Supreme Court No. 1038691

Court of Appeals No. 854364

SUPREME COURT OF THE STATE OF WASHINGTON

HEIFA VOGHT,

Petitioner,

v.

WILMINGTON TRUST, NATIONAL ASSOCIATION,
AS SUCCESSOR TRUSTEE TO CITIBANK, N.A.,
AS TRUSTEE FOR BEAR STEARNS ALT-A TRUST,
MORTGAGE PASSTHROUGH CERTIFICATES,
SERIES 2006-7,

Respondent.

ANSWER TO PETITION FOR REVIEW

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Respondent Wilmington Trust, National Association, as Successor Trustee to Citibank, N.A., as Trustee for Bear Stearns Alt-A Trust, Mortgage Passthrough Certificates, Series 2006-7 ("Wilmington Trust") respectfully submits this answer in opposition to Heifa Voght's ("Voght") petition for review, dated February 13, 2025, of an unpublished decision of the Court of Appeals, Division One, dated November 19, 2024, in *Wilmington Trust, National Association, as Successor Trustee to Citibank, N.A., as Trustee for Bear Stearns Alt-A Trust, Mortgage Passthrough Certificates, Series 2006-7 v. Heifa Voght, et al.*, No. 85436-4-I.

I. INTRODUCTION

This Court should deny review. The petition for review filed in this case by Voght is remarkable for its ability to ignore, if not distort, the facts in this case, and to ignore the Court of Appeals' opinion.

The trial court granted Wilmington Trust's motion for summary judgment but also concluded that the statute of

limitations barred any amount due before November 1, 2011.[1] Recognizing the weakness of her argument on acceleration, Voght shifted her focus of the case—nearly four years after the trial court's order granting summary judgment—to challenging Wilmington Trust's standing to foreclose. It is not surprising that Voght shifted gears because Washington law is clear on what constitutes acceleration and Voght's contention that Countrywide's notice of intent to accelerate constituted an acceleration is contrary to established precedent. However, Voght's new theory that Wilmington Trust failed to establish standing to foreclose is equally meritless. At bottom, Voght seeks to litigate the persuasiveness of Wilmington Trust's evidence nearly four years after the trial court granted summary judgment. In that period of time, Voght presented no evidence to establish a genuine issue of material fact. In its affirming the trial court's order granting summary judgment, the Court of Appeals

[1] The Complaint sought recovery of sums due since Voght's default on November 1, 2008. CP 2, 145.

applied well-established precedent under Washington law.

Because Voght fails to establish grounds for discretionary review, Wilmington Trust respectfully requests the Court to deny her petition.

II. STATEMENT OF ISSUES

1. Should the Court deny review under RAP 13.4(b)(1) – (2) because the Court of Appeals' decision followed well-established precedent?

2. Should the Court deny review under RAP 13.4(b)(4) because Voght's passing reference to "substantial public importance" is unsupported by the record or citation to legal authorities?

III. STATEMENT OF THE CASE

This case involves a judicial foreclosure of a $660,000 loan Voght received in 2006 in exchange for a note secured by deed of trust encumbering certain real property known as 3307 NE 7th Street, Renton, WA 98056-3850. CP 2, 153, 157-162, 164-179, 228, 370. Under the deed of trust, Mortgage Electronic

Registration Systems, Inc. ("MERS") was the beneficiary solely as nominee for the lender, Countrywide Bank, N.A., its successors and assigns. CP 164-165. Countrywide endorsed the note in blank. CP 153, 162, 371. Servicing transferred from Countrywide to Bank of America to Select Portfolio Servicing, and finally to Nationstar effective April 1, 2014. CP 247-248, 261-267. Through a series of assignments, Wilmington Trust received assignment of the deed of trust by recorded assignment on December 27, 2013. CP 181-184, 371. Wilmington Trust was the holder of the note and assignee of the deed of trust as of the filing of the complaint. CP 2, 69, 152-153. Wilmington Trust commenced this judicial foreclosure action on October 25, 2017, because Voght defaulted on the loan, making her last payment in November 2008. CP 1-43, 154, 247, 370.

Wilmington Trust moved for summary judgment on the ground that it has the holder of the note, assignee of the deed of trust, and Voght was in default on her obligations to repay the loan. CP 141-149. In support of its motion, Wilmington Trust's

loan servicing agent, Nationstar, provided a declaration regarding the loan and default based on Nationstar employee Karleton Chester's personal knowledge acquired through examination of the note, deed of trust, assignment, *and* Nationstar's electronic servicing system. CP 152-218. The trial court granted summary judgment in favor of Wilmington Trust in January 2019. CP 369-376. The trial court addressed the only issue Voght contested: the statute of limitations. CP 369-376. The trial court found that a prior judicial foreclosure action did not toll the statute of limitations, and therefore, granted summary judgment but only as to debt owed from November 1, 2011. CP 374. The trial court further held that a fact-finding hearing would be required to determine the correct amount of principal, interest and other fees owed. CP 374.

