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No. 72905-5

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

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JACK GRANT,

Plaintiff-Appellant

v.

FIRST HORIZON HOME LOANS, et al.,

Defendant-Respondent

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ON APPEAL FROM WHATCOM COUNTY SUPERIOR COURT
(Hon. Deborra E. Garrett)

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# RESPONDENT FIRST HORIZON HOME LOANS' ANSWERING BRIEF

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant Jack Grant (Grant), an experienced real estate attorney, has had the use and enjoyment of his waterfront property without having to make a single mortgage payment for almost five years. This is the second appeal Grant has taken from a dismissal of his pre-sale "wrongful foreclosure" lawsuit. In 2010, Grant filed suit to enjoin the then-pending foreclosure sale of residential property located in Blaine, Washington (Property). The lawsuit was dismissed pursuant to CR 12(b)(6) motions to dismiss and Grant appealed to this Court.

In 2012, this Court issued its unpublished decision in *Grant v. First Horizon Home Loans*, 168 Wn. App. 1021 (2012) (*Grant I*). The Court affirmed the dismissal of nearly all of Grant's lawsuit, including the his Consumer Protection Act (CPA) and other damages claims. Grant petitioned the Supreme Court review but the petition was denied and so the case was remanded on the limited issue of whether First Horizon was authorized to foreclose on the Property. Because the previous foreclosure of the Property has expired and has never been restarted, this one remaining issue was moot and the trial court again dismissed the case.

Despite the fact that *Grant I* upheld the dismissal with prejudice of his CPA claim, Grant nevertheless attempted to relitigate the CPA claim on remand. The trial court properly found that this claim had been

disposed of on appeal and so granted First Horizon's motion for summary judgment, fully resolving the case.

The instant appeal represents Grant's attempt to get yet another bite at the apple on his CPA claim. However, the Court's prior ruling in *Grant I* is conclusive and the CPA claim may not be resurrected. The trial court's decision was correct and should be affirmed.

## II. COUNTERSTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The issue on this appeal is whether the trial court properly dismissed Grant's suit with prejudice on summary judgment. There was only one claim remaining in the case following the previous appellate ruling in *Grant I* and that claim was moot and therefore properly dismissed. Grant attempted to resurrect his CPA claim on remand, but that claim was no longer part of the case as the trial court properly determined.

## III. COUNTERSTATEMENT OF THE CASE

### A. Factual Recitation from *Grant I*.

Many of the relevant facts of this suit have already been recited by this Court in *Grant I*:

> In December 2003, Grant obtained an $800,000 construction loan from Horizon Bank to make improvements to his beach cottage in Blaine, Washington. The following year, Grant submitted an application to First

Horizon Home Loans for a new loan of $838,000 (Loan) to refinance the construction loan. As a condition for the new loan, Stewart Title informed Grant that his wife must be added to the title and must sign the note (Note). Additionally, the loan amount approved was only $800,000. Grant objected to the changes, but he ultimately executed a quitclaim deed adding his wife to the title. Grant and his wife then signed the note and executed a deed of trust (Deed of Trust). According to Grant, he received an oral commitment that the quitclaim deed would be held in a file and not recorded except in the event of default. In fact, the quitclaim deed was recorded immediately. Grant and his wife divorced in 2009. Grant was awarded the beach property as his separate property.

....

In April 2010, Grant stopped making payments on the loan. Quality Loan Service Corporation of Washington (Quality) issued a notice of default on July 15, 2010. Quality identified itself as the agent for the "current owner/beneficiary of the Note secured by the Deed of Trust"[.]

....

On July 20, 2010, MERS recorded an assignment to BNYM of the deed of trust "together with the Promissory Note secured by said Deed of Trust". 9 On September 10, 2010, BNYM appointed Quality as successor trustee of the deed of trust. In this capacity, Quality issued a notice of trustee's sale on September 28, 2010. The notice set a sale date of January 7, 2011. Grant filed a complaint in Whatcom County Superior Court seeking to enjoin the trustee's sale. He also asked the court to declare the note and deed of trust void, quiet title in his favor, and award damages and attorney fees.

....

