Supreme Court No. 89610-1

Division 1 Court of Appeals No. 68545-7-1

SUPREME COURT
OF THE STATE OF WASHINGTON

Bank of America NA, as successor by merger to Lasalle Bank NA, as trustee to Wamu Mortgage Pass-Through Certificates Series 2006 AR11 Trust,

Plaintiff, Respondent

v.

Christopher L. Short et al.,

Defendant, Appellant-Petitioner

PETITION FOR REVIEW

Christopher L. Short, Pro se
P.O. Box 1080
Republic, Washington 99166
(509) 775-0469
clshort123@peoplepc.com

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I. IDENTITY OF PETITONER

Christopher L. Short (Mr. Short) is the Petitioner. Mr. Short is the defendant in a judicial foreclosure action filed in Whatcom County Superior Court (Trial Court). The Trial Court granted a motion for summary judgment against Mr. Short.

II. COURT OF APPEALS DECISION

Mr. Short appealed the trial court's decision to the Court of Appeals, State of Washington, Division I (Court of Appeals). The Court of Appeals on 09/23/2013 remanded to the trial court mandating respondent, Bank of America comply with a local superior court rule, WCCR 54(c), by filing the original promissory note prior to entry of judgment.[1]

WCCR 54(c) states:

> "No Judgment shall be taken upon a negotiable instrument until the original instrument has been filed."

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[1] It is not known by Mr. Short whether Bank of America is willing or able to comply with the Court of Appeals mandate. Because the mandate has the effect of vacating the order on summary judgment and precluding the entry of any judgment by the Trial Court if Bank of America fails to comply, Mr. Short would in that case consider further proceedings in this matter unnecessary. However, Mr. Short does not have the luxury of waiting for the outcome of that possibility because the Court of Appeals has also affirmed the summary judgment against him in part. Mr. Short in seeking to preserve his right to a trial by jury must petition the Court for review of that portion of the Court of Appeals decision that he finds to be in conflict with previous rulings of this Court and a violation of his rights under the Washington State and United States Constitutions in a timely manner.

The Court of Appeals affirmed that Bank of America as the Trustee of an express trust could bring suit against Mr. Short in its own name and; that unless otherwise ordered by the court Bank of America could maintain the suit in its own name even though Bank of America had been removed or resigned as Trustee of the Trust during the pendency of the litigation against Mr. Short.

The Court of Appeals affirmed there was no genuine issue as to any material fact; that the affiant Araceli Urquidi was competent to testify and that her affidavit complied with CR 56(e).

On 10/14/2013 Mr. Short filed a motion for reconsideration.

On 10/29/2013 the Court of Appeals denied Mr. Short's motion for reconsideration.

III. ISSUES PRESENTED FOR REVIEW

The Washington State Constitution, Article 1, Section 2 states:

"The Constitution of the United States is the supreme law of the land."

The Seventh Amendment to the Constitution of the United States states:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law"

The standards by which summary judgement may be ordered and affirmed by a court must meet very stringent standards to preserve a parties right to trial by jury, as this Court has ruled on many occasions.

1. Whether the Court of Appeals affirmation of the Trial Court's decision that there was no geniune issue as to any material fact is in conflict with the Court's decision in *Hiatt v. Walker Chevrolet Co.* 120 Wn 2nd, 57, 837 P.2d 618 (1992) in which the court held "Where a dispute as to a material fact exists, summary judgment is improper"?
2. Whether the Court of Appeals affirmation of the Trial Court's ruling that certain evidence was admissable is in contradiction to CR 56 (c) & (e)?
3. Whether the Trustee of an express trust bringing suit in its own name and not joining the party for whose benefit the action is brought may disregard the express governing provisions of said trust which specifically prohibit certain acts in conflict with the Court's decision in *Hudson v. Alaska Airlines* 43 Wn 2nd 71, 71-72 (1953) and *Dept of Labor & Indus. v. Kantor* Wn App. 764, 799 (1999) (citations omitted)?

4. Whether the Trustee of an express trust, who has brought suit in their own name, without joining the party for which the action is brought may continue the litigation after being removed or resigning as trustee of the trust?

IV. STATEMENT OF CASE

On 06/07/2006 Mr. Short obtained a loan from Washington Mutual Savings Bank, FA (WaMu) for the purposes of refinancing real property in Whatcom County, Washington. Mr. Short executed a promissory note and a deed of trust.

On 04/28/2010 Bank of America, NA as successor by merger to Lasalle Bank NA as Trustee to WaMu Mortgage Pass-Through Certificates Series 2006-AR11 Trust (Trust) filed a complaint naming Mr. Short as a defendant as well as Washington Mutual Bank, unknown parties, unknown occupants and Does 1-10. CP 303-344.

Bank of America in their complaint prayed for a money judgment against Mr. Short on the promissory note. Further praying that in the event Mr. Short did not pay the money judgment forthwith upon entry that his real property might be sold and the funds from such sale awarded to Bank of America and if any deficiency remained after applying the proceeds from the sale of the real property that a deficiency judgment be entered against him. CP 307 lines 1-20.

