Supreme Court No. 93868-1

(Court of Appeals No. 73631-1)

Division I

SUPREME COURT
OF THE STATE OF WASHINGTON

VALERIE SLOTKE, an unmarried woman,

Defendant-Petitioner,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR IXIS REAL ESTATE CAPITAL TRUST 2006-HE3 MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2006-HE3,

Plaintiff-Respondent.

PETITION FOR REVIEW

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PETITION FOR REVIEW

I IDENTITY OF PETITIONER

This Petition is filed by Defendant-Appellant, Valerie Slotke. Petitioner was Defendant in Pierce County Superior Court, Cause No. **13-2-09169-6**, and Appellant in the Court of Appeals, Division One, Cause No. 73631-1-I.

II COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals' decision filed on January 11, 2016, specifically the Court's analysis of the *security follows the note* legal axiom set forth on page 11 of the decision. *See* Slip Op. at A-11. Also, Petitioner seeks review of the appellate court's decision that the bar against simultaneous enforcement of the note and DOT was not breached in this case. The analysis of that issue is set forth at A-12.

III ISSUES PRESENTED FOR REVIEW

This case presents an issue that has never been addressed by this or any other court in the State of Washington. At this moment, two diametrically opposed versions of the *security follows the note* legal axiom are law in Washington. One version holds that the security follows a transfer of the status of *holder* of a secured mortgage note, regardless of who *owns*

the note held. This is the version relied on, successfully, by Plaintiff-Respondent in the trial and appellate courts. The other version, relied on unsuccessfully by Defendant-Appellant below, is codified at RCW 62A.9A-203(a), (b), and (g). The codification of the axiom unambiguously states the security follows the transfer of *ownership* of a secured mortgage note.

The creators of the Uniform Commercial Code ("UCC"), the American Law Institute ("ALI") and the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), claim, correctly, UCC §9-203 (RCW 62A.9A-203) is the codification of the centuries-old common law *security follows the note* legal axiom. *Official Comment 9 to UCC 9-203.* This claim is supported by the holdings in thousands of commercial law cases; cases spread out over three centuries; cases drawn from every judicial jurisdiction in the United States. The codified version of the axiom is supported by contents of every standard deed of trust ("DOT") and by RCW 61.24.030(7)(a) of the Washington Deeds of Trust Act ("DTA").

The *holder* claim, on the other hand, is a recent invention. It is supported by a rash of decisions over the last ten years; decisions that are not supported by the historical commercial law record.

The State of Washington cannot have two diametrically opposed laws, each of which purports to provide the definitive rule concerning who is entitled to enforce the security for a secured mortgage note. Particularly when

both legal standards are based on the same legal axiom—the *security follows the note* legal axiom.

This issue affects tens of thousands of Washington homeowners.

IV STATEMENT OF CASE

A. Simultaneous Enforcement of Note and DOT Forbidden.

On or about May 16,2006, in return for a loan that Defendant-Appellant received from First Financial Services, LLC, DBA The Lending Center ("TLC"), Defendant-Appellant executed a promissory note in the amount of $253, 575.00 ("Note") in favor of TLC. CP 4: 2-4. Deutsche Bank National Trust Company as trustee for IXIS Real Estate Capital Trust 2006-HE3 Mortgage Pass-Through Certificates Series 2006-HE3 ("Plaintiff-Respondent") was not the original lender.

The Note, and the underlying mortgage-debt obligation ("Obligation") for which the Note was taken as payment by TLC, were secured by a DOT in favor of TLC, the Lender. CP 4: 5-7.The DOT was given to TLC to secure, to TLC (*Lender* and *owner* of the beneficial interest in the Note and the Obligation for which the Note was taken by TLC as payment, and no one else in the world): (1) performance of the agreements and covenants contained in the Note; and (2) repayment of the Obligation for which the Note was taken as payment, and all renewals, extensions and modifications of the Payment Right. *Id.*

The DOT encumbered Defendant-Appellant's property located at 203 Fox Island Blvd., Fox Island, Washington, 98333 ("Property"). CP 4: 6-7. TLC recorded the DOT on May 24, 2006. CP 4: 8-9.

In the Memorandum in Support of Plaintiff's Motion for Summary Judgment ("Memorandum"), Plaintiff-Respondent indicates the Mortgage Electronic Registration Systems, Inc. ("MERS") assigned MERS' interest in the DOT to Plaintiff-Respondent and recorded the assignment on August 5, 2011. CP 4: 11-14. Further, the Memorandum asserts Plaintiff-Respondent is the "holder of the Payment Right (i.e., the Note) and "beneficiary of the DOT." CP 4: 15-16.

The appellate court, after reviewing the facts set out above and considering the arguments and documentary evidence submitted by the parties, found Plaintiff-Respondent, the alleged *holder* of the Note, had authority to enforce the Note after Defendant defaulted; and, because Plaintiff-Respondent both enforced the note and foreclosed the deed of trust in a single action, the statutory bar against simultaneous actions did not apply. *See Slip Opinion,* Appendix A-1 to A-2. Having made these two findings, the court affirmed the lower court decision. *Id.*, at A-2.

