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No. 53747-8 II

On appeal from Mason County No. 16-2-00654-3

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

DANIEL PETERSON AND KRISTI PETERSON,

Appellants,

v.

CITIBANK N.A., NOT IN ITS INDIVIDUAL CAPACITY, BUT
SOLELY AS TRUSTEE OF NRZ PASS-THROUGH TRUST VI,

Respondent.

APPELLANTS' OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

Assignment of Error 1

The summary judgment motions judge erred by failing to require McCarthy and Holthus (M & H), attorneys for Fay Servicing, to produce proof of their Authority to represent Citibank as a trustee/fiduciary of the trust which purportedly owned the Petersons' note on behalf of certificate holders.

Issue Related to Assignment of Error 1

Where the issue of an attorney's authority to represent the plaintiff becomes a material factual issue with regards to the granting or denial of summary judgment, must the challenged attorney present proof of his authority to represent the plaintiff in order to be granted summary judgment on behalf of the plaintiff? (Short Answer: YES)

Assignment of Error 2

The summary judgment motions judge erred by not requiring M & H to provide proof of their authority to act as the attorney for the named plaintiff trustee on behalf of the trust.

Issues Related to Assignment of Error 2

- 1.) Did the summary judgment motions judge have a duty to determine whether the attorneys claiming to represent the named plaintiff had authority to do so in order to determine whether it had subject-matter jurisdiction over the case? (Short Answer: YES)
- 2.) Was the summary judgment motions judge required to determine whether M & H had an attorney-client relationship with the named plaintiff in order to determine whether it could award attorney fees pursuant to either the note or deed of trust? (Short Answer: YES)
- 3.) Did the evidence before the summary judgment motion's judge present a material fact issue with regard to whether the attorney represented the named plaintiff in the complaint and summary judgment motion? (Short Answer: YES)

Assignment of Error 3

The summary judgment motions judge erred by failing to find that a material factual issue existed with regard to whether the note was authentic.

Issues Related to Assignment of Error 3.

- 1.) Where the Petersons as defendants challenged the authenticity of the note in their answer to the complaint, was the plaintiff required to prove the authenticity of the Note in order to be a holder? (Short Answer: YES)
- 2.) Did the Petersons' testimony in their declarations that their signatures on the note and deed of trust were forged create a material question of fact which precluded summary judgment? (Short Answer: YES)

Assignment of Error 4

The summary judgment motion's judge erred in failing to require M & H to prove the note and deed were not split from one another.

Issue Related to Assignment of Error 4.

- 1.) If plaintiff does not hold an authentic note, must the plaintiff prove "chain of title" in order to foreclose? (Short Answer: YES)
- 2.) In order to foreclose upon a 2005 security agreement and note obligation that were originally split from one

another must the “holder” demonstrate through evidence that the note and deed of trust have been reunited?

(Short Answer: YES)

II. STATEMENT OF THE CASE

A. The Complaint and Answer

M & H filed the “complaint” in this action that named “Citibank, N.A., Not in Its individual Capacity, but solely as trustee of the NRZ Pass-Through Trust V” as the only Plaintiff against property owners “Daniel C. Peterson” and “Kristy Peterson AKA Kristy J. Peterson” with the Mason County Superior Court on October 31, 2016. Clerks Papers (CP) 1–6. The last page of the complaint identifies M & H as the attorneys for the Plaintiff.

The Petersons filed an answer, which asserted the note was not authentic. CP 56 Complaint, ¶ 6.

B. The Motion for Summary Judgment filed by M & H purportedly on behalf of Citibank, as Trustee.

M & H moved for summary judgment on behalf of Citibank, as Trustee. The Petersons alleged there were at least three fact issues which precluded the trial court from entering a summary judgment. They included (1) Whether the real

party in interest was before the court; (2) Whether the promissory note being sued upon was authentic; and (3) Whether chain of title as to the original note had to be established.

