Supreme Court No. 96407-6
Court of Appeals No. 50242-9-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

WELLS FARGO BANK, N.A., AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN TRUST 2006-1, ASSET-BACKED CERTIFICATES, SERIES 2006-1, its successors in interest and/or assigns,

Plaintiff/Respondent

v.

BARRY M. GARDNER AKA BARRY M. GARDNER SR., MARY BETH GARDNER, et al.,

Defendants/Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Petition for Review before this Court arises out of a judicial foreclosure action brought by Wells Fargo Bank as Trustee (the "Trust")[1] after borrowers Barry and Mary Beth Gardner (the "Gardners") defaulted on a note and deed of trust held by the Trust. It is undisputed that the Gardners defaulted in 2009, and that the Trust satisfied all the elements of a foreclosure action. The only dispute is whether the Gardners can raise a viable affirmative defense and CPA counterclaim based on a mediator's finding during mediation under the Foreclosure Fairness Act, RCW 61.24.163 ("FFA"), that the Trust's prior servicer did not mediate in good faith because it failed to timely provide documents during the mediation. The Gardners contend that foreclosure can be precluded indefinitely as a result of this finding, in spite of the fact that the Trust's former and current loan servicer continued to negotiate and exchange offers with the Gardners for over a year after the mediation, the Gardners were never able to make a reasonable offer and instead made only successive inferior offers, and the Trust did not initiate judicial foreclosure until two years after the mediation.

The Washington Court of Appeals, Second Division, correctly concluded that the mediation finding could not be raised as an affirmative

[1] Respondent's complete name is Wells Fargo Bank, N.A., as Trustee for Option One Mortgage Loan Trust 2006-1, Asset-Backed Certificates, Series 2006-1, its successors and/or assigns.

defense to a judicial foreclosure. The clear language of the mediation statute supports this interpretation, as well as the structure of the Deed of Trust Act and legislative history. The Court further correctly found that the Gardners' CPA counterclaim was unavailing, as they could show no injury caused by the alleged violation. The Gardners raise no error or issues warranting this Court's review, and their Petition should be denied.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the Court of Appeals err in finding that a mediator's certification that a party failed to act in good faith during mediation under RCW 61.24.163 cannot serve as a defense to a judicial foreclosure?

2. Did the Court of Appeals err in affirming grant of summary judgment on the Gardners' CPA counterclaim where there was no evidence of injury or causation?

3. Is there any basis, as required under the Washington Rules of Appellate Procedure ("RAP"), Rule 13.4(b), for this Court to accept discretionary review of the Court of Appeals' unpublished opinion affirming grant of summary judgment in this routine foreclosure case?

4. Is the Trust entitled to an award of attorney's fees and costs incurred in responding to the Gardners' Petition for Review?

III. COUNTERSTATEMENT OF THE CASE

A. The Gardners Take Out a Loan to Purchase Property

In 2005, the Gardners signed a promissory note ("Note") and Deed of Trust encumbering property located in Kitsap County, Washington (the "Property"), for the purpose of obtaining a residential mortgage loan for $900,000 to refinance the Property. (CP 420-426; CP 411.) It is undisputed that the Trust is the current holder of the Note. (CP 418, 424.)

B. The Gardners Default and Seek a Discounted Payoff

The Gardners admit they defaulted on the Loan in 2009 and have not made any mortgage or tax payments on the Property since then. (CP 481-482, 489). As a result, the Trust's prior loan servicer commenced a non-judicial foreclosure and the Gardners requested a referral to foreclosure mediation under the Foreclosure Fairness Act, RCW 61.24.163 ("FFA"), which is a section of the Deed of Trust Act, RCW 61.24 et seq. ("DTA"). (Doc. 66, Ex. E).

