

Case No. 45953-1-II

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

SANDRA CABAGE

Plaintiff/Appellant,

v.

NORTHWEST TRUSTEE SERVICES, INC.; PNC MORTGAGE, a
division of PNC BANK N.A.; and DOE DEFENDANTS 1 through 20

Defendants/Appellees.

PLAINTIFF SANDRA CABAGE'S REPLY BRIEF ON APPEAL

Melissa A. Huelsman, WSBA #30935

Law Offices of Melissa A. Huelsman, P.S.
705 Second Avenue, Suite 601
Seattle, WA 98104
(206) 447-0103
Attorney for Plaintiff/Appellee Sandra
Cabage

TABLE OF CONTENTS

REPLY.....1

1. **First and foremost, PNC Bank, N.A. lied about its role in the nonjudicial foreclosure to Ms. Cabage and to the mediator. It never had any legal authority to nonjudicially foreclose on Ms. Cabage nor to participate in the FFA Mediation.**.....5

2. **NWTS also violated the requirements of the Deed of Trust Act, even though it had an express duty to Ms. Cabage and it is liable to her as a result.**.....11

3. **Ms. Cabage proved that she met all of the elements of a CPA claim, including injury and out of pocket damages.**.....13

4. **Ms. Cabage’s claims for intentional and/or negligent misrepresentation are similarly supported by the facts that are in evidence.**.....23

5. **Ms. Cabage does not have claims directly flowing from the Deed of Trust Act against either of the Defendants.**.....23

CONCLUSION..... 23

TABLE OF AUTHORITIES

Cases

Albice v. Premier Mortg. Svcs. of Wash., Inc., 174 Wn.2d 560, 276 P.3d 1277 (2012).....	15, 16, 24
Bain v. Metropolitan Mortg. Grp., Inc., 175 Wn.2d 83, 285 P.3d 34 (2012).....	passim
Beaton v. JPMorgan Chase Bank N.A., 2013 WL 1282225 (W.D. Wash. 2013).....	10
Cox v. Helenius, 103 Wn.2d 383, 693 P.2d 683 (1985).....	24
Hangman Ridge Training Stables v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, (1986).....	7, 14
In re Meyer, 506 B.R. 533, 540 & 546-47 (Bkrctcy. W.D. Wash. 2014)....	11
Klem v. Washington Mut. Bank, 176 Wn.2d 771, 782, 295 P.3d 1179 (2013).....	16, 17, 19, 22
Knecht v. Fidelity Nat'l Title Ins. Co., 2014 WL 4057148, *8-*9 (W.D. Wash. Aug. 14, 2014).....	10
Lucero v. Cenlar, FSB, Case No. C13-0602-RSL (W.D. Wash. 2013)....	10
Mason v. Mortgage America, 114 Wn.2d 842, 792 P.2d 142 (1990). 13, 22	
McDonald v. OneWest Bank, FSB, 2013 WL 858178 (W.D. Wash., Sept. 25, 2013).....	10, 19, 20
Panag v. Farmers Ins. Co. of Wash. 166 Wn.2d 27, 53, 204 P.3d 885 (2009).....	13, 15, 17, 22
Rucker v. Novastar Mortg., Inc. 177 Wn.App. 1, 311 P.3d 31, (2013).....	15
Sato v. Century 21, 101 Wn.2d 599, 681 P.2d 242 (1984).....	21
Schroeder v. Excelsior Mgmt. Grp., LLC, 177 Wn.2d 94, 297 P.3d 677 (2013).....	15, 16, 24
St. Paul Ins. Co. v. Updegrave, 33 Wn.App. 653, 656 P.2d 1130 (1983) 21	
State v. Schwab, 103 Wn.2d 542, 558, 693 P.2d 108 (1985) (Dore, J. dissenting).....	17
Talmadge v. Aurora Chrysler Plymouth, Inc., 25 Wn. App. 90, 605 P.2d 1275 (1979).....	22
Udall v. T.D. Escrow Services, Inc., 159 Wn.2d 903, 916, 154 P.3d 882 (2007).....	16
Walker v. Quality Loan Svc. Corp., 176 Wn.App. 294, 308 P.3d 716 (2013).....	15

STATUTES

RCW 61.24.005(2)..... *passim*
RCW 61.24.010(2)..... 15
RCW 61.24.030(7)..... *passim*
RCW 61.24.030(7)(a) *passim*
RCW 61.24.030(8)(l)..... 10, 12
RCW 61.24.040 9
RCW 61.24.163(5)(c) *passim*
RCW 61.24.163(8)(a) *passim*
RCW 62A.3-203 7, 8

OTHER AUTHORITIES

David A. Leen, Wrongful Foreclosures in Washington, 49 *Gonzaga Law Review*, 331 (April 2014).....10

REPLY

1. First and foremost, PNC Bank, N.A. lied about its role in the nonjudicial foreclosure to Ms. Cabage and to the mediator. It never had any legal authority to nonjudicially foreclose on Ms. Cabage nor to participate in the FFA Mediation.

