

No. 456427-2-II

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

MARK A. VELASCO and DANIKA E. VELASCO,
and the marital community composed therein,

Appellants

v.

NORTHWEST TRUSTEE SERVICES, INC., WELLS FARGO BANK,
HSBC Bank USA, National Association as Trustee for WFMBS 2007-011, WELLS
FARGO HOME MORTGAGE, MERSCORP, INC., a Delaware Corporation,
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Respondents.

Appeal from Superior Court for Lewis County
The Honorable Judge John Lawler

APPELLANTS' OPENING BRIEF

Jill J. Smith, WSBA #41162
Natural Resource Law Group, PLLC
2217 NW Market St., Suite 27
Seattle, WA 98107-4062
(206) 227-9800
Attorney for Appellant

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I. INTRODUCTION

This action involves a mortgage loan the Velascos entered into in 2007 and the subsequent attempted foreclosure by the Respondents. The Velascos obtained a purchase money mortgage loan from ComUnity Lending, Inc. to finance the purchase of their home in Winlock, Washington. Very shortly after obtaining the loan, in December 2007, Lewis County and the surrounding areas

were hit with a catastrophic flood that caused significant property damage in the area, resulting in the loss of employment for many people in the affected area. The Velascos were among those that saw a drastic drop-off in business and the resulting loss of income, as Interstate-5 was closed during that time, cutting off a major transportation route.

Nevertheless, the Velascos took immediate action to communicate with Wells Fargo, who alleged it was the servicer of the loan and HSBC the beneficiary. At that point, Wells Fargo quickly took advantage of this misfortune and took every opportunity available to it to thwart the Velascos' attempt to obtain a loan modification so their monthly payments would be more affordable, including telling the Velascos that they would be required to make a large balloon payment or be held in default. The Respondents sent the Velascos foreclosure notices immediately after they completed the first 90-day plan. Then, after almost two years of working in good faith with Wells Fargo to keep their loan on track, the Velascos were given another Notice of Trustee's Sale by Wells Fargo and Northwest Trustee Services, Inc. to begin foreclosure proceedings on the property. The Velascos filed suit in 2011 after realizing that Wells Fargo was not dealing in good faith with them and they were determined to keep their home. In April 2013, NWTS sent yet another NOD, in preparation for yet another NOTS.

The court wrongfully summarily dismissed the Velascos' claims against all Respondents for violation of the Consumer Protection Act, violation of the Deed of Trust Act, Negligence and Quiet Title, and that decision should be reversed.

II. ASSIGNMENTS OF ERROR

1. The trial court erred on November 15, 2013 when it granted Respondents' Motions for Summary Judgment, entered judgment in favor of the Respondents, and dismissed the Velascos' Consumer Protection Act, Deed of Trust Act, Declaratory Judgment, and Quiet Title claims with prejudice.

2. The trial court erred on November 15, 2013 when it granted Respondents' Motions for Summary Judgment, entered judgment in favor of NWTS, and dismissed the Velascos' claims based on the finding that the Assignment of Deed of Trust made by MERS recorded on November 19, 2008 assigning the Deed of Trust to HSBC Bank USA, N.A. as Trustee for WFMBS 2007-011 was not unlawful.

3. The trial court erred on November 15, 2013 when it granted Respondents' Motions for Summary Judgment, entered judgment in favor of the Respondents, and dismissed the Velascos claims with prejudice based on the finding that Wells Fargo, HSBC and MERS' foreclosure actions were lawful as the alleged beneficiaries and/or holder of the Note and Deed of Trust.

4. The trial court erred on November 15, 2013 when it granted Respondents' Motions for Summary Judgment, entered judgment in favor of the Respondents, and dismissed the Velascos claims with prejudice based on the finding that the acts of the Respondents during the loan modification process were not unlawful, unfair or deceptive.

Issues Pertaining to Assignments of Error

1. Did the trial court erroneously grant the Respondents' motions under CR 56 where as a matter of law, MERS cannot make an assignment of the

deed of trust because it is not a proper beneficiary or lender within the meaning of Washington statutes? (Assignments of Error No. 1, 2)

2. Did the trial court erroneously grant the Respondents' motions for summary judgment when it found that there was nothing improper or unlawful about the fact that the trustee and the beneficiary were the same person or entity on the assignment of deed of trust and the appointment of successor trustee? (Assignments of Error No. 2, 3)
3. Did the trial court erroneously grant the Respondents' motions for summary judgment when it found that there was nothing improper about the transfer of the loan into the securitized trust? (Assignments of Error No. 1, 2, 3).
4. Did the trial court erroneously grant the Respondents' motions for summary judgment when it found that there were issues of material fact that remained concerning the loan modification process, but those issues were not material to the "underlying issue of whether the deed of trust can be non-judicially foreclosed."? (Assignment of Error No. 4)

III. STATEMENT OF THE CASE

This action involves real property located at 136 Sargent Road, Winlock, Washington 98596 (hereinafter "Property"). On or about June 4, 2007, the Velascos (Appellants) entered into a single-family residential real estate promissory note (hereinafter "Note") with ComUnity Lending, Inc. of Morgan Hill, California (a California corporation, hereinafter "Lender"). (CP 6, 124-138). Discover Mortgage brokered the loan. A Deed of Trust (hereinafter "DOT") securing the interest of the property was recorded by Lewis County Title Company on June 8, 2007, Instrument Number 3282189, naming the Velascos as Grantors. (CP 6, 124).