V ARGUMENT

This Petition involves an issue of substantial public interest that should be decided by the Supreme Court. Tens of thousands of Washington's most vulnerable homeowners will continue to be abused by the ability of persons with whom those homeowners have no contractual relationship to sell those homeowners' homes in violation of the *security follows the note* doctrine as codified in RCW 62A.9A-203(a), (b), and (g).

When the *security follows the note* doctrine as codified in RCW 62A.9A-203(a), (b), and (g) is properly applied, only a transferee who becomes an *owner* of a mortgage note as a result of the transfer is permitted to enforce the security for the note. This is what the doctrine has meant for well over five centuries. This is what the actual doctrine still means. The misinterpretation of the doctrine that has arisen in the past decade should be clearly identified as such and eliminated.

For at least two reasons, Plaintiff-Respondent's failure to prove it is the "***owner***" of the Note and of the Obligation for which the Note was taken as payment should have caused the trial court to deny Plaintiff-Respondent's Motion for Summary Judgment and Decree of Foreclosure.

A. RCW 62A.3-310(b) and 61.24.030(4) prevent simultaneously enforcement of Note and DOT.

The first reason is the simplest and easiest to comprehend. Under both the UCC--RCW 62A.3-310(b)(3)--and the DTA--RCW 61.24.030(4)--a person may not *simultaneously* enforce a note and the underlying obligation for which the note is taken as payment. In the Motion for Summary Judgment and accompanying Affidavit in Support of Plaintiff's Motion for Summary Judgment, Plaintiff-Respondent bases the claim that it is entitled to a Decree of Foreclosure on Defendant-Appellant's failure to make the April 1, 2010 and subsequent Note payments. CP 5: 3-7; and CP 10: 4-10. If a party has only the right to enforce the note, the only way he can reach the lien interest contained in the DOT that secures the note is through the exercise of the right to enforce the note.[1] Thus, from its inception, this litigation has been an attempt to enforce the Note and DOT *simultaneously*.

Both RCW 62A.3-310(b)(3) and RCW 61.24.030(4) preclude simultaneous enforcement of the note and underlying obligation for which the note is taken as payment. If there had been no other basis, on the basis of Plaintiff-Respondent's attempt to enforce the Note and Obligation

[1] Plaintiff-Respondent claims to be the owner of the Note. However, Plaintiff-Respondent, believing it must be only the holder of the Note to be entitled to foreclose, has provided absolutely no evidence that it is the owner of the Note. Because Defendant-Appellant's position is correct, proof of ownership is an issue that is material to the outcome of this case; and the lack of proof of ownership should have caused the trial court to deny Plaintiff-Respondent's motion for summary judgment.

simultaneously the trial court should have denied the Motion for Summary Judgment and Decree of Foreclosure. But there is an even more important reason that should have led to the denial of Plaintiff-Respondent's motion.

B. Transfer of Ownership Required to transfer Right to Enforce DOT.

RCW 62A.9A.-203(a), (b) and (g) is the UCC's codification of the common law "security follows the Note" legal axiom. The provision establishes the requirements that must be met for a person to obtain an *enforceable* "security interest" ("ownership interest") in a promissory note and the DOT that secures the note and obligation for which the note is taken as payment.[2]

In the Foreclosure Complaint, Plaintiff-Respondent alleged it was the "owner" of the note. However, Defendant-Appellant denied that allegation in the Answer to the Foreclosure Complaint, thereby putting Plaintiff-Respondent--as the party who has the burden of proof regarding contested allegations in the Complaint--to its proof on the issue.

To prove ownership of the note, Plaintiff-Respondent was obligated to meet the three requirements of RCW 62A.9A.-203(b). Plaintiff-Respondent had to prove: (1) ***value*** was given for the Note; (2)

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[2] Official Comment 9 to UCC §9-203 makes it clear that this provision is the codification of the common law principal that the "transfer of an obligation secured by a security interest or other lien on personal or *real property also transfers the security interest or lien.*" That is, the *security follows the note.*

rights in the note were transferred to Plaintiff-Respondent by someone who had rights in the note or who had the right to transfer rights in the note; and (3) Plaintiff-Respondent had "***possession***" of the note, as the term "possession" is understood in the UCC, before it commenced this litigation. If Plaintiff-Respondent failed to meet, or prove it had met, any one of these three requirements, then it failed to obtain, or failed to prove it had obtained, an enforceable security interest (ownership interest) in the Note; and, because of RCW 62A.9A.-203(g), it simultaneously failed to obtain, or failed to prove it had obtained, an enforceable ownership interest in the DOT.

Plaintiff-Respondent's pleadings offer *no proof of the first and second requirements* mandated by RCW 62A.9A-203(b). As a result, independent of the statutory prohibition against simultaneous enforcement of the note and DOT (a prohibition which, standing alone, should have caused the trial court to reject Plaintiff-Respondent's Motion for Summary Judgment and Decree of Foreclosure), Plaintiff-Respondent never demonstrated that it had an enforceable interest in the Note or the DOT. Thus, even if simultaneous enforcement was not prohibited by statute, Plaintiff-Respondent would not have been entitled to Summary Judgment or a Decree of Foreclosure—especially not on a summary judgment basis.