While it is not surprising that PNC Bank, N.A. (“PNC”) would like this Court to completely ignore its actions in connection with the attempt at non-judicial foreclosure and during the mediation session, its document falsification is at the core this case. The record is abundantly clear that PNC was never the “beneficiary”. RCW 61.24.005(2). It was never the noteholder nor was it the loan owner. *Id.*; RCW 61.24.030(7). Therefore, it had no authority to appoint a successor trustee, to initiate a nonjudicial foreclosure and it did not have authority to participate in the Foreclosure Fairness Act (“FFA”) mediation in the role of “beneficiary”. RCW 61.24.163. At no time during the history of the FFA has there been a reference to anyone other than the “beneficiary” being a participant, except that an “agent” for the beneficiary may be present at the mediation session and someone with authority to make a decision on behalf of the beneficiary may be on the phone. RCW 61.24.163(8)(a). In fact, RCW 61.24.163(5)(c) **requires** proof “that the entity claiming to be the beneficiary is the owner of any promissory note or other obligation secured by a deed of trust.” RCW 61.24.163(5)(c). This may be demonstrated by use of the declaration required in RCW 61.24.030(7)(a).

The documents submitted to Ms. Cabage and the mediator during the FFA mediation by PNC falsely stated that it was the “beneficiary”.

PNC asserted, through its attorney, Mr. Katz and its employee on the telephone, that “PNC had full and complete authority to make all decisions” about the loan and that Ms. Cabage had not been reviewed for a loan modification. CP 41-46; 56-133. If the excuse for not providing a loan modification had been an investor restriction, then the entity participating in the mediation on behalf of the beneficiary is **required** to provide a copy of that document and to seek a waiver of the restriction. RCW 61.24.163(5)(j). Here, PNC revealed for the first time during the mediation session that there was an “investor” involved in a passing comment, but refused to identify the entity any further and continued to absolutely refuse to even consider Ms. Cabage for a loan modification. This is a complete perversion of the requirements of the FFA, especially since one of the core requirements of the FFA was the need for proof that the beneficiary was the owner of the loan. RCW 61.24.163(5)(c). Instead of complying with that requirement, PNC lied and asserted repeatedly that it was the “beneficiary”. As the Supreme Court held in *Bain*, “[I]f MERS never “held the promissory note, then it is not a ‘lawful’ ‘beneficiary’”. *Bain v. Metro. Mrtg. Group, Inc.*, 175 Wn.2d 83, 97, 285 P.3d 34 (2012). This does not just apply to MERS. Here, PNC never held Ms. Cabage’s Promissory Note and it was therefore never a “beneficiary”. RCW 61.24.005(2).

Further, the FFA requires the following from the parties to a mediation:

(9) The participants in mediation must address the issues of foreclosure that may enable the borrower and the beneficiary to reach a resolution, including but not limited to reinstatement, modification of the loan, restructuring of the debt, or some other workout plan. To assist the parties in addressing issues of foreclosure, the mediator may require the participants to consider the following:

(a) The borrower's current and future economic circumstances, including the borrower's current and future income, debts, and obligations for the previous sixty days or greater time period as determined by the mediator;

(b) The net present value of receiving payments pursuant to a modified mortgage loan as compared to the anticipated net recovery following foreclosure;

(c) Any affordable loan modification calculation and net present value calculation when required under any federal mortgage relief program, including the home affordable modification program (HAMP) as applicable to government-sponsored enterprise and nongovernment-sponsored enterprise loans and any HAMP-related modification program applicable to loans insured by the federal housing administration, the veterans administration, and the rural housing service. If such a calculation is not provided or required, then the beneficiary must provide the net present value data inputs established by the federal deposit insurance corporation and published in the federal deposit insurance corporation loan modification program guide or other net present value data inputs as designated by the department. The mediator may run the calculation in order for a productive mediation to occur and to comply with the mediator certification requirement; and

(d) Any other loss mitigation guidelines to loans insured by the federal housing administration, the veterans administration, and the rural housing service, if applicable.

RCW 61.24.163(9). PNC did absolutely none of the above.

When PNC asserted to the trial court and in this appeal that the “good faith” certification made by the mediator is inviolate and that Ms. Cabage may not make any challenge to it, it is contending that it and other loan servicers are free to lie to borrowers and mediators with impunity, and that so long as the mediator does not catch the lie during mediation, there is no consequence for that lie. That result is absurd and contradicts

the reason that the Legislature passed the FFA into law. _____
It is particularly absurd in this situation given the blatant refusal of the mediator to fulfill her duties in numerous instances which are outlined in the Opening Brief and her refusal to require adherence to the statute. The mediator's acts in violation of the statute should not preclude Ms. Cabage's claims.¹

For the first time in its Response, PNC argues that it could not review Ms. Cabage's documents given the timeframe for the mediation session as a new excuse for its refusal to review her for a loan modification. Not only is this a new argument on appeal, it is completely inconsistent with its representations made during the mediation session. PNC did not contend that it did not have time to review her documents. Instead, it contended that it was refusing to do so. Further, PNC could have requested a continuance but did not do so. RCW 61.24.163(8)(b). This is just another attempt to obfuscate and try to detract from its numerous falsehoods made throughout the mediation and the litigation. More importantly, PNC was never the "beneficiary" nor the loan owner. It did not have the authority to take any actions under the DTA that must be completed by those persons or entities.

