Supreme Court No. 93291-3

Court of Appeals No. 32816-3-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JAMES BLAIR

Appellant,

v.

NORTHWEST TRUSTEE SERVICES, INC.; BANK OF AMERICA, N.A., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; FEDERAL HOME LOAN MORTGAGE CORPORATION; and DOE DEFENDANTS 1 through 20

Respondents.

ANSWER OF RESPONDENT NORTHWEST TRUSTEE SERVICES, INC. TO PETITION FOR REVIEW

Submitted By:
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

Statutes and Codes

Court Rules

Secondary Sources

Appellate Court Records

Articles

Legislative History

Treatises

Trial Court Decisions

I. IDENTITY OF ANSWERING PARTY

Respondent Northwest Trustee Services, Inc. ("NWTS") hereby answers the over-length Petition for Review of Appellant James Blair ("Petition for Review") as follows below.

II. STATEMENT OF RELIEF SOUGHT

NWTS requests that the Washington Supreme Court decline to accept discretionary review of the published decision in *Blair v. NWTS et al.*, 193 Wn. App. 18, -- P.3d -- (2016).

III. SUMMARY OF ARGUMENT

First, Mr. Blair asserts an issue concerning the existence of a beneficiary declaration which is neither found in the Complaint nor addressed in NWTS' summary judgment motion. Mr. Blair only raised this supposed issue for the first time on appeal after other cases commented on the declaration's form. To give credence to Mr. Blair's argument now would be improper.

Second, Mr. Blair assumes that NWTS exclusively and strictly relied on a beneficiary declaration before recording a trustee's sale notice, but *reliance is not the standard for compliance* under the governing statute. Rather, RCW 61.24.030(7)(a) may be satisfied through alternative means, which the record demonstrates in this case.

Third, Mr. Blair further mistakenly assumes that the mere receipt of a beneficiary declaration was the "but for" cause of expenses that he incurred to challenge Bank of America's *actually proper* foreclosure. But Mr. Blair's default, and not a declaration, is what led to the issuance of statutory notices, and Mr. Blair's attorneys' fees are not causally connected to the declaration itself.

For these reasons, Supreme Court review should be denied.

IV. RELEVANT FACTS

In September 2008, Mr. Blair executed a promissory note in the amount of $240,000, payable to Countrywide Bank, FSB, and secured its repayment with a deed of trust naming property in Chelan County as collateral. CP 624-639, 645-648.

In 2009, Mr. Blair defaulted on the loan and BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing LP requested that NWTS commence a non-judicial foreclosure. CP 559-561; CP 583, ¶ 4.

On December 31, 2009, the foreclosure process was stopped upon reinstatement of the loan. CP 583, ¶ 7. However, in August 2010, Mr. Blair again could not make the required mortgage payments. CP 563-565.

On July 20, 2011, Bank of America, as successor by merger to BAC Home Loans Servicing, LP ("Bank of America"), requested that

NWTS again commence a non-judicial foreclosure. CP 583, ¶ 8. On July 21, 2011, Mr. Blair was sent a Notice of Default. CP 563-565.

On March 7, 2012, Bank of America recorded an Appointment of Successor Trustee with the Chelan County Auditor, vesting NWTS with the powers of the original trustee. CP 567.

On April 27, 2012, NWTS recorded a Notice of Trustee's Sale, and sent the same to Mr. Blair. CP 572-581; CP 584, ¶ 13.

In August 2012, Mr. Blair sued Bank of America, NWTS, MERS, and Freddie Mac in the Chelan County Superior Court, alleging violations of the Consumer Protection Act ("CPA"), Deed of Trust Act ("DTA"), and the tort(s) of Negligent or Intentional Misrepresentation. CP 3-19.

On or about November 4, 2013, NWTS moved for summary judgment. CP 516-584. On September 9, 2014, the Hon. Judge Lesley Allan granted summary judgment to all Defendants. CP 1161-1164.

