No. 68832-4-I 89403-5

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

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RYAN SANTWIRE, an individual,

Appellants,

v.

UMPQUA BANK, an Oregon Bank.

Respondent.

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# PETITION FOR DESCRETIONARY REVIEW TO WASHINGTON SUPREME COURT (RAP 13.4)

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## I. Identity of Petitioner

Ryan Santwire is the Petitioner herein, was the appellant in the Court of Appeals, and Defendant in the Superior Court.

## II. Citation to Court of Appeals Decision

Petitioner seeks review of Division One's unpublished decision in *Umpqua Bank v Santwire*, No. 68832-4-1, Slip Op., (Wash. Ct. App. Aug. 5, 2013). (A copy of this decision is included as Appendix (App.) 1.)

## III. Issues Presented for Review

1.) Whether Umpqua Bank (Respondent) had standing to seek, and the King County Superior Court (Trial Court) had jurisdiction to appoint, a custodial receiver, with the power of sale, over Santwire's property where the issue of note ownership underlying the security instrument was disputed and Umpqua Bank failed to show that it had acquired Santwire's note?

2.) Whether under the circumstances of this case Petitioner was denied his right to due process under Art. 1 § 3 of the Washington Constitution and the Fifth and Fourteenth Amendments to the United States Constitution?

## IV. Statement of the Case

On March 21, 2012, Respondent filed a First Amended Complaint Seeking Appointment of Receiver (CP 76-255), and scheduled an Order to Show Cause (OSC) hearing for April 23, 2012. (CP 1-12)

Petitioner filed a Response to the OSC (CP 256-260 and CP 278-285).

On April 23, 2012 a hearing was held before Commissioner Carlos Y. Velategui in the Ex Parte Department of Superior Court and continued to April 25, 2012 for further proceedings. (Tr., April 23, 2012, pgs. 1-16, CP 161).

On April 25, 2012 a hearing was held before Commissioner Carlos Y. Velategui. (Tr., April 25, 2012, pgs. 1-16). Commissioner Velategui granted Respondent's Motion and entered an Order Appointing Pacific Receivers, LLC as custodial receiver of the three condominium units and a small residential rental property of Petitioner (CP 262-277) relying on the testimony of a witness, Lynnette Chen-Wagner, for the Respondent (Tr., April 25, 2012 at pg. 10-13) and denying Petitioner's request to present his witnesses (Tr., April 25, 2012 at pg. 14).

On May 4, 2012 Petitioner filed a Motion for Revision of Commissioner's Order (CP 414-939), Respondent filed Opposition (CP 940-945), and Petitioner filed a Reply (CP 946-950).

On May 17, 2012, a hearing was held before Superior Court Judge John P. Erlick. (Tr., May 17, 2012, pgs. 1-29). Judge Erlick signed and entered an Order Denying Motion for Revision. (CP 951).

On May 24, 2012, Petitioner filed a timely Notice of Appeal to Court of Appeals. (CP 952-969).

On August 5, 2013, the Court of Appeals issued its decision in *Santwire*.

On August 26, 2013, Umpqua Bank filed a Motion to Publish Decision (Attached as App. 2) which was rejected by the Division One panel on August 28, 2013. (Attached as App. 3.) Pursuant to RAP 13.4 (a)[1] this motion for review is timely made.

## V. Authority

### *A. Considerations for Granting Review.*

The COA decision in Santwire, possibly stands for the new and novel proposition that production of the note is not required in an action seeking to enforce the note or the corresponding security instrument. Further, Mr. Santwire was told that he could respond with "whatever he wished." When he attempted to offer oral testimony the answer was a resounding "no." Finally, Mr. Santwire was further denied due process

[1] "If no motion to publish or motion to reconsider ....is timely made, a petition for review must be filed within 30 days after the decision is filed. If such a motion is made, the petition for review must be filed within 30 days after an order is filed denying a timely motion for reconsideration or determining a timely motion to publish."

when he was denied the right to offer oral testimony regarding his theory of the case, after Umpqua Bank was given the opportunity to present oral testimony regarding its theory of the case.

A petition for review will be accepted 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; (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; (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. RAP 13.4. For the reasons stated below, this court should accept review under all four of the considerations found in RAP 13.4 (1)-(4).

***B. The Santwire decision granting a remedy under the Deed of Trust without making the Creditor show that it is the actual owner of the note and beneficiary of the Deed of Trust: 1) conflicts with Supreme Court and Court of Appeals Authority, and 2) is an issue of substantial public interest that should be determined by the Supreme Court.***

The granting of remedies under a deed of trust without a showing that the entity seeking the remedy is the actual owner of the note and beneficiary of the deed of trust conflicts with Supreme Court and Court of Appeals Authority.

Moreover, in light of the historic events that are occurring everyday regarding the foreclosure crisis, the debt bubble, and the struggling economy, both local, national, and international, the issue of whether a creditor must show it is the actual holder of a note, and a beneficiary of the deed trust when seeking remedies at law and equity is a matter of substantial public interest that should be determined by the Supreme Court.

i. Granting of Remedies in Conflict with Supreme Court and Court of Appeals Authority.

*Santwire* conflicts with Division One's published decision in *Walker* handed down 20 days later. The Respondents moved to have *Santwire* published as they contend, quite possibly correctly, it stands for the entirely new and novel proposition that production of the note is not required in an action seeking to enforce the note or corresponding security instrument. The Court of Appeals does appear to have implicitly held, analogizing to nonjudicial foreclosure case law, the purported note holder need not produce proof of note ownership in order to enforce its alleged right to enforce the note:

> "However, in the context of lawsuits seeking to enjoin foreclosure proceedings or set aside trustee sales, several courts, including federal courts in Washington applying the deed of trust act, have rejected the argument that this requirement means that a lender must produce the original signed promissory note before it can lawfully foreclose."

*  *  *

"Nor does Santwire point to any authority suggesting that in this context, the lender did not sufficiently prove that it is both the possessor and beneficiary of the note."

