Supreme Court No. 90504-5

(Court of Appeals No. 70295-5-I)

THE SUPREME COURT
OF THE STATE OF WASHINGTON

JPMORGAN CHASE BANK, N.A.,

Plaintiff-Respondent,

v.

MICHIKO STEHRENBERGER

Defendant-Petitioner.

APPEAL FROM DIVISION ONE
OF THE WASHINGTON COURT OF APPEALS

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner is Defendant/Appellant below Michiko Stehrenberger.

II. DECISION FOR WHICH REVIEW IS SOUGHT

Ms. Stehrenberger seeks review of the decision of Division One of the Court of Appeals ("Division I") in *JPMorgan Chase Bank, NA v. Stehrenberger*, No. 70295-5-I (Div. 1, Apr. 28, 2014)(unpublished) (the "Opinion"). The Opinion and the June 6, 2014 Order denying reconsideration are attached as Appendix A-1 and A-14.

III. ISSUES PRESENTED FOR REVIEW

Issue 1: Did Division I violate the separation of powers embodied within the Constitution of the State of Washington when it failed to apply the rules of statutory construction to RCW 62A.3-203; RCW 62A.3-309; RCW 62.9A-108; RCW 62A.9A-203, effectively nullifying the Legislature's expressed intent?

Issues related to Issue 1:

1. Can a person who has never had physical possession of an original paper negotiable instrument qualify as a "person entitled to enforce the instrument"?
2. Can a person become entitled to enforce an instrument through a document that assigns "all right, title, and interest" to a negotiable instrument, without ever receiving physical delivery of the instrument?

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3. If a person proves "ownership" or "purchase" of a negotiable instrument, but has never received physical delivery of the original paper instrument, is that person entitled to enforce payment based upon a copy of the instrument?
4. Is it possible for a court to objectively determine whether a specific negotiable instrument was among a bulk purchase of assets from a failed company in receivership, when the purchase agreement refers to "all assets" generally, but no list or schedule exists that identifies this particular instrument as among the assets of the failed company on the date that it went into receivership?

Issue 2: Does Division I's Opinion conflict with this Court's long-standing summary judgment procedures as set forth in *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989) and *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 302, 616 P.2d 1123 (1980) requiring the movant in a summary judgment motion to prove *all* required elements of its burden of proof to prevail as a matter of law?

Issue 3: Should the Court address and resolve the conflicts between Division I's Opinion and (a) Division III's decision on summary judgment in *Colbert v. US Bank of Washington*, No. 28508-1-III (Div. 3, 2010) (unpublished)[1] concerning opposing interpretations of RCW 62A.3-309,

[1] *Colbert*, like *Stehrenberger*, is an unpublished opinion and neither are intended to be cited or discussed herein as either authoritative or for persuasive value, but to show that a conflict of interpretation of RCW 62A.3-309 exists between the courts below which should be addressed by this Court. *See* GR 14.1; RAP 13.4(b)(2).

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and (b) Division I's decision in *Trujillo v. Northwest Trustee Services, Inc.*, Slip.Op. 702592-0-I (June 2, 2014) concerning opposing interpretations of RCW 62A.3-203?

Issue 4: Should this Court reverse the dismissal of counterclaims and the award of expenses, costs, and attorney fees if this Court reverses summary judgment?

IV. STATEMENT OF THE CASE

With few exceptions, the relevant facts of the case are undisputed and recited in the Opinion:

Ms. Stehrenberger entered into a promissory note ("Note") with Washington Mutual Bank in 2007. The Note is a negotiable instrument under Washington's Uniform Commercial Code ("UCC") (RCW 62A.3). Opinion at 4 ¶ 3.

Washington Mutual Bank failed on September 25, 2008 and the Federal Deposit Insurance Corporation (the "Receiver") was appointed as its receiver. Opinion at 1 ¶ 3.

The Receiver assigned to JPMorgan Chase Bank, N.A. ("Chase") "all right, title, and interest of the Receiver" in and to the assets of Washington Mutual Bank under a Purchase and Assumption Agreement dated September 25, 2008. Opinion at 1 ¶ 3.

The Purchase and Assumption Agreement does not list any "loans," "negotiable instruments" or "promissory notes" as among the categories of

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assets being sold by the Receiver. CP 621-664; *see* CP 633 ¶ 3.1 "Assets Purchased by Assuming Bank."

The Receiver did not effect a merger between Chase and Washington Mutual Bank pursuant to 12 U.S.C. § 1821(d)(2)(G)(i)(I), but instead effected a sale of Washington Mutual Bank's assets, with limited transfer of liability, to Chase under 12 U.S.C. § 1821(d)(2)(G)(i)(II), a provision of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). Opinion at 1 (use of Purchase and Assumption Agreement).

Chase has never had physical possession of Ms. Stehrenberger's Note. Opinion at 6 ¶ 3.

There is no Lost Note Affidavit evidencing that Washington Mutual Bank or the Receiver ever lost physical possession of Ms. Stehrenberger's Note. Opinion 8 ¶ 2.

The King County Superior Court ("Trial Court") granted summary judgment in favor of Chase on February 15, 2013. Ms. Stehrenberger timely filed for reconsideration on February 25, 2013.

The Trial Court denied reconsideration on April 1, 2013. Ms. Stehrenberger timely appealed. Opinion at 1 ¶ 1.

Division I affirmed the Trial Court in its Opinion issued April 28, 2014. Ms. Stehrenberger timely filed for reconsideration on May 19, 2014.

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Amici, collectively titled "Homeowners' Attorneys," timely filed a motion on May 20, 2014 requesting leave to file their proposed Amicus Curiae Memorandum in support of Ms. Stehrenberger's motion for reconsideration. Division I's order denying the motion requesting leave to file the Amicus Curiae Memorandum is attached as A-13.

Division I denied reconsideration June 6, 2014, attached as A-14.

Ms. Stehrenberger timely files this Petition and requests the Court grant review based upon the following:

V. ARGUMENT

A. Considerations Governing Acceptance of Review

RAP 13.4(b) identifies four considerations governing acceptance of review by this Court. While all four need not be in evidence, they are here. The Opinion is in conflict with several decisions of this Court including *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989) and *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 302, 616 P.2d 1123 (1980). RAP 13.4(b)(1). The Opinion is in conflict with Division III in *Colbert v. US Bank of Washington*, No. 28508-1-III (Div. 3, June 15, 2010) (unpublished[2]) and Division I's decision in *Trujillo v. Northwest Trustee Services, Inc.*, Slip.Op. 702592-0-I (June 2, 2014). The Opinion raises a question under the separation of powers doctrine; a judicial invasion of

[2] *Colbert*, like *Stehrenberger*, is an unpublished opinion and neither are intended to be cited or discussed herein as either authoritative or for persuasive value, but to show that a conflict of interpretation of RCW 62A.3-309 exists between the courts below which should be addressed by this Court. *See* GR 14.1; RAP 13.4(b)(2).

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legislative prerogatives is certainly significant. RAP 13.4(b)(3). Finally, courts that act contrary to law, and the ubiquity of the Uniform Commercial Code statutes improperly nullified, underlie the millions of consumer and business transactions that occur daily throughout Washington, and give the public at large a substantial interest in having this Court address this case. RAP 13.4(b)(4).

B. "A negotiable instrument is a reified right to payment. The right to payment is represented by the instrument itself."

A promissory note that is a Uniform Commercial Code ("UCC") negotiable instrument under Ch. 62A.3 RCW is a "reified right to payment. The right is represented by the instrument itself. The right to payment is transferred by delivery of possession of the instrument." Official Comment to RCW 62A.3-203,[3] attached as A-16.

An obligation upon an instrument is only discharged to the extent that payment is made to the proper person entitled to enforce the instrument. RCW 62A.3-602.

"It is long-settled law that one paying a note, either negotiable or nonnegotiable, should demand production of it upon payment or risk having to pay again to the assignee." *In re Columbia Pacific Mortgage, Inc.*, 22 Bankr. 753 (W.D. Wash. 1982).

[3] Washington law may be ascertained by relying upon the official UCC comments. *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 718, 845 P.2d 987 (1993); *Olmstead v. Mulder*, 72 Wn.App. 169, 177, 863 P.2d 1355 (1993).

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Division I recently observed that "there has been considerable confusion in both judicial decisions and statutes over the distinction between the 'owner' of a note and the 'holder,' who has the right to enforce the note." *Trujillo v. Northwest Trustee Services, Inc.*, Slip.Op. 70592-0-I at 10[4] (June 2, 2014).

The UCC's Official Comment 1 to RCW 62A.3-203 provides guidance, making clear that ownership alone does **not** entitle one to enforce payment upon the instrument:

> "The right to enforce an instrument and ownership of the instrument are two different concepts....a person who has an ownership right in an instrument might not be a person entitled to enforce the instrument...**The right to payment is transferred by delivery of possession of the instrument**..."
> Official Comment 1 to RCW 62A.3-203, Appendix at A-16 ¶ 2. (emphasis added)

Division I seems to have misapprehended the term "**transfer**." RCW 62A.3-203 is explicit in that it requires physical delivery of the tangible instrument itself.[5] "Delivery, with respect to an instrument... means voluntary transfer of possession." RCW 62A.1-201(d)(15).

Only physical delivery of the tangible paper instrument – the "reified right to payment" itself – allows enforcement rights to "vest in the transferee." RCW 62A.3-203(a) and (b). "The touchstone of proper

[4] Referencing Whitman, Dale A. & Milner, Drew, *Foreclosing on Nothing: The Curious Problem of the Deed of Trust Foreclosure without Entitlement to the Enforce the Note*, 66 Ark. L. Rev. 21, 26 (2013).

[5] RCW 62A.3-203(a): "An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument."

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acquisition of the right to enforce a negotiable instrument is **physical delivery of the original note**..." White, A., *Losing the Paper*, 24 Loyola Consumer Law Rev. 4 at 472-3, citing *Gee v. U.S. Bank Nat'l Ass'n*, 72 So.3d 211, 213-24 (Fl. Dist. Ct. App. 2011)(emphasis added).

The Official Comment 1 to RCW 62A.3-203 emphasizes that a document that purports to convey "all right, title, and interest" in a negotiable instrument alone does not effect a transfer of the instrument for the purpose of enforcement, unless separate physical delivery is made:

> "...[S]uppose X is the owner and holder of an instrument payable to X. X sells the instrument to Y but is unable to deliver immediate possession to Y. Instead, **X signs a document conveying all of X's right, title and interest in the instrument to Y**. Although the document may be effective to give Y **ownership** of the instrument, **Y is not entitled to enforce the instrument until Y obtains possession of the instrument. No transfer of the instrument occurs under Section 3-203(a) until it is delivered to Y**." (emphasis added) (attached as A-16, ¶ 2)

Division I first observed that "Chase admits that it never had possession of the original note," Opinion at 6 ¶ 3, but disregarded the Official Comment's explicit rejection of the "all, right, title and interest" language contained in the Purchase and Assumption Agreement, incorrectly concluding that the written language alone transferred the Note without any separate physical delivery taking place:

> "Here, the FDIC [Receiver] **transferred** all of [Washington Mutual Bank's] loans and loan commitments to Chase pursuant to a purchase and assumption agreement dated September 25, 2008. The agreement uses broad language to describe the **transfer** of

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> all of the failed bank assets: '[...T]he 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...'" Opinion at 3 ¶ 5-6.
>
> "[...The Receiver's] **transfer** of all assets of the failed bank to Chase carried with it the authority to enforce the Stehrenberger Note. This is because Chase **purchased** all of [Washington Mutual]'s assets as shown by the purchase and assumption agreement." Opinion at 5 ¶1.
>
> "[...T]he **transfer** was made pursuant to a purchase and assumption agreement." Opinion at 8 ¶ 4.
>
> "Because Chase has the authority to enforce the note as the **transferee** of Washington Mutual Bank's (WaMu) assets, we affirm." Opinion at 1 ¶ 1. (all emphases added)

Division I further declined to consider any extra-jurisdictional authority on the "Enforcement of a Lost Instrument" under UCC § 3-309, Opinion at 7-8,[6] taking the unusual position instead that "there is nothing in RCW 62A.3-309 that prohibited a lost, destroyed or stolen instrument from being **transferred** to Chase." Opinion at 7 ¶ 1. "Section 3-203 simply does not permit the assignment of enforcement rights in a lost instrument." Zinnecker, T.R. *Extending Enforcement Rights to Assignees of Lost, Destroyed, or Stolen Negotiable Instruments under UCC Article 3: A Proposal for Reform*, 50 U. Kan. L. Rev. 111, 129 (2001).

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[6] Opinion at 7, fn 12: "Amended Brief of Appellant at 21-24 (citing *Dennis Joslin Co., LLC v. Robinson Broad. Corp.*, 977 F. Supp. 491 (D.D.C. 1997); *McKay v. Capital Res. Co., Ltd.*, 327 Ark. 737, 940 S.W.2d 869 (Ark. 1997); *State Street Bank and Trust Co.v. Lord*, 851 So.2d 790 (Fla. Dist. Ct. App. 2003)); *see also* Appellant's Statement of Additional Authority (citing *In re Harborhouse of Gloucester*, 505 B.R. 365 (Bankr. D. Mass. 2014).

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This Court is requested to provide guidance to the lower courts in recognizing that the special statutory definition of a **transfer** of negotiable instruments requires physical delivery under RCW 62A.3-203 and that 3-203's explicit rejection of the "all right, title, and interest" language clearly forbids alternate common law of contracts and assignment principles from being used to bypass its physical delivery requirements.

C. Chase's judicial admissions vs. the governing RCW 62A statutes

1. **Chase did not have physical possession of Ms. Stehrenberger's original paper Note at any time.** Opinion at 6 ¶ 3

As discussed above, RCW 62A.3-203(a) specifically defines the word "transfer" as a physical delivery of possession of the tangible Note. Chase does not qualify as the "transferee" under RCW 62A.3-203(b). No rights to enforcement of the Note therefore vested from the Receiver to Chase through the Purchase and Assumption Agreement.

RCW 62A.3-309 also states: (a) A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was **in possession** of the instrument and entitled to enforce it **when loss of possession** occurred...." As Chase admits never having had possession of the Note, Chase is not entitled to enforce it.

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2. **Chase admits that there was never any schedule of loans or list of assets created that identifies the Note as among the Washington Mutual Bank assets the Receiver sold to Chase.**

The Purchase and Assumption Agreement does not list any "loans," "negotiable instruments" or "promissory notes" as among the categories of assets being sold by the Receiver. CP 621-664; *see* CP 633 ¶ 3.1 "Assets Purchased by Assuming Bank." The Purchase and Assumption Agreement references a "Schedule 3.1a" of Washington Mutual Bank assets that were sold by the Receiver to Chase CP 621, 633 ¶ 3.1; Chase admits that no Schedule 3.1 of assets exists. CP 453. The Purchase and Assumption Agreement requires a separately identified Book Value purchase price to be paid for each individual asset CP 621, 633 ¶ 3.2, 660, 661 (definition of Book Value at 627); Chase admits that Chase has no breakdown of any Book Value or other purchase price paid that identifies any purchase made of Ms. Stehrenberger's Note. CP 869. It is therefore unclear how Chase has **any** actual interest in this Note.

