SC#93422-3

COURT OF APPEALS NO. 72905-5

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JACK GRANT,

Appellant,

v.

FIRST HORIZON HOME LOANS, aka First Horizon Corporation dba "First Horizon Home Loans"; and UNKNOWN John and Jane Does 1-10; XYZ Corporation 1-10; ABC Limited Liability Companies 1-10; and 123 Banking Associations 1-10; QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington Corporation; STEWART TITLE, dba "Stewart Title of Bellingham"; STEWART TITLE OF WESTERN WASHINGTON, INC., a Washington corporation dba "Stewart Title of Bellingham"; STEWART TITLE OF BELLINGHAM, INC., a Washington corporation dba "Stewart Title of Bellingham"; and UNKNOWN John and Jane Does 1-10; XYZ Corporation 1-10; ABC Limited Liability Companies 1-10; and 123 Banking Associations 1-10,

Respondents.

APPELLANT JACK GRANT'S PETITION FOR REVIEW

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TABLE OF CONTENT

TABLE OF AUTHORITY

Cases

Statutes

Rules of Appellate Procedure

Court Rules

I. IDENTITY OF PETITIONER

Petitioner Jack Grant ("Grant"), Appellant below and Plaintiff in the Superior Court, hereby petitions for review of the Court of Appeals decision identified in Part II.

II. CITATION TO COURT OF APPEALS DECISION

Grant seeks review of the unpublished opinion issued by the Court of Appeals for Division 1 in the case of *Grant v. First Horizon Home Loans*, No. 72905-5-1, (Wash. Ct. App. May 31, 2016). A copy of the Opinion is included in the Appendix. (App. A.)

After filing its Opinion on May 31, 2016, Grant filed a motion for reconsideration on June 20, 2016. (App. B.) On June 22, 2016, the Court of Appeals denied Grant's motion for reconsideration. (App. C.) On July 12, 2016, Grant filed both a Motion to Publish and a Motion for Extension of Time to File a Motion to Publish. On July 19, 2016, the Court of Appeals granted the extension, but ultimately denied Grant's Motion to Publish. (App. D.)

III. ISSUE PRESENTED FOR REVIEW

1. Under RAP 2.5(c)(2), may the "law of the case doctrine" be avoided by showing there has been an intervening change in controlling precedent without an additional showing that the prior decision was "clearly erroneous, and the decision would work a manifest injustice to one party." (Short Answer: Yes)

III. STATEMENT OF THE CASE

A. Initial Superior Court Proceedings

In 2010, Grant filed suit against First Horizon, Quality, and others to enjoin the nonjudicial foreclosure proceedings initiated against him. The complaint also sought damages under various theories of liability, including the Consumer Protection Act ("CPA"), Ch. 19.86 RCW, and wrongful foreclosure. "The Superior Court stated a wrongful foreclosure might arise if the property was eventually disposed of at a trustee's sale." *Grant*, 2016 WL 3080730, at *3.

The Superior Court dismissed Grant's claims pursuant to CR 12(b)(6) and CR 12(c).

B. First Appeal, "*Grant I*"

Grant appealed. *Grant v. First Horizon Home Loans*, 168 Wn. App. 1021 (Div. I 2012) ("*Grant I*")*1. On May 29, 2012, the Appellate Court dismissed Grant's CPA claim based on that court's understanding of the law at the time, which did not reflect the Supreme Court's later clarifications regarding DTA violations cognizable under the CPA. *Id.* Ultimately, the Court of Appeals remanded the case back to Superior Court to determine what authority "First Horizon and/or Quality Loan [had] to commence foreclosure proceedings under the DTA." *Grant I* at *10. The Appellate Court held, "Grant put Quality's authority in question

by filing suit to resit the foreclosure, and the question remains unanswered." *Grant I* at *1, 4.

Grant filed a petition for discretionary review, but it was denied by this Court on March 6, 2013. *Grant v. First Horizon Home Loans*, 176 Wn.2d 1021, 297 P.3d 707 (2013)(Petition for Review: Denied).

C. Superior Court Proceedings upon Remand

In 2014, upon remand and bound by the Court of Appeal's instructions, the Superior Court found "If Plaintiff's Consumer Protection Act claims were properly before this Court under current law, several disputed issues of material fact would need to be resolved before the propriety of the foreclosure can be determined."[1] The Superior Court

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[1] The court found genuine issues of material fact existed regarding:

a. Whether MetLife had authority to make the Declaration on behalf of BNYM;
b. Whether the Declaration of Beneficiary, made by Metlife on behalf of BNYM rather than by BNYM itself, meets the requirements of the statute;
c. The Declaration of Beneficiary states that BNYM is the actual holder of the Note, while the Declaration of T. Nichols says that the Note was held, at all times, by "one of BNYM's document custodians." As a fact matter, this inconsistency must be resolved and a determination made as to the identity and agency authority of the custodians who held documents pertinent to this case between December 2004 and December 2010. If the Note was in the possession of one of its document custodians, rather than of BNYM itself, an issue arises as to whether this type of constructive possession satisfies the requirements of the statute. *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012).
d. In the Court of Appeals' view, First Horizon Home Loans held the Note and MERS, the purported beneficiary, did not. (Opinion, fn 26) Ultimately MERS transferred its interest to BNYM. Trial would be required to determine what interest MERS held and what interest it transferred to BNYM.

essentially recognized that the Court of Appeals wrongfully dismissed Grant's CPA claim. *See id.* However, there were no claims remaining for the Superior Court to resolve because: 1) the Appellate Court remanded with instructions to proceed under the DTA claim; and, 2) *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014) ruled there is no pre-sale claim for violating the DTA. CP 308-309. The Superior Court dismissed Grant's claim, an unjust result when the propriety of the foreclosure proceedings had not been determined. CP 308-309.

At oral argument, the Superior Court further explained, "In other words, what I am holding is that I don't believe that I, as the trial judge, have any discretion to revive and open these claims. If I felt I did have direction, frankly, in the interest of justice I might exercise that discretion to reopen these claims." RP 49:6-11.

The record before the Superior Court included evidence not only that the parties lacked authority to initiate a nonjudicial foreclosure against Grant, but that Grant suffered injury and significant damage as a result of the Respondents/Defendants lack of authority and refusal to provide Grant

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CP 308. Additionally, the court held: "Fact issues exist as to when each of the entities in this case became parties to the PSA and as to the effect of the PSA on the relationships between the various entities which held or assigned the Note and/or Deed of Trust at issues in this case." CP 309. Finally, in regards to the Chain of Custody of the Note, the Superior Court found, "Fact issues exist as to what these transfers were; when they occurred; and their effect, if any, on the ownership of the Note." CP 309.

with material information regarding his alleged default and loan. CP 150 at ¶¶ 5-6. Grant spent a considerable amount of time attempting to determine who had authority to negotiate with him. *Id.* The Respondents/Defendants refused to provide information and obfuscated the facts to such an extent that Grant, an attorney himself, could not verify even basic information on his loan. *See* CP 150-51; CP 581-85. For instance, no evidence or documentation was proffered by the Respondents/Defendants to show who was authorized under the DTA to nonjudicially foreclosure, or who was the proper party to negotiate with. CP 150-51 at ¶¶ 2, 6-7.

In turn, Grant's business suffered drastically as every minute he spent as a result of the Respondents/Defendants' failure to be forthcoming with information was time that Grant could not spend at his law firm and working for his own clients. CP 150 at ¶2; *see also* CP 581-85 (Grant spent considerable time writing and sending a Qualified Written Request) CP 587-96 (Grant again attempted to find out material information on his loan, alleged default, and non judicial foreclosure).

D. Second Appeal, "*Grant II*"

Grant appealed for a second time, based on the Superior Court's ruling that laid out a clear road map for the Court of Appeals to consider as to why they should correct what turned out to be their wrongful dismissal of

Grant's CPA claim in *Grant I. Grant*, 2016 WL 3080730, at *2 ("*Grant II*"). Grant contended that the Superior Court erred by failing to give retroactive effect to recent Supreme Court cases involving the CPA, or that the Court of Appeals should give retroactive effect to the precedent and remand his case for trial under his CPA theory because later decisions of the Supreme Court showed the Court of Appeals was clearly wrong in dismissing Grant's CPA claim. *Grant II* at *4.

The Court of Appeals laid out its test for revisiting a prior decision as follows: "[u]nder RAP 2.5(c)(2), this Court may revisit an earlier decision in the same case that is **clearly erroneous under current law if the erroneous decision would work a manifest injustice to one party.**" *Grant II* at *5. (emphasis added). When applying this test to Grant, the Appellate Court held, "Our previous decision is not clearly erroneous, and bringing this case to an end is not manifestly unjust." *Id.* at * 15. However, as discussed *infra*, this is not the correct test for revisiting prior decisions under RAP 2.5(c)(2) when there is intervening authority. Further, the Appellate Court's decision in *Grant I*, as noted by the Superior Court, was both erroneous and unjust. CP 308-309.

Additionally, the Appellate Court held, "Grant fails to demonstrate that *Klem* changed the controlling precedent of *Hangman* in a way that materially affected his case. That is, he does not establish that his

consumer protection claim would have survived the first appeal if *Klem* had been available as a precedent." *Grant II* at *6. *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013). *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.,* 105 Wn.2d 778, 719 P.2d 531 (1986). Additionally, the Appellate Court found that the other intervening authority, i.e. *Bain*, *Lyons*, and *Frias* cases, would not have affected the outcome of Grant I, despite the Superior Court finding the opposite. *Grant II* at *13-14 (citing *Bain v. Metro. Mortgage Grp.*, 175 Wn.2d 83, 285 P.3d 34 (2012); *Lyons v. U.S. Bank Nat't Ass'n*, 181 Wn.2d 775, 336 P.3d 1142 (2014); *Frias*, 181 Wn.2d 412.

IV. GROUNDS FOR REVIEW

This Court may grant review and consider a Court of Appeals opinion if it conflicts with a Supreme Court or another Court of Appeals decision. RAP 13.4(b)(1)-(4). Additionally, the court may grant review if the opinion involves a significant question of law under the constitution or involves a substantial public interest. *Id.*

Here, the Appellate Court's refusal to revisit its earlier decision dismissing Grant's CPA claim on the basis that its previous decision was not "clearly erroneous" and "work a manifest injustice" is in direct conflict with the Supreme Court cases, which allow cases to be revisited on a showing of a change in controlling precedent. *Roberson v. Perez,* 156

Wn.2d 33, 42-43, 123 P.3d 844 (2005) and *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008).

Additionally, there is a significant public interest in protecting Washington homeowners from entities whose authority under the DTA has been held to be a genuine issue of material fact.

A. The Appellate Court's decision conflicts with Supreme Court precedent because the Appellate Court merged the two exceptions of the Law of the Case Doctrine

The Appellate Court's use of a "clearly erroneous" and "manifestly unjust" standard under RAP 2.5(c)(2), to deny revisiting its prior decision in *Grant I*, conflicts with Washington State Supreme Court authority that holds intervening case law is an independent ground for revisiting a prior appellate decision.

A prior appellate decision constitutes the law of the case. *Sintra Inc. v. City of Seattle*, 131 Wn.2d 640, 652, 935 P.2d 555 (1997). Such an appellate holding will generally be followed in subsequent stages of litigation in the same case. *Roberson*, 156 Wn.2d at 41 (2005). The Court of Appeals does have discretionary authority to review a prior Appellate Court decision in the same case under RAP 2.5(c)(2), which states as follows:

> Prior Appellate Court Decision. The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case, and, where justice would best be served, decide the case on the basis of the

> appellate court's opinion of the law at the time of the later review.

The Washington Supreme Court has held that RAP 2.5(c)(2) includes two separate exceptions to the Law of the Case Doctrine. *Robertson*, 156 Wn.2d at 42. In *Robertson*, this Court stated:

> The plain language of the rule affords appellate courts discretion in its application. RAP 2.5(c)(2) **codifies at least two historically recognized exceptions** to the law of the case doctrine that operate independently.
>
> First, application of the doctrine may be avoided where the prior decision is clearly erroneous, and the erroneous decision would work a manifest injustice to one party.
>
> **Second, application of the doctrine may also be avoided where there has been an intervening change in controlling precedent** between trial and appeal.

Id.

Here, the Court of Appeals merged these two exceptions to support its denial of Grant's request that the Court of Appeals revisit its prior decision when the record supported Grant's claims that his CPA claim should proceed to trial under the current case law. Further, given the Superior Court's ruling, Grant's CPA claim would have proceeded to trial, but for the Law of the Case Doctrine. CP 308-309.

Additionally, in between the Appellate Court's decision in *Grant I*,[2] and the Superior Court's ruling on the summary judgment motions during

[2] The decision in *Grant I* was entered May 29, 2012.

remand,[3] the Washington Supreme Court handed down a number of decisions regarding available causes of actions for homeowners contesting various aspects of nonjudicial foreclosure proceedings. *Bain*, 175 Wn.2d 83; *Klem*, 176 Wn.2d 771; *Frias*, 181 Wn.2d 412; *Lyons*, 181 Wn.2d 775; and *Trujillo v. Northwest Trustee Services, Inc.*, 183 Wn.2d 820, 355 P.3d 1100 (2015); *see also* CP 308-309.

These cases clarified that for presale litigants, such as Grant, violations of the DTA were not cognizable under the DTA until the home had been sold. *Id.* Prior to a home being sold, violations of the DTA are cognizable under the CPA. *Id.* Additionally, these cases provided guidance as to how a litigant could meet each CPA element when claiming a DTA violation through the CPA. As discussed *supra*, Grant met the CPA elements as laid out in *Bain, Klem, Frias, Lyons, and Trujillo*, nevertheless his CPA claim was wrongfully dismissed by the Appellate Court in *Grant I.*

Even the Superior Court acknowledged the intervening case authority supported revival of Grant's CPA claim, but ruled the Law of the Case Doctrine prevented the Superior Court from allowing Grant's CPA claim to move forward, even though proper application of the controlling authority would have necessitated a denial of Respondents/Defendants motions for summary judgment. CP 308-309. This is memorialized by the

[3] The Summary Judgment was entered December 2, 2014.

Superior Court's holding that, " **If** Plaintiff's Consumer Protection Act claims were properly before this Court **under current law, several disputed issues of material fact would need to be resolved** before the propriety of the foreclosure can be determined" CP 308-309 (emphasis added).

The disputed issues of material fact regarding the propriety of the foreclosure centered around a multitude of DTA and CPA violations evident through public records and the Defendants' moving papers, which Grant raised in opposition to Respondents/Defendants' Motions for Summary Judgment, including: (1) documentation that three separate securitized trusts claimed to be the single and complete owner of Grant's note,[4] and (2) the beneficiary declaration made by an employee of Metlife Bank N.A., without any proof of Metlife's agency and/or authority,[5] which stated that Bank of New York Mellon as Trustee for the holders of the Certificate, First Horizon Mortgage-Pass Through Certificates Series

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[4] *Compare* CP 86-7 (Assignment of Deed of Trust purporting to transfer beneficial interest in Grant's Deed of Trust and all interest in the Note from MERS to First Horizon Mortgage Pass-Through Certificates Series FH05-01) *with* CP 154 (Assignment of Deed of Trust from First Horizon Mortgage Pass-Through Certificates Series FH05-01 to First Horizon Mortgage Pass-Through Certificates Series FHASI 2005-1 dated May 23, 2014.) and *compare* CP 207 at ¶ 5 (Theresa Nichols declaring First Horizon Pass-Through Certificates Series FHASI 2005-I was in physical possession of Grant's Note and Deed of Trust from 2005 until January 16,2014) *with* CP 007:2-5 (Court briefing claimed that pursuant to a pooling and servicing agreement, First Horizon Mortgage Pass-Through Certificate Series 2005- I Mortgage Pass-Through Certificates Series 2005-I was in possession of the Note.)

[5] CP 176:23-24.

FH05-01, was the actual holder of the Note, even though this contradicted the declaration of Theresa Nichols;[6] and (3) Quality's statement that it would sell Grant's home unless instructed not to by the beneficiary, a violation of its duty of good faith under RCW 61.24.010(4). CP 260.

The record at Superior Court, when given the benefit of the intervening authority of *Bain*, *Klem*, *Lyons*, *Trujillo*, etc., support a revival of Grant's CPA claim under RAP 2.5(c)(2). All Grant needed to show was the presence of intervening authority in order to allow the Court of Appeals to use its discretion under RAP 2.5(c)(2). *Roberson*, 156 Wn.2d at 42-43. However, in refusing to revisit its prior decision under RAP 2.5(c)(2), the Court of Appeals held Grant to the first, harder to meet, exception to the Law of the Case Doctrine: "Our previous decision is not clearly erroneous, and bringing this case to an end is not manifestly unjust." *Grant II* at * 15.

This directly conflicts with the Washington Supreme Court holding that an Appellate Court may revisit an earlier decision without such a showing when there is intervening controlling case law. *Roberson*, 156 Wn.2d at 42-43 (intervening controlling case law is an independent exception to the "clearly erroneous" and "manifest injustice" exception); *see also Brundridge*, 164 Wn.2d at 441 (citing *Roberson*, 156 Wn.2d at

[6] CP 027 at ¶ 5.

42)("the law of the case" simply does not apply when there is an intervening change in law.)

Additionally, the fact that the abuse of discretion standard applies does not insulate decisions from further review. *State v. Perdang*, 38 Wn. App. 141, 145, 684 P.2d 781, 783 (Div. I 1984). The Appellate Court's use of the incorrect standard amounts to an abdication of the responsibility to exercise discretion. *Id.* at 146.

