

FILED
Court of Appeals
Division II
State of Washington
12/26/2019 4:52 PM
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' REPLY BRIEF

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I. Introduction

This case gives meaning to the observation of the Washington State Supreme Court’s Civil Legal Needs Update Study (2015)¹ that “[j]ustice is absent for low-income Washingtonians who frequently experience serious civil legal problems” (p. 3).

Indeed, this case demonstrates that clientless lawyers are routinely allowed by Washington courts and judges to mount judicial attacks on Washingtonians notwithstanding the law has prohibited them from doing so since before Washington became a State.

Further, that Washington state superior court judges, like the one who decided this case, have usurped for themselves the power of juries to decide cases to the point where this bulwark is no longer a check and balance which protects the liberties of the people.

The Petersons ask this Court to restore justice and the rule of law to courts from which it is presently absent.

¹ This Study can be accessed at this government link: https://ocla.wa.gov/wp-content/uploads/2015/10/CivilLegalNeedsStudy_October2015_V21_Final10_14_15.pdf

II. REPLY TO M&H's Response A

Fay Servicing has an agency relationship with Plaintiff/Respondent as its loan servicer and can hire an attorney to execute its obligations of servicing the loan. M & H's Opening Brief, pp. 3–6.

The first thing McCarthy Holthus (hereinafter M & H) does in its Answering Brief is admit they do not represent the purported Plaintiff, Citibank, as trustee or in any other capacity. M & H outright tells this Court they represent Fay Servicing, not Citibank. In this regard M & H writes:

Fay Servicing is a loan servicer for Respondent. A loan servicer is responsible for handling the regular servicing activities of a loan that a loan beneficiary may not have the capability to perform. Such actions regularly include collecting payments and enforcing the terms of the Deed of Trust by foreclosing when the loan enters default. To foreclose, the loan servicer must hire legal counsel. This is the case here with Fay Servicing hiring MH to represent the loan beneficiary, Respondent. This relationship between the beneficiary, loan servicer, and counsel is well known to the courts^{2,3}.

² There is no evidence supporting any of these facts in the court record below. See Clerk's Papers. Specifically, there are no agreements between Fay Servicing and/or Citibank and/or any other parties evidencing that Fay Servicing has the authority to act as the Plaintiff in bringing this case, or to hire M & H as the attorneys for Citibank. Indeed, that is why the Petersons challenged M & H standing to bring this action on behalf of Citibank in the first place. See *infra*.

³ In *Brown* the superior court and the appellate courts had a copy of the actual agreements which the parties claimed established the right of the

* * *

Understanding that it is a common relationship and frequent occurrence for a beneficiary to hire a loan servicer and for that loan servicer to then hire an attorney to conduct a foreclosure, it is plain to see that the trial court did not abuse its discretion in not requiring MH to provide proof that it represented Respondent.

M & H Answering Brief, pp. 4–5. (Emphasis Supplied)

M & H is wrong in its analysis because neither this Court, nor the superior court has been provided any proof that M & H represents Citibank, the named Plaintiff, in any capacity. Judges don't have, and should not have, the authority to make up proof.

As can be seen M & H's argument admits that it represents Fay Servicing and not the named Plaintiff in this lawsuit. M & H argues this is okay because it is a "common occurrence" in Washington State for lawyers not having any relationship with a beneficiary to foreclose on landowners without any proof there is actually a relationship between the lawyers and the named Plaintiff.

M & H argues that such fraud on the superior court and

servicers to foreclose in that case. *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 521-23, 359 P.3d 771, 776-77 (2015).

other parties to lawsuits is acceptable because RCW 2.44.030 expressly states that a court or a judge “*may*” on showing of reasonable grounds therefor “require the attorney for the adverse party . . . to produce or prove the authority under which he or she appears” Answering Brief, p. 4.

According to M&H and Fay Servicing because the statute uses the word “may” the superior court judge has absolute discretion to determine an attorney must show proof of their authority to appear on behalf of the party the attorney is claiming to represent.

