

IN THE WASHINGTON COURT OF APPEALS
DIVISION I

CASE NO. 73548-9-I
(Consolidated with Case Nos. 73648-5-I; 73549-7-I; and 73649-3-I)

OCWEN LOAN SERVICING, LLC,

Appellant/Cross-Appellee,

v.

MICHAEL E. and ROCIO BAUMAN,

Appellees/Cross-Appellants.

INITIAL BRIEF OF APPELLANT

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2015 OCT -8 AM 9:25
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TABLE OF CONTENTS

INTRODUCTION 1

ASSIGNMENTS OF ERROR 3

STATEMENT OF THE CASE 4

 A. The Turner Property (Cause No. 142028758) 4

 B. Bonvicini Property (Cause No. 142028766)..... 8

 C. Course of Proceedings 10

ARGUMENT 16

I. The Trial Court Erred By Granting Summary Judgment in
the Baumans’ Favor Despite Ocwen’s Evidence Indicating
Its Standing to Enforce the Rights of Redemption. 16

II. The Trial Court Abused Its Discretion By Striking Ocwen’s
Additional Evidence..... 23

III. The Trial Court Erred In Concluding That Ocwen Failed
To Demonstrate Its Standing To Redeem On the Motion to
Reconsider..... 26

CONCLUSION..... 30

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	21
<i>August v. U.S. Bancorp</i> , 146 Wash. App. 328, 190 P.3d 86 (2008).....	23
<i>Bain v. Metro. Mtg. Grp., Inc.</i> , 175 Wash. 2d 83, 285 P.3d 34 (2012).....	18
<i>Barkley v. Greenpoint Mortg. Funding</i> , ___ Wash. App. ___, ___ P.3d ___, 2015 WL 4730175 (2015).....	18
<i>Barrett v. Freise</i> , 119 Wash. App. 823, 82 P.3d 1179 (2003).....	17
<i>Beal v. City of Seattle</i> , 134 Wash. 2d 769, 954 P.2d 237 (1998) (en banc).....	21
<i>Coble v. Suntrust Mortg.</i> , No. C13-1878, 2015 WL 687381 (W.D. Wash. Feb. 18, 2015)	18
<i>Detweiler v. J.C. Penney Cas. Ins. Co.</i> , 110 Wash. 2d 99, 751 P.2d 282 (1988).....	17
<i>Graff v. Allstate Ins. Co.</i> , 113 Wash. App. 799, 54 P.3d 1266 (2002).....	17, 19
<i>In re Butler</i> , 512 B.R. 643 (Bankr. W.D. Wash. 2014).....	18
<i>In re Marriage of Burkey</i> , 36 Wash. App. 487, 675 P.2d 619 (1984).....	23
<i>Leslie v. Grupo ICA</i> , 198 F.3d 1152 (9th Cir. 1999)	21

<i>Lyons v. U.S. Bank Nat. Ass'n</i> , 181 Wash. 2d 775, 336 P.3d 1142 (2014) (en banc).....	17
<i>Martini v. Post</i> , 178 Wash. App. 153, 313 P.3d 473 (2013).....	23
<i>Merrill Lynch, Pierce, Fenner & Smith, P.C. v. Greystone Servicing Corp., Inc.</i> , Case No. No. 3:06-CV-0575, 2009 WL 2568323 (N.D. Tex. Aug. 18, 2009).	7
<i>Perry v. Hamilton</i> , 51 Wash. App. 936, 756 P.2d 150 (1988).....	23
<i>Sprague v. Sysco Corp.</i> , 97 Wash. App. 169, 982 P.2d 1202 (1999).....	21
Statutes	
RCW 35.50.270	1
RCW 62A.1-201	18
RCW 62A.3-301	18
Rules	
Wash. CR 26	26
Wash. CR 56	3, 20

INTRODUCTION

Each of the cases consolidated in this appeal raises a common question: whether a trial court can simply disregard factual statements in a sworn affidavit supported by foundation in order to grant summary judgment in the moving party's favor. In each case, Appellant Ocwen Loan Servicing, LLC ("Ocwen") presented an affidavit containing a statement, made under oath and with supporting foundation, that, if true, entitled Ocwen to a favorable ruling on the defendant's motion for summary judgment. But in each case, the trial court disregarded the sworn statement and granted summary judgment against Ocwen. Those holdings are wrong under Washington law and should be reversed.

At issue in this appeal are two purchases made by Appellees Michael and Rocio Bauman (the "Baumans") of properties in Snohomish County at bargain prices at foreclosure sales conducted by the Cross Valley Water District. The Baumans were able to obtain the properties at below-market prices because each property was sold subject to a two-year right of redemption, as reflected in the judgments allowing the Cross Valley Water District to foreclose. Per those judgments, the right of redemption vested in the party entitled to enforce the security interest on each property under RCW 35.50.270.

After the Baumans' purchases, Ocwen—the holder of the promissory notes secured by security interests on the properties—sought to redeem the properties by providing notice to the Baumans and asking them for an accounting of the amounts needed to redeem. But, the Baumans refused to provide that statement. In response, Ocwen was forced to bring each of these actions seeking a declaratory judgment that it was entitled to redeem. The Baumans moved for summary judgment, challenging both the availability of any right of redemption to a security holder for the two properties¹ and Ocwen's standing to redeem. In response, Ocwen submitted a sworn statement in each case attesting facts that supported Ocwen's status as the holder of the promissory note secured by a deed of trust on each of the properties as of February 2013.