(*Santwire* at ¶¶ 18 and 21)

The Court of Appeals reliance on cases like *Beaton v. JPMorgan Chase Bank N.A.,* Case No. C11-872RAJ, 2013 WL 1282225 at*4 (W.D. Wash. March 26, 2013); and *Petree v. Chase Bank,* No. 12-CV-5548-RBL, 2012 WL 6061219, at*2(W.D. Wash. Dec. 6,2012) is in stark contrast to *Walker v. Quality Loan Service Corp. of Washington*, No. 65975-8-I (Wash. Ct. App. Aug. 26, 2013) issued only twenty days later.

In *Beaton* the court, relying on *Krienke v. Chase Home Finance, LLC,* 140 Wn. App. 1032, (2007),[2] the same case relied on in *Vawter v. Quality Loan Service Corp. of Washington*, 707 F. Supp. 2d 1115 (W.D. Wash. 2010),[3] states:

"Beaton asserts various claims...all of which appear to be alternate forms of the "show me the note" assertion often made and soundly rejected in DTA cases. The court construes Beaton's violation of the DTA claim as alleging a breach by the trustee of its obligation to obtain, prior to recording the notice of trustee's sale, proof that the beneficiary under the deed of trust is the owner of the related promissory note. *See* RCW 61.24.030(7)(a). As construed, plaintiff's DTA claim would be able to be pursued post-foreclosure."

*Beaton* at ¶ 8.

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[2] See *Beaton* fn 5.

[3] *Vawter* at 1123.

Accord *Vawter*:

"In support of this claim, the Vawters marshal a range of alleged problems connected with the Deed of Trust, the Note, and the nonjudicial foreclosure process, including: (1) that MERS cannot hold a beneficial interest under the Deed of Trust; (2) that Chase prematurely appointed QLS as successor trustee; and (3) that Chase does not hold the Note. The Vawters, however, do not contest their default under the Note, they concede that the trustee's sale has been discontinued, and they acknowledge that Chase now has possession of the Note.
In Washington, at least two courts have concluded that the DTA does not authorize a cause of action for damages for the wrongful institution of nonjudicial foreclosure proceedings where no trustee's sale occurs."

*Vawter* at 1123.[4]

Then compare *Walker*:

"We recognize our disagreement with Vawter v. Quality Loan Service Corp. of Washington, where the United States District Court for the Western District of Washington reached a contrary result, holding that "the DTA does not authorize a cause of action for damages for the wrongful institution of nonjudicial foreclosure proceedings where no trustee's sale occurs." To reach this conclusion, the court relied upon Pfau v. Washington Mutual, Inc. and Krienke v. Chase Home Finance, LLC, which were decided before the legislature enacted RCW 61.24.127. Further, the court decided Vawter before our Supreme Court decided Bain. We also disagree with the reasons that the court identified to support its decision."

* * *

"Because **his arguments concern Quality's and Select's actions to enforce a security interest**, these parties may constitute "debt collectors" within the statute's meaning. Assuming that Walker's

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[4] Citing *Pfau v. Wash. Mutual, Inc.*, No CV-08-00142-JLQ, 2009 WL 484448, at *12 (E.D.Wash. Feb. 24, 2009); *Krienke v. Chase Home Fin., LLC,* 140 Wn.App. 1032, 2007 WL 2713737, at *5 (Wash.Ct. App.2007) and; *Henderson v. GMAC Mortgage Corp.,* No. C05-5781RBL, 2008 WL 1733265, at *5 (W.D.Wash. Apr. 10, 2008).

> allegations are true, neither Quality nor Select had a present right to possess the property through nonjudicial foreclosure **because they never held the note or the underlying debt** and were not lawfully appointed under the DTA. If Walker is able to prove these underlying DTA violations, he may also be able to show that Quality and Select violated § 1692f(6) by threatening nonjudicial foreclosure." (emphasis supplied).
>
> *Walker* at ¶¶ 22 and 41

If this is the case then *Walker* and *Santwire* stand for conflicting propositions. It seems odd that the same court that said "[t]hese allegations [that a "cursory investigation" would have revealed that Quality did not have proper authority to act because they were appointed by a non-note holder], if proved, would show that Quality failed to act in good faith by failing to adequately inform itself about its authority to foreclose" (Walker at ¶ 21) should have also accepted Respondent's assertion that it held Petitioner's note, the basis for standing and the trial court's subject matter jurisdiction, in the absence of an endorsement, allonge, or conveyance of some sort, specific to the Santwire note, by the Federal Deposit Insurance Corporation (FDIC).

Dictum of the court notwithstanding, Petitioner does not bear the burden of showing the purported note holder, Respondent, lacks standing. Quite the opposite is true. The purported note holder has the burden of proving standing and the court is obligated to consider this before it may consider anything further. "Lack of jurisdiction over the subject matter

renders the superior court powerless to pass on the merits of the controversy brought before it...[w]hile litigants...may waive their right to assert a lack of *personal* jurisdiction, litigants may not waive *subject matter* jurisdiction."[5] "Jurisdiction of the subject matter is essential in every case; **a condition precedent**, in a way, to the acquisition of authority over the parties. A judgment is a mere nullity if pronounced by a court which undertakes to exercise authority over matters wholly outside the powers conferred upon it by law."[6] "A universal principle as old as the law is that the proceedings of a court without jurisdiction are a nullity and its judgment without effect either on the person or property. In other words, a court without jurisdiction over a case cannot enter judgment in favor of either party. **It can only dismiss the case for want of jurisdiction.**"[7] The Court of Appeals knows this.

It was clear that under the Purchase and Assumption Agreement that the assets of Evergreen Bank were not fully vested in Respondent without further steps being taken, namely acquiring the endorsement of the FDIC, an allonge, or some form of conveyance specific to the

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[5] *Skagit Surveyors v. Friends of Skagit*, 135 Wn. 2d 542, 958 P.2d 962, 969 (1998).(Paraphrasing *Deaconess Hosp. v. Washington State Highway Comm'n,* 66 Wn.2d 378, 409 and 410, 403 P.2d 54 (1965) (Donworth, J., concurring in part and dissenting in part)) (emphasis original).

