2008. *See* MSJ CP at 65, n. 2. *See* Greggerson Decl. CP 125:4–8, Ex. 1 CP 128–130; (3) National City Bank merged with PNC on or about November 6, 2009. MSJ at CP 64, n. 1. *See* Greggerson Decl. CP 125:4–8 and Ex. 1 at CP 130; (4) The Note was subsequently indorsed, and then indorsed in blank by National City ***after*** the loan had been sold to *Freddie Mac* without proof National City had any authority to do so on behalf of *Freddie Mac* or National City Mortgage. *See* MSJ at 65; *See also* Greggerson Decl. 125:4–8, Ex. 1 CP 128–130; (5) National City Bank defrauded *Freddie Mac* by forcing Laura Cozza to sign a loan application which "padded" her income by $800.00 per month. CP 199:11–200:11; (5) PNC and its successors possessed and

produced for the superior court the purported Note at the time of oral argument on the cross motions for summary judgment; and (6) the Washington's Deeds of Trust Act, Chapter 61.24 RCW was amended in 2018 to allow the *holder*, as opposed to the holder of a note and deed of trust that had not been split from one another, to enforce that note and incident deed of trust by foreclosure of the real property security. CP 460:9–14, 636:25–37; 638:4–9; 647:27–648:2.

Plaintiffs argued in their Motion for Summary Judgment they had standing to foreclose because PNC possessed the Note instrument, *citing* to the Washington Supreme Court's decision in *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 523, 359 P.3d 771 (2015) and several court of appeals decisions subsequent to it. *See* CP 69:3–14.

Cozza made several factual arguments to PNC and successors' motion, including:

> Discovery responses provided by Plaintiffs to Cozzas, attached as Exhibits 15 [CP 736–739], 16 [CP 740–742], and 17 [CP 743–745], demonstrate Cozzas' loan was sold to Freddie Mac less than a year after it was funded. Exhibit 15 to Cozza's declaration is the April 22, 2013, letter from Freddie Mac requiring that PNC to buy back Cozzas' loan. *The letter indicates the loan was purchased on April 14, 2008*. *Id*. at p. 1. *The letter states the reason for the buyback is that a National City entity provided Freddie Mac with fabricated income statements. Id.* at pp. 1–3. *Cozza testified in support of her cross-motion that the fabricator of her second mortgage application was National City—some version of it—which created these documents and forced the Cozzas to sign them. See* Cozza declaration in support of Cross-Motion, pp. 9–10, paragraphs 37–41 [CP 198–200].

> *Exhibit 16 to Cozza's declaration is a May 5, 2013, letter from PNC Mortgage to Freddie Mac, which acknowledges the loan was sold to Freddie Mac. This is significant because PNC admits against interest that it did not acquire the Cozzas' loan through any merger in 2009 because no National City entity owned the loan. Freddie Mac claimed to own, and PNC admitted Freddie Mac owned, the Cozzas' loan before the merger occurred.*
>
> *Exhibit 17 to Cozza's declaration indicates Freddie Mac required PNC to repurchase the Cozzas' loan, but there is nothing in the record which suggests PNC did repurchase that obligation or how that repurchase affects Plaintiffs prayer for foreclosure.*

CP 684:6–18. (Emphasis supplied).

In one of her declarations Cozza testified:

> *When Robert Nitz* [National City agent] *generated the loan application he padded my income by about $800, and he knew this, while at the time he was forcing us to sign a loan under threat of foreclosure for an amount that was more than we had originally agreed to pay.*

See CP 199:11–200:11. (Emphasis Supplied)

Cozza also responded that PNC and successors had not shown they were entitled to a summary judgment as a matter of law. *see* CR 56 (c). In this regard she argued that PNC and its successors were not entitled to a judgment of foreclosure simply because PNC possessed the Note under the Note and incident deed of trust security agreement because both were dated February 12, 2008.