RCW 62A.9A-203(b)(1) – (3) establishes the three criteria a transferee must satisfy to obtain an enforceable security interest (i.e., "ownership interest"[RCW 62A.1-201(b)(35)]) in a promissory note. The transferee must: (1) give ***value*** for the note (RCW 62A.9A-203[b][1]); (2) take the note from a ***"debtor"*** (a ***seller*** of the note (RCW 62A.9A-102[28][B]) who has rights *in the note or* the power to transfer rights *in the note* (RCW 62A.9A-203[b][2]) to a ***"secured party"*** (a person to whom a note has been ***sold*** (RCW 62A.9A-102[72][D]; and (3) take *"possession"* of the note after purchasing it (RCW 62A.9A-203[b][3][A], [B], [C], or [D]).

Only after the three requirements listed in the preceding paragraph have been met does the deed of trust follow the mortgage note to the transferee. *RCW 62A.9A-203(g).* Please read the language of 9A-203(g) carefully. That language clearly makes the right to use 9A-203(g) (the codification of the common law *security follows the note* doctrine) dependent upon the transferee meeting the requirements of 9A-203(a) and (b).

The otherwise brilliant analysis of RCW 62A.9A-203 contained in *Brown v. Washington Department of Commerce,* No. 90652-1 (2015) ultimately reached the wrong result because the court felled to recognize that, pursuant to RCW 62A.9A-203(g), the DOT follows a note transfer

only if the note transfer meets the requirements of RCW 62A.9A-203(a) and (b). Moreover, with the exception of some cases decided in the last 10 years, the *security follows the note* doctrine has always meant the security follows a transfer of the *ownership* of a note.

The analysis of the security follows the note doctrine provided in this Section B is supported by more than 300 years of American commercial law history. Thousands of cases. A few case examples follow. To understand the meaning of the examples however it is important to have firmly in mind the legal meaning of the word, "assignment."

Black's Law Dictionary defines the word "Assignment" as the transfer of an assignor's *entire* interest in property, including real property: "A Transfer or making over to another of the *whole of any property*, real or personal, ..." It includes transfers of all kinds of property (cite omitted) including negotiable instruments. The transfer by a party of *all of its rights* to some kind of property . . . ." Black's Law Dictionary 109 (5th ed. 1979). Thus, if property, real or personal, is *assigned*, then the *ownership* of that property has been transferred. This definition of the word *assignment* has existed since before the birth of this nation and has been the unchallenged rule in this country for as long as this country has been a nation.

For centuries the "security follows the note" legal axiom has meant the security follows a transfer of *ownership* of a note. The cases cited below reach back 193 years. Each of these cases--and each one represents at least 50 others that could easily be supplied—holds that the security follows the transfer of *ownership* of the note.

1. ***Carpenter v. Longan***, 83 U.S. 271, 274 (1873) (in an appeal from the Supreme Court of Colorado Territory, the United State Supreme Court stated: "The note and mortgage are inseparable; the former as essential, the latter as an incident. An ***assignment*** of the note carries the mortgage with it, while an assignment of the latter alone is a nullity." This is a case in which the note was ***assigned***, from one ***owner*** of the note to another for a valuable consideration. The assignee became the ***owner*** of the note. Carpenter is the seminal U.S. Supreme Court decision on this subject. It is still cited by court's across the country today.)

2. ***Nance v. Woods***, 79 Wash. 188, 189, 140 P. 323, (Wash. 1914) ("the mortgage follows the note").

3. ***California Civil Code § 2936*** ("The ***assignment*** of a debt secured by mortgage carries with it the security");

4. ***In re AMSCO, Inc.***, 26 B.R. 358, 361 (Bankr. D. Conn. 1982) ("An ***assignment*** of the note carries the mortgage with it . . . .");

5. ***Margiewicz v. Terco Properties***, 441 So.2d 1124, 1125 (Fla. Dist. Ct. App. 1983) ("when a note secured by a mortgage is ***assigned***, the mortgage follows the note into the hands of the mortgagee");

6. ***Federal National Mortgage Ass'n v. Kuipers***, 314 Ill.App.3d 631, 635, 732 N.E.2d 723, 727 (Ill. Ct. App. 2000) ("The ***assignment*** of a mortgage note carries with it an equitable ***assignment*** of the mortgage by which it was secured. The ***assignee*** stands in the shoes of the ***assignor-mortgagee*** with regard to the rights and interests under the note and mortgage. . . . [I]n Illinois, the ***assignment*** of the mortgage note is sufficient to transfer the underlying mortgage.").

7. ***Lagow v. Badollet***, 1 Blackf. 416, 1826 WL 1087, at *3 (Ind. 1826) ("a mortgage . . . follows the debt into whose hands soever it may pass").

8. ***In re Bird***, No. 03-52010-JS, 2007 WL 2684265, at *2-4 (Bankr. D.Md. Sept. 7, 2007) ("The note and mortgage are inseparable; the former as essential, the latter as an incident. An ***assignment*** of the note carries the mortgage with it . . . .").