On March 17, 2016, Division Three of the Court of Appeals issued a published opinion affirming the ruling below. Case No. 32816-3-III. On May 12, 2016, after Mr. Blair sought reconsideration, the Court of Appeals amended its opinion, but the result stood. *Id.*

V. RESPONSE TO ISSUE PRESENTED

1. NWTS did not violate RCW 61.24.030(7)(a) prior to

recording a sale notice, and NWTS did not cause injury to Mr. Blair. The Court of Appeals correctly affirmed the grant of summary judgment.

VI. ARGUMENT

A. Standard of Review.

Discretionary acceptance of a decision terminating review may be granted only based on the criteria set forth in R.A.P. 13.4(b). Mr. Blair asserts only the first and fourth criteria. Petition for Review at 8.

B. Mr. Blair's Complaint Did Not Allege That NWTS Violated RCW 61.24.030(7)(a) and He Should Not be Entitled to Additional Review on This New Theory.

"A complaint must at least identify the legal theories upon which the plaintiff is seeking recovery." *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 25, 974 P.2d 847 (1999). "A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along." *Id.* at 26; *see also Camp Fin., LLC v. Brazington*, 133 Wn. App. 156, 162, 135 P.3d 946 (2006) ("[a] complaint generally cannot be amended through arguments in a response brief to a motion for summary judgment."); *Shields v. Morgan Fin., Inc.*, 130 Wn. App. 750, 758, 125 P.3d 164 (2005) ("[t]he complaint does not allege these new theories...."). On appeal, issues raised for the first time are generally not considered.

See In re Marriage of Knutson, 114 Wn. App. 866, 871, 60 P.3d 681 (2003); *see also Dewey*, *supra*. at 26; R.A.P. 2.5(a).

Here, Mr. Blair's Complaint asserted three causes of action, plus a requested remedy of injunctive relief. CP 3-19. The DTA cause of action was not available to Mr. Blair pursuant to *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014) (no pre-sale DTA claim exists under state law). The other two causes of action focused on whether Bank of America could foreclose due to Freddie Mac's involvement as the Note "owner." *See, e.g.*, CP 12 (Compl., ¶¶ 2.16, 2.17).

Mr. Blair's Complaint specifically alleged the following:

> * NWTS made "misrepresentations *in* its Notice of Trustee's Sale...." CP 15-16, ¶ 3.8 (emphasis added).
>
> * NWTS proceeded with a foreclosure initiated "by an entity which did not have legal authority...." CP 16, ¶ 3.9.
>
> * NWTS failed to act in good faith because the Notice of Trustee's Sale "did not include the identification of the actual 'beneficiary' as evidenced by the contradictory Assignment that has been recorded, which differs from the information about the owner of the loan on the Notice of Default." CP 17, ¶ 3.13.
>
> * NWTS was not appointed "by the Note Holder or 'Beneficiary,' as defined by the DTA. Therefore, Defendant NWTS is not the Trustee...." CP 17, ¶ 3.14.
>
> * The Notice of Trustee's Sale *contained* "incorrect information" and NWTS did not take instructions from the "actual Note Holder." CP 17-18, ¶ 3.15 (emphasis added).

> * NWTS and the other Defendants "intentionally misrepresented the identities of the true Note Holder and its ability to foreclose...." CP 18, ¶ 3.18.

Nowhere in the Complaint did Mr. Blair reference RCW 61.24.030(7)(a), impugn the beneficiary declaration, or allege that NWTS failed to comply with statutory prerequisites before issuing a sale notice.[1]

To the contrary, Mr. Blair focused on: 1) whether Bank of America had the right to foreclose due to Freddie Mac's ownership of the loan, and 2) the contents of the sale notice (but not the predicate to its issuance). CP 1-19. These arguments, however, were all resolved by *Brown v. Wash. State Dep't of Commerce*, 184 Wn.2d 509, 543, 359 P.3d 771 (2015).