> The Cozzas' deed of trust was recorded with the Whatcom County Auditor in February 2008. The Deed of Trust Act, Ch. 61.24 RCW was *subsequently amended that same year and in 2009, 2011, 2012, 2013, 2014 and 2018. It is Cozza's position that as of 2008 the law in Washington required that a lender must both hold and own the Note in order to foreclose. See Bain v. Metro. Mortg. Grp. Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012); *Kennebec,*

> *Inc. v. Bank of the W.*, 88 Wn.2d 718, 565 P.2d 812 (1977). *Compare* to 2018 Amendments to the DTA, attached as Exhibit 2 to Stafne's declaration [CP 634-675]. . .
>
> Since these procedures for foreclosure [*i.e.*, so as to allow just noteholders to foreclose] changed after the Cozza loan was agreed to it is Cozza's position that Plaintiffs must comply with the foreclosure requirements as they existed in 2008. This is because States can substantially impair contractual rights and remedies only prospectively. *Ogden v. Saunders*, 25 U.S. 213, 12 Wheat. 213, 262, 6 L. Ed. 606 (1827). And equity does not permit a change in remedies that changes the expectations of the parties. *Willard v. Tayloe*, 75 U.S. 557 (1869). . . .

CP 686–687.

In reply to Cozza's opposition, PNC and its successors continued to assert that note holders, who did not own the incident security agreement, have always been allowed to foreclose in Washington state, citing *Deutsche Bank National Trust Company v. Slotke*, 192 Wn. App. 166, 173-74, 367 P .3d 600 (2016) and *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 222-23, 450 P.2d 166 (1969). Thus, the legal issues posed by the cross-motion for the superior court and this Court to resolve were simple ones: First, whether present statutory law or the statutory law in effect in 2008 applied to the 2008 agreements sought to be enforced. Second, if the 2008 laws applied, to determine whether PNC and its successors had complied with them.

Based on this evidence and these legal arguments—and without the benefit of any findings and conclusions by the superior court—this Court found and concluded:

> Before April 2013, PNC sold the Loan to Freddie Mac. In April 2013, Freddie Mac informed PNC that because PNC overstated Laura Cozza's income in violation of Freddie Mac's requirements, PNC needed to repurchase the Loan.

Un. Op. 2.

> PNC submitted evidence that it holds and owns the Note[1]. The declaration of PNC employee Sarah Greggerson says that PNC possessed the Note when it initiated the Complaint. During her deposition, Cozza stated that she recognized her signature on the Note. And at the first summary judgment hearing, PNC produced what it claimed was the original Note in its possession. National City Mortgage Co., a subsidiary of National City Bank, endorsed the note in blank and then National City Bank merged with PNC.
>
> Cozza submitted correspondence between Freddie Mac and PNC from 2013 in which Freddie Mac informed PNC that PNC must repurchase the Subject Loan because PNC inflated Cozza's income, which violated the sale guidelines. But this merely indicates that Freddie Mac owned the Note at some point. Nothing in this correspondence indicates that PNC did not buy back the loan.
>
> ***Cozza contends that PNC should have produced evidence that it bought back the Loan. But possession of the Note suffices for PNC to have standing.*** *See* Deutsche Bank, 192 Wn. App. at 173.
>
> Cozza also says that PNC cannot sue because it committed fraud by overstating Cozza's income and claiming ownership of the Loan when it was not the owner. ***We conclude that Cozza has not established a genuine issue of material fact about fraud, and thus fraud cannot constitute the basis for an argument that PNC lacks the authority to sue.***

[1] This statement, *i.e.,* that PNC submitted evidence that it holds *and owns* the Note is not accurate and Cozza respectfully requests that in this Court's reconsideration it acknowledge the inaccuracy of the statements or identify where in the record evidence of ownership of the Note exists.

> ***Cozza relies only on the correspondence between Freddie Mac and PNC in her attempt to establish a genuine issue of material fact as to the existence of fraud***[2]. . . .

Un. Op. 5.12

This Court's factual finding the loan was sold to *Freddie Mac* sometime prior to 2013 is flawed because that is not what the evidence demonstrated—and certainly not what PNC and its successors or Cozza argued. *See supra*. The evidence taken in the light most favorable to Cozza demonstrates her PNC loan was acquired by *Freddie Mac* in ***April, 2008***. Because it was not owned by any National City entity that merged with PNC in ***October, 2008*** or ***November, 2009*** when the mergers occurred, a question of fact exists with regard to whether the loan was actually acquired pursuant to those mergers as PNS asserts it was. This is materially significant because if the loan was not transferred in the manner PNC alleges, *i.e.,* through merger, there is a question of fact as to how the Note was obtained because under RCW 62.A.3-203(b) a note that has been obtained illegally or through fraud cannot be enforced by an entity which merely possesses the note. *See e.g., Rogan v. Vanderbilt Mortg. & Fin. (In re Dorsey),* No. 13-8036, 2014 Bankr. LEXIS 875 (B.A.P. 6th Cir. Mar. 7, 2014); *U.S. Bank Nat'l Ass'n v. George*, 2015-Ohio-4957, ¶¶ 7-14, 50 N.E.3d 1049, 1053-56 (Ct. App. 2015).

