73827-5

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COURT OF APPEAL NO. 73827-5
SNOHOMISH COUNTY NO. 14-2-07754-6

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

D. RYAN PATRICK and RHONDA PATRICK, husband and wife,

Appellants,

v.

WELLS FARGO BANK, N.A., a national banking association; QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington corporation; QUALITY LOAN SERVICE CORPORATION, a California corporation; MCCARTHY & HOLTHUS, LLP, a California law firm; and HSBC BANK, USA, N.A. AS TRUSTEE FOR WELLS FARGO ASSET-BACKED PASS-THROUGH CERTIFICATES SERIES 2007-AR8, a National Bank as Trustee for a New York common law trust,

Respondents.

APPELLANTS' OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION

In early 2009, Wells Fargo pretended to consider the Patrick family for a loan modification when they were current on their monthly mortgage payment. After approximately eight months of providing Wells Fargo with documents and believing they were being considered for a loan modification, Wells Fargo told Mr. Patrick that if he was three months late on his monthly payment he would qualify for a loan modification that would give him and his family a lower monthly payment. The Patrick family trusted Wells Fargo was telling them the truth. Unfortunately for the Patrick family, over the next several years, it became apparent that placing trust in the representations of Wells Fargo was the biggest mistake they had ever made. After spending six years in torment, Wells Fargo not only took their family home, but stripped Mr. and Mrs. Patrick of their hopes and dreams. Today, Mr. and Mrs. Patrick are going through a divorce because they were ripped apart by the stress and futility of dealing with Wells Fargo[1] and the Trustee Defendants.[2] They carry the shame of losing their home and family because they trusted Wells Fargo.

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[1] "Wells Fargo" stands for Wells Fargo and HSBC Bank, USA, N.A. as Trustee for Wells Fargo Asset-Backed Pass-through Certificates Series 2007-AR8.

[2] "Trustee Defendants" stands for Quality Loan Service Corporation of Washington, Quality Loan Service Corporation, and McCarthy & Holthus, LLP

II. ASSIGNMENT OF ERROR[3]

1. The Superior Court erred in granting the Respondent's' request for summary judgment when genuine issue of material fact existed regarding the Patricks' Consumer Protection Act Claim.
2. The Superior Court erred in granting the Respondent's' request for summary judgment when genuine issue of material fact existed regarding the Patricks' negligence claim.
3. The Superior Court erred in granting the Respondent's' request for summary judgment when genuine issue of material fact existed regarding the Patricks' DTA claim.
4. The Superior Court erred in Considering Hearsay evidence that was properly objected to in the Patrick's response brief, and at oral argument.

III. STATEMENT OF THE CASE

A. Accepting, Relying Upon, and Complying with Wells Fargo's Advice Reduces the Patrick Family to Ruins.

On July 10, 2007, the Patricks put their life savings, $110,000.00, down and borrowed money from Wells Fargo in to buy their family home at 4028 164th Place South East, Bothell, Washington 98012 ("Property"). CP 2 at ¶ 3; CP 2779 at ¶ 3; CP 1166-1172.

In 2008, the housing market crashed as a result of the subprime mortgage crises. **See Wigod v. Wells Fargo Bank, N.A.**, 673 F.3d 547 (7th Cir. 2012). Like many Americans, the Patricks found themselves "underwater." CP 2 at ¶ 4. However, the Patricks remained optimistic because they were both gainfully employed and had heard about loan

[3] Mr. and Mrs. Patrick's counsel apologizes for the broad assignments of error, but believes they are required because the trial court did not provide any guidance in its order granting Respondents' summary judgment motions. *compare* VP 54:5-55:9 (The Superior Court took the motions under advisement) *with* CP 739-43 (court issued general grant of summary judgment without providing basis or explanation).

modification programs sponsored by the federal government. *Id.* at ¶ 4, CP 3 at ¶ 7; CP 2779 ¶ 4.

In May 2009, the Patricks hired Choice Financial to help them obtain a loan modification from Wells Fargo. CP 2 ¶ 5, CP 12-22. The Patricks continued to work with Choice through December 2009. *Id.*; CP 2-3 at ¶ 6. The Patricks provided Wells Fargo with all requested financial documents, but Wells Fargo never seemed to have enough information to make a decision. *Id.* In December 2009, the Patricks again contacted Wells Fargo and inquired about a loan modification to reduce their monthly payments and to secure a reduced interest rate to reflect market conditions. CP 2-3 at ¶¶ 5-7; CP 2779 at ¶ 5. Wells Fargo told the Patricks that they could not obtain a loan modification because the Patricks were current on their monthly payments. CP 3 at ¶¶ 8-9; CP 2779 at ¶ 5. Further, Wells Fargo advised the Patricks to stop making their monthly payments so the Patricks could obtain a permanent modification. *Id.* Although nervous about missing payments, the Patricks relied on Wells Fargo's advice and stopped making their monthly payments. *Id.* Little did the Patricks know, this was only the beginning of the ensuing nightmare which continues today.

Immediately complying with Wells Fargo's advice to miss three payments, the Patricks began submitting loan modification paperwork to Wells Fargo. CP 4 at ¶ 10; CP 2779 at ¶ 5. Between December 2009 and

April 2010, Wells Fargo regularly requested financial information from the Patricks, and the Patricks promptly sent to Wells Fargo all of the requested materials. *Id.* The Patricks spent time and money on this process. *Id.* Despite the Patricks following all of Wells Fargo's instructions, Wells Fargo lost paperwork and often requested duplicative documents. *Id.* This process was extremely stressful and frustrating for the Patricks because the delays, lost paperwork, and repetitive requests were out of their hands. *Id.*

Next, in early 2010, Wells Fargo instructed the Patricks to make three trial period payments to obtain a permanent modification with reduced payments and a decreased interest rate. CP 4 at ¶ 11; CP 2124-2127. Wells Fargo told the Patricks that if they successfully made the trial payments, the Patricks would receive a permanent modification. CP 4 at ¶ 11. Wells Fargo instructed the Patricks to pay $3,096.34 in June 2010, July 2010, and August 2010. *Id.*; CP 2124-2127. Relying on Wells Fargo's representations, the Patricks made all three payments as instructed. *Id.*

After the Patricks timely made all three payments, Wells Fargo did not offer the Patricks a true loan modification that would put the Patricks in a better financial position, as Wells Fargo had promised when it induced the Patricks to miss monthly payments. CP 4-5 at ¶¶ 11-12; CP 2128-2133. Instead, Wells Fargo presented the Patricks with a forbearance agreement.

CP 4-5 ¶ 12, CP 26-35; CP 2128-2133. Although the forbearance agreement is titled "Loan Modification Agreement," it required the Patricks to make monthly payments in the amount of $2,400.90 with an interest rate of 6.625%, and a balloon payment at the end of the loan. *Id.* This put the Patricks in a worse financial position. CP 4-5 at ¶ 12. Further, Wells Fargo said it would foreclose on the Patricks' home if they did not sign the forbearance agreement. CP 5 at ¶ 13. Left with no other options, the Patricks signed and commenced making payments to Wells Fargo under its terms. *Id.* Fortunately for the Patricks, they could afford to make these payments despite the financial crisis. *Id.*

Given that the forbearance agreement failed to provide the Patricks with any relief, the Patricks continued to communicate with Wells Fargo regarding a true modification. CP 5 at ¶ 14. In June 2012, Wells Fargo again instructed the Patricks to fall behind on their monthly payment to qualify for a modification. *Id.* This began a new cycle of chaos were Wells Fargo requested repetitive and voluminous documentation. CP 5-6 at ¶ 15. The Patricks complied with each request and, in turn, Wells Fargo provided conflicting responses and new requests. CP 5-6 at ¶ 15.

B. Wells Fargo's Responses to Discovery Reveal Patent Unfairness and Deception in Their Loan Modification Program

i. Wells Fargo's internal guidelines show it would not consider the Patricks for a modification unless the Patricks' missed Payments

Wells Fargo made available to its employees a tool that provided information about the servicing of the Patricks' loan based on the guidelines in the pooling and servicing agreement. CP 2240-2246, CP 2297-2303. These guidelines show the Patricks would not be considered for a loan modification unless they were either "in Default or Default Imminent." CP 2156-2157, CP 2240-2246, CP 2297-2303. This directive explains why Wells Fargo twice told the Patricks that they must miss payments to qualify for a modification. *Id.*; CP 3 ¶¶ at 8-9, CP 2779.

ii. Wells Fargo changed the Patrick's point of contact frequently, such that they were constantly restarting the modification process

While the Patricks were seeking a modification from Wells Fargo, Wells Fargo switched the Patricks' client contact seven times. CP 2148-2152, CP 2196-2198, CP 2234-2236, CP 2252-2253, CP 2468-2471. In some instances, they dealt with their client contact for about a month before it was changed and in some instances they had their contact changed after having dealt with the same person for a year or more. *See Id.*

Furthermore, as explained *infra,* the transition between contacts was marred with mistakes, inaccuracies, and unreasonable behavior on the part of Wells Fargo. Often, the Patricks would receive conflicting information or requests from more than one Wells Fargo employee claiming to be their

dedicated client contact at the same time or within a few days of each other. *Compare* CP 2166-2187, *with* CP 2188-2203; *compare also* 2218-2221, *with* 2222-2223. One representative might send a letter to the Patricks requesting information to supplement an existing modification application while another representative sent the Patricks a letter denying their application and requesting that they start anew. *See e.g.* CP 2166-2187 (Wells Fargo representative Sandra Contreras sent the Patricks two letters on November 8, 2012, acknowledging receipt of modification documents, then another letter on November 9, 2012, curiously introducing herself and soliciting the Patricks to submit documents for a completely new modification application); CP 2188-2198 (Wells Fargo representative sent the Patricks three separate letters on November 12, 2012, one introducing herself as the Patricks new assigned contact person, another denying the Patricks' outstanding application for a modification, and yet another requesting additional information for the modification application that she denied that same day); CP 2214-2233 (Wells Fargo sends conflicting letters that acknowledge receipt of application materials and deny the application on the same day, then send letter requesting additional information for that same modification application just days later).

iii. Wells Fargo continually solicited and accepted the Patricks' applications for HAMP when Wells Fargo knew, or should have known, that the servicing guidelines for the Patricks' loan made a HAMP modification an impossibility

The servicing guidelines for the Patricks' loan, available to Wells Fargo employees, but not the Patricks, provide that loan modifications are allowed. CP 2240-2246, CP 2297-2303, CP 2666. However, there are very specific limitations. *See Id.*; CP 2692-2694, CP 2717. A modification of the Patricks' loan may not include: 1) capitalization or increase in the principal balance; 2) forgiveness of any portion of the principal balance; 3) setting aside or deferring any principal; 4) any extension of the maturity date of the loan; or, 5) any permanent reduction in the mortgage interest rate. *Id.* These limitations prevented the Patricks' loan from being modified under HAMP. CP 2357-2454.

Nonetheless, Wells Fargo unfairly and deceptively solicited HAMP modification applications from the Patricks and told the Patricks they were being considered for a HAMP modification. CP 2152-2155, CP 2162-2163, CP 2192-2195, CP 2214-2217, CP 2237-2239, CP 2254-257, CP 2289-2292, CP 2304-2307, CP 2320-2324, CP 2328-2341, CP 2472-2573. Wells Fargo sent the Patricks multiple solicitations inviting the Patricks to apply for a HAMP modification. CP 2254-2257, CP 2289-2292, CP 2472-2573. Additionally, Wells Fargo's denial letters to the Patricks often stated

"[w]e do not have the contractual authority to modify your loan under HAMP because of limitations in our servicing agreement." CP 2192-2195, CP 2214-2217, CP 2320-2324. In spite of these statements, after Wells Fargo induced the Patricks to miss payments to obtain a loan modification, Wells Fargo continued to give the Patricks false hope by soliciting HAMP applications, telling the Patricks they would be considered for a HAMP modification, and occasionally reviewing the Patricks for a HAMP modification. CP 2152-2155, CP 2162-2163, CP 2192-2195, CP 2214-2217, CP 2237-2239, CP 2254-257, CP 2289-2292, CP 2304-2307, CP 2320-2324, CP 2328-2341, CP 2472-2573.

