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NO. 1018932

**SUPREME COURT
OF THE STATE OF WASHINGTON**

21st MORTGAGE CORPORATION,
Plaintiff / Cross-Appellant / Respondent,

v.

DUNCAN K. ROBERTSON,
Defendant / Third Party Plaintiff / Appellant / Cross-
Respondent,

v.

OCWEN LOAN SERVICING, LLC,
Third Party Defendant / Respondent.

**OCWEN LOAN SERVICING, LLC'S
ANSWER TO PETITION FOR REVIEW**

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I.

INTRODUCTION

The Court should deny Duncan K. Robertson's ("Robertson's") petition for review for three independently sufficient reasons.

1. Robertson's petition seeks review of issues that were not properly preserved below and are not of substantial public interest due to the unusual way the parties have framed their arguments.

This is Robertson's second appeal in this case. On his first appeal, the Court of Appeals reversed a summary judgment in favor of plaintiff 21st Mortgage Corporation ("21st"), finding triable issues of fact on only narrow issues which Robertson has now abandoned.

Instead, Robertson asks this Court to hold that endorsements on an allonge are ineffective unless the allonge is affixed to the note and hence that 21st lacked standing unless the allonges were affixed to its note before it filed this suit. Those issues were not within the scope of the limited remand after Robertson's first appeal and so cannot properly be raised on this appeal.

Furthermore, those issues are not of substantial public interest because ordinarily a party in physical possession of a note is entitled to enforce it—and thus has standing to sue for judicial foreclosure of an accompanying deed of trust—regardless of the validity or invalidity of any endorsements.

Whether and when allonges with endorsements were affixed to the note is significant in this case only because of the way the parties addressed that issue below. Because the issues are unlikely to arise under the same circumstances in other cases, those issues are not worthy of this Court's review.

Robertson's third issue is even more tightly bound up in the peculiar facts of this case, making its resolution even less suitable for this Court's review.

2. This case is a poor vehicle for deciding the issues the petition raises. Review is constrained by a bankruptcy court order confirming sale of the note and by the Court of Appeals' rulings on the prior appeal in this case, which are law of this case. Also, Robertson is a poor champion of homeowner-borrowers, whose rights he invokes. He is not a borrower but rather a junior secured lender who claimed to own the property by means of

what the trial court found to be an invalid nonjudicial foreclosure.

3. The petition's three issues relate solely to the judgment in 21st's favor on its complaint for judicial foreclosure, not to the dismissal of Robertson's third-party claims against Ocwen Loan Servicing LLC ("Ocwen"). Even if one or more of Robertson's issues were review-worthy, this Court should not review the portion of the Court of Appeals' opinion affirming the judgment in Ocwen's favor.

For each of these reasons, the Court should deny Robertson's petition.

II.

STATEMENT OF THE CASE

There are two distinct parts to this case. The first involved 21st's judicial foreclosure claim against Robertson and his affirmative defenses.

The second part of the case involved Robertson's counter-claims against 21st and third-party claims against Ocwen, which had briefly serviced the loan before transferring servicing to 21st in February 2014.

**A. Facts Relating To 21st's Claims
And Robertson's Defenses**

In November 1999, Linda Nicholls borrowed \$100,000 from Old Kent Mortgage Company ("Old Kent"), signing a promissory note and a deed of trust encumbering a property on 4th Avenue in Seattle (the "First Priority Loan"). CP 2-4, 9, 33.

Through a series of transfers, the First Priority Loan ended up in the hands of Residential Funding Company, LLC ("RFC") which thereafter declared bankruptcy. CP 5529. In November 2012, the bankruptcy court approved a sale of some RFC assets, including the First Priority Loan, to Berkshire Hathaway, Inc. CP 5529. Berkshire transferred the loan to the Knoxville 2012 Trust. Christiana Trust, a division of Wilmington Savings Fund Society, FSB, is the trustee of that trust. 21st is its master servicer and has serviced the First Priority Loan since 2014. RP 329-339.

In 2006, Nicholls borrowed \$82,000 from Robertson, signing a second priority deed of trust encumbering the same property (the "Second Priority Loan"). Nicholls defaulted on the Second Priority Loan. A notice of trustee's sale was recorded on January 9, 2008, which set the sale date for April 11, 2008.

Robertson purportedly bought the property at the foreclosure sale on September 26, 2008. CP 53.