1. Fact Issue 1: Does M & H have an attorney client relationship with Citibank?

Almost two and a half years after the Complaint was filed, M & H filed a motion for summary judgment on behalf of Plaintiff Citibank as Trustee. (CP 288-295) In support of this CR 56 motion M&H submitted the declaration of Lauren Jowers. CP 303-411. Jower's declaration is captioned as "**DECLARATION OF PLAINTIFF** IN SUPPORT OF MOTION FOR DEFAULT AND GENERAL JUDGMENT OF FORECLOSURE" (Plaintiff's Declaration) (emphasis supplied) CP 303. The declaration states Jowers works for Faye Servicing, **which hired M & H** to bring this case against the Petersons. In this regard, the declaration states:

2. I am employed as a Foreclosure Specialist by Faye Servicing, LLC, "Servicer", the servicer for Plaintiff, CITIBANK, N.A., NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS TRUSTEE OF NRZ PASS-THROUGH TRUST VI. CP 303

*

*

*

10. **Servicer has retained McCarthy & Holthus, LLP to prosecute this foreclosure action and**

is obligated to pay a reasonable fee and reimburse costs incurred in connection with the firm's services. Pursuant to the terms of the promissory note and/or Deed of Trust, these fees are recoverable against the defendant in this action. . . .

CP 306 (Emphasis Supplied)

The declaration of John Thomas, an M & H attorney (which was submitted simultaneously with Jowers declaration and the motion for summary judgment) does not dispute that Fay Servicing retained M & H to pursue this case on behalf of the named Plaintiff. CP, 296–298 Nor does Thomas dispute that it is Fay Servicing that “is obligated to pay a reasonable fee and reimburse costs” to M & H. *Id.*

The Petersons responded that these declarations created a fact issue with regard to whether M & H had an attorney-client relationship with Citibank. In this regard, the Petersons submitted the declaration of their attorney, which stated:

3. Most of the litigation I have been doing over the past decade involves foreclosures. I know, based on this experience that servicers conduct foreclosure litigation on behalf of trustees, like Citibank, pursuant to Powers of Attorney, which does not create an attorney-client relationship between the servicer's attorney and the Trustee/fiduciary.

Further, it is my experience that such powers of attorneys do not require attorneys for servicers to take into account the fiduciary duties the Trustee owes to certificate holders.

4. Given that declarant Jowers works for the Servicer, and there is no evidence that John Thomas of McCarthy Holthus has an attorney-client relationship with Plaintiff Citibank, I request this Court order these attorneys to prove by what authority they act on behalf of the purported plaintiff pursuant to Ch. 2.44 RCW.

Stafne declaration, CP 72, paragraphs 3–4.

In their opposition to the motion for summary judgment the Petersons argued that if Citibank had no attorney-client relationship with M & H, then M & H's motion for summary judgment failed to show how M & H and Faye Servicing 1) had standing to bring this action; and 2) were the real parties in interest for purposes of commencing this action. They also argued that if M & H did not represent Citibank, the purported trustee, the action should be dismissed because Citibank was an indispensable party, citing CR 19.

In addition, the Petersons argued that if M & H did not represent the trustee it could not recover the attorney fees requested pursuant to CR 56.

2. Fact Issue 2: Is the Note upon which this lawsuit is

premised authentic?

The Petersons also requested that summary judgment be denied because they disputed the authenticity of the note upon which M & H premised this lawsuit. If the note was not authentic, the Petersons argued, it could not be enforced or provide the basis for a foreclosure in equity. *See e.g. 21st Century v. Robertson*, No. 75267-6-I, 2017 Wn. App. LEXIS 2471, (Ct. App. October 30, 2017) (**unpublished**). *Cf. Summit Leasing, Inc. v. Chhatrala Edes, LLC*, No. 33870-3-III, 2016 Wn. App. LEXIS 2488, at *10 (Ct. App. Oct. 13, 2016) (**unpublished**)

In this regard Dan Peterson testified he did not sign the note upon which M & H was premising this lawsuit. Indeed, Dan Peterson outright testified: “I dispute the note because I did not sign it.” CP 103, paragraph 4. As further evidence the note and deed were not authentic Peterson alleged that he did not recognize his wife’s signature and *her name was spelled wrong*. CP 103, paragraphs 9–12. As further evidence there was a material question about the note’s authenticity Dan Peterson testified that M & H had provided the Court with differ-

ent copies of the note at different times. CP 103–104. Paragraphs 13–15. With regard to both of the notes M & H submitted to the court, Dan Peterson testified: “I dispute the 2016 and 2019 Notes because I believe they are forgeries.” CP 104, paragraph 16.