The trial court granted summary judgment for the Baumans in both cases. The court disregarded the sworn statement regarding Ocwen's status as the holder of the instruments and instead focused on the questions it felt were left unanswered by the other documents Ocwen produced in support of its opposition. The trial court offered no justification for disregarding the sworn statement in Ocwen's supporting affidavit as evidence of (at the very least) a genuine fact dispute between the parties.

¹ The trial court ruled in Ocwen's favor as to this issue in each case. The Baumans cross-appealed those rulings, which were docketed as case numbers 73648-5-I and 73649-3-I.

After being ambushed by unfavorable summary judgment rulings that simply disregarded Ocwen's supporting evidence, Ocwen moved the trial court to reconsider its ruling, offering very detailed proof of its status as the holder of the promissory notes and the party entitled to enforce the deeds of trust. But the trial court denied the motions, alternatively holding that it would not consider the supplemental evidence submitted after its summary judgment ruling and that even if it would consider such evidence, Ocwen failed to demonstrate standing.

ASSIGNMENTS OF ERROR

1. The trial court erred by failing to grant any inferences—much less all reasonable inferences—in favor of Ocwen, the non-moving party, regarding its status as the party entitled to redeem the properties. Under Washington Court Rule 56, a trial court may not make determinations about the credibility of a sworn statement on summary judgment, nor disregard statements made based on the affiant's personal knowledge.

2. The trial court erred when it purported to strike the evidence Ocwen submitted in support of its motions to reconsider summary judgment. Ocwen had no way to anticipate that the trial court would disregard a sworn and supported statement in order to grant the Baumans summary judgment; penalizing it for failing to provide additional supporting evidence at that time constituted an unfair surprise.

3. The trial court erred in concluding that the evidence Ocwen submitted in support of its motions to reconsider summary judgment failed to demonstrate Ocwen's standing to redeem the property. That additional evidence exhaustively laid out the basis for Ocwen's standing, including multiple on-point sworn statements. The trial court's newly stated standard for proving holder status in its order denying the motions to reconsider was inconsistent with its own previous holdings and has no foundation in Washington law.

STATEMENT OF THE CASE

A. The Turner Property (Cause No. 142028758)

On November 9, 2009, James L. Turner executed an adjustable rate note in favor of Golf Savings Bank (the "Turner Note"), evidencing a mortgage loan for \$372,181 (the "Turner Loan"). CP 719-23. On the same day, to secure the debt evidenced by the Note, Turner executed a deed of trust naming as the beneficiary Mortgage Electronic Registration Systems, Inc. ("MERS"), in its capacity as nominee for Golf Savings Bank (the "Turner Deed of Trust"). CP 724-43. The Turner Deed of Trust created a security interest on property located at 6602 63rd Street SE, Snohomish, Washington 99290 (the "Turner Property"). CP 727. The Turner Deed of Trust was recorded in the Snohomish County public records on November

17, 2009. CP 724. MERS assigned the deed of trust to GMAC Mortgage, LLC (“GMAC”) in an assignment recorded on April 18, 2011. CP 744.

Turner failed to pay the Cross Valley Water District (the “Water District”) for water service charges incurred in connection with the property encumbered by the Turner Deed of Trust. CP 691-703. On October 18, 2011, the Water District commenced a judicial foreclosure action to foreclose its statutory lien for delinquent water services charges, including a lien on the Turner Property. *See Cross Valley Water District v. Chan-Hyuk Kim*, Cause No. 11-2-09007-6 (Snohomish Cnty. Superior Court) (also in CP 691-703). The complaint named GMAC as a defendant due to its role as the record beneficiary of the deed of trust. CP 693.

On January 13, 2012, the court entered a final order in the Water District’s foreclosure action, directing judgment to be entered against Turner, GMAC, and other parties with a lien interest in Turner’s property. CP 704-07. The Judgment and Order of Sale specifically stated:

ORDERED, ADJUDGED, and DECREED that each of the above-named defendants and all persons having or claiming to have an interest in or claim against the real property described in Schedule A be and are hereby forever barred and foreclosed of all right title and interest in and to said parcel of real property, except for the right and equity of redemption from and after a date which is two years after the date of sale thereof under this decree pursuant to RCW 35.50.270.

CP 706. On March 13, 2012, the Water District sold the Property at a public auction; the Baumans purchased it for \$63,000, or about 17% of the original principal amount of the Turner Loan. CP 710-12. The Water District conveyed the Turner property to the Baumans in a quitclaim deed that stated:

[The Water District] in consideration of the premises and by virtue of the statutes of the State of Washington, in such cases provided, do hereby grant and convey without express or implied warranty regarding title, possession or encumbrances, unto Michael Bauman and Rocio Bauman, their heirs and assigns, forever the real property hereinbefore described subject to the right of redemption within two years from the date of sale pursuant to RCW 35 50 270.

CP 711.

