No. 92211-0

SUPREME COURT FOR THE STATE OF WASHINGTON

KELLY BOWMAN,

Appellant/Plaintiff,

v.

SUNTRUST MORTGAGE, INC., et al.,

Respondents/Defendants.

ANSWER OF RESPONDENT NORTHWEST TRUSTEE SERVICES, INC. TO KELLY BOWMAN'S PETITION FOR REVIEW

Heidi Buck Morrison, WSBA No. 41769
Northwest Trustee Services, Inc.
Attorney for Respondent
Northwest Trustee Services, Inc.

13555 SE 36th St., Suite 100
Bellevue, WA 98006
(425) 213-5534 Phone
(425) 283-5968 Fax
hbuckmorrison@northwesttrustee.com

TABLE OF CONTENTS

I. Identity of Answering Party 1

II. Statement of Relief Sought 1

III. Facts Relevant to The Petition For Review 1

A. Factual History 1

B. Procedural History 3

IV. Answer to Issues Presented 4

V. Authority and Argument 5

A. Standard of Review 5

B. The Court of Appeals' Decision Does Not Conflict With Supreme Court Precedent 6

C. The Court of Appeals Properly Admitted the Declaration of SunTrust employee, Ms. Young 14

D. The Court of Appeals Correctly Affirmed the Trial Court's Decision Denying Bowman's Request for Continuance for Additional Discovery 17

E. Bowman Presents No Viable Reason for Review Based on the Assignment of Deed of Trust or NWTS' Reliance on the Beneficiary Declaration 18

F. The Trial Court Did Not Err in Granting Summary Judgment to NWTS on Bowman's CPA Claim 19

G. Bowman's Lawsuit Does Not Present a Substantial Public Interest 23

VI. Conclusion 24

TABLE OF AUTHORITIES

Case Law

Amer. Express Centurion Bank v. Stratman, 172 Wn. App. 667, 292 P.3d 128 (2012) 15

Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 285 P.3d 34 (2012) 4, 6, 7, 8, 9, 11, 19, 20

Bavand v. Chase Home Fin., LLC, 2015 WL 4400739 (Jul. 20, 2015) 21

Bowman v. SunTrust Mortgage, Inc., et al, 2015 WL 4730115, (Wash. Ct. App. Aug. 10, 2015) (unpublished) 1, 4, 13, 14, 23

Brown v. Washington State Department of Commerce, Case No. 90652-1 9

Butler v. Joy, 116 Wn. App. 291, 65 P.3d 671 (2003) 17, 18

F.A.A. v. Cooper, 132 S. Ct. 1441, 1450, 182 L. Ed. 2d 497 (2012) 10

Cooper's Mobile Homes, Inc. v. Simmons, 94 Wn.2d 321, 617 P.2d 415 (1980) 22

Discover Bank v. Bridges, 154 Wn. App. 722, 226 P.3d 191 (2010) 15

Grimwood v. Univ. of Puget Sound, 110 Wn.2d 355, 359, 753 P.2d 517 (1988) 14

Klem v. Wash. Mut. Bank, 176 Wn.2d 771, 295 P.3d 1179 (2013) 21

Lyons v. U.S. Bank Nat. Ass'n, 181 Wn.2d 775, 336 P.3d 1142 (2014) 4, 6, 7, 8, 9, 11, 12, 13, 23

McLain v. Kent Sch. Dist., No. 415, 178 Wn. App. 366, 378, 314 P.3d 435 (2013) 10

Nader v. Blair, 549 F.3d 953, 963 (4th Cir. 2008) 15

Nat'l Union Ins. Co. v. Puget Power,
94 Wn. App. 163, 178, 972 P.2d 481 (1999) 14

Schultz v. Wells Fargo Bank, 2013 WL 4782157 (D. Or. Sept. 5, 2013)..14

Segal Co. (Eastern States), Inc. v. Amazon.com,
280 F.Supp.2d 1229 (W.D. Wash. 2003).....21

State v. C.A.E., 148 Wn. App. 720, 201 P.3d 361 (2009) 10

Strong v. Valdez Fine Foods, 2013 WL 3746097, * 1
(9th Cir. July 18, 2013)) 15

Trujillo v. Nw. Tr. Servs., Inc., 181 Wn. App. 484, 498, 326 P.3d 768, 775
(Wash. Ct. App. 2014), *as modified* (Nov. 3, 2014), *review granted*,
182 Wn. 2d 1020, 345 P.3d 784 (2015) and *rev'd in part*,
355 P.3d 1100
(2015).....8

Trujillo v. NWTS, -- Wn.2d --, 355 P.3d 1100
(2015).....4, 6, 8, 9, 10, 12, 13, 23