Nicholls also defaulted on the First Priority Loan. 21st filed a complaint for judicial foreclosure in July 2014. *21st Mortg. Corp. v. Robertson*, No. 75262-6-I, 2017 Wash. App. LEXIS 2471, at *3 (Ct. App. Oct. 30, 2017) (“*Robertson I*”). Nicholls did not answer the complaint. CP 798. Robertson did, asserting numerous affirmative defenses. CP 39-87. In addition, Robertson alleged 11 affirmative claims which were counter-claims against 21st and third-party claims against various other entities, including Ocwen. CP 71-87.

After the trial court stayed Robertson’s counterclaims and third-party claims, CP 779, Robertson and 21st filed cross-motions for summary judgment on the complaint and affirmative defenses, CP 797.

In March 2016, the trial court granted 21st summary judgment, denying Robertson’s cross-motion, striking his affirmative defenses, and finding that his 2008 nonjudicial foreclosure sale was invalid. CP 797-800; Pet., 2.

At Robertson’s request, the summary judgment was certified under CR 54(b). Robertson appealed. *Robertson I*, 2017 Wash. App. LEXIS 2471. The Court of Appeals reversed in part. It held that James Kelley’s “expert” report and affidavit raised triable issues of fact as to whether 21st held Nicholls’ original note or only a copy of that note and its allonges. *Id.*, at *6-9 ¶¶ 13, 15, 17; *21st Mortg. Corp. v. Nicholls*, No. 83347-2-I, ___ Wash. App. 2d ___, 525 P.3d 962, 966, ¶ 10, 2023 Wash. App. LEXIS 473, at *5, ¶ 10 (Ct. App. Mar. 13, 2023) (“*Robertson II*”).

The Court of Appeals expressly declined to decide if the trial court had erred in holding Robertson’s 2008 nonjudicial foreclosure sale invalid. *Robertson I*, 2017 Wash. App. LEXIS 2471 at *10, ¶ 19; *Robertson II*, at 525 P.3d at pp. 966, ¶ 11; 2023 Wash. App. LEXIS 473, at *5-6, ¶ 11, *40, ¶ 97. And it affirmed the trial court’s striking all of Robertson’s affirmative defenses other than the one challenging 21st’s standing on the ground it supposedly did not hold the original Nicholls note. *Robertson I*, 2017 Wash. App. LEXIS 2471 at 10-12, ¶¶ 20-24; *Robertson II*, at 525 P.3d at pp. 966, ¶ 12. .

After remand, 21st moved for partial summary judgment on Robertson's counterclaims. CP 5493. Initially the trial court granted the motion except as to a counterclaim for outrage. CP 2151. On the parties' cross-motions for reconsideration, the trial court granted summary judgment on that counterclaim as well. CP 2178, 2256, 2260-66; *Robertson II*, 525 P.3d at 966, ¶ 13.

In the run-up to the jury trial of Robertson's challenge to 21st's standing, 21st successfully moved to exclude James Kelley's testimony. *Robertson II*, 525 P.3d at 967, ¶ 18. At the trial's end, the jury found that 21st was in possession of the original Nicholls note and the original allonges, but that the allonges were not affixed to the note on the date 21st filed its complaint. CP 3383-84; *Robertson II*, 525 P.3d at 967, ¶ 18. The trial court entered judgment for Robertson.

Both parties appealed. 21st claimed judgment should have been entered in its favor as it made no legal difference whether the allonges were affixed to the Nicholls note on the date 21st filed its complaint. Robertson sought a new trial, asserting the

trial court had erred in excluding Kelley's testimony. *Robertson II*, 525 P.3d at 967-68, ¶¶ 19-21.

B. Robertson's Third-Party Claims Against Ocwen

On remand after *Robertson I*, the trial court lifted its stay of Robertson's counterclaims and third-party claims. Ocwen moved for summary judgment on Robertson's third-party claims against it. CP 1243. The trial court initially granted the motion as to all third-party claims other than outrage, but, on reconsideration, granted the motion on that claim as well. CP 2160, 2163, 2263.

On Ocwen's motion, the trial court entered final judgment in Ocwen's favor on October 1, 2020 under CR 54(b). CP 2279. Robertson's initial appeal from that judgment was stayed and later voluntarily dismissed after Robertson filed this appeal following entry of judgment on 21st's complaint. *See Duncan K. Robertson v. Ocwen Loan Servicing, LLC*, No. 82020-6, 9/13/2021 and 11/15/2021 letter rulings.

Robertson's notice of appeal which commenced this appeal sought review of the trial court's orders granting Ocwen's

summary judgment and reconsideration motions as well as the trial court's various rulings in favor of 21st.

III.