While brokering the loan, defendant Discover Mortgage inflated the Velasco's income, had multiple appraisals of the property performed, and forged signatures. (CP 6). At the closing, the loan documents presented to Mr. and Mrs.

Velasco had a different interest rate, income statements, and a different total loan amount. Later that year, Lewis County suffered from record flooding that crippled commerce and business throughout Western Washington. Interstate 5 was closed. (CP 6). As a result, many of the County's residents including the Velascos struggled to maintain an income.

Mr. and Mrs. Velasco contacted Wells Fargo Home Mortgage, the servicer of the loan, and were told that they could stop making payments because they were in a FEMA disaster area. (CP 6). After approximately three months, the Velascos attempted to resume making their payments, only to learn from Wells Fargo Home Mortgage that they would have to make a large balloon payment or be held in default. (CP 7)

The Plaintiffs repeatedly attempted without success to modify their mortgage loan and were denied by Wells Fargo Home Mortgage each time, who claimed that the "investors" would not allow for a modification. (CP 7).

Despite making trial modification payments, Appellants were told to not make payments on their home pending the modification process, which dragged on and on. While in the midst of attempting to work out a repayment plan, a flurry of recordings related to the property began. (CP 7). The Plaintiffs trust and belief that they could work out a mortgage modification was crushed when the Respondents Wells Fargo and HSBC who apparently thoroughly controlled Northwest Trustee Services actions, began their attempts to foreclose on the property.

On November 19, 2008, an Assignment of Deed of Trust was recorded, executed on November 17, 2008, on behalf of the Mortgage Electronic Registration Systems, Inc., in the Lewis County Recorder's Office, Instrument Number 3316803, clouding the title to the Plaintiff's property. Jeff Stenman, signed the document as "Vice President" for MERS, which is named as the Beneficiary and Grantee in the original DOT. (CP 7, 317). The Assignment of the Deed of Trust did not assign the promissory Note. Mr. Stenman is an employee, officer and registered agent of Respondent Northwest Trustee Services, Inc. (CP 7, 317).

On November 19, 2008, an Appointment of Successor Trustee was recorded, dated November 3, 2008, wherein the Lewis County Title Company is the named Trustee, and MERS as nominee for the Lender and Lender's successors and assigns; also naming MERS as a beneficiary, under the original DOT. The document was recorded in the Lewis County Recorder's Office as Instrument Number 3316804, clouding the title to Plaintiff's property a second time. (CP8, 316).

The Appointment of Successor Trustee bears the signature of Nicole Miles, who represents herself to be Vice President of Loan Documentation of Wells Fargo Bank, N.A. as Attorney-in-Fact for HSBC Bank USA, N.A. as Trustee for WFMBS 2007-11. (CP 8, 316). In this Appointment of Successor Trustee, Ms. Miles appoints Respondent Northwest Trustee Services, Inc. as successor trustee, without the written resignation of the original trustee, Lewis County Title Company, who had not ceased to act. (CP 8, 316).

Both of the documents recorded on November 19, 2008 were improperly executed. The Assignment of the Deed of Trust was executed on November 17, 2008, two weeks prior to the Appointment of Successor Trustee being executed (November 3, 2008), negating the appointment of the successor trustee, despite the improper recordations. (CP 8, 316).

MERS is not a lender, and was at no time the lender on the subject promissory note and deed of trust, despite its fraudulent assertion on the Deed of Trust that it was the "Grantee." (CP 124). MERS has no interest in the subject promissory Note or DOT. Additionally, in the original DOT, particularly in Paragraph 24 under Non-Uniform Covenants, the right to substitute a trustee is vested exclusively with the Lender. (CP 8, 135).

In this particular series of recordations following the recording of the original DOT, there is no subsequent perfection of security interest on the part of any subsequent "beneficiaries;" thus the entire chain of title has been irreparably clouded and is unmarketable. (CP 8-9).

Further, on December 5, 2008, acting outside of the capacity of any authority properly vested to it, Respondent Northwest Trustee Services, Inc., through Title Guaranty Company, again recorded a Notice of Trustee's Sale under RCW 61.24 *et seq.*, Instrument number 3317539, in an attempt to sell the Velascos' property. (CP 9, 195-198, 245-248).

The document was signed by an employee of Respondent Northwest Trustee Services, Inc., namely, Vonnie McElligott, and notarized by a Rhea S. Pre, a notary public in the State of Washington. (CP 9, 195-198, 345-248).

Although allegedly notarized by the same person, the signatures of the notary public on the recorded documents were markedly different. The Velascos allege that this signature was forged, largely due in part to the notoriety of Respondent Northwest Trustee Services Inc.'s "foreclosure mill" behaviors.¹ (CP 9).

MERS claims itself as a beneficiary of the Note on the DOT and that Jeff Stenman, an agent, employee and officer for the Trustee, Respondent Northwest Trustee Services. Inc. is signing as the Vice President of an alleged beneficiary in violation of the Washington Deed of Trust Act RCW 61.24 *et seq.* (CP 9-10, 317). At no time relevant herein did the Velascos owe to MERS any financial obligation. MERS did not lend any money in regards to the subject property. MERS did not hold or retain the original signed note. (CP 10, 60:22-25).

On February 22, 2010, Respondent Northwest Trustee Services, Inc., recorded a Notice of Discontinuance of Trustee's Sale, as Instrument No. 3341309 as recorded in the Lewis County Recorder's Office. (CP 10, 57). On this document, Mr. Stenman, now acting as an agent, employee and officer of Respondent Northwest Trustee Services dated this document on February 11, 2010 and Jill C. Green, the notary public for the State of Washington did not sign and date the document until February 18, 2010, clearly indicating that Ms. Green did not witness Mr. Stenman's signing of the document. (CP 10, 57). This document further clouded and/or slandered Plaintiff's title.