Statutes

RCW 61.24.005(2)..... 6

RCW 61.24.010 21

RCW 61.24.010(4).....10, 21

RCW 61.24.030(7)(a) 6, 7, 8, 9, 11, 19, 23

RCW 61.24.030(7)(b) 10, 23

RCW 62A.3-201 11

RCW 62A.3-301 .....9, 12

Court Rules

CR 56(e).....14, 16

CR 56(f).....17, 18

R.A.P. 13.4(b).....4, 5, 6, 7, 9, 13, 19, 24

R.A.P. 13.4(b)(1).....24

R.A.P. 13.4(b)(4).....24

Other Sources

1 *McCormick on Evidence* § 10 (Kenneth S. Broun, 7th ed. 2013).....15

I. IDENTITY OF ANSWERING PARTY

Respondent Northwest Trustee Services, Inc. ("NWTS") hereby answers the Petition for Review of Appellant Kelly Bowman ("Petition for Review") as follows below.

II. STATEMENT OF RELIEF SOUGHT

NWTS requests that the Washington Supreme Court decline to accept discretionary review of the unpublished decision in *Bowman v. SunTrust Mortgage, Inc., et al*, 2015 WL 4730115, (Wash. Ct. App. Aug. 10, 2015) (unpublished).

III. FACTS RELEVANT TO THE PETITION FOR REVIEW

A. Factual History.

On or about September 4, 2008, Appellant Kelly Bowman ("Bowman") executed a promissory note (the "Note") in the amount of $417,000.00, payable to SunTrust Mortgage, Inc. ("SunTrust"). CP 258-260. The Note is indorsed in blank, and SunTrust has maintained physical possession of the Note since September 2008. CP 255.

Bowman secured repayment of the Note with a deed of trust ("Deed of Trust"). CP 205-219. On September 11, 2008, the Deed of

Trust was recorded with the King County Auditor, and encumbered real property located in King County (the "Property"). *Id.*[1]

On June 1, 2010, Bowman defaulted on the terms of the Note and Deed of Trust when he failed to make any further required loan payments. CP 221-223; CP 255, ¶ 5; CP 665, ¶ 6.

On July 11, 2012, NWTS received a referral from SunTrust to commence a nonjudicial foreclosure of the Property. With the referral, NWTS received a copy of the Note (payable to SunTrust) and the Deed of Trust. CP 636.

On July 23, 2012, SunTrust executed a sworn declaration (the "Beneficiary Declaration") stating that it was the holder of the Note. CP 220. NWTS received the Beneficiary Declaration on August 10, 2012. CP 636.

Almost one month later, on August 14, 2012, NWTS sent a Notice of Default to Bowman. CP 221-223. Attached to the Notice of Default was the "Foreclosure Loss Mitigation Form", executed by SunTrust, which averred, under the penalty of perjury that "SunTrust Mortgage, Inc. is the

---

[1] On March 26, 2012, an Assignment of Deed of Trust in favor of SunTrust was recorded under King County Auditor's No. 20120326000276, and a corrective Assignment – to add a co-borrower's name – was later recorded under King County Auditor's No. 20121025000009. CP 42, CP 49-50 (respectively).

beneficiary and is the actual holder of the promissory note or other obligation secured by the deed of trust." CP 6; CP 48.[2]

On November 5, 2012, SunTrust executed an appointment of successor trustee ("Appointment of Successor Trustee") document, naming NWTS successor trustee under the Deed of Trust and vesting NWTS with the powers of the original trustee. CP 224. The Appointment of Successor Trustee became effective on November 8, 2012, when it recorded under King County Auditor's No. 20120608001749. *Id.*

On November 29, 2012, a Notice of Trustee's Sale was recorded with the King County Auditor, setting a sale date of March 29, 2013. CP 225-228. The sale was subsequently postponed, and ultimately did not occur. CP 232-233; CP 863, ¶ 2.

Bowman never communicated with NWTS from the date of SunTrust's foreclosure referral (July 11, 2012) through the date he initiated legal action against NWTS on March 19, 2013. CP 637

B. Procedural History.

On March 14, 2013, Bowman filed a Complaint against SunTrust, Federal National Mortgage Association (Fannie Mae), Mortgage Electronic Registration Systems, Inc., NWTS, and "Doe Defendants 1-10." CP 1-62.

---

[2] The "Foreclosure Loss Mitigation Declaration" was dated July 21, 2012. CP 6; CP 48.

On July 12, 2013, the trial court granted summary judgment to all Defendants. CP 716-720. This appeal followed. CP 722.

On August 10, 2015, the court of appeals, Division 1, affirmed the trial court's grant of summary judgment in favor of Respondents on all claims. *Bowman v. SunTrust Mortgage, Inc.*, No. 70706-0-I, 2015 WL 4730115, at *1 (Wash. Ct. App. Aug. 10, 2015) (unpublished). Appellant now seeks review by this Court pursuant to RAP 13.4(b).

