

COURT OF APPEALS I NO. 72825-3
SNOHOMISH COUNTY NO. 13-2-05366-5

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JASON BROCK, a single person,

Petitioner,

v.

WELLS FARGO BANK (“WFB”); as trustee; on behalf of the holders of
the HarborView Mortgage Loan Trust Mortgage Loan Pass-Through
Certificates, Series 2006-12; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC. (“MERS”); SELECT PORTFOLIO
SERVICING, INC. (“SPS”); LS TITLE OF WASHINGTON;
NORTHWEST TRUSTEE SERVICES, INC.; JOHN DOES NOS.

Respondents.

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APPELLANT JASON BROCK’S REPLY BRIEF

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ORIGINAL

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I. INTRODUCTION

The trial court committed error when it granted Respondents' Motion for Summary Judgment dismissing Mr. Brock's Consumer Protection Act ("CPA") claim against (1) Select Portfolio Servicing, Inc. ("Select"); (2) Wells Fargo Bank, N.A. in its capacity as trustee on behalf of the holders of the Harborview Mortgage Loan Trust Pass-Through Certificates Series 2006-12 ("Wells Fargo"); (3) Mortgage Electronic Registration Systems Inc. ("MERS"); and (4) Northwest Trustee Services, Inc. ("NWTS") (collectively the Respondents). A motion for summary judgment should only be granted when there is no genuine issue of material fact and after viewing all evidence in the light most favorable to the nonmoving party. The record fails to establish evidence that Respondents met their burden in moving for summary judgment and the Responsive documents of Respondents only demonstrate this point. *See generally* CP. 172-191; 228-246.

In response to Mr. Brock's Opening Brief, the Respondents attempt to recharacterize the issues of this appeal. Mr. Brock's claims arise from the unlawful nonjudicial foreclosure initiated against him by the Respondents who committed CPA violations. Respondents unsuccessfully attempt to turn these issues on their head by arguing that they are entitled to enforce the note under Title 62A RCW when it is clear the note was not

negotiable and possession alone was not sufficient to be a holder because Ch. 62A.3 RCW, by its very terms, did not apply. Select and Wells Fargo did not meet their burden at summary judgment because they failed to provide admissible evidence that they were the holder of an instrument or document at the time they initiated nonjudicial foreclosure proceedings. CP 228-237; CP 192-227. Additionally, the other Respondents MERS and NWTS also did not meet their burden below. CP 185-191; CP 172-184.

II. REPLY ARGUMENT

First, NWTS should be prohibited from oral argument under RAP 11.2. Second, the trial court erred in relying upon inadmissible evidence. Third, it is not possible for Respondents to be “a holder” of Mr. Brocks’ negatively amortizing and non-negotiable note under RCW 62A.3. Fourth, the evidence showed Respondents were not the beneficiary at the time the foreclosure was initiated. Fifth, the appointment of successor trustee was invalid. Sixth, it was error for the Trial Court to dismiss Brock’s CPA claims against all respondents at summary judgment. Finally, Mr. Brock established the injury element of his CPA claim at summary judgment.

A. NWTS Should Be Prohibited From Oral Argument Under RAP 11.2 and No Respondent Should Be Allowed to Argue NWTS Complied With its Duty of Good Faith Under RCW 61.24.010(4)

NWTS has submitted a joinder to Select and Wells Fargo’s Answering Brief, in lieu of submitting their own briefing. *See* Respondent

Northwest Trustee Services, Inc.’s Joinder in Co-Respondent’s Answering Brief (“NWTS Joinder”). Accordingly, multiple issues that Brock appealed against NWTS have not been addressed by any respondent. Brock specifically appealed whether NWTS complied with its duty of good faith and no respondent addressed that issue. *See* Appellant Jason Brock’s Opening Brief (“OB”) at 2, 35-36. Brock argued this duty of good faith was a violation of RCW 61.24.010(4), another issue the Respondents leave unaddressed. *Id.*

Additionally, Select and Wells Fargo argue that Select had power to execute the beneficiary declaration, but NWTS did not address its distinct and separate duties under RCW 61.24.010(4) to do a cursory investigation into the purported beneficiaries right to foreclose or whether they could rely on the beneficiary declaration at subject.¹ Accordingly, NWTS has not attempted to defend against these points and the Court need look no further than Brock’s opening brief. *See* NWTS Joinder; OB

