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Supreme Court No. 94093-2

Court of Appeals No 74264-7-I

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

Robert and Doris Cummings, husband and wife,

Appellants,

v.

Northwest Trustee Services of Washington, Mortgage Electronic
Registration Systems, Inc., and Deutsche Bank National Trust Co., as
Trustee for the Registered Certificate Holders of First Franklin Mortgage
Loan Trust, Asset-Backed Securities Series 2006-FF8,

Respondents.

**RESPONDENTS' ANSWER TO APPELLANTS CUMMINGS
PETITION FOR REVIEW**

John E. Glowney, WSBA 12652
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
Telephone: (206) 624-0900
Facsimile: (206) 386-7500
*Attorneys for Respondents Deutsche
Bank as trustee and MERS*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	II
ARGUMENT	1

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bain v. Metropolitan Mortgage Group, Inc.</i> , 175 Wn.2d 83, 285 P.3d 34 (2012).....	2
<i>Brown v Department of Commerce</i> , 184 Wn.2d 509, 359 P.3d 771 (2015).....	1, 2, 5, 6
<i>Offield v. FNMA</i> , No. 11-00841-CV-W-BP, 2013 U.S. Dist. LEXIS 50676 (W.D. Mo. Mar. 14, 2013).....	3
<i>Provident Bank v. Cmty. Home Mortg. Corp.</i> , 498 F. Supp. 2d 558 (E.D.N.Y. 2007)	4
<i>Trujillo v. Nw. Tr. Servs., Inc.</i> , 181 Wn. App. 484, 326 P.3d 768 (2014), <i>rev'd on other grounds</i> , 183 Wn.2d 820 (2015).....	2
<i>In re Veal</i> , 450 B.R. 897 (B.A.P. 9th Cir. 2011).....	3, 4
Statutes	
Mo. Rev. Stat. § 400.9-109(a)(3).....	4
RCW 62A.3-301	2
RCW 62A.3-310	1
RCW 62A.9A-203	1
U.C.C. § 3-203 (1995)	5
UCC § 3-602(a).....	3
UCC § 3-602(c).....	3
UCC § 9-203(a).....	3

UCC § 9-203(b)	3
UCC § 9-203(g)	2
Other Authorities	
Restatement (Second) Contracts § 316	5
Restatement (Third) of Property (Mortgages) § 5.4(a) (1997).....	4

ARGUMENT

Respondents,¹ Defendants below, submit this answer to Appellants Cummings Petition for Review. The Court of Appeals correctly denied the Cummings' appeal for the reasons set forth in the Court of Appeals' Opinion and in Respondents' Appellate Brief submitted below. The Cummings provide no new argument to challenge the Court of Appeals' rulings, all of which concern long-settled, basic rules of commercial law dealing with promissory notes and deeds of trust.

The Cummings' argument that this Court's decision in *Brown v Department of Commerce*, 184 Wn.2d 509, 359 P.3d 771 (2015), unconstitutionally conflicts with RCW 62A.3-310, RCW 62A.9A-203 and the Washington Deeds of Trust Act is meritless. The Cummings' argument is unsupported by any authority and provides no reason for this Court to revisit *Brown* or the Court of Appeals' ruling. No issue of constitutional dimension or of substantial public interest is raised. To the contrary, the Court performed its proper and ordinary duty in construing and applying Washington commercial and statutory law. The petition is without merit and should be denied.

¹ Mortgage Electronic Registration Systems, Inc., and Deutsche Bank National Trust Co., as Trustee for the Registered Certificate Holders of First Franklin Mortgage Loan Trust, Asset-Backed Securities Series 2006-FF8.

This Court has conclusively rejected the Cummings' position. This Court's rulings in *Bain v. Metropolitan Mortgage Group, Inc.*² and *Brown*³ are clear that the "holder" of the borrower's note is entitled to commence and prosecute a non-judicial foreclosure. Under RCW 62A.3-301, a "[p]erson entitled to enforce" an instrument means (i) the holder of the instrument" Whether the holder of the note is the "owner" is not a legally relevant inquiry; rather, "proof of [the status of holder] is what entitles a beneficiary to enforce a note secured by a deed of trust. Ownership of the note is irrelevant."⁴ The Cummings provide no basis to disregard this recent and conclusive precedent.

Respondents were only required to demonstrate that they are the holder of the Cummings' original note. They did so. In any event, the Cummings' argument that the security for a note only follows a transfer of ownership of the note is contrary to over 100 years of precedent. *See* Respondents' Appellate Brief at 7-18.⁵ The Cummings' theory is simply unsupported by any contrary authority.

² 175 Wn.2d 83, 103-04, 285 P.3d 34 (2012).

³ 184 Wn.2d at 515.

⁴ *Trujillo v. Nw. Tr. Servs., Inc.*, 181 Wn. App. 484, 506, 326 P.3d 768 (2014), *rev'd on other grounds*, 183 Wn.2d 820 (2015).

⁵ The "security follows the note" rule was codified in UCC section 9-203(g). There is no hint or suggestion that in doing so it materially changed or limited the rule to transfers of ownership. There is no hint or suggestion that as part of the
(continued . . .)

The basic underlying reason for the rule is that the power to enforce the note, and any security for the note, should be kept together. *Id.* at 15-16. Accordingly, transfer by assignment or negotiation is equally effective to carry with it the security.

The Cummings' arguments confuse the function of Article 3, which addresses enforcement of the note, and Article 9, which addresses disputes related to ownership of the note.

[T]he rules that determine who is entitled to enforce a note are concerned primarily with the maker of the note. They are designed to provide for the maker a relatively simple way of determining to whom the obligation is owed and, thus, whom the maker must pay in order to avoid defaulting on the obligation. UCC § 3-602(a), (c). By contrast, the rules concerning transfer of ownership and other interests in a note identify who, among competing claimants, is entitled to the note's economic value (that is, the value of the maker's promise to pay). Under established rules, the maker should be indifferent as to who owns or has an interest in the note so long as it does not affect the maker's ability to make payments on the note.

