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DIVISION II

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

NO. 49752-2-II

(Pierce County Superior Court Case No. 16-2-08797-7)

BRAD L. BILLINGS and JOHNNITA D. BILLINGS,

Appellants//Plaintiffs,

vs.

BANK OF NEW YORK MELLON F/K/A THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE C. WALT, INC. ALTERNATIVE LOAN TRUST 2007-OA17 MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2006-OA17, QUALITY LOAN SERVICING OF WASHINGTON, INC., and JOHN DOES 1-10,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF PIERCE

APPELLANTS BILLINGS' OPENING BRIEF

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I ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in granting summary judgment in holding that Appellants did not have standing to challenge the assignment of their loan

2. The trial court erred in granting summary judgment in view of the issues presented by the Affidavit of Marie McDonnell

B. Issues Pertaining to Assignments of Error

1. If a party is permitted to challenge an assignment or transfer of a Note or Deed of Trust, is summary judgment proper when such a challenge is made?

2. If an expert witness affidavit satisfies all of the requisites for such affidavits, can a trial court weigh the evidence in that affidavit and grant summary judgment?

II STATEMENT OF THE CASE

A. Relevant Facts

The following facts are taken from Appellants' Second Amended Complaint (hereafter "2AMC") which was filed on or about July 8, 2016 (Clerk's Papers [hereafter "CP"], pages 266-470), pursuant to an Order of the lower court permitting the filing thereof (CP, pages 471-472).

On or about August 6, 2006, Appellants executed a promissory Note and Deed of Trust (hereafter "DOT") in favor of Countrywide Bank, N.A. (hereafter "CWB")(CP, page 281). An entity styled Mortgage Electronic Registration Systems, Inc. (hereafter "MERS") purportedly assigned the Note and the DOT to the securitization trust (the CWALT, Inc. Alternative Loan Trust 2006-OA17, hereafter the "Trust") of which Respondent Bank of New York Mellon (hereafter "Mellon") was the claimed "trustee", doing so on June 5, 2011, which Assignment was recorded on June 21, 2011 (CP, page 282). MERS had no interest in either the Note or the DOT on either June 11, 2011 or June 15, 2011 (CP, page 282).

Pursuant to Federal statute, the Trust was obligated to have purchased Appellants' loan by no later than ninety (90) days after September 29, 2016 (the day that the Trust closed)(CP, page 283). MERS

is not a lawful beneficiary, and thus had nothing to assign to the Trust (CP, page 285). The Assignment was thus void, and the lien created by the DOT was never lawfully transferred to the Trust (CP, page 284).

There was no evidence that the Trust was authorized by RCW 61.24.010(2) to appoint Quality Loan Service (hereafter "QLS") as the successor trustee (CP, page 286). QLS conducted the Trustee's Sale on February 12, 2016 and illegally sold Appellants' property to Respondent Mellon (CP, page 287).

Appellants thus filed the action below to challenge the foreclosure and sale of their property to Respondent Mellon, and also sought damages.

B. Procedural Facts.

Appellants commenced the action below to continue to enjoin a stay of the issuance of a Writt of Restitution to evict Appellants from their property. Appellants sought a preliminary injunction of the issuance of the writ pending further Order of the lower court and resolution of Appellants' claims against Respondent Bank of New York Mellon (hereafter "Mellon") as alleged beneficiary of the promissory Note which was foreclosed upon by Respondent Quality Loan Service (hereafter "QLS") in a non-judicial foreclosure action initiated and conducted by QLS.

On May 20, 2016, the Hon. Frank E. Cuthbertson found sufficient cause to issue a Temporary Restraining Order to stay an unlawful detainer action brought by Respondent Mellon (CP, page 267). The action below was filed and supported by the Affidavit and Testimony of Marie McDonnell CP, pages 38-265), and a Second Amended Complaint (hereafter "2AMC") was filed on July 8, 2016 (CP, pages 266-470) which was permitted by Order of the lower court (CP, pages 471-472). The 2AMC sought reversal of the Trustee's Sale and for damages for violations of the Consumer Protection Act, the Deed of Trust Act, Wrongful Foreclosure, Misrepresentation, fraud, breach of contract, and related claims.

