Supreme Court No. _____

COA No. 854356

SUPREME COURT OF THE STATE OF WASHINGTON

VS Developing, LLC,

Petitioner,

v.

BRMK Priest Point, LLC, et al.,

Respondents.

PETITION FOR REVIEW

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I. INTRODUCTION

At its heart, this case is about the rule of law and due process. There are very few things in this world that we know with absolute certainty, and the rule of law is the bedrock of American Society. Throughout most of human history, the rules by which life was governed were usually determined by force and fraud: He who had the power—whether military strength or political dominance—made the rules. A principle that itself is quite old and long predates the United States, the rule of law means laws that bind all people and that are enforced by a *system of courts*, not by mere discretionary authority.

This fundamental bedrock of our legal system is critical in *judicial* foreclosure actions where borrowers can rely on the *impartial* judge of the superior court to prevent overreaching by lenders who make it their business to obtain every advantage from the foreclosure process. But, when the legislature enacted the Deed of Trust Act ("DTA") and authorized *nonjudicial* foreclosures for the first time, the legislature vested the

tremendous power of sale of property not in a judge but in a trustee who must undertake *the role of the judge* as an *impartial third party* who owes a duty to both parties to ensure that the rights are protected. These rights and protections of borrowers in *nonjudicial foreclosures* can swiftly erode to zero when the trustee—as here—has *fiduciary* obligations to the lender and otherwise lacks impartiality, neutrality, and independence.

II. IDENTITY OF PETITIONER

VS Developing seeks review of the decision below.

III. COURT OF APPEALS DECISION

VS Developing seeks review of the Court of Appeals' unpublished decision filed on September 30, 2024 (*VS Developing, LLC v. BRMK Priest Point, LLC*, 85435-6-I, 2024 WL 4360596, at *1 (Wash. Ct. App. Sept. 30, 2024)).[1] The Court of Appeals denied the Motion for Reconsideration on October 23, 2024.[2]

[1] Appx. A.
[2] Appx. B.

IV. ISSUES PRESENTED FOR REVIEW

1. Because the trustee was not impartial, neutral, or independent and because there was an actual and impermissible conflict on the part of the trustee, the trustee lacked legal authority under Washington law to proceed with the *contested* nonjudicial foreclosure, rendering it void.

2. Because the Trustee's Sale is void, even though VS Developing did not enjoin the trustee sale under RCW 61.24.130, no waiver of the right to obtain relief against the void sale exists. *Cox v. Helenius*, 103 Wn.2d 383 (1985).

3. Genuine issues of material fact precluded dismissal of the claims on summary judgment, and, in fact, VS Developing supported the claims against Respondents for their role in the wrongfully conducted non-judicial foreclosure.

4. Because VS Developing's action was not "settled, discontinued, or abated" when the trial court ordered the removal of VS Developing's Lis Pendens, the trial court lacked authority to cancel it when it did. RCW 4.28.320.

5. Because VS Developing was substantially justified in filing the Lis Pendens, Respondents were entitled to no award of attorney's fees or costs under RCW 4.28.328(3).

V. STATEMENT OF THE CASE[3]

In June 2016, BRMK Priest Point, LLC ("Broadmark") approached Ms. Victoria Stelmakh and Mr. Valentin Stelmakh ("the Stelmakhs"), immigrants from Ukraine and governors of V.S Investment Assoc, LLC ("VS Investment"), with an offer to sell certain real property located at 2467 South College Street, Seattle, WA ("the Project"), which was largely undeveloped land. Alongside this offer, Broadmark extended a proposal to lend approximately $1.8 million for the construction of commercial and residential units on the land. Broadmark's dealings were rife with deceit, however. Unbeknownst to the Stelmakhs, Broadmark misrepresented the condition and readiness of the Project. It was only much later that VS Investment discovered that Broadmark's assurances about the Project were false. Also, because Broadmark's loan was to be secured by the Project—and VS

[3] Unless otherwise noted, the facts are taken from the First Verified Amended Complaint ("FAC"). *See* CP 385-437.

Investment was also making a substantial cash down payment—Broadmark assured the Stelmakhs that only $200,000 of the loan amount would need to be further secured. To facilitate this, Broadmark actively pressured them into using their personal residence at 4415 Priest Point Dr NW, Tulalip, WA 98271 ("Subject Property") as collateral.

To execute this scheme, Broadmark demanded that the Stelmakhs form a "new single-purpose LLC" and transfer ownership of their personal residence into the LLC. CP at 405. Broadmark's email clearly reveals the manipulative intent behind this demand: "We cannot have our Borrower and Personal Guarantors as the same entity. Therefore, if [the Subject Property] is vested to you individually, we cannot write a loan on the property since you are our personal guarantor. We will need you to quit claim deed the property into a different entity other than you personally in order to use the property as additional collateral." *Id*. Under duress, and without representation or adequate understanding of technical

English, the Stelmakhs complied, quitclaiming the Subject Property to VS Developing—a single-purpose entity formed exclusively for this transaction and lacking any independent resources. Unbeknownst to the Stelmakhs, Broadmark's maneuver circumvented regulations governing the use of personal residences as collateral for commercial loans. This wrongful conduct deprived the Stelmakhs of significant legal protections, including Washington's homestead exemption, which safeguards homeowners in foreclosure scenarios.

It was not until later that the Stelmakhs discovered the full extent of Broadmark's misrepresentations. These undisclosed issues caused extensive delays, forcing VS Investment to incur significant costs to correct the defects. By the time the Project was completed, its market value had substantially diminished. VS Investment suffered severe financial losses because the Project could not command the anticipated sale price—or, had the truth been known, VS Investment would never simply have agreed to the purchase.

Amid these mounting challenges, the Stelmakhs were shocked to discover that Broadmark had fraudulently secured the entire $1.8 million loan against their personal residence—far exceeding the agreed-upon $200,000 limit. Their alarm is captured in an email sent to Broadmark (CP at 407):

"Good afternoon Bryan. Can you please explain why is there a lien against the Priest Point for $1.8 million? I hope that's not accurate because that was not our agreement at all????"

Broadmark's misconduct ultimately drove VS Investment into bankruptcy. Even after the Project was sold, Broadmark claimed a remaining balance on the loan and initiated nonjudicial foreclosure proceedings against the Stelmakhs' home. On January 10, 2022, Broadmark appointed Hacker & Willig, Inc., P.S. ("H&W") as Successor Trustee under the Deed of Trust for the Subject Property. CP at 409. Then, on February 28, 2022, H&W recorded a Notice of Trustee's Sale of Commercial Loan against the Stelmakhs' personal residence (CP at 412-418) and ultimately auctioned their home over their repeated objections. Overall,

Broadmark's deceptive practices, wrongful overcollateralization, and disregard for the rights of the Stelmakhs exemplify predatory conduct. These actions left the Stelmakhs financially devastated and stripped of the protections they were entitled to under the law.

On May 18, 2023, VS Developing filed a lawsuit against, challenging, *inter alia*, the foreclosure of the Subject Property as void. CP at 477-510. Because the lawsuit disputed the Subject Property's ownership, VS Developing also recorded a Lis Pendens against the property.

On May 31, 2023, Respondents filed a "Motion For Order To Remove Lis Pendens And Dismiss Claim For Quiet Title." CP at 226-234. On June 13, 2023, the trial court issued an order requiring the removal of the Lis Pendens—while all the claims were still actively pending. CP at 223-225. On June 16, 2023, the court dismissed all the claims. CP at 174.

VI. ARGUMENT FOR GRANTING REVIEW

A. Criteria for discretionary review.

The decision upends the DTA considering this Court's holdings that, in a nonjudicial foreclosure, given the lack of judicial oversight, the trustee shall undertake the role of a superior court judge as the impartial third party between the parties to the deed of trust, making it a three-party transaction. *See Klem v. Washington Mut. Bank*, 176 Wn.2d 771 (2013). As such, the decision is also contrary to Article I, section 3 of our state constitution's command that "[n]o person shall be deprived of life, liberty, or property, without due process of law." The decision further conflicts with prior Court of Appeals' decisions and other prior decisions of this Court, including *Cox* and its progeny, regarding the ability of a lawyer-trustee to serve both as trustee and as lawyer for the beneficiary under the deed of trust transaction as well as the application of waiver.

B. The Decision is not supported by Washington law.

When rendering its decision affirming the trial court's Order, the Court of Appeals erroneously found that the law did not prohibit counsel for the beneficiary from acting as trustee and that VS Developing waived its claims because it had failed to follow the statutory restraint procedure. This case is appropriate for review because it sets the standards for the role of the trustee who must undertake the position of the judge as an impartial third party in deed of trust foreclosures. Since the judiciary is not involved such foreclosures, only the words of the DTA itself stand between the borrower and the lender eager to foreclose. The decision dangerously erodes these protections by empowering lenders, irrespective of conflicts, to use their own attorneys—who owe the highest duty of loyalty and fidelity to their clients—as trustees. This practice circumvents the DTA's goals, strips borrowers of an impartial trustee, and paves the way for foreclosures that lack fairness, constitutional due process, and the rule of law. The decision leaves borrowers

unprotected, enabling lenders to foreclose on properties without the oversight or due process the DTA was designed to provide and opens a troubling door that undermines the DTA's intent and purpose. Washington law cannot allow a system where the rights of borrowers are rendered meaningless, and properties are taken without due process of law. The DTA's protections must have real force, or they fail to serve their purpose. Accordingly, this Court's review is necessary to ensure that Washington's nonjudicial foreclosure process remains just, equitable, and consistent with due process and rule of law.

C. The *contested* Trustee's Sale is void.

1. The DTA framework: In a nonjudicial foreclosure, the trustee shall undertake the role of the superior court judge as an impartial and neutral third party.