Accordingly, review by this court is warranted because the Appellate Court's Opinion directly conflicts with the analysis used by the Washington Supreme Court when deciding to exercise discretion under RAP 2.5(c)(2).

B. There is a substantial public interest in ensuring the most recent Supreme Court decisions are promptly implemented in order to protect the community from harm.

There is a substantial public interest in the question of whether the Court of Appeals should use the proper standard under RAP 2.5(c)(2) to revisit a prior decision when intervening authority changes the outcome, especially in the realm of consumer protection. Importantly, the interest is heightened by the subject matter of the lawsuit, the potential loss of a Washington Homeowner's residence where the Superior Court has ruled genuine issues of material fact exist regarding those entities who are seeking to strip that homeowner, such as Grant, of his home.

The research on the social effects of foreclosure demonstrates vast and severe negative implications and damages caused by losing a home, not only on the individual and family who lose their home, but their surrounding community. When Washington homeowners are denied the protections afforded by the DTA, it results in societal problems on a wide scale including: abandoned homes,[7] negative health effects on neighbors,[8] disruption in children's education,[9] and destruction of Washington families by increased rates of divorce[10] and suicide.[11] The nonjudicial foreclosure has negatively impacted Grant's health including creating high blood pressure and anxiety, which are common problem among those facing foreclosure as documented by a number of studies.[12]

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[7] Kingsley, Smith & Price, The impacts of Foreclosure on Families and Communiites, the Urban Institute, May 2009, available at http://www.urban.org/UploadedPDF/411909_impact_of_foreclsoures.pdf.

[8] Dina ElBoghaddy, Foreclosures may rise neighbors' blood pressure, study finds, May 12, 2014 http://www.washingtonpost.com/business/economy/study-foreclosures-may-raise-neighbors-blood-pressure/2014/05/12/5f519952-da03-11e3-bdal-9b46b2066796_story.html, last accesed June 5, 2014.

[9] Issacs, Julia B., The Ongoing Impact of Foreclosures on Children, The Brookings Instiutes, April 2012, at 4-6, available at http://www.brookings.edu/~/media/research/files/papers/2012/4/18%20foresclosures%20children%isaacs/0418_foreclosures_children_isaacs.pdf (88,000 Washington Children (6%) were affected by foreclosures of owner-occupied homes from 2004-2008).

[10] Philip N. Cohen, Recession and Divorce in the United States, 2008-2011, Population Research and Policy Review, January 2014, *available at*: http://www.papers.ccpr.ucla.edu/papers/PWP-MPRC-2012-008/PWP-MPRC-2012-008.pdf.

[11] Jason N. Houle and MIchael T. Light. *The Home Foreclosure Crisis and Rising Suicide Rates, 2005 to 2010*, American Journal of Public Health, June 18, 2005 at 1073-79, *available at* http:// www.jnhoule.org/storage/Houle_Light_AJPH_Final.pdf.

[12] The following articles all detail the negative health implication of foreclosure:

Crucially, the actions of financial institutions related to homeownership and financing have been at issue in numerous cases over the last several years. From the enactment of the DTA in 1965 through 2010, which is a period of 45 years, there were approximately 198 cases discussing the DTA. That number includes: 1) 70[13] cases decided in federal court, of which 25[14] were reported; 2) 128[15] state cases of which 70[16] were reported and 14[17] were decided by the WA Sup Ct., while 56[18] were decided by Washington Appellate Courts. That represents approximately 4.4 cases per year with 2.1[19] cases per year being

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Cannuscio CC et al (2012). Housing strain, mortgage foreclosure and health in a diverse internet sample. Nurs Outlook, 60(3). doi:10.1016/j.outlook.2011.08.004. Nettleton S, Burrows R (1998). Mortgage debt, insecure home ownership and health: an exploratory analysis. Sociology of Health & Illness, 20, 731-53.

Nettleton S, Burrows R (2000). When a capital investment becomes an emotional loss: the health consequences of the experience of mortgage possession in England. Housing Stud., 15, 463-478.

Osypuk TL, Caldwell CH, Platt RW, Misra DP (2012). The Consequences of Foreclosure for Depressive Symptomatology. Elsevier, 1047-2797. doi:10.1016/j.annepidem.2012.04.012.

Pollack CE, Lynch J (2009). Health Status of People Undergoing Foreclosure in the Philadelphia Region. American J of Public Health, Ross LM, Squires GD (2011). The personal costs of subprime lending and the foreclosure crisis: a matter of trust, insecurity, and institutional deception*. Soc Sci Q, 92, 140-63. doi.wiley.com/10.1111/j.1540-6237.2001.00761.x.99(10), 1833.

Vásquez-Vera H, Rodríguez-Sanz M, Palència L, Borrell C (2016). Foreclosure and Health in Southern Europe: Results from the Platform for People Affected by Mortgages. J of Urban Health, Bulletin of the New York Academy of Medicine, 93(2), 312. doi:10.1007/s11524-016-0030-4.

[13] 35% of cases were decided by federal courts

[14] 35% of cases decided by federal courts were published

[15] 65% of cases were decided by state courts

[16] 54% of cases decided by state courts were published

[17] 20% of cases were decided by the Wash. Sup. Ct.

[18] 80% of reported state cases were decided by the Washington Appellate Courts.

[19] 48% publishing rate

published.

From 2011 through 2016 a period of 4.58 years, there have been 416[20] cases involving the DTA. That number includes: 1) 281[21] cases decided in federal court, of which 16[22] were reported; 2) 135[23] state cases of which 50[24] were reported and 13[25] were decided by the WA Sup Ct., while 37[26] were decided by Washington Appellate Courts. That represents approximately 90.8 cases per year with 14.4[27] cases per year being published.

Recent cases examining the conduct of financial institutions include: 1) *Trujillo*, 183 Wn.2d 820 (ambiguous beneficiary declaration is a violation of DTA and is sufficient to support Consumer Protection Act (CPA) claim); 2) *Lyons*, 181 Wn.2d 775 (Without a nonjudicial foreclosure sale, mortgagor was precluded from bringing a claim for damages against trustee under the Deed of Trust Act (DTA), but was not

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[20] This number is astounding considering the vast majority of people with low and moderate-high incomes cannot afford legal services. *See* 2003 Washington State Civil Legal Needs Study, http://www.courts.wa.gov/newsinfo/content/taskforce/CivilLegalNeeds.pdf This remains true today. See 2015 Civil Legal Needs Study Update (June 2015)# http://ocla.wa.gov/wp-content/uploads/2015/06/CLNS14-Executive-Report-05-28-2015-FINAL1.pdf.

[21] 68% of cases were decided by federal courts

[22] 6% of cases decided by federal courts were published

[23] 32% of cases were decided by state courts

[24] 37% publishing rate

[25] 26% of cases decided by the Wash. Sup. Ct.

[26] 74% of reported state cases were decided by the Washington Appellate Courts

[27] This is approximately 7 times the historical numbers.

precluded from alleging DTA violations under the Consumer Protection Act (CPA); the same principles that governed CPA claims generally applied to CPA claims based on alleged DTA violations, and while, without the sale of property, damages were not recoverable under the DTA, a CPA claim could be maintained regardless of the status of the property.); 3) *Frias,* 181 Wn.2d 412 (The analysis of the elements of a CPA action premised on alleged DTA violations is the same as the analysis of the elements of a CPA claim premised on any other allegedly unfair or deceptive practice with a public interest impact occurring in trade or commerce that has allegedly proximately caused injury to a plaintiff's business or property.); 4) *Klem*, 176 Wn.2d 771 ("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 practice and satisfies the first element of the CPA.");[28] 5) *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 106-107, 297 P.3d 677 (2013) ("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 other things, it is a requisite to a trustee's sale that the deed contain the power of sale, .030(1); that the *107

[28] In *Klem* Quality refused to postpone the nonjudicial sale without permission from the alleged beneficiary. Here, Quality did the exact same thing to Mr. Grant. CP 260.

property not be used primarily for agricultural purposes, .030(2); that a default has occurred, .030(3); that there is no other pending action by the beneficiary to seek satisfaction of the obligation, .030(4); that the deed has been recorded in the relevant counties, .030(5); that the trustee maintain an address for service of process, .030(6); 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**[29] 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.") (emphasis added) (footnote not in original); 6) *Bain*, 175 Wn.2d at 117 (Representing oneself as a beneficiary when that is false is unfair or deceptive); 7) *Albice v. Premier Mortgage Servs. of Washington, Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012) (Failure to comply with the DTA results in sale that is void, not voidable.); 8) *Bavand v. OneWest Bank, F.S.B.*, 176 Wn. App. 475, 309 P.3d 636 (Div. I 2013) (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. Violations of the DTA can be the basis for CPA claims.); 9) *Walker v. Quality Loan Serv. Corp.*, 176

[29] Here, the trial court found there were genuine issues of material fact regarding whether a proper beneficiary had instituted nonjudicial foreclosure proceedings against Mr. Grant. CP 307-309

Wn. App. 294, 308 P.3d 716 (Div. I 2013), *as modified* (Aug. 26, 2013) ("'distraction and loss of time to pursue business and personal activities due to the necessity of addressing the wrongful conduct through this and other actions' and 'the necessity for investigation and consulting with professionals to address Respondents' wrongful foreclosure and collection practices and violation of RCW 61.24, et seq.' [as well as] 'take[ing] time off from work and incurr[ing] travel expenses to consult with an attorney to address the misconduct of the Defendants" meets the injury requirement under the CPA).

The sheer volume of recent cases, along with high number of recently published cases establish that Grant's case has tremendous value to the public at large.

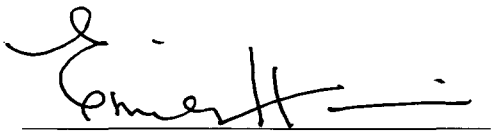
V. CONCLUSION

In sum, the Appellate Court improperly applied Supreme Court precedent, an error that will have a dramatic and widespread impact on Washington residents. By accepting Grant's Petition for Review, this Court has the opportunity to protect our community from the rampant disregard of consumers that the financial industry has showed over the last 5 years and ensure its decisions are implemented immediately.

DATED this 21st day of July, 2016 at Arlington, Washington.

DATED this 21st day of July, 2016 at Arlington, Washington.

JBT & Associates, P.S.



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CERTIFICATE OF SERVICE

I, Ashley Brogan, 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 22nd day of July, 2016, I caused to be served a true and correct copy of Appellant Jack Grant's Petition for Review in the above title matter by causing it to be delivered to:

Andrew Yates Abraham K. Lorber Lane Powell, PC 1420 5th Ave Suite 4100 Seattle, WA 98101 yatesa@lanepowell.com lorbera@lanepowell.com	☐Facsimile ☐Express Mail ✓ U.S. First Class Mail Postage Paid ☐Hand Delivery ☐Legal Messenger ✓ Electronic-Email
Joseph Ward McIntosh McCarthy & Holthus 108 1st Ave S Suite 300 Seattle, WA 98104 Jmcintosh@mccarthyholthus.com	☐Facsimile ☐Express Mail ✓ U.S. First Class Mail Postage Paid ☐Hand Delivery ☐Legal Messenger ✓ Electronic-Email

DATED this 22nd day of July, 2016 at Arlington, Washington.

Ashley Brogan

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JACK GRANT, Appellant, v. FIRST HORIZON HOME LOANS, aka FIRST HORIZON CORPORATION dba "First Horizon Home Loans"; and QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington corporation, Respondents, and UNKNOWN JOHN and JANE DOES 1-10, XYZ CORPORATIONS 1-10, ABC LIMITED LIABLITY COMPANIES 1-10; and 123 BANKING ASSOCIATIONS 1-10; STEWART TITLE dba "Stewart Title of Bellingham"; STEWART TITLE OF WESTERN WASHINGTON, INC., a Washington corporation dba "Stewart Title of Bellingham"; STEWART TITLE OF BELLINGHAM, INC., a Washington corporation dba "Stewart Title of Bellingham"; and UNKNOWN JOHN and JANE DOES 11-20; XYZ CORPORATIONS 11-20; and ABC LIMITED LIABLITY COMPANIES 11-20; Defendants.	No. 72905-5-I DIVISION ONE UNPUBLISHED OPINION FILED: May 31, 2016

BECKER, J. — A borrower requests an opportunity to pursue a consumer protection claim that this court, in a previous appeal, held was properly dismissed. The borrower contends consumer protection law changed in his favor while the rest of his lawsuit was still alive. Because we are unpersuaded that our previous decision would have come out differently under current law, we decline to exercise our discretion to reinstate the claim.

At issue is an order granting summary judgment to respondents First Horizon Home Loans and Quality Loan Service Corporation of Washington. This court reviews orders granting summary judgment de novo. Summary judgment is proper if the facts, when viewed in the light most favorable to the nonmoving party, entitle the movant to judgment as a matter of law. Bavand v. OneWest Bank, FSB, 176 Wn. App. 475, 309 P.3d 636 (2013).

In 2004, appellant Jack Grant obtained a construction loan for $800,000 from First Horizon Bank to make improvements to his beach cottage. The promissory note memorializing the loan required monthly payments of $4,732. A deed of trust on the property secured the note.

In April 2010, Grant stopped making monthly payments. In July 2010, Quality issued a notice of default. Quality claimed to be the owner and beneficiary of the promissory note.

Grant filed suit against First Horizon, Quality, and others to enjoin the nonjudicial foreclosure proceedings. The complaint also sought damages under various theories of liability, including the Consumer Protection Act, chapter 19.86

RCW. The complaint asserts that the foreclosure proceedings and documents were confusing and misleading, making it impossible to know the true identity of the owner or holder of the note and deed of trust, who had the legal right to foreclose, who was entitled to payments, and whether the note still existed. The allegedly unfair or deceptive acts or practices specified in the complaint in support of the consumer protection claim are that First Horizon failed to legally assign the note and deed of trust, failed to notify Grant of changes in the trustee or owner of the note and deed of trust, failed to notify him of the appointment of agents, and refused to proceed with the advance of the loan unless he accepted last-minute changes that altered the status of his separate property.

Initially, the trial court issued a temporary restraining order enjoining a trustee's sale of Grant's home. But in February 2011, the trial court dismissed Grant's lawsuit with prejudice on motions brought under CR 12(b)(6) and 12(c). The consumer protection claim, among others, was dismissed on statute of limitations grounds. The trial court stated that a cause of action for wrongful foreclosure might arise if the property was eventually disposed of at a trustee sale.

Grant appealed. He argued that none of the defendants had authority to foreclose. A section of his opening brief addressed the merits of the consumer protection claim and referred to First Horizon and Quality as "foreclosure mills."[1] Grant identified the unfair and deceptive act as Quality's issuance, without authority, of a falsified notice of default. He argued that such conduct was likely

[1] Brief of Appellant at 39. Grant v. First Horizon Home Loans, No. 66721-1 (Wash. Ct. App. May 24, 2011).

to be repeated and deceive other members of the public. He also noted the legislature's recent passage of the bill that established the Foreclosure Fairness Act, chapter 61.24 RCW. Grant claimed the Foreclosure Fairness Act added new per se violations of the Consumer Protection Act that should apply retroactively to his case.

Quality's responding brief went through the five elements of a consumer protection claim and claimed that Grant failed to allege facts that would support a claim that the issuance of the notice of default met those elements. First Horizon's responding brief pointed out that Grant's brief did not discuss any conduct attributable to First Horizon regarding the alleged consumer protection violations. First Horizon further argued that even if the undiscussed allegations in the complaint were examined, they were insufficient to support a consumer protection claim. Both defendants argued against retroactive application of the Foreclosure Fairness Act.

Our opinion issued on May 29, 2012. We reversed only the dismissal of Grant's claim for declaratory and injunctive relief. On that issue, we held that the complaint alleged violations of the deed of trust act, chapter 61.24 RCW, sufficient to create a triable issue regarding the defendants' authority to commence foreclosure. "Grant put Quality's authority in question by filing suit to resist the foreclosure, and the question remains unanswered." Grant v. First Horizon Home Loans, noted at 168 Wn. App. 1021, 2012 WL 1920931, at *1, *4, review denied, 176 Wn.2d 1021 (2013).

At the same time, we held that the trial court properly dismissed Grant's claim for damages for wrongful foreclosure under the deed of trust act because there was no case law recognizing such a cause of action. Separately, we affirmed the dismissal of all other claims for damages. With regard to the consumer protection claim, we explained that the only allegation of an unfair or deceptive act or practice concerned Quality's issuance of the notice of default. We rejected Grant's effort to show that Quality's conduct was a per se violation under a statute that had not been enacted at the time of the relevant events. We also concluded he had not argued that Quality's alleged misconduct had the capacity to deceive a substantial portion of the public.

