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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RE: PETITION FOR REVIEW OF
THE DECISION OF THE COURT OF APPEALS
DIVISION III

COURT OF APPEALS CASE NO. 31944-0

ONEWEST BANK, FSB,

Petitioner,

v.

MAUREEN M. ERICKSON,

Respondent.

Answer to OneWest Bank FSB's Petition for Review

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I. ANSWER TO INTRODUCTION AND SUMMARY

OneWest Bank N.A. ("OneWest") has presented a Petition for Review ("Petition") asking this Court to accept discretionary review of the decision of the Court of Appeals entered in favor of Maureen Erickson ("Erickson"). RAP 13.4(b) sets out the bases for requesting that the Supreme Court grant discretionary review of a decision of the Court of Appeals. At pages seven and 11 of its Petition, OneWest relied on subsections (1), (3), and (4) of RAP 13.4(b) in seeking review. Specifically, OneWest argues the decision of the Court of Appeals is in conflict with a decision of the Supreme Court, raises a significant question of law under the United States Constitution, and involves an issue of substantial public interest. As shown below, all those contentions are incorrect.

At page 7 of its Petition, OneWest claimed that the Court of Appeals' decision conflicts with this Court's decision in *In Re Marriage of Kowalewski*, 163 Wn.2d 542, 182 P.3d 959 (2008); and raises a significant issue under Article IV, Section 1, of the United States Constitution because the Court of Appeals analyzed whether an Idaho court had jurisdiction to enter a purported order on which OneWest now relies. In fact, the Court of Appeals' review of the Idaho court's jurisdiction to enter

its order was consistent with *Kowalewski*, and the United States Constitution. Further, OneWest did not contend in the trial court or in the Court of Appeals that the Court of Appeals lacked authority to determine whether the Idaho court had jurisdiction to enter the purported order. Finally, the order upon which OneWest now relies (but did not rely upon in its appeal brief) was never authenticated, and should not have been considered in the competing requests for summary judgment.

OneWest's final basis for requesting discretionary review was a claim that this matter involves an issue of substantial public interest that should be determined. This case it involves a very unique factual situation that is unlike almost any case either party found; it does not involve an issue of substantial public interest. Further, prior cases all support the authority of the Court of Appeals to determine whether the Idaho court had jurisdiction to enter the order affecting title to Washington property owned by Washington residents; this is not a matter this Court needs to or should determine.

OneWest's Petition should also be rejected because the issues it has raised in its Petition were either not raised in the trial court or on appeal, are inconsistent with the positions OneWest took at either or both levels, or misrepresent the facts. As argued below, issues not raised in the

trial court in connection with competing requests for summary judgment should not be considered on appeal at any level. RAP 9.12. In a motion for reconsideration, a requesting party is entitled to ask the Court of Appeals to review "points of law or fact which the moving party contends the court has overlooked or misapprehended." RAP 12.4(c). No rule authorizes a party to introduce and argue theories and claims it has never previously presented. No authority presented by OneWest in its Petition suggests that this Court should disregard appellate rules and allow OneWest to now completely change its tactics and the issues it raised in proceedings below. For example, at trial and on appeal OneWest

a. invited the trial court to analyze Idaho law and whether the Idaho court had jurisdiction over the Washington property at issue;

b. Did not cite *Kowalewski* as relevant authority or suggest the full faith and credit clause of the United States Constitution was implicated;

c. Did not assert on appeal that Erickson signed the purported order authorizing a reverse mortgage, or claim that she should be barred from challenging it;

d. Did not request or suggest in the trial court or on appeal that OneWest might be entitled to equitable relief under doctrines such as estoppel, waiver or equitable subrogation; and

g. Did not argue in the trial court or on appeal that if OneWest was not granted summary judgment, that granting summary judgment in favor of Erickson would not be appropriate.

Further, OneWest has falsely asserted that Erickson did not request summary judgment below or on appeal. In fact, Erickson made the request at both levels, OneWest treated Erickson's request for summary judgment as a cross-motion for summary judgment, and OneWest presented an order that reflected Erickson's request for summary judgment was considered by the trial court and denied.

