95381-3

Supreme Court No. 953-81-3
Court of Appeal No. 34615-3-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

U.S. BANK NATIONAL ASSOCIATION, ET AL

Respondent/Plaintiff

v.

GEORGIA A. PLUMB, JOSHUA C. PLUMB, KAMERON F. PLUMB; and THE WORD CHURCH

Petitioners/Appellants/Defendants, *Pro Se*

PETITION FOR REVIEW

Georgia A. Plumb, Joshua C. Plumb,
Kameron F. Plumb, Word Church aka
Rev. Georgia A. Plumb
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Other Cases

Statutes

Regulations and Rules

Constitutions

A. Identity of Petitioners

Georgia A. Plumb, Joshua C. Plumb, Kameron F. Plumb, and The Word Church aka Rev. Georgia A. Plumb (the Petitioners *pro se*) (the Plumbs) ask this court to accept review of the Court of Appeal's decision terminating review designated in Part B of this petition.

B. Court of Appeals' Decision

On December 14, 2017 the Court of Appeals, Division III filed its Unpublished Decision affirming the superior court's judgment and decree of foreclosure entered after summary judgment was granted in favor of U.S. Bank Nat'l Ass'n, *et al* (U.S. Bank). A copy of the decision is attached hereto as Appendix I.

C. Issues Presented for Review

1. If U.S. Bank did not possess the note on the date it filed this foreclosure suit, did U.S. Bank lack standing to foreclose?

2. If U.S. Bank was not the holder of the note on the date it filed suit, can it cure this standing defect by obtaining the note at a later date, prior to judgment being granted?

3. Has U.S. Bank properly proven the date when it acquired possession of the note?

4. Did the Appeals Court err in concluding the "Note Location Determined" document was inadmissible hearsay?

5. Did the Appeals Court err in stating that there is no evidence that Ocwen had authority to speak on behalf of U.S. Bank?

6. Was it proper for U.S. Bank to raise hearsay objections to its own documents for the first time at this late stage on appeal?

7. Did the Appeals Court err in implying that if Deutsche Bank held physical possession of the note on the date this lawsuit was filed and continued to maintain this physical possession for several months afterward, U.S. Bank might have still held "constructive possession" of the note on the date this lawsuit was filed?

8. Has U.S. Bank failed to sufficiently prove that it held the note on the date this lawsuit was filed?

9. Should the bank be required to prove that it held possession of the note on the date this lawsuit was filed?

10. Was summary judgment improper and were the Plumbs denied due process?

D. Statement of the Case

In about August 2004, multiple predatory, unscrupulous originating parties[1] working together to create excessive profits for themselves, lured Carl Plumb (now deceased) and Georgia Plumb (husband and wife) and

[1] The lender, Finance America, LLC (now defunct); its mortgage company, 1st Columbia Mortgage Corporation (now defunct as its license was later suspended); its mortgage broker, Chris Hutchison; its appraiser, C. Galland; its title company (Fidelity Title Company); its servicer of the loan, Ocwen Loan Servicing, LLC (Ocwen) and their agents and/or employees.

their two younger sons who lived with them, Kameron Plumb and Joshua Plumb, into entering into an unconscionable, fraudulent mortgage loan transaction, at the expense of, but hidden from the innocent Plumbs, jeopardizing loss of their home. This was accomplished via the use of various misrepresentations, legal threat, appraisal fraud, notary fraud, and illegal forgery of a note written instrument and a deed of trust written instrument.

The Plumbs dispute that they executed or delivered a lawful promissory note and deed of trust to Finance America, LLC in August 2004. The Plumbs deny that they signed any document on August 15th, 16th or 17th or on August 26th, 2004 before any notary public. The Plumbs showed undisputed evidence that U.S. Bank has two deeds of trust, one is an incomplete written instrument without legal effect and the other deed of trust that was recorded on August 31 is an illegal forged written instrument that has no legal effect. The Plumbs also contend that U.S. Bank's note is different from the Fidelity Title Company's certified copy and that the bank's note also an illegal forged written instrument.

Once the Plumbs began to discover fraud in the origination they stopped making payments on May 1, 2009. The Plumbs contend that U.S. Bank could not be assigned the beneficial interest of a forged deed of trust.

On 07/08/2009 the Plumbs' authorized representatives and professional

mortgage loan auditors, officially notified Ocwen (the sole loan servicer for all note holders) that there was fraud in the origination of the loan.[2] Ocwen did not respond as required by law. After that, the Plumbs officially notified all parties of interest of the fraud in the origination of the loan, including, but not limited to Ocwen, LaSalle Nat'l Bank Ass'n, and the trustee Aztec Foreclosure Corp. The parties failed to properly respond.

On 12/26/2013, U.S. Bank filed its foreclosure complaint, stating that "*Plaintiff is the holder of the note*".

On 5/12/2014, the Plumbs filed a motion to dismiss because U.S. Bank did not have standing.

On 08/04/2014, U.S. Bank, through Ocwen (its attorney-in-fact and loan servicing agent), acquired possession of the forged Note. Appellants' Brief, Appendix page 1.

On 7/17/2015, U.S. Bank's attorneys (Tiffany Owens) and attorney-in-fact (Ocwen) and its contract manager (Matthew Owens), jointly responded to the Plumbs' *First Set of Interrogatories and Requests for Production of Documents*.

Included as part of U.S. Bank's attorneys' official responses was a document that Mr. Owens signed and dated entitled "Note Location

[2] CP 89-134.

