Supreme Court No. 953-81-3
Court of Appeal No. 34615-3-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

U.S. BANK NATIONAL ASSOCIATION, ET AL

Respondent/Plaintiff

v.

GEORGIA A. PLUMB, JOSHUA C. PLUMB, KAMERON F. PLUMB; and THE WORD CHURCH

Petitioners/Appellants/Defendants, *Pro Se*

PETITIONERS' REPLY TO RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

Georgia A. Plumb, Joshua C. Plumb, Kameron F. Plumb, and The Word Church aka Reverend Georgia A. Plumb (the Petitioners *pro se*) (the Plumbs) ask this Court to accept this Reply to Respondent's (U.S. Bank's) Answer to their Petition for Review.

II. NEW ISSUES RAISED BY U.S. BANK IN ITS ANSWER TO PETITION FOR REVIEW

A. Is the decision of the Court of Appeals in conflict with a decision of the Supreme Court?

B. Is the decision of the Court of Appeals in conflict with a published decision of the Court of Appeals?

C. Is a significant question of law under the Constitution of the State of Washington and of the United States involved?

D. Does the decision of the Court of Appeals involve an issue of substantial public interest that should be determined by the Supreme Court?

III. ARGUMENTS WHY FOR REVIEW SHOULD BE ACCEPTED

The Plumbs *pro se* do hereby reply to U.S. Bank's Answer pursuant to RAP 13.4(d) because the bank seeks review of various new issues not raised in the Petition.

> "*A party may file a reply to an answer only if the answering party seeks review of issues not raised in the petition for review. A reply to an answer should be limited to addressing only the new issues raised in the answer.*" RAP 13.4(d).

As a matter of law, the allegations of the *pro se* litigant are held to less stringent standards than formal pleadings drafted by lawyers and courts must construe inartful pleadings liberally in *pro se* actions. *Haines v. Kerner*, 404 U.S. 519, 92 S. Ct. 594, 30 L.Ed.2d 652 (1972); *Boag v. MacDougall*, 454 U.S. 364, 102 S. Ct. 700, 70 L.Ed.2d 551 (1982).

In its Answer, U.S. Bank seeks to distract attention away from the main issue of this case, which is that U.S. Bank did not have standing when it filed its case, under the controlling Washington statute at issue, Uniform Commercial Code (UCC) RCW 62A.3. (In seeking summary judgment, the movant always has the burden of proving, by uncontroverted facts that no genuine issue as to any material fact exists.) *State ex re. Bond v. State,* 62 Wn.2d 487, 383 P.2d 288 (1963). (The burden is on the moving party to establish its right to judgment as a matter of law, and facts and reasonable inferences from the facts are

considered in favor of the nonmoving party.) *Goad v. Hambridge,* 85 Wn. App. 98, 931 P.2d 200, review denied, 132 Wn.2d 1010, 940 P.2d 654 (1997); *Hansen v. Horn Rapids O.R.V. Park,* 85 Wn. App. 424, 932 P.2d 724, review denied, 133 Wn.2d 1012, 946 P.2d 402 (1997). (Summary judgment is proper only when facts are viewed in the light most favorable to party opposing summary judgment and there is no genuine issue of material fact.) *Neiffer v. Flaming,* 17 Wn. App. 440, 563 P.2d 1298 (1977).

A. The Decision of the Court of Appeals is in Conflict with a Decision of the Supreme Court.

U.S. Bank erred in it Answer, because the appeals court conflicted with past Supreme Court rulings in multiple ways, described below:

In its complaint, U.S. Bank claimed it was holder and owner of a promissory note indorsed in blank under RCW 62A.3-301(i) of Washington's UCC statute and this Court's holdings in *Brown v. Dep't of Commerce,* 184 Wn.2d 509, 359 P.3d 771 (2015)] and other cases cited therein.[1][2]

This Court holds in *Brown* that Washington's Uniform Commercial Code (UCC) statute, RCW 62A.3 controls what entity is entitled to enforce a promissory note in Washington state. "A

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[1] CP 680, Lines 15-28; CP 681-683; CP 829-832.
[2] CP 703-743.

promissory note evidencing a home loan is often a negotiable instrument, making article 3 of the UCC applicable. RCW 62A.3-102." *Brown* at 524. "When a note is indorsed in blank, it is 'payable to bearer and may be negotiated by transfer of possession alone.' Wash. Rev. Code § 62A.3-205(b)." *Brown Id.* at 523. "[I]t is the holder of a note who is entitled to enforce it. U.S. Bank's note is indorsed in blank.[3] "When a note is indorsed in blank, it is 'payable to bearer and may be negotiated by transfer of possession alone.' Wash. Rev. Code § 62A.3-205(b)." *Brown Id.* at 523.

