Case No. 100394-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Joshua C. Plumb & Kameron F. Plumb, et al.,

Appellants/Defendants,

v.

U.S. Bank National Association, et al.,

Respondent/Plaintiff.

On Appeal from the Court of Appeal Div III No. 37687-7-III

AMICUS CURIAE MEMORANDUM

Scott E. Stafne, WSBA No. 6964
Stafne Law *Advocacy & Consulting*
239 North Olympic Avenue
Arlington, WA 98223
360.403.8700

Church of the Gardens Press
www.churchofthegardens.org

Table of Contents

Table of Authorities

State Cases

Federal Cases

State Statutes

Constitutional Provisions

Other

I. Introduction

On March 29, 2022, this Court granted Church of the Gardens (COTG), Stafne Law Advocacy and Consulting (SLAC), and Scott Stafne (Stafne) permission to file this Memorandum in support of Plumbs' (Plumbs) Petition for Discretionary Review,[1] which is presently pending before this Court. As the Plumbs demonstrate in their Petition all three of the issues for which they seek review relate to their challenge to U.S. Bank's *standing* to file the underlying judicial foreclosure proceedings.

III. Facts of this Appeal

The relevant facts of this appeal so far as they involve the pertinent issue of whether U.S. Bank National Association , as a trustee, had *standing* to bring this judicial foreclosure action against the Plumbs are undisputed. They are set forth in the two unpublished decisions of Division III deciding the appeal below, the last of which—*U.S. Bank Nat'l Ass'n v. Plumb*, No. 37687-7-III (Wash. Ct. App. September 2, 2021) (unpublished)—appears at Petitioner Appendix

[1] The Petition was filed on behalf of Appellants Georgia A. Plumb, Joshua C. Plumb, Kameron F. Plumb, and The Word Church all of whom are referred to collectively herein as Appellants Plumbs.

1a–4a. That decision incorporates and relies upon as its basis for rejecting the Plumbs' *standing* arguments Division III's earlier decision in *U.S. Bank Nat'l Ass'n v. Plumb*, No. 34615-3-III (Wash. Ct. App. Dec. 14, 2017) (unpublished)[2], which held that because the Plumbs failed to demonstrate that U.S. Bank did not have *standing* that defense failed. *See* Petition App. 2a ("explaining [Division III held] ***the Plumbs lacked sufficient evidence that U.S. Bank did not hold the note. . . .***")

The Plumbs assert this was error because *standing* in this case was not a defense which the Plumbs had to prove, but a prerequisite to U.S. Bank filing suit against the Plumbs and their real property.

III. Application of RAP 13.4(b) criteria to this case

RAP 13.4(b) sets forth the relevant criteria for granting discretionary review. This Rule states:

> ***(b) Considerations Governing Acceptance of Review.*** A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the

[2] *See* Petition App. 1a, referencing and incorporating Division III's earlier 2017 Appeal decision at https://www.courts.wa.gov/opinions/pdf/346153_unp.pdf as the basis for deciding the appeal for which review is sought here.

> Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

A. Review should be granted pursuant to RAP 13.4(b)(1) & (2)

1. Division III's holding the Plumbs must demonstrate U.S. Bank did not hold the Note when the action commenced conflicts with decisions of this Court and the Court of Appeals.

This Court held in *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 222-23, 450 P.2d 166 (1969) that "[t]he holder of a negotiable instrument may thereon sue in his own name" *citing* RCW 62.01.51. As this Court knows, the principles of RCW 62.01.51 were incorporated into RCW 62A.3-301 when Washington's version of the Uniform Commercial Code was adopted and as a result this Court has held on numerous occasions that only the note's holder or someone authorized by the holder can enforce the deed of trust security instrument. *See e.g., Brown v. Dep't of Commerce*, 184 Wn.2d 509, 535-36, 359 P.3d 771, 783-84 (2015). *Brown* observes that this result, i.e., only the holder can enforce the note, is consistent with its precedent. *Id.* 184 Wn.2d at 532–42.

