

2012

Steven R. Kemp v. Wells Fargo Bank, N.A., HSBC Bank USA, National Association as Trustee for the Benefit of the Certificateholders of the Wells Fargo Mortgage Backed Securities 2007-8 Trust, Wells Fargo Bank, N.A., and John DOES of Unknown Number : Reply Brief of Appellant

Utah Court of Appeals

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James D. Gardner; Steward O. Peay; Snell & Wilmer, L.L.P.; Attorneys for Appellees.

E. Craig Smay; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS

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STEVEN R. KEMP

Plaintiff/Appellant,

vs.

WELLS FARGO BANK, N.A., HSBC  
BANK USA, NATIONAL ASSOCIA-  
TION AS TRUSTEE FOR THE BENE-  
FIT OF THE CERTIFICATEHOLDERS  
OF THE WELLS FARGO MORTGAGE  
BACKED SECURITIES 2007-8 TRUST,  
WELLS FARGO BANK, N.A., AND  
JOHN DOES OF UNKNOWN NUM-  
BER.

Defendants/Appellees.

Case No. 20120099-CA

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REPLY BRIEF OF APPELLANT

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Nature of the Proceeding: Appeal

Trial Court and Judge: Appeal from the Second District Court, Davis County,  
Case No. 110703609, Judge John R. Morris.

James D. Gardner (8798)  
Steward O. Peay (9584)  
SNELL & WILMER, L.L.P.  
15 West South Temple, Suite 1200  
Salt Lake City, Utah 84101-1004  
Telephone: (801) 257-1900  
Facsimile: (801) 257-1800  
*Attorneys for Appellees*

E. Craig Smay (2985)  
174 E. South Temple  
Salt Lake City, Utah 84111  
Phone: (801) 539-8515  
Fax: (801) 539-8544

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*Attorney for Appellant*  
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SNELL & WILMER, L.L.P.  
15 West South Temple, Suite 1200  
Salt Lake City, Utah 84101-1004  
Telephone: (801) 257-1900  
Facsimile: (801) 257-1800  
*Attorneys for Appellees*

E. Craig Smay (2985)  
174 E. South Temple  
Salt Lake City, Utah 84111  
Phone: (801) 539-8515  
Fax: (801) 539-8544

*Attorney for Appellant*

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**STATE STATUTES**

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Appellant replies herewith to the Brief of Appellee herein.

Appellant Is Not Estopped to Seek Declaratory Judgment

Appellee's claim under *Merchants Grocery Co. v. Shawnee Milling Co.*, 72 S.E. 2d 797 (Ga. App. 1952), asserting estoppel, is misplaced. Not only is the principle of the Georgia cases not asserted in the Utah case cited, *Ceco. Corp. v. Concrete Specialists, Inc.*, 772 P. 2d 967 (Utah 1989), the principle has no application in the present case.

Here, appellees did not inform appellant of the transfer, and withheld the identities of the transferees. It purports to act for the transferees. Appellant could not pay the transferees, but must pay appellees.

Further, appellant does not seek to enforce or avoid a contract. Appellant seeks a declaration who is owed the debt, reserving any claim for reimbursement. The injury asserted is that appellant may have to pay twice.

Appellee's cases are inapplicable.

Appellee's Brief is Otherwise Irrelevant

Appellee's Brief does nothing to respond to the observations that *CPA v. MERS*, 2011 UT App. 232 (U. Apps: 2011) makes MERS, not defendant, the permanent agent to foreclose of the original lender, and relies upon a patently erroneous reading of a section of the Restatement of Property, Mortgages, not adopted by any other court in the Country.

There is simply no authority for the proposition that the appointment of an agent to foreclose (such as found in the standard MERS trust deed) by an original owner of debt can bind subsequent transferees of the debt, or that one who transfers the whole debt can

retain power to foreclose the security. The statutory and case law of Utah say the direct opposite; to foreclose the security, one must own the debt. *CPA v. MERS* simply makes an extremely strained reading of the Restatement replace the plain language of §57-1-35, UCA (1953).

Instead, defendant has taken the familiar course of creating claims for appellant, and attacking them. In particular, appellee continues to assert that appellant claims that securitization separates the debt from the security. Even *CPA v. MERS* correctly perceives that appellant does not so claim. Appellant has never taken the position that securitization separates a debt (note) from a security (trust deed), depriving anyone of proceeding on the trust deed. Appellant has always asserted that such a separation is impossible, that the security lodges with the owner of the debt, and that, where the debt has been conveyed and re-conveyed to further parties, the original lender can no longer assert the security. That is unequivocally the law of Utah, the sole exception being *CPA v. MERS*, which, while reciting the ancient law, holds that it may be set aside by an “agreement” in a trust deed that the security may remain enforceable despite sale and re-sale of the debt. *CPA v. MERS* is based entirely upon a misreading of the Restatement of Property Mortgages, which appellees do not attempt to defend.

Respectfully submitted this 20th day of August, 2012.

  
E. Craig Smay, *Attorney for Appellant*

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing “**REPLY BRIEF OF APPELLANT**”, was sent this 20th day of August, 2012, postage pre-paid to the following by U.S. Mail:

James D. Gardner (8798)  
Steward O. Peay (9584)  
SNELL & WILMER, L.L.P.  
15 West South Temple, Suite 1200  
Salt Lake City, Utah 84101-1004  
Telephone: (801) 257-1900  
Facsimile: (801) 257-1800  
Email: [jgardner@swlaw.com](mailto:jgardner@swlaw.com)  
[speay@swlaw.com](mailto:speay@swlaw.com)



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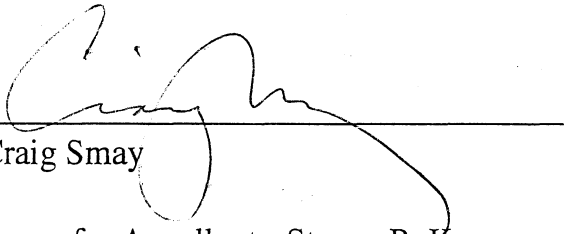
E. Craig Smay, *Attorney for Appellant*



**CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)**

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 502 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2008 for MAC Version 12.3.3 in 13-point Times New Roman Font.



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E. Craig Smay

Attorney for Appellant - Steven R. Kemp

Dated: August 20, 2012