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COURT OF APPEALS I NO. 72905-5

WHATCOM COUNTY NO. 10-2-02676-9

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

JACK GRANT,

Appellant,

v.

FIRST HORIZON HOME LOANS, et. al.,

Respondents.

APPEAL FROM SUPERIOR COURT FOR WHATCOM COUNTY

APPELLANT JACK GRANT'S REPLY BRIEF

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I. RELIEF REQUESTED

For the reasons stated herein and in Grant's Opening Brief, Grant requests this Court to reverse the Superior Court's ruling that Grant cannot enjoy the current interpretation of Washington law, and remand for proceedings to determine whether or not the initiation of foreclosure proceedings was lawful.

II. ARGUMENT IN REPLY

A. This Court Should Reverse the Superior Court's Decision that it Needed this Court's Approval to Apply "Current Law" to CR 56 Motions

Appellee Quality Loan Service Corporation of Washington (Quality) incorporates Appellee First Horizon's (Horizon) arguments regarding "Injunctive and Declaratory Relief" into its answering brief (QAB), at 5.

Horizon's Answering Brief (HAB) acknowledges:

> Grant's central argument in his appeal is that the law of CPA claims changed between this Court's decision in *Grant I* and the trial court's decision on First Horizon's motion for summary judgment. As a result Grant claims he is entitled to have his case decided under "current" law. This argument is misguided because the CPA claim was no longer before the Court on remand -- it had been dismissed with prejudice and that dismissal had been affirmed by this Court.

HAB, 9-10. The reason Horizon and Quality are making this argument is because their motions for summary judgment are based on the proposition that Grant's CPA claims are moot. *See, e.g.* CP 12, 120.

Significantly, neither Quality nor Horizon challenge the Superior Court's conclusion that intervening controlling authority by the Supreme Court following *Grant I* makes violations of the DTA actionable for damages under the CPA. CP 308. Nor did either argue to the Superior Court that current law precludes an award for damages under the CPA for those violations of the DTA which this Court found possible in *Grant 1*. Quality and Horizon fail to explain why *Frias*[1] holding that the DTA does not have a cause of action for damages before the sale applies to Grant's case, but not *Frias*' holding that a pre-sale violation of the DTA can give rise to CPA liability.

In support of its position the superior court could not consider intervening precedent by the Supreme Court holding that violations of the DTA can support a CPA claim, Horizon cites *Gudmundson v. Commercial Bank & Trust Co.*, 160 Wash. 489, 496, 295 P. 167 (1931). HAB 10. That case states a trial court cannot consider an intervening change in controlling authority upon remand unless it seeks permission from the appellate court to do so. *Id.* Significantly, Horizon does not include the

[1] *Frias v. Asset Foreclosure Servs.*, 181 Wn.2d 412, 334 P.3d 412 (2014)

next sentence of the quotation, which states: "Relief from changed conditions or rights accruing pending the appeal on which the entry of a specific judgment is ordered can be had only by resort to some sort of original proceeding by which appropriate relief may be secured." *Id.*, at 496. The Rules of Appellate Procedure have changed since 1931.

Gudmundson is no longer good law to the extent it requires a trial court to seek permission to alter a decision based on a change in controlling precedent:

> We hold appellate leave is not required where a party seeks modification of a decision after issuance of the appellate mandate if the modification sought relates to later events not before the appellate court during the first appeal. Unlike the RAP 7.2(e) procedure, however, permission of the appellate court need not be obtained even if the trial court is inclined to grant the motion because the trial court's action will not affect a pending appeal. Rather, the trial court's action is subject to review as any other trial court decision.

Alpine Indus., Inc. v. Gohl, 101 Wn.2d 252, 255-57, 676 P.2d 488 (1984).[2]

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[2] Horizon's also argues:

> Here, this Court's affirmance of the trial court's dismissal of the CPA claim and subsequent mandate represents a final decision on the merits barring the relitigation of the CPA claim. RAP 12.7("The Court of Appeals loses the power to change or modify its decision (1) upon issuance of a mandate in accordance with [blank space].]

HAB, 12.

As can be seen Horizon's argument is unsupported by citation to any authority. To the extent Horizon meant to quote from RAP 12.7 (1) the words which should be inserted in the blank space of the brief appear to be "rule 12.5, except when the mandate is recalled as provided in rule 12.9, ...". But understanding what Horizon meant to say does not help its argument.