Wells Fargo even attended mediation with the Patricks regarding the Patricks' pursuit of qualifying for a HAMP modification, in spite of its knowledge that the Patricks' loan was ineligible. CP 2293-2296, CP 2345-2457. At mediation, Wells Fargo falsely represented to the Patricks that the reason they were denied a HAMP modification was that they did not qualify based on their income. CP 2345-2356. Perhaps this was so that Wells Fargo could avoid complying with RCW 61.24.163(5)(j) or disclosing it was prohibited from modifying the Patricks loan, even though it had twice induced them to miss monthly mortgage payments so they would qualify. CP 2354-2356. In truth, it would not have mattered what the Patricks' income was, given their loan's ineligibility for HAMP. *Id.*

When the Patricks appealed the mediation outcome, Wells Fargo's investigation report stated that the loan was not eligible for HAMP. CP 2357-2454. Nonetheless, Wells Fargo continued to consider the Patricks for a HAMP loan modification. CP 2472-2573.

iv. Wells Fargo obfuscated the loan modification process

While dealing with the Patricks, Wells Fargo performed multiple acts to confuse, delay, and complicate the modification process. Wells Fargo repeatedly gave the Patricks conflicting information regarding who the "investor" was that Wells Fargo was servicing the Patricks loan on behalf of. CP 2193-2195[4], CP 2209-2211[5], CP 2215-2217[6], CP 2248-2251.[7] Wells Fargo stated that the Patricks' applications for a modification had been denied based on the decision of the investor. CP 2118-2120, CP 2158-2161, CP 2192-2195, CP 2214-2217, CP 2313-2324. However, the investor was identified to be different entities, including: (1) HSBC as Trustee, (2) the Trust, and (3) Wells Fargo. *Compare* CP 2192-2195 *with* CP 2208-2211, CP 2214-2217, CP 2247-2251, CP 2313-2324. Sometimes, the identified investor would alternate over the course of a few months. *Id.* Other times, Wells Fargo did not identify the existence of an investor,

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[4] November 12, 2012, "investor, Wells Fargo Bank, N.A."
[5] December 21, 2012, "investor, HSBC Bank USA, N.A."
[6] January 16, 2013, "investor, Wells Fargo Bank, N.A."
[7] June 14, 2013, "investor, HSBC BANK USA, N.A. WFMBS 2007-AR-8"

such as in its denial letters. CP 2118-2123, CP 2158-2161, CP 2192-2195.

Wells Fargo forced the Patricks to submit duplicative documents, because Wells Fargo failed to carefully review the submitted documents. *See infra*. The Patricks submitted a Third Party Authorization form naming people to whom the Patricks had authorized Wells Fargo to share their information with, including their housing counselors at Parkview Services. CP 2162-2165. Wells Fargo responded with a letter stating that it received and recognized its authorization to share info with only one of these people; the Washington Attorney General's office. CP 2204-2205. The Patricks were forced to submit a separate form, again authorizing Wells Fargo to share their information with Parkview. CP 2206-2207.

Wells Fargo also made requests that were impossible to comply with, including requests for future bank account statements, i.e. reporting periods that would not conclude until after the deadline had passed. CP 2188-2191 (Letter dated November 12, 2012, that requests the Patricks' future personal bank statements from 10/22/12-11/23/12 and future business bank statements from 11/1/12-11/30/12, yet also states that that these documents must be received by the due date of November 22, 2012).

v. Wells Fargo provided the Patricks' with false reasons for the denial of their loan modification applications.

Wells Fargo gave multiple false reasons for denying the Patricks a

modification. Wells Fargo stated that the investor determined it was against their best interests, the investor simply declined to approve, and the Patricks didn't qualify due to their monthly income. CP 2118-2120, CP 2158-2161, CP 2247-2251. All of these statements are false; as Master Servicer, Wells Fargo, is identified in Wells Fargo's own guidelines as being the party whose consent is required to approve a modification. CP 2240-2246, CP 2297-2303, CP 2666. Wells Fargo also claimed the Patricks had exceeded the allowed number of modifications, an untruth that was uncovered at mediation. CP 2313-2319, CP 2345-2353.

C. The Patricks mediate with Wells Fargo under Washington's Fairness Foreclosure Act

Despite telling the Patricks they would qualify for a loan modification, Wells Fargo started non-judicial foreclosure proceedings in August 2013. CP 2912 at ¶ 4. Getting nowhere with Wells Fargo, the Patricks turned to Parkview Services, a housing counselor, for help. CP 5 at ¶ 16. The Patricks were referred into the Foreclosure Fairness Act's ("FFA") Mediation Program, under RCW 61.24.163, and started working with housing counselor Shelley Doran in 2014. CP 6 at ¶¶ 16-17; CP 2780 at ¶ 8. Despite their ongoing ordeal with Wells Fargo, the Patricks felt hopeful, the FFA Mediation would finally afford them the opportunity to sit down and talk with a real person to get things straightened out. *Id.*

Ms. Doran tried to get Wells Fargo to provide the Patricks with a long overdue loan modification. CP 6, CP 36-738; CP 2345-2353. Ms. Doran and the Patricks prepared a complete loan modification package and promptly provided this to the FFA Mediator and Wells Fargo, through its attorney, Mr. Robert McDonald of Defendant M&H. *Id.*

Sadly, despite Ms. Doran's assistance and advocacy, the Patricks did not fare any better with Wells Fargo. Wells Fargo did not provide the Patricks with Net Present Value ("NPV") inputs before the FFA Mediation Session. CP 6-7 at ¶ 18; RCW 61.24.163(5)(g). On the day of the mediation, the Patricks and Ms. Doran arrived anxious and early. *Id.*; CP 2780-2781 at ¶ 9. At this point, Wells Fargo had not let the Patricks know the results of the modification review. CP 2780-2781 at ¶ 9. When the Mediation did not begin on time, the Patricks felt increasingly apprehensive. *Id.*; CP 6-7 at ¶ 18; CP 2345-2353.

At mediation, Wells Fargo refused to consider all of Rhonda's income despite Rhonda's willingness to be a co-borrower on a modification. CP 6-7 at ¶ 18. Next, the Wells Fargo representative made inconsistent statements regarding the Patricks' eligibility for loan modification programs: the representative stated the Patricks were not eligible for a loan modification because they had exceeded the number of allowed modifications, but later admitted that this was not true. *Id.*; CP 2780-2781

at ¶ 9; CP 2345-2353. The NPV provided by Wells Fargo included manipulated inputs resulting in a failing NPV; after the Mediation, Ms. Doran used the correct inputs resulting in a passing NPV, which showed the Patricks were eligible for a loan modification under HAMP. CP 6-7 at ¶¶ 18-19; CP 2304-2312, CP 2325-2344, CP 2345-2353.

Moreover, the Patricks requested a copy of the pooling and servicing agreement that Wells Fargo alleged was related to their loan, a document the Patricks were entitled to under RCW 61.24.163(5)(j). CP 2345-2353. Wells Fargo provided a single page that was clearly part of a larger document. *Id.* In discovery, Wells Fargo produced two separate documents it claimed were related to the servicing of the loan; each over 100 pages. CP 2624-2772. However, during FFA Mediation, Wells Fargo would not provide the complete documents even though the mediator required them to. CP 2345-2353. Additionally, Wells Fargo did not provide any documentation detailing efforts made to obtain a waiver of the investor restriction, as required under RCW 61.24.163(5)(j). *Id.*

Based off their mediation experience, the Patricks filed a complaint against the trustee conducting the nonjudicial foreclosure, QLSWA, with the Washington Attorney General's Office. CP 1711-1714. The Patricks expressed their concern that they were continually denied a loan modification, even when told they were told they would get one, and, in

fact, they qualified for one. *Id.* In response, QLSWA stated they did not have enough information to evaluate the Patricks' assertions, even though QLSWA is owned by the same attorneys that own M&H, and Mr. McDonald represented Wells Fargo as an attorney working for M&H, and Mr. McDonald was also General Counsel for Quality. CP 1717-1739.

D. Foreclosure proceedings initiated by Wells Fargo's attorney during FFA mediation

While the Patricks were in FFA mediation, QLSWA and M&H, the firm that represented Wells Fargo in FFA mediation against the Patricks, began a nonjudicial foreclosure against the Patricks when QLSWA "received the referral initiated by Wells Fargo, through the LPS desktop System" in August 2013. CP 1016; CP 2912 at ¶ 4. CP 1696-97.

QLSWA & M&H share common ownership. CP 959. Tom Holthus and Kevin McCarthy own QLSWA. *Id.* Mr. Holthus and Mr. McCarthy are also the founding partners of M&H. *Id.*; CP 996-1006. M&H offers legal representation to banks and other financial institutions and advertises on its website: "We pride ourselves on knowing the judges and the 'local-local' rules to effectively represent our lender clients." *Id.* The 30(b)(6) designee for M&H characterized M&H as follows:

> Q: Okay, is the majority of your work in Washington related to foreclosures? A: I would characterize it as it's primarily related to or solely focused on representing lenders and servicers typically in a default loan situation, which involves foreclosures, yes.

CP 954 at 17:13-19.

In Washington, QLSWA and M&H share the same physical address at 108 1st Avenue South in Seattle, Washington 98104. CP 1344; CP 1007-1010. In addition, QLSWA and M&H shared the same previous address, 19735 10th Avenue NE, Suite N-200, Poulsbo, WA 98370. CP 1206-1210 (QLSWA lists this Poulsbo address on the Notice of Default); CP 1334 (M&H lists the same Poulsbo address as its address on the letter to the mediator). Further, QLSWA directs all correspondence and borrowers to Quality Loan Services Corp., located at 2141 5th Ave. San Diego, CA 92101. CP 1208, CP 1448 (Notice of Trustee Sale lists the trustee mailing address as Quality Loan Servicer Corp.'s address).

In addition to sharing an office, M&H acts as QLSWA's counsel and advises QLSWA on how to conduct foreclosures against Washington residents, such as the Patricks. CP 957 at 26:15-19. QLSWA also acts as a vendor for M&H. CP 958 at 31:12-23. M&H refers mutual clients to QLSWA for nonjudicial foreclosures and QLSWA refers clients to M&H. *Id*; CP 964 at 54:5-8. Even though M&H serves as QLSWA's counsel, there is no formal written agreement memorializing the retention of M&H by QLSWA. CP 961 at 45:8-13.

QLSWA and M&H share files and communicated with each other through the IDS platform for the purposes of completing the nonjudicial

foreclosure against the Patricks.[8] After receiving the referral, QLSWA and M&H worked together to appoint QLSWA successor trustee after a different entity, Northwest Trustee Services, was originally appointed successor trustee. CP 2912 at ¶ 4; CP 1076. QLSWA was not the original trustee listed on the Patricks' deed of trust. CP 1049-1068. On September 4, 2013, "Robyn Tassal, McCarthy & Holthus" drafted an Appointment of Successor Trustee and sent it on to Wells Fargo for execution. CP 2109. Later in the communication, she identified herself as "Robyn Tassell, Quality Loan Services Corp." *Id.* This was memorialized in a letter to Wells Fargo, which requires Wells Fargo to return the appointment back to Quality Loan Servicer's Corp. and reads: "This document is needed for us to advance the nonjudicial foreclosure that we are requesting for you." CP 1173-1174. The appointment was signed by Howard Randolph Straughen for Wells Fargo, as servicer and attorney in fact for HSBC Bank USA, National Association as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Asset Backed Pass-Through Certificates Series 2007-AR8 ("Wells Fargo Asset Trust"). CP 1196-1197.

M&H continued to actively participate in the foreclosure against the

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[8] CP 2097-2110; CP 1028, CP 1043, CP 1182-1183, CP 1194, CP 1196-1197, CP 1199, CP 1206-1210, CP 1212, CP 1214, CP 1220, CP 1243, CP 1253, CP 1274-1276, CP 1277, C-1342, CP 1344, CP 1412, CP 1417-1418, CP 1427-1430, CP 1432-1433, CP 1435, CP 1442, CP 1450, CP 1452, CP 1463, CP 1539, CP 1543, CP 1564, CP 1758-1762, CP 2097.

Patricks. The following actions were completed by M&H:

(1) Robyn Tassall, identified as an employee of M&H in the IDS communication log, requested the Beneficiary Declaration from Wells Fargo on September 4, 2013. CP 2108-2109. In a separate communication from Ms. Tassall to Wells Fargo, Ms. Tassall listed herself as a QLSWA employee with an email address: rtassall@qualityloan.com. CP 2109. Ms. Tassal also completed a referral audit on September 4, 2013. *Id.*

(2) On October 15, 2013, Andrew Basom, identified as an employee of M&H in the IDS communication log, updated the system with a request to get an updated Loss Mitigation Declaration. CP 2107-2108. In addition, Mr. Basom completed an assignment status and loss mitigation review on August 27, 2013. CP 2109-2110.