Notably, at that time, no Washington appellate court had ruled on the effect of mentioning RCW 62A.3-301 in a beneficiary declaration. However, most federal judges in the state agreed that such declarations were permissible. *See, e.g., Bakhchinyan v. Countrywide Bank, N.A.*, 2014 WL 1273810 (W.D. Wash. Mar. 27, 2014). Thus, NWTS did not submit all the other evidence in its possession establishing its *accurate* knowledge that Bank of America was the beneficiary.

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[1] NWTS' 2013 summary judgment motion presciently observed:

> Plaintiff *does not contend* that NWTS recorded the Notice of Trustee's Sale without first obtaining the Beneficiary Declaration. Plaintiff also *fails to allege any basis* as to why NWTS could not rely on the Beneficiary Declaration.

CP 529 (Motion at 14) (emphasis added).

Not until *after* the trial court granted summary judgment was a decision made in *Lyons v. U.S. Bank, N.A. et al.*, 181 Wn.2d 775, 336 P.3d 1142 (2014), holding that such declarations are ineffective. Suddenly, on appeal, Mr. Blair invoked *Lyons* and attacked NWTS' compliance with RCW 61.24.030(7)(a). *Compare* Brief of Appellant at 17-22, *with* Response Brief of NWTS at 31 (mentioning the argument as new).[2]

This finesse to create an issue where none had existed prior to summary judgment, is completely improper under *Dewey*, *Camp Fin., LLC*, and related authorities. It would be a travesty of justice for NWTS to face the possibility of remand and continued litigation on a new theory that was not originally pled, briefed, or argued below. The outcome of this case should stand based on what was brought before the trial court.[3]

C. Even if RCW 61.24.030(7)(a) is Placed at Issue, Compliance With the Statute Does Not Depend Exclusively on a Beneficiary Declaration.

The DTA requires a trustee to "have proof that the beneficiary is

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[2] Mr. Blair's Statement of Issues to the Court of Appeals also did not identify any basis for liability against NWTS with respect to the beneficiary declaration. Rather, he stated:

> If *BANA* was merely the custodian of Mr. Blair's Promissory Note, *could it prove* it was the 'owner' of the loan by signing the Beneficiary Declaration, which states that it is an 'actual holder' or has requisite authority....'?

Brief of Appellant at 4 (emphasis changed from original). This issue related to just Bank of America has now transformed into criticizing NWTS' compliance with the DTA and its so-called "standard business practices." Petition for Review at 1 (Issue Presented).

[3] Although the Court of Appeals analyzed RCW 61.24.030(7)(a) despite the issue having not been raised, there was no need for NWTS to seek reconsideration as it prevailed.

the owner of any promissory note or other obligation secured by the deed of trust" before recording a Notice of Trustee's Sale. RCW 61.24.030(7)(a). Where an owner and holder are different – as was the case with Mr. Blair's loan – the statute is ambiguous. *Brown v. Wash. State Dep't of Commerce*, *supra*, at 543.

The statute does not define what "proof" means, but it suggests *one possible means* of accomplishing the requirement is through a declaration averring that "the beneficiary is the actual holder of the promissory note or other obligation." RCW 61.24.030(7)(a); *see also Beaton v. JPMorgan Chase Bank N.A.*, 2013 WL 1282225, *4 (W.D. Wash. Mar. 26, 2013). Absent a declaration, the necessary level of proof, otherwise applicable to civil actions, is "a mere 'preponderance.' " *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 608, 260 P.3d 857 (2011).[4]

Lyons found a declaration's reference to RCW 62A.3-301 was ambiguous, and NWTS could not rely on it; however, NWTS could still show compliance with RCW 61.24.030(7)(a) through other evidence. 181 Wn.2d at 791; *see also Trujillo v. NWTS*, 183 Wn.2d 820, 833, 355 P.3d

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[4] The preponderance standard makes sense because "a deed of trust is subject to all laws relating to mortgages on real property." RCW 61.24.020. Since 1965, lenders can either "sue on the obligation [a civil action], judicially foreclose as a mortgage [also a civil action], or nonjudicially foreclose under the trust deed power of sale." Sullivan, Rights of Washington Junior Lienors in Nonjudicial Foreclosure, 67 Wash. L. Rev. 235 (1992).