In re Veal, 450 B.R. 897, 912 (B.A.P. 9th Cir. 2011) (footnote omitted);

Offield v. FNMA, No. 11-00841-CV-W-BP, 2013 U.S. Dist. LEXIS 50676

(W.D. Mo. Mar. 14, 2013)).

(. . . continued)

codification process UCC sections 9-203(a) and (b) were incorporated into the rule as part of the codification. The Cummings identify no cases or authorities that adopt this position or support their theory. *See* Respondents' Appellate Brief at 13-18.

Third and finally, Plaintiffs rely upon UCC Article 9. To begin, Plaintiffs correctly note that Article 9 governs the sale of a promissory note, such as their mortgage note. Mo. Rev. Stat. § 400.9-109(a)(3); *In re Veal*, 450 B.R. 897, 909 (B.A.P. 9th Cir. 2011) (discussing analogous UCC provisions). On this basis, Plaintiffs argue that Article 9 bears on whether the purchaser or seller of that note can enforce it. This argument confuses the different roles of Articles 3 and 9. Article 9 does not determine who can enforce a note; Article 3 does. *In re Knigge*, 479 B.R. at 505-06; *In re Veal*, 450 B.R. at 908-13 (distinguishing between Article 3 and of Article 9). Instead, Article 9 “determines whether the purchaser of the note ... obtains a property interest in the note.” *Id.* at 913. Thus, Article 9 identifies “who, among competing claimants, is entitled to the note’s economic value” – that is, the borrower’s promise to make loan payments. *Id.* at 912. Article 9 resolves disputes between the note’s buyer, its seller, and others, such as a bankruptcy trustee. *See Provident Bank v. Cmty. Home Mortg. Corp.*, 498 F. Supp. 2d 558, 568-571 (E.D.N.Y. 2007) (applying Article 9 to resolve dispute between competing claimants to loan’s economic value). These matters do not affect Plaintiffs, and have no bearing on whether a party can enforce a note. *Id.* at 912 (“[Plaintiffs] should not care who actually owns the Note – and it is thus irrelevant whether the Note has been fractionalized or securitized – so long as they do know who they should pay. Returning to the patois of Article 3, so long as they know the identity of the ‘person entitled to enforce’ the Note, [Plaintiffs] should be content.”).

Id. at *8-9 (emphasis added).

The Cummings failed to cite to the Court of Appeals any case or other authority that makes the distinction the Cummings make and supports the Cummings’ argument. Instead, the cases, as noted by the Restatement (Third) of Property (Mortgages) § 5.4(a) (1997),

demonstrated that the rule has been applied both to transfers by assignment or by negotiation. *Id.*

Ownership of a contractual obligation can generally be transferred by a document of assignment; see Restatement, Second, Contracts § 316. However, if the obligation is embodied in a negotiable instrument, a transfer of the right to enforce must be made by delivery of the instrument; see U.C.C. § 3-203 (1995). The principle of this subsection, that the mortgage follows the note, applies to either form of transfer of the note. Moreover, it applies even if the transferee does not know that the obligation is secured by a mortgage. *See* Illustrations 1-3.

Id. at cmt. b (emphasis added).

If the mortgage obligation is a negotiable note, Uniform Commercial Code § 3-203 (1995) is generally understood to make the right of enforcement of the note transferrable only by delivery of the instrument itself to the transferee.

Id. at cmt. c.

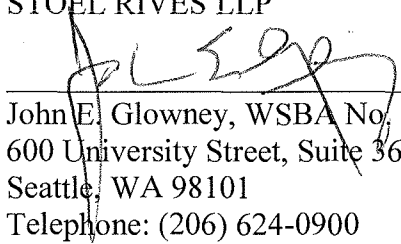
Not surprisingly, because this subject is settled law, the Cummings' petition for review provides pages and pages of argument without the citation of any authorities other than the Cummings' counsel's unsupported theorizing. The idiosyncratic theories of a party's counsel, unsupported by any authority, provide no basis for this Court to reconsider its recent ruling in *Brown*.

There is no constitutional issue created by this Court's ruling in *Brown*, and unsupported theories of counsel contrary to established law are not matters of substantial public interest. Construction, interpretation

and application of Washington's statutes is a basic function of the Washington courts, and in that respect *Brown* demonstrates nothing out of the ordinary. The Court of Appeals ruled correctly. The Cummings' petition should be denied.

Respectfully submitted this 23rd day of February 2017.

STOEL RIVES LLP



John E. Glowney, WSBA No. 12652
600 University Street, Suite 3600
Seattle, WA 98101
Telephone: (206) 624-0900
Attorneys for Respondents

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that I caused **Respondents' Answer to the Appellants Cummings' Petition for Review** to be filed with the Supreme Court (original and one copy); and caused a true and correct copy of same to be served upon the party listed below by email/pdf and via U.S. mail:

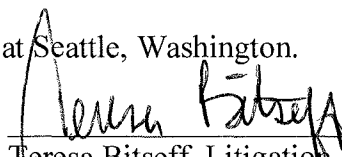
James A. Wexler
2025 – 201st Avenue SE
Sammamish, WA 98075
wex@seanet.com

Attorneys for Appellants

Joshua Schaer
RCO LEGAL, PS
13555 SE 36th Street, Suite 300
Bellevue, WA 98006
jschaer@rcolegal.com

Counsel for Defendant NWTs

DATED: February 27, 2017 at Seattle, Washington.



Teresa Bitseff, Litigation Practice Assistant
STOEL RIVES LLP