REASONS TO DENY REVIEW

A. The Petition Raises No Issue Worthy Of The Court's Review

1. Resolution Of Robertson's First Issue Is Not Of Substantial Public Interest

The Court should deny review of Robertson's first issue as it is not of substantial public interest. Whether endorsements on an allonge are effective only when the allonge is firmly affixed to the note is not an issue likely to arise in many cases, and in even fewer will that issue be outcome-determinative. *See* Pet., 1, 8-17.

The reason is simple. One need not be a "holder" of a promissory note to be entitled to enforce the note.

As Robertson argues, for a person other than the original payee to be a "holder" of a note, the note must be properly endorsed to that person or bearer. RCW 62A.1-201(a)(21)(A). Since the Nicholls note was originally payable to Old Kent, 21st is a "holder" of that note only if it was properly endorsed payable to 21st or to bearer.

However, under RCW 62A.3-301, a party is entitled to enforce the note if it is *either* “(i) the holder of the [note, *or*] (ii) a nonholder in possession of the [note] who has the rights of a holder.”

21st could be a nonholder in possession of the Nicholls note with the rights of a holder—and thus be the party entitled to enforce that note through a judicial foreclosure action—even if the note was not endorsed at all or the endorsements were ineffective—for the reason Robertson champions or for any other reason.

As UCC’s Permanent Editorial Board has explained, “if a holder ... transfers the note to another person, that other person (the transferee) obtains from the holder the right to enforce the note even if the transferee does not become the holder” as does any subsequent transferee of the initial transferee. Permanent Editorial Board of the Uniform Commercial Code, Report: Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes (Nov. 14, 2011), 5-6 (“PEB Rpt.”).¹

¹ The Report is publicly available at <https://www.uniformlaws.org/viewdocument/pebucc->

(Fn. cont’d)

[Thus, if] the payee of a note sells it to an assignee, intending to transfer all of the payee's rights to the note, but delivers the note to the assignee without indorsing it[, t]he assignee will not qualify as a holder (because the note is still payable to the payee) but, because the transaction between the payee and the assignee qualifies as a transfer, the assignee now has all of the payee's rights to enforce the note and thereby qualifies as the person entitled to enforce it. Thus, the failure to obtain the indorsement of the payee does not prevent a person in possession of the note from being the person entitled to enforce it

PEB Rpt., 6.

And, the Permanent Editorial Board provided the following illustration of these principles:

Maker issued a negotiable mortgage note payable to the order of Payee. Payee sold the note to Transferee and gave possession of it to Transferee for the purpose of giving Transferee the right to enforce the note. Payee did not, however, indorse the note. Transferee is not the holder of the note because, while Transferee is in possession of the note, it is payable neither to bearer nor to Transferee. UCC § 1-201(b)(21)(A). Nonetheless, Transferee is a person entitled to enforce the note. This is

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because the note was transferred to Transferee and the transfer vested in Transferee Payee's right to enforce the note. UCC § 3-203(a)-(b). As a result, Transferee is a nonholder in possession of the note with the rights of a holder and, accordingly, a person entitled to enforce the note. UCC § 3-301(ii).

PEB Rpt., 7.

The facts recited in the Court of Appeals' opinion show that the just-quoted illustration would fit this case—if the endorsements on the allonges were ineffective as Robertson claims. The original payee and holder of the Nicholls note, Old Kent, transferred the note to RFC, which transferred the note to 21st. *Robertson II*, 525 P.3d at 965-66, ¶¶ 5-6. Each transfer was clearly intended to give the transferee the right to enforce the Nicholls note. *Id.*; RCW 62A.3-203(a). The ultimate transferee, 21st, was in possession of the note when it filed the complaint in this case. *Robertson II*, 525 P.3d at 972, ¶¶ 50, 51.

Thus, even if the endorsements on the allonges to the Nicholls note were wholly ineffective, as Robertson claims, 21st would still be a nonholder in possession of the Nicholls note with the rights of a holder—hence, the party entitled to enforce the

Nicholls note with standing to sue for judicial foreclosure of the deed of trust securing that obligation.

21st did not argue below that it was a nonholder with the rights of a holder. So that fallback position may not be available to it. But few other noteholders are likely to make that same choice when faced with a similar challenge to their standing to foreclose. When a noteholder does claim, even as a fallback position, to be a nonholder with the rights of a holder, Robertson's issue about affixing allonges will become irrelevant.

For that reason, Robertson's first issue for review is unworthy of this Court's review. The issue is of little public interest. *See* RAP 13.4(4). Its resolution will affect few cases.

