

No. 63218-3-I

DIVISION ONE, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

---

ANDREA CHEN,  
Plaintiff/Appellant

v.

STATE FARM BANK,  
Defendant/Respondent

---

ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(Honorable Steven C. Gonzalez)

---

BRIEF OF RESPONDENT

---

Andrew H. Salter  
WSBA No. 11954  
Todd W. Wyatt  
WSBA No. 31608  
Salter Joyce Ziker, PLLC  
1601 Fifth Avenue, Suite 2040  
Seattle, WA 98101  
Phone: 206-975-5960  
Fax: 206-957-5961  
Attorneys for Respondent  
State Farm Bank

2010 JAN - 8 PM 2: 05

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON

ORIGINAL

## TABLE OF CONTENTS

|      |  |    |
|------|--|----|
| I.   | INTRODUCTION .....   | 1  |
| II.  | STATEMENT OF THE CASE.....   | 2  |
|      | A. Substantive Facts .....   | 2  |
|      | 1. Andrea’s employment at Safety-Touch .....   | 2  |
|      | 2. Safety-Touch and Andrea buy a car.....  | 2  |
|      | 3. State Farm Bank repossesses the car .....   | 5  |
|      | 4. State Farm Bank corrects the title.....   | 6  |
|      | 5. Current status of the car and loan .....  | 7  |
|      | B. Andrea’s Theory Regarding the Modified Loan and<br>Sale of the BMW .....                          | 7  |
|      | C. Procedural History .....  | 8  |
|      | 1. Safety-Touch’s bankruptcy.....  | 8  |
|      | 2. The complaint and counterclaims .....   | 8  |
|      | 3. Andrea’s and State Farm Bank’s motions for<br>summary judgment.....                               | 9  |
| III. | ARGUMENT .....   | 11 |
|      | A. Standard of Review.....   | 11 |
|      | B. The Trial Court Properly Granted Summary<br>Judgment to State Farm Bank on Its Counterclaims..... | 11 |
|      | 1. Andrea is liable for breach of contract.....  | 11 |
|      | 2. In the alternative, Andrea is liable for unjust<br>enrichment.....                                | 14 |
|      | 3. State Farm Bank is the legal owner of the<br>vehicle.....   | 14 |
|      | 4. Andrea was properly ordered to surrender<br>possession of the vehicle.....                        | 15 |
|      | C. Andrea’s Claims Were Properly Dismissed With<br>Prejudice .....                                   | 15 |
|      | 1. Andrea’s fraud and outrage claims were<br>barred by the statute of limitations.....               | 15 |
|      | 2. There was no genuine issue of material fact<br>regarding Andrea’s fraud claim .....               | 16 |
|      | 3. There was no genuine issue of material fact<br>regarding Andrea’s CPA claim.....                  | 18 |
|      | 4. There was no genuine issue of material fact<br>regarding Andrea’s outrage claim.....              | 20 |
| IV.  | CONCLUSION.....  | 21 |

## TABLE OF AUTHORITIES

### Table of Cases

|  |        |
|--|--------|
| <i>Alejandre v. Bull</i> , 159 Wn.2d 674, 690, 153 P.3d 864 (2007).....  | 17     |
| <i>Aubrey’s R.V. Center, Inc. v. Tandy Corp.</i> , 46 Wn. App. 595, 609-10, 731 P.2d 1124 (1987).....                  | 20     |
| <i>Bailie Commc’ns, Ltd. v. Trend Bus. Sys., Inc.</i> , 61 Wn. App. 151, 159-60, 810 P.2d 12 (1991).....               | 14     |
| <i>Beal v. City of Seattle</i> , 150 Wn. App. 865, 872, 209 P.3d 872 (2009).....                                       | 11     |
| <i>Burmeister v. State Farm Ins. Co.</i> , 92 Wn. App. 359, 366, 966 P.2d 921 (1998) .....                             | 12     |
| <i>Diversified Realty, Inc. v. McElroy</i> , 41 Wn. App. 171, 173-74, 703 P.2d 323 (1985) .....                        | 11     |
| <i>Doe v. Finch</i> , 133 Wn.2d 96, 100-101, 942 P.2d 359 (1997).....  | 16     |
| <i>Dragt v. Dragt/Detray LLC</i> , 139 Wn. App. 560, 571, 161 P.3d 473 (2007).....                                     | 13     |
| <i>Int’l Ultimate, Inc. v. St. Paul Fire &amp; Marine Ins. Co.</i> , 122 Wn. App. 736, 744, 87 P.3d 774 (2004) .....   | 11     |
| <i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 790-91, 719 P.2d 531 (1986)..... | 19, 20 |
| <i>Ives v. Ramsden</i> , 142 Wn. App. 369, 384-85, 174 P.3d 1231 (2008).....   | 15     |
| <i>Kloepfel v. Bokor</i> , 149 Wn.2d 192, 195, 66 P.3d 630 (2003).....   | 20, 21 |
| <i>Leingang v. Pierce County Med. Bureau, Inc.</i> , 131 Wn.2d 133, 150, 930 P.2d 288 (1997).....                      | 18, 19 |
| <i>Lightfoot v. MacDonald</i> , 86 Wn.2d 331, 333, 544 P.2d 88 (1976).....   | 20     |
| <i>McCallum v. Allstate Property &amp; Cas. Ins. Co.</i> , 149 Wn. App. 412, 419, 204 P.3d 944 (2009).....             | 11     |
| <i>Orr v. Bank of America</i> , 285 F.3d 764, 774 n.8 (9 <sup>th</sup> Cir. 2002) .....                                | 12     |
| <i>Robinson v. Avis Rent A Car Sys., Inc.</i> , 106 Wn. App. 104, 113, 22 P.3d 818 (2001).....                         | 19     |
| <i>Sigman v. Stevens-Norton, Inc.</i> , 70 Wn.2d 915, 920, 425 P.2d 891 (1967).....                                    | 17     |