Before 1965, Washington law recognized mortgages as the only security interest in real property in the state.[4] As such, mortgages had to be foreclosed through the judicial process.

[4] *Brown v. Washington State Dep't of Commerce*, 184 Wn.2d 509, 515 (2015).

Critically, "***in a judicial foreclosure action, an <u>impartial</u> judge of the superior court acts as <u>the trustee</u>***[.]"[5] This is critical, in part, because borrowers can rely on the judiciary to prevent overreaching by lenders who make it their business to obtain every advantage from the foreclosure process.[6]

In 1965, the legislature "authorized nonjudicial foreclosure for the first time, subject to strict statutory requirements" when it enacted the DTA to "supplement[ ] the time-consuming judicial foreclosure procedure [for mortgages] by providing [an] alternative private sale which results in substantial savings of time."[7] Under the DTA, "[a] deed of trust transaction is 'a ***three-party transaction*** in which the borrower (grantor) deeds the property to a trustee who holds the deed as

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[5] *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 789 (2013) (citing RCW 61.12.040; RCW 4.12.010).
[6] *See* RCW 61.12.
[7] *Brown*, 184 Wn.2d at 515 (citing John A. Gose, *The Trust Deed Act in Washington,* 41 Wash. L. Rev. 94, 95-96 (1966) (footnotes omitted)); *Klem*, 176 Wn.2d at 788.

security for the lender (beneficiary) in return for the borrower having received a loan from the lender."[8]

As the purpose of a deed of trust is identical to that of a mortgage, the need for a trustee is primarily found in the nonjudicial foreclosure process available only for deeds of trust.[9] The courts are a sufficient guardian of the borrower's rights when the courts must be used to foreclose those rights, as is the case with mortgage. But, when those rights may be foreclosed without judicial supervision in a nonjudicial foreclosure, judicial supervision in a nonjudicial foreclosure, a third-party trustee, with duties to both the grantor and beneficiary, is necessary.[10] This Court has held that, in a nonjudicial foreclosure, "***the trustee undertakes the role of the judge as an impartial third party*** who owes a duty to both parties

[8] *Id*. (emphasis added).
[9] *Cox v. Helenius*, 103 Wn.2d 383 (1985).
[10] *Id.*

to ensure that the rights of both the beneficiary and the debtor are protected."[11] As this Court has further observed:

> "When secured by a deed of trust that grants the trustee the power of sale if the borrower defaults on repaying the underlying obligation, the trustee may usually foreclose the deed of trust and sell the property without judicial supervision….This is a significant power, and we have recently observed that "the [deed of trust] Act must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales…Critically under our statutory system, a trustee is not merely an agent for the lender or the lender's successors. Trustees have obligations to all of the parties to the deed, including the homeowner. RCW 61.24.010(4)"[12]

In *Klem*, this Court also underscored the neutrality and impartiality of the trustee: "[t]he power to sell another person's property, often the family home itself, is a tremendous power to vest in anyone's hands. Our legislature has allowed that power to be placed in the hands of a private trustee, rather than a state

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[11] *Renata v. Flagstar Bank, F.S.B.*, 189 Wn. App. 1004 (2015) (citing *Cox*, 103 Wn.2d at 389).
[12] *Bain*, 175 Wn.2d at 93.

officer, ***but common law and equity requires that trustee to be evenhanded to both sides and to strictly follow the law***."[13]

Further, this Court has emphatically emphasized the trustee's obligation to maintain a neutral and impartial stance: "[A]s a pragmatic matter, it is the lenders, the servicers, and their affiliates who appoint trustees. Trustees have considerable financial incentive to keep those appointing them happy and very little financial incentive to show the homeowners the same solicitude…[h]owever, despite these pragmatic considerations and incentives under our statutory system, ***a trustee is not merely an agent for the lender*** or the lender's successors. Trustees have obligations to all of the parties to the deed, including the homeowner."[14] To adhere to this duty, the trustee shall, *inter alia*, ***remain impartial and protect the interests of all the parties***"[15]; "***take reasonable and appropriate steps to avoid***

[13] *Klem*, 176 Wn.2d at 789 (internal citations omitted) (emphasis added).
[14] *Id*. (internal citations omitted).
[15] *Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 831 (2015).

sacrifice of the debtor's property and his interest"[16]; ***not*** ***"defer[ ] to the lender*** on whether to postpone a foreclosure sale and thereby fail[ ] to exercise its independent discretion as an impartial third party";[17] and ***strictly comply with the DTA***.[18]

Also, this Court has held that "the practice of a trustee in a nonjudicial foreclosure…failing to exercise its independent discretion as an impartial third party with duties to both parties is an unfair and deceptive act or practice"[19]; that "[b]ecause of the very nature of nonjudicial foreclosures, Washington courts have not shied away from protecting the rights of the parties"[20]; that if *the trustee's actions are unlawful, the trustee's sale is void;*[21] and that Washington courts "have invalidated trustee

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[16] *Cox*, 103 Wn.2d at 389 (citing *McHugh v. Church*, 583 P.2d 210, 214 (1978)).
[17] *Klem*, 176 Wn.2d at 792.
[18] *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 111–12 (2013) (citing *Albice v. Premier Mortgage Servs. of Washington, Inc.*, 174 Wn.2d 560, 568 (2012) (citing *Udall*, 159 Wn.2d at).
[19] *Klem*, 176 Wn.2d at 792.
[20] *Id*. at 788.
[21] *Cox*, 103 Wn.2d at 388–89.

sales that do not comply with the [DTA]."[22] "Again, the trustee in a nonjudicial foreclosure action has been vested with incredible power. Concomitant with that power is an obligation to both sides to do more than merely follow an unread statute and the beneficiary's directions…***If the trustee acts only at the direction of the beneficiary, then the trustee is a mere agent of the beneficiary and a deed of trust no longer embodies a three-party transaction***. If the trustee were truly a mere agent of the beneficiary there would be, in effect, only two parties with the beneficiary having tremendous power and no incentive to protect the ***statutory*** and ***constitutional property rights*** of the borrower."[23] The decision below conflicts with this well-established case law: In a nonjudicial foreclosure, given the lack of judicial oversight, the trustee shall undertake the role of a judge as the impartial third party between the parties to the deed of trust, making it a <u>three-party</u> transaction; otherwise, the

[22] *Klem*, 176 Wn.2d at 788 (citing *Albice*, 174 Wn.2d at 568).
[23] *Id*. at 791-92 (internal citations omitted) (emphasis added).

DTA's protections evaporate in violation of article I, section 3 of our state constitution's command that "[n]o person shall be deprived of life, liberty, or property, without due process of law."

2. By definition, a beneficiary's counsel acting as a fiduciary to the beneficiary cannot conduct the foreclosure, especially of a *contested* Trustee's Sale, as a neutral, impartial, and independent judicial substitute.

"A fiduciary relationship exists as a matter of law between an attorney and client, and the attorney owes the highest duty of fidelity and good faith to the client."[24] The fiduciary duties arising from an attorney-client relationship are generally categorized as involving the duty of preserving confidences and of individual loyalty.[25] Further, "[t]he relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence."[26] "[A]ttorneys owe an undivided duty of loyalty to the client."[27] Additionally, under

[24] *In re Larson*, 103 Wn.2d 517, 520 (1985); *see also Perez v. Pappas*, 98 Wn.2d 835, 840–41 (1983).
[25] Mallen, 2 Legal Malpractice § 15:1 (2017 ed.).
[26] RPC 1.8 cmt. 17.
[27] *Mazon v. Krafchick*, 158 Wn.2d 440, 448–49 (2006).

the DTA, one of the trustee's statutory qualifications is that "[t]he trustee or successor trustee shall have no fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust."[28]

Needless to say, no superior court judge in a judicial foreclosure action can have fiduciary duty or owe the highest duty of fidelity and individual loyalty to the plaintiff-lender seeking to judicially foreclose on the borrower's home. ***Critically, to fulfil the goals of the DTA and to preserve the due process, nonjudicial foreclosures shall be no different***. In fact, judges must avoid both impropriety and the appearance of impropriety and to always aspire to conduct that ensures the greatest possible public confidence in their independence and impartiality,[2930] which the trustee lacks if the trustee also serves as legal counsel to the beneficiary. Having a trustee who owes the highest duty of fidelity to the lender alone not just creates the

[28] RCW 61.24.010(3) (Emphasis added).
[29] *See, e.g.*, Code of Judicial Conduct, Rule 1.2.

appearance of impropriety, but also destroys the integrity of the DTA. A lender's counsel and fiduciary with the highest duty of fidelity and individual loyalty to the lender cannot fulfill the role of what would be the equivalent of a superior court judge in a judicial foreclosure action; serve as a guardian of the borrower's rights when the lender chooses to foreclose nonjudicially; take reasonable and appropriate steps to avoid sacrifice of the borrower's home; be evenhanded to both sides; and otherwise serve as a neutral, independent, and impartial third party between the lender or beneficiary and the borrower, especially in a *contested* nonjudicial foreclosure to which the borrower objects.

Moreover, an attorney is an agent of a disclosed principal,[31] not a party to a given transaction. If the trustee were to act as legal counsel and fiduciary to the lender *with the highest duty of fidelity and individual loyalty to the lender*, the trustee would be a mere agent of the lender, not a party to the transaction, and the deed of trust would no longer embody the statutorily

[31] *See, e.g.*, *Copp v. Breskin*, 56 Wn. App. 229, 232 (1989).

mandated three—as opposed to two—party transaction. Thus, "there would be, in effect, only two parties with the beneficiary having tremendous power and no incentive to protect the statutory and constitutional property rights of the borrower."[32]

3. The Opinion Also Conflicts with *Cox* and Its Progeny.

In *Cox*, this Court specifically considered the question of whether circumstances exist under which a lawyer cannot serve as trustee under the DTA. There, this Court held:

> "**[T]he statute may not allow attorneys to do that which the Code of Professional Responsibility prohibits**. The spirit of CPR DR 5-105(B) would seem to condemn action of the nature that occurred here. **Where an actual conflict of interest arises, the person serving as trustee and beneficiary should prevent a breach by transferring one role to another person**." *Cox*, 103 Wn.2d at 390 (emphasis added).