9. ***In re Ivy Properties, Inc.***, 109 B.R. 10, 14 Bankr. D. Mass. 1989) ("[U]nder Massachusetts common law the ***assignment*** of a debt carries with it the underlying mortgage, without necessity for the granting or recording of a separate mortgage assignment.");

record to establish that appellee is the current owner of the note and mortgage at issue in this case, and, therefore, the real party in interest.") *(citations to Ohio's versions of UCC §§9-109(a)(3). 9-102(a)(72)(D) and 9-203(g) omitted)*;

15. ***MidFirst Bank, SSB v. C.W. Haynes & Co., Inc.***, 893 F. Supp. 1304, 1318 (D.S.C. 1994) ("South Carolina recognizes the 'familiar and uncontroverted proposition' that 'the ***assignment*** of a note secured by a mortgage carries with it an ***assignment*** of the mortgage.'

16. ***Kirby Lumber Corp. v. Williams***, 230 F.2d 330, 333 (5th Cir. 1956) (applying Texas Law) ("The rule is fully recognized . . . that a mortgage to secure a negotiable promissory note is merely an incident to the debt, and passes by ***assignment or transfer*** of the note.")

17. ***UMLIC VP LLC V. Matthias***, 234 F. Supp.2d 520, 523 (D. V.I. 2002) (citing and quoting with approval the "**RESTATEMENT (THIRD) OF PROPERTY, MORTGAGES § 5.4(a)** (1997). The comment to this section further explains that '[t]he principle of this subsection, that the mortgage follows the note, . . . applies even if the transferee does not know that the obligation is secured by a mortgage. . . . Recordation of a mortgage ***assignment*** is not necessary to the effective transfer of the obligation or the mortgage securing it.' Id. § 5.4 cmt. B (1997). Accordingly, in the Virgin Islands, no separate document

specifically ***assigning*** and transferring the mortgage which secures a note is required to accompany the ***assignment*** of the obligation, because the mortgage automatically follows the note.

Plaintiff-Respondent has never offered any proof it gave *value* for the note. Thus, Plaintiff-Respondent did not prove it had satisfied the first requirement for obtaining an enforceable security (ownership) interest in the Note. As previously demonstrated, the failure to prove it has an enforceable security (ownership) interest in the Note was a simultaneous failure to prove it has an enforceable security interest in the DOT. *See RCW 62A.9A-203(g).* Also, Plaintiff-Respondent has not demonstrated, and cannot demonstrate, the entity that transferred the Note and DOT to it—MERS—had any interest in either the Note or DOT to convey. So, the MERS assignment, which the trial and appellate courts deemed irrelevant, is actually highly material to the decision of the main issue in this cas

The Court should accept review under RAP 13.4(b)(4) because the Court of Appeals' decision, based upon an erroneous interpretation of the *security follows the note* doctrine is directly contrary to the codification of the *security follows the note* doctrine contained in RCW 62A.9A-203(a), (b), and (g).

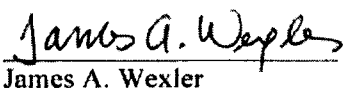
CONCLUSION

Pursuant to 13.4(b)(4), this Court should accept review and reverse the Court of Appeals.

DATED this 10th day of February, 2016.

Respectfully submitted,

JAMES A. WEXLER



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that, on the date stated below, I caused a copy of Defendant's Petition for Supreme Court Review to be served on:

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The Petition was served by Email as agreed to Emilie Edling

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DATED this 10th day of February, 2016, Sammamish, WA 98075.

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Appendix

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

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR IXIS REAL ESTATE CAPITAL TRUST 2006-HE3 MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2006-HE3,	)	No. 73631-1-I
Respondent,	)	
v.	)	
VALERIE J. SLOTKE,	)	PUBLISHED OPINION
Appellant.	)	FILED: January 11, 2016

VERELLEN, A.C.J. — The holder of a promissory note secured by a deed of trust has authority to elect to commence a judicial foreclosure of that deed of trust. After Valerie Slotke defaulted on her promissory note, Deutsche Bank National Trust Company elected to commence an action to judicially foreclose the deed of trust securing her delinquent note. Slotke appeals the order granting Deutsche Bank summary judgment and the decree of foreclosure. She argues Deutsche Bank was not entitled to foreclose in the absence of proof that it was the owner of the beneficial interest in the note. She also argues Deutsche Bank improperly sued simultaneously to enforce the note and to foreclose the deed of trust.

The holder of a note may commence a judicial foreclosure of the deed of trust in the same manner as a mortgage. As the holder of the note, Deutsche Bank had

authority to enforce the note after Slotke defaulted. Because it both enforced the note and foreclosed the deed of trust in this single action, the statutory bar against simultaneous actions does not apply. Accordingly, we affirm.

FACTS

Valerie Slotke borrowed $253,575 from First NLC Financial Services, LLC, doing business as The Lending Center on May 16, 2006. This loan was evidenced by a promissory note dated May 16, 2006 under which The Lending Center is designated as "Lender" and "Note Holder."[1] The face amount of the note is $253,575.00. It provides for Slotke to make periodic payments. It also provides for acceleration of the maturity of the debt evidenced by the note in the event Slotke failed to make payments under the note.