¹ The behaviors described herein are what has become predominant in the media with the admission of so-called "robosignors" such as Jeffrey Stephan of Ally Financial (GMAC Mortgage) who admitted in deposition to signing 10,000 documents a month with no personal knowledge of what he was signing and attesting to by false swearing before a notary. Foreclosure mills (law firms specifically designed to foreclose on homeowners using whatever means necessary to "manufacture" documents to make their case meritorious have been found as fraud on the court in many foreclosure cases. U.S. Bank v. Harpster (S1-2007-CA6684ES, Pasco County, FL). This case dismissed the foreclosure with prejudice.

Mr. Stenman's signature compared between the documents he allegedly signed and were recorded are markedly different, and the notarization of those documents was done in violation of the duties of a notary public in the State of Washington. (CP 10, 57).

Presently, there has been no recordation of any perfected security interest on the part of any lender purporting to be the holder in due course of the Note in question, subsequent to the original recordation of the DOT. The Velascos further assert and argue that the title will remain unmarketable until all clouds are removed through the quieting of title. (CP 10-11).

VI. SUMMARY OF ARGUMENT

All respondents violated the Consumer Protection Act because they committed unfair and deceptive acts that had a public interest impact, and which caused harm to the Velascos. The Assignment of Deed of Trust and the Appointment of Successor Trustee were not in compliance with the Deed of Trust Act. Respondents actions during the loan modification were unfair and deceptive.

All respondents violated the Deed of Trust Act because the Beneficiary and the Trustee were the same party, NWTS took the actions of a Trustee before an Appointment of Successor Trustee was recorded, and the Assignment of Deed of Trust to HSBC was invalid because it occurred after the closing date and the cutoff date of the mortgage-backed security pool.

Wells Fargo, MERS and HSBC are liable for negligence in breaching their independent duties to the Velascos as required by the Consumer Protection Act and the Deed of Trust Act.

The court wrongfully dismissed Appellants' Quiet Title claim because the Velascos can show the strength of their title as opposed to the defects in the Respondents' claim to title on the subject property.

V. LEGAL ARGUMENT

A. Standard of Review

The Court reviews an order granting summary judgment de novo. *Hannum v. Dep't of Licensing*, 144 Wash.App. 354, 359, 181 P.3d 915 (2008). Summary judgment is only appropriate where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. CR 56(c). In deciding on a motion for summary judgment, the court must consider all facts, and reasonable inferences from those facts, in the light most favorable to the nonmoving party. *Watson v. Emard*, 267 P.3d 1048, 165 Wn.App. 691, 697 (2011), citing *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.2d 82 (2005). Thus, if there are material facts in the case that remain at issue, construing those facts in the light most favorable to the non-moving party, the court may not grant summary judgment.

There are numerous genuine issues of material fact that remain in this case and summary judgment should not have been granted. The foreclosure proceedings were initiated by Respondents when none of them were authorized to act as a beneficiary or trustee. The facts show that Wells Fargo, HSBC and MERS defrauded the Velascos, wrongfully attempted to foreclose on their property by transmitting unlawful notices to initiate the sale of Plaintiffs' home, engaged in unfair and deceptive practices violating the Consumer

Protection Act, RCW 19.86 *et seq.*, and failed to act in good faith. The facts on all these claims are in dispute.

B. All Respondents Violated the Consumer Protection Act and the Deeds of Trust Act

The trial court erroneously summarily dismissed the Appellants' Consumer Protection Act Claim, reasoning that the CPA claim was "derivative" of other claims. (VRP 43:9-13). The Appellants' Consumer Protection Act claims were independent claims that are not derivative of any other claims. Therefore, the trial court's dismissal was in error on this point and should be reversed and remanded to the trial court.

To sustain a claim for unfair and deceptive business practices under the Washington Consumer Protection Act (CPA), a Plaintiff must establish: (1) an unfair or deceptive act or practice (2) caused by the defendant (3) that occurred in trade or commerce (4) which impacted public interest (5) and caused injury to Plaintiff in his or her business or property. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986); RCW 19.86.020; RCW 19.86.093. To the extent that a violation of the Deed of Trust Act can create a cause of action under the CPA, the Deed of Trust Act must be strictly construed in favor of the borrowers, because lenders do not need the authority of the courts to initiate foreclosure proceedings. This principle has been repeatedly upheld by Washington courts. *Walker v. Quality Loan Service Corp.*, 176 Wn. App. 294, 308 P.3d 716 (2013),² *Albice v. Premier Mortg. Servs. Of Wash., Inc.*, 174 Wn.2d

² "Because the DTA 'dispenses with many protections commonly enjoyed by borrowers under judicial foreclosures, lenders must strictly comply with the statutes, and courts must strictly construe the statutes in

560, 567, 276 P.3d 1277 (2012) (citing *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007), *Bavand v. OneWest Bank*, 309 P.3d 636, 176 Wn.App. 475 (2013),³ *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 105, 297 P.3d 677, 682 (Wash. 2013), *Bain v. Metro. Mortg. Group, Inc.*, 175 Wn.2d 83, 93, 285 P.3d 34 (2012).

