SUPREME COURT NO. 940568

COURT OF APPEALS No. 74050-4-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

PAULINE CONNER,

Plaintiff/Appellant.

v.

EVERHOME MORTGAGE COMPANY, a division of EVERBANK, REGIONAL TRUSTEE SERVICES, INC., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a/k/a MERSCORP, FEDERAL NATIONAL MORTGAGE ASSOCIATION, LENDER PROCESSING SERVICES, DOES I-XXX, INCLUSIVE,

Defendants/Respondents

ANSWER TO PETITION

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I. INTRODUCTION

The Court of Appeals affirmed the trial court's summary judgment dismissal of Petitioner Pauline Conner's ("Petitioner") wrongful foreclosure claims rejecting all of Petitioner's arguments. Petitioner subsequently filed a Petition for Review and raised several issues, but only seeks review of two – (1) whether the reliance on certain declarations was erroneous and (2) whether the refusal to allow a continuance under 56(f) was erroneous. Neither of the Court of Appeals decision on these issues is in conflict with a decision of the Supreme Court or involves an issue of substantial public interest that should be determined by the Supreme Court. There is nothing novel or extraordinary in this Court of Appeals Division I unpublished appeal. Thus, this Court should deny Conner's Petition for Review because RAP 13.4(b)(1) and 13.4(b)(4) do not apply to this case.

II. ANSWERS TO THE ISSUES PRESENTED FOR REVIEW

1. The decision of the Court of Appeals that the trial court properly relied on the Declarations of Lee and Kaufman is not in conflict with a decision from the Supreme Court.

2. The decision of the Court of Appeals that the trial court properly denied Petitioner's request for a continuance under CR 56(f) is not in conflict with a decision from the Supreme Court and involves no issue of substantial public interest that should be determined by the Supreme Court.

III. STATEMENT OF THE CASE

In May 2006, Petitioner obtained a loan for $279,000 from Irwin Mortgage Corporation ("IMC"). CP 874, 878-881. A Deed of Trust encumbering the property located at 21604 78th Avenue SE, Woodinville, Washington ("the Property") secured the loan. CP 874. The Deed of Trust identifies IMC as "Lender" and MERS as beneficiary "as nominee for Lender and Lender's successors and assigns." CP 874, 882-899.

In June 2006, IMC sold the loan to Fannie Mae and indorsed the Note in blank. CP 874-875, 900-902. Effective January 2007, loan servicing transferred to Everbank. CP 874-875. Everbank serviced the Loan on behalf of Fannie Mae. CP 875. Since then, Everbank has maintained possession of the original Note. CP 875.

Petitioner defaulted under the Note and Deed of Trust beginning in May 2009. CP 1194. Everbank advised Petitioner of her default and impending referral to foreclosure. CP 875-876. Petitioner failed to cure her default. CP 310.

On September 2, 2009, Rick Wilken, as Vice President of MERS, executed an Assignment of the Deed of Trust from MERS to Everbank. CP 875, 903-910. The Assignment was recorded on October 20, 2009, in Snohomish County. CP 875.

On September 1, 2009, Everbank referred the Loan to Regional, authorizing it to commence nonjudicial foreclosure. CP 654. Regional obtained the Affidavit of Note Holder from Everbank as part of its foreclosure referral package. CP 654.

On September 2, 2009, Everbank signed the Appointment of Trustee for Regional to become the new trustee. CP 655, 667-669. Subsequently, on September 18, 2009, as authorized agent for Everbank, Regional issued Petitioner a Notice of Default ("NOD"). CP 654, 659-663. On October 20, 2009, Regional recorded the Appointment of Successor Trustee and afterwards recorded the Notice of Trustee's Sale ("NOTS") in the official records of Snohomish County. CP 655, 667-674.

