Supreme Court No. _____

COA No. 85436-4

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 PASS-THROUGH
CERTIFICATES, SERIES 2006-7,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Heifa Voght seeks review of the decision below.

II. COURT OF APPEALS DECISION

Mrs. Heifa Voght ("Mrs. Voght") seeks review of the Court of Appeals' decision filed on November 19, 2024 (*Wilmington Tr. v. Heirs*, 85436-4-I, 2024 WL 4824198 (Wash. Ct. App. Nov. 19, 2024).[1] The Court of Appeals denied Mrs. Voght's Motion to Reconsider on January 14, 2025, after the Court of Appeals called for and received an Answer from Wilmington Trust to the Motion to Reconsider.[2]

III. INTRODUCTION

This case presents critical issues of substantial public importance concerning judicial foreclosure standards and the burden of proof required to enforce a promissory note under Washington law. Division I's decision affirming summary judgment in favor of Wilmington Trust departs from well-

[1] Appx. A.
[2] Appx. B-C.

established precedent, diluting evidentiary safeguards intended to protect borrowers against wrongful foreclosure actions. Specifically, Division I misapplied fundamental summary judgment principles by allowing Wilmington Trust to prevail without presenting any evidence that it was the holder of the original note or was entitled to enforce it. This ruling directly conflicts with this Court's precedents under which the moving party on summary judgment must provide factual evidence establishing entitlement to judgment as a matter of law with all reasonable inferences construed against the moving party.

This case also raises additional issues, including Division I's erroneous reliance on *Merceri* to reject evidence supporting acceleration; the rejection of the judicial estoppel despite Wilmington Trust's inconsistent positions in prior cases; and the denial of Mrs. Voght's proper request under CR 56(f) for necessary discovery to contest Wilmington Trust's claims.

IV. ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in ruling as a matter of law on Wilmington Trust's claims when Wilmington Trust failed to provide any factual evidence that it was the holder of the original note and was otherwise entitled to enforce it?

2. Did the trial court err in ruling as a matter of law on Wilmington Trust's claims when genuine factual disputes existed regarding whether acceleration of the note had occurred and the entire debt was, therefore, time-barred?

3. Did the trial court err in denying Mrs. Voght's request under CR 56(f) for additional discovery on critical issues, including acceleration and Wilmington Trust's entitlement to enforce the note, before granting summary judgment?

4. Did the trial court err in failing to apply the doctrine of judicial estoppel to preclude Wilmington Trust from asserting an inconsistent position regarding the sufficiency of the Notice of Intent to Accelerate, contrary to its prior successful arguments in other jurisdictions?

V. STATEMENT OF THE CASE

In 2006, Mrs. Heifa Voght and her late husband, Mr. James Voght, purchased their home at 3307 NE 7th Street, Renton, WA 98056 with a loan from Countrywide Bank, N.A. ("Countrywide"). *See* CP at 246. In 2008, Mr. Voght was diagnosed with pancreatic cancer and, as his illness progressed,

was unable to work. CP at 246-267. The loss of income caused the Voghts to fall behind on their mortgage payments beginning November 1, 2008. *Id*. Tragically, on March 22, 2010, Mr. Voght passed away. *Id*.

On or about December 17, 2008, before Mr. Voght's death, Countrywide sent a "Notice of Intent to Accelerate" to the Voghts. CP at 250-251. This notice informed the Voghts of their default: "If the default is not cured on or before January 16, 2009, the mortgage payments will be accelerated with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time." *Id*. But, the Voghts were unable to cure the default, and foreclosure proceedings were initiated in late 2009, which were later discontinued. CP at 247.

In 2014, Wilmington Trust, which claims to have acquired the note, filed a judicial foreclosure action. CP at 686-732. But, on April 6, 2016, this case was dismissed for lack of

prosecution. CP at 734. Wilmington Trust unsuccessfully tried to vacate the dismissal on multiple occasions. CP at 737-739.

On October 25, 2017, nearly a decade after the acceleration notice and initial foreclosure proceedings, Wilmington Trust filed the present foreclosure action. CP at 369-376. On December 14, 2018, Wilmington Trust moved for summary judgment. CP at 141-224. On January 30, 2019, the trial granted the summary judgment motion ("MSJ Order")—even though Wilmington Trust had failed to present any *evidence* that it was entitled to enforce the note. CP at 369-376.

On February 8, 2019, Mrs. Voght, through her then-counsel, unsuccessfully sought discretionary review of the MSJ Order. CP at 377-386; 409-413. Thereafter, Wilmington Trust did not seek to terminate the stay of the trial court proceedings until May 18, 2022—more than three years later. CP at 537-538. Meanwhile, Mrs. Voght's previous counsel withdrew, leaving her temporarily unrepresented. CP at 534-535.

On September 6, 2022, after securing new counsel, Mrs. Voght filed a motion for relief from the MSJ Order. CP at 667-812. Mrs. Voght also filed an opposition to Wilmington Trust's Motion for Entry of Judgment And A Decree of Foreclosure. CP at 613-663. On September 21, 2022, the court denied Wilmington Trust's Motion for Entry of Judgment And A Decree of Foreclosure for yet another failure to establish the claimed amounts. CP 871-873. The court also denied the motion to vacate the MSJ Order. CP at 874-878. On October 3, 2022, Mrs. Voght timely filed a Motion for Reconsideration (CP at 888-896), which the court also denied (CP at 898-899).

In May 2023, Mrs. Voght and Wilmington Trust reached a resolution to proceed with the appeal: Mrs. Voght agreed to the entry of a final judgment, preserving her right to challenge the court's prior orders on appeal while avoiding further delays caused by Wilmington Trust's repeated and ongoing failures to substantiate its claimed amounts. CP at 1124-1129.

VI. ARGUMENT FOR GRANTING REVIEW

Division I affirmed the MSJ Order, even though Wilmington Trust had failed to meet its burden on summary judgment by presenting no evidence that it was entitled to enforce the note, and incorrectly drew all inferences on summary judgment in favor of Wilmington Trust.

Accordingly, Division I's decision conflicts with the decisions of this Court and of the Court of Appeals. RAP 13.4(b)(l) – (2). This case also presents issues of substantial public interest that this Court should determine because the decision erodes evidentiary standards for establishing holder status and sets a very dangerous precedent. RAP 13.4(b)(4).

A. <u>The Moving Party Must Meet Its Burden of Proof Before The Burden Ever Shifts To The Non-Moving Party, And All Reasonable Inferences Must Be Interpreted Against The Moving Party.</u>

The burden on summary judgment is on the moving party to prove that no material issue is genuinely in dispute. CR 56*;* *La Plante v. State*, 85 Wn.2d 154, 158 (1975). To meet this

burden, the moving party must prove "by uncontroverted facts" no genuine issue of material fact exists. *Id*. Only after the moving party has met its burden of producing evidence showing it is entitled to judgment as a matter of law does the burden shift to the non-moving party to set forth facts showing there is a genuine issue of material fact. *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 302 (1980). Also, all reasonable inferences must be resolved against the moving party, here, Wilmington Trust, and the motion should be granted only if reasonable people could reach but one conclusion. *Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wn.2d 99, 108 (1988); *In re Estate of Black*, 153 Wn.2d 152, 161 (2004).

B. The Decision Conflicts with Precedent.

1. The "Holder" of The Note Entitled To Commence A Judicial Foreclosure Is The Person In Possession of A Note That Is Payable To The Bearer Or To An Identified Person That Is The Person In Possession.