The fact that the Court of Appeals loses authority to review its own decision following the Supreme Court's denial of discretionary review under RAP 12.7 does not

This Court should carefully consider as a matter of judicial policy whether appellate courts should be a gatekeeper with regard to deciding whether a Superior Court may *on remand* apply *current* law to the facts in deciding a summary judgment motion. Such a requirement would likely greatly increase the number of subsequent appeals this Court would have to hear on an interlocutory remand basis where, like here, the Supreme Court has changed or clarified precedent following a Court of Appeals decision. Allowing such appeals to approve or reject a Superior Court's interpretation of current law seems wasteful of judicial resources; the validity of a Superior Court's decision regarding whether there has been an intervening change in the law is subject to appellate review, just like any other decision. *Alpine*, 101 Wn.2d at 255-57.

Accordingly, in the event this Court finds Superior Courts should simply apply current law retroactively to *sub judice* cases, *see* Grant's Opening Brief (OB) at 11-24, it should reverse the Superior Court's Order finding it had no discretion to apply current law and remand for further proceedings to resolve the material factual disputes identified in the Superior Court's Order. *See* CP 308-9.

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mean the superior court lost its authority *on remand* to follow the Supreme Court's current construction of the CPA for purposes of awarding damages against Horizon and Quality. Nor does it mean that on appeal this Court should not apply current CPA law in evaluating the merits of this appeal, if it reaches that issue. *Cf* RAP 2.5(c)(2).

B. The Superior Court was Required to Retroactively Apply Current Law Construing the CPA and DTA on Remand

The Superior Court properly concluded that *Frias* had changed CPA law by concluding that a violation of the DTA could constitute an unfair or deceptive practice in a trade or business for purposes of recovering damages. CP 307-309. Indeed, after careful review of the pleadings and consideration of oral argument the superior court concluded:

> If the Plaintiff's Consumer Protection Act claims were properly before this Court under current law, the Court would find that several disputed issues of material fact would need to be resolved before the propriety of the foreclosure can be determined.

CP 308.

Significantly, neither Horizon nor Quality argued below (or argue here) that current CPA law does not allow for CPA damages. Instead, they argue Grant is not entitled to retroactive application of *Frias* on remand regarding his CPA claim. This argument is without merit.

"Where the Supreme Court has ruled authoritatively on an issue, its ruling applies retroactively. *Jackowski v. Borchelt*, 114 Wn.2d 720, 731, 278 P.3d 1100 (2012); *Lunsford v. Sabehagen Holdings, Inc.*, 166 Wn.2d 264, 270, 279-280 (2009)." OB at 11 (quoting CP 160). This principle has constitutional implications with regard to the Supreme Court's construction of statutes, like the DTA and CPA.

When, as here, the Supreme Court construes the meaning of statutes "that construction operates as if it were originally written into [the statute] ... and that determination [of the statute's meanings] relates back to the time of the statute's enactment." *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009). The reason the construction relates back to the time the statute was enacted is because the Supreme Court has final authority under the separation of powers inherent in our Constitution to declare what the meaning of the law is. *Id.* Once the meaning of a statute has been decided, it is not legally appropriate for any court to apply a different interpretation of the statute to cases which have not yet been finally adjudicated and to which such an interpretation is applicable. *See* OB at 11-14.

Similar principles were utilized by the Supreme Court in *Akrie v. Grant*, ___ Wn.2d ___, ___ P.3d ___, Slip. Op. 89820-1, at *1-2 (July 23, 2015) to assure that current law was applied to the plaintiffs in that case. There, Plaintiffs failed to appeal a superior court's award of damages pursuant to a statute the Supreme Court had just ruled was unconstitutional. The Court noted that under the general rule an appellate court will only grant a respondent affirmative relief when the respondent files a notice of appeal. The Court held that notwithstanding this rule the

damages should be voided because such a result was demanded "by the necessities of the case." *Id.*

In this case, both Horizon and Quality appeared below and moved for a summary judgment based on the theory that the case was moot. The "necessities of the case" for resolving whether this case is moot (an issue raised by Appellees) require this Court acknowledge that under current law damages are now a form of relief available to Grant. Since the Superior Court can provide Grant relief under current law, this case is not moot. *See Washington State Commc'n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 203-04, 293 P.3d 413 (Div. I, 2013) *review denied,* 178 Wn.2d 1010, 308 P.3d 643 (2013).

C. Neither Horizon Nor Quality Challenged Grant's Compliance with the CPA in Their Initial Motions, and Therefore Cannot do so Here

Here, the record establishes that Grant's original complaint pled causes of action under the DTA and CPA at a time when DTA violations had not yet been held as conduct justifying CPA damages. Notwithstanding *Frias*' intervening construction of the CPA so as to support a cause of action for pre-sale DTA violations, both Quality and Horizon based their motions for summary judgment following remand on the contentions 1.) that the "[t]he only claims before this Court [following remand] are for injunctive or declaratory relief," *see* Horizon MSJ, CP 10-

15; Quality MSJ, CP 120 (adopting Horizon's arguments); and 2.) that neither Horizon nor Quality violated the DTA, *see* Horizon MSJ, CP 19-22; Quality MSJ, CP 122-125.

On appeal, both Quality and Horizon devote much of their responses arguing Grant has not shown that he satisfies all of the CPA elements. HAB at 14-21; QR, at 5-9. But this is an argument they needed to make to the Superior Court in their original summary judgment motions before making it here.

> It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment." Further, "[a]llowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond." Thus, "it is incumbent upon the moving party to determine what issues are susceptible to resolution by summary judgment, and to clearly state in its opening papers those issues upon which summary judgment is sought." If the moving party fails to do so, it may either strike and refile its motion for summary judgment or raise the new issues in a new filing at a later date, but the moving party cannot prevail on the original motion based on issues not raised therein.

Admasu v. Port of Seattle, 185 Wn. App. 23, 40, 340 P.3d 873 (Div. I, 2014) *review denied,* 352 P.3d 187 (2015) (internal citations omitted).

Rather than strike and re-file new motions for summary judgment after Grant's response so as to include raise the issue that Grant could not meet the CPA elements under *Frias*, Quality and Horizon chose to proceed with their existing motions. This is a problem for them as the

failure to make such an below precludes them from doing so here. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351, 358 (1983).

D. Quality May Not Assert New Arguments on Appeal, and Jack Grant Demonstrated a Public Interest Impact under the CPA

In *Frias* our Supreme Court held that violations of the DTA, which this Court held Grant had properly alleged in his complaint, can be unfair or deceptive practices in a trade or business giving rise to CPA damages liability. 181 Wn.2d at 430-3.

On appeal, for the first time, Quality contends Grant cannot show a public interest impact. QAB at 7. This was never argued below, and should not be entertained on appeal. *Smith*, 100 Wn.2d at 37.

Even if this Court does entertain Quality's new argument, the question as to whether Horizon and Quality's violations of the CPA impact the public interest is a question of fact. *Holiday Resort Community Ass'n v. Echo Lake Assocs., LLC,* 134 Wn. App. 210, 227, 135 P.3d 499 (Div. I, 2006). Here, the trial court identified numerous questions of material fact which precluded granting Horizon and Quality a summary judgment holding they had not violated the DTA. CP 308-309. They included: 1.) The legal effect and validity of the beneficiary declaration, CP 308; 2.) the effect of the Pooling and Servicing Agreements on agency relationships, CP 309; and 3.) Chain of custody of the note. CP 309.

Because the potential violations of the DTA identified by the Superior Court would or could impact numerous people,[3] the CPA's public interest impact also would have been found to involve a material fact issue if Horizon and Quality had chosen to argue that this criteria had not been satisfied.

Finally, *Frias* also makes clear Grant can establish CPA causation and damages if those material issues of fact the Superior Court has decided exist are resolved in his favor. This is because

> [a] CPA plaintiff can establish injury based on unlawful debt collection practices even where there is no dispute as to the validity of the underlying debt. Where a business demands payment not lawfully due, the consumer can claim injury for expenses he or she incurred in responding, even if the consumer did not remit the payment demanded... "Consulting an attorney to dispel uncertainty regarding the nature of an alleged debt is distinct from consulting an attorney to institute a CPA claim. Although the latter is insufficient to show injury to business or property, the former is not."... The injury element can be met even where the injury alleged is both minimal and temporary.

181 Wn.2d at 431 (internal citations omitted). In this case the issue is whether there was a lawful beneficiary and whether Quality had a right to demand payment and record a notice of trustee's sale on that entity's behalf, and whether or not that caused Grant to incur damages investigating the propriety of the foreclosure.

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[3] *See* RCW 19.86.093(3)

E. Grant Identified Unfair and Deceptive Conduct by Pointing to the Three Different Securitized Trusts Claiming Interests in his Note

This case was remanded originally to determine whether or not Bank of New York Mellon f/k/a The Bank of New York, as Trustee for the holders of the Certificates, First Horizon Pass-Through Certificates Series FH05-01 (Trust FH05-01) had any interest in Grant's Note when the Notice of Default and Notice of Trustee Sale were issued. *Grant I,* at *4-5. The Notice of Default, Appointment of Successor Trustee, and the Notice of Trustee's Sale all reference Trust FH05-01 as the beneficiary. CP 78 (Notice of Default), CP 83 (Appointment of Successor Trustee), CP 92 (Notice of Trustee's Sale). Additionally, the record contains a 2010 Assignment of Deed of Trust wherein Mortgage Electronic Registration Systems, Inc., purported to assign all beneficial interest in the Deed of Trust together with the Promissory Note to Trust FH05-01.[4] CP 86.

Following remand, First Horizon argued in its Motion for Summary Judgment that Grant's Note was part of a securitization, and referenced Exhibit A to the Declaration of Andrew Yates. CP 08. Exhibit A to the Declaration of Andrew Yates was a Pooling and Servicing

[4] This was the Assignment *Grant I* took issue with: "The question here is whether BNYM was entitled to foreclose. This requires a determination of whether MERS had any interest in the note it purported to assign to BNYM (or whether BNYM obtained the note through some other means), and whether this transfer occurred before the notice of default was issued." *Grant I*, at *5.

Agreement for First Horizon Mortgage Pass-Through Trust 2005-1 Mortgage Pass-Through Certificates, Series 2005-1 (Trust 2005-1). CP 56.

Additionally, evidence in the record pointed to a third securitization claiming an interest in Grant's Note. Theresa Nichols declared Grant's Note and Deed of Trust was included in a securitization identified as "First Horizon Mortgage Pass-Through Certificates Series FHASI 2005-1" (Trust FHASI 2005-1), not Trust 2005-1. CP 26. Ms. Nichols also declared Grant's Note was in physical possession of Trust FHASI 2005-1 from early 2005 until January 16, 2014. CP 26-27. This would mean that at the time of the foreclosure proceedings, Trust FHASI 2005-1 (and not Trust FH05-01, the purported beneficiary) could have held the Note. If FH05-01 did not hold the Note but held itself out as a beneficiary, that would be unfair and deceptive under the CPA. *See Bain v. Metro. Mortg. Grp.*, 175 Wn.2d 83, 117, 285 P.3d 34 (2012) (characterizing entity as beneficiary without being a holder is unfair and deceptive under the CPA).

Grant testified that he spent time determining who had authority to negotiate with him regarding the alleged defaults and who was entitled to enforce his loan and who was entitled to nonjudicially foreclose. CP 150. Grant had to file a lawsuit because it was impossible for him to determine whether the nonjudicial foreclosure proceedings were occurring lawfully.

Just recently the Washington Supreme Court confirmed that having to investigate uncertainty regarding interests in the Note caused by foreclosing entities is a sufficient injury under the CPA. *Trujillo v. Nw. Tr. Servs.*, ___ Wn.2d ___, ___ P.3d ___, Slip. Op. 90509-6, at *16 (Aug. 20, 2015). Significantly, in *Trujillo* the borrower admitted to defaulting on the loan obligations, *id.* at *4, but the *Trujillo* Court nevertheless found an actionable CPA injury when the borrower had to investigate the propriety of a foreclosure initiated because of the borrower's default. Grant's investigation of which entity had authority to foreclose constitutes an injury. But for the unlawful initiation of foreclosure, Grant never would have had to undertake that investigation to determine whether the foreclosure was proper.

Horizon continually refers to Trust FH05-01, Trust 2005-1, and Trust FHASI 2005-1 as "BNYM." These entities are not the same; as evidenced by the Corporate Assignment of Deed of Trust between Trust FH05-01 to Trust FHASI 2005-1, which lists Trust FH05-01 as located in Texas and Trust FHASI 2005-1 being located in New York. CP 154. Simply because Bank of New York Mellon acts as a trustee for many different securitizations does not mean those securitizations are the same. Horizon and Quality were the moving parties, and cannot request this Court to infer these trusts are the same entity.

Horizon argues these investigation costs are not sufficient to support the damages element if there is no genuine uncertainty to dispel. HAB at 20. However, with three different securitizations claiming to include Grant's Note, Grant did have a genuine uncertainty to dispel regarding which trust, if any, was entitled to foreclose on him.

F. Horizon's and Quality's Remaining Arguments are Meritless

Horizon and Quality appear to argue that Jack Grant is a deadbeat debtor that has benefitted from living in his home for five years. But, there are no facts in the record to support this assertion. The reason this case has gone on so long, and continues today, is because this Court and on remand the Superior Court found fact issues which suggest these appellees may have been unlawfully attempting to take Grant's home under the guise of the DTA.

From Grant's perspective, the five year delay has been caused by defendants' violations of the DTA and attempt to dismiss his case without affording him an opportunity for discovery. Further, Grant has been prejudiced by the five year delay because his significant equity in the property has been eroded by the lenders claiming they can accrue interest for 5 years at a rate that is almost twice the market rate.