Kristi Peterson signed a similar declaration testifying that she did not sign the note either. CP, 62 paragraph 4. “My name is not Kristy; has never been Kristy, I have never used the alias of Kristy, nor have I ever signed any document as Kristy.” CP 63, paragraph 10.

III. ARGUMENT

A. Question of fact exists as to whether M & H had authority to represent Citibank in any capacity because the evidence before the Court indicated M & H was the attorney for the Servicer, not the Trustee.

In support of its motion for summary judgment M & H submitted the “Plaintiff’s declaration” signed by Jowers (CP 303–411). This declaration is identical to the one which was submitted by Shaniqua Clark as the “plaintiff,” which can be found CP 175–287).

Both declarations swear that each declarant “plaintiff” is employed as a foreclosure specialist for Fay Servicing the

servicer for CITIBANK, N.A., NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS TRUSTEE OF NRZ PASS-THROUGH TRUST VI. Compare CP 176 with CP 304. Both Jowers and Clark testified in their declarations (which M & H filed with the Mason County Superior Court) that it was the servicer who had retained M & H and was responsible for paying M & H the fees and costs associated with this judicial foreclosure. *Id. See also* CP 177 & 306.

The declaration filed by M & H attorney Thomas did not dispute the testimony of Jowers or Clark that M & H represented only the servicer. CP 296–302. Nor did Thomas dispute that Fay, the servicer, not the note holder, was responsible for paying M & H’s attorney fees and costs in this case. *Id.*

Paragraph 7(E) of the “Adjustable Rate Note” contains a clause that provides the “Note Holder”, not the “Servicer” will be reimbursed its attorney fees. That provision states:

If the Note Holder has required me to pay immediately in full as described as above , the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. These expenses include, for example, reasonable attorney fees.

CP 308.

Paragraph 26 of the applicable deed of trust security instrument states:

26. Attorney fees. Lender shall be entitled to recover its reasonable attorneys' fees and costs in any action or proceeding to construe or enforce this Security Instrument. The term "attorney' fees," whenever used in this Security Instrument, shall include without limitation attorneys' fees incurred by Lender in any bankruptcy proceedings or on appeal.

CP 329.

Because "Plaintiffs' declarations" demonstrated that M & H was hired by Fay Servicing—not the named plaintiff on the complaint—and Fay was obligated to pay M & H's attorney fees the Petersons argued that M & H had not presented proof it represented Citibank and was entitled to fees. Accordingly, the Petersons requested the summary judgment judge require M & H demonstrate their proof of authority to the named plaintiff.

In *Hatfield v. King*, 184 U.S. 162 (1902) the United States Supreme Court voided a quiet title judgment being ap-

pealed because the attorney claiming to represent the defendant had no authority to represent her. After simply stating that lawyers who do not represent parties cannot be involved in court cases where they falsely claim to do so, the Court went on to state how this practice (the one the summary judgment judge allowed to occur here) is not consistent with judicial integrity. In this regard, a unanimous Supreme Court stated:

. . . ***The charges*** [that attorneys do not actually represent parties in court proceedings] ***are serious ones, affecting the integrity of counsel, commended, by the fact of admission to the bar of the Circuit Court, to the confidence of the community. They involve that due administration of justice in that court and cannot be passed without notice and action. It is not enough that the doors of the temple of justice are open; it is essential that the ways of approach be kept clean.*** We refrain from extended comment because, as heretofore stated, the testimony is mainly by *ex parte* affidavits, which are often, this case being no exception, quite unsatisfactory, and it is only through the sifting process of cross-examination that the real facts can be disclosed. ***When the truth is ascertained, if there be wrongs as charged, the language of judicial condemnation should be clear and emphatic, and a punishment inflicted such as the wrongs deserve; and if no wrong has been done the conduct of counsel will be cleared from suspicion.***

184 U.S. at 167–68 (Emphasis Supplied)

The summary judgment judge expressed no interest in keeping the accessway to Washington courts free from clientless lawyers, notwithstanding *Hatfield* demonstrates why the integrity of judicial process mandated the summary judgment motions judge do so.