1100 (2015) ("[t]his ambiguity indicated that the declaration might be ineffective."). Neither *Lyons* nor *Trujillo* stands for the proposition that simply having an ambiguous beneficiary declaration – or even claiming to have relied on it – automatically satisfies an element of the CPA.

This is because a declaration is *not* a necessary prerequisite to "having proof" of the beneficiary's status before issuing a sale notice. The form of that proof can be accomplished by multiple means besides a declaration. *See, e.g., Lucero v. Cenlar FSB*, 2015 WL 520441, *3 (W.D. Wash. Feb. 9, 2015) ("[t]here is nothing magical or unique about the declaration: the beneficiary may declare that it is the beneficiary as many times as it wants, as long as it retains possession of the original note."); *Singh v. Fed. Nat. Mortg. Ass'n*, 2014 WL 3739389, *6 (W.D. Wash. Jul. 28, 2014) ("RCW 61.24.030(7) does not require a beneficiary declaration, much less that the trustee provide the declaration to a borrower.").[5]

As the Senate Bill Report to ESB 5810 (creating RCW 61.24.030(7)(a)) stated, "the trustee's proof of the beneficiary's ownership of the promissory note *may* be in the form of the beneficiary's declaration.... The trustee *may* rely on this declaration, unless the trustee

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[5] In the Washington Practice Series, Professors Stoebuck and Weaver explain the scope of a trustee's duties in the order they are likely performed; no mention is made of obtaining a beneficiary declaration or conducting some form of investigation into the beneficiary's identity. 18 Wash. Prac., Real Estate § 20.8 (2d ed. 2015).

violated its duty of good faith."[6] Similarly, the House Bill Report to ESB 5810 stated, "the trustee *may* rely on the beneficiary's declaration as evidence of proof, absent a violation of the trustee's duty of good faith."[7] *Accord Arnett v. MERS*, 2014 WL 5111621, *4 (W.D. Wash. Oct. 10, 2014) (it is "nonsensical" to suggest that a trustee's acceptance of a beneficiary declaration is "in itself, a violation of the duty of good faith.").

In this case, whether NWTS obtained a declaration that was later deemed ambiguous is immaterial to adherence with RCW 61.24.030(7)(a), as NWTS did not *exclusively* or *solely* rely on that document alone.

Rather, the record establishes that NWTS possessed alternative evidence that satisfied RCW 61.24.030(7)(a). Critically, for the purpose of summary judgment, Mr. Blair failed to refute any of this documentation. Instead, he chose to contend that only a note "owner" can non-judicially foreclose – a position ultimately repudiated by *Brown*.

First, and perhaps most importantly, Bank of America was truly the beneficiary at all times relevant to the foreclosure. The Court of Appeals recognized this fact, essentially finding that no matter what other information NWTS might have gleaned, "it would have... learned that

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[6] Found at: http://lawfilesext.leg.wa.gov/biennium/2009-10/Pdf/Bill%20Reports/Senate/5810.E%20SBR%20HA%2009.pdf (emphasis added).
[7] Found at http://lawfilesext.leg.wa.gov/biennium/2009-10/Pdf/Bill%20Reports/House/5810.E%20HBR%20APH%2009.pdf (emphasis added).

BoA was the holder of the note indorsed in blank, thus having the proof required by the statute and allowing it to proceed with foreclosure against Mr. Blair's property." Am. Opin. at 20.

This statement is also in accord with federal jurisprudence on the same issue. *See, e.g., Myers v. MERS*, 540 Fed. Appx. 572 (9th Cir. 2013) (holding the note is the "bottom line."). Indeed, under Washington law, it *cannot be unfair or deceptive* to act based on information that is *true*. *Cf. Fisher v. World-Wide Trophy Outfitters, Ltd.*, 15 Wn. App. 742, 551 P.2d 1398 (1976) (promises were deceptive because they did not become true).

