

No. 71952-1-I

**COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON**

GARY AND DIANE ALEXANDER;

PLAINTIFFS-APPELLANTS

vs.

**CAPITAL ONE, N.A.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,
AKA MERS;**

DEFENDANTS-APPELLEES

PLAINTIFFS-APPELLANTS' OPENING BRIEF (CONSOLIDATED APPEAL)

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DIVISION I
STATE OF WASHINGTON


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I. Assignments of Error:

- (a) The trial court committed reversible error by granting the defendant-appellee's motion for summary judgment.
- (b) The trial court committed reversible error by refusing to allow the plaintiffs-appellants an evidentiary hearing to determine if *Frye*¹ allowed the introduction of expert witness testimony concerning the fraudulent nature of the alleged original promissory note and deed of trust.
- (c) The trial court committed reversible error by assessing sanctions against the plaintiffs-appellants' good faith claims against Capital One Bank, N.A.

II. Issues:

- (a) Were there contested questions of material fact that precluded summary judgment?
- (b) Should the plaintiffs-appellants have been afforded an evidentiary hearing pursuant to *Frye* before their expert witness' testimony was summarily stricken from the record?
- (c) Was there evidence of plaintiffs-appellants' good faith prosecution of the action, and alternate remedies available to the defendant-appellee, which should have precluded CR 11 sanctions?

¹ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). In Washington, see *State v. Copeland*, 130 Wash.2d 244, 259-61, 922 P.2d 1304 (1996).

III. Statement of the Case:

The Plaintiffs-Appellants (Gary and Diane Alexander, or “Alexanders”) sued the Defendant-Appellee (Capital One Bank, N.A., or “COB”) for COB’s nonjudicial foreclosure of the Alexanders’ personal residence located on the western shore of Lake Sammamish, Redmond, Washington, claiming COB had no standing to seek nonjudicial foreclosure and that the trustee’s deed was void.

COB filed a motion for summary judgment and motion for sanctions against the Alexanders and their counsel, and the trial court granted the motions. Upon reconsideration, the trial court affirmed its decisions. Alexanders appeal the trial court's order dismissing this action against COB, claiming there are material facts challenging standing of COB to nonjudicially foreclose the Alexanders’ personal residence, and that the Alexanders’ action was brought in good faith, with supporting evidence corroborating the Alexanders’ complaint.

Alexanders presented testimony by deposition and declarations under penalty of perjury to prove their defenses against summary judgment and sanctions:

(a) Several declarations of James Kelley, Ph.D., who unequivocally stated COB’s proffered promissory note was counterfeit and not an original note, thus proving COB had no standing to

nonjudicially foreclose the Alexanders' personal residence. The trial court refused to hear this testimony, summarily concluding without evidentiary hearing that the witness was not an expert, and that his conclusions would not be considered.

(b) Loan audit report of Michael Wood, presented by declaration, providing evidence establishing COB had no standing to nonjudicially foreclose the Alexanders' personal residence. The trial court ignored this declaration.

(c) Declaration testimony of plaintiff-appellant Gary Alexander, an experienced mortgage loan broker, who unequivocally testified that his signature on the purported documents was not an original signature, because he always signed in blue ink as a business practice and that he did not depart from this protocol when executing loan documents with his purported lender, Chevy Chase Bank (now defunct). This impeached the proffered note and DOT as being "original" documents, despite COB counsel's representations to the court. The trial court summarily rejected Mr. Alexander's declaration testimony, opining that no one could remember if his or her signature was signed in blue ink five years after the signing. This was error, and prevented the Alexanders from presenting testimonial evidence by robust examination.

(d) Declaration testimony of plaintiff-appellant Gary Alexander, an experienced mortgage loan broker, who unequivocally testified that he personally negotiated the loan documents and disbursement of funds with the Chevy Chase assigned banker, and he was placed on notice by Chevy Chase Bank that no funds would be disbursed until Chevy Chase Bank sold the loan and loan documents. The trial court summarily rejected his declaration testimony.