2. Resolution Of Robertson's Second Issue Will Not Change The Outcome In Most Cases

Robertson's second issue is whether a party must have standing to sue at the time it files a judicial foreclosure action. Pet., 1, 18-23. The issue is closely linked to his first issue.

Robertson claims that 21st lacked standing when it filed the complaint in this action because the allonges with the endorsements necessary to make 21st a holder of the Nicholls note were not affixed to the note at that time. Pet., 21-22.

This second is not of substantial public interest for the same reason as Robertson's first issue. Robertson's issue about the date of affixing an allonge will be a non-issue in any case in which the noteholder invokes RCW 62A.3-301(ii) and argues it is a nonholder with the rights of a holder.

Robertson does not argue that the person entitled to enforce the note lacks standing. A nonholder with the rights of a holder is entitled to enforce the note. RCW 62A.3-301(ii). Hence, Robertson's date-of-affixing-the-allonge issue will affect only the rare cases involving an unattached allonge and a noteholder that does not invoke RCW 62A.3-301(ii). Accordingly, the issue is not of substantial public interest or suitable for this Court's review. *See* RAP 13.4(4).

3. Robertson's Third Issue Is Too Bound To The Particular Facts Of This Case To Be Of Substantial Public Interest

Robertson's third issue for review concerns whether the trial court erred in holding that the Nicholls note was self-authenticating under ER 902. Pet., 1-2, 23-28. The Court should deny review of this issue as it is too bound up in the particular facts of this case to be of interest to anyone but 21st and Robertson.

Robertson claims that the Nicholls note was not self-authenticating because he had denied the note's authenticity and because *Robertson I* was law of the case holding that he overcame the presumption of authenticity under RCW 62A.3-308(a). Pet., 24-25. In few other cases will this particular concatenation of circumstances arise. So, how the law applies to it is not of substantial public interest. See RAP 13.4(4).

Moreover, Robertson is doubly wrong about *Robertson I* and its effect on the post-remand proceedings. On his first appeal, Robertson claimed that 21st lacked standing because it held only a copy of the Nicholls note, not the original. *Robertson I*, 2017 Wash. App. LEXIS 2471, at *6-7, ¶ 13. He also contended that the allonges were not attached to the Nicholls note and were made by printer and most likely were copies. *Id.*, at *8, ¶ 15. In both respects, *Robertson I* held that Robertson had raised a triable issue of fact by submitting James Kelley's report and affidavit. *Id.*, at *6-9, ¶¶ 13, 15, 17.

By contrast, Robertson does not now claim that 21st holds a copy of the Nicholls note; instead, he asserts that Nicholls' signature on the original note has not been shown to be "authentic

and authorized.” Pet., 24. *Robertson I* did not address that contention. And, the contention is wrong. Under RCW 62A.3-308(a), even when authenticity is denied, “the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature.” *Robertson* has not shown that Nicholls is dead or incompetent.

Also, *Robertson I* did not guarantee *Robertson* a trial on the issue of authenticity of the note because the evidence at trial was substantially different than it had been on the summary judgment motion reviewed in *Robertson I*. See *Southwest Marine Inc. v. Danzig*, 217 F.3d 1128, 1136 n. 8 (9th Cir. 2000) (law of the case doctrine applies unless substantially different evidence was adduced at a later trial); *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967) (same). As stated, *Robertson I* decided that James Kelley’s report and affidavit raised a triable issue of fact. But on remand, before trial, the trial court excluded Kelley’s testimony—an evidentiary ruling that the Court of Appeals later affirmed and *Robertson* does not ask this Court to overturn.

Robertson II, 2023 Wash. App. LEXIS 473, at *26-30, ¶¶ 61-69. Without Kelley’s testimony, Robertson could not and did not raise any issue as to the authenticity of the Nicholls note or the signatures on the note or allonges.

For all of these reasons, the Court should deny review of Robertson’s third issue.

B. This Case Is A Poor Vehicle For Deciding Any Of The Issues Robertson Seeks To Raise

Review should also be denied because this case is a poor vehicle for deciding the issues Robertson raises for review.

Review of issues in this case is complicated by the law-of-the-case effect of the Court of Appeals’ decision in *Robertson I*. Robertson claims that *Robertson I* made a binding determination that he raised a triable issue of fact that only a jury could properly resolve. *See* Pet., 24-25. 21st will argue, as it did below, that *Robertson I* limited the issues on remand, allowing trial only over whether the note it holds and the endorsements to it are “authentic,” and not whether the allonges were affixed to the note. 21st Answering Brief, 30-35.