IV. ANSWER TO ISSUES PRESENTED

1. The court of appeals decision in this case at bar does not conflict with any Supreme Court precedent, including *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83 (2012), *Trujillo v. Northwest Trustee Services, Inc.*, -- Wn.2d --, 355 P.3d 1100 (2015); and *Lyons v. U.S. Bank Nat. Ass'n*, 181 Wn.2d 775, 336 P.3d 1142 (2014) because (1) the uncontroverted evidence demonstrated SunTrust's authority to foreclose as the beneficiary and (2) that NWTS had in its possession adequate proof of SunTrust's beneficiary status upon which it was entitled to rely.

2. The declaration submitted by SunTrust was admissible and competent evidence in support of summary judgment.

3. The court of appeals correctly affirmed denial of Bowman's request for a continuance to conduct additional discovery when

Bowman failed to bring a motion for continuance and failed to set forth any showing of good cause for such a continuance. .

4. The court of appeals correctly held that NWTS did not violate its duty of good faith.

5. The court of appeals did not err in granting summary judgment to NWTS on Bowman's Consumer Protection Act ("CPA") claim, and that decision was properly affirmed on appeal.

6. The issues presented by Bowman in this case are not of substantial public interest.

V. AUTHORITY AND ARGUMENT

NWTS incorporates the argument section of the Answer to Bowman's Petition for Review by SunTrust, Mortgage Electronic Registration Systems, Inc. ("MERS"), and Federal National Mortgage Association ("Fannie Mae") already submitted in this case.

A Standard of Review.

Discretionary acceptance of a decision terminating review is appropriate in only four narrowly prescribed circumstances. RAP 13.4(b). The Washington Supreme Court accepts a petition for review only if: (1) the court of appeals' decision conflicts with a decision of the Supreme Court; (2) the decision conflicts with another appellate decision; (3) the

case involves a significant question of constitutional law; or (4) the decision involves "an issue of substantial public interest." *Id.*

The Court should not accept review under RAP 13.4(b) in the case at bar. The issues here are covered by established case law and are narrow, discrete, and specific to the facts of this particular matter.[3]

B. The Court of Appeals' Decision Does Not Conflict With Supreme Court Precedent.

Bowman contends that the court of appeals' decision affirming the trial court conflicts with the Supreme Court decisions in *Trujillo*, *Lyons*, and *Bain*. Petition for Review, at *10. However, this Court should not accept review under RAP 13.4(b) because the court of appeals' unpublished decision does not conflict with this Court's holdings in *Bain*, 175 Wn.2d 83, *Trujillo*, 355 P.3d 1100, or *Lyons*, 181 Wn.2d 775.

In recent decisions, this Court has interpreted the definition of "Beneficiary" as found at RCW 61.24.005(2), which provides that a "Beneficiary" of a deed of trust is the "holder of the instrument." *see also Bain*. This Court has also addressed RCW 61.24.030(7)(a), which addresses certain prerequisites to nonjudicial foreclosure. *See Trujillo* and *Lyons*. In the present case, the court of appeals correctly applied the

---

[3] Bowman addresses only the first and fourth criteria. Petition for Review at 1-4.

precedents established in the aforementioned cases. On this basis, no review under RAP 13.4(b) is warranted.

In *Bain,* this Court held that to foreclose under Washington's Deed of Trust ("DTA") and in accordance with the Uniform Commercial Code ("UCC"), "a beneficiary must either actually posses the promissory note or be the payee." *Bain*, 175 Wn.2d, at 104. This Court explained that "the legislature meant to define 'beneficiary' to mean the actual holder of the promissory note or other debt instrument." *Id.* at 101.

In *Lyons*, this Court acknowledged that for purposes of RCW 61.24.030(7)(a),[4] a declaration "stating that the beneficiary is the actual holder of the promissory note" is sufficient evidence for the trustee to rely upon before recording a notice of trustee's sale. *Lyons*, 181 Wn.2d at 790.[5] Moreover, the *Lyons* Court concluded that only if "there [was] an indication that the beneficiary declaration might be ineffective," would any additional duty of investigation arise. 181 Wn.2d at 790.

---

[4] RCW 61.24.030(7)(a) reads: "[t]hat, 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.

[5] This Court acknowledged that numerous other forms of proof could satisfy the requirement under RCW 61.24.030(7)(a). *Lyons*, 181 Wn.2d at 790.Indeed, here in addition to the unambiguous declaration, NWTS also had a copy of the Note payable to SunTrust. CP 636.

In *Trujillo*, this Court further interpreted RCW 61.24.030(7)(a), holding that a beneficiary declaration stating the beneficiary "could be the 'actual holder' 'or' it could be something else" was ambiguous and insufficient evidence upon which the trustee could rely. *Trujillo*, 355 P.3d 1100, 1106-07.

The court of appeals' decision does not conflict with *Bain*, because SunTrust did, in fact, actually hold the Note at all relevant times during the entire unfinished foreclosure process, and SunTrust was the payee identified on the blank indorsed Note. CP 255; CP 258-260.