In the final analysis, OneWest's real complaint in this case is that it is unhappy with the conclusion the Court of Appeals reached regarding the Idaho Court's jurisdiction to appoint a receiver with regard to interests in Washington real property owned by a Washington resident. This is not claimed by OneWest to constitute a basis for obtaining discretionary review.

II. IDENTITY OF RESPONDENT

Maureen Erickson ("Erickson") was the Appellant before the Court of Appeals and asks this Court to deny review of the Court of Appeals' decision.

III. ANSWER TO ISSUES PRESENTED FOR REVIEW

As noted above and in the argument section below, issues OneWest has presented to this Court for review were not presented in the trial court or in OneWest's brief in the Court of Appeals. They should not now be argued or considered for the first time in OneWest's effort to obtain discretionary review. See, e.g. RAP 9.12 and 12.4(c).

IV. ARGUMENT

1. Claimed conflict with Washington Supreme Court Decision. OneWest claims that this Court should accept review because the court of appeals' decision conflicts with this Court's decision in *In Re Marriage of Kowalewski*, 163 Wn.2d 542, 182 P.3d 959 (2008). *Kowalewski* is entirely consistent with the Court of Appeals' decision. *Kowalewski* involved a divorce proceeding in which a Washington court had personal jurisdiction over both spouses in a dissolution proceeding and adjudicated their interests in Washington property as well as their equitable rights in connection with property in Poland. It did not purport

to confer jurisdictional authority on a Washington court in connection with ownership of a non-resident's property in another country. Instead, this Court recognized in *Kowalewski* that, when a court in the jurisdiction where real property is located is asked to adjudicate a matter that would affect legal ownership of real property in that jurisdiction (such as the request to foreclose the deed of trust at issue in this case), it would be for the court in that jurisdiction to determine whether it would give force or effect to the Washington court's order. *Id.* at 552-53. The Court concluded that a foreign jurisdiction would not be "bound by a Washington court's decree . . ." (Citation omitted.) *Id.* at 552.

OneWest's argument in the Court of Appeals concerning the purported validity of the Idaho court orders was set out at pages 24 and 25 of OneWest's appellate brief (attached hereto as Appendix I). OneWest did not argue that the Court of Appeals should refrain from reviewing the Idaho law it cited or from examining the validity of the Idaho court order at issue, as authorized by legal authority OneWest presented. OneWest essentially asked the Court of Appeals to review and analyze the applicability of the statues and cases upon which it relied.

OneWest did cite or rely on *Kowalewski*. Instead, OneWest cited three cases in this portion of its argument. Those cases do not support OneWest's position.

Stewart v. Stewart, 85 Wash. 202, 206, 147 P. 1157 (1915) held that a Washington court has jurisdiction to determine issues affecting ownership of Washington property (even if the claimed owner was the estate of a person who had resided outside Washington). That case supported the authority of the Court of Appeals in this state to assert jurisdiction over Washington property in connection with an action that would affect ownership of that property (such as a foreclosure action that would result in transferring legal title to that property).

Conservatorship of O'Connor, 48 Cal. App. 4th 1076, 56 Cal. Rptr. 2d 386 (1996), analyzed California statutes to determine whether a California court retained jurisdiction over a conservatorship matter following the ward's death. That case has no bearing whatever over the issues presented in this case.

Finally, OneWest cited *Freise V. Walker*, 27 Wn.App. 549, 553, 619 P.2d 366 (1980). In *Freise*, the Court of Appeals recognized that a Washington appellate court has authority to determine whether a trial

court had jurisdiction over parties to enter an order and, if not, to refuse to enforce it.

To the extent cases cited by OneWest on appeal apply to the issues presented, they support a conclusion that the Court of Appeals had authority to determine whether the Idaho court had jurisdiction to enter a decision affecting title to Washington property owned by Washington residents, and to refuse to give force or effect to the order if jurisdiction was found to be lacking. Neither those cases nor the cases cited by OneWest in its Petition support the conclusion that Erickson could not challenge the validity of an Idaho order affecting title to her Washington property, particularly since the action being pursued, if successful, would result in transferring legal title to her property. OneWest's claimed conflict with a decision of this Court does not exist.