"Lenders ... have long been free to sell ... secured debt, typically by selling the promissory note signed by the

homeowner." *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 88 (2012). Under the Uniform Commercial Code ("UCC"), a person who is in possession of a promissory note endorsed in blank, i.e. one that does not specify the person to whom it is payable, is a "holder" of the note and is entitled to enforce it. *Terhune v. N. Cascade Tr. Servs., Inc.*, 9 Wn. App. 2d 708, 723, (2019) (citing RCW 62A.3-205(b)), *review denied*, 195 Wn.2d 1004 (2020). Indeed, the "holder" of the note entitled to commence a judicial foreclosure is "the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession."[3] Under the UCC, "if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder.[4] 'Negotiation' means " 'a transfer

[3] RCW 62A.1–201(b)(21)(A) *see also Bain*, 175 Wn.2d at 104 (referring to UCC to interpret the term "holder" as used in DTA).

[4] RCW 62A.3–201(b). "Indorsement" means a signature that is made on an instrument for the purpose of negotiating the instrument. RCW 62A.3–204(a).

of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder.' "[5] Further, the "holder" of a note is "[t]he person in possession of a [note] that is payable ... to bearer."[6] A note becomes payable to bearer when it is indorsed in blank.[7] An "indorsement" is "a signature ... made on an instrument for the purpose of ... negotiating the instrument[or] ... restricting payment of the instrument."[8] An indorsement is made in blank when it does not identify a person to whom it makes the note payable.[9] An indorsement that *does* identify a person to whom it makes the note payable is a "special indorsement."[10] When a note is specially indorsed, it "becomes

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[5] RCW 62A.3–201(a); *see also id.* cmt. 1 ("A person can become holder of an instrument when the instrument is issued to that person, or the status of holder can arise as the result of an event that occurs after issuance. 'Negotiation' is the term used in Article 3 to describe the post-issuance event.").
[6] RCW 62A.1-201(b)(21)(A); *see also Bain*, at 104.
[7] RCW 62A.3-205(b).
[8] RCW 62A.3-204(a).
[9] RCW 62A.3-205(a)-(b).
[10] RCW 62A.3-205(a).

payable to the identified person and may be negotiated **only** by the indorsement of that person."[11] Yet, "[w]hen indorsed in blank, a [note] ... may be negotiated by transfer of possession alone until specially indorsed."[12]

2. It Is Necessary To Distinguish Between "Owner" And "Holder," Because It Is Only The Holder Of The Note That Has Authority To Enforce It.

The **holder** of a promissory note secured by a deed of trust has authority to elect to commence a judicial foreclosure of the deed of trust. *Deutsche Bank Nat. Tr. Co. v. Slotke*, 192 Wn. App. 166, 168 (2016). But, it is necessary to distinguish between "owner" and "holder," because it is the **holder** of the note that has said authority to commence a judicial foreclosure.

Specifically, "[u]nder the UCC, promissory notes embrace two sets of rights." *Brown v. Washington State Dep't of Commerce*, 184 Wn.2d 509, 524 (2015):

[11] *Id*. (emphasis added).
[12] *Id*.

1) Holder: "The first set of rights is held by the 'person entitled to *enforce*' the note, a legal term of art commonly referred to as 'PETE' status." *Id.* (emphasis added). "By definition, the PETE is the person entitled to enforce the note, *i.e.*, to sue *in its own name* and collect on the note if the obligation has been dishonored." *Id*. at 526. To gain PETE status, one must be the **holder** of the note. *Id*. at 525.[13] "Holder means a person who is in possession of an instrument issued or indorsed to that person or to his or her order or to bearer or in blank." *Id*. at 526.[14] "The fact that a person is not the 'owner' of paper does not affect his status as a holder." *Id*.

2) Owner: "The second set of rights is *ownership* of the note." *Id*. "The owner has the right to the economic benefits of the note, such as monthly mortgage payments and foreclosure proceeds." *Id*. (emphasis added). "The rules concerning ownership of a note govern who is 'entitled to the economic value of the note.'" *Id*. at 527. "An owner of an instrument does not necessarily have possession of the instrument." *Id*. at 526.

As such, the statute's definition of "holder" does not turn on ownership. "That is unsurprising, given that the statute expressly provides that "[a] person may be a person entitled to

[13] The other methods of gaining PETE status under RCW 62A.3–301(ii) and (iii) are not at issue here.
[14] Citing 5A Anderson on the Uniform Commercial Code § 3–201:7, at 449 (Ronald A. Anderson ed., 3d ed., 1994 rev.).

enforce the instrument, a PETE, *even though the person is not the owner* of the instrument." RCW 62A.3–301 (emphasis added). *Brown*, 184 Wn.2d at 525. "The PETE and the owner of the note can be the same entity, but they can also be different entities." *Id*. Further, RCW 62A.3–301 clarifies the relationship between PETE status and ownership status: It provides that a person *need not* own a note to be entitled to enforce the note." *Brown,* 184 Wn.2d at 525.

Critically, only the **holder** of the note, *i.e.*, the PETE, that has authority to enforce it. "When the borrower pays the PETE—and *only* when the borrower pays the PETE—the borrower's obligation is discharged."[15] *Id*. at 527. "The PETE's possession of the note provides the borrower "with a relatively simple way of determining to whom his or her obligation is owed and, thus, whom to pay in order to be discharged." *Id*.

[15] *See* RCW 62A.3–602(a) ("[A]n instrument is paid to the extent payment is made ... to a person entitled to enforce the instrument[, a PETE]. To the extent of the payment, the obligation of the party obliged to pay the instrument is discharged ... .").

This rule focuses on the party who *possesses* the note to protect the borrower from being sued fraudulently or by multiple parties on the same note. 5A Anderson on the Uniform Commercial Code § 3–207:7, at 449 (3d ed.1994 rev.) ("The purpose of requiring that the plaintiff have possession of the paper is to protect the defendant from multiple liability."). *Id*. at 526. Allowing both the PETE and the owner to enforce the note would undermine the rule that grants enforcement authority to the PETE, protecting borrowers from duplicative or fraudulent claims. Hence, it is well established the **holder** of the note is the only party with the authority to enforce it.

3. Division I Ignored That—Contrary To Wilmington Trust's Representations To the Trial Court—The Note Was Never "Specially Indorsed" To Wilmington Trust.

When Wilmington Trust moved for summary judgment (CP at 141-224), Wilmington Trust *misrepresented* to the court that the note was "specially indorsed" to Wilmington Trust: "In the instance case, the Note is ***specially indorsed*** to [Wilmington

Trust] and [Wilmington Trust] is entitled to foreclose."[16] But, nothing could be further from the truth. Wilmington Trust cited Exhibit 1 to Declaration of Plaintiff In Support of Motion For Default And General Judgment of Foreclosure ("Chester Declaration"). CP 152-218. Noticeably absent from the note is any special endorsement to Wilmington Trust. CP at 157-162.

4. Wilmington Trust Presented No Evidence That It Was The Holder of The Note.

While Wilmington Trust claimed in motion that Wilmington Trust was the holder of the Note (CP at 142, line 20), noticeably absent from the Chester Declaration—the only declaration Wilmington Trust produced in support of its motion—is any testimony to that effect. CP 152-218. Wilmington Trust also argued that "[t]here is nothing in Chester's declaration that puts Plaintiff's standing in-question" and "Voght offers no evidence of her own to rebut standing,"[17] but Division III correctly reiterated, in an unrelated matter

[16] CP at 146, lines 9-15 (Emphasis added).
[17] CP at 822.

involving Wilmington Trust (which was represented by the same counsel), that "Wilmington Trust [has] an affirmative burden to provide evidence that it is the holder of the Note, whether or not its status as the holder is disputed.[18] In Mrs. Voght's case, Wilmington Trust failed to meet its affirmative burden of production on summary judgment, regardless of whether Mrs. Voght ever disputed Wilmington Trust's status.

As this Court has held, a trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds *if the factual findings are unsupported by the record*; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.[19] Therefore, regardless of whether Mrs.

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[18] *Okanogan Cnty. v. Various Parcels of Real Prop.*, 12 Wn. App. 2d 1076 n.2 (2020).