In January 2010, the Gardners began consulting with Steve McLean, a "Reverse Mortgage Advisor," to discuss the possibility of acquiring a reverse mortgage on their home, which the Gardners hoped would allow them to reach a settlement with the Trust to pay off the Loan. Thereafter, the parties participated in a first mediation on October 25, 2011, which was unsuccessful. (CP 464.) Then, on April 19, 2012, the Gardners offered the Trust a discounted payoff of $377,727 to extinguish

the Trust's lien, based on their belief that they could obtain a reverse mortgage of $407,727 and provide the remaining amount to the Trust after subtracting $30,000 for legal fees and repairs. (CP 538-39.) The Trust's servicer responded the next day, advising that the Property had been appraised at $470,000 and that the Trust would allow a discounted payoff of $423,000, and possibly even go as low as $413,000, but would not absorb the cost of the Gardners' legal fees and repairs. (CP 536.) On May 31, 2012, the Gardners offered an even lower offer of $375,000. (CP 299).

The parties engaged in a second mediation on September 20, 2012. (CP 464). It is undisputed that no reverse mortgage was ever approved by McLean (CP 516-18); accordingly, the Gardners were not actually able to offer funds at the mediation. Nonetheless, after the September 20, 2012 mediation, the mediator issued a report which checked a box that the beneficiary failed to mediate in good faith because of a "[l]ack of timely provision of documents." (CP 463).

The parties continued to negotiate. On November 13, 2012, the Gardners made an offer of $379,321. (CP 552, 545). The Trust's servicer rejected the offer as being too low and requested the Gardners rework the offer. (CP 551). The Gardners never provided another offer above $379,321. (CP 300). In March 2013, servicing of the Loan transferred to Ocwen Loan Servicing, LLC. On April 10, 2013, Ocwen sent a notice of default to the Gardners. In response, the Gardners offered $300,000 on

October 23, 2013 to resolve the lien, an offer down almost eighty thousand dollars from the offer provided almost a year earlier. (CP 300).

C. The Trust Brings a Judicial Foreclosure Action

In September 2014, the Trust filed the judicial foreclosure lawsuit. (Doc. 2). The Gardners responded with an Amended Answer, asserting that the Loan servicer's failure to mediate in good faith at the September 2012 mediation was an affirmative defense to judicial foreclosure under former RCW 61.24.163(14) and a violation of the CPA. (Doc. 18.)

On Wells Fargo's motion, the Trial Court struck the defense under CR 12(f), but did not strike the counterclaim. The Court later granted summary judgment as to the Gardners' counterclaim by Court Order on March 23, 2017. (CP 644-46).

D. The Gardners Appeal and Petition for Review

The Gardners filed a Notice of Appeal, disputing the Trial Court's interpretation of RCW 61.24.163(14)(b) (2012). The Court of Appeals of Washington, Division 2, affirmed the Trial Court. *Wells Fargo Bank, N.A. for Option One Mortg. Loan Tr. 2006-1, Asset-Backed Certificates, Series 2006-1 v. Gardner*, No. 50242-9-II, 2018 WL 4334227 (Wash. Ct. App. Sept. 11, 2018). The Court carefully considered the disputed statute and relied on both the structure of the statute and the last antecedent rule to determine that the statute did not allow the use of the mediation certificate as a defense to a judicial foreclosure. *Id*. at *5.

As to the Gardners' counterclaim, the Court of Appeals held that the Gardners had failed to prove injury and causation under the CPA, a required element of such a claim. *Id*. at *7. Although the Gardners asserted that the lost opportunity cost them attorney fees, the Court of Appeals held that they presented no evidence or argument from which the Court could determine if they lost fees that were recoverable as damages in a CPA claim, as set forth in the Washington Supreme Court's *en banc* decision, *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 57 (2009). The only potential injury they established was the loss of their home to foreclosure; however, they failed to establish actual causation – another required element – because they failed to show how the timely provision of documents would have altered the situation and avoided injury. *Gardner*, 2018 WL 4334227, at *8.

The Gardners now bring this Petition for Review.

IV. REASONS WHY REVIEW SHOULD BE DENIED

This Court should deny the Gardners' Petition for Review because the Gardners' Petition fails to show any actual error in the Court of Appeals' ruling and does not satisfy the Court's standards for review.

A. The Gardners' Petition for Review is Unsupported by Authority and Raises No Legitimate Legal Issue

The Gardners' Petition fails to identify any error in the Court of Appeals' interpretation of the law or review of evidence.

1. RCW 61.24.163(14)'s text precludes the Gardners' affirmative defense

The Gardners argue that the Court of Appeals erred in applying the last antecedent rule in its interpretation of RCW 61.24.163(14) (2012). This decision was in accord with the one other case discussing the issue, *Thurman v. Wells Fargo Home Mortg. Co.*, No. 12-1471, 2013 WL 3977622, at *1 (W.D. Wash. Aug. 2, 2013) (quoting RCW 61.24.163(14)). Further, the Court's interpretation is supported by the rules of statutory construction, the context of the statute as a whole, legislative intent, and the recognized difference between nonjudicial and judicial foreclosures.

First, the Court of Appeals properly utilized the last antecedent rule to understand the legislature's intent in drafting the statute. The rule is a grammar rule "which states that qualifying or modifying words and phrases refer to the last antecedent." *State v. Bunker*, 169 Wn. 2d 571, 578, 238 P.3d 487 (2010). "Related to this rule is the corollary principle that the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one." *Id*. (internal citations omitted). The two rules are not applied if the whole of the statute indicates a contrary legislative intent, or if applying the rule "would result in an absurd or nonsensical interpretation" or render parts of the statute superfluous. *Id*.

Here, the statute provided:

> (a) The mediator's certification that the beneficiary failed to act in good faith in mediation constitutes a defense to the nonjudicial foreclosure action that was the basis for initiating the mediation....
>
> (b) The mediator's certification that the beneficiary failed to act in good faith during mediation does not constitute a defense to a judicial foreclosure or a future nonjudicial foreclosure action if a modification of the loan is agreed upon and the borrower subsequently defaults.

RCW 61.24.163(14) (2012). Subsection (b) does not include a comma prior to introducing the qualification "if a modification of the loan is agreed upon and the borrower subsequently defaults." *Id*. Accordingly, under the last antecedent rule, the qualification applies only to nonjudicial foreclosures (and not judicial foreclosures), if this makes sense with the structure of the statute and legislative history. The rule was utilized without error exactly as this Court utilized it in an *en banc* decision, *City of Spokane v. Cty. Of Spokane*, 158 Wn. 2d 661, 673-74, 146 P.3d 893 (2006), wherein the Court found that the qualification at the end of the sentence referred to the last antecedent listed in the sentence.

Here, the last antecedent rule renders an interpretation that is consistent with the entire DTA and the legislative intent of creating additional protection to borrowers facing non-judicial foreclosure. First, as noted by the Washington Court of Appeals, subsection (a) of the statute expressly states that the mediator's certification that the beneficiary failed to act in good faith is a defense to "the nonjudicial foreclosure action that

was the basis for initiating the mediation." RCW 61.24.163(14)(a) (2012). "If the legislature had intended to extend the affirmative defense to both judicial and nonjudicial foreclosures, it could have clearly expressed that intent by including both terms in subsection (a)." *Gardner*, 2018 WL 4334227, at *5. The Gardners never respond to this point.

The Gardners argue that legislative intent compels this Court to ignore the last antecedent rule because the FFA was enacted due to the legislature's recognition that homeowners need access to a neutral third party to assist in foreclosure mediation, (Petition at 4), suggesting the legislature intended the mediation requirement to apply prior to *any type* of foreclosure. To the contrary, the official finding and declaration by the legislature, quoted only in-part by the Gardners (Petition at 4), states: "Washington's *nonjudicial foreclosure* process does not have a mechanism for homeowners to readily access a neutral third party to assist them in a fair and timely way." *Official Note*, subsection (c), RCW 61.24.005 (emphasis added). The statute was intended to create a mediation process for *non*-judicial foreclosures only, as is clear from the fact that the mediation requirement was added to the DTA, which is part of a comprehensive statutory scheme enacted to provide an alternative to judicial foreclosure. *Albice v. Premier Mortg. Servs. Of Washington, Inc.*, 174 Wn. 2d 560, 567, 276 P.3d 1277 (2012) ("The procedural requirements for conducting a trustee sale are extensively spelled out in

[the DTA]"). Like other provisions of the DTA, the mediation requirement exclusively applies to the non-judicial foreclosure process. *See* RCW 61.24.160(3) (2012) (noting housing counselor may refer a borrower to mediation under RCW 61.24.163 after the borrower has obtained the notice of default required prior to nonjudicial foreclosure); RCW 61.24.163(1) (2012) (same); RCW 61.24.163(14)(a) (2012) (noting mediator's finding that beneficiary failed to act in good faith in mediation "constitutes a defense *to the* nonjudicial foreclosure action that was the basis for initiating the mediation") (emphasis added). Interpreting RCW 61.24.163(14)(b) as providing an affirmative defense only for non-judicial foreclosures is wholly consistent with the structure and intent of the DTA, which provides additional protections for borrowers facing non-judicial foreclosures.

It is far from surprising that the mediation requirement was not intended to attach to a future judicial proceeding, for the difference between judicial and non-judicial foreclosures is explained by a long history of precedent from Washington Courts. The DTA was drafted to create an efficient and inexpensive foreclosure system that promoted the stability of land titles and provided adequate protection from wrongful foreclosure. *Albice*, 174 Wn. 2d at 567. In contrast with judicial foreclosures, the DTA "provides a comparatively inexpensive mechanism for lenders to foreclose." *United States v. Vallejo*, 660 F. Supp. 535, 538

(W.D. Wash. 1987). Accordingly, "[t]here are substantial differences in the respective rights of lenders and borrowers under each [process]." *Washington Fed. v. Harvey*, 182 Wn. 2d 335, 337, 340 P.3d 846 (2015) (internal citations omitted). The non-judicial process eliminates rights that a borrower has under a judicial foreclosure, such as "statutory redemption rights, RCW 61.24.050," the right to a homestead exemption, and the checks and balances of the judicial process and requirement of proving a right to foreclose in court. *Id*. In exchange, the act typically does not allow a lender to pursue a deficiency judgment against the borrower. *Harvey*, 182 Wn. 2d at 336; RCW 61.24.100. Further, the act requires strict compliance with its specific steps "[b]ecause the act dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures." .*Albice*, 174 Wn. 2d. at 567. Here, the legislature has opted to add to those requirements a mechanism for mediation.

The Gardners argue that the Trust should not be allowed to evade the consequences of its failure to mediate in good faith by abandoning the nonjudicial foreclosure and initiating a lawsuit. (Petition at 5.) The argument disregards the fact this is exactly what RCW 61.24.163(14) requires, since it clearly precludes use of the efficient, less costly non-judicial process if there is a finding of lack of good faith during the mediation. Further, the argument is not compelling given the Trust's loan servicers in this case continued to negotiate with the Gardners for over a

year after the mediation, but the Gardners never provided an acceptable offer and instead continually lowered the amount they were willing to pay.

The Gardners' interpretation would also potentially preclude any subsequent foreclosure after a finding of lack of good faith in mediation – whether non-judicial or judicial – unless the borrowers are provided a loan modification at some time after the mediation. RCW 61.25.163(14)(b) (no foreclosure defense where borrowers subsequently provided a loan modification and default). The interpretation would create a right for borrowers to obtain a loan modification, in spite of clear Washington law recognizing that there is no such right, and a lack of any legislative history supporting the intent to create such a right. *See McAffee v. Select Portfolio Servicing, Inc*., 193 Wn. App. 220, 233-34, 370 P.3d 25, 32 (2016) (noting borrowers' argument that respondents "had a duty to help her modify the terms of her loan" was unsupported by any contract term and that there was no private right of action under HAMP to require a loan modification); *Badgett v. Security State Bank*, 116 Wn.2d 563, 572, 807 P.2d 356 (1991) (holding a lender is "under no good faith obligation" to renegotiate a loan agreement).[2]

[2] *Badgett* is still good law, and was not overruled by the FFA. It continues to be cited after the FFA's enactment. *Bucci v. Northwest Trustee Services, Inc*., 197 Wn. App. 318, 387 P.3d 1139 (2016) (unpublished portion) ("Bucci's disappointment over the denial of his desire for a loan modification is not actionable," *citing Badgett*). The Gardners "appear to believe that a beneficiary's breach of its duty of good faith somehow automatically entitles the borrower to [loss mitigation]. That is not the law." *Thurman*, 2013 WL 3977622 at *4.

The Gardners cite to *In re Smith*, 139 Wn.2d 199, 986 P.2d 131 (1999), as an example where this Court declined to apply the last antecedent rule because it led to an interpretation that was inconsistent with the context of the statute as a whole. (Petition at 7.) The actual analysis and statutory context at issue in *Smith* is more complicated than the analysis the Gardners provide in their Petition. The statute at issue provided two different qualifications within it, and the Department of Corrections argued that one qualification applied only to the last antecedent while the other qualification applied to both antecedent terms. *Id*. at 205. The Court determined that this reading made no sense and would lead to an "absurd consequence." *Id*. at 205 (citing Former RCW 9.94A.150(1) (1996)). It rejected the DOC's interpretation, noting that the "last antecedent" rule means "the last word, phrase, or clause that can be made an antecedent *without impairing the meaning of the sentence.*" *Id*. (emphasis in original). Here, the Court of Appeals' interpretation of RCW 61.25.163(14)(b) does not impair the meaning of the sentence and is consistent with application of the last antecedent rule and its comma corollary, as well as the entire context of the statute and the DTA.

The bar on judicial foreclosures proposed by the Gardners is unnecessary in light of the protections already supplied by the judicial process, and the availability of other affirmative equitable defenses in judicial foreclosures. Further, the facts of the instant case demonstrate

how prejudicial such a bar would be: Here, the Gardners would invoke a prior finding of lack of good faith in a non-judicial foreclosure mediation to preclude a judicial foreclosure action taking place years after the mediation, and after the Gardners have repeatedly been unable to make a reasonable settlement offer, and while the Gardners continue to reside at the Property free of charge, without making payments on the loan.

2. The Gardners' Counterclaim failed as a matter of law because the Gardners failed to prove an injury and causation

The Gardners allege that the Trust's failure to mediate in good faith by failing to bring documents to the 2012 mediation violated the DTA and therefore constituted an unfair practice under the Washington Consumer Protection Act. (Doc. 18). In order to survive summary judgment, the Gardners were required to present evidence of the five elements for a CPA claim: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation. *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 782, 295 P.3d 1179 (2013) (quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986)). The "failure to prove any of the elements is fatal to a CPA claim." *Johnson v. Camp Auto., Inc.*, 148 Wn. App. 181,

185, 199 P.3d 491 (2009) (quotations omitted). Here, the Gardners failed to show any evidence of injury or causation.[3]

As to evidence of injury, the Court of Appeals correctly noted that "both the Gardners stated in their depositions that they were not seeking any monetary damages." *Gardner*, 2018 WL 4334227, at *7. The Court then acknowledged that the loss of their home through foreclosure could constitute an injury under the CPA. *Id*. Here, however, the Gardners did not lose their residence following the mediation; rather, the non-judicial foreclosure was abandoned, efforts to settle continued for over a year, and they finally were judicially foreclosed on due to their continued failure to pay on the loan or make a reasonable settlement offer. Further, the Gardners argued that they had expended additional attorney fees as a result of the failure to mediate in good faith, but the Washington Court of Appeals determined that they provided no evidence or argument to allow the Court to determine that the type of attorney fees incurred were recoverable under *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 62, 204 P.3d 885 (2009). *Gardner*, 2018 WL 4334227, at *7. In their Petition, the Gardners fail to dispute this finding.

Instead, the Gardners argue that the Court of Appeals failed to address whether they suffered an actionable injury for "the loss of the

[3] The Trust also contends that the Gardners failed to show a public interest impact, but do not seek review of this issue and instead reserve the right to file a supplemental brief if the Court accepts review.

opportunity to mediate in good faith." (Petition at 12.) They are incorrect. The Court of Appeals noted their argument but implicitly held that the amorphous allegation of a lost opportunity must be connected to some more concrete injury, which is why the Court then evaluated whether there was injury and causation associated with the alleged consequences of the "lost opportunity" – such as the loss of title to real property or the incurring of additional attorney fees. *Gardner*, 2018 WL 4334227, at *7.

The Gardners argue that the Court should have found the lost opportunity itself was actionable, just as the loss of goodwill can be actionable even though it is not specifically quantifiable.[4] They fail to point to any authority supporting this argument. *Reid v. Countrywide Bank, N.A.*, No. C13-0099-JCC, 2013 WL 7219500, at *4 (W.D. Wash. July 11, 2013) ("Nor have they directed the Court to any authority stating that the loss of opportunity to engage in such negotiation is a cognizable injury.") Further, the argument is clearly erroneous because this Court has held that an injury under the CPA must be to "business or property." *Ambach v. French*, 167 Wn. 2d 167, 171-72 (2009). Unlike incurring attorney fees or the loss of a residence, the loss of an opportunity to mediate in good faith is not a direct injury to a business or property. *See, e.g., Panag*, 166 Wn.2d at 57.

[4] The Gardners also mistakenly argue that it "is incontestable that a good faith mediation never occurred here." (Petition at 12.) To the contrary, RCW 62.24.163(14)(a) provides: "In any action to enjoin the foreclosure, the beneficiary is entitled to rebut the allegation that it failed to act in good faith."

Further, a "lost opportunity" is distinguishable from "loss of goodwill." The latter constitutes an actual loss that can be proven to have occurred, even if the amount of the loss is difficult to quantify. *See, e.g.*, *Nordstrom, Inc. v. Tampourlos*, 107 Wn. 2d 735, 741, 733 P.2d 208, 211 (1987) (CPA violation "injured Nordstom's business reputation and goodwill.") Here, the "lost opportunity" is entirely speculative as to whether any appreciable injury occurred, as there is no evidence supporting the idea that having the opportunity to participate in a good faith mediation would have led to a different result. *Kremerman v. Open Source Steel, LLC*, No. C17-953-BAT, 2018 WL 5785441, at *19 (W.D. Wash. Nov. 5, 2018) (holding CPA plaintiff failed to prove loss of profits, goodwill, or opportunity because there was no evidence that plaintiff was harmed in any appreciable way). While such a "lost opportunity" claim would be speculative in any context, it is highly dubious in the Gardners' case, where there is no evidence that the mediator's lack of good faith finding had anything to do with the Gardners' inability to settle. The Gardners fail to cite to a single instance in which they offered an acceptable monetary sum as a discounted payoff to the Trust, and fail to point to any evidence that different conduct at the mediation would have achieved a different outcome. In fact, as Mr. McLean testified, the Gardners were never approved for a reverse mortgage, which was the

Gardners' only attempt at renegotiating their loan agreement through a heavily discounted payoff. (CP 516-18.)

As to causation, the Gardners weakly claim that the alleged DTA violation was the "but for" cause of losing their home to a *judicial* foreclosure rather than a non-judicial foreclosure. First, this argument was not clearly raised in their Opening Brief on appeal, and should not be considered at this point. (*See* Opening Br., 12-13.) Further, there is no evidence in the record that a "good faith mediation" would have led to a non-judicial foreclosure; abandonment of a non-judicial for a judicial proceeding is possible at any time. Moreover, the Trust had an absolute right to proceed judicially and cannot be held liable on that account. *Patrick v. Wells Fargo Bank, N.A.*, 196 Wn. App. 398, 410, 385 P.3d 165 (2016) (declining to find a CPA violation based on failure to give a loan modification because the record showed that there was no obligation to provide a loan modification.) Finally, the Gardners did not experience a judicial foreclosure because of the mediation – they experienced it because they failed to pay on their loan, failed to cure their default, and failed to make an acceptable settlement offer at any time. *Patrick*, 196 Wn. App. at 410 (noting trustee's sale occurred not because of CPA violation, but because borrowers failed to pay on their loan, cure their default, or attempt to restrain the foreclosure sale); *Malloy v. Quality Loan Serv. of Washington*, No. 75136-1-I, 2017 WL 6335994, at *5 (Wash. Ct. App.