Critically, following *Cox*, the Washington State Bar Association ("WSBA") published an Advisory Opinion 926,[33] which stated, in part, as follows:

> "**If, under the particular facts, the trustee must exercise independent judgment in deciding about how**

[32] *Klem*, 176 Wn.2d at 791-92 (internal citations omitted).
[33] Appx. C.

> **to proceed with the sale, then the lawyer-trustee cannot continue to serve both as trustee and as lawyer for the beneficiary**. A lawyer cannot, consistent with the Rules of Professional Conduct, act as a fiduciary exercising discretion and as an advocate. In the words of RPC 1.7(b), it would not be reasonable for the lawyer-trustee to believe or she could exercise independent judgment while at the same time fulfilling all of the professional responsibilities to the client-beneficiary. **Consent of the beneficiary, in such circumstances, does not solve the problem**."

Given this impermissible conflict, the Trustee Sale is void even though VS Developing did not follow the statutory restraint procedure. In fact, the Stelmakhs had repeatedly objected to and otherwise *contested* the nonjudicial foreclosure before the Trustee's Sale.[34] Accordingly, the Court of Appeals' reliance on *Cascade Manor Assocs. v. Witherspoon, Kelley, Davenport & Toole, P.S.*, 69 Wn. App. 923 (1993), does not properly address this issue because, unlike *Cascade*, this case involves an impermissible conflict that renders the sale void regardless of whether a pre-sale remedy was sought or waiver applied.

[34] *See, e.g.*, FAC, ¶¶ 4.17-4.20, 6.7.

In fact, in *Schroeder*, this Court further reinforced a basic statement of law it had originally made in *Cox:* **Even where a party fails to timely enjoin a trustee sale under RCW 61.24.130, if a trustee's actions are unlawful, the sale is void**.[35] In such cases, no waiver of the right to obtain relief exists.

Accordingly, the decision conflicts with Washington case law on the DTA: If H&W could not act as an *independent, neutral, and impartial judicial substitute* in the subject foreclosure—which was contested—then H&W had no authority to complete the foreclosure. Neither the Stelmakhs nor Broadmark could vest H&W with authority the DTA did not.[36] As such, at the risk of having the Trustee's Sale voided, title quieted in VS Developing, and subjecting itself and Broadmark to, *inter alia*, a CPA claim, H&W completed the contested sale.

[35] *Cox*, 103 Wn.2d at 388–89.
[36] RCW 61.24.020, .010.

4. The Opinion Also Conflicts with Case Law On Waiver.

In *Albice*, this Court noted that the plain language of RCW 61.24.040 indicates that waiver under the DTA is not to be rigidly applied.[37] There, this Court concluded that "[w]aiver ... cannot apply to all circumstances or types of postsale challenges." *Id*. This Court then pointed to the language of RCW 61.24.040(1)(f)(IX), which states that " '[f]ailure to bring ... a lawsuit ***may*** result in waiver of any proper grounds for invalidating the Trustee's sale.' "[38]

Moreover, "'[a] waiver is the intentional and voluntary relinquishment of a known right'" and may result from an express agreement or be inferred from circumstances indicating an intent to waive.[39] Critically, "[w]aiver is ***disfavored***, and a party seeking to establish waiver has a ***heavy burden of proof***."[40]

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[37] 174 Wn.2d 560, 570 (2012).
[38] *Id*. (Emphasis added.)
[39] *Schroeder*, 177 Wn.2d at 106 (quoting *Bowman v. Webster*, 44 Wn.2d 667, 669 (1954)).
[40] *Big Blue Capital Partners of Washington, LLC v. Reg'l Tr. Servs. Corp.*, 46116-1-II, 2018 WL 333141, at *4 (2018) (citing

Here, while the Stelmakhs did not bring a motion for a temporary restraining order, they testified that, given the circumstances, they ultimately lacked adequate opportunity to seek presale remedies to prevent the foreclosure of their home at the time.[41] Furthermore, given their repeated objections to the nonjudicial foreclosure and good faith efforts to save their home from foreclosure, including in the form of bankruptcy, no basis exists to conclude, on summary judgment, that they voluntarily and intentionally relinquished their rights. The Court of Appeals' decision overlooked that the Stelmakhs had voiced their objections to the sale. The Court of Appeals then used this incorrect fact—that there was no objection to the sale—for purposes of finding waiver, which was error, particularly considering that all reasonable inferences must be resolved against the moving party, here, Respondents.

Saili v. Parkland Auto Ctr., Inc., 181 Wn. App. 221, 225 (2014)) (emphasis added).

[41] *See, e.g.*, FAC, ¶ 4.22.

D. Genuine issues of material fact precluded entry of summary judgment.

Taking all the facts alleged in VS Developing's *verified* complaint as true and resolving all reasonable inferences in VS Developing's favor, a reasonable jury could find that Respondents materially violated the DTA so as to render the sale void; that H&W failed to act in good faith or impartially; and could otherwise find in favor of VS Developing on its claims. For example, a reasonable jury could find that VS Developing had objected to the sale before it occurred and that the foreclosure was contested, creating an impermissible conflict for H&W so as to render the completed sale void.

Additionally, with regard to the analysis of the "Duty of Good Faith," the Court of Appeals wrote, in part: "Here, there is ***no evidence*** showing that HW, as trustee, failed to adequately inform itself of BRMK Lending's right to foreclose on the subject property, treat BRMK Lending and VS Developing equally, investigate potential issues using its own

judgment, or otherwise act in compliance with its statutory duty of good faith." But, in reviewing the evidence submitted on summary judgment, facts asserted by the non-moving party and supported by affidavits or other appropriate evidentiary material must be taken as true.[42] The Court of Appeals overlooked the fact that VS Developing had a verified complaint before the trial court containing the requisite sworn allegations sufficient to defeat summary judgment. Moreover, the Court of Appeals' reliance on the claimed lack of "evidence" further demonstrates that the trial court erred in granting summary judgment because the trial court did so without giving VS Developing any opportunity to conduct discovery: VS Developing cannot be blamed for lack of "evidence" while being precluded from conducting any discovery with regard to the claims or defenses.

E. The Opinion Conflicts With Case Law Holding That "The Action Must Be Settled, Discontinued, Or Abated" Before A Removal of A Lis Pendens Can Be Ordered.

[42] *State ex rel Bond v. State*, 62 Wn.2d 487 (1963).

Under RCW 4.28.320, the failure to establish that the action is settled, discontinued, or abated deprives the court of discretion to cancel the lis pendens.[43] Here, in concluding that the trial court did not error in ordering the release of the Lis Pendens, the Court of Appeals stated "Because VS Developing waived its claims to the subject property by failing to comply with the restraint procedures under the DTA, [the condition] was satisfied." But, the Court of Appeals overlooked that on the date of the order, the action was not "settled, discontinued, or abated." An action is considered "settled, discontinued, or abated" when it has reached a state of complete finality or voluntary dismissal, which had not happened in this case. *Guest v. Lange*, 195 Wn. App. 330, 336 (2016), *review denied*, 187 Wn.2d 1011 (2017). *See also Suess v. Nw. Timber & Dev., Inc.*, 24 Wn. App. 2d 1010 (2022). In *Suess*, Division I also explained that a notice of appeal renders the action not "settled,

[43] *Guest v. Lange*, 195 Wn. App. 330, 336 (2016), *review denied*, 187 Wn.2d 1011 (2017).

discontinued, or abated" because the case is still pending and not final for purposes of discontinuing a lis pendens. Accordingly, the litigation concerning the property must be fully resolved either through a final judgment that is no longer subject to appeal or through a voluntary dismissal of the action by the parties involved—which did not happen here.

F. The Opinion Conflicts With Case Law On The Lis Pendens Statute Which Authorizes No Award of Fees Where the Claimant Establishes Substantial Justification for Filing the Lis Pendens.

RCW 4.28.328(3) provides for recovery of damages and *possibly* costs and attorney's fees to the aggrieved party who prevails in defense of the action in which the lis pendens was filed only where the lis pendens is filed without a substantial justification.[44] For the reasons discussed above and argued in the trial court (CP at 71-92), VS Developing has established the requisite substantial justification for filing of the Lis Pendens.

[44] *See South Kitsap Family Worship Center v. Weir*, 135 Wn. App. 900, 911 (2006).

VII. CONCLUSION

The Opinion is in conflict with decisions of this Court and published decisions of the Court of Appeals. The case also presents a significant question of law under the Constitution of the State of Washington and involves an issue of substantial public interest that will harm other members of the public if the opinion is permitted to stand unreversed in Washington.

This Brief contains 4,570 words, excluding the parts of the document exempted from the word count, in compliance with RAP 18.17(c)(10).

Respectfully submitted this 22nd day of November 2024.

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/s/ Boris Davidovskiy

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2024, I caused the foregoing document to be efiled with the Court of Appeals, Division I, which will send notification to all counsel of record.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct.

DATED at Edmonds, Washington, this 22nd day of November, 2024.

/s Boris Davidovskiy

_____

Boris Davidovskiy, WSBA #50593

APPENDIX A

FILED
9/30/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

VS DEVELOPING, LLC,

Appellant,

v.

BRMK PRIEST POINT, LLC; HACKER & WILLIG, INC., P.S.; and JOHN & JANE DOES 1-10,

Respondents.

