Supreme Court No. 90353-1

Court of Appeals Division I No. 70140-1

U.S. Bank National Association, as Trustee of the Banc of America Funding 2007-D

Respondents

v.

Blair La Mothe,

Petitioner

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Jeffrey Ramsdell)

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

This is a straightforward case, where the court granted the noteholder a decree of judicial foreclosure after a bench trial. The complicating factor has been the borrower on appeal raised new claims that had not been preserved, that were inconsistent with the record, and that generally lacked any merit.

This Court should deny the petition to review the unpublished decision affirming the decree of judicial foreclosure against petitioner Blair La Mothe and in favor of plaintiff/respondent U.S. Bank National Association as Trustee for a loan trust (known as the Banc of America Funding 2007-D) (U.S. Bank). The case is not appropriate the vehicle to clarify or test the scope of RAP 2.5(a), which is entitled Errors Raised for the First Time on Review. Moreover, the new statutory standing claim (which was raised for the first time on review) cannot alter the judgment on the merits in this case.

COUNTERSTATEMENT OF THE CASE

A. After a bench trial, the Court granted judicial foreclosure.

The U.S Bank sued La Mothe to enforce a secured loan, reform the deed of trust, and judicially foreclosed against investment property. La Mothe had not made a payment since October 2009 – four years ago.[1]

At trial, experienced foreclosure counsel (David Leen) represented La Mothe.[2] At trial before Judge Joan Dubuque, La Mothe stipulated to the reformation of the deed of trust's legal description.[3] La Mothe acknowledged borrowing the money and defaulting on his obligation in 2009.[4] He further acknowledged that U.S. Bank was entitled to collect on the loan, and the endorsed note and assignment were evidence in the bench trial.[5]

After admitting into evidence the endorsed note and the recorded assignment of the deed of trust and hearing the arguments of counsel, the court entered findings and conclusions that U.S Bank was the real party in interest and granted judicial foreclosure. [6]

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[1] RP at 72:18-73:2; *id.* at 70:5-13.
[2] CP 253-54.
[3] CP 75 (stipulation); CP 8:6-9:3 (allegations in the complaint).
[4] RP 120:17-25.
[5] Decision at 2, 5 n. 5.
[6] CP 341-53; RP (March 1, 2013) 1-11 (La Mothe timely appealed); CP 355-75.

B. The Court of Appeals rejected new issues raised for the first time on appeal and affirmed.

On appeal, the borrower hired new counsel who raised three issues: (1) U.S. Bank was not the real party in interest, (2) the trial court improperly admitted the note as a trial exhibit, and (3) U.S. Bank lacked standing to seek foreclosure.[7] But the Court of Appeals affirmed on each of three issues, because the record established that (1) La Mothe had conceded that U.S. Bank was the real party in interest, (2) La Mothe failed to object to the admission of the note at trial, and (3) La Mothe failed preserve the standing argument at trial.[8]

During oral argument, appellate counsel withdrew the real party in interest issue, conceding La Mothe raised the opposite real party in interest theory at trial and had not challenged a factual finding that the correct party was before the court.[9] After making that concession, La Mothe's remaining issue was if the bank lacked standing. La Mothe argued the lack of standing could be raised even on appeal, but the Court of Appeals "was not persuaded by this jurisdiction claim" and ruled the argument conflicted with controlling authority that lack of standing was not lack of subject matter jurisdiction.[10]

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[7] Decision at 1.
[8] *Id.*
[9] *Id.* at 5
[10] Decision at 3-4.