¹ The nonjudicial foreclosure system depends on good faith and self-regulation by the parties because of the lack of judicial oversight. *Frizzell v. Murray*, 179 Wn.2d 301, 318, 313 P.3d 1171, 1179 (2013) (González, J. Concurring) *citing Cox v. Helenius*, 103 Wn.2d 383, 388-389, 693 P.2d 683 (1985) (“Because the deed of trust foreclosure process is conducted without review or confirmation by a court, the fiduciary duty imposed upon the trustee is exceedingly high.”); *Albice v. Premier Mortgage Servs. of Washington, Inc.*, 174 Wn.2d 560, 572, 276 P.3d 1277 (2012) (“When trustees [are made to] strictly comply with their legal obligations under the act, interested parties will have no claim for postsale relief, thereby promoting stable land titles overall.”); *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 790, 295 P.3d 1179 (2013). Additionally, “[f]or this system to remain efficient and stable as a whole, courts must preserve the integrity of the DTA.” *Frizzell*, 179 Wn.2d at 318.

at 37-38.

Because NWTS did not file an independent brief, but instead they filed a joinder in the other Respondents' briefing, NWTS should be barred from participating in oral argument under RAP 11.2(a). RAP 11.2(a) ("A party of record may present oral argument only if the party has filed a brief.)(emphasis added); *see also Adams v. Department of Labor and Industries*, 128 Wn.2d 224, 228, 905 P.2d 1220 (1995). Additionally, no Respondent should be allowed to provide oral argument regarding whether NWTS violated its duty of good faith or failed to do a cursory investigation into Select and Wells Fargo's authority to initiate a nonjudicial foreclosure because no Respondent addressed these issues in their answering brief. *See id* at 228 (citing *Bolt v. Hum*, 40 Wn. App. 54, 60, 696 P.2d 1261) review denied, 104 Wn.2d 1012 (Div. I 1985) ("same treatment to issues to which the respondent has not replied, even though the respondent has filed a brief").

"In addition to this penalty in cases where the respondent has failed to file a brief, the Court of Appeals has also limited review to whether the appellant's brief makes a *prima facie* showing of reversible error." *Adams*, 128 Wn.2d at 228 (citing *Hobart Corp. v. North Cent. Credit Servs., Inc.*, 29 Wn. App. 302, 303, 628 P.2d 842 (Div. III 1981); *State v. Wilburn*, 51 Wn. App. 827, 829-30, 755 P.2d 842 (Div. II 1988)).

For these issues, which no Respondent has addressed, the Court need only to look to Brock's opening brief to make a determination on whether the trial court erred in dismissing Brock's CPA claims against NWTs. *See id.*

B. The Trial Court Erred in Relying Upon Inadmissible Evidence

The testimony of the Respondent's attorney was inadmissible.

Additionally, the testimony of Ms. Johnstone is inadmissible.

i. The Testimony of the Respondent's attorney was inadmissible

Respondents argue that the testimony of their counsel was a moot point because, "[n]o witness was required to authenticate the note or deed of trust." Wells Fargo, Select, and MERS Brief ("RB") at 6. However, Respondents' counsel testified to facts beyond simply providing a note. Wells Fargo's counsel also made representations that the document, aside from being the original note, was also in Wells Fargo's possession as of the date of appointment of successor trustee. RP 31:19-32. However, there was no factual evidence of this in the record. These statements by counsel were inadmissible. Wells Fargo's counsel has no personal knowledge of what occurred prior to litigation in 2012. They were made improperly in violation of RPC 3.7(a)² and relied upon by the trial court in error.

Additionally, the the copy of the note testified to by Select and

² When a lawyer acts as an advocate and a witness is is difficult to discern argument from testimony.

Wells Fargo's counsel was different and contradictory to the copy of the note provided in the filing with the Declaration of Ms. Johnstone.³ CP 200-207; Supp, CP 1, 5, 8. The trial court was required to view this evidence in a light most favorable to Brock and a genuine issue of material fact existed just by Respondent's attorney bringing a different copy of the note to the summary judgment than what was included in Ms. Johnstone's declaration.⁴ The trial court erred with it resolved this issue of fact by determining the Note offered by Respondents counsel was the original. CP 78-80. The trial judge was improperly judging the credibility of the different copies of the note based solely on the testimony of Well Fargo's counsel. *Id.*; *Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d 138 (1997)(When there is contradictory evidence, or the moving party's evidence is impeached, an issue of credibility is presented.) The trial court should not resolve issues of credibility on summary judgment, but should reserve the issue of credibility for trial. *Id.*; *see also Dunlap v. Wayne*, 105 Wn.2d 529, 536-7, 716 P.2d 842 (1986); *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P. 2d 966 (1963).