In the meantime, Turner's promissory note had been passed to a new holder, Ocwen Loan Servicing, LLC. Turner's Note was first endorsed from Golf Savings Bank to Ally Bank, from Ally Bank f/k/a GMAC Bank to GMAC Mortgage, LLC and was thereafter endorsed in blank from GMAC Mortgage, LLC. CP 53, 59-64.² Ally Bank served as

² GMAC became the holder of the Turner Note in conjunction with its assumption of the servicing rights connected with the pool of Government National Mortgage Association ("Ginnie Mae") mortgage-backed securities secured by multiple notes, including the Turner Note. "Ginnie Mae is a government corporation within HUD established to guarantee mortgage-backed securities, pursuant to 24 C.F.R. Part 320." *Merrill Lynch, Pierce, Fenner & Smith, P.C. v. Greystone Servicing Corp., Inc.*, Case No. No. 3:06-CV-0575, 2009 WL 2568323, at *1 (N.D. Tex. Aug.

the document custodian and held physical possession of the note on behalf of Ocwen and as Ocwen's agent from February 15, 2013 until May 1, 2014. CP 56-57, 635, 879-880. At that time, U.S. Bank became the successor document custodian and maintained physical possession of the note on Ocwen's behalf until December 15, 2014, when the original loan file (including the original note) was released to Ocwen. CP 635.

On May 8, 2013—more than ten months before the expiration of the two-year redemption period, Ocwen notified the Baumans that it intended to redeem the Turner property. CP 717. However, the Baumans refused to provide an accounting of the amounts due to redeem the property under RCW 35.50.270. CP 717. This forced Ocwen to file an action in the Snohomish County Superior Court seeking a declaratory judgment that it was the party entitled to redeem. CP 975-83. Ocwen deposited \$70,000 into the court's registry, which represented a good-faith estimate of the amount required to redeem the property.

18, 2009). When the Turner Note was packaged into a Ginnie Mae pool, GMAC was made the "Issuer" and servicer for the notes in the pool, and Ally Bank was named as the document custodian. CP 54, 56-57. **The Issuer for the Ginne Mae security pool is granted authority to enforce the security interests securing the loans in the pool and to hold the notes through the document custodian.** CP 54, 55-56, 604-19. After GMAC entered bankruptcy, Ocwen purchased several of its asset and mortgage servicing rights, including the servicing rights and Issuer rights to the pool of mortgage-backed securities that included the Turner Loan. CP 54-55, 104-208. Ocwen became the Issuer for the pool that included the Turner Loan. CP 55-56, 390-604.

B. Bonvicini Property (Cause No. 142028766)

On June 20, 2008, Patricia and Bruno Bonvicini executed a promissory note (the “Bonvicini Note”) in favor of Evergreen Moneysource evidencing a mortgage loan for \$240,555 (the “Bonvicini Loan”). CP 1592-94. On that same day, the Bonvicinis executed a deed of trust (the “Bonvicini Deed of Trust”) in favor of MERS as the nominee for Evergreen Moneysource. CP 1595-1605. The Bonvicini Deed of Trust created a security interest in real property located at 23030 105th Avenue SE, Woodinville, Washington 98077 (the “Bonvicini Property”). CP 1596. The Bonvicini Deed of Trust was recorded in the Snohomish County public records on June 27, 2008. CP 1595.

The Bonvicinis failed to pay the Cross Valley Water District for certain charges connected with water service. As a result, the Water District commenced a judicial foreclosure action against them. *See Cross Valley Water District v. Bonvicini, GMAC Mortgage, LLC and Federal Home Loan Mortgage Corporation*, Cause No. 11-2-08089-5 (Snohomish Cnty. Superior Court) (also in CP 1569-77). On February 3, 2012, the Court entered a final judgment ordering the sale of the Bonvicini Property subject to “the right and equity of redemption from and after a date which is two years after the date of the sale thereof under this decree pursuant to RCW 35.50.270.” CP 1578-81.

On March 13, 2012, the Bonvicini Property was sold at a public auction. CP 1584. The Baumans purchased the Bonvicini Property at the auction for \$30,000, or about 12.5% of the amount of the initial principal amount of the Bonvicini Loan. CP 1586. The Water District conveyed the Bonvicini Property to the Baumans in a quitclaim deed that stated:

[The Water District] in consideration of the premises and by virtue of the statutes of the State of Washington, in such cases provided, do hereby grant and convey without express or implied warranty regarding title, possession or encumbrances, unto Michael Bauman and Rocio Bauman, their heirs and assigns, forever the real property hereinbefore described subject to the right of redemption within two years from the date of sale pursuant to RCW 35 50 270.

CP 1585.

As with the Turner Note, Ocwen became the holder of the Bonvicini Note between the time when it was first executed and the time this lawsuit was filed.³ Specifically, the Note was endorsed from Evergreen Moneysource to GMAC Bank, from GMAC Bank to GMAC Mortgage, LLC, and then in blank by GMAC Mortgage, LLC. CP 1046-

³ As with the Turner Note, Ocwen became the servicer of the Bonvicini Loan by purchasing servicing rights from GMAC Mortgage, LLC while GMAC was in bankruptcy. CP 1590. The purchase of the servicing rights vested Ocwen with the responsibility and legal right to enforce the Bonvicini Note as a holder through a limited power of attorney. CP 1041, 1499-1505, 1590. At that time, the Bonvicini Note was in physical custody of Ally Bank, acting as the document custodian. CP 1043, 1590.

