No. 89812-0

SUPREME COURT
OF THE STATE OF WASHINGTON

Cause No. 66527-8-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

DONALD COLLINGS and BETH COLLINGS, husband and wife,

Respondents,

v.

CITY FIRST MORTGAGE SERVICES, LLC,

Petitioner,

U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR THE GREENPOINT MORTGAGE FUNDING TRUST MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-ARI,

Plaintiff in Intervention/Petitioner.

ANSWER TO PETITIONS FOR REVIEW

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I. INTRODUCTION

Respondents Donald and Beth Collings filed suit to save their home from foreclosure after they were victims of a foreclosure rescue scam and equity skim perpetrated by petitioner City First Mortgage Services, LLC, through its manager Robert Loveless. Petitioner U.S. Bank intervened, claiming that it was entitled to enforce the Loveless note and deed of trust that was the product of City First's fraud based on an undated endorsement, signed in blank, that was not physically attached to the note. After the Collings brought this lawsuit and filed a lis pendens giving U.S. Bank constructive notice of the fraud, U.S. Bank acquired the note and deed of trust, for no value, as trustee for a securitized mortgage trust. Neither the Court of Appeals' decision affirming the trial court's denial of City First's motion for a new trial, nor its rejection of U.S. Bank's claim that that it was a bona fide purchaser for value entitled to enforce the note and deed of trust, presents grounds for review by this Court.

The Court of Appeals followed established law, including this Court's most recent decision in *Barton v. State*, 178 Wn.2d 193, 308 P.3d 597 (2013), in affirming the trial court's denial of City First's motion for a new trial premised on the Collings; covenant not to

execute against Mullen, another City First employee. Mullen's testimony was truthful, he had no incentive to lie, and City First suffered no prejudice from his testimony, which mirrored that of its other witnesses. City First has abandoned its challenge to the overwhelming evidence, including uncontradicted testimony of its own witnesses, that City First clothed its manager Loveless with authority to make the loans that enabled the skim, and that City First profited from those loans, which were prohibited by Loveless' agreement with the Collings.

U.S. Bank similarly fails to articulate any basis for review of the Court of Appeals' affirmance of the trial court's finding that it was not a bona fide purchaser for value. The trial court found, based on ample evidence, that U.S. Bank took the Loveless note and deed of trust with constructive notice that the loan was expressly prohibited, and the Court of Appeals did not address the doctrine of equitable subrogation raised in the petition because U.S. Bank never raised the argument on appeal. The appellate court followed established law in awarding attorney fees against U.S. Bank because it sought to enforce a deed of trust that authorized an award of fees to a prevailing party, and the Collings prevailed.

This Court should deny review and award attorney fees to the Collings under RAP 18.1(j).

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Does a trial court have discretion under *Barton v. State*, 178 Wn.2d 193, 308 P.3d 597 (2013), to deny a defendant's motion for a new trial based on plaintiff's claimed misconduct in failing to reveal an agreement not to execute against the defendant's employee when the jury found the defendant independently and severally liable for profiting from unlawful equity skimming based on overwhelming evidence from its own witnesses?

B. May the trustee of a securitized mortgage trust rely upon the doctrine of equitable subrogation, raised for the first time on appeal in this Court, to enforce a note and deed of trust where it failed to establish that it paid value for the note, or that it became the holder of the note and deed of trust until after a lis pendens gave notice that the loan secured by the deed of trust was the product of an illegal equity skim?

III. RESTATEMENT OF THE CASE

The jury in its verdict and the trial court in its findings rejected petitioners' distorted versions of the facts, which ignore the

governing standard of review and inflate the significance of a covenant not to execute with City First's employee Andrew Mullen. Like the Court of Appeals' opinion, this restatement of the case does not rely on Mullen's deposition testimony in reciting the evidence upon which the jury found, the trial court affirmed, and the petitioners do not now contest, that the Collings were the victims of an illegal equity skim perpetrated by City First and relied on by U.S. Bank for its claims to the Collings' property:

A. The Collings, Victims Of An Equity Skimming Scam Perpetrated By City First And Its Manager Loveless, Sued And Filed A Lis Pendens To Prevent Foreclosure On Their Home.