C. The Court of Appeals denied the reconsideration motion that raised more new issues.

La Mothe moved for reconsideration, argued his lack of standing claim raised subject matter jurisdiction and raised a statute of frauds provision that had not been briefed.[11] La Mothe contended the trial court "committed reversible error in not dismissing the Underlying Amended Complaint because Respondent [U.S. Bank] . . . lacked standing to seek a judicial foreclosure."[12]

In reply, U.S. Bank observed that La Mothe's brief violated RAP 10.3 by failing to identify the part of record where he had moved for dismissal.[13] The fundamental problem was La Mothe never moved for dismissal; he did not even plead standing as a defense.[14] U.S. Bank also brought to the court's attention how: "La Mothe filed a trial brief containing the cursory statement that 'Plaintiff lacks standing or authority to foreclose.'"[15] U.S. Bank then explained how La Mothe abandoned any standing theory at trial:

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[11] Mot. for Recons. at 11; *id.* at 16-17 (raising RCW 64.04.010 (part of the statute of frauds). The statute of frauds is an affirmative defense listed in CR 8(c). La Mothe did not assert the statute of frauds among his affirmative defenses or at trial. CP 88-89. He waived that defense. Additionally, he did not explain how the defense applied to this case.

[12] Opening Br. at 1.

[13] Br. of Resp't at 21. Br. of Resp't at 21 (citing Dennis v. Heggen, 35 Wn. App. 432, 434, 667 P.2d 131 (1983) (granting 12(b)(6) dismissal on the basis of lack of real party-in-interest status resulting from assignment)).

[14] CP 88-89.

[15] Br. of Resp't at 22 (citing CP 194:13-14).

> The trial transcript does not mention the word "standing" except in the context that one attorney was "standing up." In contrast, during closing, La Mothe argued that U.S. Bank was the proper party. During closing, he never argued that U.S. Bank lacked standing. Washington courts have declined to consider standing when a party has failed to raise it below. Here, La Mothe waived any standing defense by failing to pursue it at trial. Raising the new defense on appeal prejudices U.S. Bank, by depriving it of presenting additional evidence and responsive arguments below.[16]

The trial brief framed the cursory lack-of-standing legal conclusion in terms of a factual issue that was more akin to the issue of the real-party-in-interest status: "there is no evidence that Plaintiff has possession of the Note ..."[17] But the trial court decided that factual issue against La Mothe.[18] That issue became a verity on appeal, when La Mothe failed to assign error to the trial court's findings and conclusions that the note was in evidence and was endorsed to U.S. Bank, U.S. Bank was the assignee of the mortgage, and the correct party in interest was before the court.[19] Bolstering the record against La Mothe were his trial counsel's and his own admissions that U.S. Bank was the real party in interest entitled to collect on the note.[20]

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[16] Id. at 22-23.
[17] CP 190:21-191:2 (Trial Br. § Introduction); CP 194:13-14 (§ Conclusion stating "Plaintiff lacks standing or authority to foreclose upon the property . . .").
[18] CP 366 (Finding G).
[19] Decision at 2, 5 n. 6; CP 366-67.
[20] Decision at 5 n. 5.

On appeal, the reconsideration motion argued that RCW 64.04.010 should be considered. But La Mothe had failed to reference the statute in any pleading until he moved for reconsideration.[21] U.S. Bank observed that the new argument was so undeveloped that it does not warrant consideration. The new argument appeared to be that RCW 64.04.010 (the statute of frauds for real estate and trusts) somehow imposes a standing requirement on the plaintiff trust arising from the securitization of interests.[22] But the motion failed to identify any statutory requirement that the trust failed to satisfy.[23]

The new argument could not resuscitate standing as an issue or argument for number of reasons, including the Pooling and Servicing Agreement's § 11.11 restricting third-party beneficiaries prevents La Mothe from invoking that agreement.[24] Furthermore, the well-established majority rule rejects borrower standing defenses stemming from a trust's alleged violation of a Pooling and Servicing Agreement or from the securitization process.[25] More recent decisions reinforce the majority rule.[26]

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[21] Appellee's Resp. to Mot. for Recons. at 6-7.
[22] Mot. for Recons. at 6, 16.
[23] Appellee's Resp. to Mot. for Recons. at 7.
[24] Br. of Resp't at 25-26.
[25] See generally Additional Authorities of Respondent (Mar. 24, 2014).
[26] *See, e.g., Ogorsolka v. Residential Credit Solutions, Inc.*, No. 2:14-cv-00078-RSM (W.D. Wash. June 23, 2014) (granting 12(b)(6) dismissal and citing Washington and California decisions ruling borrowers lacked standing to enforce the terms of Pooling and

After receiving US Bank's response, the court denied reconsideration. Petitioning for review, La Mothe has brought on new counsel.