|  |    |
|--|----|
| <i>Westview Investments, Ltd. v. U.S. Bank, National Association</i> , 133 Wn. App. 835, 854, 138 P.3d 638 (2006)..... | 19 |
| <i>Williams v. Joslin</i> , 65 Wn.2d 696, 697, 399 P.2d 308 (1965).....  | 16 |

Statutes

|                                |    |
|--------------------------------|----|
| RCW 46.12 <i>et seq.</i> ..... | 14 |
| RCW 46.12.030(1)(b) .....      | 18 |
| RCW 46.12.181 .....            | 18 |
| RCW 62A.9A-609 .....           | 15 |

Washington Court Rules

|                         |    |
|-------------------------|----|
| Civil Rule 56(e).....   | 13 |
| Evidence Rule 901 ..... | 11 |
| Evidence Rule 902 ..... | 11 |
| Evidence Rule 201 ..... | 15 |

## I. INTRODUCTION

Appellant Andrea Chen borrowed money from State Farm Bank to purchase a \$50,000 car. There is no dispute that the loan, which was secured by the vehicle Andrea<sup>1</sup> purchased, is in default. Andrea argues, however, that the terms of her loan from State Farm Bank were modified so that the loan became an unsecured loan for which only her employer was liable. She contends she then purchased the car free and clear from her employer. Andrea's theory, if adopted, allows her to keep the car even though State Farm Bank has not been repaid the money it loaned her to pay for it.

As the trial court correctly found, Andrea cannot create a genuine issue of material fact regarding her legal duties under the loan agreement when no evidence was presented showing that any modification occurred and no additional consideration was provided to State Farm Bank for the alleged loan modification. The loan terms must be enforced.

The trial court properly granted State Farm Bank's motion for summary judgment, and denied Andrea's motion for summary judgment. This Court should affirm.

---

<sup>1</sup> Various members of Appellant Andrea Chen's family will be mentioned throughout this brief. To avoid confusion, this brief will refer to them, as well as Andrea Chen, by their first names. No disrespect is intended.

## II. STATEMENT OF THE CASE

### A. Substantive Facts

#### 1. Andrea's employment at Safety-Touch

After graduating from high school in 1999, Andrea began working for Safety-Touch & Javithon, Inc. ("Safety-Touch"). CP 26 (the deposition of Andrea Chen, hereinafter the "Chen Dep." at 14:21-24). Safety-Touch sold promotional items to various businesses and governmental entities. CP 25 (Chen Dep. at 13:2-21).

Andrea's father, Huy Chen, owned and operated Safety-Touch. Andrea's mother, Lee Chen, served as Safety-Touch's bookkeeper. CP 33-34 (Chen Dep. at 26:4-27:7). Andrea's brother, Jason Chen, also worked for Safety-Touch. CP 32 (Chen Dep. at 23:6-18).

Jason and Andrea worked as "account executives," placing bids and orders from different customers who wanted to purchase products through Safety-Touch. CP 27-29 (Chen Dep. at 15:12-17:16). As part of her job, approximately two times per month Andrea would use a car to make sales calls. CP 30-31 (Chen Dep. at 18:24-19:10).

#### 2. Safety-Touch and Andrea buy a car

In 2002, Safety-Touch decided to purchase a car for Andrea, who at the time was approximately 22 years old. Safety-Touch had previously purchased a new Audi for her brother Jason. CP 35 (Chen Dep. at 28:7-11). For Andrea, Safety-Touch purchased a new BMW M3 coupe with a price of over \$50,000. CP 36 (Chen Dep. at 53:5-20); CP 59-60 (the note and security agreement).