No. 85435-6-I

DIVISION ONE

UNPUBLISHED OPINION

HAZELRIGG, A.C.J. — VS Developing LLC held real property that was used to secure a $1.8 million loan from BRMK Priest Point LLC to VS Investment Assoc LLC. VS Investment defaulted on the loan and the trustee foreclosed and sold the property. Nine months later, VS Developing filed a complaint that alleged the sale was invalid as BRMK Priest Point's counsel, Hacker & Willig Inc. had acted as trustee. The trial court dismissed the claims on summary judgment. Because the relevant statute does not prohibit counsel for the beneficiary from acting as trustee and VS Developing failed to follow the statutory restraint procedure, VS Developing waived its claims and summary judgment dismissal of the complaint was proper. We affirm.

FACTS

Viktoria and Valentin Stelmakh[1] are the principals of VS Investment Assoc LLC and its affiliate VS Developing LLC.[2] In 2016, VS Investment agreed to purchase largely undeveloped land located in Seattle, WA (development property) from BRMK Lending LLC, the parent company of BRMK Priest Point LLC (BRMK PP). To purchase the land, on April 18, 2016, VS Investment accepted a loan from BRMK Lending in the amount of $1,880,000. The Stelmakhs personally guaranteed the loan. The loan was also secured by two deeds of trust,[3] one for the development property in Seattle and the other for real property located at 4415 Priest Point Drive, NW, Tulalip, WA (subject property) that was owned by VS Developing.

On multiple occasions over the next couple of years, VS Investment requested, and BRMK Lending agreed, to increase the loan amount and extend the maturity date on the loan. Ultimately, the maturity date was extended to November 1, 2018 and VS Investment and the Stelmakhs defaulted by failing to pay the balance. As of November 25, 2019, VS Investment and the Stelmakhs owed BRMK Lending approximately $3,722,105.46 on the loan. Following the

[1] This opinion refers to the Stelmakhs by their first names as needed for clarity. No disrespect is intended.

[2] As appellant VS Developing acknowledges in briefing, "VS Investment is not a party to this action."

[3] A deed of trust is a type of mortgage that involves "'a three-party transaction in which land is conveyed by a borrower, the grantor, to a trustee, who holds title in trust for a lender, the beneficiary, as security for credit or a loan the lender has given the borrower.'" *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 92-93, 285 P.3d 34 (2012) (internal quotation marks omitted) (quoting 18 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: TRANSACTIONS § 17.3, at 260 (2d ed. 2004)).

default, BRMK Lending filed a petition in King County Superior Court pursuant to RCW 7.08.030 for appointment of a receiver to administer VS Investment's assets.

On February 28, 2022, BRMK Lending initiated the foreclosure process for its deed of trust on the subject property. Hacker & Willig (HW), the law firm representing BRMK Lending, was appointed as the successor trustee to conduct the sale of the subject property. The trustee's sale was initially scheduled for June 3, 2022 and statutory notices were sent to all interested parties, including VS Developing and the Stelmakhs. On June 2, VS Developing filed a petition for bankruptcy in the United States Bankruptcy Court in the Western District of Washington. The bankruptcy court dismissed the petition, and on June 27, VS Developing filed another bankruptcy action, which was also dismissed.[4] As a result of those proceedings, the trustee's sale was postponed and ultimately rescheduled for August 19.

The trustee again sent statutory notices pursuant to RCW 61.24.040 to all of the parties. VS Developing neither objected nor sought to enjoin the sale. On August 19, the sale of the subject property occurred on the steps of the Snohomish County Courthouse. Though representatives for VS Developing, its attorney and Viktoria, were present at the trustee's sale, neither objected or otherwise raised any issue with the sale. The sole bidder was BRMK Lending, which, operating through its subsidiary, BRMK PP, received the trustee's deed and became the owner of the subject property. Pursuant to RCW 61.24.060(1), BRMK PP was entitled to possession of the property 20 days after the sale, September 8, 2022.

[4] Those cases were *In re VS Dev., LLC*, Case No. 22-10916-MLB (W.D. Wash. June 2, 2022) and *In re VS Dev., LLC*, Case No. 22-11041-CMA (W.D. Wash. June 17, 2022).

However, the Stelmakhs refused to vacate the property. On October 5, BRMK PP filed an unlawful detainer action against them and sought a writ of restitution. On November 14, the trial court ordered the issuance of a writ of restitution and directed the Snohomish County Sheriff's Office (SCSO) to remove the Stelmakhs from the property. On December 14, SCSO restored the subject property to BRMK PP. After retaining possession of the property and spending approximately $300,000 to clean and repair the premises in preparation for sale, BRMK PP accepted a purchase offer for it on May 16, 2023 and scheduled the closing of the sale for June 15.

On May 18, 2023, VS Developing filed a complaint against BRMK PP and HW alleging violations of ch. 61.24 RCW, the foreclosure fairness act, more commonly referred to as the deeds of trust act or "DTA," and ch. 19.86 RCW, the Consumer Protection Act (CPA), seeking injunctive relief to prevent the scheduled sale and to quiet title to the property. VS Developing claimed that BRMK PP violated the DTA by assigning its counsel, HW, as the successor trustee for the subject property and contended that HW "had no authority to foreclose on the [s]ubject [p]roperty, rendering the sale and the [t]rustee's [d]eed null and void." According to VS Developing, because HW represented BRMK PP as legal counsel, HW "could not, by definition, fulfill its role of a neutral judicial substitute and violated the DTA and [CPA] every time it performed any act as the trustee in this case." VS Developing also filed a lis pendens[5] against the subject property.

[5] "A 'lis pendens' is an 'instrument having the effect of clouding the title to real property.'" *Guest v. Lange*, 195 Wn. App. 330, 336, 381 P.3d 130 (2016) (quoting RCW 4.28.328(1)(a)).

On May 22, 2023, BRMK PP and HW sent an e-mail to counsel for VS Developing to provide notice of its request that it "dismiss its [c]omplaint and withdraw its [l]is [p]endens immediately." BRMK PP explained that the claims in VS Developing's complaint, which centered on the assertion that it was a violation of the DTA and CPA for HW to act as the trustee in the sale of the subject property, "lack[] any basis in fact and [are] not supported by any controlling legal authority." Further, BRMK PP noted that, because VS Developing was provided with statutory notice and did not seek to restrain the sale prior to the foreclosure, VS Developing had waived any such claims pursuant to RCW 61.24.127(4) because the loan was secured by a commercial property. BRMK PP concluded that the complaint and lis pendens were "clearly meritless" and demanded that VS Developing dismiss them or BRMK PP would file a motion to dismiss and seek sanctions. Two days later, on May 24, counsel for VS Developing responded and expressly refused to remove the lis pendens or dismiss the claims.

On May 31, BRMK PP filed a motion for an order to remove the lis pendens and to dismiss the action to quiet title. First, BRMK PP asserted that an attorney for the beneficiary may legally act as the trustee pursuant to the DTA as shown in *Cascade Manor Associates v. Witherspoon, Kelley, Davenport & Toole, P.S.,* 69 Wn. App. 923, 934-35, 850 P.2d 1380 (1993). Second, BRMK PP insisted that VS Developing's claims were waived because they were brought after the trustee's sale and the failure to raise such claims or attempt to enjoin the sale beforehand operates as a waiver, as explained in *Patrick v. Wells Fargo Bank, N.A.*, 196 Wn. App. 398, 405-07, 385 P.3d 165 (2016). Third, BRMK PP stated that "VS

Developing ha[d] no justification for filing the [l]is [p]endens" and sought its removal along with an award of attorney fees pursuant to RCW 4.28.328(3).

On June 14, 2023, the trial court ordered the removal of the lis pendens after finding there was "no legal basis" for it.[6] On June 16, after converting the motion to dismiss to a summary judgment motion and allowing the parties additional time for briefing under CR 56, the trial court granted summary judgment in favor of BRMK PP and entered an order that dismissed all of VS Developing's claims. The court stated that "any further attempts to thwart the sale of the Priest Point [p]roperty may result in further sanctions," and authorized BRMK PP to bring a motion for sanctions within 30 days. On July 13, BRMK PP moved for an award of sanctions against VS Developing and its counsel and requested attorney fees in the amount of $35,000. On July 21, the trial court granted BRMK PP's motion and ordered VS Developing to pay $35,000 in attorney fees within 30 days. VS Developing failed to pay within the timeframe required by the court and BRMK PP filed a motion for entry of judgment on the fee award. On September 7, the court entered a final judgment against VS Developing in the amount of $35,000 and imposed a postjudgment interest rate of 12 percent.

VS Developing timely appealed.[7]

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[6] VS Developing sought interlocutory review of the trial court's order to remove the lis pendens and to dismiss the quiet title claim. VS Developing also filed an emergency motion objecting to the supersedeas decision under RAP 8.1(h) or for reversal of the order requiring removal of lis pendens. A commissioner of this court determined that a stay of the trial court's order was not warranted and denied the emergency motion. That ruling mooted VS Developing's petition for discretionary review.

[7] While VS Developing's opening brief includes only three assignments of error, it addresses 15 separate issues. As VS Developing did not designate as part of the record on appeal the relevant orders for its challenges on several issues, those claims are not properly before this court. In its amended notice of appeal, VS Developing failed to designate (1) the denial of its motion to stay the order requiring removal of the lis pendens, (2) the denial of its motion to continue

ANALYSIS

I. Standard of Review

This court reviews summary judgment rulings de novo. *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014). "Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id*. "A material fact is one on which the outcome of the litigation depends." *Becerra Becerra v. Expert Janitorial, LLC*, 176 Wn. App. 694, 702, 309 P.3d 711 (2013), *aff'd*, 181 Wn.2d 186, 332 P.3d 415 (2014). This court "places itself in the position of the trial court and considers the facts in a light most favorable to the nonmoving party." *Young v. Key Pharms., Inc.,* 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

On summary judgment, "the moving party bears the initial burden of showing the absence of an issue of material fact." *Id.* at 225. "The burden then shifts to the nonmoving party to present evidence that an issue of material fact remains." *Haley v. Amazon.com Servs., LLC*, 25 Wn. App. 2d 207, 216, 522 P.3d 80 (2022). At this stage, the "nonmoving party must set forth specific facts showing a genuine issue." *Baldwin v. Sisters of Providence in Wash., Inc.,* 112 Wn.2d 127, 132, 769 P.2d 298 (1989). "Mere allegations or conclusory statements of fact unsupported by evidence are not sufficient." *Patrick*, 196 Wn. App. at 405. On

proceedings under CR 56(f), (3) the judgment against the plaintiff, and (4) any orders resulting from "post-judgment supplemental proceedings." Accordingly, we decline to consider its arguments as to those orders.