On 01/03/2011 Mr. Short filed an answer to Bank of America's complaint.

On 01/08/2011 Mr. Short served Bank of America with defendant's first set of interrogatories and request for production of documents.

On or about 02/11/2011[2] Bank of America is removed or resigns as Trustee of the Trust. (Mr. Short was not aware of this event until after he received responses to his discovery request on 07/14/2011.)

Bank of America ignored Mr. Short's discovery request and on 04/19/2011 filed a motion for summary judgment with an affidavit in support of the motion for summary judgment.[3] CP 553-557. The affiant was the attorney for Bank of America, Albert Lin.[4] CP 299-302.

Bank of America continued to ignore Mr. Short's discovery request. On 04/25/2011 Mr. Short conducted a CR 26(i) conference with Mr. Lin. Bank of America continued recalcitrant in complying with Mr. Short's

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[2] There is a discrepancy in the dating of this event. Bank of America has used the date 02/11/2011 in all documents referencing the event starting with the events first disclosure in answer to interrogatory 1.2 of Mr. Short's discovery request. CP 246 lns. 13-19. U.S. Bank who replaced Bank of America as Trustee of the Trust stated in a letter to Mr. Short that they took over the role of Trustee of the Trust on 01/20/2011. CP 587.

[3] The Court of Appeals mistakenly identified this motion for summary judgment as the motion that lead to the order that is the subject of Mr. Short's Appeal. App. 3,¶3. The motion for summary judgment that lead to the order that is the subject of Mr. Short's appeal was filed 10/14/2011.

[4] The Court of Appeals mistakenly identifies the affidavit of Araceli Urquidi as being filed with this motion for summary judgment. App. 3,¶4. The affidavit of Araceli Urquidi the Court of Appeals references in its opinion is not filed with Bank of America's second motion for summary judgment either. Ms. Urquidi's affidavit referenced by the Court of Appeals is not filed with trial court until five days prior to hearing on the motion for summary judgment, but not served on Mr. Short until three days prior to the hearing on the motion for summary judgment in violation of CR 56.

discovery requests. On 05/17/2011 Mr. Short filed a motion to compel. The court on 06/20/2011 granted Mr. Short's motion over Bank of America's objections and struck the scheduled hearing on Bank of America's motion for summary judgment.

On 07/14/2011 Bank of America served Mr. Short with Bank of America's Responses to Defendant's first set of Discovery Requests. Mr. Short was also provided a courtesy copy of a Pooling and Servicing Agreement (PSA) on CD disk that was referenced in Bank of America's responses. CP 246 ln. 7.

On 10/14/2011 Bank of America files and serves a second motion for summary judgment and an affidavit in support of motion for summary judgment with the motion. CP 565-570. The motion was identical to the first motion, however a new affiant, Araceli Urquidi from southern California provided the affidavit in support of the motion for summary judgment.[5] CP 256-298.

Like Mr. Lin before her, Ms. Urquidi's affidavit was defective in certain relevant ways in that she misidentified the plaintiff and she failed to comply with the requirements of RCW 9.72.085. CP 227-233.

[5] Araceli Urquidi provided two declarations in support of Bank of America's motion for summary judgment, one with the motion and one days before the hearing on the motion.

On 01/20/2012 Mr. Short responded to Bank of America's motion for summary judgment. CP 221-255. On 01/26/2012 Bank of America filed[6] a reply and a second affidavit of Araceli Urquidi in support of motion for summary judgment. CP 211-220, CP 111-154.

On 02/03/2012 the hearing on Bank of America's motion for summary judgment was heard as scheduled. Mr. Short appeared in person. Mary Stearns an attorney representing Bank of America appeared telephonically. RP 02/03/2012. The Trial Court granted Bank of America's motion for summary judgment. CP 108-109.

On 02/14/2012 Mr. Short filed a motion for reconsideration. CP 97-107. Bank of America filed a response. CP 71-79. Mr. Short filed a reply. CP 18-60.

On 03/02/2012 the hearing on Mr. Short's motion for reconsideration was heard. Mr. Short appeared in person. Bank of America attorney Albert Lin appeared telephonically. RP 03/02/2012. The Trial Court denied Mr. Short's motion.

On 08/07/2012 Mr. Short filed a motion to vacate. Bank of America filed a response. Mr. Short filed a reply. On 09/21/2012 Mr. Short's motion to vacate was heard. RP 09/21/2012. Mr. Short appeared in person.

[6] Neither Bank of America's reply nor Araceli Urquidi's affidavit were served on Mr. Short in a timely manner. CR 56 requires all supporting affidavits be filed and served not less than 28 day prior to the hearing and any reply be filed and served not less than 5 days prior to the hearing.

Bank of America attorney Barbara Bollero appeared in person. The Trial Court denied Mr. Short's motion to vacate.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This court should accept review pursuant to RAP 13(b) 1, 2, 3 and 4 because the Court of Appeals decision is in conflict with decisions of this Court, and other appeals courts and summary judgment involves issues of substantial public interest because it deprives a person of their constitutional right to trial by jury. Summary judgment has and must be constantly and vigilantly controlled lest the procedure become familiar and expediently used by the courts without due consideration for the constitutional right of which a person may be deprived.