The trial court erred when it dismissed the Velascos' Consumer Protection Act claim. The trial court reasoned that since it found that Respondents acted lawfully in the foreclosure process, the Velascos' CPA claims failed. (VRP 43:9-13). Under the trial court's reasoning, in the context of non-judicial foreclosures, borrowers would never have a remedy for violations of the Deed of Trust Act or the CPA, so long as the foreclosing entity made the bare assertion that it had the authority to foreclose. This would render the procedures required under the Deed of Trust Act and the Consumer Protection Act meaningless.

1. *Respondents' Actions Were Unfair and Deceptive*

The CPA does not define the term "unfair." The CPA is to be "liberally construed that its beneficial purposes may be served." RCW 19.86.920; *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984). The Supreme Court of Washington recently addressed Consumer Protection Act violations in *Bain v. Metropolitan Mortgage Group, Inc.* in the context of the Deed of Trust Act and mortgages in Washington. In summarizing, the *Bain* Court held the following:

the borrower's favor.'" *Walker*, 176 Wn.App. at 306, quoting *Albice v. Premier Mortg. Servs. Of Wash., Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012).

³ "The supreme court has repeatedly stated that the Deeds of Trust Act 'must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting non-judicial foreclosure sales.'" *Bavand*, 176 Wn.App. at 486 quoting *Schroeder v. Excelsior Mgmt. Group, LLC* 177 Wn.2d 94, 105, 297 P.3d 677, 682 (Wash. 2013).

To prove that an act or practice is deceptive, neither intent nor actual deception is required. The question is whether the conduct has “the capacity to deceive a substantial portion of the public.” *Hangman Ridge*, 105 Wash.2d at 785 [719 P.2d 531]. Even accurate information may be deceptive “if there is a representation, omission or practice that is likely to mislead.” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wash.2d 27, 50, 204 P.3d 885 (2009) (quoting). Misrepresentation of the material terms of a transaction or the failure to disclose material terms violates the CPA. *State v. Ralph Williams’ N.W. Chrysler Plymouth, Inc.*, 87 Wash.2d 298, 305-09, 553 P.2d 423 (1976). Whether particular actions are deceptive is a question of law that we review de novo. *Leingang v. Pierce County Med. Bureau*, 131 Wash.2d 133, 150, 930 P.2d 288 (1997).

Bain v. Metropolitan Mortgage Group, Inc., 285 P.3d 34, 49-50, 185 Wn.2d 83 (2012).

It is clear that it is not necessary for an act or practice to be a per se violation of the Deed of Trust Act to state a Consumer Protection Act claim. The Supreme Court in *Klem v. Washington Mutual Bank* emphasized that, “To resolve any confusion, we hold that a claim under the Washington CPA may be predicated upon a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute, but in violation of public interest.” *Klem v. Washington Mutual Bank*, No. 87105-1, Slip Op. 16 (Feb. 28, 2013). In other words, an act or practice may be unfair or deceptive if it has the capacity to deceive and it is not a requirement that the specific unfair or deceptive act be defined in a statute as a per se violation of a statute for that act or practice to violate the CPA. To the extent that the court dismissed the case on this basis, the court was in error.

a. *Naming MERS as a Beneficiary on the Deed of Trust was Unfair and Deceptive*

As a matter of law, MERS is not a lawful beneficiary on a Deed of Trust in Washington. In *Bain v. Metropolitan Mortgage Group, Inc.*, 175. Wn. 2d 83, 285 P.3d 34 (Wash. 2012), an *En Banc* Washington State Supreme Court held that MERS is not a lawful beneficiary under the Deed of Trust Act. *Id* 98-99. The Supreme Court held that the beneficiary must hold the promissory note. *Id*. The Supreme Court based its reasoning on well established Washington law regarding the Deed of Trust Act, stating:

When secured by a deed of trust that grants the trustee the power of sale if the borrower defaults on repaying the underlying obligation, the trustee may usually foreclose the deed of trust and sell the property without judicial supervision. [citations omitted]. This is a significant power, and we have recently observed that “the [deed of trust] Act must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers’ interest and the lack of judicial oversight in conducting nonjudicial foreclosure sales.” *Udall v. T.D. Escrow Servs., Inc.*, 159 Wash.2d 903, 915-16, 154 P.3d 882 (2007) (citing *Queen City Sav. & Loan Ass’n v. Mannhalt*, 111 Wash.2d 503, 514, 760 P.2d 350 (1988) (Dore. J. dissenting)). Critically under our statutory system, a trustee is not merely an agent for the lender or the lender’s successors. Trustees have obligations to all of the parties to the deed, including the homeowner. RCW 61.24.010(4) (“ The Trustee or successor Trustee has a duty of good faith to the borrower, beneficiary, and grantor.”); *Cox v. Helenius*, 103 Wash2d 383, 389, 693 P.2d 683 (1985)(citing GEORGE E. OSBORNE, GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 7.21 (1979)(“[A] trustee of a deed of trust is a fiduciary for both the mortgagee and mortgagor and must act impartially between them.”)).[4] Among other things, “the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust” and shall provide the homeowner with “the name and address of the owner of any promissory notes or other obligations secured by the deed of trust” before foreclosing on an owner-occupied home. RCW 61.24.030(7)(a), (8)(1).

Id. at 93-94.

