NO. 95376-7

(Court of Appeals NO. 75262-6-I)

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

21st Mortgage Corporation,

Respondent,

v.

Linda C. Nicholls; Duncan K. Robertson,

Petitioner.

RESPONDENT 21ST MORTGAGE CORPORATION'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF ANSWERING PARTY

21st Mortgage Corporation ("Respondent" or "21st") is Respondent in the appeal and Plaintiff in the Superior Court action. Respondent hereby answers the Petition for Review ("Petition") of Appellant Duncan K. Robertson ("Petitioner" or "Robertson") as follows.

II. SUMMARY OF GROUNDS FOR DENYING REVIEW

The trial court's order granting judgment in favor of 21st pursuant to CR 56 was correctly affirmed in part by the Court of Appeals.[1] The Court of Appeals also properly declined to consider affirmative defenses and arguments not raised by Petitioner. Review of an appellate decision is appropriate in only four narrowly prescribed circumstances under RAP 13.4(b). This Court should not accept review of the Petition because, here, the issues are narrow, discrete, specific to the facts of this particular matter, and resolved by established case law. The Petition fails to show that the Court of Appeals' decision is in conflict with either a decision of this Court or a decision of another Court of Appeals or involves an issue of substantial public interest. This Court should deny the Petition.

III. COUNTERSTATEMENT OF CASE

The Petition fails to present a coherent statement of the facts and

[1] The Superior Court's summary judgment order was reversed in part concerning one issue (i.e., whether Respondent holds the note at issue and is, thus, entitled to foreclose the deed of trust) which does not appear to be at issue in the Petition.

procedure relevant to the issues presented for review, as required by RAP 13.4(c)(6). Respondent presents the following Counterstatement of Case in order to aid the Court's review of the Petition.

A. Statement of Facts Relevant to Review.

On November 15, 1999, Linda Nicholls ("Nicholls") obtained a loan from Old Kent Mortgage Company dba National Pacific Mortgage, a Michigan corporation ("Old Kent") by executing and delivering an Adjustable Rate Note ("Note") in the sum of $100,000.00. CP 1331, 1335-43. In order to secure the prompt and punctual repayment of the Note, Nicholls granted a Deed of Trust ("Deed of Trust"), encumbering real property located in King County ("Property"), in favor of Old Kent as beneficiary, which Deed of Trust was recorded on November 15, 1999 as Recording No. 19991115001505. CP 1332, 1344-59. The Note and Deed of Trust are collectively referred to herein as the "Loan".

Residential Funding Corporation, LLC, purchased the Loan from Old Kent. CP 1339. The Loan was securitized and Bank One N.A. as trustee of the securitized portfolio ("Bank One") was appointed beneficiary of the Deed of Trust. CP 3360, 3364-5. An Assignment of Deed of Trust from Old Kent to Bank One was recorded in King County on August 3, 2000, as Recording No. 20000803000299. *Id.* Bank One

later merged into JPMorgan Chase Bank NA ("Chase") thereby making Chase the trustee of the securitized portfolio. CP 1310, 3360-6.

On October 1, 2006, Bank of New York Trust Company, N.A. ("BNYTC") exchanged its trustee business with Chase and thereby succeeded to Chase's interest as trustee of the Loan. CP 1310. Thereafter, the Bank of New York Mellon Trust Company NA ("Mellon") succeeded to the interest of BNYTC. CP 3361, 3367-8.

On August 12, 2010, an Assignment of Deed of Trust assigning Chase's interest in the Loan to Residential Funding Real Estate Holdings, LLC ("RFREH") was recorded in King County as Recording No. 20100812000720, however, that assignment was ineffective as Chase no longer held the interest in the Loan since that interest had previously been exchanged to BNYTC (then succeeded by Mellon). CP 3360, 3366. A Corrective Corporate Assignment of Deed of Trust was subsequently recorded on July 27, 2012 from Mellon to Residential Funding Company LLC ("RFC"), as Recording No. 20120727001563. CP 3361, 3367-8.

