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COURT OF APPEALS
DIVISION II

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Court of Appeals No. 50242-9-II
Trial court No. 14-2-01703-2

STATE OF WASHINGTON

BY AP
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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

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

Plaintiff-Respondent,

v.

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

Defendant-Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

On September 12, 2011, Appellants requested a mediation in a pending non-judicial foreclosure under the foreclosure mediation program, codified at RCW 61.24.163.

The first mediation was held October 25, 2011. The parties did not reach an agreement at this time but continued to engage in months of informal discussion.

In February 2012, Appellants obtained approval for a reverse mortgage in the amount of \$425,965.50. Dckt #48, Ex. L, p. 2. In May 2012, Appellants, through their attorney, offered a settlement amount of \$375,000. Dckt #47, Ex. I, p.2.

A final mediation was held on September 20, 2012. This mediation failed. The mediator, Nancy Tarbell, explained that the lender's representatives had failed to mediate in good faith as they had not submitted documents in a timely manner. Dckt #48, Ex. H, p. 2. In a separate letter, Ms. Tarbell noted that lender's representatives had come to the mediation unprepared to negotiate figures, unaware of the nature of the appraisal and documents at hand, and unable to negotiate specific terms, certified that the lender had failed to negotiate in good faith. Dckt #48, Ex. H, p. 3.

In November 2012, Appellants submitted a settlement offer for \$379,321.00 to Respondent. Dckt #48, Ex. L, p. 2. Respondents rejected the offer, but never offered an alternative beyond noting that “the final net still needs to be higher to the investor.” Dckt #48, Ex. M, p. 2 Appellants attempted to recontact Respondents on several occasions after this. Dckt #48, Ex. M, p. 1-2. The record before this Court does not show that Respondents engaged in further negotiations, choosing instead, to initiate judicial foreclosure proceedings.

II. ASSIGNMENTS OF ERROR

The trial court erred in granting Respondent’s Motion for Summary Judgment as relating to Appellant’s Consumer Protection Act (CPA) claim and in dismissing Appellant’s Affirmative defense.

III. STATEMENT OF THE CASE:

Respondents filed their Summons and Complaint for Deed of Trust Foreclosure on September 4, 2014. Dckt #2. Appellants submitted an Answer on October 7, 2014. Dckt #4. Appellants, through counsel, submitted an Amended Answer in March 2015. Dckt #18. In this Amended Answer, Appellants asserted an affirmative defense and counterclaim based on Respondents’ failure to mediate in good faith. Dckt #18, p. 2-3.

Respondents filed a Motion to Dismiss the counterclaim, asserting that the failure to mediate in good faith did not constitute a defense to a judicial foreclosure action. Dckt #25. Respondent also argued that the failure to mediate in good faith did not constitute a violation of the Consumer Protection Act (CPA). Dckt #25, p. 5-6.

The trial court had a hearing on the issue on July 17, 2015. At the conclusion of the hearing, the trial court struck the affirmative defense under CR 12(f) but denied the motion to dismiss the counterclaim. Dckt #32.

Respondent filed a Motion for Summary Judgment on November 4, 2016. Dckt #45. Respondent filed a second Motion for Summary Judgment on February 10, 2017. Dckt #63. In the motion, Respondents argued that Appellants' CPA counterclaim should be dismissed as they could not prove the elements required under the statute. Dckt #63, p. 10-14. The trial court held a hearing on Respondent's motion on March 10, 2017. Dckt #73. The trial court entered an Order granting Respondent's Motion for Summary Judgment as to the CPA claim in March 23, 2017. Dckt #76.

IV. ISSUES:

Did the pleadings and evidence before the Trial court give rise to a genuine issue of material fact making summary judgment inappropriate?

Did the trial Court err in dismissing Appellant's affirmative defense?

V. ARGUMENT

The standard of review for both the CR 12(b)(6) motion and the CR 56 summary judgment motion is *de novo*. *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988). *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wash.2d 853, 860, 93 P.3d 108 (2004).

A. The Pleadings and Evidence Before the Trial Court Gave Rise to a Genuine Issue of Material Fact, Therefore, the Trial court Erred in Granting the Motion for Summary Judgment in Regard to Appellant's Consumer Protection Act Claim.