The Notice of Trustee's Sale set a public auction on January 22, 2010. CP 655, 681-684. Regional postponed the sale until April 16, 2010. CP 655. Petitioner did not seek to restrain the trustee's sale. CP 338, 349. Fannie Mae purchased the property at the trustee's sale on April 16, 2010, and Regional recorded a Trustee's Deed to this effect. CP 656, 685-687. After Petitioner failed to vacate, Fannie Mae instituted an unlawful detainer action, which this court stayed pending the outcome of this lawsuit.

Conner filed her wrongful foreclosure lawsuit on February 13, 2012, seeking damages and injunctive relief. CP 1253-1269. On May 14, 2012, Petitioner filed a First Amended Complaint asserting claims for wrongful foreclosure, fraud, breach of good faith and fair dealing, violations of the Consumer Protection Act ("CPA"), and Gross Negligence. CP 1192-1205. On July 9, 2015, Respondents moved for summary judgment seeking dismissal of all claims against them.

Regional, who entered into receivership, was not a party to the summary judgment proceeding.

On August 4, 2015, Petitioner moved for a continuance of the summary judgment to conduct further discovery of the issue of possession and ownership. On September 14, 2015 the trial court heard Conner's Motion to Continue and Lender Respondents' Motion for Summary Judgment. CP 16. On September 22, 2015, the Court issued a Memorandum Decision and Order where the Court denied Conner's Motion to Continue and granted Lender Respondents' Motion for Summary Judgment in its entirety, dismissing all claims. CP 10-15. Conner appealed, and the Court of Appeals affirmed the trial court.

IV. ARGUMENT

1. Standard of Review

RAP 13.4(b) provides that a petition for review will be accepted by the Supreme Court only: (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) if the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Petitioner relies on RAP 13.4(b)(1) and (4). Because the lower court ruling does not create a conflict in law or involve an issue of substantial public interest,

review is not warranted.

2. The Court of Appeals did not commit error by affirming the trial court's reliance on the Declarations of Lee and Kaufman.

The Court of Appeals properly relied on Washington statutory and case law authority governing the submission of supporting declarations on summary judgment and the application of the business records. Specifically, the Court of Appeals relied on the recent published appellate decision in *Barkley v. GreenPoint Mortg. Funding, Inc.*, 358 P.3d 1204, 1210, 190 Wash.App. 58, 67–68 (Wash.App. Div. 1, 2015). Petitioner offers no explanation to support her claim that the Court's reliance on *Barkley v. GreenPoint Mortg. Funding, Inc.* was misplaced. The *Barkley* case is directly on point and in line with Washington court rules on summary judgment and the evidence code.

Under Washington law, to be considered on summary judgment, a supporting declaration must be made on personal knowledge and the facts set forth must be admissible in evidence. CR 56(e) provides the requirements for an admissible affidavit:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

CR 56(e) affidavits must be made on personal knowledge, must set forth

facts admitted into evidence, and must show that the affiant is competent to testify to the information in the declaration. Washington courts consider the requirement of personal knowledge to be satisfied if the proponent of the evidence satisfies the business records statute. *See Discover Bank v. Bridges,* 154 Wn.App. 722, 726, 226 P.3d 191 (2010). RCW 5.45.020 provides that a business record is admissible when

> [T]he custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

Courts broadly interpret the statutory terms "custodian" and "other qualified witness". *State v. Smith,* 55 Wn.2d 482, 348 P.2d 417 (1960); *State v. Quincy,* 122 Wn.App. 395, 399, 95 P.3d 353 (2004). Also, the need not be identified by the person who created it. *Cantrill v. Am. Mail Line, Ltd.,* 42 Wn.2d 590, 257 P.2d 179 (1953). In the trial court proceeding, Respondents submitted the Declaration of Lee and Kaufman in support of summary judgment. The Declarations contained adequate foundation to qualify as business records and the exhibits were properly authenticated. The trial court did not abuse its discretion by allowing said Declarations to be considered especially in light of Petitioner not submitting any contradictory evidence or moving to timely strike the Declarations.