U.S. Bank and its affidavits failed to make out a prima facie case that the bank or its agent held actual or constructive possession of the note on the date it filed the foreclosure complaint. Its affidavits are irrelevant and insufficient at a matter of law and the trial court improperly relied upon them.[4] (A declaration in support of or in opposition to summary judgment must satisfy the standards of CR 56(e).) *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 787, 819 P.2d 370 (1991); *Melville v. State*, 115 Wn.2d 34, 36, 793 P.2d 952 (1990). (The declaration must be made on personal knowledge, set forth admissible evidentiary facts, and affirmatively show that the declarant is

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3 CP 790.

4 CP 781-823; CP 745-780. VRP 114, Lines 1-11; CP 994.

competent to testify to the matters stated therein.) *Klossner v. San Juan County*, 93 Wn.2d 42, 44, 605 P.2d 330 (1980). Under Washington law U.S. Bank's affiants did not have a right to testify because they did not establish actual personal knowledge under CR 56(e). "*Lack of Personal Knowledge. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.*" Wash. R. Evid. 602. (An affiant in a summary judgment proceeding must affirmatively show competence to testify to the matters stated. It is not enough that the affiant be "aware of" or "familiar with" the matter; personal knowledge is required.) *Marks v. Benson,* 62 Wn. App. 178, 813 P.2d 180, review denied, 118 Wn.2d 1001, 822 P.2d 287 (1991).

Furthermore, U.S. Bank's note, deed of trust, and other documents are inadmissible because a competent witness did not swear to the documents' authenticity, including an appropriate attestation made under penalty of perjury. (The language of the affidavits do not meet the requirement of CR 56(e) that authenticity of these documents be sworn to.) *Discover Bank v. Bridges,* 154 Wn. App. 722, 725-26, 226 P.3d 191 (2010) (holding at 725 that declarations made "*under penalty of perjury*" met CR 56(e)'s requirements).

U.S. Bank did not dispute the note location document that showed Deutsche Bank held the note on the date the case was filed. In their defense the Plumbs proffered conflicting evidence of a note location document that they received from the bank in its response to their discovery request that showed *Deutsche Bank* held possession of the subject note on the date the case was filed. This document showed that *Deutsche Bank* continued to hold possession for several months afterward. (Appellants' Br, Appx, page 1). The trial court record clearly shows that the bank did not raise any objection to the conflicting note location document in either a brief or in a hearing. Directly contrary to RAP 2.5(a) and the facts in the record, the Court of Appeals unfairly reviewed the bank's new counsel's untimely, false "hearsay" claim and made its wrongful decision to affirm the trial court's unjust decision on *standing* based upon the bank's fraudulent argument. Pet. Appx I at 4 & 5. Pursuant to ER 103, the matter of "hearsay" could not be fairly and properly considered by the Court of Appeals because the bank never raised the issue in the trial court. *State v. Powell*, 126 Wn.2d 244, 893 P.2d 615 (1995) at 257. (Silence constitutes an admission only if (1) the party-opponent heard the accusatory or incriminating statement and was mentally and physically able to respond and (2) the statement and circumstances were such that it is reasonable to conclude the party-

opponent would have responded had there been no intention to acquiesce.) *State v. Neslund,* 50 Wn. App. 531, 749 P.2d 725, review denied, 110 Wn.2d 1025 (1988). (Issues not raised in hearing for summary judgment cannot be considered for the first time on appeal.) *Ashcraft v. Wallingford,* 17 Wn. App 853, 565 P.2d 1224 (1977). ("Under ER 103, an objection must be made to preserve an evidentiary error for appeal. Defense counsel did not object to Closson's statement nor did he ask for 258 a continuing objection to that line of inquiry....") *State v. Powell* 893 P.2 615, 126 Wash. 2d 244 (1995). (Matters not raised in the pleadings, depositions, or affidavits and considered by the trial court when ruling on a motion for summary judgment under subdivision (c) of this rule may not be considered by the supreme court when the cause is appealed.) *Ferrin v. Donnellefeld,* 74 Wn.2d 283, 444 P.2d 701 (1968). (The supreme court can review only those matters that have been presented to the trial court for its consideration before entry of the summary judgment.) *American Universal Ins. Co. v. Ranson,* 59 Wn.2d 811, 370 P.2d 867 (1962). ("An established rule of appellate review in Washington is that a party generally waives a right to appeal an error unless there is an objection at trial. Wash. R. App. 2.5(a).") *State v. Kalebaugh,* 183 Wn.2d 578, 355 P.3d 253 (2015) at 583.