Determined." *Id.* The said document showed that *Deutsche Bank* held possession of the forged note and deed of trust instruments on 12/26/2013, which is the date U.S. Bank filed its foreclosure complaint. In direct contradiction to the information on Mr. Owens' signed and dated note location document, in their answers to the Plumbs' Interrogatories, U.S. Banks' attorneys contradicted themselves, stating, "*Ocwen Loan Servicing, LLC* as attorney in fact for Plaintiff held the original Note on the date the complaint was filed on December 26, 2013." [emphasis added] Appellants' Br, Appendix page 2. (Later, in its pleading, U.S. Bank acknowledged the conflicting "note location determined" document but never attempted to explain the discrepancy between U.S. Bank's agent's sworn statement (made under penalty of perjury) and the conflicting note location document that Mr. Owens signed and dated (regarding which entity held possession of the note on the date the case was filed). The bank never objected to the note location document, never disputed it, and at the same time it never claimed that there was an honest mistake made, or that Deutsche Bank was also its agent or that U.S. Bank and/or its agent controlled the location where the note was held at Deutsche Bank when the case was filed.)

On 03/31/2016, U.S. Bank filed a motion for summary judgment and memorandum in support of motion for summary judgment. In support, it

also filed two conflicting, conclusory affidavits executed by agents from Ocwen. Both affiants claimed that the Plumbs had "executed" the bank's note and deed of trust "on **August 16, 2004.**" The instruments that the affiants attached to their affidavits, however, showed the instruments were both "executed" on the "**26th**" day of "**August, 2004**". (The Plumbs dispute that they signed any document on either the 16th or the 26th before any notary public and that the handwritten date of the "26th" day of "August, 2004" was not on any note or deed of trust they signed.) U.S. Bank's affiants failed to make their affidavits under penalty of perjury and both failed to establish that the note had been endorsed and delivered to U.S. Bank or its agent on the date when the foreclosure case was filed.

On 07/01/2016, at the summary judgment hearing, the court held the opinion that it had expressed earlier, "*It comes down to the fact that money was loaned and there was agreement to repay it...and it hasn't been paid back. That's what this all comes down to.*"[3] With this opinion, 1) the court refused to receive testimony from the Plumbs in the summary judgment hearing;[4] 2) the court incorrectly concluded that the Universal Commercial Code (UCC) did not apply in this case and that the bank did not have to possess the note before it filed the foreclosure lawsuit;[5] 3) the

[3] VRP 55, Lines 15-19.
[4] VRP 85, Line 20.
[5] VRP 101, Lines 11-25; p 102, 103; p 104, Lines 1-9; p 108, Lines 1-13; VRP 103, Lines 7-25; p 104, Lines 1-9.

court did not make a finding or determination on any of the Plumbs' material issues and their admissible evidence that they put forth in their defense[6]; 4) The Plumbs testified throughout the proceedings that there were wrongful acts, crimes, forgery and fraud committed by the originators of the loan and the bank's attorney in fact and loan servicing agent (Ocwen and its agents), but the court found that it did not matter in this case;[7] 5) The court held that fraud was a separate issue from the loan and because a loan had been made that had not been paid, that was all that mattered.[8] The court ruled in favor of the bank.

The Plumbs appealed. On 12/14/2017 Division III affirmed.

E. Argument Why Review Should Be Accepted

Pursuant to Washington State's Rules of Appellate Procedure (RAP) this Supreme Court should review the decision of the Court of Appeals affirming the judgment and decree of foreclosure entered after summary judgment was granted by the superior court in favor of U.S. Bank because 1) the decision is in direct conflict with decisions of the Washington Supreme Court (RAP 13.4(b)(1); 2) the decision is in conflict with another decision of the Washington Court of Appeals (RAP 13.4(b)(2); and 3) this

[6] VRP 106, Lines 19, 20.
[7] VRP 96, Lines 3-25; pp 97-98; VRP 99, Lines 1-20. VRP 92, Lines 23-25; p 93; p 94, Lines 1-14.
[8] VRP 90, Lines

petition involves an issue of substantial public interest that should be determined by the Washington Supreme Court (RAP 13.4(b)(4). 4) The central issue of standing being raised as a defense in this foreclosure lawsuit is now brought for consideration for the first time before this Supreme Court. Numerous state supreme courts across this country (e.g., New York, Hawaii, Ohio, Vermont, New Mexico, Oklahoma, Kansas) have recently ruled on this very same issue, and their decisions are united in agreement regarding this important subject. The rulings from these state supreme courts unanimously reject the approach adopted by the trial court in this case. It is in the interests of fairness, justice and the public benefit that this important issue be clarified for the courts, the banks, and homeowners in our state, just as it has been clarified by these supreme courts for the citizens of their own states across the nation. This will help to ensure proper compliance with the rules and will help to avoid additional abuse commited against homeowners by unscrupulous agents of the banks. 5) See also Appendix II, Relevant Cases' Holdings.

1. If U.S. Bank did not possess the note on the date it filed this suit, the bank lacks standing to foreclose. Lack of standing cannot be cured after a foreclosure case is filed, by obtaining the note later on, prior to judgment.