48. Ocwen held the note by means of constructive possession through its agent, the document custodian.

On March 25, 2013—about a year before the expiration of the two-year redemption period, Ocwen notified the Baumans that it intended to redeem the Bonvicini Property. CP 1590. However, the Baumans refused to provide an accounting of the amounts due to redeem the property under RCW 35.50.270. CP 1590. This forced Ocwen to file an action in the Snohomish County Superior Court seeking a declaratory judgment that it was the party entitled to redeem. Ocwen deposited \$35,000 into the court's registry, which represented a good-faith estimate of the amount required to redeem the property.

C. Course of Proceedings

Although the Turner and Bonvicini actions were never consolidated, they were litigated together on parallel tracks. On November 3, 2014, the Baumans moved for summary judgment in each case, arguing, *inter alia*, that (1) their purchases of the Turner Property and the Bonvicini Property were not subject to any rights of redemption (notwithstanding the plain language of the judgments of foreclosure and quitclaim deeds), and (2) even if the purchases were subject to redemption, Ocwen lacked standing in each case to redeem. CP 936-57, 1990-2008.

Ocwen responded in opposition to each motion for summary judgment. CP 889-904, 1864-77. Ocwen first pointed out that reading out the right of redemption from the final judgments of foreclosure in each case would be both unlawful and inequitable. Second, Ocwen explained in detail—with attached supporting evidence—how it had standing to enforce the notes secured by the respective properties.

As for the Turner Property, Ocwen presented a sworn statement from Tonya Tillman indicating that Ocwen “holds the original [Turner] Note and is entitled to enforce the Note.” CP 717. Ms. Tillman explained the basis for her personal knowledge to make such a statement, indicating she was a Senior Loan Analyst for Ocwen with access to Ocwen’s business records, and that Ocwen’s records “were made in the ordinary course of business” and “at the time of the transaction reflected.” CP 715.

Ms. Tillman explained that Ocwen acquired servicing rights to the Turner Loan “[e]ffective February 15, 2013” by purchasing them from GMAC. CP 714, 716. Ms. Tillman stated that she was also employed as Senior Loan Analyst with GMAC “[p]rior to February 15, 2013,” and that the two companies’ “records and systems [were] the same continuous in nature from [GMAC] to Ocwen.” CP 714. Ms. Tillman’s affidavit also identified and included an Asset Purchase Agreement that Ms. Tillman identified as governing the terms of Ocwen’s purchase of the servicing

rights from GMAC “[o]n February 15, 2013.” CP 716, 759-862. Ms. Tillman further attested that by means of the February 2013 purchase, “Ocwen became the Issuer of Ginnie Mae Pool Number 892068,” and that Pool Number 892068 included the Turner Loan. CP 716. Ocwen provided with Ms. Tillman’s affidavit a copy of a screenshot from Ginnie Mae’s Enterprise Portal dated June 2014 identifying Ocwen as the Issuer for the pool that included in the Turner Loan. CP 863.

Ms. Tillman explained that Ally Bank “serves as the document custodian for the Turner Loan,” and that, due to [Ocwen’s] status as the Issuer of the Ginnie Mae securities pool, “[o]nly Ocwen can request a release of loan documents from Ally Bank.” CP 717. To corroborate that statement, Ocwen produced a copy of the blank-endorsed Turner Note and a copy of the Ally Bank Custodian Agreement that Ms. Tillman indicated applied to the Turner Note. CP 719-23, 879-880.

As for the Bonvicini Property, Ocwen also presented a sworn statement from Ms. Tillman indicating that Ocwen “holds the original [Bonvicini] Note and is entitled to enforce the Note.” CP 1590. As with the Turner Note, Ms. Tillman attested that Ocwen purchased the servicing rights to the Bonvicini Loan in February 2013 from GMAC, CP 1590, and identified and attached an Asset Purchase Agreement as governing that purchase. CP 1607-1710. Ms. Tillman further stated under oath that an

identified Servicing Agreement and Limited Power of Attorney gave Ocwen the authority to possess and enforce the Bonvicini Note. CP 1590, 1711-1854. Ms. Tillman stated that Ally Bank was the document custodian of the Bonvicini Note, but was not a party entitled to enforce it. CP 1590. Ocwen also included a copy of the original Bonvicini Note endorsed in blank (making it bearer paper). CP 1592-94.

In their reply briefs, the Baumans primarily argued that Ocwen had no right of redemption. CP 658-82, 1541-60. The only argument they raised regarding Ocwen's status as a holder of the Bonvicini Note was that Ocwen could not be a holder if physical possession of the Note were actually in the hands of another entity, even if that entity were acting as Ocwen's agent. *See* CP 1552-54. As for the Turner Note, the Baumans again argued that possession of the Note through an agent was insufficient to confer holder status, *see* CP 670-71, but even if it were enough, Ocwen would have to be the Issuer for the Ginnie Mae securities in order to enjoy that status. CP 672-76.

The trial court granted summary judgment for the Baumans in each case. CP 650-57, 1533-40. Although the trial court rejected their argument that the equity of redemption recognized in their quitclaim deeds could be ignored, the court held that Ocwen had failed to prove its standing to redeem the properties. The court held, as to the Turner Note, that Ocwen

had failed to show that its purchase of the servicing rights from GMAC Mortgage, LLC was effective before the expiration of the redemption period, and thus Ocwen could not demonstrate standing before that time. *See* CP 655-56. The Court rejected the sworn statements of Ms. Tillman establishing Ocwen's status as the buyer of the servicing rights to the Turner Loan and the Issuer as to the pool of Ginnie Mae securities that included the Turner Loan as of February 2013. CP 655-56.