The multiple copies of the note go to the heart of the dispute,

³ Testified the copy of the note was true and correct. CP 193 at ¶4

⁴ The copy of the note in the record, attached to the declaration of Ms. Johnstone had different indorsements and did not have the "PREPARED BY RICHMOND MONROE GROUP" label in the bottom left corner of the allonge and the top left corner of the first page of the note. Compare CP 200,204, 207 with Supp, CP 1, 5, 8.

which is why Washington's RPCs prohibit a lawyer from acting as a witness in the same case in which they are an advocate. RPC 3.7(a). RP: 5-2-3, 6:2. Wells Fargo's counsel also made representations that the document, aside from being the original note, was also in Wells Fargo's possession as of the date of appointment of successor trustee. RP 31:19-32.

ii. The Testimony of Ms. Johnstone is Inadmissible

Respondents argue that Ms. Johnstone's testimony is admissible because Select may rely upon the records of a prior loan servicer. RB at 17-20. In support of their argument, Respondents cite to a Florida bankruptcy case, which they use for the proposition that prior servicers' records are admissible by the current servicer, even if the witness lacks personal knowledge. RB at 17-18; *In re Sagamore Partners, Ltd.* No. 11-37867-BKC-AJC, 2012 WL 3564014, at * 5 (Bankr. S.D. Fla. Aug. 17, 2012). While Washington has no such precedent and has distinctly different rules of Evidence than the federal rules of evidence,⁵ Ms. Johnstone's declaration would still not meet the low admissibility standard allowed in the *In Re Sagamore* case.

The reasoning of the Floridian court was that the prior servicer's records were admissible because they had been integrated into the records

⁵ Compare FRE 803(6) with RCW 5.45.020.

of the current servicer. *Id.* at *5. However, errors in previous servicer records would prohibit their admissibility. *Id.* Here, Respondents are not claiming Wells Fargo is a prior loan servicer. *See* CP 192. Instead, Respondents claim Select is an agent of Wells Fargo. *Id.* However, the first and second paragraphs of the power of attorney supplied by Ms. Johnstone claim the extent of the relationship is based on other documents not submitted as evidence.⁶ CP 197. Ms. Johnstone provided no testimony that Wells Fargo's records were integrated into Selects' records. CP 192-227. Importantly, Ms. Johnstone's declaration seeks to admit a note that is different than the note that the Respondent's attorney claimed was the original, showing contradictory records, a clear error in her reliance on Wells Fargo's records. *Compare* CP 200-207 *with* Supp. CP 1-8; CP 193 at ¶¶ 3-6, 8.

The court should not modify Washington state's evidentiary rules to allow inadmissible evidence. Washington's Rules of Evidence specifically require that business records must be produced by a custodian and identified by one who has supervised the record's creation. *See State v. Smith*, 16 Wn. App. 425, 433, 558 P.2d 265 (Div. II 1979) review denied, 88 Wn.2d 1011 (1977). Foundational requirements still apply to business records. *See* RCW 5.45.020 (Business record statute is to be

⁶ Failure to provide the "agreements" in the moving papers deprives Mr. Brock of his right to due process.

strictly construed.); *see also State v. Finkley*, 6 Wn. App. 278, 280, 492 P.2d 222 (Div. I 1972), review denied, 80 Wn.2d 1007 (1972). Ch. 5.45 RCW does not create an exception for the foundational requirements of identification and authentication. *State v. Devries*, 149 Wn.2d 842, 847, 72 P.3d 748 (2003).

Importantly, Mr. Brock is not arguing that a servicer can never rely on a predecessor's business records, but in this case, Select and Wells Fargo attempted to introduce summaries of prior loan servicers without meeting the requirements for authentication and admissibility under the Washington Rules of Evidence.

Additionally, Respondents fail to address the main argument with the proffered testimony of Ms. Johnstone, her attempt to summarize business records not submitted. CP 193 at ¶¶ 4, 6; CP 194 at ¶¶ 7, 8; *See* RCW 5.45.020, *see also Pollock v. Pollock*, 7 Wn. App. 394, 405, 499 P.2d 213 (Div. I, 1972); *Podbielniak v. LPP Mortg. Ltd.*, __ Wash __, 362 P.3d 1287, 1290 (Div. 1 2015) (“The business records exception does not permit affidavits testifying to the contents of documents that are not in record.” (citing *Melville v. State*, 115 Wn.2d 34, 36, 793 P.2d 952 (1990))).