At the beginning of the case, in opposition to Ms. Cabage's request for injunctive relief, PNC continued to mislead and deceive the trial court

¹ As noted in the Opening Brief, PNC was required to provide an explanation regarding any denial for a loan modification in sufficient detail for a reasonable person to understand why the decision was made. RCW 61.24.163(5)(h). It did not do so because it refused to review her and this too was ignored by the mediator. CP 1358-1359.

by referring to the mediator certificate as containing truthful representations when it was not truthful. (The certificate indicated that the NPV analysis resulted in a negative result, which was absolutely untrue.) RCW 61.24.163(9)(c) & (12)(e). CP 56-133. PNC also continued to falsely assert that it was the “beneficiary”. Once Ms. Cabage obtained discovery from PNC, the extent of its falsehoods was clear. PNC was never the noteholder and it was certainly not the loan owner. Instead, the loan was owned by a securitized trust and the Promissory Note signed by Ms. Cabage and indorsed in blank had been in a vault facility run by Deutsche Bank, acting as custodian, since the loan was sold shortly after inception.

During deposition, PNC confirmed that it had refused to even review Ms. Cabage for a loan modification because there was a notation on a computer screen which indicated that because she had not reaffirmed the loan during her bankruptcy, it could not be modified. The deponent could not explain why that entry had been made on her account, who had made it, or whose policy it represented. In fact, the deponent knew absolutely nothing about the FFA mediation process at all, which is consistent with PNCs action throughout their handling of her file. The FFA requires meaningful participation by all of the parties in considering the borrower for a loan modification. PNC did nothing at all except submit false documents, send a belligerent attorney to the meeting with an employee on the phone with no authority at all and to make false representations to Ms. Cabage and the mediator. RCW 61.24.163(9).

When Ms. Cabage obtained a copy of the Servicing Agreement, it was very clear that there were no restrictions at all on loan modifications for loans owned by the trust and there certainly was no reference at all to restrictions due to bankruptcy. What was clear is that someone at PNC simply made up this restriction and used it to prevent Ms. Cabage from even being considered for a loan modification, even though the person who is participating in the mediation on behalf of the alleged beneficiary is required to have full authority to make a decision about a loan modification. RCW 61.24.163(7)(b)(ii). Since PNC had refused to even consider a modification for Ms. Cabage, the person participating had no authority whatsoever. As Ms. Cabage has contended through this litigation, PNC never participating in the mediation as required under the FFA and instead, used the process to lie and obfuscate. This resulted in an injury and damages to Ms. Cabage. She was required to obtain legal assistance when she received the second NOTS to ascertain her rights. She was then referred to mediation and properly participated in the process, paid the mediation fees, fees for an attorney to assist her and parking at the mediation. She also took time off from work, and whether or not she was docked any pay for taking that time, it was nevertheless time missed from work. She was also required to pay an attorney to obtain injunctive relief and prevent the foreclosure. *Id.* All of this constituted an “injury”, because it was complete waste of time due entirely to the actions of PNC and out of pocket damages consistent with the requirements of the Consumer Protection Act (“CPA”). *Hangman Ridge*

Training Stables v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, (1986);
RCW 19.86.090.

The DTA defines the “beneficiary” as the “holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.” RCW 61.24.005(2). As the evidence demonstrates, PNC was required to provide proof, in advance of the mediation, that the entity claiming to be the beneficiary is the “owner” of any promissory note or obligation secured by the deed of trust. RCW 61.24.163(5)(c). *See also*, RCW 61.24.030(7). The “beneficiary” **may** use the Beneficiary Declaration as proof of ownership, but that document is not incontrovertible.² The Declaration that PNC submitted was dated June 25, 2010 and signed by Kaycee M. Kleehamer, “Authorized Officer”. The form indicated that “PNC Bank, National Association sbm National City Mortgage a division of National City Bank of Indiana nka National City Bank is the actual holder of the promissory note or other obligation evidencing the above-referenced loan **or has requisite authority under RCW 62A.3-301 to enforce said obligation.**” CP 409 (emphasis added). The later adduced evidence is clear that the language wherein PNC asserts that it was the

² The “Beneficiary Declaration” is required before a foreclosing trustee may proceed with a nonjudicial foreclosure of residential real property. RCW 61.24.030(7)(a) requires that “the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.” This mirrors the proof of ownership language in RCW 61.24.163(5)(c).

‘actual holder’ was untrue, as the Note was being held by Deutsche Bank. The qualifying language about having “requisite authority under RCW 62A.3-301” is not permitted under the DTA. There is nothing in RCW 61.24.030(7) or anywhere else in the DTA that contemplates someone with “requisite authority under RCW 62A.3-301” to perform functions that are assigned only to the “beneficiary” or “noteholder”, consistent with RCW 61.24.005(2). RCW 61.24.030(7); RCW 61.24.163(5)(c).

Further, there was never any proof that PNC had obtained authority to enforce the terms of the Note under RCW 62A.3-301 either. Thus, on its face, the purported Beneficiary Declaration did not comply with the requirements of the DTA. PNC and NWTS both knew this. In fact, NWTS admitted during deposition that an attorney from the law firm representing PNC at the mediation and the same firm representing NWTS in this case, Routh Crabtree Olsen, drafted that version of the Beneficiary Declaration used in connection with this foreclosure and others. CP 1316:23-1318:3. So, it was the attorneys for both defendants who crafted a Beneficiary Declaration with language not permitted under or in compliance with the statute by adding the caveat of “or authorized to enforce” under Article 3 in an effort at misleading borrowers and mediators about the rights of the entities initiating nonjudicial foreclosures and participating in FFA mediations.

