No. 31744 – *Jackie Lucas, Janice Lucas, individually and on behalf of all others similarly situated, Jack Overbaugh, Charlotte Overbaugh, Dale Michaelson, Pansy Michaelson, and Angela Kennedy v. Fairbanks Capital Corp., a corporation, R. Vance Golden, III, John Doe and Robert Doe, as trustees*

and

No. 31745 – *Jackie Lucas, Janice Lucas, individually and on behalf of all others similarly situated, Jack Overbaugh, Charlotte Overbaugh, Dale Michaelson, Pansy Michaelson, and Angela Kennedy v. Fairbanks Capital Corp., a corporation, R. Vance Golden, III, John Doe and Robert Doe, as trustees*

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Starcher, J., concurring, in part, and dissenting, in part:

I am in agreement with my colleagues in adopting Syllabus Point 1: a trustee to a deed of trust given as security for a home mortgage loan absolutely owes a fiduciary duty to all of the signatories of the trust deed. This fiduciary duty is not a recent concept, but actually has a centuries-old basis that can be traced back as far as 1876 in West Virginia's common law jurisprudence.[1] As this Court stated:

> No general principles are better settled than, a trustee is the agent of both parties and must consult impartially the interests of each. . . . He is supposed to be the common friend and agent

[1]*See* Syllabus, *Anchor Stove Works v. Gray*, 9 W.Va. 469 (1876) (trustee to a deed of trust must act "in such a way as would promote the interest of all, and not be prejudicial to the rights of either party[.]"). *See also, Machir v. Sehon*, 14 W.Va. 777 (1879) (interpreting the duties of a trustee under the 1870 version of *W.Va. Code*, 38-1-3, the statute interpreted by the majority opinion).

> of both parties impartial and disinterested, whose duty it is to act justly and discretely towards those in interest.

Spencer and Miller v. Lee, 19 W.Va. 179, 187-88 (1881). As Justice Cardozo noted, the fiduciary duty of a trustee carries a responsibility to behave with "[n]ot honesty alone, but the punctilio of an honor the most sensitive."[2]

I dissent, however, to the rest of the opinion. I do so because the questions certified from the circuit court concerned the breadth of a trustee's duties under the common law, but the majority opinion reformulated those questions so as to only construe *W.Va. Code*, 38-1-3. The result is that, while the majority opinion contains numerous scholarly citations to the centuries-old *common law* duties of a trustee, the opinion ignores these citations in reaching its ultimate, and wrong, conclusion: A trustee only has the duties defined by *statute* and no more.

For at least 128 years, this Court has utilized the common law to empower trustees to deeds of trust to "do the right thing." The Court, not the Legislature, required trustees to approach each deed of trust with an open mind and do the fair thing for both the lender and the landowner.

But the majority opinion's holding that trustees can only do those acts contained in *W.Va. Code*, 38-1-3, and no others, overrules centuries of common law, emasculates trustees and makes them virtual automatons working at the sole behest of lenders. Furthermore, *W.Va. Code*, 38-1-3 is a skeletal statute. It has no provisions setting

[2]*Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928).

forth what a creditor has to transmit to the trustee to initiate a foreclosure. It has no verification requirements. It also has no process for the borrower to raise legitimate objections. As the majority opinion correctly notes, "the present statute governing sales under trust deeds . . . may well be inadequate to address the complexities of the modern state of the home loan mortgage industry as it relates to trust deed transactions."

I cannot so blithely turn my back on the common law in favor of a hollow statute which even the majority admits is inadequate.

I.
Deeds of Trust are Historical Developments of Courts through the Common Law Not Legislatures through Statutes

The majority opinion forgets that the concepts of a "trustee" and a "deed of trust" do not have their roots in statutes. Instead, the idea of a trustee was born in ancient courts of equity nearly 500 years ago. But it was not until the 1800s that trustees were routinely involved as impartial, third-party intermediaries in mortgages and deeds of trust. How trustees came to be involved with mortgages and deeds of trust is a complex and tangled history, built upon conflicts between lenders and landowners who used their property as collateral for loans. "Its development in modern times bears the scars of the never-ending struggle between debtor and creditor."[3] But the struggle was borne out, not in legislatures, but in the courtroom.