Further, VS Developing attached over 200 pages of documents as appendices to its briefing on appeal, in plain contradiction of RAP 10.3(a)(8), without submitting a motion to supplement the record or otherwise seeking permission of this court as required by RAP 9.11(a). As such, we do not consider those materials either.

review, this court may affirm summary judgment "on any ground supported by the record." *Pac. Marine Ins. Co. v. Dep't of Revenue*, 181 Wn. App. 730, 737, 329 P.3d 101 (2014).

II. Foreclosure and Restraint Requirements of the DTA

BRMK PP contends that VS Developing has waived any objection to the trustee's sale by failing to follow the restraint requirements of RCW 61.24.130. VS Developing avers that waiver is inapplicable and the "trustee's sale is void because it was not a three-party transaction." BRMK PP is correct.

A. Nonjudicial Foreclosure

The DTA "creates a three-party mortgage system allowing lenders, when payment default occurs, to nonjudicially foreclose by trustee's sale." *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012). There are three fundamental goals of the DTA: "an efficient and inexpensive process, adequate opportunities for parties to prevent wrongful foreclosure, and stability of land titles." *Patrick,* 196 Wn. App. at 405. When property is secured by a deed of trust that grants such power to the trustee and the borrower defaults on the underlying payment obligation, "the trustee may usually foreclose the deed of trust and sell the property without judicial supervision." *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 93, 285 P.3d 34 (2012).

B. Presale Restraint Procedure and Waiver

"RCW 61.24.130 provides a procedure for stopping a trustee's sale." *Patrick*, 196 Wn. App. at 405. It allows any person who has an interest in the property to move to restrain a trustee's sale on "any proper legal or equitable ground." RCW 61.24.130(1). The person must do so before the sale takes place; courts are prohibited from restraining "a trustee's sale unless the person seeking the restraint gives five days['] notice to the trustee." RCW 61.24.130(2). The applicant must also pay the amount "due on the obligation secured by the deed of trust." RCW 61.24.130(1).

As our Supreme Court has made clear, the restraint procedure of RCW 61.24.130 is the "*only* means by which a grantor may preclude a sale once foreclosure has begun with receipt of the notice of sale and foreclosure." *Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985) (emphasis added). The failure to comply with RCW 61.23.130 "may result in waiver of the right to object to the sale." *Plein v. Lackey*, 149 Wn.2d 214, 227, 67 P.3d 1061 (2003). Under the DTA, "waiver of any postsale challenge occurs where a party (1) received notice of the right to enjoin the sale, (2) had actual or constructive knowledge of a defense to foreclosure prior to the sale, and (3) failed to bring an action to obtain a court order enjoining the sale." *Albice*, 174 Wn.2d at 569. Further, "we apply waiver only where it is equitable under the circumstances and where it serves the goals of the act." *Id.* at 570. Our Supreme Court has explained that applying waiver in the circumstances set out in *Albice* serves the three goals of the DTA. *Plein*, 149 Wn.2d at 227-28.

Here, the application of waiver is equitable and appropriate. On February 28, 2022, HW initiated foreclosure and notified VS Developing that the trustee's sale was scheduled for June 3, 2022. VS Developing did not move to enjoin the sale. Rather, VS Developing waited until June 2 and pursued bankruptcy relief. VS Developing ultimately filed two petitions for Chapter 11 bankruptcy in federal court, both of which were dismissed. As a result of those filings, HW rescheduled the trustee's sale for August 19 and again provided notice to VS Developing. Still, VS Developing did not move to restrain the sale. Moreover, then-counsel for VS Developing attended the trustee's sale on August 19, as did Viktoria as its representative, and neither objected to the sale. It was not until *nine months later*, on May 18, 2023, that VS Developing filed its complaint against BRMK PP and HW.

The elements of waiver are plainly established here and VS Developing does not contest that it (1) received timely notice of its right to restrain the trustee's sale, (2) had knowledge of its defense prior to the sale, and (3) failed to pursue the restraint procedure required by RCW 61.24.130. Notably, VS Developing was aware that HW was acting as both the successor trustee and counsel for BRMK PP nearly *six months before* the sale took place but failed to raise this defense until *nine months after* the property had been sold. As the court noted in *Plein*, "'To allow one to delay asserting a defense [until after the sale] would be to defeat the spirit and intent of the trust deed act.'" 149 Wn.2d at 228 (alteration in original) (quoting *Peoples Nat. Bank of Wash. v. Ostrander*, 6 Wn. App. 28, 32, 491 P.2d

1058 (1971)). Accordingly, VS Developing has waived its claims to the subject property.[8]

C. Alleged Procedural Irregularities

VS Developing contends the sale is void. According to VS Developing, the "requisites" to this "nonjudicial foreclosure were not satisfied because the trustee acted as legal counsel for the beneficiary and could not have served as a neutral third party and judicial substitute." In circumstances where the trustee fails to comply with the requirements of the DTA or conducts the foreclosure proceedings without statutory authority, the trustee's sale may be invalidated regardless of the borrower's failure to seek a presale injunction. *See Albice*, 174 Wn.2d at 575; *Cox*, 103 Wn.2d at 388. Neither of those circumstances are present here.

1. Duty of Good Faith

Former versions of the DTA imposed a fiduciary duty on trustees, but in 2008, our legislature expressly eliminated that duty by adding RCW 61.24.010(3). *Bain,* 175 Wn.2d at 94 n.4; LAWS OF 2008, ch. 153, § 1. Under the current version of the statute, in effect at the time of the sale at issue here, the trustee has only a "duty of good faith to the borrower, beneficiary, and grantor." RCW 61.24.010(4). "This duty requires the trustee to remain impartial and protect the interests of all

[8] RCW 61.24.127 provides four types of claims that a plaintiff "may not" waive by failing to follow the DTA's presale restraint procedures. *Patrick*, 196 Wn. App. at 406. These include claims for damages premised on allegations of (1) common law fraud or misrepresentation, (2) a violation of the CPA, (3) the trustee's failure to "materially comply" with the DTA, or (4) a violation of RCW 61.24.026. RCW 61.24.127(1).

However, "[t]his section does not apply to the foreclosure of a deed of trust used to secure a commercial loan." RCW 61.24.127(4). Because this was a commercial loan to VS Investment Assoc, secured by property owned by VS Developing, the safe harbor of RCW 61.24.127 is inapplicable and does not preclude waiver of any claim in VS Developing's complaint.

the parties." *Lyons v. U.S. Bank Nat'l Ass'n*, 181 Wn.2d 775, 787, 336 P.3d 1142 (2014). The trustee must "'adequately inform' itself regarding the purported beneficiary's right to foreclose, including, at a minimum, a 'cursory investigation'" *Id*. (quoting *Walker v. Quality Loan Serv. Corp.,* 176 Wn. App. 294, 309-10, 308 P.3d 716 (2013)). To comply with its duty of good faith, the "trustee must treat both sides equally and investigate possible issues using its independent judgment." *Id*. Here, there is *no evidence* showing that HW, as trustee, failed to adequately inform itself of BRMK Lending's right to foreclose on the subject property, treat BRMK Lending and VS Developing equally, investigate potential issues using its own judgment, or otherwise act in compliance with its statutory duty of good faith. When a trustee strictly complies "with their legal obligations under the act, interested parties will have no claim for postsale relief." *Albice*, 172 Wn.2d at 572.

2. Counsel for Beneficiary Serving as Trustee

VS Developing identifies no case law or provision of the DTA that prohibits counsel for the beneficiary from serving as the trustee in a nonjudicial foreclosure. "Prior to 1975, the deed of trust act strictly forbade agents, employees, or subsidiaries of a beneficiary to act as a trustee." *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 791 n.13, 295 P.3d 1179 (2013) (citing former RCW 61.24.020 (1965)). Our legislature removed that limitation in 1975. *Id.*; LAWS OF 1975, 1st Ex. Sess., ch. 129, § 2. Thus, while the DTA previously prohibited counsel for the beneficiary from acting as the trustee, our legislature amended the statute nearly 50 years ago to expressly "allow an employee, agent or subsidiary of a beneficiary to also be a

trustee." *Cox*, 103 Wn.2d at 390. "The amendment," our Supreme Court explained in *Cox*, "furthers the general intent of the act that nonjudicial foreclosure be efficient and inexpensive." *Id*.

BRMK PP cites to *Cascade Manor*, in which Cascade argued that the trustee, Currin, violated his fiduciary duties by simultaneously acting as counsel for Bancorp, the beneficiary of the deed of trust. 69 Wn. App. at 934. On review, this court determined there was "no basis to conclude that Currin breached his fiduciary duties as trustee by acting as both the trustee and Bancorp's attorney." *Id*. at 934-35. In rejecting Cascade's claim, the court explained:

> Contrary to Cascade's assertion, *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985), does not prohibit a trustee from also acting as the attorney for the beneficiary. Instead, *Cox* noted that, although the attorney's dual role could have "precipitated" a breach of fiduciary duties if a conflict of interest arose, such a breach could be prevented if "the person serving as trustee and beneficiary . . . transferr[ed] one role to another person." 103 Wn.2d at 390. While a trustee acting as counsel for one of the involved parties could avoid any risk of conflict when litigation arises by arranging for a substitute trustee, neither *Cox* nor any other authority requires the trustee to do so.