As noted in Ms. Cabage’s Opening Brief, Division I issued an opinion just before her brief was due in *Trujillo v. Northwest Trustee Services, Inc.*, 326 P.3d 768, 774 (2014). That case is currently being

reviewed by the Supreme Court to determine whether it will accept the case or not. However, she urged this Court to reject *Trujillo* as it expressly contradicts the decision of the Washington Supreme Court in *Bain*. In *Bain*, as noted above, the Supreme Court found that “beneficiary” was defined by the legislature in the DTA to mean the “noteholder”, consistent with the definition in RCW 61.24.005(2). *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d at 88-89. The *Bain* Court held that the trustee in a non-judicial foreclosure “shall have proof that the beneficiary is the *owner* of any promissory note or other obligation secured by the deed of trust,” *Bain* at 93-94 (quoting RCW 61.24.030(7)(a); emphasis added), and that “[i]f the original lender [has] sold the loan, that purchaser would need to establish *ownership* of the loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions.” *Id.* at 111 (emphasis added). The *Bain* Court did not find that the “owner” language was superfluous nor that it could be read out of the statute. And in fact, it would be inappropriate for the Supreme Court to do so. The Legislature chose to include the “owner” language in the DTA when it created the Notice of Foreclosure language at RCW 61.24.040(2), which has been in the statute for years. The Legislature made the choice again when it used the “owner” language multiple times in recent years with additions to the statute, which are all designed to protect property owners. This includes the reference to “owner” in the FFA portion. RCW 61.24.163(5).

It is inconsistent with *Bain* for the *Trujillo* court to find that after

the legislature amended the DTA to include an express proof of ownership requirement for the noteholder in RCW 61.24.030(7)(a) and required that the owner be identified under RCW 61.24.030(8)(l), it intended there to be an even lower standard for use under the DTA which allows parties with a lesser relationship to the note – less than the “noteholder” and “owner” requirements recognized in *Bain* – to non-judicially foreclose.³ *See also*, *Knecht v. Fidelity Nat’l Title Ins. Co.*, 2014 WL 4057148, *8-*9 (W.D. Wash. Aug. 14, 2014); *McDonald v. OneWest Bank, FSB*, 2013 WL 858178 (W.D. Wash., Sept. 25, 2013); *Beaton v. JPMorgan Chase Bank N.A.*, 2013 WL 1282225 (W.D. Wash. 2013); *Lucero v. Cenlar, FSB*, Case No. C13-0602-RSL (W.D. Wash. 2013); David A. Leen, Wrongful Foreclosures in Washington, 49 *Gonzaga Law Review*, 331 (April 2014).

The same proof of “ownership” language was added to the FFA statute in 2012. RCW 61.24.163(5)(c). *See*, PNC Response Brief, Appendix C. The Legislature made that amendment for a reason, and it was not so that the ownership requirement should be subverted and ignored. Presumably, it was meant to be consistent with the other “owner” requirements at other places in the statute, but it certainly demonstrates the Legislature’s interest in the “owner” of the loan being the entity involved in the foreclosure and the FFA mediation.

³ The legislature added this additional “proof of ownership” requirement to the DTA in 2009. *See* Laws of 2009, ch. 292, § 8 (7)(a). At the same time, it added the requirement that in any non-judicial foreclosure on residential real property, the notice of default must identify the “name and address of the owner of any promissory notes or other obligations secured by the deed of trust.” *Id.* § 8 (8)(l).

The supposed “logic” of PNC and NWTS is twisted. The Legislature could not have meant that one could prove it was the “owner” of the loan by testifying that it is the “actual holder” if the purported “actual holder” is **not** the “owner”. RCW 61.24.030(7). Nor does it make any sense to allow a “beneficiary” (noteholder) “claiming” to be an owner to prove it by providing a document that is signed by someone who is not a “noteholder” or an owner, as is the case with PNC.

2. NWTS also violated the requirements of the Deed of Trust Act, even though it had an express duty to Ms. Cabage and it is liable to her as a result.

Just as with PNC, NWTS violated the requirements of the DTA at almost every step in the process of trying to nonjudicially foreclose on Ms. Cabage. RCW 61.24, *et seq.* While it is certainly true that PNC was lying to everyone about its role, NWTS also knew that there were problems with documentation used in support of the foreclosure and in fact, its attorneys created the “Beneficiary Declaration” form that contained the improper qualifying language. The Appointment of Successor Trustee document was signed by an “Authorized Officer” of PNC but NWTS admitted in deposition that there was no scrutiny of the contents of this document at all. CP 1279-3120 (Stenman Dep., 1297:3-1299:15). This is entirely consistent with the factual findings made in *In re Meyer*, 506 B.R. 533, 540 & 546-47 (Bkrcty. W.D. Wash. 2014). (The case is presently on appeal.) Judge Overstreet found that NWTS’ employees did nothing more than rely upon the information that appeared on its computer screens and they did not many inquiries. *Id.*

Here, NWTS' records, which included PNC's records, indicated that there was an "investor" who owned Ms. Cabage's loan, but they ignored that fact and accepted the documentation provided by PNC falsely asserting that it was the "beneficiary". The "investor" was listed as Bank of New York Mellon, who was later found to be the "Master Servicer" of the securitized trust that owned Ms. Cabage's loan. CP 1311:6-1313:18; 1314:1-25; 1315:25; 1319:10-25. The fact that NWTS has never been appointed as the successor trustee by the "beneficiary" and loan owner did not stop NWTS from proceeding with both attempts at a nonjudicial foreclosure sale of the Residence. RCW 61.24.030(7).