Chase asserts that RCW 62A.9A governs the sale of promissory notes, such as the Receiver's sale of assets to Chase through the Purchase and Assumption Agreement. CP 255 ¶ 2; RCW 62A.9A-109(a)(3). RCW 62A.9A-108(b)(6) requires the assets ("collateral") to be sufficiently identified by "objectively determinable" means. Under RCW 62A.9A-108(c) a "supergeneric" description such as "all of the assets," is insufficient for the purposes of enforcing the sale agreement against third

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parties. RCW 62A.9A-203(b) and (b)(2). The Purchase and Assumption Agreement's Section 3.1, "Assets Purchased by Assuming Bank" uses the supergeneric "all of the assets" language explicitly rejected by RCW 62A.9A-108(c):

> "[...T]he Receiver hereby sells, assigns, transfers, conveys, and delivers to the Assuming Bank [Chase], all right, title, and interest of the Receiver in and to **all of the assets**..." Opinion at 3-4. (emphasis added)

Division I relied upon the supergeneric "all assets" description and disregarded the UCC financing statements filed with Washington's Department of Licensing in which multiple third party entities had already claimed rights in Washington Mutual Bank's "promissory notes" and "negotiable instruments" prior to the September 25, 2008 failure date. The "Schedule 3.1a" referenced within the Purchase and Assumption Agreement's Section 3.1,"Assets Purchased by Assuming Bank," CP 633 ¶ 3.1, purportedly intended to identify which of the assets that the Receiver had the power to sell was never actually created. CP 453; RCW 62A.9A-203(b)(2).

Whether the Note was included among the assets from the Receiver is not "objectively determinable" from the four corners of the purchase agreement as is required under RCW 62A.9A-108(b)(6). Division I improperly resolved issues of material fact in the movant's favor on

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summary judgment, concluding against the evidence that the Note was among the unidentified assets left at the time that the bank failed.

Even if **ownership** had been established through Purchase and Assumption Agreement, the separate **transfer** by physical delivery under RCW 62A.3-203, mandatory for the purposes of enforcing payment upon the Note as discussed above and in the Official Comment to RCW 62A.3-203, was not proved and summary judgment was improper.

3. **"Chase...did not own Washington Mutual at any time."** CP 511

Chase confirms that there was no merger of the entirety of the assets and liabilities of the two banks effected by the Receiver under FIRREA's 12 U.S.C. § 1821(d)(2)(G)(i)(I). The sale of assets was instead effected under a different prong of the FIRREA, § 1821(d)(2)(G)(i)(II), through the Purchase and Assumption Agreement, Opinion at 3 ¶ 5; CP 665 ¶ 3. As a result, Chase's theory that it acquired the loans and loan commitments of Washington Mutual Bank "by operation of law" is incorrect. *Kim v. JPMorgan Chase Bank, N.A.*, 493 Mich. 98 at 102-109 and 116-117, 825 N.W. 2D 329 (2012)(see *Kim* analysis of incorrect "by operation of law" legal conclusion of *Affidavit of FDIC* at CP 665 ¶ 5).

While Division I's Opinion seems to rely on FIRREA, the FDIC's authority under FIRREA is inconsequential to the application of the UCC. It is Washington's UCC, not 12 U.S.C. § 1821(d)(2), that governs the enforcement and sale of negotiable instruments, Opinion at 4 ¶ 3, *Federal*

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Financial Co. v. Gerard, 90 Wn.App. 169, 176-77, 949 P.2d 412 (1998) (relying on *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87, 114 S.Ct 2048, 129 L.Ed.2d 67 (1994) in holding that it is state law, the UCC, that applies).

Division I nevertheless allowed Chase to "step into the shoes" of the failed bank – even when there was no evidence that the failed bank itself was entitled to enforce this Note on the date that the Receiver took over, or that the Receiver had derived any enforcement rights to sell in the Note. RCW 62A.9A-203(b)(2). Division I determined Chase was a **purchaser** through the Purchase and Assumption Agreement, Opinion at 5 ¶ 1, 6 ¶ 4, even when the description of assets in a sale of promissory notes were not met to allow them to be "objectively determinable" under RCW 62A.9A-108(b)(6). Division I ignored both the missing links in the chain of ownership and the lack of physical delivery required to qualify as the **transferee** entitled to enforce the Note under RCW 62A.3-203.

Despite Chase's judicial admissions, Division I leapfrogged over the specific requirements of RCW 62A.3-203; RCW 62A.3-309; RCW 62A.9A-108 and RCW 62A.9A-203 to bridge the numerous evidentiary gaps to affirm summary judgment in favor of Chase.

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D. Division I's violation of the Separation of Powers and *sub silento* nullification of the governing statutes

In casting aside the specific requirements of the governing statutes, Division I disregarded the separate law-making power of the Legislature. The separation of powers doctrine is "one of the cardinal and fundamental principles of the American constitutional system." *State Bar Association v. State,* 125 Wn.2d 901, 903, 890 P.2d 1047 (1995). "[L]egislation is not to be nullified by the judicial branch of the government unless the enactment contravenes the constitution or is manifestly unreasonable, arbitrary and capricious." *Harris v. Hornbaker,* 98 Wn.2d 650, 657, 658 P.d 1219 (1983) (paraphrasing *Fleming v. Tacoma,* 81 Wn.2d 292, 301, 502 P.d2d 327 (1972)(Neill, J. concurring)). Division I provided no explanation as to why these statutes should be disregarded under the *Harris* analysis.

"[Courts] cannot add...[or]...delete language from an unambiguous statute: 'Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.' *State v. J.P.*, 149 Wn.2d 444, 69 P.3d 318 (2003) (quoting *Davis v. Dep't. of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999)).

Division I rendered the governing statutes meaningless when it affirmed summary judgment in favor of Chase on the basis of a purported purchase rather than that of the required physical delivery of the instrument.

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E. Summary Judgment procedure vs. Chase's burden of proof

Summary judgment may well have been appropriate in this case, but not in favor of Chase.

In reviewing summary judgment de novo, a Court of Appeals takes the position of the Trial Court and considers the facts in a light most favorable to the nonmoving party. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, at 226, 770 P.2d 182 (1989). Chase, the Plaintiff, bore the burden of proving its case. *Young,* 112 Wn.2d at 225. Ms. Stehrenberger needed only show "an absence of evidence" to support "an element essential to that party's case." *Young,* 112 Wn.2d at 225. "A material fact is one upon which the outcome of the litigation depends, in whole or in part." *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980).

If the moving party does not sustain its burden of demonstrating, by offering evidence or otherwise, that it is entitled to judgment as a matter of law, summary judgment should not be granted, even if the nonmoving party did not submit any evidence. *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298 at 302, 616 P.2d 1223 (1980). Judicial admissions, such as the admission in respondents' answer...have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Key Design Inc. v. Moser*, 138 Wn. 2d 875, 983 P.2d 653 (1999) (Madsen, J. joined by Alexander, J. concurring and dissenting) (joined by Talmdage. J in separate dissent).

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Here, Chase's admissions – that it has never had physical possession of the Note at any time, that it has no list identifying the Note as among the assets sold by the Receiver through the Purchase and Assumption Agreement, and that it paid no Book Value purchase price to acquire the Note – are themselves key evidence that defeat Chase's breach of contract claim. Chase essentially admitted that it could not prove at least two of the four required elements of its claim: the existence of an enforceable contract between the parties, and that Chase has suffered any losses at all related to a Note it never actually purchased.

Division I, instead, improperly turned summary judgment on its head when it considered the facts, and Chase's judicial admissions, in the light most favorable to the *movant*, and affirmed summary judgment for Chase.

F. Conflict with *Colbert*'s interpretation of RCW 62A.3-309

In *Colbert v. US Bank of Washington*, at A-39, Division III came to the exact opposite conclusion as Division I did in *Stehrenberger* under RCW 62A.3-309. The Colberts sought to enforce lost negotiable instruments, in that case bonds, against a financial institution, U.S. Bank, N.A.. The Colberts moved for summary judgment with the same result as Chase in the instant case; the party seeking to enforce the instruments was granted summary judgment at the trial court level. The defendant, U.S. Bank, made the same argument on appeal as Ms. Stehrenberger did on the same basic facts – that the party seeking to enforce the lost instruments

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had not proven physical possession at the time of loss as required under RCW 62A.3-309. On that basis, Division III reversed summary judgment.

Under the same statute, RCW 62A.3-309, the same summary judgment procedure, and the same fact of the movants' lack of possession of the instruments at the time of loss in both cases, Divisions I and III have come to opposite conclusions.

G. Conflict with *Trujillo*: Same Division I panel, inconsistent interpretation of RCW 62A.3-203 issued just 35 days apart

The same panel of three judges in Division I interpreted RCW 62A.3.203 to opposite effect in different opinions just 35 days apart. Though Division I designated its decision in *Stehrenberger* as unpublished, Division I published its decision in *Trujillo v. Northwest Trustee Services, Inc.*, Slip.Op. 702592-0-I (June 2, 2014), A-42, taking the exact opposite stance on RCW 62A.3-203. In *Stehrenberger*, Division I stated:

> "Because the previous analysis does not hinge upon whether Chase is the "**owner**" of the note, we need not address this argument." Opinion at 8 ¶ 3. (emphasis added)

Division I based its decision that "Chase has authority to enforce as a **transferee**," Opinion at 1 ¶ 1, on its conclusion that Chase was the **purchaser** under the Purchase and Assumption Agreement. Division I failed to explain why it considers a purchaser to be different from an "owner" for the purposes of Official Comment 1's clarification that "a

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person who has an ownership right in an instrument might not be a person entitled to enforce the instrument..." A-16 ¶ 2.

A little over a month later, Division I emphasized in *Trujillo* that under the very same Official Comment to RCW 62A.3-203, it does not matter whether an entity is the "owner" of the Ms. Trujillo's note – because Division I concluded that the only the entity with physical possession of Ms. Trujillo's note is entitled to enforce it. Division I noted that Fannie Mae delivered possession of Ms. Trujillo's note to Wells Fargo and that possession entitled Wells Fargo to enforce it, regardless of Fannie Mae's ownership. Division I emphasized that physical possession, not ownership, is dispositive of enforcement rights in a note. *Trujillo* at 13-18.

Division I denied reconsideration in *Stehrenberger* just four days after publishing its contradictory interpretation of "owner" vs. "person entitled to enforce" in *Trujillo.*

H. Public Importance

The UCC underlies millions of business and consumer transactions that occur daily throughout Washington. The consistent and reliable application by the courts is essential to the stability of these transactions.

Summary judgment procedure disposes of a large percentage of court cases, and the courts' strict compliance with procedural requirements is crucial. The courts below have now twice disregarded the strict summary judgment procedures to reach a conclusion against a self-

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represented party. The arbitrary application of court procedures is reason enough for the public to be concerned.

The lower courts' nullification of the Legislature's powers introduces additional Constitutional concerns under doctrines such as the separation of powers, appearance of fairness, and due process, that should not be lightly dismissed. It is the job of the judiciary to apply the law, not make it. *See generally* Const. Arts. II and IV.

I. Reversal of Award for Expenses, Costs, and Attorney Fees

A party who prevails on an action to enforce a contract is entitled to costs and fees as provided by the contract. RCW 4.84.330. A party who prevails on appeal is similarly entitled, provided compliance with RAP 18.1. A reversal of summary judgment by this Court would require reversal of the Trial Court's and Division I's awards to Chase RAP 18.1(b) and (h)-(j) and dismissal of counterclaims.

VI. CONCLUSION

For the foregoing reasons, Ms. Stehrenberger respectfully requests the Supreme Court of Washington grant her Petition for Review.

Dated this 7th day of July, 2014.

Respectfully submitted,

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DECLARATION OF SERVICE

I, Michiko Stehrenberger, certify under penalty of perjury under the laws of the State of Washington that on this day I caused the original of the foregoing *Petition for Review* for the Washington Court of Appeals Division I Case No. 70295-5-I to be served by physical delivery upon the Washington Court of Appeals, Division III, in accordance with court rules allowing filing with any Division of the Court of Appeals, at the following address:

Washington Court of Appeals, Division III
500 N Cedar St
Spokane, WA 99201

I also caused to be served both by first-class mail, postage prepaid and dropped in an outgoing mailbox on this day, and by email, a true and correct copy of the foregoing *Petition for Review* upon the Respondent, JPMorgan Chase Bank, N.A., upon the following counsel of record:

Mr. Fred Burnside and Ms. Rebecca Francis
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And a true and correct copy upon Amici "Homeowner's Attorneys" via email to karrie@stafnetrumbull.com.

Dated July 7, 2014

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JPMORGAN CHASE BANK, N.A.,	)	No. 70295-5-I
Respondent,	)	DIVISION ONE
v.	)	
MICHIKO STEHRENBERGER,	)	UNPUBLISHED
Appellant.	)	FILED: April 28, 2014

Cox, J. – Michiko Stehrenberger appeals the grant of summary judgment in favor of JPMorgan Chase Bank, N.A. (Chase) to enforce her admittedly delinquent loan obligation. Because Chase has the authority to enforce the note as the transferee of Washington Mutual Bank's (WaMu) assets, we affirm.

On September 11, 2007, Stehrenberger executed a promissory note in the amount of $50,000 to WaMu.

On September 25, 2008, WaMu failed, and the Federal Deposit Insurance Corporation placed the bank in receivership. Under a purchase and assumption agreement, Chase purchased all of WaMu's assets. The FDIC, as receiver, assigned to Chase "all right, title, and interest of the Receiver in and to all of the assets [of WaMu]." The agreement expressly included loans among the transferred assets. Chase received an electronic record generated by WaMu of the loan disbursements and payments made by Stehrenberger.

In 2010, Stehrenberger admittedly defaulted by failing to make payments to Chase. She claimed that the FDIC did not execute an assignment identifying

her loan when it transferred WaMu's assets to Chase. She also claims that Chase did not have possession of the original note.

In 2011, Chase commenced this action on the delinquent note. Stehrenberger answered and asserted numerous defenses and counterclaims. The trial court granted Chase's motion to dismiss for some of the counterclaims. The trial court denied Stehrenberger's motion for reconsideration.

After extensive discovery by Stehrenberger, Chase moved for summary judgment on the delinquent note and Stehrenberger's unjust enrichment and Consumer Protection Act counterclaims. Stehrenberger moved for declaratory relief or partial summary judgment.

The trial court granted Chase's motion and dismissed the remaining counterclaims. It did so notwithstanding that Chase does not have possession of the original note. Chase does have copies, showing the terms of the note.

The trial court stated that Chase is owed $46,598.53 and past-due interest of $2,810.79 under the promissory note. Additionally, the trial court explained that Stehrenberger's motions were moot. The trial court denied Stehrenberger's motion for reconsideration.

Stehrenberger then sought "adequate protection" to guard against a third party attempting to enforce the lost promissory note. The trial court denied this motion.

The trial court also granted Chase's motion for attorney fees as prevailing party under the note. It awarded $98,446.76 in attorney fees "in light of [Stehrenberger's] protracted defense of this matter."

Stehrenberger appeals.

AUTHORITY TO ENFORCE PROMISSORY NOTE

Stehrenberger argues that the trial court erred when it granted summary judgment to Chase. Specifically, she argues that Chase did not have the authority to enforce the promissory note because it never had physical possession of the original promissory note. We disagree.

Summary judgment decisions are reviewed de novo.[1] Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.[2]

Under 12 U.S.C. § 1821(d)(2)(G)(i)(II), the FDIC has the authority to "transfer any asset or liability of the institution in default (including assets and liabilities associated with any trust business) without any approval, assignment, or consent with respect to such transfer."