[6] *Deaconess* at 410 (quoting *Fortier v. Fortier,* 23 Wn.2d 748, 162 P.2d 438 (1945)) (emphasis supplied).See also *Proios v. Bokeir,* 72 Wn. App. 193, 197, 863 P.2d 1363, 1365 (1993); *State v. Swanson,* 16 Wn. App. 179, 189, 554 P.2d 364 (1976).

[7] Id. (quoting 14 Am. Jur. *Courts* 367, § 167) (emphasis supplied). See also *State v. Northwest Magnesite Co.*, 28 Wn.2d 1, 42, 182 P.2d 643 (1947).

Petitioner's note, **if** it was indeed an asset of Evergreen Bank at the time the FDIC was appointed receiver.

Accord RCW 62A.3-203 (c):

> "Unless otherwise agreed, if an instrument is transferred for value **and the transferee does not become a holder because of lack of indorsement** by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but **negotiation of the instrument does not occur until the indorsement is made**." (emphasis supplied).

In order to affirm an erroneous failure to dismiss, for lack of standing, by the Trial Court, the Court of Appeals put itself in the position of issuing two wildly different opinions acrux the same basic underlying principles of law. Worse, under *Walker*, the same court that issued *Walker* "failed to act in good faith by failing to adequately inform itself about" (*Id.* at ¶ 21) whether Respondent was, in fact, the holder of the note and had standing to enforce the note or the corresponding security instrument.

Further, *Santwire* is in conflict with a decision of the Supreme Court in Bain and Division One's recent decision in *Bavand*. The Supreme Court held in *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn. 2d 83, 285 P.3d 34 (2012) that "if MERS [and presumably any party] does not hold the note, it is not a lawful beneficiary." *Id.* at 99;

This Court further elaborated saying, "[i]f the original lender had sold the loan, that purchaser would need to establish ownership of that

loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions. Having MERS convey its "interests" would not accomplish this." *Id.* at 111.

Accord *Bavand v. Onewest Bank, FSB*, No. 68217-2-I, Slip Op. (Wash. Ct. App. Sept. 9, 2013).

> Possession of a "true and correct *copy* of the original" note does not, of course, establish possession of the original note itself. Without possession of the note, on which OneWest relies in this case, it is not the holder of that instrument either under the Uniform Commercial Code or the Deeds of Trust Act.
>
> *Bavand* at ¶ 61 (emphasis original).

In *Santwire,* the Court of Appeals struggles to find that the Respondent must have been the owner or holder of the note stating: (1) the FDIC was appointed as receiver of Evergreen Bank; (2) Respondent submitted a copy of a 2010 *Purchase and Assumption Agreement* by which the FDIC assigned its "interest"; (3) Respondent submitted copies of the promissory note and related instruments, including the deeds of trust and assignments of rent; and (4) the Trial Court considered sworn testimony of the bank's vice president and asset resolution officer that the bank had not sold the note and has physical possession of it.

There are two problems with this approach. First, the Trial Court, and subsequently the Court of Appeals, **assumed** Evergreen Bank had not already sold, transferred or conveyed the note, or some interest therein,

prior to the FDIC becoming its receiver. Second, even if this were not the case, the *Purchase and Assumption Agreement* explicitly requires further steps be taken, namely acquiring the endorsement of the FDIC, an allonge, or some form of conveyance specific to the Petitioner's note, consistent with RCW 62A.3-203, **if** it was indeed an asset of Evergreen Bank at the time the FDIC was appointed receiver.[8]

*Santwire* is decided on a dearth of evidence regarding the chain of title of the Petitioners note but according to the Court of Appeals "[t]his evidence would satisfy the lender's proof requirement under RCW 61.24.030(7). [sic]"[9] The Respondents neither demonstrated that it actually held the promissory note nor did they document the chain of transactions which led to its purported possession of the note as contemplated by *Bain* at 111.

ii. Granting of Remedies under Deed of Trust without showing note ownership and beneficiary status under the Deed of Trust is a matter of substantial public interest

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[8] The Purchase and Assumption Agreement between the FDIC and Umpqua does not identify the assets of Evergreen Bank assigned specifically leaving the question as to whether or not Santwire's note was among them and no records of Evergreen Bank, e.g. the books showing Santwire's note as an asset as opposed to being sold or pledged, were ever introduced.

[9] "That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee **shall have proof that the beneficiary is the owner of any promissory note** or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection." (emphasis supplied).

The standard for determining owner/holder issues of substantial public interest and should be determined by the Supreme Court. This state of affairs cannot continue. We need this court to decide once and for all whether a purported note holder must show conclusively that they are entitled to enforce the instrument or document, or whether they must simply offer bald assertions that they are entitled to enforce the instrument.

Additionally, the granting of remedies under a deed of trust without a showing that the entity seeking the remedy is the actual owner of the note and beneficiary of the deed of trust is a matter that is of extreme public interest and importance.

Traditional banking has gone the way of the two dollar bill and the longstanding, if sub silento, presumption that a bank merely claiming possession could undoubtedly show it was entitled to enforce the instrument has as much value today as the manufactured and robo-signed assignments on which such claims are frequently based. The Modern Banker has more in common with a spray-tanned Vegas card shark than the balding, grey haired, bespectacled coin counter of yore and the proof is in the paperwork.

***C. Depriving a Citizen of Due Process: 1) Conflicts with Supreme Court and Court of Appeals Authority; 2) Is a Significant Question of Law under the Constitution of the State of Washington or of the United***

***States; and, 3) Is an Issue of Substantial Public Importance that the Supreme Court Should Review.***

The Supreme Court should grant review of the due process issues presented in this Petition because the Court of Appeals' decision deprives Mr. Santwire of due process in a manner that is in conflict with state and federal constitutions and applicable case law. Further, the guarantee of due process, as it relates to foreclosure issues, is a matter of not only substantial public importance, but of extreme public importance.

i. Depriving a Citizen of Due Process Conflicts with the Constitution of the State of Washington and the United States, As Well As Supreme Court and Court of Appeals Authority

Due Process requirements in foreclosure and related litigation raise significant questions of law under the Constitution of the State of Washington and/or the Constitution of the United States. Further, the *Santwire* decision is in conflict with decisions of the Supreme Court of Washington and Appellate Courts of Washington.