Voght sought discretionary review. CP 377-386. The Court of Appeals denied Voght's request. CP 410-413. The Court of Appeals issued its certificate of finality on July 19, 2019. CP 548. Wilmington Trust thereafter moved for a final

judgment to determine the correct amount of principal, interest and other fees owed. *See* CP 549-552. In response, Voght challenged for the first time whether Wilmington Trust held the note—over 3 years and 7 months after the trial court granted summary judgment to Wilmington Trust. CP 613-619, 620-639, 640-663. Contemporaneously with her opposing the motion for final judgment, Vought filed a motion for relief from the trial court's January 2019 order granting summary judgment. CP 667-812. The trial court denied Voght's motion for relief from judgment finding, inter alia, that the Court of Appeals already denied discretionary review of the January 30, 2019 order and Voght failed to identify her standing arguments to the trial court or the Court of Appeals. CP 874-876.

After further procedural motions and several trial continuances, the parties filed a stipulation and order for entry of final judgment, decree of foreclosure, and stay pending appeal on May 17, 2023. CP 1124-1129. As part of the stipulation, Voght agreed to entry of final judgment without waiver of her

rights to appeal the trial court's prior orders. CP 1126.

IV. ARGUMENT

This Court should deny review. Voght has not met the criteria required for a discretionary grant of review by this Court. A petition for review will be accepted by this Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b)

Voght argues that review should be granted under RAP 13.4(b)(1)-(2) and (4) because the Court of Appeals' decision purportedly conflicts with decisions of this Court, published decisions of the Court of Appeals, and involves an issue of substantial public interest. (Pet. 7.) The Court of

Appeals' decision triggers none of these grounds for review. To the contrary, the Court of Appeals adhered to well-established precedent regarding standing to foreclose, acceleration, and judicial estoppel. Further, Voght's passing reference "substantial public importance" is unsupported by the record or citation to legal authorities.

A. Review should not be granted under RAP 13.4(b)(1)-(2) because the Court of Appeals' decision does not conflict with this Court's decisions or any published decision of the Court of Appeals.

Voght devotes the entirety of her petition to the argument that the Court of Appeals' decision conflicts with precedent. (Pet. 8-31.) In support of her argument, Voght contends the Court of Appeals failed to follow precedent regarding standing (Pet. 8-28), acceleration (Pet. 29-30), and judicial estoppel (Pet. 31). Each argument fails as explained in more detail below.

1. The decision below follows Washington law on standing.

In *Deutsche Bank Nat. Tr. Co. v. Slotke*, 192 Wash. App. 166, 172 (2016), the Court of Appeals recognized that the law of

mortgages applies where a deed of trust is foreclosed as a mortgage. "Since 1998, the deed of trust act has defined a 'beneficiary' as 'the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.'" *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wash. 2d 83, 98–99 (2012). The Court of Appeals followed these well-established standards. (Op. 9.)

The instrument evidencing the obligations secured by the deed of trust is the note Voght executed in August 2006 in exchange for the loan. CP 142, 153, 157-162. A note is a negotiable instrument governed by RCW 62A. *Brown v. Washington State Dep't of Com.*, 184 Wash. 2d 509, 524 (2015). Under Washington law three categories of persons are entitled to enforce a negotiable instrument such as the note executed by Voght:

> (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the

> instrument who is entitled to enforce the instrument pursuant to RCW 62A.3–309 or 62A.3–418(d).

Brown at 525 (2015) (citing RCW 62A.3-301). The holder of the note may sue in its own name. *Slotke,* 192 Wash. App. 172.

The Court of Appeals correctly observed that Voght's note is "endorsed in blank" and becomes payable to bearer—i.e., it may be negotiated by transfer of possession alone. (Op. 10, quoting RCW 62A.3-201, 205 and *Slotke* at 172.) In the context of summary judgment, a party may prove its status as the holder by evidence of possession through a declaration by the loan servicer. (Op. 10, citing *Terhune v. N. Cascade Tr. Servs., Inc.*, 9 Wash. App. 2d 708, 724 (2019).)