Grant strongly objects to assertions that he delayed this lawsuit for his benefit. Grant initiated this lawsuit in good-faith at a time the

governing law was in transition. After the accumulation of 5 years of case law, some of the arguments he made have been resolved in his favor while his case remained *sub judice*.

Grant also objects to the missing text in Horizon's Answering brief, found on pages 8 (at the end of the first paragraph and in the middle of the third paragraph), 9 (missing entries for footnotes 25 and 26), 12 (first paragraph purporting to quote RAP 12.7), 13 (missing text in Section C subtitle), and page 17 (footnote 40 is blank). This missing text appears in both the copy of the brief served on Grant as well as the copy of the brief posted on the Court of Appeals website.[5] Grant respectfully requests this Court ignore incomplete citations and arguments, *see* RAP 10.3(a)(6), and find those issues not cogently briefed to be waived. *In re Parentage of S.E.C.,* 154 Wn. App. 111, 116, 225 P.3d 327 (Div. II, 2010) (failure to cite supporting authority waives assignment of error).

Finally, Grant objects to the misleading statements and improper conclusions contained in HAB. For example, at Page 1, paragraph two; second to last line of the HAB it is stated: "Because the previous foreclosure of the Property has expired and has never been restarted ..." This is not entirely true. Another nonjudicial foreclosure began as a result of a Notice of Default dated May 21, 2015. This was followed by a Notice

[5] Available at http://www.courts.wa.gov/content/Briefs/A01/729055 Respondent First Horizon Hom Loans's.pdf

of Trustee's Sale dated July 1, 2015, recorded under Whatcom County Auditor's File Number 2150700182. The new Notice of Trustee's Sale even references the Assignment of Deed of Trust between MERS and Trust 2005-1 this Court raised issue with in *Grant I*. On July 23, 2015, Quality recorded a Discontinuance of Trustee Sale under Whatcom County Auditor's File Number 2150702629. It is difficult to imagine, based on the representations made, Horizon and Quality will not restart the foreclosure of the Property. *Cf. Knecht v. Fidelity Nat. Title Ins. Co*, 2014 WL 4057148 (W.D. Wash., Aug. 14, 2014) ("There is no trustee's sale currently pending, although Defendants are conspicuously silent about whether they intend to conduct a sale in the future. It is difficult to imagine that they have any other intent."). If this were to happen, Grant would be estopped from pointing out all the issues of fact the Superior Court found below.

At page 9, footnote 23 the HAB argues "First Horizon stipulates that, subject to the various preclusive doctrines, in the event a new notice of sale was recorded, Grant could bring a lawsuit challenging that sale." But why should this same issue have to be re-litigated in another case between these same parties when it is now before the Superior Court on remand? At some point Grant should have access to discovery and his day in court to determine which of the various different entities claiming to be

the beneficiary (if any) actually satisfies the meaning of RCW 61.24.005(2).

Finally the last paragraph of pages 13-14 in the HAB contains additional misstatements of the record. Horizon claims there were "undisputed facts before the trial court," despite the Superior Court noting "[i]f Plaintiff's [CPA] claims were properly before this Court under current law, the Court would find that several disputed issues of material fact would need to be resolved before the propriety of the foreclosure can be determined." CP 308. In direct contrast to Horizon's claim that there was no dispute regarding BNYM's document custodians had possession of the original note, the Superior Court found that fact issues existed regarding transfers of the Note among the competing securitized Trusts. CP 309. Further, Horizon argues that "Nationstar had possession of the Note" was undisputed; the Superior Court's Order noted that the declaration of beneficiary stated Trust FH05-01 possessed the Note, while the declaration of Theresa Nichols said the Note was held by a document custodian.

III. CONCLUSION

The Superior Court believed there were genuine issues of fact precluding a grant of summary judgment to Quality and Horizon, but mistakenly believed it needed this Court's approval to apply current,

binding Washington precedent. There are three securitized trusts all claiming to hold and own Grant's Note; the DTA contemplates a single beneficiary, not multiple. Grant, as much as every other Washington Citizen, deserves the right to have his case decided according to the most accurate interpretation of Washington law. This Court should reverse the Superior Court's ruling that Grant cannot enjoy the current interpretation of Washington CPA law, and remand for proceedings to determine whether or not he is entitled to damages under that law.

DATED this 21th day of August, 2015 at Arlington, Washington.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Shaina Johnson, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

1. At all times hereinafter mentioned I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

2. That on the 21th day of August, 2015, I caused to be served a true and correct copy of Appellants Jack Grant's Reply Brief to defendants in the above title matter by causing it to be delivered to:

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DATED this 21th day of August, 2015 at Arlington, Washington.

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