[3]Lawrence M. Friedman, *A History of American Law* 246 (2d. Ed. 1985).

A trustee is nothing more than a third-party middleman who holds and manages property, which belongs to one person, for the benefit of another person. The trustee mechanism was born half a millennium ago in English courts of equity as a fair and fast mechanism to convey and manage interests in real and personal property, and is a mechanism that remains with us to this day. But the use of the trustee mechanism in the context of loans and mortgage deeds did not begin in America until approximately 200 years ago.

In Middle English times, money systems were weak and credit information was primitive. Laws against usury prohibited lenders from charging interest on loans. Land was a large part of the nation's wealth, and people turned to land as security for loans. To bypass the usury laws and obtain credit, landowners would give lenders a mortgage deed for their land in exchange for a loan. The lender took immediate possession of the debtor's land, and would collect the rents and profits from the land – instead of collecting interest on the loan – until the loan was paid. At some future date established in the mortgage deed the landowner would repay the principal of the loan, the deed would (hopefully) be returned, and the lender would (hopefully) allow the landowner to reenter the land. But not always; unfortunately, many landowners were bilked out of their property by unscrupulous lenders. And, of course, if payment was not made by the maturity date of the loan, then the lender's ownership of the land became absolute.

Inevitably, landowners and lenders hired lawyers and turned to the court system for a remedy. To prevent unfair behavior by lenders, in the sixteenth century courts of equity were asked by landowners to compel lenders to convey the land back to the

landowners. The English courts of Chancery began to recognize what was called the "equity of redemption," and the landowner was allowed, even after the maturity date of the loan, to repay the lender and get his land back.

Over time, lenders began a custom of allowing landowners to retain possession of their mortgaged land until there was a default on the loan. When the landowner defaulted, courts of equity were again asked to respond, and developed the system of equitable foreclosure. The landowner's failure to repay the loan no longer resulted in an automatic forfeiture of their ownership interest in the land to the lender. Instead, the lender would have a right to petition a court for a decree of foreclosure, the granting of which would bar the landowner's right to the equity of redemption. The lender would thereby recoup his investment by taking title and possession of the property if the landowner failed to repay the loan within a time fixed by the court. The equitable foreclosure system was slow but fair: the lender could petition the court to give ownership of the land to the lender to repay the loan, but the landowner would have a chance to remedy the default or explain the default when the lender had not behaved reasonably.

By the end of the seventeenth century, mortgages had essentially evolved into a cumbersome, inefficient mechanism more akin to a lien rather than a deed of an interest in property. Both lenders and landowners suffered. Lenders could not take possession of the land in case of a default without first dispensing with the landowner's right to the equity of redemption by pursuing a decree of foreclosure. Conversely, little by little a custom developed such that lenders would allow landowners to retain possession of their land; the

end result was that lenders could only seize possession of the land during the loan through an action at law for ejectment. If after default a landowner offered to repay the lender the loan amount and was refused, the landowner had to bring a special bill in equity for redemption; unfortunately, the landowner could not assert this equitable right as a defense to an action at law, such as to an action for ejectment brought by the lender.

Furthermore, at the end of the seventeenth century the most common type of foreclosure in England was the "strict foreclosure," whereby the lender, without a sale of the land, was decreed the full owner of the property. As one commentator noted, "[t]he action of strict foreclosure entailed a resort to Chancery proceedings which were notoriously protracted and expensive."[4] Only in limited cases would courts decree that the land be sold at a public auction, and the lender could not bid on the property. In other words, lenders had only two options: either possession and title to the property, or if the court deemed it necessary, the proceeds of the sale of the property to a third party and a claim for the deficiency.