Argument: According to the Vermont Supreme Court (*U.S. Bank National Ass'n v. Kimball, 2011 VT 81*), when a foreclosing party was not the holder of the note on the date the lawsuit was filed, dismissal is warranted for this reason alone. The court said, in relevant part, "*When a plaintiff is not able to establish that it possessed a note on the date a foreclosure complaint was filed, the complaint should be subject to dismissal if only to provide a clear incentive to plaintiffs to see that the issue of standing is properly addressed before any complaint is filed.*" (Emphasis added)

"*It is neither irrational nor wasteful to expect a foreclosing party to actually be in possession of its claimed interest in the note, and have the proper supporting documentation in hand when filing suit.*"

If a Bank is allowed to file a foresclosure case without standing, and then to cure this standing defect by obtaining the note afterwards, this removes all incentive for a plaintiff to have standing when a foreclosure case is filed. A plaintiff that files a foreclosure complaint without being the holder must embrace fundamental dishonesty in order to file and maintain the case, since it is necessary to state that they <u>are</u> the holder of the note in order to invoke the jurisdiction of the court. Allowing banks to do this would have the unintentional effect of encouraging and increasing the frequency of filings made in bad faith. The courts and the public does not benefit from a deluge of bad filings, which is why every state supreme court that has ruled on this issue has ruled against the banks and in favor

of the position described here. Short term judicial economy does not outweigh the greater principle of requiring foreclosing parties to have standing when they file their cases. Please also see the following recent state Supreme Court cases:

Supreme Court of Hawaii: *Bank of Am., N.A. v. Reyes-Toledo*, 139 Haw. 361, 368-69, 390 P.3d 1248, 1255-56 (2017).

Supreme Court of New Mexico: *Deutsche Bank Nat. Trust Co. v. Johnston,* 2016-NMSC 013, 369 P.3d 1046, 1052 (N.M. 2016) (holding that "standing must be established as of the time of filing suit in mortgage foreclosure cases");

Supreme Court of Oklahoma: *Deutsche Bank Nat. Trust v. Brumbaugh,* 2012 OK 3, 270 P.3d 151, 154 (Okla. 2012) ("Being a person entitled to enforce the note is an essential requirement to initiate a foreclosure lawsuit. In the present case, there is a question of fact as to when Appellee became a holder, and thus, a person entitled to enforce the note. Therefore, summary judgment is not appropriate.");

Supreme Court of New York: *U.S. Bank Nat'l Ass'n v. Steinberg*, 2013 NY Slip Op 52167(U), 42 Misc. 3d 1201(A), 984 N.Y.S.2d 635 (Sup. Ct.) (holding that "Plaintiff is not entitled to the relief it seeks because it has failed to proffer any evidence of its standing to

foreclose under the...Note at the time of commencement.");

Supreme Court of Kansas: *FV-I, Inc. v. Kallevig*, 306 Kan. 204, 392 P.3d 1248 (2017) (holding, "In order for a plaintiff to prevail in its mortgage foreclosure proceeding, it must establish both that it possessed enforcement rights in the note under Article 3 of the UCC....and that those rights existed at the time it filed the action.")

Supreme Court of Ohio: *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St. 3d 13, 2012-Ohio-5017, 979 N.E. 2d 1214 (2012) (holding, standing is determined as of the filing of the complaint.)

2. Error by the Appeals Court: The Note Location Determined document was incorrectly labeled "inadmissible hearsay".

Argument: The appeals court offered several reasons (which we believe to be incorrect) as to why it treated the Note Location Determined document as inadmissible hearsay. The appeals court stated, "*..the document is not an admission of a party opponent. The document purports to have been made by an employee of Ocwen, not U.S. Bank. Although Ocwen worked as a servicing agent for U.S. Bank's loan, there is no evidence Ocwen had authority to speak on behalf of U.S. Bank. ER 801(d)(2)(iii). Nor is there any evidence U.S. Bank ever adopted the note*

location document as its own or agreed to its truthfullness. ER 801(d)(2)(ii)." (Appendix I., page 4)

The note location document was included as part of a bundle of documents requested by U.S. Bank and provided as part of "*Plaintiff's Responses to Defendants' First Set of Interrogatories and Request for Production of Documents.*" (Appellants' Brief Appendix) The contents were provided by U.S. Bank as part of its official response and the collection of them, as a whole fell under the label given to it by U.S. Bank, who called it "Plaintiff's Responses". U.S. Bank did not call it "Ocwen's Responses". When U.S. Bank requested Ocwen's assistance and worked in tandem with Ocwen to answer, it implicitly authorized Ocwen's involvement. When it labeled the end result, "Plaintiff's Responses" that is the same as "U.S. Bank's Responses", thus adopting this collection as its own and asserting ownership by U.S. Bank of the collection of documents which U.S. Bank provided to the Plumbs as U.S. Bank's official reply. U.S. Bank never objected before the trial court to any of these documents or answers that it provided as "Plaintiff's Responses". It waived any such objection. "*Under ER 103, an objection must be made to preserve an evidentiary error for appeal. Defense counsel did not object to Closson's statement nor did he ask for 258 a continuing object to that line of inquiry....*" *State v. Power* 893 P.2 615, 126 Wash. 2d 244 (1995). It

authorized them implicitly and explicitly by its actions and its own labeling of this collection of documents, the entirety of which is called, "Plaintiff's Responses". U.S. Bank made no distinction between individual documents. It used a sweeping general term that covered everything included. If Ocwen was authorized to participate in the written answers, it was authorized to participate in the document production. U.S. Bank's failure to object at any time to any of these documents is further evidence of this. U.S. Bank's reference of the Note Location Determined document is evidence of its allowance of it. If U.S. Bank included these documents as part of "Plaintiff's Responses" and sent them to the Plumbs, then U.S. Bank asserted ownership and adoption of such records in its official authorized reply. With this in mind, multiple hearsay exceptions exist:

ER 801(d)(i) The party's own statement, in either an individual or a representative capacity.