Respondents brought the underlying suit by filing a Complaint for Deed of Trust Foreclosure. Appellants filed an Amended Answer which included a counterclaim alleging that Respondents' failure to mediate in good faith was an unfair or deceptive act in trade or commerce in violation of the Consumer Protection Act (CPA). Dckt #18. Appellant relied on statutory authority in implicating the Consumer Protection Act. RCW 61.24.135(2) makes it clear that the "[f]ailure of the beneficiary to mediate in good faith is also an unfair or deceptive act in trade or commerce and an unfair method of competition in violation of the Consumer Protection Act."

The Court considers whether the non-moving party has alleged sufficient facts to state a claim for relief that is “plausible on its face” when ruling on a motion for summary judgment. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). The pleadings and evidence before the Trial court gave rise to genuine issues of material fact supporting Appellant’s CPA counterclaim. The trial court erred in granting respondent’s motion for summary judgment on this claim. *See Phillips v. King County*, 968 P.2d 871, 136 Wn.2d 946 (Wash. 1998); *Moritz v. Daniel N. Gordon, P.C.*, 895 F.Supp.2d 1097, 1103 (W.D. Wash. 2012) (“Summary judgment is appropriate if the evidence, when viewed in the light most favorable to the non-moving party, demonstrates that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”).

1. Elements of a claim under the Consumer Protection Act.

There are two methods of proving a claim under the CPA (RCW 19.86). The first is to establish the existence of five distinct elements:

1. An unfair or deceptive act or practice;
2. occurring in trade or commerce;
3. public interest impact;
4. injury to plaintiff in his or her business or property; and
5. causation.

See Hangman Ridge, 105 Wash.2d 778, 780; *Meyer v. U.S. Bank Nat. Ass’n*, 530 B.R. 767, 776 (2015). The second method is to show that an

act constitutes a *per se* unfair trade practice impacting the public interest as declared by the Legislature in a statute. *See Hangman Ridge*, 105 Wash.2d at 785-86. A declaration by the Legislature can satisfy the first three elements of a CPA claim, leaving only the issues of damages and causation to be determined.

2. RCW 61.24.135 gives rise to a CPA claim for a violation of the good faith duty set out in RCW 61.24.163

RCW 61.24.163 sets out the duties and responsibilities of parties engaging in the foreclosure mediation program. RCW 61.24.163(5) sets out the beneficiary's duties when engaged in the mediation program. RCW 61.24.163(10) sets out that a party is not acting in good faith where it fails to provide the required documentation or fails to designate a representative with adequate authority to fully settle, compromise, or otherwise reach a resolution.

RCW 61.24.135(2)(a) explicitly defines a violation of the duty to act in good faith (as defined in RCW 61.24.163) to be an unfair or deceptive act in trade or commerce and an unfair method of competition in violation of the consumer protection act.

3. The pleadings and exhibits before the trial court gave rise to a genuine issue of material fact as to the existence of Appellant's CPA claim

Appellants brought forth evidence satisfying all five elements necessary for a claim under the CPA sufficient to survive a motion for

summary judgment where the facts are viewed in a light most favorable to the non-moving party. The trial court did not offer any explanation in granting Respondents' Motion for Summary Judgment, so each element will be discussed.

4. Appellant has satisfied the first two elements of a CPA act by showing that Respondent did not mediate in good faith as required by RCW 61.24.163.

The pleadings and the exhibits in the record demonstrate that Appellants have satisfied the first two elements of a CPA claim. The mediator submitted a letter describing the numerous failures of the Respondents' agents at the scheduled mediation:

- the lender was not prepared to negotiate figures;
- the lender was unaware of the nature of the appraisal and documents at hand;
- the lender did not have a representative with adequate authority to reach a resolution available; and
- the lender asserted that the numbers that had previously discussed were stale and that the borrowers would need to restart the process.

See Dckt #48, Ex. H, p. 2. The Respondents' failures at the time of the scheduled mediation were inconsistent with the duties set out in RCW 61.24.163(5), (10). The Legislature has expressly determined that a party's failure to mediate in good faith satisfies the first two elements of a CPA claim. RCW 61.24.135(2)(a) ("It is an unfair or deceptive act in trade or commerce and an unfair method of competition in violation of the consumer protection act...").

The record supports a finding that Appellants have satisfied the first two elements of a CPA claim when considering the evidence in a light most favorable to them. *See Moritz*, 895 F.Supp. at 1103.

5. Appellants have met the third element of a CPA claim by bringing evidence that Respondents' failure to mediate in good faith in violation was an unfair or deceptive act against the public interest pursuant to RCW 19.86.020.

An individual may satisfy the public interest element of a CPA claim by showing either a *per se* interest or by a 3-prong test announced in *Anhold v. Daniels*, 94 94 Wash.2d 40, 614 P.2d 184 (1980), or the violation may satisfy the public interest element *per se*. *See Hangman Ridge*, 105 Wash2d. at 789. The *Anhold* method requires proof that:

- (1) the defendant by unfair or deceptive acts or practices in the conduct of trade or commerce has induced the plaintiff to act or refrain from acting;
- (2) the plaintiff suffers damage brought about by such action or failure to act; and
- (3) the defendant's deceptive acts or practices have the potential for repetition.

Anhold, 94 Wash.2d at 46. The record demonstrates that Respondents' failure to mediate in good faith was against the public interest, satisfying the third element of a CPA claim whether using the *per se* prong or the *Anhold* method.

First, RCW 19.86.093 explains that "a claimant may establish that the act or practice is injurious to the public interest because it (1) Violates

a statute that incorporates this chapter;...” RCW 61.24.135(2)(a) explicitly declares that the failure to mediate in good faith pursuant to RCW 61.24.163 is an unfair or deceptive act under RCW 19.86. Respondents’ failure to mediate in good faith was, *per se*, against the public interest.

Second, the public interest element is implicated through the RCW. The Legislature declared that “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce” were unlawful under RCW 19.86.020. The Legislature also declared “that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public...” RCW 19.86.920.

Therefore, the Legislature has already determined that unfair or deceptive acts by a business are, *per se*, against the public interest. *See Hangman Ridge*, 105 Wash.2d at 790 (“The *per se* method requires a showing that a statute has been violated which contains a specific legislative declaration of public interest impact.”).

Here, the mediator expressly described behaviors by Respondents’ agents that were in violation of RCW 61.24.163. Respondents may take issue with the mediator’s report, but this Court considers the facts in a

light most favorable to Appellant. As such, Appellants have satisfied their duty of demonstrating a public interest impact sufficient to survive summary judgment. *See Moritz*, 895 F.Supp. at 1103.

Finally, Respondents' failure to mediate in good faith can be seen to be against the public interest by using the *Anhold* method. The intent of the Foreclosure Fairness Act is stated by the Legislature as follows:

- (a) Encourage homeowners to utilize the skills and professional judgment of housing counselors as early as possible in the foreclosure process;
- (b) Create a framework for homeowners and beneficiaries to communicate with each other to reach a resolution and avoid foreclosure whenever possible; and
- (c) Provide a process for foreclosure mediation when a housing counselor or attorney determines that mediation is appropriate. For mediation to be effective, the parties should attend the mediation (in person, telephonically, through an agent, or otherwise), provide the necessary documentation in a timely manner, willingly share information, actively present, discuss, and explore options to avoid foreclosure, negotiate willingly and cooperatively, maintain a professional and cooperative demeanor, cooperate with the mediator, and keep any agreements made in mediation. SSHB 1362, 2011 c 58 § 1.

Respondents' failure to mediate in good faith was an unfair act or practice in the conduct of trade or commerce. Appellants' actions (investigating the reverse mortgage, retaining an attorney, attending the mediations) were predicated on their belief that Respondents were acting in good faith.

Appellants have satisfied the first prong of the *Anhold* method. *See Hangman Ridge*, 105 Wash.2d at 789.

As discussed further, below, Appellants have suffered damage as a result of Respondents' actions. Appellants have satisfied the second prong of the *Anhold* method. *See id.*

Finally, the public is placed at risk if lenders are not held to the good faith standard. Individuals, such as Appellants, will only enter into this process once. As such, a failure to act in good faith by one individual has no impact on how the next individual will proceed. Lenders, on the other hand, will engage in these negotiations repeatedly in the ordinary course of their business. If lenders can act in bad faith with no penalty in one case, they have no incentive to act in good faith in the next. The public interest protected by the Foreclosure Fairness Act is, thus, thwarted. The potential, even likelihood that Respondents will repeat their actions satisfies the third prong of the *Anhold* method. *See id.*

Appellants have satisfied the third element of their CPA claim by showing both a *per se* public interest and through the *Anhold* method. *See id.*

6. The record and pleadings document injury sufficient to satisfy the fourth element of a CPA claim.

The pleadings document that Appellants have suffered damages sufficient to sustain a CPA claim. Individuals “may only recover for injuries that they demonstrate were proximately caused by a defendant’s unfair or deceptive practices.” *See Meyer*, 530 B.R. at 781 (citing *Bhatti v. Guild Mortg. Co.*, 550 Fed.Appx. 514, 515 (9th Cir. 2013)). Even so, the injury need not be great and no monetary damages need to be proven. *See id.* (citing *Mason v. Mortgage America, Inc.*, 114 Wash.2d 842, 854 (1990)).

Respondents’ argument about damages focused on Appellants’ deposition responses that they were not seeking monetary damages. The fact they did not feel they had suffered a monetary injury does not equate to a finding that they did not suffer an injury as a result of Respondents’ failure to negotiate in good faith. As the *Mason* Court noted, “[t]he fact that the Act allows for injunctive relief bolsters the conclusion that injury without specific monetary damages will suffice.” *Mason*, 114 Wash.2d at 854.

Both Appellants explained in their depositions and in their subsequent declarations that their purpose in the lawsuit was to be able to stay in their home and that they hoped to enjoin the foreclosure until a

good faith mediation could be held. Further, Appellants also suffered damage in that Respondents robbed them of their statutory right to a good faith mediation. This threatened loss of use of the property and violation of their right to a good faith mediation was sufficient injury to sustain the CPA claim. *See id.* (“The fact that the Act allows for injunctive relief bolsters the conclusion that injury without specific monetary damages will suffice.”).

Further, Respondents sought a judicial foreclosure after the failure of the mediation, despite their role in the failure. Had the parties engaged in a good faith mediation, Appellants would either been able to come to an agreement that allowed them to retain their property or they would have exhausted their defenses against the foreclosure. Instead, Appellants have been forced to defend this suit as a result of Respondents’ failure to mediate in good faith. Appellants have incurred attorney fees related to this defense and the resulting counterclaim that they would not have incurred had the mediation been carried out in good faith. *See, generally, Krusee v. Bank of America*, No. C13-824, 2013 WL 3973966 (W.D. Wash. 2013) (Finding that where an individual incurred additional expenses in mediation as a result of Defendants failure to mediate in good faith as required by statute she has alleged a claim for damages cognizable under Washington law for a failure to mediate in good faith).

7. The pleadings and evidence demonstrate that the injuries suffered by Appellants were caused by Respondents' failure to mediate in good faith and subsequent abandonment of the non-judicial foreclosure process.

Appellants have claimed that the injuries they have suffered include the attorney fees that they have incurred as a result of Respondents' abandonment of the non-judicial foreclosure process after they failed to mediate in good faith. In entering the mediation process, Appellants had hoped to be able to come to a mutually acceptable agreement that would allow them to remain in their home for the remainder of their lives. To this end, Appellants had begun the process of securing a reverse mortgage prior to the September 2012 mediation.

Respondents argued that Appellants could not prove damages or causation because they had not been approved for a reverse mortgage prior to the bad faith mediation and could have applied at any time. Dckt #45, p. 1-2. Respondent ignores their own role in Appellants' inability to secure the reverse mortgage in making this argument.

Appellants owe a principal balance of \$895,500.00 on the loan they took out in 2005. *See* Dckt #64, p.5. Appraisals of the home place the value at under \$500,000.00. Thus, under the best of circumstances, Respondents would have been unable to recover the full principal amount, let alone the fees and interest they are charging.

Appellants informed Respondents that the property is also reliant on easements for access and water. See Dckt #65, Ex. E, p. 5. The nature of these easements and their impact on the value of the property was not developed at the trial level, but it stands to reason that buyers will be hesitant to invest in property having issues that may require legal action to sort out. Thus, Respondents are unlikely to receive full value for the property.

Respondents' inability to comprehend how Appellants might qualify for a reverse mortgage when they owe so much more than the property is worth (Dckt #45, p. 5) is ultimately of no moment. Respondent is going to have to accept a lesser amount, regardless of who purchases the property. This is consistent with the deposition of Stephen McLean, the mortgage servicer that Appellants were working with at the time of the mediation. Mr. McLean stated that the lack of equity in the home was irrelevant as the lender was going to have to be willing to discount the amount in accepting a payout. See Dckt #65, Ex. E, p. 15.

From this starting point, the question is: would the Appellants have been able to enter an agreement that allowed them to retain the property but for Respondents' bad faith mediation and subsequent abandonment of the non-judicial foreclosure process? The answer, when the facts are viewed in a light most favorable to Appellants is "yes."

First, Respondent argues that there was no injury because Appellants could have applied for a reverse mortgage at any time before or after the mediation. Dckt #45, p. 10. Respondents' argument ignores the conditions necessary for such a mortgage to take place. Mr. McLean explained on several occasions that the amount of the lien was not relevant as the lender was going to need to accept a lesser amount. This amount could not be determined until a successful negotiation had taken place.

Respondent also argued that Appellants could not have qualified for the reverse mortgage because they had to wait two years from the date their bankruptcy was discharged. Respondents' thinking was, presumably, that Appellants could not have qualified for the reverse mortgage when they first spoke with Mr. McLean because this period had not yet passed. Respondents' argument ignores that the bad faith mediation leading to the CPA counterclaim took place over two-and-a-half years after the bankruptcy was discharged.

Appellants would have qualified for a reverse mortgage had Respondents engaged in a good faith mediation and come to a mutually acceptable figure. If the parties could not agree on a mutually acceptable figure, the non-judicial procedure would have gone through with no injury to Appellant. Respondents' failure to mediate in good faith and

abandonment of the non-judicial foreclosure process caused the attorney fees incurred as a result of the use of the judicial foreclosure process.

Respondents have argued that Appellants were unwilling to budge from an offer of \$377,727 at the time of the mediation, thus the failure to mediate in good faith was not the cause of any injury that they suffered. Respondent's argument fails. There is no knowing how Appellants might have responded had Respondents come to the mediation prepared to negotiate in good faith. The evidence before the trial court documents, however, that Appellants had actually entered the mediation with room for negotiation.

The record documents that Appellants continued to try to negotiate an acceptable settlement with Respondents following the mediation. In November 2012, Appellants submitted a settlement offer for \$379,321.00. This amount was \$1,594 more than the amount Respondents have alleged that Appellants were unwilling to budge from. Respondents rejected the offer, but never offered an alternative beyond noting that "the final net still needs to be higher to the investor." Appellants attempted to recontact Respondents on several occasions but the only response contained in the record before the trial court was the initiation of the judicial foreclosure proceedings.

Respondents argued that the fact the Appellants never offered more than \$379,321 on a debt valued at over more than \$1 million shows that there was no injury. Respondent neglects to mention that, in November 2012, their agent had proposed that an offer somewhere between \$379,321 and \$432,147.55 (less than half the principal amount still owed) would have satisfied the investor. *See* Dckt #48, Ex. M, p. 2. In April 2012, the investor had proposed a settlement of \$423,000 which their representative felt they could get down to \$413,600. Dckt #65, Ex. J, p. 1. The settlement statement documents that Appellants proposed to set aside \$30,000 for repairs to the home. Dckt #48, Ex. L, p. 3. This money could have been used to make up much of the distance between the amounts the parties were proposing had Respondents negotiated in good faith.

The evidence in the record, viewed in a light most favorable to Appellants, shows that the Appellants would not have suffered injuries in their use of the property or the accrual of attorney fees had Respondents mediated in good faith. *See Frias v. Asset Foreclosure Services, Inc.*, 181 Wash.2d 412, 431 (2014) (“...other business or property injuries might be caused when a lender or trustee engages in an unfair or deceptive practice in the nonjudicial foreclosure context.”).