(e) Deposition testimony of Ms. Lori Gileno testified that she disputed the originality of the signatures on COB's proffered promissory note, and that she disputed COB's claim that Chevy Chase retained ownership of the loan and loan documents, and therefore COB could not have assumed ownership of the loan and loan documents several years after Chevy Chase Bank closed its doors, under COB's claim Chevy Chase's "merger" with COB automatically caused COB to possess the note and deed of trust ("DOT") in this case². The trial court ignored her deposition testimony, yet allowed COB to refer to her testimony in support of its arguments for summary judgment.

Plaintiff-Appellant Gary Alexander also signed the Alexanders' verified complaint, stating in part, under penalty of perjury of the laws of the State of

² For emphasis, relevant pages of Ms. Gileno's testimony are provided this tribunal in the Appendix, attached to this opening brief.

Washington, that “...to the best of my knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the complaint as stated above (a) is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (b) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (c) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.” The trial court assessed sanctions against the Alexanders and their counsel, and failed to consider the testimony of their witnesses because the trial court had stricken all the testimony as incompetent before ruling on COB’s sanctions motion. No live testimony was allowed to consider the admissibility of Alexanders’ proffered witnesses before sanctions were assessed. No consideration was given the Alexanders for their claim that they brought their action in good faith, relying upon their witnesses, all of whom established a prima facie case that COB had no standing to nonjudicially foreclose the Alexanders’ personal residence.

IV. Argument:

1. Contested material facts cannot support summary judgment.

On review of summary judgment motions, this court engages in the same inquiry as the trial court. *Ruff v. King County*, 125 Wn. 2d, 697, 703, 887 P.2d 886 (1995); *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 123, 839 P.2d 314 (1992). Summary judgment is only appropriate where the record proves "there is no genuine issue as to any material fact and that the moving party [COB] is entitled to judgment as a matter of law". CR 56(c); *Ervin v. Columbia Distributing, Inc.*, 84 Wn. App. 882, 886, 930 P.2d 947 (1997). A fact is material if it affects the outcome of litigation. *Ruff, supra*, 125 Wn.2d at 703 (citing *Barrie v. Hosts of America, Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980); *Braegelman v. Snohomish County*, 53 Wn. App. 381, 383, 766 P.2d 1137, *review denied*, 112 Wn.2d 1020 (1989)). "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). In this case Alexanders have provided those essential facts which show this action should be presented to a fact-finder to determine whether or not COB had standing to nonjudicially foreclose the Alexanders' personal residence, and if not, what remedies should apply. Summary judgment should not have been granted³.

The burden is on COB to establish its right to summary judgment, and all facts *and reasonable inferences from the facts* must be considered in favor of

³ If COB has no standing to nonjudicially foreclose the Alexanders' personal residence, then the several causes of action for recovery have merit. The DOT trustee's deed is void, and the Alexanders have the right to pursue their remedies.

Alexanders. *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 452, 842 P.2d 956 (1993); *Ervin v. Columbia Distributing, Inc.*, 84 Wn. App. 882, 886, 930 P.2d 947 (1997). Issues of standing to foreclose and admissibility of expert's opinions are subject to summary judgment only "when reasonable minds could reach but one conclusion". *Ruff v. King County*, 125 Wn. 2d, 697, 704, 887 P.2d 886 (1995) (quoting *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985)). See, also, *Commodore v. University Mechanical Contractors, Inc.*, *supra*, at 123. In this case, the Alexanders are entitled to construe all contested facts in their favor, and the reasonable inferences arising from those facts: COB does not have standing to nonjudicially foreclose the Alexanders' personal residence. The material facts supporting summary judgment are contested (the note and DOT are contested as not being authentic). Summary judgment should be denied.

Here, the trial court had reliable evidence that COB's note and DOT were counterfeit. The declaration testimony of James Kelley, Ph.D. and deposition testimony of Lori Gileno directly supported these facts. Gary Alexander's declaration corroborated these facts. This evidence should have defeated summary judgment.