The promissory note was secured by a deed of trust also dated May 16, 2006, which Slotke signed. The deed of trust encumbered real property that she owned. The real property is located in Pierce County, Washington. This deed of trust was recorded on May 24, 2006 with the Pierce County Auditor's Office.

Thereafter, The Lending Center both indorsed the promissory note and assigned the deed of trust to Deutsche Bank. The assignment of deed of trust is dated March 3, 2011 and was recorded on August 5, 2011 with the Pierce County Auditor's Office.

Slotke defaulted on her loan obligations on April 1, 2010 by failing to make the payment due under the promissory note. Deutsche Bank exercised the terms of the note permitting acceleration of the maturity of the note in the event of any default. The unpaid balance of the debt was then $247,875.98.

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[1] Clerk's Papers (CP) at 157.

After Slotke failed to cure the default, Deutsche Bank commenced this judicial foreclosure action in Pierce County Superior Court. The bank sought a money judgment for the amounts owed under the promissory note and also sought to foreclose the deed of trust securing the note.

On May 27, 2014, Deutsche Bank moved for summary judgment. In support of its motion, Deutsche Bank filed an affidavit attesting to its possession of the note bearing the indorsement by The Lending Center payable to Deutsche Bank. At the hearing on the motion for summary judgment, Deutsche Bank also produced the original promissory note signed by Slotke for inspection by the court.

The court granted summary judgment to the bank, dismissing all of Slotke's claims with prejudice. The court concluded

> (a) That the conditions precedent to foreclosure of the Promissory Note and Deed of Trust executed by Valerie J. Slotke have occurred;
>
> (b) That Deutsche Bank is the holder of the Note and [beneficiary] of the Deed of Trust[;]
>
> (c) That Deutsche Bank is entitled to foreclosure of the Promissory Note and Deed of Trust on the Subject Property.[2]

On September 19, 2014, the superior court entered a judgment and decree of foreclosure in favor of Deutsche Bank. The decree includes a monetary judgment against Slotke in favor of the bank. It also provides for foreclosure of the deed of trust and a sheriff's sale of the property encumbered by the deed of trust, followed by a redemption period of eight months.

Slotke appeals.

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[2] Id. at 125.

ANALYSIS

This court reviews an order granting summary judgment de novo, engaging in the same inquiry as the superior court.[3] "Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."[4] The initial burden is on the moving party to show there is no genuine issue of any material fact.[5] The burden then shifts to the nonmoving party to "'set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact.'"[6] This court reviews the facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party.[7]

Deutsche Bank's Authority to Commence a Judicial Foreclosure

A deed of trust may be judicially foreclosed by commencing an action in superior court.[8] Specifically, the deeds of trust act, chapter 61.24 RCW, expressly provides,

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[3] Beaupre v. Pierce County, 161 Wn.2d 568, 571, 166 P.3d 712 (2007).

[4] CR 56(c); Am. Exp. Centurion Bank v. Stratman, 172 Wn. App. 667, 673, 292 P.3d 128 (2012).

[5] CR 56(e); Vallandigham v. Clover Park Sch. Dist., 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

[6] Meyer v. Univ. of Washington, 105 Wn.2d 847, 852, 719 P.2d 98 (1986) (quoting Allard v. Bd. of Regents of Univ. of Washington, 25 Wn. App. 243, 247, 606 P.2d 280 (1980)).

[7] Right-Price Recreation, LLC v. Connells Prairie Cmty. Council, 146 Wn.2d 370, 381, 46 P.3d 789 (2002).

[8] Helbling Bros., Inc. v. Turner, 14 Wn. App. 494, 496-97, 542 P.2d 1257 (1975) (explaining that the "language of the deed[s] of trust act contained in RCW 61.24 requires there be an election either to foreclose the deed of trust pursuant to the terms of RCW 61.24.040, or in the alternative, to foreclose the deed of trust as a mortgage, as provided for in RCW 61.24.100."); see also RCW 61.24.020, .100(8), .120; WASH. STATE BAR ASS'N, REAL PROPERTY DESKBOOK § 21.3, at 21-5 to -6 (4th ed. 2014); 18 WILLIAM

"This chapter shall not supersede nor repeal any other provision now made by law for the foreclosure of security interests in real property."[9]

Where a deed of trust is foreclosed as a mortgage, the law of mortgages applies.[10] That is because a deed of trust is a species of mortgage.[11] These two principles have been the law since the deeds of trust act was enacted in 1965.

Here, Deutsche Bank commenced a judicial foreclosure of the deed of trust. Slotke's primary argument on appeal is that Deutsche Bank was not entitled to summary judgment and a decree of foreclosure "in the absence of proof that it was the 'owner' of the beneficial interest in the [n]ote."[12] But because Washington State Supreme Court expressly rejected this proposition decades ago in John Davis & Co. v. Cedar Glen No. Four, Inc., Slotke's argument fails.[13]

John Davis & Co. was an appeal of a case in which John Davis had judicially foreclosed a mortgage on real property to satisfy delinquent notes of a corporation.[14] The Scotts held mortgages against the same real property.[15] The superior court

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B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: TRANSACTIONS § 20.19, at 437 (2d ed. 2004).