The trial court did not properly make a finding or determination of the note location document. The true record quoted in relevant part below shows the trial court did not fairly make a finding or determination on any of the Plumbs' material issues and their evidence because the court's only concern was that money was loaned that had not been paid back. (Pet. pages 6-7).

The trial court did not make any factual determinations and did not properly rule pursuant to Washington's controlling Article 3 of the UCC. Contrary to Washington's controlling UCC statute, Article 3, the quotes from the Verbatim Report of Proceeding show the trial court erroneously did not care if the bank did not hold possession of the note on the date the foreclosure suit was filed and it erroneously held the UCC was not applicable.

> THE TRIAL COURT: ***"I'm not making any factual determination. I'm making a legal determination."***[5] ***"Whether somebody had the Note at one particular point in time or didn't have the Note really doesn't matter, because they have the Note now."***[6] ***"This is not a U.C.C. transaction."***[7] ***"They have the Note now. I'm finding that's all they need."***[8] ***"[T]hey since got the Note so it doesn't make any difference whether they had it at the time."***[9] ***"It doesn't matter*** **[if they lied about it under penalty of perjury]** ***with regard to the question of whether or not they're***

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5 VRP 106, Lines 19, 20.
6 VRP 99, Lines 6-8;
7 VRP 102, Line 3.
8 VRP 102, Lines 17, 18.
9 VRP 103, Lines 7, 8.

entitled to the foreclosure."[10] **[If they were not entitled when they filed the Complaint],** ***"I'm saying it doesn't matter now."***[11] ***"[I]n a notice pleading state, once the lawsuit is filed, there can still be things that happen afterwards so they're allowed to perfect their claim afterwards."***[12] **[If they didn't have the Note or their agent didn't have the Note, that doesn't matter a bit, because]** ***"They have the Note now...."*** [13]

Lastly, under its Argument A, in bad faith U.S. Bank, through its new counsel, has directly lied to this Court in its Answer, claiming that the trial court had "*ruled*" the evidence petitioners held up in support of their defense is "*inadmissible hearsay.*" The bank did not and cannot point to any place in the entire trial court record where this claimed *"ruling"* occurred. If this Court would search the entire trial court record for the word "*hearsay*," it will find that the Plumbs were the only ones who ever raised the issue of "*hearsay*"![14] Contrary to the facts, the bank's new counsel also fraudulently claimed in the Court of Appeals that the trial court had "*excluded*" the conflicting note location document because it was "*inadmissible hearsay.*" (Respondent's Br at 17-19). Directly contrary to RAP 2.5(a) and the facts in the record, the Court of Appeals unfairly reviewed the bank's false "hearsay" claim and made its wrongful decision to affirm the trial

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10 VRP 103, Lines 16-20.
11 VRP 103, Lines 21-23.
12 VRP 104, Lines 3-6.
13 VRP 108, Lines 8-10.
14 CP 373, 444, 446, 470, 471, 903, 908, 909.

court's unjust decision on *standing* based upon the bank's fraudulent argument. Pet. Appx I at 4 & 5. *Brown, supra* is relevant. This Court should accept review under RAP 13.4(b)(1).

B. The Decision of the Court of Appeals was in Conflict with a Published Decision of the Court of Appeals.

Contrary to U.S. Bank's claims, the Court of Appeals' unjust, unpublished decision in this case directly conflicts with multiple decisions by the Court of Appeals. First, the Court of Appeals allowed U.S. Bank to raise untimely hearsay objections to their own documents for the first time on appeal, contrary to the decision of the Court of Appeals in *State v. Powell* 893 P.2 615, 126 Wash. 2d 244 (1995). ("Under ER 103, an objection must be made to preserve an evidentiary error for appeal. Defense counsel did not object to Closson's statement nor did he ask for 258 a continuing objection to that line of inquiry....") Next, there is the published decision of the Court of Appeals in *Deutsche Bank Nat'l Tr. Co. v. Slotke*, 192 Wn. App. 166, 367 P.3d 600 (2016). (Pet. page 21; Pet. Appx I pages 4 and 5). In *Slotke Id.* at 605, 607, the Court of Appeals affirmed the superior court's ruling because at all times material Deutsche Bank maintained possession of the note indorsed to Deutsche Bank throughout the judicial foreclosure action. Thus, under Article 3 of Washington's UCC and existing foreclosure