In *Deutsche Bank Nat'l Tr. Co. v. Slotke*, 192 Wn. App. 166, 367 P.3d 600 (2016) Division I held that the holder of a promissory note could enforce a deed of trust mortgage security because it was the note holder at the time the judicial foreclosure was filed. "Deutsche Bank maintained possession throughout this entire foreclosure action." *Id.* 192 Wn. Petition App. at 175. *See also 21st Mortg. Corp. v. Robertson*, No. 75262-6-I, 2017 Wn. App. LEXIS 2471, at *11 (Ct. App. Oct. 30, 2017) ("If 21st does not hold the note, then it does not have standing to enforce it. *See* RCW 62A.3-301. The trial court erred in striking this affirmative defense.")

2. Division III's decision conflicts with this Court's decisions in *Freedom Found. v. Teamsters Local 117 Segregated Fund* and *In re Buecking.*

In re Marriage of Buecking, 179 Wn.2d 438, 316 P.3d 999 (2013) indicated that in order to determine whether statutory predicates constitute jurisdictional requirements, courts must consider legislative intent. *Buecking*, at 179 Wn. 2d at 450-455. Last year in *Freedom Found. v. Teamsters Local 117 Segregated Fund*, 197 Wn.2d 116, 480 P.3d 1119 (2021) this Court indicated its position may have evolved beyond that stated in *Buecking*: "We no longer view statutory restrictions of courts' power to render judgment as

jurisdictional because the legislature cannot restrict the court's jurisdiction where the constitution has specifically granted the court's jurisdiction." *In re Buecking,* 197 Wn.2d at 121. (cleaned up)

Both cases observed, however, that statutory limitations on courts' exercise of judicial power "are precisely the kind of procedural requirements that limit the exercise of a court's jurisdiction but do not eliminate that jurisdiction." *See Freedom Found.*, 197 Wn.2d at 141-42 *citing Buecking* at 179 Wn.2d at 449.

Division III's decisions below conflict with those parts of *Freedom* and *Buecking* which require superior courts must consider statutory *standing* defenses, *see e.g.,* RCW 62A.3-301; RCW 61.24.005(2), which are timely made, as procedural limitations on superior courts' jurisdiction.

Another concern related to the decisions below is Division III's holding that *standing* must be disproved by defendants—rather than proved by plaintiffs—appears to be erroneously predicated on the authority of *In re Estate of Reugh*, 10 Wn. App. 2d 20, 57, 447 P.3d 544 (2019). Petition App. at 2a. But *Reugh*, like *Buecking* and *Freedom*, involves a waiver situation, which this case does not.

Nonetheless, *Reugh* recognizes that there is a conflict in Washington caselaw regarding whether statutory *standing* can be waived, *id.*, 10 Wn. App. 2d at 54-5, that this Court recently confirmed in *Williams v. Spokane*, No. 99071-9 (Washington Supreme Court March 3, 2022) as being: "whether standing is a jurisdictional requirement that must be considered if it is raised for the first time on appeal or, instead, a nonjurisdictional rule that an appellate court may refuse to review if it is raised for the first time on appeal." *Id.* at 13. (Cleaned up)

Because the Plumbs did not waive *standing* as a defense before the superior court, Amici bring this conflict in caselaw regarding the above stated issue to this Court's attention in order to demonstrate the urgency for resolving that underlying *standing* issue, regardless of whether it is characterized as jurisdictional or procedural. And because this conflict as to standing in judicial foreclosures can be resolved in this appellate review action, Amici urges this Court to do so.

B. Review should also be granted pursuant to RAP 13.4(b)(3)

The issue of whether a judicial foreclosure can be filed by an entity which does not hold the underlying Note merits

review because "a significant question of law under the Constitution of the State of Washington or of the United States is involved." This is because possession of the Note is necessary to establish that justiciability[3] which is a prerequisite for the legitimate exercise of *judicial power* pursuant to Wash. Const. art. IV. *See e.g., Bellingham Bay Improvement Co. v. New Whatcom,* 20 Wash. 53, 58, 54 P. 774, 775 (1898)("[W]e think that it is equally clear that . . . [judicial power] does not necessarily include the power to hear and determine a matter that is not in the nature of a suit or action between parties.") *See also* Stephen Landsman, *The Adversary System*: *A Description and Defense* (1984). *Cf. United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