A. The Court of Appeals affirms the Trial Courts finding of historical material facts while finding a different set of historical material facts.

A historical fact is a thing done, an action, an event or occurrence in a time and place. Some historical facts may be proved by direct evidence other by inference from evidence of other facts. The resolution of disputes over historical facts or the inferences to be drawn from them is a jury function. A dispute over historical facts or inferences, if genuine and material within the meaning of CR 56, precludes summary judgment.

Documents that are signed and dated provide direct evidence.

B. Story One

On 09/25/2008 an event took place that is evidenced by a dated, signed and then recorded document; a Purchase and Assumption Agreement between the FDIC as receiver of Washington Mutual and JPMorgan Chase Bank, NA filed with King County Auditor on 10/03/2008 under file number 20081003000790. Pursuant to the agreement JPMorgan Chase acquired certain of the assets, including all the loans and all loan commitments of Washington Mutual.

A description of this historical event is contained in Bank of America's complaint, CP 304, lns.18-24. their motion for summary judgment, CP 300, lns. 21-23. and the affidavit in support of their motion for summary judgment. CP 258, lns. 3-10. Mr. Short has reviewed the document and agrees this historical event took place and that *only* the assets, including all loans and all loan commitments of Washington Mutual are addressed in this agreement.

Mr. Short has examined, accepts and agrees with this direct evidence.

Bank of America states, in its complaint, motion for summary judgment, and affidavit in support of motion for summary judgment that Mr. Short's Note and Deed of Trust were assigned to JPMorgan Chase Bank by this FDIC agreement.

Mr. Short has examined this statement and the record and found no direct evidence to support this statement of material fact.

The next historical event in Mr. Short's chain of title occurred on 03/23/2010 when as stated in Bank of America's complaint, CP 305 lns. 1-2. motion for summary judgment, CP 301 lns. 5-8. and affidavit in support of motion for summary judgment, CP 258 lns. 10-13. JPMorgan Chase Bank NA assigned the Note and Deed of Trust to Plaintiff and filed such assignment with Whatcom County Auditor on 03/26/2010, under file number 20081003000790.

Mr. Short because he had found no direct evidence that his loan was part of the assets of WaMu at the time it was seized by FDIC, while not disputing that a document was made and filed purporting to transfer all beneficial interest in Mr. Short's Note and Deed of Trust from JPMorgan Chase to Bank of America, does not accept or agree that this is a true statement of fact because there is no direct evidence JPMorgan Chase Bank had any beneficial interest in Mr. Short's Note and Deed of Trust to transfer.

These are the material facts that at the hearing on Bank of America's motion for summary judgment that Judge Mura stated were his understanding of the facts regarding the chain of title of Mr. Short's loan. RP 02/03/2012 pg. 6, lns. 1-4; pg. 11 lns 6-9.

C. Story Two

Mr. Short conducted discovery in the form of Interrogatories. At interrogatory 1.4 CP 247. Mr. Short asked:

> "Was the subject loan owned by WAMU at the time the FDIC sold certain WAMU mortgage assets to JPMorgan Chase? Yes or No? If the answer is yes, please provide all documents relating to the transfer of the subject loan to JPMorgan Chase."

Bank of America answered:

> "No...."[7] CP 247 ln. 16.

Therefore Mr. Short's loan was not part of the WaMu assets seized and transferred to JPMorgan Chase Bank.

This statement directly conflicts and contradicts allegation 6 of Bank of America'a complaint, ¶ 9 of the Bank of America's motion for summary judgment and ¶6 of the affidavit in support of Bank of America's motion for summary judgment. Id. 9.

The conflict in this material fact alone raised by Bank of America itself, and presented to the trial court in Mr. Short's response to motion for

[7] There is an extended answer beyond the answer "No". This extended answer was not requested nor does it in any way change the simple answer "No" to the direct question. Bank of America has criticized Mr. Short for not including their whole paragraph answer to a yes or no question. The supposed reasoning is that Mr. Short by including the whole paragraph would somehow change their "No" answer to yes.

summary judgment is sufficient to meet the standard that there exists a genuine dispute as to *any* material fact.

Further, links in the chain of Mr. Short's title dependent on the resolution of the aforementioned material fact are essential for the court to have resolved prior to determining if Bank of America has a right to bring suit against Mr. Short.

As stated Mr. Short provided this information to the Trial Court in his response to motion for summary judgment. It was in reply to Mr. Short's response that Bank of America through the affidavit of Araceli Urquidi that story two was formally introduced. CP 113 ln. 21-pg.115.

Ms. Urquidi in her second affidavit in support of motion for summary judgment did not abandon story one but tells story two subsequent to story one.