> Grant asserted causes of action for (1) breach of contract; (2) bad faith/"breach of duties"; (3) intentional infliction of emotional distress; (4) interference with contractual relations; (5) negligence; and (6) violation of various statutory requirements. Grant also asserted several affirmative defenses, presumably to the enforcement of the note and deed of trust, including "wrongful conduct, undue influence and duress." 11 On November 5, 2010, the trial court granted Grant's request for a temporary restraining order enjoining the trustee's sale.
>
> ....
>
> First Horizon, Stewart Title, and Quality each filed motions to dismiss under or , arguing that most of Grant's claims were based on conduct occurring in 2004 and therefore barred by the statutes of limitation. Quality and First Horizon also argued that Grant's claims for intentional infliction of emotional distress, bad faith/breach of duty, Consumer Protection Act (CPA) violations, "wrongful foreclosure," and negligence failed on their merits.
>
> After argument on the motions, the court concluded the statute of limitations had run on the claims of intentional infliction of emotional distress, on the interference with contractual relationship, negligence, and CPA claims.[1]

## B. In *Grant I*, This Court Affirmed Dismissal of All Claims But One.

Grant appealed the trial court's Rule 12 dismissal of his claims.[2] In the prior appeal, this Court analyzed each of Grant's causes of action and found that each claim was properly dismissed.[3] This included Grant's

[1] *Grant I*, 168 Wn. App. 1021 at *1-4.
[2] *See Grant I*, 168 Wn. App. 1021.
[3] *See id.*

CPA claim, whose dismissal the Court explicitly affirmed.[4] Thus, following dismissal, Grant had no live claim for damages remaining in the lawsuit. However, the Court then reversed the case on the limited issue of "the authority of First Horizon and/or Quality Loans to commence foreclosure proceedings under the DTA," which implicated only Grant's claims for injunctive and declaratory relief.[5]

Following the decision in *Grant I*, Grant petitioned the Supreme Court for review.[6] The Supreme Court denied this petition for review on March 6, 2013.[7] Subsequently, this Court issued its mandate on April 5, 2013, remanding the case to the trial court.[8]

As discussed below, on remand Grant argued that his CPA claim was still live and the claim should be evaluated under the law of the *Frias*, *Klem*, and *Lyons* cases.[9] While *Frias*[10] and *Lyons*[11] were decided after this case was remanded, *Klem*[12] was handed down by the Supreme Court even before it denied Grant's petition for review.

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[4] *Grant I*, 168 Wn. App. 1021 at *7.
[5] *Id.* at *10.
[6] *See* CP 111.
[7] *Id.*
[8] CP 114-15.
[9] *See* Op. Br. pp. 3-4 (assignment or error 1).
[10] *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 416, 334 P.3d 529 (2014)
[11] *Lyons v. U.S. Bank Nat. Ass'n*, 181 Wn.2d 775, 779, 336 P.3d 1142 (2014)
[12] *Klem v. Wn. Mut. Bank*, 176 Wn.2d 771, 774, 295 P.3d 1179 (Feb. 28 2013)

## C. On Remand, First Horizon Demonstrated that it was the Note Holder.

Grant petitioned the Supreme Court for review of the Court's ruling in *Grant I* and that petition was denied.[13] Thereafter, the case was remanded back to the Whatcom County Superior Court.[14]

After the Court's limited remand, First Horizon moved for summary judgment dismissal of Grant's remaining claims.[15] In support of its motion, First Horizon presented sworn testimony that Grant's original Note and Deed of Trust were in the possession of BNYM from early 2005 until January 16, 2014.[16] After that time, the original Note was transferred to Nationstar Mortgage LLC (Nationstar), BNYM's new servicing agent on the Loan.[17] Grant did not submit any sworn testimony rebutting these facts.

First Horizon also authenticated a copy of the Note through a declaration, reflecting that the Note is indorsed in blank.[18]

On December 2, 2014, the trial Court granted motions for summary judgment filed by both First Horizon and by Quality.[19] This second appeal followed.

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[13] CP 112.
[14] *Id.*
[15] *See* CP 5.
[16] CP 27 at ¶ 5.
[17] *Id.* at ¶ 8.
[18] CP 34. The Note (including its indorsement) is also self-authenticating commercial paper. ER 902(i).

## IV. STANDARD OF REVIEW

First Horizon agrees that the standard of review on a motion for summary judgment is de novo review.[20]

Summary judgment is proper if, after viewing all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party, no genuine issues exist as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Torgerson v. North Pac. Ins. Co.*, 109 Wn. App. 131, 136, 34 P.3d 830 (2001). A defendant can move for summary judgment by challenging the plaintiff's ability to adduce admissible evidence on any essential element of its case. *Guile v. Ballard Comty. Hosp.*, 70 Wn. App. 18, 22, 851 P.2d 689 (1993); *see also Landberg v. Carlson*, 108 Wn. App. 749, 753, 33 P.3d 406 (2001) (stating that summary judgment is a procedure to test the existence of a party's evidence).

Where, as here, a party moves for summary judgment and shows an absence of evidence to support an essential element of the plaintiff's claim, the burden shifts to the nonmoving party to provide evidence sufficient to establish the existence of the challenged element of its case. *See Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 & n.1, 770 P.2d 182 (1989) (quoting ).

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[19] CP 307-309.
[20] *See* Op. Br. p. 9.

Where the nonmoving party fails to do so, summary judgment is proper "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Young*, 112 Wn.2d at 225 (quoting ).

## V. ARGUMENT

### A. The Lack of Any Pending Foreclosure Under the At-Issue Notice of Sale Renders this Case Moot.

The notice of trustee's sale at issue in this lawsuit had an initial sale date of January 7, 2011.[21] There is no evidence in the record that a new notice of sale was ever recorded. Thus, as a matter of law, the last day to bring the Property to sale under that notice was April 29, 2011. RCW 61.24.040(6) (sale may be continued up to 120 days).

"A case is moot if a court can no longer provide effective relief." *Harbor Lands LP v. City of Blaine*, 146 Wn. App. 589, 592-593, 191 P.3d 1282 (2008) (quoting

). The issue of mootness "is directed at the jurisdiction of the court" and may thus be raised at any time. *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 350, 662 P.2d 845 (1983).

[21] *Grant I*, 168 Wn. App. 1021 at *2.

The one issue before the trial court on remand was whether the defendants were authorized to foreclose on the Property.[22] There was no foreclosure sale pending at any point following April 29, 2011 and so the one issue before the trial court was moot. The lack of an actual controversy between the parties mooted the case and thus summary judgment dismissal was proper.[23] The trial court properly reached this conclusion, although it incorrectly framed the issue as whether a Deed of Trust Act (DTA) claim was available in the absence of a completed sale, a question that *Frias* answered in the negative.[24]

## B. Grant's Claim That the Trial Court Failed to Apply Proper CPA Law on Remand Is a Red Herring Where the CPA Claim Was Dismissed With Prejudice and the Dismissal Was Affirmed by This Court.

Grant's central argument in his appeal is that the law of CPA claims based on allegedly wrongful nonjudicial foreclosure activities changed between this Court's decision in *Grant I* and the trial court's decision on First Horizon's motion for summary judgment.[25] As a result, Grant claims that he is entitled to have his case decided under the "current" law.[26] This argument is misguided because the CPA claim was

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[22] *See Grant I*, 168 Wn. App. 1021 at *10.
[23] First Horizon agrees 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.
[24] CP 307-8.
[25] *See*
[26]

no longer before the Court on remand – it had been dismissed with prejudice and that dismissal had been affirmed by this Court.[27]

As applicable here, RAP 12.5 provides that the Court of Appeals will issue its mandate "If a petition for review has been timely filed and denied by the Supreme Court, upon denial of the petition for review." When, as here, a case is remanded:

> ***A trial court has no authority to enter any judgment or order not in conformity with the order of the appellate court.*** That order is conclusive on the parties, and no judgment or order different from or in addition to that directed by it can have any effect, though it may be such as the appellate court ought to have directed. ***Where the mandate of an appellate court directs a specific judgment to be entered, the tribunal to which such mandate is directed must yield obedience thereto.*** No modification of the judgment so directed can be made by the trial court, nor can any provision be engrafted on or taken from it.

*Gudmundson v. Commercial Bank & Trust Co.*, 160 Wash. 489, 496, 295 P. 167, 170 (1931) (emphasis added).

As noted above, in this case Grant's original CPA claim was dismissed with prejudice, the dismissal was affirmed, Grant's petition for review was denied, and the Court's mandate was issued.[28] Under these circumstances the CPA claim was fully adjudicated and could not be reopened by the trial court.

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[27] *Grant I*, 168 Wn. App. 1021 at *7.
[28] *Grant I*, 168 Wn. App. 1021 at *7; CP 112 (mandate).

The cases Grant cites in his brief do not actually help him in the procedural circumstances here. For example, Grant cites *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 271,208 P.3d 1092 (2009) for the principal that "a new decision of law applies retroactively unless expressly stated otherwise in the case announcing the new rule of law."[29] However, in that case the issue was what law to apply to the plaintiff's product liability claim whose dismissal had been overturned on appeal. *Lunsford*, 166 Wn.2d at 169. In dispositive contrast to this case, there was no question in *Lunsford* that the product liability claim was still live on remand. *Id.* ("The trial court granted Sabotage's motion for summary judgment. The Court of Appeals overturned the trial court[.]").

Similarly, in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991), the Supreme Court considered a retroactivity ruling that seemed to invalidate Georgia's protectionist tax rate for distilled liquors.[30] The Court found that the invalidation of Georgia's statute should be applied retroactively to Jim Beam where Jim Beam was a litigant in a case before the court:

> The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case ***it must do so with respect to all others not barred by procedural requirements or res judicata.***

[29] Op. Br. p. 12.
[30] *See id.*

*Jim Beam*, 501 U.S. at 544 (emphasis added).

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 .]"). *Jim Beam* is unavailing to Grant where, as here, the CPA claim is simply no longer before the Court.

*Robinson v. City of Seattle*, 119 Wn.2d 34, 73-80, 830 P .2d 318 (1992), the final case Grant significantly relies upon, is similarly unavailing.[31] In that case, the issue was whether the invalidation of the City of Seattle's housing ordinance should be applied retroactively, allowing the plaintiffs to sue under 42 U.S.C. § 1983 based on money paid pursuant to the ordinance before it was invalidated. *Robinson*, 119 Wn.2d at 72. The Court found that property owners who paid fees pursuant to the ordinance before it was invalidated could sue for recovery of the paid fees only; property owners who paid fees after invalidation had a § 1983 claim. *Id.* at 80. What the case most emphatically did not do, however, was allow the resuscitation of a dismissed claim whose dismissal was affirmed

[31] *See* Op. Br. p. 13.

on appeal and for which all appellate avenues had been previously exhausted.

This appeal comes down to one simple issue: was Grant's CPA claim disposed of in the course of his previous appeal? The record is clear that the claim was dismissed with prejudice by the trial court, that dismissal was affirmed by this Court, Grant's petition for review was denied, and this Court subsequently issued its mandate.[32] Under these circumstances the trial court properly found that it no longer had authority to adjudicate the CPA claim and properly granted First Horizon's motion for summary judgment.[33]

### C. Grant's CPA Claim Fails as a if it Was Properly Before the Court.

First Horizon has conclusively demonstrated that Grant's CPA claim was no longer a live claim following this Court's mandate in *Grant I.* Even if the CPA or other damage was live, however, such claims would fail as a matter of law under *Bain v. Metro. Mortgage Grp., Inc.*, 175 Wn.2d 83, 111, 285 P.3d 34, 48 (2012) and related case law.

#### 1. At All Relevant Times, BNYM Was the Holder of the Note and the Beneficiary of his Deed of Trust.

The undisputed facts before the trial court on First Horizon's motion for summary judgment showed that (1) BNYM's document

[32] *Grant I*, 168 Wn. App. 1021 at *7; CP 112 (mandate).
[33] *See* CP 307-9.

custodians had possession of the original Note from early 2005 through January 16, 2014[34]; (2) Nationstar, BNYM's servicing agent, had possession of the Note from January 16, 2014 through the date First Horizon's motion for summary judgment was filed;[35] and (3) the Note was indorsed in blank.[36] Accordingly, at all relevant times, BNYM was the holder of the Note and beneficiary of the Deed of Trust.