After receiving a City First mail solicitation offering mortgage debt relief, and after months of misrepresentations that their loan had been approved (9/15 RP 12, 21-22), the Collings, desperate to keep their family home, agreed to quit claim their home to City First manager Robert Loveless in August 2006. The Collings agreed to pay Loveless a fee of $78,540 to take out an "investment" mortgage on their home from City First, and to then pay Loveless "rent" equal to the monthly mortgage payment for a minimum of three years, when the Collings could exercise the right

to repurchase their home for its "purchase price" of $510,000. (Op. ¶ 4; 9/14 RP 29-33; 9/15 RP 24-25, 39; Exs. 3, 5, 8)

City First required a copy of the Collings' lease with Loveless as part of the underwriting process. (9/14 RP 64; 9/15 RP 140-41, 192-93; Ex. 33) The Collings/Loveless lease specifically forbade Loveless from placing any other lien on the home, or from obtaining a home equity line of credit (HELOC). (Ex. 5) Nonetheless, in December 2006, without the Collings' consent or knowledge and in clear breach of their agreement, Loveless refinanced and obtained a $52,500 HELOC from City First. (Op. ¶ 6; 9/14 RP 67-68; Exs. 12, 13) Loveless obtained the loan with the assistance of Andrew Mullen, an employee in the City First office Loveless managed. (9/14 RP 53) City First received an origination fee for the loans to its manager Loveless. (Ex. 8, 55) Although City First considered the Collings/Loveless lease with an option to repurchase "non-merchantable" (9/16 RP 10-14), City First closed and then sold the loans after Loveless apparently substituted a second, phony lease with tenants named "Muniz." (Op. ¶ 8; 9/16 RP 9-11; Ex. 34)

The Collings diligently paid "rent" to Loveless. (9/15 RP 27) In April 2008 Loveless defaulted on both loans (9/14 RP 65), and in

July 2008 the Collings found a notice of default posted on their home. (Op. ¶ 6; 9/14 RP 36-37; Ex. 11) They discovered Loveless' unauthorized refinance and HELOC months later, when Loveless threatened to evict the Collings unless they sent him more money. (9/14 RP 67-68, 9/15 RP 29; Ex. 14)

In March 2009, the Collings sued the Mortgage Electronic Registration System (MERS), the asserted "nominee for Lender City First" (Ex. 16), recorded a lis pendens, and successfully enjoined the trustee's sale. (Exs. 18-19; CP 2182-86, 2201-03) The Collings sought damages from City First, Loveless, Mullen, and another City First employee. (CP 3-17; Op. ¶¶ 7-8)

B. U.S. Bank Intervened To Enforce The Fraudulent Loveless Loan, But Failed To Establish That It Was A Holder In Due Course Of The Note Or A Bona Fide Purchaser For Value.

After City First sold the Loveless loan, it found its way into a pool of loans managed by petitioner U.S. Bank "as Trustee for the GreenPoint Mortgage Pass-Through Certificates, Series 2007-AR1." (Op. ¶ 8; CP 2100) MERS assigned U.S. Bank "all beneficial interest" in the Loveless loan on July 22, 2009, three months after the Collings filed their lis pendens. (Exs. 23, 154; 9/16 RP 83, 99) U.S. Bank intervened in this action, seeking a declaration that it

could foreclose on the Loveless note and deed of trust. (CP 2176-80; 9/16 RP 87) U.S. Bank alleged that it owned the note and deed of trust based on an undated "allonge" – an attachment to the note, purporting to assign it, that had been endorsed in blank. (Op. ¶ 9; CP 2176-80; Ex. 151)

Based on the evidence U.S. Bank presented at trial, which included several different versions of the note, some with an endorsement allonge and some without (Exs. 72, 82, 151; CP 2191-96), the trial court found that the allonge containing the endorsement in blank was not (as the law requires) at all times physically attached to the note, that U.S. Bank could not establish that GreenPoint Mortgage Funding, Inc. had endorsed the note before the Collings filed their lis pendens, and that U.S. Bank was not a bona fide purchaser for value. (FF 7-12, 15-16, 19, CP 1853-56) The trial court also found that U.S. Bank failed to engage in a reasonable inquiry that would have revealed obvious defects in the loan file, including not just that the Collings/Loveless lease expressly forbade the loan, but also that a forged lease between "Muniz" and Loveless in the loan file predated Loveless' ostensible ownership of the property. (Ex. 34; 9/16 RP 10-11; FF 13-14, CL 24, CP 1854-55; Op. ¶ 13)

C. The Trial Court Quieted Title In Collings Free Of U.S. Bank's Asserted Interest And Entered Judgment On The Jury's Verdict Against City First Based On Its Own Conduct And That Of Its Manager Loveless. The Court of Appeals Affirmed.