Ultimately, the purpose of evidence is “that the truth may be ascertained and proceedings justly determined.” ER 102. To that end, all evidence should be original, authenticated, and relevant. ER 1002; *Fiore*

v. PPG Industries, Inc., 169 Wn. App. 325, n. 4, 279 P.3d 972 (Div. I 2012); *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 748-49, 87 P.3d 774 (Div. I 2004); ER 402. Summaries of business records which are not provided, are inadmissible hearsay and should not have been considered by the court on summary judgment.

C. It is not possible for Respondents to be “a holder” of Mr. Brock’s negatively amortizing and non-negotiable note under RCW 62A.3

Brock’s negatively amortizing note is not a negotiable instrument subject to RCW 62A.3-104(a) because it has a principal balance that includes unpredictable fluctuations, including principal increases for amounts greater than what is listed on its face. CP 200-204. Thus, Respondents’ argument that Brock’s note is negotiable because “commercial certainty” is determined from the face of the instrument is not only unpersuasive, but lacks a foundation in reality. RB at 20-25. There is no way to look at the face of Brock’s note and determine the amount of principle at any given time because the note amount continually adjusts in a non-traditional manner. CP 202 at ¶3(F). Accordingly, this is not an instrument for a fixed amount of money under the definition of negotiable instrument and Ch. 62A.3 RCW does not apply.⁷ RCW 62A.3-

⁷ See *Anderson v. Hoard*, 63 Wn.2d 290, 292-293, 387 P.2d 73 (1963) (emphasis added) (citing *Farquhar v. Fidelity Ins., Trust & Safe Deposit Co.*, 13 Phila. 473, 474, 8 Fed. Cas. 1068 (C.C.E.D. Pa, 1878)); *Vancouver Nat. Bank v. Starr*, 123 Wash. 58, 62, 211

104(a)(A negotiable instrument is, *inter alia*, an unconditional promise or order to pay *a fixed amount of money*.) (emphasis added).

Respondents citation to RCW 62.3-106 cmt. 1, supports Brock's position that his note is not negotiable, "[t]he rationale is that the holder of a negotiable instrument should not be required to examine another document to determine rights with respect to payment." RB at 22.

Respondents go on to argue that because the note states that the interest rate will change and subsequent portions of interest will be recharacterized as principal, the note is negotiable, i.e. it represents a fixed amount of money. RB at 23. However, the note's explanation that the principle will change only highlights the undeniable fact that it is not negotiable, it does not magically change the inherent character of the note. Respondents argument is counter to the whole purpose of RCW 62A.3. J.P.T., Annotation, *Negotiability of note as affect by provision therein, or in mortgage securing the same for payment of taxes, assessments, or insurance*, 45 A.L.R. 1074 (1926) ("The reason for this rule is that negotiable paper is used as a substitute for money, and therefore it must indicate precisely how much money it represents").

Respondents' argument is contradicted by their other claims that

P. 746 (1923); *see also* J.P.T., Annotation, *Negotiability of note as affected by provision therein, or in mortgage securing the same for payment of taxes, assessments, or insurance*, 45 A.L.R. 1074 (1926)

payment is a defense to collection on the note because the note holder is entitled to the figure identified on the face of the note, and it would be the borrower's burden to show what payments were made. RB at 15-16. By the terms of Mr. Brock's Note, a purported "note-holder" would not seek to collect the figure identified on the face of the note, when that figure increased from inception.⁸ Importantly, Respondents are not claiming Brock only owes the number identified on the face of the note. *Compare* CP 194 at ¶7 with CP 200 at ¶1. Instead, they are claiming that Brock owes more than the figure identified on the face of the note.⁹ The reality of the situation is that no one, including Respondents, could determine what principle was owing on the face of the note at any given time without looking to external documents. *See* CP 200-04.

Even if the Court was persuaded by Respondent's argument that the UCC had relaxed the rules on an instrument retaining its negotiable character,¹⁰ even when interest and fee calculations were determined by a document outside of the four corners, this argument still fails because

⁸ RCW 19.144.050 prohibits financial institutions from making or facilitating a loan with negative amortization, such as Mr. Brock's note. The predatory nature of negative amortization notes were a harmful departure from the traditional mortgage that caused the legislature to outlaw their creation. *Id*; *see also* RCW 19.144.005. RCW 19.144.010(8) defines "negative amortization" as "an increase in the principal balance of a loan caused when the loan agreement allows the borrower to make payments less than the amount needed to pay all the interest that has accrued on the loan. The unpaid interest is added to the loan balance and becomes part of the principal."