case law, Deutsche Bank was the holder of *Slotke's* note, and it had the authority to enforce the note in the judicial action. Here in this case, however, U.S. Bank did not submit any affidavit in support that declared or established that the bank or its agent was the actual holder in possession of the note on the date it filed its foreclosure complaint.[15] Therefore, the unjust decision of the Court of Appeals to affirm the trial court's decision in this case is in direct conflict with the Court of Appeals' decision in *Slotke Id.* Thus, this Court should accept review under RAP 13.4(b)(2).

C. The Courts deprived the Plumbs of their property without due process and equal protection of law under U.S. Const. amend. XIV, § 1 and Wash. Const. art. I, § 2. U.S. Bank did not establish standing under Article 3 of the UCC.

U.S. Bank erred in its Answer on this issue because, U.S. Const. amend. XIV, § 1 provides in pertinent part: "...nor shall any state deprive any person of...property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws." Wash. Const. art. I, § 2 provides in relevant part: "No person shall be deprived of...property, without due process of law." Aside from the two Due Process Clauses, the Plumbs' property interest is also created by statutes or regulations, as well as the common law. Wash. Rev. Code § 4.04.010

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[15] CP 781-823; CP 745-780.

(2008) ("The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state.") The Plumbs' Due Process protections apply to both permanent and temporary deprivation of property. *Reilly v. State*, 18 Wn. App. 245, 566 P.2d 1283 (1977). The Plumbs' "deprivation of property" protections of Due Process are applicable whenever any significant property interest is at stake." *Olympic v. Chaussee Corp.*, 82 Wn.2d 418, 511 P.2d 1002 (1973).

Both lower courts clearly knew or should have known that the fundamental issue of U.S. Bank's *standing* had not been established under Washington's controlling statute, Article 3 of the UCC and this Court's relevant determinations in *Brown* and the cases cited therein that require the bank or its agent have "possession" of the note on the date of commencement of a foreclosure action. The trial court deprived the Plumbs of Due Process shown by the Verbatim Report of Proceeding quotes above. When issues of fact are necessary to the determination of a court's jurisdiction, due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses. The trial court never held an

evidentiary hearing to determine whether the plaintiff was the holder of the note at the time that it instituted the foreclosure action, despite being provided with unrefuted evidence produced by the plaintiff showing that plaintiff was not the holder of the note on the date the lawsuit was filed. The unjust trial court did not care if the bank or its agent did not hold possession of the note on the date the suit was filed, and subsequently denied the Plumbs due process.

The facts are inextricably intertwined with the controlling law in this case which is Article 3 of the UCC that requires the bank to establish that it was a holder of a note on the date it filed its foreclosure complaint. The two lower courts knew or should have known that the bank's supporting affidavits were not made on actual personal knowledge pursuant to CR 56(e) because they clearly did not establish that the bank or its agent held possession of the note on the date it filed suit. The courts did not have jurisdiction and they unfairly denied the Plumbs of their property in direct violation of both their federal and state constitutional personal rights. The two lower courts grossly abused their discretion when they exercised it on untenable grounds and for untenable reasons. *Morin v. Burris* 160 Wn.2d 745, 753, 161 P.3d 956 (2007). (Pet. page 20 and 21).

Furthermore, both courts knew or should have known that U.S. Bank did not dispute the veracity of the conflicting note location document that showed Deutsche Bank held the note on the date the case was filed, either in a pleading or in a hearing. In ruling in favor of the bank, the trial court held, ***"I'm not making any factual determination. I'm making a legal determination."***[16] This is clear evidence that the court did not "*exclude*" the note location document showing Deutsche Bank held the note because it was "*inadmissible evidence*," (contrary to what the bank in falsely represented in its Respondent's Brief on pages 17-19; the Court of Appeals claimed in its unpublished opinion (Pet. Appx pp 4, 5); and the Bank now claims in its Answer.)