The Petersons disagree. American jurisprudence, including Washington state jurisprudence, requires a plaintiff in a lawsuit to have its own standing, *i.e.* its own interest in a case, to bring any lawsuit. *See e.g. GMAC Mortg., LLC v. City of Spokane*, No. 30749-2-III, 2013 Wn. App. LEXIS 1444, at **10-11 (Ct. App. June 18, 2013)(“In order to establish standing sufficient to enforce private rights or challenge private rights, the challenging party must demonstrate that it has some real interest, and that the interest is present and substantial, as opposed to an expectancy or future contingent

interest. *Kim v. Moffett*, 156 Wn. App. 689, 698, 234 P.3d 279 (2010), (quoting *State ex rel. Hays v. Wilson*, 17 Wn.2d 670, 672, 137 P.2d 105 (1943)).” *Id.* at 9–10).

In this case, M & H now concedes that it represents Fay Servicing, not the named Plaintiff. Accordingly, the reason M & H has refused to provide any proof of its authority to represent Citibank is likely because it has none. And it is the Petersons’ position the legislature has no authority to allow M & H as lawyers the right to bring a case in the superior court without standing than it has to allow these lawyers to violate the Constitution. *See e.g. In re Elliott*, 74 Wn.2d 600, 446 P.2d 347 (1968).

CH. 2.44 RCW relating to “attorneys-at-law” was first enacted in 1863. It was amended in 1881, and then again amended in 2011⁴. CH 2.44 became state law in 1889 by way of ratification of the Washington Constitution. *See Wash. Const. art. XXVII § 2*⁵. In interpreting its meaning courts must

⁴ See Certification of Enrollment, Senate Bill 5045, 62nd Legislature, 2011 Regular Session REVISED CODE OF WASHINGTON -- TECHNICAL CORRECTIONS, EFFECTIVE DATE: 7/22/11, p. 30, accessible at <http://lawfilesexternal.wa.gov/biennium/201112/Pdf/Bills/Session%20Laws/Senate/5045.SL.pdf?cite=2011%20c%20336%20C2%A7%2059>;

⁵ This Constitutional provision states:

view this statute in the context of the time in which it was written.

RCW 2.44.030 was written during the period of time that the United States Supreme Court was establishing law that attorneys cannot not invoke the judicial power of Article III courts if they do not represent the parties they claim to represent. Further, that all cases involving false attorneys purporting to represent clients they do not are nullities. See *e.g. Shelton v. Tiffin*, 47 U.S. (6 How.) 163, 12 L. Ed. 387 (1848); (Attorney's appearance without party's consent was a nullity and resulted in a void sheriff's sale.); *Lord v. Veazie*, 49 U.S. (8 How.) 251, 255-256 (1850) ("The whole proceeding [where the plaintiffs did not have standing] was in contempt of the court, and highly reprehensible, . . . A judgment in form, thus procured, in the eye of the law is no judgment of the court. It is a nullity, . . ."); *Hatfield v. King*, 184 U.S. 162, 22

All laws now in force in the Territory of Washington, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature: Provided, That this section shall not be so construed as to validate any act of the legislature of Washington Territory granting shore or tide lands to any person, company or any municipal or private corporation.

S. Ct. 477, 46 L. Ed. 481 (1902) (A decree entered against persons not served with process, but for whom an unauthorized appearance has been entered by an attorney, was a nullity which must be reversed.)

Washington's principles of standing are much like those the federal courts use to comply with U.S. Const. art. III "case and controversy" jurisprudence applicable to courts of limited jurisdiction. See Petersons' Opening brief, pp. 11-14, which argued that allowing roving bands of lawyers who do not actually represent those Plaintiffs they claim demeans that judicial integrity expected of courts of justice in the United States. *Id.* at p. 12.

Lawyers, like M&H, claiming to represent plaintiffs with whom they have no attorney-client relationship is unfair, deceptive, and profane. Such dishonest procedures are contemptuous of that justice which is the goal of courts in America's republican government. Such false claims by attorneys, like M&H, to be representing clients they do not represent obstructs those accessways to justice, which the Supreme Court has declared must be left clean and open in

these regards. *See* Opening Brief, 11–18.

