No. 51375-7- II

98132-9

On appeal from Mason County No. 16-2-00654-3

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON DIVISION II

DANIEL ROGERS, an individual,

Petitioner,

v.

QUALITY LOAN SERVICE CORPORATION,
a Washington Corporation

Respondent.

PETITION FOR DISCRETIONARY REVIEW

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I. Identity of Petitioner:

Petitioner is Daniel L. Rogers, hereafter referred to as "Sonny" or "Rogers" herein. Sonny was the Plaintiff/Cross-Defendant in the trial court and was the Appellant in the Court of Appeals.

II. Citation to Court of Appeals Decision for which Review is Sought:

This Petition seeks review of *Rogers v. Quality Loan Serv. Corp.*, No. 51375-7-II, 2019 Wn. App. LEXIS 1737 (Ct. App. July 2, 2019) (**Unpublished**). This decision was filed on July 2, 2019, and a copy of that decision is attached hereto as *Exhibit 1 to the Appendix*. Before a motion for reconsideration could be filed Sonny filed for bankruptcy and his former attorney requested the Court of Appeals withdraw its mandate. *See Exhibit 2 to the Appendix*. While the time to seek discretionary review before this Court was pending, Rogers filed for bankruptcy. Upon notice of the bankruptcy, the Court of Appeals stayed its mandate. *See Exhibit 3 to the Appendix*. Upon motion the Court of Appeals extended the deadline for filing discretionary review until January 21, 2020. *See Exhibit 4 to the Appendix*.

III. Issues Presented for Review:

1.) Whether under the circumstances of this case Sonny was entitled to the appointment of counsel under the United States and Washington Constitutions?

2.) Whether the superior court erred in determining as a matter of law pursuant to CR 56 the amount of the default where throughout the course of the multiple summary judgment proceedings it was obvious the amount of the default was disputed and there was conflicting evidence of this dispute?

IV. Statement of the Case:

Factual Circumstances Giving Rise to the Lawsuit

Sonny filed a Chapter 13 bankruptcy on January 4, 2008. This was converted into a Chapter 7 bankruptcy. The Chapter 7 bankruptcy extinguished Sonny's personal obligation on the promissory note and deed of trust lien which gives rise to this Appeal. Clerk's Papers (CP 659–660).

In 2012 Quality Loan Service Corporation of Washington (Quality) brought nonjudicial foreclosure proceedings pursuant to Washington's Deed of Trust Act, Chapter 61.24, against Rogers claiming in its Notice of Foreclosure that he had not paid any money

on his lien since 2007. This was untrue. Sonny had actually paid Chase, as servicer for Well Fargo N.A., an additional $27,000 which was not reflected in its foreclosure documents.

Indeed, according to the November 14, 2016, Memorandum summary judgment decision by Mason County Superior Court Judge Goodell, Sonny Rogers paid Chase through the Bankruptcy Trustee, in favor of Chase and Wells Fargo substantial additional monies after May 2007. CP 836–848.

There is no dispute that the amounts paid Chase through Sonny's Chapter 13 plan were not timely credited to his account and were not reflected in Chase's 2012 Notice of Default, upon which Sonny's nonjudicial foreclosure was based. This is significant as it shows Chase was prepared to take his home based on an amount in default that it should have known was wrong.

Although Sonny pointed this error out to Chase, it did nothing about it. So, Sonny sued Chase, Wells Fargo, their DTA Trustee Quality, and its owner law firm McCarthy Holthus. CP 1102–1180.

The variations in the billings that Rogers disputed are demonstrated throughout the Clerk's Papers. See also CP 1007–11. In fact, these variations in amounts caused Judge Goodell to deny any

summary judgment as to the amount of the debt. *See* e.g. CP 617, 637–646, 698–699, 701–702, 712–713, 716, 723. After Judge Goodell denied summary judgment with regard to the amount of the debt, Chase filed a motion for summary judgment which was heard by Judge Toni A. Shelton. Judge Shelton found based on the declaration of Evan L. Grageda that Sonny had paid Sonny $32,475.75 after April 1, 2007, notwithstanding it had previously claimed otherwise. CP 1426.

The Summary Judgment Proceedings in the Superior Court

The first oral argument was held regarding Defendant Quality and McCarthy-Holthus' Motion for Summary Judgment on June 1, 2015. Sonny filed his opposition papers late. Transcripts, 7–8. Sonny asked for the court to consider his response or to grant him a continuance so his response could be considered. *Id.* at 8–19. The court refused, explaining "[t]he Court holds pro se Plaintiffs to the same standard as they do to attorneys. Certainly, there are times when the Court will grant some leeway when there is a compelling reason to do so." *Id.* at 19.

The Court didn't give Sonny any leeway because his filing was "too" late; the motion to continue was not supported by an affidavit; and because of the totality of the circumstances. *Id.* at 19–20. During

his oral argument the court told Sonny: "So, the Court will only consider those matters that have been presented to the Court properly for review." Transcripts, 27. When Sonny asked if the court would accept evidence, the court responded: "No, I will only consider those matters that have been filed with the Court properly in response to the Motion for Summary Judgment." *Id.* at 28. Rogers responded by stating in pertinent part:

> This has never been an attempt by Plaintiff to get out of a debt that may or may not be owed, but rather an effort to get to an accurate status of this account and agree to a workable solution. According to Defendants' own documents and notices, there are an extraordinary number of inaccuracies, including the wrong party laying claim to the Plaintiff's property that have been presented by the Defendant to the Courts and/or on the recorded public records causing untold harm to Plaintiff with clouded title issues, legal costs of defending the title to the property, and years of unwelcome stress on the Plaintiff's family and business.
>
> And that is what has been happening to me and our family. And all I've asked—all I've ever asked is that the non-biased Trustee that is supposed to represent myself as well as the bank look at those documents.

Id. at 28–29.