The Note Location Document became U.S. Bank's own statement when it was included as part of the collection of documents labeled by U.S. Bank's attorney as "Plaintiff's Responses". Plaintiff is U.S. Bank. If U.S. Bank had disagreed with the Note Location Document, it never should have included it as part of this collection of documents and labeled it as "Plaintiff's Responses" then sent it to the Plumbs, then never objected

to it, even going so far as to reference it without objection. It is unreasonable to fail to object to this document before the trial court, to even reference it without objection, then long after the fact attempt to assert an untimely hearsay objection for the first time on appeal. Contrary to RAP 2.5(a), the Court of Appeals improperly reviewed the bank's bogus claim in its reply brief that the conflicting note location document was now "hearsay." "An issue raised and argued for the first time in a reply brief is too late to warrant consideration." *Deutsche Bank Nat'l Tr. Co. v. Slotke*, 192 Wn. App. 166, 367 P.3d 600 (2016). Ocwen may have generated the document, but its documents implicitly and explicitly became incorporated into and adopted as U.S. Bank's own official authorized statement when U.S. Bank's attorney self-defined that batch of discovery documents as "Plaintiff's responses". By calling it U.S. Bank's response, Plaintiff's authorized attorney accepts and adopts the contents, presenting them collectively as U.S. Bank's authorized response. Thus, they become that party's own official statement. Furthermore,

ER 801(d)(ii) a statement of which the party has manifested an adoption or belief in its truth, or

Not only has U.S. Bank's own description and label of this collection of documents indicate that it was adopted as its own property, but there is evidence to indicate that U.S. Bank believes the information contained

within the Note Location Determined document to be true. Ryan Carson (U.S. Bank's current attorney) has never once claimed before the Appellate court that U.S. Bank had possession of the note on the date this lawsuit was filed. He states freely that U.S. Bank had the note as the time U.S. Bank filed for summary judgment and says U.S. Bank has it now, but is careful to avoid claiming that U.S. Bank did at the beginning. Further,

ER 801(d)(iii) a statement by a person authorized by the party to make a statement concerning the subject, or

Contrary to the Court of Appeals improper argument, the evidence is overwhelming that proves Ocwen has authority to speak on behalf of U.S. Bank pursuant to ER 801(d)(2)(iii) because the bank's affiants are from Ocwen.[9] U.S. Bank can't have it both ways: Using Ocwen's responses for other discovery answers and referencing them, plus using Ocwen's affidavits in support of summary judgment, but when it comes to inconvenient information which U.S. Bank never previously objected to, suddenly representing Ocwen as being some unauthorized party. Ocwen's authorization is clear due to the fact that U.S. Bank requested Ocwen's involvement, U.S. Bank took Ocwen's responses and incorporated them under the umbrella term "Plaintiff's Responses". U.S. Bank further

[9] CP 781-823; CP 745-780;

explicitly and implicitly implied authorization by referring to Ocwen as being Plaintiff's attorney-in-fact (Appellants' Brief, Appendix, Page 2) and providing Ocwen's answers as part of its official, authorized response. U.S. Bank had the freedom and capacity to object to any unauthorized testimony or record, they did not do so at the trial court level, despite multiple opportunities. Therefore, they waived timely objection. U.S. Bank's own actions and their own self-applied label provide sufficient evidence to conclude that Ocwen was authorized by U.S. Bank to produce the statements and documents in question. If they hadn't been, U.S. Bank would have stopped it.

U.S. Bank never objected to these answers at any time before the trial court. Again, the fact that U.S. Bank labelled it "Plaintiff's Responses" means that the contents provided as part of that batch of discovery responses is incorporated into Plaintiff's response and is authorized by Plaintiff. Plaintiff had the opportunity to remove any document from that group that was unauthorized, or to object to any unauthorized document that inadvertently was included. The fact that U.S. Bank never did so, granted their acceptance, allowance and implicit/explicit authorization.

ER 801(d)(iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party,

The same reasoning from above applies to this exception as well. U.S. Bank specifically chose to include Ocwen as part of its authorized official reply and to label the things produced by Ocwen as "Plaintiff's Responses". This, combined with U.S. Bank's failure to object before the trial court, combined with U.S. Bank's description of Ocwen as being its attorney-in-fact, plus U.S. Bank's general demeanor, is strong evidence for Ocwen's authorization by U.S. Bank. Plus, Ocwen's documents were made under penalty of perjury.

Further, contrary to the Court of Appeals erroneous argument, the note location qualified for a hearsay exception as a business record pursuant to ER 803(a)(6), because it was specifically verified, identified and attested to as being a true and correct record by a clearly qualified person, U.S. Bank's attorneys and its attorney in fact and loan servicing agent's (Ocwen)"Contract Manager." U.S. Bank authorized Mr. Owens to respond to all of the Plumbs' discovery requests and to make his responses specifically under penalty of perjury to be true and correct. He specifically attested to the record's identity and the mode of preparation and showed that it was made in the regular course of business, at or near the time of the act, condition or event by his stamping his name, handwriting the date "7/16/15", and signing his initials on the document, swearing under

penalty of perjury that the document was true and correct that same day. Appellants' Br, pages 1, 4.