Wash. Const. Art. I § 3 states "No person shall be deprived of life, liberty, or property, without due process of law." Further, the Fourteenth Amendment to United States Constitution provides in part that no "state [shall] deprive any person of life, liberty, or property, without due process of law. . ."

Noting the nearly identical language of these clauses, the Washington Supreme Court has stated that "the federal cases while not necessarily controlling should be given 'great weight' in construing our own due process provision." *Olympic Forest Prods., Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 422, 511 P.2d 1002 (1973) *quoting Petstel, Inc. v. County of King*, 77 Wn.2d 144, 153, 459 P.2d 937 (1969). Moreover, insofar as the due process clause of the Fourteenth Amendment to the United States Constitution provides greater protection than does Wash. Const. Art. 1, § 3, the federal constitution must prevail. *Id.*; U.S. Const. Art. 6 § 2.

Even though the boundaries of the concept of due process are not capable of precise formulation, there are certain fundamental considerations involved. *Olympic* at 422.

The minimal requirements of due process when a deprivation of life, liberty, or property is threatened are: 1) notice reasonably calculated to apprise interested parties of the pendency of the action; and, 2) an opportunity for a hearing appropriate to the nature of the case, given at a meaningful time and in a meaningful manner. *Id.*; *Boddie v. Connecticut*, 401 U.S. 371, 377, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971).

Moreover,

> "[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

*Olympic* at 423 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162, 95 L. Ed. 817, 71 S. Ct. 624 (1951)) (Frankfurter, J., concurring).

This flexibility means that a "procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case." *Olympic* at 423 (citing *Bell v. Burson*, 402 U.S. 535, 540, 29 L. Ed. 2d 90, 91 S. Ct. 1586 (1971)). The procedural safeguards afforded in each situation should be tailored to the specific function to be served by them. *Olympic* at 423; *See Goldberg v. Kelly*, 397 U.S. 254, 267, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970).

In addition, the Washington Supreme Court, when analyzing a receiver in the context of a corporation has said, "The appointment of a

receiver is a harsh and extraordinary remedy and will be resorted to by the courts only in extreme cases." *Scott v. Trans-System, Inc.*, 148 Wn. 2d 701, 64 P.3d 1, 5 (2003) (citing *Blinn v. Almira Trading Co.,* 190 Wn. 156, 162, 66 P.2d 1132 (1937)).

Further, a court order is void when based on a hearing which was held without adequate notice to all of the parties and without adequate opportunity for all parties to be heard at such hearing. *Esmieu v. Schrag*, 88 Wn.2d 490 497, 563 P.2d 203 (1977).

Additionally, a judicial officer is required to disqualify himself where there is a violation of due process or appearance of fairness. *See Tatham v. Rogers*, 170 Wn. App. 76, 283 P.3d 583 (2012).

An analysis of the facts of this case show that Mr. Santwire has been deprived of his property without due process, in direct conflict with: 1) the Constitution of the State of Washington; 2) the Constitution of the United States; and, 3) Supreme Court and Court of Appeals authority, because he was not afforded adequate notice or an adequate opportunity to be heard.

In order for the due process clause of the United States Constitution, as well as the due process clause of the Washington State Constitution to be fulfilled, adequate notice must be given to the individual who is going to be deprived of property. *Olympic* at 422. In this

case the defective notice provided to Mr. Santwire was provided by the Commissioner, at the conclusion of the April 23, 2012 hearing, and Mr. Santwire was not afforded his right to be heard at the hearing on April 25, 2012.

Umpqua Bank produced an FDIC report at the hearing on April 23, 2013 in an attempt to show that Umpqua Bank had achieved ownership of the note and security instrument. Mr. Santwire's attorney then asked the Commissioner, "[d]o I have a chance to respond to this document she just gave me?" (Tr. Ap. 23, 2012, pg 10). The Commissioner responded that Mr. Santwire could "[r]espond with **whatever you wish on Wednesday** [April 25, 2012]." (emphasis added) *Id.*

On Wednesday, April 25, 2013 the Commissioner allowed Umpqua to call Lynette Chen-Wagner, an employee of Umpqua Bank, as a witness. (Tr., Ap. 25, 2012, pgs. 12-13). Ms. Chen-Wagner testified that the notes are in the dominion and control of the bank and that she worked with them almost every day. *Id.* On cross-examination, she testified that she last saw the originals of these promissory notes approximately a month ago, but she did not bring them with her to court. *Id.*

The Commissioner ruled that he was satisfied that Umpqua Bank has standing, that they own the note, that they have possession, dominion and control over it, that they have the right to enforce it. (Tr. Ap. 25, 2012,

pg. 13). **He also noted from the pleadings** that Mr. Santwire recognized the right of Umpqua to manage these notes and collect the fees for a period of time, because Mr. Santwire actually transmitted money to them and then quit. *Id.*

Mr. Santwire had no opportunity to confront the commissioner by stating whether: 1) he contested these payments; or, 2) why he had made them. *Id.*

Santwire's attorney asked whether Mr. Santwire would be allowed to testify, and the Commissioner stated "**no**." (emphasis added) (Tr. Ap. 25, 2012, pg. 14). The commissioner denied Mr. Santwire the ability to testify, after granting Umpqua Bank the right to have an employee testify, and after stating at the hearing on April 23, 2012 that Mr. Santwire could "[r]espond with **whatever** you wish on Wednesday [April 25, 2012]." (emphasis added). Mr. Santwire wished to respond with oral testimony. He had received notice from the commissioner that this would be allowed. Further, if one party is allowed to offer oral testimony the principles of due process require the other party be afforded the same opportunity.[10]

The commissioner's ruling, and the Court of Appeals decision conflicts with Supreme Court Authority as discussed above.

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[10]Additionally, allowing one party to present oral testimony, and denying the other party the same exact right violates the appearance of fairness that is required by the judiciary. *See Tatham supra.*

ii. Due Process in proceedings related to a Deed of Trust, the alleged corresponding note, and litigation related to the Deed of Trust or the note is an issue of substantial public importance that the Supreme Court Should Review.