The Second Notice of Trustee's Sale document issued by NWTS identified the "beneficiary" as National City in one portion of the document and PNC in another portion. CP 418-423. Presumably this related to the fact that the Assignment document in the records of Pierce County indicated that the "beneficiary" was National City, an entity that had been purchased by PNC. Ms. Cabage was not served with a new Notice of Default, which should have been done since the previous Notice of Default was more than two years' old by the time the second foreclosure had commenced. The DTA does not require the issuance of a new NOD, but because the information from two years prior was inaccurate, a new document should have been issued. RCW 61.24.030(8)(c), (d) (requiring statement of default amount and itemized accounting). Neither PNC nor NWTS sent Ms. Cabage a Notice of Pre-Foreclosure Options, a document that was required with the passage into

law of the FFA in 2011. (The NOD was issued in 2010.) RCW 61.24.030. See, *Watson v. Northwest Trustee Services, Inc.*, Case No. 69352-2-I (Wash. Ct. App., Div. I, March 18, 2014), which also involved NWTS as the purported trustee. Presumably, the Defendants did not want Ms. Cabage to be aware of her right to FFA mediation, which is something that she learned when she consulted with an attorney upon receiving the second NOTS.

3. Ms. Cabage proved that she met all of the elements of a CPA claim, including injury and out of pocket damages.

The Washington Supreme Court just made it clear that the types of items that Ms. Cabage identified may constitute “injury” and “damages” under the CPA in *Frias v. Asset Foreclosure*, Case No 89343-3 (Wash. Sup. Ct., September 19, 2014). Citing to *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 204 P.3d 885 (2009), and even expanding upon that holding, the Supreme Court found that a borrower could suffer an injury based upon “unlawful debt collection practices, even when there is no dispute as to the validity of the underlying debt.” *Frias* at 19, citing to *Panag* at 55-56, n. 13. It reiterated that consulting with an attorney “to dispel uncertainty” is compensable under the CPA. *Frias* at 20, citing to *Mason v. Mortgage America*, 114 Wn.2d 842, 792 P.2d 142 (1990). Here, Ms. Cabage had to consult an attorney in order to determine her rights in the face of the second NOTS where she learned about her right to mediation under the FFA and her rights in relation to the attempted nonjudicial foreclosure sale. Defendants try to parse her responses to

descriptions of her injuries and damages by picking through her deposition but ignoring the contents of her Declarations on file with the Court and the contents of her discovery responses in yet another attempt at improperly manipulating the record. In support of its argument, PNC cites to the fact that the trial court in *Bain* dismissed MERS as a defendant following remand. First, that case is still pending and has not yet been appealed, so there is no way to determine how an appellate court will view that decision. Second, and more importantly, that decision was predicated upon the particular facts of that case. Those facts have absolutely nothing to do with the facts in this case, especially since the claims against MERS in the *Bain* case related solely to its involvement in executing an Assignment document and nothing more, and involve interpretation of the requirements of the DTA as it was constituted in 2008. The portions of the DTA at issue in this case date from amendments since 2009. The facts of *Bain* are inapposite. In fact, Ms. Cabage described her injuries and her damages consistent with the requirements of the CPA and summary judgment should never have been granted, especially in light of the *Frias* decision.

The elements of a CPA claim are: “(1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or their business or property; (5) causation.” *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, (1986).

//

a. Unfair and Deceptive Acts or Practices

Ms. Cabage provided substantial evidence of the “unfair” and “deceptive acts” of PNC and NWTs, as the Court noted in *Panag*, the complained of acts may be either “unfair” or “deceptive”. *Panag* at 55-56. In *Schroeder v. Excelsior Management Group, LLC*, 297 P.3d 677, 683 (Wash. 2013), the Washington Supreme Court emphasized that the DTA “**is not a rights-or-privileges-creating statute**” but rather presents non-waiveable requirements for foreclosing entities, and reiterated that “strict compliance [with the DTA] is required” *Id.* (citing *Albice v. Premier Mortg.*, 174 Wash.2d at 568; *see also Walker v. Quality Loan Svc. Corp.*, 176 Wn.App. 294, 308 P.3d 716 (2013); *accord Rucker v. Novastar Mortg., Inc* 177 Wn.App. 1, 311 P.3d 31, (2013)). In its recent decisions, the Washington Supreme Court has further clarified the duties of companies managing the foreclosure process, and has observed recently that “to prevent property from being wrongfully appropriated through nonjudicial means and to avoid constitutional and equitable concerns, at a minimum, a foreclosure trustee must be independent and ‘owes a duty to act in good faith to exercise a fiduciary duty to act impartially to fairly respect the interests of both the lender and debtor.’” *Schroeder, supra*, at 681 n.3 (Wash. 2013). The same standard applies whether the case is brought before the foreclosure has occurred. (The “duty” owed by a trustee is now defined only as “good faith” adherence to the statute. RCW 61.24.010(4)).

The Supreme Court has reiterated that Washington’s DTA “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 nonjudicial foreclosure sales." *Klem v. Quality Loan Service*, 176 Wash.2d 771, 789, 295 P.3d 1179 (2013) (citing *Udall v. T.D. Escrow Servs., Inc.*, 159 Wash.2d 903, 915-16, 154 P.3d 882 (Wash. 2007)).

Washington particularly emphasizes the role of the courts in realizing the equitable goals of the CPA. *See, Klem*, 176 Wash.2d 771, 786, 295 P.3d 1179 ("Given that there is no limit to human inventiveness, courts, as well as legislatures, must be able to determine whether an act or practice is unfair or deceptive to fulfill the protective purposes of the CPA.").