Also, contrary to the Court of Appeal's erroneous argument, the Plumbs established the admissibility of the note location document pursuant to ER 803(a)(15) because the statements in the document were relevant and purported to establish and affect an interest in the Plumb's residential property. The statements showed the Plumbs' property address located at "4902 Richey Rd. Yakima, WA 98908" and no dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document. Also, U.S. Bank's attorneys and attorney in fact provided the document as a true and correct document in their responses to the Plumbs' request for production of documents.

3. <u>This Supreme Court and other Supreme Courts through our nation recognize that a foreclosing plaintiff must establish entitlement to enforce a promissory note at the time the action was commenced by applying the Uniform Commercial Code Article 3.</u>

The Court of Appeals in this instant case manifestly erred in affirming the trial court's decision to grant summary judgment because U.S. Bank has failed to establish that it became a "holder" of the note, within the meaning of the UCC, by evidencing the physical delivery of the note from

the original lender Finance America, LLC to the trust of which U.S. Bank is a trustee. The bank's two affidavits are insufficient to establish U.S. Bank's standing because they contain no specific factual details (i.e., when, who, what, where and how) evidencing Finance America, LLC's delivery of the note to the trust. The bank's affidavits are irrelevant to the factual circumstances under which the note was delivered from the lender, Finance America, LLC, to the trust prior to commencement of the foreclosure lawsuit. The Supreme Court should reverse the trial court's order granting the bank summary judgment because U.S. Bank failed to establish its prima facie standing to foreclose. U.S. Bank failed to submit probative evidence of the note's physical delivery prior to the commencement of the action. The only non-contradictory proof of physical delivery of the note submitted by U.S. Bank were affidavits from its servicing agent who failed to establish that the note was physically delivered to U.S. Bank or its agent prior to commencement of the lawsuit. Here, U.S. Bank has failed to satisfy its burden of establishing that it had the requisite standing to commence this foreclosure action. The bank's affidavits, made over a year after the case was filed, do not establish that the note was duly negotiated within the meaning of the UCC. While the bank's affidavits (made over a year after the suit was filed) make the conclusory assertion that plaintiff is currently in possession of the note, the

affidavits fail to address the physical delivery of the note from Finance America, LLC and, thus, failed to establish that the plaintiff had physical possession of the note prior to commencing this action. Further, the bank's affidavits are admittedly based on the affiants' general review of the bank's mortgage servicing business records, rather than their own personal knowledge. Accordingly, the bank's conclusory assertions that state the bank is the "holder" or in "possession" of the note does not prove that the bank was the "holder" or in "possession" of the note on the date the foreclosure case was filed. Without producing any probative, admissible evidence of "delivery" the affidavits are insufficient, as a matter of law. See e.g.

> *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 359 P.3d 771 (2015), where this Supreme Court held: "[A] promissory note is often a negotiable instrument and therefore article 3 of the U.C.C. is applicable. RCW 62A.3-102." "When a note is indorsed in blank, it is 'payable to a bearer and may be negotiated by transfer of **possession alone**.' RCW 62 A.3-205(b)." [emphasis added][10]
>
> The UCC at RCW 62A.3-104(a)(b)&(e) identifies a promissory Note as a negotiable instrument and the code defines and controls who is entitled to enforce a negotiable interest in a note. It requires

[10] CP 714, Lines 9-11.

that the plaintiff be the "holder of the instrument" at the time it filed suit. RCW 62A.3-301 "'Person entitled to enforce' an instrument means (i) the holder of the instrument". Pursuant to the UCC RCW 62A.3-203 "Transfer of instrument; rights acquired by transfer. An instrument is transferred WHEN IT IS DELIVERED by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." [emphasis added] "Under the UCC, the 'holder' of the note entitled to commence a judicial foreclosure is the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession, Wash. Rev. Code § 62A.1-201(b)(21)(A)." *Deutsche Bank Nat'l Tr. Co. v. Slotke,* 192 Wn. App. 166, 367 P.3d 600 (2016). Under Article 3 of the UCC, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder, Wash. Rev. Code § 62A.3-201(b). *Id.* "Negotiation" means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder, Wash. Rev. Code § 62A.3-201(a)." *Id.*

4. The Court of Appeals erred in claiming, "Even if the note location document were admissible, it would not appear dispositive. The document does not show that, at the time of suit, U.S. Bank lacked at least constructive possession of the note."

Here, the Court of Appeals failed to consider a relevant admission by the Bank. In its reply brief to the court of appeals (Respondent's Brief, Pages 13-14), U.S. Bank's attorney admitted that "if" Deutsche Bank held the note on the date this lawsuit was filed, that U.S. Bank would not have been the true party of interest in this case. The bank's attorney highlights this as a defect needing to be cured, thus removing the possibility that Deutsche Bank could hold possession of the note at the same time that U.S. Bank had constructive possession of the note. Thus, the Bank has closed down that avenue of reasoning explored by the Court of Appeals and has clarified this issue for the court.

For the reasons described above, and contrary to the Court of Appeals' erroneous claim on page 5 of its Opinion, (Appendix I), the Plumbs' arguments were indeed sufficient to challenge the facts set forth in U.S. Bank's motion for summary judgment. Standing to sue is a threshold issue. U.S. Bank could not prove it had proper standing in this case. Both lower courts unjustly deprived the Plumbs of their property, without due

process of law, in violation of U.S. Const. Amend. XIV, § 1 and Wash. Const. Art. I, § 3. The bank's extensive dishonesty and lack of standing is an appropriate basis for the Supreme Court to to award CR 11 sanctions pursuant to *State v. Verharen*, 136 Wn.2d 888, 904-05, 969 P.2d 64 (1998), The Supreme Court should dismiss the case.