Respondent Mellon filed a Motion for Summary Judgment (hereafter "MSJ") on September 23, 2016 (CP, pages 476-493) together with the Declaration of Jennifer L. Hoisington (CP, pages 494-532) and Amy Edwards (CP, pages 533-535). Appellants filed their Reply to the MSJ on October 24, 2016 (CP, pages 536-549), supported by the Supplemental Declaration of Appellant Johnnita D. Billings (CP, pages 550-571). Counsel for Appellants also filed a Declaration on October 24, 2016 in Support of Appellants' Motion to Amend First Amended Complaint for Wrongful Foreclosure Actions (CP, pages 572-575).

Appellants filed their Amended Reply to Respondent Mellon's MSJ on October 28, 2916 (CP, pages 576-591), supported by the Amended Declaration of Johnnita D. Billings (CP, pages 592-602) and her Amended Supplemental Declaration as well (CP, pages 603-616).

Respondent Mellon filed its Reply in Support of its MSJ on November 1, 2016 (CP, pages 617-625), together with a Supplemental Declaration of Amy Edwards (CP, pages 626-635). A Memorandum of Journal Entry with the Exhibit Record were filed on November 10, 2016 (CP, pages 636-637, 638), and a Memorandum of Journal Entry was filed on November 21, 2016 (CP, pages 639-640). The lower court's Order granting Summary Judgment and Dismissing Complaint was also filed on November 21, 2016 (CP, pages 641-644).

Appellants filed their Motion for Reconsideration on December 1, 2016 (CP, pages 645-725). A Memorandum of Journal Entry was filed on December 13, 2016 (CP, pages 726-727) together with an Order denying Appellants' Motion for Reconsideration (CP, page 728).

A Notice of Appeal to this Court was filed on December 19, 2016 (CP, pages 729-734). The Designation of Clerk's Papers was filed on February 7, 2017 (CP, pages 738-740).

III. ARGUMENT

A. Standard of Review

This court reviews an order granting summary judgment *de novo*, and performs the same inquiry as the trial court. *Failla v. FixtureOne Corp*, 181 Wn.2d 642, 649, 336 P.3d 1112 (Wash. 2014). The evidence is to be viewed in the light most favorable to the nonmoving party, and with the court drawing all reasonable inferences in favor of the nonmoving party. *Eicon Construction, Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 164, 273 P.3d 965 (Wash. 2012); *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 497, 210 P.3d 308 (Wash. 2009).

The standard for summary judgment is a stringent one. Summary judgment is only proper if the pleadings, affidavits, depositions and admissions on file demonstrate that there is no genuine issue as to *any* material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hash v. Children's Orthopedic Hospital*, 49 Wn.App. 130, 132, 741 P.2d 584 (1987). A fact is material if it affects the outcome of the litigation. *Eicon Constr., supra; Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (Wash. 1995).

Summary judgment should only be affirmed if reasonable persons could reach but one conclusion from all of the evidence. *Atwood v. Albertson's Food Ctrs., Inc.*, 92 Wn.App. 326, 330, 966 P.2d 351 (Wash. 1998).

The record below demonstrates that numerous genuine issues of material fact exist, including facts pertaining to the alleged appointment of the trustee by an entity which has been held by the Supreme Court of Washington ***not*** to be the beneficiary of the Deed of Trust. These facts, which were of record including those set forth in the Declaration of Marie McDonnell attached to the Complaint, affected the outcome of the litigation and were thus material. Summary judgment was thus improperly entered, and the lower court also erred in not granting Appellants' Motion for Reconsideration. The decision of the Superior Court must thus be reversed.