The court of appeals' decision also does not conflict with *Lyons* or *Trujillo* because the beneficiary declaration considered by NWTS is unambiguous. It identifies SunTrust as the holder of the note, without any equivocation. Furthermore, the record is devoid of any indication that NWTS was presented with evidence that contradicted or would call SunTrust's declaration into question or that any evidence actually existed that contradicted the averments made in SunTrust's declaration.[6]

---

[6] Bowman argues that SunTrust's declaration was contradicted by evidence of the sale of the obligation to Fannie Mae. Petition for Review, at *9. However, Fannie Mae's ownership of the loan does not contradict a declaration by SunTrust that it holds the Note. Indeed, this Court's ruling in *Lyons* and *Trujillo* did not overrule the court of appeals' holding in *Trujillo* that ownership is not dispositive. *See Trujillo v. Nw. Tr. Servs., Inc.*, 181 Wn. App. 484, 498, 326 P.3d 768, 775 (Wash. Ct. App. 2014), *as modified* (Nov. 3, 2014), *review granted*, 182 Wn. 2d 1020, 345 P.3d 784 (2015) and *rev'd in part*, 355 P.3d 1100 (2015). Moreover, neither *Trujillo* nor *Lyons* distinguished or criticized Washington's UCC provision that "[a] person may be a person entitled to enforce the

that despite RCW 61.24.030(7)(a)

Indeed, in both *Trujillo* and *Lyons*, this Court remanded claims based on the presence of an "ambiguous" beneficiary declaration, while this case involves no such evidence. CP 6, 48, 220, 636.

Bowman also argues NWTS could not rely on the beneficiary declaration in this case because the declaration states SunTrust is the "holder" rather than the "actual holder." Petition for Review, at *9.[7] Not only is this a red herring, it is contradicted by the record.

First, the beneficiary declaration in the present case is accurate and does not require the word "actual." As noted *supra*, the DTA requires a trustee to have "proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust" before recording a Notice of Trustee's Sale. RCW 61.24.030(7)(a). *One possible means* of

---

instrument even though the person is not the owner of the instrument [.]" RCW 62A.3-101. Nor did they criticize or reverse *Bain*; rather, they relied upon it.

[7] Contrary to Bowman's assertions, neither *Trujillo* nor *Brown* addresses the propriety of a declaration stating the beneficiary is the "holder" vs. "actual holder." *Trujillo* addressed the propriety of a declaration that was "ambiguous whether the declaration proves Wells Fargo is the holder or whether Wells Fargo is a nonholder in possession or person not in possession who is entitled to enforce the provision under RCW 62A.3–301" because of the phrase "or has requisite authority under RCW 62A.3–301 to enforce said obligation" contained in the declaration. *See Trujillo*, 355 P.3d, at 1106-07. *Brown* is similarly off point as it addresses whether the entity required to participate in an FFA mediation must be both the holder and owner of the subject promissory note. Moreover, Bowman's reliance on what he believes this Court will hold in *Brown* is purely speculative and does not fall under RAP 13.4(b).

accomplishing this requirement is through a declaration averring that "the beneficiary is the actual holder of the promissory note or other obligation." *Id*; *see also Trujillo*, 355 P.3d at 1105-06.

Further, "[u]nless 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." RCW 61.24.030(7)(b).

The term "actual holder" is not defined in either the DTA or UCC. When a statutory term is undefined, the court should look to "the ordinary meaning of the term." *McLain v. Kent Sch. Dist., No. 415*, 178 Wn. App. 366, 378, 314 P.3d 435 (2013); *accord F.A.A. v. Cooper*, 132 S. Ct. 1441, 1450, 182 L. Ed. 2d 497 (2012) (definition of "actual damages" in Privacy Act must be considered in "the particular context in which the term appears.").

In *State v. C.A.E.*, Division Two of the court of appeals evaluated the term "actual" in the context of a restitution order for "actual expenses." 148 Wn. App. 720, 201 P.3d 361 (2009). The majority found that "to be an 'actual expense,' it should be 'in existence,' 'present,' or 'current'." *Id.* at 727. The dissent in *C.A.E.* added that "actual" has two dictionary definitions: 1) "existing in fact or reality," and 2) "existing at the present or at the time." *Id.* at 732.

The term "actual" does not restrict the *manner* of being a note holder; rather, it compels an expression of *when* an entity *is* the holder. As noted above, the State Supreme Court found in *Bain* that "a beneficiary must either actually possess the promissory note *or* be the payee." 175 Wn.2d at 104 (emphasis added). It is therefore permissible to enforce the obligation as the instrument's payee regardless of where the note is physically located. *Bain*, 175 Wn.2d, at 103-104 (Making reference Article 3 of the UCC as appropriate for purpose of the Deeds of Trust Act."); *see also* RCW 62A.3-201, cmt. 1.