The trial court quieted title in favor of Collings and against Loveless after Loveless failed to answer the complaint. The court reserved for trial the issue of City First's liability, U.S. Bank's interest in the property, and the amount of the Collings' damages. (Op. ¶ 10; CP 245-54, 271-80, 371-76)

City First employee Mullen appeared through counsel, and was deposed telephonically from Utah. (CP 728-824) City First's counsel asked no questions of its former employee, and did not subpoena or serve notice on Mullen or Loveless to attend trial. When it became clear that Mullen could not afford to defend (or to pay any judgment) (CP 297, 784-85), the Collings entered into a covenant not to execute with Mullen in exchange for repayment of $500 of the costs of deposing him. (CP 1162, 1165, 1212) No evidence supports City First's assertion that an agreement was reached with Mullen regarding the substance of his testimony. Indeed, counsel for the Collings had no communication with Mr. Mullen except through his legal counsel. Mullen's former counsel

testified by declaration that no such arrangement was ever made, and in fact no such arrangement ever existed. (CP 1838)

City First had not asked in discovery about any agreements between the parties, and neither Mullen nor the Collings informed the court of the agreement. When Mullen did not appear at trial, the Collings introduced a portion of his deposition testimony describing his relationship with Loveless and City First, and denying any knowledge of Loveless' fraud. (CP 728-824, 1715-17) City First then read to the jury the remaining portions of Mullen's deposition testimony (including pages 46-47, which it now cites as prejudicial error: City First Pet. 4), identifying the Loveless loan documents, describing Mullen's substantial legal problems (which included a federal indictment), and confirming City First's role in the fraudulent loan. (CP 769-95, 1715-17; 9/16 RP 16-17)

After a three-day trial, the jury found that City First was liable to the Collings under the Equity Skimming Act, Credit Services Organization Act ("CSOA"), the Consumer Protection Act, and for civil conspiracy. (CP 897-901) City First's liability was both primary and vicarious, based upon the actions of its manager Loveless. The jury assessed against City First $80,622 (twice the

compensatory damages it found) in punitive damages under the CSOA, RCW 19.134.080(1). (CP 900)

The jury awarded $8,000 in punitive damages against Mullen under the CSOA. (CP 898, 900) The trial court entered a $120,933 judgment against City First and an $8,000 judgment against Mullen. (CP 1353-56) It did not enter judgment against Loveless, who filed for bankruptcy immediately before the jury returned its verdict. (CP 1860)

After considering the jury's CR 39 advisory verdict,[1] the trial court entered findings of fact that U.S. Bank had not exercised due diligence in discovering defects in the Loveless loan, and thus had failed to establish that it was a bona fide purchaser for value. (FF 9-15, 18-19, CL 24, CP 1851-57) The trial court also found that U.S. Bank failed to provide satisfactory proof of ownership of the Loveless note that its deed of trust allegedly secured. (FF 8, 16, 19, CP 1852, 1855) The court quieted title in favor of the Collings free and clear of U.S. Bank's alleged lien interest. (CP 1857)

[1] The trial court accepted some, but not all, of the jury's advisory verdict. U.S. Bank quotes selective parts of the jury's advisory verdict, but ignores others – including that U.S. Bank knew that Loveless was not in possession of the property, that foreclosure was not necessary to collect on the Loveless note, that the allonge containing the endorsement in blank to the note was not at all times physically attached to the note, and that U.S. Bank could not establish when GreenPoint Mortgage Funding endorsed the note. (CP 891-96)

When City First saw a reference to the Collings' covenant not to execute against Mullen in the Collings' fee request, it moved for a new trial on the ground of misconduct. (Op. ¶ 21) The trial court found that the Mullen covenant had no effect on the jury's verdict, and that "[n]o reason appears to discharge City First from liability to Collings for its own acts that damaged Plaintiffs, all independent of what Mullen or Loveless did." (CP 1862)

The Court of Appeals affirmed. *Collings v. City First Mortg. Services, LLC*, 175 Wn. App. 589, 308 P.3d 692 (2013). The Court of Appeals held that the trial court did not abuse its discretion in denying City First's motion for new trial because City First suffered no prejudice arising from the Mullen covenant. (Op. ¶¶ 25-29) It upheld the jury's verdict against City First as supported by substantial evidence and affirmed the judgment against U.S. Bank based on the trial court's findings that U.S. Bank was not a bona fide purchaser. (Op. ¶¶ 41, 70) The Court of Appeals awarded attorney fees on appeal against City First based upon the Collings' statutory claims, including the CPA, and against U.S. Bank based upon the attorney fee clause in the deed of trust U.S. Bank sought to enforce against the Collings. (Op. ¶ 72)

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. Division One's Decision Affirming The Denial Of City First's Motion For A New Trial Does Not Conflict With *Barton* And Follows Established Precedent.

This Court's recent decision in *Barton v. State*, 178 Wn.2d 193, 308 P.3d 597 (2013), confirms that nondisclosure of a covenant not to execute may be harmless even if in violation of specific discovery obligations and in a case involving joint and several liability and contribution claims under RCW ch. 4.22 – circumstances posing far more risk of prejudice than present here. City First has now abandoned its challenge to the overwhelming evidence – much of it from its own witnesses – that established its liability for its manager Loveless' equity skim. That verdict could not possibly have been tarnished by a covenant between Mullen and Collings, and the trial court did not abuse its discretion in denying City First's motion for a new trial.