Washington law emphasizes statutory limits on trustees in numerous instances. As noted by the Court in *Schroeder*, the DTA's "requisites to a trustee's sale" very much matter. "These are not, properly speaking, rights held by the debtor; instead, they are limits on the trustee's power to foreclose without judicial supervision." *Schroeder, supra*, at 683. "It is well settled that the trustee in foreclosure must strictly comply with the statutory requirements. *Albice*, 174 Wn.2d at 568 (citing *Udall*, 159 Wn.2d at 915-16). A trustee in a nonjudicial foreclosure may not exceed the authority vested by that statute. *Id.*" *Schroeder* at 686.

Here, PNC and NWTS affirmatively lied regarding their respective power and authority. PNC falsely asserted it was a "beneficiary" and had the power to utilize the DTA to foreclose on Ms. Cabage's property and to participate in the FFA mediation, while simultaneously refusing to participate in an FFA mediation. NWTS falsely asserted that it had been

properly appointed as a trustee by PNC and had the legal authority to foreclose under the DTA. These acts were “unfair” and “deceptive”. The Supreme Court wrote most extensively about the CPA in *Klem* and described claims for violations of the requirements of the DTA as being a “violation of public interest.” *Klem* at 782-786. The Court then quoted from this portion of *Panag*:

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would have undertaken an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of the country.

Klem, at 782-786, citing to *Panag*, 166 Wn.2d at 48 (quoting *State v. Schwab*, 103 Wn.2d 542, 558, 693 P.2d 108 (1985) (Dore, J. dissenting) (quoting H.R. Conf. Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914)). The *Klem* Court further noted that “an act or practice can be unfair without being deceptive” and that the statute clearly allows claims for “unfair acts **or** deceptive acts or practices.” *Klem*, at 782-786.

b. In the course of trade or commerce.

PNC and NWTS are in the business of servicing mortgage loans and acting as a foreclosing trustee, respectively. Thus, their actions occurred in the course of trade or commerce, as evidenced by the fees and costs demanded from Ms. Cabage by these Defendants – to pay their fees for conducting their business. Further, the *Bain*, *Klem* and *Frias* Courts

have all made clear that the work of engaging in these complained of activities are clearly done in the course of trade or commerce.

c. Public interest element

The statute itself proscribes how a plaintiff proves the public interest element at RCW 19.86.093. It reads:

It is injurious to the public if it:

- (1) Violates a statute that incorporates this chapter;
- (2) Violates a statute that contains a specific legislative declaration of public interest impact;
- (3)(a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons.**

RCW 19.86.093 (emphasis added). In this case, the actions of PNC and NWTS were part of its regular course of business and therefore its actions in trying to foreclose nonjudicially in violation of the requirements of the DTA did injure other persons who are similarly situated; had the capacity to injure other persons for the same reasons and has the capacity to injure other persons because they continue in this same course of conduct, as evidenced most clearly by their repeated assertions throughout their pleadings that they have done nothing wrong. The same is true of PNC's action in refusing to participate in compliance with the requirements of an FFA mediation. Such actions have the ability to injure others, as it is part of the regular conduct of their business. This is especially true of NWTS, in light of the factual findings in *In re Meyer and Watson*.

Moreover, the CPA clearly contemplates those situations where a

defendant might contend that the complained of bad acts are a “one off” incident by allowing the meeting of the public interest element by showing that the act “has the capacity” to injure others. RCW 19.86.093(3)(b). In *McDonald v. OneWest Bank, FSB, supra*, the court engaged in an analysis of just the sort of argument presented by this defendant:

The CPA does not define “unfair or deceptive” for purposes of the first element. Whether an act is unfair or deceptive is a question of law. *Leingang v. Pierce County Med. Bureau, Inc.* 131 Wn.2d 133, 150, 930 P.2d 288 (1997). Washington courts have held that a deceptive act must have the capacity to deceive a substantial portion of the population (*Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 30, 948 P.2d 816 (1997) and “misleads or misrepresents something of material importance” (*Holiday Resort Cmty. Ass’n v. Echo Lake Assocs., LLC*, 134 Wn.App. 210, 226, 135 P.3d 499 (2006)). This element is distinct from the third element of public interest impact and focuses on the act's capacity to deceive rather than its actual impact on the public. *May v. Honeywell Int’l, Inc.*, 331 Fed.Appx. 526, 529 (9th Cir. 2009). *See also, Henery v. Robinson*, 67 Wn.App. 277, 291, 834 P.2d 1991 (1992).

.....

All three named defendants play substantial roles in the mortgage industry in this state, and the business practices that gave rise to this litigation particularly the misleading designation of first MERS and then OneWest as beneficiaries and the issuance of notices of default without proper assignments and/or possession of the original note—are in no way unique to plaintiff but rather affect the general borrowing public. The third element is, therefore, satisfied.

McDonald at 10. This is consistent with the Court’s holding in *Klem*, quoted above, supports this analysis as well. Just as the Defendants in

McDonald, which included NWTs, the defendants here play “substantial roles” in the mortgage industry in this state and any assertion otherwise by the Defendants is a blatant misrepresentation to this Court.

d. Injury to person or business.