A property owner's right to due process in the area of foreclosure related proceedings is a matter of **extreme** public importance. Property owners throughout the nation, and more importantly for this Court, the State of Washington, are under financial attack. The financial crisis that struck in 2008 has devastated millions of Americans.

In the years since the financial crisis and subsequent massive wave of foreclosures hundreds of thousands of foreclosures have taken place. In most of these proceedings homeowners have been denied any type of due process because the lender forecloses nonjudicially. Alleged beneficiaries and not complying with the laws of the state of Washington, and property owners are paying the price. The Supreme Court of Washington needs to articulate what due process a property owner is entitled to in a foreclosure, foreclosure related litigation, or action on a note because, surely, the complete deprivation of property owners' right to due process is unconstitutional, against existing case law authority, and morally repugnant.

## VI. Conclusion

For the aforementioned reasons, this court should grant discretionary review of this appeal.

RESPECTFULLY SUBMITTED this 26th day of September, 2013.

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**Certification of Service**

I, Shaina Dunn, the undersigned, declare under the penalty of perjury that I served a true and correct copy of Appellants Petition for Discretionary Review on Respondents' attorney by giving a copy of that document to ABC Legal Messenger Service for delivery to the following individuals:

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Karen Orehoski
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Seattle, WA 98101-3118

DATED this 27th day of September, 2013, in Arlington, Washington. By:

_____

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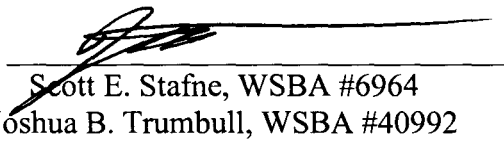
**Appendix**

For the aforementioned reasons, this court should grant discretionary review of this appeal.

RESPECTFULLY SUBMITTED this 26th day of September, 2013.



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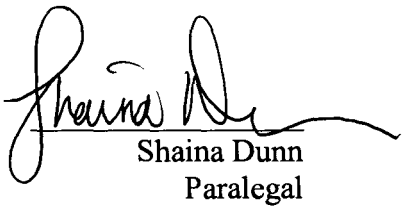
DATED this 27th day of September, 2013, in Arlington, Washington. By:



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**Appendix**

Appendix 1

Umpqua Bank v Santwire, No. 68832-4-1 (Wash. Ct. App. Aug. 5, 2013).

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
# DIVISION ONE

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| UMPQUA BANK, an Oregon bank, Respondent, v. RYAN SANTWIRE, an individual, Appellant. | ) | No. 68832-4-I<br><br>UNPUBLISHED OPINION<br><br>FILED: August 5, 2013 |

VERELLEN, J. — Ryan Santwire challenges a court order appointing a custodial receiver for property securing a debt. Santwire does not contest default on the underlying debt. He primarily argues that Umpqua Bank lacked standing to initiate the receivership proceedings because he executed the promissory note at issue in favor of Evergreen Bank and Umpqua Bank failed to establish that it is the successor beneficiary. He also contends he was denied the opportunity to present testimony and that a receivership was not reasonably necessary. Finding no error, we affirm.

## FACTS

On July 9, 2009, Ryan Santwire executed a promissory note for a face amount of $1,251,685 in favor of Evergreen Bank. The note had a maturation date of July 6, 2010. The note is secured by deeds of trust on two properties, three of five units in a condominium building (Beach Drive property) and a Seattle house (75th Avenue property). Both deeds of trust provide that the lender has the right to have a receiver

appointed in the event of default. As additional security, Santwire executed assignments of rent for both properties and a commercial pledge agreement of another asset.

On January 10, 2010, the State of Washington closed Evergreen Bank and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver. Immediately upon the closure, the FDIC and Umpqua Bank entered into a purchase and assumption agreement under which Umpqua Bank purchased the failed bank's assets.

Santwire did not make timely payments on the promissory note and failed to pay the balance due when the note matured. Umpqua Bank did not receive any payments under the commercial pledge agreement. The bank sent several notices to the Beach Drive property tenants to enforce the assignment of rent agreements. Santwire instructed the tenants to ignore the notices. Eventually, the tenants of one of the three units began paying rent to the bank. Umpqua Bank sent similar notices to the tenants at the 75th Avenue property, but did not receive any rental payments from those tenants.

In February 2011, Umpqua Bank learned of water intrusion problem at the Beach Drive property. An investigator reported that one of the units had a collapsed ceiling caused by water damage and possible mold. A July 2011 report showed that the problem had not been remediated and identified other maintenance issues. Santwire did not pay 2011 property taxes on the Beach Drive property.[1]

[1] The record does not reveal whether there was a tax delinquency on the 75th Avenue property.

Umpqua Bank commenced this action seeking appointment of a receiver.[2] On March 20, 2012, the court entered a show cause order requiring Santwire to appear for a hearing on April 23, 2012.

Three days before the hearing, Santwire filed a response. He argued that Umpqua Bank failed to demonstrate that it is the holder of the note and beneficiary of the two deeds of trust. Specifically, Santwire pointed out that Umpqua Bank had not provided a copy of the agreement between the FDIC and Umpqua Bank to show its purchase of Evergreen Bank's assets. Santwire asked for a continuance so Umpqua Bank could obtain and provide the documents necessary to establish its interest.

The attorney for Umpqua Bank produced a copy of the 2010 purchase and assumption agreement at the April 23 hearing. The commissioner continued the hearing for two days.

When the hearing resumed on April 25, Santwire reasserted his objection. He argued that because the agreement between Umpqua Bank and the FDIC did not reference specific assets, including the promissory note at issue, the evidence failed to establish Umpqua Bank's interest in the note. Umpqua Bank's attorney offered to retrieve and present the actual promissory note or present the testimony of a bank officer who was present in the courtroom and could testify that the bank had physical possession of the promissory note and had not sold the debt to a third party. The court agreed to hear the testimony. Lynette Chen-Wagner, vice president and asset resolution officer for Umpqua Bank, testified that she was the manager of the loan at

[2] Umpqua Bank began foreclosure proceedings on the Beach Drive property in 2011, but terminated those proceedings before initiating this action for receivership.

issue, that the bank possessed the actual note and deeds of trusts, and that the bank had not sold its interest in the note.