If review is granted, this court should grant the relief sought in Part F below.

Because the arguments raised by the Court of Appeals are without merit, the Plumbs are entitled to sanctions and attorney fees and/or costs.

F. Conclusion

For the meritorious reasons shown above in Part E, this Petition for Review should be accepted by the Supreme Court, because the decision of the Court of Appeals is in direct conflict with the decisions of the Supreme Court and is in conflict with another decision of the Court of Appeals pursuant to RAP 13.4(b)(1)(2)). Also, this petition involves issues of a foreclosing bank's bad faith and deception in the court, lack of standing, and its failure to honestly, fairly and properly establish that it had became a "holder' of the note within the meaning of the UCC, by evidencing the physical delivery of the note from the original lender. This case is of substantial public interest that should be determined by the Supreme Court pursuant to RAP 13.4(b)(4).

The relief sought, if review is granted, is that this Court do the following: 1) To prevent a gross miscarriage of justice, order and decree reversal of the trial court's decision with directions to enter judgment declaring that the case be dismissed with prejudice; 2) Grant the costs the Plumbs have incurred to file and proceed in the appeal and in this review; 3) Order a reversal of any purchase at any Sheriff's sale that might have taken place, and that the purchaser restore any property taken through the sale to the Plumbs; and 4) Grant such other and further relief as may be proper and equitable.

Dated: January 16, 2018

Respectfully submitted,

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Georgia A. Plumb

By Joshua C. Plumb
Joshua C. Plumb

By
Kameron F. Plumb

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Appendix I.

Table of Contents

FILED
DECEMBER 14, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

U.S. BANK NATIONAL ASSOCIATION, AS SUCCESSOR IN INTEREST TO WILMINGTON TRUST COMPANY, AS TRUSTEE, SUCCESSOR IN INTEREST TO BANK OF AMERICA, NATIONAL ASSOCIATION, AS TRUSTEE FOR STRUCTURED ASSET INVESTMENT LOAN TRUST MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2005-1, Respondent, v. GEORGIA A. PLUMB; JOSHUA C. PLUMB; KAMERON F. PLUMB; and THE WORD CHURCH, Appellants, ESTATE OF CARL PLUMB, DECEASED; UNKNOWN HEIRS AND DEVISEES OF CARL PLUMB, DECEASED; CITIBANK, N.A.; ALSO ALL PERSONS OR PARTIES UNKNOWN CLAIMING ANY RIGHT, TITLE LIEN, OR INTEREST IN THE PROPERTY DESCRIBED IN THE COMPLAINT HEREIN, Defendants.	No. 34615-3-III UNPUBLISHED OPINION

PENNELL, J. — The Plumbs appeal a judgment and decree of foreclosure entered after summary judgment was granted in favor of U.S. Bank National Association. We affirm.

FACTS

In August 2004, the Plumbs executed and delivered a promissory note and corresponding deed of trust encumbering their home to Finance America, LLC in exchange for a $360,000 loan. The front page of the deed of trust is dated August 16, 2004, but the Plumbs signed the document on August 26. The deed of trust was recorded on August 31. The beneficial interest in the deed of trust was subsequently assigned to U.S. Bank.

The Plumbs failed to make the monthly payment due on March 1, 2009. Since that time, they have continued to withhold payments on the loan, alleging fraud as the reason for nonpayment. On June 13, 2009, the Plumbs were provided with written notice of default by U.S. Bank's loan servicing agent, Ocwen Loan Servicing, LLC. The Plumbs did not cure the default.

On December 26, 2013, U.S. Bank filed a foreclosure complaint in Yakima County Superior Court and moved for summary judgment in May 2015. The superior court granted summary judgment to U.S. Bank and the Plumbs appeal.

ANALYSIS

Standing

The Plumbs' chief argument is U.S. Bank lacked standing to foreclose on their property because it did not possess the promissory note on the date it filed suit. Although it is undisputed that U.S. Bank possessed the note at the time of the summary judgment proceedings, the Plumbs claimed the critical time period was the date of suit. As factual support for their possession claim, the Plumbs point to an item they refer to as the "Note Location Determined" document that states:

> [B]ased on Deutsche Bank data base they first initially received the loan on 9/13/2004 then withdrew and sent it to GMAC on 10/14/04, received it back on 11/9/04, withdrew and sent it to Ocwen on 7/22/10, received it again on 9/14/13 and withdrew and sent it out to Ocwen on 7/28/14. Ocwen received the Original Note and Mortgage on 8/4/14 and has remained in custody of the Original documents since that date.

Clerk's Papers at 665.

Our inquiry on summary judgment is the same as in the trial court. *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005). We consider the pleadings and supporting documents to determine whether there is a genuine issue of material fact for trial. CR 56(c). A party opposing summary judgment cannot rely on speculation or inadmissible evidence to show material factual issues. *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 306, 151 P.3d 201 (2006). Instead, the opponent must proffer facts

that would be admissible at trial and would tend to show the existence of disputed material facts. *Id.*

A threshold problem with the Plumbs' arguments in opposition to summary judgment is that the note location document is hearsay. ER 801(c). Contrary to the Plumbs' assertions, the document is not an admission of a party opponent. The document purports to have been made by an employee of Ocwen, not U.S. Bank. Although Ocwen worked as a servicing agent for U.S. Bank's loan, there is no evidence Ocwen had authority to speak on behalf of U.S. Bank. ER 801(d)(2)(iii). Nor is there any evidence U.S. Bank ever adopted the note location document as its own or agreed to its truthfulness. ER 801(d)(2)(ii). Because the note location document is hearsay, it can only be considered on summary judgment if the Plumbs are able to establish an exception to the hearsay rule.