On May 14, 2012, RFC, and fifty other related companies, filed a petition in U.S. Bankruptcy Court for the Southern District of New York. CP 1310-1. The multiple chapter 11 bankruptcies were consolidated in a jointly administered case in that court captioned *In re: RESIDENTIAL CAPITAL LLC, et al.*, Case No. 12-12020(MG) ("Bankruptcy Case").

CP 1331. The Bankruptcy Case liquidated certain assets, including the Loan, through noticed sales with the opportunity for interested parties to object and be heard. On November 21, 2012, an Order Under 11 U.S.C. §§ 105, 363, and 365 and Fed. R. Bankr. P. 2002, 6004, 6006, and 9014 (I) Approving (A) Sale of Debtors' Assets Pursuant To Asset Purchase Agreement With Berkshire Hathaway, Inc.; (B) Sale of Purchased Assets Free and Clear of Liens, Claims, Encumbrances, and Other Interests; and (C) Related Agreements; and (II) Granting Related Relief (the "Sale Order") was entered, approving, in part, the sale of the Note and the beneficial interest in the Deed of Trust to Berkshire Hathaway, Inc. ("Berkshire"). CP 1332, 1360-1457.

The Loan was among the assets delivered and transferred to Berkshire as part of the closing of the transaction authorized by the Sale Order. CP 1333, 1453-6; *see also* CP 2180, 2240-1. Pursuant to the Sale Order, Berkshire became the owner of the Loan and thereafter held the beneficial interest in the Deed of Trust free and clear of any claims against the prior owners of the Loan in accordance with the asset purchase agreement. *Id.* Thereafter, Berkshire deposited the Loan into the Knoxville 2012 Trust, a Delaware statutory trust (the "Knoxville Trust"), and appointed Wilmington Savings Fund Society, FSB, dba Christiana Trust, a division of Wilmington Savings Fund Society, FSB as Trustee

("Christiana"). CP 1333. Christiana then elected 21st as the Master Servicer and Custodian for the Knoxville Trust, which included the Loan. CP 2180, 2186-2237. To date, the Loan has remained in the Knoxville Trust with 21st appointed as the Master Servicer and Custodian. Pursuant to the Servicing Agreement and the Power of Attorney, which 21st holds through it, 21st is authorized and entitled to bring the foreclosure action in its own name. *Id.*; CP 2238-9.

Subsequent to the recording of the Corrective Assignment, RFC, acting pursuant to the terms of the Sale Order, assigned the Loan to 21st by Assignment of Deed of Trust, recorded on July 23, 2013, as Recording No. 20130723001972 in the records of King County. CP 3361, 3369.

In early 2006, Robertson allegedly loaned money to Nicholls and secured that loan by recording a Deed of Trust encumbering the Property and naming Robertson as the beneficiary. CP 2245-8. That Deed of Trust was recorded on January 6, 2006 in the records of King County as Recording No. 20060106002340 ("Robertson DOT"). *Id.* Robertson admitted that he obtained the Robertson DOT with knowledge of the existence of the superior Deed of Trust recorded in 1999. CP 1312.

On October 7, 2008, Robertson caused a Trustee's Deed to be recorded in the King County records as Recording No. 20081007101048 ("Trustee's Deed") by which Robertson asserts his status as the alleged

"undisputed fee simple owner" of the Property. CP 2257-67. The Trustee's Deed recites that the sale occurred on September 26, 2008. CP 2258. It further recites that the default listed in the Notice of Trustee's Sale was not cured and summarily states "all legal requirements and all provisions of said Deed of Trust have been complied with, as to acts to be performed and notices to be given, as provided in Chapter 61.24 RCW." *Id.*

The Notice of Trustee's Sale that was the predicate for the purported trustee sale was recorded January 9, 2008 as Recording No. 2008010900688 ("NOTS"). CP 2251-6. The NOTS set the sale date for April 11, 2008. CP 2251. However, according to the Trustee's Deed, the sale actually occurred on September 26, 2008 – 168 days from the date listed in the NOTS. Tellingly, the Trustee's Deed does not recite any facts related to a continuance of the sale and, in fact, the paragraph relating to the NOTS is missing the sale date specified in the NOTS. CP 2258.