2. COB cannot rely upon the "merger" of Chevy Chase Bank with COB to conclude it is the holder of the original note and DOT.

The "global assignment" of deeds of trust from Chevy Chase Bank to Capitol One Bank, N.A. does not logically allow COB to assert preemption of the

Washington Deeds of Trust Act, especially when the loan and loan documents (note and DOT) were sold to a third party before Chevy Chase Bank ceased to exist. *See, e.g., Cerezo v. Wells Fargo Bank*, No. 13–1540 PSG, 2013 WL 4029274, at *2-4 (N.D. Cal. Aug. 6, 2013); *Leghorn v. Wells Fargo Bank, N.A.*, 950 F. Supp. 2d 1093, 1107-08 (N.D. Cal. 2013); *Hopkins v. Wells Fargo Bank, N.A.*, CIV. 2:13-00444 WBS, 2013 WL 2253837, at *3 (E.D. Cal. May 22, 2013); *Rhue v. Wells Fargo Home Mortgage, Inc.*, No. CV 12-05394 DMG (VBKx), 2012 WL 8303189, at *2-3 (C.D. Cal. Nov. 27, 2012); *Rodriguez v. U.S. Bank Nat. Ass'n*, Civ. No. 12–00989 WHA, 2012 WL 1996929, at *7 (N.D. Cal. June 4, 2012); *Albizo v. Wachovia Mortgage*, No. 2:11-cv-02991 KJN, 2012 WL 1413996, at *15-16 (E.D. Cal. Apr. 20, 2012); *Scott v. Wells Fargo Bank, N.A.*, No. 10-3368 (MJD/SER), 2011 WL 3837077, at *4-5 (D. Minn. Aug. 29, 2011); *Gerber*, 2012 WL 413997, at *4; *Valtierra v. Wells Fargo Bank, N.A.*, Civ. No. 1:10–0849, 2011 WL 590596, *4 (E.D. Cal. Feb. 10, 2011). Those courts usually have applied preemption only to conduct occurring *before* the loan changed hands from the bank to the entity not governed by the relevant deeds of trust act. *See, e.g., Leghorn*, 950 F. Supp. 2d at 1107-08 (N.D. Cal. 2013); *Hopkins*, 2013 WL 2253837, at *3; *Rhue*, 2012 WL 8303189, at *2-3; *Rodriguez*, 2012 WL 1996929, at *7; *Scott*, 2011 WL 3837077, at *4-5; *Gerber*, 2012 WL 413997, at *4; *Valtierra*, 2011 WL 590596, *4. This is because “preemption is not some sort of asset that can be bargained, sold, or transferred . . .” *Gerber*, 2012 WL 413997,

at *4. Preemption of the Washington Deeds of Trust Act could not occur in this case, because the loan documents left the possession of Chevy Chase two years before the “global assignment” of deeds of trust occurred. So how does COB escape its duty to present a legitimate assignment of the specific DOT and note allegedly signed by these homeowners in favor of Chevy Chase Bank, which was defunct before the assignment occurred? It cannot. COB has failed to prove legitimate standing to nonjudicially foreclose the Alexanders’ personal residence.

3. Bain does not stand for the proposition that COB could rely upon its own employee to act as agent for Chevy Chase Bank to assign the DOT and note to COB.

Here, the trial court concluded that the assignment of the DOT was legitimate. This is error. The assignment of the DOT from Chevy Chase Bank to COB was executed *years* after Chevy Chase Bank was defunct. No employee of Chevy Chase Bank executed the assignment. COB used one of its own employees, who purportedly was an officer of MERS, to assign the DOT and note to COB. The assignment document recited that MERS was assigning the DOT from Chevy Chase Bank to COB. However, MERS did not hold the Alexanders’ note, and therefore it had no power to assign the DOT even if the assigning “officer” could be construed to be an agent of Chevy Chase Bank⁴. This is the