Similarly, as to the Bonvicini Note, the court held that Ocwen had failed to demonstrate that it had standing to enforce the security instrument before the expiration of the redemption period. CP 1537-39. The court expressly rejected Ms. Tillman's sworn statements that Ocwen acquired servicing rights to the Bonvicini Loan in February 2013, and that those servicing rights conferred both the responsibility and authority to enforce the Bonvicini Note and Deed of Trust and redeem the property. CP 1538-39.

Ocwen moved to reconsider in each case. CP 639-49, 1522-32. As for the Turner Loan, Ocwen supported its motion with another supporting affidavit that provided exhaustive details about the timing and mechanics of Ocwen's purchase of GMAC's assets and servicing rights, including the servicing rights to the Turner Note and Ocwen's change in status to the Issuer for the Ginnie Mae securities pool. CP 51-58. The affidavit

expressly stated: “On February 15, 2013, Ocwen, as the Issuer, acquired the right to possess the Turner Note. Ocwen currently holds the original Note and is entitled to enforce the Note.” CP 57. As for the Bonvicini Note, Ocwen submitted an affidavit that contained the sworn statement: “Effective February 15, 2013, Ocwen purchased the servicing rights to the Mortgage and Note executed by Patricia and Bruno Bonvicini (the “Bonvicinis”) from GMAC Mortgage, LLC (“GMACM”).” CP 1039. The affiant further stated “On February 15, 2013, Ocwen, pursuant to the Servicing Agreement and the Limited Power of Attorney, acquired the right to possess and enforce the Bonvicini Note.” CP 1043.

The Baumans moved to strike Ocwen’s motions. CP 35-50, 1019-37. The Baumans argued that Ocwen’s supplemental evidentiary submissions were both “duplicative” of existing evidence and contained new information, and thus should not be considered by the trial court. CP 1022. The Baumans further argued that the sworn statements in Ocwen’s affidavits constituted impermissible legal conclusions and ultimate facts and thus should not be considered as creating a factual dispute that would thwart summary judgment. CP 38-40, 1022-24 Ocwen filed a reply in support of its motion to reconsider and a response in opposition to the Baumans’ motions. CP 22-34, 1004-18.

On May 14, 2015, the trial court entered separate orders denying Ocwen's motion for reconsideration in each case. CP 14-16, 997-99. The court purported to grant the motion to strike Ocwen's affidavits, but also held that even if the evidence were considered, the court's decision regarding Ocwen's standing would remain the same.

Ocwen timely appealed both final orders. CP 1-13, 984-96. The Baumans cross appealed each order. All four cases were consolidated in this appeal.

ARGUMENT

I. The Trial Court Erred By Granting Summary Judgment in the Baumans' Favor Despite Ocwen's Evidence Demonstrating Its Standing to Enforce the Rights of Redemption.

The trial court's grants of summary judgment in favor of the Baumans should be reversed because they flout the proper application of the summary judgment standard under Washington law. Instead of granting "all reasonable inferences" in Ocwen's favor (as it should have), the trial court examined Ocwen's evidence with Sherlockian scrutiny. Plainly stated, reasonable minds could disagree about Ocwen's standing to redeem the properties at the time the redemption period expired; and under Washington law, that mandates reversal.

Washington law is clear that summary judgment is "appropriate only if the record demonstrates there is no genuine issue of material fact

and the moving party is entitled to judgment as a matter of law.” *Lyons v. U.S. Bank Nat. Ass’n*, 181 Wash. 2d 775, 783, 336 P.3d 1142, 1147 (2014) (en banc). Under this familiar standard, the Court must “consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party.” *Graff v. Allstate Ins. Co.*, 113 Wash. App. 799, 802, 54 P.3d 1266, 1268 (2002). *See also Lyons*, 181 Wash. 2d at 783, 336 P.3d at 1147; *Barrett v. Freise*, 119 Wash. App. 823, 839, 82 P.3d 1179, 1187 (2003). Additionally, “[a] question of fact may be determined as a matter of law when reasonable minds could reach but one conclusion from the evidence presented.” *Graff*, 113 Wash. App. at 802, 54 P.3d at 1268. Accordingly, “[a] motion for summary judgment, however, should be granted only if, from all the evidence, reasonable [persons] could reach but one conclusion.” *Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wash. 2d 99, 108, 751 P.2d 282, 286 (1988) (citation and internal quotation marks omitted).

Here, the evidence Ocwen introduced in response to the Baumans’ summary judgment *at the very least* created genuine issues of fact. First, as to the Turner Note, Ocwen responded directly to the Bauman’s suggestion that it lacked standing to redeem the Turner Property because it was not the Issuer for the Ginnie Mae mortgage-backed securities that

included the Turner Note.⁴ Ocwen produced Ms. Tillman’s affidavit explaining how Ocwen purchased assets from GMAC Mortgage, LLC (including servicing rights to the Turner Loan) through an agreement that became effective on February 15, 2013, and how “[t]hrough its acquisition of GMAC Mortgage, LLC’s servicing rights, Ocwen became the Issuer of Ginnie Mae Pool Number 892068” CP 716. In its brief, Ocwen explained how its status as the Issuer allowed it to rely upon a document custodian to maintain physical possession of a promissory note and thus Ocwen was a “person entitled to enforce” the note as the holder of a blank-endorsed instrument under RCW 62A.1-201 and 62A.3-301. CP 900-03; *see Bain v. Metro. Mtg. Grp., Inc.*, 175 Wash. 2d 83, 104, 285 P.3d 34, 44 (2012); *Barkley*, __ Wash. 2d __, __ P.3d __, 2015 WL 4730175, at *4.