Defining "actual" to mean a current factual reality comports with the present tense emphasized in RCW 61.24.030(7)(a), *i.e.* the use of "is" to define the point at which a beneficiary must declare its status.[8] In other words, 61.24.030(7)(a) requires an averment to being the "actual" holder because it directs a beneficiary to state its status at the point when the declaration *is* signed – not at some prior or future time when another entity may have been, or become, the holder. This interpretation is logical because RCW 61.24.030(7)(a) affords the assurance to a trustee of knowing who holds the note at a point before the sale notice is recorded.

---

[8] Oral Argument at 22:25, *Lyons v. Northwest Trustee Services*, Case No. 89132-0 (May 27, 2014) (Wiggins, J.), *available at* http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2014050021 (statute emphasizes present tense).

Thus, a beneficiary declaration stating "holder" is no different than one using the phrase "actual holder" because it remains a sworn statement of the beneficiary's status at the time it is signed. The word "actual" is not a magic incantation that destroys a reliance on the entire declaration simply because it is omitted.

Indeed, this Court's decision in both *Lyons* and *Trujillo* supports this position as it makes *no distinction* between "holder" and "actual holder." This Court wrote: "[o]n its face, it is ambiguous whether the declaration proves Wells Fargo is the **holder** or whether Wells Fargo is a nonholder in possession or person not in possession who is entitled to enforce the provision under RCW 62A.3–301." *Trujillo*, at 1107 (citing *Lyons*, 181 Wn.2d at 791) (Emphasis added). Thus, both *Lyons* and *Trujillo* expressly agree that the status of being a "holder" is the critical consideration in foreclosure, and the Court pays no heed to using the word "actual" as a means of describing that fact.

Here, the July 2012 declaration at issue plainly says "SunTrust Mortgage, Inc. *is* the holder...." CP 220.[9] The declaration even reflects "Note Holder" in the header. *Id.* Furthermore, we know the declaration to be accurate because the court of appeals held that SunTrust has held the

[9] The record reflects that NWTS received the declaration on August 10, 2012, prior to when it recorded the Notice of Trustee's Sale on November 29, 2012. CP 636; CP 225-228.

blank indorsed note since 2008. *Bowman v. SunTrust Mortgage, Inc.*, 2015 WL 4730115, at *1 (Wash. Ct. App. Aug. 10, 2015); CP 255.

Additionally, SunTrust as the present beneficiary under the Deed of Trust, appointed NWTS as the successor trustee, and there has been no recorded assignment evidencing a different beneficiary. *Id.*, at *2; *see also* CP 53.

In sum, the court of appeals, in accordance with both *Lyons* and *Trujillo*, correctly held that NWTS was entitled to rely on the unambiguous beneficiary declaration before recording the Notice of Trustee's Sale. The declaration accurately stated that SunTrust *is* the Note holder, and that fact was actually true whether the word "actual" was used or not.

Notwithstanding this, the record demonstrates that in addition to the beneficiary declaration, NWTS also possessed (and provided to Bowman with the Notice of Default) another declaration, which stated SunTrust is the "actual holder." CP 6, 48. This is yet another form of proof upon which NWTS was entitled to rely. *Lyons, Trujillo.*

Bowman has not demonstrated that further appellate review is necessary under RAP 13.4(b) on this issue.

C. The Court of Appeals Properly Admitted the Declaration of SunTrust Employee, Ms. Young.

The court of appeals properly affirmed the trial court's consideration of the declaration of SunTrust employee, Carmella T. Norman Young.[10] *Bowman*, 2015 WL 4730115, at *4. Bowman seeks review arguing that the declaration testimony was inadmissible hearsay and the court of appeals erred affirming the trial court's admittance of such evidence. Petition for Review, at 12.

"Affidavits and declarations supporting and opposing a motion for summary judgment 'must be made on personal knowledge, set forth facts that would be admissible in evidence, and show that the affiant is competent to testify on the matter'." *Nat'l Union Ins. Co. v. Puget Power*, 94 Wn. App. 163, 178, 972 P.2d 481 (1999); *see also Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988); CR 56(e). "[T]he requirement of personal knowledge imposes only a 'minimal' burden on a witness; if reasonable persons could differ as to whether the witness had an adequate opportunity to observe, the witness's testimony is admissible." *Schultz v. Wells Fargo Bank, NA*, 2013 WL 4782157 (D. Or.

[10] Notably, Bowman argues that "the subject decision affirming this testimony contradicts opinions of this Court" yet Bowman fails to cite any such opinion. Petition for Review, at *12. Additionally, Bowman's bare assertion that the issues is of substantial public importance is similarly unsupported. *Id.*

Sept. 5, 2013), *citing Strong v. Valdez Fine Foods*, 2013 WL 3746097, * 1 (9th Cir. July 18, 2013), *quoting* 1 *McCormick on Evidence* § 10 (Kenneth S. Broun, 7th ed. 2013); *see also Nader v. Blair*, 549 F.3d 953, 963 (4th Cir. 2008) (custodian of records can speak from personal knowledge as to whether certain documents are admissible business records for purposes of summary judgment, even when not involved in their creation).