Here, the FDIC transferred all of WaMu's loans and loan commitments to Chase pursuant to a purchase and assumption agreement dated September 25, 2008. The agreement used broad language to describe the transfer of all of the failed bank's assets:

> Subject to Sections 3.5, 3.6 and 4.8, the Assuming Bank hereby purchases from the Receiver, and the 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*** (real, personal and mixed, ***wherever located and however acquired***) including all subsidiaries, joint ventures, partnerships, and any and all other business combinations or arrangements,

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[1] Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

[2] CR 56(c).

> whether active, inactive, dissolved or terminated, of the Failed Bank whether or not reflected on the books of the Failed Bank as of Bank Closing.[3]

Given this broad language, Stehrenberger's promissory note is among the assets transferred to Chase.

There is no dispute that Stehrenberger's note is a negotiable instrument under Washington's Uniform Commercial Code (UCC). Accordingly, we look first to the UCC to determine whether Chase had the authority to enforce the note.

In Federal Financial Co. v. Gerard, this court explained that RCW 62A.3-203(b) sets out the rights of an assignee of a note:

> "***Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument***, including any right as a holder in due court, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument."[4]

This court concluded that "the unambiguous language of the above statutory provision supports the conclusion that the assignment of a note by the FDIC carries with it the right to enforce the instrument."[5] This court explained that this conclusion is consistent with "the policy of the Code that promotes a free market for negotiable instruments" and "Washington's common law respecting assignability of contract rights."[6]

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[3] Clerk's Papers at 621, 633 (emphasis added).

[4] 90 Wn. App. 169, 176-77, 949 P.2d 412 (1998) (quoting RCW 62A.3-203(b)).

[5] Id. at 177.

[6] Id.

Here, in accordance with Gerard, the FDIC's transfer of all assets of the failed bank to Chase carried with it the authority to enforce Stehrenberger's note. This is because Chase purchased ***all*** of WaMu's assets as shown by the purchase and assumption agreement.

Stehrenberger makes a number of arguments to challenge Chase's authority to enforce her promissory note. None are persuasive.

First, her primary argument is based on the Washington UCC provision that discusses the enforcement of lost, destroyed, or stolen instruments. Specifically, she contends that RCW 62A.3-309(a) required Chase to have physical possession of the original promissory note in order to enforce it. Because Chase admits that it never had physical possession of the note, she contends that Chase did not have the authority to enforce the note. We disagree.

RCW 62A.3-301 explains who is entitled to enforce a negotiable instrument:

> "Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) ***a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309*** or 62A.3-418(d).[7]

If a person is not in possession of the instrument, RCW 62A.3-309 explains when lost, destroyed, or stolen instruments may be enforced. There are number of requirements stated in two subsections of this statute. The first subsection provides:

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[7] (Emphasis added.)

> (a) A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.[8]

As a United States bankruptcy panel of the Ninth Circuit explained, "The plain meaning of RCW 62A.3-309(a) is that a person no longer in possession of an instrument is nonetheless entitled to enforce it if that person was in possession and entitled to enforce it when the loss of possession occurred."[9]

Since Chase admits that it never had possession of the original note, the issue is whether Chase can meet the requirements of RCW 62A.3-309(a). Because Chase purchased all of WaMu's assets and the rights that come along with them, Chase steps into the shoes of WaMu and can meet the statutory requirements in WaMu's capacity. As Chase argues, it proved the three requirements:

> WaMu possessed the Note and was entitled to enforce it because Stehrenberger admits signing the instrument and leaving it with WaMu (satisfying the first element). CP 249 ¶ 64. Stehrenberger presented no evidence on summary judgment (and none exists) showing WaMu transferred the Note to anyone except Chase, who bought the Note from the FDIC, as receiver (satisfying the second element). If WaMu lost the Note, then it is a tautology that the Note's whereabouts could not be determined (satisfying the third element). Accordingly, WaMu was entitled to enforce the Note, and

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[8] RCW 62A.3-309(a).

[9] In re Allen, 472 B.R. 559, 566 (B.A.P. 9th Cir. 2012).

> Chase bought all the rights of WaMu, including the right to enforce the Note. See Gerard, 90 Wn. App. at 183.[10]

There is nothing in RCW 62A.3-309 that prohibited a lost, destroyed, or stolen instrument from being transferred to Chase. Thus, subsection (a) of RCW 62A.3-309 is not a barrier to Chase enforcing Stehrenberger's note.

Additionally, "Subsection (b) requires a proponent under subsection (a) to prove the terms of the instrument, *e.g.*, via a Lost Note Affidavit."[11] Chase met the requirements of the second subsection, RCW 62A.3-309(b), which states:

> (b) A person seeking enforcement of an instrument under subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, RCW 62A.3-308 applies to the case as if the person seeking enforcement had produced the instrument.

Chase was able to prove the terms of the instrument by producing a true and correct copy of the instrument. Moreover, as previously discussed, Chase is entitled to enforce the instrument as the transferee of WaMu's assets.

Stehrenberger cites several cases from other jurisdictions, including Dennis Joslin Co. v. Robinson Broadcasting Corp.[12] These cases suggest that an assignee may not enforce a note that was lost, destroyed, or stolen ***before***

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[10] Brief of Respondent-Plaintiff JPMorgan Chase Bank, N.A. at 28-29.

[11] In re Allen, 472 B.R. at 566.

[12] Amended Brief of Appellant at 21-24 (citing Dennis Joslin Co., LLC v. Robinson Broad. Corp., 977 F. Supp. 491 (D.D.C. 1997); McKay v. Capital Res. Co., Ltd., 327 Ark. 737, 940 S.W.2d 869 (Ark. 1997); State Street Bank and Trust Co. v. Lord, 851 So.2d 790 (Fla. Dist. Ct. App. 2003)); see also Appellant's Statement of Additional Authority (citing In re Harborhouse of Gloucester, 505 B.R. 365 (Bankr. D. Mass. 2014)).

assignment.[13] But these extrajurisidictional cases do not control this case. Here, Chase is able to enforce the note because it purchased all of WaMu's assets and can fulfill the requirements of RCW 62A.3-309 in WaMu's capacity.

Second, Stehrenberger argues that Chase did not prove the elements of RCW 62A.3-309 because it did not produce a "lost note affidavit." But she fails to cite authority that a "lost note affidavit" is needed to prove the elements of RCW 62A.3-309. As previously discussed, Chase pointed to evidence that proves that the statutory requirements were met. It does not matter that they were not contained in a "lost note affidavit."

Third, Stehrenberger contends that even if Chase is the "owner" of the note "proof of ***direct*** physical possession by the 'person seeking to enforce' is still required to be able to enforce a note that is a negotiable instrument." Because the previous analysis does not hinge upon whether Chase is the "owner" of the note, we need not address this argument.

Fourth, Stehrenberger asserts that Chase did not acquire WaMu's assets by operation of law. But the prior analysis does not make such assertion. Rather, the transfer was made pursuant to a purchase and assumption agreement. Thus, this argument is not relevant.

Fifth, Stehrenberger argues that "[u]nder RCW 5.46.010 a mere copy of a negotiable instrument is not admissible in place of the original for the purpose of seeking enforcing payment upon it." But that statute addresses evidentiary

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[13] Dennis Joslin Co., LLC, 977 F. Supp. at 495; McKay, 327 Ark. at 740-41; State Street Bank and Trust Co., 851 So.2d at 792; In re Harborhouse of Gloucester, 505 B.R. at 371-72.

issues, not the UCC. It states that copies of business records are admissible.[14] Thus, this argument is not persuasive.

Sixth, Stehrenberger, in her reply brief, makes a number of arguments challenging the validity of the purchase and assumption agreement between the FDIC, as receiver of WaMu, and Chase. She cites Livonia Props. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC to assert that she has standing to challenge the assignment as an "obligor."[15] But, as that case explains, Stehrenberger does not have standing to challenge the assignment to which she was not party because she is not at risk for having to pay the debt twice.[16] Thus, these arguments are not persuasive.

Because the trial court properly granted summary judgment in favor of Chase, we deny Stehrenberger's request that we reverse the dismissal of her unjust enrichment and Consumer Protection Act claims.

Chase also asserts that we may affirm the trial court based on res judicata. Given our previous discussion, we need not to rely on this basis.

ADEQUATE PROTECTION

Stehrenberger next argues that the trial court abused its discretion when it denied her CR 59 motion to amend the judgment to provide her with adequate protection against a third party from enforcing the promissory note. We disagree.

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[14] RCW 5.46.010.

[15] Reply Brief of Appellant at 10 (citing Livonia Props. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC, 399 Fed. Appx. 97, 102 (6th Cir. 2010)).

[16] Livonia Props. Holdings, LLC, 399 Fed. Appx. at 102.

RCW 62A.3-309(b) provides an adequate protection requirement when a person seeks to enforce a lost, destroyed, or stolen instrument:

> The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

CR 59(h) authorizes the trial court to alter or amend a judgment if a motion is brought within 10 days. This court reviews a trial court's denial of a CR 59 motion to amend judgment for abuse of discretion.[17]

Here, the trial court did not abuse its discretion in denying the motion to amend. Stehrenberger's promissory note was payable to WaMu, and Chase is now the only entity that can enforce WaMu's loans. There is no evidence that she is at risk of having any entity other than Chase attempt to enforce the loan. Given this low risk, the trial court did not abuse its discretion when it denied the CR 59 motion.

ATTORNEY FEES

Finally, Stehrenberger asserts that the trial court abused its discretion when it awarded Chase $98,446.76 in attorney fees as the prevailing party under the promissory note. Specifically, she argues that the trial court did not consider her objections to Chase's billings. We disagree.

Under RCW 4.84.330, the prevailing party in an action to enforce or defend a contract is entitled to attorney fees and costs as provided by the

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[17] Collins v. Clark County Fire Dist. No. 5, 155 Wn. App. 48, 81, 231 P.3d 1211 (2010).

contract.[18] As the parties agree, the promissory note provides that the bank is entitled to attorney fees and costs. RCW 4.84.330 makes this unilateral provision bilateral. Thus, the "prevailing party" is entitled to an award.

We review the amount of an attorney fee award for an abuse of discretion.[19]

Stehrenberger does not dispute that Chase was the prevailing party in the trial court. Rather, she contends that the trial court did not consider her "opposition and objections, identifying specific items on Chase's billings that [she] asserted were improperly billed as a result of wasteful or duplicative activities unnecessary for the prosecution of the case."

But in the order granting attorney fees to Chase, the trial court stated that it "reviewed the motion and the pleadings filed herein," which would include Stehrenberger's "Amended Opposition to Plaintiff JPMorgan Chase Bank, N.A.'s Motion to Fix Attorney Fees as Costs of Suit." Additionally, the trial court stated that the amount of fees and costs was "reasonable and necessary to prosecute plaintiff's claims in light of defendant's protracted defense of this matter." Given these statements in the order, the trial court considered Stehrenberger's objections to the attorney fees and thus it did not abuse its discretion when it made the award.

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[18] Reeves v. McClain, 56 Wn. App. 301, 311, 783 P.2d 606 (1989).

[19] Morgan v. Kingen, 166 Wn.2d 526, 539, 210 P.3d 995 (2009).

Both parties request attorney fees if they are the prevailing party on appeal. Because Chase is the prevailing party on appeal, it is entitled to fees and costs, subject to its compliance with RAP 18.1.

We affirm the grant of summary judgment and award reasonable attorney fees to Chase, subject to its compliance with RAP 18.1.

COX, J.

WE CONCUR:

RICHARD D. JOHNSON,
Court Administrator/Clerk

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May 28, 2014

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CASE #: 70295-5-I
JP Morgan Chase Bank, N.A., Res. v. Michiko Stehrenberger, App.

Counsel:

The following notation ruling by Richard D. Johnson, Court Administrator/Clerk of the Court was entered on May 28, 2014, regarding Amicus Curiae's Motion to File Amicus Curiae Brief:

At the direction of the panel, the motion is denied.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

lls

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

JPMORGAN CHASE BANK, N.A.,	)	No. 70295-5-I
Respondent,	)	ORDER DENYING MOTION FOR RECONSIDERATION
v.	)	
MICHIKO STEHRENBERGER,	)	
Appellant.	)	

Appellant, Michiko Stehrenberger, has moved for reconsideration of the opinion filed in this case on April 28, 2014. The court having considered the motion has determined that the motion for reconsideration should be denied. The court hereby

ORDERS that the motion for reconsideration is denied.

Dated this 6th day of June 2014.

For the Court:

Cox, J.

Judge

Laws 1955, ch. 35, §§ 62.01.022, 62.01.058, 62.01.059.
Laws 1965, Ex.Sess., ch. 157, § 3–207.
Former § 62A. 3–207.

Uniform Law:

This section is similar to § 3–202 of Revised Article 3 of the Uniform Commercial Code. See Vol. 2 Uniform Laws Annotated, Master Edition or ULA Database on Westlaw.

Law Review and Journal Commentaries

Chemical Bank v. Washington Public Power Supply System: An aberration in Washington's application of the ultra vires doctrine. 8 U.Puget Sound L.Rev. 59 (1984).

Library References

Bills and Notes ⇐182, 228, 239, 364, 452.
Westlaw Topic No. 56.
C.J.S. Bills and Notes; Letters of Credit §§ 29, 36, 65, 74, 102, 147, 150, 151, 157, 160, 167, 191, 244 to 248, 260, 261.
Negotiation subject to rescission, see Wash.Prac. vol. 1A, Kunsch, § 38.16.
Transfer of obligation without transfer of mortgage and vice versa, see Wash.Prac. vol. 18, Stoebuck, § 17.20.

62A.3–203. Transfer of instrument; rights acquired by transfer

(a) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

(b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

(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.

(d) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this Article and has only the rights of a partial assignee.

[1993 c 229 § 24; 1965 ex.s. c 157 § 3–203. Cf. former RCW 62.01.043; 1955 c 35 § 62.01.043; prior: 1899 c 149 § 43; RRS § 3434.]

UNIFORM COMMERCIAL CODE COMMENTS

1. Section 3–203 is based on former Section 3–201 which stated that a transferee received such rights as the transferor had. The former section was confusing because some rights of the transferor are not vested in the transferee unless the transfer is a negotiation. For example, a transferee that did not become the holder could not negotiate the instrument, a right that the transferor had. Former Section 3–201 did not define "transfer." Subsection (a) defines transfer by limiting it to cases in which possession of the instrument is delivered for the purpose of giving to the person receiving delivery the right to enforce the instrument.

Although transfer of an instrument might mean in a particular case that title to the instrument passes to the transferee, that result does not follow in all cases. The right to enforce an instrument and ownership of the instrument are two different concepts. A thief who steals a check payable to bearer becomes the holder of the check and a person entitled to enforce it, but does not become the owner of the check. If the thief transfers the check to a purchaser the transferee obtains the right to enforce the check. If the purchaser is not a holder in due course, the owner's claim to the check may be asserted against the purchaser. Ownership rights in instruments may be determined by principles of the law of property, independent of Article 3, which do not depend upon whether the instrument was transferred under Section 3–203. Moreover, a person who has an ownership right in an instrument might not be a person entitled to enforce the instrument. For example, suppose X is the owner and holder of an instrument payable to X. X sells the instrument to Y but is unable to deliver immediate possession to Y. Instead, X signs a document conveying all of X's right, title, and interest in the instrument to Y. Although the document may be effective to give Y a claim to ownership of the instrument, Y is not a person entitled to enforce the instrument until Y obtains possession of the instrument. No transfer of the instrument occurs under Section 3–203(a) until it is delivered to Y.