At this point it may be useful to digress to address the reasons Ms. Urquidi's second affidavit in support of summary judgment should have been rejected and not considered by the previous courts. Moving from least to most substantive. (see page 18 for discussion on competency)

1. Ms. Urquidi's affidavit fails to correctly identify the plaintiff in the caption.
2. Ms. Urquidi's affidavit in accordance with CR 56(c) must be filed and served not less than 28 days prior to the

hearing on motion for summary judgment. Ms. Urquidi's affidavit was filed on 01/26/2012. The hearing date was 02/03/2012.[8]

3. Ms. Urquidi references a Pooling and Servicing Agreement (PSA). CP 114 ln 5-6. A copy of this document is not provided to the court.[9] The PSA is also incomplete. Attached as Exhibit D to the PSA is the Mortgage Loan Schedule that purports to identify the loans the Trust owns. PSA pg. 69-70. This Schedule states it is intentionally left blank and that a copy of the Schedule may be obtained from certain sources. No copy of Exhibit D has been provided to the courts or Mr. Short.

CR 56 does not allow for Mr. Short to provide the Trial Court a written response to this new information even if time would have permitted him to do so.

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[8] Bank of America has argued that Ms. Urquidi's affidavit is other than is stated on its face and is somehow acceptable even though CR 56(c) clearly states "any supporting affidavits". [Resp. Brief pg.16-17] Accepting Bank of America's argument that it is something other than an affidavit in support of motion for summary judgment *arguendo* Ms. Urquidi's affidavit fails because if it was in reply to Mr. Short's response and it must be filed and served not less than 5 days prior to the hearing on motion for summary judgment. The declaration of mailing for Ms. Urquidi's affidavit states it was mailed to Mr. Short on 01/25/2011. Adding 3 days for mailing and excluding weekends and holidays as required by the rules, Ms. Urquidi's affidavit was improperly served prior to the 02/03/2011 hearing date.

[9] Ms. Urquidi merely provides a website address which is asserted will produce the (PSA), which does not comply with CR 56.

D. The Trial Court accepts Story One, The Court of Appeals accepts Story Two.

The Trial Court's decision is not reduced to a formal written opinion so the Verbatim Report of Proceedings is the only record we may consult to gain insight into what formed the Trial Court's opinion.

At page 3 and 4 of the RP the Court states it did not "follow" Mr. Short's arguments. RP 02/03/2012 pg 3 line 22 - pg 4 line 4. The Court did not seek clarification of the issues it was unable to "follow" from Mr. Short[10], but instead sought clarification on issues from Bank of America.

At page 6 the court recites the essential elements of Story number 1 as the basis of its decision. RP 02/03/3012 pg. 6 lines 1-6.

The Court of Appeals in undertaking the same inquiry as the Trial Court adopts an alternative view of historical events in its statement of facts.

> "Short's loan was bundled into a securitized trust know as WaMu Mortgage Pass-Through Certificates Series 2006-AR11Trust (Trust)...WaMu retained the servicing rights to Short's loan." App. 2, ¶1.

[10] The only question directed by the court to Mr. Short at this point was "are you an attorney?"

Although the date of the "bundling"[11] is not provided by the Court of Appeals, the date can be approximated by inference. If WaMu retained the servicing rights to Short's loan as the Court of Appeals stated, WaMu was obviously still functioning and had not at that time been seized by the FDIC. This can be additionally inferred by the Court of Appeals statement that when WaMu did fail and was seized by the FDIC that JPMorgan acquired the servicing rights to Short's loan.[12] App. 2,¶2.

The cornerstone of the chain of title of Mr. Short's loan, a historical event, a material fact is described by the Trial Court and the Court of Appeals in such a way as to exclude the other's possibility. There are of course even other possibilities, not just the Trial Court's or the Court of Appeals choice of events that are deserving of a jury's inquiry into the facts.

E. Ultra Vires and Illegal Acts

The place where the Trial Court and the Court of Appeals have to come together is on the only direct evidence that Bank of America has submitted that it is the holder of Mr. Short's Note and Deed of Trust, the publicly recorded assignment of the deed of trust.[13] CP 343-344

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[11] "Bundling" is a euphemism for transfer of beneficial interest en masse.
[12] The distinction between servicing rights to a loan and beneficial interest in a Note and Deed of Trust is significant.
[13] This document has serious defects see CP 31, ¶7 for a full discussion.

The Trial Court does not expressly mention the PSA,[14] The Court of Appeals does however state at page 2 of its opinion that:

"A Pooling and Servicing Agreement (PSA) govern all aspects of the Trust."[15] App. 2 ¶1.

The assignment of Mr. Short's deed of trust is dated 03/23/2010 and recorded 03/26/2010. The PSA which govern all aspects of the Trust at Article II § 2.06 states that the closing date for the Trust is the start-up date, which is 08/24/2006 and; that all Mortgage Files[16] must be in the hands of the Trustee or Custodian not later than 45 days after the closing date to be considered part of the Trust's Mortgage Pool Assets. PSA Article II §§ 2.05-2.07.

