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No.63207-8

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

DOROTHY ("DOTTIE") L. BROWN, by and through her guardian
JOYCE M. RICHARDS,

Appellant,

v.

WELLS FARGO BANK, NATIONAL ASSOCIATION, a foreign
corporation doing business in the State of Washington, and BEVERLY
ANN HOGG,

Respondents.

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BRIEF OF APPELLANT

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I. INTRODUCTION

Dorothy L. Brown (“Dottie”)¹ is a 96-year-old woman living in a long-term care facility. Shortly before she was hospitalized, her son Barry Brown had her appoint him as attorney-in-fact. He and his fiancée, Beverly Hogg, promptly began spending her money on themselves. Barry also applied for a reverse mortgage on his mother’s home. Wells Fargo Bank, National Association (“Wells Fargo”) approved the loan, although Dottie was not eligible because she no longer lived in the home.

Eventually a guardian was appointed and charged with recovering Dottie’s assets from Barry and Hogg. At the first summary judgment hearing, the trial court dismissed Dottie’s claims against Hogg, and continued trial to allow Barry to sue Wells Fargo for its advice with respect to the reverse mortgage.

First Barry, then Dottie sued Wells Fargo. The trial court dismissed both claims at summary judgment. It also entered judgment against Barry for the theft of his mother’s home equity, leaving only Barry’s misuse of Dottie’s other assets for trial. Dottie dismissed her remaining claims against Barry, and appealed the dismissal of Hogg and Wells Fargo.

¹ First names of members of the Brown family are used for clarity. No disrespect is intended.

Dottie seeks reversal of Hogg's dismissal of Hogg because Hogg helped to take her equity and refuse to repay the money taken. Dottie seeks reversal of summary judgment for the bank because it wrongly approved Barry's loan application and refused to repay its profit from the improper reverse mortgage.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Dottie Brown's motion for summary judgment against Wells Fargo Bank, N.A.

2. The trial court erred by granting Wells Fargo Bank, N.A.'s motion for summary judgment dismissing Dottie Brown's claims.

3. The trial court erred by granting Beverly Hogg's motion for summary judgment dismissing Dottie Brown's claims against her.

4. The trial court erred by denying Dottie Brown's motion for summary judgment against Beverly Hogg.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Should the denial of Dottie Brown's motion for summary judgment against Wells Fargo be reversed, when the bank submitted no evidence that it complied with state and federal laws designed to protect elderly home owners from fraud and abuse? (Assignment of Error 1)

2. Should summary judgment dismissing Wells Fargo be reversed, when Dottie Brown submitted evidence establishing that it

approved an application for a mortgage against her home that was submitted by Barry Brown, without evidence that Barry was authorized to act on her behalf, and without evidence that she met the federal eligibility requirements for the loan? (Assignment of Error 2)

3. Should summary judgment dismissing Beverly Hogg be reversed, when the evidence showed that Hogg converted Dottie Brown's home equity by knowingly taking possession of reverse mortgage proceeds and refusing to repay the funds? (Assignment of Error 3)

4. Should the denial of Dottie Brown's motion for summary judgment against Beverly Hogg be reversed, when Beverly Hogg submitted no evidence other than bare allegations to refute the evidence against her? (Assignment of Error 4)

IV. STATEMENT OF THE CASE

1. Should the denial of Dottie Brown's motion for summary judgment against Wells Fargo be reversed, when the bank submitted no evidence that it complied with state and federal laws designed to protect elderly home owners from fraud and abuse? (Assignment of Error 1)

2. Should summary judgment dismissing Wells Fargo be reversed, when Dottie Brown submitted evidence establishing that it approved an application for a mortgage against her home that was submitted by Barry Brown, without evidence that Barry was authorized to

act on her behalf, and without evidence that she met the federal eligibility requirements for the loan? (Assignment of Error 2)

3. Should summary judgment dismissing Beverly Hogg be reversed, when the evidence showed that Hogg converted Dottie Brown's home equity by knowingly taking possession of reverse mortgage proceeds and refusing to repay the funds? (Assignment of Error 3)

4. Should the denial of Dottie Brown's motion for summary judgment against Beverly Hogg be reversed, when Beverly Hogg submitted no evidence other than bare allegations to refute the evidence against her? (Assignment of Error 4)

V. ARGUMENT

Dottie Brown should have been granted summary judgment against Wells Fargo because the bank failed to come forward with any evidence to rebut Dottie's evidence that it failed to comply with state and federal law. In addition, Dottie's request for treble damages up to \$10,000 and attorneys' fees and costs, pursuant to RCW 19.86.090, should be granted. Conversely, summary judgment in favor of Wells Fargo should be reversed in light of the prima facie evidence in support of Dottie's claims.