⁹ Respondents' claim Brock owes \$868,133.53 in principal on August 22, 2014. CP 194 at ¶7. \$825,000.00 is the amount of principal identified on the face of the note. CP 200 at ¶1.

¹⁰ RB at 23.

Brock's principle was constantly increasing. CP 200, 202 at ¶3(F).

Additionally, Respondents own legal citation supports a finding that Mr. Brock's note was not for a fixed amount of money because the principle was increasing by varied amount. *See* RB 20-25.

Respondents also unpersuasively argue that the note was negotiable because Brock had the choice to pay an amount specific to ensure negative amortization did not occur and therefore the note was negotiable. RB at 25. However, this is exactly what makes the note non-negotiable. The ability of the borrower to make a payment for less than the interest amount resulting in an unpredictable amount being added to the principle due to the changing nature of the interest rate and payment, all without throwing a borrower into default. *See* CP 200-02; *see also supra* n. 8. The negotiability of a document is not judged by whether a changing principal amount may be avoided when the document is specifically set up to have a changing principal through negative amortization. RCW 62A.3-104. The creation of this specific note, providing for an adjustable rate and a negatively amortizing interest that gets added to the principle, is a construct specifically designed to be distinct from the traditional mortgage note amortized to pay off the principal and interest over a set amount of years. *See supra* n. 8.

Brock is not arguing that the current balance of the note must be

evidenced and fixed from the face of the document. Brock is arguing that the principal balance of the note must be fixed from the face of document. The evidence at summary judgment showed Select claimed Brock's principle was considerably higher and a different amount than the one listed on the face of the note. CP 194 at ¶7; CP 200 at ¶1.

By asking this Court to hold Mr. Brock's negatively amortizing note to be a negotiable instrument, Respondents are essentially asking this court to hold that all contracts representing a debt obligation are negotiable in order to avoid having to show by admissible evidence that they are holder and therefore the beneficiary before foreclosing on a Washington home. However, the jurisprudence of the court and Washington's enactment of the UCC, clearly demonstrate that not all notes are negotiable. *See Brown v. Washington State Department of Commerce*, 184 Wn.2d 509, 524, 359 P.3d 771 (2015) ("A promissory note evidencing a home loan is *often* a negotiable instrument, making article 3 of the UCC applicable. RCW 62A.3-102. The promissory note at issue in this case is a negotiable instrument governed by article 3 of the UCC.") *Id.* The Supreme Court in *Brown* was clear to distinguish that while promissory notes evidencing home loans are many time negotiable instruments subject to Ch. 62A.3, they are not always. *See id.* at 528 (If article 3 did not apply, "Article 9 governs the sale and ownership of

promissory notes.)

When the promissory note is not a negotiable instrument, such as Mr. Brock's note, any evidence attempting to establish holdership under Ch. 62A.3 RCW is a legal nullity and an illogical basis for a grant of summary judgment regarding beneficiary status under RCW 61.24.005(2). Accordingly, the Superior Court erred by ruling that Wells Fargo was the beneficiary of Mr. Brock's non-negotiable note at the time Respondents initiated the nonjudicial foreclosure in 2012 simply because their attorney claimed to possess the note years later at summary judgment, as such a finding is not supported by the law. *See* RCW 62A.3-102; *see also Brown*, 184 Wn.2d at 524.

D. The Evidence Showed Respondents Were Not the Beneficiary at the Time the Foreclosure was Initiated

The trial court erred in granting Respondents Motion for Summary Judgment when there was genuine issues of material fact regarding whether Wells Fargo was the beneficiary at the time it initiated the nonjudicial foreclosure against Mr. Brock.

Wells Fargo did not provide evidence it was the beneficiary at the time it purported to appoint NWTS as successor trustee on October 16, 2012. *See e.g. Bavand v. OneWest Bank, F.S.B.*, 176 Wn. App. 475, 486-87, 309 P.3d 636 (2013); *see also e.g. Rucker v. Novastar Mortg., Inc.*,

177 Wn. App. 1, 13-16, 311 P.3d 31 (Div I 2013). To nonjudicially foreclose, the foreclosing entity must be a beneficiary under RCW 61.24.005(2). *Bain v. Metro Morg. Grp., Inc.*, 175 Wn.2d 83, 110, 285 P.3d 34 (2012); *Bavand*, 176 Wn. App. at 484, 488; *Rucker*, 177 Wn. App. at 14. “‘Beneficiary’ means the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.” RCW 61.24.005(2).