Deeds of trust and foreclosures thereof, such as are at issue here, are governed by the DTA, RCW 61.24 *et seq.* Since 1998, the DTA has defined a "beneficiary" of a deed of trust as "the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation." *Bain v. Metro Mtg. Gp., Inc.*, 175 Wn.2d 83, 98-99, 285 P.3d 34 (2012), (citing RCW 61.24.005(2) (emphasis added).

The Washington U.C.C. defines the "Holder" of a negotiable instrument in relevant part as "The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession." RCW 62A.1-201(21)(A); *Bain*, 175 Wn.2d at 104. A negotiable instrument is payable to bearer if, as is the case with

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[34] CP 27 at ¶ 7.
[35] *Id.* at ¶ 8.
[36] CP 34.

the Note here, it is indorsed in blank. *See* RCW 62.A.3-205(b). In *Bain*, the court explained that:

> If the original lender ha[s] sold the loan, that purchaser would need to establish ownership of that loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions.

175 Wn.2d at 111 (emphasis added).

Here, the Note was originally payable to First Horizon.[37] Thus, at the time of execution First Horizon was holder of the Note and Beneficiary of the Deed of Trust. RCW 62A.1-201(21)(A); RCW 61.24.005(2). Subsequently, the Note was indorsed-in-blank and possession was transferred to BNYM.[38] At this time, BNYM became holder of the Note and beneficiary of the Deed of Trust. RCW 62A.1-201(21)(A); RCW 61.24.005(2).

It is of no moment that BNYM possessed the Note through Nationstar or other servicing agents and document custodians.[39] The Supreme Court explicitly condoned the use of agents in *Bain*, holding that "nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note. Washington law, and the deed of trust act itself, approves of the use of agents." 175 Wn.2d at 106. Further, the Uniform Commercial Code specifically permits a party to attain the

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[37] CP 31 at ¶ 1.
[38] CP 27 at ¶ 7.
[39] *See id.* at ¶¶ 7-8.

possession necessary for holder status constructively, through an agent. *See* RCW 62A.3-201, cmt. 1 (explaining "nobody can be a holder without possessing the instrument, either directly or through an agent.").

The use of document custodians to maintain physical possession of mortgage notes also accords with sound commercial practice. *See Barton v. JP Morgan Chase Bank, N.A.*, No. C13-0808RSL, 2013 WL 5574429 (W.D. Wash. Oct. 9, 2013), at *1 (recognizing that "[o]riginal promissory notes are bearer paper: the holder of the note has the right to collect payments thereunder according to its terms. It is hardly surprising that original notes are not bandied about or otherwise put at risk of loss or destruction.").

Thus, the record before the trial court demonstrated that, as a matter of law, BNYM, as the holder of the instrument was entitled to enforce the Note and Deed of Trust. This legal conclusion fundamentally dooms Grant's claim that BNYM lacked authority to foreclose.

**2. Grant Failed to Submit Admissible Evidence in Support of Multiple Elements of His CPA Claim.**

Under the CPA, the Plaintiff has the burden of proving each of the following elements: (1) that defendants engaged in an unfair or deceptive act(s) or practice(s); (2) that the act(s) or practice(s) occurred in the conduct of the defendant's trade or commerce; (3) that the act(s) or

practice(s) affected the public interest; (4) that Plaintiff was injured; and (5) that defendant's act(s) or practice(s) caused the Plaintiff's injury. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins.*, Co., 105 Wn.2d 778, 787-93,719 P.2d 531 (1986).

Here, Grant failed to satisfy the first, fourth, and fifth elements of his claim – there were no wrongful acts that actually caused Grant damage.

**a. <u>There is No Unfair or Deceptive Conduct Where BNYM Was the Note Holder and the Deed of Trust Beneficiary at All Relevant Times</u>.**

The gravamen of Grant's CPA claim is that BNYM and its agents lacked authority to foreclose the Deed of Trust.[40] However, as shown above BNMY was the holder of the Note at all relevant times because it possessed the Note through its agents or custodians.[41] First Horizon satisfied the requirements of *Bain* by showing that the foreclosing party held the Note – the foreclosure was therefore legal and proper in the face of Grant's undisputed default. *Bain*, 175 Wash. 2d 83 at 111 ("If the original lender had sold the loan, that purchaser would need to establish ownership of that loan, ***<u>either</u>*** by demonstrating that it actually held the promissory note ***<u>or</u>*** by documenting the chain of transactions[.] (emphasis added)).