Ms. Cabage provided testimony in multiple forms which articulated injuries and damages sufficient to prove a CPA claim. She has paid to consult with a lawyer to investigate her claims when she received the second NOTs; to pay an attorney to refer her to mediation and participate with her in mediation; she has paid mediation fees in the statutorily required amount of \$200.00; she paid for parking in connection with attending the mediation and hearings; she took time off of work to attend the mediation; and she took time off of work to attend the mediation, hearings and the deposition. Ms. Cabage had to pay an attorney and costs associated therewith in order to obtain injunctive relief. She also incurred fees in connection with moving out of the house and then back into the house when it was not foreclosed. All of these items constitute not only injuries but out of pocket damages. The trial court relied upon Judge Coughenour’s decision in *Thurman v. Wells Fargo Home Mortgage*, 2013 WL 3977622 (W.D. Wash., August 2, 2013) to support its findings that Ms. Cabage’s costs associated with mediation were not recoverable under the CPA because they would have otherwise been incurred. As noted above, the *Frias* Court has rejected that position and found expressly that those sorts of damages constitute injury and are recoverable. *Frias, supra*.

e. Causation.

Ms. Cabage proved that PNC and NWTS have caused the damages that she has claimed throughout this case relating to the improper attempts at nonjudicial foreclosure and in connection with an FFA mediation that was a complete waste of time and Ms. Cabage's money. No one else is responsible for the actions in attempting to foreclose nonjudicially in violation of the requirements of the DTA. Certainly, no one else is responsible for the falsehoods perpetrated by PNC throughout this process which resulted in Ms. Cabage wasting time on a fruitless mediation and wrongful attempts at foreclosure. The falsehoods perpetuated by PNC and NWTS directly caused Ms. Cabage to have suffered the complained of injuries and damages.

The mediation would have been in compliance with the requirements of the FFA if PNC had adhered to its requirements in every way, and if it had reviewed Ms. Cabage for a modification. But instead, Ms. Cabage spent time and money for no reason. Further, Ms. Cabage would not have had to investigate her claims and then bring litigation to pursue her claims were it not for the wrongful actions of the defendants. In addition, she would not have had to move out of the house and then back into it if she had not received false representations from PNC and NWTS that they had the right to foreclose on the property, when they did not.

The actions of the se Defendants' acts constituted violations of the CPA and support an award of damages and attorneys' fees and costs. *Sato*

v. Century 21, 101 Wn.2d 599, 681 P.2d 242 (1984); *St. Paul Ins. Co. v. Updegrave*, 33 Wn.App. 653, 656 P.2d 1130 (1983); *Talmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, 605 P.2d 1275 (1979). Specific monetary damages are not even necessary but a court is nevertheless required to award a prevailing plaintiff attorneys fees. *Mason v. Mortgage America*, 114 Wn.2d 842, 792 P.2d 142 (1990). Certainly, the Washington Supreme Court has made clear in *Frias*, *Bain*, and *Klem* that plaintiffs are able to bring CPA claims for violations of the DTA similar to those made here and in fact, that the type of injuries and damages claimed in this case are compensable.

The *Frias* Court noted that when a borrower was denied a chance to obtain a loan modification because of the failure of the beneficiary to participate in the mediation in good faith, she has sufficiently demonstrated an injury and incurred monetary damages as a result of PNC's refusal to participate in the FFA mediation. Just because PNC was able to fool the mediator about its role by presenting false documents to the mediator and Ms. Cabage, does not mean that it properly participated in mediation. It should also be noted that a failure to participate in compliance with the FFA statute is a *per se* CPA violation. RCW 61.24.163(10)(c) holds that a basis for a "not in good faith" finding can be predicated upon the "[f]ailure of a party to designate representatives with adequate authority to fully settle, compromise, or otherwise reach resolution with the borrower in mediation". That is precisely what happened in this case, in addition to the presentation of false information

to all of the parties. Ms. Cabage did not argue to the trial court that the actions in this case constituted a *per se* CPA violation under this section, but this Court may factor this FFA language into its *de novo* review of the legal arguments made in this case when considering the impact of refusal to comply with FFA requirements upon borrowers such as Ms. Cabage.

4. Ms. Cabage's claims for intentional and/or negligent misrepresentation are similarly supported by the facts that are in evidence.

Ms. Cabage proved the fact of the misrepresentations made to her and the mediator to the trial court. She analyzed those requirements in her Opening Brief and will rely upon that briefing.

5. Ms. Cabage does not have claims directly flowing from the Deed of Trust Act against either of the Defendants.

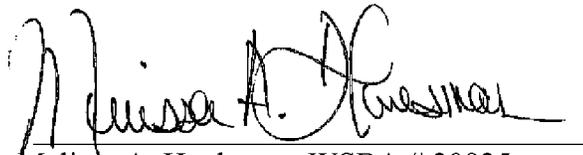
Ms. Cabage specifically claims for breach of the duties under the DTA against NWTS. With the Washington Supreme Court's decision in *Frias v. Asset Foreclosure, supra*, it is clear that she no longer has those claims. As noted above, the Supreme Court made clear that other claims such as the CPA may flow from violations of the requirements of the DTA, and analysis of those claims is not altered by the DTA; however, it found that there is no direct claim for a violation of the DTA unless a foreclosure sale has actually occurred. *Id.*

CONCLUSION

For all the foregoing reasons, Ms. Cabage respectfully urges the Court to find that the trial court did not apply any of the appropriate standards to the analysis of Ms. Cabage's claims and to reverse the entry

of the order for summary judgment. Consistent with the Supreme Court's recent decisions in *Frias*, *Bain*, *Klem*, *Albice* and *Schroeder*, and consistent with long-standing cases such as *Cox v. Helenius*, this Court must find for Ms. Cabage and remand the case back to the trial court for a trial of Ms. Cabage's claims.