Petitioner cites two Supreme Court cases in the Issues Presented Section, but provides no analysis or explanation as to how these cases apply to the present

case and create a conflict of interest. The two cases cited *State v. Weeks* and *State v. Fricks* are not in conflict. In *State v. Weeks*, the Supreme Court determined that the unauthenticated hospital record was not "competent evidence" because it did not satisfy RCW 5.45.020 based on the record not having been made in the regular course of business. *State v. Weeks*, 425 P.2d 885, 886–87, 70 Wash.2d 951, 953 (WASH 1967). Contrary to Petitioner's claim, the *State v. Weeks* case did not hold that a declaration was inadmissible under the business records exception because it contains information compiled from third parties.

Petitioner's citation to *State v. Fricks* is similarly misguided. Petitioner seems to cite the *Fricks* case for the proposition that the contents of a business record cannot be established by a witness's oral testimony, the actual document must be offered. The Court noted that appropriate testimony must establish the identity and mode of preparation in order to lay a foundation for admission under RCW 5.45.020. *State v. Fricks*, 588 P.2d 1328, 1333, 91 Wash.2d 391, 397–98 (Wash., 1979). Nothing about the Court of Appeal's decision conflicts with this Supreme Court decision. In fact, the Court of Appeal's decision is consistent with *Fricks* in the criteria it considered in determining whether the business records applied. Specifically, the Court noted that the affiants provided their respective titles and declared under penalty of perjury they had personal knowledge of how the business maintained records and personally reviewed the records, which were attached as exhibits.

Furthermore, as noted by the trial court, Petitioner offered no evidence contesting the facts in the Declarations of Lee and Kaufman. Therefore, the undisputed record before the trial court demonstrated that the information in the Declarations of Lee and Kaufman was accurate and could be considered on summary judgment. A trial court's decision to admit or exclude evidence lies within its sound discretion and will not be reversed absent a manifest abuse of discretion. *Int'l Ultimate, Inc.* v. *St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774 (2004) (no abuse of discretion in admitting documents under business records exception to hearsay prohibition). A trial court's decision to admit evidence is reviewed for a manifest abuse of discretion. *State v, Ziegler*, 114 Wn.2d 533. 538 (1990). A trial court abuses its discretion when it bases its decision on unreasonable or unsound grounds. *Dix v. ICI Group, Inc*,, 160 Wn.2d 826, 833 (2007). There is nothing in the record to suggest that the trial court abused its discretion.

The Court of Appeals properly affirmed the trial court's decision to admit the Declarations of Lee and Kaufman because they both complied with CR 56(e) and RCW 5.45.020 and Petitioner submitted no contrary evidence. The Court of Appeals also considered that in the trial court, the Petitioner failed to move to strike the Declaration of Kaufman and therefore could not raise this issue on appeal. In conclusion, both the trial court's ruling to allow the Declarations and its granting of summary judgment and the Division I's affirmation are correct decisions.

Lastly, Petitioner also does not identify any issue of substantial public interest to support her request for relief under RAP 13.4(b)(4) and no such public interest concern exists. The case involves the private matter of a routine non-judicial foreclosure of secured property due to a loan default. Division I's unpublished decision did not alter or expand on the current state of foreclosure law in Washington State. While there will continue to be non-judicial foreclosures and summary judgments concerning foreclosures, a Supreme Court decision in this case is not likely to impact any such future proceedings because the underlying findings were limited to the particular facts of this case. Because no issue of substantial public interest exists, the Petition for Review should be denied.

3. The Court of Appeals did not commit error by affirming the trial court's denial of Petitioner's request for a CR 56(f) Continuance

The Supreme Court should not accept this Petition for Review because the decision of the Court of Appeals does not conflict with a Supreme Court decision and involves no issue of substantial public interest that should be determined by the Supreme Court. Petitioner offers no evidence warranting a review under these criteria. Petitioner only argues for a liberal reading of the discovery rules. Accordingly, the Petition for Review should be denied.