The two courts deprived the Plumbs of their right to equal protection of law under U.S. Const. amend. XIV, § 1 because they treated the Plumbs differently from other similarly situated homeowners in other states. In this case here, the lower courts did not require that U.S. Bank have possession of the note on the date of suit, whereas, state supreme courts throughout the nation have protected their homeowner citizens. (Please see the seven state supreme court cases the Plumbs cited in their Petition, pages 9-11). These other state supreme courts have recently justly and fairly ruled on this issue that standing and enforcement rights

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[16] VRP 106, Lines 19, 20.

in the note under Article 3 of the UCC must be established as of the time of filing suit in mortgage foreclosure cases. Here, the two lower courts wantonly deprived the Plumbs of their long time home without properly requiring that the bank's standing and enforcements rights first be established under the plain requirements set forth in the controlling statute, Washington's Article 3 of the UCC.

Also, the Plumbs are *pro se* Petitioners/Appellants/Defendants. The lower court treated the Plumbs differently than it would someone that was represented by an attorney.[17] As a matter of law, the allegations of the *pro se* litigant are held to less stringent standards than formal pleadings drafted by lawyers and courts must construe inartful pleadings liberally in *pro se* actions. *Haines v. Kerner*, 404 U.S. 519, 92 S. Ct. 594, 30 L.Ed.2d 652 (1972); *Boag v. MacDougall*, 454 U.S. 364, 102 S. Ct. 700, 70 L.Ed.2d 551 (1982).

The state has no jurisdiction. The courts' wrongful decisions in this case are a gross miscarriage of justice, harmful beyond a reasonable doubt, a manifest error, a manifest abuse of discretion, a gross, significant, unfair deprivation of property without due process of law, and a gross violation of the Plumbs' equal protection rights under Wash. Const. art. I, § 3 and U.S. Const. amend. XIV, § 1 and wrongfully

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[17] VRP 39, Lines 24, 25; VRP 40, Line 1.

affected the outcome of the case. (State interference with a fundamental right is subject to strict scrutiny.) *In re Parentage of C.A.M.A.*, 154 Wash.2d 52, 57, ¶ 10, 109 P.3d 405 (2005). *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997).) Review should be accepted under RAP 13.4(b)(3).

D. The decision of the Court of Appeals Involves an Issue of Substantial Public Interest That Should Be Determined By The Supreme Court.

U.S. Bank erred in its Answer on this issue because: **There is a Presumptive Public Interest Impact.** The central issue of standing in this case raises issues of substantial public importance. U.S. Bank is a public Trust and therefore there is considerable evidence that U.S. Bank is involved with an enormous number of mortgages in Washington state and throughout the nation. If U.S. Bank files foreclosure complaints without establishing proper standing, as it did here in this present case, it is acting contrary to Washington's Article 3 of the UCC and the statute's plain, unambiguous meaning. It is unfair, fundamentally deceptive and dishonest, and would have a negative impact on the public. This element is presumptively met. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012) at 118. For this reason this Court needs to grant review under RAP 13.4(b)(4) because this involves an issue of substantial public interest that should be determined by the Washington

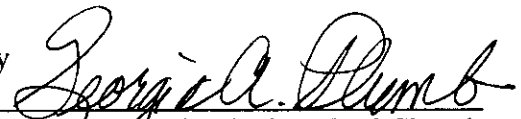
Supreme Court. Seven other state supreme courts have recently ruled on this same issue of standing, unanimously ruling against the banks. In those other states, homeowners were in danger of further abuse by the same banks, so the supreme courts of those states clarified the issue to prevent this from occurring further.

V. CONCLUSION

In light of the foregoing, review should be granted in this matter.

Dated this 8th day of March, 2018,

Respectfully submitted,

By 
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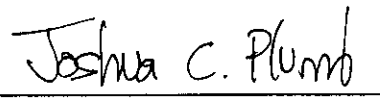
By 
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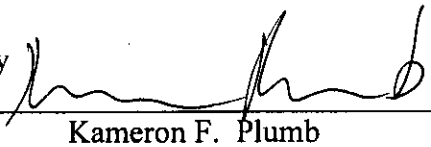
By 
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Supreme Court No. 953-81-3
Court of Appeal's No. 3461-3-III
U.S. Bank Nat'l Ass'n v. Plumb

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I hereby declare that on March 8, 2018, I caused to be served a true and correct copy of the originals of Petitioners' 1) Petitioners' Reply to Respondent's Answer to Petition for Review; and 2) this Proof of Service via Washington State Appellate Courts' eFiling Portal to:

1) The Supreme Court of the State of Washington
2) Ryan M. Carson, WSBA #41057 Wright Finlay & Zak, LLP
   3600 15th Ave W, Suite 200 Seattle, WA 98119
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Dated: March 8, 2018

in Yakima County, Washington.

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March 08, 2018 - 4:38 PM

Transmittal Information

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