Because the Deeds of Trust Act (“DTA”) does not define the term holder, courts look to the UCC for guidance. *Bain*, 175 Wn.2d at 104. In Washington, the term holder is defined under RCW 62A.1-201(21)(A) & Ch. 62A.3 RCW. However, 62A.1-201 and Ch. 62A.3 RCW apply only to instruments that are negotiable. 62A.1-201(21)(A) 62A.3-102 (“This article applies to negotiable instruments). *See also Brown*, 184 Wn.2d at 524 (whether a promissory note is subject to article of the UCC depends upon whether or not it is negotiable).

Respondents argue that they were the beneficiary because they claim Wells Fargo possessed the Note when the nonjudicial foreclosure was commenced. RB at 10-13. However, Respondents cannot point to any evidence in the record that supports this assertion. *See generally* RB. The evidence put forth by Respondents at summary judgment was only Ms.

Johnstone's Declaration dated August 22, 2014 which declared Wells Fargo "is in possession of, controls, and holds the original [Note]. CP 193 at ¶4. In addition to being an inadmissible summary of business records not offered into evidence, Wells Fargo proffered testimony that it was in possession of Brock's note on August 22, 2014 does not establish beneficiary status on October 16, 2012 and throughout the nonjudicial foreclosure process. *Id.*

Now in the context of this appeal, the Respondents attempt to confuse the issues by citing to two unrelated documents for additional support. RB at 10. The first is a power of attorney dated December 2, 2011 between Select and Wells Fargo. CP 172. Respondents cannot explain how a document attempting to evidence an agency relationship demonstrates possession of Mr. Brock's note on October 16, 2006 or compliance with RCW 61.24.005(2). *See* RB at 10. Production of a power of attorney is not evidence of whether Wells Fargo had any interest in the Note or deed of trust on October 16, 2006. *See* CP 197.

Additionally, parties cannot contract around the provisions of the DTA, including the statutory requirements of a beneficiary. *Bain*, 175 Wn.2d at 105. The beneficiary must be "the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation."

RCW 61.24.005(2).

Secondly, Respondents Select and Wells Fargo point to the beneficiary declaration executed by Select and used by NWTs as proof under RCW 61.24.030(7)(a) to conduct the nonjudicial foreclosure. RB at 10. This attempt to re-purpose the declaration as evidence that Wells Fargo was the beneficiary on October 16, 2012 is unavailing. *Id.* Respondents confuse their burden of having to establish the chain of title of the non-negotiable instrument in order to prove they were a valid beneficiary, who could utilize the nonjudicial foreclosure process set up by the DTA, with the burden of the NWTs, the trustee, who was required to have proof under RCW 61.24.030 before conducting a nonjudicial foreclosure. Compare *Bain*, 175 Wn.2d at 111 (Beneficiary has burden of showing chain of title) with RCW 61.24.030(7)(a) (Trustee must have proof beneficiary is the owner or unequivocal declaration that beneficiary is the actual holder).

Even if Wells Fargo had evidence it possessed the note on October 16, 2012, a showing of possession, alone, would not be sufficient to show they were the holder and beneficiary because Mr. Brock's note is not a negotiable instrument subject to Ch. 62A.3. See RCW 62A.3-104(a); See also RCW 61.24.005(2). Instead, Wells Fargo would have to establish chain of title, through a series of assignment or purchase contracts, in

order to show it was the beneficiary under RCW 61.24.005(2). The Supreme Court has repeatedly confirmed this point in both *Lyons* and *Bain*. *Lyons v. U.S. Bank Nat. Ass'n.*, 181 Wn.2d 775, 789, 336 P.3d 1142 (2014)(quoting *Bain*, 175 Wn.2d at 102 (“If the original lender had sold the loan, [it] would need to establish ownership of that loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions.”))

The failure of Respondents to meet their burden at summary judgment and the genuine issue of material fact regarding whether or not Wells Fargo was the beneficiary on October 16, 2012 warrants a remand.