The Court of Appeals relied on the declaration provided by Wilmington Trust's loan servicer, Nationstar, regarding the note. (Op. 10.) Specifically, Nationstar representative Karleton Chester testified that he reviewed not only Nationstar's electronic servicing system, but also actual documents including the note, deed of trust, and assignment in its possession. CP 152-

153. Voght submitted no evidence in opposition to summary judgment to create a triable issue of material fact on this point. *See* CP 227-270.

Ignoring the forgoing, Voght asserts several red herring arguments.

First, Voght contends that the Court of Appeals misunderstood the nature of the endorsement on the note. (Pet. 10-11, 14-15.) The genesis of this argument arises because Wilmington Trust incorrectly referred to the note as being specially endorsed in the body of its motion although the copy of the note attached to Mr. Chester's declaration correctly shows it was endorsed in blank. *Compare* CP 146 *with* CP 162. This error did not confuse the Court of Appeals, which analyzed the issue based on the note being endorsed in blank. (Op. 10 "An instrument endorsed in blank, as it was here...".)

Second, Voght misleadingly argues that Wilmington Trust presented no evidence that it was entitled to enforce the note. (Pet. 5, 7, 15-19.) Voght cannot dispute that Wilmington Trust's

motion was supported by Mr. Chester's declaration. Rather, Voght argues that Mr. Chester's declaration is not sufficient evidence to shift the initial burden to Voght. However, Washington law does not require the moving party to present conclusive evidence to meet its initial burden. *See Sartin v. Est. of McPike*, 15 Wash. App. 2d 163, 177 (2020) (substantial evidence standing alone not sufficient to allow summary judgment but sufficient to shift the burden). Indeed, it is well settled that the "court may not disregard a party's declaration" even if "it believes the testimony to be 'self-serving'" *Haley v. Amazon.com Servs.*, LLC, 25 Wash. App. 2d 207, 220 (2022). Mr. Chester's declaration was more than sufficient to shift the burden to Voght—who utterly failed to shift it back.

Voght attempts to get around this by contending in her motion for reconsideration to the Court of Appeal that Mr. Chester's declaration only establishes that Nationstar held the original note. But this argument is also unavailing because Washington law permits a beneficiary to act through its agents.

See Terhune v. N. Cascade Tr. Servs., Inc., 9 Wash. App. 2d 708, 724 (2019) (loan servicer declaration under penalty of perjury sufficient to meet initial burden on summary judgment); *Barkley v. GreenPoint Mortg. Funding, Inc.*, 190 Wash. App. 58, 67 (2015) (declaration of assistant secretary of loan servicer permitted on summary judgment); *Villegas v. Nationstar Mortg., LLC*, 8 Wash. App. 2d 878, 891 (2019) (loan servicer declaration establishing servicer's assumption of servicing obligations and directions regarding foreclosure sufficient to establish authority in nonjudicial foreclosure context); *see also Okanogan Cnty. v. Various Parcels of Real Prop.*, 13 Wash. App. 2d 341, 350 (2020) (servicer declaration sufficient as long as the declarant asserts personal knowledge).

Here, Mr. Chester's declaration is sufficient to shift the burden because he worked for Wilmington Trust's loan servicer, Nationstar, and he was familiar with Nationstar's recordkeeping for Voght's loan. CP 152-153. Mr. Chester testified he obtained personal knowledge through personally examining the business

records for the loan, including review of the actual most salient documents in its possession (e.g., note, deed of trust, assignment) in addition to a review of Nationstar's electronic records. CP 153.

"[T]he only requirements for an affidavit or declaration to be considered are that it 'shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.'" *Haley*, 25 Wash. App. 2d at 220–21. Voght did not contest the facts in Mr. Chester's declaration in her response to Wilmington Trust's motion for summary judgment.[2] CP 227-352. "When a nonmoving party fails to controvert relevant facts supporting a summary judgment motion, those facts are considered to have been established."

[2] Voght's omission is all the more telling because Wilmington Trust put her on notice in its complaint that it asserted it was the holder of the note. CP 2 ¶ 9.[2] *See Robbins v. Mason Cnty. Title Ins. Co.*, 195 Wash. 2d 618, 635 (2020) (purpose of motion is to give opposing party notice of the relief sought).

Cent. Washington Bank v. Mendelson-Zeller, Inc., 113 Wash. 2d 346, 354 (1989). Instead, Voght relied solely on the denial based on lack of information and belief in her answer[3] which is insufficient to show a genuine issue for trial and avoid summary judgment. *Young v. Key Pharms., Inc.*, 112 Wash. 2d 216, 225 (1989).

