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

NO. 74264-7-I

ROBERT CUMMINGS and DORIS CUMMINGS, husband and wife,

Plaintiffs/Appellants,

vs.

NORTHWEST TRUSTEE SERVICES OF WASHINGTON; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AND DEUTSCHE BANK NATIONAL TRUST CO., AS TRUSTEE IN TRUST FOR THE REGISTERED CERTIFICATE HOLDERS OF FIRST FRANKLIN MORTGAGE LOAN TRUST, ASSET-BACKED SECURITIES SERIES 2006-FF8

Defendants/Respondents.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SNOHOMISH

APPELLANTS SUPPLEMENTAL REPLY BRIEF

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I ARGUMENT

In their brief, Defendants Deutsche Bank as trustee ("DB") and Mortgage Electronic Registration Systems ("MERS") (collectively "Defendants") assert numerous misstatements of law and fact. For example:

> As the Cummings acknowledge, the Washington Supreme Court has conclusively rejected their position. The Washington Supreme Court's rulings in *Bain* and *Brown* hold that the "holder" of the borrower's note is entitled to commence and prosecute a non-judicial foreclosure. Under RCW 62A.3-301, a "[p]erson entitled to enforce an instrument means (i) the holder of the instrument." Whether the holder of the note is the "owner" is not a legally relevant inquiry; rather, "proof of [the status of holder] is what entitles a beneficiary to enforce a note secured by a deed of trust. Ownership of the note is irrelevant." *Trujillo v. Nw. Tr. Servs., Inc.*, 181 Wn.App. 484, 506, 326 P.3d 768 (2014), *rev'd on other grounds*, 183 Wn.2d 820 (2015). The Cummings provide no basis to disregard this recent and conclusive precedent.

Defendants' Reply, at 5 – 6.

The precedent is indeed recent, but it is not conclusive. In reality, Who owns the note? is the only relevant query. Moreover, Defendants' claim that Plaintiffs "provide no basis to disregard this recent and conclusive precedent" is simply untrue. Plaintiffs provide a very strong basis for rejecting the recent precedent—RCW 62A.9A-203(a), (b), and (g) and the historical meaning of the "security follows the note" legal axiom that it codifies![1]

[1] Defendants' claim that Plaintiffs argue codification of the axiom *materially and substantially* changed the axiom (*Defendants' Reply*, at 6) is either an inept reading of Plaintiffs' position on this issue or a deliberate attempt to distort Plaintiffs' position. Plaintiffs actually prove the exact opposite of Defendants' claim. RCW 62A.9A-203(a), (b), and (g) faithfully codifies the traditional meaning of the "security follows the note" doctrine. It is the recent spate of cases, not Plaintiffs, that attempts to materially and substantially change the meaning of the axiom.

As is true in every state in the country, in Washington the state legislature, not the state supreme court, enacts the laws. The job of every court in this state, including the Supreme Court, is to apply laws as written by the state legislature to facts presented in justiciable controversies that come before the court. Where the law is clear, the court, regardless of its beliefs about what the law should be, is obligated to apply the law as written.

Properly read, RCW 62A.9A-203's meaning is crystal clear: the right to enforce a deed of trust is transferred *only* with the transfer of "*ownership*" of the note the deed of trust secures. Thus, because RCW 62A.9A-203(a), (b), and (g) contradicts the "holder" holdings in *Bain*, *Trujillo*, and *Brown*, those holdings should be ignored by this court in deciding this case.[2]

Another example of the numerous misstatements made by Defendants is found on page 6 of *Defendants' Reply*:

> The Cummings unsupported argument is that codification of the rule that "the security follows the note" in the UCC, in fact, materially and substantially (and *sub silentio*) changed that rule to provide that the security follows only the transfer of "ownership" of a note. The Cummings cite no authority for this meritless argument.

Plaintiffs have *never* argued codification of the "security follows the note" doctrine materially and substantially changed the meaning of the doctrine.