Following this testimony, the commissioner determined "that Umpqua Bank has standing, that they own the note, that they have possession, dominion, and control over it, that they have the right to enforce it."[3] When it became apparent that the commissioner was preparing to enter the order to appoint a receiver, Santwire's counsel expressed surprise because he believed his client would have the opportunity to testify. The commissioner stated that he had heard all of the testimony needed to address Santwire's challenge to Umpqua Bank's standing, and pointed out that Santwire had ample opportunity to submit material evidence by means of a declaration.

The court entered an order appointing a custodial receiver. The court found appointment of a receiver appropriate both in accordance with the deeds of trust and under the court's statutory authority.

Santwire filed a motion to revise. Again, he asserted that Umpqua Bank had not established its interest as the successor beneficiary of Evergreen Bank and therefore, had no standing to pursue a receivership. Santwire also challenged the commissioner's decision to deny his request to testify and offer exhibits at the April 25 hearing, and asserted that receivership was unnecessary because other remedies would have been sufficient to address the alleged problems.

[3] Report of Proceedings (RP) (Apr. 25, 2012) at 13. The commissioner further noted that Santwire initially recognized Umpqua Bank's right to manage and collect the proceeds from the loan.

The motion was heard by a King County Superior Court judge. Umpqua Bank produced the original promissory note at the hearing, but the court declined to consider any new evidence. Nevertheless, considering that the bank sought receivership as provided for in the deeds of trust, as opposed to judgment on the note, the court concluded that the sworn testimony that the bank possessed the original note was sufficient to establish its interest. The court concluded that transfer of Evergreen Bank's assets "was effectuated through the bulk sale, which was overseen by the FDIC, and that should be sufficient."[4] The court rejected Santwire's claim that he was denied the opportunity to defend because he was able to respond to the bank's petition and was not prohibited from submitting any evidence in support of his position. The court denied the motion for revision.

ANALYSIS

In ruling on a motion for revision, the superior court reviews the commissioner's decisions de novo based upon the evidence and issues presented to the commissioner.[5] We review the decision of the superior court.[6] When the superior court denies a motion for revision, it has the effect of adopting the commissioner's rulings as

[4] RP (May 17, 2012) at 13.

[5] In re Marriage of Moody, 137 Wn.2d 979, 992-93, 976 P.2d 1240 (1999).

[6] Boeing Emps. Credit Union v. Burns, 167 Wn. App. 265, 270, 272 P.3d 908, review denied, 175 Wn.2d 1008, 285 P.3d 885 (2012).

its own.[7] When the record is entirely documentary, an appellate court stands in the same position as the trial court and reviews the record de novo.[8]

A receiver is "a person appointed by the court as the court's agent, and subject to the court's direction, to take possession of, manage, or dispose of property of a person."[9] The power to appoint a receiver is discretionary.[10] A trial court abuses its discretion when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons."[11]

*Standing/Party in Interest*

Santwire contends that Umpqua Bank lacked standing to initiate receivership proceedings. Consistent with his position below, Santwire claims that Umpqua Bank failed to prove it is the owner and holder of the note because it did not produce the actual note nor evidence of a written endorsement transferring Evergreen Bank's interest to Umpqua Bank.

The deed of trust act, chapter 61.24 RCW, governs transactions in which a lender issuing a promissory note or other debt instrument to a borrower utilizes a deed

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[7] State ex rel. J.V.G. v. Van Guilder, 137 Wn. App. 417, 423, 154 P.3d 243 (2007); see also In re Marriage of Williams, 156 Wn. App. 22, 27-28, 232 P.3d 573 (2010).

[8] Hous. Auth. of City of Pasco & Franklin County v. Pleasant, 126 Wn. App. 382, 387, 109 P.3d 422 (2005).

[9] RCW 7.60.005(10).

[10] King County Cmty. & Human Servs. v. N.W. Defenders Ass'n, 118 Wn. App. 117, 122, 75 P.3d 583 (2003).

[11] T.S. v. Boy Scouts of Am., 157 Wn.2d 416, 423, 138 P.3d 1053 (2006) (internal quotation marks omitted) (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

of trust to secure a promissory note or other debt of the borrower.[12] The borrower becomes the grantor of the deed of trust and the lender is the beneficiary.[13] A trustee holds title to the property in trust for the lender.[14] In the event the borrower defaults on his or her debt or other obligation, the beneficiary may direct the trustee to foreclose pursuant to a trustee's sale without judicial supervision.[15]

Before issuing notice of a trustee's sale, the trustee must "have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust."[16] However, in the context of lawsuits seeking to enjoin foreclosure proceedings or set aside trustee sales, several courts, including federal courts in Washington applying the deed of trust act, have rejected the argument that this requirement means that a lender must produce the original signed promissory note before it can lawfully foreclose.[17] The statute itself establishes a means for the lender to satisfy the proof requirement: "A declaration by the beneficiary made under penalty of

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[12] Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 92-93, 285 P.3d 34 (2012).

[13] Id.

[14] Id.

[15] Id.

[16] RCW 61.24.030(7)(a); see also Bain, 175 Wn.2d at 93-94 (trustee has statutory obligation to obtain proof of beneficiary's ownership of the note as element of its duty to the grantor of the deed of trust).