Here it is not only statutes which limit the rights to enforce the promissory note and to foreclose the deed of trust mortgage to the holder of the note, but also the language of the Note and mortgage instrument agreements affording

[3] "Justiciability" means "[t]he quality or state of being appropriate or suitable for adjudication by a court." Black Law Dictionary, Ninth Edition, p. 923 (2009).
See also Diversity Indus. Dev. Corp v. Ripley, 82 Wn.2d 811, 815, 514 P.2d 137 (1973).

those remedies. Washington law has long held that a third party may only enforce a contract if it is made to appear that the contracting parties intended to "secure to him personally the benefits of the provisions of the contract." *Layrite Concrete Prods. v. H. Halvorson,* 68 Wn.2d 70, 72, 411 P.2d 405, 406 (1966) citing *Pacific Mercantile Agency v. First Nat'l Bank of Ferndale,* 187 Wash. 149, 60 P.2d 6 (1936).

And both those agreements and the statutes relating to them have been developed in response to those equitable principles that have long limited foreclosures of property in Washington and elsewhere. *See e.g.,* H.W. Chaplin, The Story of Mortgage Law, 4 Harv. L. Rev. 1 (1890) *Cf. Templeton v. Warner*, 89 Wash. 584 (1916).

Amici assert that allowing entities who cannot show *standing* (which is defined as "[a] party's right to make a legal claim or seek enforcement of a duty or right[4]") to foreclose pursuant to statute or the agreements creating the lien or those equitable principles applicable to foreclosures also poses Fourteenth Amendment Due Process Clause issues

[4] As per Black's Law Dictionary, Ninth Edition, 1536 (9th Ed. 2009).

because no branch of state government, including the judicial branch, can simply give homeowner's property away to one who has no rightful claims to it. *See e.g., Wastewater Dist. v. Olympic View Water & Sewer Dist.*, 196 Wn.2d 353, 370, 474 P.3d 547 (2020) ("We previously held that the municipal court lacked the authority to issue relief that implicated the interests of a nonparty. *Id.* 196 Wn.2d at 370.) *Cf. United States v. Sineneng-Smith*, *supra*. (Observing our system of adjudication in the United States is an adversarial one) And CR 56 cannot be used to change these constitutional protections.

C. Review should also be granted pursuant to RAP 13.4(b)(4)

RAP 13.4(b)(4) indicates discretionary review is appropriate "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court." COTG, SLAC, and Stafne assert this criterion supports granting review here because giving random banks, acting as trustees for purported trusts composed of investors in mortgage-backed securities, *standing* to foreclose on homes and displace those homeowners to the streets of our communities impacts the public interest in a myriad of ways, one of which is increasing the amount of court-imposed

homelessness in Washington State.

Homelessness has devastating consequences for all of us because it negatively impacts public safety and health. Amici asserts that increasing court-imposed homelessness will further exacerbate Washington communities' inability to protect their inhabitants from newly evolving diseases, like COVID 19[5] and other pathogens which have been harming communities like ours today since medieval times.[6]

Allowing banks who have no legal right to relief to file an action in our state courts seeking either a money judgment or foreclosure of property is an abuse of our judicial system. The fact that our courts have discretion to grant *standing* in cases of great public importance to persons who

---

[5]*See e.g.,* Jack Tsai and Michael Wilson, *COVID-19: A potential public health problem for homeless populations,* The Lancet Public Health, March 11, 2020. (Last accessed on April 5, 2022) https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30053-0/fulltext

[6] *See e.g.,* Christiana Lee, "California sees resurgence of 'medieval diseases' (While the world is preoccupied with the Wuhan coronavirus, surging homelessness in the US is fueling the spread of typhus and typhoid fever)", Asia Times, February 10, 2020, https://asiatimes.com/2020/02/california-sees-resurgence-of-medieval-diseases/ (Last accessed on April 5, 2022)

do not have the direct interest required by the Federal Constitution's Article III "case or controversy" requirement does not empower litigants in this State to an exercise of judicial power to collect on commercial paper without showing they possess a direct interest in the pertinent loan.