Dottie Brown should have been granted summary judgment against Hogg, because Hogg presented nothing but bare denials that she was in unlawful possession of Dottie's money, which was contradicted by the

evidence before the court. Summary judgment in favor of Hogg should be reversed in light of the prima facie evidence of Hogg's culpability.

A. APPELLATE COURT REVIEW IS DE NOVO

An appellate court reviews a trial court's decision on summary judgment de novo. *Go2net, Inc. v. Freeyellow.Com, Inc.*, 158 Wn.2d 247, 253, 143 P.3d 590 (2006). Summary judgment should be granted when the admissible evidence presented shows there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The evidence and the reasonable inferences are to be considered in the light most favorable to the nonmoving party. *Wagg v. Estate of Dunham*, 146 Wn.2d 63, 67, 42 P.3d 968 (2002) (citation omitted). Questions of fact may be determined as a matter of law when reasonable minds could reach but one conclusion. *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005) (citation omitted).

To defeat summary judgment, the nonmoving party must come forward with evidence sufficient to rebut the moving party's contentions. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). Bare assertions and conclusions will not satisfy this burden. *Id.* at 9.

B. WELLS FARGO VIOLATED FEDERAL AND STATE LAW

The evidence established that Wells Fargo deliberately ignored legal safeguards imposed on home equity conversion loans, the express purpose of which is to protect elderly homeowners from predatory lenders and elder abuse. Wells Fargo failed to come forward with any evidence to rebut its failure to comply with the consumer counseling requirement for reverse mortgages; the residency requirement. It also failed to rebut the evidence that it negligently relied on a power of attorney form that expressly required a written determination of incompetence before it became effective.

National lending institutions, including federally chartered banks and their subsidiaries, are heavily regulated by federal law; they are also subject to state laws that do not conflict with federal regulation. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 127 S. Ct. 1559, 1567, 167 L.Ed.2d 389 (2007). Here, Wells Fargo violated both federal banking law as well as state laws designed to protect individuals such as Dottie Brown.

1. Wells Fargo Failed To Comply With Federal Law

The United States Congress authorized the type of loan at issue here “to meet the special needs of elderly homeowners” by allowing them to obtain future payments secured by their residence, which is often their chief or even their only asset. Reverse mortgages were created by 1994

amendments to the Truth in Lending Act (“TILA”), 15 U.S.C. § 1601 et seq., known as the “Home Ownership and Equity Protection Act” (“HOEPA”). Reverse mortgages were defined as follows:

The term “reverse mortgage transaction” means a nonrecourse transaction in which a mortgage, deed of trust, or equivalent consensual security interest is created against the consumer's principal dwelling--

- (1) securing one or more advances; and
- (2) with respect to which the payment of any principal, interest, and shared appreciation or equity is due and payable (other than in the case of default) only after--
 - (A) the transfer of the dwelling;
 - (B) the consumer ceases to occupy the dwelling as a principal dwelling; or
 - (C) the death of the consumer.

15 U.S.C. § 1602(bb).

For example, an elderly homeowner could find herself unable to pay the increasing cost of property tax on a home that is fully paid for; yet on a fixed income, she might be unable to afford the monthly payments required in an ordinary mortgage.

To ensure that reverse mortgages were available only to those for whom they were intended, and were not abused, Congress established specific eligibility requirements: the mortgagor must be at least 62 years old, must live in the home that will secure the mortgage, and must be made fully aware of the consequences of obtaining the mortgage. See 12

U.S.C. § 1715z-20(d). Thus, a bank may not enter into such a loan unless its borrower has obtained independent credit counseling, and its borrower lives in at home. Wells Fargo ignored both requirements.

a) Wells Fargo approved a reverse mortgage without valid consumer counseling.

Wells Fargo did not require consumer counseling by Dottie Brown. Wells Fargo argues that Dottie was competent to manage her own affairs until she was hospitalized on February 22, 2006. CP 718. Yet, to comply with the counseling requirement, it relied on Barry's telephonic participation on February 16, 2006. CP 190.

The reverse mortgage regulations require a bank to provide names and addresses of counseling agencies which have been approved by the Secretary of Housing and Urban Development as soon as a consumer contacts a bank about a reverse mortgage. 24 C.F.R. § 206.41(a). This requirement should ensure that elderly people who qualify for a reverse mortgage do not lightly lose their equity in their homes. In this case, however, Wells Fargo accepted consumer counseling given to the borrower's son, without any evidence that he was authorized to act on his mother's behalf at the time.

In response to Dottie's claim that Wells Fargo failed to comply with this requirement, the bank neither disputed the requirement, nor offered

not one iota of evidence that the requirement was reasonably satisfied by Barry's telephonic counseling. Instead, the bank wants to have its cake and eat it too: on the one hand it claims the power of attorney was effective when Dottie signed it on February 15, because she was competent until hospitalized on February 22, and on the other hand, it claims it could rely on Barry's counseling on February 16 to comply with federal and state laws governing consumer loans. The its inconsistent and unsupported assertions are insufficient to defeat summary judgment.

b) Wells Fargo ignored the residency requirement.

Wells Fargo did not even try to rebut the evidence that it failed to comply with the requirement that a borrower must be living in her own home to obtain a reverse mortgage. CP 808-17. Nor did Wells Fargo submit any evidence that it reasonably believed Dottie would be living in the home to be secured in the future. The bank simply ignored this requirement in closing the loan and distributing \$198,057.86 to Barry and his fiancée.

It is undisputed that a reverse mortgage is a loan that is secured by a consumer's principal dwelling, which becomes immediately due and payable when the consumer "ceases to occupy the dwelling as a principal dwelling." See 12 C.F.R. § 226.33(a). Again, Wells Fargo made no effort to show that it complied with federal law.

2. Wells Fargo Violated Consumer Protection Law

Extending a reverse mortgage that allowed Barry to drain the equity from his mother's home, on the strength of the documents in Wells Fargo's possession, violated not only federal law, but also Washington's Consumer Protection Act (CPA). The fact that a business operates in a highly regulated arena does not exempt it from liability under Washington's CPA. *See, e.g., Short v. Demopolis*, 103 Wn.2d 52, 60-61, 691 P.2d 163 (1984), *Ethridge v. Hwang*, 105 Wn. App. 447, 457, 20 P.3d 958 (2001). Rather, such areas are often regulated precisely because consumers are particularly vulnerable to unfair and deceptive practices. This is true of residential home loans.

Moreover, a plaintiff need not specify the laws violated by the bank does not mean that she cannot rely on such violations to support her CPA claim. *Anderson v. Wells Fargo Home Mortgage, Inc.*, 259 F. Supp. 2d 1143, 1147 (W.D. Wash. 2003). In *Anderson*, Wells Fargo's failure to provide a mandated disclosure within three days of a loan application was held to be a deceptive act for purposes of the Washington CPA. *Id.*; *see also Pierce v. NovaStar Mortg., Inc.*, 238 F.R.D. 624, 629 (W.D. Wash. 2006) (defendant "committed a *per se* violation of the CPA by failing to comply with written disclosure requirements under the CLA, TILA, and RESPA"). Here, Dottie relies on an extremely similar violation – the

failure to require that the elderly person whose equity will be mortgaged receive independent consumer counseling, at a time when the bank argues she was fully competent.

Washington's CPA prohibits (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) having an impact on public interest; (4) injury to plaintiff in his or her business or property; and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). The first element may be satisfied by a statutory violation that the legislature has declared to be deceptive, or where an act "had the capacity to deceive a substantial portion of the public." *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 30, 948 P.2d 816 (1997) (quoting *Hangman Ridge*, at 785). A plaintiff relying on a statutory violation must show that the violation proximately caused damages, and that he or she was within the class of people that the statute sought to protect. *Keyes v. Bollinger*, 31 Wn. App. 286, 640 P.2d 1077 (1982).

At summary judgment, Wells Fargo argued that a statute must specifically state that its violation constitutes an unfair or deceptive act or trade practice is incorrect. The court simply confirmed that such acknowledgements by the legislature were appropriate; it did not limit unfair acts to those specifically enumerated by the legislature. *Hangman*

Ridge Training Stables, Inc., 105 Wn.2d at 786-87. The bank's failure to comply with the federal reverse mortgage requirements constituted an unfair and deceptive act for purposes of Washington's consumer protection law.