[19] *State v. Rundquist*, 79 Wn. App. 786, 793 (1995) (citing WASHINGTON STATE BAR ASS'N, WASHINGTON APPELLATE PRACTICE D ESKBOOK § 18.5 (2d ed.1993)), review denied, 129 Wn.2d 1003 (1996).

Voght—a non-moving party—raised this issue at the time, a trial court abuses its discretion if its factual findings and decision, here, summary judgment in favor of Wilmington Trust, is not supported by the record. While Wilmington Trust has blamed Mrs. Voght for not raising the issue at the time, it was Wilmington Trust's burden to prove "by uncontroverted facts" that it was entitled to enforce the note. Wilmington Trust failed to meet this burden, which, thus, never shifted to Mrs. Voght. The trial court's decision merits this Court's Review. RAP 13.4.

5. Division I's Reliance On Wilmington Trust's Purported "Evidence" To Establish Entitlement To Enforce The Note Conflicts With Precedent.

Division I wrongly concluded that Wilmington Trust met its initial burden to show it is entitled to enforce the note when Division I pointed out that Wilmington Trust: (1) "stated that it held the note" and (2) "provided a supporting declaration by an employee of the loan servicer who stated that they personally examined the note, deed of trust, and assignment." Op. at 10.

a) Wilmington Trust's unsworn "statement" in the motion is not factual evidence.

As this Court has held, "once the moving party has met its burden of offering **factual evidence** showing that it is entitled to judgment as a matter of law, the burden shifts to the nonmoving party. *Graves v. P. J. Taggares Co.*, 94 Wn.2d 298, 302 (1980) (citing *LaPlante v. State*, 85 Wn.2d 154, 158 (1975); *Okanogan Cnty.*, 13 Wn. App. 2d at 349 ("Wilmington Trust will have an affirmative burden to provide **evidence** that it is the holder of the Note, whether or not its status as holder is disputed").[20] Only "[a]fter the moving party submits **adequate affidavits**, the nonmoving party must set forth specific facts rebutting the moving party's contentions and disclose that a genuine issue as to a material fact exists." *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13 (1986).[21] But, "(i)f the moving party does not sustain that burden, summary judgment should not be entered, irrespective of whether the

[20] Emphasis added.
[21] Emphasis added.

nonmoving party has submitted affidavits or other materials." *Id*. (citing *Jacobsen v. State*, 89 Wn.2d 104, 108 (1977); P. Trautman, Motions for Summary Judgment: Their Use and Effect in Washington, 45 Wash.L.Rev. 1, 15 (1970).

Division I's reliance on the Wilmington Trust's "statement" that it is the holder of the note is contrary to precedent, which requires the moving party to offer *factual evidence*. Wilmington Trust's single statement was contained in a motion,[22] signed by counsel,[23] did not—and could not—constitute "factual evidence." *See Baden Sports, Inc. v. Kabushiki Kaisha Molten*, CV06-0210 MJP, 2007 WL 1185680, at *2 (W.D. Wash. Apr. 20, 2007) ("Defendants present no evidence supporting these claims. First, Defendants did not provide any declaration or evidence from Nishihara indicating that he initiated the inquiry. The conclusory

[22] CP at 142, line 20.
[23] *See also* RPC 3.7(a), which provides that in general, "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness".

assertion contained in Defendants' motion is not evidence”); *Garrels v. Wales Transp., Inc.*, 706 S.W.2d 757, 759 (Tex. App. 1986) *Garrels*, 706 S.W.2d at 759 (“The movant's evidence must be in the form of a sworn affidavit”; finding that “an unsworn motion is not evidence of probative value that the location” is “where the defendant can probably be found.”); *In re Innovative Commc'n Co., LLC*, BANKR. 06-10133, 2007 WL 496439, at *2 (Bankr. D. Del. Feb. 13, 2007) (“the motion is not evidence at all”); *Carter v. Integon Nat'l Ins. Co.*, 821CV01511CEHAEP, 2022 WL 19465901, at *2 (M.D. Fla. Mar. 24, 2022) (“Argument of counsel in a motion is not evidence”); *Autauga Creek Craft House, LLC v. Brust*, 2180300, 2020 WL 3886178 (Ala. Civ. App. July 10, 2020) (“‘[m]otions and arguments of counsel are not evidence.’ ‘[S]tatements in motions are not evidence and are therefore not entitled to evidentiary weight.’ ‘[B]riefs submitted in support of motions are not evidence to be considered by the Court in resolving a summary judgment motion.’”); *see also Hale v.*

Burlington N. & Santa Fe Ry. Co., 638 S.W.3d 49, 77 (Mo. Ct. App. 2021); ("A motion does not prove itself and the burden is on the movant to prove its allegations.") *Calvert v. Alessi & Koenig, LLC*, 2:11-CV-00333-LRH, 2012 WL 136244, at *2 (D. Nev. Jan. 18, 2012) ("Counsel's perfunctory argument in Plaintiff's motion is not evidence"). In fact, in this Court's own words, "a party may prove its status as a holder by providing **evidence** of possession such as presenting the *original* note to the trial court or by a **declaration** by the lender or loan servicer that the party holds the note. *Bucci v. Nw. Trustee Services, Inc.*, 197 Wn. App. 318, 328 (2016); *Terhune*, 9 Wn. App. 2d at 724. *See also* RCW § 61.24.030 ("A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the holder of any promissory note or other obligation secured by the deed of trust shall be sufficient proof

as required under this subsection");[24] *Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 826 (2015).[25]

Simply put, Division I erroneously determined that Wilmington Trust's "statement" within its motion constitutes evidence. Indeed, declarations made under the penalty of perjury are critical: They ensure reliability in legal cases. Unlike motions, a sworn declaration carries a heightened level of accountability, in part, because the declarant affirms the truthfulness of the statements subject to legal consequences for any falsehoods. *See* RCW 9A.72. This safeguard helps prevent fraudulent or unsupported claims and reinforces the integrity of evidence presented to the court, particularly given that the subject events transpired in the aftermath of the 2008 financial

[24] Emphasis added.
[25] *See also* RPC 3.7(a), which provides that in general, "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness."

crisis—a period marked by widespread mortgage fraud and a catastrophic collapse in the housing market.[26]

b) The employee's declaration does not establish that Wilmington Trust is the holder.

Division I further erroneously concluded that the "supporting declaration by an employee of Nationstar, the loan servicer, who stated that they personally examined the note, deed of trust, and assignment" was sufficient to establish that Wilmington Trust met its initial burden on summary judgment to demonstrate that it is entitled to enforce the note.

As an initial matter, Division I's decision conflicts with the above-stated precedent under which all reasonable inferences on summary judgment must be construed in the light most favorable to the nonmoving party. As stated above, noticeably absent from the "supporting declaration" is any testimony that

[26] United States Department of Justice, Federal Bureau of Investigation, 2008 Mortgage Fraud Report, https://www.fbi.gov/stats-services/publications/mortgage-fraud-2008. (last visited Feb. 13, 2025).

Wilmington Trust is the holder the mote.[27] Accordingly, any conclusion that Wilmington Trust is the holder of the note necessarily relies on inference, yet all reasonable inferences must be construed against Wilmington Trust, not in its favor.

Further, while the employee's declaration states that the employee of Nationstar, Wilmington Trust's servicer, "reviewed the Note," the declaration noticeably lacks any testimony that the Note reviewed was the original Note. If the employee of the servicer reviewed only a copy of the Note, that would be insufficient to establish entitlement to foreclose. *See Trujillo v. Nw. Tr. Servs., Inc*., 183 Wn.2d 820, 828 (2015) ("Possession of a copy of the original note does not establish possession of the original note."); *see also Bavand v. OneWest Bank, F.S.B.*, 176 Wn. App. 475, 498 (2013) ("Possession of a 'true and correct copy of the original' note does not, of course, establish possession of the original note itself.) (abrogated in part on other grounds by *Frias v. Asset Foreclosure Services, Inc*., 181 Wn.2d

[27] CP at 157-162.