Third, Voght cites to a series of out-of-state court decisions in support of her argument that the Court of Appeals failed to comply with its own published decisions or this Court. (Pet.19-20.) Of course, out-of-state court opinions do not implicate RAP 13.4(b)(1)-(2). Rather, Voght must show that the Court of Appeals failed to comply with published decisions of the Washington Court of Appeal or decisions of this Court. Voght fails to do so. Indeed, the only published decisions by Washington appellate courts cited by Voght establish that a declaration by a loan servicer is sufficient to show standing to

[3] CP 69.

foreclose. (Pet. 21.) This is the same standard applied by the Court of Appeals. (Op. 10.)

2. The Court of Appeal correctly applied *Merceri* to Voght's argument that Countrywide's notice of intent was not an acceleration.

Voght contends the Court of Appeals erroneously relied on *Merceri v. Bank of New York Mellon*, 4 Wash. App. 2d 755 (2018). (Pet. 29.) According to Voght, this case is distinguishable because Wilmington Trust previously initiated foreclosure. (Pet. 29, citing CP 247.) However, the notice of trustee's sale attached to Voght's declaration shows there was no acceleration because the total amount due as stated in the notice of trustee's sale was $58,661.04. CP 254. Voght's loan was for $660,000. CP 157. Washington courts have found that a notice of trustee's sale identifying the cure amount as less than the total debt demonstrates that no acceleration occurred. *U.S. Bank Nat'l Ass'n as Tr. of Holders of Adjustable Rate Mortg. Tr. 2007-2 v. Ukpoma*, 8 Wash. App. 2d 254, 257 (2019); *Terhune v. N. Cascade Tr. Servs., Inc.*, 9 Wash. App. 2d 708, 721 (2019)

(foreclosure notices demanding only past due sums demonstrates no acceleration).

Next, Voght essentially argues that *Merceri*, and indeed, *A.A.C. Corp* and *Glassmaker*, should be overturned. Specifically, Voght contends that "correspondence from Countrywide show no waiver of rights and confirms steps consistent with acceleration." (Pet. 30, citing CP 251, 789-812.) Voght advocates for a change in the law so that acceleration may occur by equivocal statements of potential future actions such as those in Countrywide's notice of intent. But the well established rule is that "acceleration must be made in a clear and unequivocal manner which effectively apprises the maker that the holder ***has*** exercised his right to accelerate the payment date." *Merceri v. Bank of New York Mellon*, 4 Wash. App. 2d 755, 761 (2018) (emphasis added) (quoting *Glassmaker v. Ricard*, 23 Wash. App. 2d 35, 38 (1979)). Thus, the only step consistent with acceleration is evidence that the lender has already accelerated the loan. Statements of equivocal future intent do not suffice.

Finally, Voght asserts that Nationstar's HAMP correspondence to her in 2016 "explicitly referenced an already-accelerated loan." (Pet. 30, citing CP 733, 766, 781.) Not so. Nationstar's letters were based on HAMP form letters required under the HAMP program. The record shows that Nationstar's letters provided no details about the status of Voght's loan at the time of the HAMP offer. *See* CP 766-781. Tellingly, however, in her declaration Voght establishes that acceleration did not occur by attaching a copy of the notice of trustee's sale recorded 11 months after Countrywide's notice of intent issued in December 2008. *See* CP 247-254. In that notice of trustee's sale recorded in November 2009, the total amount due was $58,661.04—a small fraction of the $660,000 original loan balance. *Compare* CP 254 *with* CP 157.

3. The Court of Appeal correctly held that judicial estoppel does not apply in this case.

Voght final argument for discretionary review is that the trial court abused its discretion by concluding that the doctrine

of judicial estoppel did not bar Wilmington Trust from asserting it had not accelerated the loan. (Pet. 31.)

The standard of review for judicial estoppel is abuse of discretion. *Miller v. Campbell*, 164 Wash. 2d 529, 536 (2008). Decisions or orders of the trial court are not disturbed on review unless the court's discretion was manifestly unreasonable, based on untenable grounds, or exercised for untenable reasons. The Court of Appeals correctly identified reasonable, tenable grounds for distinguishing Wilmington Trust's arguments concerning acceleration made in Illinois and Ohio courts with its arguments made in this case.