An instrument is a reified right to payment. The right is represented by the instrument itself. The right to payment is transferred by delivery of possession of the instrument "by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." The quoted phrase excludes issue of an instrument, defined in Section 3–105, and cases in which a delivery of possession is for some purpose other than transfer of the right to enforce. For example, if a check is presented for payment by delivering the check to the drawee, no transfer of the check to the drawee occurs because there is no intent to give the drawee the right to enforce the check.

2. Subsection (b) states that transfer vests in the transferee any right of the transferor to enforce the instrument "including any right as a holder in due course." If the transferee is not a holder because the transferor did not indorse, the transferee is nevertheless a person entitled to enforce the instrument under Section 3–301 if the transferor was a holder at the time of transfer. Although the transferee is not a holder, under subsection (b) the transferee obtained the rights of the transferor as holder. Because the transferee's rights are deriva-

ive of the transferor's rights, those rights must be proved. Because the transferee is not a holder, there is no presumption under Section 3–308 that the transferee, by producing the instrument, is entitled to payment. The instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it. Proof of a transfer to the transferee by a holder is proof that the transferee has acquired the rights of a holder. At that point the transferee is entitled to the presumption under Section 3–308.

Under subsection (b) a holder in due course that transfers an instrument transfers those rights as a holder in due course to the purchaser. The policy is to assure the holder in due course a free market for the instrument. There is one exception to this rule stated in the concluding clause of subsection (b). A person who is party to fraud or illegality affecting the instrument is not permitted to wash the instrument clean by passing it into the hands of a holder in due course and then repurchasing it.

3. Subsection (c) applies only to a transfer for value. It applies only if the instrument is payable to order or specially indorsed to the transferor. The transferee acquires, in the absence of a contrary agreement, the specifically enforceable right to the indorsement of the transferor. Unless otherwise agreed, it is a right to the general indorsement of the transferor with full liability as indorser, rather than to an indorsement without recourse. The question may arise if the transferee has paid in advance and the indorsement is omitted fraudulently or through oversight. A transferor who is willing to indorse only without recourse or unwilling to indorse at all should make those intentions clear before transfer. The agreement of the transferee to take less than an unqualified indorsement need not be an express one, and the understanding may be implied from conduct, from past practice, or from the circumstances of the transaction. Subsection (c) provides that there is no negotiation of the instrument until the indorsement by the transferor is made. Until that time the transferee does not become a holder, and if earlier notice of a defense or claim is received, the transferee does not qualify as a holder in due course under Section 3–302.

4. The operation of Section 3–203 is illustrated by the following cases. In each case Payee, by fraud, induced Maker to issue a note to Payee. The fraud is a defense to the obligation of Maker to pay the note under Section 3–305(a)(2).

Case #1. Payee negotiated the note to X who took as a holder in due course. After the instrument became overdue X negotiated the note to Y who had notice of the fraud. Y succeeds to X's rights as a holder in due course and takes free of Maker's defense of fraud.

Case #2. Payee negotiated the note to X who took as a holder in due course. Payee then repurchased the note from X. Payee does not succeed to X's rights as a holder in due course and is subject to Maker's defense of fraud.

Case #3. Payee negotiated the note to X who took as a holder in due course. X sold the note to Purchaser who received possession. The note, however, was in-

dorsed to X and X failed to indorse it. Purchaser is a person entitled to enforce the instrument under Section 3–301 and succeeds to the rights of X as holder in due course. Purchaser is not a holder, however, and under Section 3–308 Purchaser will have to prove the transaction with X under which the rights of X as holder in due course were acquired.

Case #4. Payee sold the note to Purchaser who took for value, in good faith and without notice of the defense of Maker. Purchaser received possession of the note but Payee neglected to indorse it. Purchaser became a person entitled to enforce the instrument but did not become the holder because of the missing indorsement. If Purchaser received notice of the defense of Maker before obtaining the indorsement of Payee, Purchaser cannot become a holder in due course because at the time notice was received the note had not been negotiated to Purchaser. If indorsement by Payee was made after Purchaser received notice, Purchaser had notice of the defense when it became the holder.

5. Subsection (d) restates former Section 3–202(3). The cause of action on an instrument cannot be split. Any indorsement which purports to convey to any party less than the entire amount of the instrument is not effective for negotiation. This is true of either "Pay A one-half," or "Pay A two-thirds and B one-third." Neither A nor B becomes a holder. On the other hand an indorsement reading merely "Pay A and B" is effective, since it transfers the entire cause of action to A and B as tenants in common. An indorsement purporting to convey less than the entire instrument does, however, operate as a partial assignment of the cause of action. Subsection (d) makes no attempt to state the legal effect of such an assignment, which is left to other law. A partial assignee of an instrument has rights only to the extent the applicable law gives rights, either at law or in equity, to a partial assignee.

Historical and Statutory Notes

Recovery of attorneys' fees—Effective date—1993 c 229: See RCW 62A.11–111 and 62A.11–112.

Laws 1993, ch. 229, § 24, rewrote the section, which previously read:

"62A.3–203. Wrong or misspelled name

"Where an instrument is made payable to a person under a misspelled name or one other than his own he may indorse in that name or his own or both; but signature in both names may be required by a person paying or giving value for the instrument."

For disposition of pre-1993 subject matter, see table preceding § 62A.3–101.

Source:

Laws 1899, ch. 149, §§ 27, 30 to 32, 49, 58.
RRS §§ 3418, 3421 to 3423, 3440, 3449.
§§ 62.01.027, 62.01.030 to 62.01.032, 62.01.049, 62.01.058.
Laws 1955, ch. 35, §§ 62.01.027, 62.01.030 to 62.01.032, 62.01.049, 62.01.058.
Laws 1965, Ex.Sess., ch. 157, §§ 3–201, 3–202.
Former §§ 62A.3–201, 62A.3–202.

Uniform Law:

This section is similar to § 3–203 of Revised Article 3 of the Uniform Commercial Code. See Vol. 2 Uniform Laws Annotated, Master Edition or ULA Database on Westlaw.

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...s and Notes ⇐176 to 384.
...stlaw Topic No. 56.
...J.S. Bills and Notes; Letters of Credit §§ 4, 24, 25, 28 to 30, 33, 63, 65, 139 to 201, 203, 204, 242 to 245.

Notes of Decisi

...tishment 4
...ssory note 2
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...fficiency of indorsement

...ere defendant maker had executed ... promissory notes payable to real ... corporation, and individual al... to be president of the real estate ...ration endorsed the notes with his ... signature, with no indication that ... acting on behalf of the corpora... that he was officer of corpora... making the notes payable to finan... services corporation, and financial ...es corporation endorsed the notes ...r of individual plaintiffs, individ... plaintiffs were not holders in due ...e since the individual plaintiffs ...ired whatever right the financial ...es corporation had, which was at ... legal title, and since the individual ...ffs took with notice of facial in...iency of the original payee's en...ments. Fines v. Stock (1984) 37 ...App. 101, 678 P.2d 839.

Promissory note

...e and not federal law determined ...r financial institution that ac...d promissory note from the Feder... Deposit Insurance Corporation ..., in its capacity as receiver of ...nt bank, was entitled, in suing as ...'s assignee to recover on note, to ...advantage of special limitations pe... applicable to suits by the FDIC in ...ceivership capacity. Federal Fi... Co. v. Gerard (1998) 90 Wash. ...2e9. 949 P.2d 412, review denied ...Wash.2d 1025, 969 P.2d 1064.

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J.S. Bills and Notes; Letters of Credit §§ 4, 24, 25, 28 to 30, 33, 65, 65, 139 to 201, 203, 204, 242 to 248.

Transfer and negotiation, see Wash. Prac. vol. 1A, Kunsch, §§ 38.13, 38.17.

Notes of Decisions

Sufficiency of indorsement

ere defendant maker had executed promissory notes payable to real corporation, and individual alto be president of the real estate ocation endorsed the notes with his signature, with no indication that was acting on behalf of the corporaor that he was officer of corporamaking the notes payable to finanservices corporation, and financial ces corporation endorsed the notes or of individual plaintiffs, individplaintiffs were not holders in due se, since the individual plaintiffs ired whatever right the financial ces corporation had, which was at legal title, and since the individual ffs took with notice of facial inciency of the original payee's enements. Fines v. Stock (1984) 37 App. 101, 678 P.2d 839.

Promissory note

te and not federal law determined her financial institution that acd promissory note from the Feder Deposit Insurance Corporation C), in its capacity as receiver of vent bank, was entitled, in suing as 's assignee to recover on note, to advantage of special limitations pe applicable to suits by the FDIC in receivership capacity. Federal Fi cial Co. v. Gerard (1998) 90 Wash. 169, 949 P.2d 412, review denied Wash.2d 1025, 969 P.2d 1064.

ere promissory note did not indi loan was not to be completed until rity in boat was provided, and no sign of security agreement or vessel mortgage was produced, borrowers rather than lender, had title to loan proceeds when they signed note and received check. State v. Gillespie (1985) 41 Wash.App. 640, 705 P.2d 808, review denied.

3. Rights of assignee

Under Washington law of negotiable instruments, assignment of promissory note for value by the Federal Deposit Insurance Corporation (FDIC), in its capacity as receiver for insolvent bank, carried with it all of the rights of the FDIC to enforce instrument, including the right to invoke extended statute of limitations applicable to suits by the FDIC, provided only that assignee could not acquire rights of holder in due course if it engaged in any fraud or illegality affecting the instrument. Federal Financial Co. v. Gerard (1998) 90 Wash.App. 169, 949 P.2d 412, review denied 136 Wash.2d 1025, 969 P.2d 1064.

Assignee of promissory note could enforce note against maker notwithstanding lack of endorsement from original payee, where assignee offered unrefuted proof of original payee's assignment of note to assignee. Metropolitan Mortg. & Securities Co., Inc. v. Becker (1992) 64 Wash.App. 626, 825 P.2d 360.

4. Garnishment

Where garnishee answered writ of garnishment by asserting its, and not defendant's, ownership (under this section and § 62A.3–104) of certificate of deposit, plaintiff's failure to controvert answer under §§ 7.33.180 and 7.33.240 mandated that neither the certificate

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62A.1-102 << 62A.1-103 >> 62A.1-104

RCW 62A.1-103
Construction of uniform commercial code to promote its purposes and policies; applicability of supplemental principles of law.

(a) This title must be liberally construed and applied to promote its underlying purposes and policies, which are:

(1) To simplify, clarify, and modernize the law governing commercial transactions;

(2) To permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and

(3) To make uniform the law among the various jurisdictions.

(b) Unless displaced by the particular provisions of this title, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.

[2012 c 214 § 103; 1965 ex.s. c 157 § 1-103. Cf. former RCW sections: (i) RCW 22.04.570; 1913 c 99 § 56; RRS § 3642. (ii) RCW 23.80.180; 1939 c 100 § 18; RRS § 3803-118; formerly RCW 23.20.190. (iii) RCW 62.01.196; 1955 c 35 § 196; RRS § 3586. (iv) RCW 63.04.030; 1925 ex.s. c 142 § 2; RRS § 5836-2. (v) RCW 81.32.511; 1961 c 14 § 81.32.511; prior: 1915 c 159 § 51; RRS § 3697; formerly RCW 81.32.600.]

Notes:

Application -- Savings -- 2012 c 214: See notes following RCW62A.1-101 .

Application of common law: RCW 4.04.010.

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RCW 62A.1-201
General definitions.

(a) Unless the context otherwise requires, words or phrases defined in this section, or in the additional definitions contained in other articles of this title that apply to particular articles or parts thereof, have the meanings stated.

(b) Subject to definitions contained in other articles of this title that apply to particular articles or parts thereof:

(1) "Action," in the sense of a judicial proceeding, includes recoupment, counterclaim, set-off, suit in equity, and any other proceeding in which rights are determined.

(2) "Aggrieved party" means a party entitled to pursue a remedy.

(3) "Agreement," as distinguished from "contract," means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in RCW 62A.1-303.

(4) "Bank" means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company.

(5) "Bearer" means a person in control of a negotiable electronic document of title or a person in possession of a negotiable instrument, negotiable tangible document of title, or certificated security that is payable to bearer or indorsed in blank.

(6) "Bill of lading" means a document of title evidencing the receipt of goods for shipment issued by a person engaged in the business of directly or indirectly transporting or forwarding goods. The term does not include a warehouse receipt.

(7) "Branch" includes a separately incorporated foreign branch of a bank.

(8) "Burden of establishing" a fact means the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence.

(9) "Buyer in ordinary course of business" means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a preexisting contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Article 2 of this title may be a buyer in ordinary course of business. "Buyer in ordinary course of business" does not include a person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(10) "Conspicuous," with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is a decision for the court. Conspicuous terms include the following:

(A) A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and

(B) Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

(11) "Consumer" means an individual who enters into a transaction primarily for personal, family, or household purposes.

(12) "Contract," as distinguished from "agreement," means the total legal obligation that results from the parties' agreement as determined by this title as supplemented by any other applicable laws.

(13) "Creditor" includes a general creditor, a secured creditor, a lien creditor, and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity, and an executor or administrator of an insolvent debtor's or assignor's estate.

(14) "Defendant" includes a person in the position of defendant in a counterclaim, cross-claim, or third-party claim.

(15) "Delivery," with respect to an electronic document of title means

voluntary transfer of control and with respect to an instrument, a tangible document of title, or chattel paper, means voluntary transfer of possession.

(16) "Document of title" means a record (i) that in the regular course of business or financing is treated as adequately evidencing that the person in possession or control of the record is entitled to receive, control, hold, and dispose of the record and the goods the record covers and (ii) that purports to be issued by or addressed to a bailee and to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass. The term includes a bill of lading, transport document, dock warrant, dock receipt, warehouse receipt, and order for delivery of goods. An electronic document of title means a document of title evidenced by a record consisting of information stored in an electronic medium. A tangible document of title means a document of title evidenced by a record consisting of information that is inscribed on a tangible medium.

(17) "Fault" means a default, breach, or wrongful act or omission.

(18) "Fungible goods" means:

(A) Goods of which any unit, by nature or usage of trade, is the equivalent of any other like unit; or

(B) Goods that by agreement are treated as equivalent.

(19) "Genuine" means free of forgery or counterfeiting.

(20) "Good faith," except as otherwise provided in Article 5 of this title, means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(21) "Holder" with respect to a negotiable instrument, means:

(A) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;

(B) The person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession; or

(C) The person in control of a negotiable electronic document of title.

(22) "Insolvency proceeding" includes an assignment for the benefit of creditors or other proceeding intended to liquidate or rehabilitate the estate of the person involved.

(23) "Insolvent" means:

(A) Having generally ceased to pay debts in the ordinary course of

business other than as a result of bona fide dispute;

(B) Being unable to pay debts as they become due; or

(C) Being insolvent within the meaning of federal bankruptcy law.

(24) "Money" means a medium of exchange currently authorized or adopted by a domestic or foreign government. The term includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more countries.

(25) "Organization" means a person other than an individual.

(26) "Party," as distinguished from "third party," means a person that has engaged in a transaction or made an agreement subject to this title.

(27) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(28) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain by use of either an interest rate specified by the parties if that rate is not manifestly unreasonable at the time the transaction is entered into or, if an interest rate is not so specified, a commercially reasonable rate that takes into account the facts and circumstances at the time the transaction is entered into.

(29) "Purchase" means taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property.

(30) "Purchaser" means a person that takes by purchase.

(31) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(32) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

(33) "Representative" means a person empowered to act for another, including an agent, an officer of a corporation or association, and a trustee, executor, or administrator of an estate.