Washington courts have often affirmed the admissibility of declarations from bank employees just like Ms. Young and properly did so here too. *See, e.g., Am. Express Centurion Bank v. Stratman*, 172 Wn. App. 667, 674-75 (2012) (rejecting challenge to bank employee declaration, holding that affiant's personal knowledge of how records are kept generally was sufficient for business records exception); *Discover Bank v. Bridges*, 154 Wn. App. 722, 725-26 (2010) (same).

In *Discover Bank*, the Court affirmed the admission of a declaration stating that the declarant (a) worked for the Defendant; (b) had access to the relevant account records; (c) made statements based on personal knowledge and review of those records and under penalty of perjury; and (d) the attached account records were true and correct copies made in the ordinary course of business. 154 Wn. App. at 726.

Here, Ms. Young similarly averred that her declaration was based on personal knowledge and a review of records kept by SunTrust in the

ordinary course of business. CP 254, ¶ 1. Given that SunTrust was both the original lender and foreclosing beneficiary, it is reasonable that said records would evidence SunTrust's possession of the Note, relationship with the Fannie Mae, and the outstanding arrearage on the loan. CP 255, ¶¶ 3-5.

Had Bowman wished to inquire about the "scope of authority granted by Fannie Mae," "chain of custody for alleged possession of the Note," or "maintenance of the records," he could have conducted discovery on those inquiries. Yet he did none of those things, instead choosing to merely object to Ms. Young's knowledge as a witness. Despite Bowman's contentions, Ms. Young's declaration meets the requirements of CR 56(e), and it was suitably admitted as evidence in the summary judgment hearing, which was properly affirmed by the court of appeals.[11]

\\

\\

\\\

[11] NWTS notes that its Motion for Summary Judgment did not rely exclusively on Ms. Young's testimony, and Bowman has not objected to declarations submitted by NWTS, including the Declaration of Alan Burton, Declaration of Counsel, Declarations of Jeff Stenman, or Declaration of Ashley Hogan. CP 234-238; CP 633-651.

D. The Court of Appeals Correctly Affirmed the Trial Court's Decision Denying Bowman's Request for Continuance for Additional Discovery.

The court of appeals did not abuse its discretion in affirming the trial court's denial of Bowman's request for continuance under CR 56(f).

A trial court "may deny a [CR 56(f)] motion for a continuance when (1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact." *Butler v. Joy*, 116 Wn. App. 291, 65 P.3d 671 (2003).

Here, Bowman did not file a motion for continuance, nor did he file an affidavit. Rather, he made his request at the end of his memorandum in opposition to the respondents' motions for summary judgment but failed to address the criteria for seeking a continuance under CR 56(f). *See Bowman v. SunTrust Mortgage, Inc.*, WL 4730115, at *7. And, as the court of appeals correctly noted, Bowman "made no showing of good cause as to how he expected additional information to impact the issues here." *Id.*

The court of appeals correctly affirmed the trial court's denial of Bowman's CR 56(f) request for continuance; no further review is warranted. *See also Butler*, *supra*.

E. Bowman Presents No Viable Reason for Review Based on the Assignment of Deed of Trust or NWTS' Reliance on the Beneficiary Declaration.

Bowman calls for review arguing "[t]o issue its Notice of Trustee's Sale, NWTS relied on the Assignment of Deed of Trust by MERS and SunTrust's ambiguous Beneficiary Declaration." Petition, at 15.

First, Bowman merely cites to his own response brief to support his contention that NWTS relied on the Assignment of Deed of Trust in issuing the Notice of Trustee's Sale. Petition for Review, at 15 (citing CP 824). Yet, review of the record demonstrates that at no time did NWTS present any evidence or argue that it relied on the Assignment of Deed of Trust for proof of SunTrust's beneficiary status prior to issuing the Notice of Trustee's Sale. Indeed, NWTS argued the opposite. *See* NWTS' Brief, at 15-16 ("Noticeably absent [in the DTA] is any requirement to 'prove' one's authority as a beneficiary, or execute or record an Assignment of the Deed of Trust" as well as cited authority that stands for the proposition that an "[a]ssignment is not only irrelevant to a foreclosure in Washington, and does not confer Beneficiary status, but it does not involve NWTS.")

Moreover, in rejecting Bowman's theories relating to MERS, the court of appeals, citing to the Supreme Court's decision in *Bain*, correctly held that "[t]he mere fact that the deed of trust identified MERS as beneficiary will not support a claim." *Bowman*, at *5 (*citing Bain*, at 120). Bowman has provided no reason pursuant to RAP 13.4(b) for further appellate review on this issue.