2. Claimed issue under the United States Constitution. OneWest's second basis for claiming that this Court should accept review is a contention that a significant question of law under the Constitution is involved. RAP 13.4(b)(3). OneWest claims that the decision implicates the full faith and credit clause in Article IV, Section 1, of the United States Constitution.

OneWest again relied primarily on *Kowalewski* for this assertion. However, in *Kowalewski,* this Court acknowledged that the full faith and credit clause was not at issue. *Id.* at 552, fn. 1. Further, *Kowalewski* recognized that an action to adjudicate or affect legal title to real property must be brought in the state where the real property is located. *Id.* at 547.

In its Petition, at page 8, OneWest also discussed *Brown v. Brown*, 46 Wn.2d 370, 371, 281 P.2d 850 (1955), claiming that the case showed "that courts ***could*** 'affect legal title indirectly' by, for example directing a person to 'convey or release any interest in the Washington land.'" (punctuation and emphasis as in original). In fact, *Brown* held that a Washington court has authority to reject a California court's order purporting to affect title to Washington property based on the foreign court's lack of jurisdiction over issues affecting title to Washington real property. This Court determined that such action is consistent with the full faith and credit provisions in the United States Constitution. *Id.* at 371-72. OneWest misstated the holding and analysis in that case.

As OneWest also acknowledged in its Petition for Review at page 7, the Court of Appeals recognized that the United States Supreme Court has determined that "[d]ecrees of one state affecting interests in land in another state are not afforded full faith and credit under the United States

Constitution," citing *Fall v. Eastin*, 215 U.S. 1, 30 S.Ct. 3, 54 L.Ed. 65 (1909). (One West's Appendix A, at 21). OneWest did not dispute this analysis apart from OneWest's incorrect assertion that it was inconsistent with *Kowalewski*.

In the final analysis, OneWest presented Idaho statutory authority and case law in the Court of Appeals that essentially asked the Court of Appeals to review Idaho law and the validity of the order appointing the Idaho receiver, Shelley Bruna. OneWest argued in the Court of Appeals that, based on the Idaho statutes it cited, the order appointing Bruna as conservator vested her with authority "to encumber property in Washington . . . without any further court order." (Appendix I, at 25). OneWest did not mention or rely on the purported court order regarding execution of a reverse exchange upon which it now relies. Based on all authority cited by OneWest and the argument it presented on appeal, the Court of Appeals' review of the Idaho Court's jurisdiction to enter its order was entirely appropriate and consistent with the United States Constitution.

3. Claimed issue of substantial public interest. Finally, OneWest contends that this Court should accept review because it involves an issue of substantial public interest that should be determined.

RAP 13.4(b)(4). OneWest cited almost no case, inside or outside Washington, with analogous facts and OneWest has not contended this issue is likely to arise again. The situation in this case is not remotely analogous to that presented in *State v. Watson*, 155 Wn. 2d 574, 122 P.3d 903 (2005). In that case, this Court recognized that the decision of the Court of Appeals at issue had "the potential to affect every sentencing proceeding in Pierce County after November 26, 2001, where a DOSA sentence was or is at issue" and that it would have a potential to "chill policy actions taken by both attorneys and judges." *Id.* at 577. Since there is no claim or suggestion that the Court of Appeals' decision will have significant application and OneWest has made no other argument suggesting this case will have significant impact on anyone beyond the immediate parties, this case does not present an issue of substantial public interest.