(34) "Right" includes remedy.

(35) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. "Security interest"

includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9A of this title. "Security interest" does not include the special property interest of a buyer of goods on identification of those goods to a contract for sale under RCW62A.2-401 , but a buyer may also acquire a "security interest" by complying with Article 9A of this title. Except as otherwise provided in RCW 62A.2-505, the right of a seller or lessor of goods under Article 2 or 2A of this title to retain or acquire possession of the goods is not a "security interest," but a seller or lessor may also acquire a "security interest" by complying with Article 9A of this title. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under RCW 62A.2-401 is limited in effect to a reservation of a "security interest." Whether a transaction in the form of a lease creates a "security interest" is determined pursuant to RCW 62A.1-203.

(36) "Send" in connection with a writing, record, or notice means:

(A) To deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and, in the case of an instrument, to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances; or

(B) In any other way to cause to be received any record or notice within the time it would have arrived if properly sent.

(37) "Signed" includes using any symbol executed or adopted with present intention to adopt or accept a writing.

(38) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(39) "Surety" includes a guarantor or other secondary obligor.

(40) "Term" means a portion of an agreement that relates to a particular matter.

(41) "Unauthorized signature" means a signature made without actual, implied, or apparent authority. The term includes a forgery.

(42) "Warehouse receipt" means a document of title issued by a person engaged in the business of storing goods for hire.

(43) "Writing" includes printing, typewriting, or any other intentional reduction to tangible form. "Written" has a corresponding meaning.

[2012 c 214 § 109; 2001 c 32 § 9; 2000 c 250 § 9A-802; 1996 c 77 § 1. Prior: 1993 c 230 § 2A-602; 1993 c 229 § 1; 1992 c 134 § 14; 1990 c 228 §

62A.3-103 << 62A.3-104 >> 62A.3-105

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RCW 62A.3-104
Negotiable instrument.

(a) Except as provided in subsections (c) and (d), "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

(1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;

(2) Is payable on demand or at a definite time; and

(3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

(b) "Instrument" means a negotiable instrument.

(c) An order that meets all of the requirements of subsection (a), except subsection (a)(1), and otherwise falls within the definition of "check" in subsection (f) is a negotiable instrument and a check.

(d) A promise or order other than a check is not an instrument if, at the time it is issued or first comes into possession of a holder, it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable or is not an instrument governed by this Article.

(e) An instrument is a "note" if it is a promise and is a "draft" if it is an order. If an instrument falls within the definition of both "note" and "draft," a person entitled to enforce the instrument may treat it as either.

(f) "Check" means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank, or (ii) a cashier's check or teller's check. An instrument may be a check even though it is described on its face by another term, such as "money order."

(g) "Cashier's check" means a draft with respect to which the drawer and drawee are the same bank or branches of the same bank.

(h) "Teller's check" means a draft drawn by a bank (i) on another bank, or (ii) payable at or through a bank.

(i) "Traveler's check" means an instrument that (i) is payable on demand, (ii) is drawn on or payable at or through a bank, (iii) is designated by the term "traveler's check" or by a substantially similar term, and (iv) requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the instrument.

(j) "Certificate of deposit" means an instrument containing an acknowledgment by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money. A certificate of deposit is a note of the bank.

[1993 c 229 § 6; 1965 ex.s. c 157 § 3-104. Cf. former RCW sections: RCW 62.01.001, 62.01.005, 62.01.010, 62.01.126, 62.01.184, and 62.01.185; 1955 c 35 §§ 62.01.001, 62.01.005, 62.01.010, 62.01.126, 62.01.184, and 62.01.185; prior: 1899 c 149 §§ 1, 5, 10, 126, 184, and 185; RRS §§ 3392, 3396, 3401, 3516, 3574, and 3575.]

Notes:

Recovery of attorneys' fees -- Effective date -- 1993 c 229: See RCW 62A.11-111 and 62A.11-112.

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62A.3-202 << 62A.3-203 >> 62A.3-204

RCW 62A.3-203
Transfer of instrument; rights acquired by transfer.

(a) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

(b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

(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.

(d) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this Article and has only the rights of a partial assignee.

[1993 c 229 § 24; 1965 ex.s. c 157 § 3-203. Cf. former RCW 62.01.043; 1955 c 35 § 62.01.043; prior: 1899 c 149 § 43; RRS § 3434.]

Notes:

Recovery of attorneys' fees -- Effective date -- 1993 c 229: See RCW 62A.11-111 and 62A.11-112.

62A.3-207 << 62A.3-301 >> 62A.3-302

RCW 62A.3-301
Person entitled to enforce instrument.

"Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or 62A.3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

[1993 c 229 § 29; 1965 ex.s. c 157 § 3-301. Cf. former RCW 62.01.051; 1955 c 35 § 62.01.051; prior: 1899 c 149 § 51; RRS § 3442.]

Notes:

Recovery of attorneys' fees -- Effective date -- 1993 c 229: See RCW 62A.11-111 and 62A.11-112.

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62A.3-308 << 62A.3-309 >> 62A.3-310

RCW 62A.3-309
Enforcement of lost, destroyed, or stolen instrument.

(a) A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(b) A person seeking enforcement of an instrument under subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, RCW 62A.3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

[1993 c 229 § 37.]

Notes:

Recovery of attorneys' fees -- Effective date -- 1993 c 229: See RCW 62A.11-111 and 62A.11-112.

62A.3-601 << 62A.3-602 >> 62A.3-603

RCW 62A.3-602
Payment.

(a) Subject to subsection (b), an instrument is paid to the extent payment is made (i) by or on behalf of a party obliged to pay the instrument, and (ii) to a person entitled to enforce the instrument. To the extent of the payment, the obligation of the party obliged to pay the instrument is discharged even though payment is made with knowledge of a claim to the instrument under RCW 62A.3-306 by another person.

(b) The obligation of a party to pay the instrument is not discharged under subsection (a) if:

(1) A claim to the instrument under RCW 62A.3-306 is enforceable against the party receiving payment and (i) payment is made with knowledge by the payor that payment is prohibited by injunction or similar process of a court of competent jurisdiction, or (ii) in the case of an instrument other than a cashier's check, teller's check, or certified check, the party making payment accepted, from the person having a claim to the instrument, indemnity against loss resulting from refusal to pay the person entitled to enforce the instrument; or

(2) The person making payment knows that the instrument is a stolen instrument and pays a person it knows is in wrongful possession of the instrument.

[1993 c 229 § 72; 1965 ex.s. c 157 § 3-602. Cf. former RCW 62.01.122; 1955 c 35 § 62.01.122; prior: 1899 c 149 § 122; RRS § 3512.]

Notes:

Recovery of attorneys' fees -- Effective date -- 1993 c 229: See RCW 62A.11-111 and 62A.11-112.

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62A.9A-107 << 62A.9A-108 >> 62A.9A-109

RCW 62A.9A-108
Sufficiency of description in security agreement.

(a) **Sufficiency of description.** Except as otherwise provided in subsections (c), (d), and (e) of this section, a description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.

(b) **Examples of reasonable identification.** Except as otherwise provided in subsection (d) of this section, a description of collateral reasonably identifies the collateral if it identifies the collateral by:

(1) Specific listing;

(2) Category;

(3) Except as otherwise provided in subsection (e) of this section, a type of collateral defined in the Uniform Commercial Code;

(4) Quantity;

(5) *Computational or allocational formula or procedure; or*

(6) Except as otherwise provided in subsection (c) of this section, any other method, if the identity of the collateral is objectively determinable.

(c) **Supergeneric description not sufficient.** A description of collateral as "all the debtor's assets" or "all the debtor's personal property" or using words of similar import does not reasonably identify the collateral. However, as provided in RCW 62A.9A-504, such a description is sufficient in a financing statement.

(d) **Investment property.** Except as otherwise provided in subsection (e) of this section, a description of a security entitlement, securities account, or commodity account is sufficient if it describes:

(1) The collateral by those terms or as investment property; or

(2) The underlying financial asset or commodity contract.

(e) **When description by type insufficient.** A description only by type of collateral defined in the Uniform Commercial Code is an insufficient description of:

(1) A commercial tort claim; or

(2) In a consumer transaction, consumer goods, a security entitlement, a securities account, or a commodity account.

[2000 c 250 § 9A-108.]

RCW 62A.9A-109
Scope.

(a) **General scope of Article.** Except as otherwise provided in subsections (c) and (d) of this section, this Article applies to:

(1) A transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract;

(2) An agricultural lien;

(3) A sale of accounts, chattel paper, payment intangibles, or promissory notes;

(4) A consignment;

(5) A security interest arising under RCW 62A.2-401, 62A.2-505, 62A.2-711(3), or 62A.2A-508(5), as provided in RCW 62A.9A-110; and

(6) A security interest arising under RCW 62A.4-210 or 62A.5-118.

(b) **Security interest in secured obligation.** The application of this Article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this Article does not apply.

(c) **Extent to which Article does not apply.** This Article does not apply to the extent that:

(1) A statute, regulation, or treaty of the United States preempts this Article;

(2) Another statute of this state expressly governs the creation, perfection, priority, or enforcement of a security interest created by this state or a governmental unit of this state;

(3) A statute of another state, a foreign country, or a governmental unit of another state or a foreign country, other than a statute generally applicable to security interests, expressly governs creation, perfection, priority, or enforcement of a security interest created by the state, country, or

governmental unit; or

(4) The rights of a transferee beneficiary or nominated person under a letter of credit are independent and superior under RCW 62A.5-114.

(d) **Inapplicability of Article.** This Article does not apply to:

(1) A landlord's lien, other than an agricultural lien;

(2) A lien, other than an agricultural lien, given by statute or other rule of law for services or materials, but RCW 62A.9A-333 applies with respect to priority of the lien;

(3) An assignment of a claim for wages, salary, or other compensation of an employee;

(4) A sale of accounts, chattel paper, payment intangibles, or promissory notes as part of a sale of the business out of which they arose;

(5) An assignment of accounts, chattel paper, payment intangibles, or promissory notes which is for the purpose of collection only;

(6) An assignment of a right to payment under a contract to an assignee that is also obligated to perform under the contract;

(7) An assignment of a single account, payment intangible, or promissory note to an assignee in full or partial satisfaction of a preexisting indebtedness;

(8) A transfer of an interest in or an assignment of a claim under a policy of insurance, other than an assignment by or to a health-care provider of a health-care-insurance receivable and any subsequent assignment of the right to payment, but RCW 62A.9A-315 and 62A.9A-322 apply with respect to proceeds and priorities in proceeds;

(9) An assignment of a right represented by a judgment, other than a judgment taken on a right to payment that was collateral;

(10) A right of recoupment or set-off, but:

(A) RCW 62A.9A-340 applies with respect to the effectiveness of rights of recoupment or set-off against deposit accounts; and

(B) RCW 62A.9A-404 applies with respect to defenses or claims of an account debtor;

(11) The creation or transfer of an interest in or lien on real property, including a lease or rents thereunder, except to the extent that provision is made for:

(A) Liens on real property in RCW 62A.9A-203 and 62A.9A-308;

(B) Fixtures in RCW 62A.9A-334;

(C) Fixture filings in RCW 62A.9A-501, 62A.9A-502, 62A.9A-512, 62A.9A-516, and 62A.9A-519; and

(D) Security agreements covering personal and real property in RCW 62A.9A-604;

(12) An assignment of a claim arising in tort, other than a commercial tort claim, but RCW 62A.9A-315 and 62A.9A-322 apply with respect to proceeds and priorities in proceeds;

(13) An assignment in a consumer transaction of a deposit account on which checks can be drawn, but RCW 62A.9A-315 and 62A.9A-322 apply with respect to proceeds and priorities in proceeds; or

(14) A transfer by this state or a governmental unit of this state.

[2000 c 250 § 9A-109.]

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62A.9A-202 << 62A.9A-203 >> 62A.9A-204

RCW 62A.9A-203
Attachment and enforceability of security interest; proceeds; supporting obligations; formal requisites.

(a) **Attachment.** A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

(b) **Enforceability.** Except as otherwise provided in subsections (c) through (i) of this section, a security interest is enforceable against the debtor and third parties with respect to the collateral only if:

(1) Value has been given;

(2) The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and

(3) One of the following conditions is met:

(A) The debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;

(B) The collateral is not a certificated security and is in the possession of the secured party under RCW 62A.9A-313 pursuant to the debtor's security agreement;

(C) The collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under RCW 62A.8-301 pursuant to the debtor's security agreement; or

(D) The collateral is deposit accounts, electronic chattel paper, investment property, letter-of-credit rights, or electronic documents, and the secured party has control under RCW62A.7-106 , 62A.9A-104, 62A.9A-105, 62A.9A-106, or 62A.9A-107 pursuant to the debtor's security agreement.

(c) **Other UCC provisions.** Subsection (b) of this section is subject to RCW 62A.4-210 on the security interest of a collecting bank, RCW

62A.5-118 on the security interest of a letter-of-credit issuer or nominated person, RCW 62A.9A-110 on a security interest arising under Article 2 or 2A, and RCW62A.9A-206 on security interests in investment property.

(d) **When person becomes bound by another person's security agreement.** A person becomes bound as debtor by a security agreement entered into by another person if, by operation of law other than this Article or by contract:

(1) The security agreement becomes effective to create a security interest in the person's property; or

(2) The person becomes generally obligated for the obligations of the other person, including the obligation secured under the security agreement, and acquires or succeeds to all or substantially all of the assets of the other person.

(e) **Effect of new debtor becoming bound.** If a new debtor becomes bound as debtor by a security agreement entered into by another person:

(1) The agreement satisfies subsection (b)(3) of this section with respect to existing or after-acquired property of the new debtor to the extent the property is described in the agreement; and

(2) Another agreement is not necessary to make a security interest in the property enforceable.

(f) **Proceeds and supporting obligations.** The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by RCW 62A.9A-315 and is also attachment of a security interest in a supporting obligation for the collateral.

(g) **Lien securing right to payment.** The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.

(h) **Security entitlement carried in securities account.** The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account.

(i) **Commodity contracts carried in commodity account.** The attachment of a security interest in a commodity account is also attachment of a security interest in the commodity contracts carried in the commodity account.

[2012 c 214 § 1503; 2000 c 250 § 9A-203.]

RAYMOND E. COLBERT and RHONDA L. COLBERT, husband and wife, Respondents,

v.

U.S. BANK OF WASHINGTON, NATIONAL ASSOCIATION, a National Bank, Appellant.

No. 28508-1-III

Court of Appeals of Washington, Division 3

June 15, 2010

UNPUBLISHED OPINION

Sweeney, J.

This is a dispute over the existence and payment of two Washington college savings bonds. The owners of the bonds claimed the bank lost the bonds and sued for the proceeds. The bank has no record of the bonds, suggests that it may have paid out on them already, and says the bond holders should not be allowed to assert a claim for the proceeds, regardless, because they failed to list the bonds in their bankruptcy schedules. At the invitation of the lawyers, the trial court resolved the dispute on cross motions for summary judgment. We conclude that there are genuine issues of material fact that preclude summary resolution of this dispute and reverse and remand for trial.

FACTS

Raymond and Rhonda Colbert bought two $25, 000 State of Washington general obligation college savings bonds for their sons from U.S. Bank of Washington in 1989. The Colberts' bonds could not be redeemed before their maturity dates. One matured in 2003; the other in 2007.