Other federal cases expressing the same reasoning regarding the inappropriateness of attorneys purporting to represent clients they do not include without limitation: *Pueblo of Santa Rosa v. Fall*, 273 U.S. 315, 47 S. Ct. 361 (1927)(holding proceedings in which attorneys claim to represent clients they do not are nullities.); *Shelton v. Tiffin*, 47 U.S. (6 How.) 163 (1848) (Attorney's appearance without party's consent was a nullity and resulted in a void sheriff's sale.) *See also In re Retail Chemists Corp.*, 66 F.2d 605 (2d Cir. 1933) where a panel composed of Court of Appeals Judges Learned Hand, Augustus Hand, and Harrie B. Chase observed:

. . . A party to a suit may by timely motion dispute the authority of the opposing attorney to act for the party in whose name he is proceeding, and, if the authority is not shown, the court will dismiss the action for want of parties before it. *Pueblo of Santa Rosa v. Fall*, 273 U.S. 315, 47 S. Ct. 361, 71 L. Ed. 658; *Sutherland v. International Ins. Co. of New York* (C.C.A.) 43 F.(2d) 969; *King of Spain v. Oliver*,

Fed. Cas. No. 7,814; *Bonnifield v. Thorp* (D.C.) 71 F. 924; *Chesapeake & O. Ry. Co. v. Commonwealth*, 189 Ky. 465, 225 S.W. 145; *Cf. Gaston & Co. v. All Russian Zemsky Union*, 221 App. Div. 732, 224 N.Y.S. 522; *Orr & Co. v. Fireman's Fund Insurance Co.*, 141 Misc. 330, 253 N.Y.S. 2, reversed 235 App. Div. 1, 256 N.Y.S. 79; *Institute of Educational Travel v. Binkerd*, 90 Misc. 325, 153 N.Y.S. 427; *Cockran v. Leister*, 2 Root (Conn.) 348.

66 F.2d at 608.

It is the Petersons' position that these cases stand for the proposition that lawyers, who do not represent real parties in interest, have no standing to sue or defend parties they do not represent.

Washington has recognized since its territorial days that allowing roving bands of lawyers unanchored to any client to bring cases against anyone they name as defendants is not in the best interests of the people or courts of justice. Accordingly, in 1863 the Territorial Legislature passed a statute governing the actions of attorneys in Washington. That statute became Washington state law by virtue of Wash. Const. art. XXVII, § 2. That Chapter of Washington law relating to attorneys is presently codified at Chapter 2.44 RCW.

RCW 2.44.010 states in pertinent part: "An attorney

and counselor has authority: (1) to bind his client in any proceedings in an action or special proceeding by his or her agreement duly made, . . .” If the attorney does not have a client, obviously this language suggests the attorney can’t bind anyone.

The next section, RCW 2.44.020, provides that:

If it be alleged by a party for whom an attorney appears, that he or she does so without authority, the court may, at any stage of the proceedings, relieve the party for whom the attorney has assumed to appear from the consequences of his or her act; it may also summarily, upon motion, compel the attorney to repair the injury to either party consequent upon his or her assumption of authority.

The next section, RCW 2.44.030, provides:

The court, or a judge, may, on motion of either party, and on showing reasonable grounds therefor, require the attorney for the adverse party, or for any one of several adverse parties, to produce or prove the authority under which he or she appears, and until he or she does so, may stay all proceedings by him or her on behalf of the party for whom he or she assumes to appear.

The Petersons challenged M & H’s authority to represent the named plaintiff, *i.e.* CITIBANK, N.A., NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS TRUSTEE OF NRZ

PASS-THROUGH TRUST VI in the summary judgment proceedings.

In their opposition to M & H's motion for summary judgment the Petersons argued:

CR 19 requires that persons needed for a just occasion must be joined in this lawsuit. The Petersons contend that there is no evidence in the record that either Jowers or Thomas are employed or retained by Citibank and that Citibank in its own capacity or as a fiduciary is not a party to this lawsuit. As previously noted in footnote 2, *supra*, there is no evidence that Thomas has an attorney-client relationship with the alleged Plaintiff Citibank. And other evidence, or case law suggests it has none because servicers are responsible for handling defaults.