Moreover, this is not an issue that this Court needs to decide. To the extent similar situations have been analyzed, existing decisions have already confirmed that the Court of Appeals had the authority to examine and determine whether the Idaho court decision affecting title to Washington property owned by Washington residents should be given force or effect. This would be particularly true in the context of a

foreclosure action which, if successful would result in transferring legal title to the property. See, e.g., *Fall v. Eastin*, supra. (decrees of one state affecting interests in land in another state are not afforded full faith and credit under the United States Constitution); *Kowalewski*, supra; *Brown*, supra. In fact, OneWest's only disagreement with the Court of Appeals analysis regarding the right to review the jurisdiction of another state court in orders affecting title to real property in Washington was an incorrect assertion that the ruling conflicted with this Court's decision in *Kowalewski.* Again, as shown above, there was no such conflict.

4. OneWest has raised new, inconsistent and inaccurate arguments.

OneWest's Petition should also be rejected because the issues it has raised in its Petition were either not raised in the trial court or on appeal, are inconsistent with the positions OneWest took at either or both levels, and/or misrepresent the record. Washington recognizes that issues not raised in the trial court in connection with competing requests for summary judgment should not be considered on appeal at any level. RAP 9.12. In a motion for reconsideration, Washington appellate rules direct a requesting party to direct the Court of Appeals to review "points of law or fact which the moving party contends the court has overlooked or

misapprehended." RAP 12.4(c). The rule does not authorize a party to introduce and argue theories and claims it has never previously presented. Nothing in any rule or authority cited by OneWest suggests that this Court should disregard appellate rules and allow OneWest to completely change the tactics it employed and issues it raised below.

At trial and on appeal OneWest cited and analyzed Idaho law in requesting that the validity of the purported Idaho order at issue be honored. See Appendix I; (CP 80-82). OneWest's current claim that the Court of Appeals should not have examined and analyzed Idaho law or the jurisdiction of the Idaho court is inconsistent with its previous position and should not be considered on appeal. RAP 9.12.

OneWest now claims Erickson should not be permitted to attack the validity of the purported order authorizing the reverse mortgage at issue because she and attorneys for her father, Bill McKee purportedly signed it. OneWest made no such argument in the trial court or on appeal and it should not be considered. RAP 9.12.

Further, the order on which OneWest relies in its Petition (but not in its appeal brief) was never authenticated and should not have been considered for any purpose. The only purported foundation for consideration of this order was provided by counsel for OneWest, who did

not purport to have firsthand knowledge of the purported order. Rather, he testified by affidavit that his client had been able to locate and fax to him a copy of "an executed Order Directing Conservator to Facilitate a Reverse Mortgage . . ." (CP 106). There is no indication where this faxed document originated and no one purported to authenticate it. The purported document appears to have been assembled from multiple faxed transmissions, appears to have been signed by an Idaho judge on different pages, contains no signatures that have been authenticated, does not show that it was ever entered, and does not show that it was ever circulated by the court clerk to anyone. (CP 108-112). Erickson argued at the trial court and on appeal that the order was not properly authenticated and should not be considered on summary judgment. (CP 179-181; Appellant's Brief, pp. 14-16; Respondent's Brief, pp. 4-7; Appellant's Reply, pp. 8-11). The Court of Appeals acknowledged that Erickson had raised this issue, but did not find it necessary to reach that issue. If it were relevant and necessary to decide the issue, all arguments made by OneWest that depend on the validity of that order should be rejected. Inadmissible evidence may not be considered in connection with competing requests for summary judgment. *Sentinel C3, Inc. v. Hunt*, 181 Wn.2d 128, 141, 331 P.3d 40 (2014) (decided after briefing was

completed in this case and included by Erickson in a Statement of Additional Authorities filed October 29, 2014).

OneWest also claimed that Erickson should not have been granted summary judgment because she never requested it. This claim is false. Erickson requested summary judgment at the trial court and on appeal. (CP 63, ; Appellant's Brief, p. 10, para.10; p. 12, para. 16; p. 13 and 25; Appellant's Reply pp. 6 and 232). OneWest treated Erickson's request for summary judgment as a cross-motion for summary judgment in the trial court. (CP 76, 86). The order for partial summary judgment that OneWest presented in the trial court evidenced that the trial court considered Erickson's request for summary judgment and denied it. (CP 114). At best, OneWest's argument in this regard was careless.