Mr. Short's Deed of Trust could not possibly be accepted into the Trust's Mortgage Pool Assets some three years plus after the closing date as the Court of Appeals proclaims App 5 ¶4. without violating the provisions of the PSA, including PSA Article II § 2.02(iv), and inflicting significant damage on Trust's investors by compromising the Trust's REMIC tax status. To dispel the Court of Appeals assertion that the

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[14] Mr. Short argues that the PSA has not been entered in evidence properly and it is unknown whether the trial court even could access this document because the trial court was supplied only a online address to view it, and this just five days before the hearing, though the Court of Appeals appears to have acknowledged and accepted it. App. 2 ¶1.
[15] Available online per Ms. Urquidi. CP 114 lns. 5-7.
[16] Mortgage Files are defined on page 66 of the PSA and include Notes and Deeds of Trust

evidence was uncontoverted, Mr. Short brought this to the attention of the Trial Court in his response to motion for summary judgment. CP 235 lns. 3-5.

The PSA also states that there is a Mortgage Loan Purchase Agreement. PSA 69. According to the PSA the Mortgage Loan Purchase Agreement defines 'Qualified Loans" that the Trust may purchase. The Mortgage Loan Purchase Agreement has not been entered into evidence but it is reasonable to presume that a loan in default would not qualify. Both courts have found Mr. Short's loan to be in default as of February 2009

The assignment of Mr. Short's Note and Deed of Trust, which are known to be in default, from JPMorgan Chase Bank's personal book to Bank of America as Trustee for the Trust would constitute a fraud on the investors in the Trust.[17] This of course is an illegal act, and a violation of the Trust's PSA. The assignment of Mr. Short's Note and Deed of Trust, which is publicly recorded[18] must therefore be void.

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[17] The Court of Appeals states at page 2 of it opinion "In March 2010, Chase assigned all beneficial interest in Short's Note and Deed of Trust to Bank of America. In April 2010, Bank of America sued Short to foreclose on the property and for a deficiency judgment." App 2 ¶4.

[18] Public recording of a document does not attest to the documents validity nor that it can effect its purported purpose, only that its filing is acknowledged, available to, and provides notice to the public of its existence.

F. Affidavits of Araceli Urquidi

The Court of Appeals has stated that Araceli Urquidi has established herself as competent to testify by stating "Urquidi states she is an agent of Bank of America,…". App. 8, ¶3.

The Court of Appeals has acknowledged in its facts that Bank of America ceased being the Trustee of the Trust on 02/11/2011. App. 3, ¶2. Ms. Urquidi made and filed two affidavits in support of Bank of America's motion for summary judgment. The first is dated 09/21/2011 and filed on 10/14/2011 and the second is dated 01/19/2012 and filed on 01/26/2012. CP 256, CP 111.

Ms. Urquidi is identified as an employee of JP Morgan Chase Bank on 07/14/2011 in Bank of America's answer to interrogatory 1.1. CP 245. Any relevant agency relationship Ms. Urquidi could have ever possibly had with Bank of America would have been derived from her employment at JP Morgan Chase and its relationship to the Trust as its Servicer during a period of time in which Bank of America was the Trustee of the trust. Therefore any agency relationship Ms. Urquidi may have had with Bank of America was severed when Bank of America was removed or resigned as Trustee of the Trust.

Ms. Urquidi was not an agent of Bank of America on the date of the making or filing of either of her two affidavits. Ms. Urquidi is therefore not competent to testify.

G. Trustees Status After Removal or Resignation CR 25

The Court of Appeals has misinterpreted the removal or resignation of Bank of America as Trustee of the Trust as a transfer of interest and has therefore mistakenly applied CR 25(c) to the event rather than CR 25(b).[19]

The interest in this case is Mr. Short's loan. The Trust by removing or accepting Bank of America's resignation as Trustee did not in that process transfer any interest in Mr. Short's loan.[20]

When the Trustee of an express Trust brings suit in its own name, without joining the party for whose benefit the action is brought, and is

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[19] The Court of Appeals misunderstanding of the event may be attributed to Respondent's Brief where Bank of America takes unruly liberty with the record by stating at page 5 ¶2; "On February 11, 2011, U.S. Bank National Association (USBank) purchased all of BOA's mortgage Trust business, inclusive of the subject loan, and was substituted as the Trustee of the WaMu Trust. (CP 246)" which the Court of Appeals renders to; "In February 2011, U.S. Bank National Association (U.S. Bank) purchased Bank of America's mortgage trust business and succeeded Bank of America as trustee of the Trust." The source cited CP 246 Bank of America response to interrogatory 1.2 actually states; "Later on February 11, 2011, U.S. Bank National Association ("U.S. Bank") replaced Bank of America as Trustee of the Trust; thus as of February 11, 2011, U.S. Bank is the Trustee of the Trust that owns the subject loan. (Plaintiff intends to file a substitution of party, substituting U.S. Bank for Bank of America as Plaintiff.)"

[20] Transfer of interest in a loan i.e. note and deed of trust are accompanied by a formal process including public recording of documents etc. No transfer of interest in Mr. Short's loan by the Trust is even suggested.

removed or resigns as Trustee during the pendency of the litigation they become incompetent thereby.

CR 25(b) Incompetency, is the rule that governs procedure in the event a party becomes incompetent. Therefore in accordance with CR 25(b) Bank of America may not continue the action after being removed or resigning their position as Trustee of the Trust on or about 02/11/2011.

