

**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)**

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**BRAD L. BILLINGS and JOHNITA 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 CWALT, 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/Defendants.

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

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**APPELLANTS BILLINGS' REPLY BRIEF**

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## **TABLE OF CONTENTS**

### **I ARGUMENT**

- A. The Trial Court Impermissibly Weighed Evidence and Determined Credibility on summary judgment**
- B. There Were Genuine Issues of Material Fact as to the Alleged Transfer of the Note to the Trust**

### **IV CONCLUSION.**

**TABLE OF AUTHORITIES**

<b><u>Cases</u></b>	<b><u>Page(s)</u></b>
<i>Atwood v. Albertson’s Food Ctrs., Inc.</i> , 92 Wn.App. 326, 330, 966 P.2d 351(Wash. 1998).....	05
<i>Bain v. Metropolitan Mortgage Group, Inc.</i> , 175 Wn.2d 83, 285 P.3d 34 (Wash.2012).....	05
<i>Barker v. Advanced Silicon Materials, L.L.C.</i> , 131 Wn.App. 616, 128 P.3d 633 (2006).....	05
<i>Bavand v. OneWest Bank FSB</i> , 176 Wn.App. 475, 309 P.3d 676 (Wash. 2013).....	05
<i>Brown v. City of Tacoma</i> (unpublished), No. 43708-2-II (Wn.App. (2014)).....	05.
<i>Layton v. Dalla</i> , (unpublished), No. 30740-9-III (Wn.App. 2012).....	05
<i>Eicon Construction, Inc. v. E. Wash. Univ.</i> , 174 Wn.2d 157, 164, 273 P.3d 965 (Wash. 2012).....	05.
<i>Hash v. Children’s Orthopedic Hospital</i> , 49 Wn.App. 130, 132, 741 P.2d 584 (1987).....	04
<i>Keifert v. Nationstar Mortgage LLC</i> , 153 So.3d 351 (Fla. 1 <sup>st</sup> DCA 2014).....	07
<i>Kelly v. Bank of N.Y. Mellon</i> , 170 So.3d 145 (Fla. 1 <sup>st</sup> DCA 2015).....	.....
<i>Kilbury v. Franklin County</i> , 151 Wn.2d 552, 90 P.3d 1071 (Wash. 2004).....	07
<i>Lloyd v. Bank of N.Y. Mellon</i> , 160 So.3d 513 (Fla. 4 <sup>th</sup> DCA 2015).....	08
<i>Michael v. Mosquer-Lacy</i> , 165 Wn.2d 595, 200 P.3d 695 (2009).....	06
<i>Peoples v. SAMI II Trust</i> , 178 So.3d 67 (Fla. 4 <sup>th</sup> DCA 2015).....	07

<i>Ruff v. County of King</i> , 125 Wn.2d 697, 887 P.2d 886 (Wash. 1995).....	05.
<i>State v. Haq</i> , No. 64839-0-1 (Wash. App. 2012).....	07
<i>Vallandingham v. Clover Park School Dist.</i> , 109 P.3d 805, 154 Wash.2d 16 (Wash 2005).....	05
<i>Wilson v. Steinbach</i> , 98 Wash.2d 434, 656 P.2d 1030 (1982).....	05
<i>Wright v. Langbehn</i> , (unpublished), No. 51622-1-I (Wash.App. 2003).....	05

**OTHER AUTHORITIES**

CR 56(c).....	04
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## I. ARGUMENT

### A. The Trial Court Impermissibly Weighed Evidence and Determined Credibility on Summary Judgment.

To be clear, this matter comes to this Court on appeal on the granting of summary judgment. As a threshold matter, 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). This is not the only standard; Washington decisional law has imposed additional requirements which must be adhered to, and prohibitions to be avoided, in order for a grant of summary judgment to be proper.

A fact is material if it affects the outcome of the litigation, *Eicon Constr. Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 164, 273 P.3d 965 (Wash. 2012), *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (Wash. 1995), and the question at summary judgment is whether there is any genuine issue of material fact *regardless of the standard of proof*. *Wright v. Langbehn*, Unpublished), No. 51622-1-I (Wash.App. 2003)(emphasis supplied).

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) (emphasis supplied); *Vallandingham v. Clover Park School Dist.*, 109 P.3d 805, 810, 154 Wash.2d 16 (Wash. 2005)(summary judgment is granted **only** if, from all of the evidence, reasonable persons could reach but one conclusion, citing *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982)(emphasis supplied)

Further, and significant to this appeal, a court cannot weigh evidence or make credibility determinations on summary judgment. *Barker v. Advanced Silicon Materials, L.L.C.*, 131 Wn.App. 616, 624, 128 P.3d 633 (2006); *Layton v. Dalla*, (unpublished, but citing *Barker, supra*), No. 30740-9-III (Wn.App. 2012); *Brown v. City of Tacoma* (unpublished, but citing *Barker, supra*), No. 43708-2-II (Wn.App. 2014).

