

STATE OF MAINE  
SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. CUM-19-48

**The Bank of New York Mellon F/K/A The Bank of New  
York, As Trustee (CWALT 2005-07CB)**

**Plaintiff - Appellant**

**v.**

**Michael Buck and Danielle Shone**

**Defendants – Appellees**

---

ON APPEAL FROM  
CUMBERLAND COUNTY SUPERIOR COURT  
Docket No.: PORSC-RE-2015-116

---

**BRIEF OF THE APPELLEES**

Appellees' Attorneys:

Mark A. Kearns, Bar No. 2485

Mark L. Randall, Bar No. 3683

482 Congress Street

Suite 304

Portland, ME 04101

207-775-0002

[mark@randalllaw.com](mailto:mark@randalllaw.com)

[mak@newlaws.com](mailto:mak@newlaws.com)

Appellant's Attorneys:

Santo Longo, Bar No. 9152

Bendett & McHugh, P.C.

30 Danforth Street

Suite 104

Portland, ME 04104

207-517-8918

[slongo@bmpe-law.com](mailto:slongo@bmpe-law.com)

**TABLE OF CONTENTS**

COVER..... 1

TABLE OF CONTENTS..... 2

TABLE OF CASES AND STATUTES..... 3

STATEMENT OF FACTS..... 4

PROCEDURAL HISTORY..... 5

STANDARDS OF REVIEW..... 8

APPELLEES’ RESPONSE TO APPELLANT’S ARGUMENTS

I. Plaintiff’s witness, Mr. James D’Orlando of Bayview Loan Servicing, is not a witness qualified to lay the foundation for Plaintiff’s Exhibit D: “Notice of Default” pursuant to M.R.Evid. 803(6)..... 9

II. The trial court correctly relied upon the case of *Deutsche Bank National Trust Co. v. Eddins*, 2018 ME 47,182 A.3d 1241 (Me. 04-03-2018) and other case law to exclude Exhibit D: “Notice of Default” even though testimony presented in this case differs significantly from that in *Eddins*..... 20

CONCLUSION..... 23

## **Table of Cases, Statutes and Rules**

<i>Bank of America v. Greenleaf</i> , 2014 ME 89;	9
<i>Beneficial Maine Inc. v. Carter</i> , 2011 ME 77;	20, 21
<i>Chase Home Finance LLC v. Higgins</i> , 2009 ME 136;	11, 23
<i>Deutsche Bank National Trust Company v. Eddins</i> , 2018 ME 47;	10, 11, 20, 21, 22
<i>Homeward Residential, Inc. v. Carter</i> , 2015 ME 108;	10
<i>HSBC Mortg. Servs., Inc. v. Murphy</i> , 2011 ME 59;	21
<i>JP Morgan Chase, N.A. V. Lowell</i> , 2017 ME 32;	20
<i>KeyBank Nat'l Ass'n v. Estate of Quint</i> , 2017 ME 237;	8, 12, 21, 22
<i>M&amp;T Bank v. Plaisted</i> , 2018 ME 121;	8, 11, 12, 16, 20, 21, 22, 25
<i>State v. Lewis</i> , 401 A.2d 645 (Me. 1979);	10
<i>State v. Saulle</i> , 414 A.2d 897 (Me. 1980);	10
Title 14 MRS § 6111;	5, 6, 7, 9, 10, 18, 20
14 MRS § 6321-A;	23
M.R. Civ. P. 56(j);	23
M.R. Civ. P. 59(e)	8, 22
M.R. Civ. P. 93;	23
M.R. Evid. 803(6);	9, 11, 17, 20, 22
M.R. Evid. 902(11);	6, 22, 25

## **STATEMENT OF FACTS**

Michael Buck and Danielle (Shone) Buck (hereinafter “Bucks”) obtained a residential loan on January 28, 2005 from America’s Wholesale Lender. The Complaint asserts that “Defendants executed and delivered to Mortgage Electronic Registration Systems, Inc. as nominee for America’s Wholesale Lender, a mortgage dated January 28, 2005 and recorded on February 3, 2005 in Book 22295 at Page 202 of the Cumberland County Registry of Deeds (the “Mortgage”). Said Mortgage was partially released as to a portion of the premises by virtue of a Partial Release from Mortgage Electronic Registration Systems, Inc., dated October 12, 2006 and recorded on October 23, 2006 in Book 24489 at Page 6 of the Cumberland County Registry of Deeds. [See Appendix Page 36, ¶ 8].

By letters dated April 24, 2015, the law firm of Bendett & McHugh, P.C., with an address of 270 Farmington Avenue, Suite 151, Farmington, Connecticut, issued notices of default, addressing one letter to Michael Buck and one letter to Danielle Shone. [See Appendix p. 54-56 and 62-64.] The

letter states that the law firm represents Bayview Loan Servicing, L.L.C., but does not disclose the owner of the loan and mortgage or that Bayview Loan Servicing, LLC has been assigned the right issue a default and right to cure letter, pursuant to 14 M.R.S. § 6111. The letter includes a cure date, but does not disclose the Bucks have 35 days to pay the “Cure Amount”. The actual cure amount breakdown is included on a separate sheet of paper. The letters do not contain an actual signature of any actual person, but only contain a typed signature.

### **Procedural History**

A civil action foreclosure dated June 26, 2015 was filed in the Cumberland County Superior Court captioned, *The Bank of New York Mellon f/k/a The Bank of New York as Trustee (CWALT 2005-07CB) v. Michael Buck and Danielle Shone*, PORSC-RE-2015-00116. After several continuances, the matter was set for trial to be held on October 10, 2018. The trial court had provided all counsel with sufficient notice of trial and Ordered the disclosure of all trial witnesses and trial exhibits well before trial, all without objection of the

parties. Plaintiff-Appellant at no time prior to trial disclosed a witness who could testify about the creation and retention of the notice of default letters purportedly sent to the Bucks.

Plaintiff-Appellant at no time prior to trial provided to Defendants-Appellees an Affidavit of Authentication pursuant to M.R. Evid. 902(11). Defendants-Appellees filed a motion *in limine* requesting the trial court to exclude all witnesses and exhibits not previously disclosed to Defendants-Appellees within the deadlines imposed by the court.

At the commencement of trial, Justice Warren inquired of Plaintiff-Appellant's counsel as to whether any new witnesses not listed on the witness list were to be called and counsel answered in the negative. At that point counsel for Plaintiff-Appellant handed Defendants-Appellees' counsel an Affidavit attempting to allow in evidence the § 6111 Notice of Default letter. [Trial Transcript P. 32] The Affidavit was not listed as an Exhibit prior to trial by Plaintiff-Appellant. The Defendants-Appellees were not given any notice of Plaintiff-Appellant's intent to use the Affidavit at trial to offer the Affidavit in evidence in order to have the § 6111 Notice of

Default letters entered in evidence at trial. The Defendants-Appellees were not given a fair opportunity to object to the authenticity of the record or object on the basis of hearsay. The Court rejected the Affidavit and upheld Defendants-Plaintiffs' objection.

A colloquy ensued regarding Plaintiff-Appellant's method of admitting the § 6111 Notice of Default letters in evidence and Plaintiff-Appellant stated that one of the witnesses from a servicer could address that testimony. Justice Warren allowed Plaintiff-Appellant to proceed with its witness from Bayview Loan Servicing in order to lay the necessary foundation for admission of the law firm's § 6111 letter addressed to Michael Buck, marked for identification purposes as Plaintiff's Exhibit D. At the end of the examination by Plaintiff-Appellant, Defendants-Appellees objected to the admissibility of the law firm's § 6111 Notice of Default letter. After careful analysis and consideration Justice Warren determined that the witness lacked the requisite knowledge and capacity for laying a proper foundation for law firm's § 6111 letter. Having determined Plaintiff-Appellant could not fulfill the notice

requirements for the civil action foreclosure, Justice Warren entered Judgment for Defendants-Appellees.

Plaintiff-Appellant's M.R. Civ. P. 59(e) motion for new trial or to alter or amend judgment was denied and a timely notice of appeal was filed.

### **STANDARDS OF REVIEW**

In order to overturn the trial court's evidentiary ruling below, Plaintiff-Appellant must demonstrate an abuse of discretion and clear error. Under the "abuse of discretion" standard of review, the decision to exclude evidence will not be reversed unless there is the required substantial showing that the lower court committed a clear error of judgment in reaching its decision on the admissibility of the evidence. *M&T Bank v. Plaisted*, 2018 ME 121, ¶ 19, citing *KeyBank Nat'l Ass'n v. Estate of Quint*, 2017 ME 237, ¶ 13, 176 A.3d 717. Basically Plaintiff-Appellant must show to this Court that the trial court's decision was irrational or based on a clear misunderstanding or misapplication of the law and the foundational consideration was obviously or clearly wrong.

The trial court's careful, considered and thoughtful analysis of Plaintiff-Appellant's witness's testimony and the court's identification of the missing elements of foundation for admissibility of the § 6111 Notice of Default letter demonstrates there was no clear misunderstanding or misapplication of the rules and law for laying the proper foundation.

### **APPELLEES' RESPONSE TO APPELLANT'S**

#### **ARGUMENTS**

- I. **Plaintiff's witness, Mr. James D'Orlando of Bayview Loan Servicing, is not a witness qualified to lay the foundation for Plaintiff's Exhibit D: "Notice of Default" pursuant to M.R.Evid. 803(6).**

At trial Plaintiff-Appellant claimed the April 24, 2015 § 6111 Notice of Default letters from Bendett & McHugh, P.C. addressed to Defendants-Appellees are part of its business records and attempted to establish a foundation in order to have the letters entered in evidence. [Trial Transcript P. 57, Lines 15-18] Footnote 15 in *Bank of America v. Greenleaf*, 2014 ME 89 (07-03-2014) provides guidance in such instances:

“[T]he court’s obligation was to consider only that foundation already established before it has admitted the exhibit in evidence. *See, e.g., State v. Lewis*, 401 A.2d 645, 647 (Me. 1979) (“Before introducing an exhibit a party is required [to establish] adequate foundation...”). Moreover, we note that a witness may not testify as to the contents of an exhibit before it is admitted in evidence. *See e.g., State v. Saulle*, 414 A.2d 897, 899 (Me. 1980) (“[W]e cannot overemphasize the necessity that nothing be exhibited to the [factfinder] until it has first been marked for identification, properly indentified, shown to opposing counsel and received in evidence.”)

“When ‘making foundational findings, the court may only consider evidence established prior to the exhibit’s admission in evidence.’” *Deutsche Bank National Trust Company v. Eddins*, 2018 ME 47 (04-03-2018) ¶ 10 citing *Homeward Residential, Inc. v. Carter*, 2015 ME 108, ¶ 2. In this case Plaintiff-Appellant provided one witness, Mr. D’Orlando of Bayview Servicing, to attempt to establish the required foundation to enter the Bendett & McHugh, P.C. default letters in evidence. After his testimony the Court ruled that the witness had not established that necessary foundation. Because the § 6111 Notice of Default letters are a required element in a Maine civil action foreclosure; and, they could not be entered in evidence; the Court entered Judgment for the

Defendants-Appellees. *Chase Home Finance LLC v. Higgins*, 2009 ME 136 (12-31-2009).

In *M&T Bank v. Plaisted*, 2018 ME 121 (05-31-2018) this Court addressed once again the stringent foundational requirements to qualify business records for admission under the business records exception to the hearsay rule, M.R. Evid. 803(6). In *Plaisted*, a witness from Bayview Loan Servicing<sup>1</sup> took the witness stand and attempted to lay a foundation for admission of business records. *Plaisted* ¶ 7. Similar to the facts in the present case, in *Plaisted*, Bayview Loan Servicing was attempting to admit records created by another business after default. *Id.* at ¶ 10. Also similar to *Plaisted*, in the present case Bayview claimed to be a qualified witness with knowledge of the Notice of Default letters. Trial Transcript, p. 57, line 11-18.

This Court reiterated in *Plaisted* the necessity of having a qualified witness who “was intimately involved in the daily operation of the business and whose testimony showed the firsthand nature of [the] knowledge” but who “need not be an

---

<sup>1</sup> Bayview Loan Servicing is the same corporate witness in the present case.

employee of the record's creator.” *I’d.* at ¶ 12, (citing *Estate of Quint*, 2017 ME 237, ¶ 15, 176 A.3d 717).

As this Court pointed out to Defendant at the time of its ruling excluding the Notice of Default letter - marked as Plaintiff’s Exhibit D, the witness, Mr. D’Orlando, did not testify as to any knowledge of the law firm’s on site business practices<sup>2</sup> regarding the process involved in the creation of the Notice of Default letters, the process of including the necessary language as required by Maine Statute within those letters or the letter in question, the process of review of the Notice of Default letter by office staff and an attorney at the firm before the Notice of Default letter is mailed, the process of review of the itemized financial information contained in the letter, and the process for mailing the letter and receipt by the law firm of any confirmation of mailing and/or delivery. All of this information was lacking in Plaintiff-Appellant’s witness’s testimony when the direct examination of the witness was

---

<sup>2</sup> The Notice of Default letter (marked as Plaintiff’s Exhibit D) was printed on stationary of the law firm of Bendett & McHugh with an address of Farmington, Connecticut, with the computerized signature of a firm lawyer and contained additional pages including a separate page setting forth the itemization of the “cure amount”.

concluded by Plaintiff's counsel on October 10, 2018. This information is even more important in this case where the letter from the law firm and the attorney is not personally signed but signed by a machine. There was no testimony about whether the attorney who "signed" the letter ever saw it; reviewed it; or, even was in the building or in Connecticut at the time it was "signed".

As the Trial Court noted at the time of the ruling denying the admission of the Notice of Default letter in evidence, the witness testified about Bayview's audits generally, about Bayview's visits to the offices of law firms, about Bayview's random sampling's of foreclosure cases with demand letters to verify the cure amount matched the numbers sent by Bayview, and about its interviews of senior management regarding business practices used for demand letters. The witness did not offer information or state his intimate knowledge or familiarity what the business practices of the law firm were, or more specifically what the business practices of Bendett & McHugh, P.C., were at the time the Notice of Default letter was created and mailed. Trial Transcript, p.58, Line 4 - p. 59,

Line 15. Then for an inexplicable reason the Bayview witness, when asked if Bayview interviews “junior staff who actually do the hands-on work with the demand letters on a day-to-day basis?”, answered, “Yes, they would.” In the follow up question by its counsel, “if, through the interviews, Bayview would seek to establish the law firm is following policies and procedures,” Bayview again answered it “would”. Trial Transcript, p. 59, line. 17 - p. 60, line. 3. These answers underscored a lack of knowledge, despite the leading nature of the question. Even if the Bayview witness had responded differently to those questions, by stating “yes, we do that with all law firms including Bendett & McHugh”, the testimony still lacked the necessary foundation for admissibility of the Notice of Default letter.

The Bayview witness never testified: 1) about the time frame when the law firm letter was drafted; 2) about the process used by the law firm for the content to compose the letter, review the letter or the mailing process; 3) about the process involving how the name of the attorney is chosen to be printed in the signature line; 4) about how the attorney

reviews and determines the validity and correctness of the letters; and, 5) about any process of obtaining confirmation of mailing or the receipt of the letter by the Defendants.

Plaintiff-Appellant seems also to argue that because the Notice of Default letter was part of Bayview's records, that as an "integrated record" the Bayview witness did not need to be knowledgeable of the daily operation of the law firm and creation of Notice of Default letters to show the first hand nature of the knowledge even though not an employee. Instead, Plaintiff argues its witness only needed sufficient knowledge of the law firm's regular general business practices to demonstrate the reliability and trustworthiness of any law firm information including the Notice of Default letter. However, this Court has set forth that a qualified witness or custodian of documents seeking to admit integrated business records "must demonstrate knowledge of five factors including that "the producer of the record employed regular business practices for creating and maintaining the records that were sufficiently accepted by the receiving business to allow

reliance on the records by the receiving business”. *Plaisted*, 2018 ME 121, ¶ 23. (emphasis added).

In the present case Plaintiff-Appellant’s witness did not provide this information in his testimony. Although, the witness stated Bayview always sought to confirm that the cure amount numbers in the Notice of Default letters were correct<sup>3</sup> and reviewed the cure amount numbers after the letters were purportedly mailed, the witness offered no understanding or knowledge of the law firm’s process for creating a notice of default letter for a particular mortgagor or knowledge of the law firm’s process of reviewing the letter prior to it being electronically signed or knowledge of the process of mailing the letter or knowledge of the process of confirmation of mailing or confirming receipt of the letter by the mortgagor. Like in *Plaisted*, Plaintiff-Appellant’s witness in this case offered insufficient testimony to lay a foundation for the admission of Exhibit D or the process for creating and maintaining Exhibit D, and the process of mailing or confirmation of mailing and

---

<sup>3</sup> Review of Plaintiff’s Exhibit D reveals the “cure amount” calculation was on a separate sheet of paper and only the words “cure amount” were referenced within the text of the Notice of Default letter.

the receipt of the letter by the mortgagor. This informational vacuum did not provide the foundational facts required for admissibility of the Notice of Default letter.

It is no secret to this Court and trial courts that the Lender/Creditor parties in Maine are dissatisfied with the application of Maine Rule of Evidence 803(6). Creating incongruent paper trails and lacking the proper witnesses to lay the necessary foundation, Plaintiff-Appellant believes the solution to entering its documents in evidence is to put the burden on Defendant-Appellee and similarly situated defendants. Essentially, Plaintiff-Appellant wants the restrictions removed.

Plaintiff-Appellant misses the whole point. The fact is documents admitted in evidence under the hearsay exception prevent a party from cross examining the preparer of the document. The policy is that business records - a memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, are not necessarily being challenged for being what they are and so are admissible if the necessary factual foundation is provided

by a qualified witness. Once admitted the contents of the letter are difficult if not impossible to challenge because the witness who created the document is not present in court.

A § 6111 letter, however, is no mere business record - a memorandum, report, or record or data. The § 6111 letter is a requirement for the commencement of a Maine civil action foreclosure of primary residences and compliance must be strictly enforced. The § 6111 notice of default letter has taken on an importance because often the contents of the letter are challenged as deficient along with whether the defendant actually received the letter.

Plaintiff-Appellant wants to be the tip of spear to end the importance of the § 6111 letter and have it classified as a mere objective record of a regularly conducted business. The notice of default letter is of course far more important as are its contents. It is the burden of Plaintiff-Appellant, although it despises this responsibility, to provide the necessary foundation for the admission of the § 6111 letter, created and maintained by its law firm, in evidence. This requires the witness to have sufficient knowledge of both businesses

regular practices. Unfortunately, Plaintiff-Appellant's witness was unfamiliar with the law firm's regular practices involving the creation, review, maintaining, mailing and obtaining proof of mailing of the § 6111 letter.

Plaintiff-Appellant points out that "at no point did the Defendants deny they had received the 'Notice of Default'". Defendant did not have that obligation when the foundation for admission of the document in evidence was lacking.

Then Plaintiff-Appellant emphasizes in its brief that the § 6111 letter was not unreliable and was trustworthy and this alone should have resulted in its admission in evidence. The problem is we are not talking about a simple memorandum, report, record or data. This important and vital document, Plaintiff-Appellant's Exhibit D, based on the testimony was created in a vacuum. As the trial court observed correctly, there was no evidence as to how the law firm created or maintained these letters, the source of the information that forms the content of the letter, what process there was for review of the letters, what process there was for mailing and obtaining receipt of mailing and delivery. The trial court acted

properly in not placing the burden on Defendant and excluding the § 6111 letter for evidence due to lack of foundation.

II. **The trial court correctly relied upon the case of *Deutsche Bank National Trust Co. v. Eddins*, 2018 ME 47, 182 A.3d 1241 (Me. 04-03-2018) to exclude Exhibit D: “Notice of Default”, when testimony presented in this case differs significantly from that in *Eddins*.**

The following holding in *Eddins* is relevant to the issues presented in this instant case.

“A document that is supported by the foundational standards prescribed in the Maine Rules of Evidence 803(6) is admissible as an exception to the general rule precluding admission of hearsay evidence. The witness who testifies to the predicate for the admission of a business record need not have personal knowledge about the matter that is memorialized in the document, because the foundational elements of a Rule 803(6) business record, by themselves, provided sufficient indication that the information contained in the record is reliable and trustworthy. *Plaistaid* ¶ 12 11 citing M.R. Evid. 803(6); *Lowell*, 2017 ME 32, ¶ 11, 156 A.3d 727; *Beneficial Maine Inc. v. Carter*, 2011 ME 77, ¶ 12, 25 A. 3d 96.

[T]he proponent of the document must present evidence that the qualifying witness is either the custodian of the record or some other person with sufficient knowledge of the processes used by the creator of the record to produce and retain the record. *Id.* ¶ 11

“A qualified witness is one who was intimately involved in the daily operation of the [business] and whose testimony showed the firsthand nature of the knowledge.” *Plaistaid* ¶ 11

citing *HSBC Mortg. Servs., Inc. v. Murphy*, 2011 ME 59, ¶ 10, 19 A.3d 815.

The witness who provides foundational testimony need not be an employee of the entity that created and maintained the document at issue *if*, for purposes of Rule 803(6), that witness has adequate knowledge of the processes used by the entity that created and preserved the document. *Id.* ¶ 12, Citing *Carter*, 2010 ME 77, ¶ 13, 25 A.3d 96; *see also KeyBank Nat'l v. Estate of Quint*, 2017 ME 237, ¶ 15, 176 A.3d 717.

Consequently, when a document is created by one entity and then transmitted to another, and the document is then offered as a business record pursuant to Rule 803(6), the witness must be shown to have “sufficient knowledge of *both* business’ regular practices to demonstrate the reliability and trustworthiness of the information”. [Citations omitted] The incorporation of one entity’s record into the records of the receiving entity is not sufficient, by itself, for the admissibility of that record. *Plaistaid* ¶ 12.

The trial court listened to Plaintiff-Appellant’s witness and found that, “[Plaintiff’s Counsel has] done a valiant job of establishing everything but one thing, that is that this witness has personal knowledge of the record creating and keeping practices of Bendett & McHugh.” Trial Transcript p. 73, Lines 12-15.

In the Trial Court’s written ORDER issued on the day of trial the Court stated: “For the reasons stated on the record at today’s hearing, the court rules that an adequate foundation has not been laid for the admissibility as a business record of

the notice of deficiency and right to cure notice allegedly sent to defendant Michael Buck (plaintiff Ex. D).” [Appendix p. 16]

In the Trial Court’s Order in response to Defendant-Appellant’s Rule 59(e) Motion entered on January 3, 2019 the Court does not rely exclusively on *Eddins*. It is a well reasoned and written ORDER in which the Trial Court also relies on *Quint*, which is the same case on which Plaintiff-Appellant relies. Further, as suggested in *Plaistaid*, the Trial Court considered the M.R. Evid. 902(11) Affidavit, but rejected it because the attempted certification by Plaintiff-Appellant did not adhere to the Rule “because written notice of intent to offer in question with a certification was not provided to defendants’ counsel prior to trial as required by M.R. Evid. 902(11). [Appendix p. 34]

Not only did the Court properly and consistently apply the holdings in *Eddins*, *Quint* and *Plaistaid*, all those cases are consistent with M.R.Civ. P. 803(6), which is the underlying Rule allowing an exception to the hearsay rule for business records. Certainly the Trial Court did not abuse its discretion

nor commit clear error in denying the entry in evidence the Notice of Default.

### **Conclusion**

It is hard to believe the Great Recession began more than ten years ago; and, that the year 2009 was very, very tough for many Maine families trying desperately to save their homes. In 2009 on average almost 100 new foreclosure cases were filed in Maine courts each week! Imagine the ‘drumbeat’ of stress and sadness befalling Maine families on a daily basis. But the three branches of Maine government were ‘up to the task’. In August, 2009 M.R. Civ. P. 56(j) was enacted and implemented; and, on December 31, 2009 the Maine Supreme Court issued its landmark decision in *Chase v. Higgins*. The Maine Legislature passed and the Governor signed the new Title 14 MRS § 6321-A, Foreclosure Mediation Program, which became effective for all counties in Maine on January 1, 2010. Also, effective January 1, 2010 M.R.Civ. P 93, Foreclosure Diversion Program was adopted and implemented for all Maine counties. All of these historic changes significantly changed the process and procedure of civil action foreclosure practice

in the State. Beginning in 2010 most foreclosure cases have been tried before trial judges. Motions for Summary Judgment have been rare. For the last ten years the trial courts have done a herculean job hearing and deciding thousands of foreclosure cases while at the same time applying Maine Rules and Laws affecting such trials as those Rules and Laws were interpreted by the Maine Supreme Court.

With the change of the practice for foreclosure cases from motions for summary judgment to trials, one subtle difference has come to the forefront; and, this case is an example of this subtle change. The standard of review of a decision appealed to the Supreme Court on a motion for summary judgment is *de novo*. On the other hand, there are various standards of review for appeals of foreclosure judgments resulting from a trial. For certain issues on appeal after a foreclosure trial the standard can be *de novo*; but, in cases such as the instant Appeal, the standard is *abuse of discretion* and *clear error*. Without these more stringent standards for foreclosure trials, the Supreme Court could become “trial court #2” and be asked to retry the case *de novo* using the trial transcript. The Rules

and the Law Court recognize that during a trial the trial court makes decisions based on the live witness' testimony, proffered exhibits and the applicable law. Those decisions only can be overturned in rare and extraordinary cases where there was a clear misunderstanding or misapplication of the law.

In this case an experienced trial Justice presiding in the busiest Courthouse in the State, carefully considered his trial decisions, which is clear from the Trial Transcript. Specifically, before deciding his ruling on the 902(11) Affidavit, the Justice consulted the Civil Rules Book and read the relevant portion in the record. The analysis the trial court ultimately made on whether the default letters could be entered in evidence were based on a clear understanding of the Rules of Evidence and the case law. Exercising his discretion on whether the only last minute proffered witness adequately laid a proper business record foundation was the Court's "reasonable call".

As Justice Alexander suggests in his decision in *Plaistaid*, entering a business record in evidence when it is

created by another entity is not an insurmountable task. Rule 902(11) can work efficiently and fairly to all parties. Plaintiff-Appellant certainly knew prior to trial getting the default letters in evidence was a critical issue. Without those letters in evidence judgment for Defendants-Appellees would be required. Why Plaintiff-Appellant chose its approach to the admission of the default letters is not known.

It is not for the Supreme Court to speculate on why Plaintiff-Appellant chose its particular trial strategies. Likewise it is not the role of the Supreme Court to “bail out” Plaintiff-Appellant when the trial strategies failed, as occurred in this case.

The default letters in this case are unique in that although appearing to be letters from an attorney employed by Bendett & McHugh, P.C.; the letters do not contain any attorney’s signature. Did the attorney ever actually see the letters? Does the attorney actually work for Bendett & McHugh, P.C. in Connecticut? Does the Attorney actually exist? This isn’t “robo signing”; but, the letters appear to be created and signed by a computer! The only trial witness

proffered by Plaintiff-Appellant did not have personal knowledge of how the letters were created and maintained.

For the reasons and arguments expressed in this Brief and in the Cumberland County Superior Court's Orders of Judgment for Defendant-Appellees it is proper and just that the default letters were not entered in evidence and judgment for Defendants-Appellees should be affirmed.

DATED: June 12, 2019

A handwritten signature in black ink, appearing to read "M.L. Randall", written over a horizontal line.

Mark L. Randall, Esquire Maine Bar# 3683  
Mark A. Kearns, Esquire Maine Bar# 2485  
*Attorneys for Michael and Danielle Buck*  
*Defendants-Appellees*