ANALYSIS AND ARGUMENT WHY DISCRETIONARY REVIEW SHOULD NOT BE GRANTED

La Mothe argues that discretionary review is merited under RAP 13.4(b)(1) and (2), which permit review when the decision of the Court of Appeals conflicts with a decision of this Court or with another decision of the Court of Appeals.[27] But no decisional conflict warrants the discretionary review of the unpublished decision in this case. Furthermore, the substantive claims lack any merit undercutting the plea for review of an appellate procedural issue.

La Mothe simply misunderstands the role of appellate discretion and its application in preservation of error rule and the exceptions to the rule. Any conflict between divisions of the Court of Appeals regarding

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Servicing Agreements); *Natividad v. Bank of Am., NA*, No. C 14-0215 MMC (N.D. Cal. May 28, 2014) (granting 12(b)(6) dismissal and discussing the lack of borrower standing decisions in California state and federal courts); *Miller v. JP Morgan Chase Bank, N.A.*, No. 5:13-CV-03192-EJD (N.D. Cal. Aug. 8, 2014). *See Wood v. Germann*, 130 Nev. Adv. Op. 58, 331 P.3d 859, 859 (Nev: 2014) (concluding "that a post-closing-date loan assignment does not render the assignment void, but merely voidable, and that a homeowner therefore lacks standing to rely on the timing of the assignment as a basis for challenging the subsequent purchaser's authority to enforce the loan.") "Thus, we conclude that the . . . assignment was not void, but was merely voidable, as Deutsche Bank was entitled to ratify the post-closing-date loan assignment; and appellant, who is neither a party nor an intended third-party beneficiary of the PSA, lacked standing to challenge the assignment's validity." 331 P.3d at 861. *See* Appellee's Resp. to Mot. for Recons. at 7 (citing decisions).

[27] Pet. for Review at 3.

when standing is classified as a jurisdictional issue under RAP 2.1(a)(1) does not "put the trial courts in a difficult position," because the issue is primarily one regarding appellate discretion – not stare decisis viewed from the trial court perspective.[28]

A. The RAP 2.5 embodies the preservation of error rule and breadth of appellate discretion.

RAP 2.5(a) reflects a prudential constraint for limiting judicial decision-making – "the requirement that parties raise issues at trial to preserve them for appeal," reflecting "a policy of conserving judicial resources and forcing litigants to fully articulate their positions as early as possible for resolution."[29]

The preservation of error rule is a well-established requirement in our judicial system.[30] A winning party generally should be entitled to defend a judgment on the record -- not face new issues on appeal. The rule requiring preservation of error generally closes the door to claims not raised in the trial court. The door is left ajar, because appellate courts have the inherent discretion to decide claims of error not raised below[31]

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[28] *See* Pet. For Review at 11 (citing Mark DeForrest, *In The Groove or in a Rut? Resolving Conflicts Between the Divisions of the Wash. St. Ct. of App. at the Trial Court Level*, 48 GONZ. L. REV. 455, 459 (2012-13)).

[29] Justice Phillip Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Court Sys.*, 22 SEATTLE UNIV. L. REV. 695, 715-16 & n. 66 (1999).

[30] *See* 15A Karl B. Tegland & Douglas J. Ende, *Wash. Practice: Handbook Civil Procedure* § 88.1 (2013-14 ed.) (preservation of error)

[31] *Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844 (2005) ("by using the term 'may,' RAP 2.5(a) is written in discretionary, rather than mandatory, terms."); *Obert v. Envtl.*

and even decide ones not raised by the parties if necessary to reach a proper decision on the merits.[32] Principled appellate discretion identifies general categories claims of errors that may be considered on review, even when the claims are not raised below. RAP 2.5 embodies a framework of principled appellate discretion.