[17] See, e.g., Beaton v. JPMorgan Chase Bank N.A., Case No. C11–872RAJ, 2013 WL 1282225 at *4 (W.D. Wash. March 26, 2013); Petree v. Chase Bank, No. 12–CV–5548–RBL, 2012 WL 6061219, at *2 (W.D. Wash. Dec. 6, 2012); Hogan v. Washington Mutual Bank, N.A., 230 Ariz. 584, 586, 277 P.3d 781, 783 (2012); Diessner v. Mortg. Elec. Registration Sys., 618 F. Supp. 2d 1184, 1187 (D. Ariz. 2009).

perjury stating that the beneficiary is the actual holder of the promissory note . . . shall be sufficient proof as required under this subsection."[18]

This case does not involve nonjudicial foreclosure. But we can analogize to these provisions because Umpqua Bank also seeks to enforce a remedy provided for in the deed of trust. The evidence shows, and Santwire does not dispute, that the FDIC was appointed as receiver of Evergreen Bank. Umpqua Bank submitted evidence of the 2010 purchase and assumption agreement, the method by which the FDIC transferred its interest in the failed bank's assets to Umpqua Bank. The agreement provides that, subject to certain specific exceptions not applicable here, "Receiver hereby sells, assigns, transfers, conveys, and delivers to the Assuming Bank, all right title, and interest of the Receiver in and to all of the assets . . . of the Failed Bank."[19] The bank also submitted copies of the promissory note and related instruments, including the deeds of trust and assignments of rent. Finally, the court considered sworn testimony of the bank's vice president and asset resolution officer that the bank had not sold the note and has physical possession of it. This evidence would satisfy the lender's proof requirement under RCW 61.24.030(7).[20]

Santwire relies on a Uniform Commercial Code (UCC) provision, chapter 62A.3-203 RCW, "Transfer of instrument; rights acquired by transfer," which provides that a negotiable instrument is transferred when "delivered by a person other than its issuer for

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[18] RCW 61.24.030(7)(a).

[19] Clerk's Papers at 302.

[20] See Pierson v. SMS Financial II, LLC, 959 S.W.2d 343, 348-49 (Tex. App. 1998) (affidavit from records custodian that FDIC transferred note and that it owned the note, together with photocopy of the note, was sufficient evidence to establish that the lender owned and held the note).

the purpose of giving to the person receiving delivery the right to enforce the instrument."[21] Guided by UCC definitions under RCW 62A.3-201 and -301, the Supreme Court in Bain v. Metropolitan Mortgage Group, Inc. determined that a beneficiary must either actually possess the promissory note or be the payee.[22] Santwire does not cite any UCC provision, or any other legal authority, suggesting that a promissory note may not be transferred in a bulk asset transfer agreement such as the one here between the FDIC and Umpqua Bank. Nor does Santwire point to any authority suggesting that in this context, the lender did not sufficiently prove that it is both the possessor and beneficiary of the note.

Santwire also cites the best evidence rule. Under ER 1002, the original is required to prove the content of a writing, recording, or photograph. But under ER 1003, duplicates are admissible to the same extent as the original unless "a genuine question is raised as to the authenticity of the original" or "in the circumstances it would be unfair to admit the duplicate in lieu of the original." Although Santwire argued that production of the actual note was required, he did not object to the admissibility of a duplicate under the evidentiary rules. Nor does Santwire identify any genuine issue as to authenticity or articulate why admission of a duplicate was unfair.

*Right to Present Evidentiary Testimony*

Santwire contends he was denied his right to testify at the April 25 hearing. He claims his testimony would have refuted Umpqua Bank's position that the properties were not being maintained. But Santwire fails to establish that he had a right to present

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[21] RCW 62A.3-203(a).

[22] Bain v. Metro. Mortg. Group, Inc., 175 Wn.2d 83, 103-04, 285 P.3d 34 (2012).

live testimony at the hearing. Santwire points out that with respect to receivership proceedings, a "creditor or other party in interest has a right to be heard with respect to all matters affecting the person" whether or not a party to the action.[23] But Santwire was heard in this matter. He was permitted to respond to Umpqua Bank's action in briefing and oral argument. Nothing prevented Santwire from presenting evidence in support of his response, including declaration testimony. King County local rules provide that motion practice rules apply to receivership petitions.[24] Nothing in these rules requires evidentiary testimony and fact finding.[25]

Santwire's counsel explains that he was led to believe there was no need to submit declaratory evidence because the commissioner indicated that his client would be permitted to testify. But Santwire misinterprets the record. When the commissioner decided to continue the hearing on April 23, Umpqua Bank's counsel asked whether she should be prepared to present certain documents. The commissioner replied, "Bring whatever you want, Counsel."[26] Santwire's counsel asked whether he would have an opportunity at the next hearing to respond to the asset transfer agreement, the commissioner said he could respond "with whatever" he wished.[27] These exchanges do not suggest that the commissioner agreed to conduct an evidentiary hearing or consider

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[23] RCW 7.60.190(2).

[24] LCR 66(2).

[25] LCR 7.

[26] RP (Apr. 23, 2012) at 9.

[27] Id. at 10.

live testimony. Neither party asked about presentation of testimony, and up to that point, Santwire had raised no objection to the bank's factual allegations.[28]

Although Santwire argues that the commissioner's decision denying his request to present testimonial evidence violated his constitutional right to due process, the facts are not comparable to the cases upon which he relies.[29] Santwire was aware of Umpqua Bank's allegations regarding the maintenance of the properties and the need for a receivership to protect the assets for a month prior to the April 23 hearing. Santwire never challenged the bank's assertions with regard to its inability to collect rent. Nor did he challenge the bank's claims as to lack of maintenance until he filed a supplemental response on April 25, the date of the reconvened hearing. Santwire cannot demonstrate that the court's ruling on his last minute request to testify deprived him of a meaningful opportunity to respond in this proceeding.[30]

*Evidence of Reasonable Necessity*

Santwire contends that even if Umpqua Bank has standing to enforce the remedies provided under the deed of trust, the appointment of a receiver was an abuse of discretion because the evidence did not show that a receiver was reasonably

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[28] Santwire filed a supplemental response on April 25, the day of the reconvened hearing, and argued for the first time that a receivership was unnecessary because the bank exaggerated the extent of needed repairs.

[29] See Baxter v. Jones, 34 Wn. App. 1, 2-4, 658 P.2d 1274 (1983) (in order to conclude trial by the end of the day, trial court terminated cross-examination before counsel could pursue questions related to a key issue in the dispute); In re Marriage of Ebbighausen, 42 Wn. App. 99, 102, 708 P.2d 1220 (1985) (father's due process rights violated when the court resolved a joint custody issue in chambers and failed to hear testimony concerning the merits of both parties' custody request).