Safety-Touch employed other account executives who were not related to the Chen family. Indeed, while Andrea worked there, Safety-Touch had “at least four to five” account executives. CP 32 (Chen Dep. at 23:3-8). Only one of these account executives besides Andrea and Jason ever received a car, and that was a Ford Taurus. CP 34 (Chen Dep. at 27:23-25). Andrea did not remember if the Ford Taurus was new or used. CP 35 (Chen Dep. at 28:7-14).

Andrea and Safety-Touch purchased the BMW from a dealer in Canada. To fund the purchase, she signed a promissory note and security agreement in favor of State Farm Bank (hereinafter the “Note”). CP 59-60. The Note’s promise to pay reads, in part, as follows:

PROMISE TO PAY: The undersigned (“*Borrower*”, “*you*” or “*your*”), jointly and severally, promise(s) to pay to the order of [State Farm Bank] the Amount Financed shown above with interest . . .

CP 59 (underline emphasis added).

The Note’s signature line states:

ACKNOWLEDGEMENT: Borrower agrees to the terms of this Promissory Note and Security Agreement including the additional terms set forth on the second page. Borrower [acknowledges] receipt of a completed copy of this instrument and the insurance disclosure statement prior to consummation of the loan.

SIGNATURES

Safety-Touch & Javithon by      Andrea Chen

Andrea Chen as an individual

*Id.* (emphasis added). Andrea signed all three signature lines. *Id.*

The Note also contains the following provisions:

Security: You are giving a security interest in the following motor vehicle: New; 2002; BMW; M3 2dr coupe . . .

. . . .

SECURITY: To secure payment of this Note and all renewals and extensions hereof, Borrower grants and pledges to Lender a security interest in the property disclosed in the Truth in Lending Disclosures above with all attachments and all accessions thereto and all proceeds thereof (hereinafter, the “*Collateral*”).

. . . .

PERFECTION OF SECURITY INTEREST: To the extent allowed by applicable law, Lender is hereby appointed as Borrower’s attorney-in-fact to do at Lender’s option and at Borrower’s [expense] things necessary or desirable to perfect, keep perfected and maintain Lender’s security interest in the Collateral, to protect such Collateral and to execute any document or instrument [illegible] keep perfected and protect such security interest of the Lender in the Collateral.

. . . .

DEFAULT AND ACCELERATION: . . . Borrower agrees to pay all of Lender’s reasonable costs and expenses in enforcing this Note or in realizing upon the Collateral, including court costs and reasonable attorney’s fees, to the extent permitted by applicable law (including bankruptcy or insolvency proceedings).

. . . .

REMEDIES OF LENDER: Upon the occurrence of any event of default, the Lender shall have all of the rights and remedies of a secured party as provided by Article 9 of the Uniform Commercial Code, including, but not by way of limitation, the right of Lender to take immediate possession of the Collateral and anything located therein, with or without judicial process . . . .

. . . .

SUCCESSORS AND ASSIGNS: . . . If there is more than one Borrower, their obligations hereunder shall be joint and several. Any changes to this Note must be in writing and signed by Lender.

CP 59-60.

In addition to the Note, Andrea executed a Power of Attorney in favor of State Farm Bank. CP 62. This document allowed State Farm Bank “to transfer ownership, apply for Certificate of Title or Duplicative Certificate of Title, and to perform other duties which may be required in connection with the perfection of a security interest, sale, transfer and/or purchase of the following property . . . .” *Id.*

After Safety-Touch and Andrea purchased the car, she drove it to Washington, where she registered *herself* as both the registered *and* legal owner on the car title. CP 64. She never sent State Farm Bank a copy of this title. CP 53 (Chen Dep. at 82:25-83:3).

### **3. State Farm Bank repossesses the car**

It is undisputed that Andrea and Safety-Touch eventually defaulted on their monthly payment obligations to State Farm Bank. Exercising its rights under the Note, State Farm Bank repossessed the car in January 2004. Andrea thereafter made payment to State Farm Bank, and received

the car back within two or three days of losing possession. CP 56 (Chen Dep. at 92:18-24).

**4. State Farm Bank corrects the title**

Because Andrea never sent State Farm Bank a copy of the title, in February 2004, State Farm Bank—employing its power as Andrea’s attorney-in-fact—modified the title using a “vehicle of title application” form and an “affidavit of lost title.” CP 66-68.

Even though thereafter State Farm Bank was listed on the title and registration as the legal owner of the car, Andrea did not notice the change to the car’s registration:

Q. When did you first learn that State Farm [Bank] had changed the name of the legal owner?

A. I don’t remember the years thinking back. I don’t remember the years.

Q. I would assume, and tell me if I’m wrong, but I would assume it would be the following year when you registered your car, and you got a new registration where State Farm [Bank] was listed as the registered [sic] owner.

A. Well, I do a lot of it online, and when it comes, I just pretty much throw it in my car, and I don’t really think about it.

Q. So when you got the registration in the mail, you didn’t necessarily review it, you just threw it in your glove compartment?

A. Pretty much, yeah.

CP 49 (Chen Dep. at 74:1-16).

## 5. Current status of the car and loan

It is undisputed that the loan is in default. Despite the Court's order to surrender the BMW to State Farm Bank, Andrea is currently keeping the car at her aunt's house in Vancouver, British Columbia. CP 49 (Chen Dep. at 74:17-23).

### B. Andrea's Theory Regarding the Modified Loan and Sale of the BMW

Andrea admitted at her deposition that, under the loan terms as written, State Farm Bank has a security interest in the car. CP 40-41 (Chen Dep. at 62:22-63:8). But Andrea testified that after she and Safety-Touch took out the loan, the loan was modified to render Safety-Touch the only borrower. CP 37-38 (Chen Dep. at 56:2-57:23). Andrea also claims that the loan was changed to an unsecured loan. *Id.*

Critically, Andrea was unable to identify, let alone produce, *any* document that would confirm that the loan was modified as she alleges. *Id.* Nor does she have any personal knowledge of such a change in the loan—she was merely told these things by her father. CP 39, 42-43, 57 (Chen Dep. at 58:4-13; 64:11-65:12; 105:3-20). The declaration provided by her father only states that he “discuss[ed]” possible modification with State Farm Bank, but no other details regarding the alleged modification were provided. CP 171. And—even though it is State Farm Bank's practice to retain such documents—State Farm Bank does not possess any documents that would evince such a change in the loan. CP 88.

Andrea also contends that after the loan was modified, Safety-Touch sold her the car in exchange for her agreement to waive commissions due to her from Safety-Touch. CP 43-45 (Chen Dep. at 65:13-67:16). Once again, Andrea was unable to identify or produce *any* document that would show that the sale actually occurred. CP 45 (Chen Dep. at 67:17-24). And Andrea did not notify State Farm Bank of the alleged sale. CP 45-46 (Chen Dep. at 67:25-68:7).

**C. Procedural History**

**1. Safety-Touch's bankruptcy**

Safety-Touch eventually declared bankruptcy and identified State Farm Bank as a creditor. Not knowing who possessed the car, State Farm Bank filed a motion for relief from stay in the bankruptcy matter, which Safety-Touch opposed. The bankruptcy court granted State Farm Bank's motion, and issued an order on May 5, 2008, commanding Safety-Touch to surrender the car to State Farm Bank within five days. CP 70-71. Safety-Touch has not complied with this court order.

**2. The complaint and counterclaims**

On May 6, 2008, Andrea filed a *pro se* complaint against State Farm Bank in King County Superior Court, CP 73-75, essentially raising three claims. First, she asserted that State Farm Bank's act of placing itself on the car's title was fraudulent, and she asked the trial court to "vacate" State Farm Bank's position on the title and award her damages for the towing costs she had to pay because of the repossession. Second, she sought statutory damages under the Washington Consumer Protection

Act (“CPA”). And third, she sought unspecified damages for “extreme mental anguish, emotional distress, humiliation and inconvenience.” CP 75 (¶¶ 3.1-3.4).

State Farm Bank alleged counterclaims for breach of contract, unjust enrichment, specific performance (requiring Andrea to deliver the car to State Farm Bank), and a request for a declaratory judgment identifying State Farm Bank as the legal owner of the car. CP 82-86.

**3. Andrea’s and State Farm Bank’s motions for summary judgment**

Andrea filed a motion for summary judgment on December 29, 2008. CP 152-66.<sup>2</sup> It was accompanied by her declaration, CP 167-69, and the declaration of her father, Huy, CP 170-72.

On January 30, 2009, State Farm Bank filed its own motion for summary judgment, with two supporting declarations. CP 1-90. Both parties filed opposition briefs and reply briefs, and on February 27, 2009 the trial court heard oral argument on both motions.

After oral argument, the trial court granted State Farm Bank’s motion for summary judgment and denied Andrea’s motion for summary judgment. CP 218-20. The trial court’s order reads, in pertinent part:

ORDERED, ADJUDGED, AND DECREED that State Farm Bank’s Motion for Summary Judgment is

---

<sup>2</sup> The trial court’s Index to Clerk’s Papers lists Andrea’s Motion for Summary Judgment as reproduced on pages 152 through 166 of the Clerk’s Papers. The copy of that motion served on undersigned counsel for State Farm Bank had a number of exhibits attached and was accordingly longer than 14 pages. Counsel for State Farm Bank is not aware of why there is this discrepancy between what is in the Clerk’s Papers and what counsel has on file.

GRANTED and Plaintiff's Motion for Summary Judgment is DENIED. Plaintiff's claims are dismissed with prejudice. And it is further

ORDERED, ADJUDGED, AND DECREED that State Farm Bank is the legal owner of the 2002 BMW M3 coupe VIN WBSB193432JR15644. Plaintiff shall surrender the vehicle to State Farm Bank within ten (10) days of the date of this order.<sup>3</sup> And it is further

ORDERED, ADJUDGED, AND DECREED that Plaintiff is liable to State Farm Bank in the amount of \$23,590.35. After repossessing the vehicle, State Farm Bank may exercise any and all rights it may have under the law or the parties' agreements, and may deduct any proceeds from the sale of the vehicle from the amount owed by Plaintiff. State Farm Bank is also entitled to recover attorneys' fees and damages incurred in this action and in United States Bankruptcy Court for the Western District of Washington Case No. 04-26135-SJS, in amounts to be determined by subsequent motion.

CP 219.

Andrea moved for reconsideration. CP 224-33. That motion was denied. CP 240.

State Farm Bank moved for entry of final judgment and an award of attorneys' fees. CP 234-39. The trial court granted that motion, and final judgment was entered against Andrea for \$50,854.41. CP 241-44. Andrea filed a Notice of Appeal and a supplement thereto challenging the trial court's summary judgment order, the order denying her motion for reconsideration, and entry of the judgment. CP 245-47.

---

<sup>3</sup> Andrea has not complied with this order. In the event that State Farm Bank finally receives the car, any profits from the sale will be credited toward the judgment amount, minus costs and expenses.

### III. ARGUMENT

#### A. Standard of Review

This Court reviews the trial court's summary judgment decisions *de novo*. *Beal v. City of Seattle*, 150 Wn. App. 865, 872, 209 P.3d 872 (2009). The trial court's denial of Andrea's motion for reconsideration is reviewed for an abuse of discretion. *McCallum v. Allstate Property & Cas. Ins. Co.*, 149 Wn. App. 412, 419, 204 P.3d 944 (2009).

#### B. The Trial Court Properly Granted Summary Judgment to State Farm Bank on Its Counterclaims

##### 1. Andrea is liable for breach of contract

There is no dispute that Andrea, who signed "as an individual," is a "Borrower" on the Note and that the Note is in default. CP 59-60; *Diversified Realty, Inc. v. McElroy*, 41 Wn. App. 171, 173-74, 703 P.2d 323 (1985) ("If personal liability is intended, the 'nearly universal practice' is to have the officer sign twice, once in his corporate capacity and once as an individual. 3A W. Fletcher, *Private Corporations* § 1119 at 170 (1975)."). Andrea, accordingly, is liable for breach of contract.<sup>4</sup>

---

<sup>4</sup> Without any declaration or other basis to place it in admissible form, Andrea, with her brief in opposition to State Farm Bank's summary judgment motion below, submitted "Exhibit Z" which is a two-page car loan application. CP 206-07. Andrea apparently maintains this document shows she was not the borrower on the loan. Since the document was not authenticated in any way, it is not admissible evidence and should not be considered. Although State Farm Bank challenged the admissibility of this document below, (CP 214-15), it is unknown whether or not the trial court considered it.

A court may not consider inadmissible evidence when ruling on a motion for summary judgment. *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736, 744, 87 P.3d 774 (2004). Moreover, documents submitted with a summary judgment motion must be properly authenticated to be admissible. *Id.* at 745. Evidence Rules 901 and 902 govern authentication and (footnote continued)

Andrea's theory is that the Note was modified to apply only to Safety-Touch, and that she later purchased the car from Safety-Touch—allegedly providing her with free and clear title. There are a number of problems with this reasoning.

First, the Note requires that any modifications be in writing. CP 60. There is nothing in the record to demonstrate such a writing. Nor did Andrea have any personal knowledge of any oral modifications. State Farm Bank has no records supporting Andrea's theory. CP 88. Andrea's father, Huy, submitted a declaration in support of her motion for summary judgment stating that he merely "discuss[ed]" changing the loan, but he

---

allow a document to be authenticated "with the testimony of a witness with knowledge that the document is what it is claime[d] to be." *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 366, 966 P.2d 921 (1998). Put another way, "[a] document can be authenticated . . . by a witness who wrote it, signed it, used it, or saw others do so." *Orr v. Bank of America*, 285 F.3d 764, 774 n.8 (9<sup>th</sup> Cir. 2002) (quoting 31 Wright & Gold, *Federal Practice & Procedure: Evidence* § 7106, 43 (2000)).

Even if "Exhibit 2" is considered, it does not change the outcome. The "Applicant" listed on the application is Andrea personally, not Safety-Touch. Although Andrea appeared to request that the borrower be Safety-Touch, it is clear that State Farm Bank would not provide the loan unless Andrea individually was bound as well—Andrea accepted this condition by signing the Note in her personal capacity. CP 59. Also, the "application" is not the contract between Andrea and State Farm Bank; the Note and the Power-of-Attorney form are. Andrea signed in her individual capacity, unambiguously agreeing to the terms of the Note.

Finally, *even if* one could come to the conclusion that Safety-Touch was the sole borrower of the funds, that still does not release Andrea from liability. The Note states that "all obligations of Borrower shall be binding upon Borrower's heirs, beneficiaries, personal representatives, successors, and assigns." CP 60. If Andrea was not an original borrower (which she was), she nevertheless became obligated to State Farm Bank once she (allegedly) purchased the car from Safety-Touch. She also unambiguously appointed State Farm Bank as her individual attorney-in-fact with an independent basis to perform the acts Andrea now complains of. Summary judgment, accordingly, was still warranted.

does not describe how, with whom, why, or whether it was actually changed. CP 170-71. Andrea did not meet her burden under Civil Rule 56(e) to show “specific facts” that create a jury issue regarding modification of the loan.

Second, in his declaration, Huy never stated that Andrea was somehow “released” from the loan as her theory purports. At most, Huy seemed to be alleging that the loan was changed from secured to unsecured. But there is no evidence that Andrea was ever released from the loan—indeed, why would she be?—and accordingly she is still liable for breach of contract even if the loan was modified into an “unsecured” loan.

Moreover, it is telling that Andrea did not say in her declaration that she was acting only in her representative capacity when she signed the promissory note. Indeed, when questioned at her deposition about this, she asserted multiple times that *she did not remember* why she signed the documents in her individual capacity. CP 101-07 (Chen Dep. at 50:7-51:5; 52:12-53:34; 55:3-23; 59:9-19; 73:9-15).

Third, even if there was evidence in the record showing that the loan was changed as Andrea proposes, that is still insufficient. For a modification to be binding, there must be mutual consideration. *See Dragt v. Dragt/Detray LLC*, 139 Wn. App. 560, 571, 161 P.3d 473 (2007). Here, both of the alleged changes to the loan—making it unsecured and removing Andrea as a borrower—are to the benefit of the borrowers, not

to the benefit of State Farm Bank. Without additional consideration, any alleged modification is ineffective.

**2. In the alternative, Andrea is liable for unjust enrichment**

A party is liable for unjust enrichment when: (1) a benefit is conferred on one party by another; (2) the party receiving the benefit has an appreciation or knowledge of the benefit; and (3) the receiving party accepts or retains the benefit under circumstances that make it inequitable for the receiving party to retain the benefit without paying its value. *Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn. App. 151, 159-60, 810 P.2d 12 (1991).

Andrea took possession of the car and has continued to use it knowing that the loan was in default. Andrea knew that the loan documents forbid Safety-Touch from selling her the car. CP 60 ("Collateral: Borrower covenants, represents, and agrees with Lender as follows: . . . (b) that Borrower will not sell . . . the Collateral"). She benefited from the use of the car without paying for it. It is inequitable for Andrea to keep the car under these circumstances. It is also inequitable for Andrea to pay nothing to State Farm Bank for the car when it was State Farm Bank who financed her purchase of the car from the dealer.

**3. State Farm Bank is the legal owner of the vehicle**

Under the Note and Power of Attorney, State Farm Bank has a security interest in the vehicle. Washington law provides, per RCW 46.12 *et seq.*, that State Farm Bank is accordingly the legal owner. The Court

properly entered a declaratory judgment stating that the vehicle's legal owner is State Farm Bank. CP 244.

**4. Andrea was properly ordered to surrender possession of the vehicle**

The Note—as well as Article 9 of the Uniform Commercial Code, RCW 62A.9A-609—provide that State Farm Bank is entitled to repossess the car upon default. There is no dispute that the loan is in default, but Andrea has refused to relinquish possession. An order compelling Andrea to surrender the car was properly entered.

**C. Andrea's Claims Were Properly Dismissed With Prejudice**

**1. Andrea's fraud and outrage claims were barred by the statute of limitations**

Andrea alleged three claims in her complaint: fraud, a violation of the CPA because of fraud, and intentional infliction of emotional distress. CP 75. The fraud claims stem from State Farm Bank's act of changing title on the vehicle in early 2004.

Claims for fraud have a three year limitations period that begins to run when a party discovers *or should have discovered by due diligence* all the elements of the claim. *Ives v. Ramsden*, 142 Wn. App. 369, 384-85, 174 P.3d 1231 (2008). Here, State Farm Bank changed the title on the car in February 2004. CP 66-68. At a minimum, Andrea should have discovered the change in title when she next received her Washington registration—which this Court can take judicial notice under ER 201 would include a listing of the legal owner—in August 2004. CP 49, 66-68. But she did not. Instead, she threw that and subsequent registrations

in the glove compartment of the car without looking at them. CP 49. She had until August 2007 to file a fraud claim but did not until May 2008. It is accordingly time barred.<sup>5</sup>

Her intentional infliction of emotional distress claim is also time barred. It is unclear whether such claims have a three- or two-year statute of limitations. *See Doe v. Finch*, 133 Wn.2d 96, 100-101, 942 P.2d 359 (1997) (explaining but not deciding the unresolved issue). Even if one assumes the limitations period is three years, Andrea's claim filed in May 2008 is too late. Andrea claims emotional distress based upon the repossession of the car which occurred in January 2004—CP 55-56 (Chen Dep. at 91:20-92:17)—meaning she had until January 2007 to file her claim. She did not do so, accordingly her cause of action for intentional infliction of emotional distress was accordingly properly dismissed with prejudice.

**2. There was no genuine issue of material fact regarding Andrea's fraud claim**

Regardless of whether her claim is timely, Andrea's allegations of fraud by State Farm Bank were without merit. Each element of fraud must be proved by clear, cogent, and convincing evidence. *Williams v. Joslin*, 65 Wn.2d 696, 697, 399 P.2d 308 (1965). The nine elements of fraud are (1) representation of an existing fact, (2) materiality of the fact, (3) falsity

---

<sup>5</sup> In a difficult to understand passage, Andrea appears to argue that the statute of limitations on her fraud claim did not begin to run until May 8, 2006. Andrea's Opening Brief at 9-10. Andrea cites no basis in the record for this contention.

of the fact, (4) the speaker's knowledge of the falsity of the fact, (5) the speaker's intent that the fact should be acted on by the person to whom the fact was represented, (6) ignorance of the fact's falsity on the part of the person to whom it is represented, (7) reliance on the truth of the factual representation, (8) the right of the person to rely on the factual representation, and (9) the person's consequent damage from the false factual representation. *Sigman v. Stevens-Norton, Inc.*, 70 Wn.2d 915, 920, 425 P.2d 891 (1967); *see also Alejandre v. Bull*, 159 Wn.2d 674, 690, 153 P.3d 864 (2007).

Here, there are at least two barriers to Andrea's fraud claim. First, the act Andrea claims to be fraudulent was the signing of a vehicle title application by a State Farm Bank representative. CP 66-68 (signing the title application and affidavit of lost title as "Andrea Chen by Dan Hinkle for SF Bank"). But Andrea expressly authorized State Farm Bank to take these actions in the Note and Power of Attorney she executed. *See* CP 59-62. Andrea gave State Farm Bank permission to correct title and execute necessary documents in her name. When Andrea failed to forward her original title to State Farm Bank, State Farm Bank was entitled to protect its interests. There was no "false" statement by any representative of State Farm Bank.<sup>6</sup>

---

<sup>6</sup> For the first time on appeal, Andrea argues that: (1) the power of attorney was invalid; and (2) there was not a full hearing on this issue below. Andrea's Brief at 11. Andrea supplies no explanation or argument for these theories; it is accordingly impossible for State Farm Bank to respond.

On this same issue, Andrea also appears to assert that State Farm Bank violated RCW 46.12.181. Andrea had a duty under RCW 46.12.030(1)(b) to inform the Department of Licensing that State Farm Bank had a security interest in the vehicle—it is undisputed that she did not do so and that she did not forward a copy of the title to State Farm Bank. State Farm Bank, accordingly had the right as the first priority secured party to apply for a proper title.

Finally, *even if* one of these statutes were violated, or if one of the many unrelated criminal statutes cited by Andrea were violated, Andrea was still not entitled to summary judgment. Her claim of fraud requires a false representation *to Andrea*, and reliance *by Andrea* on such a representation. Here, the statements were made to the Department of Licensing, not to Andrea. There is nothing in the record to show reliance on the statements by Andrea or any damage as a result of such reliance. Moreover, Andrea asserts she did not believe that the statements were true, which is another required element. The fraud claim was properly dismissed.

**3. There was no genuine issue of material fact regarding Andrea's CPA claim<sup>7</sup>**

Whether a particular act, if proven, gives rise to a CPA violation is a question of law. *Leingang v. Pierce County Med. Bureau, Inc.*, 131

---

<sup>7</sup> Andrea argues that the trial court erred by dismissing the CPA claim based upon the Statute of Limitations. Andrea's Opening Brief at 10. But State Farm Bank did not argue below that the CPA claim was time barred. CP 12-14. The statute of limitations on a CPA claim was never presented or considered by the trial court.

Wn.2d 133, 150, 930 P.2d 288 (1997). To establish a CPA claim, a plaintiff must prove five elements:

- (1) an unfair or deceptive act or practice;
- (2) occurring within trade or business;
- (3) affecting the public interest;
- (4) injuring the plaintiff's business or property; and
- (5) a cause relation between the deceptive act and the resulting injury.