Second, as discussed *supra* in Sec. (V)(B), the beneficiary declaration in this case complied with RCW 61.24.030(7)(a) as did NWTS' consideration of the declaration. In fact, the declaration considered by NWTS is precisely what is proscribed by the statute.

In sum, Bowman has identified no conflicting Supreme Court decision and fails to demonstrate how this is a matter of substantial public interest to warrant review under RAP 13.4(b). Bowman's conclusory statement that the issue is "clearly...a matter of substantial public interest and contradicts existing precedent of this Court" is wholly unsupported. Petition, at 16. Review should be denied.

F. The Trial Court Did Not Err in Granting Summary Judgment to NWTS on Bowman's CPA Claim.

Bowman assigns error to the court of appeals' decision claiming it "discounted the foreclosing trustee's duty of good faith to Mr. Bowman, specifically to assure that the 'beneficiary' is the owner as well as the

actual holder of the obligation before serving and recording its Notice of Trustee's Sale."[12] Petition for Review, at 16-17.

In support of this, Bowman merely re-hashes his baseless accusation that NWTS relied on the Assignment of Deed of Trust (*see supra*, Sec. (V)(E)) and that NWTS improperly relied upon the Beneficiary Declaration and failed to obtain authority from the beneficiary before initiating foreclosure (*see supra*, Sec. (V)(B) and (E)). Petition for Review, at 17.[13]

Moreover, Bowman seeks to mislead the Court about NWTS' statutory duty, insisting that trustees owe a "fiduciary" duty to borrowers.

---

[12] Bowman also argues the lower court erred finding that SunTrust was the proper beneficiary based on "mere custody of... [the] Note." Petition for Review at 16. Yet, the court of appeals properly applied this Court's precedent in *Bain*, to determine SunTrust's physical possession of the blank indorsed note since the time of its making made it the holder of the note. *Bowman*, at *3 (Noting "the DTA broadly defines 'beneficiary' as 'the holder of the instrument or document evidencing the obligations secured by the deed of trust'"; and that in *Bain*, this Court determined the Uniform Commercial Code (UCC) guides interpretation of the DTA's terms; and that the "UCC defines 'holder' as the person in possession of the note that is payable either to bearer or to an identified person that is the person in possession.").

[13] Bowman also points out that he contended, on appeal, that NWTS ignored competing claims by various entities claiming to be "holder" or "beneficiary" and relied on improperly dated and notarized documents". Petition for Review, at 17. Just as he did at the trial court level and court of appeals, Bowman fails to cite to any evidence in support of these "contentions." *Id.* Furthermore, as to allegations of improper notarization, the court of appeals did not err when, in consideration of NWTS' representative's testimony that NWTS "routinely include[s] an 'effective date' on the Notice of Sale which evidences the date of its drafting" coupled with the statutory requirement that the notice include "some date upon which arrearage figures are effective", and the fact that the reinstatement figure date listed on the subject notice was the same date as the "effective date" , "it is logical the notice would list arrearage figures as of the date the document was drafted" and "there was no showing that the 'postdating' was a source of benefit to the trustee or detriment to Bowman." *Bowman*, at *4; CP 633-651.

Petition for Review at 17, *citing Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013); *cf. Bavand v. Chase Home Fin., LLC*, 2015 WL 4400739, *10, n. 25 (Jul. 20, 2015). In *Klem*, the Court addressed a trustee's "fiduciary duty" only because the underlying facts dated from an earlier version of the DTA.[14] The *current* statute provides: "[t]he trustee or successor trustee has a duty of *good faith* to the borrower, beneficiary, and grantor." RCW 61.24.010(4) (emphasis added).

Nowhere in the record has Bowman shown that he produced testimony or documentation supporting the requisite prongs of a CPA claim.

Indeed, Bowman failed to prove how it was unfair or deceptive for NWTS to have carried out its duties as trustee on behalf of the *correct* beneficiary, and he introduced no evidence below establishing that some entity other than SunTrust was actually holding the Note, or that NWTS had reason to believe the same.

Bowman failed to prove that NWTS engaged in a broad sweep of activity likely to affect the general public. *See e.g., Segal Co. (Eastern*

---

[14] As Chief Justice Madsen noted:

> [t]he majority repeatedly refers to the fiduciary duty of the trustee. In the present case, the trustee owed fiduciary duties because among other things the nonjudicial foreclosure sale occurred early in 2008. However, the judicially imposed 'fiduciary' standard applies, at the latest, only in cases arising prior to the 2008 amendment of RCW 61.24.010. The 2008 amendment expressly rejected the 'fiduciary' standard. *Id.*

States), Inc. v. Amazon.com, 280 F.Supp.2d 1229, 1234 (W.D. Wash. 2003) (granting motion to dismiss CPA claim as allegation "on information and belief that defendant engages in a 'pattern and practice' of deceptive behavior" is insufficient to satisfy public interest requirement).