1. The Decision Does Not Conflict With *Barton* Or Any Other Precedent.

This Court held in *Barton* that the trial court did not abuse its discretion in denying the State's motion for a new trial for the failure to supplement discovery responses to disclose a covenant not to execute. 178 Wn.2d at 215-16, ¶¶ 43-46. *Barton* is consistent

with established precedent that the appellate courts defer to the trial court's discretion in ruling on a motion for a new trial, and affirm if it is "within the range of acceptable choices[;] we will overturn that decision only if we find that it was not supported in the record or was made under an incorrect standard." *Teter v. Deck*, 174 Wn.2d 207, 222, ¶ 28, 274 P.3d 336 (2012).

The Court of Appeals followed settled law in holding that "in order to grant a party's motion for new trial, prejudice is required." (Op. ¶ 25) *See Trosper v. Heffner*, 51 Wn.2d 268, 317 P.2d 530 (1957) (reversing order granting new trial in absence of prejudice); *Spratt v. Davidson*, 1 Wn. App. 523, 526, 463 P.2d 179, 181 (1969) ("The existence of a mere possibility or remote possibility of prejudice is not enough" to warrant a new trial; reversing order granting new trial."). As in *Teter* and *Barton*, whether counsel's alleged misconduct "unfairly and improperly exposed the jury to inadmissible evidence [and] prejudiced . . . [a party's] substantial right to a fair trial," *Teter*, 174 Wn.2d at 225, ¶ 34, is an issue upon which the appellate court must necessarily defer to the trial court:

> The trial judge, by virtue of his favored position, should be accorded room for the exercise of sound discretion. He sees and hears the witnesses, the jurors, the parties, counsel, and any bystanders. He can evaluate first hand candor, sincerity, demeanor,

> intelligence, and any surrounding incidents; whereas, the reviewing court is tied to the written record.

Todd v. Harr, Inc., 69 Wn.2d 166, 168, 417 P.2d 945 (1966), *quoting Baxter v. Greyhound Corp.*, 65 Wn.2d 421, 437, 397 P.2d 857 (1964).

The Court of Appeals' affirmance of the trial court's order denying a new trial on the ground that City First suffered no prejudice does not conflict with *Barton* or with any other decision of this Court or the Court of Appeals. RAP 13.4(b)(1), (2).

2. City First's Recasting Of Facts Rejected By The Courts Below Cannot Create A Matter of Substantial Public Interest.

City First's hyperbolic insistence that the Mullen covenant was a form of a "Mary Carter agreement" (City First Pet. 13, 19) that "incented" false testimony (City First Pet, 15) bears little resemblance to the actual facts heard by the jury and relied upon by the Court of Appeals. City First's miscasting of the record does not create an "issue of substantial public concern." RAP 13.4(b)(4).

a. There Was No Evidence That Mullen's Testimony Was False.

Mullen had no incentive to testify falsely, and City First conceded below that his deposition testimony was truthful. (CP 1162, CP 1821: "City First has never suggested that Mr. Mullen

perjured himself . . . .") As that portion of his deposition that City First itself read to the jury confirms (CP 769-95, 1715-17; 9/16 RP 15-17), the Collings had good reason to secure Mullen's testimony given the difficulties they would encounter in collecting on a judgment against him, his residence outside of Washington, and the difficulties they encountered in even scheduling his deposition in the first place.[2]

The Court of Appeals properly held that there was no evidence "that any specific statement Mullen made was false or misleading." (Op. ¶ 28) The parties had no agreement relating to the substance of Mullen's testimony. (CP 1162, 1212; *see* CP 1773) Mullen's agreement in the covenant not to execute that he would provide "acceptable" testimony required only that he fully answer the questions put to him at his deposition. (CP 1212, 1838)

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[2] Mullen stated in his deposition that he lacked the "means available to . . . fight" with other borrowers who had filed litigation against him. (CP 784-85; *see* CP 1212 (Mullen "unable to pay any kind of judgment that the Collings might obtain at trial."), 1838 ("Mr. Mullen still has not paid my law firm the fees for representing him")) Shortly after his deposition, Mullen's counsel withdrew, because Mullen could not afford to pay her to represent him at trial. (CP 1212) Although he later denied that he was "insolvent," Mullen never asserted that he could satisfy a judgment in favor of the Collings. (CP 1773)

b. There Was Overwhelming Independent Evidence Of City First's Liability For Loveless' Acts.