A trial court's denial of a motion for a CR 56(f) continuance is reviewed for an abuse of discretion. *Lake Chelan Shores Homeowners Ass'n* v. *St. Paul Fire & Marine Ins. Co.*, 176 Wn. App. 168, 183, 313 P.3d 408 (2013). "A trial

court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or reasons." *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012). A trial court may deny a CR 56(f) continuance if: (1) the party seeking it has no 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 material fact. *Baechler v. Beaunaux*, 167 Wn. App. 128, 132, 272 P.3d 277 (2012).

Here, the trial court found that the evidence sought by Petitioner would not have created an issue of fact and therefore the continuance was not warranted. The Court of Appeals correctly affirmed this decision because Petitioner did not make the showing necessary to justify a CR 56(f) continuance and nothing in the record demonstrated the trial court acted unreasonably thereby abusing its discretion. Petitioner argues that the trial court offered no grounds for its decision denying the continuance. This is blatantly wrong. In its Memorandum of Decision, the trial court found that the discovery sought was not material in the judgment of the court. Additionally, the court denied the continuance because Petitioner offered no reason to doubt the accuracy of the declarations and therefore the court found no reason to believe that a continuance would be fruitful. The Court of Appeals properly affirmed this decision finding that the evidence sought by Petitioner would not have created an issue of material fact, which is an express ground for denying a continuance. The Court of Appeals also

considered the three-year time frame that Petitioner had to complete discovery but failed to do so.

And even if the trial court abused its discretion, which there is no evidence of, the issue does not conflict with Supreme Court authority or present a substantial public interest. Reviewing the appellate decision will not provide new guidance to litigants. There is no novel issue of law that would redefine existing law. For the foregoing reasons, the Court should deny the Petition for Review.

V. REQUEST FOR ATTORNEY'S FEES

Pursuant to RAP 18.1, Respondents request attorneys' fees and costs on appeal. RAP 18.1(j) provides for a fee award for answering petitions for review. Specifically, the rule provides:

> If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review. A party seeking attorney fees and expenses should request them in the answer to the petition for review.

In Washington, attorney fees are awarded to the prevailing party in an action on a contract when the contract provides for attorney fees and costs incurred to enforce its provisions. *QFC v. Mary Jewell T. L.L.C.*, 134 Wn. App. 814, 818, 142 P.3d 206 (2006); see also *Union Bank, N.A. v. Blanchard*, 378 P.3d 191, 203, 194 Wash.App. 340, 364 (Wash.App. Div. 1, 2016)

Attorney's fees are provided for in the Deed of Trust and are appropriate here because Respondents prevailed on the appeal and the Petition for Review is without any legal or factual basis. As such, Respondents respectfully requests this Court grant its request for reasonable attorney's fees against Petitioner Pauline Conner. Respondents further request leave of Court to file an Affidavit supporting attorney's fees. RAP 18.1(d).

VI. CONCLUSION

The arguments in Petitioner's petition for review are without merit. The decision of the Court of Appeals is not in conflict with a decision from the Supreme Court nor does it involve an issue of substantial public interest. Accordingly, the petition for review should be denied.

Respectfully submitted this 16th day of January, 2017.

Nicolas Daluiso, WSBA #23505
Robinson Tait, P.S.
Attorneys For Lender Respondents

CERTIFICATE OF SERVICE

I, Natalie Carson, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am a paralegal at Robinson Tait, P.S., attorneys for Respondents, and am competent to be a witness herein.

On January 18, 2017, I caused to be served via first class, U.S. Mail a true and correct copy of the foregoing ANSWER TO PETITION to the following:

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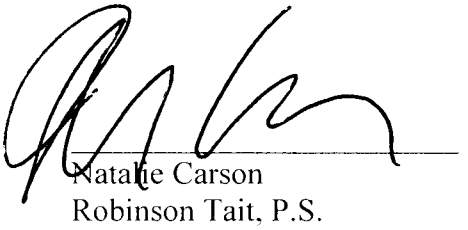

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