Voght takes issue with Wilmington Trust's arguments on acceleration across different jurisdictions—comparing arguments made in Illinois and Ohio with its argument in this case under Washington law. However, Illinois and Ohio law on acceleration are different than Washington law. Under Illinois and Ohio law, for example, a default alone may accelerate the note. *Wells Fargo Bank, N.A. v. Rodriguez*, 2024 IL App (3d)

230020, ¶ 26 ("[i]n a contract with an acceleration clause, a breach constitutes a breach of the entire contract."); *U.S. Bank Natl. Assn. v. Gullotta*, 120 Ohio St. 3d 399, 405 (2008) ("By agreeing to an acceleration clause, the parties in this case have avoided the operation of the general rule that nonpayment on an installment loan does not constitute a breach of the entire contract."). This is contrary to Washington's rule requiring a clear and unequivocal act for acceleration and the rule that a mere default is insufficient. *A.A.C. Corp. v. Reed*, 73 Wash. 2d 612, 615 (1968) ("...mere default alone will not accelerate the note."); *see also Coman v. Peters*, 52 Wash. 574, 577 (1909) (notwithstanding acceleration clause, debt did not mature "upon the mere happening of the default").

It was neither clearly unreasonable nor untenable for the trial court to conclude that where the underlying legal standards on acceleration are significantly different, between Illinois and Ohio on the one hand and Washington in the other, Wilmington Trust did not take "clearly inconsistent position[s]." *Arkison v.*

Ethan Allen, Inc., 160 Wash. 2d 535, 538 (2007). Accordingly, the trial court's ruling on judicial estoppel should not be disturbed.

4. The Court of Appeals correctly affirmed the trial court's denial of Voght's motion under CR 60(b)

Voght did not contest Wilmington Trust's standing to foreclose on summary judgment in January 2019. She waited nearly four years, when in September 2022, Voght moved for relief from judgment under CR 60(b)(4), alleging Wilmington Trust obtained judgment based on fraud because it allegedly was not the holder of the note. CP 667. The standard of review for denial of a motion under CR 60(b) is abuse of discretion. *Matter of Guardianship of Adamec*, 100 Wash. 2d 166, 173 (1983).

The Court of Appeals correctly noted that relief under CR 60(b)(4) covers circumstances where fraudulent conduct or misrepresentation caused entry of judgment where the losing party was prevented from fully and fairly presenting its case or defense. (Op. 17, quoting *Lindgren v. Lindgren*, 58 Wash. App.

367, 372 (1990).) Voght was required to establish grounds for relief under CR 60(b)(4) by clear and convincing evidence.

While Voght took issue with Wilmington Trust's reference in the motion for summary judgment to the note being "specially indorsed" (CP 669), the Court of Appeals correctly observed that the mistake was "evident from the pleadings" and there was no connection with Voght's failure to raise the issue of standing in opposition to summary judgment. (Op. 18.) Indeed, neither Wilmington Trust's complaint nor Mr. Chester's declaration referenced a special endorsement. CP 1-6, CP 152-155. Further, the copies of the note attached to the complaint and Mr. Chester's declaration contain no reference to a special endorsement. CP 14-19, 157-162.

Accordingly, this Court should not disturb the trial court's decision denying the CR 60(b) motion.

B. Review should not be granted under RAP 13.4(b)(4) because Voght has inadequately briefed substantial public importance.

In her introduction, Voght cites to RAP 13.4(b)(4) and

asserts that review should be granted because this case "presents critical issues of substantial public importance..." (Pet. 1.) The only other reference to RAP 13.4(b)(4) or public importance appears in Voght's introductory paragraph to her argument section. (Pet. 7.) Voght's passing reference to "substantial public importance" is unsupported by the record or citation to legal authorities. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *Palmer v. Jensen*, 81 Wash. App. 148, 153 (1996) (citing *State v. Johnson*, 119 Wash. 2d 167, 171 (1992)). Accordingly, the Court should not consider Voght's passing reference to "substantial public importance" as a basis for review under RAP 13.4(b)(4).

V. CONCLUSION

For the reasons stated herein, Respondent Wilmington Trust, National Association, As Successor Trustee To Citibank, N.A., As Trustee For Bear Stearns ALT-A Trust, Mortgage Pass-Through Certificates, Series 2006-7 respectfully requests the Court deny Voght's petition for review.

I certify that this motion complies with the word limit of RAP 18.17 because it contains 3,795 words, excluding the parts exempted by RAP 18.17. In preparing this certification, I have relied on the word count calculation of the word processing software used to prepare this motion.

DATED this 19th day of March, 2025.

By: */s/ Thomas N. Abbott*

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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2025, I caused the foregoing document to be electronically filed with the Supreme Court of the State of Washington, which will send notification to all counsel of record.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct.

DATED this 19th day of March, 2025.

/s/ Thomas N. Abbott
Thomas N. Abbott, WSBA No. 53024

TROUTMAN PEPPER LOCKE LLP

March 19, 2025 - 5:34 PM

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