As the English common law was transplanted to the American colonies, it was modified to reflect the needs of settlors for improved, more efficient means of financing

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[4]Robert H. Skilton, "Developments in Mortgage Law and Practice," 17 Temple U.L.Q. 315, 317 (1943). *See also* 4 Kent Commentaries 139 (1st Ed. 1830) ("[T]he expense, trouble, formality and delay of foreclosure by a bill in equity. The vexatious delay which accrues upon foreclosure, arises, not only from the difficulty of making all proper persons parties, but chiefly from the power that Chancery assumes to enlarge the time for redemption on a bill to foreclosure. There are cases in which the time has been enlarged, and the sale postponed, again and again, from six months to six months, to the great annoyance of the mortgagee.")

growth. Mortgages were used in the colonies, but the remedy of foreclosure was modified by the courts to meet domestic needs. As time went on, strict foreclosure was supplanted by foreclosure followed by a judicial or public sale, and by the 1830s strict foreclosure had virtually vanished from the American legal landscape. Further, American courts allowed the lenders to bid on the property at the judicially-ordered public auction, and to later make a claim against the debtor for the difference between the auction sale price and the balance of the debt due.

Lenders, however, still wanted to bypass the delays and costs associated with lawsuits to force a judicial sale of mortgaged property. Lenders took the next step in history, and with the help of lawyers added contractual language to mortgages by which landowners waived their equitable rights of redemption and right to a judicially-ordered sale of the land. When signed by the landowner, the language expressly gave the lender the authority to seize and privately sell the property without court action, and without the equity of redemption. Unfortunately, this private sale process, which is still used in many states today, is open to many abuses:

> [F]or example, the mortgagee may not make a good faith effort to realize any more than the amount of the debt, despite the fact that the mortgagor has considerable equity in the property; the mortgagee may foreclose through the power of sale for only a technical default, which a court might overlook; the mortgagee may foreclose because of factual errors, having failed to secure the proof of default that would be necessary in judicial foreclosure; the mortgagee may sell the property after a default that is the product of fraudulent or near-usurious terms in the mortgage contract, terms that a court would refuse to enforce in judicial foreclosure. The efficiency and savings that are

> possible through the use of power of sale foreclosures are, therefore, at least partially offset by the potential for injustice that seems to be inherent in nonjudicial remedies.

Comment, "Power of Sale Foreclosure after *Fuentes*," 40 U.Chi.L.Rev. 206, 212 (1974).

The common-law private power of sale mechanism predates the *United States Constitution*, as do its abuses. But it was not until the early 1800s that the mechanism became popular in the United States. With this growing popularity, states began enacting statutes establishing conditions of advertisement and sale that had to be met before the private sale power could be validly exercised. Many courts, however, viewed private powers of sale "with jealously, as an invasion of their sphere"[5] and began imposing limits. For example, courts concluded that lenders were not permitted to buy the property at the sale.

Some southern states – including our mother state of Virginia – took an even more extreme view, and concluded outright that a private power of sale given to a lender was wholly invalid. *See Taylor's Adm'r v. Chowning*, 3 Leigh 654, 30 Va. 654 (Va. 1832) ("[I]f a mortgage be made to secure a debt, and power be thereby given to the mortgagee to sell the subject to pay the debt, the mortgagee cannot execute the power, the character of creditor and trustee, in such case, being incompatible[.]"). These courts held that no one could grant a private power of sale to a mortgagee-lender.

It was precisely because of the confluence of these historical events that lenders and landowners, through courts of equity, merged the common-law concepts of trustees,

[5]Skilton, 17 Temple U.L.Q. at 324.

mortgages and private powers of sale, and thereby created deeds of trust as a fair tool to secure debts. A trustee to a deed of trust has, therefore, rights and duties based upon centuries of precedent in equity. Such a trustee is an intermediary who must act to protect both the lender's investment and the landowner's opportunity to remedy a default when the lender is behaving unreasonably or usuriously.

I concede that my summary of several centuries of common law is exceptionally brief, but this history teaches us two principles that are relevant to the instant case but that were quickly forgotten by the majority opinion: this "mortgage" system involving trustees developed over the years primarily because of abuses by lenders; and the evolution occurred in courts of equity, not through legislative action.