Second, the Note itself was payable to Countrywide Bank. CP 539. It is well-known that Bank of America acquired Countrywide's assets. *See, e.g., Brown, supra.* at 521, n. 2 ("Countrywide Bank originated Brown's note but Countywide was later purchased by Bank of America."); *Rose v. ReconTrust Co., N.A.*, 2013 WL 1703335, *1 (E.D. Wash. Apr. 18, 2013) ("Countrywide Home Loans was subsequently acquired by Bank of America, N.A....").

Third, before defaulting, Mr. Blair made his payments to Bank of America, and acknowledged in his Complaint that Bank of America was the loan servicer. CP 4 (Compl., ¶ 1.3). As noted in *Brown*:

> 'Servicer' is not a legal term of art. Homeowners use the word to refer to the bank to which they send mortgage payments because

> they reasonably believe the servicer is the person entitled to enforce the note and because paying the servicer will discharge their obligation. That is true when the servicer holds the note. The inference that a 'servicer' denotes a 'holder' is therefore apparent....

184 Wn.2d at 784 (citation omitted).

Fourth, Bank of America (and its predecessor BAC Home Loans) requested that NWTS commence non-judicial foreclosure on the subject property. CP 583, ¶¶ 4, 8. The referrals came from no one else.

Fifth, Bank of America appointed NWTS as the successor trustee. CP 567. The DTA affords only a beneficiary the right to appoint a new successor trustee to foreclose on a deed of trust. RCW 61.24.010(2).

Sixth, Bank of America supplied a beneficiary declaration to NWTS. Although the *contents* of the declaration have been called into question, it cannot be denied that Bank of America *provided* the document, which is also on its letterhead. CP 562, 570.

Certainly if Mr. Blair pled a violation of RCW 61.24.030(7)(a) in his Complaint, then NWTS would have produced even more "proof" of Bank of America's beneficiary status to ensure a complete record. *See, e.g., Trujillo v. NWTS*, Case No. 13-2-06928-8 (King Co. Supr. Ct.), Dkt. No. 93 (denying Plaintiff's post-remand partial summary judgment motion when NWTS showed other documents establishing beneficiary's identity);

Bucci v. NWTS et al., Case No. 13-2-29758-2 (King Co. Supr. Ct.), Dkt. Nos. 97A, 97B, 97I (challenge to RCW 61.24.030(7) raised; summary judgment granted based on evidence apart from declaration).[8]

Mr. Blair's presumption that NWTS "did not have the proper legal authority to issue the Notice of Trustee's Sale... because it did not have a proper beneficiary declaration" is unfounded. Petition for Review at 12. Mr. Blair falsely assumes that NWTS could not have complied with RCW 61.24.030(7)(a) outside of exclusive reliance on a beneficiary declaration, but the existing, unchallenged, appellate record shows he is wrong.

D. Even if a Beneficiary Declaration was Hypothetically the Sole Document in NWTS' Possession, Reliance on it Would Have Been a Reasonable Interpretation of Law.

Prior to *Lyons* in 2014 (again, after NWTS' summary judgment), there was no inkling that an appellate decision might someday find the language referencing RCW 62A.3-301 in the beneficiary declaration to be ambiguous. And where there is a change in legal authority, a party is protected from CPA liability under the "reasonable interpretation of existing law" defense. *See* Opin. at 20, n. 1, *citing Leingang v. Pierce Cnty. Med. Bureau, Inc.*, 131 Wn.2d 133, 155, 930 P.2d 288 (1997), *Perry*

[8] *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 249, 178 P.3d 981 (2008) (trial court rulings may be cited as persuasive, although not precedential).

v. Island Sav. & Loan Ass'n, 101 Wn.2d 795, 684 P.2d 1281 (1984).

Mr. Blair incorrectly asserts that *Lyons* rejected the application of this defense when NWTS briefed the issue. Petition for Review at 20. Instead, for whatever reason, this particular argument in *Lyons* was not addressed and the decision was silent concerning cases such as *Leingang*.