This Court avoids having to deal with Cozza's fraud allegations only by ignoring her testimony. This Court's statement in its Unpublished

[2] Cozza also asserts this factual finding is untrue. She testified that she was forced to take part in this fraud by being forced to sign a loan application prepared by an agent for PNC which padded her income by approximately $800.00 per month. *See* CP 199:11–200:11.

Opinion that the only evidence of fraud in the record is the 2013 communications between *Freddie Mac* and PNC is not accurate. As previously stated Cozza testified she was forced by National City upon threat of foreclosure to misrepresent her income to defraud Freddie Mac. *See* CP 199:11–200:11.

This Court cannot ignore this evidence for purposes of ruling on these CR 56 cross motions. *See Keck v. Collins,* 184 Wn.2d 358, 357 P.3d 1080 (2015). And it also cannot be ignored for purposes of evaluating the merits of this Court's Unpublished Opinion that PNC and its successors never advocated the position advanced by this Court on their behalf. PNC argues in its briefing in response to Cozza's argument the loan was sold in April, 2008 that it, PNC, bought the loan back. But it is not sufficient for PNC to make the arguments in its brief without evidence this Court can consider pursuant to CR 56. *See e.g., Green v. A.P.C.,* 136 Wn.2d 87, 99, 960 P.2d 912, 917-18 (1998)*; Hollins v. Zbaraschuk*, 200 Wn. App. 578, 594 (Wash. Ct. App. 2017). Indeed, PNC's ineffectual attempt to rebut Cozza's evidence that *Freddie Mac* bought the loan in April, 2008 by arguing it bought it back is an admission against interest that the 2008 sale occurred. *See Drumheller v. Nasburg*, 3 Wn. App. 519, 523-24, 475 P.2d 908 (1970). This Court should not ignore this evidence.

An additional reason this Court needs to reconsider its Unpublished Opinion is because it did not consider Cozzas' legal argument that the February, 2008 Note and deed of trust agreements needed to be enforced pursuant to Washington law at the time they were signed. This, of course,

was necessary to do in order to determine what the statutory requisites for standing were for the 2008 agreements.

Both of these agreements make clear they incorporate existing law into their terms. The Note agreement refers to *Applicable Law* in paragraphs 6(E), 7, and 10. CP 149–151. Paragraph 10 of the Note states the Note is a uniform instrument secured by a mortgage or deed of trust. CP 151. The Deed of Trust references the term *Applicable Law* over twenty times. *See e.g.,* CP 156, 158–64. The Deed of Trust defines *Applicable Law* to mean: "all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions." CP 153. The phrase *Applicable Law*, as it is defined in the deed of trust security instrument, does not require signers to obey future laws. It requires the parties comply with the law in effect when the agreements are executed. And in this regard, it is hardly a novel provision for a contract.

Indeed, "[o]ne of the basic principles of contract law is the general law in force at the time of the formation of the contract is a part thereof." *Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship*, 158 Wn. App. 203, 223-24, 242 P.3d 1, 12 (2010) quoting *Arnim v. Shoreline Sch. Dist. No. 412*, 23 Wn. App. 150, 153, 594 P.2d 1380 (1979). *See also Pierce Cty. v. State*, 159 Wn.2d 16, 27-39, 148 P.3d 1002, 1009-15 (2006); *Caritas Servs. v. Dep't of Soc. & Health Servs.*, 123 Wn.2d 391, 404-05, 869 P.2d 28, 36 (1994); *cf. Margola Assocs. v. Seattle*, 121 Wn.2d 625, 653-54, 854 P.2d 23, 38-39 (1993) overruled on other grounds *Chong Yim v. City of Seattle*, 194 Wn.2d 682, 451