II.
The Majority Opinion Ignores the Common Law

What bothers me about the majority opinion is that it gives lip service to common-law precedents, without understanding or acknowledging their historical context. The majority opinion makes numerous scholarly references to the fiduciary duties of trustees in a deed of trust from West Virginia's common law. Citing cases from as far back as 1893, the majority opinion notes that a trustee must "look to the rights and interests of the trust-debtor, as well as to those of the trust-creditor, in-as-much as he is the agent of both parties,

and bound to act impartially, between them."[6] The majority opinion goes on to dismiss as "mere dicta" this Court's suggestion in 1916 that a trustee is "required" to take certain actions to protect the rights of one party to a deed of trust.[7] Instead, the majority opinion opts to note a case from 1893 in suggesting that a trustee "may and ought of his own motion" act to protect a party.[8]

But the majority opinion's bookish excursion into the common law has nothing to do with the majority opinion's final holding. The majority opinion states that because "we find nothing in the language of W.Va. Code § 38-1-3 to suggest that a trustee has a duty to consider objections to the foreclosure sale,"[9] then a trustee can and must ignore a party's objections and proceed with a sale of the property. In the eyes of the majority opinion, a trustee is powerless to consider a party's legitimate objections. In other words, if the duty to consider an objection isn't set out in a statute, then there is no duty. Forget five centuries of application of the common law to facts; the majority opinion says that because the Legislature has spoken on this topic, the common law has ceased to exist.

The majority opinion is, therefore, a classic example of "dual personalities." On the one hand, quoting the common law, it says trustees "may and ought" to do things to

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[6]Syllabus Point 7, *Hartman v. Evans*, 38 W.Va. 669, 18 S.E. 810 (1893).

[7]*See* ___ W.Va. at ___, ___ S.E.2d at ___ (Slip Op. at 15) *citing Copelan v. Sohn*, 75 W.Va. 83, 82 S.E. 1016 (1916).

[8]*See* ___ W.Va. at ___, ___ S.E.2d at ___ (Slip Op. at 17), *citing Hartman v. Evans*, 38 W.Va. 669, 679, 18 S.E. 810, 814 (1893).

[9]___ W.Va. at ___, ___ S.E.2d at ___ (Slip Op. at 18).

remove impediments to a fair sale. On the other hand, it says trustees don't have to remove impediments to a fair sale because the statute doesn't explicitly give them the power to do so. If practitioners of the law come away from the majority opinion confused about the true responsibilities of a trustee, I wouldn't blame them.

I have read the statute at hand, *W.Va. Code*, 38-1-3, and common-law cases interpreting that statute stretching back to 1879. I have far more faith in the sensibilities of trustees than the majority opinion, and believe this Court has amply set forth the powers and duties of trustees in the deed of trust context, in general, and in the context of *W.Va. Code*, 38-1-3, in particular. Put simply, I do not believe that *W.Va. Code*, 38-1-3 obliterated the common law responsibilities of a trustee to ensure that a foreclosure sale is conducted properly and fairly, for both the lender and the landowner.

W.Va. Code, 38-1-3, parsed down into its constituent parts, says this:

1. The trustee in any trust deed given as security by a grantor,
2. Shall:
    A. Whenever required by any creditor secured by the deed,
    AND
    B. After the debt due to such creditor:
        (i). Shall have become payable by the grantor and
        (ii) Default shall have been made by the grantor
            (a) in the payment thereof, or
            (b) any part thereof,
    AND
    C. If all other conditions precedent to sale by the trustee, as expressed in the trust deed, shall have happened,
3. Sell the property conveyed by the deed, or so much thereof as may be necessary, at public auction, having first given notice of such sale.

The majority opinion gives the statute a minimalist construction, construing it to read "the trustee shall, whenever required by any creditor, sell the property conveyed by the deed" and leaves it at that. Unlike the majority opinion, when I read this statute, I see that it carries a lot of hidden baggage for a trustee. The statute doesn't just say the property has to be sold the moment a creditor demands a sale; it also says that, before there is a sale, there must be evidence that (a) the debt to the creditor is payable, and (b) the debtor has made a default in payment, in whole or in part. The statute also doesn't say that the entire property must be sold; it says the trustee must sell "so much thereof as may be necessary," which tells me that the trustee must ascertain how much is owed by the debtor and whether the property can be sold off in smaller parcels.