The bankruptcy court’s order approving the sale to Berkshire of RFC assets, including the First Priority Loan adds

another layer of complexity to the case. The order directs all other government agencies “to accept this Order ... and all other documents and instruments necessary and appropriate to consummate the Sale,” including RFC’s blank endorsement on an allonge to the Nicholls note. Ex. 12, § 7. To address Robertson’s issues for review, the Court would be required to determine whether the bankruptcy court’s order supersedes or modifies the normal operation of the UCC provisions that Robertson relies on.

And then there is the parallel action that was removed to federal court. *See Robertson v. GMAC Mortg. LLC*, 982 F. Supp. 2d 1202 (W.D. Wash. 2013); *Robertson v. GMAC Mortgage, LLC*, 640 Fed. Appx. 609, 610 (9th Cir. 2016). As Robertson has aptly noted: “This case does not come here on a clean slate.” CP 51 ¶ 7.2.

Also, Robertson is a poor champion of homeowner-borrowers, whose rights he invokes. He is not a borrower but rather a junior secured lender. The trial court found he had held an invalid nonjudicial foreclosure under the Second Priority Loan. *See Robertson I*, 2017 Wash. App. LEXIS 2471, at *2 ¶ 3, 9-10 ¶¶ 18-19. On this appeal, the Court of Appeals confirmed that

finding, stating “Robertson is not the record owner of the property.” *Robertson II*, 2023 Wash. App. LEXIS 473, at *40, ¶ 97. Robertson’s petition does not challenge that conclusion, though it incorrectly asserts that he is the “beneficial owner of the property.” Pet., 2.

If non-affixed allonges were really a sufficiently frequent problem to be review-worthy, the Court would soon have another opportunity to address the issues raised by Robertson’s petition in a less procedurally complicated case that is brought by homeowner/borrower. Robertson suggests no reason why the Court should rush to decide his issues in this case rather than await a more suitable vehicle for addressing them.

**C. Robertson’s Petition Raises Issues Only
With Respect To 21st’s Claims, Not
Robertson’s Third-Party Claims Against Ocwen**

Each of the issues that Robertson asks the Court to review relate solely to 21st’s complaint and its right to judicially foreclose Nicholls’ deed of trust.

Ocwen is not a party to that part of this case, being neither the plaintiff nor one of the defendants in the judicial foreclosure complaint. *See* CP 1-2. Instead, Ocwen was roped into this

action only by Robertson's naming it as a third-party defendant in his answer, counterclaims and third-party complaint solely because during the 18 months it acted as servicer of the Nicholls First Priority Loan, Ocwen signed an Appointment of Successor Trustee. CP 39, 49-50.

The Court of Appeals affirmed the judgment dismissing Robertson's counterclaims and third-party claims. *Robertson II*, 2023 Wash. App. LEXIS 473, at *35-40, ¶¶ 82-97. The petition raises no issue regarding that portion of the Court of Appeals' opinion.

Accordingly, if the Court is inclined to grant Robertson's petition, it should limit its review to the portion of the case concerning 21st's complaint and Robertson's defenses to that complaint, leaving unreviewed the portion of the case concerning Robertson's counterclaims and third-party claims. As Ocwen is not a party to the complaint, it should not be required to participate as a party to any review the Court may grant on Robertson's petition. And whatever the outcome on any such review, the Court should leave the Court of Appeals' affirmance of the judg-

ment dismissing Robertson's counterclaims and third-party claims undisturbed.

IV.

CONCLUSION

For the foregoing reasons, the Court should deny Robertson's petition for review.

Dated: May 12, 2023.

/s/ Douglas C. Stastny

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CERTIFICATE OF WORD COUNT

Pursuant to [RAP 18.17](#), I certify under penalty of perjury that the word count of **OCWEN LOAN SERVICING, LLC'S ANSWER TO PETITION FOR REVIEW** is 3,755 (less than 5,000), in Times New Roman 14-point font. This certificate was prepared in reliance on the word-count function of the word processing system (Microsoft Word) used to prepare the document. I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 12, 2023.

/s/ Douglas C. Stastny
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Severson & Werson
Attorney for Respondent
Ocwen Loan Servicing, LLC

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 595 Market Street, Suite 2600, San Francisco, CA 94105.

On May 12, 2023, I served true copies of the following document(s): **OCWEN LOAN SERVICING, LLC'S ANSWER TO PETITION FOR REVIEW** on the interested parties in this action as follows:

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

Executed on May 12, 2023, at Palo Alto, California.



Erica L. Wheelock

May 12, 2023 - 10:08 AM

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