The trial court rejected Dottie consumer protection claim on the grounds that Wells Fargo reasonably relied on Barry's authority to act on his mother's behalf. The court's decision should be reversed because Wells Fargo failed to produce evidence that Dottie was competent when she signed the form, a week before she was diagnosed with dementia, and because the bank never obtained the written determination of incompetence required by the form itself. Wells Fargo's actions were unfair to Dottie and every other consumer in her position, and they were the proximate cause of Dottie's loss of the equity in her home.

a) Wells Fargo had no reason to accept Barry's authority to obtain a reverse mortgage.

Wells Fargo accepted at face value that Dottie was competent when she signed a power of attorney form, even though she was hospitalized a week after signing the form, unable to communicate and with evidence of prior dementia, and even though her son had orally applied for the reverse mortgage before he was appointed her attorney in fact.

In response to Dottie's motion for summary judgment, Wells Fargo retroactively tried to show that Dottie was competent on February 15, by hiring a doctor to review her medical records. CP 758-59. Wells Fargo then claimed the doctor had concluded that Dottie did not become incompetent until February 22, 2006. CP 722. In fact, the bank's doctor could not reach any such conclusion, because Dottie had not been examined by any medical professional during the weeks before Barry took her to the hospital.

Contrary to Wells Fargo's assertion, Dr. Stump reported only what was in the records: that when Dottie was admitted to hospital on February 22, she was diagnosed with "diffuse cerebral vascular disease with atrophy and lacunar infarcts"; that no earlier mental status examination appears in her records; and that a "new" (i.e. "additional") infarct was identified on February 22. CP 758-59. Thus, the records suggest Dottie had cerebral vascular disease before she was hospitalized, and the records did not contain any tests related to prior cerebrovascular incidents. The doctor did not have any evidence on which to base any other conclusion.

Nor does a hearsay "observation" that Dottie was alert, on a home health care record dated February 1, demonstrate legal competence. CP 736. No one but Barry and Hogg has asserted that Dottie was competent

on February 15, and self-serving conclusions without factual support will not defeat summary judgment. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988).

The fact is that there is no evidence that Wells Fargo ever spoke to anyone but Barry about a reverse mortgage on Dottie's home. Every single loan document was signed by Barry. The only contact Dottie had with anyone from Wells Fargo was when a bank teller verified her driver's license. Since Wells Fargo did not take any steps to communicate with Dottie directly, or to communicate with anyone other than a doctor who disavowed knowledge of her competency, it is not relevant whether anyone else believed Dottie to be competent on February 15, or thereafter.

Nor does it matter whether an alternate power of attorney form was valid, when the bank was not aware of its existence when it approved the loan.² The bank was presented with a loan applicant who claimed to act for his mother, based on a document he obtained *after* having orally applied for a loan from Wells Fargo, *after* the bank told him that independent consumer counseling was required, and *the day before* he obtained a counseling certification on her behalf. Even if the bank's failure to comply with federal loan requirements were not a per se unfair act

² Hogg's attorney filed a power of attorney allegedly signed by Dottie on the same day, which contained no restrictions, CP 433-35, but it was never presented to Wells Fargo, CP 762, 768.

under Washington's CPA, Wells Fargo's acceptance of Barry's authority was negligent and self-serving.

b) Wells Fargo approved a loan application by an attorney-in-fact without evidence of incompetence from a doctor or court.

Barry gave Wells Fargo a power of attorney form that would only become effective upon the disability or incompetence of his mother. The document listed several bases for finding disability or incompetence, and two alternate means of determining disability or incompetence:

Disability may be evidenced by a written statement of a qualified physician regularly attending the principal and/or by other qualified persons with knowledge of any confinement, detention or disappearance. Incompetence may be established by a finding of a court having jurisdiction over the incompetent principal.

CP 63. However, the bank approved the loan without any determination by either Dottie's regular physician, or a court.

The most Wells Fargo was able to show is that one of its loan processors sent a facsimile with questions to "a representative of Dr. Michael Franceschina," Dottie's orthopedic surgeon. CP 818-820. The employee apparently charged with researching Dottie's competence does not even claim to have spoken to a doctor, or anyone with medical training, much less someone who had assessed Dottie's competency.