MERS did not have any authority under the Washington Deed of Trust Act to assign the Deed of Trust to HSBC Bank USA, National Association, as Trustee for WFMBS 2007-11. The Supreme Court contemplated this very scenario in the *Bain* decision, stating:

...MERS suggest that, if we find a violation of the act, “MERS should be required to assign its interest in any deed of trust to the holder of the promissory note, and have that assignment recorded in the land title records, before any non-judicial foreclosure could take place.” Resp. BR. Of MERS at 44 (*Bain*). But if MERS is not the beneficiary as contemplated by Washington law, it is unclear what rights, if any, it has to convey. Other courts have rejected similar suggestions. *Bellistri*, 284 S.W.3d at 624 (citing *George v. Surkamp*, 336 Mo. 1, 9, 76 S.W.2d 368 (1934)). Again, the identity of the beneficiary would need to be determined. Because it is the repository of the information relating to the chain of transactions, MERS would be in the best position to prove the identity of the holder of the note and beneficiary.

Bain at 111-112.

The Supreme Court in *Bain*, held: “While we are unwilling to say it is per se deceptive, we agree that characterizing MERS as the beneficiary has the capacity to deceive and thus, for the purposes of answering the certified question, presumptively the first element is met.” *Bain* at 117.

b. *Northwest Trustee Services (NWTS) actions were unfair and deceptive*

The actions of NWTS parallel the actions of MERS in the case at bar. On November 19, 2008, NWTS recorded an Appointment of Successor Trustee, wherein it was nominated as the trustee. This Appointment was executed on November 3, 2008. (CP 316). On November 17, 2008, two weeks after the execution of the Appointment of Successor Trustee, a NWTS’ employee, Jeff

Stenman, signed the Appointment of Successor Trustee as a Vice President of MERS. (CP 317). The document was notarized by a NWTS' employee. *Id.* In the instant case, NWTS which was acting as the trustee, also had employees acting as the beneficiary under the deed of trust. The DOTA is very clear in its mandate that "No person, corporation or association may be both trustee and beneficiary under the same deed of trust." RCW 61.24.020. The trial Court erred when it found that since they were "separate entities" the requirements of the trustee being separate from the beneficiary of the deed of trust were met. (VRP 43:3-8).

A trustee has very well defined duties under the Deed of Trust Act, and if a trustee initiates the foreclosure process it is not merely acting as an agent for the beneficiary. It must act as the neutral party who has a good faith duty to all parties, including the borrower. To act simply as the agent for the beneficiary would be a conflict of interest because an agent owes a duty of loyalty to the principle, so it would be impossible and unlawful for the trustee to act in a neutral manner when acting as agent for the beneficiary.

In *Klem v. Washington Mutual Bank*, the Supreme Court held that "a claim under the Washington CPA may be predicated upon a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest." *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013). The court determined that a trustee's failure to fulfill its duty to the borrower constituted a "deceptive act" under the CPA. *Klem*, 176

Wn.2d at 787. NWTS failed to fulfill its duty to the Velascos by sending the Notice of Default before the Appointment of Successor Trustee was recorded. This is a failure to act in an impartial manner. NWTS also failed to fulfill its duty to the Velascos when Jeff Stenman signed documents as both the beneficiary's representative and a representative of the Trustee, when the beneficiary and the trustee cannot be the same party.

In the case at bar, these roles become blurred and run afoul of the entire purpose of the Deed of Trust Act. It is unlawful for the trustee to also be a "vice-president" of the beneficiary. RCW 61.24.020. The title "vice-president" indicates that the person is acting as an officer for the corporation and owes that corporation a fiduciary duty. In the instant case, Jeff Stenman, an employee and officer at Northwest Trustee Services owes that entity a fiduciary duty. The requirements of the Deed of Trust Act go beyond having the same person employed by multiple parties acting as the representative of the beneficiary, and the foreclosure trustee for another entity. Therefore, NWTS failed to fulfill its duty to the Velascos by failing to be independent, and by having employees also acting as officers for MERS. This is a deceptive act that meets the first element of the Washington Consumer Protection Act.

c. Wells Fargo's and HSBC's Actions were Deceptive

Wells Fargo as Servicer for HSBC as trustee for WFMBS 2007-11 was unfair and deceptive when it unlawfully claimed to be the beneficiary of the deed of trust when the closing date and the cutoff date of the security occurred long before the Assignment of the Deed of Trust was made from MERS, even if the

MERS assignment was found to be valid. Pursuant to RCW 61.24.020, a deed of trust is subject to all laws relating to mortgages on real property. An assignment of a mortgage is not effective until recording. RCW 61.16.020; see *Price v. Northern Bond & Mortg. Co.*, 161 Wash. 690, 696, 297 P. 786 (Wash. 1931) (where the assignment of a mortgage is not recorded, purchaser has right to assume no assignment has been made). MERS did not even have the legal authority to transfer the deed of trust. This collusive process used MERS, Northwest Trustee Services and Wells Fargo to essentially prevent the Velascos from being able to identify who the owner of the note was, prevent direct communication with the lender, and served the purpose of creating a default that the Velascos could not cure.⁴

In addition, Wells Fargo's actions were unfair and deceptive during the loan modification program. The Velascos attempted to modify their mortgage seeking the proper means to catch up on the payments that became more difficult due to the floods. In each attempt, Wells Fargo claimed that the "investors" would not allow for a modification. (CP 200-211). In fact, the Pooling and Servicing Agreement (PSA) specifically authorizes the servicer to enter into loan modifications. (VRP 27:3-16, CP 209, 296).

Instead of acting in good faith and in a transparent manner, Wells Fargo and HSBC beleaguered the Velascos with a vexing array of changing fax numbers, contacts, overly-burdensome requirements, and repeated requests for financials and other oppressive demands for information. Wells Fargo and HSBC

⁴ This argument is more fully set forth in Part C. of this brief, p. 26.

procrastinated through the process for years, while Wells Fargo continued to accept forbearance payments from the Velascos who were attempting to obtain a loan modification. Wells Fargo and HSBC deceived the Velascos by accepting forbearance payments and continuing to request information from the Velascos, knowing full well that Wells Fargo and HSBC never intended to modify the loan, and instead continued forward with the foreclosure process.