"RAP 2.5 is carefully worded so that it does not require the appellate court to review anything, or to avoid reviewing anything."[33] "The rule is written in terms of what the appellate court may do, thus giving the appellate court broad discretion to determine the scope of review on a case-by-case basis."[34] "The cases tend to be fact-specific and thus have only limited precedential value. The courts have often reached contrasting results under RAP 2.5, but the inconsistencies simply reflect the appellate court's broad discretion under RAP 2.5 . . ."[35]

The broad discretion of appellate courts cuts against La Mothe's futile efforts to weave together decisions construing the exceptions to RAP 2.5(a)'s preservation rule to arrive at clear conflicting authority supporting the petition for review. The petition suffers from other defects as well.

Research and Dev. Corp., 112 Wn.2d 323, 771 P.2d 340 (1989) ("the rule precluding consideration of issues not previously raised operates only at the discretion of this court.")

[32] *Alverado v. Wash. Pub. Power Supply Sys.*, 111 Wn.2d 424, 429, 759 P.2d 427 (1988).

[33] 2A Karl B. Tegland *Wash. Prac., Rules Practice* RAP 2.5 at 146 (7th ed. 2011) (Author's comments, heading "Appellate court discretion").

[34] *Id.*

[35] *Id.*

B. Appellate lawyers are tempted to misclassify issues as jurisdictional to avoid the preservation of error rule.

RAP 2.5(a)'s preservation of error rule states: "The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). The rule then states the discretionary exceptions to the general rule. The first exception permits a party to raise "lack of trial court jurisdiction" as a claimed error "for the first time in the appellate court." RAP 2.5(a)(1).

Either the court has jurisdiction or it does not. When the absence of jurisdiction is brought to the appellate court's attention, the court must sua sponte decide the jurisdictional issue, leaving it outside the zone of appellate discretion. Courts have broadly adopted the lack-of-jurisdiction exception, but the exception creates a temptation to label a claim of error as jurisdictional when it is not.[36] That kind of mislabeling is happening in this case in an effort to delay a final decision, while this Court considers the petition.

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[36] Robert J. Martineau, *Subject Matter Jurisdiction as a New Issue on Appeal: Reining in an Unruly Horse*, B.Y.U. L. Rev. 1, 34-35 (1988) (stating the most recognized exception is challenging the subject-matter jurisdiction of the trial court; courts have classified matters that are not properly within this exception). *See Marley v. Dep't of Labor and Indus.*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994) (citing the article).

C. The Court of Appeals did not abuse discretion when it rejected the issue misclassified as a jurisdictional standing issue.

Under the abuse of discretion standard, discretion is abused when its exercise is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons.[37] La Mothe cannot satisfy that deferential standard when he did not properly raise, frame and support his claim of jurisdictional standing in the Court of Appeals and in this Court, and especially when that claim could not alter the decision on the merits of the case.

La Mothe's opening and reply appellate briefs did not raise, frame, and support a claim of standing under a particular statute, and he concedes he failed to develop the issue below. His drive-by appellate arguments were about violations of the pooling and servicing agreement and a UCC provision governing negotiable instruments; those arguments failed to develop specific points.[38] Additionally, his briefing speculating who might enforce a negotiable instrument was irrelevant, when the court admitted into evidence at trial the endorsed note (unlike the out-of-state

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[37] *Accord, Humphrey Indus., Ltd. v. Clay Street Assocs.*, 170 Wn.2d 495, 506, 242 P.3d 846 (2010) (stating the multi-part abuse of discretion standard in the context of discretionary awards of attorney fees).
[38] Reply Br. at 5 ((RCW 62A.3-203).

decisions that he relied upon).[39] The well-established majority rule rejects his other theories stemming from the pooling and servicing agreement.[40]

D. The category of issue presented is better addressed in another case or in this Court's rulemaking process.

The petition presents the question of statutory standing ("is standing a jurisdictional issue if it is grounded in a particular statute that only permits certain parties to bring an action.")[41] Yet, the petition itself is not "grounded in a particular statute," causing the petition to be an improper and inefficient means to pose the question for review.[42] The statutory standing argument is merely a glimmer in the eye of appellate counsel, at most.