Mr. Blair, channeling briefing from the Attorney General, argues the defense is limited "almost exclusively to insurance bad faith cases." Petition for Review at 21. But in *Trujillo*, the Attorney General suggested the Court look directly towards insurance bad faith jurisprudence for guidance and analogized the reasoning of those cases "in the foreclosure context." *Trujillo v. NWTS*, Case No. 90509-6 (Wash. Sup. Ct.), Amicus Brief of Attorney General at 13-15.

As stated above, a beneficiary declaration is *not* the singular method of satisfying RCW 61.24.030(7)(a), and reliance on a declaration does not equate to *per se* non-compliance. But, for the sake of argument, even if the record was devoid of anything else demonstrating NWTS had proof Bank of America was the beneficiary before recording a sale notice, numerous courts upheld the propriety of an "ambiguous" declaration in 2011. *See, e.g., Mickelson v. Chase Home Fin. LLC*, 579 Fed. Appx. 598 (9th Cir. 2014) (declaration contained reference to RCW 62A.3-301); *In re*

Brown, 2013 WL 6511979 (B.A.P. 9th Cir. Dec. 12, 2013); *Bakhchinyan v. Countrywide Bank, N.A., supra.* Mr. Blair's *ex post facto* condemnation of NWTS should not serve as grounds for the acceptance of review.

E. The Mere Existence of a Beneficiary Declaration Did Not Cause Injury to Mr. Blair.

CPA liability requires a causal link between the alleged misrepresentation or deceptive practice and the purported injury. *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 793, 719 P.2d 531 (1986); *see also Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 82, 170 P.3d 10 (2007). If a claimed expense would have been incurred regardless of whether a CPA violation existed, causation is not established. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 64, 204 P.3d 885 (2009).

Mr. Blair seeks reversal of the Court of Appeals' finding that the required element of causation was not demonstrated below. He draws a connection between NWTS' receipt of a beneficiary declaration and the cost of hiring counsel for an initial consultation and transporting her to a hearing. Petition for Review at 7.[9]

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[9] Mr. Blair's expense of obtaining an injunction was not compensable under the CPA. *See, e.g., Demopolis v. Galvin*, 57 Wn. App. 47, 786 P.2d 804 (1990) (litigation expenses are not an "injury" under the CPA); *Thurman v. Wells Fargo Home Mortg.*, 2013 WL 3977622 (W.D. Wash. Aug. 2, 2013).

But as the Ninth Circuit Court of Appeals held concerning a CPA claim in the foreclosure context:

> Plaintiffs' foreclosure was not caused by a violation of the DTA because Guild [the foreclosing entity] was both the note holder and the beneficiary when it initiated foreclosure proceedings, and therefore the 'cause' prong of the CPA is not satisfied.

Bhatti v. Guild Mortg. Co., 2013 WL 6773673, *3 (9th Cir. Dec. 24, 2013); *accord, e.g.*, *Babrauskas v. Paramount Equity Mortg.*, 2013 WL 5743903 (W.D. Wash. Oct. 23, 2013) (plaintiff's failure to meet obligation "is the 'but for' cause of the default" and foreclosure), *McCrorey v. Fed. Nat. Mortg. Ass'n*, 2013 WL 681208 (W.D. Wash. Feb. 25, 2013) (same).

Likewise, Mr. Blair's Petition for Review blissfully ignores that *but for his own default on two separate occasions*, no foreclosure would have occurred and no sale notice would have been recorded. It is Mr. Blair alone, and not Bank of America or NWTS, who remains the root cause of all foreclosure notices issued after he stopped making payments and failed to cure a significant arrearage. *See also* CP 7 (Compl., ¶ 2.2) (Mr. Blair confessed to falling behind on payments to Bank of America).