All these acts of Wells Fargo and HSBC and MERS were unfair and deceptive, and even if they were found to be lawful, certainly had the capacity to deceive.

2. *Respondents' Actions Had An Impact on the Public Interest*

There is ample support for the position that the acts of Northwest Trustee Services, Wells Fargo, HSBC and MERS that caused harm to the Velacos and are acts that impact the public interest. A plaintiff may show that a deceptive commercial act or practice has affected the public interest by satisfying any of five different factors.

(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; *Bavand* at 31. The court in *Hangman Ridge* also held, finding in this context that:

Ordinarily, a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest. *Lightfoot v. MacDonald*, *supra* 86 Wash. at 334, 544 P.2d 88. However, it is the likelihood that additional plaintiffs have been or will

be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest. *McRae v. Bolstad, supra*, 101 Wash. at 166, 676 P.2d 496. Factors indicating public interest in this context include: (1) Were the alleged acts committed in the course of defendant's business? (2) Did defendant advertise to the public in general? (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others? (4) Did plaintiff and defendant occupy unequal bargaining positions? As with the factors applied to essentially consumer transactions, not one of these factors is dispositive, nor is it necessary that all be present. The factors in both the “consumer” and “private dispute” contexts represent indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact.

Hangman Ridge, 105 Wn.2d at 790-791.

The problems the Velascos encountered with these Respondents were more than just a private dispute. Wells Fargo, HSBC, MERS and NWTs are engaged in the same processes with countless other borrowers and homeowners and the identical behavior has been, and is likely to be repeated. This should not be viewed as limited simply to a private dispute.

In *Bavand v. OneWest Bank*, 176 Wn.App. 475, 308 P.3d 636 (2013), the court held that “In the context of a similar CPA claim based on MERS’s representation that it was a beneficiary, the *Bain* court noted that ‘there is considerable evidence that MERS is involved with an enormous number of mortgages in the country (and our state)...’ It then concluded that ‘[i]f in fact the language is unfair or deceptive, it would have a broad impact. This element is also presumptively met.’”⁵ Here, as in *Bavand*, MERS’s status as the named beneficiary in this deed of trust presumptively meets the public interest element of a CPA claim.

⁵ *Bain*, 175 Wn.2d at 118, quoted in *Bavand*, 176 Wn.App. at 507.

There should be no doubt that MERS's conduct impacts the public interest. See *Hangman Ridge*, 105 Wn.2d at 790 (noting a private dispute may affect the public interest if it is likely that others have been or will be injured in exactly the same fashion); Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. Cin. L.Rev. 1359, 1362 (2010) ("Although MERS is a young company, 60 million mortgage loans are registered on its system."). The actions of a foreclosure trustee, as a party vested with the ability to engage in foreclosure and trustee's sale activity, are certainly considered actions that have a public interest impact. It should be patently clear from the record in this case that but for the deceptive actions of all Respondents, the Velascos would not have suffered injuries. The Velascos incurred investigative expenses, legal fees, and loss of work time, as well as additional late fees, inspection fees, and damage to credit, thus proving causation and damages.

As in *Bain*, the alleged acts of MERS were done in the course of its business, and MERS naming itself as a "beneficiary" was a generalized practice that was a course of conduct repeated in hundreds of other deeds of trust." *Bavand* at 31. Additionally, Wells Fargo and Northwest Trustee Services are involved in an enormous number of loans and foreclosures in Washington State.

3. The Velascos Suffered Damages From Respondents' Acts

As the court in *Hangman Ridge* concluded, "the injury need not be great, but it must be established." And, as the Supreme Court noted in *Panag v. Farmers Insurance Co. of Washington*, "'Injury' is distinct from 'damages.'"

Monetary damages need not be proved; unquantifiable damages may suffice.” *Panag*, 166 Wn.2d at 58, quoted in *Bavand* at 33. Because of the unfair and deceptive acts of Wells Fargo, HSBC, Northwest Trustee Services and MERS, the Velascos suffered damage to credit, loss of credit opportunities, loss of business opportunities and potential loss of their home to foreclosure, which is still a looming possibility.

C. Recent Federal Law Supports Plaintiffs’ Position That Borrowers Have Standing to Challenge the Transfer of the Note

In *Reinagel v. Deutsche Bank National Trust Co.* 722 F.3d 700 (5th Cir. 2013), the court followed the majority rule that an obligor may raise any ground that renders the assignment void, rather than merely voidable. Under New York Trust Law, every sale, conveyance or other act of the trustee in contravention of the trust is void. EPTL §7-2.4. Therefore, the acceptance of the note and mortgage by the trustee after the date the trust closed, would be void. *Wells Fargo Bank, N.A. v. Erobo* (N.Y.Sup.Ct. 2013) 39 Misc.3d 1220(A), 2013 WL 1831799, p. 8; see Levitin & Twomey, *Mortgage Servicing*, *supra*, 28 Yale J. on Reg. at p. 14, fn. 35 (under New York law, any transfer to the trust in contravention of the trust documents is void).