OneWest made a final suggestion that the trial court should have remanded the case to the trial court to consider the potential for granting equitable relief to OneWest on bases such as estoppels, waiver or equitable subrogation. The assertion is incorrect because both sides were seeking summary judgment and OneWest did not argue before the trial court or in the Court of Appeals that any such equitable issues existed or should be considered. These new claims should not be considered on appeal. RAP 9.12.

V. CONCLUSION

For the reasons stated above, Maureen Erickson requests that this Court deny OneWest's Petition for Discretionary Review of the Court of Appeals' decision and denial of OneWest's Request for Reconsideration.

RESPECTFULLY SUBMITTED this 23rd day of February 2015.

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APPENDIX I

In fact, Erickson herself *agreed* to the reverse mortgage in a stipulated order bearing her signature, all the while not disclosing the hidden quit claim deed. CP 136-137, CP 152, ¶ 10. Erickson even provided funds to her father in the amount of $1,750.00 one day before the closing of the reverse mortgage on the Property. CP 152, ¶ 9, CP 165. In other words, both Erickson and her father were aware of the reverse mortgage, and Erickson even donated funds to assist with its closing. *Id.*; CP 168-169.

Between two parties, one of whom must suffer a loss, the Court should look to who could have best protected their interests; in this case, Erickson failed to record her interest in the Property or file a *lis pendens*, and OneWest was entitled to rely on record title. *See Cunningham, supra.* at 963; *Armstrong, supra.* at 117.[18]

In sum, because of Erickson's unrecorded conveyance, Erickson took her interest in the property subject to the Deed of Trust and OneWest's assigned right to enforce the same. As a result, the trial court properly granted summary judgment to OneWest, and Erickson's claimed cross-motion for summary judgment was either moot or subject to denial on the merits.

G. Erickson Cannot Collaterally Attack Bruna's Appointment as Conservator.

In Erickson's purported cross-motion for summary judgment, she asserted – for the first time – a challenge to Bruna's authority to execute the Deed of Trust. CP 59; *see*

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[18] RCW 4.28.320 states that:

> "From the time of the filing [of a lis pendens] only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he or she were a party to the action."

"The underlying purpose of a lis pendens is to give notice of pending litigation affecting the title to real property and to give notice that anyone who subsequently deals with the affected property will be bound by the outcome of the action to the same extent as if he or she were a party to the action." *Cranwell v. Mesec*, 77 Wn.App. 90, 109 n. 22, 890 P.2d 491 (1995).

also Brief of Appellant at 25.[19] But Idaho law grants a conservator appointed there power over property in other states. *See* I.C. §15-5-420(a) ("the appointment of a conservator vests in him title as trustee to all property of the protected person."); I.C. §15-5-420(c) ("A conservator has the same power over the title to property of the protected person's estate that an absolute owner would have."); I.C. §15-5-424(3)(g) (conservator can "[a]cquire or dispose of an estate asset including land in another state for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of or abandon an estate asset."). Such actions can be accomplished without further authorization of the court. I.C. §15-5-424(3).

When Bruna was appointed a conservator by the Shoshone County Court, she had the power under the Idaho statutes to encumber property in Washington, and she could do this without any further court order. Bruna's authority to execute the Deed of Trust as McKee's conservator is a verity that should not be subject to Erickson's collateral attack. *Accord Stewart v. Stewart*, 85 Wash. 202, 206, 147 P. 1157 (1915); *Conservatorship of O'Connor*, 48 Cal. App. 4th 1076, 1096, 56 Cal. Rptr. 2d 386 (Cal. App. 1st Dist. 1996); *but see Freise v. Walker*, 27 Wn. App. 549, 553, 619 P.2d 366 (1980).

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[19] Bruna's authority encompassed executing the Deed of Trust on *McKee's* behalf, not Erickson's. Indeed, Erickson conceded this fact in her "Memorandum in Opposition to Plaintiff's Motion for Summary Judgment" (which she asserts also became a cross-motion for summary judgment). CP 54, ¶ 8.