B. <u>The trial court erred in granting summary judgment in holding that Appellants did not have standing to challenge the assignment of the Deed of Trust</u>

Appellants challenged the June 15, 2011 Assignment of Deed of Trust in their pleadings below. The lower court ruled, at the summary judgment hearing, that:

"plaintiffs lacked standing to challenge the assignment of the deed of trust. Plaintiffs are not a party to the assignment of the deed of trust or to the pooling and service agreement, the PSA". (Transcript, page 47, lines 5-9).

The court cited no decisional law, rule, regulation, or statute in support of this conclusion. Courts which have dealt with this issue have clarified the misconception adopted by both courts and litigants which arose out of a Federal decision from 2010. As the highest appellate court of Washington has not yet addressed this issue, this Court may look to the law of other jurisdictions for guidance. *State v. Haq*, No. 64839-0-1 (Wash. App. 2012)(recognizing that Supreme Court of Washington looked to law of other jurisdictions where no settled Washington common law on issue); *Kilbury v. Franklin County*, 151 Wn.2d 552, 90 P.3d 1071, 1077 (Wash. 2004)(approach applied by superior court found be contrary to the law of other jurisdictions); *Tahat v. Tahat*, 182 Wash.App. 655, 334 P.3d 1131, 1137 (Wash.App. 2014)(court looked to definitions and law of other jurisdictions to answer question of whether letter constituted a "judgment, order or other decision").

The genesis for the argument that a borrower (allegedly) does not have standing to challenge an assignment originated from the United States Court of Appeals for the 6th Circuit in its opinion in *Livonia Properties Holdings, LLC v. 12840-12976 Farmington Road Holdings*

LLC, 399 F. App'x 97, 102 (6th Cir. 2010), which was later clarified by the 6th Circuit in its opinion in *Slorp v. Lerner*, No. 13-3402 (6th Cir. 2014) which clarified the 6th Circuit's prior opinion in *Livonia Properties* and held that a borrower who is not a party to an assignment may challenge the validity of that assignment to establish the assignee's lack of title among other defects, and that a non-party homeowner may challenge a putative assignment's validity on the basis that it was not effective to pass legal title to the putative assignee (citing *Conlin v. Mort. Elec. Registration Sys.*, 714 F.3d 355, 361 (6th Cir. 2013)). In *Slorp*, the 6th Circuit admitted that its prior opinion in *Livonia Properties* "has confounded some courts and litigants" (Opinion at paragraph 7). The analysis of the Court is instructive:

> The District Court held, and the defendants now maintain, that Slorp lacked standing to assert his claims because an individual who is not a party to an assignment may not attack the assignment's validity. We differ with this interpretation of *Livonia Properties*. The sweeping rule that the district court extrapolated from *Livonia Properties* dwarfs our actual holding in that case. The district court in *Livonia Properties* stated that an individual "who is not a party to an assignment lacks standing to challenge that assignment", and our *Livonia Properties* opinion quoted and endorsed that general statement, perhaps inartfully. 399 F. App'x at 102. But we quickly limited the scope of that rule, clarifying that a non-party homeowner may challenge the validity of an assignment to establish the assignee's lack of title, among other defects. ... Thus, a non-party homeowner may challenge a putative assignment's validity on the basis that it was not effective to pass

> legal title to the putative assignee. *See Conlin v. Mortg. Elec. Registration Sys.*, 714 F.3d 355, 361 (6th Cir. 2013); *Livonia Props.*, 399 F. App'x at 102; *see also Woods v. Wells Fargo Bank, N.A.*, 733 F.3d 349-353-54 (1st Cir. 2013); 6A C.J.S. *Assignments* paragraph 132 ("The debtor may also question a plaintiff's lack of title or the right to sue").

Slorp at page 7.

Appellants challenged the putative assignment of the Deed of Trust below, and also challenged the alleged transfer of the Note in view of the fact that the alleged "endorsement" was undated and unauthenticated. Appellants also challenged the signatures on the assignment documents pursuant to Section 3-308 of the UCC. It is of record that Respondent did not produce any witness to testify as to the authenticity or genuineness of the signatures, nor did Respondent provide any evidence of the authority of the "signers" to have executed the documents.