⁴ Throughout both briefs—but the Bonvicini brief in particular—the Baumans argued primarily that Ocwen lacked standing because the physical possession of the note by an agent (*i.e.*, the document custodian) rendered Ocwen a non-holder under Washington law. That argument has been flatly rejected by this Court. *See Barkley v. Greenpoint Mortg. Funding*, __ Wash. App. __, __ P.3d __, 2015 WL 4730175, at *4 (2015) (holding that “U.S. Bank, through its agent, Chase, was the holder of the note”); *accord, e.g., Coble v. Suntrust Mortg.*, No. C13-1878, 2015 WL 687381, at *6 (W.D. Wash. Feb. 18, 2015) (citing RCW 62A.3-301; “under the UCC a holder may possess a note ‘directly or through an agent.’”); *In re Butler*, 512 B.R. 643, 652-53 (Bankr. W.D. Wash. 2014). Regardless whether the Baumans attempt to press that discredited argument on appeal, it is important to understand that it was their primary argument in the trial court and the issue to which Ocwen attempted to respond directly.

Similarly, Ocwen demonstrated its standing to enforce the Bonvicini Note **despite the fact that the Baumans never challenged Ocwen’s standing to redeem that property based on an alleged failure to demonstrate that it was the holder of the instrument.**⁵ Again, Ocwen produced a sworn statement concerning its purchase of servicing rights from GMAC Mortgage, LLC, including rights to the Bonvicini loan, “[e]ffective February 15, 2013.” CP 1588, 1590. Ocwen also produced a copy of a Servicing Agreement “effective February 15, 2013,” CP 1711-1847, that gave Ocwen “the authority to sue to enforce or collect on the Bonvicini Loan.” CP 1590.

In granting summary judgment for the Baumans, despite Ocwen’s evidence, the trial court completely misapplied the proper summary judgment standard. Rather than “consider[ing] all facts submitted and all reasonable inferences from them in the light most favorable to [Ocwen],” *Graff*, 113 Wash. App. at 802, 54 P.3d at 1268, the trial court did the opposite—it examined and weighed every facet of Ocwen’s evidence and then granted summary judgment for the Baumans without giving Ocwen

⁵ The Baumans argued at several points in their summary judgment brief that Ocwen lacked standing because the actual original note was held by a document custodian; never once did they argue that Ocwen lacked standing due to a failure to acquire possession of the blank-endorsed note through an agent by the expiration of the redemption period.

the benefit of any of the inferences demonstrated by the Tillman Affidavit and attached documents.

For example, the trial court completely disregarded Ms. Tillman's testimony regarding Ocwen's purchase of the Bonvicini Note and servicing rights through its asset purchase from GMAC Mortgage, LLC, and the effective date of the purchase of February 15, 2013. CP 1590. The trial court apparently considered the sworn statement to be meaningless because it was not accompanied by a specific corroborating document.⁶ Washington law does not set such a high evidentiary bar for summary judgment; instead, CR 56 requires only that an affidavit be based on personal knowledge and demonstrate the affiant is competent to testify as to the issue. CR 56(e). The trial court apparently discounted facts within the affiant's personal knowledge: **Ms. Tillman's affidavit clearly states that she formerly worked for GMAC Mortgage, LLC and switched to**

⁶ To be clear, Ocwen included with its opposition brief a copy of the Asset Purchase Agreement, a detailed document setting out the terms of Ocwen's purchase of the servicing rights from GMAC. CP 1607-1710. Although the Agreement was dated November 2, 2012, and even though Ms. Tillman attested that it was effective as of February 15, 2013, the trial court held that this evidence created no reasonable inference that the Agreement was effective before March 13, 2014, when the two-year redemption period expired. The documents Ocwen submitted with its Motion to Reconsider (which include multiple filings with the Securities and Exchange Commission) remove all doubt about the effective date, as each confirms that the asset purchase became effective on February 13, 2015. *See* CP 1181, 1194, 1339.