In fact, Mr. Blair never submitted any evidence in opposition to summary judgment where he specifically testified that the Notice of Trustee's Sale or a beneficiary declaration caused him to incur expenses. Quite the opposite: Mr. Blair stated that he incurred attorneys' fees only

upon realizing that he "was facing foreclosure of my home and that I was not being properly reviewed for a loan modification...." CP 1094, ¶ 2.

The Notice of Default, which came well before the sale notice, undoubtedly informed Mr. Blair of the foreclosure, and NWTS had nothing to do with Bank of America's loan modification review.

Furthermore, Mr. Blair's expenses were wholly independent of the existence of a private declaration that he later discovered *only subsequent to* filing suit. *See* Blair's Motion for Reconsideration to the Court of Appeals at 4 ("The only reason Mr. Blair saw the document was because he initiated litigation related to the foreclosure.").[10] This is not "but for" causation under the CPA. *See Panag*, *supra.* at 64.

As such, the Court of Appeals correctly determined that "Mr. Blair does not aver that NWTS's [assumed] violation of RCW 61.24.030(7)(a) caused him any injury," and "we are unable to locate any facts in the record that support a causal link between NWTS's [assumed] violation of RCW 61.24.030(7)(a) and Mr. Blair's injury." Am. Opin. at 19, 20.

F. NWTS' Receipt of a Beneficiary Declaration Did Not Prejudice Mr. Blair.

Although the Court of Appeals declined to rule on the question of

[10] State law does not require recording a beneficiary declaration or providing a copy to the borrower. *See, e.g., Douglass v. Bank of Am. Corp.*, 2013 WL 2245092 (E.D. Wash. May 21, 2013).

prejudice to Mr. Blair, NWTS believes that consideration of the CPA's causation element implicates whether prejudice occurred. Opin. at 21.

State courts in Washington routinely dismiss CPA claims based on DTA violations where a plaintiff fails to demonstrate that his interests were prejudiced by a material failure to comply with statutory mandates. *See, e.g., Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 154 P.3d 882 (2007); *Podbielancik v. LPP Mortg. Ltd. et al.*, 191 Wn. App. 662, 362 P.3d 1287 (2015); *Amresco Indep. Funding, Inc. v. SPS Props., LLC*, 129 Wn. App. 532, 119 P.3d 884 (2005); *Steward v. Good,* 51 Wn. App. 509, 754 P.2d 150 (1988); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 112, 752 P.2d 385 (1988).

Federal courts likewise follow the general principle that materiality and prejudice are necessary for any DTA-based cause of action. *See, e.g., Bavand v. OneWest Bank*, 587 Fed. Appx. 392 (9th Cir. Oct. 20, 2014); *Cagle v. Abacus Mortg., Inc.*, 2014 WL 4402136, *4 (W.D. Wash. Sept. 5, 2014); *Vawter v. Qual. Loan Serv. Corp. of Wash.*, 2010 WL 5394893, *6 (W.D. Wash. 2010).

All of these courts recognize that while the DTA is strictly construed, it is not a strict-liability statute. Indeed, it would be inapposite to require materiality and prejudice only in a DTA-based claim pursuant to

RCW 61.24.127, yet totally eliminate the same requirement for "DTA violations that could be compensable under the CPA." *Frias, supra.* at 430; *see also Meyer v. U.S. Bank, N.A.*, 2015 WL 3609238, *5 (W.D. Wash. Jun. 9, 2015) ("[t]echincal violations of the DTA do not constitute unfair or deceptive acts or practices actionable under the CPA absent a showing of materiality or prejudice.").

Because Mr. Blair's CPA claim was predicated on purported material non-compliance with the DTA, he needed to prove that he suffered prejudice from NWTS' alleged conduct during the foreclosure.

The record shows that Mr. Blair was not prejudiced when Bank of America gave a beneficiary declaration to NWTS. The Ninth Circuit decision in *Mickelson, supra.*, speaks to the same issue as the one now argued by Mr. Blair; the *Mickelson* Court wrote: "Chase actually held the promissory note during the relevant period. For this reason, even if the Mickelsons were correct that Chase's beneficiary declaration was inadequate under Washington Revised Code § 61.24.030(7)(a), any such failing could not have prejudiced them." 579 Fed. Appx. at 601.