Cosajay v. Mortgage Electronic Registration Systems, Inc., 2013 WL 5912569 (D. Rhode Island, Nov. 5, 2013) and cases cited therein, including *Culhane v. Aurora Loan Services of Nebraska*, 708 F.3d 282 (1st Cir. 2013) and *Woods v. Wells Fargo Bank, N.A.*, No. 12-1942, 2013 WL 5543637 (1st Cir. October 9, 2013, which is also cited in *Slorp, supra*) further clarify the issues relating to borrower challenges to assignments. In *Cosajay*, the homeowner alleged

that the assignments of the mortgage were invalid on the grounds of, *inter alia*, the assignments being made outside of the time specified by the securitized trust. The Billings took the same position here.

The Defendants in *Cosajay* relied on a line of cases to argue that a party does not have standing to assert rights under a contract to which it is not a party. In addition to the 6th Circuit's clarification of this legal misconception in the *Slorp* opinion, the court pointed to the divergence from this argument by noting that a statutory power of sale in a mortgage is governed by a state statute which provides a mortgagor with the right to ensure that any foreclosure is done appropriately, and also noted that the First Circuit found standing when the challenge was limited to invalid, ineffective, or void assignments *such as where the assignor had nothing to assign or had no authority to make an assignment* to a particular assignee. The court expressly stated that its "decision finding standing is buttressed by Defendants' extreme and incongruous argument that would allow Ms. Cosajay no relief because she is not a party to the assignment."

The same is true here. Foreclosures in Washington, and the authority to undertake actions to foreclose, are governed by statutes to insure that a homeowner is not deprived of his or her property absent strict compliance with the statutory scheme. There is no "wiggle room" in the

statutes; strict compliance is required. *Albice v. Premier Mortg. Serv. of Wash*, 174 Wn.2d 560, 568, 276 P.3d 1277 (Wash. 2012). In fact, the Supreme Court of Washington reversed two foreclosures where the purported beneficiary did not have the power to appoint the successor trustee (*Rucker v. NovaStar Mortgage, Inc.*, 177 Wn.App 1, 14, 311 P.3d 31 (2013)), and where the defective appointment of a trustee could not be cured where the entity was not the proper beneficiary under the Deeds of Trust Act (*Bavand v. OneWest Bank FSB*, 176 Wn.App. 475, 309 P.3d 676 (Wash. 2013).

In *Rucker*, the court held that there were genuine issues of material fact about whether the successor trustee conducted the nonjudicial foreclosure sale without the authority to do so:

> If it is determined at trial that NovaStar was not acting as an agent of the beneficiary, then the appointment of QLS [the substitute trustee] was improper, and it follows that QLS had no statutory authority to conduct the trustee's sale. As in [*Schroeder v. Excelsior Mgmt. Grp. LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013)] and *Albice*, vacation of the sale is a proper remedy.

Rucker, 177 Wn.App. at 17.

The principle was reaffirmed in *Bavand*:

> Without a proper appointment,] the successor trustee] did not succeed to any of the original trustee's powers under the deed of trust. Specifically, it had no power to conduct a nonjudicial foreclosure and trustee's sale of Bavand's property. This is a material failure to comply with the provisions of the Deed of Trust Act.

Bavand, 176 Wn.App. At 490.