The Loan is in default for several reasons, including the failure to make the monthly payments as required by the Note, abandoning the Property in violation of the Deed of Trust, and failing to pay taxes and other charges assessed against the Property. CP 1332, 3345. The Loan is past due for the payment due on January 1, 2008 and every payment due thereafter, plus interest, late charges, and fees. CP 1312.

Nicholls' last payment on the Note was on August 11, 2009 in accordance with a repayment plan agreed to by 21st's predecessor when Nicholls was in a prior foreclosure. CP 2592-3. Under that repayment agreement, Nicholls made a payment of $1,205 that was received on July 8, 2009. CP 2592. On August 11, 2009, 21st's predecessor received a second payment of $1,250 from Nicholls. CP 2593. The payments made by Nicholls on July 8 and August 11, 2009 are the final payments made by Nicholls and applied to the Loan.

B. Statement of Proceedings Relevant to Review.

21st commenced the underlying judicial foreclosure by filing a complaint against Nicholls and Robertson on July 24, 2014. CP 1-38. Robertson subsequently filed a cross-claim against numerous defendants, none of whom are parties to this appeal. CP 87-135. On July 7, 2015, the trial court entered an Order of Default against Nicholls for her failure to appear and respond to the complaint. CP 3357-8.

On January 5, 2016, the trial court entered an Order Re: Motions for Stay, Trial Continuance and Discovery ("Discovery Order"). CP 1457-8. Among other things and contrary to Robertson's claim that the trial court denied his motion to compel, the Discovery Order clearly shows that the trial court struck Robertson's motion to compel due to his failure to confer as required by CR 26(i). *Id.*

On March 14, 2016, the trial court entered an Order on Motions for Summary Judgment ("MSJ Order") which found that 21st was entitled to a decree of foreclosure, struck Robertson's affirmative defenses, denied Robertson's motion for summary judgment, and continued the stay of Robertson's counterclaims and third-party damage claims. CP 2536-9. The MSJ Order was slightly revised by an Order on Motion for Reconsideration, entered on March 25, 2016.[2] CP 2701-2. The trial court subsequently entered a Judgment for Deed of Trust Foreclosure on April 28, 2016 (CP 2733-7) and an Order for Sale of Real Property on May 25, 2016 (CP 2746-8).

Robertson appealed both the MSJ Order and the Discovery Order. Opening Brief ("OB") 5. The Court of Appeals reversed in part and affirmed in part the MSJ Order. The Court held that the evidence submitted by Robertson was "sufficient to create a genuine issue of material fact whether 21st is entitled to enforce the note." Opinion ("OP")[3] 1-2. The Court correctly affirmed the remainder of the MSJ Order by declining to consider the trial court's ruling invalidating Robertson's non-judicial foreclosure (OP 9) and by affirming the trial court's dismissal of all of Robertson's affirmative defenses (with the exception of the standing

[2] On April 28, 2016, the trial court entered an Order to Certify CR 54(b) Final Status to Judgment on Order on Motions (Dkt. 166) and Order on Reconsideration (Dkt. 171) as Being Final for Purposes of Appeal ("Final Order"). CP 2728-32.
[3] "OP" herein refers to the amended Unpublished Opinion dated October 30, 2017.

defense as it relates to the aforementioned issue of material fact) (OP 9-11). The Court did not address the "Exclusive Jurisdiction" argument (see OP 9, fn. 6) or the Discovery Order. The Court denied both Respondent's and Appellant's cross Motions for Reconsideration but issued an amended Unpublished Opinion on October 30, 2017.

IV. ISSUES PRESENTED IF REVIEW IS GRANTED

The Petition's statement of issues is not procedurally accurate within the framework of RAP 13.4(b). The issues that would actually be presented, if review is granted, are as follows[4]:

1. Did the Court of Appeals properly decline to consider Robertson's claim that the Superior Court erred in invalidating the 2008 trustee's sale;

2. Did the Court of Appeals properly affirm the Superior Court's dismissal of Robertson's affirmative defenses (with the exception of his standing defense); and

3. Did the Court of Appeals properly conclude that Robertson had waived and abandoned issues that were not raised to the Superior Court or Court of Appeals?