The Colberts tried to redeem both bonds in 2007. U.S. Bank responded that it did not have a record of the bonds. The Colberts then asked U.S. Bank of Investments (U.S. Bank's affiliate) and the Bank of New York (a bond paying agent) for records of the bonds. U.S. Bank of Investments said it had no record of the bonds. And the Bank of New York said it was "the paying agent for the issues, but [did] not have any holdings for [the bonds]." Clerk's Papers (CP) at 610. The Bank of New York found no book entry for the 2003 bond and found a book entry in someone else's name for the 2007 bond.

The Colberts sent U.S. Bank and U.S. Bank of Investments an affidavit of lost instrument and demanded that they pay on the bonds. Neither bank responded. So the Colberts sued U.S. Bank for enforcement and payment of the bonds.

Both parties moved for summary judgment. U.S. Bank argued that the Colberts should be judicially estopped from enforcing the bonds because they failed to disclose the bonds in their 2002 and 2005 bankruptcy proceedings. The Colberts filed for chapter 11 bankruptcy in 2002 and chapter 12 bankruptcy in 2005. They named U.S. Bank as a creditor in the first bankruptcy. But the Colberts did not list either the bonds or any claim to the bond proceeds as an asset in either bankruptcy proceeding. The first bankruptcy ended with an approved repayment plan and decree. The court dismissed the second bankruptcy after it approved a settlement agreement between the Colberts and RFC Property I, Inc. U.S. Bank's creditor's claims were assigned to RFC.

U.S. Bank also argued that the Colberts failed to show the terms of the bonds or that they were lost. The bank argued that the bonds could not be lost because they are electronic and that their terms were not set forth in the "Confirmation Safe-Keeping Receipts" produced by the Colberts. Instead, the bank claimed a document entitled, "Official Statement, " set forth the bonds' terms.

The trial court denied U.S. Bank's motion for summary judgment and granted summary judgment to the Colberts. U.S. Bank appeals.

DISCUSSION

Standard of Review

The issues here were resolved on cross motions for summary judgment and so our review is de novo. *Skinner v. Holgate,* 141 Wn.App. 840, 847, 173 P.3d 300 (2007). That is, we place ourselves in the trial court's position and consider the facts before that court in the light most favorable to the nonmoving party. *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn.App. 222, 227, 108 P.3d 147 (2005).

Summary judgment is appropriate "if the pleadings, . . . answers to interrogatories, . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). The moving party has the initial burden of showing that no genuine issue of material fact exists. CR 56(e); *Del Guzzi Constr. Co. v. Global Nw. Ltd.*, 105 Wn.2d 878, 882, 719 P.2d 120 (1986). If the moving party satisfies its burden, the nonmoving party must produce specific facts that show the presence of a genuine issue of material fact for trial. CR 56(e); *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

The Colberts' Summary Judgment Motion

U.S. Bank first contends that the Colberts were not entitled to summary judgment on the question of whether

they satisfied the requirements for a lost instrument under RCW 62A.3-309. That statute requires that they show (1) the bonds' terms, (2) their right to enforce the bonds, (3) their possession of the bonds at a time when they had a right to enforce them, (4) the absence of a transfer or lawful seizure of the bonds, and (5) the inability to gain possession of the bonds because their whereabouts are unknown. RCW 62A.3-309.

U.S. Bank maintains that genuine issues of fact remain over the bonds' terms and the Colberts' right to enforce the bonds.

The Bonds' Terms

The Colberts produced documents that did not show the bonds' terms-a confirmation/safekeeping receipt, a securities contract, and an untitled document adding terms to the securities contract for each bond. The receipt contains no terms. And the securities contracts contain only general terms between the Colberts and U.S. Bank, not terms specific to the bonds at issue. U.S. Bank produced a document entitled, "Official Statement $130, 000, 000 State of Washington General Obligation College Savings Bonds, Series 1989." CP at 388-96. This document contains specific terms for the bonds. It is undisputed and evidence of the bonds' terms.

The Colberts' Right to Enforce the Bonds

The right to require payment of the bonds follows if the Colberts (1) possessed the bonds, (2) could enforce them when they lost possession of them, (3) did not personally transfer the bonds, (4) did not lose them to a lawful seizure, and (5) cannot reasonably repossess them because they were lost, destroyed, or stolen. RCW 62A.3-309.

First, there is a question of fact as to whether the Colberts possessed the two bonds. The Colberts possessed the bonds if they owned them. *See* Webster's Third New International Dictionary 1770 (1993) (defining "possess"). And receipts show the Colberts purchased two bonds in 1989. The receipts are proof of possession. But there is also evidence that the Colberts did not possess the bonds. Bankruptcy schedules from 2002 and 2005 do not show that the Colberts owned any bonds. And each bank the Colberts contacted said it did not have a record of the bonds. The Colberts maintain that they owned the bonds in 2002 and 2005 but did not list them in their bankruptcy schedules because they held the bonds in trust for their sons and their lawyer told them they did not have to list them. But the record contains no evidence of such a trust. There is, then, an issue of fact as to whether the Colberts possessed the bonds when they reached maturity.

The receipts, bankruptcy schedules, and the banks' responses also raise issues of fact about when the Colberts lost possession of the bonds and whether they were enforceable at the time. There are, then, genuine issues of fact as to whether the Colberts have a right to enforce the bonds. The Colberts were not entitled to summary judgment. CR 56(c).

U.S. Bank's Summary Judgment Motion

The Colberts rely on *Miller v. Campbell*[1] for the proposition that, because judicial estoppel is an equitable remedy, its application is vested in the sound discretion of the trial court. Resp't's Br. at 17. And, while equitable remedies like judicial estoppel may have been the province of the trial court at one time, it is clear that the modern rule is that they are like any other legal cause of action:

> The Court of Appeals, in affirming the equitable relief, agreed with [Vaughn Community Church], holding that trial courts have broad discretionary power in fashioning equitable remedies and such action is typically reviewed for abuse of discretion. This standard is incorrect.
>
> While the fashioning of the remedy may be reviewed for abuse of discretion, the *question of whether equitable relief is appropriate is a question of law.*

Niemann v. Vaughn Cmty. Church, 154 Wn.2d 365, 374, 113 P.3d 463 (2005) (emphasis added) (citations omitted).

Judicial estoppel, like other equitable doctrines, requires proof of specific elements. *Baldwin v. Silver*, 147 Wn.App. 531, 535-36, 196 P.3d 170 (2008). Whether or not the court's factual findings support those elements is a question of law that we will review de novo, giving no deference to the trial court. *Id.* And, of course, we will review the court's findings for substantial evidence. *Id.*

The Bank contends that it was entitled to summary judgment on its claim of judicial estoppel. Judicial estoppel requires a showing of three elements: (1) a party's current position is inconsistent with an earlier position; (2) an earlier court accepted the earlier position, creating the perception that the earlier court or the later court was misled; and (3) the party gets an unfair advantage or imposes an unfair disadvantage on the opposing party if not estopped. *Skinner*, 141 Wn.App. at 848.

Inconsistent Positions

Bankruptcy petitioners must disclose all of their assets to the court, including all of their claims and potential causes of action. *Id.* at 848-49. The Colberts represented in their chapter 11 and chapter 12 bankruptcy filings that they neither owned bonds nor held bonds for others. They also represented that they had no contingent claims to redeem bonds. But the Colberts now claim that they have owned two bonds since 1989 and have had a right to redeem one since 2003 and the other since 2007. The Colberts' current position, then, is inconsistent with their earlier position in their chapter 11 and chapter 12

bankruptcy cases. But, again, there is an issue of fact as to whether and when the Colberts' possessed these bonds. They may have held them and lost them before their first bankruptcy.

Moreover, it is not clear that a court can judicially estop the Colberts' action. Courts generally estop debtors from benefitting from undisclosed assets after their bankruptcy proceedings close. *Id.* at 848. The status of the bank's debt and whether or not failure to list the claim disadvantaged the bank, given the debts owed to the bank, are questions of fact not properly the object of summary judgment.

Attorney Fees

U.S. Bank requests statutory attorney fees. It appears to base its request on RAP 14.2 and RAP 14.3. Those rules authorize an award of costs, including statutory attorney fees, to the substantially prevailing party on appeal. RAP 14.2, 14.3. Neither U.S. Bank nor the Colberts is the substantially prevailing party here. Both parties prevailed in part. Each party should, therefore, bear its own costs. *In re Marriage of Goodell*, 130 Wn.App. 381, 394, 122 P.3d 929 (2005).

We reverse the order granting the Colberts' motion for summary judgment, affirm the order denying U.S. Bank's motion for summary judgment, and remand for trial on both claims-lost instrument and judicial estoppel.

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

We Concur: Korsmo, A.C.J., Brown, J.

Notes:

[1] *Miller v. Campbell*, 137 Wn.App. 762, 771, 155 P.3d 154 (2007).

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROCIO TRUJILLO, an unmarried woman, Appellant, v. NORTHWEST TRUSTEE SERVICES, INC., a Washington corporation, Respondent, WELLS FARGO, NA, Defendant.	)	No. 70592-0-I DIVISION ONE PUBLISHED FILED: June 2, 2014

Cox, J. — The question that we decide is whether the successor trustee under a deed of trust securing a delinquent note in this case breached its duty of good faith under the Deeds of Trust Act, RCW 61.24.010(4).[1] Specifically, we decide whether Northwest Trustee Services Inc. (NWTS), the successor trustee, was entitled to rely on the beneficiary declaration of Wells Fargo Bank, N.A. for authority to schedule a trustee's sale of property owned by Rocio Trujillo. We hold that the declaration satisfies the requirements of RCW 61.24.030(7)(a). Under the circumstances of this case, NWTS was entitled to rely on that

[1] Brief of Appellant (Oct. 7, 2013) at 7.

declaration as evidence of the proof required under this statute. NWTS did not violate its duty of good faith under the Deeds of Trust Act.

The trial court properly granted NWTS's CR 12(b)(6) motion to dismiss. We affirm.

The material facts are not disputed. In 2006, Trujillo obtained a loan for $185,900 from Arboretum Mortgage Corp. This loan was evidenced by a promissory note that was secured by a deed of trust dated March 29, 2006 encumbering her real property.[2] The deed of trust was recorded in King County, Washington on March 31, 2006.[3]

Trujillo claims that Arboretum sold this loan to Wells Fargo in 2006.[4] She further claims that Wells Fargo sold the loan to the Federal National Mortgage Association ("Fannie Mae") and retained the loan servicing rights.[5]

This record reflects that the deed of trust was assigned to Wells Fargo from Arboretum by the Assignment of Deed of Trust dated February 2, 2012.[6] The assignment was recorded in King County, Washington on February 2, 2012.[7]

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[2] Clerk's Papers at 17.

[3] Id.

[4] Brief of Appellant at 6.

[5] Id.

[6] Clerk's Papers at 35.

[7] Id.

Trujillo admits that she "defaulted on [her loan] on November 1, 2011."[8]

By its beneficiary declaration dated March 14, 2012, delivered to NWTS, Wells Fargo declared under penalty of perjury that Wells Fargo "is the actual holder of the promissory note . . . evidencing the [delinquent Trujillo] loan or has requisite authority under RCW 62A.3-301 to enforce said [note]."[9]

The Notice of Default dated May 30, 2012, which NWTS transmitted to Trujillo, itemized the amounts in arrears for the delinquent loan.[10] Moreover, the notice provided to Trujillo contained certain contact information for her delinquent loan.[11] Specifically, this notice states, "The owner of the note is Federal National Mortgage Association (Fannie Mae)," and it further provides Fannie Mae's address.[12] The same page of this notice states, "The loan servicer for this loan is Wells Fargo Bank, N.A.," and it further states Wells Fargo's address.[13]

NWTS recorded the Notice of Trustee's Sale dated July 3, 2012.[14] The notice was recorded on July 10, 2012, and it scheduled a sale date of November

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[8] Plaintiff Trujillo's Complaint Against Foreclosure in Violation of Washington Deed of Trust Act at 3; Brief of Appellant at 6.

[9] Clerk's Papers at 36.

[10] Id. at 37-39.

[11] Id. at 38.

[12] Id.

[13] Id.

[14] Id. at 41-44.

9, 2012 for Trujillo's property.[15] Although this record does not tell us, we assume that sale did not occur, as originally scheduled. We reach this conclusion because this action followed that November 2012 scheduled sale date.

In February 2013, Trujillo, acting pro se, commenced this action against NWTS and Wells Fargo. She claimed that NWTS and Wells Fargo violated various provisions of the Deeds of Trust Act. She also claimed violations of the Criminal Profiteering Act and the Consumer Protection Act. She sought damages for these alleged violations as well as for claimed intentional infliction of emotional distress. Moreover, she sought injunctive relief to restrain the successor trustee's sale of her property as well as an award of attorney fees.

NWTS moved to dismiss Trujillo's complaint pursuant to CR 12(b)(6). The trial court granted this motion and dismissed with prejudice her claims against NWTS. From this record, it appears that the trial court allowed separate claims against Wells Fargo to stand unaffected by the court's decision on this NWTS motion.[16]

Trujillo appeals. Wells Fargo is not a party to this appeal.[17]

STANDARD OF REVIEW

Trujillo argues that we should review the trial court's order as a summary judgment order under CR 56(c). NWTS argues that the trial court's order should be reviewed as a dismissal under CR 12(b)(6). We agree with NWTS.

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[15] Id. at 41-42.

[16] Report of Proceedings (May 31, 2013) at 20-21.

[17] Notice of Appeal at 1.

In Cutler v. Phillips Petroleum Co., the supreme court explained that courts should "dismiss a claim under CR 12(b)(6) only if it appears beyond a reasonable doubt that no facts exist that would justify recovery."[18] "'Under this rule, a plaintiff's allegations are presumed to be true', and 'a court may consider hypothetical facts not part of the formal record.'"[19] "CR 12(b)(6) motions should be granted 'sparingly and with care' and 'only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.'"[20]

CR 12(b)(6), in part, provides:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . . A motion making any of these defenses shall be made before pleading if a further pleading is permitted. . . . If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. ***If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.***[21]

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[18] 124 Wn.2d 749, 755, 881 P.2d 216 (1994).

[19] Id.

[20] Id. (quoting Hoffer v. State, 110 Wn.2d 415, 420, 755 P.2d 781 (1988)).

[21] (Emphasis added.)

A trial court's ruling on a motion to dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6) is a question of law and is reviewed de novo by an appellate court.[22]

In contrast, under CR 56(c), a party may move for summary judgment if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. A trial court's grant of summary judgment is also reviewed de novo.[23]

An appellate court treats a motion to dismiss as a motion for summary judgment "when matters outside the pleading are presented to and not excluded by the court."[24] But as the rule and case authority plainly indicate "[d]ocuments whose contents are alleged in a complaint but which are not physically attached to the pleading may . . . be considered in ruling on a CR 12(b)(6) motion to dismiss."[25] Correspondingly, where matters outside the pleadings are not considered by the court, the motion is not treated as one for summary judgment.[26]

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[22] Cutler, 124 Wn.2d at 755.

[23] Aba Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P.3d 574 (2006).

[24] Sea-Pac Co., Inc. v. United Food and Commercial Workers Local Union 44, 103 Wn.2d 800, 802, 699 P.2d 217 (1985).

[25] Rodriguez v. Loudeye Corp., 144 Wn. App. 709, 726, 189 P.3d 168 (2008).

[26] Id. at 725.