The note location document does not qualify for a hearsay exception as a business record. ER 803(a)(6). To be admitted as a business record, a document must be verified by a custodian of record or another qualified witness who can attest to the record's identity and mode of preparation. RCW 5.45.020; *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 858, 292 P.3d 779 (2013) (admissibility as a business record requires showing the document was "made in the regular course of business, at or near the time of

the act, condition or event"). No such verification exists in the record. The business record exception therefore fails.

The Plumbs also have not established admissibility of any statements in the note location document affecting an interest in property. ER 803(a)(15). A statement contained in a document purporting to establish or affect an interest in property is not considered hearsay if the matter stated was relevant to the purpose of the document. 5C KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 803.58 at 140 (6th ed. 2016). The note location document does not, in and of itself, purport to establish or impact an interest in the Plumbs' home or any other form of property. ER 803(a)(15) is inapplicable.

The Plumbs proffer of the note location document was not, therefore, sufficient to challenge the facts set forth in U.S. Bank's motion for summary judgment.[1]

Fraud

The Plumbs next argue: (1) forgery in U.S. Bank's promissory note and deed of trust instruments, and (2) fraud in the origination of the mortgage loan vitiated the instruments and the transaction.

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[1] Even if the note location document were admissible, it would not appear dispositive. The document does not show that, at the time of suit, U.S. Bank lacked at least constructive possession of the note.

The elements of fraud include: (1) representation of an existing fact, (2) materiality, (3) falsity, (4) the speaker's knowledge of its falsity, (5) intent of the speaker that it should be acted on by the plaintiff, (6) plaintiff's ignorance of its falsity, (7) plaintiff's reliance on the truth of the representation, (8) plaintiff's right to rely on it, and (9) damages suffered by the plaintiff. *Adams v. King County*, 164 Wn.2d 640, 662, 192 P.3d 891 (2008). The person alleging fraud must prove all of these elements by clear, cogent, and convincing evidence. *Pedersen v. Bibioff*, 64 Wn. App. 710, 722-23, 828 P.2d 1113 (1992). The absence of any element is fatal to a claim of fraud. *Puget Sound Nat'l Bank v. McMahon*, 53 Wn.2d 51, 54, 330 P.2d 559 (1958).

The Plumbs' first theory is fraud in the inducement, namely fraudulent appraisal. They claim the appraisal done in conjunction with their refinance reflected an incorrect and inflated value for their property. This claim of fraud fails. The difference between the assessed and appraised value is not sufficient evidence of a false statement, as required by element number three. In addition, the Plumbs cannot point to any evidence that U.S. Bank was aware of an inflated appraisal amount, as required by element number four.

The Plumbs' second theory is a person working on the refinance threatened to sue them if they did not sign the loan documents. This vague allegation does not constitute a false statement, as required by element number three.

The Plumbs' third theory is the promissory note and deed of trust in U.S. Bank's possession are forgeries. There are also insufficient facts to support this claim. The Plumbs have admitted that no entity besides U.S. Bank has attempted to demand payment on the promissory note. The discrepancy in the dates on the deed of trust would only be of consequence if there was a dispute as to the date the contract was entered into, which there was not. The Plumbs also claim other parts of the deed of trust were forged including the name of the trustee, the legal description of the property, and the presence of a form name on the lower left-hand corner. The Plumbs have not shown how this affects the terms of the instrument. Moreover, most of the alleged forgeries the Plumbs point to are in the deed of trust. But it is the note that is important. The mortgage is incident to the note. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 104, 285 P.3d 34 (2012).

Laches

The Plumbs contend U.S. Bank's lawsuit must be dismissed due to the equitable doctrine of laches. They argue U.S. Bank caused irreparable harm to their ability to

defend by waiting over four years after the Plumbs defaulted in May 2009 to file the foreclosure action.

The doctrine of laches protects defendants who are injured by a plaintiff's delay in bringing the action. *Assocs. Hous. Fin. LLC v. Stredwick*, 120 Wn. App. 52, 61, 83 P.3d 1032 (2004). To invoke this defense, a defendant must establish three things: (1) the plaintiff knew, or could have reasonably discovered, the facts constituting a cause of action, (2) the plaintiff unreasonably delayed filing the action, and (3) the defendant was materially prejudiced by the delay. *Id.* at 62. Absent unusual circumstances, the doctrine of laches should not be invoked to bar an action short of the applicable statute of limitation. *In re Marriage of Hunter*, 52 Wn. App. 265, 270, 758 P.2d 1019 (1988).

The Plumbs cannot meet the elements of laches. U.S. Bank filed this action within the six-year limitation period. RCW 4.16.040(1). Any delay within this period did not prejudice the Plumbs. To the contrary, the Plumbs benefitted from the delay, as they have continued to live in their home without making loan payments. Although the Plumbs did suffer the loss of their family member, Carl Plumb, during the limitation period, they cannot show that the outcome of their case could have been different with Carl Plumb's assistance.

Due process

The Plumbs next claim they were deprived of their right to due process and equal protection. Regarding due process, the Plumbs argue the superior court unreasonably ignored the facts and refused to allow them to testify at the summary judgment hearing. Regarding equal protection, the Plumbs claim they were treated differently than other similarly situated homeowners.