⁴ MERS’ “officer” could not sign the assignment of mortgage document. Chevy Chase Bank was defunct long before the assignment was executed. No document

holding in *Bain*. See, also, *Bavand v. OneWest Bank, et al.* 176 Wash. App. 475, 309 P. 3d 636 (2013) (“...MERS is not a proper beneficiary under the Deeds of Trust Act. The reason for this is that a proper beneficiary under the Act must be a “holder” of the note or other secured obligation (cites omitted). MERS is not a holder of the note in this case.” *Bavand*, at 491)

4. The trial court relied upon the representations of COB’s counsel at the summary judgment hearing to conclude COB’s proffered note must have been the original note, and therefore COB was the “holder” of a note endorsed in blank.

COB presented its claim that it was a holder of the Alexanders’ note, by showing the trial judge a note where the note’s authenticity had been challenged by three witnesses: (1) James Kelley, Ph.D., (2) Lori Gileno, and (3) Gary Alexander. The trial judge examined the note, heard the alleged authenticating remarks of COB’s counsel, ignored the objections of Alexanders’ counsel, and ignored the testimony of Alexanders’ three witnesses, ruling they were incompetent. This was error. The trial court should have allowed an evidentiary hearing or trial on the merits, when these contested facts were material to the outcome of litigation.

exists where Chevy Chase Bank appointed the MERS “officer” as its agent with signing authority to execute an assignment of the DOT.

5. COB is not a legitimate “holder” of an unconditional promise to pay from the Alexanders⁵.

Mere examination of the promissory note (alleged copy) clearly proves the note itself cannot be an “unconditional promise” to pay a debt. The note is replete with conditions, any of which destroy the note’s status as a negotiable instrument, subject to UCC Article 3. RCW 62A.3-104 requires any note or instrument to be an unconditional promise to pay:

“(a) Except as provided in subsections (c) and (d), "**negotiable instrument**" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

(1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder;

(2) is payable on demand or at a definite time; and

(3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.***

*** (c) An order that meets all of the requirements of subsection (a), except paragraph (1), and otherwise falls within the definition of "check" in subsection (f) is a negotiable instrument and a check.

(d) A promise or order other than a check is not an instrument if, at the time it is issued or first comes into possession of a holder, it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable or is not an instrument governed by this Article.” RCW 62A.3-104.

⁵ Alexanders are not conceding that COB actually holds a legitimate original note.

Article 3 is limited to rules for treatment of negotiable instruments, and the proffered note is not a negotiable instrument. The tracing requirements of Article 9 must be applied, regardless of the “holder” language of RCW 61.24.005(2).

6. Alexanders should be entitled to an evidentiary hearing to prove the admissibility of their expert’s testimony.

Under *Frye*, the testimony of an expert witness, such as James Kelley, Ph.D., requires the methodology, opinions, observations, findings and conclusions must be provided in conformance with generally accepted scientific methodology. When this expert’s testimony was challenged by COB, the trial court did not allow an evidentiary hearing, over Alexanders’ objection, to determine if *Frye* would preclude the evidence submitted by James Kelley, Ph.D.⁶ Essentially, the Alexanders were ambushed, with no opportunity to respond. Justice Thomas Chambers had something to say about this sort of ambush in his suggestion that the Washington Deeds of Trust Act⁷, as applied, should be examined for Washington due process of law protections. The same analysis should apply here:

“We have not had occasion to fully analyze whether the nonjudicial foreclosure act, on its face or as applied, violates article I, section 3 of our state constitution's command that “[n]o person shall be deprived of life, liberty, or property, without due process of law.” While article I, section 3 was mentioned in passing in *Kennebec, Inc. v. Bank of the West*, 88 Wn.2d 718, 565 P.2d 812 (1977), where we joined other courts in concluding that the Fourteenth Amendment does not bar

⁶ COB’s fear of James Kelley, Ph.D.’s testimony is understandable. His conclusions would be the death-knell of COB’s standing to nonjudicially foreclose upon Alexanders’ personal residence.