Ocwen when Ocwen's purchase of GMAC's servicing portfolio became effective on February 15, 2013. CP 714. Requiring Ms. Tillman to cite a specific document or have her sworn testimony based on first-hand knowledge corroborated by other evidence is not the standard under Washington law. The trial court should not make a credibility determination about an affiant in determining a motion for summary judgment; especially here, where no controverting evidence was offered. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (“Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.”); *accord, e.g., Leslie v. Grupo ICA*, 198 F.3d 1152, 1157 (9th Cir. 1999).⁷

The trial court's consideration of the evidence for the Turner Note is even less defensible. For the Turner Loan, the trial court framed the issue of Ocwen's standing to redeem as a question whether Ocwen was the Issuer for the Ginnie Mae securities before the expiration of the redemption period. CP 655-56. **The trial court's own opinion**

⁷ Washington's courts may look to federal decisions applying the Federal Rules of Civil Procedure for guidance in construing similar provisions in the Washington Court Rules. *See Beal v. City of Seattle*, 134 Wash. 2d 769, 777, 954 P.2d 237, 241 (1998) (en banc); *Sprague v. Sysco Corp.*, 97 Wash. App. 169, 172, 982 P.2d 1202, 1204 (1999).

acknowledges that the record evidence created “an inference” that Ocwen held the servicing rights to the Ginnie Mae securities and was their issuer sometime before June 2014—*i.e.*, during a time period before the redemption period expired. CP 655. Yet the trial court disregarded that inference immediately, holding instead that because Ocwen had failed to present “proof” it was the issuer before the redemption period expired, it could not withstand summary judgment. CP 655-56. Respectfully, that is not the standard under Washington law: a nonmoving party only needs to demonstrate a genuine issue of material fact, *i.e.*, one upon which reasonable minds could differ—not conclusive “proof” as to that issue (although Ocwen’s evidence conclusively demonstrated it became the Issuer during the redemption period).

The bar for opposing summary judgment is designed to be a low one. While parties cannot simply offer conclusory allegations, legal conclusions, or sweeping characterizations in order to survive a summary judgment motion, a sworn statement regarding a fact based on first-hand knowledge that creates a fact question upon which reasonable minds can disagree is enough to send a case to trial. Here, Ocwen offered evidence of several facts that, under a proper application of the summary judgment standard under which all reasonable inferences are granted in its favor, created triable issues for the jury regarding its status as a holder of the

Turner and Bonvicini Notes. The orders granting summary judgment should be reversed accordingly, and the cases remanded for further factual development and trial.

II. The Trial Court Abused Its Discretion By Striking Ocwen's Additional Evidence.

Second, and separately, the trial court's order granting the Baumans' motions to strike Ocwen's affidavits supporting its motion to reconsider was an abuse of discretion. The trial court's proffered justifications for striking the evidence cannot withstand scrutiny.

Washington has recognized that "nothing in CR 59 prohibits the submission of new or additional materials on reconsideration." *Martini v. Post*, 178 Wash. App. 153, 161-62, 313 P.3d 473, 478 (2013). Additionally, "[i]n the context of summary judgment, unlike in a trial, there is no prejudice if the court considers additional facts on reconsideration." *Id.* (quoting *August v. U.S. Bancorp*, 146 Wash. App. 328, 347, 190 P.3d 86, 95 (2008)). Although the trial court has discretion in deciding what evidence to permit to be introduced in support of a motion to reconsider, *Perry v. Hamilton*, 51 Wash. App. 936, 938, 756 P.2d 150, 152 (1988), it is a reversible error if the trial court adopts a position that no reasonable person would have taken. *See In re Marriage of Burkey*, 36 Wash. App. 487, 489, 675 P.2d 619, 620 (1984).

No reasonable person would accept the trial court's proffered reasons for striking Ocwen's affidavits. As to the first reason—that Ocwen had failed to justify its alleged failure to provide the evidence in connection with its initial opposition to the Baumans' summary judgment motions, CP 15, 998—the reality is that Ocwen could not have possibly anticipated that the Court would depart from the normal summary judgment standard and set the bar so high the first time around. As discussed at length above, in response to the motions for summary judgment, Ocwen presented more than ample evidence that it was the servicer and holder of the Turner and Bonvicini Notes as of February 15, 2013, including by sworn statements from an employee who switched her employment from GMAC to Ocwen when the package of servicing rights also changed hands. In addition to the sworn testimony, Ocwen attached scores of documents supporting its arguments as to why it had standing to redeem each of the properties. There is no controverting evidence anywhere in the record. In light of the summary judgment standard—again, that all reasonable inferences are to be granted in favor of the non-movant—no reasonable person could have anticipated that Ocwen's initial response to the summary judgment motion would be deemed inadequate.

The trial court's second reason for striking Ocwen's evidence supporting its motion to reconsider—that Ocwen supposedly failed to

respond to certain discovery requests by the Baumans, CP 15, 998—is completely baseless. As to every discovery request the Baumans identified for which Ocwen allegedly refused to respond, Ocwen responded with specific objections regarding the request; but for nearly every request, Ocwen nonetheless provided the requested information. For example, the Baumans pointed to Ocwen’s supposed “refus[al] to answer the Baumans’ question about whether and when Ginnie Mae approved of Ocwen as the Issuer” for the pool of mortgage securities that included the Turner Loan. CP 40. Here is the complete text of the relevant interrogatory and Ocwen’s answer:

1 **INTERROGATORY NO. 23:** Has Ginnie Mae approved of Ocwen as the current “Issuer” for
2 Pool Number 892068?
3 **ANSWER:** In addition to the forgoing General Objections, Ocwen objects to this request as it is
4 not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff also objects on
5 the grounds that this request is unduly burdensome as it seeks information that is not relevant or
6 material to the subject matter of the instant litigation and would require the production of
7 documents containing confidential or competitively sensitive information. Subject to these
8 objections Ocwen states that it is the current Issuer for Pool Number 892068.
9
10

Ocwen had no idea that the Baumans considered its response—which confirmed that Ocwen was the Issuer for Pool Number 892068, which necessarily required Ginnie Mae approval—to be a “refus[al]” to

answer the question until the Baumans raised it as such in their briefing.