In deciding the court should rule on the motion, the court explained again: "The Court has already indicated that there are certain rules that we have to abide by in Summary Judgment Motions

and that the Court does hold pro se litigants to the same standard as attorneys, . . .” Transcript, 30. The court set the date of June 15, 2015, to announce its decision. *Id.*

In announcing its judgment, the court went through the allegations of Sonny’s complaint and dismissed some of the causes of action with prejudice and some without. *Id.* 37–44. The court found that Sonny’s complaint and the evidence before it, which should have included Sonny’s claims regarding the variations in what he actually owed, did not constitute an unfair and deceptive practice under the CPA and therefore dismissed that claim with prejudice. The court did not consider any other of the CPA elements. *Id.* 41–42. The court also dismissed Sonny’s claim that the attempt to nonjudicially foreclose on his home violated the Deeds of Trust Act because the sale did not occur. *Id.* at 42–43. Later in the hearing the court stated: “There is no finding with regard to F, Material Breach of Deed of Trust.” *Id.* at 46.

The hearing transcript reflected Sonny had trouble understanding what had been ruled upon at that hearing. Transcript. 49–50.

On or about August 6, 2018, Sonny filed a motion and declaration for Findings of Indigency. CP 476. On August 27, 2015, the

superior court found that certain portions of the record were necessary for review and transmitted the order on to the Supreme Court for review. CP 493–494. The superior court's order does not reference any statute or court rule documenting the basis for this procedure or any notice and opportunity Sonny had with regard to participating in it. *Id.*

On or about August 6, 2018, Sonny filed a motion and declaration for Findings of Indigency. CP 476.

On August 27, 2015, the superior court found that certain portions of the record were necessary for review and transmitted the order on to the Supreme Court for review. CP 493–494. The superior court's order referring the indigency order to the Supreme Court does not reference any statute or court rule documenting the basis for this procedure. *Id.*

At the third hearing on August 24, 2015, Sonny indicated to the court that he had a "mini-stroke." He asked the Court for a 30-day extension of time to file his brief and participate in oral argument. Transcript 66–70. Based on his claim of medical disability the court set over the hearing until September 16, 2015. This gave Sonny until September 2, 2015, or approximately eight days to respond to the summary judgment motion.

During oral argument on this summary judgment motion by Quality Sonny again argued that he had been harmed by Quality's attempts on behalf of Chase and Wells Fargo to collect different amounts of money than was actually owed and that this had forced him into bankruptcy. *Id.* at 71. Further, that:

> I filed a Chapter 13, the Trustee approved it, here we go. And for 19 months, I paid almost $2,000, a month, into the plan to not only pay my mortgage, but also to pay the an arrearages. $500, a month, went towards the arrearages. I did that for 19 months and in 19 months, they collected almost $37,000 from me - . . .

Transcripts at 79.

The court, which refused to consider any of Sonny's evidentiary submissions, granted Quality's motion for summary judgment of dismissal, including dismissing Sonny's claim for what the court called "generalized equitable relief." *Id.* at 83–84.

On November 4, 2015, a panel of the Supreme Court issued an order denying Sonny's Motion for Indigency, stating only: "[t]hat the Appellants Motion for the Expenditure of Public Funds is denied." CP 553.

After Defendants Quality and McCarthy Holthus were dismissed, Defendants Chase and Wells Fargo Bank brought a

summary judgment motion, which was argued on September 26, 2016. Shortly before this argument Sonny had requested a disability accommodation pursuant to GR 33, which was granted. He appeared at the oral argument with his Disability Advocate, Kyle Welch. Welch helped Sonny explain the various disparities in Chase's billing materials.

Among the evidentiary materials that Sonny relied and asked the superior court consider was Chase's November 2012 Notice of Default, CP 1033–1037, and Chase's December 2012 Notice of Foreclosure, CP 1028–1029, both of which reported that Chase had not been paid any monies since May 1, 2007. Sonny and his advocate also showed Judge Goodell his bankruptcy records, which established that he had paid Chase approximately $27,000 since he filed his Chapter 13, which was well after May 1, 2007.

The court granted Defendants Chase and Wells Fargo's motion for summary judgment, *except with regard to the amount of the default*. The court's Memorandum Opinion Re: The Chase and Wells Fargo Defendants' Motion for Summary Judgment, CP 836–848, states in this regard:

> There is a genuine issue of material fact with regard to the total amount due and owing under the Deed of Trust/ As indicated earlier, an opinion of Eva L. Grageda was provided by the Defendants in support of the total amount that they claim is owing. However, the basis for the opinion is lacking. This information is necessary to determine the appropriate application of payments made after April 30, 2007. While it is clear that plaintiff is in default for failure to maintain the monthly payments required by the Deed of Trust, the total amount of debt is disputed by Plaintiffs and the Defendants have failed to provide adequate support for their calculations. In addition the Defendants have not addressed the right of redemption, if any, that the Plaintiff may have with regard to a foreclosure sale or what costs it believes are recoverable in this action.

CP at 847.

Thereafter, Defendants submitted a group of computer print-outs, which Sonny could not understand, CP 1516–1571; 1674–1720, and which likely would not have been understood by a jury as indicating that Chase had received $32,475.75 from Sonny's Bankruptcy, *Id.* Transcript at 132. especially in light of these banks' failure to account for these sums when the nonjudicial foreclosure was commenced in 2012; some five years after chase claimed Sonny had been continually in default.

Despite the obvious jury question these circumstances raised about the amount of the default, Judge Shelton granted summary judgment as to the amount of the debt. The Court of Appeals affirmed

because "[t]he superior court correctly determined that the payment history was accurate and correctly ruled that entry of judgment in favor of Chase and the Trust was proper." This was error because these records should not have been found to be credible by either the superior court or the Court of Appeals.

V. Argument

This Court Should Grant Discretionary Review of These Proceedings Under RAP 3(4)(b)(3), and (4).

The Court of Appeals held "Rogers fails to identify any constitutional or statutory right to the appointment of counsel for actions under the DTA." That is true. Sonny argued that litigants without counsel in Washington's courts do not obtain justice. Further, that the United States Constitution guaranteed litigants "courts of justice."

As support for the proposition that litigants without counsel do not achieve justice in Washington's courts Sonny cited this Court's 2003 Civil Legal Needs Study[1] (2003 Study) and 2015 Civil Legal Needs Study (2015 Update)[2]. Opening Brief in Court of Appeals (OB),

[1] Last accessed on January 21, 2019 at: https://www.courts.wa.gov/newsinfo/content/taskforce/CivilLegalNeeds.pdf

[2] Last accessed on January 21, 2019 at:

pp. 18–27. But the Court of Appeals refused to consider these official reports as evidence notwithstanding they contained clear admissions about the lack of justice for pro se litigants in Washington's courts. Such admissions included, among others, the lead sentence of the Executive Summary of the 2015 Update, which states:

> "Justice is absent for 70 percent of the state's low income Washingtonians who frequently experience serious legal problems."

Two years later in *Selene RMOF II REO Acquisitions II, LLC v. Ward*, 189 Wn.2d 72, 90-92, 399 P.3d 1118, 1128-29 (2017) this Court decided in a 5-4 split that a *purchaser of a purchaser* from a trustee sale should be allowed to bring an unlawful detainer action against the former owner of the property. The dissent, written by Justices Yu and joined in by Chief Justice Fairhurst and Justices Steven C. González and Sheryl Gordon McCloud, challenged this procedure as being unjust in light of the fact that most victims of foreclosures cannot afford attorneys.

> . . . [T]he majority states that Ward "is foreclosed from asserting her title challenge" because "the appropriate time to assert such challenge was prior to foreclosure." Majority at 83. Our jurisprudence on this point is clear and certainly may have determined the outcome of a quiet title action. Nevertheless, this holding highlights another concern: that

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https://ocla.wa.gov/wp-content/uploads/2015/10/CivilLegalNeedsStudy_October2015_V21_Final10_14_15.pdf

> the remedies available to protect against wrongful foreclosures are insufficient, *particularly for low-income homeowners faced with the daunting task of enjoining a trustee's sale without the aid of legal counse*l.
>
> Ward's story is not unique in this regard. She seemingly attempted to assert her challenge at the appropriate time, but her case was dismissed before the court could adjudicate the merits. Am. Verbatim Report of Proceedings at 18, 21. The remedies provided under chapter 61.24 RCW are not crafted for the pro se homeowner in mind, resulting in prejudice against those low-income homeowners most at risk of foreclosure. If Ward had had the benefit of legal counsel, this case may have unfolded quite differently.
>
> This lack of legal counsel is critical because RCW 61.24.130(1) does not provide the same protections as the unlawful detainer statute. Under RCW 59.12.030(6), color of title is sufficient to halt the summary proceedings to first resolve the issue of ownership. The trial court acts as a safeguard for the rights of the homeowner whose title may have been fraudulently transferred to the party seeking possession. On the other hand, in nonjudicial foreclosure proceedings, the burden rests with the homeowner to bring a lawsuit enjoining the trustee's sale. While this certainly avoids "'time-consuming judicial foreclosure proceedings'" and "'save[s] substantial time and money to both the buyer and the lender,'" the lack of judicial oversight carries real consequences that may not, in practice, be alleviated by the remedy provided under RCW 61.24.130(1). Majority at 78 (quoting *Peoples Nat'l Bank of Wash. v. Ostrander*, 6 Wn. App. 28, 31, 491 P.2d 1058 (1971)). ***A remedy that few can reasonably access in practice is no remedy at all.***

Selene RMOF II REO Acquisitions II, LLC, 189 Wn. 2d at 90–92.

Curiously, Justices Johnson and Wiggins, who along with

Justice Steven González, served as part of the teams which prepared the 2003 Study and/or the 2015 Update ignored the justice issue that Sonny raises here.

As support for the proposition that Washington Courts are required to be Courts of Justice under the United States Constitution, Rogers cited the United States Constitution, the Federalist Papers, and case law as well as recent statements to this effect made by former Chief Justice Fairhurst. OB 15–17; 27–37.

Notwithstanding that Sonny's experience in the Mason County Superior Court was characterized by injustice such as (1) not applying longstanding summary judgment principles to Sonny's arguments and evidence; (2) strict implementation of time limits—notwithstanding a medical emergency—the Court of Appeals ignored these injustices. Indeed, it refused to mention them at all.

It is Sonny's position that courts, in Washington and elsewhere, cannot ignore that they are the branch of government primarily responsible for providing access to justice to the people in these American states.

This Court should revisit and grant review of the question as to whether courts in Washington have the responsibility to provide

justice for all the people or can choose to be only servants of the rich by ducking consideration of this "justice issue" that it has itself identified.

Rogers also argued that he was entitled to an attorney under the due process clause of the United States Constitution where justice was likely to be absent if he did not have an attorney. Rogers argued that this was so because a situation in which the courts would not provide litigants with justice demanded that court's examine those "distinct factors" set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976) in civil cases such as was done in *Lassiter v. Department of Social Servs. Of Durham Cty*., 452 U.S. 18, 101 S. Ct. 2153 (1981) at pages 25-27.

In balancing *Mathews* three factors, *i.e.* 1) the nature of the private interest; 2) the State's interests; and 3) the risk of an erroneous deprivation of a right, the Supreme Court noted in *Lassiter* that the nature of the private right being protected was "[a] parent's interest in the accuracy and justice of the decision to terminate his or her parental status." *Id*. at 27. (Emphasis Supplied) The same injustice is at stake here.

The Supreme Court stated with regards to the government's interests: "Since the State has an urgent interest in the welfare of the

child, it shares the parents interests in an accurate and just decision." *Id.* The same is true here where foreclosures are ravishing our communities and hurting everybody but the banks, like the too big to fail defendants here.

Finally, the Supreme Court considered the risk the parent would be erroneously deprived of her child because the parent is not represented by counsel. The Court first observed in this regard that North Carolina sought to ensure an accurate decision by establishing numerous procedures to ensure accurate and just State court decisions. *Lassiter*, supra, 428 U.S. at 28-29.

Relying on these alternative procedures to provide fairness (a situation which at least four members of this court did not exist here, see Selene, supra) the United States supreme court that the likelihood of an unjust decision was not so compelling as to mandate appointment of counsel. However, the Court cautioned: "In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair."

A serious constitutional issue affecting the substantial public interests of the State of Washington exists with regard to whether its courts can ignore the absence of justice within a judiciary which was

once defined by itself as a temple of justice. Rogers claims that such review of the "justice issues" is warranted because (1)because a significant question of law under the Constitution of the United States is involved (*see* RAP 13.4(b)(3)) and (2) because this petition involves an issue of substantial public interest that should be determined by the Supreme Court. (*See* RAP 13.4(b)(4))

The Lower Courts Treated Rogers Worse Than They Would Have Treated Attorneys.

The Defendant/Appellees Chase and Wells Fargo sent out notices incorrectly stating the amount purportedly due under the Note and Deed of Trust. CP 1429–1431, ¶¶ 3 & 4; 1453, ¶ 2 . Sonny asserts that sending borrowers contradictory statements regarding the amount due, by a factor of tens of thousands of dollars, constitutes a default of the promissory note and the deed of trust. CP 1429–1431, ¶¶ 3 & 4; 1453, ¶ 2.

The fact that the Note Holder or its agents had previously sent out contradictory bills and had not provided any testimony explaining how the $30 plus thousand payments in the bankruptcy were handled creates issues of fact as to whether Chase's most recent estimates are accurate; how Chase and Wells Fargo could have made such an enormous mistake. It also calls into question the financial credibility

and integrity of these financial creditors.

Our system of justice contemplates credibility and other factual issues should be resolved at trial after the fact finder has an opportunity to observe witnesses' testimony and conflicting evidence. *See Maziar v. Washington State Dep't of Corr.*, 183 Wn.2d 84, 85-86, 349 P.3d 826, 827 (2015)("[A]ny party ... [has] the right to have a jury determine most matters of fact."); *see also Balise v. Underwood*, 62 Wn.2d 195,381 P.2d 966 (1963)(Credibility of witnesses testifying differently about a disputed issue is question of fact to be resolved by the jury at a trial).

More recently Washington's Supreme Court decided *Keck v. Collins*, 184 Wn.2d 358, 357 P.3d 1080 (2015), which held that litigants shouldn't lose cases just because evidence is provided late or in an improper form.

In *Collins* this court held that the fundamental purpose of summary judgment proceedings is to determine whether there is sufficient evidence of a factual dispute that a trial is justified. In this regard, this Court stated:

> . . . [A]fter striking the untimely filed expert affidavit, the trial court determined that the remaining affidavits were] insufficient to support the contention that the Doctors'

> actions fell below the applicable standard of care. *Essentially, the court dismissed the plaintiffs' claim because they filed their expert's affidavit late.* But "our overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action." *Burnet*, 131 Wn.2d at 498 (citing CR 1). The "'purpose [of summary judgment] is not to cut litigants off from their right of trial by jury if *they really have evidence which they will offer on a trial*, it is to carefully test this out, in advance of trial *by inquiring and determining whether such evidence exists.*'" *Preston v. Duncan*, 55 Wn. 2d 678, 349 P.2d 605 (1960) (quoting *Whitaker v. Coleman*, 115 F.2d 305 (5th Cir. 1940)).

Keck v. Collins, 184 Wn. 2d at 369.

Another published Washington Court of Appeals case which applies this same standard is *Regelbrugge v. State*, 7 Wn. App. 2d 29, 37, 432 P.3d 859, 864-65 (2018).

The Mason County Superior Court deliberately refused to apply this same standard to Sonny Rogers because he was a *pro s*e litigant with disabilities brought on by that Court's disparate treatment of him. Accordingly, review should be granted of this case pursuant to RAP 13(4)(b)(1) and (2) which provide:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; . . .

Furthermore, review should be granted under RAP 13(4)(b)(4) because this issue involves an "issue of substantial public interest that should be determined by the Supreme Court." This Court knows that people who can't afford lawyers have little faith in the system. OB p. 26 citing 2015 Civil Update Study, Justice Wiggins' Introduction, p. 2.

It goes against the public interest for this Court to send a message that Washington courts will rubber stamp a banks' claims to an amount owed where the same banks have been off by thousands of dollars with regard to the amount they claimed was due.

In short, this Court should grant discretionary review so as to determine whether the Superior Court should have granted summary judgment as to the amount of the debt where Chase's billings where were admittedly off by over $30,000 for several years.

VI. Conclusion

Sonny Rogers respectfully requests this Court grant discretionary review of Issues 1 and 2 hereof.

Dated this 21st day of January, 2020, at Arlington, Washington.

Respectfully submitted,

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Appendix

Appendix 1	Unpublished Opinion	App. 023–034
Appendix 2	Notice of Automatic Stay	App. 035–041
Appendix 3	Mandate August 22, 2019	App. 042
Appendix 4	Commissioner's Ruling November 25, 2019	App. 043

Filed
Washington State
Court of Appeals
Division Two

July 2, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DANIEL L. ROGERS, an individual, Appellant, v. QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington corporation; MCCARTHY HOLTHUS, LLP, a Professional Services Organization; JPMORGAN CHASE BANK, N.A., a national association; WELLS FARGO BANK, N.A., a national association; WAMU MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2005-PR1 TRUST,. Respondents.	No. 51375-7-II UNPUBLISHED OPINION

SUTTON, J. — After defaulting on a loan secured by a promissory note and a deed of trust on his property, Daniel L. Rogers, acting pro se, filed a complaint to stop a non-judicial foreclosure by JPMorgan Chase, N.A. (Chase), Wells Fargo Bank, N.A., and Wells Fargo Bank, N.A. as Trustee for the WaMu Mortgage Pass-Through Certificates Series 2005 (the Trust).[1] Chase and the Trust filed a motion for summary judgment and dismissal of Rogers's complaint and for judgment on the Trust's counterclaim for judicial foreclosure. The superior court granted the motion in part, dismissed the complaint, granted foreclosure on the Trust's judicial foreclosure counterclaim, and denied without prejudice the motion for entry of judgment on the total amount

[1] Quality Loan Service Corporation of Washington and McCarthy & Holthus were dismissed from the case in 2015, and thus, are not part of this appeal.

due, Rogers's redemption right, and the Trust's recoverable costs. The Trust filed another summary judgment motion on the amount due and the superior court granted the motion and entered judgment against Rogers. Rogers appeals both orders.

Preliminarily, Rogers argues that he is entitled to the assistance of counsel and the superior court should not have held him to the same standard as an attorney. He also argues that the superior court erred by granting summary judgment in favor of Chase and the Trust because there are genuine issues of material fact regarding his Consumer Protection Act (CPA) [2] claim and the amount due on the defaulted loan. Chase and the Trust argue that the superior court did not err because Rogers failed to show a genuine issue of material fact. We hold that Rogers is not entitled to the assistance of counsel and the court did not err in holding him to the same standard as an attorney. We also hold that the superior court did not err by granting summary judgment and dismissing all claims in Rogers's complaint including the CPA claim against Chase, granting the Trust's judicial foreclosure counterclaim, and entering judgment against Rogers. We affirm both orders.

FACTS

I. BACKGROUND INFORMATION

A. INDIGENCY AND APPELLATE REVIEW

Rogers filed a motion for indigency. He explained that he had been unemployed for six months, and had to sell personal items and rely on roommates to survive. He requested the following relief: waiver of the filing fee, preparation of verbatim report of proceedings, costs of

[2] Ch. 19.86 RCW.

reproducing clerk's papers, appointment of counsel, and an order to the clerk of the superior court to transmit to the Supreme Court the papers designated in the findings of indigency. The superior court found that Rogers was "unable by reason of poverty to pay for all or some of the expenses of appellate review," and that "[Rogers] is unable to contribute." Clerk's Papers (CP) at 482. On November 4, 2015, a panel of the Supreme Court issued an order denying his motion for indigency, stating only, "That the Appellant's Motion for Expenditure of Public Funds is denied." CP at 553.

B. LOAN, PROMISSORY NOTE AND DEED OF TRUST

In November 2004, Rogers borrowed $240,000 from Washington Mutual Bank (WaMu), evidenced by a promissory note (Note). Rogers promised in that Note to make payments "every month," and to do so "until I have paid all of the principal and interest and any other charges described below that I may owe under this Note." CP at 1256. Rogers also signed a Deed of Trust securing the Note against his property in Tahuya, Washington (Property). The Deed of Trust provides that the beneficiary can sell the Property if Rogers defaulted on his loan. The Note and the Deed of Trust name WaMu as both lender and beneficiary. The Note is indorsed-in-blank. In 2005, WaMu sold the Note to Wells Fargo Bank, N.A. the acting trustee for the WaMu Mortgage Pass-through Certificates Series 2005-PR1 Trust, but remained the loan servicer and custodian.

Rogers defaulted on his loan in 2007 and declared bankruptcy. After Rogers defaulted, he made payments to the bankruptcy trustee, Chase, along with other payments that Chase ultimately credited to his loan.

In September 2008, WaMu failed and the Federal Deposit Insurance Corporation (FDIC) took WaMu into receivership. *Rundgren v. Wash. Mut. Bank, FA,* 760 F.3d 1056, 1059 (9th Cir. 2014); *Benson v. JPMorgan Chase Bank, N.A.,* 673 F.3d 1207, 1209-10 (9th Cir. 2012). The

FDIC assumed "all rights, titles, powers, and privileges" of WaMu. Formerly 12 U.S.C. § 1821(d)(2)(A)(i) (2008).

On September 25, 2008, Chase became the successor-in-interest as to WaMu's rights in Rogers's loan by its purchase of WaMu's assets from the FDIC. Chase and the FDIC entered into a purchase and assumption agreement to memorialize the purchase, which included WaMu's rights to service certain loans (including Rogers's loan). In 2011, Chase executed a corporate assignment of deed of trust, assigning its interest in Rogers's Deed of Trust to Wells Fargo Bank, N.A., as trustee for the Trust. While the Trust owned the Note, Chase serviced the loan and physically possessed the Deed of Trust and Note. The Trust also gave Chase a limited power of attorney to enforce Rogers's loan.

II. PROCEDURAL INFORMATION

On January 21, 2014, Rogers filed a complaint seeking to stop a non-judicial foreclosure on the Property, and alleged a number of causes of actions against Chase and the Trust which are not relevant to this appeal. Rogers alleged that Chase improperly foreclosed non-judicially because it did not acquire an interest in the Property, making the non-judicial foreclosure documents invalid. Rogers further alleged that Chase and the Trust failed to follow the Deed of Trust Act (DTA)[3] requirements for non-judicial foreclosure and alleged that the property was being used for agricultural purposes. Chase and the Trust then commenced judicial foreclosure proceedings against the Property.

[3] Ch. 61.12 RCW.

On July 17, 2015, Chase and the Trust answered Rogers's complaint, and the Trust filed a judicial foreclosure counterclaim. Rogers did not file an answer to the counterclaim. On June 28, 2016, Chase and the Trust filed a motion for summary judgment dismissal of all claims in Rogers's complaint and for foreclosure on the Trust's judicial foreclosure counterclaim.

The superior court granted partial summary judgment to Chase and the Trust on all claims in Rogers's complaint, dismissing them with prejudice, and granted the Trust's judicial foreclosure counterclaim. However, the superior court found that there were genuine issues of material fact as follows:

> a. The total amount due and [owing] under the Deed of Trust, including proof of the amount of each monthly installment owing;
>
> b. The rights of redemption held by [Rogers], if any;
>
> c. The costs Defendant/Counterclaimant believes are recoverable in this action.

CP at 855-56.

In 2017, the Trust filed another motion for summary judgment and an affidavit with exhibits showing the payment history to prove what Rogers owed, what was due, and what Chase had credited on the outstanding loan. Instead of timely opposing that second motion, Rogers, on the final hearing date, filed a number of documents alleging a disability and referencing accommodations under the Americans with Disabilities Act (ADA)[4], as well as motions to dismiss the counterclaims, for reconsideration of the superior court's evidentiary ruling to take judicial notice of certain documents, and to strike the declarations filed in support of the Trust's judicial foreclosure counterclaim. Because Rogers did not present any evidence to the contrary, the

[4] 42 U.S.C. § 12102(2) (2009).

superior court accepted the payment history as accurate, granted summary judgment, and denied Rogers's motions. The superior court entered a judgment stating that the Trust was entitled to recover $239,644.49 with interest at 3.8720 percent per annum from Rogers and was allowed to foreclose on Rogers's property.

Rogers appeals both superior court orders.

ANALYSIS

I. LEGAL PRINCIPLES

We review a superior court's summary judgment order de novo. *Reliable Credit Ass'n v. Progressive Direct Ins.*, 171 Wn. App. 630, 637, 287 P.3d 698 (2012). Summary judgment is appropriate if, when viewing the facts in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). "A genuine issue of material fact exists only where reasonable minds could reach different conclusions." *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009). If there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law, we affirm the superior court's summary judgment order. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013).

"Mere allegations or conclusory statements of fact unsupported by evidence do not sufficiently establish such a genuine issue." *Discover Bank v. Bridges,* 154 Wn. App. 722, 727, 226 P.3d 191 (2010). "[T]he nonmoving party 'may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value.'" *Bridges*, 154 Wn. App. at 727 (quoting *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)).

II. APPOINTMENT OF COUNSEL

For the first time on appeal, Rogers argues that the superior court erred by not providing him with the assistance of counsel based on indigence. He argues that he was entitled to the appointment of counsel because otherwise justice could not be done by the court. We disagree.

RAP 2.5(a) states:

> The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

Generally, there is a right to counsel in civil cases only when a civil litigant's "physical liberty is threatened" or a "fundamental liberty interest . . . is at risk." *In re Dependency of Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995).

Here, Rogers fails to identify any constitutional or statutory right to the appointment of counsel for actions under the DTA. Although he claims that his property and financial interests are at stake, the Trust filed a judicial foreclosure counterclaim allowed by the DTA to enforce the loan as Rogers had agreed to in the Deed of Trust he executed to secure the loan. On appeal, Rogers does not allege any procedural irregularities in the judicial foreclosure and he did not appeal the judicial foreclosure by the Trust, only the amount due on the defaulted loan. Under *Grove,* Rogers has no right to the assistance of counsel based on indigence. Further, the superior

court did not enter an order denying Rogers's request for the assistance of counsel. Thus, we hold that the court did not err.

III. TREATMENT OF PRO SE LITIGANTS

Citing federal authority, Rogers argues that the superior court erred by holding him, a pro se litigant, to the same standard as an attorney. We hold that the superior court did not err because the law is well established that a pro se litigant is held to the same standard as an attorney.

In federal court, pro se pleadings receive liberal construction. *Pouncil v. Tilton*, 704 F.3d 568 (9th Cir. 2012); *see Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972). But in Washington courts, a superior court "must hold pro se parties to the same standards to which it holds attorneys." *Edwards v. Le Duc*, 157 Wn. App. 455, 460, 238 P.3d 1187 (2010). This is a procedural rule; federal procedural rules do not control in state courts. *Adams v. LeMaster*, 223 F.3d 1177, 1182 n.4 (10th Cir. 2000). Thus, the Washington rule applies and the superior court did not err when it held Rogers, as a pro se litigant, to the same standard as an attorney.

IV. SUMMARY JUDGMENT

Rogers argues that the superior court erred by granting summary judgment dismissal of his claims in the complaint including his CPA claim against Chase, and erred by granting the Trust's judicial foreclosure counterclaim as to the amount due and entering judgment against him. We hold that because there are no genuine issues of material fact and because Chase and the Trust are entitled to judgment as a matter of law, the superior court did not err.

A. WAIVER OF REVIEW

Chase and the Trust initially argue that Rogers waived review of the partial summary judgment order dismissing his complaint because his assignments of error do not assert that the superior court erred in granting this motion. We agree.

"The scope of a given appeal is determined by the notice of appeal, the assignments of error," and the parties' substantive arguments. *Clark County v. W. Wash. Growth Mgmt. Hearings Bd.*, 177 Wn.2d 136, 144, 298 P.3d 704 (2013). The party must designate in its notice of appeal the decision that it wants this court to review. RAP 5.3(a).[5]

Here, in his notice of appeal, Rogers designated the partial summary judgment order dated December 12, 2016. However, his brief fails to address this order. We hold that Rogers has waived any argument regarding summary judgment dismissal of his complaint under *Clark County* and RAP 5.3(a). Thus, we review below Rogers's remaining CPA claim against Chase.

B. CPA CLAIM

Rogers argues that because there are genuine issues of material fact related to his claim that Chase violated the CPA, the superior court erred by granting summary judgment dismissal of the CPA claim. He argues that Chase sent out contradictory billing notices regarding the amount due on his defaulted loan which constituted an unfair trade or deceptive business practice in enforcing the loan. Chase argues that the superior court did not err because Rogers failed to show a genuine issue of material fact that Chase acted deceptively, unfairly, or that he was injured. We

[5] RAP 5.3(a) states in relevant part that "A notice of appeal must (1) be titled a notice of appeal, (2) specify the party or parties seeking the review, (3) designate the decision or part of decision which the party wants reviewed, and (4) name the appellate court to which the review is taken."

hold that because there are no genuine issues of material fact regarding any deceptive or unfair actions by Chase in enforcing the loan, the superior court did not err by granting summary judgment dismissal of the CPA claim.

The CPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. Under RCW 19.86.090, any person injured in his or her business or property by a violation of RCW 19.86.020 may bring a civil action to recover actual damages. *Panag v. Farmers Ins. Co. of Wash.,* 166 Wn.2d 27, 37, 204 P.3d 885 (2009). To prevail on a CPA claim, a plaintiff must prove "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation." *Panag,* 166 Wn.2d at 37. Whether a plaintiff can prevail on a CPA claim is a case by case determination of whether the plaintiff can satisfy each of the five elements. *Lyons v. U.S. Bank Nat'l Ass'n*, 181 Wn.2d 775, 785, 336 P.3d 1142 (2014).

Here, Rogers alleges that Chase:

> The Defendant/Appellee sent out monthly notices stating the amount due. The Deed of Trust required payments be paid when due. [Rogers] asserts that sending borrowers contradictory statements regarding the amount due constitutes a default of the promissory note and the deed of trust.
>
> The fact that the Note [h]older or its agents had previously sent out contradictory bills and had not provided any testimony explaining how the $30 plus thousand payments in the bankruptcy were handled creates an issue of fact *per se* and one regarding the . . . total amount owed. It also involves question with regard to credibility of creditors. These issues of fact should not have been resolved against [Rogers].

Appellant's Amended Opening Br. at 38.

But Rogers fails to establish all the elements of a CPA claim. *Panag,* 166 Wn.2d at 37. Rogers's brief lacks any citation to the record and contains unsupported assertions related to the

CPA claim. Because Rogers fails to establish all elements of a CPA claim, and there are no genuine issues of material fact, we hold that the superior court did not err by dismissing the CPA claim.

C. JUDICIAL FORECLOSURE COUNTERCLAIM

Rogers claims that Chase and the Trust misstated the amount due in the Trust's judicial foreclosure counterclaim. He also claims that Chase and the Trust did not credit him the money he had paid during his bankruptcy and that Chase had sent him contradictory information, which he claims constitutes a "factual dispute" defeating summary judgment. Chase and the Trust claim that Rogers waived all defenses to the counterclaim for judicial foreclosure by failing to answer the counterclaim. We disagree with Chase and the Trust because, although Rogers failed to answer the counterclaim, this issue was litigated below and Rogers appealed the order entering judgment on the amount due. However, because there are no genuine issues of material fact regarding the amount due on the defaulted loan, we hold that Chase and the Trust were entitled to judgment as a matter of law, and thus, the court did not err.

"Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." CR 8(d). We can affirm the grant of summary judgment on any basis present in the record of proceedings in the superior court. *King County v. Seawest Inv.t Assocs., LLC,* 141 Wn. App. 304, 310, 170 P.3d 53 (2007).

Rogers fails to provide any evidence that the payment history on the amounts due was inaccurate. The superior court correctly determined that the payment history was accurate and

correctly ruled that entry of judgment in favor of Chase and the Trust was proper. Thus, we hold that the superior court did not err. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.
SUTTON, J.

We concur:

Maxa, C.J.
MAXA, C.J.

Melnick, J.
MELNICK, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION II

DANIEL L. ROGERS, Appellant, v. QUALITY LOAN SERVICE CORPORATION, Respondent.	No.: 51375-7 II **DECLARATION OF SCOTT E. STAFNE PROVIDING NOTICE OF APPELLANT'S BANKRUPTCY AND THIS COURT'S VIOLATION OF THE AUTOMATIC STAY CURRENTLY IN FORCE** **Mason County Cause No. 14-2-00045-0**

1. My name is Scott E. Stafne. I was the attorney for Daniel R. Rogers (Sonnie) before he filed bankruptcy prior to this Court's issuance of its mandate.
2. I have attached hereto as *Exhibit 1* a copy of the first page of Mr. Roger's bankruptcy filing, which documents the bankruptcy case number and filing date of his bankruptcy.
3. I am no longer the attorney for Sonnie Rogers as a result of his

bankruptcy. However, once his bankruptcy case is completed it is likely I will help Sonny file a motion to reconsider this Court's ruling.

4. This Court's issuance of ts mandate in violation of the automatic stay provisions of the district court will make this difficult to do.
5. Accordingly, I am advising the panel that it has no subject-matter jurisdiction to issue a mandate in these appeal proceedings in violation of the bankruptcy stay which is now in effect.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my information and belief.

DATED this 21st day of August, 2019, in Arlington, Washington.

By: */s/ Scott E. Stafne*
Scott E. Stafne, Declarant
scott@stafnelaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing with the Clerk of the Court using the Appellant's Court Portal utilized by the Washington State (Court of Appeals or Supreme Court), which will provide service of these documents to those attorneys of record.

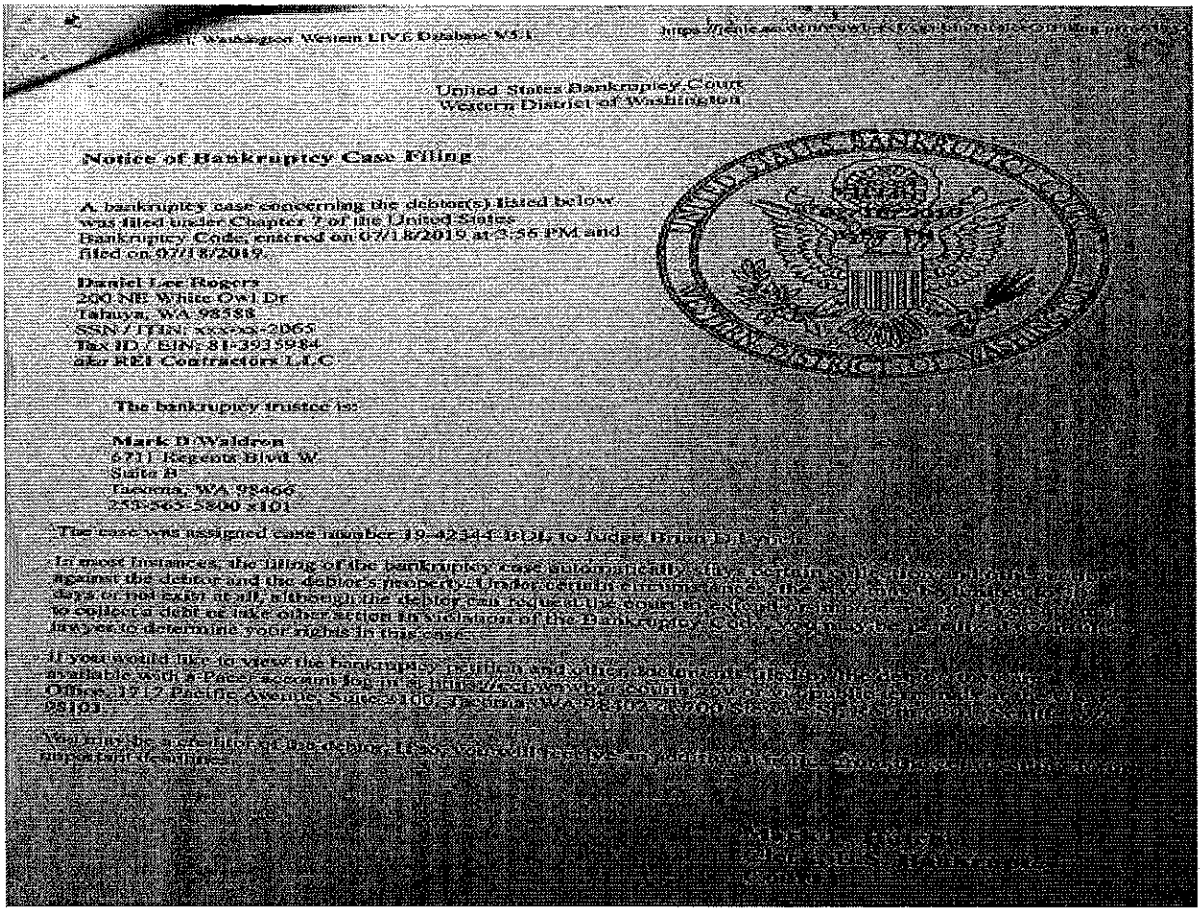
DATED this 21st day of August, 2019.

By: */s/ LeeAnn Halpin*
LeeAnn Halpin, Paralegal
leeann@stafnelaw.com

Exhibit 1

Rogers v. Quality Loan Servicing

No.: 51375-7 II



United States Bankruptcy Court
Western District of Washington

Notice of Bankruptcy Case Filing

A bankruptcy case concerning the debtor(s) listed below was filed under Chapter 7 of the United States Bankruptcy Code, entered on 07/18/2019 at 3:56 PM and filed on 07/18/2019.

Daniel Lee Rogers
200 NE White Owl Dr
Tahuya, WA 98588
SSN / ITIN: xxx-xx-2065
Tax ID / EIN: 81-3935984
aka REI Contractors LLC

The bankruptcy trustee is:

Mark D Waldron
6711 Regents Blvd W
Suite B
Tacoma, WA 98466
253-565-5800 x101

The case was assigned case number 19-42344-BDL to Judge Brian D. Lynch.

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be terminated with respect to property of the debtor or property that secures a debt. Consult an attorney familiar with your rights in this case.

If you would like to view the bankruptcy petition and other documents filed in this case, they are available with a PACER account for a fee at https://ecf.wawb.uscourts.gov. You may also visit the Clerk's Office, 1717 Pacific Avenue, Suite 2100, Tacoma, WA 98402-3200 Monday - Friday, 8:30 AM - 4:30 PM, except for holidays, or call (253) 593-6970.

You may be a creditor of the debtor. If so, you will receive an additional notice with important deadlines.

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United States Bankruptcy Court Western District of Washington

BANKRUP

Notice of Bankruptcy Case Filing

A bankruptcy case concerming the debtor(s) listed below was filed under Chapter 7 of the United States Bankruptcy Code, entered on 07/18/2019 at 3:56 PM and filed on 07/18/2019.

Daniel Lee Rogers 200 NE White Owl Dr Tahuya, WA 98588 SSN/ITIN: xxx-xx-2065 Tax ID/EIN: 81-3935984 aka REI Contractors LLC

WESTER

WASHING

RICT OF

The bankruptcy trustee is:

Mark D Waldron 6711 Regents Blvd W Suite B Tacoma, WA 98466

253-565-5800 x101 The case was assigned case number 19-42344-BDL to Judge Brian D Lynch.

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consulta lawyer to determine your rights in this case. If you would like to view the bankruptcy petition and other documents filed by the debtor, they are available with a Pacer account log in at https:llecf wawb uscourts.gov or via public terminals at the Clerk's Office, 1717 Pacific Avenue, Suite 2100, Tacoma, WA 98402 or 700 Stewart St, Room 6301, Seattle, WA 98101.

You may be a creditor of the debtor. If so, you will receive an additional notice from the court setting forth important deadlines.

Mark L. Hatcher Clerk, U.S. Bankruptey Court

STAFNE LAW ADVOCACY & CONSULTING

August 21, 2019 - 2:32 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	51375-7
Appellate Court Case Title:	Daniel Rogers, Appellant v. Quality Loan Service Corporation, Respondent
Superior Court Case Number:	14-2-00045-0

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- leeann@stafnelaw.com
- lisabass@dwt.com
- micah@stafnelaw.com
- pam@stafnelaw.com

Comments:

Declaration of Scott E. Stafne Providing Notice of Appellant's Bankruptcy

---

Sender Name: Scott Stafne - Email: Scott@StafneLaw.com
Address:
239 N OLYMPIC AVE
ARLINGTON, WA, 98223-1336
Phone: 360-403-8700

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Washington State Court of Appeals
Division Two

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General Orders, Calendar Dates, and General Information at http://www.courts.wa.gov/courts **OFFICE HOURS**: 9-12, 1-4.

August 22, 2019

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CASE #: 51375-7-II: Daniel Rogers v. Quality Loan Service Corporation
Case Manager: Jodie

Counsel:

On the above date, this Court entered the following notation ruling:

A RULING BY COMMISSIONER SCHMIDT:

The Mandate is recalled and the Appeal is stayed pending further order of the Bankruptcy Court.

Very truly yours,

Derek M. Byrne
Court Clerk

:jlt
cc: Mason County Superior Court

Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454
Derek Byrne, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)
General Orders, Calendar Dates, and General Information at http://www.courts.wa.gov/courts **OFFICE HOURS**: 9-12, 1-4.

November 25, 2019

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CASE #: 51375-7-II: Daniel Rogers v. Quality Loan Service Corporation
Case Manager: Jodie

Counsel:

On the above date, this Court entered the following notation ruling:

A RULING BY COMMISSIONER SCHMIDT:

Petitioner is granted an extension of time to and including January 21, 2020 to file the Motion for Discretionary Review.

Very truly yours,

Derek M. Byrne
Court Clerk

:jlt

CERTIFICATE OF SERVICE

I hereby certify that on this day, January 21, 2020, the Motion for Discretionary Review was served by this Court's electronic case filing system.

Dated this 21st day of January, 2020, in Arlington, Washington.

By: s/ *LeeAnn Halpin*
LeeAnn Halpin, Paralegal

STAFNE LAW ADVOCACY & CONSULTING

January 21, 2020 - 4:39 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	51375-7
Appellate Court Case Title:	Daniel Rogers, Appellant v. Quality Loan Service Corporation, Respondent
Superior Court Case Number:	14-2-00045-0

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