Dec. 11, 2017) (unpublished) (borrowers failure to pay on their loan was the "but for" cause of the foreclosure).

Understandably, the Gardners only briefly mention how a non-judicial foreclosure rather than a judicial foreclosure could have possibly harmed them, stating "[t]hey would have known their rights and options and not incurred the costs of defending against a judicial foreclosure." (Petition at 14.)[5] There is no evidence in the record that the change in the Gardners "rights and options" caused an injury to business or property, nor is there evidence that they incurred financial loss (which they freely could have chosen not to incur by not contesting the foreclosure). Even if they did incur attorney fees, they did not prove this on summary judgment[6] or provide evidence or argument sufficient to show if fees incurred were recoverable under *Panag*, 166 Wn.2d at 57.

[5] If anything, the Gardners obtained an advantage as a result of the abandoned non-judicial foreclosure. They were able to live in the residence years longer without making payments on the Loan, and obtained the rights afforded in the context of judicial foreclosures. Because the Gardners were already discharged from personal liability in bankruptcy (CP 357-58), it was irrelevant to them that the Trust could not obtain a deficiency through a non-judicial foreclosure.

[6] The Gardners testified under oath at their depositions that they had suffered no monetary injury (CP 317, 323). In their updated 2017 interrogatory responses, filed with their opposition to the Trust's motion for summary judgment, the Gardners additionally alleged that they sought damages "in an amount equal to the appropriate percentage of statistical success in good faith mediation ... multiplied by the fair market value of rental costs based upon the life expectancy of [the Gardners]." (CP 579). They failed to mention or provide evidence of attorney fees incurred, even though it was their duty to do so on summary judgment.

B. The Gardners' Petition Does Not Satisfy any Requirement for Acceptance of Review

The Gardners' Petition suffers a further defect in that it fails to satisfy this Court's requirements for review under RAP 13.4(b). There is no conflict among the various courts or significant question under the State or U.S. Constitution. RAP 13.4(b)(1)-(3). The Gardners also have not identified an important public interest. RAP 13.4(b)(4). Even if they had, their Petition lacks merit given the Gardners fail to show a single instance of error in the Court of Appeals' ruling.

V. ENTITLEMENT TO ATTORNEY FEES

If this Court denies the Petition, the Trust respectfully requests that the Court award reasonable attorney's fees and costs pursuant to RAP 18.1(a) for time spent preparing an Answer to the Petition. The Deed of Trust executed by the Gardners includes a provision awarding attorney's fees, including appellate fees, to a prevailing party, (CP 23), and an award is supported by RAP 18.1(a) and RCW 4.84.330.

VI. CONCLUSION

For the reasons set forth above, the Trust requests that this Court deny the Gardners' Petition for Review.

RESPECTFULLY SUBMITTED this 28th day of January, 2019.

By *s/ Emilie K. Edling*
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Of Attorneys for Respondent

CERTIFICATE OF SERVICE

I the undersigned declare as follows: I am over the age of 18 years and am not a party to this action. I certify that on the 28th day of January, 2019, I caused a true and correct copy of this **ANSWER TO PETITION FOR REVIEW** to be served on the following via first class mail, postage prepaid:

Karen E. Richmond
Ronald D. Richmond
Richmond & Richmond Ltd.
1521 Piperberry Way S.E., Suite 135
Port Orchard, WA 98366-1231

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: January 28, 2019

s/Rachel M. Perez
Rachel M. Perez

HOUSER & ALLISON, APC (SEATTLE

January 28, 2019 - 9:48 AM

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