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[40]

[41] CP 27 at ¶ 7.

Further, there is no ground for satisfying the unfair or deceptive element based on the fact that the Loan was securitized – the securitization of a loan does not constitute a deceptive act or practice under the CPA. *Cagle v. Abacus Mortgage, Inc.*, No. 2:13-CV-02157-RSM, 2014 WL 4402136, at *4 (W.D. Wash. Sept. 5, 2014) (claims regarding securitization of loan "fail to establish an unfair or deceptive act or practice" sufficient to overcome motion to dismiss).

Mere securitization of the loan does not give rise to a cause of action. *In re Nordeen*, 495 B.R. 468, 479–80 (B.A.P. 9th Cir. 2013) (declining to find securitization renders the loan void); *Bain*, 175 Wn.2d at 112 (inclusion of MERS in deed of trust does not render loan void).[42]

Simply put, Grant defaulted on a loan secured by real property. His lender was permitted to foreclose that loan without incurring CPA liability.

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[42] *See also Cuddeback v. Bear Stearns Residential Mortg. Corp.*, No. 12-1300 RSM, 2013 U.S. Dist. LEXIS 152989, *7 (W.D. Wash. Sept. 10, 2013) ("Courts have routinely rejected claims where securitization of a promissory note voids the instrument."); *Blake v. U.S. Bank Nat. Ass'n*, No. C12-2186 MJP, 2013 WL 6199213 (W.D. Wash. Nov. 27, 2013) *reconsideration denied*, No. C12-2186 MJP, 2014 WL 119067 (W.D. Wash. Jan. 13, 2014). This is because securitization merely creates "a separate contract, distinct from Plaintiffs' debt obligations under the reference credit (i.e. the Note)." *Larota–Florez v. Goldman Sachs Mortg. Co.*, 719 F. Supp. 2d 636, 642 (E.D. Va. 2010) (granting summary judgment to lender because debtor's securitization theories regarding separation and satisfaction of secured interests fail as a matter of law). *See also Bhatti v. Guild Mortg. Co.*, C11-0480-JLR, 2011 WL 6300229, at *5 (W.D. Wash. Dec. 16, 2011) ("[s]ecuritization merely creates a separate contract, distinct from the Plaintiffs' debt obligations under the Note, and does not change the relationship of the parties in any way."), *aff'd* 550 F. App'x 514 (9th Cir. 2013); *Moseley v. CitiMortgage, Inc.*, No. C11–5349-RJB, 2011 WL 5175598, at *7 (W.D. Wash. Oct. 31, 2011); *Bittinger v. Wells Fargo Bank N.A.*, 744 F. Supp. 2d 619, 625–26 (S.D. Tex. 2010) (finding that obligee under a note did not have standing to sue for breach of contract even though his loan had been bundled into the PSA).

### b. Grant Failed to Present any Admissible Evidence of Injury to Business or Property Proximately Caused by First Horizon's Conduct.

Causation and injury are essential elements of a CPA claim that a plaintiff must plead, and ultimately prove. *Hangman Ridge*, 105 Wn.2d at 780; *see also Panag v. Farmers Ins. Co. of Wn.*, 166 Wn.2d 27, 65, 204 P.3d 885 (2009) ("If the investigative expense would have been incurred regardless of whether a violation existed, causation cannot be established.").

Although the general threshold for a CPA injury is not high, where, as here, the plaintiff claims an unfair or deceptive act or practice based on an affirmative misrepresentation (in this case, that BNYM was entitled to foreclose the Loan) the plaintiff must show "a causal link between the misrepresentation and the plaintiff's injury." *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wn., Inc.*, 162 Wn.2d 59, 83, 170 P.3d 10, 22 (2007). Critically, in this analysis, causation cannot be established "merely by a showing that money was lost." *Id.* at 81.

**First**, there is no dispute that Grant took out the Loan, signed the Deed of Trust, and defaulted on the Loan. Thus, any damages he has were not caused by the actions of First Horizon, they were caused by Grant's own default on a legally valid loan. *See Babrauskas v. Paramount Equity*

*Mortg.*, No. C13–0494RSL, 2013 WL 5743903 (W.D. Wash. Oct. 23, 2013) at *4 (plaintiff's "failure to meet his debt obligations is the "but for" cause of the default, the threat of foreclosure, any adverse impact on his credit, and the clouded title").