The First Circuit in *Culhane v. Aurora Loan Services of Nebraska* held that that a mortgagor has standing to challenge the assignment of a mortgage on her home to the extent that such a challenge is necessary to contest a foreclosing entity's status qua mortgagee. *Culhane v. Aurora Loan Services of Nebraska*, (1st Cir. 2013) 708 F.3d 282, 291. The court based its holding on the finding that

“there is no principled basis for employing standing doctrine as a sword to deprive mortgagors of legal protection conferred upon them under state law.” *Id.*

The First Circuit also held in *Woods v. Wells Fargo Bank, N.A.* that “standing exists for challenges that contend that the assigning party never possessed legal title and, as a result, no valid transferable interest ever exchanged hands. See *U.S. Bank Nat’l Ass’n v. Ibanez*, 458 Mass. 637, 651, 941 N.E. 2d 40, 53 (2011) (“[T]here must be proof that the assignment was made by a party that itself held the mortgage.”) *Woods v. Wells Fargo Bank, N.A.*, 733 F.3d 349, 354 (1st Cir. 2013).

In *Glaski v. Bank of America, N.A.*, 218 Cal. App. 4th 1079 (2013), the court found that the borrower may have standing to question the legitimacy of a transfer of a note into a securitized trust. *Glaski*, 218 Cal. App. at 1095. The court held that “We reject the view that a borrower’s challenge to an assignment must fail once it is determined that the borrower was not a party to, or third party beneficiary of, the assignment agreement. Cases adopting that position “paint with too broad a brush.” (*Culhane v. Aurora Loan Services of Nebraska, supra*, 708 F.3d at 290). Instead, courts should proceed to the question whether the assignment was void.” *Glaski* at 1095.⁶ The court’s reasoning was not solely based on interpretation of California laws, but on the holding of federal appellate court decisions. The transaction may be void if, *inter alia*, the rules surrounding the formation of the trust were not strictly followed. In *Glaski*, the court found

⁶ *Culhane v. Aurora Loan Services of Nebraska* (1st Cir. 2013) 708 F.3d 282, 291. (“We think that these cases paint with too broad a brush.”)

there was a cause of action and a material issue of fact as to whether the note in question was transferred into the trust in a timely fashion. *Id.*

The reasoning in *Glaski* reflects the current trend on this issue. “Where an assignment is merely voidable at the election of the assignor, third parties, and particularly the obligor, cannot...successfully challenge the validity or effectiveness of the transfer.” (7 Cal.Jur.3d (2012) Assignments, §43, p. 70).” Quoted in *Glaski* at 1094-1095. But a challenge can be brought by the borrower if the assignment is void:

The statement implies that a borrower can challenge an assignment of his or her note and deed of trust if the defect asserted would *void* the assignment. (See *Reinagel v. Deutsche Bank National Trust Co.* (5th Cir., July 11, 2013, No. 12-50569) ___ F.3d ___ [2013 WL 3480207, p. *3] [following majority rule that an obligor may raise any ground that renders the assignment void, rather than merely voidable].) We adopt this view of the law and turn to the question whether *Glaski*’s allegations have presented a theory under which the challenged assignments are void, not merely voidable.”

Glaski, at 1095.

The court further held that, because securitized trusts are governed by New York statutes, applying those statutes “to void the attempted transfer is justified because it protects the beneficiaries of the ...Trust from the potential adverse tax consequence of the trust losing its status as a REMIC trust under the Internal Revenue Code... we join the position stated by a New York court approximately two months ago: ‘Under New York Trust Law, every sale, conveyance or other act of the trustee in contravention of the trust is void. EPTL §7-2.4. Therefore, the acceptance of the note and mortgage by the trustee after the date the trust closed, would be void.’ (*Wells Fargo Bank, N.A. v. Erobobo*

(N.Y.Sup.Ct. 2013) 39 Misc.3d 1220(A), 2013 WL 1831799, p. 8; see Levitin & Twomey, *Mortgage Servicing*, *supra*, 28 Yale J. on Reg. at p. 14, fn. 35 [under New York law, any transfer to the trust in contravention of the trust documents is void].)” *Glaski* at 1097. The court concluded that the entity holding the power of sale (the trustee for the securitized trust) was not the holder of the Glaski deed of trust. *Id.*

D. Respondents Are Liable for Negligence

1. *The Independent Duty Rule Does Not Bar Plaintiff’s Claim*

According to the Washington Supreme Court’s recent decision pertaining to the independent duty doctrine, the economic loss rule does not bar recovery in tort if the defendant’s alleged misconduct comes from tort duty arising separate from the contract. *Eastwood v. Horse Harbor Foundation, Inc.*, 241 P.3d 1256, 1264, 170 Wn.2d 380 (2010). The nature of the loss and manner in which it occurs is key. *Alejandre v. Bull*, 159 Wn.2d 674, 684, 153 P.3d 864 (2007). “The test is not simply whether an injury is an economic loss arising from breach of contract, but rather whether the injury is traceable *also* to a breach of a tort law duty of care...” *Eastwood*, Wn.2d at 1264 (emphasis added) (holding in a landlord/tenant dispute that a tenant’s duty not to cause waste can be a duty independent of lease covenants). Assessing the independent duty does not involve a bright line rule relying on strict categories.⁷ Instead, to avoid confusion, it is better approached on a “careful, case-by-case analysis...[i]t can be unclear where

⁷ The court notes that a potential brightline rule would rely on these categories: “(1) economic losses, (2) personal injury, and (3) property damage. *See, e.g., Alejandre*, 159 Wn.2d at 684, 153 P.3d 864. Although these categories can be helpful, they are derived from product liability cases. They can be confusing when removed from their original context.” *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 396, 241 P.3d at 1265 (2010).

economic loss ends and begins.” *Id.* at 1265. Once the independent duty is held to exist as a matter of law, the connection between the breach and the plaintiff’s injury becomes a factual question of proximate cause. *Id.* at 1267.