P.3d 694 (2019). And it has long been "universal law that the statutes and laws governing citizens in a state are presumed to be incorporated in contracts made by such citizens, because the presumption is that the contracting parties know the law." *Leiendecker v. Aetna Indem. Co.*, 52 Wash. 609, 611, 101 P. 219 (1909); *accord Fischler v. Nicklin*, 51 Wn.2d 518, 522, 319 P.2d 1098 (1958) ("[E]xisting law is a part of every contract, and must be read into it."). This principle, *i.e.,* contracts incorporate existing law, applies both to "statutes *and the settled law of the land at the time the contract is made*." *In re Application of Kane*, 181 Wn. 407, 410, 43 P.2d 619 (1935). (Emphasis Supplied) *See also Coolidge v. Long*, 282 U.S. 582, 51 S. Ct. 306 (1931) (Federal impairment of contracts clause applied to a trust deed).

Laws apply only prospectively unless the political branches have made clear their intent is that a law should be applied retroactively *and even then, it is necessary that any retroactive application complies with constitutional restraints such as due process, equal protection, the impairment of contracts clause, and equity*. *See e.g., Opati v. Republic of Sudan*, 206 L.Ed.2d 904 (U.S. May 18, 2020) citing *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 114 S. Ct. 1483 (1994). *See also Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 507-8, 198 P.3d 1021 (2009).

As the court record reflects Washington's DTA was amended in 2018 to allow the *holder* of a promissory note to enforce a deed of trust by way of foreclosure. CP 460:9–14, 636:25–37; 638:4–9; 647:27–648:2. If, as PNC and its successors assert, the Deed of Trust Act already allowed holders to foreclose, even if the deed of trust security was split from the note, then this

Court must explain why the legislature amended the statute. *Cf. Cox v. Helenius,* 103 Wn.2d 383, 693 P.2d 683 (1985)("We are required, when possible, to give effect to every word, clause and sentence of a statute." *Id.* at 387–88.)

PNC and successors' position that standing law regarding foreclosures in Washington has not changed since 1969 (when and *John Davis & Co. v. Cedar Glen No. Four*, *Inc.*, *supra.* was decided) is not tenable. When the Deed of Trust statute was enacted in 1965 the statute did not include a definition for beneficiary; instead, relying upon the common law to determine who could foreclose. *Cf. Kennebec, Inc. v. Bank of the W.*, 88 Wn.2d 718, 724-26, 565 P.2d 812, (1977). The common law considered that "[t]he note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity." *Carpenter v. Longan*, 83 U.S. 271 (1873). The *Davis* case PNC relies upon for the proposition Washington has always allowed persons holding the note to foreclose regardless of whether the security is no longer incident, refutes this claim by making clear that the party foreclosing was both the owner and holder of both the notes and mortgages. *See* Davis, 75 Wn.2d at 219, 222-23.

The common law enacted into the statute in 1965 allowed the owner of a note secured by a deed of trust to foreclose the real estate security only if the deed of trust had not been split from the Note. *See e.g.*, *Restatement (Third) of Property: Mortgages* § 5.4 (1997). And *Bain v. Metro. Mortg. Grp., Inc., supra,* clearly holds in 2012—three years before *Brown v. Dep't of*

Commerce, 184 Wn.2d 509, 359 P.3d 771 (2015) was decided–that this was still the law in Washington at that time. *Bain*, 175 Wn. 2d at 112-13. *Cf.* 175 Wn. at 96-97; 105-06. *Brown v. Dep't of Commerce* made clear the Court intended to ***follow***, not overrule, *Bain*. *See Bown, supra*. 184 Wn. App. at 539-40. But even if the Supreme Court intended to overrule *Bain*, such ruling would not have had a retroactive application. *See supra*.

Cozza respectfully asks this Court reconsider its unpublished decision relating to standing because of its factual errors and its failure to address her arguments.

D. This Court should reconsider its recusal decision based on the United States Supreme Court's Due Process precedents applicable to judicial neutrality

The institutional and political legitimacy of courts in our system of government is specifically premised on the integrity of judges as neutral arbiters of disputes between adverse parties. Because "judges are as honest as other men, and not more so[3]" our Founders made clear the People's expectation that the authority of the judicial branch of government depends not on the FORCE or WILL of judges, but on the appropriateness of their *judgments*. *See* Alexander Hamilton, Federalist Paper No. 78 (1788)[4]. And it was expected that those judgments would be available to the public for evaluation and rejection, if necessary; as has occurred throughout this nation's history. The most notable example of a rejection being the Civil

[3] Letter from Thomas Jefferson to William Charles Jarvis, 28 September 1820, accessible at https://founders.archives.gov/documents/Jefferson/98-01-02-1540.