Additionally, where the "basic operative facts are undisputed and the core issue is one of law," the motion to dismiss need not be treated as a motion for summary judgment.[27]

Here, the trial court entered an order granting NWTS's motion to dismiss under CR 12(b)(6). Because the supporting documents the trial court considered were alleged in the complaint and the "basic operative facts are undisputed and the core issue is one of law," we review the order under CR 12(b)(6), not as a summary judgment under CR 56(c).[28]

RCW 61.24.030(7)(a)

In her briefing, Trujillo identifies the sole issue on appeal as: Whether NWTS breached its duty of good faith by "recording, transmitting and serving the [notice of trustee's sale] after receiving a declaration from Wells [Fargo] stating that [the bank] was the actual holder of the Note."[29] The essence of the claim that she asserts is that the beneficiary declaration that Wells Fargo signed under penalty of perjury and delivered to NWTS did not satisfy the requirements of RCW 61.24.030(7)(a).[30] We hold that the declaration satisfied this statute.

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[27] Ortblad v. State, 85 Wn.2d 109, 111, 530 P.2d 635 (1975).

[28] Id.

[29] Brief of Appellant at 7.

[30] Id. at 12-16, 26-27.

"When construing a statute, our goal is to determine and effectuate legislative intent."[31] We first "give effect to the plain meaning of the language used as the embodiment of legislative intent" where possible.[32] "We determine plain meaning 'from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.'"[33] "In general, words are given their ordinary meaning, but when technical terms and terms of art are used, we give these terms their technical meaning."[34]

This court reviews de novo questions involving the interpretation of statutes.[35]

The Deeds of Trust Act, specifically RCW 61.24.030, states certain requisites for a trustee's sale for a nonjudicial foreclosure of a deed of trust. The version of this statute that was in effect at the time of commencement of the nonjudicial foreclosure proceeding involving Trujillo's real property in early 2012 stated, in relevant part:

It shall be requisite to a trustee's sale:

. . .

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[31] Swinomish Indian Tribal Cmty. v. Wash. State Dep't of Ecology, 178 Wn.2d 571, 581, 311 P.3d 6 (2013).

[32] Id.

[33] Id. (internal quotation marks omitted) (quoting TracFone Wireless, Inc. v. Wash. Dep't of Revenue, 170 Wn.2d 273, 281, 242 P.3d 810 (2010)).

[34] Id.

[35] Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

> (7)(a) 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.***
>
> (b) Unless the trustee has violated his or her duty under RCW 61.24.010(4), ***the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection.***[36]

Both the former and current versions of RCW 61.24.030(7)(a) require a trustee or successor trustee to have proof that the beneficiary has authority to enforce a note "secured by the deed of trust" before recording a notice of a trustee's sale.[37] Prior to the 2011 amendments to this statute, there was no such proof requirement.[38]

RCW 61.24.030(7)(a) specifies what proof of authority to enforce such a note "shall be sufficient." Finally, unless the trustee or successor trustee violates his or her duty under RCW 61.24.010(4), he or she is "entitled to rely on the beneficiary's declaration" to satisfy the proof requirement of the statute.[39]

Here, the parties advance conflicting views on how to read and properly apply RCW 61.24.030(7)(a). Trujillo claim that NWTS was required to obtain

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[36] Former RCW 61.24.030 (Laws of 2011, ch. 58, § 4) (emphasis added).

[37] Compare id., with RCW 61.24.030 (Laws of 2012, ch. 185, § 9); see also RCW 61.24.010(2) (permitting the resignation of a trustee named in a deed of trust and the appointment of a successor trustee).

[38] See former RCW 61.24.030 (Laws of 2009, ch. 292, § 8).

[39] RCW 61.24.030(7)(b).

proof from Wells Fargo that it was the "owner" of her delinquent note.[40] She further claims that without such proof the successor trustee was not authorized to record the notice of trustee's sale.[41] This argument is primarily based on the first sentence of this statute, which refers to the beneficiary as the "owner" of the note.

NWTS disagrees with this argument. It argues that Wells Fargo, the beneficiary, was the "holder" of the note and, as such, had the authority to provide the proof required under this statute.[42] This argument is primarily based on the second sentence of the statute, which refers to the beneficiary as the "holder" of the note. NWTS further argues that it both complied with this statute and its duty of good faith under the Deeds of Trust Act. Thus, it claims it was entitled to rely on the beneficiary declaration that Wells Fargo provided.

Commentators have noted that there has been considerable confusion both in judicial decisions and statutes over the distinction between the "owner" of a note and the "holder," who has the right to enforce the note.[43] They have also identified Washington's Deeds of Trust Act as an example of this confusion.[44]

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[40] Brief of Appellant at 7.

[41] Id.

[42] Opening Brief of Appellee Northwest Trustee Services, Inc. at 5-6.

[43] Dale A. Whitman & Drew Milner, *Foreclosing on Nothing: The Curious Problem of the Deed of Trust Foreclosure without Entitlement to Enforce the Note*, 66 ARK. L. REV. 21, 26 (2013).

[44] Id. at 26 n.23.

Resolution of the conflicting views in this case requires that we determine the legislature's intent in enacting this statute. To determine legislative intent, we focus our inquiry by examining certain key terms of this statute—"beneficiary," "owner," and "holder." In examining these key terms, we determine their plain meanings from what this statute and related statutes say about them.[45] And where these technical terms are used, we give them their technical meanings.[46]

The first of these technical terms in RCW 61.24.030(7)(a) is "beneficiary." There is no dispute in this case that Wells Fargo is the "beneficiary" of the deed of trust securing Trujillo's delinquent note. This record contains the beneficiary declaration of Wells Fargo dated March 14, 2012 that states:

> BENEFICIARY DECLARATION
> (NOTE HOLDER)
> (Executed by Officer of Beneficiary)
>
> . . .
>
> The undersigned, under penalty of perjury declares as follows:
>
> Wells Fargo Bank, NA is the actual holder of the [Trujillo] promissory note . . . or has requisite authority under RCW 62A.3-301 to enforce said obligation.
>
> . . .
>
> [s/ Vice President of Loan Documentation][47]

There is no evidence in this record that contests either the validity or truthfulness of this beneficiary declaration, signed by an officer of Wells Fargo

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[45] Swinomish Indian Tribal Cmty., 178 Wn.2d at 581.

[46] Id.

[47] Clerk's Papers at 36.

under penalty of perjury and delivered to NWTS for the purpose of complying with this statute. Absent conflicting evidence, the declaration should be taken as true.

We note that our conclusion about the status of Wells Fargo is consistent with the supreme court's analysis in Bain v. Metropolitan Mortgage Group, Inc. regarding the Deeds of Trust Act's definition of "beneficiary."[48] As that court held, the beneficiary is "the ***holder*** of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation."[49] The "instrument . . . evidencing the obligation secured" by the deed of trust is the note in this case.[50] And the Uniform Commercial Code further clarifies that the "'holder'" of the note means "'the person in possession'" of the note.[51]

This record reflects that Trujillo concedes in her pleadings that "as soon as Wells [Fargo] began the foreclosure process, Fannie Mae transferred ***possession*** of the Note to Wells [Fargo]."[52] This concession is significant in that it is consistent with the beneficiary declaration before us. It is also consistent

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[48] 175 Wn.2d 83, 98-99, 285 P.3d 34 (2012).

[49] Id. (emphasis added) (quoting RCW 61.24.005(2)).

[50] See id. at 101-03.

[51] Id. at 103-04 (quoting former RCW 62A.1-201(20) (2001)).

[52] Plaintiff Trujillo's Complaint Against Foreclosure in Violation of Washington Deed of Trust Act at 4 (emphasis added).

with Bain's discussion of who constitutes a beneficiary for purposes of the Deeds of Trust Act.

For these reasons, we conclude that Wells Fargo, which states under penalty of perjury, that it is the holder of the note, has provided proof that it is the "beneficiary" of the deed of trust securing the delinquent note for purposes of this statute.

We next consider the technical term "owner" in this statute. The term "owner" is not defined in the Deeds of Trust Act. Likewise, the UCC does not define the term for purposes of Article 3, Negotiable Instruments. Nevertheless, commentators have characterized ownership as "the right to economic benefits of the note."[53]

The UCC does, however, make clear that the "person entitled to enforce" a note is not synonymous with the "owner" of the note. That distinction is explained in UCC Comment 1 to RCW 62A.3-203, which states in relevant part:

. . .

> Although transfer of an instrument might mean in a particular case that title to the instrument passes to the transferee, that result does not follow in all cases. ***The right to enforce an instrument and ownership of the instrument are two different concepts.*** A thief who steals a check payable to bearer becomes the holder of the check and a person entitled to enforce it, but does not become the owner of the check. If the thief transfers the check to a purchaser the transferee obtains the right to enforce the check. If the purchaser is not a holder in due course, the owner's claim to the check may be asserted against the purchaser. Ownership rights in instruments may be determined by principles of the law of property, independent of Article 3, which do not depend upon whether the instrument was transferred under Section 3-203.

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[53] Whitman, supra note 43, at 25.

> ***Moreover, a person who has an ownership right in an instrument might not be a person entitled to enforce the instrument.*** For example, suppose X is the owner and holder of an instrument payable to X. X sells the instrument to Y but is unable to deliver immediate possession to Y. Instead, X signs a document conveying all of X's right, title, and interest in the instrument to Y. Although the document may be effective to give Y a claim to ownership of the instrument, Y is not a person entitled to enforce the instrument until Y obtains possession of the instrument. No transfer of the instrument occurs under Section 3-203(a) until it is delivered to Y.
>
> . . .[54]

The absence of a definition of "owner" in either the Deeds of Trust Act or the UCC is not fatal to our determination of the effect of that term in RCW 61.24.030(7)(a). We say so for several reasons.

First, the use of different words in the same statute ordinarily means that the legislature did not intend them to mean the same thing.[55] Applying that principle here, we conclude that the legislature intended the words "owner" and "holder" to mean different things. Indeed, as we explained earlier in this opinion, the UCC states that these terms are not synonymous.[56]

Second, the supreme court stated decades ago that although these terms are not synonymous, this does not preclude the possibility that an "owner" of a note may also be its "holder." Where one has the status of both "owner" and "holder," it is the status of holder of the note that entitles the entity to enforce the obligation. Ownership of the note is not dispositive.

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[54] (Emphasis added.)

[55] Guillen v. Contreras, 169 Wn.2d 769, 776-77, 238 P.3d 1168 (2010).

[56] See UCC Comment 1 to RCW 62A.3-203.

The supreme court stated these principles in John Davis & Co. v. Cedar Glen No. Four, Inc.[57] In that case, the supreme court had before it an appeal of a mortgage foreclosure in which John Davis & Company had foreclosed on real property to satisfy delinquent notes of a corporation.[58] James R. Scott and his wife held mortgages against the same property.[59] The superior court decided that the mortgages of John Davis securing the delinquent notes had lien priority over the mortgages held by the Scotts.[60] The Scotts appealed.

On appeal, the Scotts contested the priority of the liens of the John Davis mortgages.[61] They argued that John Davis did not have authority to foreclose the mortgages.[62] This was based on the fact that a corporation other than John Davis had advanced to the borrower the funds for the loans evidenced by the notes that were secured by the mortgages held by John Davis at the time of the foreclosure.[63] The supreme court rejected that contention by stating:

> [John Davis] is the ***holder and owner*** of the notes and mortgages of the [borrower]. The ***holder*** of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument. See RCW 62.01.051. It is not

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[57] 75 Wn.2d 214, 450 P.2d 166 (1969).

[58] Id. at 215.

[59] Id.

[60] Id.

[61] Id. at 222.

[62] Id.

[63] Id.

> necessary for the ***holder*** to first establish that he has some beneficial interest in the proceeds.[64]

This passage explains that, at common law, the holder of a note could also be its owner at the same time. In that case, John Davis was both "holder and owner" of the notes, as the court expressly stated in the opinion.

Significantly, the quoted language also makes clear that, at common law, it was the status of holder of the note that was dispositive on the question of who had authority to enforce the note and mortgage. Likewise, payment to the holder discharged the debt evidenced by the note, regardless of ownership. The question of ownership was irrelevant to both enforcement and discharge, as evidenced by the omission of the term "owner" in the above discussion by the supreme court concerning enforcement and discharge.

It is also noteworthy that the supreme court cited former RCW 62.01.051 in support of its analysis in John Davis. The case was decided in 1969, but the events it described occurred before enactment of the UCC in Washington in 1965.

Significantly, the principles of former RCW 62.01.051 were incorporated into Article 3, Negotiable Instruments, when the UCC was enacted in Washington.[65] Specifically, RCW 62A.3-301 now states:

> "Person entitled to enforce" an instrument means (i) the ***holder*** of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to

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[64] Id. at 222-23 (emphasis added).

[65] See former RCW 62.01.051 (1955).

> RCW 62A.3-309 or 62A.3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the ***owner*** of the instrument or is in wrongful possession of the instrument.[66]

The language of subsection (i) of this provision of the current UCC makes clear, as did the John Davis court, that the "holder" of a note is entitled to enforce the note. It also makes clear that a "holder" may enforce the note "even though the [holder] is not the owner" of the note.[67]

We have no reason to conclude that the legislature intended to depart from either the common law, as articulated in John Davis, or the UCC, as articulated in RCW 62A.3-301, in enacting RCW 61.24.030(7)(a) regarding proof of who is entitled to enforce a note that is secured by a deed of trust. The language of the first sentence of RCW 61.24.030(7)(a) could have more clearly stated that a beneficiary who is the owner of a note is not always the holder of the note. The holder is entitled to enforce it. Better still, the legislature could have eliminated any reference to "owner" of the note in this provision because it is the "holder" of the note who is entitled to enforce it, regardless of ownership.

Nevertheless, when we consider the second sentence of this statute, specifying that the beneficiary must be the holder of the note for purposes of proof, together with the case authority and other related statutes we have discussed, we must conclude that the required proof is that the beneficiary must be the holder of the note. It need not show that it is the owner of the note.

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[66] (Emphasis added.)

[67] RCW 62A.3-301.

We next address the meaning of the technical term "holder." In doing so, we follow the analysis and conclusion set forth by the supreme court in Bain.[68]

There, the supreme court explained that the interpretation of the Deeds of Trust Act should be guided by relevant provisions of the Washington UCC, which include Article 3, Negotiable Instruments, and Article 1, general provisions.[69] RCW 62A.1-201 provides the definition of "holder" of a note:

> (21) "Holder" with respect to a negotiable instrument, means:
>
> (A) The person in ***possession*** of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession; . . . .[70]

Like the definition for "beneficiary," the definition of "holder" does not include any reference to the term "owner."

Here, as we observed early in this opinion, the record reflects that Wells Fargo had possession of Trujillo's note from the beginning of the foreclosure proceeding.[71] By definition, it is the "holder" of that note.

Moreover, as the beneficiary declaration states, Wells Fargo is also entitled to enforce the note, a negotiable instrument, under RCW 62A.3-301 because it is the "holder of the instrument." RCW 61.24.030(7)(a), properly read, does not require Wells Fargo to also be the "owner" of the note. Rather, it

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[68] Bain, 175 Wn.2d at 103-04.

[69] Id.

[70] (Emphasis added.)

[71] See Plaintiff Trujillo's Complaint Against Foreclosure in Violation of Washington Deed of Trust Act at 4.

requires that a person entitled to enforce a note be a holder and need not also be an owner.

In sum, the beneficiary declaration in this case is sufficient under RCW 61.24.030(7)(a). Proof that Wells Fargo was the holder of the note was sufficient under this statute.