The jury based City First's liability on independent evidence – now uncontested – that mirrored and went far beyond the innocuous portions of Mullen's deposition that the Collings presented at trial. (City First Pet. 4) The jury found City First liable not for the acts of Mullen, but for its own actions and those of its manager Loveless, who City First allowed to solicit and make loans. (CP 898-900; Op. ¶ 16)

The jury did not need Mullen's confirmation of his undisputed involvement with Loveless in originating loans on behalf of City First to find that he and Loveless were City First's agents, and that City First profited from the Loveless loan on the Collings home. Mullen and Loveless were both City First employees, who City First held out as "managers." (9/14 RP 56; 9/15 RP 29, 84, 189; Exs. 3-5) City First identified as a City First branch the "Home Front" office out of which Mullen and Loveless worked. (9/15 RP 84) Mullen and Loveless agreed to be bound by City First's Corporate Policy Handbook. (Ex. 60) City First paid Mullen and Loveless commissions from fees generated by originating loans for City First, including the Loveless loan. (Ex. 60)

City First employee Gavin Spencer put the Collings in touch with Loveless after they answered a direct solicitation and applied for a loan with City First. (9/14 RP 22, 28-29; 9/15 RP 12) City First's loan documents identified Mullen as its loan officer on the initial Loveless loan on the Collings property. (Exs. 46, 122) City First's witness Shari Russett identified the "documentation error in the initial loan" on the Collings residence, including City First's improper destruction of the Loveless loan file. (City First Pet. 4) (9/15 RP 63, 73, 91, 187-88) Ample evidence (none of which came from Mullen) supports City First's liability for Loveless' actions, and City First has abandoned its challenge to the sufficiency of that evidence in this Court.

City First chose to present Mullen's testimony confirming these facts to the jury, even though it did not seek discovery from him, cross-claim against him, ask any questions of him at his deposition, or compel his attendance at trial. (CP 769-803, 1716-17; 9/16 RP 17) Mullen's deposition testimony was not only wholly consistent with his answers to written discovery (CP 1188-1209), trial exhibits, and the testimony of City First's principal witness Shari Russett, but City First invited the "prejudice" of which it now complains. *See Sdorra v. Dickinson*, 80 Wn. App. 695, 703, 910

P.2d 1328 (1996) (abuse of discretion to grant new trial where party invited the error relied upon in its CR 59 motion).

c. No Competent Evidence Supports City First's Argument For Review Based On Closing Argument.

City First's attempt to establish prejudice based upon its counsel's hearsay allegations of closing argument (City First Pet. 6) is a particularly egregious fabrication for which there is no evidence in the record. The trial court disagreed with City First's allegation concerning what Collings' counsel said in closing argument, then struck its hearsay contention that the Collings' counsel emphasized Mullen's absence at trial. (2/15 RP 6-7) The Court of Appeals affirmed. (Op. ¶ 27) City First's reliance once again on its counsel's hearsay, without even acknowledging that the lower courts refused to consider it, violates RAP 18.9.

d. No Misleading Jury Instructions.

Rather than demonstrating prejudice, the special verdict shows how Mullen's deposition testimony had no effect on City First's liability. The jury found City First liable for the acts of its agent Loveless, not Mullen, under uncontested pattern instructions defining agency and the vicarious liability for acts occurring in the course of employment. The jury attributed no compensatory

damages to Mullen, though it fined him $8,000 in punitive damages for his role in facilitating the equity skim. (CP 850-56, 898-900)

The jury instructions, to which no party excepted, did not mislead the jury about the true posture of the parties by instructing the jury that City First could "only act through its officers, managers, and employees." (City First Pet. 6, 14, *quoting* CP 856) This statement of black letter law is indisputably accurate, as Mullen had not been released by operation of law by virtue of a covenant not to execute. *See Barton*, 178 Wn.2d at 207, ¶ 24 (covenant not to execute did not release defendant by operation of law). Even if Mullen had been released, City First was not. As the jury and the court found, City First was liable for its own actions as well as those of its agent and manager Loveless. (CP 1861)

3. This Case Does Not Involve A "Mary Carter" Agreement, And A Covenant Not To Execute Is Inadmissible In the Absence of Collusion or Bias.