[9] RCW 61.24.120 ("Other foreclosure provisions preserved") (boldface omitted).

[10] RCW 61.24.020 ("a deed of trust is subject to all laws relating to mortgages on real property").

[11] Rustad Heating & Plumbing Co. v. Waldt, 91 Wn.2d 372, 376, 588 P.2d 1153 (1979).

[12] Appellant's Br. at 14 (boldface omitted).

[13] 75 Wn.2d 214, 222-23, 450 P.2d 166 (1969).

[14] Id. at 215.

[15] Id.

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decided that the John Davis mortgage had lien priority over the mortgages held by the Scotts.[16] They appealed.

On appeal, the Scotts contested the priority of the John Davis mortgage lien.[17] In support of that argument, they maintained that John Davis did not have authority to foreclose the mortgage.[18] This was based on the fact that a corporation other than John Davis was the original lender of the funds evidenced by the note and secured by the mortgage that John Davis held at the time of the action.[19]

The Supreme Court rejected that argument, stating:

> [John Davis] is the holder and owner of the notes and mortgages of the corporation. 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 necessary for the *holder* to first establish that he has some beneficial interest in the proceeds.[20]

We conclude that the plain words of that case apply to a judicial foreclosure of a deed of trust. Specifically, it is the holder of a note who is entitled to enforce it. It is not necessary for the holder to establish that it is also the owner of the note secured by the deed of trust.

In Trujillo v. Northwest Trustee Services, Inc., this court observed that the law stated in John Davis & Co. had not changed since that case was decided.[21] This court also observed in Trujillo that the "beneficial interest" to which the Supreme Court

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[16] Id.

[17] Id. at 222.

[18] Id.

[19] Id.

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

[21] 181 Wn. App. 484, 498-500, 326 P.3d 768 (2014), rev'd on other grounds, 183 Wn.2d 820, 355 P.3d 1100 (2015).

referred in John Davis & Co. has been characterized as "ownership."[22] These common law principles were incorporated into Article 3, Negotiable Instruments, of the Uniform Commercial Code (UCC) when it was enacted in Washington.[23] Specifically, RCW 62A.3-301 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 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.[24]

At oral argument, counsel for Slotke cited RCW 61.24.030, the nonjudicial remedy section of the deeds of trust act, as a basis for Slotke's "ownership" argument. This argument is unpersuasive for two reasons.

First, RCW 61.24.030 states the requisites for a trustee's sale for a nonjudicial foreclosure of a deed of trust.[25] More specifically, the language in RCW 61.24.030(7)(a) states that "the trustee shall have proof that the beneficiary is the *owner* of any promissory note or other obligation secured by the deed of trust."[26] But this provision has no bearing on a judicial foreclosure of a deed of trust because such a foreclosure, as the statutes make clear, is controlled by the law of mortgages.

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[22] Id. at 497.

[23] Id. at 500; RCW 62A.3-301.

[24] RCW 62A.3-301.

[25] See RCW 61.24.040 (providing that "[a] deed of trust foreclosed under this chapter shall be foreclosed as[,]" followed by the procedural requirements for conducting only nonjudicial foreclosures).

[26] (Emphasis added.)

Here, for example, the trial court properly ordered in its decree of foreclosure that a sheriff's sale of the property would take place to satisfy the money judgment and that a redemption period of eight months would follow that sale. But there is no sheriff's sale and no redemption period that follows a trustee's sale in a nonjudicial foreclosure of a deed of trust.[27]

Second, even if the statute governing nonjudicial foreclosure of a deed of trust had some bearing on this particular judicial foreclosure, the argument would still fail. Even in the nonjudicial foreclosure setting, recent case law confirms that the holder of a note has authority to commence a nonjudicial foreclosure.[28]

Under the UCC, the "holder" of the note entitled to commence a judicial foreclosure is "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."[29] Under Article 3 of the UCC, "if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder."[30] "'Negotiation' means "a transfer of possession, whether voluntary or involuntary, of an

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[27] RCW 61.24.050(1).

[28] Trujillo, 181 Wn. App. at 500 (explaining that the language of RCW 62A.3-301(i) "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." (alteration in original) (quoting RCW 62A.3-3-1); see also Brown v. Washington St. Dep't of Commerce, ___ Wn.2d ___, 359 P.3d 771, 778 (2015) (explaining that RCW 62A.3-301 clarifies "that a person *need not* own a note to be entitled to enforce the note" and that the UCC's "definition of 'holder' does not turn on ownership").

[29] RCW 62A.1-201(b)(21)(A).

[30] RCW 62A.3-201(b). "Indorsement" means a signature that is made on an instrument for the purpose of negotiating the instrument. RCW 62A.3-204(a).

instrument by a person other than the issuer to a person who thereby becomes its holder."[31]

Here, Deutsche Bank obtained possession of the promissory note when the note was indorsed to Deutsche Bank by The Lending Center, the original payee under the note. Moreover, Deutsche Bank maintained possession throughout this judicial foreclosure action. It is the holder of Slotke's note.