It is difficult to understand how modern day jurists in Washington, without a single word of explanation, can ignore these hallowed rules of standing which are designed to provide justice from the courts for the people of Washington.

Finally, M & H attorneys argue:

Even if this court was to determine that MH was required to provide evidence that it did in fact represent Respondent, the correct course of action would be to remand the matter for further review of the trial court and to allow Respondent to enter proof of representation into the record.

Answering Brief, p. 6.

The Petersons disagree. M & H attorneys had their chance to show they had authority to represent the Plaintiff, and either could not, or chose not to do so. The standing cases cited by the Petersons at pages 11–14 of their Opening Brief and at page six above demonstrate that the penalty for failing to substantiate standing at the time the case is brought is cause for dismissal because of the fraud on the court and the other parties renders the proceedings a nullity.

A case which simply remands for a showing of standing and is based on jurisdictional considerations similar to those

which now exist in Washington is *PNC Mortg. v. Romero*, 2016-NMCA-064, 377 P.3d 461 (2016). But *PNC Mortg.* is not based on the type of attorney fraud which is involved in this case.

III. REPLY TO M&H's Response B

Fay Servicing's agency relationship with Plaintiff/Respondent allows it to incur costs that are ultimately reimbursed by Plaintiff/Respondent as beneficiary of the loan. M&H's Answering Brief, pp. 6-7.

M & H's argument that Fay's agency relationship allowed the real plaintiff to incur attorney fees that the Petersons must pay only addresses the second issue of law relating to the second assignment of error. That issue as stated in the Petersons' Opening Brief is:

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)

Opening Brief, p. 2.

Conceding that both the note and deed of trust allow only the named Plaintiff, *i.e.* Citibank, to recover attorney fees, M & H now argues that Fays Servicing, its actual client, was Citibank's agent for purposes of incurring attorney fees. M & H

explains *without having offered any proof* that its client Fay Servicing “collects the payments and forwards them on to Respondents, minus a fee.” Answering Brief, p. 6.

According to M & H:

The natural corollary of that [M & H’s assertion that Fay Servicing is an agent for Citibank] is that Respondent [Citibank] is also then responsible for any costs and fees incurred by Fay Servicing in foreclosing on the note. Therefore, Respondent is entitled to attorney’s fees and costs may have initially been paid by Fay Servicing to MH.

Id. at p. 7

The problem with this assertion is that both the note and the deed of trust require the attorney fees be reimbursed to the lender for costs the lender has paid. Here it is admitted the lender has not paid any attorney fees so there is no need to reimburse them.

While M & H and Fay Servicing assert on Appeal that there was an agency relationship between the unrepresented Plaintiff, Citibank, and Fay Servicing, an alleged servicer, neither of them presented any evidence establishing the parameters of the purported agency relationship.

The burden of establishing an agency relationship is on

the party asserting it exists. *Afoa v. Port of Seattle*, 191 Wn.2d 110, 126, 421 P.3d 903 (2018); *Hewson Constr. v. Reintree Corp.*, 101 Wash. 2d 819, 823, 685 P.2d 1062 (1984).

The traditional rules of agency apply here: “[A]n agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control.” *Moss v. Vadman*, 77 Wn.2d 396, 402-03, 463 P.2d 159 (1969).

There was no evidence before the superior court (or is there now before this Court) that Citibank approved of Fay Servicing acting as its agent in retaining M&H to act as Citibank’s attorney nor to pay M & H’s attorney fees. And even if there was some evidence with regard to this, resolution of the agency issue would be a factual one which should be decided in the context of a trial, not a motion for summary judgment. See *Afoa v. Port of Seattle*, *supra*. See also *Lisson v. Wells Fargo Bank, N.A.*, No. 50909-1-II, 2019 Wn. App. LEXIS 2061, at *20-26 (Ct. App. Aug. 6, 2019)(**Unpublished**).