[2] Plaintiffs certainly understand that *Trujillo* is an opinion written by this court. The court obviously takes pride in its opinions. But the "holder" holding in *Trujillo* is simply wrong. This court should not allow its pride, or wrong decisions by the Supreme Court, to stand in the way of making the correct decision in this case.

Plaintiffs have never argued the doctrine was changed *at all* by the codification. In fact, Plaintiffs have always argued exactly the opposite: the correct interpretation of RCW 62A.9A-203 mirrors the traditional meaning of the centuries-old security follows the note legal axiom. It is the recent spate of incorrect judicial decisions that attempt to materially and substantially change the doctrine.

For centuries the doctrine has meant the security follows the transfer of *ownership* of the note. The seminal U.S. Supreme Court case on this subject is *Carpenter v. Longan*, 83 U.S. 271 (1872). Defendants, after quoting a few lines of *Carpenter* out of context, cite the case as support for their claim that the security follows the transfer of the right to enforce the note. But when one analyzes the entire case, it is clear the case stands for the proposition that the security follows the transfer of ownership of a note.

In *Carpenter*, defendants, *for valuable consideration*,[3] executed a promissory note to plaintiff's assignor. On the same date, at the same time, defendants executed a mortgage to Plaintiff's assignor to secure repayment of the debt obligation for which the note was taken as payment. *Carpenter*, 83 U.S. at 271. Before the note matured, plaintiff's assignor, *for a valuable consideration*,[4] assigned the note and mortgage to plaintiff. *Id.*, at 272.

[3] In other words, the note was created and transferred ***for value***.
[4] Thus, the note was created and transferred to plaintiff's assignor *for a valuable consideration*, and the note was transferred from plaintiff's assignor to plaintiff *for a*

Two facts should be noted immediately. First, the note was *assigned* to plaintiff. As the court is undoubtedly aware, the word "assignment" is a legal term of art. According to Black's Law Dictionary and thousands of state and federal cases that could be cited, the term means "A transfer or making over to another of the *whole* of any property, real or personal, in possession or in action, or of any estate or right therein. 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, usually intangible property such as rights in a lease, *mortgage*, agreement of sale or a partnership."[5] (Emphasis added). Second, the note was assigned *for value*. In layman's terms, the note in *Carpenter* was *sold* to the plaintiff.

The *Carpenter* note was not paid at maturity; plaintiff sued. *Id.*, at 272. Defendants claimed they had tendered payment and the tender had been rejected. They also claimed plaintiff's assignor had received a portion of the payment of the debt obligation and had converted that

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valuable consideration. That is, Plaintiff *purchased* the note and the deed of trust followed the note.

[5] *Black's Law Dictionary* (5th ed. 1997), at 109. A note *owner's* transfer of the *right to enforce the note* is not a transfer of *all of the note owner's rights* in the note. Consequently, transfer of the right to enforce a note is not an assignment of the note. Moreover, transfer of the right to enforce a note, if not made as part of the assignment of the note, *does not transfer any interest in the note*. *See* Report of the Permanent Editorial Board for the Uniform Commercial Code: *Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes* (ALI and NCCUSL November 14, 2011), at 11. A person entitled to enforce, who does not own the note he is entitled to enforce, is merely a bill collector.

There is no provision in Article 3 that authorizes a person entitled to enforce a note to enforce the security for that note. But there is a provision in Article 3 that prohibits a person entitled to enforce, who does not own the note, from enforcing the underlying obligation for which the note is taken as payment. *See RCW 62A.3-310.*

portion to his own use. *Id.* The U.S. Supreme Court found it had been proven that the note and mortgage were *assigned* to plaintiff *for value. Id.* This is the context in which the *Carpenter* court opined. "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. *Id.*, at 274.