(3) On the reinstatement letter QLSWA sent to the Patricks on December 10, 2013, QLSWA charged M&H's fees, $202.50. CP 1281.

(4) On July 25, 2014, Bonnie Fullen, identified as a M&H supervisor in the IDS computer log, sent QLSWA a message wanting information on the hold status of the Patrick's nonjudicial foreclosure. CP 2104. This came three months after Ms. Fullen asked Wells Fargo what was going on in mediation. CP 2105.

(5) The Payoff reinstatement was sent to attorney Robert McDonald, who currently works for M&H and QLSWA on November 11, 2014. CP

2101; CP 1036-1041.

(6) The Patricks' complaint was sent to "client" and M&H on December 18, 2014. CP 2098.

(7) From November 24, 2014 through Dec. 8, 2014, QLSWA referred correspondence from the Patricks to Robert McDonald, the M&H attorney who represented Wells Fargo in mediation against the Patricks. CP 2100-2101; CP 1036-1041.

(8) On December 18, 2014, Alexander Shrove, Administrative assistant at M&H, updated the IDS system with a note indicating she sent a copy of the complaint to the client, Wells Fargo. CP 1059. Ms. Shove uploaded an email to Wells Fargo which stated: "Please review the litigation documents and advise if your client would like to proceed with the Trustee sale or postpone to allow further time to review." *Id.*

As part of the payoff quote issued to the Patricks, QLSWA and M&H charged the Patricks for M&H's attorney fees. CP 1764. These were charges in the amounts of $300.00 on December 9, 2013 and $202.50 on June 26, 2010, both of which predate litigation. *Compare* CP 1764 *with* CP 1783 (first communication to QLSWA from the Patricks' Counsel on Nov. 21, 2014). QLSWA and M&H required the Patricks to pay M&H attorney fees accrued three years before QLSWA was appointed successor trustee. *Compare* CP 1196-97 (Appointment recorded on Sept. 20, 2013)

with CP 1764 (Payoff included $ 202.50 attorney fee from 2010).

In addition to charging M&H fees and fees that occurred after receiving the foreclosure referral in August 2013, QLSWA and M&H required the Patricks to pay fees dated from 2010 in order to keep their home: On June 26, 2010 they charged $1350.00 for title policy, $103.14 for certified mail costs, $142.00 for Recording fees, $70.00 for process services, and $70.00 for NOTC. CP 1764 on June 2, 2010, they charged $30.00 for inspections. *Id.* On April 29, 2010, they charged $95.00 for a Brokers BPO and on January 1, 2010 another 15.00 for an inspection. *Id.*

E. After mediation, Trustee Defendants continue the nonjudicial foreclosure

On September 8, 2014, QLSWA recorded a Notice of Trustee's Sale against the Patrick's home in Snohomish County under auditor number 201409080384. CP 2937-2941.

F. The Patricks alerted M&H and QLSWA to the defects in the nonjudicial foreclosure

On November 21, 2014, the Patricks, through counsel, mailed QLSWA a letter requesting QLSWA postpone the Trustee's sale based off Wells Fargo's action in inducing the Patricks to miss payments and then refusing to provide the Patricks the promised loan modification. CP 1576-85. The Patricks also requested the opportunity to discuss these problems

with QLSWA. *Id.* QLSWA stated in a December 8, 2014 letter that it was reviewing the Patricks request to postpone the sale. CP 1838-39.

On December 17, 2014, QLSWA again responded and this time the letter was signed by Robert W. McDonald, General Counsel for QLSWA. CP 1903-04. Mr. McDonald, the same M&H attorney who represented Wells Fargo throughout mediation against the Patricks, responded on behalf of the trustee, "[QLSWA] has received recent confirmation from the loan servicer, Wells Fargo Bank N.A. that HSBC Bank USA, National Association as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Asset-Backed Pass-Through Certificates Series 2007-AR8 is the owner of the Patrick's Promissory Note secured by the Patrick Deed of Trust." *Id.*[9] The rest of the Patricks' concerns were ignored.

G. Defendants sell the Patricks home

On February 13, 2015, the Defendants sold the Patricks' home. CP. 2949-51.

IV. PROCEEDINGS BELOW

On April 27, 2015, Wells Fargo and HSBC filed a motion for summary judgment. CP 2891-2910. Additionally, QLSWA and M&H filed their own summary judgment on April 28, 2015. CP 2867-2875.

[9] Mr. McDonald is listed on the M&H letterhead as an M&H attorney, in a letter received on May 14, 2015 in a separate matter. CP 1037-41.

Before the motions were decided,the Patricks filed an amended complaint in Snohomish County Superior Court on May 27, 2015 after being granted leave by the court. CP 837-929. However, on July 25, 2015, the Superior Court granted all Defendants' summary judgment motions. CP 739-43.

V. ARGUMENT

A. Standard of Review

A Superior Court's ruling on summary judgment is reviewed de novo. **Folsom v. Burger King**, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Appellate courts must perform an independent inquiry of all materials before the Superior Court to determine whether summary judgment was appropriate. **Id.** (citing **Mountain Park Homeowners Ass'n v. Tyings**, 125 Wn.2d 337, 341, 883 P2d 1383 (1994)). On a motion for summary judgment, the court must view the facts and all reasonable inferences drawn from those facts in the light most favorable to the nonmoving party. **Camicia v. Howard S. Wright Constr. Co.**, 179 Wn.2d 684, 687-688, 317 P.3d 987 (2014) (citing CR 56(c). Summary judgment is proper only where there are no genuine issues of material fact. **Amalgamated Transit v. State**, 142 Wn.2d 183, 11 P.3d 762 (2000); CR 56(c).

The moving party has the burden of establishing the absence of an issue of material fact beyond a reasonable doubt. **Alhadeff v. Meridian on Bainbridge Island, LLC**, 167 Wn.2d 601, 611, 220 P.3d 1214

(2009)(citing **SAS Am., Inc. v. Inada**, 71 Wn. App. 261, 263, 857 P.2d 1047 (Div. I, 1993)). A genuine issue of material fact exists where reasonable minds could differ on, or otherwise draw different conclusions from, the facts controlling the outcome of litigation. **Ranger Ins. Co. v. Pierce County**, 164 Wn.2d 434, 437, 656 P.2d 1030 (1982)). The burden shifts to the non-moving party to demonstrate the existence of a material issue of fact only if the moving party establishes their "substantial burden" in showing the absence of an issue of material fact. **Young v. Key Pharmaceuticals, Inc.**, 112 Wn.2d 216, 234, 770 P.2d 182 (1989) (Dore, J. concurring in part, dissenting in part).

In granting summary judgment, a court is declaring due process has been fulfilled as well as cutting off the non-moving party's right to discovery, and right to a jury trial. **See Putman v. Wenatchee Valley Med. Ctr., P.S.**,1 Wn.2d 974, 979, 216 P.3d 374 (2009), Wash. Const, art. I § 21. To do this without violating Washington's Constitution, it must be beyond dispute that a reasonable person could not find in favor of the non-moving party. CR 56(c); **Folsom**, 135 Wn.2d at 663.

As will be explained *infra*, the Trial Court impermissibly admitted evidence, construed the facts in favor of the moving parties, and misconstrued the burdens of proof applicable to summary judgment.

B. The Trial Court's Grant of Summary Judgment was improper when the Patricks raised genuine issues of material fact that Respondents violated the CPA, DTA, and Common Law Negligence

"To prevail on a CPA action, the plaintiff must prove (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation." **Klem v. Wash. Mut. Bank**, 176 Wn.2d 771, 782, 295 P.3d 1179 (2013) (q*uoting* **Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.**, 105 Wn.2d 778, 780, 719 P.2d 531 (1986)). In **Klem**, the Court clarified the scope of the CPA:

> [t]o resolve any confusion, we hold that a claim under the Washington CPA may be predicated upon a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest.

Id. at 787.

Defendants did not contest whether the complained of acts occurred in trade or commerce and therefore conceded this element for the purposes of summary judgment. CP 2900-2907. **White v. Kent Medical Center, Inc., P.S.**, 61 Wn. App. 163, 169, 810 P.2d 4 (Div. I, 1991).

In order to prove negligence, the plaintiff must establish: 1) Duty; 2) Breach; 3) Injury; and 4) Causation. **Hertog v. City of Seattle** 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

i. Wells Fargo and HSBC as Trustee's Unfair or Deceptive Acts

Liability under the CPA may be predicated on an unfair act. **Klem**, 176 Wn.2d at 782. The term unfair is not defined in the statute because "[i]t is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field." **Panag v. Farmers Ins. Co. of Wash.**, 166 Wn.2d 27, 48, 204 P.3d 885 (2009) (quoting **State v. Schwab**, 103 Wn.2d 542, 558, 693 P.2d 108 (1984)).

Liability may also be predicated upon deceptive acts. RCW 19.86.020. "The implicit understanding is that "the actor misrepresented something of material importance." **State v. Kaiser**, 161 Wn. App. 705, 719, 254 P.3d 850 (Div. I, 2010); quoting **Hiner v. Bridgestone/Firestone, Inc.**, 91 Wn. App. 722, 730, 959 P.2d 1158 (Div. III, 1998), rev'd on other grounds, 138 Wn.2d 248, 978 P.2d 505 (1999). "To prove that an act or practice is deceptive, neither intent nor actual deception is required." **Kaiser**, 161 Wn. App. at 719. "Even accurate information may be deceptive 'if there is a representation, omission or practice that is likely to mislead.'" *Id.*

ii. Wells Fargo committed unfair or deceptive practices and negligence when it pretended to consider the Patricks for a loan modification when the Patricks were current on their monthly payments

Between May 2009 and December 2009, the Patricks paid Choice Financial to work with Wells Fargo to obtain a permanent loan

modification. CP 2, CP 12-22. During this time, Wells Fargo solicited and accepted documents from the Patricks while representing that it was assisting the Patricks in modifying the loan. CP 2-3 at ¶ 6. Despite complying with all of Wells Fargo's requests, the Patricks working with Choice Financial were unsuccessful in obtaining a modification.

Wells Fargo's own guidelines for servicing the Patrick's loan provide that to qualify for a modification, a borrower must either be in default or default must be imminent. CP 2240-2246, CP 2297-2303, CP 2666. However, Wells Fargo did not inform the Patricks of this until after the Patricks had ceased working with Choice Financial and spent money and time working towards an illusory modification. CP 2, CP 12-22. Therefore, between May 2009 and December 2009, Wells Fargo's dealings with the Patricks were a complete farce because Wells Fargo knew or had reason to know the Patricks would not qualify for a modification while the Patricks were current on their payments. It was unfair or deceptive for Wells Fargo to knowingly solicit and accept modification application documents when it knew the Patricks would never qualify while they current on their payments, and Wells Fargo failed to disclose this information to the Patricks.

iii. Wells Fargo committed unfair or deceptive practices and negligence when it induced the Patricks to default so they would be able to receive a loan modification and then subjected the Patricks to an unfair, or deceptive, or incompetent loan modification process

In **Tokarz v. Frontier Fed. Sav. & Loan Ass'n.**, 33 Wn. App. 456, 656 P.2d 1089 (Div. III, 1982), the court ruled:

> modern banking practices involve a highly complicated structure of credit and other complexities which often thrust a bank into a role of an adviser, thereby creating a relationship of trust and confidence which may result in a fiduciary duty upon the bank to disclose facts when dealing with the customer.

Id. at 459 (*citing* **Stewart v. Phoenix. Nat'd Bank, 49 Ariz.** 34, 64 P.2d 101, 106 (1937); **Hutson v. Wenatchee Fed. Sav. & Loan Ass'n**, 22 Wn. App. 91, 588 P.2d 1192 (Div. III, 1978)). Under these circumstances:

> one who speaks must say enough to prevent his words from misleading the other party; **one who has special knowledge of material facts to which the other party does not have access may have a duty to disclose these facts to the other party**; and one who stands in a confidential or fiduciary relation to the other party to a transaction must disclose material facts.

Id. (emphasis added).

Montana's Supreme Court cited **Tokarz,** 33 Wn. App 456 with favor and applied its reasoning when a bank advised a borrower to miss payments to obtain a modification. **Morrow v. Bank of America, N.A.**, 375 Mont. 38, 48, 324 P.3d 1167 (2014). The **Morrow** Court held banks owe borrowers fiduciary duties when offering advice regarding loan modifications. **Id.** at 47. The Court also ruled banks are obligated to

manage the modification process in a non-negligent manner that does not damage borrowers. **Id**. at 49.

Similarly, in **Alvarez v. BAC Home Loans Servicing, L.P.** the California Court of Appeals held servicers owe homeowners a duty to exercise reasonable care in the review of their loan modification applications once they had agreed to consider them. 228 Cal. App. 4th 941, 948-49, 176 Cal. Rptr. 3d 304 (2014). Washington law also requires an actor to act reasonably once a duty is voluntarily undertaken, even if no duty is originally owed. **Folsom**, 135 Wn.2d at 676-677.

Here, Wells Fargo instructed the Patricks to miss their monthly payment to obtain a permanent modification. CP 3 ¶¶ 8-9, CP 5 at ¶ 14. After having never missed a payment, the Patricks followed Wells Fargo's advice and missed payments to obtain the promised loan modification. *Id.*

Instead of offering the Patricks a modification after requiring the Patricks to make three trial payments, Wells Fargo presented the Patricks with a forbearance agreement.CP 4-5 at ¶¶ 11-12. Wells Fargo told the Patricks if they did not agree to its terms, Wells Fargo would foreclose. CP 5 at ¶ 13. The Patricks felt they had no option but to sign the forbearance agreement, which put them in a worse financial position than they were before they relied on Wells Fargo's advice. CP 1-10. Mr.

Patrick continued to discuss his situation with Wells Fargo and was told again that if he missed three payments he would be given a loan modification that would put his family in a better financial position. *Id.*

After inducing the Patricks to miss payments the second time, Wells Fargo subjected the Patricks to a never ending loan modification "process." CP 2779-2781 at ¶¶ 5-9; CP 5-7 at ¶ 15-19. The Patricks submitted voluminous and repetitive documentation only to be provided conflicting responses and new requests. CP 5-6 at ¶ 15; CP 2779 at ¶ 5. The entire process became a charade as Wells Fargo routinely sent the Patricks correspondence that was erroneous, conflicting, and nonsensical. *Id.*

iv. Wells Fargo committed unfair or deceptive practices when it failed to comply with RCW 61.24.163(5)(j)

RCW 61.24.163(5) lists certain documents a beneficiary must provide the borrower, including the investor restriction and documentation detailing the efforts of the beneficiary to obtain a waiver of the investor restriction provision if the beneficiary claims it cannot implement a modification due to such a restriction. At the mediation, Wells Fargo claimed an investor restriction prohibited it from modifying the Patrick's loan, but never gave the Patricks the portion of the servicing agreement that contained such a restriction nor did Wells Fargo provide documentation showing it made <u>any</u> effort to obtain a waiver. CP 6-7 at ¶

18; CP 2780-2781 at ¶ 9. A violation of RCW 61.24.163(5)(j) is a violation of a requisite to sale, RCW 61.24.030(9), and by itself is sufficient to make the trustee's sale *ultra vires* and void as well as qualify as a unfair or deceptive act.

v. Wells Fargo committed unfair or deceptive practices when it failed to mediate in good faith at the FFA Mediation

A bank's failure to mediate in good faith at FFA mediations violates the CPA. RCW 61.24.135(2). RCW 61.24.163(10) provides a list of conduct constituting bad faith including "[f]ailure of the borrower or the beneficiary to provide the documentation required before mediation or pursuant to the mediator's instructions." RCW 61.24.163(10)(b).

Here, the Defendants failed to mediate in good faith. First, prior to the FFA mediation, the Defendants did not provide the Patricks with NPV inputs as required by the FFA. CP 6-7 at ¶ 18. In addition, Wells Fargo refused to consider Mrs. Patrick's income or provide the complete pooling and servicing agreement and waiver request documentation, required under RCW 61.24.163(5)(j). *Id.* During mediation, the Patricks became concerned they were not dealing with an individual who had authority to modify their loan or resolve the ongoing nightmare Wells Fargo had created because the person on the phone lacked basic information and made inconsistent statements. CP 6-7 at ¶ 18. For example, the Patricks

were told they could not get a modification because they had already received too many and then later told that was not true. *Id.* During the course of mediation, it became clear Wells Fargo was using erroneous numbers and inputs to justify the denial. *Id.* at ¶¶ 18-19. After mediation, the Patricks' showed they qualified for a modification in a letter sent to Wells Fargo. *Id.*

A mediator's certification that the beneficiary failed to mediate in good faith raises a rebuttable presumption of that conclusion. RCW 61.24.163(14)(a). While not explicit as to a borrower, it follows from this basis that the Patricks can and do overcome any rebuttable presumption based on the mediator's certification. *See e.g.* RCW 4.84.330.

vi. Wells Fargo and HSBC as Trustee committed unfair or deceptive practices when they appointed Quality as DTA trustee and Quality violated its duty of good faith owed to the Patricks at the Direction of Wells Fargo.

Additionally, Wells Fargo and HSBC as trustee can be held vicariously liable for Quality's violations of its duty of good faith under RCW 61.24.010(4). The **Klem** Court held a DTA trustee's violations of RCW 61.24.010(4) could result in a CPA claim against the foreclosing entity;

> [a]n independent trustee who owes a duty to act in good faith to exercise a fiduciary duty to act impartially to fairly respect the interests of both the lender and the debtor is a minimum to satisfy the statute, the constitution, and equity, at the risk of having the sale

> voided, title quieted in the original homeowner, and subjecting itself and the beneficiary to a CPA claim.

176 Wn.2d at 790.

vii. Wells Fargo and HSBC committed unfair or deceptive practices when Wells Fargo nonjudicially foreclosed against the Patricks

As outlined *supra*, the Patricks were unfairly or deceptively told that to receive a loan modification, they had to stop paying their monthly payments on two separate occasions. CP 1-10. It was further unfair of the Defendants to repeatedly violate multiple borrower protections in the DTA and then to direct their agent, QLSWA, to sell the property. CP 2949-51.

a. Public Interest Impact

RCW 19.86.093 provides that:

> … a claimant may establish that the act or practice is injurious to the public interest because it:
> (1) Violates a statute that incorporates this chapter;
> (2) Violates a statute that contains a specific legislative declaration of public interest impact; or
> (3)(a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons.

Wells Fargo's unfair or deceptive conduct in inducing the Patricks to default and subjecting the Patricks to a kafkaesque loan modification process meets the public interest impact element under RCW 19.86.093(3)(b) & (c) because Wells Fargo telling borrowers to default and then carrying out an unfair or deceptive loan modification process

had, and has, the capacity to injure other persons. Certainly the public has an interest in loan servicers dealing with their customers in good faith.

The Patricks' situation is similar to many Washingtonians; the Bank entered into a settlement and assurance of discontinuance with the Washington State Attorney General in October 2010 as part of a multi-state and federal lawsuit related to Wells Fargo's problematic origination and servicing of adjustable rate notes.[10] HAMP modifications, without consideration of other programs, affect millions nationwide.[11]

Additionally, the Defendants' violations of RCW 61.24.030(9) in failing to comply with the FFA Mediation requirements conclusively satisfy this element. RCW 19.86.093(2) provides that a CPA cause of action "establish[es] that the act or practice is injurious to the public interest because it . . . [v]iolates a statute that contains a specific legislative declaration of public interest impact." Under the MORTGAGE - HOMEOWNERSHIP SECURITY - BUSINESS REGULATIONS ACT, (S.H.B. No. 2770), the legislature announced findings in Laws of 2008, ch. 108, § 1 (codified as amended RCW 19.144.005), which provide

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[10] *See* Press Release, Washington State Office of the Attorney General, Attorney General McKenna announces mortgage payment help for Wells Fargo, Wachovia, and World Savings Bank borrowers (October 06, 2010), available at http://www.atg.wa.gov/news/news-releases/attorney-general-mckenna-announces-mortgage-payment-help-wachovia-and-world, last visited May 15, 2015.

[11] Jean Braucher, Humpty Dumpty and the Foreclosure Crisis: Lessons from the Lackluster First Year of the Home Affordable Modification Program (HAMP), 52 Ariz. L. Rev. at 727, 759 and n. 143 (2010).

"protecting our residents and our economy from the threat of widespread foreclosures . . . is in the public interest." These findings apply because the legislature amended RCW 61.24.030 of the DTA in that very same act. *See* Laws of 2008, Ch. 108 § 22. For convenience and clarity, the legislature links to public interest findings on its own webpage for RCW 61.24.030.[12] Because the statute contains a declaration of public interest, a violation of RCW 61.24.030 *per se* affects the public interest.

b. Injury and Causation

To prove a CPA claim, the Patricks were required to show injury to their "business or property" and "a causal link . . . between the unfair or deceptive acts and the injury suffered. **Hangman Ridge**, 105 Wn.2d at 792-93. A minimal injury and "pecuniary losses occasioned by inconvenience may be recoverable as actual damages." **Panag**, 166 Wn.2d at 57 (*citing* **Keyes v. Bollinger**, 31 Wn. App. 286, 296, 640 P.2d 871 (Div. 1, 1982); **Tallmadge v. Aurora Chrysler Plymouth, Inc.**, 25 Wn. App. 90, 605 P.2d 1275 (Div, I, 1979)).

"[D]istraction and loss of time to pursue business and personal activities due to the necessity of addressing the wrongful conduct through this and other actions" are sufficient injuries under the CPA. **Walker v.**

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[12] http://apps.leg.wa.gov/rcw/default.aspx?cite=61.24.030 (view bottom of page for: "Notes: . . . Findings - - 2008 c 108: See RCW 19.144.005") (last visited May 15, 2015).

Quality Loan Service Corp., 176 Wn. App. 294, 320, 308 P.3d 716 (Div. I, 2013). "A plaintiff can establish injury based on unlawful debt collection practices even when there is no dispute as to the validity of the underlying debt." **Frias v. Asset Foreclosure Servs.**, 181 Wn.2d 412, 441, 334 P.3d 529 (2014) (citing **Panag**, 166 Wn.2d at 55-56 & n.13). "Breach and proximate cause are generally questions for the trier of fact." **Hertog,** 138 Wn.2d at 275.

The Defendants cannot reasonably dispute a cognizable CPA injury where the Defendants sold the Patrick's property at the *ultra vires* trustee's sale after inducing the Patricks to miss payments and to spend time and money seeking a loan modification that Wells Fargo knew would never be approved. CP 2949-51; *see* **Frias**, 181 Wn.2d at 431 ("Without question, where a plaintiff actually loses title to her house in a foreclosure sale...that plaintiff has suffered injury to his or her property.")

Under the CPA, the defendant's actions must proximately cause plaintiff's injuries. **Schnall v. AT&T Wireless Servs., Inc.**, 171 Wn.2d 260, 277-78, 259 P.3d 129 (2011) (quoting **Indoor Billboard/ Washington Inc. v. Integra Telecom of Washington, Inc.**, 162 Wn.2d 59, 82, 170 P.3d 10 (2007). "Proximate cause is a factual question" and entails a causal link "unbroken by any new independent cause." **Id**. at 278-79. However, the act does not need to be the sole proximate cause of the

injury as there can be more than one. **Id.**

The Patricks spent years devoted to getting the modification Wells Fargo had promised. The Patricks spent considerable time and money filling out paperwork, calling Wells Fargo, and mailing and faxing requested documentation at Wells Fargo's behest. CP 2779 at ¶ 5 ("Wells Fargo's incompetence and failure to act in a reasonable manner resulted in tremendous amounts of my work, time, efforts, and energy being wasted"). Because of Wells Fargo and HSBC's wrongful conduct, their inconsistent statements, and finger pointing throughout the FFA mediation, Mrs. Patrick was forced to investigate possible reasons for this. CP 2781 at ¶ 11. Mrs. Patrick would stay up at night researching Wells Fargo, securitization, and loan modification programs to figure out what was happening. *Id.* The stress, anxiety, and hours that Wells Fargo forced Mrs. Patrick to devote to getting a modification eventually caused Mrs. Patrick to lose her job in May 2014. CP 2781-2782 at ¶ 12. Mrs. Patrick was unable to continue working because of Wells Fargo's actions. *Id.*

Mr. Patrick also suffered economic injuries as a result of the defendant's wrongful conduct. CP 7-10 at ¶¶ 20-26. Mr. Patrick has spent approximately 1,500 hours dealing with Wells Fargo. CP 8 at ¶ 22. Wells Fargo has caused Mr. Patrick to suffer professional harm as a real estate broker. *Id.* Being foreclosed as a professional in the real estate market has

damaged his reputation and ability to get client based referrals. *Id.*

The Patricks have been damaged by the sale of their home. CP 2949-2951. Losing title to their home was a direct result of Wells Fargo's actions. Further, this Court should disregard the Defendants' callous argument presented to the trial court that the Patricks' own default is the cause of the Patricks' misfortune. CP 2906. This argument is morally repugnant and amounts to nothing more than victim blaming. The reason the Patricks stopped making their monthly payments on two occasions was that Wells Fargo advised them to and told them that by doing so they would be put into a better financial position. CP 3 at ¶¶ 8-9, CP 5 at ¶ 14; CP 2779 at ¶ 5. After missing payments the first time, in December 2009, the Patricks demonstrated their ability to make monthly payments under the trial payment plan and the forbearance agreement. CP 4-5 at ¶¶ 11-12.

Further, all Defendants should have been barred from arguing a default occurred, because of promissory estoppel. Promissory estoppel requires:

> (1) A promise that (2) the promisor should reasonably expect to cause the promisee to change his position and (3) that does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise.

Tacoma Auto Mall, Inc. v. Nissan N. Am., Inc., 169 Wn. App. 111, 127, 279 P.3d 487 (Div. II, 2012).

Wells Fargo promised the Patricks a modification and told the Patricks

they would give them a modification if they stopped making their monthly mortgage. CP 3 at ¶ 8, CP 5 at ¶ 14. Wells Fargo was servicing the Patricks loan, so Wells Fargo should have reasonably expected their promise would cause the Patricks to change their position. *See e.g.* **Tokarz**, 33 Wn. App. 456; *see also e.g.* **Morrow**, 2014 MT 117. At the time of the promise, the Patricks were current on their monthly payments, and stopped making their monthly payments relying on Wells Fargo's promise. CP 3 at ¶ 8, CP 5 at ¶ 14. The Patricks were justified in doing so because they reasonably believed Wells Fargo had the ability to modify their payments based on Wells Fargo's status as loan servicer and Wells Fargo's continued representations. *Id.* Injustice can only be avoided by enforcing the promise because the Patricks lost their family home and suffered tremendous distress because of their justified reliance on Wells Fargo's promise. CP 7-10 at 20-26.

C. Wells Fargo is Not Exempt From the CPA

Wells Fargo and HSBC argued they could not be held accountable for their unfair or deceptive conduct simply because they are national banks. CP 2900-2902. This argument flies in the face of common sense, Washington law, and justice. Defendants incorrectly offered the blanket assertion that national banks "are specifically exempt from state law CPA claims." CP 2900. Defendants asserted that RCW 19.86.170 exempts

actions or transactions falling within the jurisdiction of federal statute 15 U.S.C. § 57a, which Defendants argued grants rulemaking powers concerning unfair or deceptive acts of national banks to the Office of the Comptroller of the Currency ("OCC"). CP 2900.

However, the Defendants' argument (1) distorted the RCW to give the appearance the CPA exempts actions *regulated* by federal law when it does **not**, and (2) improperly conflated CPA exemption analysis with primary jurisdiction analysis to give the appearance the legal authorities they cite satisfy CPA exemption when they do **not**. CP 2900-2902; *see* **Miller v. U.S. Bank of Washington, N.A.**, 72 Wn. App. 416, 420-22, 865 P.2d 536 (Div. I, 1994), *as corrected* (Feb. 22, 1994) (the CPA exemption did not apply and the court conducted a primary jurisdiction analysis).

i. Statutory Construction & Cases Show the CPA does Not Exempt Defendants' Regulations

First, HSBC as Trustee may be held liable under the CPA because it is acting as a trustee for a trust, and not as a national association. In **Vogt**, the Washington Supreme Court held that a borrower's CPA claim against a National Bank was not exempt where the National Bank was administering a trust. **Vogt. v. Seattle First Nat'l Bank**, 117 Wn.2d 541, 553, 817 P.2d 1365 (1991). The **Vogt** Court noted that although the Office of Comptroller of the Currency ("OCC") has regulatory and supervisory

authority over National Banks, "that authority alone does not result in exemption under the Consumer Protection Act" where the National Bank is acting as trustee for a trust. **Id**.

Furthermore, Wells Fargo and HSBC's exemption argument is contradicted by the plain language of the CPA as well as the policy that the CPA be liberally construed to serve its beneficial purpose. **TracFone Wireless, Inc. v. Dep't of Revenue**, 170 Wn.2d 273, 281, 242 P.3d 810 (2010)(citing **Dep't of Ecology v. Campbell & Gwinn, LLC**, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) (In construing a statute the court must determine and give effect to the legislature's intent); *see also* **Mellon v. Regional Trustee Services Corporation**, 182 Wn. App. 476, 489, 334 P.3d 1120 (Div. III, 2014) (citing RCW 19.86.920).

The CPA only exempts actions or transactions ***permitted*** by federal law; it does not exempt actions or transactions **regulated or prohibited** by federal law. *Compare* RCW 19.86.170 *with* CP 2900; *see also* **Vogt**, 177 Wn.2d at 552 (quoting **In re Real Estate Brokerage Antitrust Litig.**, 95 Wn.2d 297, 301, 622 P.2d 1185 (1980)) (In order for exemption to apply "an agency must take 'overt affirmative actions specifically to permit the actions or transactions engaged in' by the person or entity involved in a [CPA] complaint.") Defendants' conclusion was based on their incomplete and cherry-picked citation of RCW 19.86.170. CP 2900.

The CPA exempts some actions or transactions that are regulated, but that exemption is very limited; it does **not include** the authorities offered by Defendants.

> **Nothing in this chapter shall apply to** actions or transactions otherwise permitted, prohibited or regulated under laws administered by the insurance commissioner of this state, the Washington utilities and transportation commission, the federal power commission **or the actions or transactions *permitted* by any other regulatory body or other officer acting under statutory authority of** this state or **the United States**

RCW 19.86.170 (emphasis added).

The CPA does not exempt itself from actions regulated or prohibited by federal law—for the CPA to exempt itself, the federal law **must permit** the complained of behavior.[13] *See id; see also* **Vogt**, 177 Wn.2d at 552. For the Defendants to be exempt from the CPA, they must cite a federal law or regulation **that permits** their behavior but they did the *exact opposite* and advertised that their conduct is prohibited by federal law.[14] Furthermore, where Defendants only offered analysis under primary jurisdiction doctrine, they *implied* that the CPA does not exempt the Patricks' causes of action. CP 2902 (citing 12 C.F.R. § 1015.3(b)). Accordingly, the CPA applies to Defendants conduct and they can be held

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[13] The Defendants did not assert that 12 C.F.R. § 1015.3(b) is administered by the Washington Insurance Commissioner, the Washington Utilities and Transportation Commission, or the Federal Power Commission.

[14] CP 2902 ("12 C.F.R. § 1015.3(b) ***prohibits*** Wells Fargo").

liable because their conduct is not permitted by federal law.

ii. Primary Jurisdiction Doctrine is Irrelevant where 12 C.F.R § 1015 doesn't apply to Defendants

The doctrine of primary jurisdiction applies when courts and regulatory authorities share concurrent jurisdiction over a dispute. **Miller**, 72 Wn. App. at 420-21 (citing **Vogt**, 117 Wn.2d at 552.) The application of primary jurisdiction is **not mandatory**, but is within the sound discretion of the court. **In re Real estate Brokerage Antitrust Litigation**, 95 Wn.2d at 305. The doctrine guides "a court in determining whether it should refrain from exercising its jurisdiction until an administrative agency with special competence has resolved an issue arising in the proceeding before the court." **Id**. at 301. However, the analysis should not have been applied because (1) Defendants offered no regulation nor analysis to support its 15 U.S.C. § 57a[15] argument, and (2) Defendants cannot say they are regulated here, because regulation 12 C.F.R § 1015 does not apply to HSBC or Wells Fargo.

Defendants asserted "[t]here is no question that the Comptroller of the Currency has the authority to resolve disputes between the banks and their customers" but **offered no citation** or explanation to support it. CP 2901.

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[15] 15 U.S.C. § 57a is part of the United States Code as enacted under by Congress under Public Laws. It is not a regulation.

Although Defendants invoked **Miller** in stating that the Office of the Comptroller of the Currency ("OCC") is the agency with the power to grant Plaintiff's relief," it **again failed to offer citation** or explanation. CP 2901. Defendants offered 15 U.S.C. § 57a as a regulation invoking primary jurisdiction but fail to provide any analysis for why. CP 2901.

Ultimately, Defendants offered 12 C.F.R § 1015 as the applicable regulation, but that regulation is not related to the OCC; the Bureau of Consumer Financial Protection implemented the regulation cited by Defendants in 2009 and entitled it "Regulation O," and there **no connection** to 15 U.S.C. § 57a. *See* 12 C.F.R. § 1015.1. Further, 12 C.F.R. § 1015.5, which Defendants asserted "regulates in detail how Wells Fargo can present loan modification programs" **does not apply** to Wells Fargo or HSBC. CP 2902. That regulation section governs "any mortgage assistance relief service provider," which as defined in 12 C.F.R. § 1015.2(6) specifically **excludes** Defendants Wells Fargo and HSBC as Trustee when it provides; "this term does not include: (2) the servicer of a dwelling loan" or its agents. The same regulation defines servicer as the entity responsible for receiving any payments from a consumer. Wells Fargo claimed it is the Patricks' servicer. Additionally, the Defendants claimed HSBC as Trustee is the owner of the note, which would make HSBC the entity who would receive the Patricks' payments. Accordingly,

the Superior Court had primary jurisdiction

iii. The OCC cannot have primary jurisdiction because it is powerless to grant the Patricks relief

Additionally, the OCC and its functions do not satisfy the doctrine of primary jurisdiction. For the OCC to have primary jurisdiction, (1) the "statutory authority of the agency in some way must limit the applicability of the [law]"; (2) "[t]he agency must have special competence over all or some part of the controversy which renders the agency better able than the court to resolve the issues"; and (3) "[t]he claim before the court must involve issues that fall within the scope of a pervasive regulatory scheme so that a danger exists that judicial action would conflict with the regulatory scheme." **Brokerage Antitrust**, 95 Wn.2d at 302-03.

An administrative agency should not be accorded primary jurisdiction if the agency is powerless to grant relief requested. **Id**. at 304. *see also* CP 2774 (Letter from OCC stating Wells Fargo Bank, N.A. is "an entity that does not fall under the jurisdiction of our office."); CP 2776-2777 (Letter from CFPB stating, "[i]f the company broke the law, will you tell me? No." The letter continues, "Can I hire my own lawyer to look into this? Yes." Additionally, the CFPB does not "comment on possible violations of the law unless they're made public", and "can't give legal advice or represent individuals in legal matters", and doesn't "advocate for [the

consumer's] desired resolution.") The OCC would tell the Patricks how the bank responded to their complaint, advise them to get a lawyer if they disagree, and not ask them how well the OCC handled the dispute.[16]

Further, Congress designed the OCC to compliment state consumer protection laws. While Congress might have granted the OCC regulatory authority over national banks, generally, and "to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce,"[17] Congress has long known "[i]t is impossible to frame definitions which embrace all unfair practices . . . Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again."[18] This is why "[C]ongress chose a structure that relies on the scope of local laws to establish the outer boundaries of a national bank's authority." **Vogt**, 117 Wn.2d at 556 (quoting Comptroller Letter, [1990-1991 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,236, at 71,312 (1990)). Requiring Wells Fargo and HSBC to comply with the DTA, CPA, and negligence when interacting with Washington families and when nonjudicially foreclosing on homes does not stand "as an obstacle to the accomplishment and

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[16] OCC website: http://www.helpwithmybank.gov/complaints/what-to-expect/complaints-what-to-expect.html
see also http://www.gao.gov/assets/250/249070.pdf, last visited May 15, 2015.
[17] *See* 15 U.S.C. § 57a, generally, and 15 U.S.C. § 57a(a)(2).
[18] H. R. Conf. Rep. No. 1142, 63d Cong., 2d Sess., 19 (1914).

execution of the full purpose and objectives of Congress. **Vogt**, 117 Wn.2d at 553, citing **Detonics ".45" Assocs. v. Bank of Cal.,** 97 Wn.2d 351, 355, 644 P.2d 1170 (1982). Because the CPA and the Patricks' causes of action relate to factual disputes, the OCC cannot offer them any remedy. *See* **Hangman Ridge**, 105 Wn. 2d at 790. Accordingly, this Court, and not the OCC, has primary jurisdiction over this dispute.

D. Genuine Issues of Material Fact Existed Regarding the Patricks' CPA, DTA, and Common Law Negligence Claims against Trustee Defendants

Trustee Defendants committed the following unfair and/or deceptive actions by selling the Patricks home after violating RCW 61.24.030(3), RCW 61.24.010(2), RCW 61.24.010(3), RCW 61.24.010(4) and by charging for Fees that occurred prior to the nonjudicial foreclosure.

i. Trustee Defendants Violated RCW 61.24.030(3) when they initiated, conducted, and sold the Patricks home after receiving notice that the Patricks did not Default.

RCW 61.24.030 states, "[i]t shall be requisite to a trustee's sale … (3) [t]hat a default has occurred in the obligation secured or a covenant of the grantor, which by the terms of the deed of trust makes operative the power to sell." RCW 61.24.030(3).

Trustee Defendants were given notice there was no default because the Patricks were told to stop making their payments to receive a promised modification. M&H represented Wells Fargo in mediation and was

apprised on all modification activities between its client and the Patricks. CP 1696-1697. M&H, equipped with this knowledge, actively advised QLSWA on how to proceed with the foreclosure. CP 2097-2110. The exact same M&H/QLSWA attorney, Mr. McDonald, was both Wells Fargo's mediation attorney against the Patricks and the attorney who later responded on behalf of QLSWA to the Patrick' concerns. CP 1696-1697, CP 1838-1939. Mr. McDonald responded to the Patrick's allegations that Wells Fargo told them to miss payments to get a promised modification by stating QLSWA is not the servicer. CP 1576-1585; CP 1838-1839.

In addition, the Patricks submitted a complaint against QLSWA to the Washington Attorney General, which reiterated the unfair way they were treated while trying to get a modification. CP 1711-1714. QLSWA was forced by the attorney general to review the complaint and respond. CP 1711. Instead of being an independent neutral trustee pursuant to RCW 61.24.010(4), QLSWA simply gave a cursory response that they did not have enough information to evaluate the Patricks' claims. CP 1717-1739. Worse, the Trustee Defendants sold the Patricks home after receiving all of this information and after the Patricks filed a lawsuit on this very issue. CP 2949-2951. The Trustee Defendants had notice there was no default before they sold the Patricks home in violation of RCW 61.24.030(3).

ii. Trustee Defendants violate RCW 61.24.010(3) and RCW 61.24.010(4) by Owing Fiduciary Duties to the Purported Beneficiary

Because the Trustee Defendants acted as both the attorney for the foreclosing party and as trustee, they violated RCW 61.24.010(3), by owing Wells Fargo a fiduciary duty, and RCW 61.24.010(4), by failing to meet its duty of good faith to the Patricks.

> If the trustee acts only at the direction of the beneficiary, then the trustee is a mere agent of the beneficiary . . . If the trustee were truly a mere agent of the beneficiary there would be, in effect, only two parties with the beneficiary having tremendous power and no incentive to protect the statutory and constitutional property rights of the borrower.

Klem, 176 Wn.2d at 791-792. QLSWA has allowed the servicer and purported beneficiary's lawyer to exclusively decide whether there was a default, whether it was complying with the DTA, and whether its client, Wells Fargo as attorney in fact for the Wells Fargo Asset Trust, was a beneficiary under RCW 61.24.005(2). CP 944 at 26:15-19; CP 1903-04 (Response from Quality/M&H attorney). Further, QLSWA has allowed the purported beneficiary's lawyer to advise it on how to complete the nonjudicial foreclosure against the Patricks while charging the Patricks for M&H work. *Id.*; CP 1764 (QLSWA charges for M&H fees), CP 2097-2110 (internal communication shows M&H actively involved). This is a violation of the DTA and CPA because it is both unfair and deceptive.

iii. Trustee Defendants violated RCW 61.24.010(4) When They Failed to Act Impartially as a Neutral Judicial Substitute.

It is well settled law that DTA trustees have a duty of good faith to act impartially between the foreclosing entity and the borrower. **Lyons v. U.S. Bank, N.A**, 181 Wn.2d 775, 786, 336 P.3d 1142 (2015) (citing **Klem**, 176 Wn.2d at 790); **Trujillo v. Nw. Tr. Servs., Inc**., 183 Wn.2d 820, 355 P.3d 1100 (2015). A trustee "must treat both sides equally and investigate possible issues using its independent judgment to adhere to its duty of good faith." **Klem**, 176.Wn.2d at 790. Further, a trustee must "adequately inform" itself regarding the purported beneficiary's right to foreclose, including, at a minimum, a "cursory investigation" to adhere to its duty of good faith. **Lyons**, 181 Wn.2d at 787 (citing **Walker**, 176 Wn. App. at 309-10 *overruled on other grounds in* **Frias**, 181 Wn.2d at 429.

Instead of exercising its own independent judgment to decide whether QLSWA, Wells Fargo, and HSBC were complying with the DTA, CPA, and duties owed under common law, or whether the nonjudicial foreclosure of the Patricks' property should be stopped, QLSWA delegated these tasks to M&H. CP 944 at 26:15-19.

QLSWA is not a neutral trustee as required by RCW 61.24.010(4). QLSWA completed the foreclosure against the Patricks with M&H, a law firm that owes fiduciary duties to Wells Fargo. CP 1696-97. (M&H

represented Wells Fargo in mediation against the Patricks); s*ee also* **Mazon v. Krafchick**, 158 Wn.2d 440, 448-449, 144 P.3d 1168 (2006) ("[A]ttorneys owe an undivided duty of loyalty to the client"). Further, when Quality responded to the Patricks claims, **the response was from the same lawyer who represented Wells Fargo at mediation against the Patricks**. **Id**. Unbelievably, instead of saying he represented Wells Fargo, he stated he was general counsel for QLSWA. CP 1839. Moreover, M&H and QLS not only share owners and offices, they have the same clients. CP 950, 959 at 37:10-16 (same owners); CP 1008, 1010 (same locations); CP 958 at 31:12-23, CP 964 at 54:5-8 (same clients).

M&H actively completes trustee functions, such as, requesting the beneficiary Declaration, updating the loss mitigation declaration, completing an assignment status and loss mitigation review, requesting information on the file, directly communicating with Wells Fargo and third party vendors, and receiving the Patricks' pay off statement. CP 1758-6. M&H, an entity with fiduciary duties to Wells Fargo, acts as trustee and attempts to cloak its action under QLSWA in violation of the CPA and a Trustee's duty of good faith.

Most importantly, Trustee Defendants violated their duty of good faith by deferring to Wells Fargo in regards to whether to proceed to sale in the face of the borrower notifications to the Trustee that the sale was

improper. **Lyons**, 181 Wn.2d at 788. A trustee's deference to the lender is unfair or deceptive under the CPA:

> We hold that the practice of a trustee in a nonjudicial foreclosure deferring to the lender on whether to postpone a foreclosure sale and thereby failing to exercise its independent discretion as an impartial third party with duties to both parties is an unfair or deceptive act or practices and satisfies the first element of the CPA.

Klem, 176 Wn.2d at 792; *see also* **Lyons**, 181 Wn.2d at 788.

Instead of doing an investigation and acting as an independent neutral trustee, M&H on behalf of QLSWA, asked Wells Fargo whether they wanted to proceed to sale or postpone the sale. CP 2098. Wells Fargo's answer is inappropriately redacted, but because the Patrick family requested the sale not occur, and QLSWA did sell their home, it is safe to infer Wells Fargo instructed QLSWA to sell the home Mr. and Mrs. Patrick shared with their three children. This is a CPA and DTA violation as well as negligent under controlling authority. *See* **Lyons,** 181 Wn.2d at 788, *see also* **Klem**, 176 Wn.2d at 792.

iv. The Trustee Defendants committed an unfair or deceptive act by charging the Patricks fees dated three years before being referred the nonjudicial foreclosure

As part of the payoff quote issued to the Patricks, the Trustee Defendants charged the Patricks for fees that occurred three years prior to being referred the nonjudicial foreclosure and prior to recording the

appointment of successor trustee. CP 1756-65; 1196-97 (Appointment recorded on Sept. 20, 2013); CP 1764 (June 26, 2010 they charged $1350.00 for title policy, $103.14 for certified mail costs, $142.00 for Recording fees, $70.00 for process services, $70.00 for NOTC, and $202.50 for attorney fees. On June 2, 2010, Trustee Defendants charged $15.00 twice for inspections. On April 29, 2010, $95.00 for a Brokers BPO and on January 1, 2010 another 15.00 for an inspection.)

The Trustee Defendants required the Patricks to pay for fees that occurred years before Quality recorded the assignment and were entirely unrelated to the Patricks modification woes in 2013. *Id.* This profit driven scheme aimed at forcing desperate homeowners to pay additional, unreasonable, and unlawful fees in order to save their homes is the epitome of an unfair business practices the CPA was designed to prevent.

v. The Trustee Defendants' Conduct Affects the Public Interest

The public interest impact prong of the CPA is a question of fact for the jury to resolve. **Hangman Ridge,** 105 Wn.2d at 789-90. The actions of the Trustee Defendants are not unique to the Patricks, but represent the majority of homeowners they foreclose on. As noted by the Washington Supreme Court, "Quality … has demonstrated little understanding or regard for Washington law." **Klem**, 176 Wn.2d at 796. It is highly likely that others have suffered or will suffer the same injuries as the Patricks.

Additionally, Respondents' violations of multiple sections of RCW 61.24.030 conclusively satisfy this element. *See* analysis supra at 40.[19] Accordingly, the public interest element is met.

vi. The Trustee Defendants Caused the Patricks Damages[20]

The Trustee Defendants cannot reasonably dispute a cognizable CPA injury where the Trustee Defendants sold the Patrick's property at the *ultra vires* trustee's sale. CP 2949-2951; *see* **Frias**, 181 Wn.2d at 431.

The Trustee Defendants also argued the cause of the nonjudicial foreclosure was the Patricks' default. However, The Patricks did not default when they were the victims of predatory and negligent acts by Wells Fargo. *See generally* CP 1-10. Second, a hypothetical default would not entitle the Trustee Defendants to violate the DTA by acting as both the trustee and attorney for the alleged beneficiary in violation of RCW 61.24.010(4). **Lyons**, 181 Wn. 2d at 787 (The DTA Requires the trustee to remain impartial); *see also* **Frias**, 181 Wn.2d at 431 (injury may be established based on unlawful debt collection practices based on a lawful debt). Here, the Trustee Defendants facilitated QLSWA's appointment as successor trustee and performed the unwarranted nonjudicial foreclosure.

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[19] http://apps.leg.wa.gov/rcw/default.aspx?cite=61.24.030 (view bottom of page for: "Notes: . . . Findings - - 2008 c 108: See RCW 19.144.005")(last visited April 19, 2015).

[20] The Patrick family has suffered damages directly from defendants DTA violations and negligence, as expressed in their amended complaint. Quality did not move for summary judgment regarding the DTA or negligence.

CP 2912, ¶ 4; CP 1076. In response, the Patricks spent a large amount of time and money contesting it. *See* CP 1-10; *see also* CP 2778-2783. The Trustee Defendants each charged the Patricks fees including: attorney fees, and the recording, mailing, and serving of trustee notices. QLSWA has demanded the Patricks pay these fees to keep their home. CP 1758-1764. This is unlawful debt collection. **Frias**, 181 Wn.2d at 431.

Most importantly, the Trustee Defendants sold the Patricks home during litigation and after the Patricks gave them notice of the defects in the nonjudicial foreclosure and the unfair treatment by Wells Fargo in inducing the Patricks to default and throughout the modification process. CP. 2949-2951. The Trustee Defendants acted in favor of their paying clients, Wells Fargo and HSBC as Trustee the Wells Fargo Asset Trust, by selling and recording a trustee deed in favor of the Wells Fargo Asset Trust while disregarding the multiple correspondences and the lawsuit that the Patricks had filed. *Id.*; CP 1576-1585, CP 1711-1714. This has been a profound loss that has caused the Patricks time, money, and severe emotional and physical harm, recoverable under the Patrick's other claims.

E. The Trustee Defendants Rely Upon Inadmissible Evidence As A Basis For Its Motion

In its motion, the Trustee Defendants relied on the Declaration of Annette Cook and the Supplemental Declaration of Sierra Herbert-West,

both filed on April 14, 2015. CP 2876-2877; CP 2878-2951.

i. Ms. Cook's Declaration Contained Inadmissible Hearsay Which the Court Should Not have Considered

Courts may only consider admissible evidence in ruling on a motion for summary judgment. **Burmeister v. State Farm Ins. Co.**, 92 Wn. App. 359, 365-66, 966 P.2d 921 (Div. II, 1998). Ms. Cook's declaration should not have carried any weight at summary judgment because it contained hearsay[21] that meets no exception[22] under ER 803 or ER 804.[23] CP 2876-2877. The declaration was also objected to as hearsay during oral argument. VP at 42:21-25.

Ms. Cook testified: "M&H's corporate records are kept in the normal course of business. I have reviewed the corporate file and am competent to testify to its contents. I also make this declaration based on personal knowledge." CP 2876 at ¶ 2. Although a declaration by itself is not hearsay, Ms. Cook swore to the contents of documents absent from the court record. *See Id.* Ms. Cook did not have personal knowledge of the facts in M&H's records, and she offered information from those documents for the truth of the matter asserted. *Id.* CR 56(e) requires

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[21] Hearsay is an out of court statement offered for the truth of the matter asserted. ER 801(c).

[22] Hearsay is generally inadmissible. ER 802.

[23] *See* **SentinelC3, Inc. v. Hunt**, 181 Wn.2d 127, 141, 331 P.3d 40 (2014) (citing **State v. (1972) Dan J. Evans Campaign Comm.**, 86 Wn.2d 503, 506–07, 546 P.2d 75 (1976) (affidavits based on hearsay evidence bear no weight at summary judgment).

affidavits be made on personal knowledge. **Rice v. Offshore Sys., Inc.**, 167 Wn. App. 77, 86, 272 P.3d 865 (Div. I, 2012). Those portions of Ms. Cook's declaration constitute hearsay because she recited information from an out of court source, in this case M&H records, for the truth of the matter asserted. ER 801. By failing to submit documents into the record, her summation of documents is hearsay. *See* **Cameron v. Boone**, 62 Wn.2d 420, 427, 383 P.2d 277, (1963) (hearsay includes testimony sourced, not upon personal knowledge, but in written word of another); *see also* RCW 5.45.020 (business records exception to rule against hearsay requires identification of business record). Thus, the information offered by Ms. Cook was hearsay within hearsay because the information comes from documents, which are themselves hearsay. **State v. Monson**, 53 Wn. App. 854, 862, 771 P.2d 359 (Div. I, 1989) *aff'd*, 113 Wn. 2d 833, 784 P.2d 485 (1989) (citing ER 805) (business records are hearsay).

Hearsay within hearsay is admissible, if each part meets an exception, ER 805; however, a business record can never meet the hearsay exception unless the document itself is being offered into evidence. *See* RCW 5.45.020. RCW 5.45.020 states:

> A record of an act, condition or event ... shall be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of

information, method and time of preparation were such as to justify its admission.

This statute does not provide for later summaries or declarations of these records and Washington Courts strictly construe the business records exception.[24] The Trustee Defendants did not attach or identify these records. *See* CP 2876-2877 Accordingly, Ms. Cook's testimony of their contents was inadmissible hearsay.

RCW 5.45.020 further requires records be produced by a custodian or identified by one who has supervised the record's creation. *See* **State v. Smith**, 16 Wn. App. 425, 433, 558 P.2d 265 (Div. 2, 1976), *rev. denied*, 88 Wn.2d 1011 (1977). Ms. Cook did not claim to be a document custodian or someone who has supervised the record's creation. *See generally* CP 2876-2877. The Trustee Defendants have provided no evidence qualifying Ms. Cook to authenticate and testify regarding the mode, method, or the identity of M&H's records which Ms. Cook bases her declaration on. *Id.* Accordingly, where Ms. Cook's declaration contained inadmissible evidence, it should not have been considered.

ii. Ms. Cook's Statements were Not Based Upon Personal Knowledge

Further, Ms. Cook had no personal knowledge of the statements made

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[24] **State v. Finkley**, 6 Wn. App. 278, 280, 492 P.2d 222 (Div. 1, 1972), *rev. denied*, 80 Wn.2d 1007 (1972)

in her declaration because she was not employed by M&H while the Trustee Defendants initiated and conducted the nonjudicial foreclosure against the Patricks, and she never personally undertook any action related to the Patricks. CP 937, 940 at 7:13-19. If there is a genuine issue of credibility regarding a party's evidence, a trial court must deny a motion for summary judgment to avoid resolving a genuine issue of credibility. **Amend v. Bell**, 89 Wn.2d 124, 129, 570 P.2d 138 (1977). An issue of credibility is present if there is contradictory evidence or the movant's evidence is impeached. **Id**. (citing **Balise v. Underwood**, 62 Wn.2d 195, 200, 381 P.2d 966 (1963)).

Ms. Cook stated, "M&H does not now, nor has it ever held itself out a trustee foreclosing on Plaintiff's property." CP 2876 at ¶ 6. However, Ms. Cook was not working at M&H in 2013 or for the first half of 2014 while the Trustee Defendants initiated and conducted nonjudicial foreclosure proceedings against the Patricks. CP 937, 940 at 7:13-19; CP 2922-2927 (Notice of Default issued November 19, 2013). On September 30, 2014, Ms. Cook was deposed in a separate matter. CP 931 at ¶ 4. Ms. Cook testified that she had only been employed by M&H since August 4, 2014. CP 937, 940 at 7:13-19. Ms. Cook started at M&H a year after the Trustee Defendants formally began the nonjudicial foreclosure against the Patricks. *Id*; CP 2912 at ¶ 4 (QLSWA received referral in August 2013).

In addition, the evidence produced by QLSWA in discovery showed M&H worked on the nonjudicial foreclosure against the Patricks. M&H employees created the appointment of successor trustee, requested the beneficiary Declaration, updated the loss mitigation declaration, completed an assignment status and loss mitigation review, requested information on the file, directly communicated with Wells Fargo, and received the Patricks' pay off statement. CP 2098, 2100-01, 2104-09. QLSWA charged the Patricks attorney fees for M&H. CP 1764.

Ms. Cook also claimed M&H does not "commingle" employees or accounts with Quality." CP 2876 at ¶ 5. However, discovery produced by QLSWA shows M&H commingled employees. Robyn Tassall conducted trustee activities on the Patricks and identified herself as both an M&H employee and a QLSWA employee. CP 2108-2109. In addition, Attorney Robert McDonald represented Wells Fargo in mediation as an attorney employed by M&H and later sent Patricks' counsel correspondence as General Counsel for QLSWA. CP 1696-1697, 1703, 1839. This, and Ms. Cook's own admissions, reveal the declaration's lack of foundation, credibility, and truthfulness. *Id.* Thus, summary judgment was inappropriate. **Amend**, 89 Wn.2d at 129.

iii. The Supplemental Declaration of Sierra Herbert West contained inadmissible hearsay which the court should disregard

Ms. Herbert-West attempted to introduce a QLSWA "business record" entitled, Affidavit of Mailing, based on a review of QLSWA's file. CP 2878 at ¶¶ 3-4, 2881-2882. The Affidavit, as a business record, is hearsay. **Monson**, 53 Wn. App. at 862 (citing ER 805) (business records are hearsay). The affidavit is not made by an individual with personal knowledge, but is made by David Fry, authorized signer for IDSoultions, Inc., as Authorized Agent for QLWA, based on, "(s)he is readily familiar with business practices relative to the mailing of documents and that on 9/9/2014, a copy of the Notice of Sale, of which the attached is a true and correct copy, was mailed in the ordinary course of business." *Id.*

It was unclear whose business practices, Mr. Fry claimed to be familiar with, where he worked, or which entity created the business record. *Id.* Additionally. there were no business records attached. *Id.* There is a copy of the notice of sale, without any indication if and when it was sent. *Id.* This does not establish the document meets any exception to hearsay and should not have been considered. *See* **SentinelC3**, 181 Wn.2d at 141.

F. Summary Judgment was improper when the Patricks Did Not Waive claims that did not arise under the DTA, or Claims for Damages under the DTA.

i. Waiver under the DTA does not apply to the Patricks' causes of action which arose outside of the DTA

The Defendants argued the Patricks waived their ability to contest the nonjudicial foreclosure and post-sale damages claims pursuant to the DTA. CP 2894-2900. As a preliminary matter, this argument cannot apply to the Patricks' claims against Wells Fargo, HSBC, QLSWA and related entities, which do not arise out of the nonjudicial foreclosure proceedings.

In **Schroeder**, the Washington Supreme Court rejected the argument that a borrower's failure to enjoin the sale prevented the borrower from recovering damages on other causes of action:

> **We find no support in the law for the idea that the failure to enjoin a sale somehow extinguishes other claims, causes of actions, or remedies available to parties to a real estate transaction or deed of trust.** As we noted recently, "waiver only applies to actions to vacate the sale and not to damages actions." *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 796, 295 P.3d 1179 (2013).

Schroeder v. Excelsior Management Grp., LLC, 177 Wn.2d 94, 113-14, 297 P.3d 677 (2013) (emphasis added).[25]

Wells Fargo can be held liable under negligence and the CPA for

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[25] Wells Fargo, MERS, MERSCORP, and US Bank argued **Schroeder** was resolved based on equity: "In **Schroeder**, the inequity existed because the property at issue was agriculture, therefore, the non-judicial foreclosure sale was invalid." Dkt. 32 at 7:19-20. These Defendants fail to explain how non-judicially foreclosing on agricultural property is more inequitable than non-judicially foreclosing on non-agricultural property; apparently these Defendants believe equity favors crops, livestock, and aquatic goods rather than Washington families and children. **Schroeder** clearly held that where a requisite of the DTA was not met, such as the property being non-agricultural as required by RCW 61.24.030(2), the trustee lacks power to nonjudicially foreclose and any sale is void. **Schroeder**, 177 Wn.2d at 105-106 (citing **Albice v. Premier Mortg. Services of Washington, Inc.**, 174 Wn.2d 560, 568, 276 P.3d 1277 (2012)).

damages caused by inducing the Patricks to stop paying based on a promised loan modification and subjecting the Patricks to a convoluted loan modification process. The Patrick's damages are a direct result of these actions by Wells Fargo and do not arise under the DTA. Accordingly, Wells Fargo's waiver argument does not apply to these aspects of the Patricks' CPA and negligence claims.

ii. Waiver does not apply to the Patricks' claims for damages arising out of the illegal trustee's sale

The Washington Supreme Court has consistently held that waiver, if it applies at all, only applies to actions to vacate the sale and not to claims for damages. **Frizzell v. Murray,** 179 Wn.2d 301, 310, 313 P.3d 1171 (2013); **Schroeder**, 177 Wn.2d at 114; **Klem**, 176 Wn.2d at 796. The **Frizzell** Court cited **Schroeder** approvingly for the proposition that waiver does not apply to claims for damages. 179 Wn.2d at 310. In explaining its decision to remand the case back to the trial court, the **Frizzell** Court reasoned, "the trial court did not have the benefit of our guidance in **Schroeder** when it made its ruling, potentially leading it to erroneously conclude that the failure to obtain pre-injunctive relief results in a waiver of all claims, notwithstanding RCW 61.24.127." **Frizzell,** 179 Wn.2d at 312.

In the very first sentence of Justice Gonzales' concurrence in **Frizzell,**

he writes "I agree with the majority that Tamara Frizzell has not waived her monetary damages claims." **Id**. at 313 (Gonzales, J., Concurring). If the **Frizzell** Court truly wanted to hold that all claims for damages not listed in RCW 61.24.127(1)(a) -(d) are waived, they would have reversed as to the dismissal of Frizzell's common law fraud and CPA claims only. The **Frizzell** Court did not do this because of the long standing principle that waiver does not apply to claims for damages. **Id**. at 310; **Schroeder**, 117 Wn.2d at 114; **Klem**, 176 Wn.2d at 796. As the Court noted in **Schroeder**, there is simply no support in the DTA for Respondents' interpretation of RCW 61.24.127 as extinguishing other claims, causes of actions, or remedies available to citizens generally. 177 Wn.2d at 114.

Additionally, a statute must be construed so as to be constitutional. **Klem**, 176 Wn.2d at 790. The Defendants' interpretation of RCW 61.24.127 was unconstitutional because: (1) it grants DTA beneficiaries and trustees special immunities from statutory and common law causes of action in violation of Const. art. I, § 12 and Const. art. II, § 28. (2) it prevents the Judiciary from hearing causes of action related to cases at law which involve the title or possession of real property in violation of Const. art. IV, § 6, and (3) it creates an unconstitutional barrier to the superior courts' original jurisdiction by requiring an injunction before allowing a claim based on statutory or common law causes of action to proceed in

violation of Const. art. I, § 10.[26] **See Blanchard v. Golden Age Breweries,** 188 Wn. 396, 412, 63 P.2d 397 (1936); **Putnam v. Wenatchee Med. Ctr.,** 166 Wn.2d 974, 216 P.3d 374 (2009); **Schroeder v. Weighall,** 179 Wn.2d 566, 316 P.3d 482 (2014).

Rather than adopt an unconstitutional reading of RCW 61.24.127, this Court should interpret RCW 61.24.127 as not excluding damages for any claim, which is consistent with Washington Supreme Court precedent. Thus, the Patricks did not waive any claims for damages.

iii. Waiver relating to challenging and setting aside the trustee's sale does not apply when the underlying trustee's sale is void

In **Schroeder**, the Washington Supreme Court held a sale was void and waiver was inapplicable where the property in question was agricultural in nature because RCW 61.24.030(2) prohibits the nonjudicial foreclosure of agricultural property. **Schroeder,** 177 Wn.2d at 105-06. The court stated that waiver under the DTA is different from traditional waiver because the requirements of the DTA cannot be waived by contract. **Id.** at 107.

> RCW 61.24.030 is not a rights-or-privileges-creating statute. Instead, it sets up a list of "requisite[s] to a trustee's sale." Among

[26] The Patricks are **not** arguing that RCW 61.24.127 is unconstitutional, nor are they seeking a declaration that RCW 61.24.127 is unconstitutional. The Patricks are simply asking this Court to interpret RCW 61.24.127 consistently with Washington's Constitution and Washington Supreme Court precedent, thus the Patricks do not need to notify Washington's Attorney General under RCW 7.24.110.

> other things, it is a requisite to a trustee's sale . . . that the trustee have proof that the beneficiary is the owner of the obligation secured by the deed of trust, .030(7); and that the beneficiary has given written notice of the default to the debtor containing specific statutory language advising the debtors of their rights, .030(8). ***These are not, properly speaking, rights held by the debtor; instead, they are limits on the trustee's power to foreclose without judicial supervision.***

Id. at 106-7 (emphasis added).

When these requisites are not met, waiver does not apply because the trustee lacks all authority to conduct a nonjudicial foreclosure. **Id**. at 112. If a requisite to sale under RCW 61.24.030 is violated, the sale is void and a superior court lacks authority to allow the sale to stand, regardless of whether a borrower can successfully restrain an unlawful trustee's sale. **Id**. Importantly, the **Schroeder** Court distinguished its own prior application of waiver in the case of **Plein v. Lackey**, 149 Wn.2d 214, 227, 67 P.3d 1061 (2003). The **Schroeder** Court stated: **Plein** "waived his right to contest the sale" based on the specific circumstances of that case.[27] Unlike the Patricks, **Plein** did not contest that a requisite of the DTA was not met; instead, **Plein** challenged the nonjudicially foreclosing entities rights in the underlying instrument and failed to seek a temporary injunction. **Id**.

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[27] The **Schroeder** Court explicitly pointed out that **Plein** was decided on the merits of that case and not based only on the borrower's failure to restrain the sale. 177 Wn.2d at 112 ("While we disposed of the case on its merits, we also considered the alternate grounds pleaded by the trustee to uphold the sale: that the challenger had waived his challenge by not seeking a temporary injunction blocking the sale...Under the facts of that case, we concluded he had." Thus, the language relied on by Defendants is *dicta* and not the law.

Accordingly, the **Schroeder** Court held, "Nothing in **Plein**, suggests that waiver might cause the deed of trust act to apply to transactions to which the deed of trust act does not apply." **Schroeder**. 177 Wn.2d at 112.

In **Cox v. Helenius**, the Washington Supreme Court held a sale was void where one of the DTA requisites was not satisfied. 103 Wn.2d 383, 387-388, 693 P.2d 683 (1985).[28] Additionally, In **Bavand v. OneWest Bank**, Division I of the Washington Court of Appeals held a sale was void where the trustee lacked authority to nonjudicially foreclose. 176 Wn. App. 475, 489-492, 309 P.3d 636 (Div. I, 2013). The trustee in **Bavand** was appointed by OneWest Bank the day before OneWest Bank was transferred the Deed of Trust and the Note from MERS. **Id**. at 482-483. The Court ruled that the trustee can only be appointed by a proper beneficiary under RCW 61.24.010(2) and when the successor trustee was appointed, OneWest Bank was not the beneficiary. **Id.** at 490. The trustee was not appointed by a proper beneficiary and the subsequent trustee's sale was void because the trustee never had power to conduct the sale. **Id.**

The **Bavand** Court rejected the same arguments made by Defendants.

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[28] The legislature subsequently amended RCW 61.24.030(4); Now, the requisites is "no action **commenced by the beneficiary of the deed of trust** is now pending..." (emphasis added). When **Cox** was decided the bolded language did not exist in RCW 61.24.030(4). However, despite the change in language, **Cox** still stands for the proposition that failure to satisfy the statutory requisites to nonjudicial foreclosure results in a void sale.

After analyzing RCW 61.24.127 and RCW 61.24.130, the Court noted:

> [In *Schroeder*], the supreme court reinforced a basic statement of law that it originally had made in *Cox v. Helenius*: **Even where a party fails to timely enjoin a trustee sale under RCW 61.24.130, if a trustee's actions are unlawful, the sale is void. In such cases, there is no waiver of the right to seek and obtain relief.**

Bavand, 176 Wn. App. at 492 (emphasis added).

In **Rucker v. NovaStar Mortg., Inc.**, Division I held that the failure to enjoin the sale did not result in a waiver to challenge and reverse the sale. 177 Wn. App. 1, 14-15, 311 P.3d 31 (Div. I, 2013). In **Rucker**, NovaStar transferred the Note and Deed of Trust to a securitized trust, and subsequently appointed a successor trustee under the Deed of Trust despite not holding the Note. **Id.** at 7-8. The court reasoned that because NovaStar appointed the successor trustee when it did not hold the note, the appointment was invalid and the successor trustee's subsequent trustee's sale was also invalid. **Id.** at 16. Where the trustee was not appointed by a beneficiary as required by RCW 61.24.010(2), vacating the subsequent trustee's sale was an appropriate remedy for the DTA violation. **Id.** at 17. Here, like **Schroeder**, **Cox**, **Bavand**, and **Rucker**, waiver is inapplicable when the requisites of the DTA were not met. If the sale was void, this Court does not have the power to declare it valid for the purposes of RCW 61.24.127. **Schroeder**, 177 Wn.2d at 112. Under this precedent, the Defendants' Motion should have been denied because there are unresolved

issues of material fact as to whether the trustee's sale was void.[29]

iv. Waiver is an equitable doctrine and should not have been applied against the Patricks based on the facts and circumstances of this case[30]

In **Albice**, the Washington Supreme Court held that, because waiver is an equitable principle, an equitable analysis should be undertaken to decide if it should be applied, even when waiver can be applied because the trustee has complied with the DTA requisites. 174 Wn.2d. at 569-571. Such an inquiry furthers the purpose of the DTA: "the nonjudicial foreclosure process should result in [sic] interested parties having an adequate opportunity to prevent wrongful foreclosure." **Id.** The definition of waiver also supports an equitable analysis, "waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right." **Schroeder** 177 Wn.2d at 106 (*citing* **Bowman v. Webster**, 44 Wn.2d 667, 669, 269 P.2d 960 (1954)).

Basing its holding on the plain language of the DTA, the **Albice** Court made clear that waiver is not automatic, but rather discretionary as

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[29] RCW 61.24.030(3), RCW 61.24.010(2), RCW 61.24.010(3), RCW 61.24.010(4), RCW 61.24.030(7)(a).

[30] As discussed *supra*, Defendant's interpretation of Ch. 61.24 RCW would create an irrebuttable presumption in favor of waiver, which is unconstitutional under Due Process (Wash Const art I § 3 and U.S. Const. amend. XIV), Special Privileges/Equal Protection (Wash Const art I § 12), and Separation of powers (Wash Const. art IV § 6).

indicated by the term "may." **Id**. at 570 (*citing* RCW 61.24.040(1)(f)(IX)). the **Albice** Court found the legislative intent was to only apply waiver when equitable, avoiding strict application. **Id**. Accordingly, waiver "cannot apply to all circumstances or types of post sale challenges." **Id**. It is of paramount importance that courts retain discretion to review post sale challenges to ensure strict legal compliance with the DTA. **Id**. at 572.

It would be inequitable, as highlighted in **Schroeder**, to allow a purported trustee and/or beneficiary, whose authority to act comes solely from the DTA, to escape liability based on an equitable defense to the DTA. Similarly, it is inequitable to allow Defendants to point to the Patricks' failure to comply with RCW 61.24.130 in order to escape liability for their own repeated violations of the DTA.

Further, holding that the Patricks waived their claims makes no sense. The Patricks, when faced with an unlawful foreclosure, did not intentionally and voluntarily relinquish the right to their property; they sued the parties responsible for the unlawful foreclosure before the sale occurred. CP 837-929. The Patricks expressly invoked this Court's equitable jurisdiction to stop the trustee's sale because the Defendants did not have authority under the DTA to conduct the sale. *Id.* at ¶ 4.25; *see also* **Schroeder** 177 Wn.2d at 113 n.13 ("...we note an action to challenge a foreclosure sale may sound in equity and superior courts have original,

concurrent jurisdiction over all cases in equity.")

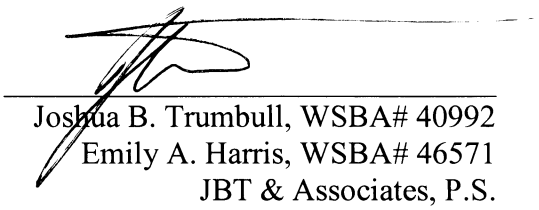
Here, the Patricks did not idly sit by and allow the theft of their property under the subterfuge of the DTA. *See* **Klem**, 176 Wn.2d at 790 (While the legislature has established a mechanism for nonjudicial sales, neither due process nor equity will countenance a system that permits the theft of a person's property by a lender or its beneficiary under the guise of a statutory nonjudicial foreclosure).Simply because the Defendants chose to flout the authority of this Court by conducting the sale while litigation was pending does not mean the Patricks intentionally and voluntarily gave up the right to their home or to be compensated for the damages Wells Fargo and HSBC as Trustee's actions have caused them.

VI. CONCLUSION

The Patricks have suffered great harm because Wells Fargo told Mr. Patrick that if he was three months late on his monthly payment he would qualify for a loan modification that would give his family a lower monthly payment. The Patrick family trusted Wells Fargo was telling them the truth. This trust resulted in six years in suffering, and in the end Wells Fargo callously stripped the hopes and dreams away from a family. This court should remand this case back to Superior Court, so that a jury, long known as the conscience of the community, can render a decision on who is responsible for the damages the Patrick family suffered.

DATED this 19th day of January, 2016 at Arlington, Washington.

Respectfully Submitted By:



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CERTIFICATE OF SERVICE

I, Ashley Burns, 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 19th day of January, 2016, I caused to be served a true and correct copy of Appellants' Opening Brief to Respondents in the above title matter by causing it to be delivered to:

Joseph Ward McIntosh McCarthy & Holthus, LLP 108 1st Ave S, Suite 300 Seattle, WA 98104 jmcintosh@mccarthyholthus.com	☐Facsimile ☐Express Mail ✓ U.S. First Class Mail ☐Hand Delivery ☐Legal Messenger ✓ Electronic-Email
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DATED this 19th day of January, 2016 at Arlington, Washington.

Ashley Burns
Paralegal