⁷ R.C.W. 61.24.005, *et seq.*

nonjudicial foreclosures, no independent state constitutional analysis was, or has since been done. *Cf. State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Certainly, there are other similar "self help" statutes for creditors that are subject to constitutional limitations despite the State's limited involvement. *See, e.g., Culbertson v. Leland*, 528 F.2d 426 (9th Cir. 1975) (innkeeper's use of Arizona's innkeeper's lien statute to seize guest's property was under color of law and subject to a civil rights claim). "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of state law.'" *Id.* at 428 (quoting *United States v. Classic*, 313 U.S. 299, 325-26, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941)); *accord Smith v. Brookshire Bros., Inc.*, 519 F.2d 93, 95 (5th Cir. 1975) (exercise of statute that allowed merchant to detain suspected shoplifters subject to civil rights claim); *Adams v. Joseph F. Sanson Inv. Co.*, 376 F. Supp. 61, 69 (D.C. Nev. 1974) (finding Nevada's landlord lien act violated due process because it allowed landlord to seize tenant property without notice); *Collins v. Viceroy Hotel Corp.*, 338 F. Supp. 390, 398 (N.D. Ill. 1972) (finding Illinois innkeepers' lien laws, which allowed an innkeeper to seize guest's property without notice, violated due process); *Hall v. Garson*, 430 F.2d 430, 440 (5th Cir. 1970) (exercise of a statute giving a landlord a lien over the tenant's property gave rise to a civil rights claim against private party)." *Klem v. Washington Mut. Bank*, 175 Wn.2d 771 (fn. 11), 295 P.3d 1179 (2013).

The Alexanders should have an opportunity to present live testimony, with robust examination, to evaluate the admissibility of expert witness James Kelley, Ph.D.'s observations, findings, conclusions and opinions. The same argument applies for the testimony of Lori Gileno, Michael Wood and Gary Alexander. This is the threshold for fundamental due process of law in this case.

7. This case is not a case where CR 11 sanctions should have been assessed against the Alexanders and their counsel.

Apparently, one of the driving forces for the trial court's award of sanctions against the Alexanders and their counsel was the court's frustration with the proffered testimony of James Kelley, Ph.D., Lori Gileno, Gary Alexander, and

loan auditor Michael Wood. Otherwise, the trial court would not have made sweeping decisions striking their testimony from the record she relied upon for her summary judgment motion decision. However, there is no ethical obligation to hire mainstream experts. It is counsel's ethical duty to zealously advocate for the Alexanders, which may *require* hiring outliers⁸ if it would help the Alexanders' case. See David Bernstein, Note, *Out of the Frye-ing Pan and Into the Fire: The Expert Witness Problem in Toxic Tort Litigation*, 10 Rev. Litig. 117, 159 (1990).

The text of Rule 11 indicates that counsel's signature certifies the validity of court papers. The Rule sets out two bases for the legitimacy of pleadings. The Rule requires that pleadings be well based in fact and law (as it exists or as it should be legitimately modified or extended) and that counsel's decision regarding the basis of the pleading be made after reasonable inquiry. Further, counsel's signature is a certification that the pleading is not presented for "any improper purpose." The Court, upon finding a violation of the Rule, may impose sanctions upon not just the individual signer of the pleading, but also against the signer's law firm, as the signer is an agent of the law firm. *Maddeen v. Foley*, 83 Wash. App. 385, 392 (1996). In this case, Attorney Sandlin did not merely sign the complaint—he obtained the loan audit reports of two loan auditors, the

⁸ This is not a concession that any of the Alexanders' witnesses were "outliers." Assuming the Court of Appeals concludes any of the witnesses are outliers, even then the Alexanders' actions were appropriate.

deposition testimony of one expert witness, Lori Gileno, was provided, and James Kelley, Ph.D. submitted proof the “original” note and “original” deed of trust signature page were counterfeit. Furthermore, Mr. Alexander signed a verified complaint, based upon his sophistication as a mortgage broker, that COB did not obtain any legitimate standing in this case. Much more due diligence was also conducted, as per the declarations and exhibits filed of record.