VI. CONCLUSION

Pursuant to RAP 13.4(b) 1, 2, 3 & 4 this Court should accept review.

Respectfully submitted this 22 day of November, 2013.

Christopher L. Short, Pro se
Defendant, Appellant-Petitioner

COURT OF APPEALS DIVISION I OF THE STATE OF WASHINGTON

Bank of America, NA as successor by Merger of LaSalle Bank NA, as Trustee to WaMu Mortgage Pass-Through Certificates Series 2006-AR 11 Trust Respondents, vs Christopher L. Short; Washington Mutual Bank; Unknown Parties in Possession; or Claiming Right to Possession; and Unknown Occupants And Does 1-10 inclusive Appellants.	)	Case No: 68545-7-1 DECLARATION OF SERVICE

I certify that on or about November 22, 2013, I sent by United States Mail a copy of the attached: Petition for Review to;

:

Ann T. Marshall and Barbara L. Bollero (individually)
Bishop, White, Marshall & Weibel, P.S.
720 Olive Way, Suite 1201
Seattle, WA 98101-1801

I declare under penalty of perjury and the laws of the State of Washington that the foregoing is true and correct and that this Declaration was executed in Republic, WA. on November 22, 2013

Christopher L. Short
PO Box 1080
Republic, WA 99166
509 775 0469
Clshort123@peoplepc.com

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BANK OF AMERICA, N.A., as successor by merger to LASALLE BANK, N.A., as trustee to WaMu Mortgage Pass-Through Certificates Series 2006-AR11 Trust,	)	No. 68545-7-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
Respondent,	)	
v.	)	
CHRISTOPER L. SHORT,	)	
Appellant,	)	
WASHINGTON MUTUAL BANK; UNKNOWN PARTIES IN POSESSION; OR CLAIMING A RIGHT TO POSSESSION, and UNKNOWN OCCUPANTS; and DOES 1-10 inclusive,	)	
	)	FILED: September 23, 2013
Defendants.	)	

GROSSE, J. — A trustee of an express trust is entitled to bring suit in its own name without joining the party for whose benefit the action is brought. When a new trustee succeeds the original trustee during the pendency of the litigation, the original trustee may continue the action unless otherwise ordered by the court. Because Bank of America, N.A., the original trustee, established that it was entitled to judgment as a matter of law, we affirm the order of summary judgment. However, we remand for Bank of America to comply with a local superior court rule requiring the filing of an original promissory note prior to judgment.

FACTS

In June 2006, Christopher Short executed a promissory note in the amount of $294,000 to Washington Mutual Bank, F.A. (WaMu). The promissory note was secured by a deed of trust encumbering agricultural property in Deming, Washington. Short's loan was bundled into a securitized trust known as the WaMu Mortgage Pass-Through Certificates Series 2006-AR 11 Trust (Trust). A Pooling and Servicing Agreement (PSA) governs all aspects of the Trust. The original trustee of the Trust was LaSalle Bank, N.A. (LaSalle). In October 2007, LaSalle was succeeded as trustee by Bank of America, N.A. (Bank of America) following a merger. WaMu retained the servicing rights to Short's loan.

In September 2008, WaMu failed. It was seized by the federal government and placed into receivership with the Federal Deposit Insurance Corporation (FDIC). JPMorgan Chase Bank (Chase) acquired the vast majority of WaMu's assets, including the servicing rights to Short's loan. Chase also maintained physical possession of the original promissory note.

It is undisputed that Short defaulted on payments on the note in February 2009.

In March 2010, Chase assigned "all beneficial interest" in Short's note and deed of trust to Bank of America. In April 2010, Bank of America sued Short to foreclose on the property and for a deficiency judgment. The caption of the complaint designated the plaintiff as "Bank of America, NA as successor by merger

to LaSalle Bank NA, as Trustee to WaMu Mortgage Pass-Through Certificates Series 2006-AR 11 Trust."

In February 2011, U.S. Bank National Association (U.S. Bank) purchased Bank of America's mortgage trust business and succeeded Bank of America as the trustee of the Trust.

In April 2011, Bank of America moved for summary judgment. The caption for the motion now designated the plaintiff as "Bank of America, NA as successor by merger to LaSalle Bank NA, as Trustee to WaMu Mortgage Pass-Through Certificates Series 2006-AR 11 Trust, through their loan servicing agent JPMorgan Chase Bank, NA."

In support of its motion, Bank of America attached the affidavit of Araceli Urquidi. The affidavit stated, in pertinent part:

> Under penalty of perjury, the undersigned hereby declares as follows:
> 1. I am over the age of 18 years and am not personally a party to this litigation. As to the following facts, I know them to be true of my own personal knowledge, and if called upon to testify in this action, I could and would testify competently thereto.
> 2. I am a duly authorized agent and signer for Bank of America, NA as successor by merger to LaSalle Bank, NA, as Trustee to WaMu Mortgage Pass-Through Certificates Series 2006-AR 11 Trust, and its servicing agent JP Morgan Chase Bank, NA ("Plaintiff"). I am duly authorized to make this declaration on behalf of Plaintiff.
> 3. As an agent for the Plaintiff, I am familiar with the manner and procedure by which loan records are obtained, prepared, and maintained. Those records are obtained, prepared, and maintained by employees or agents of the Plaintiff in the performance of their regular business duties at or near the time, act, conditions, or events recorded thereon. The records are made either by persons with knowledge of the matters they record or from information obtained by persons with

> such knowledge. I have knowledge of and/or access to those records. I personally reviewed those records when making this declaration.
>
> . . . .
>
> 16. The original promissory note evidencing Mr. Short's loan is in the possession of Chase's loan record department, and is physically located in Chase's secure warehouse in Monroe, Louisiana.