412 (2014). (For example, Mrs. Voght's counsel also possesses a copy of the Note, which, needless to say, does not confer authority to enforce it.) Nor would possession of the original note at the time of the summary judgment hearing or when the employee executed the declaration establish that the same party possessed the note *when all actions essential to a valid foreclosure took place and when the complaint was filed*.[28]

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[28] *See*, e.g., *Jelic v. BAC Home Loans Servicing, L.P.*, 178 So. 3d 523, 524–525 (Fla. Dist. Ct. App. 2015) ("Statements that make exclusive use of the present tense (here: 'Bank of America *is* the holder of the note' (emphasis added)) are insufficient. What is required is some evidence that the foreclosing party *was* the holder at the appropriate time."). There, the court refused to adopt a presumption that the ability to produce an original note during litigation automatically established that the party possessed the note at the time the complaint was filed. The court emphasized the need for specific evidence showing that the foreclosing party was the holder of the note at the relevant time. Also, the Bank's sole witness undermined their testimony by retracting a prior assertion that the Bank owned the loan before the complaint was filed. This retraction further highlighted the lack of evidence necessary to establish that the Bank held the note at the time of filing, leading the court to conclude that the burden of proof had not been met. *See also* Elizabeth Renuart, *Uneasy Intersections: The Right to Foreclose and the U.C.C.*, 48 Wake Forest L. Rev. 1205, 1218–1221 (2013); Adam J. Levitin, *The Paper Chase:*

Accordingly, Division I wrongly *assumed* or *inferred* that the employee must have reviewed the *original* Note; that Wilmington Trust was the holder of the Note (an alleged fact not even stated in the employee's declaration); and that Wilmington Trust possessed the Note *at the time the complaint was filed*. But, these inferences contradict the well-established precedent, which requires that all reasonable inferences be construed against Wilmington Trust and in the light most favorable to the nonmoving party—here, Mrs. Voght. By failing to adhere to this mandatory standard on summary judgment, Division I improperly resolved key factual ambiguities in favor of Wilmington Trust—contrary to the decisions of this Court.

Nor did Division I explain why Wilmington Trust would still have the authority to enforce the note if the records the employee reviewed belonged to the servicer. As stated, under the UCC, promissory notes involve two distinct rights: enforcement

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Securitization, Foreclosure, and the Uncertainty of Mortgage Title, 63 Duke L.J. 637, 657 (Dec. 2013) (delivery under Article 3 requires voluntary transfer of physical possession).

and ownership. Enforcement is tied to possession, granting the PETE, or holder, the authority to enforce the note, while ownership pertains to the economic benefits. Here, the employee's declaration establishes a key fact fatal to Wilmington Trust's case: If anything, the declaration indicates that Nationstar, not Wilmington Trust, was the PETE or holder of the Note. The employee testified that they examined Nationstar's records, which, if anything, would support that Nationstar held the Note and, thus, had the authority to enforce it. But, Nationstar is not the plaintiff in this case because it is Wilmington Trust that initiated this judicial foreclosure action and is the plaintiff here. Accordingly, even if Wilmington Trust *owned* the Note, it was Nationstar that had the right to enforce it, as the employee's own admission indicated that the Note was in possession of Nationstar's records, which the employee personally examined.

Thus, Wilmington Trust's own "evidence" was internally inconsistent. While Wilmington Trust claimed in its motion to be the holder of the Note, the declaration contradicted this claim by

pointing to Nationstar as the holder. While Division I cited *Terhune* for the proposition that a party may prove its status as a holder by a declaration by the lender or loan servicer that the party holds the note, *Terhune* is inapposite. There, the servicer's employee explicitly stated that "U.S. Bank was the owner of and was in possession of the note." *Terhune*, 9 Wn. App. 2d at 716. It necessarily follows that the servicer in *Terhune* was not the owner or holder of the note. Unlike in *Terhune*, Nationstar's employee did not state that Wilmington Trust was the owner or held the Note. Rather, Nationstar's employee stated that they personally examined the Note, which only further supported a reasonable inference in favor of Mrs. Voght that Nationstar was the holder of the Note and that Wilmington Trust, thus, lacked authority to enforce it.

In sum, without a sworn declaration affirming that Wilmington Trust is the holder or evidence on summary judgment of the original Note, Wilmington Trust failed to meet its initial burden: the motion is not evidence; the declaration does

not establish Wilmington Trust as the holder; and allowing Wilmington Trust to meet its burden based on an unsworn motion, which is further inconsistent with its supporting declaration, would significantly erode evidentiary standards for establishing holder status and set a dangerous precedent. Accordingly, review is merited. RAP 13.4(b)(l), (2), and (4).

C. Division I Erred In Relying On *Merceri* To Affirm Summary Judgment On The Issue Of Acceleration.

Division I erroneously relied on *Merceri v. Bank of N.Y. Mellon*, 4 Wn. App. 2d 755 (2018), to affirm summary judgment, overlooking the distinct facts and totality of evidence in this case. *See* App. C. Unlike *Merceri*, where the lender's actions were limited to a notice of intent to accelerate, here, the lender initiated foreclosure proceedings shortly after the notice, demonstrating affirmative action to carry out acceleration. CP at 247. Additionally, the notice sent to the Voghts included unequivocal language stating that the loan "will be accelerated" and foreclosure would "be initiated" if the default was not

cured, eliminating the ambiguity present in *Merceri*. CP at 250-251. Further, the deed of trust and correspondence from Countrywide show no waiver of rights and confirm steps consistent with acceleration. CP at 251, 789-812. Finally, Nationstar's communications in 2016 regarding HAMP explicitly referenced an already-accelerated loan, contradicting the trial court's conclusion that acceleration occurred in 2017. CP at 733, 766, 781. Accordingly, fact issues abounded as to whether the loan was accelerated, distinguishing this case from *Merceri* and making summary judgment improper.

D. Summary Judgment Should Be Denied To Allow Mrs. Voght To Complete All Necessary Discovery.

As detailed in Mrs. Voght's Motion to Reconsider (App. C), the trial court erred by granting Wilmington Trust's summary judgment motion without allowing necessary discovery on acceleration, and Division I's contrary conclusion was incorrect. While Division I believed the CR 56(f) request only concerned claimed amounts, Mrs. Voght's opening brief

clearly emphasized prior counsel's request for additional discovery on acceleration. See APP21. This request satisfied the CR 56(f) criteria under *In re Estate of Fitzgerald*, 172 Wn. App. 437 (2012). Wilmington Trust's incomplete discovery responses failed to produce critical communications about acceleration, and timing constraints hindered prior counsel's efforts to compel discovery. CP at 241, 269, 277. Missing evidence, including post-notice conduct and Countrywide communications, is highly relevant to whether affirmative action was taken to accelerate. Review is warranted.

E. Wilmington Trust Should Be Judicially Estopped From Arguing That The Notice Of Intent To Accelerate Is Not Evidence Of Acceleration.

For the reasons discussed in Mrs. Voght's Motion to Reconsider (App. C), the trial court abused its discretion by concluding that the doctrine of judicial estoppel did not apply to Wilmington Trust's argument about acceleration. In *Podar* and

Wagener,[29] Wilmington Trust or its servicer relied on Notices of Intent to Accelerate as sufficient evidence of acceleration, arguing they satisfied conditions to accelerate based on the deed of trust. Yet, in this case, Wilmington Trust contradicted its prior stance, asserting that the Notice of Intent to Accelerate was merely a threat. This inconsistency demonstrates precisely the type of opportunistic argument judicial estoppel is intended to prevent. Judicial estoppel focuses on the inconsistency of a party's positions, not differences in state law, and Wilmington Trust's selective reliance on the deed of trust language in prior cases underscores its fundamental inconsistency. By allowing Wilmington Trust to take conflicting positions, the trial court undermined fairness and predictability in judicial proceedings.