> *Violation of CPA* [Consumer Protection Act]
>
> Grant contends his complaint was adequate to state a claim under the CPA, chapter 19.86 RCW. Although his complaint alleged CPA claims against First Horizon, Stewart Title, and "Defendants," his arguments on appeal pertain only to Quality.
>
> To prevail on a private CPA claim, a plaintiff must establish (1) an unfair or deceptive act or practice; (2) that occurs in trade or commerce; (3) a public interest; (4) injury to the plaintiff; and (5) a causal link between the unfair or deceptive act and the injury suffered. The failure to establish any of the five elements is fatal to a CPA claim.
>
> "Unfair or deceptive act or practice" is not defined by the CPA. It is a question of law whether an alleged act is unfair or deceptive. Consumers may establish an unfair or deceptive act by showing "either that an act or practice 'has a capacity to deceive a substantial portion of the public' or that 'the alleged act constitutes a per se unfair trade practice.'" "Implicit in the definition of 'deceptive' under the CPA is the understanding that the practice misleads or misrepresents something of material importance." Whether an unfair act has the capacity to deceive a substantial portion of the public is a question of fact.
>
> Grant contends Quality's conduct in issuing the notice of default before it had authority to do so and without proving or even investigating the requisite facts "is deception." He does not argue that this conduct had the capacity to deceive a substantial portion of the public. Instead, Grant attempts to show a "per se" violation

> by reference to the 2011 "Foreclosure Fairness Act" amendments to the DTA. These amendments establish a mediation program and require lenders to mediate in good faith. Among other things, lenders must provide "[p]roof that the entity claiming to be the beneficiary is the owner of any promissory note or obligation secured by the deed of trust." Failure to do so is a per se violation of the CPA.
>
> Grant argues the 2011 amendments are retroactive. A statute is presumed to operate prospectively unless the legislature indicates otherwise. This presumption can be overcome only if the legislature explicitly provides for retroactivity, the amendment is curative, or the statute is remedial. Grant contends the amendments apply retroactively because they are remedial.
>
> "'A remedial statute is one which relates to practice, procedures and remedies.'" Such a statute will be applied retroactively "unless it affects a substantive or vested right." But because the 2011 amendments provide a cause of action for the lender's failure to provide documentation that it was not previously required to provide, they affect a substantive right. It would be inappropriate to apply the amendments retroactively.
>
> Because Grant has established neither a per se CPA violation nor the capacity of Quality's conduct to deceive a substantial portion of the public, the trial court properly dismissed the CPA cause of action.

Grant, 2012 WL 1920931, at *7 (footnotes omitted).

Grant moved for reconsideration and for publication. The motion was denied on August 20, 2012. Grant petitioned for review. The Supreme Court denied Grant's petition for review. The mandate from this court issued in April 2013. The case returned to the trial court for further proceedings.

The claim that survived the appeal was Grant's claim for declaratory and injunctive relief, in which he sought to enjoin the foreclosure on the basis that First Horizon and Quality commenced foreclosure proceedings without authority. On remand, First Horizon and Quality moved for summary judgment. They submitted evidence and argument tending to establish their authority to commence foreclosure. They also argued that the claim to enjoin foreclosure

under the deed of trust act was moot. So much time had elapsed since the notice of trustee's sale that a sale could no longer be conducted under that notice.

Grant did not resist dismissal of his claim for injunctive and declaratory relief. He argued, though, that he was entitled to proceed on the consumer protection claim set forth in his original complaint due to recent developments in the law, specifically Frias v. Asset Foreclosure Services, Inc., 181 Wn.2d 412, 334 P.3d 529 (2014). Frias holds that under appropriate circumstances, violations of the deed of trust act may be actionable as consumer protection violations "regardless of whether a foreclosure sale has been completed," and that such claims are governed by the ordinary principles applicable to all claims under the Consumer Protection Act. Frias, 181 Wn.2d at 433. Grant argued that the alleged violations of the deed of trust act which this court identified as a potential basis for enjoining the foreclosure, also provided a basis for him to seek consumer protection damages under Frias.

To show that First Horizon and Quality commenced foreclosure without lawful authority, Grant referred to evidence those defendants submitted with their motions for summary judgment. Grant argued that the testimony of the records custodian was inadmissible and conflicted with other evidence. He also argued that it remained unclear who actually held the promissory note at the pertinent time; the promissory note was not secured by the deed of trust because the ownership of the two instruments had become separated; and Quality was not a

lawfully appointed trustee because the beneficiary declaration did not comply with RCW 61.24.030(7).

Quality replied that it had issued the notice of default in reliance on a beneficiary declaration executed by the stated beneficiary's lawful agent and that Grant had failed to show this was unlawful. First Horizon replied that under this court's opinion, the damages claims had not been remanded, and even if the consumer protection claim were properly before the trial court, the claim would fail for lack of proof.

The trial court heard oral argument on November 20, 2014. Grant urged the court to let him proceed with the consumer protection claim despite this court's decision that the claim had been properly dismissed. He argued that it would be "inequitable" not to allow him "the benefit of the correct interpretation of the law" announced by the Supreme Court in Frias and several other recent cases, which according to Grant had overruled the reasoning employed by this court in dismissing his consumer protection claim. The colloquy between the trial judge and Grant's attorney set forth Grant's position as follows:

> THE COURT: I take it you're arguing that the decision made by the Court of Appeals was not erroneous at the time given the state of law at the time, but that two years has passed since the Court of Appeals decision and in that time the law has changed in ways that would permit this claim to stand were it brought today; is that correct?
>
> MR. FISHER: Exactly right. It would be one thing if they dismissed everything, then Mr. Grant would be out of luck. But because the case is still alive Mr. Grant gets the benefit of the subsequent Washington Supreme Court decisions that overrule or are inconsistent with the decision in Grant.

The trial court concluded it did not have authority to revive a substantive claim that had been dismissed by this court. The court granted summary judgment to First Horizon and Quality.

Grant appeals. He contends that the superior court erred by failing to give retroactive effect to recent Supreme Court cases involving the Consumer Protection Act.

Grant asserts the fundamental rule of statutory construction that when a statute has been construed by the Supreme Court, that construction operates as if it were originally written into it. Hale v. Wellpinit Sch. Dist. No. 49, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009). That rule does not operate to resurrect before the superior court a claim that has previously been dismissed by this court.

RAP 12.2 makes it clear that the ruling in Grant's first appeal, upon issuance of the mandate in April 2013, became "effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court . . . except as provided in rule 2.5(c) (2)." RAP 12.2 is a straightforward application of the law of the case doctrine. The law of the case doctrine stands in part for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation. Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). Applying the law of the case, the trial court correctly ruled it did not have authority to revive the Consumer Protection Act claims when our decision in the first appeal had affirmed the dismissal of those claims.

RAP 12.2 notes the exception to the law of the case doctrine provided in RAP 2.5(c)(2). The exception applies to the appellate courts, not to the superior court:

> **(c) Law of the Case Doctrine Restricted.** The following provisions apply if the same case is again before the appellate court following a remand:
>
> . . . .
>
> (2) *Prior Appellate Court Decision.* The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

RAP 2.5. An appellate court is not obliged to perpetuate its own error, particularly when there has been an intervening change in controlling precedent between trial and appeal. Roberson, 156 Wn.2d at 42. Under RAP 2.5(c)(2), this court may revisit an earlier decision in the same case that is clearly erroneous under current law if the erroneous decision would work a manifest injustice to one party. Roberson, 156 Wn.2d at 42. The use of the term "may" makes application of RAP 2.5(c)(2) discretionary, not mandatory. Roberson, 156 Wn.2d at 42.

Grant's position is as stated by the trial court. He contends the previous Court of Appeals decision "was not erroneous at the time given the state of law at the time," but in the two intervening years, "the law has changed in ways that would permit this claim to stand were it brought today."

Grant contends the analysis this court employed in his first appeal was effectively overruled in Klem v. Washington Mutual Bank, 176 Wn.2d 771, 295 P.3d 1179 (2013). The Supreme Court issued its opinion in Klem in February

2013, while Grant's petition for review was pending. In Klem, the facts supporting a consumer protection claim were egregious. Quality Loan Services, acting as trustee for a deed of trust securing the home of an elderly woman suffering from dementia, issued a notice of sale that had been falsified with a predated notary acknowledgement. The falsification facilitated a rapid foreclosure sale of the home for one dollar more than was owed. Klem, 176 Wn.2d at 774.

The Supreme Court rejected an argument that only an act or practice declared "unfair" by the legislature could be "unfair" for purposes of the Consumer Protection Act. The court quoted the leading consumer protection case of Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986).

> In Hangman Ridge, we observed:
>
> > The [first] two elements may be established by a showing that (1) an act or practice which has a capacity to deceive a substantial portion of the public (2) has occurred in the conduct of any trade or commerce. Alternatively, these two elements may be established by a showing that the alleged act constitutes a per se unfair trade practice. A per se unfair trade practice exists when a statute which has been declared by the Legislature to constitute an unfair or deceptive act in trade or commerce has been violated.
>
> Hangman Ridge, 105 Wn.2d at 785-86. Several courts, including the Court of Appeals below, seem to have understood this language to establish the exclusive ways the first two elements of a CPA claim can be established.

Klem, 176 Wn.2d at 784-85. The Klem court discussed how the definitions of "unfair" and "deceptive" have evolved over the years and concluded that "courts, as well as legislatures, must be able to determine

whether an act or practice is unfair or deceptive to fulfill the protective purposes of the CPA":

> To 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.
>
> We note in passing that an act or practice can be unfair without being deceptive.

Klem, 176 Wn.2d at 784-87. Grant contends Klem shows that this court defined too narrowly the conduct that could serve as a predicate for a consumer protection action.

Grant fails to demonstrate that Klem changed the controlling precedent of Hangman Ridge in a way that materially affected his case. That is, he does not establish that his consumer protection claim would have survived the first appeal if Klem had been available as a precedent. Grant's opponents were not attempting to constrain or limit the definition of an unfair or deceptive act or practice. Grant provides no basis for criticizing this court's application of Hangman Ridge, even in hindsight. Given the briefing before this court, Klem would not have changed the analysis.

The next case that Grant contends would make a difference is Frias, decided in 2014. There, the Supreme Court held that under appropriate circumstances, violations of the deed of trust act may be actionable under the Consumer Protection Act regardless of whether a foreclosure sale has been completed, and such claims are governed by the ordinary principles applicable to all claims under the Consumer Protection Act. Frias, 181 Wn.2d at 433.

Grant does not show that Frias would have changed the way this court analyzed the briefs in his first appeal. In Frias, the homeowner's opening brief explicitly argued that violations of the deed of trust act could be actionable as consumer protection violations.[2] Nothing prevented Grant from similarly arguing to this court that by alleging violations of the deed of trust act he was also identifying unfair or deceptive practices that could serve as the basis for recovery of damages and attorney fees under the Consumer Protection Act in the absence of a completed sale. Even after Frias, this court would not be expected to reach out and decide in Grant's favor an argument he did not make in his opening brief. As stated in our first opinion, that brief analyzed the consumer protection act claim in terms of Quality's issuance of the notice of default, not in terms of the additional alleged violations of the deed of trust act that he now wishes to pursue.

For the same reason, it is improbable that we would have come to a different decision in Grant's first appeal if he had been able to cite the other two cases he now points to as offering new protections for homeowners—Bain v. Metropolitan Mortgage Group, Inc., 175 Wn.2d 83, 120, 285 P.3d 34 (2012), decided on August 16, 2012, a few months after our opinion, and Lyons v. U.S. Bank National Ass'n, 181 Wn.2d 775, 336 P.3d 1142 (2014). These cases, like Frias, state that there is no cause of action for damages for wrongful foreclosure, but a consumer protection claim can be maintained for violations of the deed of trust act in a foreclosure proceeding that has not been completed by a sale.

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[2] Plaintiff's Opening Brief on Questions Certified to the Supreme Court by the U.S. District Court at 23-24, Frias v. Asset Foreclosure Servs. Inc., No. 89343-8 (Wash. Oct. 31, 2013).

Notably, Lyons cites a federal case that presaged Bain and Frias: Vawter v. Quality Loan Serv. Corp. of Wash., 707 F. Supp. 2d 1115 (W.D. Wash. 2010). Lyons, 181 Wn.2d at 785. In Vawter, the court considered whether the factual allegations supporting the plaintiff's claim under the deed of trust act supported, as well, the five elements of a claim under the Consumer Protection Act. Vawter, 707 F. Supp. 2d at 1129-30. Vawter was decided on April 22, 2010. Grant cited Vawter in his opening brief to this court filed in May 2011, but only to urge *rejection* of its holding that there is no cause of action for damages for wrongful foreclosure.[3] Grant did not argue that each violation of the deed of trust act that he had itemized could also serve a predicate for a Consumer Protection Act claim.

We conclude that while we have discretion under RAP 2.5(c)(2) to reconsider the dismissal of Grant's consumer protection claim under the law as it exists today, it would not serve the interests of justice to do so. The law defining what constitutes an unfair or deceptive practice under the Consumer Protection Act has not significantly changed since Grant appeared before this court the first time. Hangman Ridge is still good law and a leading case. The recent refinements articulated in Klem and other cases would not have helped Grant

[3] Brief of Appellant at 28-30, Grant v. First Horizon Home Loans, No. 66721-1 (Wash. Ct. App. May 24, 2011).

establish the consumer protection claim that Grant presented in his first appeal.[4]

The exception to the law of the case doctrine in RAP 2.5(c)(2) is not intended to give a party a second chance to develop and articulate a theory that was at best inchoate in the first round. "In all of its various formulations the doctrine seeks to promote finality and efficiency in the judicial process." Roberson, 156 Wn.2d at 41, 44. From the beginning, Grant has failed to show that he has a serious consumer protection claim to be litigated. Our previous decision is not clearly erroneous, and bringing this case to an end is not manifestly unjust.

Affirmed.

Becker, J.

WE CONCUR:

[4] Grant's reply brief argues that the "necessities of the case," a term used in RAP 2.4(a), require this court to acknowledge that under current law, damages are a form of relief available to him. He cites Akrie v. Grant, 183 Wn.2d 665, 668, 335 P.3d 1087 (2015). In Akrie, the Supreme Court granted affirmative relief from a damage award to respondents who had withdrawn their appeal, quoting RAP 2.4(a)(2) (an appellate court may grant a respondent affirmative relief "'if demanded by the necessities of the case.'") Akrie, 183 Wn.2d at 668. Because Grant is not a respondent, RAP 2.4(a)(2) and Akrie do not bear on our analysis.

APPENDIX B

COURT OF APPEALS NO. 72905-5

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JACK GRANT,

Appellant,

v.

FIRST HORIZON HOME LOANS, aka First Horizon Corporation dba "First Horizon Home Loans"; and UNKNOWN John and Jane Does 1-10; XYZ Corporation 1-10; ABC Limited Liability Companies 1-10; and 123 Banking Associations 1-10; QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington Corporation; STEWART TITLE, dba "Stewart Title of Bellingham"; STEWART TITLE OF WESTERN WASHINGTON, INC., a Washington corporation dba "Stewart Title of Bellingham"; STEWART TITLE OF BELLINGHAM, INC., a Washington corporation dba "Stewart Title of Bellingham"; and UNKNOWN John and Jane Does 1-10; XYZ Corporation 1-10; ABC Limited Liability Companies 1-10; and 123 Banking Associations 1-10,

Respondents.

APPELLANTS MOTION FOR RECONSIDERATION

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TABLE OF CONTENTS

TABLE OF AUTHORITY

Washington Cases

Statutes

Rules

Other Authorities

I. IDENTITY OF THE MOVING PARTY

Movant's identity is Plaintiff/Appellant, Jack Grant.

II. RELIEF REQUESTED

Appellant respectfully requests this Court reconsider its order denying Grant's appeal dated May 31, 2016, which is attached hereto as Appendix 1. A copy of this court's order dated May 29, 2012 is attached hereto as Appendix 2. This motion is timely filed pursuant to RAP 12.4

III. RELEVANT RECORD/BACKGROUND

In 2010, Grant filed suit against First Horizon, Quality, and others to enjoin the nonjudicial foreclosure proceedings initiated against him. The complaint also sought damages under various theories of liability, including the Consumer Protection Act ("CPA"), Ch. 19.86 RCW. ***Grant v. First Horizon Home Loans***, 72905-5-I, 2016 WL 3080730, at *2 (Wash. Ct. App. May 31, 2016) ("***Grant II***"). In February 2011, the Trial Court dismissed Grant's lawsuit with prejudice on motions brought under CR 12(b)(6) and 12(c). ***Grant II*** *at* *1.

In his opening brief, Grant identified the unfair and deceptive act as Quality's issuance, without authority, of a falsified notice of default. He argued that such conduct was likely to be repeated and deceive other members of the public. ***Grant II*** at *1.

In contradiction to the plain language of Grant's opening brief, this Court concluded Grant had not argued that Quality's alleged misconduct had the capacity to deceive a substantial portion of the public. ***Grant II*** at *2; *See also* ***Grant v. First Horizon Home Loans***, 168 Wn. App. 1021 (Div. I 2012) ("***Grant I***") ("[Grant] does not argue that this conduct had the capacity to deceive a substantial portion of the public.")

In ***Grant I***, this Court remanded the case back to Trial Court to determine, what authority "First Horizon and/or Quality Loan [had] to commence foreclosure proceedings under the DTA." ***Grant I*** at *14.

Upon remand, and consistent with this Court's instructions in ***Grant I***, the Trial Court found "If Plaintiff's Consumer Protection Act claims were properly before this Court under current law, **several disputed issues of material fact would need to be resolved before the propriety of the foreclosure can be determined**" but because: 1) the Appellate Court had remanded with instructions to proceed under the claim governed by the DTA; and, 2) ***Frias v. Asset Foreclosure Services, Inc.***, 181 Wn.2d 412, 334 P.3d 529 (2014) ruled there is no pre-sale claim for violating the DTA, there were no claims remaining for the Trial Court to resolve, even though the propriety of the foreclosure proceedings had not been determined. CP 308-309 (emphasis added). The Trial Court found genuine

issues of material fact regarding:

1. Validity and Legal Effect of the Declaration of Beneficiary: The Declaration was made by an employee and MetLife, who asserted that she was authorized to make the Declaration on behalf of MEtlife, and that MetLife was authorized to make the Declaration on behalf of BYNM:

    a. Whether Metlife had authority to make the Declaration on behalf of BNYM;
    b. Whether the Declaration of Beneficiary, made by Metlife on behalf of BNYM rather than by BNYM itself, meets the requirements of the statute;
    c. The Declaration of Beneficiary states that BNYM is the actual holder of the Note, while the Declaration of T. Nichols says that the Note was held, at all times, by "one of BNYM's document custodians." As a fact matter, this inconsistency must be resolved and a determination made as to the identity and agency authority of the custodians who held documents pertinent to this case between December 2004 and December 2010. If the Note was in possession of one of its document custodians, rather than of BNYM itself, as issue arises as to whether this type of constructive possession satisfies the requirements of the statute. *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wash.2d 83.
    d. In the Court of Appeals' view, First Horizon Home Loans held the NOte and MER, the purported beneficiary, did not. (Opinion, fn 26) Ultimately MERS transferred its interest to BNYM. Trial would be required to determine what interest MERS held and what interest is transferred to BNYM.

2. Effect of Pooling and Service Agreement on Agency Relationships: Several of the entities who are asserting agency authority in this case are basing their assertions on the Pooling and Service Agreement of 2005 (hereinafter "PSA"). HOwever, not all the entities in this case were parties to the Original PSA. Fact issues exist as to when each of the entities in this case became

parties to the PSA and as to the effect of the PSA on the relationship between the various entities which held or assigned the Note and/or Deed of Trust at issue in this case.

3. Chain of Custody of the Note: The Note was transferred from the original lender almost immediately after the loan transaction was made. Several entities claimed ownership of the Note before BNYM claimed ownership in these proceedings. Fact issues exist as to what these transfers were; when they occurred; and their effect, if any, on the ownership of the Note.

Id. (collectively referred to hereinafter as, "the Trial Court's findings of issues of material fact.")

Grant appealed. He contended that the superior Court erred by failing to give retroactive effect to recent Supreme Court cases involving the Consumer Protection Act. ***Grant II*** at *4.

This Court Ruled that "[u]nder RAP 2.5(c)(2), this Court may revisit an earlier decision in the same case that is clearly erroneous under current law if the erroneous decision would work a manifest injustice to one party." ***Grant II*** at *5. Additionally, this Court ruled, "Grant fails to demonstrate that ***Klem*** changed the controlling precedent of ***Hangman*** in a way that materially affected his case. That is, he does not establish that his consumer protection claim would have survived the first appeal if ***Klem*** had been available as a precedent." ***Grant II*** at *6. ***Klem v. Washington Mut. Bank***, 176 Wn.2d 771, 295 P.3d 1179 (2013).

Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 719 P.2d 531 (1986). Finally, the Court concluded:

> "while we have discretion under RAP 2.5(c)(2) to reconsider the dismissal of Grant's consumer protection claim under the law as it exists today, it would not serve the interests of justice to do so. **The law defining what constitutes an unfair or deceptive practice under the Consumer Protection Act has not significantly changed since Grant appeared before this Court the first time.** ***Hangman*** is still good law and a leading case. The recent refinements articulated in ***Klem*** and other cases would not have helped Grant establish the consumer protection claim that Grant presented in his first appeal."

Grant II at * 12-13 (emphasis added). The Court noted, "The exception to the law of the case doctrine in RAP 2.5(c)(2) is not intended to give a party a second chance to develop and articulate a theory that was at best inchoate in the first round." ***Grant II*** at *7.

IV. ISSUES PRESENTED

1. Should this Court reconsider its opinion that "First Horizon and Quality ... submitted evidence and argument tending to establish their authority to commence foreclosure," when the record shows, "several disputed issues of material fact would need to be resolved before the propriety of the foreclosure can be determined."

2. Should this Court reconsider its opinion when it used the wrong standard to determine whether to exercise its discretion to amend its prior opinion to be consistent with intervening controlling authority while this case *sub judice*? (Short Answer: Yes)

3. Should this Court reconsider its opinion that "[Grant] does not argue that [Quality's] conduct had the capacity to deceive a substantial portion of the public" when, in fact, "Grant identified the unfair and deceptive act as Quality's issuance, without authority, of a falsified notice of default. He argued that such conduct was likely to be repeated and deceive other

members of the public."

4. Should this Court reconsider its opinion when: 1) the Washington Supreme Court Interpreted the CPA in ***Klem***; 2) that interpretation is retroactive; and, 3) ***Klem*** changes the controlling precedent of ***Hangman*** in a material way. (Short Answer: Yes)

V. ARGUMENT

Grant requests the Court reconsider its opinion issued May 31, 2016 and exercise its discretion to remand Grant's CPA claims back to the Trial Court. Specifically Grant requests the Court reconsider: 1) The Finding that Horizon and Quality submitted evidence "tending to establish their authority to commence foreclosure[;]" 2) The standard this Court employed when deciding whether to exercise discretion under RAP 2.5(c)(2); 3) The Finding that Grant did not argue "public interest" in his opening brief in ***Grant I***; and, 4) The decision that ***Klem*** did not materially change the test related to the "unfair or deceptive" prong set forth in ***Hangman***.

1. First Horizon and Quality did not, in fact, Submit Evidence "Tending to Establish Their Authority to Commence Foreclosure."

In its order granting summary judgment to First Horizon and Quality, the Trial Court stated, "[i]f Plaintiff's Consumer Protection Act claims were properly before this Court under current law, the Court would find that several disputed issues of material fact would need to be resolved

before the propriety of the foreclosure can be determined." CP 308:8-10. The Court then described genuine issues of material fact over the next 32 lines of its order. CP 308-09 (The Trial Court's findings of issues of material fact). However, in the recitation of facts by this Court, this Court erroneously states, "First Horizon and Quality ... submitted evidence and argument tending to establish their authority to commence foreclosure." ***Grant II*** at *3.

It is impossible to understand how the Trial Court's order can be read and the reader can conclude defendants "submitted evidence... tending to establish their authority to commence foreclosure." ***Grant II*** at *3. Defendants did not submit such evidence. *See* The Trial Court's findings of issues of material fact.

2. This Court Employed the Incorrect Standard Under RAP 2.5(c) When Declining Grant's Request to Have His CPA Claims Reinstated Under Current Washington Law.[1]

In deciding not to use its discretion to allow Grant's CPA claim under RAP 2.5(c)(2), the Court stated: "Our previous decision is not clearly erroneous, and bringing this case to an end is not manifestly unjust." However, Grant was not required to show the previous decision was

[1] Because amendments to GR 14.1 are going into effect on September 1, 2016, all cases, even unpublished cases will be citable as authority to Washington Courts. Accordingly, it is crucial that Courts' decisions stay consistent with published cases.

clearly erroneous, even though the Court's decision here was.

Additionally, Grant was not required to show failure to exercise discretion under RAP 2.5(c)(2) would result in manifest injustice.

As articled by the Washington Supreme Court:

> The plain language of the rule affords appellate courts discretion in its application. RAP 2.5(c)(2) codifies at least two historically recognized exceptions to the law of the case doctrine that operate independently.
>
> First, application of the doctrine may be avoided where the prior decision is clearly erroneous, and the erroneous decision would work a manifest injustice to one party.
>
> Second, application of the doctrine may also be avoided where there has been an intervening change in controlling precedent between trial and appeal.

Roberson v. Perez 156 Wn.2d 33, 42, 123 P.3d 844 (2005).

Confusingly, this Court cites ***Roberson*** for the proposition that "this Court may revisit an earlier decision in the same case that is clearly erroneous under current law if the erroneous decision would work a manifest injustice to one party." ***Grant II*** at *5.

That is exactly the opposite of what the Washington Supreme Court said. In ***Roberson*** the Washington Supreme Court clearly stated:

> [p]etitioners argue that the Division One opinion could not be set aside absent a finding by the Court Of Appeals that the previous decision was erroneous and that the erroneous decision would work a manifest injustice to one party. However, **no such finding is required where reconsideration** is prompted by

intervening, controlling precedent from this Court.

Roberson, 156 Wn.2d at 42-43 (emphasis added); ***see also Brundridge v. Fluor Federal Services, Inc.***, 164 Wn.2d 432, 441, 191 P.3d 879 (2008) (citing ***Roberson***, 156 Wn.2d at 42)("the law of the case" simply does not apply when there is an intervening change in law.)

Further, the Supreme Court provided guidance on the proper use of Appellate Court discretion when dealing with an intervening precedent: **"An appellate Court's discretion to disregard the law of the case doctrine is at its apex when there has been a subsequent change in controlling precedent on appeal."** ***Id.*** at 43. Here, the Appellate Court's obligation is to use the correct standard of review when exercising its discretion to reassess its prior decision in light of the change in case law. ***State v. Perdang***, 38 Wn. App. 141, 146, 684 P.2d 781, 783 (Div. I 1984). ("Regardless of whether the Court's [decision] was ultimately justifiable, [the Court's] stated policy of [using an incorrect standard when deciding whether to exercise discretion] amounted to an abdication of the responsibility to exercise discretion.").

Accordingly, Grant respectfully requests this Court use the proper standard when deciding to whether to exercise its discretion to allow Grant to seek redress under the CPA, as interpreted by the Supreme between

Grant I and the summary judgment motions that preceded Grant II.

3. This Court's Opinions in *Grant I* and *Grant II* are Built Upon a Faulty Keystone.

This Court in ***Grant I*** erroneously stated that "[Grant] does not argue that this conduct had the capacity to deceive a substantial portion of the public." ***Grant I*** at 16. However, in addition to the theory Quality Loan's conduct was *per se* unfair or deceptive, and contrary to the Trial Court's findings of issues of material fact, Grant argued to this Court in his opening brief that:

> Quality Loan falsified a document (the Notice of Default) and failed to prove or even investigate the basic questions, including: i) the identity of the beneficiary; ii) the chain of title to the debt and security; iii) the proof of debt; iv) even whether the underlying indebtedness was in default. Instead, Quality Loan represents that all parties are properly named in the foreclosure documents - their own documents refute this CP 293-307. This is deception.
>
> * * *
>
> Attorneys General in all 50 states are investigating circumstances similar to the conduct complained about here because the conduct is harmful or potentially harmful to the public. In the instant case, Quality Loan has been unapologetic to Grant (an attorney who, in theory, has some ability to defend himself) in making its false assertions about the basic questions. It is easy to imagine the damage that lenders like First Horizon and foreclosure mills like Quality Loan can do to people who don't have the ability or resources to dispute or fight back. A review of the many Court cases in which Quality Loan is a party in Washington State suggests that this is no aberration or one-time event for Quality Loan. Quality Loan's conduct and practice is

> likely to be repeated in the future and accordingly, has the capacity to deceive a substantial portion of the public.

Brief of Appellant at 38-39. ***Grant I.***

This Court's most recent opinion states, "[in Grant I] Grant identified the unfair and deceptive act as Quality's issuance, without authority, of a falsified notice of default. **He argued that such conduct was likely to be repeated and deceive other members of the public.**"***Grant II*** at *1 (emphasis added) .

Strangely, this Court in ***Grant II*** perpetuates the error made by the Court in ***Grant I*** when it erroneously stated "[Grant] had not argued [in Grant I] that Quality's alleged misconduct had the capacity to deceive a substantial portion of the public." ***Grant II*** at *2. As understood by this Court at the beginning of its most recent opinion, the only reasonable interpretation of the preceding quote is that Mr. Grant was arguing Quality's conduct had the capacity to deceive a substantial portion of the public.

4. The Washington Supreme Court in *Klem* Explicitly Changed the Legal Requirement for Showing an "Unfair or Deceptive Act or Practice" Under the CPA and The Analysis of Grant's Opening Brief in Grant I Would Change Significantly

In ***Grant II*** this Court held,

> The law defining what constitutes an unfair or deceptive practice under the Consumer Protection Act has not significantly changed

since Grant appeared before this Court the first time. Hangman Ridge is still good law and a leading case. The recent refinements articulated in Klem and other cases would not have helped Grant establish the consumer protection claim that Grant presented in his first appeal.

Grant II at 14-15.

However, the Supreme Court, this Court and other Washington Appellate Courts have previously acknowledged and held in ***Lyons, Frias, Walker, Rucker,*** and ***Mellon***[2] that ***Klem*** did change ***Hangman.***[3] Accordingly, Grant will first address the requirement for an "unfair or deceptive" act or practice as announced by the Supreme Court in ***Hangman***. Next, Grant will discuss Washington Appellate Courts' interpretations of the "unfair or deceptive" requirement in the years following ***Hangman***, but before ***Klem***. Third, Grant will analyze how ***Klem*** materially changed the "unfair or deceptive" requirement by significantly broadening the analysis by

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[2] In ***Mellon***, Div. III explicitly stated ***Klem*** clarified ***Hangman***:

> A plaintiff may predicate the first CPA element on "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." ***Klem,*** 176 Wn.2d 771, 787, 295 P.3d 1179 (2013) (clarifying ***Hangman,*** 105 Wn.2d at 785–86)

Mellon v. Reg'l Tr. Servs. Corp., 182 Wn. App. 476, 488, 334 P.3d 1120, 1125 (Div. III 2014)

[3] ***Lyons v. U.S. Bank Nat. Ass'n***, 181 Wn.2d 775, 336 P.3d 1142, 1149 (2014); ***Frias***, 181 Wn.2d 412; ***Walker v. Quality Loan Serv. Corp.***, 176 Wn. App. 294, 303, 308 P.3d 716 (Div. I 2013); ***Rucker v. Novastar Mortg., Inc.***, 177 Wn. App. 1, 311 P.3d 31 (Div. 1 2013); ***Mellon,*** 182 Wn. App 476; ***Klem,*** 176 Wn. 2d 771; ***Hangman,*** 105 Wn.2d 105.

adding a third way to meet the requirement. Finally, Grant will discuss the test to determine whether an act is against the "public interest."

i. Divergent Appellate Court Views of the "Unfair or Deceptive" Prong of the CPA before *Klem*.

The Court in ***Klem*** wrote:

> In ***Hangman Ridge***, we observed:
>
> > The [first] two elements may be established by a showing that (1) an act or practice which has a capacity to deceive a substantial portion of the public (2) has occurred in the conduct of any trade or commerce. Alternatively, these two elements may be established by a showing that the alleged act constitutes a per se unfair trade practice. A per se unfair trade practice exists when a statute which has been declared by the Legislature to constitute an unfair or deceptive act in trade or commerce has been violated.
> >
> > Several courts, including the Court of Appeals below, seem to have understood this language to establish the exclusive ways the first two elements of a CPA claim can be established. *Klem*, 2011 WL 6382147, at *8.
> >
> > * * *
> >
> > But, as we noted in *Saunders*, "[b]ecause the act does not define 'unfair' or 'deceptive,' this Court has allowed the definitions to evolve through a 'gradual process of judicial inclusion and exclusion.' " *Saunders*, 113 Wash.2d at 344, 779 P.2d 249 (quoting *State v. Reader's Digest Ass'n*, 81 Wash.2d 259, 275, 501 P.2d 290 (1972), *modified in Hangman Ridge*, 105 Wash.2d at 786, 719 P.2d 531). That "gradual process of judicial inclusion and exclusion" has continued to take place in cases that, properly, did not read *Hangman Ridge* as establishing the only ways the first two elements could be met.

Klem, 176 Wn.2d at 784--86. Crucially,

> Any doubt should have been put to rest in *Panag v. Farmers Ins. Co. of Wash.*, 166 Wash.2d 27, 48, 204 P.3d 885 (2009), where we discussed both per se and unregulated unfair or deceptive acts. The primary issue in *Panag* was whether a collection agency that used deceptive mailers could be liable to debtors. *Id.* at 34, 204 P.3d 885. We quoted with approval language from the congressional record on the federal consumer protection act:
>
> > " 'It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country.' "
>
> *Panag,* 166 Wash.2d at 48, 204 P.3d 885 (quoting *State v. Schwab,* 103 Wash.2d 542, 558, 693 P.2d 108 (1985) (Dore, J., dissenting) (quoting H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914))). Given that there is "no limit to human inventiveness," Courts, as well as legislatures, must be able to determine whether an act or practice is unfair or deceptive to fulfill the protective purposes of the CPA.

Klem, 176 Wn.2d at 786 (footnote omitted).

iii. Unfair or Deceptive Act or Practice After *Klem*

In ***Klem***, Quality "abdicated its duty to act impartially toward [the beneficiary and the homeowner]" when it failed to exercise independent discretion to postpone a nonjudicial foreclosure sale." ***Id.*** at 788-791. Quality committed an unfair or deceptive act or practice when it predated notarizations to speed up the foreclosure process. ***Id.*** at 794-95.

After discussing the disparate views of various Appellate Courts regarding the "unfair or deceptive" prong since ***Hangman***,[4] the Supreme Court emphatically declared:

> **To resolve any confusion**, we hold that a claim under the Washington CPA may be predicated upon a [1] *per se* violation of statute, [2] an act or practice that has the capacity to deceive substantial portions of the public, [3] **or an unfair or deceptive act or practice not regulated by statute but in violation of public interest.**[5]

Id. at 787, 786 n. 9 (brackets added)(emphasis added).

a. Definition of "Deceptive Act or Practice"

Importantly,

> [d]eception exists if there is a representation, omission or practice that is likely to mislead a reasonable consumer. In evaluating the tendency of language to deceive, the [Court] should look not to the most sophisticated readers but rather to the least. Under the [CPA], a communication may be deceptive by virtue of the "net impression" it conveys, even though it contains truthful information.