[30] See Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

necessary.[31] He insists that other adequate remedies were available, such as judicial foreclosure or injunctive relief. He also claims that the bank exaggerated the disrepair and that the order appointing a receiver exceeded the scope of the established necessity.

But the deed of trust expressly provides for the remedy of receivership upon default. Umpqua Bank provided documentary evidence to establish that (1) Santwire defaulted on the note; (2) the bank was not able to fully enforce the assignment of rent agreements due to Santwire's interference; (3) the bank had not received payments under the pledged promissory note in accordance with the commercial pledge agreement; and (4) the property had not been maintained and/or repaired in accordance with the grantor's maintenance duties under the deeds of trust. While Santwire asserts that receivership was unnecessary, there is no evidence in the record to controvert these facts. Santwire did not argue in favor of alternative remedies before the commissioner, nor did he challenge the scope of the receivership. The bank asserted below that there were no adequate alternative remedies in light of the inability to collect rents and the need to prepare the properties for sale. In view of the evidence demonstrating a risk of loss of value, Santwire fails to demonstrate that the commissioner abused his discretion in granting the order to appoint a receiver.

[31] See RCW 7.60.025(1) (receiver may be appointed if the court determines "the appointment of a receiver is reasonably necessary and that other available remedies either are not available or are inadequate").

*Attorney Fees*

Umpqua Bank contends it is entitled to an award of attorney fees incurred in defending this appeal. Both the promissory note and deeds of trust contain provisions obligating Santwire to pay fees and costs incurred in enforcing the terms of the loan under the note and deeds. These provisions both expressly provide for fees on appeal. Accordingly, we grant Umpqua Bank's request for fees upon compliance with RAP 18.1(d).

Affirmed.

WE CONCUR:

Appendix 2

Respondent's Motion to Publish Decision (August 26, 2013).

OPPOSING
COUNSEL

**VIA FAX FILING ON AUGUST 26, 2013: (206) 389-2613**

No. 68832-4-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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RYAN SANTWIRE, an individual

Appellant,

v.

UMPQUA BANK, an Oregon Bank

Respondent

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MOTION OF RESPONDENT UMPQUA BANK TO PUBLISH DECISION

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## I. Identity of Moving Party

This Motion is brought by Umpqua Bank, Respondent in this matter.

## II. Relief Requested

Respondent Umpqua Bank respectfully requests that this Court publish its opinion filed on August 5, 2013 in this case.

## III. Facts Relevant to this Motion

In this case, the Court affirmed a King County Superior Court order appointing a custodial receiver for property securing a debt. The Court's opinion in this matter clarifies the important issue that the proof requirement codified the Deed of Trust Act can be met and a lender can have standing to exercise a remedy provided for in the deed of trust even if the lender does not produce the original signed promissory note.

## IV. Authority

All decision of the Court of Appeals which have precedential value shall be published as opinions of the court. RCW 2.06.040. In determining whether an opinion should be published, the following criteria should be considered:

> (1) Whether the decision determines an unsettled or new question of law or constitutional principle; (2) Whether the decision modifies, clarifies or reverses an established

> principle of law; (3) Whether a decision is of general public interest or importance or (4) Whether a case is in conflict with a prior opinion of the Court of Appeals.

RAP 12.3(d).

Here, the Court's August 5, 2013, opinion clarifies the important issue of the proof requirement found in RCW 61.24.030(7) of the Deed of Trust Act and analogizes it to non-foreclosure proceedings under a deed of trust. The opinion also provides standing for the lender who establishes its right to enforce a promissory note and/or deed of trust through sworn testimony. The Court's well-reasoned opinion on this issue will aid future litigants and streamline the process of establishing a lender's right to exercise its remedies under a deed of trust or promissory note.

For these reasons, the Respondent Umpqua Bank respectfully asks this Court to publish its August 5, 2013, opinion.

RESPECTFULLY SUBMITTED this 26th day of August, 2013.

BRENEMAN GRUBE, PLLC

By: _____
Joseph A. Grube, WSBA #26476
Karen Orehoski, WSBA #35855
Attorneys for Respondents

CERTIFICATE OF SERVICE

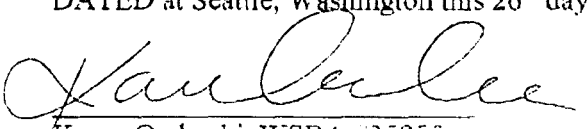
I, Karen Orehoski, certify that all at times mentioned herein I was and now am a citizen of the U.S. and a resident of the State of Washington, over the age of 18 years, not a party to this proceeding or interested therein, and competent to be a witness therein. My business address is that of Breneman Grube PLLC, 1200 Fifth Avenue, Suite 625, Seattle, Washington 98101. On August 26, 2013, I caused a copy of the foregoing Motion to Publish Decision, to be served on the following parties:

Via FAX AND U.S. MAIL:

Stafne Law Firm
Scott E. Stafne
Josh Trumbull
239 N. Olympic Ave.
Arlington, WA 98223
(fax) (360) 386-4005

I DECLARE UNDER PENALTY OF PERJURY UNDER WASHINGTON LAW THAT I HAVE READ THIS DECLARATION, KNOW ITS CONTENTS, AND I BELIEVE THE DECLARATION IS TRUE.

DATED at Seattle, Washington this 26th day of August, 2013.



/Karen Orehoski, WSBA #35855

Appendix 3

*Umpqua Bank v Santwire*, No. 68832-4-1 (Wash. Ct. App. Aug. 30, 2013).

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

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|---|---|---|
| UMPQUA BANK, an Oregon bank,<br><br>Respondent,<br><br>v.<br><br>RYAN SANTWIRE,<br><br>Appellant. | ) | No. 68832-4-I<br><br><br><br><br><br>ORDER DENYING MOTION TO PUBLISH OPINION |

Respondent Umpqua Bank filed a motion to publish the court's opinion entered August 5, 2013. The panel has considered the motion and determined it should be denied. Now therefore, it is hereby

ORDERED that respondent's motion to publish the opinion is denied.

Done this 30th day of August, 2013.

FOR THE PANEL: