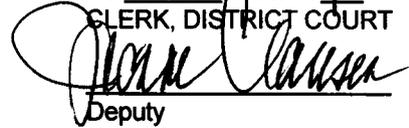


STATE OF IDAHO )  
County of KOOTENAI )<sup>ss</sup>

FILED 5/28/2020

AT 4:30 O'Clock P. M  
CLERK, DISTRICT COURT

  
Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**WILMINGTON SAVINGS FUND SOCIETY,  
FSB, d/b/a CHRISTIANA TRUST, NOT  
INDIVIDUALLY BUT AS TRUSTEE FOR  
PREMIUM MORTGAGE ACQUISITION  
TRUST,**

*Plaintiff,*

vs.

**RICHARD E. DULLANTY (Deceased)  
Unknown Heirs, Assigns and devisees of  
RICHARD E. DULLANTY; EDWARD  
DULLANTY; ANNETTE DULLANTY;  
RICHARD E. DULLANTY; DR. HOWARD  
PLATTER, PERSONAL  
REPRESENTATIVE  
OF THE ESTATE OF VIRGINIA M.  
DULLANTY; RICHARD AND VIRGINIA  
LAKE TRUST; and DOES 1-10, as  
Individuals with an interest in the  
property legally described**

**as:**

**LOT 3, BLOCK A, ROCKFORDBAY  
SUMMERHOMES, ACCORDING TO THE  
PLAT RECORDED IN BOOK "C" OF  
PLATS AT PAGE 219, RECORDS OF  
KOOTENAI COUNTY, IDAHO.**

**Which may be commonly known as: 6916  
W. Boutwell Dr., Coeur d'Alene, Idaho  
83814,**

*Defendants.*

Case No. **CV 2017 581**

**MEMORANDUM DECISION  
AND ORDER GRANTING  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT**

## I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on a Motion for Summary Judgment filed by plaintiff, Wilmington Savings Fund Society (hereinafter "Wilmington Savings"). Wilmington Savings has moved for summary judgment against all the defendants, but only the defendants Trustees of the Richard and Virginia Lake Trust and Dr. Howard Platter as Personal Representative of the Estate of Virginia Dullanty, have responded. Oral argument was held on May 26, 2020, at which time the motion was taken under advisement.

This case is a foreclosure initiated over three years ago, on January 17, 2017, by plaintiff Specialized Loan Servicing LLC, predecessor to the current plaintiff, Wilmington Savings. The foreclosure is on real property located at 6916 W. Boutwell Drive, Coeur d'Alene, Idaho (hereinafter the "Property"). The Property was originally owned by Richard E. Dullanty and Virginia Dullanty, husband and wife (hereinafter "Richard and Virginia").

On October 31, 2005, Richard and Virginia conveyed by warranty deed an undivided  $\frac{1}{2}$  interest in the Property to their son, Edward James Dullanty and his wife Annette Lynn Dullanty, (hereinafter "Edward and Annette"). On January 31, 2007, Edward and Annette, signed a Note to borrow \$300,000.00 from Washington Mutual Bank, FA. Aff. Of Costs and Computation of Interest Ex. A. This note was not signed by Richard and Virginia, but a Deed of Trust was signed on the same day (January 31, 2007). *Id.* at Ex. B. This Deed of Trust encumbers the Property and names Edward, Annette, Richard, and Virginia, as "Borrowers" to the \$300,000.00 loan. *Id.* The Deed of Trust was signed by Edward, Annette, Richard, and Virginia. *Id.*; Pl's. Reply in Supp. of Mot. for Summ. J. 3.

Richard was deceased prior to this lawsuit. Pl's. Reply in Supp. of Mot. for Summ. J. 4. Virginia was still alive at the inception of this lawsuit, as she verified her Answer to the Complaint. At some point, Virginia has passed away, apparently not long before the Stipulation to Amend Complaint was filed on April 11, 2019. The Loan and Deed of Trust were subsequently assigned to Wilmington Savings. *Id.* Additionally:

A year before getting the loan from Washington Mutual, the Dullantys filed suit against Park Addition to Rockford Bay Homes to quiet title to a strip of land adjacent to the Property. The Dullantys claimed ownership through adverse possession. The Dullantys prevailed, a Judgment was entered on March 2, 2010, and a strip of land was quieted in favor of the Dullantys. Under the terms of the Deed of Trust, the newly acquired strip of property also became encumbered by the Deed of Trust as part of the Property. On November 22, 2011, Richard and Virginia conveyed their remaining ½ interest in the Property to the Trust by quitclaim deed. The Quitclaim Deed was recorded on February 8, 2012 in Kootenai County land records as Instrument Number 2345301000. After their conveyance to the Trust, neither Richard nor Virginia had any individual or community interest in the Property.

*Id.* at 3-4. There does not appear to be any dispute on: the facts surrounding the ownership of the property, the conveyance of the property, the loan and deed of trust, the assignment of the loan and deed of trust from Washington Mutual to Specialized Loan Servicing to Wilmington Savings, the quiet title of the adversely possessed property, and the conveyance of Richard and Virginia's remaining interest in the Property.

The only Issue before this Court regarding the Motion for Summary Judgment is an issue raised by defendants Trustees of the Richard and Virginia Lake Trust and Dr. Howard Platter as Personal Representative of the Estate of Virginia Dullanty which asserts that "[t]here is a genuine issue of material fact as to Richard E. Dullanty's competency to sign the Deed of Trust." Defs'. Opp'n. to Pl's. Mot. for Summ. J. 4.

As mentioned above, Specialized Loan Servicing filed its Complaint on January 17, 2017. Virginia filed an answer on August 7, 2017. Edward and Annette filed an

Answer on December 20, 2017. Richard C. Dullanty, Robert Dullanty, and Kay Kennedy, as Trustees of the Richard and Virginia Lake Trust filed an Answer on November 8, 2018. Wilmington Savings filed an Amended Complaint on April 16, 2019. Richard, through counsel, filed an Answer to Amended complaint on May 29, 2019. Dr. Howard Platter, personal representative to the Estate of Virginia M. Dullanty filed an Answer to Amended Complaint on May 29, 2019.

On November 29, 2018, Wilmington Savings filed a Motion for Summary Judgment, a Memorandum in Support of Summary Judgment, an Affidavit of Counsel in Support of Motion for Summary Judgment, and an Affidavit of Costs Due and Computation of Interest. That motion was initially scheduled for hearing on January 31, 2019, and was rescheduled for February 25, 2019. No hearing took place on that motion and no defendant filed a response memorandum to that motion.

On November 14, 2019, counsel for defendants Edward and Annette Dullanty filed a Motion to Withdraw as their attorney. Hearing on that motion was held on December 5, 2019, and that motion was granted. On December 6, 2019, this Court entered its Order Granting Leave to Withdraw as Counsel of Record for Edward Dullanty and Annette Dullanty, which ordered that Edward and Annette Dullanty had twenty-one days to state how they would represent themselves or have new counsel appear, or they would be in default. They did neither. Accordingly, they are in default, though no party has moved for default or moved for a default judgment.

On April 3, 2020, Wilmington Savings filed the instant Motion for Summary Judgment, a Memorandum in Support of Motion for Summary Judgment, and an Affidavit of Costs Due and Computation. Trustees of the Richard and Virginia Lake Trust and Dr. Howard Platter as Personal Representative of the Estate of Virginia Dullanty filed an Opposition to Plaintiff's Motion for Summary Judgment and a

Declaration of Howard Platter on May 12, 2020. Wilmington Savings filed a Plaintiff's Reply Memorandum in Support of its Motion for Summary Judgment on May 19, 2020.

This case was scheduled for a three-day court trial to begin on April 14, 2020. Due to the Idaho Supreme Court's emergency orders related to the COVID 19 pandemic, that trial was cancelled. On May 26, 2020, at the hearing on Wilmington Savings' Motion for Summary Judgment, the Court scheduled the court trial to begin on January 11, 2021.

## **II. STANDARD OF REVIEW**

Idaho Rule of Civil Procedure 56 governs motions for summary judgment. According to Rule 56, summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." I.R.C.P. 56(a). A party asserting that there is no genuine dispute as to any material fact, or a party asserting that a genuine dispute exists, must support that assertion by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." I.R.C.P. 56(c).

If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

- (1) give an opportunity to properly support or address the fact;
- (2) consider the fact undisputed for purposes of the motion;
- (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
- (4) issue any other appropriate order.

I.R.C.P. 56(e).

The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). “Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party” to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)). To do so, the non-moving party “must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact.” *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009) (citing *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007)). “Circumstantial evidence can create a genuine issue of material fact. . . . However, the non-moving party may not rest on a mere scintilla of evidence.” *Shea v. Kevic Corp.*, 156 Idaho 540, 545, 328 P.3d 520, 525 (2014) (quoting *Park West Homes, LLC v. Bamson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240, 16 P.3d 915, 919 (2000). When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. *State Dep’t of Fin. v. Res. Serv. Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249, 252 (1997).

*Edmondson v. Shearer Lumber Prod.*, 139 Idaho 172, 176, 75 P.3d 733, 737 (2003).

The moving party may also meet “the ‘genuine issue of material fact’ burden. . . by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial.” *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). “Such an absence of evidence may be established either by

an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking." *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000) (citing *Dunnick* at 311, 882 P.2d at 478).

Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial, or to offer a valid justification for the failure to do so under [I.R.C.P. 56(d)]. *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994) (alteration added).

*Dunnick* at 311, 882 P.2d at 478; see also *Heath* at 712, 8 P.3d at 1255.

### III. ANALYSIS

Wilmington Savings asks this Court to rule that, "[t]he obligations due under the Note and Deed of Trust are in default and Plaintiff is entitled to foreclose under the terms of the Note and Deed of Trust." Mem. in Supp. of Mot. for Summ. J. 10. "In addition, the summary judgment order should include the additional property acquired by the Borrowers through adverse possession." *Id.*

The defendants Trustees of Richard and Virginia's Trust (Trustees), as well as the Personal Representative of the Estate of Virginia, Dr. Howard Platter (Dr. Platter), "ask this Court to deny the relief requested by Plaintiff's Motion for Summary Judgment" (Defs'. Opp. to Pl's. Mot. for Summ. J. 2), because, "[t]here is a genuine issue of material fact as to Richard E. Dullanty's competency to sign the Deed of Trust." *Id.* at 4. Dr. Platter is not only the Personal Representative of the Estate of Virginia Dullanty, but is also the disclosed expert for himself in his capacity as Personal Representative of the Estate of Virginia Dullanty. Defendants' Expert Witness Disclosure Filed July 15, 2019, 1-3.

Trustees and Dr. Platter (hereinafter “Defendants”) argue that “[b]ased on Dr. Platter’s interactions, he suspected Richard E. Dullanty had dementia in the 1990s and became convinced he had classic Alzheimer’s in 2003. *Id.* at 5 (citing Platter Dec. p. 2 ¶ 4,6). Additionally, “It is the professional opinion of Dr. Platter that Richard E. Dullanty did not understand the Deed of Trust which was executed by him on January 31.” *Id.* (citing Platter Dec. p. 3 ¶ 9). Finally, the Defendants argue that “Dr. Platter’s testimony creates a question of fact as to whether Richard E. Dullanty possessed sufficient mind to understand, in a reasonable manner, the nature, extent, character, and effect of the Deed of Trust on January 31, 2007.” *Id.*

Dr. Platter states in his Declaration that “I suspect Richard E. Dullanty had Dementia in the 1990s and became convinced he had classic Alzheimer’s in 2003.” Decl. of Howard Platter 2, ¶ 5. Dr. Platter goes on to state that “[o]n January 31, 2007, Richard E. Dullanty was suffering from Alzheimer’s disease[,]” and “[b]ased on my interactions with Richard E. Dullanty over the course of many years, it is my professional opinion that as a result of his Alzheimer’s (sic) disease, Richard E. Dullanty could not and did not understand documents to which he was signing on January 31, 2007.” *Id.* at ¶¶ 7, 8. Finally, Dr. Platter states that “[a]s a result of his Alzheimer’s (sic) disease and based on my many interactions with Richard E. Dullanty, it is my professional opinion that Richard E. Dullanty did not understand the Deed of Trust which was executed by him on January 31, 2007.” *Id.* at ¶ 9.

Wilmington Savings makes four arguments in response to the Defendants assertions:

First, Edward and Annette’s ½ interest was properly encumbered. Second, the Trust and Estate have no legal standing to challenge the validity of the Deed of Trust. Third, there are no material facts to support the conclusion that Richard was incompetent at the time he signed the

Deed of Trust. And, fourth, Dr. Platter's opinion is immaterial, lacks foundation, and is inadmissible.

Pls'. Reply in Supp. of its Mot. for Summ. J. 5.

**A. Edward and Annette's ½ interest is encumbered by the Deed of Trust.**

Wilmington Savings argues that:

Edward and Annette (the children) owned a 1/2 interest in the Property, and their signatures on the Deed of Trust encumbering their 1/2 interest are not challenged. Richard and Virginia (the parents) only owned a 1/2 interest in the Property when they signed the Deed of Trust. Even if Richard were incompetent in 2007 When he signed the Deed of Trust, it does not affect the validity of the Deed of Trust encumbering Edward and Annette's 1/2 interest. Thus, there is no basis for the Court to deny Plaintiff's ability to foreclose on Edward and Annette's ½ interest.

*Id.*

The Motion for Summary Judgment regarding foreclosure of Edward and Annette's ½ interest in the Property is granted because no genuine issue of material fact exists. Richard and Virginia conveyed an undivided ½ interest in the Property to Edward and Annette in 2005 (*Id.* at 3 (citing Kootenai County land records November 1, 2005 as Instrument Number 1992524)), and no argument has been presented to dispute this fact or argue why foreclosure on the property for their ½ interest is not appropriate. Additionally, Edward and Annette Dullanty are in default.

**B. The Trust does not have standing and the Estate does not have standing to challenge the validity of the Deed of Trust.**

Wilmington Savings argues that the Trust and Estate have no standing to Challenge the Validity of the Deed of Trust because "[a]n encumbrance signed in violation of I.C. §32-912 is not *void*, but is *voidable by the non-signing spouse*. *Id.* at 6.

Wilmington Savings argues that the Estate has no standing because:

The Estate represents the signing spouse (Virginia), not the non-signing spouse (Richard). The statute was not intended to protect Virginia or her Estate from Virginia's own voluntary action of encumbering her interest in

the Property. The Estate thus has no standing to challenge the Deed of Trust.

*Id.* at 6. Additionally, Wilmington Savings argues that the Richard and Virginia Lake Trust (hereinafter the “Lake Trust”) has no standing because:

Richard and Virginia conveyed their 1/2 interest in the Property to the Trust on or around November 16, 2011. As a result of that conveyance, neither Richard nor Virginia retained any right, title or interest in the Property. The Trust took title to the Property subject to all encumbrances and without any warranty of title.

The Trust is a separate entity from Richard and Virginia’s marital community. As an unrelated third party to the Deed of Trust, the Trust cannot use the marital community laws “as a sword” to challenge the validity of a transaction between two spouses. *New Phase Investments, LLC v. Jarvis*, 153 Idaho 207, 210, 280 P.3d 710, 713 (2012). The Trust, therefore, has no standing to challenge the validity of the Deed of Trust.

*Id.* at 6, 7. Idaho Code Ann. § 32-912 reads:

Either the husband or the wife shall have the right to manage and control the community property, and either may bind the community property by contract, except that neither the husband nor wife may sell, convey or encumber the community real estate unless the other joins in executing the sale agreement, deed or other instrument of conveyance by which the real estate is sold, conveyed or encumbered, and any community obligation incurred by either the husband or the wife without the consent in writing of the other shall not obligate the separate property of the spouse who did not so consent; provided, however, that the husband or wife may by express power of attorney give to the other the complete power to sell, convey or encumber community property, either real or personal. All deeds, conveyances, bills of sale, or evidences of debt heretofore made in conformity herewith are hereby validated.

Finally, Wilmington Savings argues that:

Even if the action were brought by Richard, the non-signing spouse is estopped from later challenging the transaction if they do not take any steps to challenge it and their conduct is consistent with its validity. “[E]ven if an instrument lacks an acknowledgment of a spouse’s signature, the spouse will be deemed to have waived the defect if his or her conduct is consistent with the existence and validity of the instrument.” *Lowry v. Ireland Bank*, 116 Idaho 708, 711, 779 P.2d 22, 25 (Ct. App. 1989). Richard never took any steps to challenge the validity of the Deed of Trust, and that lack of action estops any later challenge.

Plf’s. Reply in Supp. of Mot. for Summ. J. 7.

This Court finds that the Estate representing Virginia has no standing to challenge the validity of the Deed of Trust because Virginia signed the Deed of Trust encumbering the Property, and the protections of I.C. 32-912 can only be invoked to shield a non-signing party from an encumbrance or sale of community property. The Idaho Supreme Court has held that:

although labeling conveyances in violation of Section 32–912 as “void,” the court has, in effect, treated such agreements as “voidable” by the non-signing spouse. In light of the purpose of the statute, the benefit of Section 32–912 is only intended to flow to the non-signing spouse for the protection of his or her interest in community real property, and it is only the non-signing spouse who may ask a court to declare an attempted transfer void under that statute. In other words, the statute is only properly used as a shield by the non-signing spouse to protect an interest in community real property—not as a sword by a third party to defeat an earlier recorded encumbrance.

*New Phase Investments, LLC v. Jarvis*, 153 Idaho 207, 211, 280 P.3d 710, 714 (2012).

Since Virginia is not the non-signing spouse, the Estate of Virginia clearly lacks standing to pursue their claims under I.C. § 32-912.

This Court also finds the Lake Trust has no standing. Going back to the language of *New Phase Investments* mentioned in the paragraph immediately above, it is important that the Idaho Supreme Court further reinforced these findings in a footnote which reads:

New Phase's argument that it essentially became a community member by operation of its deeds of trust is without merit. Although it is true that New Phase acquired a beneficial interest in the Property upon execution of its trust deeds, it does not follow that it also inherited the statutory protections of a community member. Idaho Code § 32–912 governs the property rights of husband and wife, and New Phase cites no authority for the proposition that an assignee of rights to community property is entitled to the same protections those parties have under the statute.

*New Phase Investments, LLC v. Jarvis*, 153 Idaho 207, 211, 280 P.3d 710, 714 (2012) (Footnote 4.). Above, this Court found that the Estate representing Virginia has no

standing to challenge the validity of the Deed of Trust because Virginia signed the Deed of Trust encumbering the Property, and the protections of I.C. 32-912 can only be invoked to shield a non-signing party from an encumbrance or sale of community property, because Virginia is not the non-signing spouse, the Estate of Virginia clearly lacks standing to pursue their claims under I.C. § 32-912. Similarly, this Court finds that the Lake Trust does not have standing to pursue their claims that Richard's incapacity voided the Deed of Trust because the Lake Trust is a separate entity third party that cannot inherit the protections of I.C. § 32-912, which are offered only to the non-signing spouse.

No copy of the terms of the Lake Trust have been offered into the record.

Wilmington Savings stated in their briefing, without citation, that:

Richard and Virginia conveyed their 1/2 interest in the Property to the Trust on or around November 16, 2011. As a result of that conveyance, neither Richard nor Virginia retained any right, title or interest in the Property. The Trust took title to the Property subject to all encumbrances and without any warranty of title.

Pl's. Reply in Supp. of Mot. for Summ. J. 6. It is unknown if this means the trust was revocable, irrevocable, or anything else regarding the terms of the Lake Trust.

Ultimately, the terms of the Lake Trust do not matter in respect to the issue at hand.

What this issue comes down to is that, if Richard was still alive, he could challenge the Deed of Trust for lack of capacity under I.C. § 32-912. Similarly, once Richard died, his Estate could likely challenge the Deed of Trust for lack of capacity under I.C. § 32-912, because Richard's Estate directly represents his interests. The Idaho Supreme Court has made abundantly clear that the signing spouse and third parties cannot invoke the protections of I.C. § 32-912 (see *New Phase Investments, LLC v. Jarvis*, 153 Idaho 211). Therefore, the Lake Trust cannot step into Richard's shoes and inherit Richard's statutory protections because the Lake Trust is a separate entity from Richard. *Id.* This

is true, even if the Lake Trust has been assigned rights to community property of Richard and Virginia. *Id.* Defendant's cite no authority to suggest that an assignee of rights to community property is entitled to the same protections as spouses have under the statute. Additionally, the Lake Trust is an entity which was created not just by Richard but also Virginia, who as the signing party to the Deed of Trust is barred from invoking the protections of I.C. § 32-912.

For the reasons stated above, this Court finds that the Lake Trust does not have standing to pursue their claim that Richard's incapacity voided the Deed of Trust.

**C. Dr. Platter's Declaration does not provide admissible evidence as to whether Richard Dullanty was not competent when he signed the Deed of Trust.**

Defendants have provided evidence, through Dr. Platter's Declaration, that Richard was incompetent when he signed the Deed of Trust on January 31, 2007. Dr. Platter asserts that "[b]ased on my interactions with Richard E. Dullanty over the course of many years, it is my professional opinion that as a result of his Alzheimer's (sic) disease, Richard E. Dullanty could not and did not understand documents to which he was signing on January 31, 2007." Decl. of Howard Platter in Supp. of Defs'. Opp. to Mot. for Summ. J. 2, ¶ 8. Additionally, Dr. Platter states that, "[a]s a result of his Alzhiemer's (sic) disease and based on my many interactions with Richard E. Dullanty, it is my professional opinion that Richard E. Dullanty did not understand the Deed of Trust which was executed by him on January 31, 2007." *Id.* at ¶ 9. This Court must determine whether that evidence is admissible, and if it is, does it create a genuine issue of material fact (as to the question of Richard's competence at the time of signing the Deed of Trust).

The Idaho Supreme Court has set forth the standard of review for trial court determinations on admissibility of evidence:

Trial courts have “broad discretion in the admission of evidence at trial, and [their] decision to admit such evidence will be reversed only when there has been a clear abuse of that discretion.” *Empire Lumber Co. v. Thermal-Dynamic Towers, Inc.*, 132 Idaho 295, 304, 971 P.2d 1119, 1128 (1998). “The same standard applies to the admission of expert testimony.” *Basic American, Inc. v. Shatila*, 133 Idaho 726, 743, 992 P.2d 175, 192 (1999) (citation omitted). In the case of an incorrect ruling regarding evidence, a new trial is merited only if the error affects a substantial right of one of the parties. I.R.C.P. 61; I.R.E. 103; *Hake v. DeLane*, 117 Idaho 1058, 1065, 793 P.2d 1230, 1237 (1990).

*Karlson v. Harris*, 140 Idaho 561, 564, 97 P.3d 428, 431 (2004).

While Dr. Platter’s declaration expresses opinions about Alzheimer’s, such medical diagnosis is not all that helpful in determining the issue this Court must decide. The issue for this Court to decide is whether Richard Dullanty had the capacity to contract. A diagnosis of Alzheimer’s may relate to that question, but does not answer that question. As discussed below, even Dr. Platter’s diagnosis of Alzheimer’s is problematic as it is conclusory and not supported by foundation.

Whether or not Richard Dullanty “understood” the “Deed of Trust” (which is the question Dr. Platter attempts to answer), is not the pertinent question. The Idaho Supreme Court in *Olsen v. Hawkins* set out the rules for judging a person’s capacity or incapacity to contract:

as a general rule, all proceedings involving the competency of an individual to execute a valid contract start with the presumption of competency and that this presumption may be relied upon until the contrary is shown. 29 Am.Jur., *Insane Persons*, § 132, p. 253. Since the presumption is in favor of capacity to contract, he who asserts the incapacity of a person to contract has the burden of proof. 17A C.J.S. *Contracts* § 584b, p. 1124.

90 Idaho 28, 33, 408 P.2d 462, 464 (1965).

“The test of mental capacity to contract is whether the person in question possesses sufficient mind to understand, in a reasonable manner, the nature, extent, character, and effect of the act or transaction in which he is engaged; the law does not gauge contractual capacity by the standard of

mental capacity possessed by reasonably prudent men. It is not necessary to show that a person was incompetent to transact any kind of business, but to invalidate his contract it is sufficient to show that he was mentally incompetent to deal with the particular contract in issue,..."

*Id.* (quoting 17 C.J.S. Contracts § 133(1)e, p. 860).

Thus, when Dr. Platter asserts that because of his "Alzheimer's (sic) disease, Richard E. Dullanty could not and did not understand documents to which he was signing on January 31, 2007" (Decl. of Howard Platter in Supp. of Defs'. Opp. to Mot. for Summ. J. 2, ¶ 8) and "[a]s a result of his Alzhiemer's (sic) disease...Richard E. Dullanty did not understand the Deed of Trust which was executed by him on January 31, 2007" (*Id.* at ¶ 9), Dr. Platter did not directly address the pertinent issue under *Olson*, whether Richard Dullanty possessed "sufficient mind to understand, in a reasonable manner, the nature, extent, character, and effect of the act or transaction in which he is engaged." This Court simply does not know the answer to that question from reading Dr. Platter's Declaration.

Wilmington Savings argues that:

Even if Dr. Platter's opinion were material, Dr. Platter simply offers a conclusive opinion that Richard was suffering from dementia in the 1990s and "was convinced" Richard had "classic Alzheimer's disease in 2003." However, the declaration completely lacks any foundation for Dr. Platter's conclusion. Dr. Platter did not treat Richard, did not diagnose Richard, and there is no evidence that any other doctors diagnosed him. Dr. Platter does not identify any diagnosis made by any other doctors or provide any medical records or review of any records to support his conclusion. Dr. Platter's opinion is based on his limited social interactions with Richard, and not on medical evaluation or treatment. It is therefore not "based upon a reasonable degree of medical probability," but is a mere possibility.

The lack of evidentiary foundation for Dr. Platter's conclusion is significant because it does not create an admissible material issue of fact as to whether on the date of execution of the Deed of Trust, Richard understood the nature of his actions. "[E]xpert opinion which is speculative, conclusory, or unsubstantiated by facts in the record is of no assistance to the jury in rendering its verdict, and therefore is inadmissible." *Coombs v. Curnow*, 148 Idaho 129, 140, 219P.3d453,464 (2009). Dr. Platter was not present at the signing. On the contrary, the

notary personally met with Richard and confirmed that he understood the nature of his actions at the time of signature. Had the notary not believed Richard to be competent at the time of signature, the notary would not have executed the notarial certificate. The notary's contemporaneous personal interaction With Richard at the time of execution of the Deed of Trust must be presumed valid. Dr. Platter was not present at the signing and he has no contrary evidence. Dr. Platter's opinion and conclusions are unsupported by any medical evidence and come 13 years after the event--it is purely speculation as to what occurred 13 years ago.

Dr. Platter's declaration is not objective. He is the Personal Representative for Virginia's Estate. Thus, he is not testifying as a neutral expert, but is in an adverse capacity to Richard. Dr. Platter's fiduciary duty to Virginia's Estate is in conflict with an objective medical examination, and Dr. Platter's fiduciary interest and bias in favor of Virginia's Estate raises issues as to his objectivity. Because Dr. Platter's declaration does not meet the bare minimum standards and foundation of an objective expert opinion, it does not create any material issues of fact.

*Id.* at 12.

Idaho Rule of Evidence 702 states, "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Idaho Rule of Evidence 703 states:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion or inference on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Idaho Rule of Evidence 403 states:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

The Idaho Supreme Court has found that:

Under the rules, expert opinion testimony is only admissible when “the expert is a qualified expert in the field, the evidence will be of assistance to the trier of fact, experts in the particular field would reasonably rely upon the same type of facts relied upon by the expert in forming his opinion, and the probative value of the opinion testimony is not substantially outweighed by its prejudicial effect.” *Ryan v. Beisner*, 123 Idaho 42, 47, 844 P.2d 24, 29 (Ct.App.1992); see also Idaho R. Evidence 702, 703, & 403. “[E]xpert opinion which is speculative, conclusory, or unsubstantiated by facts in the record is of no assistance to the jury in rendering its verdict, and therefore is inadmissible.” *Ryan*, 123 Idaho at 46–47, 844 P.2d at 28–29; see also Idaho R. Evidence 702. Testimony is speculative when it “theoriz[es] about a matter as to which evidence is not sufficient for certain knowledge.” *Karlson v. Harris*, 140 Idaho 561, 565, 97 P.3d 428, 432 (2004). Conversely, expert testimony will assist the trier of fact when the reasoning or methodology underlying the opinion is scientifically sound and “based upon a ‘reasonable degree of medical probability’ ” —mere possibility is insufficient. *Bloching v. Albertson's, Inc.*, 129 Idaho 844, 846–47, 934 P.2d 17, 19–20 (1997) (quoting *Roberts v. Kit Mfg. Co.*, 124 Idaho 946, 948, 866 P.2d 969, 971 (1993)).

*Coombs v. Curnow*, 148 Idaho 129, 140, 219 P.3d 453, 464 (2009).

Dr. Platter states in his Declaration that “I graduated from University of Washington School of Medicine...” Decl. of Dr. Platter 2, ¶ 2. “I am retired from clinical medicine but was a board certified geriatric (sp) and family practice doctor.”

*Id.* at ¶ 1. “My medical practice was mostly VA where I was involved with many demented patients and participated in drug trials for new medication. I was also a clinical professor for the University of Washington School of Medicine.” *Id.* at ¶ 3.

This Court finds that Dr. Platter’s Declaration fulfills the requirement that he was a likely qualified as an expert in family practice and geriatrics, but this Court has no idea if that is still the case as he is retired, and this Court has no idea if an expert in family practice and geriatrics may make a posthumous diagnosis of Alzheimer’s, and if so, whether that diagnosis of Alzheimer’s precludes that person’s ability to “possesses sufficient mind to understand, in a reasonable manner, the nature, extent, character, and effect of

the act or transaction in which he is engaged” as required by *Olson*. Dr. Platter then states that:

I was Richard E. Dullanty’s consultant for his defense in a Washington State bar action and have known him since the 1953s... I suspected Richard E. Dullanty had Dementia in the 1990s and became convinced he had classic Alzheimer’s in 2003... During the course of my life, Richard E. Dullanty was my parents and my own attorney and I had many interactions with him... On January 31, 2007, Richard E. Dullanty was suffering from Alzheimer’s disease... Based on my interactions with Richard E. Dullanty over the course of many years, it is my professional opinion that as a result of his Alzheimer’s disease, Richard E. Dullanty could not and did not understand documents to which he was signing on January 31, 2007... As a result of his; Alzheimer’s disease and based on my many interactions with Richard E. Dullanty, it is my professional opinion that Richard E. Dullanty did not understand the Dead of Trust which was executed by him on January 31, 2007.

*Id.* at 2-3, ¶¶ 4-9.

This Court finds that Dr. Platter’s testimony in his Declaration is inadmissible because it is speculative, conclusory, and unsubstantiated by facts on the record. Additionally, Dr. Platter does not answer the question required by *Olson*.

In this case, Dr. Platter is simply offering conclusory testimony that Richard Dullanty “did not understand the Deed of Trust” he signed on January 31, 2007. Dr. Platter must establish in his Declaration why he reached the opinion that Richard Dullanty “did not understand the Deed of Trust” he signed on January 31, 2007, and Dr. Platter’s Declaration has not done this. Dr. Platter’s Declaration is speculative, conclusory, and unsubstantiated by any facts on the record. Dr. Platter provided as foundation that he had known and interacted with Richard for many years and he was previously board certified as a “geriatricic (sic) and family practice doctor”, but Dr. Platter’s testimony does not state definitively that he personally diagnosed Richard Dullanty with Alzheimer’s in a clinical setting. Even if Dr. Platter had clinically diagnosed Richard Dullanty with Alzheimer’s, Dr. Platter has not offered testimony how

that disease effected Richard Dullanty's ability on January 31, 2007, to possess "sufficient mind to understand, in a reasonable manner, the nature, extent, character, and effect of the act or transaction in which he is engaged" as required by *Olson*.

Dr. Platter did not render his opinion to a reasonable degree of medical probability. In medical malpractice cases, the expert's opinion as to the community standard must be set to a degree of reasonable medical certainty. I.C. § 6-1013. In other cases, to establish causation or some other fact, the standard for a medical opinion is that such opinion is held to a reasonable degree of medical probability. *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217-18 (2000). Dr. Platter's Declaration does not use those magic words. *Jensen* makes it clear such failure is not fatal. *Id.* However, *Jensen* makes it clear that there has to be some expression of the degree of certainty or probability to which that opinion is held. *Id.* All Dr. Platter tells us is that it is his "professional opinion" that Richard Dullanty did not understand the Deed of Trust. Decl. of Dr. Platter 2, 3, ¶¶ 8, 9. Nothing in Dr. Platter's Declaration tells us what his "professional opinion" means. It could be inferred that since Dr. Platter was a practicing physician, that his opinion is a medical opinion. Even given that inference, nothing in Dr. Platter's Declaration tells this Court whether that medical opinion is on a more probable than not basis. For that additional reason, Dr. Platter's opinion is not admissible.

Additionally, there is no doubt there is a question as to Dr. Platter's objectivity given his status as Personal Representative of Virginia's estate. This Court has not been presented with any argument that such relationship is an automatic disqualifier for his medical opinion. At this point, the issue of his personal involvement simply goes to

the weight of his opinion, were this Court to find his opinion admissible. This Court has not found that opinion to be admissible.

Finally, if this Court were to accept Dr. Platter's conclusory statements that Richard Dullanty was generally incapacitated at all times due to his Alzheimer's condition since January 31, 2007, this Court would also have to accept that Richard was incapacitated at the time he signed and transferred his interest in the Property to the Lake Trust in 2011. This would destroy the legitimacy of the creation of the Lake Trust itself, which is the very entity that is seeking to have the Deed of Trust thrown out for Richard's supposed incapacity in the first place. Dr. Platter's testimony is not scientifically sound, and theorizes about a matter as to which evidence is not sufficient for certain knowledge.

This Court finds Dr. Platter's opinions to be inadmissible, thus, at the present time there is no genuine issue of material fact exists regarding Richard's competence when he signed the Deed of Trust.

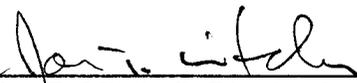
#### **IV. CONCLUSION AND ORDER.**

For the reasons stated above, Wilmington Savings' Motion for Summary Judgment to foreclose on the property is granted. Wilmington Savings' Motion for Summary Judgment to foreclose upon Defendants' Property is granted to the extent that Edward and Annette Dullanty's ½ interest is encumbered by the Deed of Trust, and that the Estate of Virginia Dullanty and the Lake Trust do not have standing to challenge the validity of Richard Dullanty's signature on the Deed of Trust. Wilmington Savings' Motion for Summary Judgment is also granted to the extent that there is no admissible evidence presented which would establish an issue of material fact exists as to whether Richard Dullanty was competent when he signed the Deed of Trust.

IT IS HEREBY ORDERED THAT plaintiff Wilmington Savings' Motion for Summary Judgment to foreclose upon Defendants' Property is GRANTED.

IT IS FURTHER ORDERED that summary judgment includes the additional adjacent property that was acquired by any defendant through adverse possession in Kootenai County Case No. CV 2006-4897, and plaintiff Wilmington Savings may foreclose on that property as well.

Entered this 28<sup>th</sup> of May, 2020.

  
\_\_\_\_\_  
John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the 28<sup>th</sup> day of May, 2020, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail, email or facsimile to each of the following:

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By   
\_\_\_\_\_  
Jeanne Clausen, Deputy Clerk of Court