[4] While it is not clear from the Petition, it appears that neither Robertson nor 21st are seeking review of the Court's decision to partially reverse the MSJ Order because a genuine issue of material fact exists which precludes summary judgment.

V. AUTHORITY AND ARGUMENT

A. Standard for Review.

Discretionary acceptance of a decision terminating review may be granted only if: (1) the decision of the Court of Appeals is in conflict with the decision of the Supreme Court; (2) the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; (3) a significant question of law under the constitution of the state of Washington or of the United States is involved; or (4) the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

At the outset, this Court should not accept review under RAP 13.4(b) because Robertson has failed to identify the considerations governing acceptance of review. The Petition claims several times that the decision of the Court of Appeals "conflicts" with other decisions, but fails to include specific references to the applicable portions of the appellate Opinion and citations to existing law in Washington that are in conflict. The Petition does not meet the requirements of RAP 13.4(b) and review should be denied on this basis alone.

As a second preliminary matter, Robertson repeatedly argues that the Court of Appeals did not address the Discovery Order and other subsequent orders of the trial court and that this failure is a fatal flaw

requiring review by this Court.[5] However, Robertson misunderstands the Rules of Appellate Procedure and, in any event, fails to cite to any conflicting authority under RAP 13.4(b).

Under RAP 12.2, the Court of Appeals accepting discretionary review can reverse, affirm, or modify a decision being reviewed or "take any other action as the merits of the case and the interest of justice may require."[6] RAP 12.2. Here, there was no reason to address the Discovery Order and, indeed, Robertson failed to include any identifiable legal argument in his Opening Brief relating to the Discovery Order. See RAP 10.3 (requiring assignment of error to be included in appellate brief). But even if he had, that order was not appropriate for review because, in fact, the trial court did not deny Robertson's motion to compel as he alleges, but rather entered an order striking the motion because of Robertson's failure to confer before filing.[7] The Petition's numerous references to Robertson's "motion to compel" are a red herring and not a basis for review.

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[5] Robertson also claims that his arguments related to the bankruptcy Sale Order were not addressed by the Court of Appeals. Petition 5. This is flatly incorrect. The Opinion directly addressed this argument and found it unpersuasive. OP 8. Further, Robertson fails to include any actual argument related to the bankruptcy in the Petition.

[6] Reliance on *Green River Cmty. College Dist. No. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 730 P.2d 653 (1986) is improper. *Green River* does not hold that RAP 2.2 precludes an appellate court from applying discretion in an appeal. Rather, *Green River's* holding relating to the RAPs is limited to the conclusion that technical defects in pleading assignments of error can be overlooked. 107 Wn.2d at 431.

[7] The Discovery Order states in pertinent part (CP 1458): "The Motion to Compel Discovery is stricken and the parties are directed to confer with a view to resolving any currently existing discovery disputes ...".

In addition, Robertson misunderstands the effect of the Court's partial reversal of the MSJ Order. The Petition seems to argue that the Court's failure to address subsequent trial court orders, such as the decree of foreclosure, effect the validity of the Opinion or will somehow confuse the trial court upon remand.[8] But again Robertson has failed to comprehend RAP 8.1 and 12.2. RAP 8.1(b) states that "[a] trial court decision may be enforced pending appeal or review unless stayed pursuant to the provisions of this rule." This includes execution of real property after entry of a judgment of foreclosure unless the appellant files a supersedeas bond. RAP 8.1(b)(2). Further, RAP 12.2 provides that the trial court may make whatever post-judgment decisions are necessary after the mandate is issued so long as those decisions do not conflict with the appellate decision. RAP 12.2.