VII. CONCLUSION

This Court should review Division I's decision, RAP 13.4(b)(l), (2), and (4), and vacate the summary judgment order.

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[29] *Wilmington Trust, N.A. v. Podar*, 2018 IL App (1st) 172960-U (2018); *Nationstar Mortgage, L.L.C. v. Wagener*, 2015-Ohio-1289.

This Brief contains 4,966 words, excluding the parts of the document exempted from the word count, in compliance with RAP 18.17.

Respectfully submitted this 13th day of February 2025.

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/s/ Boris Davidovskiy

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2025, I caused the foregoing document to be efiled with the Court of Appeals, Division I, 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 at Edmonds, Washington, this 13th day of February, 2025.

/s Boris Davidovskiy

_____

Boris Davidovskiy, WSBA #50593

Appendix A

FILED
11/19/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WILMINGTON TRUST, NATIONAL ASSOCIATION, AS SUCCESSOR TRUSTEE FOR BEAR STEARNS ALT-A TRUST, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-7,

Respondent,

v.

THE UNKNOWN HEIRS AND DEVISEES OF JAMES L. VOGHT; HEIFA VOGHT; THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS SUCCESSOR TRUSTEE TO JPMORGAN CHASE BANK, N.A., AS TRUSTEE ON BEHALF OF THE CERTIFICATEHOLDERS OF THE CWHEQ INC., CWHEQ REVOLVING HOME EQUITY LOAN TRUST, SERIES 2006-H; HOLOCHUK WOOD SERVICES; DISCOVER BANK, ISSUER OF THE DISCOVER CARD; EGP INVESTMENTS LLC; OCCUPANTS OF THE PROPERTY,

Defendants,

HEIFA VOGHT,

Appellant.

No. 85436-4-I

DIVISION ONE

UNPUBLISHED OPINION

MANN, J. — Heifa Voght (Voght) appeals the entry of final judgment and decree of foreclosure of her family home in Renton, Washington (the property). Voght argues the trial court erred when it granted summary judgment for Wilmington Trust because there were genuine issues of material fact as to acceleration, and whether Wilmington Trust held the note. We affirm.

I

In 2006, James and Heifa Voght executed an interest only adjustable rate note (the note) for $660,000 related to the property. The note was indorsed in blank.[1] The note named Countrywide Bank, N.A. (Countrywide) as the lender and states, "I understand that Lender may transfer this Note. Lender of anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.'" The note provided for monthly payments of principal and interest beginning on October 1, 2006. The note also provided that, in the event of default, the note holder may send a written notice of default stating that if payment is not made the holder may require immediate payment in full.

The Voghts executed a deed of trust to secure the note. The deed of trust provided that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for Countrywide and Countrywide's successors and assigns. In the event of default, the deed of trust provided that the lender may charge the Voghts fees for services performed in connection with default, including attorney fees. The deed of trust

[1] A note indorsed in blank is payable to the bearer and "may be negotiated by transfer of possession alone." RCW 62A.3-205(b). Bucci v. N.W. Trustee Servs. Inc., 197 Wn. App. 318, 323, n.1, 387 P.3d 1139 (2016). The note was initially indorsed by Countrywide Bank, N.A. to Countrywide Home Loans, Inc. Countrywide Home Loans, Inc., then indorsed the note in blank.

also provided that should the Voghts default, the lender must give notice before acceleration and if the default is not cured then the lender may require immediate payment in full without further demand.

After the Voghts failed to make their November 2008 payment, on December 17, 2008, Countrywide sent a notice of intent to accelerate the loan:

> If the default is not cured on or before January 16, 2009, the mortgage payments will be accelerated with the full amount remaining accelerated and becoming due and payable in full, and foreclosure proceedings will be initiated at that time. As such, the failure to cure the default may result in the foreclosure and sale of your property.

A notice of trustee's sale of the property was recorded in November 2009, but was discontinued in 2011.

In 2009, MERS assigned all beneficial interest in the deed of trust to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing (BAC). BAC later merged into Bank of America, N.A.

James Voght died in 2010.

On October 24, 2011, MERS assigned the deed of trust to "Citibank, N.A., as Trustee for the holders of the Bear Stearns Alt-A Trust 2006-7, Mortgage Pass-Through Certificates, Series 2006-7" (Citibank).

In 2012, loan servicing was transferred from Bank of America to Select Portfolio Servicing, Inc. (SPS). In January 2013, SPS notified Voght that the holder of the note was Citibank.

In July 2013, Bank of America assigned the deed of trust to Nationstar Mortgage, LLC (Nationstar). In December 2013, Nationstar assigned the deed of trust to "Wilmington Trust, N.A., successor trustee to Citibank, N.A., as Trustee for the

Certificate Holders of Structured Asset Mortgage Investments II Inc., Bear Stearns Alt-A Trust 2006-7, Mortgage Pass-Through Certificates, Series 2006-7." By 2014, Nationstar was the loan servicer.

In June 2014, Wilmington Trust filed a complaint seeking foreclosure against Voght, the estate of James Voght, and other lienholders in King County Superior Court. The action was dismissed by clerk's order for failure to proceed in April 2016. Wilmington Trust unsuccessfully moved to vacate the dismissal.

Wilmington Trust filed the current complaint seeking foreclosure in October 2017. Voght asserted affirmative defenses for statute of limitations, estoppel, res judicata, failure to mitigate, contribution, and homestead right and redemption right.

Wilmington Trust moved for default and summary judgment in December 2018, asserting that the Voghts failed to make their payment on November 1, 2008, and had made no payment since. Wilmington Trust asserted it held the note and that the note had been specially endorsed to it as "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." Wilmington Trust submitted a declaration by Nationstar employee Karleton Chester which included as exhibits a copy of the note and deed of trust that were executed in 2006 along with the various assignments of the deed of trust. Chester declared that he personally examined the note, deed of trust, assignment, and Nationstar's electronic servicing system, and that Voght was in default. Wilmington Trust also asserted that the note was accelerated upon filing of the 2017 complaint and that the statute of limitations began running when the 2014 foreclosure action was initiated.

Voght argued that the foreclosure action was time-barred because the December 2008 notice of intent to accelerate triggered the six-year statute of limitations which expired in January 2015. Voght also argued that Wilmington Trust was judicially estopped from claiming the notice of intent to accelerate was not evidence of acceleration. In the alternative, Voght argued that the statute of limitations began to run on the first missed installment payment and each subsequent installment until the note was accelerated and without a determination of whether the statute of limitations had expired on certain installments, the correct amount due could not be calculated.

On January 30, 2019, the trial court granted Wilmington Trust's motion for summary judgment and concluded that the statute of limitations barred any amount due before November 1, 2011. The trial court ruled that a fact-finding hearing was necessary to determine the correct amount of principal, interest, and fees—unless the parties agreed to an accounting or submitted financial documentation.

Voght sought discretionary review of the order granting summary judgment under RAP 2.3(b)(1), (2), and (4) on the issues of judicial estoppel and acceleration. The trial court stayed the proceedings pending the appeal. We denied discretionary review.

On February 18, 2020, Wilmington Trust moved for entry of in rem judgment and decree of foreclosure. Wilmington Trust calculated interest owed beginning on November 1, 2011, and alleged the total amount due was $915,715.41 including interest, fees, and costs. Voght argued that Wilmington had failed to prove the correct amount owed as ordered by the court. A hearing was set for March 6, 2020, but was later stricken.