IV. REPLY TO M & H's Response C

Since Defendant/Appellant is still living, the burden of proving the Note was fraudulent lies on Defendant/Appellant. M & H's Answering Brief, pp. 7-9.

At pages 18 through 21 of their Opening Brief the Petersons argued that their, *i.e.* Daniel and Kristi Petersons signatures on the note were not genuine. Further, the Petersons pointed out that their denial of the validity of signatures in their Answer also challenged the validity of the endorsements on the note by Countrywide Bank and Countrywide Document Custody Service before the endorsement of First Magnus, the original lender, in blank, on an allonge attached to the note after it had been signed by the Countrywide entities. *See* Opening Brief, pp 21-24.

In this regard the Petersons asserted that paragraph six of their Answer was intended to put M & H and Fay Servicing on notice that they challenged the authenticity of the note being relied upon for all purposes; including these endorsements.

In response M & H and Fay argued that the presumption in favor of the validity of the Peterson's signatures could not

be rebutted because neither Dan nor Kristi Peterson were dead or incapacitated. *See* Answering Brief, pp. 7–9.

M & H offered no cases from any jurisdiction to support this “dead or incapacitated” theory. (Probably because there are none.) Instead M & H argued this result was mandated by the language of RCW 62A.3-308(a), which provides:

(a) In an 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, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature. If an action to enforce the instrument is brought against a person as the undisclosed principal of a person who signed the instrument as a party to the instrument, the plaintiff has the burden of establishing that the defendant is liable on the instrument as a represented person under RCW 62A.3-402(a).

M & H’s suggestion that there is no way for the Peterson’s to present evidence to rebut the factual presumption in favor of validity of their signatures on the note because neither is dead or incapacitated is ludicrous. Indeed, M & H’s argument goes against the plain language of the

statute.

The framers of this provision outright state the presumption created by RCW 62A.3-308 can be rebutted by evidence. The Comment to RCW 62A.3-308 provides in its subsection 1 that:

. . . The presumption rests upon the fact that in ordinary experience forged or unauthorized signatures are very uncommon, and normally any evidence is within the control of, or more accessible to the defendant⁶. The defendant is therefore required to make some sufficient showing of the grounds for the denial before the plaintiff is required to introduce evidence. *The defendant's evidence need not be sufficient to require a directed verdict, but it must be enough to support the denial by permitting a finding in the defendant's favor. Until introduction of such evidence the presumption requires a finding for the plaintiff. Once such evidence is introduced the burden of establishing the signature by a preponderance of the total evidence is on the plaintiff. **The presumption does not arise if the action is to enforce the obligation of a purported signer who has died or become incompetent before the evidence is required, and so is disabled from obtaining or introducing it. . . .***

Official Comment, U.C.C. § 3-308 (1) (Emphasis Supplied).

⁶ At least some courts question whether this presumption is appropriate given the prevalence of robo-signing. *Espey v. Select Portfolio Servs.*, 240 N.C. App. 293 n.1, 772 S.E.2d 264 (2015)

Additionally, RCW 62A.1-206 states:

Whenever this title [*i.e.* the Washington UCC] creates a ‘presumption’ with respect to a fact, or provides that a fact is ‘presumed’, the trier of fact must find the existence of the fact unless and until evidence is introduced that supports a finding of its nonexistence.

Thus, the plain language of the UCC, as adopted in Washington, refutes M & H’s argument that the presumption cannot be attacked⁷.

Romano's Carryout, Inc. v. P.F. Chang's China Bistro, Inc., 2011-Ohio-4763, ¶¶ 13-14, 196 Ohio App. 3d 648, 654, 964 N.E.2d 1102, 1107 (2011) is a case much like this one in that it involved a misspelled name. There the defendant challenged that the endorser of a negotiable instrument misspelled his own name and this evidence rebutted the presumption created by UCC 3.308. The Ohio court of appeals observed that not only was the misspelling enough to rebut