Id. at 935 (alterations in original).

In its reply brief, VS Developing insists that "*Cascade* is inapposite." First, it attempts to distinguish this case on the ground that *Cascade* was decided before the legislature amended the DTA to remove both the fiduciary duty that was previously imposed on trustees and the prohibition on an agent of the beneficiary acting as the trustee. However, neither of those amendments support VS Developing's position that counsel for a beneficiary violates the DTA by simultaneously acting as the trustee. Quite the opposite; the amendments show that the legislature, presumably aware of the history of this law, acted within its

authority to eliminate the express restriction on counsel for a beneficiary acting as the trustee, *and* removed the trustee's previous fiduciary duties and obligations, imposing only a duty of good faith. *See* former RCW 61.24.020 (1965); RCW 61.24.010(3), (4).

Second, VS Developing "distinguishes" *Cascade* on the basis that the issue here is not whether HW breached its fiduciary duties, but rather it is whether the trustee's sale "is void because of an actual and impermissible conflict of interest on the part of [HW]." In *Cox*, the court noted that, "[w]here an actual conflict of interest arises, the person serving as trustee and beneficiary should prevent breach by transferring one role to another person." 103 Wn.2d at 390. However, in its opening brief, VS Developing does not even mention the phrase "conflict of interest," let alone provide argument showing an actual conflict of interest in this case.[9] Because this "conflict of interest" argument is raised for the first time in reply, we do not consider it. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration.").

Third, VS Developing claims that, "to the extent *Cascade* does purport to allow an attorney to act as trustee and attorney for beneficiary, *Cascade* was wrongly decided." This is so, VS Developing contends, because "the deed of trust

[9] In its sole reference to "impermissible conflict" in the context of the facts of this case, VS Developing does not engage with any controlling authority, but merely presents a factual scenario not present here and asserts that a reasonable jury could reach a number of factual findings which could compound and create "an impermissible conflict for H&W so as to render the completed sale void due to the unlawful actions of the trustee." However, that assertion is premised upon facts involving a "non-contested judicial foreclosure while [H&W] simultaneously serv[ed] as legal counsel to Broadmark." This case involves a late-contested nonjudicial foreclosure, so we need not consider such a factually distinct hypothetical.

would not embody a three-party transaction, which . . . would undermine and be contrary to the very notion of due process and rule of law." Notably, VS Developing does not challenge our Supreme Court's decision in *Cox*, on which this court soundly relied in reaching its decision on this issue in *Cascade*. As neither *Cascade* nor *Cox* have been overruled or abrogated, we reject VS Developing's last-ditch attempt to avoid established case law contrary to its position. As for the bald constitutional due process aspect of this claim, we need not reach the merits. "[P]arties raising constitutional issues must present considered arguments to this court." *City of Tacoma v. Price*, 137 Wn. App. 187, 200, 152 P.3d 357 (2007). "'[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.'" *Id.* (alteration in original) (quoting *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992)). Because VS Developing's conclusory "due process" claim is unsupported by relevant authority or adequate argument, it does not warrant review. *Id.*; RAP 10.3(a)(6).

D. Summary Judgment Dismissal

On May 31, 2023, two weeks after VS Developing filed its complaint, BRMK PP and HW moved for an order to dismiss the claim to quiet title and remove the lis pendens filed against the property, which at that time was scheduled to be sold on June 15, 2023. The trial court ordered removal of the lis pendens as there was "no legal basis" supporting it. Regarding the rest of the motion, the court found that it should be treated as one for summary judgment under CR 56 and allowed the parties to supplement their briefing and materials accordingly. On June 16,

after considering the parties' supplemental briefing on the motion, the trial court entered an order dismissing all of VS Developing's claims on summary judgment.

The court's decision to grant summary judgment in favor of BRMK PP and HW was proper. Summary judgment is appropriate where, as here, "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Scrivener*, 181 Wn.2d at 444. The record shows no procedural irregularity that would preclude application of the waiver doctrine and the elements of waiver have all been established. Because VS Developing (1) had notice of its right to seek to enjoin the sale, (2) had knowledge of its defense, and (3) failed to follow the restraint procedure in RCW 61.24.130, its claims are waived. *See Patrick* 196 Wn. App. at 407. As this was a deed of trust used to secure a commercial loan, the safe harbor of RCW 61.24.127(1) does not protect any of VS Developing's claims from waiver. RCW 61.24.127(4). Thus, in the absence of any genuine issue of material fact, the trial court did not err when it granted summary judgment in favor of BRMK PP and HW and dismissed all of VS Developing's claims.[10]

[10] VS Developing contends that even if it waived all of its claims relating to the subject property, waiver does not apply to its breach of contract claim in its amended complaint. We disagree.

In its breach of contract claim, VS Developing alleged that the initial agreement with BRMK Lending was for the deed of trust on the subject property to secure no more than $200,000 but BRMK Lending "inserted language into relevant documents to the purported effect that the [subject property] was being used as collateral for the entire [p]roject." On that basis, VS Developing argued that the deed of trust was fraudulent and BRMK Lending wrongfully foreclosed on the subject property. This claim is also waived. Again, this was a deed of trust used to secure a commercial loan, and thus, there is no safe harbor protecting this claim from waiver under the DTA. RCW 61.24.130, .127.

III. Removal of Lis Pendens

VS Developing also avers the trial court erred when it ordered the removal of the lis pendens. We disagree.

Pursuant to RCW 4.28.320, "a party in an action affecting title to real property may file a notice, or lis pendens, with the county auditor regarding the pendency of the action." *134th St. Lofts, LLC v. iCap Nw. Opportunity Fund, LLC*, 15 Wn. App. 2d 549, 557, 479 P.3d 367 (2020). This filing provides "constructive notice to third parties that the title may be clouded." *Guest v. Lange*, 195 Wn. App. 330, 336, 381 P.3d 130 (2016).

Under RCW 4.28.320, the trial court "may, at its discretion, at any time after the action shall be settled, discontinued or abated, on application of any person aggrieved and on good cause shown and on such notice as shall be directed or approved by the court, order the notice authorized in this section to be canceled." Accordingly, three conditions must be met for the trial court to cancel a lis pendens: "(1) the action must be settled, discontinued, or abated, (2) an aggrieved person must move to cancel the lis pendens, and (3) the aggrieved person must show good cause and provide proper notice." *Guest*, 195 Wn. App. at 336. So long as those conditions are satisfied, the trial court has discretion to cancel a lis pendens. *Id*. "A court abuses its discretion when a decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Malvern v. Miller*, 24 Wn. App. 2d 173, 179, 520 P.3d 1045 (2022).

Here, VS Developing argues that the first and third conditions were not met. The record shows otherwise. Because VS Developing waived its claims to the

subject property by failing to comply with the restraint procedures under the DTA, the first condition was satisfied. Additionally, as BRMK PP provided notice via e-mail to VS Developing before moving for an order to remove the lis pendens and showed good cause to cancel the lis pendens, specifically that VS Developing had waived its challenges to the foreclosure by failing to follow the restraint procedures set out in the DTA, the third condition was also met. Thus, the trial court had discretion to cancel the lis pendens. Because the order to remove the lis pendens rests on the tenable ground that there was "no legal basis for the filing of a [l]is [p]endens against the subject property," the trial court did not abuse its discretion. *See id.*

IV. Attorney Fees

A. Award at Trial

VS Developing assigns error to the trial court's award of attorney fees to BRMK PP under the lis pendens statute. "We review the legal basis for an award of attorney fees de novo and the reasonableness of the amount of an award for abuse of discretion." *Hulbert v. Port of Everett*, 159 Wn. App. 389, 407, 245 P.3d 779 (2011). "A court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons." *Id*.

A "party who files a wrongful lis pendens may be liable in damages for doing so." *Samra v. Singh*, 15 Wn. App. 2d 823, 839, 479 P.3d 713 (2020). In relevant part, the lis pendens statute provides as follows:

> Unless the claimant establishes a substantial justification for filing the lis pendens, a claimant is liable to an aggrieved party who prevails in defense of the action in which the lis pendens was filed for actual

> damages caused by filing the lis pendens, and in the court's discretion, reasonable attorneys' fees and costs incurred in defending the action.

RCW 4.28.328(3). "Damages and fees are appropriate where the claimants provide no evidence of a legal right to the property." *S. Kitsap Fam. Worship Ctr. v. Weir*, 135 Wn. App. 900, 912, 146 P.3d 935 (2006). However, "where the claimants have a reasonable, good faith basis in fact or law for believing they have an interest in the property, a lis pendens is substantially justified." *Id*.

In the order awarding attorney fees to BRMK PP, the trial court found that "there was no legal basis, justification, or substantial justification per RCW 4.28.328(3) for the filing of the lis pendens." On this issue, VS Developing recites the same argument to which it has clung throughout the proceedings in the trial court and now on appeal, which is that "the statutory requisites to the contested nonjudicial foreclosure were not satisfied as the trustee acted as legal counsel to the beneficiary." This position is baseless. Because VS Developing failed to seek a presale injunction and no procedural irregularity occurred to preclude waiver, there was no substantial justification for filing the lis pendens. Accordingly, the trial court did not err when it awarded attorney fees under RCW 4.28.328.[11]

[11] VS Developing does not challenge the amount of the award. Rather, it simply notes that "even if there were no substantial justification, the award of attorney's fees is still purely discretionary, and not mandatory." Because VS Developing offers no argument as to the reasonableness of the amount awarded, we do not consider whether the trial court abused its discretion in awarding the sum of $35,000. *See Timson v. Pierce County Fire Dist. No. 15*, 136 Wn. App. 376, 385, 149 P.3d 427 (2006) ("[W]e will not review an issue that was addressed by an inadequate argument or that is given only passing treatment.").