The *Carpenter* court was talking about a *sale* of the note, not a transfer of the right to enforce it. Unless the transfer of the right to enforce a note accompanies the sale of that note, the transferee becomes nothing more than a bill collector. In fact, if the truth be known, such a transferee is not even the "holder" of the note. *See RCW 62A.9A-313.*

Defendants use of the above quote from *Carpenter* as support for the proposition the security follows a transfer of the right to enforce a note is meritless. The case does not come close to standing for that proposition. As demonstrated above, the case supports Plaintiffs' position—the security follows *the sale of a note.*

Carpenter is still good law! Over the ensuing decades, it has been cited with approval hundreds, perhaps thousands, of times.[6] The holding in *Carpenter,* which rests on the proposition that the security followed the sale of the note, is codified at RCW 62A.9A-203(a), (b), and (g). That provision commands that an enforceable *ownership* interest in a note is transferred *only if*, among two other considerations, *value* is given for the

[6] Not that approval of any lower court is needed. The U.S. Supreme Court is the supreme judicial authority in the country.

note. *RCW 62A.9A-203(a) and (b)*. And only after an enforceable ownership interest in the note has been transferred is an enforceable ownership interest in the security for the note (the deed of trust) transferred. *RCW 62A.9A-203(g)*.

No evidence has ever been presented in this case that the note was *assigned*. No evidence has ever been presented in this case that the note was transferred *for value*. As a result, there is no evidence DB ever obtained an enforceable ownership interest in the deed of trust. Without that interest, Defendants cannot lawfully be permitted to foreclose.

Citing provisions of Article 3 to prove DB has the right to enforce the note is not enlightening; it is misleading. This case is not about the right to enforce *the note*; it is about the right to enforce *the deed of trust*, which is a separate and distinct right from the right to enforce the note. This separate right has separate and distinct requirements.

Unlike the right to enforce the note, one of the requirements for enforcing the deed of trust is that you must be the owner of the right to repayment that the deed of trust secures. This is because the deed of trust, by its unambiguous terms, secures the right of repayment of the debt to only one person in the world: the Lender (i.e., the owner of the debt secured by the deed of trust) (or the Lender's successor or assign)!

The holder of a note secured by a deed of trust who does not own the note he holds is not the Lender or a successor or assign of the Lender. Hence, the holder of a note secured by a deed of trust who does not own

the note he holds cannot possibly be a party to the deed of trust that secures the note.

By what legal principle is a noteholder who is not a party to a deed of trust contract authorized to assert the "power of sale" in that contract? Washington courts have routinely held homeowners are not permitted to challenge the legality of assignments and pooling and servicing agreements precisely because homeowners are neither parties to nor third-party beneficiaries of those agreements and therefore may not assert rights under those agreements. Why then do the same courts permit noteholders who are not owners--or successors or assigns of owners--of the notes they hold (and who therefore are not parties to or third-party beneficiaries of the deeds of trust that secure those notes) to exercise the power of sale clauses in those deeds of trust?

The answer is not because the Washington Legislature gave noteholders that right in the DTA. It did not grant such a right to non-owner noteholders in the DTA. RCW 61.24.030(7)(a) requires the trustee to have proof that the person claiming to be the beneficiary of the deed of trust is the "owner" of the note. Numerous other provisions of the DTA contain the same requirement. By the way, the same requirement—ownership of the note--is contained in the deed of trust itself. Additionally, the same requirement—ownership of the note--is codified at RCW 62A.9A-203. Finally, the centuries-old security follows the note doctrine embodies the same requirement.

To date, Washington courts have ignored all of this evidence. Whether today or in the near future, that will change. It has to. On this issue, with all due respect, the courts are simply wrong.

Washington courts justify their ignorance of the "ownership" requirement in various provisions of the DTA by claiming the "holder" and "owner" language in RCW 61.24.030(7) cannot be reconciled. This claim is true for Washington courts *only* because they begin the analysis of the question with the pre-conceived conviction that the noteholder has the right to enforce the security for the note (one of only two possible answers to the question the analysis is supposed to answer), the very question the analysis is supposed to determine.

If one instead starts the analysis with no preconceived convictions, it is easy to reconcile the "holder"/"owner" language in RCW 61.24.030(7). One merely has to recognize that the "holder" and "owner" of the note and "beneficiary of the deed of trust" must all be the same person. Then the entire DTA makes sense.