It is in the public interest that this Court promptly establish those jurisdictional or prudential rules of judicial self-governance related to *standing* which are necessary to ensure the proper role of Washington's courts in our democratic society based on the separation-of-powers principles enunciated in Washington's Constitution. *See supra.* Section B. *Cf. Bank of N.Y. v. Romero*, 2014-NMSC-007, ¶ 15, 320 P.3d 1, 5 (2014).

For it is well documented in caselaw made during the Great Recession that many mortgage loans, like the one involved here, were securitized in a process that involved multiple transfers of the underlying note which made identifying their holders difficult, sometimes impossible. *See e.g., Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 97-98, and note 7, 285 P.3d 34 (2012). But this didn't stop the banks—or the investors who bought banks' ill-advised

mortgage-backed security investment vehicles—from attempting to recoup the financial losses caused by their greed by foreclosing on properties they had no legal right to. Unfortunately, this case demonstrates this practice still goes on unchecked in Washington's courts today.

Further, Amici asserts that the public policy of this State prevents Washington's courts and the current judges serving within them from having any pecuniary interest in those mortgage-backed securities which benefit from the type of indiscriminate foreclosures that Division III has attempted to legitimize in the appellate decisions being challenged here. *See e.g.,* Washington State Investment Board, thirty-sixth annual report 2017, at 34; and 40th Annual Report 2021, at 37-38 (Executive agency reports documenting the amount of Washington's judges' retirement investments in mortgage-backed securities)

In a recent policy rollout[7] Governor Inslee indicated "A variety of factors drive our state's homelessness crises, including lack of affordable housing, unemployment, poverty,

[7] Accessed on April 7, 2022, at: https://medium.com/wagovernor/inslee-announces-bold-proposals-for-homelessness-57a7a0751024

behavioral health needs and lack of services, domestic violence and accessible options for people with disabilities." With all these factors contributing to the increasing number of people who find themselves homeless Amici contends the People of Washington State have no vested interest in requiring homeowners demonstrate that the lienholder holds the note when an action is commenced because this creates undue hardship on people who do not have the resources to hire an attorney at the onset of the legal action. Rather, it is in the public interest for Washington courts to require lienholders prove they have the note when a judicial foreclosure is filed because this is consistent with our history and needed to protect our communities.

IV. Conclusion

Discretionary review should be granted.

I certify this Brief is 2,471 words when using word processing software and therefore complies with RAP 18.17.

Dated April 7, 2022, at Arlington, Washington.

Respectfully submitted,

By s/*Scott E. Stafne*
Scott E. Stafne, WSBA No. 6964
Stafne Law *Advocacy & Consulting*
239 North Olympic Avenue
Arlington, WA 98223
360.403.8700
Scott@Stafnelaw.com

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2022, I electronically filed the foregoing *Amicus Curiae Memorandum* with the Clerk of the Court for the Washington State Supreme Court by using the CM/ECF system. I certify that to the best of my knowledge all participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

DATED this 7th day of April 2022.

By: *s/ Lee A. Halpin*
LeeAnn Halpin, Paralegal

STAFNE LAW ADVOCACY & CONSULTING

April 07, 2022 - 4:13 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,394-3
Appellate Court Case Title:	US Bank National Association, et al. v. Georgia A. Plumb, et al.
Superior Court Case Number:	13-2-04236-2

The following documents have been uploaded:

- 1003943_Briefs_20220407160916SC805054_1964.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was Amicus Memorandum.pdf

A copy of the uploaded files will be sent to:

- georgia@plumbsafety.com
- jmcintosh@mccarthyholthus.com
- josh@plumbsafety.com
- leeann@stafnelaw.com
- pam@stafnelaw.com
- warren.lance@mccalla.com

Comments:

Sender Name: Scott Stafne - Email: Scott@StafneLaw.com
Address:
239 N OLYMPIC AVE
ARLINGTON, WA, 98223-1336
Phone: 360-403-8700

Note: The Filing Id is 20220407160916SC805054