Here, Robertson failed to obtain a supersedeas bond to stay execution of the MSJ Order. Accordingly, the trial court was free to issue a decree of foreclosure, writ of execution, and order of sale after entry of the MSJ Order. Nonetheless, even if that were not so, Robertson's arguments related to such post-judgment execution are not proper for

[8] Robertson similarly claims that the Court's partial reversal of the MSJ Order was incomplete because the Court did not include instructions for the trial court upon remand. Petition 9. This is erroneous. The Opinion found that a question of fact existed and remanded the case for further proceedings. OP 1-2, 11. In accordance with 12.2, the trial court can take any action necessary to further the proceeding so long as it does not conflict with an issue previously resolved on appeal. RAP 12.2.

review by this Court and must be directed to the trial court after the mandate is entered.

B. Notwithstanding the Foregoing, the Issues Raised by the Petition are Resolved by Existing Case Law.

This Court should not accept review under RAP 13.4(b). The discrete issues Robertson's Petition presents are readily resolved by existing case law and statutes. While it is extremely difficult to discern what precisely Robertson claims should be reviewed by this Court, the various issues addressed in the Petition can be categorized as follows: (1) sufficiency of the MSJ Order and Opinion under CR 56 standards; (2) due process considerations; and (3) Robertson's affirmative defenses, including the Deed of Trust "chain of title", and purported assignments of error not actually briefed or argued in the trial court or Court of Appeals.

1. The MSJ Order and the Opinion Correctly Applied the Standard of Review Under CR 56.

While scattered throughout the Petition, the basic underlying premise of Robertson's varying arguments relate to the MSJ Order, the Opinion, and the standard of review under CR 56. Robertson claims that the MSJ Order does not include facts to support the trial court's conclusion that the trustee's sale was void. He also claims that the facts submitted by 21st to rebut his affirmative defense regarding the statute of limitations were insufficient. And throughout all the arguments the Petition alleges

that the Court of Appeals used the incorrect standard of review under CR 56. All of these claims are insufficient to warrant review of the Opinion.

a. The Court of Appeals Correctly Declined to Review the 2008 Trustee's Sale.

Robertson presents several arguments relating to his 2008 trustee's sale. First, the Petition's claim that the MSJ Order does not state facts in support of the decision that the sale was void is specious for several reasons. Robertson never made this argument at the Court of Appeals and did not include it as an assignment of error. *See McKee v. Am. Home Prods, Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989) (appellate court will not consider issues on appeal that are not raised by an assignment of error or are not supported by argument and citation of authority); RAP 10.3 (a). What is more, the MSJ Order clearly contains facts relating to the determination that Robertson's 2008 trustee's sale was void making Robertson's claims to the contrary misleading and wrong. CP 2537-8.

Second, the Court of Appeals correctly determined that it was not necessary to review the determination that the trustee's sale was void and Robertson has failed to cite to any conflicting authority as required by RAP 13.4(b). The Opinion states that "Robertson's status as either junior lienholder or owner is immaterial to whether 21st is entitled to a decree of foreclosure. Regardless of whether Robertson owns the property or is a

junior lienholder, his interest in it will be foreclosed, and he will be entitled to any surplus." OP 9 (footnote and citation omitted). The Court of Appeals properly concluded that deciding whether the trustee's sale was void was not necessary for the Court's findings related to the remaining holdings and there is no contradictory authority cited in the Petition.

Lastly, even if the Court of Appeals had been inclined to review the trial court's determination that the trustee's sale was void, it is plain that the trial court's decision was supported by current case law and the Washington Deed of Trust Act ("DTA"). The DTA requires that a beneficiary proceeding with a nonjudicial foreclosure strictly comply with the DTA requirements. "The courts must strictly construe the DTA..." *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012). If the trustee does not comply with the DTA, the trustee is divested of authority to sell the property and the sale is invalid. *Id.* (citing *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 911, 154 P.3d 882 (2007)). The DTA provides that "[t]he trustee has no obligation to, but may ... continue the sale for a period or periods not exceeding a total of **[120] days**..." RCW 61.24.040 (6) (emphasis added).