Rather, on the same day, the doctor responded by declining to express any opinion as to Dottie's competence:

Please be advised that specific questions regarding her expressive aphasia and her level of competence should be addressed to either her family doctor or internist. I am an orthopedic surgeon and did not diagnose her expressive aphasia, nor is it my area of expertise to determine a patient's mental competence.

CP 133.

The bank, however, did not do as the surgeon suggested and inquire further. Wells Fargo was more interested in closing the loan than finding out whether the borrower qualified, or whether her son's loan application was valid. The April 20 entry in Wells Fargo's records document its decision to rely solely on the statement that the patient could not currently communicate, regardless of his disavowal of knowledge of competency:

04/20/06 12:49 U GINNY MILLER: DR LETTER AND DEFINITION OF WHAT APHASIA IS ARE ENOUGH EVIDENCE THAT BORROWER IS CURRENTLY INCOMPETENT- POA OKAY TO BE USED- THEREFORE CONDITION 2 OF THE STILL NEEDS IS NOW WAIVED

CP 194 (emphasis added).

Even if a doctor had determined that Dottie was incompetent before Barry applied for the reverse mortgage and was counseled about the consequences of encumbering his mother's home, Barry's authority as

attorney-in-fact did not extend to making an extraordinary gift to himself and his fiancée. Paragraph 5 of the power of attorney form prohibited him from making any such gifts during her lifetime. CP 66. Yet Barry did not simply ask Wells Fargo to refinance a mortgage for his mother, he asked to withdraw almost all the equity from her home. Wells Fargo's complicity in allowing him to do so, to its own profit, was an unfair or deceptive act under Washington's CPA.

c) The public has an interest in protecting consumers from abusive lending practices.

Like the "unfair or deceptive" element of a consumer protection claim, the "public interest" element may be met in two ways: based on the circumstances of the consumer transaction, or based on violation of a statute with an express public interest element. *Hangman Ridge*, 105 Wn.2d at 789. "A plaintiff need not show that the act in question was *intended* to deceive, but that the alleged act had the *capacity* to deceive a substantial portion of the public." *Hangman*, at 785 (citations omitted).

In a consumer transaction, the court analyzes the circumstances of the transaction, by reviewing such aspects as:

- (1) Were the alleged acts committed in the course of defendant's business?
- (2) Are the acts part of a pattern or generalized course of conduct?
- (3) Were repeated acts committed prior to the act involving plaintiff?
- (4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff?
- (5) If the act

complained of involved a single transaction, were many consumers affected or likely to be affected by it?

Hangman Ridge, 105 Wn.2d at 790.

It is difficult to argue that Wells Fargo's ready acceptance of one person's authority to drain another person's equity in her property does not impact the public interest. This is especially true when combined with the bank's blatant disregard of the federal requirements limiting loans to elderly individuals residing in their own home, and requiring principals to be made fully aware of the consequences of the reverse mortgage. Certainly, such failures have a substantial risk of repetition; if the bank's eagerness to close a loan caused it turn a blind eye to the defects in one borrower's application, it may easily do so (or have done so) to others. Although the act complained of involves a single transaction, many consumers are likely to be affected by such practices.

Moreover, Congress described its laws in terms of the public interest. For example, in TILA, Congress asserted that it was intended to protect the consumer by promoting the "informed use of credit":

Congressional findings and declaration of purpose

(a) Informed use of credit

The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this

subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

15 U.S.C. § 1601.

Congress has also relied on state laws governing lenders and brokers in its attempt to curb unfair and deceptive practices in the lending industry. *See* Franzen and Howell, *Predatory Lending Legislation in 2004*, 60 Bus. Law. 677 (2005). Our state legislature, like Congress, has clearly expressed its interest in promoting honesty and fair dealing in residential home loans, and preserving public confidence in the lending community. RCW 19.146.005 Residential home loans have been rife with unsavory practices, inspiring continued legislative attempts to assure lender compliance with fair practices. *Dwyer v. J.I. Kislak Mortg. Corp.*, 103 Wn. App. 542, 547-48, 13 P.3d 240 (2000) (finding CPA violation based on residential home mortgage lender business practice).

Although Wells Fargo argued at summary judgment that it is exempt from Washington's Mortgage Broker Practices Act, the District Court of Western Washington does not necessarily agree. *See Anderson*, 259 F. Supp. 2d at 1149-50 (fact that defendant was a subsidiary of Wells Fargo Bank, N.A. did not mean it did not qualify as "loan originator" under RCW 19.146.0201. As Judge Leighton observed in *Anderson*:

... the very purpose of [the mortgage broker practices act] is to “promote honesty and fair dealing with citizens and to preserve the public confidence in the lending and real estate community.” See RCW 19.146.050. It would be an absurd result if a mortgage broker, by virtue of his affiliation with a large commercial bank, was exempt from the prohibitions against, among other things, employing schemes to defraud borrowers (RCW 19.146.0201(1)). This incongruity is particularly troublesome where, as here, the broker also claims exemptions from the TILA governing lenders, on the basis that he is only a broker and not a “creditor.”

Anderson, 259 F. Supp. 2d at 1150.

Moreover, because Wells Fargo handled all aspects of Dottie’s reverse mortgage, it is held to the standard of care of an attorney, as an additional safeguard of the public interest:

The practice of law includes the selection and completion of legal instruments by which legal rights and obligations are established. It is established that the selection and preparation of promissory notes and deeds of trust is the practice of law. . . . [I]n order to fully safeguard the public interest, lenders must comply with the standard of care of a practicing attorney when preparing legal documents that are ordinarily incident to lenders' financing activities.

Bishop v. Jefferson Title Co., Inc., 107 Wn. App. 833, 845, 28 P.3d 802 (2001) (citing *Perkins v. CTX Mortgage Co.*, 137 Wn.2d 93, 97, 106, 969 P.2d 93 (1999) (internal quotation marks omitted)).

Regardless of whether the court makes its own determination of public impact, based on the circumstances, or adopts a legislative determination of public impact, Washington consumers are likely to be substantially impacted if Wells Fargo’s lending practices are not curtailed.

d) Dottie was damaged by the bank's actions.

Wells Fargo was paid in full for its loan, plus loan fees and interest. Wells Fargo acknowledges that a party is liable in tort for wrongfully receives money, or fails to return it to the party rightfully claiming it. CP 816. Although a guardian was appointed within a year after Wells Fargo issued its loan, and the guardian promptly notified Wells Fargo of the court's order to recover the assets, Wells Fargo refused any relief, even a reduction of interest. CP 650-53. Wells Fargo insisted on receiving the full \$220,880.21 due under the original terms of its loan (an increase of \$22,822.35 in less than ten months over the amount distributed). CP 117. Wells Fargo makes no defense other than to say that it reasonably approved the loan in the first place.

When a lender fails to comply with the law, an aggrieved individual is entitled to civil remedies through the CPA. RCW 19.86.090; *Shields v. Morgan Financial, Inc.*, 130 Wn. App. 750, 755, 125 P.3d 164 (2005), *review denied*, 157 Wn.2d 1025 (2006). In light of Wells Fargo's undeniable failure to comply with state and federal law, Dottie's damages should be awarded as a matter of law. *See also In re Marriage of Langham and Kolde*, 153 Wn.2d 553, 568, 106 P.3d 212 (2005) (discussing conversion damages and noting: 'Borrowing money to convert another's

property and then charging that person for the cost of conversion is a bold move indeed, and should not be rewarded.’)

C. HOGG IS CULPABLE FOR HER ROLE IN TAKING DOTTIE’S EQUITY AND USING HER CREDIT

Dottie moved for summary judgment against Hogg on claims of conversion and breach of fiduciary duty. In the alternative, Dottie sought a determination as to liability, reserving the issue of damages for trial. Summary judgment dismissing Hogg should be reversed because Dottie presented evidence that Hogg assumed a position of trust with respect to Dottie’s affairs; that Hogg participated in obtaining her home equity and personally received at least \$20,000 from the reverse mortgage secured by Dottie’s home; and that Hogg refused to repay Dottie despite notice that she had no right to the money.

1. Hogg Participated In Getting Dottie’s Assets.

A person converts property by willfully interfering, without lawful justification, with the possession of the person entitled to it. *Kruger v. Horton*, 106 Wn.2d 738, 743, 725 P.2d 417 (1986) (citing *Judkins v. Sadler-Mac Neil*, 61 Wn.2d 1, 3, 376 P.2d 837 (1962)). Money may be the subject of a conversion action when the money is wrongfully received, or the recipient fails to return the money to the party claiming it. *Westview*

Investments, Ltd. v. U.S. Bank Nat. Ass'n, 133 Wn. App. 835, 852, 138 P.3d 638 (2006) (citations omitted).

Hogg sought to portray herself as a passive recipient of money from Barry. However, Hogg actively participated in each act taken to obtain control over Dottie's assets. It was Hogg who drove to the bank in February 2006, to try to remove Dottie's daughter-in-law Joan from her bank account. CP 541 ("I drove them that day and I helped her.") When it was not possible to remove Joan without her finding out, Hogg and Barry took Dottie to open a new account at their bank. CP 541-42. They had her sign the form naming Barry as her attorney in fact. CP 542. Then they opened a joint account, CP 543, which eased the transfer of funds from Dottie to Barry and Hogg. CP 545 ("the bank was able to take money from Barry's account and automatically deposit it into my account.") Hogg and Barry left on a foreign vacation shortly after Dottie was hospitalized. CP 532.³

Hogg attended the Wells Fargo closing in April 2006, after Dottie was in the nursing home. CP 182. Upon Barry's receipt of \$150,000 in his Bank of America account xxxx7073, CP 207, \$20,000 was immediately

³ Hogg testified that she could not remember where they went, but the hospital records indicate they went to Mexico. CP 706, 707.

transferred to Hogg's personal account, CP 202. She continued to receive at least \$2,000 per month from Barry thereafter. CP 180.

Liability for a tort extends to all those who participate in or share in the profits. *Northern Pacific R. Co. v. Tacoma Junk Co.*, 138 Wash. 1, 7, 244 P. 117 (1926). In addition to the reverse mortgage proceeds, Barry and Hogg financed their lifestyle with checks written on Dottie's bank accounts and charges to her credit cards, which increased dramatically after Dottie was hospitalized. CP 80-93. The charges included tanning salons (CP 80, 82); air fare (CP 87), Nevada casinos (CP 88); and cruise lines (CP 89). By the time a guardian was appointed, her credit card debt was \$58,629.30. CP 99-105. Yet, the bill for Dottie's own expenses (Garden Terrace) had not been paid. CP 101.

2. Hogg Assumed A Position Of Trust In Dottie's Affairs.

Hogg assumed a position of trust and confidence with respect to Dottie. *Estate of Esala v. Morgan*, 16 Wn. App. 764, 767, 559 P.2d 592 (1977) (involvement in deceased's business and financial affairs sufficient to establish fiduciary relationship). The existence of a fiduciary relationship is a question of law. *Lang v. Hougan*, 136 Wn.App. 708, 718, 150 P.3d 622 (2007), *review denied*, 163 Wn.2d 1018 (2008).

Having taken an active role in arranging for Dottie to make significant changes in the management of her financial affairs, Hogg had a

responsibility not to use Dottie's property for her own benefit. A person in a fiduciary relationship has the burden of proving by clear, cogent and convincing evidence that an alleged gift was intended and that it was not the product of undue influence. *Koppang v. Hudon*, 36 Wn. App. 182, 186, 672 P.2d 1279 (1983); *Pedersen v. Bibioff*, 64 Wn. App. 710, 720, 828 P.2d 1113 (1991). The evidence must show that the gift was made with a full understanding of the facts. *McCutcheon v. Brownfield*, 2 Wn. App. 348, 356, 467 P.2d 868 (1970) (quoting 38 Am. Jur. 2d Gifts § 106 (1968)). In the circumstances presented here, the trial court erred by allowing Hogg to avoid liability on the grounds that she was an innocent recipient of gifts from Dottie and Barry.

3. Hogg Refused To Repay Money Wrongly Taken.

Finally, Hogg is culpable for her failure to return the money after notice of wrongdoing. To the extent Hogg raises a doubt as to her right to receive \$20,000 from Dottie two months after she was hospitalized, she was certainly put on notice by the court's actions in the guardianship matter. The courts have held that even an unwitting action may result in liability for conversion. *Morissette v. U.S.*, 342 U.S. 246, 270, 72 S. Ct. 240, 96 L.Ed. 288 (1952) ('defendant's knowledge, intent, motive, mistake, and good faith are generally irrelevant. If one takes property

which turns out to belong to another, his innocent intent will not shield him from making restitution.’) (citations omitted). As one court explained:

Proof of the defendants’ knowledge or intent are not essential in establishing a conversion. . . .

‘*** The foundation for the action of conversion rests neither in the knowledge nor the intent of the defendant. It rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results. Therefore neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action. . . .

Judkins v. Sadler-MacNeil, 61 Wn.2d 1, 3-4, 376 P.2d 837 (1962) (internal citations omitted). This remains the law of Washington today. *In re Marriage of Langham and Kolde*, 153 Wn.2d 553, 106 P.3d 212 (2005) (alleged good faith exercise of stock options did not excuse conversion).

Hogg knew where the \$20,000 in her account came from; she attended the closing that day. Her vacations with Barry, while Dottie was in Garden Terrace, went far beyond the cigarettes and gasoline Dottie customarily bought for Barry, and thus far beyond anything Barry might have legitimately taken for himself as Dottie’s attorney-in-fact. But Hogg and Barry took the vast majority of Dottie’s assets between February and August, 2006, and failed to return a cent.⁴ Hogg’s failure to repay the money after the court directed Dottie’s guardian to recover it (and refused

⁴ On September 11, 2007, Barry testified that he still had some of his mother’s money under his mattress. CP 140, 148.

to appoint Barry as guardian) certainly put Hogg on notice that she had not received a legitimate “gift” of Dottie’s equity.

Hogg should be held jointly and severally liable for the money taken as well as the debt incurred, including credit card charges, interest, and loan costs. *Marriage of Langham and Kolde*, 153 Wn.2d at 568 (‘Borrowing money to convert another’s property and then charging that person for the cost of conversion is a bold move indeed, and should not be rewarded.’) Hogg’s conduct was a breach of the position of trust she had assumed, as well as a conversion of Dottie’s primary asset and credit.

VI. CONCLUSION

Summary judgment against Wells Fargo should have been granted because the bank did not present any evidence to rebut its failure to comply with the federal law requiring consumer counseling for individuals contemplating obtaining a reverse mortgage, as well as the requirement that such loans be extended only to elderly individuals living in the home to be secured. In addition, the bank failed to confirm Barry Brown’s authority to obtain a reverse mortgage on his mother’s behalf. The bank’s actions constitute an unfair and deceptive practice in which the public has a distinct interest, entitling Dottie Brown to treble damages and an award of attorney’s fees pursuant to Washington’s Consumer Protection Act.

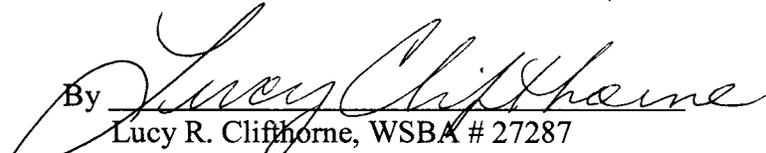
Summary judgment against Beverly Hogg should have been granted because Hogg does not dispute that she participated in obtaining and using Dottie Brown's money, and failed to repay the money after clear notice that she had no right to its continued possession.

Therefore, Dottie Brown seeks a reversal of the orders dismissing Wells Fargo and Beverly Hogg, and denying her motions for summary judgment against the same parties.

RESPECTFULLY SUBMITTED this 9th day of October, 2009.

VANDEBERG JOHNSON & GANDARA, LLP

By



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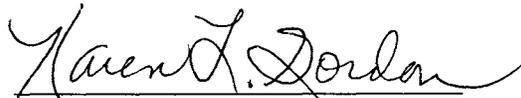
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury of the laws of the state of Washington that on the 9th day of October, 2009, I caused to be served via ABC Legal Services, for service on Monday, October 12, 2009, the foregoing Brief of Appellant, on the following counsel of record at his last known business address as follows:

Ronald E. Beard, Esq.
Lane Powell, et al.
1420 Fifth Avenue, Ste. 4100
Seattle, WA 98101-2338

AND that on the 9th day of October, 2009, I caused to be mailed, First Class mail through the United States Postal Service, the foregoing Brief of Appellant, to the following party at her last known address as follows:

Beverly A. Hogg
1911 SW Campus Drive #376
Federal Way, WA 98023


KAREN L. GORDON