Panag v. Farmers Ins. Co. of Washington, 166 Wn.2d 27, 50, 204 P.3d 885 (2009)(internal citations omitted).

Moreover, intent to deceive is not a necessary predicate to finding a violation of the CPA. ***Trujillo v. Northwest Trustee Services, Inc.***, 183 Wn.2d 820, 835, 355 P.3d 1100 (2015)(citing ***Panag***, 166 Wn.2d at

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[4] *See* § 4(ii) *supra*.
[5] "Public Interest" is defined in RCW 19.86.093

47)(Trial Court erroneously dismissed CPA claim based upon alleged violation of Deeds of Trust Act).

Additionally, "It is the intent of the legislature that, in construing this act, the Courts be guided by final decisions of the federal Courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters." RCW 19.86.920. Federal Court decisions are guiding, but not binding, authority. ***State v. Reader's Digest Ass'n***, 81 Wn.2d 259, 275, 501 P.2d 290 (1972).

b. Definition of an "Unfair Act or Practice"

"[A]n act or practice can be unfair without being deceptive." ***Klem***, 176 Wn.2d at 787. The Washington Supreme Court has not had the opportunity to "explore in detail how to define unfair acts for the purposes of our CPA." ***Id***. However, "[t]he Washington legislature instructed Courts to be guided by federal law in the area." ***Id.*** *citing* RCW 19.86.920.

> Although we have been guided by federal interpretations, Washington has developed its own jurisprudence regarding application of Washington's CPA. Current federal law suggests a "practice is unfair [if it] causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and is not outweighed by countervailing benefits."

Id. *citing* 15 U.S.C. § 45(n).

Similarly, a defendant's act or practice might be "unfair" if it "offends

public policy as established 'by statutes [or] the common law,' or is 'unethical, oppressive, or unscrupulous,' among other things." ***Id.*** at 786 (alteration in original) (quoting ***Magney v. Lincoln Mut. Sav. Bank***, 34 Wn. App. 45, 57, 659 P.2d 537 (Div. III 1983).

c. Definition of "Public Interest"

In ***Grant I***, RCW 19.86.093 was applicable. RCW 19.86.093 states an "act or practice is injurious to the public interest because the act "(3)(a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons."

Grant made significant argument in his opening brief in ***Grant I*** that Quality's actions impacted the public interest, as required to prove the first element of a CPA violation under ***Klem***, and as required to prove the third requirement under ***Klem*** and ***Hangman*** when the acts had the capacity to injure other persons, have the capacity to injure others, or could injure other people in the future as provided for in RCW 19.86.093(c).

This Court in ***Grant II*** stated that the law had not changed since ***Hangman***, but, in fact, the unfair or deceptive and public interest impact elements analyzed in ***Hangman*** have been clarified by Supreme Court Precedent including ***Bain*** and ***Klem*** and superseded by RCW 19.86.093. ***Bain v. Metro. Mortg. Grp., Inc.***, 175 Wn.2d 83, 285 P.3d 34 (2012).

d. Case Law Regarding Quality's Unfair or Deceptive Acts and Klem

In ***Walker***, "Quality recorded a notice of trustee's sale for Walker's property. The notice recited that Walker granted the deed of trust to secure an obligation in favor of [MERS], as Beneficiary, the beneficial interest in which was assigned by [MERS], as nominee for [Credit Suisse] to [Select]." "It also identified Quality as the successor trustee." ***Walker***, 176 Wn. App. at 303, *as modified* (Aug. 26, 2013). (brackets original). Walker filed suit alleging, among other causes of action, that Quality violated the CPA. ***Id.*** at 720.

Walker listed four acts that he contends were deceptive:

> (1) Quality sent a notice of default to Walker "despite not meeting the requirements of a successor trustee under RCW 61.24.010(2) which [Quality] and SELECT knew or should have known at the time the Notice of Default was issued"; (2) Quality and Select "facilitated a deceptive and misleading effort to wrongfully execute and record documents [Quality] and SELECT knew or should have known contained false statements related to the Appointment of Successor Trustee and Assignment of Deed of Trust"; (3) Quality and Select sent, executed, and recorded a notice of trustee's sale that they "knew contained false statements in that no obligation of the Plaintiff was ever owed to SELECT, the purported 'beneficiary' "; and (4) "that as a result of this conduct, [Quality] and SELECT knew that its conduct amounted to wrongful foreclosure ..."

Walker, 176 Wn. App. at 319. Similarly, First Horizon is liable here under the CPA claims for the acts of its agent, Quality.

Crucially, in ***Walker***, because of the Supreme Court's recent decisions in ***Bain***[6] and ***Klem***,[7] Quality only contended that Walker failed to meet the fourth and fifth elements of the CPA. ***Walker***, 176 Wn. App. at 318. (footnotes original). The Walker Court observed, "In ***Bain v. Metropolitan Mortgage Group Inc***, our Supreme Court held that if MERS never held the promissory note or other debt instrument, it was not a lawful beneficiary and could not appoint a successor trustee." ***Walker***, 176 Wn. App. at 308 (original footnote omitted). Walker also contended,

> If [Quality] intends to foreclose a property non-judicially it is obligated to have evidence that it is doing so on a legitimate and legal basis and not simply acting at the behest of a party that may or may not have the legal right to conduct such an action. He asserts that a "cursory investigation" would have revealed that Quality did not have proper authority to act and that Quality "recorded and relied upon documents it knew, or should have known, to be false and misleading.

Id. at 309-10.

This Court in ***Walker*** held: "these allegations, if proved, would

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[6] In ***Bain***, a case against MERS, the Court recognized that the plaintiff presumptively met the first element because "characterizing MERS as the beneficiary has the capacity to deceive." 175 Wn.2d at 117. The plaintiff also presumptively met the second element based upon "considerable evidence that MERS is involved with an enormous number of mortgages in the country (and our state), perhaps as many as half nationwide." ***Id.*** at 118. Third, the Court opined that "there certainly could be injury under the CPA" if the homeowner borrower could not determine the noteholder, if there were incorrect or fraudulent transfers of the note, or if concealing loan transfers deprived the homeowner of rights that require the homeowner to sue or to negotiate with the actual noteholder. ***Id.*** at 118–19.

[7] The Court determined that a trustee's failure to fulfill its duty to the borrower constituted a "deceptive act" under the CPA. ***Klem***, 176 Wn.2d at 787.

show that Quality failed to act in good faith by failing to adequately inform itself about its authority to foreclose. Therefore, Walker pleads facts entitling him to relief for Quality's violations." ***Id. accord Lyons***, 181 Wn.2d at 787 ("A foreclosure 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." ***Id.*** citing ***Walker***, 176 Wn. App at 309–10.)

"Our Supreme Court has recognized, in the context of a CPA claim, "Where the beneficiary so controls the trustee so as to make the trustee a mere agent of the beneficiary, then as principle [sic], the beneficiary may be liable for the acts of its agent."" ***Id.*** at 313 (***citing Klem***, 176 Wn.2d at 791 n. 12).

In ***Rucker***, *inter alia*, Rucker contended that the trustee's sale was invalid because NovaStar had no authority to appoint Quality as successor trustee. ***Rucker***, 177 Wn. App. at 7-8. They argued NovaStar was not the holder of Rucker's promissory note at the time that NovaStar executed the appointment. ***Id.*** Accordingly, Walker reasoned, because Quality was not statutorily authorized to conduct a trustee's sale, sale of the Woodinville property must be vacated. ***Id.*** This Court agreed with Rucker and remanded to Trial Court for further

proceedings. ***Id.*** at 13.

In analyzing Rucker's contentions, this Court cited ***Walker*** and reasoned "[W]hen an unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and serve a notice of trustee's sale." ***Id.*** at 37-38 (citing ***Walker,*** 176 Wn. App. 294). Such actions by the improperly appointed trustee, we have explained, constitute "material violations of the DTA." ***Walker,*** 176 Wn. App. at 308. ***Rucker***, 177 Wn. App. at 14.

The Supreme Court in ***Bain***,[8] ***Klem***,[9] ***Frias***,[10] ***Lyons***,[11] and ***Trujillo***[12] has acknowledged that material violations of the DTA, meet

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[8] "The fact that MERS claims to be a beneficiary, when under a plain reading of the statute it was not, presumptively meets the deception element of a CPA action." ***Bain***, 175 Wn.2d at 119-20

[9] "We hold that the act of false dating by a notary employee of the trustee in a nonjudicial foreclosure is an unfair or deceptive act or practice and satisfies the first three elements under the Washington CPA. ***Klem***, 176 Wn.2d at 794-95. Further, given the trustee's failure to fulfill its fiduciary duty to postpone the sale, there is sufficient evidence to support the jury's CPA violation verdict." ***Klem***,176 Wn.2d at 795.

[10] In ***Frias*** the Court held:

> we hold that the analysis of the elements of a CPA action premised on alleged DTA violations is the same as the analysis of the elements of a *433 CPA claim premised on any other allegedly unfair or deceptive practice with a public interest impact occurring in trade or commerce that has allegedly proximately caused injury to a plaintiff's business or property. *See, e.g.*, ch. 19.86 RCW; ***Klem***, 176 Wn.2d at 782–97; ***Panag***, 166 Wn.2d at 37–65; ***Hangman***, 105 Wn.2d at 783–93.

Frias, 181 Wn.2d at 432-33.

[11] Violation of RCW 61.24.010(4) satisfies the "unfair or deceptive" prong of the CPA. can. ***Lyons***, 181 Wn.2d at 787 ***citing Klem***, 176 Wn.2d at 790.

[12] Violation of RCW 61.24.030(7) supports a CPA claim as an "unfair or deceptive act." Violation ***Trujillo***, 183 Wn.2d at 834.

the "unfair or deceptive act" prong of the CPA.

e. Quality's Unfair or Deceptive Conduct in This Case as Briefed by Grant in *Grant I* in 2011.

Grant specifically and in detail laid out Quality's Unfair or Deceptive Conduct when he wrote:

> Quality Loan falsified a document (the Notice of Default) and failed to prove or even investigate the basic questions, including: i) the identity of the beneficiary; ii) the chain of title to the debt and security; iii) the proof of debt; iv) even whether the underlying indebtedness was in default

Brief of Appellant at 38-39. ***Grant I.***

As discussed above, each of the four acts identified to this Court in ***Grant I*** has been held to be the basis for a CPA Violation.

f. Quality's Unfair or Deceptive Conduct in This Case as Briefed by Grant in the Trial Court on Remand.

In its attempt to prove it has the ability to nonjudicially foreclose, First Horizon has, under the penalty of perjury, submitted evidence that the loan was wholly owned by Trust FH05-01, Trust FHASI 2005-1 and Trust 2005-1, three different trusts, all at the same time. CP 156-58; CP 158-79.

The fact that Quality continued with foreclosure actions against Grant, demonstrates that the exact same conduct Grant claimed violated the CPA was shown to the Superior Court. The Superior Court ruled that numerous issues of fact would need to be established by Trial in order to determine

the propriety of defendants' actions, as it was directed to do by this Court. ***Grant I.***. *See* the Trial Court's findings of issues of material fact.

VI. CONCLUSION

As Grant briefed in ***Grant I***, the CPA, as interpreted by the Supreme Court in ***Bain***[13] and ***Klem***,[14] which was then cited by ***Frias***,[15] ***Lyons***,[16] and ***Walker,***[17] prohibits the exact conduct Grant briefed in ***Grant I*** and put before the Trial Court in this case including: 1) falsifying a notice of default or any document required by the DTA; and, 2) failing to investigate basic questions, including the identity of the beneficiary and any issues raised by the borrower. Specifically,

> The availability of redress for wrongs during nonjudicial foreclosure under the CPA is well supported in our case law. *Id.; Bain v. Metro. Mortg. Grp., Inc.,* 175 Wash.2d 83, 119, 285 P.3d 34 (2012) (a plaintiff may bring a claim under the CPA arguing

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[13] Claiming to be a beneficiary when you are not is an unfair or deceptive act or practice.

[14] Resolving a CPA claim may be predicated on an unfair or deceptive act or practice not regulated by statute but in violation of public interest.

[15] CPA claims alleging DTA violations are governed by the same principles as other CPA claims. ***Frias***, 181 Wn.2d at 432, ***citing Klem***, 176 Wn.2d at 782–97.

[16] "The availability of redress for wrongs during nonjudicial foreclosure under the CPA is well supported in our case."***Lyons***, 181 Wn.2d at 785. Moreover,

> The allegedly improper acts of NWTS are intertwined but can be generally categorized as violations of two DTA statutes—violation of the duty of good faith under RCW 61.24.010(4) and noncompliance with RCW 61.24.030(7) (a), which instructs that a trustee must have proof the beneficiary is the owner prior to initiating a trustee's sale. 181 Wn.2d at 786. If Lyons' alleged violations are true, NWTS' actions would likely be considered unfair acts, but questions of fact remain as to whether NWTS' actions amounted to such violations.

Lyons, 181 Wn.2d at 786.

[17] Failure of a trustee to investigate whether appointed by a proper beneficiary is unfair or deceptive. ***Walker***, 176 Wn. App. at 310 & 319

> the facts specific to the case); *Walker v. Quality Loan Serv. Corp. of Wash.*, 176 Wash.App. 294, 320, 308 P.3d 716 (2013) (actions taken during the nonjudicial foreclosure process were sufficient to support all five elements of a CPA claim and survive pretrial dismissal);

Lyons 181 Wn.2d at 785.

Far from "inchoate," Grant briefed and argued Quality's conduct was unfair or deceptive under the CPA before the body of law ***Lyons*** confirmed existed. In fact, Grant's arguments and facts were nearly identical to those this Court found sustainable under the CPA in ***Walker***[18] and the Supreme found in sustainable ***Lyons***. If Grant's original briefing were analyzed under today's law, his CPA claim would go forward.

Grant requests the Court reconsider the Opinion Issued May 31, 2016 and exercise its discretion to remand Grant's CPA claims back to the Trial Court. Specifically, Grant submits that it would be fair and just to have the opportunity to recover damages and costs he has suffered through this litigation prolonged unnecessarily by Quality and First Horizon. CP 149-152. Grant requests the Court:

1) Change its finding that Horizon and Quality submitted evidence "tending to establish their authority to commence foreclosure" to be consistent with the Trial Court's Order findings numerous genuine issues

[18] *Compare* Grant's facts discussed in § XV(4)(iii)(e) with the facts in ***Walker*** discussed in § V(4)(iii)(d)

of material fact that need to be resolved before the propriety of defendant's actions can be determined;

2) Change the standard this Court employed when deciding whether to exercise discretion under RAP 2.5(c)(2) because ***Roberson*** states that when intervening case law has changed, the clearly erroneous standard requiring manifest injustice is not required;

3) Change its finding that Grant did not argue "public interest" in his opening brief in ***Grant I*** because as quoted above, Grant did argue "public interest" and this court is not required to perpetuate errors;

4) Change its decision that ***Klem*** did not materially change the test related to the "unfair or deceptive" prong set forth in ***Hangman***, because, in fact, this Court has previously interpreted ***Klem*** and ***Bain*** in ***Walker*** to allow a claim governed by the CPA for the very unlawful acts Grant complained of against Quality.

DATED this 20th day of June, 2016 at Arlington, Washington.

Respectfully Submitted By:

JBT & Associates, P.S.

Joshua B. Trumbull, WSBA# 40992
Emily A. Harris, WSBA# 46571
Attorneys for Appellant

CERTIFICATE OF SERVICE

I, Ashley Brogan, 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 20th day of June, 2016, I caused to be served a true and correct copy of Appellants Motion for Reconsideration in the above title matter by causing it to be delivered to:

Andrew Yates Abraham K. Lorber Lane Powell, PC 1420 5th Ave Suite 4100 Seattle, WA 98101 yatesa@lanepowell.com lorbera@lanepowell.com	☐Facsimile ☐Express Mail ✓ U.S. First Class Mail Postage Paid ☐Hand Delivery ☐Legal Messenger ✓ Electronic-Email
Joseph Ward McIntosh McCarthy & Holthus 108 1st Ave S Suite 300 Seattle, WA 98104 Jmcintosh@mccarthyholthus.com	☐Facsimile ☐Express Mail ✓ U.S. First Class Mail Postage Paid ☐Hand Delivery ☐Legal Messenger ✓ Electronic-Email

DATED this 20th day of June, 2016 at Arlington, Washington.

Ashley Brogan

Ashley Brogan

Appendix 1

2016 WL 3080730
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 1.

JACK GRANT, Appellant,
v.
FIRST HORIZON HOME LOANS, aka FIRST HORIZON CORPORATION dba "First Horizon Home Loans"; and QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington corporation, Respondents,
and
UNKNOWN JOHN and JANE DOES 1-10, XYZ CORPORATIONS 1-10, ABC LIMITED LIABLITY COMPANIES 1-10; and 123 BANKING ASSOCIATIONS 1-10; STEWART TITLE dba "Stewart Title of Bellingham"; STEWART TITLE OF WESTERN WASHINGTON, INC., a Washington corporation dba "Stewart Title of Bellingham"; STEWART TITLE OF BELLINGHAM, INC., a Washington corporation dba "Stewart Title of Bellingham"; and UNKNOWN JOHN and JANE DOES 11-20; XYZ CORPORATIONS 11-20; and ABC LIMITED LIABLITY COMPANIES 11-20; Defendants.