The Washington Court Rules provide very specific procedures a party must follow if it believes it has received an inadequate response to a discovery request. Notably, those procedures begin with a requirement that the party meet and confer with the other party in the litigation before raising the issue to the court. *See* CR 26(i). Here, the Baumans' discovery arguments constituted an ambush that very conveniently allowed them to skip the steps of conferring with Ocwen about the discovery inadequacies and then overcoming Ocwen's objections by filing a motion to compel. By considering the Baumans' slanted accounts of discovery gamesmanship—which, as illustrated above, were questionable at best—as an additional reason supporting its decision to strike Ocwen's affidavits in support of its motions to reconsider, the trial court abused its discretion.

III. The Trial Court Erred In Concluding That Ocwen Failed To Demonstrate Its Standing To Redeem On the Motion to Reconsider.

Finally, the trial court's orders denying Ocwen's motions to reconsider should be reversed. The trial court inexplicably concluded that the additional evidence Ocwen submitted regarding each loan failed to prove Ocwen's status as a party entitled to enforce the respective notes

and redeem each property. CP 15, 998. That determination finds no support in the record.

As to the Turner Loan, the trial court correctly noted in its summary judgment order that Ocwen's status as the holder of the Turner Note was based on three facts: (1) during the redemption period, Ocwen was the Issuer for the Ginnie Mae securities that included the Turner Loan; (2) as the Issuer for those securities, Ocwen was entitled to enforce the security interest and direct the actions of the document custodian that held the blank-endorsed promissory note; and (3) as a result, Ocwen was the "holder" of the blank-endorsed note (through its agent) and thus the party entitled to enforce it. CP 654-55. Despite correctly framing those requirements, the trial court erroneously rejected the sworn statements and the documentary inferences supporting Ocwen's status as the Issuer during the redemption period; the trial court concluded Ocwen lacked holder status on that basis alone. Accordingly, Ocwen's supplemental evidentiary submissions for the Turner Loan were aimed at exhaustively documenting its status as the Issuer during the redemption period; to that end, it attached hundreds of pages of documents from SEC filings and Ginnie Mae's records conclusively showing just that. Yet the trial court inexplicably refused to address any of the evidence and instead issued the *ipse dixit* declaration that Ocwen's additional evidence still failed to establish its

status as the holder of the Turner Note during the redemption period. CP 15. That conclusion is flatly contradicted not only by Ocwen's evidence, but by the court's own prior ruling.⁸

The trial court erred similarly regarding Ocwen's additional evidence for the Bonvicini Loan. In its initial order granting summary judgment, the trial court concluded that Ocwen had failed to present evidence indicating that it was the holder of the Bonvicini Note because it had failed to provide documentary evidence that it had purchased the servicing rights to the loan from GMAC and that its rights as a servicer to the loan (including its rights to act as the holder of the instrument) were governed by a Servicing Agreement dated February 15, 2013. CP 1537-38. Taking that conclusion at face value, Ocwen supplied exhaustive evidence concerning its acquisition of the servicing rights to the Bonvicini Loan in February 2013. But again, in denying Ocwen's motion to reconsider, the trial court changed the rules of the game and held that this

⁸ The Baumans and the trial court each also suggested that Ocwen developed a new "agency" theory as to why it had standing to enforce the notes in its motions for reconsideration. Notably, neither points to anywhere in Ocwen's briefs where it actually advanced such an argument. To be clear, Ocwen's position has been consistent from the start: at all relevant times, it has been the servicer for both the Turner Loan and Bonvicini Loan, it had the obligation and right to enforce the loans, and was the holder of the blank-endorsed promissory note for each loan, either directly or through its agent, the document custodian.

very evidence was inadequate to prove Ocwen's status as the holder of the Bonvicini Note. CP 998.

In denying Ocwen's motions to reconsider the summary judgment rulings as to both loans, the trial court completely changed course as to what was required to establish Ocwen's status as the holder of the notes. That change is not supported by the record; those orders should be reversed.

If left to stand, the trial court's orders in these cases represent a drastic change in Washington law, both as to the requirements for summary judgment and as to the standing requirements for a holder of a security interest. Ocwen produced exhaustive documentation and a myriad of sworn statements in support of its arguments as to why it had standing to redeem the property—practically all the documentation and affiant evidence a mortgage servicer could provide for a given loan. The trial court determined that all of that evidence was insufficient even to create a genuine issue of material fact as to which reasonable minds could differ. That holding cannot be allowed to stand on appeal.

CONCLUSION

For the reasons stated above, Ocwen requests that the Court reverse the trial court's grant of summary judgment for each of the consolidated cases and remand the cases for further proceedings.



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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2015, I caused the foregoing document to be served upon counsel of record as follows:

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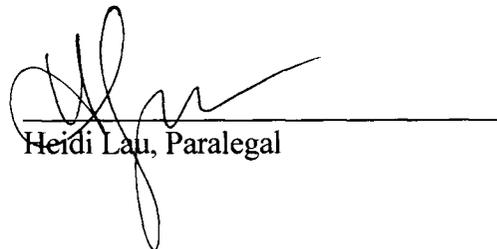
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Dated this 7th day of October, 2015.


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