At oral argument of this case, recently retained appellate counsel for Trujillo made a new argument on appeal. Counsel conceded, as the record reflects, that "as soon as Wells [Fargo] began the foreclosure process, Fannie Mae transferred ***possession*** of the Note to Wells [Fargo]."[72] Nevertheless, counsel took the position that such possession was not "legal possession of the promissory note as required to be the 'holder' under the UCC, RCW 62A.1-201(b)(21), and to be the 'beneficiary' under the Deed[s] of Trust Act, RCW 61.24.005(2)."[73] In support of this argument, counsel cites the Report of the Permanent Editorial Board for the Uniform Commercial Code dated November 14, 2011 ("Report").[74] Counsel also cites § 18.31 of Washington Practice, "Powers of Collection Agents."[75] Because these authorities have nothing to do with this case, we reject this new argument on appeal.

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[72] Id. (emphasis added).

[73] Statement of Additional Authorities (April 3, 2014) at 1-2.

[74] Id. (citing REPORT OF PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, APPLICATION OF THE UNIFORM COMMERCIAL CODE TO SELECTED ISSUES RELATING TO MORTGAGE NOTES 9 n.38 (2011)).

[75] Id. at 2 (citing 18 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE TRANSACTIONS § 18.31, at 364-66 (2d ed. 2004)).

This argument is primarily based on footnote 38 of the Report. That footnote cites UCC § 9-313 and then discusses how possession of collateral may not be relinquished when it is delivered to another person.[76] However, it is vital to understand the context of this footnote. The main text of the Report that is associated with this footnote states:

> Section 9-203(b) of the Uniform Commercial Code provides that ***three*** criteria must be fulfilled ***in order for the owner of a mortgage note effectively to create a "security interest"*** (either an interest in the note securing an obligation or the outright sale of the note to a buyer) in it.
>
> . . .
>
> ***The third criterion may be fulfilled in either one of two ways.*** Either the debtor/seller must "authenticate" a "security agreement" that describes the note ***or the secured party must take possession of the note pursuant to the debtor's security agreement.***[77]

Reading footnote 38 in the context of the main text, it is clear that this portion of the Report addresses the criteria for the owner of a mortgage note to create a security interest in that note. One of the ways is for the secured party to take possession of the note.

But that has nothing to do with the nonjudicial foreclosure proceeding that is the subject of this action. That is because the foreclosure proceeding is not based on the creation of a personal property security interest in the note. Rather, the security interest underlying the foreclosure proceeding is the lien created by the deed of trust in the real property securing the note that is in the possession of

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[76] See REPORT OF PERMANENT EDITORIAL BOARD, supra note 74, at 9 n.38.

[77] Id. (emphasis added) (footnotes omitted).

Wells Fargo. Thus, UCC § 9-313, which is concerned with security interests in notes, has no bearing on this case.

Another section of the Report makes this point clear:

> Article 3 of the UCC provides a largely complete set of rules governing the obligations of parties on the note, including how to determine who may enforce those obligations and, thus, to whom those obligations are owed.
>
> . . .
>
> UCC Section 3-301 provides only three ways in which a person may qualify as the person entitled to enforce a note, two of which require the person to be in possession of the note (which may include possession by a third party that possesses it for the person):
>
> - The first way that a person may qualify as the person entitled to enforce a note is to be its "holder."[78]

Thus, Article 3, specifically § 3-301, is dispositive on the question of who is entitled to enforce the note. And, as we also previously discussed in this opinion, Bain and other authorities make reference to Article 3 of the UCC appropriate for purpose of the Deeds of Trust Act.[79] There is no authority supporting the proposition that Article 9 of the UCC applies to this nonjudicial foreclosure proceeding. We reject counsel's attempt to use UCC § 9-313 for a purpose for which it was not intended.

The reference to § 18.31 of Washington Practice adds nothing of substance to counsel's new argument. We also reject that reference to the extent it is used to support the argument that possession of the note in this case

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[78] Id. at 4-5 (footnote omitted).

[79] See Bain, 175 Wn.2d at 103-04; Whitman, supra note 43, at 26 n.23.

is inadequate to establish either the ability to enforce the note or the beneficiary status of Wells Fargo.

For these reasons, counsel's reliance on RCW 62A.9A-313, which addresses security interests in personal property, is wholly unpersuasive.

In the Statement of Additional Authorities dated March 5, 2014, counsel for Trujillo cites In re Meyer.[80] Counsel states that the United States Bankruptcy Court for the Western District of Washington has determined that being an owner of the note is a requirement of RCW 61.24.030(7)(a).[81] That case says no such thing.

Rather, that court expressly stated that it did not have to address the argument that counsel now makes in this case:

> The Meyers argue that a trustee may not rely on a beneficiary declaration executed by anyone other than the beneficiary. Further, they argue that the trustee must have proof, in the words of the statute, that the beneficiary is the "owner" of the note as opposed to the holder of the note. ***It is not necessary to address either of these arguments***, however, because the Court concludes that NWTS could not rely on the Beneficiary Declaration because it had no proof that Wells Fargo had authority to execute that declaration on behalf of U.S. Bank.[82]

Thus, Meyer does not provide any support for this new argument.

Counsel also cites Beaton v. JPMorgan Chase Bank, N.A. in a Statement of Additional Authorities dated March 5, 2014 to support the argument that RCW

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[80] Statement of Additional Authorities (March 6, 2014) at 1 (citing In re Meyer, 506 B.R. 533 (Bankr. W.D. Wash. 2014)).

[81] Id.

[82] Meyer, 506 B.R. at 548 (emphasis added).

61.24.030(7)(a) requires proof that the beneficiary must be the "owner" of the note.[83] We decline to follow that decision for several reasons.

There, the federal district court for the Western District of Washington considered whether the successor trustee under a deed of trust in that case violated the Deeds of Trust Act.[84] Specifically at issue was whether proof that the beneficiary is the owner of a note secured by a deed of trust is required by 61.24.030(7)(a).[85] That court held that the beneficiary declaration in that case was deficient because it relied on RCW 62A.3-301 to show authority to enforce the note.[86] According to that court, this was deficient because the beneficiary who provided the declaration "could be a nonholder in possession or a person not in possession who is entitled to enforce the instrument."[87] In short, the court decided that ownership of the note was required.[88]

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[83] Statement of Additional Authorities (March 6, 2014) at 1 (citing Beaton v. JPMorgan Chase Bank, N.A., 2013 WL 1282225 at *4-5 (W.D. Wash. March 26, 2013)).

[84] Beaton, 2013 WL 1282225, at *4.

[85] Id. at *4-*5.

[86] Id.

[87] Id. at *5.

[88] Id.

First, until now, no state appellate court has decided the meaning of RCW 61.24.030(7)(a). Thus, there has been no authoritative decision on this question of state law.[89]

Second, the Beaton court omitted any analysis of the portion of the beneficiary declaration in that case that expressly stated that the beneficiary was "the actual holder of the promissory note."[90] For the reasons we explained earlier in this opinion, proof of that status is what entitles a beneficiary to enforce a note secured by a deed of trust. Ownership of the note is irrelevant.

Third, the Beaton court also misread RCW 62A.3-301 as an impediment to proof of the right to enforce a note. Properly read, this statute merely clarifies that one entitled to enforce a note may be any of three specified persons:

> (i) the ***holder*** of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or 62A.3-418(d).[91]

The plain words of this statute also make clear that:

> A person may be a person entitled to enforce the instrument even though the person is not the ***owner*** of the instrument or is in wrongful possession of the instrument.[92]

For these reasons, we decline to follow the decision in Beaton.

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[89] See Bain, 175 Wn.2d at 90-91 (certifying questions regarding the Deeds of Trust Act to the Washington State Supreme Court).

[90] See RCW 61.24.030(7)(a).

[91] RCW 62A.3-301 (emphasis added).

[92] Id. (emphasis added).

Counsel also cites Pavino v. Bank of America, N.A. in his Further Statement Re Additional Authority dated May 7, 2014.[93] There, the federal district court for the Western District of Washington stated that there is no "legal authority holding that a 'person entitled to enforce' an instrument within the meaning of RCW 62A.3-301 qualifies as a 'beneficiary' within the meaning of RCW 61.24.005(2)."[94] But in Bain, the supreme court rejected that view.[95] Thus, this argument is not persuasive.

Counsel further argues that "'[t]he rights of *pro se* litigants require careful protection where highly technical requirements are involved, especially when enforcing these requirements might result in a loss of the opportunity to prosecute . . . a lawsuit on the merits.'"[96] He cites Garaux v. Pulley in support of this argument.[97]

There, the court had before it a motion to dismiss.[98] The issue was whether the district court had abused its discretion in applying certain procedural rules relating to the motion.[99] The court held the district court had abused its

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[93] Further Statement Re Additional Authority (May 7, 2014) at 1 (citing Pavino v. Bank of America, N.A., 2011 WL 834146 (W.D. Wash. March 4, 2011)).

[94] Pavino, 2011 WL 834146, at *4.

[95] See Bain, 175 Wn.2d at 104.

[96] Supplemental Statement of Additional Authorities (April 29, 2014) at 1 (quoting Garaux v. Pulley, 739 F.2d 437 (1984)).

[97] Id. (citing Garaux v. Pulley, 739 F.2d 437 (1984)).

[98] Garaux, 739 F.2d at 437.

[99] Id. at 439-40.

discretion in applying the rule that disadvantaged a pro se litigant.[100] That is the context in which the Ninth Circuit made the following statement:

> District courts must take care to insure that *pro se* litigants are provided with proper notice regarding the complex procedural issues involved in summary judgment proceedings. We hold that where the non-moving party is appearing *pro se*, the notice requirements of Rule 56(c) must be strictly adhered to when a motion to dismiss under Rule 12(b)(6) is converted into one for summary judgment.[101]

Here, there is no procedural rule that is being applied to disadvantage Trujillo. Rather, we construe the relevant statutes to determine what the laws require. There is no violation of the principle cited in that federal case.

Trujillo makes a number of arguments in her briefs asserting that Wells Fargo must prove that it is the owner of her delinquent note. None are persuasive.

Trujillo argues that the idea that the beneficiary, note holder, and note owner are the same person "permeates" the Deeds of Trust Act.[102] She points to a number of provisions to support this argument.[103] Nothing about these citations undercuts our conclusion that owner and holder are not legally synonymous terms for purposes of this act.

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[100] Id.

[101] Id.

[102] Reply Brief of Appellant at 4-7.

[103] Id. (citing RCW 61.24.040(2); RCW 61.24.070(2); RCW 61.24.163; RCW 61.24.005(2), (7); RCW 61.24.020).

First, she cites RCW 61.24.040(2) and the language in the notice of foreclosure form.[104] It states, "The attached Notice of Trustee's Sale is a consequence of default(s) in the obligation to . . . . . ., the Beneficiary of your Deed of Trust and owner of the obligation secured thereby."[105] This form is nothing more than that. It does not state the law. Our discussion earlier in this opinion extensively discusses the controlling law. In any event, the statute states that the form need only be "substantially" followed.[106]

Second, Trujillo cites RCW 61.24.070(2), which states who may bid at a trustee's sale.[107] It states, "The trustee shall, at the request of the beneficiary, credit toward the beneficiary's bid all or any part of the monetary obligations secured by the deed of trust."[108] Trujillo argues that this "type of bid would not be possible if the 'beneficiary' of the DOT was not the 'owner' of the debt obligation secured by the DOT."[109] This argument makes no sense. As we made clear earlier in this opinion, the holder of the note is entitled to enforce the note. Bidding at the sale is merely one of the rights to enforce the note. There simply is no requirement that the bidder at the foreclosure sale must be the owner of the note.

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[104] Reply Brief of Appellant at 5 (citing RCW 61.24.040(2)).

[105] RCW 61.24.040(2) (alteration in original).

[106] Id.

[107] Reply Brief of Appellant at 5-6 (citing RCW 61.24.070(2)).

[108] RCW 61.24.070(2).

[109] Reply Brief of Appellant at 6.

Third, Trujillo cites RCW 61.24.163, which outlines the foreclosure mediation program.[110] Subsection (5) explains the required documents that the beneficiary must transmit to the mediator.[111] These documents include:

> Proof that the entity claiming to be the beneficiary is the owner of any promissory note or obligation secured by the deed of trust. Sufficient proof may be a copy of the declaration described in RCW 61.24.030(7)(a).[112]

This statute's references to the beneficiary declaration in RCW 61.24.030(7)(a) does nothing to undercut the law that the terms "owner" and "holder" are not legal synonyms. We reach this conclusion despite the reference in the above text that mentions "owner" but not "holder."

Trujillo also argues that statements by two senators at a senate and house judiciary committee meeting show that certain legislators believed that the "beneficiary" of a deed of trust should be the "holder" ***and*** the "owner" of the promissory note.[113] In view of our analysis detailed earlier in this opinion, we reject the argument that these comments by only two legislators show legislative intent contrary to what we discussed previously in this opinion.

In sum, the Wells Fargo beneficiary declaration in this case is sufficient to comply with RCW 61.24.030(7)(a).

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[110] Id. (citing RCW 61.24.163).

[111] RCW 61.24.163(5).

[112] RCW 61.24.163(5)(c).

[113] Reply Brief of Appellant at 7-11.

RCW 61.24.030(7)(b)

Trujillo next argues that the requirements of RCW 61.24.030(7)(b) were not met.[114] We disagree.

RCW 61.24.030(7)(b) states:

> Unless the trustee has violated his or her duty under RCW 61.24.010(4), ***the trustee is entitled to rely on the beneficiary's declaration as evidence of proof required under this subsection.***[115]

RCW 61.24.010(4) provides that a "trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor."

Here, Trujillo fails to substantiate that there was any breach of any duty by NWTS under RCW 61.24.010(4). Accordingly, NWTS was entitled to rely on this Wells Fargo declaration, as the plain words of the statute provide.

In her Statement of Additional Authorities dated April 3, 2014, Trujillo cites Schroeder v. Excelsior Management Group, LLC and Klem v. Washington Mutual Bank to support her argument that NWTS breached its duty of good faith.[116] While these cases discuss the duty a trustee owes the beneficiary and the debtor, they do nothing to substantiate that NWTS breached its duty of good faith when it relied on this beneficiary declaration. Thus, these cases are not helpful.

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[114] Id. at 13.

[115] (Emphasis added.)

[116] Statement of Additional Authorities (April 3, 2014) at 1 (citing Schroeder v. Excelsior Mgmt. Group, LLC, 177 Wn.2d 94, 102 n.3, 107, 114, 297 P.3d 677 (2013); Klem v. Wash. Mut. Bank, 176 Wn.2d 771, 788-92, 295 P.3d 1179 (2013)).

MOTION TO SUPPLEMENT THE RECORD

Trujillo moves to supplement the record pursuant to RAP 9.6(a) with certain documents, some of which have already been authorized by this court. We deny the motion to the extent of the remaining documents.

Trujillo asserts that her response to Wells Fargo's motion for attorney fees and costs and its attachment, a letter from a state senator, are "necessary" because it explains the legislature's intent underlying SB 5191. In SB 5191, the legislature considered but declined to adopt a bill that would have changed the definition of "beneficiary" from its current meaning of "holder" to "owner."[117]

We deny the request to supplement the record with Trujillo's response to Wells Fargo's motion and its attachment. Trujillo's response to Wells Fargo's motion for attorney fees and costs was not before the trial court when it granted NWTS's motion to dismiss. And these materials are not necessary to our decision.

We affirm the order granting NWTS's CR 12(b)(6) motion to dismiss.

Cox, J.

WE CONCUR:

[117] See Opening Brief of Appellee Northwest Trustee Services, Inc. at 9-10.