Like the agreement in *Barton,* the Mullen covenant was not a "Mary Carter" agreement because it did not realign Mullen with the Collings, and it did not make "what one party receives contingent on a certain outcome produced at trial." Phillips, *Looking out for*

Mary Carter: Collusive Settlement Agreements In Washington Tort Litigation, 69 Wash. L. Rev. 255, 256 (1994) ("Mary Carter" agreement is one in which "the settling defendant retains a financial stake in the plaintiff's recovery. . .") (City First Pet. 19)[3]

The evil of Mary Carter agreements is that the finder of fact does not know that a testifying defendant's true interests lie in supporting the plaintiff's recovery. That evil is conspicuously absent here, where the covenant not to execute was not contingent on any particular testimony and the consideration was not dependent upon the Collings' recovery against any other defendant. Instead, like the stipulation in *Barton,* the Collings' agreement with Mullen "did not realign the interests of the parties or attempt to artificially manufacture joint and several liability between an individual and a deep-pocket institutional defendant." 178 Wn.2d at 213, ¶ 37. *See McCluskey v. Handorff-Sherman*, 68 Wn. App. 96, 841 P.2d 1300 (1992) (affirming denial of non-settling defendant's motion for a

[3] *See Booth v. Mary Carter Paint Co.*, 202 So.2d 8, 10 (Fla. App. 1967) (plaintiff agreed to limit settling defendant's exposure up to a maximum of $12,500 and refrain from collecting any-thing from the settling defendant if plaintiff's recovery exceeded $37,500 from the solvent co-defendant); *Romero v. West Valley School Dist.*, 123 Wn. App. 385, 389-90, 98 P.3d 96 (2004) (characterizing agreement giving settling defendant the right to recover half of everything collected by plaintiff in excess of the settling defendant's insurance limits, up to the amount of the settling defendant's personal financial contribution, as "a classic 'Mary Carter' agreement."), *rev. denied*, 154 Wn.2d 1010 (2005).

new trial in absence of evidence of any collusion between the driver and the plaintiff), *aff'd,* 125 Wn. 2d 1, 882 P.2d 157 (1994).

City First's claim that it could have used the covenant to impeach Mullen's deposition testimony is without merit. Indeed, a trial court would abuse its discretion in admitting such evidence where the agreement does not create an incentive for the witness to change his testimony. *Diaz v. State,* 175 Wn.2d 457, 470-71, ¶¶ 32-33, 285 P.3d 873 (2012) (evidence of agreement between plaintiff and one of several defendants inadmissible under ER 408; affirming denial of new trial); *Northington v. Sivo*, 102 Wn. App. 545, 550, 8 P.3d 1067 (2000) ("In the absence of clear conflict in a witness's testimony or a circumstance in which the settlement's content provides a motive for the witness to offer biased testimony, ER 408 does not permit the jury to consider settlement evidence.")

The Court of Appeals properly recognized that City First could suffer no prejudice based on an agreement that provides no incentive for collusion and that left the parties in precisely the same alignment as existed before its execution. City First's contention that a covenant not to execute would be automatically admissible to establish bias is a quantum leap not supported by Washington law, and it presents no basis for review under RAP 13.4(b)(1), (2) or (4).

4. This Case Does Not Present Any Issue Regarding The Duty Of Disclosure Under RCW 4.22.060 Because City First's Liability Was Not Based On Fault Under The Tort Reform Act.

Although the Court of Appeals' affirmance on the ground that City First suffered no prejudice is dispositive, City First erroneously relies on *Barton* to argue that Collings' counsel "violated RCW 4.22.060(1) and CR 26(e)(2)" (City First Pet. 12) by failing to disclose the covenant with Mullen. Here, unlike in *Barton*, defense counsel never sought discovery of any agreements between the parties, and did not ask its former employee any questions in his deposition. *See* 178 Wn.2d at 216, ¶ 45. In the absence of a discovery request, there was no duty to supplement under CR 26(e).

City First quotes Judge Schindler's dissent to assert that RCW ch. 4.22 mandates disclosure of all agreements with co-defendants. But RCW 4.22.060 is inapplicable here. The Collings' statutory claims were grounded in the intentional conduct of City First and its manager Loveless.

The *Barton* Court rejected the State's contention that a covenant not to execute eliminated the teenage driver's joint and several liability under RCW 4.22.070 and the State's right to

contribution under RCW 4.22.060 because it was not a full settlement and did not result in dismissal of the party benefitting from the covenant. 178 Wn.2d at 213, ¶ 38. Here, because the Collings did not allege liability on the basis of "fault" as defined in RCW 4.22.015, there was no joint and several liability under RCW 4.22.070, no claims for contribution, no claims for comparative fault, and therefore no basis for a reasonableness determination under RCW 4.22.060. *See Tegman v. Accident & Med. Investigations, Inc.*, 150 Wn.2d 102, 115, 75 P.3d 497 (2003) (jury cannot assign "fault" under RCW 4.22.070 to defendants who are liable for intentional torts). RCW 4.22.060 did not mandate disclosure of the Mullen covenant and RCW 4.22.070 did not preclude entry of judgment against Mullen.