Given the Petersons have sued Citibank in both its individual and purported trustee capacity, they require Thomas to comply with RCW 2A.[44.]030 which requires attorneys "to produce or prove the authority under which he or she appears, and until he or she does so, . . . stay all proceedings by him or her on behalf of the party for whom he or she assumes to appear." *See Kruger-Willis v. Hoffenburg*, 2015 Wn. App. LEXIS 873 (April 21, 2015) (unpublished). *See also Kruger-Willis v. Hoffenburg*, 198 Wn. App. 408, 393 P.3d 844 (2017) *rev. denied* 189 Wn.2d 1010, 2017 Wash. LEXIS 955 (Oct. 4, 2017). . . . CP 145.

It is the Petersons' position that based on the evidence in the record a jury would have found that M & H represented Fay Servicing not Citibank. If such a finding had been made

this would have required dismissal of this case for lack of subject-matter jurisdiction, see CR 12 (h)(3), because the case was not justiciable and the attorneys, who did not represent the real party in interest, had no standing to obtain redress. See e.g. *Nw. Animal Rights Network v. State*, 158 Wn. App. 237, 242–43, 242 P.3d 891, 894 (2010) citing *Nw. Greyhound Kennel Ass'n v. State*, 8 Wn. App. 314, 318–19, 506 P.2d 878 (1973). Further, that if M & H did not represent Citibank, the case should also have been dismissed for failure to include an indispensable party. CR 19. See e.g. *Mudarri v. State*, 147 Wn. App. 590, 196 P.3d 153 (2008).

The disputed issue of M & H's attorney-client relationship was also relevant to the summary judgment judge's award of costs and attorney fees. For if a jury found M & H did not represent the Noteholder then M & H and the servicer would not be entitled to any costs and attorney fees paid by the servicer under the contract provisions set forth *supra*. On the other hand, the Petersons would be entitled to their costs and attorney fees in defending this action brought by M & H and Fay Servicing under both RCW 2.44.020 and RCW 4.84.330.

RCW 4.84.330 provides in pertinent part:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

B. A question of fact exists as to the note whether the note is authentic and transferable.

Dan and Kristi Peterson looked at the note and knew they did not sign it. In order to make this point clear legally they signed declarations under oath in which each testified that they did not sign the note this lawsuit is based upon. But the summary judgment judge completely ignored their testimony in this regard.

If agreements are forged the persons who have their signatures misappropriated are not liable. *Summit Leasing, Inc. v. Chhatrala Edes, LLC*, No. 33870-3-III, 2016 Wn. App. LEXIS 2488, at *10 (Ct. App. Oct. 13, 2016) (**unpublished**) citing *Stahly v. Emonds*, 184 Wash. 207, 210, 50 P.2d 908 (1935)

(whether the plaintiff's name was forged “presents purely a question of fact”).

In order to comply with RCW 62A.3-308(a) the Petersons pled the note was not authentic in their complaint. RCW 62A.3-308 provides in pertinent part:

In any action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity . . .

Paragraph six of the Petersons' Answer specifically denied the note attached as exhibit B to the complaint was a copy of an authentic note. This paragraph alleged:

. . . Defendants deny Exhibit B is a copy of the original note. Accordingly, Defendants require Plaintiff to produce and prove in this litigation the authenticity of any purported promissory note as well the authenticity of all signatures and indorsements, including on any allonges and/or other transfers by way of negotiation. Defendants Petersons also hereby give notice they demand to have a forensic expert inspect the purported original promissory note or any copy thereof which Defendants claim constitutes a valid basis for any previous non-judicial foreclosure. *To be clear and for purposes of record, Plaintiffs (sic) [Defendants] allege there is no legal or equitable basis for enforcement of the inauthentic note by way of the foreclosure of the security instrument dated August 3, 2005.*

CP 56, Paragraph 6 (Emphasis in the Original).

As set forth *supra.*, the Petersons testified in their declarations that the signatures on the note were not theirs and were outright forgeries. It is difficult to understand how any judge could overlook this testimony and determine that their sworn declarations did not create a triable issue of fact in light of the application of RCW 62A.3-308.