*Robinson v. Avis Rent A Car Sys., Inc.*, 106 Wn. App. 104, 113, 22 P.3d 818 (2001). Critically, a plaintiff must prove each of these five elements with *actual evidence*; mere speculation or conjecture is insufficient. See *Westview Investments, Ltd. v. U.S. Bank, National Association*, 133 Wn. App. 835, 854, 138 P.3d 638 (2006) (dismissing a CPA claim when plaintiff's arguments were based on speculation rather than actual evidence regarding the effect of defendant's practices).

As discussed above, there was nothing unfair or deceptive about State Farm Bank's actions—they were instead expressly authorized by Andrea. Andrea's CPA claim fails under the first element.

It also fails under the third. The Court must examine the following factors to determine if the public interest element is met:

- (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 Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 790-91, 719 P.2d 531 (1986). Here, all the factors but the first favor

a finding that this matter does not affect the public interest. There was no record of any generalized course of conduct by State Farm Bank, no one but Andrea was involved, and there is no threat that any other members of the public will be injured. Other than *speculation* regarding how other members of the public might be affected, Andrea can supply *no evidence* on these matters to the jury. In these circumstances, there is no genuine issue of material fact on the third element of a CPA claim. *See id.* at 794 (reversing a finding that a CPA violation occurred and holding that the public interest test was not met in a “private transaction”); *Lightfoot v. MacDonald*, 86 Wn.2d 331, 333, 544 P.2d 88 (1976) (noting that “[i]t is the obvious purpose of the [CPA] to protect the public from acts or practices which are injurious to consumers and not to provide an additional remedy for private wrongs which do not affect the public generally”); *Aubrey’s R.V. Center, Inc. v. Tandy Corp.*, 46 Wn. App. 595, 609-10, 731 P.2d 1124 (1987) (reversing a finding that a CPA violation occurred because, among other things, no other consumers were affected by the transaction involving the plaintiff). Andrea’s CPA claim was properly dismissed.

**4. There was no genuine issue of material fact regarding Andrea’s outrage claim**

Intentional infliction of emotional distress—known as the tort of outrage—requires proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) plaintiff’s resulting actual severe emotional distress. *Kloepfel v. Bokor*,

149 Wn.2d 192, 195, 66 P.3d 630 (2003). Put another way, outrage claims must be predicated on behavior “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Id.* at 196 (citations omitted).

Here, Andrea’s outrage claim was based solely on State Farm Bank’s act of repossessing the car. CP 55-56 (Chen Dep. at 91:20-92:17). Andrea sought no counseling or other treatment as a result of her alleged anguish, and the car was returned within a few days after Andrea brought her account current. CP 56 (Chen Dep. at 92:8-24).

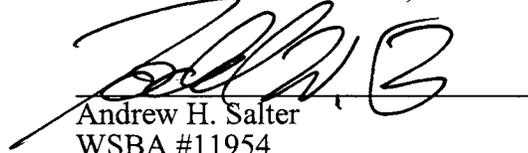
Andrea’s outrage claim was properly dismissed. Repossessing a car in which one has a secured interest is not extreme or outrageous conduct; it instead happens frequently. If Andrea’s claim were allowed to stand, any party who loses possession of property under a security agreement could theoretically bring outrage claims if they were embarrassed by the situation. Furthermore, Andrea did not provide any evidentiary basis to show that she actually suffered “extreme” or “severe” emotional distress. She sought no treatment, and only lost possession of the car for a few days. Under these undisputed facts, her claim of outrage was properly dismissed.

#### **IV. CONCLUSION**

The trial court properly concluded that Andrea cannot escape her contractual obligations to repay State Farm Bank. Summary judgment in favor of State Farm Bank was warranted. This Court should affirm.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of January, 2010.

SALTER JOYCE ZIKER, PLLC

A handwritten signature in black ink, appearing to read "AS", is written over a horizontal line.

Andrew H. Salter

WSBA #11954

Todd W. Wyatt

WSBA #31608

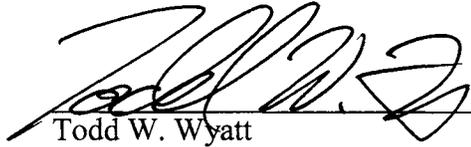
Attorneys for Respondent  
State Farm Bank

CERTIFICATE OF SERVICE

I hereby certify that a copy of this BRIEF OF RESPONDENT was sent via FedEx to the last known address for appellant as follows:

Andrea Chen  
5112 189th Avenue NE  
Sammamish, WA 98074-6125

DATED this 7<sup>th</sup> day of January, 2010.

  
\_\_\_\_\_  
Todd W. Wyatt

FILED  
COURT OF APPEALS DIV #1  
STATE OF WASHINGTON  
2010 JAN -8 PM 2:05