The pleadings and evidence before the trial court gave rise to genuine issues of material fact, when viewed in the light most favorable to the non-moving party, demonstrates that there was a genuine dispute as to a material fact as to whether Respondents' failure to mediate in good faith caused the injuries suffered by Appellants. *See Mason*, 114 Wash.2d at 854.

B. The Trial court Erred in Granting the Respondents' Motion to Dismiss Appellant's Affirmative Defense Where the Statute and Legislative Intent

RCW 61.24.163(14) discusses the impact of a lender's failure to mediate in good faith.

(a) The mediator's certification that the beneficiary failed to act in good faith in mediation constitutes a defense to the nonjudicial foreclosure action that was the basis for initiating the mediation.

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

Appellants implicated these sections in asserting an affirmative defense in their Amended Answer. Dckt #18, p.3. Respondents filed a motion requesting that this defense be dismissed under CR 12(b)(6). Dckt #25, p. 4-5. Appellants filed a response (Dckt #29) and Respondents filed a Reply (Dckt #31). The parties attended a hearing on the issue and the

Trial Court issued a bench ruling dismissing the affirmative defense. Dckt #32.

Under CR 12(b)(6), the moving party bears the burden of showing that the other party has failed to show any set of facts that would justify granting relief. *See Bavand v. One West Bank, F.S.B.*, 176 Wn.App. 475, 482 (Wash.App. Div. 1 2013). Motions to dismiss under CR 12(b)(6) “should be granted only ‘sparingly and with care.’” *Id.* at 485. If the Court finds that any hypothetical situation conceivably raised by the complaint is legally sufficient to support the claim, the CR 12(b)(6) motion is defeated. *See id.* In this case, the trial court erred in granting the motion to dismiss the affirmative defense.

1. RCW 61.24.163(14) gives rise to an affirmative defense to foreclosure where the lender acts in bad faith then abandons the non-judicial foreclosure process.

The goal in interpreting a statute is to give effect to the legislative intent behind the statute. *See Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 15, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979). The Supreme Court of Washington set out three elements that should be taken into consideration:

1. whether the individual is within the class for whose ‘especial’ benefit the statute was enacted;
2. whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and

3. whether implying a remedy is consistent with the underlying purpose of the legislation.

Frias v. Asset Foreclosure Services, Inc., 181 Wash.2d 412, 422 (2014).

First, Appellants are clearly within the class meant to be protected by RCW 61.24.163. Next, Section (14)(a) explicitly authorizes an affirmative defense if the lender tries to proceed with the non-judicial foreclosure action after acting in bad faith. RCW 61.24.163(14)(b) prohibits raising the defense only if a modification of the loan is agreed upon and the borrower defaults. This prohibition occurs whether the foreclosure action is brought through the judicial or non-judicial process.

The statute does not explicitly discuss the effect a bad faith negotiation will have on a judicial foreclosure action that is brought without any resolution of the mediation. The question remaining is how to interpret the statute in a manner consistent with the underlying purpose of the legislation.

Grammatical and policy considerations favor a reading of the statute that permits this defense to be raised under the circumstances existing in this case.

2. The statutory interpretation of RCW 61.24.163(14) favors allowing the defense.

Statutory construction begins by reading the text of the statute involved. The court should rely solely on the statutory language where there is no ambiguity. *See State v. Avery*, 103 Wash.App. 527, 532 (2000). Statutory language is ambiguous where there is more than one reasonable interpretation. *State v. Keller*, 143 Wash.2d 267, 276 (2001). The Court may consider the legislative history, principles of statutory construction, and relevant case law for guidance in construing the meaning of an ambiguous statute. *See Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wash.2d 224, 243 (2002); *State v. Roggenkamp*, 153 Wn.2d 614 (Wash. 2005).

The Court must first ask whether the language of this statute is ambiguous. RCW 61.24.163(14)(a) makes it clear that an individual may raise a bad faith defense in the same non-judicial foreclosure action.