Although M & H asked in its reply that the Petersons' declarations be stricken, the trial court failed to do so. *Compare* CP 149 with CP 166. Thus, this case is almost identical to *21st Century v. Robertson*, No. 75267-6-I, 2017 Wn. App. LEXIS 2471, (Ct. App. October 30, 2017) (**unpublished**) where Division One reversed a summary judgment based on a possession of the note theory like the one advanced here.

In *Robertson* the court explained:

Robertson argues that his evidence creates a genuine issue of material fact that 21st does not possess the original first priority promissory note. He relies on a report and affidavit by James Kelley, who examined the note. Kelley concluded that the note is "not the original adjustable rate note, but a copy thereof." CP at 2049. 21st argues that the Kelley report is inadmissible, but the trial court explicitly left that question open, and the report was

among the documents considered on summary judgment. Thus, we consider it in the light most favorable to Robertson. The Kelley report is evidence that the note is a copy, so there is a genuine issue of material fact whether 21st holds the note and is entitled to enforce it.

Id. at **6–7.

Similarly, in this case the summary judgment motions judge did not strike the Petersons’ declarations. Thus, that judge should have considered their declarations in the light most favorable to them. This would have required concluding that there was a triable issue of fact because both the Petersons testified—after reviewing the signatures M & H presented in pleadings—that the notes were forgeries. See RCW 62A.3-308.

C. Question of fact exists as to whether the
note was properly endorsed.

As previously observed the Petersons challenged the authenticity of and the authority of endorsers to make each signature on the note pursuant to RCW 62A.3-308. This challenge required the Plaintiff to prove that the note was properly endorsed by person’s who had the authority to do so.

On its face, the note is problematic in this regard because the first endorsement on the last page of the note is not by the Lender, but by a document custodian. CP 14. The Lender was “First Magnus Financial Corporation, An Arizona Corp ISAOA.” CP 10.

The first endorsement on the Note is by “Countrywide Homes Loans Inc.” without recourse to “Countrywide Document Custody Services, A Division of Treasury Bank, NA.” CP 14. To the right of the above described endorsement on the same last page of the purported note (page 5 of 5) is an endorsement in blank by Countrywide Home Loans Inc. But the problem with that endorsement is the Note does not indicate that the endorser to Countrywide had any interest in the note to endorse.

Although the page which follows these Countrywide endorsements appears to be a later endorsement by First Magnus to Countrywide Document Custody Services, A Division of Treasury Bank, N.A. (CP 15) that endorsement raises more factual problems than it solves.

For example, the Note itself indicates that it is only five pages. See page numbers at the bottom on ARN, *i.e.* Page 1 of 5 to Page 5 of 5, CP 10–14; 308–313. Thus, the purported endorsement by the Lender is not part of the original note. CP 15 & 312. Moreover, these purported endorsements appear to be different from one another. Compare CP 14 & 15 with CP 312 & 313. At the top of page 14 there is a redaction of the loan number. But at the top of CP 312 there is no redaction of the loan number, thus indicating the two allonges are different. The indorsements by the actual lender on pages CP 15 and 312 do not appear to be a part of that note or even the same document. The endorsement on CP 15 has a redaction on the top left hand side of the page, while 313 has no such redaction or indication that anything was ever printed at that same location.

This is the type of situation where courts have held the presentation of evidence that the note has been properly endorsed is required in order to justify standing and the right to enforce. See *e.g. FV-I, Inc. v. Kallevig*, 306 Kan. 204, 212–15, 392 P.3d 1248, 1256–57 (2017); *United States Bank Nat'l*

Ass'n v. Kachik, 222 So. 3d 592, 593–94 (Fla. Dist. Ct. App. 2017); *Mathis v. Nationstar Mortg., LLC*, 227 So. 3d 189, 192–93 (Fla. Dist. Ct. App. 2017); *Caballero v. U.S. Bank Nat. Ass'n ex rel. RASC 2006-EMX7*, 189 So. 3d 1044, 1045–46 (Fla. Dist. Ct. App. 2016); *US Bank, NA v. Alexander*, 280 P.3d 936, 941–42, 2012 O.K. 43, ¶ 25 (Okla. Supr. Ct. 2012); *U.S. Bank Nat. Ass'n v. Ibanez*, 458 Mass. 637, 649–51, 941 N.E.2d 40, 52–53 (2011).