Here, the trial court concluded that Robertson's trustee lacked authority to conduct the Trustee's Sale held on September 26, 2008 because that sale date was 168 days from the original date listed in the

NOTS (April 11, 2008). The Washington Supreme Court has squarely held that a trustee's sale conducted more than 120 days from the sale date listed in a notice of trustee's sale is void. *Albice*, 174 Wn.2d 560 at 568. Robertson has not cited any authority which contradicts the holding in *Albice* or the requirements of RCW 61.24.040 (6), and as a result, this Court should decline to review the Court of Appeals' Opinion.

b. The Opinion Correctly Found that 21st's Action is Not Barred by the Statute of Limitations.

The Petition next argues that the Opinion "includes assertions never pleaded or evidenced in the record below by 21st ... and others that remain in dispute ..." regarding Robertson's statute of limitations affirmative defense. Petition 12. But this observation is not accurate. As the Opinion actually states, 21st presented evidence to the trial court that Nicholls made payments on the loan in 2009. OP 9-10. The Opinion continues "Robertson argues that the evidence is not credible but he offers no evidence disputing that Nicholls made those payments." *Id.*

"[A]n adverse party may not rest upon the mere allegations or denials of a pleading ..." (CR 56); rather, the non-moving party must "set forth **specific facts** which sufficiently rebut the moving party's contentions ..." *Deutsche Bank Nat'l Tr. Co. v. Slotke*, 192 Wn. App. 166, 170-71, 367 P.3d 600 (2016) (citing *Meyer v. Univ. of Washington*, 105 Wn.2d

847, 852, 719 P.2d 98 (1986)) (emphasis added). After considering Robertson's arguments, and the record, the Court of Appeals rightly determined that he failed to set forth any facts to contradict 21st's evidence that Nicholls had made payments in 2009. Thus, the Opinion concluded that 21st's claims were not barred by the statute of limitations and the trial court properly dismissed Robertson's affirmative defense.

The Petition contains the same defects regarding the statute of limitations affirmative defense.[9] The Petition argues that 21st's evidence is not credible, but does not cite to any specific evidence in the record to contract 21st's evidence (likely because there is no such evidence). Instead, Robertson makes vague references to the "record below" without identifying any explicit facts. Petition 14. This is insufficient under CR 56 and RAP 13.4(b). And, as the Court of Appeals noted, "[t]he court is not required to search the record to locate the portions relevant to a litigant's arguments." OP 11 (citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992)).

Tellingly, the Petition does not cite to any contradictory authority that would necessitate review by this Court. In fact, Robertson's

[9] Robertson's citation to *Baldwin v. Sisters of Providence*, 112 Wn.2d 127, 769 P.2d 298 (1989) is not applicable in this case because 21st has pointed the trial court and Court of Appeals to specific evidence submitted by 21st thereby satisfying the requirements of CR 56. The burden then shifts to Robertson to submit evidence contradicting 21st's evidence. He failed to do so. Additionally, as stated herein, Robertson has the burden of proof on all elements of his affirmative defenses, not 21st.

allegations are of a factual nature and easily resolved by application of existing CR 56 law to the record. Accordingly, review should be denied.

2. This Court Cannot Review Robertson's Due Process Claim Because he Failed to Raise it Below.

Robertson argues for the first time in his Petition that the trial court's MSJ Order violated his due process rights. Robertson's argument is nonsensical, to say the least.[10] But, even if Robertson's due process argument was sound, he failed to raise it in his Opening Brief to the Court of Appeals. An appellate court will not consider issues on appeal that are not raised by an assignment of error or are not supported by argument and citation of authority. *McKee*, 113 Wn.2d at 705; RAP 10.3 (a). Where a brief contains no argument or citation to authority pertaining to omitted issues, the court will deny review of these arguments. *Ang v. Martin*, 154 Wn.2d 477, 486-487, 114 P.3d 637 (2005). Consequently, this Court should deny review of the Petition.