[4] Last accessed on March 31, 2021 at: https://guides.loc.gov/federalist-papers/text-71-80#s-lg-box-wrapper-25493470

War, when over 600,000 people died as part of this nation's effort to reverse the Supreme Court's judgment in *Scott v. Sandford*, 60 U.S. (19 How.) 393, 15 L. Ed. 691 (1857) and as a result of that effort ultimately succeeded in obtaining several amendments to the United States Constitution. *See e.g., Hi-Voltage Wire Works, Inc. v. City of San Jose*, 101 Cal. Rptr. 2d 653, 658-60, 12 P.3d 1068, 1072-74 (2000); *Cf. Fletcher v. Haas*, 851 F. Supp. 2d 287, 294 (D. Mass. 2012).

The ideas which ultimately culminated in the Separation of Powers structure of our national government began with recognition of the fact that judicial power must be exercised separately (and differently) from other types of governmental power. In England one of the powers and responsibilities of monarchs was to act as the fount of justice; *i.e.,* the source from which justice emanates. Relatively early on both judges (acting on behalf of the Crown) and litigants came to appreciate that in order for the sovereign to afford justice to the People being governed with regard to the resolving disputes between them judges had to be neutral as between the parties. *See e.g.*, *Thomas Bonham v. College of Physicians*, 77 Eng. Rep. 638 (1610), 8 Co. Rep. 107a, 118a, 77 Eng. Rep. 638, 652 (CP 1610)(holding judicial officers cannot adjudicate a case in which they have an interest.) And it was this expectation of fairness in the exercise of judicial power to provide justice for individuals that made courts and judges different from other government departments and branches; because the governed were not encouraged to expect the sovereign—or other government officials representing the sovereign—would be fair in other contexts.

But having just one branch of government that was expected to be fair to the People dramatically changed the course of human history. By the time Baron de Montesquieu wrote *The Spirit of Laws in 1750* (which inspired our Framers adoption of the Separation of Powers as part of the structure of our government) English courts had established as a principle of justice that judges exercising judicial power in individual cases must be neutral as between the parties to justiciable disputes. Ultimately, this led to an insistence that judges be independent as well. *See e.g., Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59-60 (1982); *United States v. Will*, 449 U.S. 200, 219 (1980). *See also* Smith, Joseph, *An Independent Judiciary: The Colonial Background*, 124 University of Pennsylvania Law Review 1104, (1976).

The expectation of judicial neutrality was so well established by the time our Constitution was written that even in colonial America—where the King required judges be appointed by him—James Madison observed in Federalist Paper No. 10, which was published on November 22, 1787 that: "No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. . ." *See also* Alexander Hamilton, Federalist Paper No. 80 (stating the same principle).

Over time the Supreme Court of the United States came to recognize judicial neutrality by judges as a fundamental requisite for that due process imposed on the states by the Fourteenth Amendment. *See e.g., Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016) ("No man can be a judge in his own

case" is a maxim of due process); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (same); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (same); *In re Murchison*, 349 U.S. 133, 136 (1955) (same).

Courts are required to be, and essentially are a passive branch of government, in which neutral decision-makers adjudicate outcomes between adverse parties based on the parties arguments and those of their counsel. *See e.g., United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020); *Greenlaw v. United States*, 554 U.S. 237 (2008). In *United States v. Sineneng-Smith* a panel of the Ninth Circuit decided to consider issues on appeal that were not raised by the parties and their counsel. The Court appointed amici to brief the issues the judges wanted to resolve, *see Sineneng-Smith*, *supra*. at 140 S. Ct. at 1578, and then decided the case in accord with the arguments presented by the non-party amici. The Supreme Court reversed, ruling:

> In our adversarial system of adjudication, we follow the principle of party presentation. As this Court stated in *Greenlaw v. United States*, 554 U. S. 237. . . . (2008), "***in both civil and criminal cases, in the first instance and on appeal . . ., we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.***" *Id.* at 243, . . . ***But as a general rule, our system "is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.***" *Castro v. U.S.,* 540 U.S. 375, 386, 124 S. Ct. 786, 157 L. Ed. 2d 778 (Scalia, J., concurring in part and concurring in judgment).
>
> In short: "***[C]ourts are essentially passive instruments of government.***" *United States v. Samuels*, 808 F. 2d 1298, 1301 (CA8 1987) (Arnold, J., concurring in denial of reh'g en banc)).