Appellants challenged, on three (3) separate occasions (in their Complaint, their Response to the Plaintiff's Motion for Summary Judgment, and in their Motion for Reconsideration), the appointment of the trustee, which was made by an entity styled Mortgage Electronic Registration Systems, Inc. (hereafter "MERS") as the alleged "beneficiary" of the Deed of Trust. It is established law in Washington that MERS is *not* the beneficiary of Deeds of Trust despite claiming to be so. *Bain v. Metropolitan Mortgage Group, Inc.,* 175 Wn.2d 83, 285 P.3d 34 (Wash. 2012). The *Bavand* Court reaffirmed *Bain's* holding that MERS cannot be a lawful beneficiary under Washington statutes, as the plain language of RCW 61.24.005(2) defines a "beneficiary" as "the ***holder*** of the instrument or document evidencing the obligations of the deed of trust", and if MERS never held the promissory note, then it is not a "lawful beneficiary". 309 P.3d at 643 (emphasis in original).

Appellants note that the Deed of Trust Act (DTA) implicitly requires at least one assignment be recorded (if transfer occurred) and the borrower must be given details regarding (at least) this transfer via the Notice of Trustee's sale (NOTS):

RCW 61.24.040(1)(f)(i).

> which is subject to that certain Deed of Trust dated . . . . . ., . . ., recorded . . . . . ., . . ., under Auditor's File No.. . , records of . . . . . County, Washington, from . . . . . ., as Grantor, to . . . . . ., as Trustee, to secure an obligation in favor of . . . . . ., as Beneficiary, the beneficial interest in which was assigned by . . . . . ., under an Assignment recorded under Auditor's File No. . . . . [Include recording information for all counties if the Deed of Trust is recorded in more than one county.]

There is an implication that the NOTS will explain why the person directing the trustee to foreclose has the authority to do so (unless it is the original lender, in which case it's obvious) by explaining how the purported beneficiary came to be entitled to foreclose.

This is consistent with the observation in *Bain v. Metropolitan Mortgage Group, Inc.,* 175 Wn.2d 83, 285 P.3d 34 and *Walker v. Quality Loan Service Corp. of Washington, et al., 76 Wash.App. 294 (2012)* that much litigation has been caused by lenders who tried to circumvent the land records for their own gain and the later enacted Foreclosure Fairness Act which was enacted to ensure "homeowners and beneficiaries [can] communicate with each other to reach a resolution and avoid foreclosure".

It is not unreasonable to construe RCW 61.24.040(1)(f)(i), *in pari materia*, as obligating the trustee and putative beneficiary, via notice, to inform the borrower as to who is seeking foreclosure and why that person is so entitled. *See e.g. Koegel v. Prudential Mut. Sav. Bank*, 51 Wash. App. 108, 752 P.2d 385 (1988) ("the statutes and Deeds of Trust must be strictly construed in favor of the borrower") (many cases could be cited: *Bain* ("the [deed of trust] Act must be construed in favor of borrowers"); *Udall; Klem; Schroeder; Frias; CHD; Queen City* and on and on *ad nauseum*.

This construction furthers the express goal of the legislature as it gives the borrower the opportunity to attempt to "reach a resolution and avoid foreclosure", even outside mediation, with confidence that they are engaging with a person with authority to negotiate.

It also is consistent with the judicially inferred goals of the DTA, particularly the second (the process should remain efficient and inexpensive; the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure; the process should promote the stability of land titles). *See Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985).

Bottom line when foreclosure happens the borrower should be informed of (1) who is foreclosing and (2) based on what; it should not work like a jack-in-the-box where a party pops up saying "Surprise, I've got the note now, I'm the beneficiary".

In addition to the argument above that the borrower has standing to challenge assignments, the fact is that the Note and Deed of Trust are contracts the terms of which control as between the parties and govern the intent of the parties. While the Note provides that it may be transferred, such transfers must comply with the Washington Deed of Trust Act, RCW 64.04.010 and RCW 64.04.020 which requires that transfers be in writing, for consideration, and that the transfers be made by the proper party (acknowledged) and notarized. Unless otherwise provided in the contract, or subsequently agreed to otherwise by both borrower and beneficiary, all the rights of the note and deed of trust (the loan), including possession and ownership are transferred undivided to the beneficiary and subsequent legal transferees.

Washington's recording statutes preclude false documents from being recorded, and such documents are void if there is a deceptive fact in the recorded documents.