⁷ Washington appellate case law interpreting RCW 62A.3-308 (which is sparse and only from courts of appeal) also suggests that if 1.) an answer challenging the endorsements is filed; and 2.) evidence challenging the presumption is offered and admitted in response to a motion for summary judgment, the issue of the note’s validity becomes one of fact for trial. See *e.g. CitiMortgage, Inc. v. Moseley*, No. 50895-8-II, 2019 Wash. App. LEXIS 492 at *15-16 (Ct. App. Mar. 5, 2019); *Bucci v. Nw. Tr. Servs., Inc.*, 197 Wash. App. 318, 332, 387 P.3d 1139 (2016); *U.S. Bank Nat’l Ass’n v. La Mothe*, No. 72526-2-I, 2016 Wash. App. LEXIS 394 (Ct. App. Mar. 7, 2016).

the presumption, it was enough to affirm a verdict holding that that the endorsement was not valid.

In order to challenge the authenticity of, or the authority to make, a signature on a check, a defendant must specifically deny the validity of the signature in its answer. R.C. 1303.36(A); *Fifth Third Bank v. Jones-Williams*, 10th Dist. No. 04AP-935, 2005 Ohio 4070, If a defendant does so, the burden of establishing validity is on the plaintiff. R.C. 1303.36(A). In carrying this burden, the plaintiff has the benefit of a rebuttable presumption that the signature is authentic and authorized. *Id.* Thus, the trier of fact must presume the validity of the signature unless and until the defendant introduces evidence that would support a finding that the signature is unauthentic or unauthorized. *Id.*; R.C. 1301.01(E) (definition of "presume"). To rebut the presumption, the defendant need not present the quantum of evidence necessary for the grant of a directed verdict; *rather, the defendant must only present evidence sufficient to permit the trier of fact to make a finding in the defendant's favor. Dryden v. Dryden (1993), 86 Ohio App.3d 707, 712, 621 N.E.2d 1216; Uniform Commercial Code Official Comment (1990), Section 3-308, Comment 1. If the defendant succeeds in rebutting the presumption, then the plaintiff bears the burden of proving the validity of the signature by a preponderance of the total evidence. Id.*

In the case at bar, Romano's claimed that because it was the holder of the payroll check issued to Garcia, P.F. Chang's owed it payment once Bank of America dishonored the check. P.F. Chang's challenged Romano's holder status by attacking the validity of the endorsement. In its

answer, P.F. Chang's "specifically denie[d] the authenticity of, and the authority to make, the signature of Defendant Garcia on the instrument at issue." Answer, at ¶2.

At trial, P.F. Chang's pointed out that Garcia's last name was misspelled in the endorsement. Because the probability of a person misspelling his or her own name is remote, this evidence rebutted the presumption of validity. Romano's, then, had to prove the validity of Garcia's alleged signature. . . .

Here, the superior court was not entitled to weigh the “misspelling” of Kristi’s name (*see* CP 31–32) pursuant to M & H’s motion for summary judgment because this evidence would be sufficient to sustain the Petersons’ position at trial. *See Keck v. Collins*, 184 Wn.2d 358, 369, 357 P.3d 1080 (2015) (quoting *Preston v. Duncan*, 55 Wn.2d 678, 683, 349 P.2d 605 (1960)(quoting *Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir. 1940)). *See also Smalls v. Wells Fargo Bank, N.A.*, 180 So. 3d 910, 915-19 (Ala. Civ. App. 2015). *See also* cases cited *infra*, at pp. 20–21.

V. REPLY TO M & H’s Response D

*The Note and Deed of Trust were never split,
Plaintiff/Respondent holds the original Note, and chain of title
is irrelevant to enforcing the obligation under the Note.*

M & H Answering Brief, pp. 9–12.