Attached to Urquidi's affidavit were copies of the note, the deed of trust, an affidavit from an FDIC representative regarding the transfer of assets from WaMu to Chase, and the assignment of the note and deed of trust from Chase to Bank of America.

The trial court granted summary judgment in favor of Bank of America. Short appeals.

ANALYSIS

We review a grant of summary judgment de novo, undertaking the same inquiry as the trial court.[1] Summary judgment is proper if, viewing the facts and reasonable inferences most favorably to the nonmoving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[2] The moving party has the initial burden to show that there is no genuine issue as to any material fact.[3] If the moving party satisfies its burden, only then does the burden

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[1] Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P.3d 574 (2006).
[2] CR 56(c); Versuslaw, Inc. v. Stoel Rives, LLP, 127 Wn. App. 309, 319-20, 111 P.3d 866 (2005).
[3] Hiatt v. Walker Chevrolet Co., 120 Wn.2d 57, 66, 837 P.2d 618 (1992).

shift to the nonmoving party to present evidence that material facts are in dispute.[4] If the nonmoving party fails to do so, then summary judgment is appropriate.

1. Material Facts in Dispute

Short argues the trial court erred in granting summary judgment because the evidence did not show that Bank of America was the party with the authority to enforce the note and foreclose on the deed of trust. Specifically, Short contends that Chase was unable to assign "all beneficial interest" in Short's loan to Bank of America in 2010 because the Trust, not Chase, owned the loan.

"Every action shall be prosecuted in the name of the real party in interest."[5] The real party in interest is the party "who possesses the right sought to be enforced" under the substantive law.[6] A trustee of an express trust is authorized to bring suit on behalf of the trust as the party in interest.[7]

The uncontroverted evidence established that Short's loan was pooled with other loans and placed into the Trust. Through the PSA, the Trust became the owner of the loans and held the loans for the benefit of its investors. As such, the Trust, through its trustee, is entitled to bring suit against Short.[8]

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[4] Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (quoting Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 515-16, 799 P.2d 250 (1990)).
[5] CR 17(a).
[6] Sprague v. Sysco Corp., 97 Wn. App. 169, 176 n.2, 982 P.2d 1202 (1999).
[7] CR 17(a); see also Denny v. Cascade Platinum Co., 133 Wash. 436, 439-40, 232 P. 409 (1925).
[8] Bank of America argues that Chase, as the servicing agent for the loan, is also entitled to file suit to foreclose on the deed of trust. Because we find that Bank of America had the authority to file suit, we need not address this argument. See, e.g.,

Short correctly notes that Bank of America was the trustee of the Trust at the time the complaint was filed, but by the time the judgment was entered, U.S. Bank had succeeded Bank of America as trustee. He therefore requests that "all documents misidentifying plaintiff be rejected." But CR 25(c) provides that:

> In case of any transfer of interest, the action may be continued by or against the original party unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

Substitution on grounds of transfer of interest is not mandatory.[9] And whether or not a transferee is made a party, it will be bound by an adjudication of the transferor's rights.[10] Therefore, pursuant to CR 25(c), Bank of America was entitled to maintain the action as the original party in interest.

2. Admissibility of Evidence

Short argues that the trial court erred in admitting copies of the promissory note "that were . . . not original in contradiction to WCCR 54(c), RCW 56(e) [sic] and ER 1002." We review de novo all trial court rulings made in conjunction with a summary judgment motion.[11]

Whatcom County Civil Rule (WCCR) 54(c) reads: "No judgment shall be taken upon a negotiable instrument until the original instrument has been filed."

LaSalle Bank Nat'l Ass'n v. Lehman Bros. Holdings, Inc., 237 F.Supp.2d 618, 633 (D.Md. 2002) (the fact that the special servicer and the trustee "each have the authority to institute suit does not negate the right of [the trustee] to so act.")

[9] Stella Sales, Inc. v. Johnson, 97 Wn. App. 11, 17, 985 P.2d 391 (1999).

[10] Stella Sales, 97 Wn. App. at 17-18 (quoting Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 79 Wn. App. 221, 227, 901 P.2d 1060 (1995)).

[11] Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

Bank of America argues that because it sued to foreclose on the property, rather than to collect on the note, WCCR 54(c) does not apply. This argument is unconvincing. As Short points out, Bank of America sued for a deficiency judgment. A deficiency judgment is a judgment on the note.[12] Because Bank of America sued for and obtained a judgment on the note, they were obligated to produce the original note. On remand, the original note shall be filed.