City First's contention that a lawyer's ethical duty of "candor" requires disclosure of any and all agreements between parties lacks any support as well. Attorneys are under no ethical obligation to disclose evidence to an opposing party in the absence of a discovery request. *See Sherman v. State*, 128 Wn.2d 164, 184-85, 905 P.2d 355 (1995) (no ethical duty under RPC 3.4 to disclose information to opposing party); *Zurich North America v. Matrix Service, Inc.*, 426 F.3d 1281 (10th Cir. 2005) (failure to disclose material

information in absence of discovery request is not a fraud on the court or misconduct justifying relief from judgment). If City First wanted to know about agreements that it now claims were relevant, all it had to do was ask. But it asked no questions of Mullen in discovery or at his deposition, and did not ask the Collings about payments or agreements with other parties.

Finally, and in contrast to the State in *Barton*, City First never asked for monetary sanctions against Collings or their counsel, but sought only a new trial on the ground of misconduct under CR 59(a)(2). The Court of Appeals' affirmance of the denial of its motion for a new trial presents no ground for review.

B. U.S. Bank May Not Enforce The Fraudulent Deed of Trust Because It Was Not A Bona Fide Purchaser And Because U.S. Bank Did Not Raise, And Is Not Entitled To, Equitable Subrogation.

U.S. Bank's petition similarly fails to raise any issue addressed by the Court of Appeals that merits review by this Court. U.S. Bank failed to raise its arguments concerning the "evidentiary burden" and its asserted right to equitable subrogation in the Court of Appeals. Moreover, the courts below followed settled law based on the trial court's findings that U.S. Bank failed to establish a legal or an equitable right to enforce its deed of trust against the Collings.

1. The Court of Appeals' Decision Does Not Conflict With This Court's Opinion In *Albice*.

U.S. Bank claims that the Court of Appeals "revers[ed] the evidentiary burden" (U.S. Bank Pet. 13) by affirming the trial court's finding that the Bank was not a bona fide purchaser based on substantial evidence that it had notice of restrictions on further encumbrances. (Opinion ¶¶ 61-70) The Court should deny review because this issue was raised for the first time in U.S. Bank's petition for review and because the Court of Appeals' decision in any event is wholly consistent with this Court's decision in *Albice v. Premier Mortg. Servs. Of Wash., Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012).

This Court's acceptance of review under RAP 13.4 is governed by criteria directed to the appellate court's opinion and to the issues that the intermediate appellate court's opinion raises. "This court does not generally consider issues raised for the first time in a petition for review." *Fisher v. Allstate*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998). The question whether the Collings met their burden of disproving the Bank's BFP status is not in this case because U.S. Bank did not argue on appeal that the burden of proof

was somehow "reversed" or otherwise improperly addressed by the courts below.

In any event, the Court of Appeals' decision is wholly consistent with *Albice*, in which this Court affirmed the Court of Appeals' decision that a purchaser of real property could not be a bona fide purchaser because of procedural noncompliance with the statutes governing nonjudicial foreclosure. Neither *Albice*, cited by the Court of Appeals for the general rules governing BFP status (Op. ¶ 56), nor any other case cited by U.S. Bank, supports its argument that the courts below improperly placed the burden on U.S. Bank to prove BFP status. All *Albice* does is confirm is that a purchaser cannot be a BFP if the process through which it obtained title is flawed. *Albice*, 174 Wn.2d at 573, ¶¶ 23-26.

Here, as the trial court held, U.S. Bank was not even a holder, much less a holder in due course, because it sought to enforce a note endorsed pursuant to a flawed and improperly documented mortgage securitization process, for which it did not give value. (*See* Collings Resp. to U.S. Bank Br. 39-44) Further, as the trial court found, U.S. Bank obtained its interest in the note and deed of trust by assignment from MERS *after* the Collings had recorded a lis pendens asserting their interest in their property and

providing notice of Loveless' fraud. (FF 11, 12, 19, CP 1854-56) The Court of Appeals' opinion is wholly consistent with this Court's opinion in *Albice*, and this Court should not grant review to address U.S. Bank's "burden of proof" issue raised for the first time in its petition.

2. The Court Of Appeals' Decision Does Not Conflict With This Court's Decision In *Columbia Community Bank*.

U.S. Bank raises another new issue in arguing that the Court of Appeals' opinion is inconsistent with this Court's decision in *Columbia Community Bank v. Newman Park, LLC.*, 177 Wn.2d 566 304 P.3d 472 (2013), decided after the appellate court's decision in this case and addressing the doctrine of equitable subrogation. The Court should deny review of this issue because U.S. Bank did not raise equitable subrogation in the Court of Appeals and because the Court of Appeals' decision in any event is wholly consistent with this Court's decision in *Columbia City*.