RCW 40.16.030

> Offering false instrument for filing or record.
> Every person who shall knowingly procure or offer any false or forged instrument to be filed, registered, or recorded in any public office, which instrument, if genuine, might be filed, registered or recorded in such office under any law of this state or of the United States, is guilty of a class C felony and shall be punished by imprisonment in a state correctional facility for not more than five years, or by a fine of not more than five thousand dollars, or by both.

The Note and Deed of Trust contracts provide that the Note and Deed of Trust are owned by and secure the named lender.

Appellants did not agree that any unlawful transfer by an improper "beneficiary" could take place. The transfer, and appointment of the substitute trustee, was by MERS which is not a lawful beneficiary pursuant to well-established Washington law. As the Note and Deed of Trust contracts do not provide for a transfer not permitted by Washington law, the actions of Respondent and MERS constituted an unlawful unilateral modification of the Note and Deed of Trust contracts, rendering the actions of Respondent and MERS illegal and the recorded documents false and void.

The transfer, and appointment of the substitute trustee, was by MERS which is not a lawful beneficiary pursuant to well-established Washington law. As the Note and Deed of Trust contracts do not provide for a transfer not permitted by Washington law, the actions of Respondent and MERS constituted an unlawful unilateral modification of the Note and Deed of Trust contracts, rendering the actions of Respondent and MERS illegal.

Further, Respondent and MERS did not give Appellants notice of their intent to unilaterally modify the Note and Deed of Trust contracts. As Respondent and MERS will likely take the position that the "your loan may be sold" language in the Note and Deed of Trust contracts constitutes notice, there is a genuine issue of material fact as to whether Respondent and MERS concealed their unilateral modification of the contract, rendering summary judgment improper. *Associated v. Northwest*, 203 P.3d 1077, 1082, 149 Wn.App. 429 (Wash.App. 2009).

In this respect, *Brown v. Washington State Dept. of Commerce*, 184 Wash.2d 509, 359 P.3d 771 (Wash. 2015) does not control this case and is not dispositive of the issues raised herein as the subject issues were (a) not raised by the homeowner in *Brown*, and (b) *Brown* did not address the specific issues in this appeal. *Brown* involved a situation where the

Court was called upon to determine whether the homeowner was entitled to mandatory mediation under Washington's Foreclosure Fairness Act, and whether the Department of Commerce properly denied the homeowner's request for mediation. The Court ultimately determined that the beneficiary under the Deed of Trust in that case was exempt from the mediation requirements per the exemption statutes. *Brown* also did not involve, and thus did not discuss, the issues relating to unilateral modification of the Note and Deed of Trust contracts without notice to or consent of the homeowner, or where such unilateral modification was grounded on unlawful actions undertaken by a party (here, MERS) which is not a lawful beneficiary pursuant to Washington decisional law.

There were genuine issues of material fact given the record challenges to the appointment of the trustee by and through an entity which is not and could never be the lawful beneficiary of the Deed of Trust. Summary Judgment was thus improperly entered *ab initio*, and the lower court erred in denying Appellants' Motion for Reconsideration.

Even if Appellants did not have standing to challenge the assignment (although they do), no assignments occurred as Respondent failed to demonstrate that any such transfer could have occurred given that

the Assignment was by MERS, which was not the beneficiary of the Deed of Trust. The United States District Court for the District of New Hampshire has analyzed this distinction and has held that a borrower may claim that no assignment occurred, which is not an "attack on an assignment." *Drouin v. American Home Mortgage Servicing, Wells Fargo Bank, N.A., and Option One Mortgage Corporation*, No. 11-cv-596-JL (Memorandum Order of May 18, 2012, copy filed herewith).