Finally, the Petersons would observe that M & H's motion for summary judgment was based on the premise that "[i]t is well settled in Washington that the Deed of Trust in Washington follows and is enforceable by the Noteholder." CP 292. M & H cited *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn. 2d 83, 285 P.3d 34 (2012) for this proposition. *Id.*

But *Bain* clearly did not hold in 2012, seven years after the Petersons' note and deed of trust were purportedly executed in 2005, that the deed of trust could not be split from the note "because it follows the note." In fact, *Bain* holds directly the opposite.

In *Bain* the Supreme Court was asked to treat a beneficiary under the Deed of Trust Act as if it was the equivalent of a UCC holder. A unanimous Court refused to do so because this was not consistent with the Washington's Deed of Trust Act, Chapter 61.24 RCW.

MERS also seeks support in a Virginia quiet title action. *Horvath v. Bank of N.Y., NA*, 641 F.3d 617, 620 (4th Cir. 2011). After Horvath had become delinquent in his mortgage payments and after a foreclosure sale, Horvath sued the holder of the note and MERS, among others, on a variety of claims, including a claim to quiet title in his favor on the ground that various financial entities had by “splitting . . . the pieces of’ his mortgage . . . caused ‘the Deeds of Trust [to] split from the Notes and [become] unenforceable.’” *Id.* at 620 (third and fourth alterations in original) (quoting complaint).

The Fourth Circuit rejected Horvath's quiet title claim out of hand, remarking:

It is difficult to see how Horvath's arguments could possibly be correct. Horvath's note plainly constitutes a negotiable instrument under Va. Code Ann. § 8.3A-104. That note was endorsed in blank, meaning it was bearer paper and enforceable by whoever possessed it. See Va. Code Ann. § 8.3A-205(b). And BNY [(Bank of New York)] possessed the note at the time it attempted to foreclose on the property. Therefore, once Horvath defaulted on the property, Virginia law

straightforwardly allowed BNY to take the actions that it did.

Id. at 622.

There is no discussion anywhere in Horvath of any statutory definition of “beneficiary.” While the opinion discussed transferability of notes under the UCC as adopted in Virginia, there is only the briefest mention of the Virginia deed of trust act. *Compare Horvath*, 641 F.3d at 621–22 (citing various provisions of Va. Code Ann. Titles 8.1A, 8.3A (UCC)), with *id.* at 623 n.3 (citing Va. Code. Ann. § 55-59(7) (discussing deed of trust foreclosure proceedings)). We do not find Horvath helpful.

175 Wn.2d at 105–6.

At the time *Bain* was decided in 2012 Washington courts interpreted the DTA as incorporating longstanding real estate law which held that the note and deed of trust can be split from one another in such a way that the deed of trust becomes unenforceable. The Supreme Court acknowledged this and held that deeds of trust could be split from notes in such a way that the security agreement becomes unenforceable.

Selkowitz argues that MERS and its allied companies have split the deed of trust from the obligation, making the deed of trust unenforceable. While that certainly *could* happen, given the record before us we have no evidence that it did. If, for example, MERS is in fact an agent for the

holder of the note, likely no split would have happened.

In the alternative, *Selkowitz* suggests the court create an equitable mortgage in favor of the noteholder. Pl.'s Opening Br. at 42 (*Selkowitz*). If in fact such a split occurred, the *Restatement* suggests that would be an appropriate resolution. *Restatement (Third) of Property: Mortgages* § 5.4 reporters' note at 386 (1997) (citing *Lawrence v. Knap*, 1 Root (Conn.) 248 (1791)). But since we do not know whether or not there has been a split of the obligation from the security instrument, we have no occasion to consider this remedy.

Bain, 175 Wn.2d at 1122–113.