The cases that analyze Rule 11 and its counterparts generally discuss the thin line between zealous advocacy and sanctionable conduct. Rule 11, which requires if not restraint then the generous exercise of reason, must be balanced against the chilling effect of the Rule on enthusiasm, creativity, and “vigorous advocacy.” *Bryant v. Joseph Tree, Inc.*, 119 Wash. 2d 210, 219 (1992) (citing *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1363-64 (9th Cir. 1990). The Rule itself recognizes a need for counsel to assert claims on behalf of his clients, even if those claims require “a nonfrivolous [*good faith*] argument for the extension, modification, or reversal of existing law or the establishment of new law.” Here, the Alexanders assert COB has not proved its standing to nonjudicially foreclose their personal residence. They should not be punished for their good faith efforts, and neither should their counsel.

The Court should enforce Rule 11 with the same restraint the Rule requires of counsel. Rule 11 is not meant to provide a procedural mechanism for kicking an opponent who is down. Indeed, a dismissal or denial of claims does not

necessarily mean that the claimant has asserted ungrounded or improper claims. It is imperative that the Court not investigate counsel's filings using "20-20 hindsight." *See, Joseph Tree*, 119 Wash. 2d at 220.

The focus of the Court's review is not whether Attorney Sandlin and the Alexanders interpreted the facts in the same way as the Court finds them in this case. The Court need only determine whether, under an objective standard, counsel made a reasonable inquiry before making assertions in the pleadings at issue. The reasonableness of an attorney's inquiry is judged on (i) the time available to the signer, (ii) the extent of reliance on the client's factual assertions, (iii) whether the attorney accepted the case from another attorney, (iv) the complexity of factual and legal issues, and (v) the need for discovery to develop factual circumstances underlying a claim. *Bryant v. Joseph Tree*, 119 Wash. 2d at 220-21. Here, the Alexanders were one day from a writ of restitution hearing when they stopped the process with a Chapter 11 filing. The intensive investigation and unwinding the Roland filings followed. There has been very little time for the preparation of this complex action.

Similarly, the Court need not make a determination as to the correctness of counsel's legal analysis. The Court must only determine whether, using that same objective, competent attorney standard, counsel made a reasonable inquiry into the state of the law. The Court must also evaluate whether Attorney Sandlin asserted any of the enumerated claims for an improper purpose.

The motive for filing the Rule 11 sanction request: The Court should not consider Rule 11 sanctions, if an applicable and appropriate remedy is available by statute or under other Rules. Although the Rule itself mentions an award of fees and costs (or a portion thereof) as an appropriate sanction, Rule 11 is not intended as a fee-shifting mechanism. Here, COB had an appropriate remedy short of CR 11 sanctions; namely, the prevailing party clause of the DOT (a DOT that has been legitimately challenged by the Alexanders). To sanction the Alexanders and their counsel in this action is to fee-shift the entire burden of litigation, and to punish the litigants and their counsel for bringing their good faith claims against COB.

Only after a credible claim has been made should this Court consider Rule 11 sanctions. Only after this Court determines, after inquiry, that claims were asserted without proper grounds (after reasonable investigation) or without a proper purpose, should the Court consider sanctions. The proverbial “reasonable person” in the case of Rule 11 is a reasonable attorney in like circumstances. *Kale*, 861 F.2d at 758; *Bryant v. Joseph Tree, Inc.*, 119 Wash. 2d at 210. Here, the trial court summarily struck all of the Alexanders’ proffered testimony, from several witnesses, without any opportunity for an evidentiary hearing to test the admissibility of expert testimony. *Frye* would suggest such harsh treatment is inappropriate, without an evidentiary hearing. *See*, also, Washington Constitution, Article I, Section 3.