No. 72905-5-I
|
FILED: May 31, 2016

UNPUBLISHED OPINION

BECKER, J.

*1 A borrower requests an opportunity to pursue a consumer protection claim that this court, in a previous appeal, held was properly dismissed. The borrower contends consumer protection law changed in his favor while the rest of his lawsuit was still alive. Because we are unpersuaded that our previous decision would have come out differently under current law, we decline to exercise our discretion to reinstate the claim.

At issue is an order granting summary judgment to respondents First Horizon Home Loans and Quality Loan Service Corporation of Washington. This court reviews orders granting summary judgment de novo. Summary judgment is proper if the facts, when viewed in the light most favorable to the nonmoving party, entitle the movant to judgment as a matter of law. Bavand v. OneWest Bank, FSB, 176 Wn. App. 475, 309 P.3d 636 (2013).

In 2004, appellant Jack Grant obtained a construction loan for $800,000 from First Horizon Bank to make improvements to his beach cottage. The promissory note memorializing the loan required monthly payments of $4,732. A deed of trust on the property secured the note.

In April 2010, Grant stopped making monthly payments. In July 2010, Quality issued a notice of default. Quality claimed to be the owner and beneficiary of the promissory note.

Grant filed suit against First Horizon, Quality, and others to enjoin the nonjudicial foreclosure proceedings. The complaint also sought damages under various theories of liability, including the Consumer Protection Act, chapter 19.86 RCW. The complaint asserts that the foreclosure proceedings and documents were confusing and misleading, making it impossible to know the true identity of the owner or holder of the note and deed of trust, who had the legal right to foreclose, who was entitled to payments, and whether the note still existed. The allegedly unfair or deceptive acts or practices specified in the complaint in support of the consumer protection claim are that First Horizon failed to legally assign the note and deed of trust, failed to notify Grant of changes in the trustee or owner of the note and deed of trust, failed to notify him of the appointment of agents, and refused to proceed with the advance of the loan unless he accepted last-minute changes that altered the status of his separate property.

Initially, the trial court issued a temporary restraining order enjoining a trustee's sale of Grant's home. But in February 2011, the trial court dismissed Grant's lawsuit with prejudice on motions brought under CR 12(b)(6) and 12(c). The consumer protection claim, among others, was dismissed on statute of limitations grounds. The trial

court stated that a cause of action for wrongful foreclosure might arise if the property was eventually disposed of at a trustee sale.

Grant appealed. He argued that none of the defendants had authority to foreclose. A section of his opening brief addressed the merits of the consumer protection claim and referred to First Horizon and Quality as "foreclosure mills."[1] Grant identified the unfair and deceptive act as Quality's issuance, without authority, of a falsified notice of default. He argued that such conduct was likely to be repeated and deceive other members of the public. He also noted the legislature's recent passage of the bill that established the Foreclosure Fairness Act, chapter 61.24 RCW. Grant claimed the Foreclosure Fairness Act added new per se violations of the Consumer Protection Act that should apply retroactively to his case.

1 Brief of Appellant at 39. Grant v. First Horizon Home Loans, No. 66721-1 (Wash. Ct. App. May 24, 2011).

*2 Quality's responding brief went through the five elements of a consumer protection claim and claimed that Grant failed to allege facts that would support a claim that the issuance of the notice of default met those elements. First Horizon's responding brief pointed out that Grant's brief did not discuss any conduct attributable to First Horizon regarding the alleged consumer protection violations. First Horizon further argued that even if the undiscussed allegations in the complaint were examined, they were insufficient to support a consumer protection claim. Both defendants argued against retroactive application of the Foreclosure Fairness Act.

Our opinion issued on May 29, 2012. We reversed only the dismissal of Grant's claim for declaratory and injunctive relief. On that issue, we held that the complaint alleged violations of the deed of trust act, chapter 61.24 RCW, sufficient to create a triable issue regarding the defendants' authority to commence foreclosure. "Grant put Quality's authority in question by filing suit to resist the foreclosure, and the question remains unanswered." Grant v. First Horizon Home Loans, noted at 168 Wn. App. 1021, 2012 WL 1920931, at *1, *4, review denied, 176 Wn.2d 1021 (2013).

At the same time, we held that the trial court properly dismissed Grant's claim for damages for wrongful foreclosure under the deed of trust act because there was no case law recognizing such a cause of action. Separately, we affirmed the dismissal of all other claims for damages. With regard to the consumer protection claim, we explained that the only allegation of an unfair or deceptive act or practice concerned Quality's issuance of the notice of default. We rejected Grant's effort to show that Quality's conduct was a per se violation under a statute that had not been enacted at the time of the relevant events. We also concluded he had not argued that Quality's alleged misconduct had the capacity to deceive a substantial portion of the public.

Violation of CPA [Consumer Protection Act]

Grant contends his complaint was adequate to state a claim under the CPA, chapter 19.86 RCW. Although his complaint alleged CPA claims against First Horizon, Stewart Title, and "Defendants," his arguments on appeal pertain only to Quality.

To prevail on a private CPA claim, a plaintiff must establish (1) an unfair or deceptive act or practice; (2) that occurs in trade or commerce; (3) a public interest; (4) injury to the plaintiff; and (5) a causal link between the unfair or deceptive act and the injury suffered. The failure to establish any of the five elements is fatal to a CPA claim.

"Unfair or deceptive act or practice" is not defined by the CPA. It is a question of law whether an alleged act is unfair or deceptive. Consumers may establish an unfair or deceptive act by showing "either that an act or practice 'has a capacity to deceive a substantial portion of the public' or that 'the alleged act constitutes a per se unfair trade practice.' " "Implicit in the definition of 'deceptive' under the CPA is the understanding that the practice misleads or misrepresents something of material importance." Whether an unfair act has the capacity to deceive a substantial portion of the public is a question of fact.

Grant contends Quality's conduct in issuing the notice of default before it had authority to do so and without proving or even investigating the requisite facts "is deception." He does not argue that this conduct had the capacity to deceive a substantial portion of the public. Instead, Grant attempts to show a "per se" violation by reference to the 2011 "Foreclosure Fairness Act" amendments to the DTA. These amendments establish

a mediation program and require lenders to mediate in good faith. Among other things, lenders must provide "[p]roof that the entity claiming to be the beneficiary is the owner of any promissory note or obligation secured by the deed of trust." Failure to do so is a per se violation of the CPA.

*3 Grant argues the 2011 amendments are retroactive. A statute is presumed to operate prospectively unless the legislature indicates otherwise. This presumption can be overcome only if the legislature explicitly provides for retroactivity, the amendment is curative, or the statute is remedial. Grant contends the amendments apply retroactively because they are remedial.

" 'A remedial statute is one which relates to practice, procedures and remedies.' " Such a statute will be applied retroactively "unless it affects a substantive or vested right." But because the 2011 amendments provide a cause of action for the lender's failure to provide documentation that it was not previously required to provide, they affect a substantive right. It would be inappropriate to apply the amendments retroactively.

Because Grant has established neither a per se CPA violation nor the capacity of Quality's conduct to deceive a substantial portion of the public, the trial court properly dismissed the CPA cause of action.

Grant, 2012 WL 1920931, at *7 (footnotes omitted).

Grant moved for reconsideration and for publication. The motion was denied on August 20, 2012. Grant petitioned for review. The Supreme Court denied Grant's petition for review. The mandate from this court issued in April 2013. The case returned to the trial court for further proceedings.

The claim that survived the appeal was Grant's claim for declaratory and injunctive relief, in which he sought to enjoin the foreclosure on the basis that First Horizon and Quality commenced foreclosure proceedings without authority. On remand, First Horizon and Quality moved for summary judgment. They submitted evidence and argument tending to establish their authority to commence foreclosure. They also argued that the claim to enjoin foreclosure under the deed of trust act was moot. So much time had elapsed since the notice of trustee's sale that a sale could no longer be conducted under that notice. Grant did not resist dismissal of his claim for injunctive and declaratory relief. He argued, though, that he was entitled to proceed on the consumer protection claim set forth in his original complaint due to recent developments in the law, specifically Frias v. Asset Foreclosure Services, Inc., 181 Wn.2d 412, 334 P.3d 529 (2014). Frias holds that under appropriate circumstances, violations of the deed of trust act may be actionable as consumer protection violations "regardless of whether a foreclosure sale has been completed," and that such claims are governed by the ordinary principles applicable to all claims under the Consumer Protection Act. Frias, 181 Wn.2d at 433. Grant argued that the alleged violations of the deed of trust act which this court identified as a potential basis for enjoining the foreclosure, also provided a basis for him to seek consumer protection damages under Frias.

To show that First Horizon and Quality commenced foreclosure without lawful authority, Grant referred to evidence those defendants submitted with their motions for summary judgment. Grant argued that the testimony of the records custodian was inadmissible and conflicted with other evidence. He also argued that it remained unclear who actually held the promissory note at the pertinent time; the promissory note was not secured by the deed of trust because the ownership of the two instruments had become separated; and Quality was not a lawfully appointed trustee because the beneficiary declaration did not comply with RCW 61.24.030(7).

*4 Quality replied that it had issued the notice of default in reliance on a beneficiary declaration executed by the stated beneficiary's lawful agent and that Grant had failed to show this was unlawful. First Horizon replied that under this court's opinion, the damages claims had not been remanded, and even if the consumer protection claim were properly before the trial court, the claim would fail for lack of proof.

The trial court heard oral argument on November 20, 2014. Grant urged the court to let him proceed with the consumer protection claim despite this court's decision that the claim had been properly dismissed. He argued that it would be "inequitable" not to allow him "the benefit of the correct interpretation of the law" announced by the Supreme Court in Frias and several other recent cases, which according to Grant had overruled the reasoning employed by this court in

dismissing his consumer protection claim. The colloquy between the trial judge and Grant's attorney set forth Grant's position as follows:

> THE COURT: I take it you're arguing that the decision made by the Court of Appeals was not erroneous at the time given the state of law at the time, but that two years has passed since the Court of Appeals decision and in that time the law has changed in ways that would permit this claim to stand were it brought today; is that correct?
>
> MR. FISHER: Exactly right. It would be one thing if they dismissed everything, then Mr. Grant would be out of luck. But because the case is still alive Mr. Grant gets the benefit of the subsequent Washington Supreme Court decisions that overrule or are inconsistent with the decision in Grant.

The trial court concluded it did not have authority to revive a substantive claim that had been dismissed by this court. The court granted summary judgment to First Horizon and Quality.

Grant appeals. He contends that the superior court erred by failing to give retroactive effect to recent Supreme Court cases involving the Consumer Protection Act.

Grant asserts the fundamental rule of statutory construction that when a statute has been construed by the Supreme Court, that construction operates as if it were originally written into it. Hale v. Wellpinit Sch. Dist. No. 49, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009). That rule does not operate to resurrect before the superior court a claim that has previously been dismissed by this court.

RAP 12.2 makes it clear that the ruling in Grant's first appeal, upon issuance of the mandate in April 2013, became "effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court ... except as provided in rule 2.5(c) (2)." RAP 12.2 is a straightforward application of the law of the case doctrine. The law of the case doctrine stands in part for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation. Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). Applying the law of the case, the trial court correctly ruled it did not have authority to revive the Consumer Protection Act claims when our decision in the first appeal had affirmed the dismissal of those claims.

RAP 12.2 notes the exception to the law of the case doctrine provided in RAP 2.5(c)(2). The exception applies to the appellate courts, not to the superior court:

> **(c) Law of the Case Doctrine Restricted.** The following provisions apply if the same case is again before the appellate court following a remand:
>
> *5 ....
>
> (2) *Prior Appellate Court Decision.* The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

RAP 2.5. An appellate court is not obliged to perpetuate its own error, particularly when there has been an intervening change in controlling precedent between trial and appeal. Roberson, 156 Wn.2d at 42. Under RAP 2.5(c)(2), this court may revisit an earlier decision in the same case that is clearly erroneous under current law if the erroneous decision would work a manifest injustice to one party. Roberson, 156 Wn.2d at 42. The use of the term "may" makes application of RAP 2.5(c)(2) discretionary, not mandatory. Roberson, 156 Wn.2d at 42.

Grant's position is as stated by the trial court. He contends the previous Court of Appeals decision "was not erroneous at the time given the state of law at the time," but in the two intervening years, "the law has changed in ways that would permit this claim to stand were it brought today."

Grant contends the analysis this court employed in his first appeal was effectively overruled in Klem v. Washington Mutual Bank, 176 Wn.2d 771, 295 P.3d 1179 (2013). The Supreme Court issued its opinion in Klem in February 2013, while Grant's petition for review was pending. In Klem, the facts supporting a consumer protection claim were egregious. Quality Loan Services, acting as trustee for a deed of trust securing the home of an elderly woman suffering from dementia, issued a notice of sale that had been falsified with a predated notary acknowledgement. The falsification facilitated a rapid foreclosure sale of the home for one dollar more than was owed. Klem, 176 Wn.2d at 774.

The Supreme Court rejected an argument that only an act or practice declared "unfair" by the legislature could be "unfair" for purposes of the Consumer Protection Act. The court quoted the leading consumer protection case of Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 784-85, 719 P.2d 531 (1986).

In Hangman Ridge, we observed:

> The [first] two elements may be established by a showing that (1) an act or practice which has a capacity to deceive a substantial portion of the public (2) has occurred in the conduct of any trade or commerce. Alternatively, these two elements may be established by a showing that the alleged act constitutes a per se unfair trade practice. A per se unfair trade practice exists when a statute which has been declared by the Legislature to constitute an unfair or deceptive act in trade or commerce has been violated.
>
> Hangman Ridge, 105 Wn.2d at 785-86. Several courts, including the Court of Appeals below, seem to have understood this language to establish the exclusive ways the first two elements of a CPA claim can be established.

Klem, 176 Wn.2d at 784-85. The Klem court discussed how the definitions of "unfair" and "deceptive" have evolved over the years and concluded that "courts, as well as legislatures, must be able to determine whether an act or practice is unfair or deceptive to fulfill the protective purposes of the CPA":

> *6 To 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.
>
> We note in passing that an act or practice can be unfair without being deceptive.

Klem, 176 Wn.2d at 784-87. Grant contends Klem shows that this court defined too narrowly the conduct that could serve as a predicate for a consumer protection action.

Grant fails to demonstrate that Klem changed the controlling precedent of Hangman Ridge in a way that materially affected his case. That is, he does not establish that his consumer protection claim would have survived the first appeal if Klem had been available as a precedent. Grant's opponents were not attempting to constrain or limit the definition of an unfair or deceptive act or practice. Grant provides no basis for criticizing this court's application of Hangman Ridge, even in hindsight. Given the briefing before this court, Klem would not have changed the analysis.

The next case that Grant contends would make a difference is Frias, decided in 2014. There, the Supreme Court held that under appropriate circumstances, violations of the deed of trust act may be actionable under the Consumer Protection Act regardless of whether a foreclosure sale has been completed, and such claims are governed by the ordinary principles applicable to all claims under the Consumer Protection Act. Frias, 181 Wn.2d at 433.

Grant does not show that Frias would have changed the way this court analyzed the briefs in his first appeal. In Frias, the homeowner's opening brief explicitly argued that violations of the deed of trust act could be actionable as consumer protection violations.[2] Nothing prevented Grant from similarly arguing to this court that by alleging violations of the deed of trust act he was also identifying unfair or deceptive practices that could serve as the basis for recovery of damages and attorney fees under the Consumer Protection Act in the absence of a completed sale. Even after Frias, this court would not be expected to reach out and decide in Grant's favor an argument he did not make in his opening brief. As stated in our first opinion, that brief analyzed the consumer protection act claim in terms of Quality's issuance of the notice of default, not in terms of the additional alleged violations of the deed of trust act that he now wishes to pursue.

2 Plaintiff's Opening Brief on Questions Certified to the Supreme Court by the U.S. District Court at 23-24, Frias v. Asset Foreclosure Servs. Inc., No. 89343-8 (Wash. Oct. 31, 2013).

For the same reason, it is improbable that we would have come to a different decision in Grant's first appeal if he had been able to cite the other two cases he now points to as offering new protections for homeowners—Bain v. Metropolitan Mortgage Group, Inc., 175 Wn.2d 83, 120, 285 P.3d 34 (2012), decided on August 16, 2012, a few months after our opinion, and Lyons v. U.S. Bank National Ass'n, 181 Wn.2d 775, 336 P.3d 1142 (2014). These cases, like Frias, state that there is no cause of action for damages for wrongful foreclosure, but a consumer

protection claim can be maintained for violations of the deed of trust act in a foreclosure proceeding that has not been completed by a sale.

*7 Notably, Lyons cites a federal case that presaged Bain and Frias: Vawter v. Quality Loan Serv. Corp. of Wash., 707 F. Supp. 2d 1115 (W.D. Wash. 2010). Lyons, 181 Wn.2d at 785. In Vawter, the court considered whether the factual allegations supporting the plaintiff's claim under the deed of trust act supported, as well, the five elements of a claim under the Consumer Protection Act. Vawter, 707 F. Supp. 2d at 1129-30. Vawter was decided on April 22, 2010. Grant cited Vawter in his opening brief to this court filed in May 2011, but only to urge *rejection* of its holding that there is no cause of action for damages for wrongful foreclosure. [3] Grant did not argue that each violation of the deed of trust act that he had itemized could also serve a predicate for a Consumer Protection Act claim.

3 Brief of Appellant at 28-30, Grant v. First Horizon Home Loans, No. 66721-1 (Wash. Ct. App. May 24, 2011).

We conclude that while we have discretion under RAP 2.5(c)(2) to reconsider the dismissal of Grant's consumer protection claim under the law as it exists today, it would not serve the interests of justice to do so. The law defining what constitutes an unfair or deceptive practice under the Consumer Protection Act has not significantly changed since Grant appeared before this court the first time. Hangman Ridge is still good law and a leading case. The recent refinements articulated in Klem and other cases would not have helped Grant establish the consumer protection claim that Grant presented in his first appeal. [4]

4 Grant's reply brief argues that the "necessities of the case," a term used in RAP 2.4(a), require this court to acknowledge that under current law, damages are a form of relief available to him. He cites Akrie v. Grant, 183 Wn.2d 665, 668, 335 P.3d 1087 (2015). In Akrie, the Supreme Court granted affirmative relief from a damage award to respondents who had withdrawn their appeal, quoting RAP 2.4(a)(2) (an appellate court may grant a respondent affirmative relief " 'if demanded by the necessities of the case.' ") Akrie, 183 Wn.2d at 668. Because Grant is not a respondent, RAP 2.4(a)(2) and Akrie do not bear on our analysis.

The exception to the law of the case doctrine in RAP 2.5(c)(2) is not intended to give a party a second chance to develop and articulate a theory that was at best inchoate in the first round. "In all of its various formulations the doctrine seeks to promote finality and efficiency in the judicial process." Roberson, 156 Wn.2d at 41, 44. From the beginning, Grant has failed to show that he has a serious consumer protection claim to be litigated. Our previous decision is not clearly erroneous, and bringing this case to an end is not manifestly unjust.

Affirmed.

WE CONCUR:

All Citations

Not Reported in P.3d, 2016 WL 3080730

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Appendix 2

168 Wash.App. 1021

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 1.

Jack GRANT, Appellant,

v.

FIRST HORIZON HOME LOANS, a.k.a. First Horizon Corporation, d/b/a First Horizon Home Loans; Quality Loan Service Corporation of Washington, a Washington corporation; Stewart Title, d/b/a Stewart Title of Bellingham; Stewart Title of Western Washington, Inc., a Washington corporation, d/b/a Stewart Title of Bellingham; Stewart Title of Bellingham, Inc., a Washington corporation, d/b/a Stewart Title of Bellingham, Respondents.

No. 66721–1–I.

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May 29, 2012.

Appeal from Whatcom County Superior Court; Honorable Steven J. Mura, J.

Attorneys and Law Firms

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UNPUBLISHED OPINION

ELLINGTON, J.

*1 Jack Grant filed suit against his lender and others to enjoin foreclosure proceedings on his beachfront home in Whatcom County. In addition to an injunction, he sought damages for breach of contract, bad faith, intentional infliction of emotional distress, interference with contractual relations, negligence, and violation of statutory requirements. The court granted the defendants' CR 12(b)(6) and CR 12(c) motions to dismiss. With one exception, we affirm the trial court. Grant's complaint alleges facts sufficient to create a triable issue with respect to the defendants' right to foreclose. On that issue, we reverse and remand for further proceedings.

BACKGROUND

In December 2003, Grant obtained an $800,000 construction loan from Horizon Bank to make improvements to his beach cottage in Blaine, Washington. The following year, Grant submitted an application to First Horizon Home Loans for a new loan of $838,000 to refinance the construction loan. As a condition for the new loan, Stewart Title informed Grant that his wife must be added to the title and must sign the note. Additionally, the loan amount approved was only $800,000. Grant objected to the changes, but he ultimately executed a quitclaim deed adding his wife to the title. Grant and his wife then signed the note and executed a deed of trust. According to Grant, he received an oral commitment that the quitclaim deed would be held in a file and not recorded except in the event of default. In fact, the quitclaim deed was recorded immediately. Grant and his wife divorced in 2009. Grant was awarded the beach property as his separate property.

The loan documents are central to this dispute. The promissory note identifies the lender as "First Horizon Corporation d/b/a First Horizon Home Loans."[1] It requires monthly payments of $4,732, and provides that "the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.' "[2]

1 Clerk's Papers at 655.

2 *Id.*

The deed of trust identifies the trustee as Stewart Title, the lender as First Horizon Corporation d/b/a First Horizon Home Loans, and the beneficiary and "nominee for Lender and Lender's successors and assigns" as Mortgage Electronic Registration Systems, Inc. (MERS).[3] With

respect to the lender's interests and rights, the deed of trust states:

3 Clerk's Papers at 659.

> The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to the Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. [4]

4 Clerk's Papers at 660.

The deed of trust describes MERS' interests and rights as follows:

> Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument. [5]

5 *Id.*

***2** The deed of trust also provides that it and the note can be sold without notice:

> The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with the transfer of servicing. [6]

6 Clerk's Papers at 669.

With respect to the trustee, the deed of trust provides:

> In accordance with Applicable Law, Lender may from time to time appoint a successor trustee to any Trustee appointed hereunder who has ceased to act. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law. [7]

7 Clerk's Papers at 670.

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

> The Bank of New York Mellon f/k/a The Bank of New York, as Trustee for the holders of the Certificates, First Horizon Pass–Through Certificates Series FH05–01, by First Horizon Home Loans, a division of First Tennessee Bank National Association, Master Servicers, in its capacity as agent for the Trustee under the Pooling and Servicing Agreement c/o MetLife

Home Loans a division of MetLife Bank NA.[8]

8 Clerk's Papers at 293.

(We refer to this conglomeration as BNYM).

Grant wrote to First Horizon several times before and after the notice of default to request a "standstill" of his payments while he attempted to sell the home. He received no favorable response.

On July 20, 2010, MERS recorded an assignment to BNYM of the deed of trust "together with the Promissory Note secured by said Deed of Trust".[9] On September 10, 2010, BNYM appointed Quality as successor trustee of the deed of trust. In this capacity, Quality issued a notice of trustee's sale on September 28, 2010. The notice set a sale date of January 7, 2011.

9 Clerk's Papers at 300.

Grant filed a complaint in Whatcom County Superior Court seeking to enjoin the trustee's sale. He also asked the court to declare the note and deed of trust void, quiet title in his favor, and award damages and attorney fees.

Grant's complaint focused, in large part, on the conduct of First Horizon and Stewart Title during the closing of his loan in December 2004. He alleged he had signed the note and deed of trust under duress. He also argued that, as a result of his wife being made a co-owner of the property, he had been "unable to use, sell or otherwise deal with the [p]roperty" before the market collapsed, causing him to lose money.[10]

10 Clerk's Papers at 229–30.

*3 Grant also alleged several irregularities in the transfers and assignments of the note and deed of trust. Among other things, he alleged that MERS, as "nominee" for the beneficiary, had no authority to transfer or sell the note or deed of trust. Grant also alleged MERS' purported assignment of the note to BNYM was invalid because MERS has never been the holder of the note. Additionally, Grant claimed that BNYM's designation of Quality as its agent and its subsequent appointment of Quality as successor trustee were invalid, and that Quality could not be appointed as trustee in any event because Stewart Title had never resigned that role. Accordingly, Grant argued, none of the defendants had authority to foreclose.

Based on these allegations, Grant asserted causes of action for (1) breach of contract; (2) bad faith/"breach of duties"; (3) intentional infliction of emotional distress; (4) interference with contractual relations; (5) negligence; and (6) violation of various statutory requirements. Grant also asserted several affirmative defenses, presumably to the enforcement of the note and deed of trust, including "wrongful conduct, undue influence and duress."[11] On November 5, 2010, the trial court granted Grant's request for a temporary restraining order enjoining the trustee's sale.

11 Clerk's Papers at 241.

First Horizon, Stewart Title, and Quality each filed motions to dismiss under CR 12(b)(6) or CR 12(c), arguing that most of Grant's claims were based on conduct occurring in 2004 and therefore barred by the statutes of limitation. Quality and First Horizon also argued that Grant's claims for intentional infliction of emotional distress, bad faith/breach of duty, Consumer Protection Act (CPA) violations, "wrongful foreclosure," and negligence failed on their merits.

After argument on the motions, the court concluded the statute of limitations had run on the claims of intentional infliction of emotional distress, on the interference with contractual relationship, negligence, and CPA claims. The court also indicated defendants were entitled to judgment on the breach of contract and wrongful initiation of foreclosure claims.[12] The court directed the parties to submit a proposed order conforming to its ruling.

12 The court noted, however, that Grant may have a cause of action for wrongful foreclosure if the property is eventually lost at a trustee sale.

Before the hearing on the proposed orders, Grant moved to amend his complaint to add First Tennessee Bank National Association and The Bank of New York Mellon as defendants. In his proposed amended complaint, Grant alleged that the discovery rule and the doctrine of equitable tolling applied to save his claims from the statute of limitations. He also asserted a new affirmative defense of recoupment and new causes of action, including violations of the Uniform Commercial Code (UCC) and the Truth in Lending Act (TILA), breach of Stewart Title's

"express agreement to hold the Quitclaim Deed in their file," [13] and civil fraud.

13 Clerk's Papers at 70.

Though no order had yet been entered, Grant also filed a motion for reconsideration on grounds that the statute of limitations had been tolled.

*4 At the February 4, 2011 hearing on the proposed orders, the court noted that any motion for reconsideration was premature. The court then signed an order granting the defendants' motions. Grant did not seek reconsideration. He now appeals.

DISCUSSION

Standard of Review

An order dismissing a claim under CR 12(b)(6) or CR 12(c) is reviewed de novo. [14] Dismissal under CR 12 is appropriate only if " 'it appears beyond doubt that the plaintiff cannot prove any set of facts to justify recovery.' " [15] In making this determination, " 'a plaintiff's allegations are presumed to be true and a court may consider hypothetical facts not included in the record.' " [16] CR 12(b)(6) motions "should be granted 'sparingly and with care' and 'only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.' " [17]

14 *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005).

15 *Id.* (quoting *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998)); *Pasado's Safe Haven v. State*, 162 Wn.App. 746, 752, 259 P.3d 280 (2011).

16 *Burton*, 153 Wn.2d at 422 (quoting *Tenore*, 136 Wn.2d at 330)).

17 *Tenore*, 136 Wn.2d at 330 (quoting *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988)).

Deeds of Trust Act

Quality issued the notice of default as an agent of BNYM, which it identified as the current owner/beneficiary of the note. In his complaint, Grant alleged it was not clear that either BNYM or Quality had any right to issue the notice of default or the notice of trustee sale that followed.

Under the deeds of trust act (DTA), chapter 61.24 RCW, the trustee must "have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust" before issuing a notice of trustee's sale. [18] Thus, if BNYM is not the owner of the note, then neither it nor Quality as its agent and/or trustee had authority to foreclose, and the initiation of that proceeding was unlawful.

18 RCW 61.24.030(7)(a).

The record indicates that BNYM acquired whatever interest it has in the note and deed of trust by assignment from MERS. But nothing in the record establishes that MERS had any interest in the note to convey. The note makes no mention of MERS. It identifies only "First Horizon Corporation d/b/a First Horizon Home Loans" as the "Note Holder." [19] There is no evidence that First Horizon transferred the note to MERS or BNYM.

19 Clerk's Papers at 655.

Quality argues the DTA does not require it to prove its authority to file the notice of default before doing so. That may be so, [20] but that does not change the requirement that Quality must in fact *be* authorized to act on behalf of the beneficiary. Grant put Quality's authority in question by filing suit to resist the foreclosure, and the question remains unanswered. Dismissal of this claim on a CR 12(b)(6) or CR 12(e) motion was therefore improper.

20 We note, however, that subsequent amendments to the DTA include such a requirement as part of the foreclosure mediation program. *See* RCW 61.24.163(8)(b)(iii).

Grant also alleged Quality violated the DTA because it issued the notice of default as an agent of BNYM before BNYM had acquired any interest in the deed of trust. The notice of default was issued on July 15, 2010. The assignment by MERS to BNYM did not occur until July 20, 2010.

In a somewhat similar scenario, the Massachusetts high court held that foreclosures were invalid. In *U.S. Bank National Association v. Ibanez,* the court addressed two cases in which banks foreclosed on properties and purchased them back at the foreclosure sales.[21] The banks then filed complaints to clear title, requiring them to establish the validity of the foreclosure sales.[22] The banks were not the original mortgagees, but claimed they had been assigned the mortgages though a complex securitization process. But the only evidence available indicated the banks acquired the mortgages by assignment only *after* the foreclosure sales occurred, and thus had no interest at the time of the foreclosure sale.[23] Accordingly, the banks were not permitted to quiet title. Likewise here, the only evidence indicates that BNYM acquired an interest in the deed of trust only *after* commencing the foreclosure process.

21 458 Mass. 637, 941 N.E.2d 40 (2011).

22 *Id.* at 645.

23 *Id.* at 640–45.

***5** Quality distinguishes *Ibanez* on the basis that it applies Massachusetts, not Washington, law. But the court's principal holding was that "the foreclosing entity must hold the mortgage at the time of the notice and sale in order to accurately identify itself as the present holder in the notice and in order to have the authority to foreclose under the power of sale."[24] This proposition is consistent with Washington law.[25]

24 *Id.* at 651.

25 *See, e.g.,* RCW 61.24.030(7)(a) (requiring that "before the notice of trustee's sale is recorded ... the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust").

Quality also characterizes Grant's argument as a challenge to the timing of the recordation of MERS' assignment to BNYM of the deed of trust. Quality argues there is no requirement under Washington law for a deed of trust assignment to be recorded before a foreclosure can be initiated. But recordation is not the issue. The question here is whether BNYM was entitled to foreclose. This requires a determination of whether MERS had any interest in the note it purported to assign to BNYM (or whether BNYM obtained the note through some other means), and whether this transfer occurred before the notice of default was issued.

If Quality lacked authority to act because its principal BNYM had no interest in the note, then the foreclosure proceedings were contrary to the DTA.[26] Thus, Grant's complaint contains allegations sufficient to survive CR 12 motions to dismiss. We therefore reverse the dismissal of this claim and remand for further proceedings.[27]

26 A related issue is whether MERS can serve as a lawful beneficiary of the deed of trust under these circumstances. The DTA defines "beneficiary" as "the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation." RCW 61.24.005(2). The documents here establish that MERS did not hold the note; First Horizon did. Whether MERS can act as a beneficiary without holding the note is a question currently pending before the Washington Supreme Court. *See Bain v. Mortg. Elec. Registration Sys., et al.,* No. 86206–1; *Selkowitz v. Litton Loan Servicing, LP, et al.,* No. 86207–9.

27 At oral argument, Quality's counsel faulted Grant's failure to identify the specific statutory provision he claimed had been violated. Unlike its federal counterpart, CR 12 does not require such detail. CR 12 does not permit dismissal of a claim as long as there is some hypothetical set of facts that could justify relief. *See McCurry v. Chevy Chase Bank, FSB,* 169 Wn.2d 96, 101–03, 233 P.3d 861 (2010).

Wrongful Foreclosure

Grant next argues the court should not have dismissed his damages claim for wrongful foreclosure under the DTA. He cites no provision of the DTA and no case law recognizing such a cause of action. In *Vawter v. Quality Loan Service Corp.,* a federal district court concluded that none exists under Washington law.[28] We agree.

28 707 F.Supp.2d 1115 (2010).

In *Vawter,* homeowners filed suit under the DTA to enjoin a foreclosure. They alleged many of the same deficiencies in the foreclosure process that Grant alleges here. Like Grant, the Vawters also alleged a number of tort claims,

wrongful foreclosure, and violations of the TILA and CPA.[29] Because, like Grant, the Vawters were successful in halting the trustee's sale, at least temporarily, the court considered their claim one for "wrongful institution of nonjudicial foreclosure proceedings."[30] The court identified four reasons the claim failed as a matter of law.

29 *Id.* at 1120.

30 *Id.* at 1123.

First, no provision of the DTA establishes a cause of action for wrongful institution of foreclosure proceedings. "Standing alone, the fact that the DTA establishes procedures and requisites for the nonjudicial foreclosure process does not necessarily give rise to a cause of action."[31]

31 *Id.*

Second, the DTA provides a comprehensive scheme for the nonjudicial foreclosure process, including specific remedies. "Interjecting a cause of action for damages for wrongful institution of nonjudicial foreclosure proceedings into the DTA's scheme would potentially upset the balance struck by the legislature ."[32] Further, the court reasoned, if the legislature wished to permit a cause of action for damages, it could easily have done so.[33]

32 *Id.* (citing *Udall v. T.D. Escrow Servs., Inc.*, 132 Wn.App. 130, 190 P.3d 908 (2006)).

33 *Id.* We note that the legislature amended the DTA in 2009 to provide that a borrower/grantor does not waive certain claims for damages by failing to bring a civil action to enjoin a foreclosure sale. RCW 61.24.127; LAWS OF 2009, ch. 292 § 6. However, the provision contemplates that such an action would arise only *after* a foreclosure sale has occurred. RCW 61.24.127(2)(a) ("The claim must be asserted or brought within two years from the date of the foreclosure sale."); RCW 61.24.127(2)(c) ("The claim may not affect in any way the validity or finality of the foreclosure sale.").