However, we reject Short's claim that the copy of note attached to Bank of America's summary judgment motion was inadmissible because it was not an original as required by ER 1002. A duplicate is admissible to the same extent as an

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[12] As this court recently explained in Gardner v. First Heritage Bank, __ Wn. App. __, 303 P.3d 1065 (2013):

> Under chapter 61.12 RCW governing foreclosure of mortgages and personal property liens, a deficiency judgment "arises if the amount of a judgment in a judicial foreclosure exceeds the value of the security at the foreclosure sale." Boeing[Employees' Credit Union v. Burns, 167 Wn. App. 265, 282, 272 P.3d 908 (2012)]. Once obtained, a deficiency judgment is "similar in all respects to other judgments for the recovery of money. . . ." RCW 61.12.080; see Lassen v. Curtis, 40 Wn.2d 82, 86, 241 P.2d 210 (1952) ("In our opinion, a personal judgment for the amount due on a separate obligation entered as part of a decree of foreclosure of a mortgage given to secure such obligation, in effect amounts to a judgment over for the deficiency. . . ."). As in the mortgage foreclosure context, "deficiency judgment" under RCW 61.24.100 means a money judgment sought by a trust deed beneficiary (or other creditor) following a trustee's sale that fails to satisfy the obligation secured by the deed of trust. We conclude that a "deficiency judgment" for purposes of RCW 61.24.100's antideficiency provision means a money judgment against a debtor for a recovery of the secured debt measured by the difference between the debt and the net proceeds received from the foreclosure sale.

Gardner, 303 P.3d at 1071 (footnotes omitted).

original unless a genuine question is raised as to the authenticity of the original or it would be unfair to admit the duplicate in lieu of the original.[13] Short does not challenge the note's authenticity or otherwise articulate how he was prejudiced by the duplicate.[14]

Short also challenges the admissibility of the affidavit of Araceli Urquidi. Affidavits submitted as part of a summary judgment proceeding must be made on personal knowledge and show affirmatively that the affiant is competent to testify to what is in the affidavit.[15] If an affiant refers to documents outside the affidavit, sworn or certified copies of those documents must be attached or served with the affidavit.[16]

These requirements have been satisfied. Urquidi's affidavit states that she is an agent of Bank of America, that she is familiar with the means of preparation of loan records, and that she personally reviewed Short's loan documents. Attached to Urquidi's affidavit were copies of the note, the deed of trust, an affidavit from an FDIC representative regarding the transfer of assets from WaMu to Chase, and the

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[13] ER 1003. Examples of situations in which it would be unfair to admit a duplicate include: (1) if portions of the original were excised or altered in the duplication process; (2) if the duplicate were illegible or inaudible; or (3) if the original had been intentionally and fraudulently destroyed by the party offering the duplicate. Braut v. Tarabochia, 104 Wn. App. 728, 732, 17 P.3d 1248 (2001). From the record it appears none of these situations are present here.

[14] Although Short alleges in his reply brief that Bank of America has somehow falsified the copy of the note it provided to the trial court, he provides no evidence in support of this claim.

[15] CR 56(e).

[16] CR 56(e).

assignment of the note and deed of trust from Chase to Bank of America. The trial court did not err in considering the affidavit.

Both Short and Bank of America request costs and/or attorney fees incurred in defending this appeal. However, neither cites authority warranting such an award. A request for attorney fees on appeal requires a party to include a separate section in his or her brief devoted to the request; this requirement is mandatory.[17] A "bald request for attorney fees on appeal" is insufficient; rather, argument and citation to authority are required under the rule to advise this court of the appropriate grounds for an award of attorney fees and costs.[18] As such, we deny the requests of both parties.

Affirmed and remanded for proceedings consistent with this opinion.

WE CONCUR:

COX, J.

[17] RAP 18.1(b); Phillips Bldg. Co. v. An, 81 Wn. App. 696, 705, 915 P.2d 1146 (1996).
[18] Thweatt v. Hommel, 67 Wn. App. 135, 148, 834 P.2d 1058 (1992); Austin v. U.S. Bank of Wash., 73 Wn. App. 293, 313, 869 P.2d 404 (1994).

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

BANK OF AMERICA, N.A., as successor by merger to LASALLE BANK, N.A., as trustee to WaMu Mortgage Pass-Through Certificates Series 2006-AR11 Trust,	)	No. 68545-7-I
Respondent,	)	ORDER DENYING MOTION FOR RECONSIDERATION
v.	)	
CHRISTOPER L. SHORT,	)	
Appellant,	)	
WASHINGTON MUTUAL BANK; UNKNOWN PARTIES IN POSESSION; OR CLAIMING A RIGHT TO POSSESSION, and UNKNOWN OCCUPANTS; and DOES 1-10 inclusive,	)	
Defendants.	)	

The appellant, Christopher L. Short, has filed a motion for reconsideration herein. The court has taken the matter under consideration and has determined that the motion for reconsideration should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Done this 29th day of October, 2013.

FOR THE COURT:

Grosse, J

Judge