> ***They "do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties.***" *Ibid.*

United States v. Sineneng-Smith, 140 S. Ct. 1579 (Emphasis Supplied.)

In this case it appears this Court factually manufactured the premises it used to claim there were no factual issues precluding summary judgment; *i.e.,* finding that the sale of Cozza's loan could have occurred after National City's merger with PNC in October, 2008 so as to avoid having to consider how PNC acquired the loan if National City did not have it. And by ignoring Cozza's testimony that an agent of National City padded her income by $800.00 per month in order to sell the loan to Freddie Mac for a greater amount than the Cozzas agreed to borrow. Why, Cozza asks, if this Court is acting as a neutral arbiter, has it usurped the role traditionally performed by a fact finder after a trial?

Cozza also requests this Court address her standing argument that PNC and successors did not have standing under the 2008 agreements to foreclose on her real property for the reasons previously stated.

E. Judges' pecuniary interests in mortgage-backed securities

Cozza's attorney submitted a declaration in support of Cozza's opposition to PNC and successors' opening Cross-Motion for Summary Judgment, which attached as evidence a copy of the Washington State Investment Board Thirty Seventh Annual Report 2018, which demonstrated "a substantial amount (in excess of [one] 1 billion dollars) of judge′s and other public employees' retirement funds are invested in

mortgage-backed securities, which are made up of loans like the one involved in this lawsuit." CP 458:2–450:9. The declaration further asserted that Cozza and her attorney believed these substantial retirement investments for judges in mortgage-backed securities posed "a conflict of interest situation for judges." CP 458:9–22. And that this violated the objective Due Process precedents of the Supreme Court which were applicable to state court judges. CP 459:23–460:24.

The superior court avoided considering this matter by refusing to make findings of fact or conclusions at law. This Court refused to apply the objective Due Process precedents established by the Supreme Court to Cozza's arguments, preferring instead to follow its own unpublished precedent in *JPMorgan Chase Bank, NA v. Stehrenberger,* No. 70295-5-I, 2014 Wn. App. LEXIS 1057 (Ct. App. Apr. 28, 2014), that holds judges can decide their pecuniary investments are "di minimis" to get around the issue of having to address their neutrality.

Cozza objects to this Court's resolution of her bias challenge because she is entitled to an adjudication of her case by an unbiased judge within the meaning of the Fourteenth Amendment, which means judges who (1) are neutral and (2) appear to be neutral. In *Williams v. Pennsylvania* the United States Supreme Court observed:

> A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring

> the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself. When the objective risk of actual bias on the part of a judge rises to an unconstitutional level, the failure to recuse cannot be deemed harmless.

Id. at 136 S. Ct. 1909–10.

If the standard requires an appearance of neutrality, the claim by this Court that the billions of dollars being invested by their retirement accounts into mortgage-backed securities are de minimis and cannot be questioned by litigants is disturbing because (1) that is a lot of money for most people; and (2) it presumes how this appears to them is of no consequence. With all due respect, this suggests this Court does not appreciate the necessity for the appearance of judicial neutrality to the ultimate establishment of justice for the People of Washington, which Cozza asserts is a Due Process right.

As the United States Supreme Court has noted: "[t]here was at the common law the greatest sensitiveness over the existence of any pecuniary interest however small or infinitesimal in the justice of the peace." *Tumey v. Ohio*, 273 U.S. 510, 525 (1927). And these concerns have been longstanding. *See Between the Parishes of Great Charte v. Kennington*, (1726) 93 Eng. Rep. 1107 (K.B.) (disqualifying judges from deciding a case involving the removal of a pauper that the judges' home county was otherwise obligated to financially support); *The Case of Foxham in Com. Wilts*, (1706) 91 Eng. Rep. 514 (K.B.) (disqualifying judge who held another public office that was the subject of the case); *Anonymous*, (1698) 91 Eng. Rep. 343 (K.B.) (laying "by the heels" the Mayor of Hereford for presiding

over an ejectment action involving one of his own tenants); *Dr. Bonham's Case*, *supra.* (disqualifying physician review board from assessing fines against unlicensed practitioners because the fines were received by the members of the board).