Bowman likewise failed to prove that receiving legally-mandated foreclosure notices due to his own failure to pay the secured loan led to compensable injury. If the simple act of initiating a non-judicial foreclosure were to serve as grounds for damages to a plaintiff who may experience a "loss of time," denigration of credit, or desire to "investigate" the lender's authority after defaulting on a secured loan, then *every* non-judicial foreclosure in Washington State would give rise to CPA liability. Instead, the CPA requires a causal connection between harm and unfair or deceptive conduct, which is notably absent in this case. *See Cooper's Mobile Homes, Inc. v. Simmons,* 94 Wn.2d 321, 617 P.2d 415 (1980) (alleged deceptive acts must result in injury).

Here, the court of appeals observed that

> "[T]he respondents did not conceal Fannie Mae's ownership of the note. Both the notice of trustee's sale and notice of foreclosure were consistent with the information in the notice of default that Fannie Mae was the loan owner and SunTrust was the loan servicer. Additionally, the loss mitigation form attached to the notice of default recited that SunTrust was the beneficiary and actual holder of the note. Both the notice of sale and notice of foreclosure substantially complied with the DTA and accurately

> referred to SunTrust as the beneficiary. Accordingly, Bowman does not establish a violation of the duty of good faith."

Bowman, at *4.

Ultimately, NWTS obtained two declarations that precisely satisfied the mandate of RCW 61.24.030(7)(a) as interpreted in *Lyons* and *Trujillo*, *i.e.* an unequivocal averment of SunTrust's holder status. This proof was sufficient as set forth in RCW 61.24.030(7)(b). The CPA claim was correctly adjudicated in NWTS' favor, and no further review is warranted.

G. Bowman's Lawsuit Does Not Present a Substantial Public Interest.

What has become unfortunately "typical" based on expansive readings of recent case law is the proliferation of lawsuits designed to stall foreclosure through vague, burden-shifting claims of malfeasance against every company involved in the process. *Cf.* Petition for Review at 18-19. Purely private transactions have been brought within the scope of the CPA, and bare assertions of "questioning" the identity of one's lender – despite information contained in the plain language of loan documents – have led to threats of liability against trustees such as NWTS. The Court should quell this tide by bringing Bowman's legal challenge to a close.

VI. CONCLUSION

NWTS respectfully requests that the Supreme Court decline to accept Bowman's Petition for Review. R.A.P. 13.4(b)(1) and (4). The court of appeals' decision does not conflict with established precedent and it does not give rise to a matter of substantial public interest.

DATED this 8th day of October, 2015.

NORTHWEST TRUSTEE SERVICES, INC.

By _____
Heidi Buck Morrison, WSBA #41769
Attorney for Respondent Northwest Trustee Services, Inc.

Declaration of Service

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

2. That on October 8, 2015, I caused a copy of the ANSWER OF RESPONDENT NORTHWEST TRUSTEE SERVICES, INC. TO KELLY BOWMAN'S PETITION FOR REVIEW to be served to the following in the manner noted below:

Richard Llewelyn Jones Kovac & Jones, PLLC 1750 112th Ave. NE, Suite D-151 Bellevue, WA 98004-2976 Attorneys for Appellant	[X] US Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile
John S. Devlin, III Andrew G. Yates Abraham K. Lorber Lane Powell, PC 1420 Fifth Ave., Suite 4100 Seattle, WA 98101 Attorneys for Respondents SunTrust Mortgage, Inc., Federal National Mortgage Association and Mortgage Electronic Registration Systems, Inc.	[X] US Mail, Postage Prepaid [ ] Hand Delivery [ ] Overnight Mail [ ] Facsimile

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 8 day of October, 2015.

Angela Beardsley, Executive Asst.

OFFICE RECEPTIONIST, CLERK

To: Javier Trasvina
Cc: Heidi Buck Morrison
Subject: RE: Kelly Bowman v. Suntrust Mortgage Inc.,et al (Petition for Review) / Supreme Court No. 92211-0 / Court of Appeals No. 707060

Received on 10-08-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Javier Trasvina [mailto:jtrasvina@northwesttrustee.com]
Sent: Thursday, October 08, 2015 2:42 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Heidi Buck Morrison <hbuckmorrison@northwesttrustee.com>
Subject: Kelly Bowman v. Suntrust Mortgage Inc.,et al (Petition for Review) / Supreme Court No. 92211-0 / Court of Appeals No. 707060

Kelly Bowman (Appellant) v. Suntrust Mortgage Inc.,et al *(Respondents)*
Supreme Court No. 92211-0
Court of Appeals No. *707060*
Filed by: Heidi Buck Morrison
WSBA #41769
425-213-5534
hbuckmorrison@northwesttrustee.com

Please file the attached **Answer to Petition for Review.**

If there are any questions, please contact us. Thank you.

Javier Trasvina
Paralegal

Direct: 808.315.7390
Fax: 425.974.8603
jtrasvina@northwesttrustee.com