In this case, the efforts of the Alexanders, and their attorney, reflect the essence of good faith. The Alexanders have acted in good faith. They sincerely believe, based upon their proffered evidence, that COB should not have nonjudicially foreclosed their residence. This is not an appropriate case for sanctions against the Alexanders or their counsel.

V. Conclusion:

The Washington Supreme Court has repeatedly stated that the Deeds of Trust Act “must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales.” *Schroeder v. Excelsior Mgmt. Group, LLC*, 177 Wn.2d 94, 105, 297 P.3d 677 (2013) (quoting *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007); *Bain*, 175 Wn.2d at 93 (quoting *Udall*, 159 Wn.2d at 915-16)). This includes examination of the legitimacy of standing for COB to nonjudicially foreclose the Alexanders' personal residence.

An order of summary judgment is reviewed *de novo*. This court should engage in the same inquiry as the trial court and view the facts in the light most favorable to the nonmoving party, the Alexanders. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). Application of this standard of proof should find that summary judgment was inappropriate in this action.

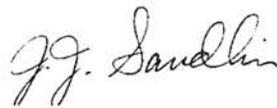
At the summary judgment hearing the Alexanders requested, and were refused, an opportunity to provide live testimony from Dr. James Kelly, to assist the trial judge in determining whether or not *Frye* should exclude his testimony. Likewise, the trial court struck the Alexanders' remaining list of witnesses from consideration, leaving the Alexanders bereft of facts to oppose the CR 11 and CR 56 motions. The declarations proffered by the Alexanders were not far afield—they were on point to refute COB's motions. Even if the trial court struck the witnesses' testimony for purposes of responding to the CR 56 motion, the Alexanders were entitled to the proffer of proof from their witnesses to defeat the CR 11 sanctions motion.

Reviewing the record *de novo*, this Court should find there was reasonable evidence that supported denying CR 11 sanctions.

The Plaintiffs-Appellants respectfully request this Court reverse the trial court's summary judgment dismissal, and award of CR 11 sanctions. This action should be remanded for a trial on the merits.

Respectfully submitted this 23rd day of October, 2014.

SANDLIN LAW FIRM



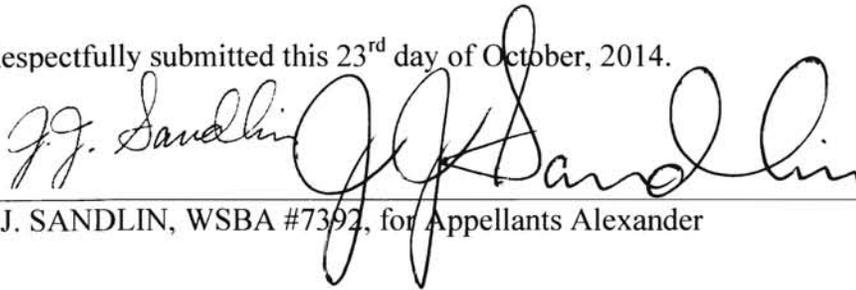
J.J. SANDLIN, WSBA #7392, for Plaintiffs-Appellants Alexander

VI. Certificate of Service:

J.J. SANDLIN declares under penalty of perjury of the laws of the State of Washington as follows:

1. On October 23, 2014, I faxed and mailed a copy of the above Opening Brief to opposing counsel, John A. Knox, WSBA #12707, Attorney for Defendants-Appellees Capital One, N.A., MERS, at WILLIAMS, KASTNER & GIBBS PLLC, 601 Union Street, Suite 4100, Seattle, WA 98101-2380 [P: (206) 628-6600; Fax: (206) 628-6611; jknox@williamskastner.com]; and
2. I mailed the appellants' Opening Brief to the Clerk of the Court, Washington State Court of Appeals, Division I, One Union Square, 600 University St., Seattle, WA 98101-1176 [fax: 206-389-2613] on October 23, 2014.

Respectfully submitted this 23rd day of October, 2014.