M & H next argues on behalf of their client Fay Servicing (neither of which have demonstrated standing to be in this Court representing the named Plaintiff, *i.e.* Citibank,) that the note and its allonge can be read in such a way as to make Citibank the holder. Brief, pp. 9–10. And then M & H argues the superior court resolved this factual issue in M & H’s favor pursuant to its summary judgment motion by weighing this factual evidence and arriving at this result. *Id.*

The problem with M & H’s argument is the evidence of the order of the endorsements and allonge (*See* Opening Brief, pp. 21–24 and CP 31–32) could have caused a jury to resolve the factual issue in a different way which would have resulted in a verdict in favor of the Petersons. *See e.g. LSF9 Master Participation Tr. v. Wils*, No. A-1-CA-37386, 2019 N.M. App. Unpub. LEXIS 329, at *2-4 (Ct. App. Apr. 15, 2019)(**Unpublished**); *Hebert v. Torbert*, 2017-1628 (La. App. 1 Cir 01/07/19)(**Unpublished**); *Smalls v. Wells Fargo Bank, N.A.*, 180 So. 3d 910, 915-19 (Ala. Civ. App. 2015); *Lee v. Suntrust Bank*, 314 Ga. App. 63, 63-66, 722 S.E.2d 884, 885-86 (2012); *Citizens Bank v. Cross*, No. PB00-1596, 2005 R.I. Super. LEXIS 85, at *9 (Super. Ct.

May 18, 2005).

The superior court had no right to usurp the jury's role in deciding this factual issue. *See Keck v. Collins, supra.*

In *Congress v. U.S. Bank, N.A.*, 98 So. 3d 1165 (Ala. Civ. App. 2012) the defendant sought reversal of a summary judgment which required her to prove by clear and convincing evidence that an allonge was fabricated. The facts in *Congress* were similar to those involved here, *i.e.* it was not clear that the plaintiff was a holder of the note.

In *Congress* the Alabama court of appeals held the trial court should have evaluated the issue of whether the allonge had been created after the fact under the preponderance-of-the-evidence standard established by the UCC. The same is true here.

The superior court below should have considered whether this evidence, *i.e.* the order of the endorsements on the note and subsequently affixed allonge, could have sustained a finding by a jury that the note had not become bearer paper—thereby requiring M & H and Fay Servicing foreclose on the note pursuant to the chain of title set forth

the April 22, 2016, assignment of the deed of trust. See CP 45–46. This assignment is from “Bank of America, N.A. successor by merger to BAC Home Loans Servicing, LP, FKA Countrywide Home Loans Servicing, LP” to the named plaintiff in this case, an entity that is not represented here. See CP 45–46.

No evidence was presented to the superior court that the Petersons’ note was actually transferred to Bank of America N.A. as a result of any merger with BAC or *Countrywide Home Loan Servicing*. This is problematic because the endorsements on the note and allonge, CP 14–15, do not suggest that the note or deed was ever held or owned by *Countrywide Home Loans Servicing, LP*. Yet the chain of title in the Mason County Auditor's Records, CP 45–46, asserts that Bank of America N.A. transferred its ownership interest in the loan (which it obtained from BAC Servicing as a result of a merger with Countrywide Homes Loan Servicing) to Citibank. *Id.* The problem here is a lack of evidence that either BAC or Countrywide Servicing ever owned either the note or deed of trust security instrument.

The trouble here, similar to the trouble in *Conley*, is Mellon's link to Bank of NY and Bank of NY's link to JP Morgan. Because the final special indorsement is to JP Morgan, Mellon needed to evidence how it obtained the Note or interest. It claims to have it because Bank of NY is a successor to JP Morgan and Mellon is the new Bank of NY. However, the record does not establish either of those necessary links.

Mellon relies on the Note, three assignments of mortgage, two change in servicer letters, a power of attorney, a Pooling & Servicing Agreement, and payment history. None of these proves standing. To begin, the Note indorsement to JP Morgan is insufficient because it does not close the gap between JP Morgan and Mellon. Nothing shows how or to what extent Bank of NY acquired assets of JP Morgan; i.e., that Bank of NY was a successor in interest of any or all of JP Morgan's assets. ...

Certo v. Bank of N.Y. Mellon, 268 So. 3d 901, 903-04 (Fla. Dist. Ct. App. 2019).