C. The Court of Appeals Correctly Found that Robertson Abandoned Claims at the Superior Court.

The Petition argues that the Court of Appeals should have addressed the affirmative defense relating to the Deed of Trust "chain of title." Petition 14-15. However, the Opinion is correct that Robertson

[10] The Petition's due process argument is long on legal citations, but has virtually no application to the issues presented here. Such vague references are not reviewable under RAP 13.4(b)(3). And contrary to Robertson's assertions that the Court of Appeals denied his appeal, the Court, in fact, agreed with Robertson and partially reversed the trial court.

"does not support this with argument" and appropriately declined to review it. OP 4, fn. 3. As stated above, the Court of Appeals properly did not consider issues on appeal that were not raised by an assignment of error nor supported by argument and citation of authority. *See McKee*, 113 Wn.2d at 705; RAP 10.3(a). And, as noted by the Court of Appeals, "[t]he defendant carries the burden of proof of an affirmative defenses." OP 10 (citing *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 267, 189 P.3d 753 (2008)). The defendant "must make a showing sufficient to establish the existence of the essential elements of those affirmative defenses." *Id.* (citing *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 255, 770 P.2d 182 (1989)). Not only did Robertson fail to meet his burden before the trial court, but he continued that failure in the Court of Appeals by not arguing each defense on appeal.[11] Most importantly, Robertson fails to set forth any conflicting law justifying review as required by RAP 13.4(b).

In addition to the "chain of title" affirmative defense, the Court of Appeals also properly concluded that Robertson abandoned nearly all of his affirmative defenses because they were not addressed to the Superior Court or preserved on appeal. The only affirmative defenses actually

[11] Reliance on *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 733 P.2d 530 (1987) is misplaced. In that case, the Court was reviewing amendments and supplemental pleadings under CR 15(b) in regards to issues tried by the parties. That case is wholly inapplicable to the failure of Robertson to advance any legal arguments, or assignments of error, for his affirmative defenses as required by the RAPs.

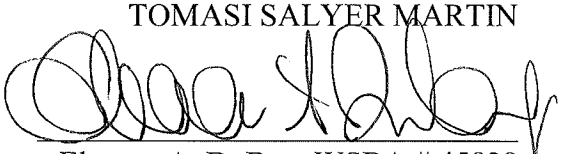
argued by Robertson were addressed by the Court of Appeals, including the statute of limitations defense and the standing defense (which was reversed in favor of Robertson). Review of the abandoned affirmative defenses is not warranted because Robertson did not submit any argument to the Court of Appeals and has failed to cite any conflicting authority as required by RAP 13.4(b).

VI. CONCLUSION

This Court should decline to accept discretionary review of the issues raised by the Petition. The brief not only fails to show that the Court of Appeals erred but it also falls far short of showing that 1) the Court of Appeals' decision conflicts with another decision either of this Court or of another Court of Appeals; 2) involves an issue of substantial public interest that should be determined by this Court; or 3) presents a significant question of constitutional law.

Respectfully submitted this 12th day of April, 2018.

TOMASI SALYER MARTIN



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CERTIFICATE OF SERVICE

I certify that on April 12, 2018, I served a copy of the foregoing document, described as **RESPONDENT 21ST MORTGAGE CORPORATION'S ANSWER TO PETITION FOR REVIEW** on the following persons by U.S. First Class Mail and email:

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I hereby further certify that on April 12, 2018, I served the foregoing document, described as **RESPONDENT 21ST MORTGAGE CORPORATION'S ANSWER TO PETITION FOR REVIEW** on the following individual by mailing to said individual a true copy thereof, addressed to her last known regular address and deposited in the Post Office at Portland, Oregon:

Linda Nicholls
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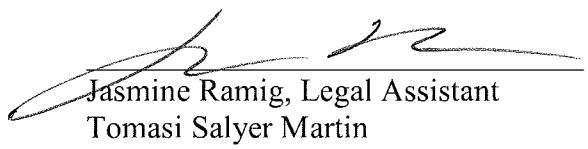
I declare under penalty of perjury under the laws of the State of Oregon that the foregoing is true and correct, and that this Declaration was executed in Portland, Oregon.

Dated: April 12, 2018



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