B. Attorney Fees on Appeal

BRMK PP requests attorney fees and costs on appeal pursuant to RCW 4.84.330 and RAP 18.1. Under RCW 4.84.330, when a contract specifically provides that attorney fees and costs incurred to enforce the provisions of that contract shall be awarded to one of the parties, "the prevailing party . . . shall be entitled to reasonable attorneys' fees in addition to costs." The terms of the deed of trust provide for attorney fees and costs and BRMK PP prevailed in the trial court and prevails again on appeal. Accordingly, we award BRMK PP attorney fees and costs incurred on appeal, subject to compliance with RAP 18.1.

Affirmed.

Hazelrigg, ACJ

WE CONCUR:

Birk, J.

Colum, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

VS DEVELOPING, LLC,

Appellant,

v.

BRMK PRIEST POINT, LLC; HACKER & WILLIG, INC., P.S.; and JOHN & JANE DOES 1-10,

Respondents.

No. 85435-6-I

DIVISION ONE

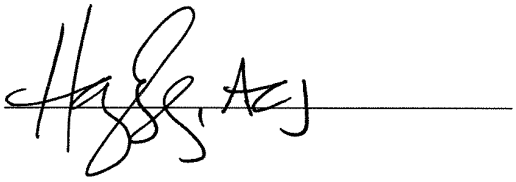
ORDER DENYING MOTION FOR RECONSIDERATION

Appellant filed a motion for reconsideration on October 21, 2024. After consideration of the motion the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:



NO. 854356

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

VS DEVELOPING, LLC, Appellant, v. BRMK PRIEST POINT, LLC; HACKER & WILLIG, INC., P.S., Respondents.	APPELLANT'S MOTION TO RECONSIDER

I. IDENTITY OF THE MOVING PARTY

Appellant VS Developing, LLC ("Appellant" or "VS Developing").

II. RELIEF REQUESTED[1]

The Court affirmed the trial court's dismissal of VS Developing's claims. Under RAP 12.4, VS Developing respectfully seeks reconsideration of that decision because the Court has overlooked and misapprehended the law and facts.

[1] On October 18, 2024, Appellant's counsel filed a motion seeking additional time to file this motion, since Appellant's counsel's schedule did not reasonably permit for the preparation of a more developed motion for reconsideration. On October 21, 2024, at approximately 1:05 p.m., Appellant's counsel received this Court's order denying the request for an extension of time. Therefore, Appellant respectfully submit this abbreviated version of a motion for reconsideration, which, due to time constraints, does not necessarily address all the issues or arguments.

III. FACTS RELEVANT TO MOTION

The relevant facts are included in the content of the Court's Opinion and of the parties' briefs and arguments.

IV. GROUNDS FOR RELIEF AND ARGUMENT

A. The Court's Decision Conflicts With *Cox* and Its Progeny.

Citing *Cox*, the Court agreed that a conflict of interest on the part of HW, the trustee, would require it to transfer the role to another person, which HW failed to do in this case. But, the Court did not consider this argument, (incorrectly) stating that it was raised for the first time in reply:

> "In *Cox*, the court noted that, "[w]here an actual conflict of interest arises, the person serving as trustee and beneficiary should prevent breach by transferring one role to another person." 103 Wn.2d at 390. However, in its opening brief, VS Developing does not even mention the phrase "conflict of interest," let alone provide argument showing an actual conflict of interest in this case. **Because this "conflict of interest" argument is raised for the first time in reply, we do not consider it. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration.")**.

It appears that the Court has misapprehended the fact Appellant did raise this issue in its opening brief. For example, on page 39 of the Opening Brief, Appellant includes the following section:

> "Moreover, the Stelmakhs had objected to and otherwise repeatedly contested the nonjudicial foreclosure before the Trustee's Sale.[2] Assuming, *arguendo*, the trustee can otherwise fully and properly perform the role of a superior court judge in nonjudicial foreclosure while having fiduciary obligations and highest duties of undivided trust and loyalty to only one of the parties to the foreclosure action, **once H&W was apprised of their objections to the sale, whether it be on the basis of the claimed amounts or otherwise, there was an <u>actual and impermissible conflict</u>. H&W now necessarily had to exercise independent judgment in deciding how to proceed with the Trustee's Sale and, therefore, could not have served as both the foreclosing trustee and counsel for Broadmark. For example, it would be incumbent upon H&W to consider effectively refusing to disregard its client's instructions to proceed with the sale to protect VS**

[2] *See, e.g.*, FAC, ¶¶ 4.17-4.20, 6.7-6.10.

> **Developing's interests, which would be wholly contrary to H&W's highest and undivided duty of loyality to Broadmark**."

This issue had also been raised before the trial court. For example, in Paragraph 6.10 of the *verified* complaint, VS Developing alleged that "Even if H&W were lawfully appointed, given the above-described actual and impermissible conflict, H&W's role had to have been transferred to another person or entity and because that never occurred, all subsequent relevant actions of H&W were unlawful and void"—which also confirms that this issue was not raised for the first time in reply.[3]

Moreover, in *Cox*, our Supreme Court specifically considered the question of whether circumstances exist under which a lawyer cannot serve as trustee under the DTA. There, the trustee was an attorney who also represented the beneficiary in a collateral lawsuit commenced by the grantors who claimed offsets arising from the underlying transaction that exceeded the secured indebtedness. *Id*. In its opinion, our Supreme Court held:

> "**[T]he statute may not allow attorneys to do that which the Code of Professional Responsibility prohibits**. The spirit of CPR DR 5-105(B) would seem to condemn action of the nature that occurred here. **Where an actual conflict of interest arises, the person serving as trustee and beneficiary should prevent a breach by transferring one role to another person**." *Cox*, 103 Wn.2d at 390 (emphasis added).

Critically, following *Cox*, the Washington State Bar Association ("WSBA") published an Advisory Opinion 926, which stated, in part, as follows:

> "**If, under the particular facts, the trustee must exercise independent judgment in deciding about how to proceed with the sale, then the lawyer-trustee cannot continue to serve both as trustee and as lawyer for the beneficiary**. A lawyer cannot, consistent with the Rules of Professional Conduct, act as a fiduciary exercising discretion and as an advocate. In the words of RPC 1.7(b), it would not be reasonable for the lawyer-trustee to believe or she could exercise independent judgment while at the same time fulfilling all of the professional responsibilities to the client-beneficiary. **Consent of the beneficiary, in such circumstances, does not solve the problem**."

[3] *See also* paragraphs 6.5-6.10 of the verified First Amended Complaint.

This issue is critical because, even if wavier applies, the sale can nonetheless be void. The Court's reliance on *Cascade Manor Assocs. v. Witherspoon, Kelley, Davenport & Toole, P.S.,* 69 Wn. App. 923 (1993), does not properly address this issue. While the DTA may allow attorneys to serve as trustees, the circumstances here involved a conflict of interest that barred HW from acting as the trustee irrespective of whether a pre-sale remedy was sought or waiver applied. Given the *verified* allegations in the complaint on this issue before the trial court, summary judgment was improper.

B. The Court Overlooked Additional Issues of Fact.

With regard to its analysis of the "Duty of Good Faith," the Court wrote, in part: "Here, there is *no evidence* showing that HW, as trustee, failed to adequately inform itself of BRMK Lending's right to foreclose on the subject property, treat BRMK Lending and VS Developing equally, investigate potential issues using its own judgment, or otherwise act in compliance with its statutory duty of good faith." But, in reviewing the evidence submitted on summary judgment, facts asserted by the non-moving party and supported by affidavits or other appropriate evidentiary material must be taken as true.[4] The Court has overlooked the fact that VS Developing had a verified complaint before the trial court containing sworn allegations sufficient to defeat summary judgment. For example, paragraph 6.8 of the complaint contained the following *verified* allegations, which the trial court (and this Court) had to accept as true on summary judgment:

> "H&W failed to act impartially toward Plaintiff, including by refusing to not proceed with the trustee's sale; wrongfully repeatedly deferring to Broadmark on whether to proceed with the sale; treating Plaintiff's requests differently from Broadmark's requests and summarily accepting Broadmark's side of the story; actively representing Broadmark in the bankrcupcy proceedings and otherwise seeking rulings and taking other actions adverse to Plaintiff's efforts to save the home; failing to adequatley inform itself regarding Broadmark's purported right to foreclose on the Subject Property; failing to take reasonable

[4] *State ex rel Bond v. State,* 62 Wn.2d 487 (1963).

> and appropriate steps to avoid sacrifice of Plaintiff's personal residence and interests; on information and belief, having an agreement with Broadmark to the effect that H&W will only cancel or continue nonjudicial foreclosure sales if Broadmark approved; and otherwise failing to strictly comply with the DTA. Nor did H&W and/or Broamark transfer H&W's role in the nonjudicial foreclosure to any other person or entity at any time during the subject events."

Moreover, this Court's reliance on the lack of evidence further demonstrates that the trial court error in granting summary judgment because the trial court did so without giving VS Developing any opportunity to conduct discovery. VS Developing cannot be blamed for lack of evidence while being precluded from conducting any discovery with regard to the claims or defenses.

Additionally, the Court's opinion recites the following proposition as a fact: "Though representatives for VS Developing, its attorney and Viktoria, were present at the trustee's sale, neither objected or otherwise raised any issue with the sale." To the contrary, while Respondents made this claim in the trial court, paragraph 4.22 of VS Developing's *verified* complaint states, in part: "While the Stelmakhs managed to attend the trustee's sale ***and otherwise continued to voice their objections to the sale***, given the circumstances at the time, they lacked adequate opportunity to seek presale remedies to prevent the foreclosure of their property at the time." Given that all reasonable inferences must be resolved against the moving party, here, Respondents,[5] this Court overlooked that representatives for VS Developing did voice their objections to the sale at the time. This Court then used this incorrect fact—that there was no objection to the sale—for purposes of finding waiver, which was error, particularly considering the summary judgment standard.