***6** Third, recognizing a cause of action for damages for wrongful institution of foreclosure proceedings would undermine one of the goals of the DTA, "that the nonjudicial foreclosure process should be efficient and inexpensive."[34] Allowing grantor/borrowers to sue for damages for attempted wrongful foreclosure would increase the expense and inconvenience of the nonjudicial foreclosure process "while at the same time failing to address directly the propriety of the foreclosure or advancing the opportunity of interested parties to prevent wrongful foreclosure."[35]

34 *Vawter*, 707 F.Supp.2d at 1123; *see also Plein v. Lackey*, 149 Wn.2d 214, 228, 67 P.3d 1061 (2003).

35 *Vawter*, 707 F.Supp.2d at 1124.

Finally, the *Vawter* court observed that even if such a cause of action existed, "this court is not persuaded that it could be maintained without a showing of prejudice."[36] The Vawters failed to allege in their complaint that they suffered prejudice as a result of the defendants' actions.

36 *Id.*

Grant asks this court to distinguish *Vawter* because it was decided by a federal court that relied to some extent on unpublished opinions by Washington courts. But the *Vawter* court's reference to unpublished decisions does not undermine its reasoning, which is sound and pertinent to this case.

Grant also suggests that, unlike the Vawters, he can establish prejudice from wrongful institution of foreclosure proceedings. He contends even the initiation of the foreclosure process diminishes his ability to preserve any of the equity in the home. He relies on *BFP v. Resolution Trust Corp.*, a fraudulent transfer case wherein the United States Supreme Court noted that "property sold within the time and manner strictures of state-prescribed foreclosure is simply worth less than property sold without such restrictions."[37] But any damage in this case is wholly speculative, as the house has not yet been sold. Further, whatever diminution of value is attributable to the home's appearance on foreclosure lists would have occurred after proper initiation of foreclosure proceedings as well. Thus, Grant's own admitted default is the cause of his damages.

37 511 U.S. 531, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994).

Because there is no cause of action for wrongful initiation of foreclosure proceedings, the court properly dismissed that claim.

Breach of the Duty of Good Faith

Grant next contends that all parties owed him the duty of good faith and breached that duty.[38] Under RCW 61.24.010(4), a trustee "has a duty of good faith to the borrower, beneficiary, and grantor." Grant relies on *Albice v. Premier Mortgage Services* to argue that a trustee's duty of good faith includes the duty to "take reasonable and appropriate steps to avoid sacrificing the debtor's interest in the property."[39] He contends Stewart Title and Quality breached this duty because "[n]either ... obtained an appraisal of the Property."[40] Presumably, Grant believes the failure to obtain an appraisal will result in the trustee accepting a low bid at auction. This possibility is too speculative to establish a claim of bad faith. Dismissal was appropriate.

38 Grant also contends that Stewart Title and First Horizon owed him fiduciary duties and breached them. But he expressly abandoned this claim below:

> Plaintiff did not intend to suggest in the Complaint that any of the Defendants owe him *fiduciary* duties.... [T]he word 'fiduciary' was incorrectly used in paragraph 7.6 of the Complaint and is hereby withdrawn. However, as pointed out in the aforementioned prior Motion, the law is clear that the Quality Loan owes the Plaintiff the duties of good faith and fair dealing, the duty to act impartially, and the duty to avoid sacrificing the Plaintiff's equity.

Clerk's Papers at 156. Although Grant attempts to resurrect the claim on appeal, we are aware of no authority that would permit him to do so. We therefore decline to address it.

39 157 Wn.App. 912, 934, 239 P.3d 1148 (2010), *rev. granted*, 170 Wn.2d 1029, 249 P.3d 623 (2011).

40 Appellant's Br. at 36.

Violation of CPA

*7 Grant contends his complaint was adequate to state a claim under the CPA, chapter19.86 RCW. Although his complaint alleged CPA claims against First Horizon, Stewart Title, and "Defendants," his arguments on appeal pertain only to Quality.

To prevail on a private CPA claim, a plaintiff must establish (1) an unfair or deceptive act or practice; (2) that occurs in trade or commerce; (3) a public interest; (4) injury to the plaintiff; and (5) a causal link between the unfair or deceptive act and the injury suffered.[41] The failure to establish any of the five elements is fatal to a CPA claim.[42]

41 *Indoor Billboard/Washington, Inc. v. Integra Telecom*, 162 Wn.2d 59, 74, 170 P.3d 10 (2007).

42 *Id.*

"Unfair or deceptive act or practice" is not defined by the CPA. It is a question of law whether an alleged act is unfair or deceptive.[43] Consumers may establish an unfair or deceptive act by showing "either that an act or practice 'has a capacity to deceive a substantial portion of the public' or that 'the alleged act constitutes a per se unfair trade practice.' "[44] "Implicit in the definition of 'deceptive' under the CPA is the understanding that the practice misleads or misrepresents something of material importance."[45] Whether an unfair act has the capacity to deceive a substantial portion of the public is a question of fact.[46]

43 *Holiday Resort Community Ass'n v. Echo Lake Assocs., LLC*, 134 Wn.App. 210, 226, 135 P.3d 499 (2006).

44 *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 344, 779 P.2d 249 (1989) (quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Co.*, 105 Wn.2d 778, 785–86, 719 P.2d 531 (1986)).

45 *Holiday Resort*, 134 Wn.App. at 226.

46 *Id.* at 226–27.

Grant contends Quality's conduct in issuing the notice of default before it had authority to do so and without proving or even investigating the requisite facts "is deception."[47] He does not argue that this conduct had the capacity to deceive a substantial portion of the public. Instead, Grant attempts to show a "per se" violation by reference to the 2011 "Foreclosure Fairness Act" amendments to the DTA.[48] These amendments establish a mediation program and require lenders to mediate in good faith. Among other things, lenders must provide "[p]roof that the entity claiming to be the beneficiary is the

owner of any promissory note or obligation secured by the deed of trust."[49] Failure to do so is a per se violation of the CPA.[50]

47 Appellant's Br. at 38.

48 *Id.* at 39–41.

49 RCW 61.24.163(8)(b)(iii).

50 RCW 61.24.135(2).

Grant agues the 2011 amendments are retroactive. A statute is presumed to operate prospectively unless the legislature indicates otherwise.[51] This presumption can be overcome only if the legislature explicitly provides for retroactivity, the amendment is curative, or the statute is remedial.[52] Grant contends the amendments apply retroactively because they are remedial.

51 *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 223, 173 P.3d 885 (2007).

52 *Id.*

" 'A remedial statute is one which relates to practice, procedures and remedies.' "[53] Such a statute will be applied retroactively "unless it affects a substantive or vested right."[54] But because the 2011 amendments provide a cause of action for the lender's failure to provide documentation that it was not previously required to provide, they affect a substantive right. It would be inappropriate to apply the amendments retroactively.

53 *Id.* (quoting *State v. McClendon*, 131 Wn.2d 853, 861, 935 P.2d 1334 (1997)).

54 *Id.*

Because Grant has established neither a per se CPA violation nor the capacity of Quality's conduct to deceive a substantial portion of the public, the trial court properly dismissed the CPA cause of action.

Truth in Lending Act

***8** Grant also argues the court improperly dismissed his claims under TILA and its regulations.[55] Grant made no such claim in his complaint, though he made reference to TILA violations in his opposition to defendants' motions and in response to their replies.[56] Although Grant attempted to amend his complaint to add a TILA claim, that motion was denied. The court did not dismiss any TILA claim because none was made. Accordingly, there was no error.

55 15 U.S.C. § 1635(b); 12 C.F.R. § 226.

56 In the latter of these pleadings, Grant points out that the provision he contends has been violated "went into effect January 1, 2011," well after the notice of default was issued here. Clerk's Papers at 102.

UCC Defenses

Grant contends he is entitled to defend against the foreclosure and pursue a claim in recoupment on the basis of the duress and undue influence he allegedly suffered at closing. We disagree.

Grant obtained the loan to refinance an outstanding construction loan. He contends he closed the loan under duress because he was required to sign a quitclaim deed and documents reflecting that his wife would also be on title. Grant objected, but decided to make these changes because he was afraid of "the threat of mortgage rates significantly rising" and had "other strains concurrently happening" in his life.[57]

57 Clerk's Papers at 229.

As the trial court accurately observed, "That's not duress. That's a business decision."[58] Grant responded, "[I]n hindsight, I agree."[59] The court did not err by dismissing the duress defense. With respect to dismissal of his remaining defenses, Grant presents no argument or authority that the court's decision was in error. We therefore decline to address them.[60]

58 RP (Jan. 14, 2011) at 24.

59 *Id.*

60 Grant likewise fails to provide any argument to support his claim that duress, undue influence, fraud and fraudulent concealment entitled him to quiet title. We also do not address that issue.

Statute of Limitations

Many of Grant's claims centered on the December 1, 2004 loan closing transaction and the requirement that Grant execute a quitclaim deed and that his wife sign the loan documents. These included intentional or negligent infliction of emotional distress, negligence, interference with contractual relations, breach of contract, bad faith and some components of his CPA claims.

The tort claims are subject to a three-year statute of limitations.[61] The breach of contract claim against Stewart Title that was based on a purported oral agreement not to file the quitclaim deed is also subject to a three-year statute of limitations.[62] The CPA claims are subject to a four-year limitations period.[63]

61 *Sabey v. Howard Johnson & Co.*, 101 Wn.App. 575, 592, 5 P.3d 730 (2000) (negligence); *Cox v. Oasis Physical Therapy, PLLC*, 153 Wn.App. 176, 192, 222 P.3d 119 (2009) (intentional infliction of emotional distress); *City of Seattle v. Blume*, 134 Wn.2d 243, 251, 947 P.2d 223 (1997) (interference with business expectancy/contractual relations); 29 DAVID K. DEWOLF, WASHINGTON PRACTICE: WASHINGTON ELEMENTS OF AN ACTION § 3:6, at 54 (2011-12 ed.); RCW 4.16.080(2).

62 RCW 4.16.080(3).

63 RCW 19.86.120.

The defendants moved to dismiss these claims for failure to file within the limitations period. In response, Grant argued that the "interference causes of action arose and continued until Plaintiff was finally able (in 2009) to file a quitclaim deed after the divorce to restore Plaintiff's title to the property" and that losses and damage caused by that interference, from emotional distress, and from the violations of the CPA "continue to this day."[64]

64 Clerk's Papers at 157.

The court concluded that "the statute of limitations has run on the claims of intentional infliction of emotional distress, on the interference with contractual relationship, negligence, [and] Consumer Protection Act claim[s]."[65] Immediately thereafter, without mentioning the statute of limitations, the court also dismissed Grant's breach of contract and bad faith claims against Stewart Title and First Horizon.

65 RP (Jan. 14, 2011) at 27.

*9 After the court's oral ruling but before the hearing in which the court would consider the parties' draft orders, Grant filed a motion for reconsideration. For the first time, Grant argued the statute of limitations did not bar his claims because the bad faith, intentional infliction of emotional distress, interference with contractual relations, negligence, and violation of statutory requirements claims involve ongoing tortious activity and that the continuing tort doctrine, equitable tolling, and discovery rule should apply. The court did not consider or rule upon the motion for reconsideration because "to the extent that there's been a motion for reconsideration before I've even entered the order, we are pulling the cart before the horse."[66] Grant did not renew his motion once the court entered its order.

66 RP (Feb. 4, 2011) at 32.

Failure to raise an issue before the trial court precludes a party from raising the issue on appeal.[67] Applicability of the discovery rule, equitable tolling, or the continuing tort doctrine was not properly raised below and is thus not properly before us. As Grant offers no other challenge to the statute of limitations, we conclude the court properly dismissed the claims arising from the 2004 loan closure.

67 *Mavis v. King County Pub. Hosp. Dist. No. 2*, 159 Wn.App. 639, 651, 248 P.3d 558 (2011); RAP 2.5.

Motion to Amend Complaint

Grant next challenges the court's denial of his motion for leave to amend his complaint to add parties and add fraud and fraudulent concealment claims. A court has broad discretion to grant or deny such a motion; the decision " 'will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.' "[68]

68 *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

After a responsive pleading has been served, a party may amend a complaint "only by leave of court or by written consent of the adverse party." [69] Leave to amend shall be freely given where justice so demands, but should not be granted where amendment would result in prejudice to the opposing party or be futile. [70] The timing of a motion to amend is also relevant. [71]

69 CR 15(a).

70 *Horsley*, 137 Wn.2d at 505–06.

71 *See, e.g., Doyle v. Planned Parenthood of Seattle–King County, Inc.*, 31 Wn.App. 126, 639 P.2d 240 (1982)

The court did not articulate why it denied Grant's motion. But none of the proposed amendments was based on new information, and there was no reason the new parties and claims could not have been included in the original complaint. Grant waited until after the court's dispositive oral ruling to file the motion, so the court could reasonably have determined the motion was untimely or the delay was prejudicial to the defendants. [72] We see no abuse of discretion.

72 *Id.* at 130–31 ("When a motion to amend is made after the adverse granting of summary judgment, the normal course of proceedings is disrupted and the trial court should consider whether the motion could have been timely made earlier in the litigation.").

Judicial Notice

Grant contends the court erred by refusing to accept the dissolution court's findings pertaining to the character of the property at issue. He offers no authority to suggest a court abuses its discretion in this way. Under ER 201(d), a court "shall take judicial notice if requested by a party and supplied with the necessary information." Grant does not assert that he was entitled to mandatory judicial notice or that he provided the court with the dissolution court's findings. Further, he alleges no prejudice. The court did not err.

Procedural Issues

***10** Grant next contends neither First Horizon nor Quality have "standing" to bring a motion under CR 12(b)(6) or 12(c). This is nonsense. They were named defendants and as such were authorized to bring motions under CR 12.

Grant also argues that Quality's CR 12(c) motion was untimely when judged by the rule pertaining to motions for summary judgment. [73] He provides no analysis or authority for the proposition that the motion should be so judged and asserts no prejudice even if the motion was untimely. Whatcom County local rules direct that all motions other than ones for summary judgment shall be filed and served no later than nine court days prior to the hearing. [74] Quality's motion was filed and served by December 28, more than nine days before the January 14, 2011 hearing. There was no error.

73 *See* CR 56(c) (summary judgment motions must be filed at least 28 days before a hearing on the motion).

74 WCCR 77.2(d)(1).

CONCLUSION

The court erred in dismissing Grant's claims with respect to the authority of First Horizon and/or Quality Loans to commence foreclosure proceedings under the DTA. We therefore reverse and remand for further proceedings on that issue. In all other respects, we affirm. [75]

75 Grant's request for attorney fees and costs on appeal under RAP 18.1 and RCW 11.96A.150(1) is denied. That statute, which pertains to trust and estate dispute resolution, does not apply here.

WE CONCUR: LEACH, C.J., and DWYER, J.

All Citations

Not Reported in P.3d, 168 Wash.App. 1021, 2012 WL 1920931

APPENDIX C

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

JACK GRANT,

Appellant,

v.

FIRST HORIZON HOME LOANS, aka FIRST HORIZON CORPORATION dba "First Horizon Home Loans"; and QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington corporation,

Respondents,

and

UNKNOWN JOHN and JANE DOES 1-10, XYZ CORPORATIONS 1-10, ABC LIMITED LIABLITY COMPANIES 1-10; and 123 BANKING ASSOCIATIONS 1-10; STEWART TITLE dba "Stewart Title of Bellingham"; STEWART TITLE OF WESTERN WASHINGTON, INC., a Washington corporation dba "Stewart Title of Bellingham"; STEWART TITLE OF BELLINGHAM, INC., a Washington corporation dba "Stewart Title of Bellingham"; and UNKNOWN JOHN and JANE DOES 11-20; XYZ CORPORATIONS 11-20; and ABC LIMITED LIABLITY COMPANIES 11-20;

Defendants.

No. 72905-5-I

ORDER DENYING MOTION FOR RECONSIDERATION

No. 72905-5-I/2

Appellant, Jack Grant, has filed a motion for reconsideration of the opinion filed on May 31, 2016. Respondents have not filed an answer to appellant's motion. The court has determined that said motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

DATED this 22nd day of June, 2016.

FOR THE COURT:

Becker, J.

Judge

APPENDIX D

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

JACK GRANT, Appellant, v. FIRST HORIZON HOME LOANS, aka FIRST HORIZON CORPORATION dba "First Horizon Home Loans"; and QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, a Washington corporation, Respondents, and UNKNOWN JOHN and JANE DOES 1-10, XYZ CORPORATIONS 1-10, ABC LIMITED LIABLITY COMPANIES 1-10; and 123 BANKING ASSOCIATIONS 1-10; STEWART TITLE dba "Stewart Title of Bellingham"; STEWART TITLE OF WESTERN WASHINGTON, INC., a Washington corporation dba "Stewart Title of Bellingham"; STEWART TITLE OF BELLINGHAM, INC., a Washington corporation dba "Stewart Title of Bellingham"; and UNKNOWN JOHN and JANE DOES 11-20; XYZ CORPORATIONS 11-20; and ABC LIMITED LIABLITY COMPANIES 11-20; Defendants.	No. 72905-5-I ORDER GRANTING MOTION FOR EXTENSION OF TIME TO FILE MOTION TO PUBLISH OPINION AND DENYING MOTION TO PUBLISH OPINION

Appellant, Jack Grant, has filed a motion to publish the opinion filed on May 31, 2016, and a motion for extension of time to file the motion to publish. Respondents

have not filed an answer to appellant's motions. The court has determined that appellant's motion for extension of time to file the motion to publish should be granted and appellant's motion to publish should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for extension of time to file the motion to publish is granted and appellant's motion to publish the opinion filed on May 31, 2016, is denied.

DATED this 19th day of July, 2016.

FOR THE COURT:

Becker, J.

Judge