E. SPS’ Appointment of NWTS as Successor Trustee Was Defective Because Only a Proper Beneficiary, Not an Agent, Can Appoint a Successor Trustee

Respondents argue there was nothing legally defective with the Appointment of Successor Trustee at issue because SPS, as agent for Wells Fargo, was authorized to appoint NWTS. RB at 28-29. For support, Respondents cite to the federal bankruptcy case, *In re Butler*, as rejecting Mr. Brock’s argument that agents are not authorized under the DTA to Appoint Successor Trustees. RB at 29 (citing *In re Butler*, 512 B.R. 643,653-54 (Bankr. W.D. Wash 2014)). However, *In re Butler* is inapplicable because the bank, who executed the Appointment of Successor Trustee, was found to be the beneficiary. *Id.* at 652. Here,

Respondents agree that the entity who executed the Appointment of NWTS, was not the beneficiary. *See* RB at 12 (Select was the servicer).

The legislature chose to allow certain actions required by the DTA to be completed by an agent, while other actions must be completed by the beneficiary. This was likely done in order to further the three policies behind the DTA.¹¹ Specifically, requiring the actual beneficiary to appoint the successor trustee eliminates errors and insures the trustee and the borrower know the actual identity of the beneficiary. Eliminating errors and allowing the borrower and the trustee to know the actual identity of the beneficiary will allow the interested parties to have an adequate opportunity to prevent wrongful foreclosure.

In addition to the issue of whether an agent is permitted to execute such a document, the larger issue is that genuine issues of material fact exist regarding whether Wells Fargo was even a beneficiary when the Appointment was executed, as discussed *supra*.

F. It was error for the Trial Court to dismiss Mr. Brock's CPA claims against all respondents at summary judgment.

At summary judgment Mr. Brock presented evidence that Respondents had engaged in unfair or deceptive conduct. Additionally,

¹¹ The DTA "furthers three goals: (1) that the nonjudicial foreclosure process should be efficient and inexpensive, (2) that the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure, and (3) that the process should promote stability of land titles." *Albice*, 174 Wn.2d at 56 *citing Cox*, 103 Wn.2d at 387.

Mr. Brock presented evidence Respondents' conduct caused him injury.

i. Unfair or deceptive conduct

Respondents argue Mr. Brock cannot show an unfair or deceptive act on behalf of Respondents, because Wells fargo is the noteholder and beneficiary of the deed of trust. RB at 30. However, under the law, Wells Fargo cannot be a noteholder of Mr. Brock's note, as discussed at length *supra*. Wells Fargo's continued misrepresentation of its status as a note holder, is an unfair or deceptive act, in and of itself. *Bain*, 175 Wn.2d at 117 (court found that it was deceptive to claim to be a beneficiary when an entity was not.) Additionally, Respondents do not even attempt to address that NTWS committed an unfair or deceptive act by violating its duty of good faith under RCW 61.24.010(4) by failing to conduct a cursory investigation of Wells Fargo's right to foreclose.¹² *Lyons*, 181 Wn.2d at 787. Finally, it was error for the court to grant summary judgment on Mr. Brock's CPA claim when there was a genuine issue of material fact regarding whether the Appointment of Successor Trustee by Select and the Assignment by MERS was deceptive.

ii. Mr. Brock established the injury element of his CPA claim at summary judgment.

Respondents argue Mr. Brock has no damages under the CPA

¹² A cursory investigation would have revealed the Brock-Countrywide note is not negotiable.

because “his non-payment of his debt expressly authorizes the note holder to enforce the deed of Trust” RB at 29. Respondents misunderstand the injury element of the CPA. The Washington Supreme Court in *Nordstrom, Inc. v. Tampourlos* distinguished between injury and damages under the CPA: “This distinction makes it clear that no monetary damages are need be proven, and that nonquantitative injuries, such as loss of goodwill would suffice for this element of the Hangman Ridge Test.” 107 Wn.2d 735, 740, 733 P.2d 208 (1987). “A plaintiff can establish injury based on unlawful debt collection practices [under the CPA] even when there is no dispute to the validity of the underlying debt.” *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 431, 334 P.3d 529 (2014) citing *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 55-56, 204 P.3d 885 (2009).

Injury also includes the costs of investigation and the time needed to conduct the investigation in response to a misleading communication. *Panag*, 166 Wn.2d at 40, 57–65; *see also Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 159 P.3d 10 (Div. I 2007), affirmed on different issues in *Panag*, 166 Wn.2d 27. “[D]istracted and loss of time to pursue business and personal activities due to the necessity of addressing the wrongful conduct through this and other actions” are also sufficient injuries. *Walker*

v. Quality Loan Service Corp., 176 Wn. App. 294, 320, 308 P.3d 716, 727 (Div. I 2013).