The language of RCW 61.24.163(14)(b), however, is not clear. It can be read to say either (1) that bad faith never serves as a defense to a judicial foreclosure or (2) that bad faith cannot be raised as a defense in a judicial or non-judicial foreclosure where the parties later agree to a modification and a subsequent default occurs. A grammatical interpretation supports the latter reading.

The wording of the statute strongly supports a reading where the preposition “to” is applied to both “judicial foreclosure” and “a future non-judicial foreclosure.” In this interpretation both phrases modify the word “defense.” To see the necessity of this reading, one need only remove “to a judicial foreclosure or” and read the remaining sentence. This change will leave the sentence intact if these represent two possible defenses foreclosed by different circumstances. The resulting sentence however is grammatically incoherent:

The mediator’s certification that the beneficiary failed to act in good faith during mediation does not constitute a defense a future nonjudicial foreclosure action if a modification of the loan is agreed upon and the borrower subsequently defaults.

One can also look at the effect when the dependent clause is moved to the beginning of the sentence:

If a modification of the loan is agreed upon and the borrower subsequently defaults, the mediator’s certification that the beneficiary failed to act in good faith during mediation does not constitute a defense to a judicial foreclosure or a future nonjudicial foreclosure action.

The resulting sentence is grammatical and retains the same meaning. This analysis demonstrates that both phrases are to be considered part of one larger phrase linked to the word “to.”

The language of the statute demonstrates that the conjunction “if” sets the conditions under which the bad faith will not form a defense. The

conditions, therefore, apply equally to both judicial and nonjudicial foreclosure procedures. A plain reading of the statute supports a reading allowing an affirmative defense to a judicial foreclosure action where the lender has acted in bad faith. This interpretation is consistent with the legislative intent to give borrowers an affirmative defense to a foreclosure where the lender does not act in good faith. *See Frias*, 181 Wash.2d at 423.

This interpretation results in a situation that is legally sufficient to support the defense. *Bavand*, 176 Wn.App. at 485. The trial court erred in dismissing Appellants' affirmative defense. *See id.*

3. The Legislative History and Purpose of the Statute Support Allowing a Defense to a Judicial Foreclosure Where the Lender Acts in Bad Faith.

Grammatical technicalities are not controlling, though they are factors that comes into statutory interpretation. *See Fraternal Order of Eagles*, 148 Wash.2d at 239 (“The spirit or purpose of an enactment should prevail over ... express but inept wording.”). The spirit and intent of the statutes support allowing bad faith actions to serve as a defense to a judicial foreclosure.

The Deeds of Trust Act, RCW 61.24, provides for a nonjudicial foreclosure procedure for certain deeds of trust. It was designed “to avoid time-consuming judicial foreclosure proceedings and to save substantial

time and money to both the buyer and the lender.” *Wash. Fed. v. Gentry*, 179 Wn.App. 470, 476 (2014). Because of the significant property rights at issue, the Legislature instituted safeguards and constructed the statute in favor of the borrower. See *Washington Federal Savings and Loan Association v. McNaughton*, 181 Wn.App. 281 (Wash.App. Div. 1 2014).

In 2011, the Washington State Legislature determined that existing safeguards were inadequate and instituted the Foreclosure Mediation program. Among the stated findings in HB 1362, first read on January 1, 2011, were the following:

(3) Foreclosures contribute to the decline in the state’s housing market, loss of property values, and other loss of revenue to the state;

4) The nonjudicial foreclosure process in Washington does not have any mechanism for homeowners to readily access an impartial decision maker in order to save the home;

...

(6) Foreclosure mediation programs have proven to be the best practice in preventing foreclosures and allowing the parties to agree upon a modification that is sustainable for the homeowner and nets the lender greater value than the lender can expect from proceeding with foreclosure.

With regard to the defense, the original bill contained the following language:

“The foreclosure mediator’s certification that the beneficiary failed to act in good faith in mediation constitutes a defense to a foreclosure action.”

After committee hearings, a substitute bill was passed with the current language. A comparison promulgated by the legislature had the following brief comparison between the original and substitute language:

HB 1362	PSHB 1362
Bad faith = defense to foreclosure.	Bad faith = not defense to future foreclosure.