**Second**, Grant's claimed damages are research and investigation costs.[43] Grant did not itemize these expenses or provide any other detail. He also does not cite to any other sworn testimony regarding any other alleged CPA damages. Indeed, the sole evidence of damages in this case is the following conclusory statement:

> I spent a considerable amount of time and money, including money for certified postage, investigating who was entitled to enforce and/or negotiate my loan, as well as trying to determine whether Quality Loan Service Corporation of Washington (Quality) was a lawful trustee.[44]

Research and investigation costs and legal fees are not sufficient to support the CPA damages element if there is no *genuine* uncertainty to dispel. *See Panag*, 166 Wn.2d at 65. And merely "having to prosecute" a claim under the CPA "is insufficient to show injury to [a plaintiff's] business or property." *Sign–O–Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 564, 825 P.2d 714 (1992). *See also Demopolis v. Galvin*, 57 Wn. App. 47, 786 P.2d 804 (1990) (subsequent purchaser's prosecution of CPA claim brought to protect property against lender's

[43] CP 150 at ¶ 6.
[44] CP 150 at ¶ 6.

non-judicial foreclosure insufficient to establish CPA injury); *Thursman v. Wells Fargo Home Mortg.*, 2013 WL 3977662, * 3-4 (W.D. Wash. Aug. 2, 2013) (resources spent pursuing CPA claim are not recoverable injuries under the CPA; collecting cases); *Babrauskas*, 2013 WL 5743903 at *4 (citing *Sign-o-Lite* and stating "the fees and costs incurred in litigating the CPA claim cannot satisfy the injury to business or property element: if plaintiff were not injured prior to bringing suit, he cannot engineer a viable claim through litigation").

*Sign-O-Lite* can be compared against *Panag*, which did allow research and investigation expenses as CPA damages. In *Panag*, the plaintiff's CPA claim was based on aggressive and continuous collection notices delivered to the plaintiff in relation to an automobile subrogation claim held by Farmers. *Panag*, 166 Wn.2d at 65. Farmers was the insurance company for the other driver in the accident. *Id.* at 34. Moreover, Farmers pursued its subrogation claim through a third party collection agency, CCR. *Id.* at 35.

Thus, in *Panag*, the plaintiff was being confronted with demands for a debt that had never been liquidated or adjudicated and was being pursued by a company he had never heard of. *See id.* His costs to investigate the nature of this alleged debt were therefore recoverable as CPA damages. Contrast that with here, where First Horizon was the

original lender with whom Grant contracted and BNYM was continuously represented as the successor.[45]

There is no evidence that Grant ever disputed BNYM's right to enforce the Loan until he was faced with foreclosure. It was only when foreclosure was imminent that he prosecuted his lawsuit. Thus, Grant's "damages" are related not to investigative costs, but merely having to prosecute the action.

A borrower cannot be injured by the lawful collection of a lawful debt. The borrower may spend time and money researching the validity of the debt, but where the debt is proven valid no CPA claim can be supported merely on this research and investigation cost. That is the situation here. Even if a CPA claim remained in this lawsuit upon remand (it did not), summary judgment dismissal with prejudice was still appropriate.

## VI. CONCLUSION

Upon remand of this case following Grant, there was (1) no foreclosure scheduled or pending; and (2) no live CPA claim. Recognizing this posture, the trial court granted First Horizon's motion for summary judgment. That order was proper and valid and, with respect, this Court should affirm.

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[45] CP 31 at ¶ 1 (First Horizon originating lender); Grant, 168 Wn. App. 1021 at *2 (first foreclosure communication identified BNYM as successor).

RESPECTFULLY SUBMITTED this 22nd day of July, 2015.

LANE POWELL PC

By _____

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## CERTIFICATE OF SERVICE

I, Sabrina Mitchell, hereby certify under penalty of perjury of the laws of the State of Washington that on the 22nd day of July, 2015, I caused to be served a copy of the attached document to the following person(s) in the manner indicated below at the following address(es):

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Sabrina Mitchell