This record makes clear that the bank presented the original note for inspection by the court at the summary judgment hearing. This was sufficient to prove the bank's status as holder of Slotke's delinquent note. We express no opinion whether this is the exclusive method for the holder of a note to prove its right to enforce the note.

Slotke's arguments are not compelling.[32] She cites no case law supporting the proposition that Deutsche Bank is not the holder of the note. Her arguments all focus on ownership requirements. She contends that "proof that one is the 'holder of the note' is *no* evidence that he is the 'owner of the note," a prerequisite for foreclosure.[33] She argues that Deutsche Bank was not the holder "in possession" of the note because "*[p]ossession* of the [n]ote has always been in the certificate holders."[34] But Deutsche Bank had possession of the original note at all material times. There is no authority

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[31] RCW 62A.3-201(a); see also id. cmt. 1 ("A person can become holder of an instrument when the instrument is issued to that person, or the status of holder can arise as the result of an event that occurs after issuance. 'Negotiation' is the term used in Article 3 to describe the post-issuance event.").

[32] Slotke provided numerous supplemental authorities on appeal to support her "proof of ownership" arguments. But these authorities miss the mark concerning who has authority to enforce a note and therefore are not compelling.

[33] Appellant's Br. at 18.

[34] Id. at 17.

under either existing case law or the UCC that a holder of a note must be the owner and therefore "in possession" in some other sense to commence judicial foreclosure.[35] And Slotke provides no authority to support her argument raised at oral argument that The Lending Center's indorsement to Deutsche Bank made it a mere custodian of the note. Therefore, her arguments fail.

Relying on another "ownership" argument, Slotke claims that

> given the federal statute that controlled [Deutsche Bank]'s creation and that controls its day-to-day operation – 26 U.S.C. § 860(A)-(G) – . . . [Deutsche Bank] still would not be authorized to foreclose because [Slotke]'s loan would have been transferred into the Trust more than four years after the last date on which it lawfully could have been transferred into the Trust."[36]

First, Slotke did not raise this argument in her opening brief, and "[a]n issue raised and argued for the first time in a reply brief is too late to warrant consideration."[37] Second, this argument has no application to the question of who is the holder of the note for purposes of commencing a judicial foreclosure.[38] Third, Slotke bases this

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[35] See Trujillo, 181 Wn. App. at 503 (distinguishing UCC § 9A, which "addresses the criteria for the owner of a mortgage note to create a security interest in that note" from a foreclosure proceeding, which "is not based on the creation of a personal property security interest in the note."); Brown, 359 P.3d at 786 n.16 (recognizing that when the trustee of a pool mortgage-backed securities *holds* the mortgage notes on behalf of the owner of the mortgage notes, the trustee can foreclose (citing Cashmere Valley Bank v. State, Dep't of Revenue, 181 Wn.2d 622, 641, 334 P.3d 1100 (2014))); In re Butler, 512 B.R. 643, 653 (Bankr. W.D. Wash. 2014) (explaining that under Washington law, one may be the "person in possession" of the deed of trust note and therefore a "holder," either physically or through an agent).

[36] Reply Br. at 8.

[37] Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

[38] See John Davis & Co., 75 Wn.2d at 222-23 ("The holder of a negotiable instrument may sue thereon in his own name . . . . It is not necessary for the holder to first establish that he has some beneficial interest in the proceeds." (citation omitted)).

argument on a challenge to Deutsche Bank's compliance with the trust's pooling and servicing agreement, but she lacks standing to raise that issue because she is not a party to or intended third-party beneficiary of that agreement.[39]

Slotke also argues that because Mortgage Electronic Registration Systems, Inc. "has never owned *any* interest" in the note, it "never possessed any ownership interest that could be lawfully assigned."[40] Further, she argues that all assignments of interests in real property in Washington must "be accomplished by deed."[41]

But Washington courts have long recognized that the security instrument follows the note that it secures.[42] Ordinarily, a transfer of a debt secured by a mortgage or other instrument in the nature of a mortgage carries with it the mortgage security and operates as an equitable assignment thereof.[43] Moreover, Slotke fails to persuasively argue that the recorded assignment of the deed of trust in this case is ineffective to transfer The Lending Center's interest to Deutsche Bank.

We conclude that because Deutsche Bank was the holder of the note and the holder of the note is authorized to commence a judicial foreclosure, summary judgment was appropriate.

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[39] See In re Nordeen, 495 B.R. 468, 480 (B.A.P. 9th Cir. 2013) (explaining that the securitization of a loan merely creates a separate contract distinct from the plaintiff's debt obligations under the note).

[40] Reply Br. at 6.

[41] Id. at 7.

[42] Mut. Sec. Fin. v. Unite, 68 Wn. App. 636, 639, 847 P.2d 4 (1993) (assignment of promissory note secured by deed of trust carried with it the deed of trust); see also Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 104, 285 P.3d 34 (2012) (in nonjudicial foreclosures, "Washington's deed[s] of trust act contemplates that the security instrument will follow the note, not the other way around").

[43] Mut. Sec., 68 Wn. App. at 639.