The language and the legislative history demonstrate that the legislature wanted a bad faith determination to be a defense to the foreclosure action brought in response to the current default, but not to follow the mortgage forever if a new agreement was reached and a new default occurred.

The legislature did not actively contemplate a scenario where a lender acts in bad faith in mediation and then abandons the non-judicial process in favor of a judicial foreclosure. An interpretation that allows this behavior with no repercussions provides no incentive for banks to engage in the foreclosure mediation program in good faith.

Such an interpretation would frustrate both the foreclosure mediation program - by removing consequences for the banks - and the deed of trust act - by encouraging judicial foreclosures as the favored method. This interpretation would clog the courts and leave consumers unprotected. Indeed, under this interpretation, the only clear beneficiary

of the entire foreclosure mediation scheme will be law firms specializing in judicial foreclosures.

An interpretation that allows borrowers to assert a defense of failure to mediate in good faith gives full and appropriate effect to the statutory scheme. *See k*, 181 Wash.2d at 423. Appellants have posited a hypothetical situation legally sufficient to support their claim. *See id.* The trial court erred in dismissing Appellants' affirmative defense. *See Bavand*, 176 Wn.App. at 485.

VI. ATTORNEYS' FEES

In addition to seeking a defense against the judicial foreclosure and damages for the failure to mediate in good faith, defendants request recovery of their attorneys' fees to date on the CPA claim under RAP 18.1. Such damages are appropriate for a prevailing consumer bringing a CPA claim. RCW 19.86.090, *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 334, 858 P.2d 1054 (1993).

Appellants also request that they be awarded costs for the entire case at the appellate level under RAP 14.2 and RAP 14.. RAP 14.2 dictates that "[a] commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review..." A prevailing

party is “any party that receives some judgment in its favor.” *See Guillen v. Contreras*, 169 Wn.2d 769; 238 P.3d 1168, 1171 (2010).

Provision of attorneys’ fees is particularly appropriate for a consumer in a consumer protection case, and particularly a mortgage foreclosure issue such as this one, because of the challenges intrinsic for persons already in financial difficulties in obtaining representation against a large company. Awarding fees recognizes the full damage done to the consumer by the company and provides incentives to ensure that the legislature’s intent in protecting consumers is given effect with adequate representation, and is consistent with the liberal construction intended of the Consumer Protection Act. RCW 19.86.920.

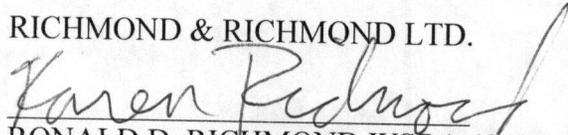
VII. CONCLUSION

Appellants brought forth evidence sufficient to survive Respondents’ motion to dismiss and the motion for summary judgment. The trial court erred in granting these motions and deciding in Respondents’ favor without considering the facts of the case. Appellants respectfully request that this Court remand this case to the trial court for consideration of their CPA claim. The trial court should also be ordered to stay the foreclosure proceedings while the parties attempt the mediation. Costs on appeal are requested and the trial court should be directed to

award attorneys' fees if the appellants prevail on a full consideration of the
CPA claim.

RESPECTFULLY SUBMITTED this 14th day of September, 2017.

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DIVISION II

2017 SEP 14 AM 11:45

STATE OF WASHINGTON

BY AP
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NO. 50242-9-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

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

Plaintiff-Respondent,

v.

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

Defendant-Appellant..

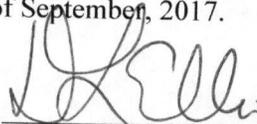
CERTIFICATE OF
SERVICE OF
APPELLANT'S BRIEF

The undersigned certifies that she is an employee of Richmond &
Richmond, Ltd., and is a person of such age and discretion as to be competent to
serve papers;

I certify that on September 13, 2017, I served the Appellant's Brief on
the Plaintiff Respondent's counsel herein after named via U.S. first class mail,
postage prepaid, addressed as follows:

Ryan Moore
HOUSER & ALLISON, APC
1601 5th AVE, Ste 850
Seattle WA 98101

DATED this 13 day of September, 2017.



Diana Ellis, Paralegal
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ORIGINAL