On May 4, 2022, Wilmington Trust moved to terminate the stay put in place in 2019. The trial court granted the motion and set a new trial date for November 14, 2022. At this time, Voght's counsel withdrew.

On June 1, 2022, Wilmington Trust moved for summary judgment against Voght and sought an in rem money judgment and decree of foreclosure, and attorney fees and costs. Theresa Robertson, a Nationstar employee, submitted a supporting declaration stating the total amount due since November 1, 2011, was $978,832.85. On September 21, 2022, the trial court determined that Wilmington Trust was entitled to judgment as a matter of law for the decree of foreclosure but denied the motion in part noting that the record submitted was insufficient to determine the exact amount owed.

Meanwhile, on September 7, 2022, Voght moved for relief from judgment of the January 30, 2019 order granting summary judgment. Voght's motion was brought under CR 60(b)(4) and (11). Vought argued that the judgment was a product of fraud, misrepresentation or misconduct because Wilmington Trust failed to establish it held the note and thus lacked standing to foreclose on the property. Voght also argued for relief under CR 60(b)(11) based on a violation of appearance of fairness. Additionally, Voght, while recognizing the court already ruled on the issue of acceleration, asserted that documents newly submitted by Wilmington Trust supported finding that the note was accelerated prior to 2017.

On September 21, 2022, the trial court denied Voght's CR 60(b) motion:

> 6. The basis for the motion relates to alleged fraud committed by the Plaintiff because the pleadings submitted to Judge Donohue purportedly did not establish standing. . . . The defendant had the ability to make any legal argument to the court at the hearing. The defendant failed to identify this argument to the trial court or to the Court of Appeals. The record here

> does not demonstrate that the lack of information in the pleadings as argued by the defendant prevented the defendant from fully and fairly presenting its case or defense. The defendant failed to make the argument, that as argued by defendant in this motion, was plain on the pleadings.
>
> 7. If defendant's argument is correct, it was a failure of counsel to raise the argument to the court at the hearing.
>
> 8. Failures of counsel are not a basis for relief pursuant to CR 60. See, Lane v. Brown & Haley, 81 [Wn. App. 102, 912 P.2d 1040 (1996)].
>
> 9. The defendant's argument fails to consider that the court ultimately is the decisionmaker on a summary judgment motion. An error of law does not provide relief from judgment pursuant to CR 60. Errors of law are addressed on appeal. See, Port of Port Angeles v. CMC Real Estate Corp., 114 Wn.2d 670, 673, 790 P.2d 145 (1990); In re Marriage of Tang, 57 Wn. App. 648, 654, 789 P.2d 118 (1990).

The trial court also determined that Voght failed to establish a basis for relief under CR 60(b)(11).

Voght unsuccessfully moved for reconsideration of the order denying relief from judgment under CR 59(a)(7), (8), and (9), sought an indicative ruling under CR 60(e), and again asserted vacation was warranted under CR 60(b).

On December 6, 2022, Wilmington Trust moved for entry of final judgment for $974,503.37. On February 17, 2023, the trial court denied the motion for entry of final judgment because the documents submitted by Wilmington Trust were the same as those previously determined to be insufficient to establish the exact amount owed. Wilmington Trust unsuccessfully moved for partial reconsideration on the entry of judgment for the principal and interest only whose sum was not reliant on extraneous facts.

On May 17, 2023, Voght and Wilmington Trust stipulated to entry of final judgment and Wilmington Trust agreed not to enforce the judgment during the pendency of an appeal. Voght timely appealed.

II

Voght argues that the trial court erred in granting summary judgment. We review an order granting summary judgment de novo; all facts and reasonable inferences must be considered in the light most favorable to the nonmoving party, here Voght. Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 123 Wn.2d 678, 685, 871 P.2d 146 (1994); Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

Summary judgment is subject to a burden-shifting scheme. Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). The party moving for summary judgment bears the initial burden of showing that there is no disputed issue of material fact. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The burden then shifts to the nonmoving party to present evidence that an issue of material fact remains. Young, 112 Wn.2d at 225. The nonmoving party must then present "'specific facts which sufficiently rebut the moving party's contentions'" and create a genuine issue of material fact. Ranger, 164 Wn.2d at 552 (quoting Meyer v. Univ. of Wash., 105 Wn.2d 847, 852, 719 P.2d 98 (1986)). "A material fact is one of such nature that it affects the outcome of the litigation." Greater Harbor, 132 Wn.2d at 279.

A

Voght argues that Wilmington Trust failed to meet its burden of production by failing to present evidence that it held the note. Voght asserts that Wilmington Trust bears the affirmative burden to show it holds the note regardless of whether Voght disputed ownership of the note in response to summary judgment. We disagree.

"Where a deed of trust is foreclosed as a mortgage, the law of mortgages applies." Deutsche Bank Nat'l Tr. Co. v. Slotke, 192 Wn. App. 166, 172, 367 P.3d 600 (2016); RCW 61.24.020. The beneficiary of a deed of trust who holds the promissory note secured thereby, can judicially foreclose on the deed of trust in the event of default. Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 83, 92-94, 285 P.3d 34 (2012). "Beneficiary" under the deed of trust act means "the holder of the instrument or document evidencing the obligations secured by the deed of trust." Bain, 175 Wn.2d at 98-99; RCW 61.24.005(2). In this case, the instrument evidencing the obligations secured by the deed of trust is the note.

The note is a negotiable instrument governed by the Uniform Commercial Code (UCC), Title 62A RCW. Brown v. Wash. State Dep't of Com., 184 Wn.2d 509, 524, 359 P.3d 771 (2015). Under the UCC only certain persons may enforce the note:

> "Person entitled to enforce" an instrument means (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 [enforcement of lost, destroyed, or stolen instrument] or 62A.3-418(d) [mistake]. A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

RCW 62A.3-301. "'The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument.'" Slotke, 192 Wn. App. at 172 (quoting John Davis & Co. v. Cedar Glen No. Four, Inc., 75 Wn.2d 214, 222–23, 450 P.2d 166 (1969)).

An instrument endorsed in blank, as it was here, becomes payable to bearer. RCW 62A.3-205. "If an instrument is payable to bearer, it may be negotiated by transfer of possession alone." RCW 62A.3-201. "'It is not necessary for the holder to first establish that he has some beneficial interest in the proceeds.'" Slotke, 192 Wn. App. at 172 (quoting John Davis & Co, 75 Wn.2d at 222-23). A party may prove its status as a holder by providing evidence of possession such as presenting the original note to the trial court or by a declaration by the lender or loan servicer that the party holds the note. Bucci v. Nw. Trustee Services, Inc., 197 Wn. App. 318, 328, 387 P.3d 1139 (2016); Terhune v. N. Cascades Tr. Servs., Inc., 9 Wn. App. 2d 708, 724, 446 P.3d 683 (2019).

Here, Wilmington Trust, as the party moving for summary judgment, had the initial burden of establishing that it was entitled to judgment as a matter of law. Whether Wilmington Trust holds or is in possession of the note is material because it determines whether Wilmington Trust may enforce the note and deed of trust. Wilmington Trust stated that it held the note and provided a supporting declaration by an employee of the loan servicer who stated that they personally examined the note, deed of trust, and assignment. Thus, Wilmington Trust met its initial burden to show it is entitled to enforce the note.

The burden then shifted to Voght to present evidence that there was a genuine issue of whether Wilmington Trust held the note. Voght failed to do so.

Generally, appellate courts will limit review to claims argued before the trial court. RAP 2.5(a). This is especially true for summary judgment proceedings. RAP 9.12. Because Voght did not raise the issue of whether Wilmington Trust holds the note in response to summary judgment, Voght failed to meet her burden on summary judgment.[2]

B

Voght argues the trial court abused its discretion by concluding that the doctrine of judicial estoppel did not apply to Wilmington Trust's argument about acceleration. We disagree.