No Simultaneous Actions

Slotke next argues that because Deutsche Bank attempted to enforce the note and deed of trust simultaneously by seeking a judicial decree of foreclosure based on Slotke's failure to make the note payments, the foreclosure "was illegitimate from its inception."[44] Because Washington courts have long rejected this concept, we disagree.[45]

The plain words of RCW 61.12.120 are dispositive of this argument. That statute states:

> The plaintiff [in a judicial foreclosure action] shall not proceed to foreclose his or her mortgage while he or she is prosecuting any other action for the same debt or matter which is secured by the mortgage, or while he or she is seeking to obtain execution of any judgment in such other action; nor shall he or she prosecute any other action for the same matter while he or she is foreclosing his or her mortgage or prosecuting a judgment of foreclosure.[46]

"In other words, two separate actions cannot be maintained at the same time for the collection of the same debt."[47] But RCW 61.12.120 does "not prevent a plaintiff from pleading the terms of a note in a foreclosure action."[48]

Here, as the holder of the note, Deutsche Bank had the requisite authority under the deeds of trust act to enforce the note and deed of trust. And this is the only action in which Deutsche Bank sought to do both simultaneously. Because Slotke's argument runs counter to the plain words of this governing statute, we reject it.

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[44] Appellant's Br. at 14.

[45] Hinchman v. Anderson, 32 Wash. 198, 206, 72 P. 1018 (1903).

[46] RCW 61.12.120.

[47] Hinchman, 32 Wash. at 206.

[48] Farm Credit Bank of Spokane v. Tucker, 62 Wn. App. 196, 201, 813 P.2d 619 (1991).

Attorney Fees and Costs

Deutsche Bank argues it is entitled to attorney fees and costs on appeal pursuant to RCW 4.84.330 and RAP 18.1. RCW 4.84.330 permits a party to recover reasonable attorney fees and costs in any action on a contract where the contract provides for this award. Here, the promissory note provides that the lender "will have the right to be paid back by [the borrower] for all of its costs and expenses in enforcing this [n]ote to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees."[49] The superior court awarded Deutsche Bank its reasonable attorney fees below. RAP 18.1(a) provides that a party may recover reasonable attorney fees or expenses on appeal if applicable law grants the party the right to recover these fees and expenses. Because Deutsche Bank has prevailed on appeal, its reasonable attorney fees and costs incurred on appeal are awarded upon compliance with RAP 18.1.

We affirm.

WE CONCUR:

Cox, J.

[49] CP at 226.

RCW 61.24.030(4)

(4) That no action commenced by the beneficiary of the deed of trust is now pending to seek satisfaction of an obligation secured by the deed of trust in any court by reason of the grantor's default on the obligation secured: PROVIDED, That (a) the seeking of the appointment of a receiver shall not constitute an action for purposes of this chapter; and (b) if a receiver is appointed, the grantor shall be entitled to any rents or profits derived from property subject to a homestead as defined in RCW 6.13.010. If the deed of trust was granted to secure a commercial loan, this subsection shall not apply to actions brought to enforce any other lien or security interest granted to secure the obligation secured by the deed of trust being foreclosed;

RCW 62A.1-201(b)(35)

(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 RCW Y62A.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.

RCW 62A.3-310(b)(3)

(b) Unless otherwise agreed and except as provided in subsection (a), if a note or an uncertified check is taken for an obligation, the obligation is suspended to the same extent the obligation would be discharged if an amount of money equal to the amount of the instrument were taken, and the following rules apply:

.....

(3) Except as provided in subsection (b)(4), if the check or note is dishonored and the obligee of the obligation for which the instrument was taken is the person entitled to enforce the instrument, the obligee may enforce either the instrument or the obligation. In the case of an instrument of a third person which is negotiated to the obligee by the obligor, discharge of the obligor on the instrument also discharges the obligation.

RCW 62A.9A-102(a)(28)(B)

(a) Article 9A definitions. In this Article:

.....

(28) "Debtor" means:

.....

(B) A seller of accounts, chattel paper, payment intangibles, or promissory notes.

RCW 62A.9A-102(a)(73)(D)

(a) Article 9A definitions. In this Article:

. . . . . .

(73) "Secured party" means:

. . . . . .

(D) A person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold.

RCW 62A.9A-203(a), (b), and (g)

(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 RCW 62A.7-106, 62A.9A-104, 62A.9A-105, 62A.9A-106, or 62A.9A-107 pursuant to the debtor's security agreement.

. . . . . .

(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.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Valerie Slotke,
Plaintiff/Petitioner

vs

Deutsche Bank National Trust Company, et al.,
Defendant/Respondent

(Court of Appeals No. 73631-1)
No.
DECLARATION OF
EMAILED DOCUMENT
(DCLR)

I declare as follows:

1. I am the party who received the foregoing email transmission for filing.
2. My address is: 3400 Capitol Blvd. SE #103, Tumwater WA 98501
3. My phone number is (360) 754-6595.
4. I have examined the foregoing document, determined that it consists of 39 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: February 10, 2016 at Tumwater, Washington.

Signature: _____

Print Name: Jacob Josephsen