Yes, Plaintiffs' position results in the mere holder of a note not being entitled to foreclose. But that is as it should be. Why should someone who has no interest in a secured note (Indeed, someone who may even have stolen the note) be entitled to enforce a deed of trust that gives the enforcement right to the *owner* of the right to repayment of the debt the deed of trust secures?

The court is obligated to reconcile provisions of a statute if it is reasonably possible to do so. *Mason v. Ga.-Pac. Corp.*, 166 Wn. App. 859 (2012). It is very simple to reconcile the owner/holder language in the DTA. One simply has to avoid starting the analysis with the preconceived notion that a non-owner holder of a secured note must be allowed to enforce the security for the note.

By the way, under RCW 62A.9A-203(a), (b), and (g), to be entitled to enforce the deed of trust, the beneficiary of the deed of trust must be the "owner" and "holder" of the note.[7] The only place where the beneficiary of the deed of trust need not be the owner of the note is in Washington courts.

Yes, it is possible for the legislature, under certain circumstances that don't exist in this case, to enact legislation that materially alters the terms of a private contract. But the Washington Legislature did not do that in the Washington Deeds of Trust Act ("DTA"). RCW 61.24.030(7)(a)

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[7] Defendants' claim RCW 62A.9A-203(g) is unrelated to 9A-203(a) and (b). This claim is silly. RCW 62A.9A-203 is a section of RCW Chapter 62A.9A. Each subsection of RCW 62A.9A-203, (a) through (i), is related to each of the other subsections of 9A-203. That is why subsections (a) through (i) are all under 9A-203. RCW 62A.9A-203(g) attaches an ownership (security) interest in a deed of trust at the same moment that an ownership (security) interest attaches to the right to payment (i.e., the promissory note) the deed of trust secures. A *promissory note* is a right to payment. *RCW 62A.9A-102(a)(65)*. The term "collateral," as used in RCW 62A.9A-203(a) and (b) includes a *promissory note* that has been sold. *RCW 62A.9A-102(a)(12)(B)*. Thus, 9A-203(a) and (b), when talking about "collateral," are talking about a *right to payment that has been sold*. What other "right to payment" do Defendants think 9A-203(g) is referencing other than the right to payment discussed in 9A-203(a) and (b), the section to which 9A-203(a), (b), and (g) belong? Defendants' claim that (g) is not connected to (a) and (b) is ludicrous.

In other words, as Plaintiffs have asserted from the beginning of this litigation, the security follows the note doctrine has always meant the security follows *the sale of a note*.[8] Until lawyers began to make, and judges, for whatever reason, began to accept, the bogus notion that the security follows the transfer of the right to enforce the note, the security, historically, had never followed the transfer of the right to enforce the note.

V CONCLUSION

For the reasons listed herein above, the court should reverse the trial court's dismissal of Plaintiff's lawsuit and remand the case to the trial court for trial on the regular court calendar.

Respectfully submitted,

JAMES A. WEXLER

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Plaintiffs/Appellants

[8] Think for a moment. Under the courts' formulation, a thief who holds a blank endorsed note that is secured by a deed of trust is legally entitled to foreclose if the note is dishonored. While there is a very good reason—liquidity of the secondary market for promissory notes--to allow a thief to enforce a blank endorsed note, there is no good reason to allow a thief to legally enforce a deed of trust. There is no market, secondary or otherwise, for deeds of trust. These facts alone should be all anyone needs to know to know the holder of a secured note that the holder does own is not entitled to enforce the deed of trust.

DECLARATION OF SERVICE

THE UNDERSIGNED declares under penalty of perjury under the laws of the State of Washington that he caused APPELLANT/ PLAINTIFFS' REPLY TO RESPONDENT/DEFENDANTS' DEUTSCHE BANK NATIONAL TRUST COMPANY, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., REPLY Brief to be served on the following representative for Respondent/Defendants at the below stated address by email as previously agreed between the parties to this litigation:

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DONE this 27th day of April, 2016 at Sammamish, WA.

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