It makes no sense for this Court to abandon the progress humankind has made over centuries in providing justice to the governed by refusing to address how these facts appear to the People. Especially is this so in a case like this one, where judges retirements will be benefited by allowing foreclosures like this one—involving fraud on homeowners and the government—to continue without an adequate consideration of facts, law, and equities of each case.

The People of Washington are not stupid. We see that judges' retirement investments presume that mortgage-backed securities are as valuable as treasury bills[5]. We know there would not be anything close to an equivalent value between the two but for the fact that Washington judges are exceedingly willing to allow foreclosures to occur in cases like this. We also know that State Street Bank has been the Fund's master custodian and securities advisor since 1997. In 2010 while State Street was advising the Washington Investment Board with regard to investing government retirement accounts in mortgage-backed securities the United States

[5] The page of each report demonstrating that mortgage-backed securities are treated as comparable investments to U.S. Treasuries is referenced by the page number following each link:
2020 Report: https://www.sib.wa.gov/financial/pdfs/annual/ar20.pdf, at 48.
2019 Report: https://www.sib.wa.gov/financial/pdfs/annual/ar19.pdf, at 47.
2018 Report: https://www.sib.wa.gov/financial/pdfs/annual/ar18.pdf, at 48.

Securities and Exchange Commission issued an "Order Instituting Cease-And-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Making Findings, and Imposing a Cease-And-Desist Order," which is accessible at: https://www.sec.gov/litigation/admin/2010/33-9107.pdf. Cozza requests this Court judicially notice the aforementioned facts.

By deciding this judicial neutrality issue based only this Panel's judges' own subjective beliefs this Court has circumvented the real issue before it, which it should appropriately adjudicate pursuant to this motion for reconsideration. And because judicial neutrality is a fundamental component of justiciability which goes to the subject-matter jurisdiction of both trial and appellate courts, this is an issue that this Court should address head-on by applying the correct legal standard. *See* CR 12(h)(3). *See also* RCW 2.28.030(1).

V. CONCLUSION

This Court should grant Cozza's Motion for Reconsideration.

Dated this 2nd day of April 2021.

Respectfully submitted by: */s/ Scott E. Stafne*

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CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION

Article I, Section 10, Clause 1:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

WASHINGTON CONSTITUTION

Article I, SECTION 23 BILL OF ATTAINDER, EX POST FACTO LAW, ETC.

No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.

WASHINGTON STATUTES

62A.3-203 as enacted in 1993 and as exists today:

Transfer of instrument; rights acquired by transfer.

(a) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

(b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a

transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

(c) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.

(d) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this Article and has only the rights of a partial assignee.

RCW 61.24.030 (7) following 2018 amendments:

It shall be requisite to a trustee's sale:

* * *

(7)(a) That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the holder 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 holder of any 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 34 61.24.010(4), the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection.

(c) This subsection (7) does not apply to association beneficiaries subject to chapter 64.32, 64.34, or 64.38 RCW;

RCW 61.24.030 (7) following 2011 Amendments:

It shall be requisite to a trustee's sale:

* * *

(7)(a) That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof

that the beneficiary ***is the owner of any promissory note*** or other obligation secured by the deed of trust. A declaration by the beneficiary made under 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.
(c) This subsection (7) does not apply to association beneficiaries 18 subject to chapter 64.32, 64.34, or 64.38 RCW;

RCW 61.24.030(7) following 2009 Amendments:

It shall be requisite to a trustee's sale:

* * *

(7)(a) That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary ***is the owner of any promissory note*** or other obligation secured by the deed of trust. A declaration by the beneficiary made under 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.

(c) This subsection (7) does not apply to association beneficiaries subject to chapter 64.32, 64.34, or 64.38 RCW;

RCW 61.24.030 which became effective on June 12, 2008 contains no similar provision (7).

RCW 91.24.030 which became effective on June 11, 1998 contains no similar provision (7).

CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing Petition for Discretionary Review with the Clerk of the Court using the Appellant's Court Portal utilized by the Court of Appeals and Washington State Supreme Court, which will provide service of this document to those attorneys of record.

DATED this 21st day of May, 2021 at Arlington, Washington.

By: s/ Scott E. Stafne
Scott E. Stafne, WSBA No. 6964

STAFNE LAW ADVOCACY & CONSULTING

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