The Court of Appeals' opinion is not in conflict with the decision in *Columbia Community Bank*, which adopted the test for equitable subrogation under *Restatement Third of Property: Mortgages* § 7.6, because, having never been asked to address this issue, the Court of Appeals never considered U.S. Bank's asserted

right to equitable subrogation. *See Fisher*, 136 Wn.2d at 252. Contrary to its cryptic claim that it "preserved" this error by unexplained assignments of error to two findings and a conclusion quieting title in the Collings (U.S. Bank Pet. 18), the Court of Appeals did not address the doctrine of equitable subrogation because U.S. Bank never raised this issue in the Court of Appeals.

The decision below is, in any event, wholly consistent with the principles announced in *Columbia Community Bank*, which held that a refinance lender was not barred from seeking equitable subrogation because it acted as a "volunteer" in refinancing existing debt. 177 Wn.2d at 580-81, ¶ 29. As this Court sets out there, "if a third party pays a debtor's outstanding loan to the lender . . . then, under certain circumstances, equity permits the third party to take over the lender's interest and receive the continuing payments of the debtor. . ." *Columbia Community Bank*, 177 Wn.2d at 574, ¶ 16. But the *Columbia Community Bank* Court did not relax the requirements that equitable subrogation be invoked only to do equity. U.S. Bank as the putative "third party" presented no evidence that in fact it had paid the loan, much less that it would lose anything if it were not subrogated to the original lender's interest. *Columbia Community Bank*, 177 Wn.2d at 582, ¶ 32-33.

In fact, the trial court found that U.S. Bank had not paid "any value" when obtaining by assignment the Loveless deed of trust, and that it had a remedy against its transferee Greenpoint Mortgage Funding, Inc. (FF 16-17, CP 1855) U.S. Bank's argument that mere lack of diligence is not a bar to equitable subrogation ignores the trial court's extensive findings that it was not entitled to an equitable remedy to prevent unjust enrichment. (CL 27-28; CP 1857) That decision is wholly consistent with this Court's precedent. *See, e.g., Kim v. Lee*, 145 Wn.2d 79, 91, 31 P.3d 665, 43 P.3d 1222 (2001) ("allowing equitable subrogation in this case would ignore the interests of equity and justice established by Washington jurisprudence.").

U.S. Bank had no right to equitable subrogation against Collings. Having so thoroughly addressed equitable subrogation in a case in which the issue was properly briefed, just a few months ago, this Court should not grant review to address an equitable subrogation argument that U.S. Bank did not raise in the Court of Appeals, and that the Court of Appeals consequently did not address.

3. The Court Of Appeals' Decision Does Not Conflict With Division Three's Decision In *Bank Of New York.*

The Court of Appeals' decision awarding fees to the Collings against U.S. Bank is wholly consistent with *Bank of New York v. Hooper,* 164 Wn. App. 295, 263 P.3d 1263 (2011), *rev. denied,* 173 Wn.2d 1021 (2012), which held "RCW 4.84.330 is a mutuality provision. Because the [appellant] bank would not have been entitled to attorney fees against [respondents], RCW 4.84.330 does not provide a basis for those parties to recover attorney fees against the bank." *Bank of New York,* 164 Wn. App. at 305, ¶ 22. As its designated representative testified, U.S. Bank intervened in this action for the express purpose of foreclosing a deed of trust against the Collings home. (9/16 RP 87) That deed of trust contained a fee provision. (Ex. 12, ¶ 26) Had U.S. Bank prevailed, it would have sought a fee award under the deed of trust's fee provision against the Collings. Because the Collings prevailed, RCW 4.84.330 therefore authorizes a fee award against the Bank. The Court of Appeals' decision awarding fees does not conflict with Division Three's decision in *Bank of New York.*

C. The Collings Are Entitled To Attorney Fees In Responding To The Petitions For Review.

The Court of Appeals awarded attorney fees to the Collings against City First under the CPA, RCW 19.86.090, and against U.S. Bank under the deed of trust it sought to enforce. (Ex. 12) Pursuant to RAP 18.1(j), this Court should award the Collings their fees in answering these petitions.

V. CONCLUSION

This Court should deny review and award respondents their fees in answering the petitions.

Dated this 16th day of January, 2014.

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DECLARATION OF SERVICE

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

That on January 16, 2014, I arranged for service of the foregoing Answer to Petitions for Review, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 16th day of January, 2014.

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Subject: Collings v. City First Mortgage Services, LLC, et al., COA Cause No. 66527-8-I
Attachments: Answer to Petitions for Review.pdf; Motion for Leave to File Overlength Answer to Petitions for Review.pdf

Attached for filing is the Answer to Petitions for Review and Motion for Leave to File Overlength Answer to Petitions for Review, in *Collings v. City First Mortgage Services, LLC*, Court of Appeals, Division I, Cause No. 66527-8-I. The attorney filing these documents is Howard M. Goodfriend, WSBA No. 14355, e-mail address: howard@washingtonappeals.com.

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