Respectfully submitted this 10th day of October, 2014.

A handwritten signature in black ink, appearing to read "Melissa A. Huelsman". The signature is written in a cursive style with a horizontal line underneath it.

Melissa A. Huelsman, WSBA # 30935
Attorney for Plaintiff Sandra Cabage

DECLARATION OF SERVICE

I, Pamela Hamilton, certify under penalty of perjury under the laws of the State of Washington, that on the day I signed this declaration of service, I caused a copy of the **PLAINTIFF SANDRA CABAGE'S REPLY BRIEF ON APPEAL** to be electronically mailed and served as follows upon counsel of record and filed with the Court:

<p>Mr. Andrew H. Salter Ms. Lisa Franklin Veris Law Group, PLLC 1809 Seventh Ave, Suite 1400 Seattle, WA 98101 Andy@verislawgroup.com lisafranklinlaw@gmail.com</p> <p>By e-mail per e-service agreement, with hard copy by U.S. Mail.</p>	<p>Ms. Katrina Eve Glogowski Ms. Kimberly M. Hood Glogowski Law Firm, PLLC 506 – 2nd Avenue Seattle, WA 98104-2343 katrina@glogowskilawfirm.com Kimberly@glogowskilawfirm.com</p> <p>By e-mail per e-service agreement, with hard copy by U.S. Mail.</p>
<p>Mr. Brian L. Lewis Ms. Lauren E. Sanken Mr. David J. Lenci K&L Gates LLP 925 – 4th Avenue, Suite 2900 Seattle, WA 98104-1158 Lauren.Sancken@klgates.com david.lenci@klgates.com brian.lewis@klgates.com</p> <p>By e-mail per e-service agreement, with hard copy by U.S. Mail.</p>	<p>Fred Burnside Steve Rummage Rebecca Francis Davis Wright Tremaine, LLP 1201 3rd Ave Ste 2200 Seattle, WA 98101-3045 FredBurnside@dwt.com SteveRummage@dwt.com RebeccaFrancis@dwt.com</p> <p>By e-mail per e-service agreement, with hard copy by U.S. Mail.</p>

Signed at Seattle, Washington, this October 10, 2014.

/s/ Pamela Hamilton
Pamela Hamilton, Paralegal

Case No. 45953-1-II

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

SANDRA CABAGE

Plaintiff/Appellant,

v.

NORTHWEST TRUSTEE SERVICES, INC.; PNC MORTGAGE, a
division of PNC BANK N.A.; and DOE DEFENDANTS 1 through 20

Defendants/Appellees.

**AMENDED DECLARATION OF SERVICE RE PLAINTIFF
SANDRA CABAGE'S REPLY BRIEF ON APPEAL**

Melissa A. Huelsman, WSBA #30935
Attorney for Plaintiff/Appellant Cabage
Law Offices of Melissa A. Huelsman, P.S.
705 Second Avenue, Suite 601
Seattle, WA 98104
206-447-0103

AMENDED DECLARATION OF SERVICE

I, Pamela Hamilton, certify under penalty of perjury under the laws of the State of Washington, that on the day I signed this Amended Declaration of Service, I caused a copy of **PLAINTIFF SANDRA CABAGE'S REPLY BRIEF ON APPEAL** to be electronically mailed and served as follows upon counsel of record and filed with the Court:

<p>Heidi Buck-Morrison John A. McIntosh Joshua Schaer RCO Legal, P.S. 13555 SE 36th St, Suite 300 Bellevue, WA 98006-1489 hbuckmorrison@rcolegal.com jmcintosh@rcolegal.com jschaer@rcolegal.com</p> <p>By e-mail per e-service agreement, with hard copy by U.S. Mail.</p>	<p>Jonathan M. Lloyd Daniel T. Davies Davis Wright Tremaine, LLP 1201 Third Avenue, Suite 2200 Seattle, WA 98101-3045 jonathanlloyd@dwt.com danieldavies@dwt.com</p> <p>By e-mail per e-service agreement, with hard copy by U.S. Mail.</p>
<p>United Guaranty Corporation Corporate Office 230 N. Elm Street Greensboro, NC 27401 <i>Third-Party Defendant</i></p> <p>By regular U.S. Mail.</p>	

Signed at Seattle, Washington, this Friday, October 10, 2014.

/s/ Pamela Hamilton
Pamela Hamilton, Paralegal

MELISSA HUELSMAN LAW OFFICE

October 10, 2014 - 4:53 PM

Transmittal Letter

Document Uploaded: 459531-Reply Brief.pdf

Case Name: Cabage v. Northwest Trustee Svcs Inc; et al.

Court of Appeals Case Number: 45953-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

Appellant's Reply Brief

Sender Name: Pamela S Hamilton - Email: paralegal@predatorylendinglaw.com

A copy of this document has been emailed to the following addresses:

Andy@verislawgroup.com

lisafranklinlaw@gmail.com

Lauren.Sancken@klgates.com

david.lenci@klgates.com

brian.lewis@klgates.com

katrina@glogowskilawfirm.com

kimberly@glogowskilawfirm.com

FredBurnside@dwt.com