The opinion cited to the case of *Newitt v. Wells Fargo Bank, N.A.*, No. 213-2011-CV-00173 (N.H. Super. July 14, 2011), which also involved an alleged transfer of an Option One mortgage, quoting "[t]he assignment from Sand Canyon to Wells Fargo of an interest which Sand Canyon did not possess" was no more effective to assign the mortgage "than the lack of any assignment at all". *Drouin* at page 10, citing *Newitt* at page 7. As the Assignment was made by an entity which could not, as a matter of law, be the "beneficiary" of the Deed of Trust and as there are no dates or other authenticating information as to the claimed "endorsements"; and as the only date of any assignment was in 2011 by MERS (which is outside of the trust closing period), there are genuine issues of material fact as to whether any "negotiation" ever occurred or could have occurred, precluding summary judgment. The lower court thus

erred in granting summary judgment and in denying Appellants' Motion for Reconsideration.

C. The trial court erred in granting summary judgment in view of the issues presented by the Affidavit of Marie McDonnell

Appellants attached to their Complaint, and also filed in support of their opposition to the Motion for Summary Judgment and in connection with their Motion for Reconsideration, the Affidavit of their expert Marie McDonnell. The subject Affidavit was thus "on file" for purposes of the lower court's obligations in determining whether summary judgment was proper.

The McDonnell Affidavit specifically states facts which demonstrate why Respondent could not have legally inherited any interest in the Note or Deed of Trust, which facts affected the outcome of the case and were thus material. Respondent demonstrated the impropriety of summary judgment by disputing the facts upon which Ms. McDonnell based her conclusions, which facts the lower court was obligated to view in the light most favorable to Appellants.

An expert witness is not restricted by the usual rule requiring a witness to testify from firsthand knowledge, and may base an opinion on hearsay, such as reports or observations of others. ER 703 The McDonnell

Affidavit sets forth specific facts and also reports and observations of other persons who have examined the relevant issues. Respondent made no motion to strike Ms. McDonnell as an expert.

Affidavits from expert witnesses may contain opinions on the ultimate issues of fact. *Pagnotta v. Beall Trailers of Or., Inc.*, 99 Wn.App. 28, 34, 991 P.2d 728 (2000). A court cannot weigh evidence at summary judgment to conclude that certain testimony is not persuasive. *McPhee v. Ford Motor Company*, No. 55832-3-I (Wash. App. 2006). The expert's affidavit must be factually based and affirmatively show competency to testify as to the matter stated therein. *Pagnotta, supra,* citing *Lilly v. Lynch*, 88 Wn.App. 306, 320, 945 P.2d 727 (1997). The facts may arise from the record itself or from information reasonably relied upon by others in the experts' field, but the expert does not have to have first-hand knowledge of the facts of the case as long as the facts are made known to the expert at or before the hearing, nor do such facts have to be admissible in evidence if they are of the type reasonably relied upon by experts in the particular field. ER 703; *Pagnotta, supra* at 34.

Ms. McDonnell's extensive Affidavit satisfies all of the necessary criteria. The lower court thus erred in granting summary judgment and denying Appellants' Motion for Reconsideration.

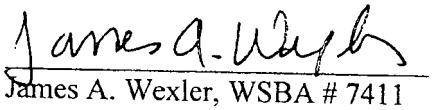
IV CONCLUSION

Appellants have standing to challenge the assignment of the Deed of Trust. Genuine issues of material fact exist with regard to the alleged transfer and pursuant to the evidentiary and factual matters raised in the Affidavit of Marie McDonnell.

The lower court thus erred in granting summary judgment, which must be reversed.

Dated this 26th Day of May, 2017 at Issaquah, Washington

Respectfully submitted,



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Billings

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CERTIFICATE OF SERVICE

I certify that on May 26, 2017, I caused a true and correct copy of this Appellants Billings" Opening Brief and this Certificate of Service to be:

Filed by hand-delivery with the:

Clerk, Court of Appeals Division II
(with Judge's Working Copy)
950 Broadway, Suite 300
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 26th day of May, 2017 at Issaquah, Washington.

BY: JAMES A. WEXLER

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