In reaching its decision to grant summary judgment, the trial court impermissibly weighed the evidence and determined credibility as to the McDonnell Affidavit, which clearly presented facts as to why the Trust never did and never could have acceded to the Note. The proof of these facts is irrelevant for purposes of summary judgment. The trial court determined that the facts could not be proven at the summary judgment stage, which is *per se* improper.

Based on the facts in the Affidavit, reasonable persons could have reached different conclusions as to the facts in the Affidavit, thus creating a genuine issue of material fact which precludes the underling case being susceptible to being resolved as a matter of law. *Michael v. Mosquer-Lacy*,

165 Wn.2d 595, 601, 200 P.3d 695 (2009). The Order appealed from is thus properly reversed on this threshold issue alone.

**B. There Were genuine issues of material fact as to the alleged transfer of the Note to the Trust**

Respondent claims in its Answering Brief that the Note was transferred to the Trust (Answering Brief, page 3). Appellants raised genuine issues of material fact as to the alleged transfer including issues with the claimed “endorsement” and the fact that the trust was obligated to purchase the loan in a specific manner during a specific time. Respondent failed to produce any evidence to show otherwise, thus giving rise to genuine issues of material fact which precluded summary judgment.

Washington decisional law has not yet addressed challenges to the validity of a claimed blank endorsement, essentially adopting an “*ipso facto*” position that if there is a claimed blank endorsement, this carries the day in (a) rendering the endorsement valid without any proof, and (b) permitting a transfer of an instrument without proof that the very vehicle which is claimed to have effected the transfer (the “endorsement”) was placed on the instrument timely and with authority. This issue is thus one of first impression in Washington, permitting this Court to 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).

Florida appellate courts have addressed this specific issue, and have uniformly and consistently held that an undated blank endorsement on a note, without witness testimony establishing the endorsement date, does not satisfy the requirements for standing in a foreclosure where securitization of the mortgage loan is involved. *Peoples v. SAMI II Trust*, 178 So.3d 67, 69 (Fla. 4<sup>th</sup> DCA 2015)(reversing final judgment of foreclosure and remanding for entry of judgment for the borrower citing *Keifert v. Nationstar Mortgage LLC*, 153 So.3d 351, 352-54 (Fla. 1<sup>st</sup> DCA 2014); *Kelly v. Bank of N.Y. Mellon*, 170 So.3d 145, 146 (Fla. 1<sup>st</sup> DCA 2015)(reversing final judgment of foreclosure holding that an undated blank endorsement on a note is insufficient to prove standing; foreclosing party must show that the endorsement occurred prior to the initiation of the foreclosure, citing *Lloyd v. Bank of N.Y. Mellon*, 160 So.3d 513, 515 (Fla. 4<sup>th</sup> DCA 2015)).

The adoption of an “*ipso facto*” standard for the automatic ratification of claimed “blank endorsements” which are not proven to have been properly or timely placed on a Note results in a deviation from the standard of proof generally required in civil actions for a party prove its case by a preponderance of the evidence, and creates a “foreclosure

exception” to these proof requirements. It is respectfully requested that this Court examine this issue and hold that absent proof of the claimed “endorsement” being placed on the Note timely and with the requisite authority, the “endorsement” is of no legal force or effect, and that these unresolved issues precluded the entry of summary judgment.

#### IV CONCLUSION

The trial court improperly entered summary judgment in view of the series of standards and prohibitions for doing so enunciated by Washington decisional law. Respondent has failed to demonstrate that the trial court’s grant of summary judgment was proper. The lower court thus erred in granting summary judgment, which must be reversed.

Respectfully submitted this 24<sup>th</sup> day of August 2017 at Issaquah, Washington.

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## CERTIFICATE OF SERVICE

I, James A. Wexler, WSBA #7411 certify and declare as follows:

1. I am the Attorney for Plaintiffs Brad L. Billings and Johnita D. Billings in the above-referenced cause of action,
2. On August 24, 2017, I caused the Appellants/Plaintiffs Billings reply Brief and this Certificate of Service by and through James A. Wexler, as their attorney to be electronically filed with:

Clerk of the Court  
Washington Court of Appeals  
Division II  
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AND delivered by e-service to the attorneys in the above referenced case, as follows:

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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 24<sup>th</sup> day of August 2017 at Issaquah, Washington

By: JAMES A. WEXLER  
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s/ James A. Wexler  
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**August 24, 2017 - 4:00 PM**

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**Comments:**

Appellants' Reply Brief with Certificate of Service attached.

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