J.J. SANDLIN, WSBA #7392, for Appellants Alexander

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STATE OF WASHINGTON
COURT OF APPEALS

APPENDIX

Excerpt of Deposition Testimony of Lori Gileno, Loan Auditor,
Refuting COB's Claim that She Agreed COB's Proffered Note and
Deed of Trust Were Original Documents

(February 7, 2014, at 83:8-25; 84:1-25; 85:1-11)

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SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

GARY W. ALEXANDER and DIANE)
M. ALEXANDER, husband and)
wife,)

Plaintiff,)

vs.)

CAPITAL ONE, N.A.; CHEVY)
CHASE BANK, F.S.B., et al.,)

Defendant.)

No. 13-2-27723-9

DEPOSITION UPON ORAL EXAMINATION OF

LORI L. GILENO

DATE: February 7, 2014

REPORTED BY: Leslee J. Unti
C.S.R. No. 2678

1 Q. Just for the record because I had given you the wrong
2 document, the signature on the last page, the bottom
3 signature, is in blue ink?

4 A. Correct.

5 Q. So that Exhibit 17 is a color copy of the original
6 Trustee's Deed that's in the original loan file?

7 A. Correct.

8 Q. I want you to assume that this original loan file has
9 been held by Capital One since the merger with Chevy
10 Chase Bank and then it was provided to me earlier this
11 week. Based on that assumption, would you agree that
12 Capital One is the holder of the Alexanders' note?

13 A. No.

14 MR. SANDLIN: Objection to the form.

15 Q. Why not?

16 A. Just one minute. Let me find what I'm looking for.
17 The reason I do not believe that this is a real note
18 is because if you look at the file you just gave me as
19 the original and the true to the order file, if you
20 look, paid to the order, it looks like it's kind of
21 blurred out like it's been copied.

22 Stamps don't do this. They might miss
23 sections, but it looks like this was photocopied on to
24 this. There's blurring under and lines around it so
25 it looks like this might have been done after the fact

1 and the ink is not in blue. It looks like it's a
2 photocopy.

3 Q. Any other reason to believe that this isn't the
4 original note?

5 A. No. It doesn't look real. First of all, the ink is
6 not the right color and it is not. It looks like it's
7 been copied.

8 Q. Why do you say the ink is not the right color?

9 A. It looks like a photocopy.

10 Q. What color should it have been?

11 A. Blue.

12 Q. Only blue is legally valid?

13 A. No, but when you look at these documents, they're
14 usually in blue signature especially in real estate.

15 Q. So have you seen a Chevy Chase Bank paid to the order
16 of endorsement stamp previously on documents?

17 A. Not from Chevy Chase, but I've seen Capital One's,
18 yes.

19 Q. But this is a Chevy Chase?

20 A. Correct.

21 Q. So you don't know whether the stamp is usually in blue
22 for Chevy Chase Bank or not; correct?

23 A. I'm not talking about the stamp. I'm talking about
24 the signature and I'm looking at the signature and it
25 looks like it's a photocopy.

- 1 Q. Does the signature by Gary Alexander appear to be
2 original?
- 3 A. Yes. It's in blue ink. It looks real.
- 4 Q. Does the signature of Diane Alexander on the note
5 appear to be original?
- 6 A. Correct.
- 7 Q. So Capital One holds an original note signed by Gary
8 Alexander and Diane Alexander reflecting a \$3,000,000
9 loan; correct?
- 10 A. I'm not answering that because I don't believe this is
11 real.
- 12 Q. Have you told us every reason you don't believe it's
13 real?
- 14 A. I have.
- 15 Q. Let's look at the Deed of Trust that we've marked as
16 Exhibit No. 15. You can look at the original if you
17 would like that's in the original loan file. Do you
18 have any reason to doubt this is the original of the
19 Deed of Trust for the Alexander loan?
- 20 A. No. It looks real. It looks like a copy. Exhibit 15
21 is a copy, but the one in the file looks real because
22 it has the original -- when they do these loans, it
23 has the sticker that they take off their little roll
24 and put it on here.
- 25 Q. The original recording sticker; correct?