In *Robinson v. Am. Home Mortg. Servicing, Inc. (In re Mortg. Elec. Registration Sys.)*, 754 F.3d 772, (9th Cir. 2014) a Ninth Circuit panel concluded a split in the note and security agreement likely occurred by designating MERS as a beneficiary in the Deed of Trust. *Id.* at 786. In reaching this conclusion, the Ninth Circuit panel quoted *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 286 P.3d 249 (2012):

Designating MERS as the beneficiary does . . . effectively “split” the note and the deed of trust at inception because . . . an entity separate from the original note holder . . . is listed as the beneficiary (MERS). . . . However, this split at the inception of the loan is not irreparable or fatal. . . . [W]hile entitlement to enforce both the deed of trust and the promissory note is required to foreclose, nothing requires those documents to be unified from

the point of inception of the loan. . . . MERS, as a valid beneficiary, may assign its beneficial interest in the deed of trust to the holder of the note, at which time the documents are reunified.

Edelstein, 128 Nev. at 259–60.

Bain's holding that the note can be split from the deed of trust means that in order for a note holder to foreclose on the security agreement the note holder must prove at the time it files suit that it not only possesses an authentic note giving it the authority to enforce the note but also that it does not fall with the DTA's exclusion of beneficiaries. See RCW 61.24.005 (2) ("Beneficiary" means the holder of the instrument or document evidencing the obligations secured by the deed of trust, ***excluding persons holding the same as security for a different obligation.***)

In this case, M & H never presented any evidence that MERS successfully returned the deed of trust to Lender or subsequent Note Holder. The evidence in the record shows that there is an issue as to whether the deed has been split

from the note. See Dan Peterson Declaration, Exhibit 1 (Corporate Assignment of Deed of Trust), CP 109–110¹; Exhibit 5 (Notice of Discontinuance of Trustee’s Sale), CP 119–20², and Exhibit 7 (Notice of Default), CP 124³.

These assignments are not consistent with the note endorsements without some sort of explanation. Accordingly, the persons bringing suit to foreclose had the burden of proof to supply such an explanation.

The Petersons Request Attorney Fees

The Petersons request attorney fees pursuant to RAP 18.1.

¹ This is a “Corporation Assignment of Deed of Trust” recorded by MERS on February 23, 2010, purporting to transfer all its “beneficial interest” in the deed of trust to BAC HOME LOANS SERVICING, LP F/K/A COUNTRY-WIDE HOME LOANS SERVICING LP. But such a transfer contradicts the agreement between the parties because the Deed of Trust explicitly agrees between the parties that MERS only has only legal title to this security agreement. CP 20 (“Borrower understands and agrees that MERS holds only legal title to interests granted by Borrower in this Security Instrument...”) Since MERS had no beneficial interest in the Deed of Trust it could not transfer its beneficial interests in that security instrument because it had none.

² Notwithstanding that MERS assigned all its beneficial interest in the Deed of Trust to BAC in February 2010 this recorded document asserts that MERS remained the beneficiary of the security instrument on September 28, 2011. CP 120.

³ The Notice of Default identifies Fannie Mae as the owner of the Note in 2013. CP 125

Paragraph 7(E) of the Peterson's promissory note provides: "[T]he Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note . . . includ[ing], for example, reasonable attorneys' fees." CP 311.

Paragraph 26 of the Deed of Trust provides:

Lender shall be entitled to recover its reasonable attorneys' fees and costs in any action or proceeding to construe or enforce any term of this Security Instrument. The term "attorneys' fees," . . . shall include without limitation attorneys' fees incurred . . . on appeal.

CP 329.

RCW 4.84.330 provides in pertinent part:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

RCW 2.44.020 also provides that the costs associated with an attorney's failure to provide authority to represent a

party shall be compensable. Accordingly, the Petersons' request an award of their attorneys fees be awarded both below and on appeal.

See also Mike's Painting, Inc. v. Carter Welsh, Inc., 95 Wn. App. 64, 71, 975 P.2d 532 (1999) (contractual provision authorizing attorney fees is authority for granting fees incurred on appeal).

Conclusion

This Court should reverse the decision of the superior court and remand this case back for a trial on the disputed factual issues. This Court should award the Petersons their costs and attorney fees on appeal.

Dated this 28th day of October, 2019, at Arlington, Washington.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day, October 16, 2019, the Appellant's Opening Brief was served by this Court's electronic case filing system.

Dated this 28th day of October, 2019, in Arlington, Washington.

By: s/ LeeAnn Halpin
LeeAnn Halpin, Paralegal

STAFNE LAW ADVOCACY & CONSULTING

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