These claims are derivative of the other claims presented in the Plumbs' briefing. As discussed, the Plumbs did not properly support their claims with admissible evidence. The Plumbs were given an opportunity to defend the lawsuit in court. There was no denial of due process.

As for the Plumbs' equal protection argument, they fail to demonstrate how they have been treated differently from other similarly situated individuals other than to say other homeowners are "protected." Appellant's Br. at 47. This court does not consider conclusory arguments unsupported by citation to authority. RAP 10.3(a)(6); *Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 629, 285 P.3d 187 (2012).

Sanctions and attorney fees

Because the arguments raised by the Plumbs are without merit, they are not entitled to sanctions or attorney fees.

CONCLUSION

The order and judgment of the superior court is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:

Fearing, C.J.

Korsmo, J.

Appendix II.

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Relevant Cases' Holdings

1) When reviewing a summary judgment order, the court must review the evidence in a light most favorable to the nonmoving party. *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987).

2) For purposes of the summary judgment standard of CR 56(c), a "material fact" is one on which the outcome of the litigation depends. A summary judgment is proper if reasonable minds could reach but one conclusion regarding the material facts. *Kim v. Moffett*, 156 Wn. App. 689, 234 P.3d 279 (2010).

3) A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

4) "With regard to summary judgment motions, the initial burden is on the moving party to show there is no genuine issue of any material fact....The burden then shifts to the nonmoving party to set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact." *Deutsche Bank Nat'l Tr. Co. v. Slotke*, 192 Wn. App. 166, 367 P.3d 600 (2016).

5) "A motion for summary judgment may be granted only if, 'after viewing all the pleadings, affidavits, depositions, admissions and all reasonable inferences drawn therefrom in favor of the nonmoving party', the trial court finds,' (1) that there is no genuine issue as to any material fact, (2) that all reasonable persons could reach only one conclusion, and (3) that the moving party is entitled to judgment as

a matter of law.'" *Higgins, v. Stafford* 123 Wn.2d 160; 866 P.2d 26, 31 (1994).

6) As a matter of law, the allegations of the *pro se* litigant are held to less stringent standards than formal pleadings drafted by lawyers and courts must construe inartful pleadings liberally in *pro se* actions. *Haines v. Kerner*, 404 U.S. 519, 92 S. Ct. 594, 30 L.Ed.2d 652 (1972); *Boag v. MacDougall*, 454 U.S. 364, 102 S. Ct. 700, 70 L.Ed.2d 551 (1982).

Supreme Court No. 953-81-3
Court of Appeal's No. 3461-3-III
U.S. Bank Nat'l Ass'n v. Plumb

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I hereby declare that on January 16, 2018, I caused to be served a true and correct copy of the originals of Petitioners' 1) Petition for Review; and 2) this Proof of Service via Washington State Appellate Courts' eFiling Portal to:

1) The Supreme Court of the State of Washington
2) Ryan M. Carson, WSBA #41057 Wright Finlay & Zak, LLP
   3600 15th Ave W, Suite 200 Seattle, WA 98119
   Email: rcarson@wrightlegal.net
   Attorney for Respondent U.S. Bank Nat'l. Ass'n. et al.

- I also sent the aforementioned documents via USPS first-class, postage prepaid mail to Mr. Carson.
- I also sent via USPS first-class, postage prepaid mail a $200 money order paid to the order of Washington State Supreme Court and addressed to:

Washington State Supreme Court
PO Box 40929
Olympia, WA 98504-0929

Dated: January 16, 2018
in Yakima County, Washington.

/s/ Georgia A. Plumb
Georgia A. Plumb, Declarant
4902 Richey Rd.
Yakima, WA 98908
(509) 965-4304
Email: georgia@plumbsafety.com

Appendix I.

Table of Contents

FILED
DECEMBER 14, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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DIVISION THREE

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Supreme Court No. 953-81-3
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PROOF OF SERVICE

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I hereby declare that on January 16, 2018, I caused to be served a true and correct copy of the originals of Petitioners' 1) Petition for Review; and 2) this Proof of Service via Washington State Appellate Courts' eFiling Portal to:

1) The Supreme Court of the State of Washington
2) Ryan M. Carson, WSBA #41057 Wright Finlay & Zak, LLP
   3600 15th Ave W, Suite 200 Seattle, WA 98119
   Email: rcarson@wrightlegal.net
   Attorney for Respondent U.S. Bank Nat'l. Ass'n. et al.

- I also sent the aforementioned documents via USPS first-class, postage prepaid mail to Mr. Carson.
- I also sent via USPS first-class, postage prepaid mail a $200 money order paid to the order of Washington State Supreme Court and addressed to:

Washington State Supreme Court
PO Box 40929
Olympia, WA 98504-0929

Dated: January 16, 2018
in Yakima County, Washington.

/s/ Georgia A. Plumb
Georgia A. Plumb, Declarant
4902 Richey Rd.
Yakima, WA 98908
(509) 965-4304
Email: georgia@plumbsafety.com

GEORGIA PLUMB - FILING PRO SE

January 16, 2018 - 4:35 PM

Filing Petition for Review

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Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	U.S. Bank National Association, et al v Estate of Carl Plumb, et al (346153)

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- rcarson@wrightlegal.net

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Sender Name: Georgia Plumb - Email: georgia@plumbsafety.com
Address:
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Yakima, WA, 98908
Phone: (509) 965-4304

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