Now, what should happen if a trustee knows that a creditor is pretty sleazy and "loose with the truth" when it says a debtor is in default in paying a mortgage,[10] or a debtor notifies the trustee that the debt has been satisfied, or notifies the trustee that there has been no default in payment? The majority opinion acts like this is a question of first impression under *W.Va. Code*, 38-1-3, and finds that the trustee has one duty: sell the property, regardless of the facts. If the ejected landowner has a problem with the sale, they can file a lawsuit to set aside the sale or stop the sale.

However, this is not question of first impression. The Court examined just such a situation in *Machir v. Sehon*, 14 W.Va. 777 (1879). A landowner, Joseph S. Machir,

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[10]The brief of the Lucases intimates quite strongly that Fairbanks Capital is about as sleazy as they come in the mortgage lending world.

essentially borrowed $1,875.00 in 1868, payable within two years without interest, from William H. Machir, and secured the debt with a deed of trust to land in Mason County. Eight years later, in 1876, William demanded that the trustee sell the land because the debt had never been repaid. The landowner (actually, his wife because Joseph had died) insisted that the debt had been fully paid off and discharged. Sitting between the two parties was the trustee. He refused William's command that the land be sold, and demanded that William produce documentation showing that the debt had not been paid. William pointed to the deed of trust as evidence of the debt. The trustee, unsure as to the existence of a debt, again refused to sell the land.

William then went to circuit court and sought an order to remove the trustee because of his refusal to act. The circuit court – like the majority opinion in the instant case – found that the trustee had no choice but to sell the property upon the demand of a creditor. The circuit court therefore removed the trustee from his position, and another person was appointed to sell the property. On appeal, however, the circuit court was reversed and the trustee was reinstated.

This Court began its opinion by looking to the common law of trusts, and found that a trustee in a deed of trust must act "as the agent of all parties in such a way as would promote the interests of all, and not be prejudicial to the rights of either party[.]"[11] When a trustee to a deed of trust encounters an issue that interferes with the fair administration of the

[11]*Machir*, 14 W.Va. at 783, *quoting* Syllabus, *Anchor Stove Works v. Gray*, 9 W.Va. 469 (1876).

trust – such that the rights of either party will be prejudiced – then at common law the trustee is empowered to do whatever it takes to ensure a fair outcome. As the Court stated,

> A trustee in a deed of trust is the agent for both parties, and bound to act impartially between them; nor ought he to permit the urgency of the creditor to force the sale under circumstances injurious to the debtor at an inadequate price. He is 'bound to bring the estate to the hammer,' as has been said by Lord Eldon, 'under every possible advantage to his *cestui que trust*,' and he should use all reasonable diligence to obtain the best price. He may and ought of his own motion, to apply to a court of equity to remove impediments to a fair execution of his trust; to remove any cloud hanging over the title; *and to adjust accounts if necessary, in order to ascertain the actual debts which ought to be raised by the sale or the amount of prior encumbrances*. And he will be justified in delaying for these preliminary purposes the sale of the property, until such resort may be had to a court of equity. If he should fail however to do this, the party injured by his default has an unquestionable right to do it; whether such party be the creditor secured by the deed, or a subsequent incumbrancer or the debtor himself or his assigns.

14 W.Va. at 783 (emphasis in original) (with citations omitted). In other words, at common law a trustee to a deed of trust has the power to delay selling the property, and to consider the objections of a party (including objections regarding the actual amount of the debt due).

Like the instant case, the Court in *Machir v. Sehon* was asked to take the next step and determine the effect that *W.Va. Code*, 38-1-3 had upon these common-law duties.[12]

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[12]The Court noted that on February 28, 1870, the Legislature had amended and reenacted section 6, chapter 72 of the Code of West Virginia to read as follows:

> 6. The trustee in any such deed [of trust], except so far as may be therein otherwise provided, shall, whenever required by any creditor secured or any surety indemnified by the deed, or the personal representative of any such creditor or surety, after the

(continued...)