The Court of Appeals was correct to state that "the failure to establish a causal link between a wrongful act and a borrower's injury would have led to similar results in the federal cases." Am. Opin. at 21.

However, Mr. Blair sidesteps the issue of prejudice in his briefing and it bears analysis in determining if the case should proceed.

VII. CONCLUSION

Mr. Blair fails to offer convincing support for why Supreme Court review is warranted in this matter.

Bank of America was the beneficiary of Mr. Blair's loan. The totality of evidence reveals that NWTS had sufficient information consistent with this reality before it recorded the Notice of Trustee's Sale, and if Mr. Blair had actually pled a violation of RCW 61.24.030(7)(a), then even more evidence would have been adduced. Moreover, NWTS did not cause Mr. Blair to incur various investigatory expenses that were unrelated to the existence of a beneficiary declaration. Finally, Mr. Blair suffered no prejudice from the sale notice and any technical defect in Bank of America's declaration.

The Court should decline to accept Mr. Blair's Petition and leave the Court of Appeals' ruling as final.

DATED this 27th day of June, 2016.

RCO LEGAL, P.S.

By: /s/ Joshua S. Schaer
Joshua S. Schaer, WSBA #31491
Attorneys for Respondent NWTS

Declaration of Service

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

2. On June 27, 2016, I caused a copy of the **Answer of Respondent Northwest Trustee Services, Inc. to Petition for Review** to be served to the following in the manner as noted:

Melissa A. Huelsman, Law Offices of Melissa A. Huelsman, P.S. 705 2nd Ave., Ste. 601 Seattle, WA 98104-1726 Attorney for Appellant	[X] US Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile [X] Email: mhuelsman@predatorylendinglaw.com
Matthew Daley Witherspoon Kelley, P.S. 422 W. Riverside Ave., Ste 1100 Spokane, WA 99201 Attorneys for Respondents Bank of America, N.A., Mortgage Electronic Registration Systems, Inc., and Federal Home Loan Mortgage Corporation	[X] US Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile [X] Email: mwd@witherspoonkelley.com

Benjamin Roesch Amy Teng Attorney General of Washington 800 Fifth Ave., Ste. 2000 Seattle, WA 98104 Amicus Curiae for Appellant Blair	[X] US Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile [ ] Email:

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 27th day of June, 2016.

Kristine Stephan, Paralegal

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, June 27, 2016 12:32 PM
To: 'Kristi Stephan'
Cc: mhuelsman@predatorylendinglaw.com; 'mwd@witherspoonkelley.com'; Joshua Schaer
Subject: RE: James Blair v. Northwest Trustee Services Inc., et al. (Petition for Review) / Supreme Court No. 93291-3 / Court of Appeals No. 32816-3-III

Received 6/27/2016.

Supreme Court Clerk's Office

From: Kristi Stephan [mailto:kstephan@rcolegal.com]
Sent: Monday, June 27, 2016 12:00 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: mhuelsman@predatorylendinglaw.com; 'mwd@witherspoonkelley.com' <mwd@witherspoonkelley.com>; Joshua Schaer <jschaer@rcolegal.com>
Subject: James Blair v. Northwest Trustee Services Inc., et al. (Petition for Review) / Supreme Court No. 93291-3 / Court of Appeals No. 32816-3-III

James Blair (Petitioner) v. Northwest Trustee Services, Inc., et al. (Respondents)
Supreme Court No. 93291-3
Court of Appeals Div. III No. 32816-3-III
Filed by: Joshua Schaer
WSBA #31491
425-457-7810
jschaer@rcolegal.com

Please file the attached **Answer of Respondent Northwest Trustee Services, Inc. to Petition for Review.**

If there are any questions, please contact us. Thank you.

Kristi Stephan
Senior Litigation Paralegal

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