Here, in addition to Defendants’ contract duties, Plaintiffs have shown that they have property damages that are traceable to the Defendants’ independent duty to refrain from unfair and deceptive business practices under the CPA. Plaintiff’s damages include, but are not limited to a clouded title, damage to credit, and a decrease in the value of Plaintiff’s property. Thus, Plaintiffs can demonstrate that they have remedies in tort.

2. *Defendants Breached A Statutory Duty Under the CPA to Act in a Fair and Transparent Manner*

Gross negligence is a “want of slight care” and is substantially greater than ordinary negligence. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 474, 229 P.3d 735 (2010); *quoting Miller v. Treat*, 57 Wn.2d 524, 532, 358 P.2d 143 (1960). “Gross negligence has been described as a failure to exercise even that care which a careless person would use.” *Prosser and Keeton on Torts*, § 31 at 211-212 (5th Ed. 1984), (*quoting* Restatement (Second) of Torts § 282) (citations omitted). In contrast to ordinary negligence, these defendants actions sink to the level of gross negligence, because they failed to use even the slightest amount of care in discharging their statutory duties to Plaintiff. See *Id.*, Ch. 5, 6. Defendants’ grossly negligent conduct falls to this level. As a result, Appellants have suffered and will continue to suffer damages in the form of damage to credit, loss of access to credit and business opportunities, loss of equity, risk of foreclosure, and risk of loss of the home.

The Consumer Protection Act (RCW § 19.86 et seq.) prohibits unfair or deceptive business practices in the course of trade or commerce, and this is a statutory duty that clearly applies to these Respondents. Appellants can demonstrate that as a direct and proximate result of the negligence of these Respondents, either acting independently or through agents and employees, the Velascos suffered economic damages and personal injuries. Wells Fargo Bank, Wells Fargo Home Mortgage, and HSBC had a statutory duty under the CPA to act in a fair and transparent manner with the Velascos in the loan modification process and the foreclosure process, and they breached this duty.

While these defendants may assert that they are under no duty or requirement to offer the Velascos a loan modification, if they are going to engage in the loan modification process, that process must be performed in a fair and transparent manner and within the intent and letter of the HAMP laws and regulations. *See generally, Corvello v. Wells Fargo*, 728 F.3d 828 (9th Cir. 2013). Wells Fargo and HSBC allowed documents to be recorded (Notices of Default, Notices of Trustee's Sale, Appointment of Successor Trustee, and Assignment of the Deed of Trust) and actions to be taken in accordance with those recorded documents that were in violation of the Deed of Trust Act and the Consumer Protection Act. This knowing and willful conduct that is clearly in violation of the Deed of Trust Act and the Consumer Protection Act falls well below the standard of care that a lender and beneficiary should uphold.

These Respondents breached their duties to the Velascos, the Velascos suffered damages as a result, and Respondents' breach of their duties were the

proximate cause of those damages. The court should find that there remains a genuine issue of material fact and as a matter of law, and the trial court was in error in granting summary judgment to the Respondents on the claim of negligence.

E. Suit To Quiet Title Was Dismissed in Error

An action to quiet title is an equitable proceeding “designed to resolve competing claims of ownership.” RCW 7.28.010 requires Walker to bring an action to quiet title against “the person claiming the title or some interest” in real property in which he has a valid interest. “A ‘plaintiff in an action to quiet title must prevail, if he prevails at all, on the strength of his own title, and not on the weakness of the title of his adversary.’ ” *Walker*, 176 Wn.App. at 322 (internal citations omitted).

A deed of trust is issued in Washington to secure a promissory note for the mortgage. The property, evidenced by the deed, serves as collateral for the Note. When the Note is sold into a mortgage-backed security pool, it is converted into a stock and fully discharged. The Velascos’ Deed of Trust secures a promissory note, (CP 125) and if the promissory note is destroyed through permanent conversion, then the Deed of Trust secures nothing. As the Title owner, the Velascos have an obligation to defend their title. The Deed of Trust also states: “Borrower covenants that Borrower is lawfully seized of the estate hereby conveyed and has the right to grant and the Property is unencumbered except for encumbrances of record. Borrower warrants and will defend generally the title to

the Property against all claims and demands, subject to any encumbrances of record.” CP 14, 126.

Therefore, the Velascos can show the strength of their title, as opposed to simply pointing out defects in Respondents’ title claims, and the dismissal of a quiet title action should be reversed.

VI. CONCLUSION

Accordingly, this Court should reverse the trial court order granting the motions for summary judgment, and remand for further proceedings.

Signed and dated this 25th day of April, 2014.

/s/ Jill J. Smith
Jill Smith, WSBA #41162
Natural Resource Law Group, PLLC
2217 NW Market St., Suite 27
Seattle, WA 98107-4062
(206) 227-9800
Attorney for Appellants

CERTIFICATE OF SERVICE

I certify under penalty of perjury that the attached document was served upon the Court of Appeals for Division II, and properly served to the counsel listed below, on April 25, 2014.

Abraham Lorber
Lane Powell
1420 Fifth Ave., Suite 4100
Seattle, WA 98101

John Thomas
RCO Legal
5112 SW 10th Ave., Suite 400
Portland, OR 97205

ATTORNEYS FOR RESPONDENTS

/s/ Jill J. Smith

Jill J. Smith, WSBA #41162

NATURAL RESOURCE LAW GROUP

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