Unlike the instant case, the Court found that *W.Va. Code*, 38-1-3 merely set out a general rule for trustees to a deed of trust. The Court found that the statute acted in *conjunction* with the common law, not as a *replacement* for the common law. The Court said:

> The object of this [] section seems to be to provide a general rule for the government of trustees, except where it is otherwise provided in the deed of trust. From this [] section I think it may be fairly deduced: 1st. That the trustee should not sell unless default be made in payment; 2d. If the debt secured has been paid, he should not sell.
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> . . . And if the debt has not been paid in full, but it is necessary that there should be an adjustment of accounts in order to ascertain the actual debt which ought to be raised by the sale, or the amount of prior incumberances [sic], or where the creditor named in the deed of trust has assigned the debt secured, or part thereof, and the debt or part thereof has been paid to the assignee by the debtor and there is controversy as to such assignment and the validity of such payment under such circumstances as to render it doubtful whether the debt has in fact been properly paid in whole or part to such assignee, and who is entitled to the debt, the trustee ought not proceed to sell, until these matters are adjudicated and settled; and he is justifiable in delaying a sale for this preliminary purpose.

14 W.Va. at 785-86. The Court then went on to make clear that the statute preserves a trustee's common-law fiduciary discretion to do what is right by all parties. This Court found, in 1879, that neither the common law nor *W.Va. Code*, 38-1-3 mandates that a trustee

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[12](...continued)

> debt due to such creditor, or for which such surety may be liable, shall have become payable and default shall have been made in the payment thereof or any part thereof by the grantor, sell the property conveyed by the deed, or so much thereof as may be necessary, at public auction for cash, after having given reasonable notice of the time and place of sale. . . .

apply to a court for a declaratory judgment every time a creditor or a debtor raises an objection to a foreclosure. Instead, under the common law and the statute, the trustee must do what the trustee sees is necessary to fairly execute the trust.

> I do not mean to say, that it is the absolute duty of the trustee of his own motion to apply to a court of equity in all such cases to remove such impediments to a fair execution of his trust; for in some cases the party, who may have or claim to have an interest in the subject of the trust and its execution by a sale thereunder, and who demands a sale to be made by the trustee, may be insolvent, or the demand of sale by such person may be made simply for frivolous and vexatious purposes without any real propriety for a sale to be made. What I do mean to say is, that where such impediments exist to a fair execution of the trust, the trustee ought not to proceed to sell the property, until such impediments are removed, or he is authorized so to do by a court of equity.

14 W.Va. at 786-87.

The majority opinion holds that a trustee to a deed of trust not only has no duty, but even has no right, to consider legitimate objections by a debtor/homeowner to a foreclosure sale, because that duty is not included in *W.Va. Code*, 38-1-3. Instead, the majority opinion holds that only the debtor homeowner has a right "to seek an injunction or to file an action to have the foreclosure sale set aside."[13] That holding is absolutely contrary to the common law, to the language of *W.Va. Code*, 38-1-3, and this Court's study of the statute in 1879 in *Machir v. Sehon*.

[13] ___ W.Va. at ___, ___ S.E.2d at ___ (Slip Op. at 19-20).

I firmly believe that under the common law, even after the enactment of *W.Va. Code*, 38-1-3, trustees have the right and duty to consider the legitimate objections of the parties to the trust, and to make inquiry where necessary. By enacting *W.Va. Code*, 38-1-3, the Legislature intended to supplement, not supplant, the common law, as this Court has made clear since 1879.

I therefore dissent to the majority opinion's reformulation of the certified questions. By reformulating the questions to only discuss *W.Va. Code*, 38-1-3, the majority opinion has failed to inform trustees of their rights and duties under a deed of trust.

Furthermore, I am authorized to state that Chief Justice Albright joins me in this separate opinion.