A trial court's decision on the application of judicial estoppel is reviewed for abuse of discretion. Miller v. Campbell, 164 Wn.2d 529, 536, 192 P.3d 352 (2008). "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds." Skinner v. Holgate, 141 Wn. App. 840, 849, 173 P.3d 300 (2007) (quoting State v. Perrett, 86 Wn. App. 312, 319, 936 P.2d 426 (1997)). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard." In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

[2] Voght argues that Wilmington Trust misrepresented that it was assigned the deed of trust and thus, lacked standing to foreclose on the property. "The holder of the promissory note has the authority to enforce the deed of trust because the deed of trust follows the note by operation of law." Winters v. Quality Loan Serv. Corp. of Wash., Inc., 11 Wn. App. 2d 628, 643, 644-45, 454 P.3d 896 (2019) (citing Bain, 175 Wn.2d at 104). Voght recites the various assignments of the deed of trust but otherwise provides no authority in support of her argument. The deed of trust follows the note and, as discussed above, Wilmington Trust stated it holds the note. So, regardless of the various assignments, Wilmington Trust as the note holder may enforce the note and deed of trust.

"'Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.'" Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (quoting Bartley-Williams v. Kendall, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006)). In Arkison, our Supreme Court set forth the following three factors to "guide a trial court's determination of whether to apply the judicial estoppel doctrine": (1) whether "a party's later position" is "clearly inconsistent with its earlier position"; (2) whether "judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled'"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." 160 Wn.2d at 538-39 (quoting New Hampshire v. Maine, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)).

Voght relies on Wilmington Trust's seemingly contrary arguments in two out-of-state cases to support her argument. In the unpublished case, Wilmington Trust, N.A. v. Podar, 2018 IL App (1st) 172960-U, at 5-9, https://www.illinoiscourts.gov/resources/226ba7cc-acfb-43e8-9919-31094fbb7e1e/file1, the notice of intent to accelerate was reviewed by the appellate court for compliance with the acceleration requirements in the mortgage agreement. Under Illinois law, courts consider a notice of acceleration a condition precedent. Podar, 2018 IL App (1st) 172960-U, at 6. Wilmington Trust argued that the notice complied with the mortgage agreement which required the lender give notice before acceleration and the notice must specify the following: default, the action to cure, due date to cure, and that failure

to cure may result in acceleration. The court determined the condition precedent to filing suit was satisfied by the notice of intent because it contained the required components. Podar, 2018 IL App (1st) 172960-U, at 7. Voght also relies on the unpublished case Nationstar Mortgage, LLC v. Wagener, 2015-Ohio-1289, ¶¶ 57-62 (unpublished), https://www.supremecourt.ohio.gov/rod/docs/pdf/8/2015/2015-Ohio-1289.pdf, in which the terms of both the mortgage agreement and the notice were nearly identical to those in Podar. In that case, the court determined that the notice of intent conformed to the notice requirements of the mortgage and satisfied the condition precedent. Wagener, 2015-Ohio-1289, ¶ 61.

Neither case is persuasive because Ohio and Illinois law appear to focus solely on whether the condition precedent is satisfied. The plaintiff's position in both Podar and Wagener was that the notice complied with the mortgage requirements, the condition precedent was satisfied and so the foreclosure action may proceed. Here, the position of Wilmington Trust is that, under Washington law, the notice did not accelerate the loan because the notice was not a "clear and unequivocal" action that the loan was indeed accelerated. Merceri v. Bank of New York Mellon, 4 Wn. App. 2d 755, 761, 434 P.3d 84 (2018). This is not clearly inconsistent with Wilmington Trust's prior argument in Illinois or Nationstar's argument in Ohio. Instead, the difference is that the law in those states requires compliance with the mortgage agreement and satisfaction of the condition precedent—neither state appears to require a "clear and unequivocal" notice. Voght does not provide applicable statutes or case law to persuade otherwise. Additionally, Voght does not explain or provide authority to support consideration of

Nationstar's prior argument given that Nationstar is not the party making the argument here.

The trial court did not abuse its discretion by deciding judicial estoppel was not applicable to Wilmington Trust's argument.

C

Voght argues that genuine issues of material fact exist over acceleration and whether foreclosure of the loan is time-barred. In contrast, Wilmington Trust argues that under Merceri, 4 Wn. App. 2d 755, the notice of intent to accelerate does not accelerate the loan. We agree with Wilmington Trust.

A deed of trust foreclosure action must be commenced within six years. RCW 4.16.040; 4518 S. 256th, LLC v. Karen L. Gibbon, P.S., 195 Wn. App. 423, 434, 382 P.3d 1 (2016). Washington law distinguishes a demand note from an installment note. 4518 S. 256th, 195 Wn. App. at 434. The statute of limitations begins to run on a demand note when it is executed while, on an installment note, the statute of limitations runs against each installment from the time it becomes due. 4518 S. 256th, 195 Wn. App. at 434. But if an installment note is accelerated, the remaining balance becomes due and the statute of limitations begins to run for all installments not previously due. 4518 S. 256th,195 Wn. App. at 434-35.

Mere default alone will not accelerate the note—even if the note provides for automatic acceleration upon default. Merceri, 4 Wn. App. 2d at 760 (citing A.A.C. Corp. v. Reed, 73 Wn.2d 612, 615, 440 P.2d 465 (1968)). "Some affirmative action is required, some action by which the holder of the note makes known to the payors that he intends to declare the whole debt due." Merceri, 4 Wn. App. 2d at 760 (quoting

Glassmaker v. Ricard, 23 Wn. App. 35, 37-38, 593 P.2d 179 (1979)). "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, 4 Wn. App. 2d at 761 (quoting Glassmaker, 23 Wn. App. at 38.)).

In Merceri, Merceri defaulted on the mortgage and the bank sent a notice of default to Merceri. 4 Wn. App. 2d at 761. The notice of default sent to Merceri is nearly identical to the notice here. On appeal, the bank argued the loan was not accelerated by the notice and this court agreed. Merceri, 4 Wn. App. 2d at 760-61. The record showed the bank did not declare the entire balance due, refuse to accept installment payments, or otherwise take affirmative action, in a clear and unequivocal manner conveying acceleration. Merceri, 4 Wn. App. 2d at 761. Additionally, the mortgage statements sent to the plaintiff after the notice showed the amount due as the sum of the past due installments—not the entire principal. Merceri, 4 Wn. App. 2d at 761. This court determined that Merceri did not receive notice of acceleration but a warning that the debt would be accelerated. Merceri, 4 Wn. App. 2d at 762-63.

Here, like in Merceri, notices of default sent to Voght did not show the entire balance of the loan as due but the sum of the past due installments. And Voght does not discuss Merceri or otherwise provide authority to counter Merceri's holding. Instead, Voght argues the deed of trust is evidence of acceleration. The deed of trust states that the lender may accelerate and that, at its option, the lender may require immediate payment without further demand. The Merceri court, dealing with a similar mortgage provision, did not find such language persuasive because acceleration of a loan still

requires clear and unequivocal action by the lender. 4 Wn. App. 2d at 761-62. We agree.

D

Voght argues she should have been allowed to complete all necessary discovery on acceleration. CR 56(f) provides that a trial court may grant a continuance to permit the nonmoving party time to complete discovery. When the nonmoving party establishes a good reason as to why the discovery cannot be timely obtained, the trial court may allow "'a reasonable opportunity to make the record complete before ruling on a motion for summary judgment.'" In re Estate of Fitzgerald, 172 Wn. App. 437, 448, 294 P.3d 720 (2012) (quoting Lewis v. Bell, 45 Wn. App. 192, 196, 724 P.2d 425 (1986)). Such a continuance is properly denied where "(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence, (2) the requesting party does not state what evidence would be established through the additional discovery, or (3) the desired evidence will not raise a genuine issue of material fact." Fitzgerald, 172 Wn. App. at 448 (citing Lewis, 45 Wn. App. at 196).