This Court, Division II, also held in *JP Morgan Chase Bank, N.A. v. Morton*, No. 49846-4-II, 2018 Wn. App. LEXIS 700 (Ct. App. Mar. 27, 2018)(**Unpublished**) that evidence must be presented in order to establish that a note and Security Instrument have been obtained by way of merger. *Id.* at *12-13.

Finally, M & H and Fay Servicing argue on behalf of the

named Plaintiff (who M & H does not represent) that there is no evidence the note and deed of trust have been split from one another because the note and deed of trust cannot be separated as a matter of law. Answering Brief, pp. 11–12.

But M & H’s assertion in this regard is not consistent with the Supreme Court’s holding in *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012) that the note and deed of trust can be separated from one another based on the principles set forth in the *Restatement (Third) of Property: Mortgages* § 5.4 (1997), which states in pertinent part: “(a) A transfer of an obligation secured by a mortgage also transfers the mortgage *unless the parties to the transfer agree otherwise.*” (Emphasis supplied)

In *Bain* MERS argued the intent of the MERS’ Security Instrument was to separate the Note from the security instrument in such a way that MERS became the holder and legal owner of the deed of trust security instrument. *Bain*, at 175 Wn.2d at 100–01.

The deed of trust security instrument M & H claims applies here, CP 17–32, demonstrates the parties agreed

MERS has both legal and beneficial ownership of the Security Instrument and that the lender owns the Note.

. . . Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to releasing and cancelling the this Security Instrument.

CP 20.

The question in *Bain* was whether the parties could consistent with the Deeds of Trust Act, CH 61.24 RCW, establish MERS as a beneficiary. The legal question here is whether the deed of trust (CP 17–32) constitutes an agreement between the parties that the note was intended to be split from the deed of trust security agreement. See Opening Brief, pp. 27–28 citing *Robinson v. Am. Home Mortg. Servicing, Inc.*, 754 F.3d 772 (9th Cir. 2014) and *Robinson v. Am. Home Mortg. Servicing, Inc. (In re Mortg. Elec. Registration Sys.)*, 754 F.3d 772 (9th Cir. 2014)(holding the same note and deed of trust documents split the deed of trust from the note.)

The law in Washington is that contract interpretation is a question of fact for the fact-finder. *See, e.g., Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990) (distinguishing contract interpretation, a question of fact, from contract construction, a question of law); *See also Hansen v. Transworld Wireless TV-Spokane, Inc.*, 111 Wn. App. 361, 376, 44 P.3d 929 (2002) (“Whether there was mutual assent is a question of fact for the jury.”); *In re Estate of Richardson*, 11 Wn. App. 758, 761, 525 P.2d 816 (1974) (“The existence of a contractual intention is a fact question to be resolved by the trier of the facts.”).

The issue of whether the note and deed of trust evidence an intention of the parties to split the note and security instrument into two different instruments controlled by different parties is a question of fact for a jury to resolve. If the jury finds this was the intention of the parties (and the Petersons claim it was) then the court would have to determine whether it should be given effect.

Washington judges cannot expect that the people will long continue to accept the courts are a legitimate third

branch of government where (1) they openly operate without attempting to provide justice for the people; and (2) usurp the peoples' rights to a trial by a jury in virtually all instances just as the superior court systematically did in this case. Judicial tyranny cannot be expected to promote peace and stability in a society when justice is never achieved by those who must confront the wealthy.

VI. Conclusion

This court should reverse the summary judgment in favor of Citibank, an unrepresented party, as a nullity for lack of standing. Alternatively, the Court should remand this case to the superior court for trial if M&H is allowed to present evidence it is Citibank's attorney.

DATED this 26th day of December, 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 Reply Brief was served by this Court's electronic case filing system.

Dated this 26th day of December, 2019, in Arlington, Washington.

By: /s/ LeeAnn Halpin
LeeAnn Halpin, Paralegal

STAFNE LAW ADVOCACY & CONSULTING

December 26, 2019 - 4:52 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53747-8
Appellate Court Case Title: Citibank, Respondent v. Daniel Peterson and Kristi Peterson, Appellants
Superior Court Case Number: 16-2-00654-3

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