La Mothe argues that *Lane v. City of Seattle* reaffirms the principle of standing as jurisdictional.[43] In *Lane*, the city raised at trial a taxpayer's lack of standing to challenge the city's tax on a water utility that the taxpayer indirectly paid. The city wisely dropped the argument on appeal. This Court exercised its appellate discretion to raise the standing issue on review and decided the taxpayer had standing since the utility was

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[39] See Br. of Resp't a 31-34 (distinguishing out-of-state decisions construing substantially different court rules and preanswer and pretrial motions).
[40] *See supra* n. 26 (citing decisions).
[41] Pet. For Review at 1 (§ C Issue Presented for Review); *id.* at 9 (when a particular cause of action is statutorily created, and that statute identifies a particular party with standing . . . the lack of standing is a question of jurisdiction that can be raised at anytime.")
[42] *Id.* at 1("is standing a jurisdictional issue if it is grounded in a particular statute that only permits certain parties to bring an action.")
[43] Pet. For Review at 6 (*Lane v. City of Seattle*, 164 Wn.2d 875, 885, 194 P.3d 977 (2008)).

unlikely to raise it.[44] Even then, this Court declined to decide if taxpayer standing was jurisdictional: it merely ruled: "This case does not lend itself to deciding whether standing is jurisdictional in Washington, since neither party briefed the matter."[45]

Like the *Lane* decision, this case does not lend itself to deciding when standing under a statute is jurisdictional in Washington. The limited briefing on the issue has been an afterthought. Additionally, La Mothe is making a category mistake. This case does not raise the classic category of standing under a statute like the special standing requirements in administrative, land use, and Uniform Declaratory Judgment Act,[46] or the problems of associational standing.[47] La Mothe's arguments about his standing under the pooling and servicing agreement do not fall within that category; moreover, the well-established rule is borrowers lack standing to invoke the pooling and servicing agreement.[48]

The abstract issue of statutory standing presented for review is better addressed in another case or perhaps in this Court's ruling-making

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[44] Gilbert Ryle, *Concept of Mind* 16-17 (1949) (a "category mistake" is made by persons who treat one set of facts as if they belonged to one set of logical type or category when they actually belong to another). *See Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 930 & n. 21 (9th Cir. 2004) (citing Ryle).

[45] *See* 164 Wn.2d at 885 n. 1.

[46] "[O]utside the context of the Uniform Declaratory Judgments Act [(chapter 7.24 RCW)], standing is an issue that must be raised in the trial court." *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 203 n. 4, 11 P.3d 762, 27 P.3d 608 (2000).

[47] *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 212-17, 45 P.3d 186 (2002).

[48] *See supra* n. 26.

process addressing RAP 2.5(a) in general. We believe, however, that clarification is unnecessary in view of the broad appellate discretion granted under RAP 2.5(a)'s other exceptions permitting parties to present for the first time on review the "(2) failure to establish facts upon which relief may be granted" and the "(3) manifest error affecting a constitutional right." RAP 2.5(a)(2)-(3). Clarification is also unnecessary because of the breadth of appellate discretion.

CONCLUSION

The lack of standing claim cannot alter the trial court's decision on the merits of this case. La Mothe acknowledged borrowing the money and defaulting on his obligation in 2009,[49] he further acknowledged that U.S. Bank was entitled to collect on the loan, and the endorsed note and assignment were evidence in the bench trial.[50] The petition is not well taken; it is a ploy for delay. For these reasons and those stated in the prior briefs, this Court should deny the petition for review.

[49] RP 120:17-25.
[50] Decision at 2, 5 n. 5.

RESPECTFULLY SUBMITTED this 15th day of October, 2014.

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CERTIFICATE OF SERVICE

I, Linda Cooper, certify under penalty of perjury and the laws of the state of Washington:

I am a citizen of the United States and a resident of King County, Washington. I am over the age of 18 years and am not a party to the within cause. My business mailing address is 1420 Fifth Avenue, Suite 4200, Seattle, Washington 98101-2338.

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s/ Linda J. Cooper
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Attached for filing is Respondent's Answer to Petition for Review.

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