Similarly, in paragraph 4.17, VS Developing's verified complaint also stated in relevant part: "the Stelmakhs, through their then-counsel and otherwise, repeatedly apprised H&W of their

[5] *Detweiler v. J.C. Penney Cas. Ins. Co.,* 110 Wn.2d 99, 108 (1988).

objections to any foreclosure of their personal residence, including on the basis of Broadmark misrepresenting material features of the Project, preparing documents that did not accurately reflect the parties' agreement, precluding VS Developing from timely completing the Project and complying with the terms of the loan agreement, and otherwise disputing Broadmark's amounts claimed as due and owing in connection with the Project." Furthermore, paragraph 4.18 of VS Developing's *verified* complaint details additional efforts to object to the sale. Given the applicable standard on summary judgment, the trial court's decision should be reversed.

C. The Court's Decision Conflicts With The Lis Pendens Statute and Caselaw.

RCW 4.28.320 sets forth three conditions that must be met for the court to cancel a lis pendens: (1) the action must be settled, discontinued, or abated; (2) an aggrieved person must move to cancel the lis pendens; and (3) the aggrieved person must show good cause and provide proper notice.[6] The failure to establish even one condition deprives the court of discretion to cancel the lis pendens.[7] Here, in concluding that the trial court did not error in ordering the release of the lis pendens when it did, this Court stated "Because VS Developing waived its claims to the subject property by failing to comply with the restraint procedures under the DTA, the first condition was satisfied." But, the Court has overlooked that <u>on the date of the order</u> directing the release of the lis pedens, the action was not "settled, discontinued, or abated." Under the lis pendens statute, an action is considered "settled, discontinued, or abated" when it has reached a state of complete finality or voluntary dismissal, which had not happened in this case. *Guest v. Lange*, 195 Wn. App. 330, 336 (2016), *review denied*, 187 Wn.2d 1011 (2017). *See also Suess v. Nw. Timber & Dev.*,

[6] *Guest v. Lange*, 195 Wn. App. 330, 336 (2016), *review denied*, 187 Wn.2d 1011 (2017).
[7] *See Id.*

Inc., 24 Wn. App. 2d 1010 (2022). In *Suess*, this Court also explained that a notice of appeal renders the action not "settled, discontinued, or abated" because the case is still pending and not final for purposes of discontinuing a lis pendens. In short, this means that the litigation concerning the property must be fully resolved either through a final judgment that is no longer subject to appeal or through a voluntary dismissal of the action by the parties involved. Because this action was not final within the meaning of the lis pendens statute when the trial court ordered the release of the lis pendens, "the trial court did not have discretion to cancel the lis pendens." *Id*.

D. Conclusion.

This Court should reverse the Order Dismissing All Claims and the Order Requiring Removal of Lis Pendens. Taking all the verified First Amended Complaint's facts as true and interpreting all reasonable inferences in VS Developing's favor, as this Court must, the trial court erred when it dismissed the claims.

This Motion contains 2048 words, excluding the parts of the document exempted from the word count, in compliance with RAP 18.17(c)(17).

DATED this 21st day of October 2024.

BORIS DAVIDOVSKIY, P.C.

/s/ Boris Davidovskiy

_____

Boris Davidovskiy, WSBA #50593
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that, on October 21, 2024, I caused the foregoing document to be efiled with the Court of Appeals, Division I, which will send notification to all counsel of record.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct.

DATED this 21st day of October 2024 at Edmonds, Washington.

BORIS DAVIDOVSKIY, P.C.

/s/ Boris Davidovskiy

_____

Boris Davidovskiy, WSBA 50593

APPENDIX C

WASHINGTON STATE BAR ASSOCIATION

Advisory Opinion: 926

Year Issued: 1986

RPC(s): RPC 1.7, 87-1

Subject: Trustee; deed of trust; client conflict; Cox v. Helenius. [Published Informal Opinion 87-1]

[Formerly published as Published Informal Opinion 87-1. All Informal Opinions are consolidated in this database.]

When the state of Washington in 1965 enacted a nonjudicial foreclosure alternative for real property security interests, it provided for the title to the property to be held by a third party given the common law title "trustee." The Act, while providing that "any attorney" admitted to practice in this state could serve as trustee, prohibited the beneficiary, or the beneficiary`s employee, agent, or subsidiary, from acting as trustee. In 1975 the legislature deleted this prohibition. Implicitly this amendment created a question for lawyers: are there circumstances under which a lawyer cannot serve as trustee?

This question was expressly raised in Cox v Helenius, 103 Wn.2d 383,693 P.2d 683 (1985), where the court set aside a deed of trust foreclosure sale, in part because of a conflict of interest on the part of the trustee. The trustee was an attorney who also represented the beneficiary in a collateral lawsuit commenced by the grantors who claimed offsets arising from the underlying transaction that exceeded the secured indebtedness. Acknowledging the 1975 amendments that allow an agent to serve as trustee, the court (at 390) stated: "[T]he statute may not allow attorneys to do that which the Code of Professional Responsibility prohibits. The spirit of CPR DR 5-105(B) would seem to condemn action of the nature that occurred here. Where an actual conflict of interest arises, the person serving as trustee and beneficiary should prevent a breach by transferring one role to another person."

The court cites the "spirit of" CPR DR 5-105(B) which prohibited multiple employment if independent professional judgment on behalf of a client is likely to be adversely affected by representation of another client. In citing this rule, the court suggested that to analyze whether a lawyer has an impermissible conflict, the grantor and beneficiary should both be viewed as clients of the trustee.

With the adoption of the Rules of Professional Conduct, the grantor need not be viewed as a client of the lawyer-trustee in order to analyze the conflict issue. Rather, the grantor should be viewed as a third party to whom the lawyer-trustee owes a duty. Rule 1.7(b) addresses the conflict between duty to a client and duty to a third party:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer`s responsibilities to another client or to a third person, or by the lawyer`s own interests, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents in writing after consultation and a full disclosure of the material acts (following authorization from the other client to make such a disclosure).

In applying Rule 1.7(b) to a particular fact pattern, the initial question is, when is the rule triggered—under what acts may the representation of the beneficiary be materially limited by the trustee`s duty to the grantor? If there may be a material limitation, then the lawyer must resolve a second question—- whether he or she reasonably believes the representation will not be adversely affected.
The trustee, according to the Helenius decision, owes some duty as a fiduciary to the grantor; must act impartially between grantor and beneficiary; must take reasonable and appropriate steps to avoid sacrifice of the debtor`s property and his interests; and can postpone a sale "for any cause he deems advantageous." These responsibilities on the part of the trustee mean that in some situations a trustee has discretionary authority and may need to exercise independent judgment in deciding whether to proceed with the sale.

In the deed of trust foreclosure context, where a particular trustee also represents the beneficiary, a conflict between grantor and beneficiary may trigger 1.7(b), and put the attorney-trustee in a position where the representation of the beneficiary may be materially limited. Thus, for example, if the grantor seeks but the beneficiary refuses to accede to a delay of the sale, the threshold may be crossed and the attorney-trustee can go forward with both responsibilities only if he or she reasonably believes the representation of beneficiary will not be adversely affected, and the beneficiary consents in writing.
If, under the particular facts, the trustee must exercise independent judgment in deciding about how to proceed with the sale, then the lawyer-trustee cannot continue to serve both as trustee and as lawyer for the beneficiary. A lawyer cannot, consistent with the Rules of Professional Conduct, act as a fiduciary exercising discretion and as an advocate. In the words of RPC 1.7(b), it would not be reasonable for the lawyer-trustee to believe or she could exercise independent judgment while at the same time fulfilling all of the professional responsibilities to the client-beneficiary. Consent of the beneficiary, in such circumstances, does not solve the problem.

If, for example, the grantor makes no request for delay of the sale, there would not be a problem under RPC 1.7(b). On the other hand, if the grantor requests a delay which reasonably appears to the trustee to be nonfrivolous, but the beneficiary refuses to agree to a postponement, then a conflict may exist that under RPC 1.7(b) prevents the lawyer from going forward with both roles; the conflict cannot be solved by the beneficiary`s consent to the continued representation by the lawyer-trustee of the beneficiary.

As Helenius makes clear, the fact that a court is involved does not necessarily mean that the trustee has no need to exercise independent judgment. Such judgment may not be called for in a bankruptcy where the grantor is represented and the bankruptcy judge will decide whether to lift the automatic stay. Depending upon the particular facts, the attorney-trustee may be able to represent the beneficiary in such circumstances because the focus of the court`s decision will be on the very area where the trustee would otherwise have some discretion. The court will, in effect, make the trustee`s decision. In every case, however, this may not be true. The focus may be on whether there is a default, and the court may not rule on whether, for some other reason, the sale should be delayed.

The lawyer-trustee who represents neither grantor nor beneficiary can serve as trustee, exercising the independent judgment required, even though the demand of the grantor and the instructions of the beneficiary conflict. The obligations of the Rules of Professional Conduct do not preclude a lawyer from serving as trustee in these circumstances.

***

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Committee on Professional Ethics (CPE) or its predecessors. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official

position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law other than the meaning of the Rules of Professional Conduct.

BORIS DAVIDOVSKIY, P.C.

November 22, 2024 - 11:35 AM

Transmittal Information

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Appellate Court Case Number:	85435-6
Appellate Court Case Title:	VS Developing, LLC, Appellant v. BRMK Priest Point, LLC, et al., Respondents
Superior Court Case Number:	23-2-03724-1

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