While Voght argued for a continuance under CR 56(f) in opposition to the second motion for summary judgment, she did so on the issue of the claimed amount owed—not on the issue of acceleration. Moreover, a continuance under CR 56(f) is at the discretion of the trial court, and Voght provides no argument that the trial court abused its discretion. Nor does Vought explain how further discovery on acceleration would overcome any of the three factors above. Fitzgerald, 172 Wn. App. at 448. We do not consider an inadequately briefed argument. Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011).

The trial court did not err by granting summary judgment for Wilmington Trust.

III

Voght argues the trial court erred by denying her motion to vacate under CR 60(b)(4).[3] First, Voght contends that Wilmington Trust's misrepresentation that it held the note is clear and convincing evidence in support of vacation under CR 60(b)(4). We disagree.

A trial court's decision on a motion to set aside a judgment is reviewed for abuse of discretion. Trinity Universal Ins. Co. of Kan. v. Ohio Cas. Ins. Co., 176 Wn. App. 185, 195, 312 P.3d 976 (2013). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." Littlefield, 133 Wn.2d at 46-47.

A trial court may set aside a judgment for fraud, misrepresentation, or other misconduct of an adverse party. CR 60(b)(4). "The fraudulent conduct or misrepresentation must cause the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case or defense." Lindgren v. Lindgren, 58 Wn. App. 588, 596, 794 P.2d 526 (1990) (citing Peoples State Bank, 55 Wn. App. 367, 372, 777 P.2d 1056 (1989)). This rule is designed to address judgments that were unfairly obtained, not judgments that may be factually incorrect. Peoples, 55 Wn. App. at 372. "The party attacking a judgment under CR 60(b)(4) must establish the fraud, misrepresentation, or other misconduct by clear and convincing evidence." Lindgren, 58 Wn. App. at 596.

[3] Voght also assigns error to the trial court's decision to deny relief under CR 60(b)(11), but fails to provide argument or authority on the issue. We do not consider an inadequately briefed argument. Norcon Builders, 161 Wn. App. at 486.

In Peoples, Hickey acquired a lien against her ex-husband's property as part of the property distribution following their dissolution. 55 Wn. App. at 368. When the bank initiated foreclosure proceedings following the ex-husband's default, it named Hickey as a party and claimed her interest was inferior and subordinate to its lien. Peoples, 55 Wn. App. at 368. Hickey, although served with the complaint, failed to appear and a default judgment was entered against her. Peoples, 55 Wn. App. at 369. Hickey moved to set aside the judgment under CR 60(b)(4), arguing the bank had mispresented the priority of her lien. Peoples, 55 Wn. App. at 370. The court concluded that Hickey had made a strong showing that the bank had misrepresented the status of its lien on Hickey's property. Peoples, 55 Wn. App. at 371. But the court nevertheless affirmed the denial of her motion because Hickey did not rely on the misrepresentation and it had nothing to do with her failure to respond to the summons and complaint. Peoples, 55 Wn. App. at 372.

Here, like in Peoples, Wilmington Trust's misrepresentation did not prevent Voght from fully and fairly presenting her case. The misrepresentation was evident from the pleadings and there is no connection between the misrepresentation and Voght's failure to raise the issue before the trial court on summary judgment. Thus, the trial court did not abuse its discretion by denying relief under CR 60(b)(4).

Second, Voght asserts that Wilmington Trust lacked standing and relies on a report prepared by her expert witness, Randall Lowell. But this does nothing to persuade that relief is warranted under CR 60(b). As mentioned above, whether Wilmington Trust holds the note is an issue of fact, not one of standing. And, Voght's expert report was not before the court on summary judgment in 2019 nor does it have

any bearing on fraud or misrepresentation under CR 60(b)(4). Nor does the report provide any new evidence but confirms what was plain on the pleadings.

Based on the above, the trial court did not abuse its discretion by denying Voght's motion for relief from judgment.[4]

We affirm.

Mann, J.

WE CONCUR:

Díaz, J.

Hazelrigg, ACJ

[4] Voght also argues that the trial court erred by denying her motion for reconsideration of the order denying her motion for relief from judgment. But Voght ignores that she failed to make an argument that was plain on the pleadings and that "[g]enerally, the incompetence or neglect of a party's own attorney is not sufficient grounds for relief from a judgment in a civil action." Lane, 81 Wn. App. at 107. Nothing in the denial of the CR 60 motion was contrary to law nor does Voght persuade that there was a lack of substantial justice. CR 59(a)(7), (9); Singleton v. Naegeli Reporting Corp., 142 Wn. App. 598, 612, 175 P.3d 594 (2008); Sligar v. Odell, 156 Wn. App. 720, 734, 233 P.3d 914 (2010). Voght fails to establish grounds for reconsideration under CR 59(a).

Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WILMINGTON TRUST, NATIONAL ASSOCIATION, AS SUCCESSOR TRUSTEE FOR BEAR STEARNS ALT-A TRUST, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-7,

Respondent,

v.

THE UNKNOWN HEIRS AND DEVISEES OF JAMES L. VOGHT; HEIFA VOGHT; THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS SUCCESSOR TRUSTEE TO JPMORGAN CHASE BANK, N.A., AS TRUSTEE ON BEHALF OF THE CERTIFICATEHOLDERS OF THE CWHEQ INC., CWHEQ REVOLVING HOME EQUITY LOAN TRUST, SERIES 2006-H; HOLOCHUK WOOD SERVICES; DISCOVER BANK, ISSUER OF THE DISCOVER CARD; EGP INVESTMENTS LLC; OCCUPANTS OF THE PROPERTY,

Defendants,

HEIFA VOGHT,

Appellant.

No. 85436-4-I

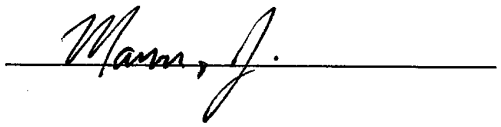
DIVISION ONE

ORDER CALLING FOR ANSWER

Appellant Heifa Voght moved to reconsider the court's opinion filed on November 19, 2024. Pursuant to RAP 12.4(d), the panel requests an answer. Therefore, it is

ORDERED that any answer to the motion for reconsideration shall be filed on or before January 3, 2025.

FOR THE COURT:



Appendix C

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WILMINGTON TRUST, NATIONAL ASSOCIATION, AS SUCCESSOR TRUSTEE FOR BEAR STEARNS ALT-A TRUST, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-7,

Respondent,

v.

THE UNKNOWN HEIRS AND DEVISEES OF JAMES L. VOGHT; HEIFA VOGHT; THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS SUCCESSOR TRUSTEE TO JPMORGAN CHASE BANK, N.A., AS TRUSTEE ON BEHALF OF THE CERTIFICATEHOLDERS OF THE CWHEQ INC., CWHEQ REVOLVING HOME EQUITY LOAN TRUST, SERIES 2006-H; HOLOCHUK WOOD SERVICES; DISCOVER BANK, ISSUER OF THE DISCOVER CARD; EGP INVESTMENTS LLC; OCCUPANTS OF THE PROPERTY,

Defendants,

HEIFA VOGHT,

Appellant.

No. 85436-4-I

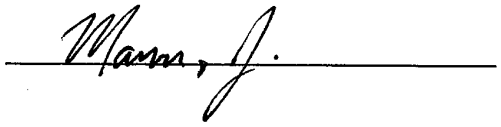
DIVISION ONE

ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Heifa Voght moved to reconsider the court's opinion filed on November 19, 2024. The panel has determined that the motion for reconsideration should be denied. Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:



BORIS DAVIDOVSKIY, P.C.

February 13, 2025 - 2:42 PM

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