Respondents also argue Mr. Brock is not entitled to damages for attorney fees accrued in litigation, but Mr. Brock does not contest this. RB at 31. Mr. Brock has pre-litigation injuries that Respondents ignore. CP 105 at ¶3; CP 257 at ¶18. Mr. Brock spent money and time investigating the Respondents' actions before filing a lawsuit and faced damage to his credit due to their unfair or deceptive actions. CP 105 at ¶3; CP 257 at ¶18. *See Id.* Finally, to succeed on his CPA claim, Mr. Brock does not need to show that Respondents conduct was the sole proximate cause of his injuries, only that it was one proximate cause. WPI 310.07 (““Proximate cause” means a cause which in direct sequence produces the injury complained of and without which such injury would not have happened. . . . **There may be one or more proximate causes of an injury.**”) (emphasis added).

G. Claims against MERS

Respondents argue that because the deed of trust follows the note, the MERS assignment can't be a CPA violation because “a MERS assignment has no legal consequence.” RB at 33. However, the DTA requires that the Notice of Trustee's Sale issued to Washington Homeowners and issued to Mr. Brock includes information on the

assignment. 61.24.040(f). The Notice of Trustee Sale sent to Mr. Brock specifically stated,

to secure an obligation "Obligation" in favor of Mortgage Electronic Registration Systems, Inc. as nominee for Countrywide Home Loans, Inc., its successor and assigns, as Beneficiary, the beneficial interest in which was assigned by BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP to Wells Fargo bank, N.A., as trustee, on behalf of the holders of the HarborView Mortgage Loan Trust Mortgage Loan Pass-Through Certificates, Series 2006-12, under an Assignment/Successive Assignments recorded under Auditor's File No. 201210230563.

CP 181. Essentially, Respondents are claiming that reference to a legal nullity as the basis for selling a home is not deceptive. *See* CP 33. The very fact that MERS files legal nullities in Washington's property records and told Mr. Brock that it was the basis for selling his home, when Respondents now claim it was not, is deceptive. *State v. Kaiser*, 161 Wn. App. 705, 719, 254 P.3d 850 (Div. I 2010) ("Even accurate information may be deceptive 'if there is a representation, omission or practice that is likely to mislead.); *see also Panag*, 166 Wn.2d at 50.

Respondents additionally argue that MERS solely acted as a nominee. However, the record shows that is false. CP 139 (MERS acted in its own name.)

These misrepresentations, such as listing MERS and the MERS

assignment, conceded legal nullities, as the basis for NWTs' authority to foreclose is in part what caused Mr. Brock to investigate, a cognizable injury under the CPA. CP 105 at ¶3; CP 257 at ¶18. Accordingly, the trial court should not have granted MERS motion for Summary Judgment on Mr. Brock's CPA claims.

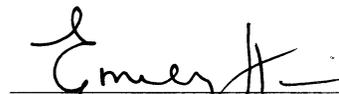
III. CONCLUSION

Because: 1) the trial court erred in relying upon inadmissible evidence; 2) it is not possible for Respondents to be "a holder" of Mr. Brocks' negatively amortizing and non-negotiable note under RCW 62A.3; 3) the evidence showed Respondents were not the beneficiary at the time the foreclosure was initiated; 4) the appointment of successor trustee was invalid; 5) it was error for the Trial Court to dismiss Mr. Brock's CPA claims against all respondents at summary judgment; 6) Mr. Brock established the injury element of his CPA claim at summary judgment; and, 7) Mr. Brock's claims against MERS are valid Mr. Brock respectfully requests that the Court reverse the dismissal and remand to the trial court for further proceedings.

Dated this 18th day of March, 2016 at Arlington, Washington.



Joshua B. Trumbull, WSBA #40992
JBT & Associates, P.S.



Emily A. Harris 46571
JBT & Associates, P.S.

CERTIFICATE OF SERVICE

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

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

2. That on the 18th day of March, 2016, I caused to be served a true and correct copy of Appellant Jason Brock’s Reply Brief to Respondents in the above title matter by causing it to be delivered to:

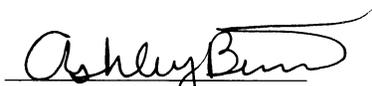
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DATED 18th day of March, 2016 at Arlington, Washington.


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